No. 22-5260

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ERMOLD; DAVID MOORE

Plaintiffs–Appellees

v.

KIM DAVIS, Individually

Defendant–Appellant

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 DEFENDANT–APPELLANT

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DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Defendant-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.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Defendant–Appellant, Kim Davis, requests oral argument because this case presents new and complex issues of federal law concerning the free exercise rights and qualified immunity of elected state officials who are tasked with enforcing state laws on marriage licensing and religious liberty accommodation in the wake of the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015). Moreover, the competing constitutional claims and defenses involved in this case 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).

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, under the collateral order doctrine, in this appeal from the district court's summary judgment order (R.108, PageID# 1948) denying Davis qualified immunity from Plaintiffs' claims in granting partial summary judgment for Plaintiffs and denying summary judgment for Davis. *See Watkins v. Healy*, 986 F.3d 648, 658 (6th Cir. 2021). The Court also has pendent jurisdiction to review the district court's denial of Davis's free exercise defense under the First Amendment because it is "inextricably intertwined" with Davis's qualified immunity defense. *Id.* at 659. Davis timely filed her Notice of Appeal (R.109, PageID# 1970) on March 31, 2022.

ISSUES

The primary question for the Court is whether the district court erred in denying Davis qualified immunity from Plaintiffs' claims, which question is of grave importance to "the Nation's essential commitment to religious freedom," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), and necessarily includes:

1. Whether the constitutional right to marry is violated by a state's accommodation of its marriage official's free exercise rights under the First Amendment while making marriage licenses readily available throughout the

state and placing no substantial burden on any couple's ability to obtain a marriage license;

2. Whether the constitutional right to marry is violated by a Kentucky's accommodation of its marriage official's free exercise rights under the Kentucky Religious Freedom Restoration Act (KRFRA) while making marriage licenses readily available throughout the state and placing no substantial burden on any couple's ability to obtain a marriage license;

3. Whether *Obergefell* clearly established a constitutional right to marry for same-sex couples that exceeds the preexisting constitutional right to marry for other-sex couples; and

4. Whether *Obergefell* clearly established a constitutional right to marry for same-sex couples that preempts all free exercise rights of individual state marriage licensing officials regardless of the ready availability of marriage licenses throughout the state for any couple.

THE CASE

I. INTRODUCTION.

On June 26, 2015, the Supreme Court held that the marriage laws of Kentucky and three other states, defining marriage as the union of one man and one woman, were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell*

v. Hodges, 576 U.S. 644, 675–76 (2015). The majority also explained, however, that "[t]he First Amendment ensures that religious . . . persons are given proper protection . . . ." *Id.* at 679.

Thus, while *Obergefell* mandates equal treatment under state marriage laws, it also affirms religious free exercise protections for individuals under the First Amendment. *Obergefell* did not address the application of free exercise protections to individual state marriage licensing officials executing the specific requirements of state marriage licensing schemes, like Kentucky's, prescribing the issuance of marriage licenses, by whom, when, and where. This appeal addresses these issues and poses questions *Obergefell* did not answer. (*See* Issues, *supra*, pp.1–2.) Thus, while *Obergefell* instigated this case, it does not control it or bind this Court to any foregone conclusions.

II. FACTS.

A. Kentucky Marriage Law Prior to *Obergefell*.

1. Marriage licensing.

Prior to *Obergefell*, Kentucky constitutionally and statutorily defined marriage as the union between one man and one woman. KY. CONST. § 233A (2004); KRS 402.005 (1998). The pre-*Obergefell* marriage licensing statutes commanded that "[e]ach county clerk shall use the form prescribed by the Department for Libraries and Archives [KDLA] when issuing a marriage license" which "shall

be uniform throughout this state." KRS 402.100 (2006), 402.110 (1984). The licensing statutes did not authorize county clerks to alter the KDLA-prescribed form, and imposed criminal penalties on any county clerk "who knowingly issues a marriage license to any persons prohibited by this chapter from marrying." KRS 402.990(6) (1996).

By statute, the pre-*Obergefell* form had to include both a "marriage license" and a "marriage certificate." KRS 402.100 (2006). (Form, R.89-11, PageID# 898; Hr'g Tr., R.89-1, PageID## 796–99.) The license section had to include an "authorization statement of the county clerk issuing the license" and "the signature of the county clerk or deputy clerk issuing the license." KRS 402.100(1) (2006). The certificate section had to include "the name of the county clerk under whose authority the license was issued," and "[a] signed statement by the county clerk or a deputy county clerk of the county in which the marriage license was issued that the marriage license was recorded." KRS 402.100(2), (3) (2006).

The licensing statutes permit the issuance of a Kentucky marriage license to any qualified couple in *any* county. KRS 402.080. With some county clerks having multiple branch offices, there are approximately *137 marriage licensing locations in Kentucky*. (V.Compl., R.89-10, PageID# 869.) The statutes also permit a county judge/executive to issue a marriage license, upon the absence of

the county clerk or vacancy in the clerk's office, by "a memorandum thereof" recorded in the same manner as a KDLA form. KRS 402.240.

2. Kentucky Religious Freedom Restoration Act (KRFRA).

The Kentucky Religious Freedom Restoration Act (KRFRA), 2013 Ky. Acts ch. 111, § 1 (HB279), KRS 446.350, was passed in 2013 by overwhelming majorities in the Kentucky General Assembly, over the veto of Governor Steve Beshear.[1] (Ky. Bill Tracking, House Bill 279, R.92-7, PageID# 1683.) KRFRA is housed in KRS ch. 446, titled "Construction of Statutes," in a section titled "Rules of Codification," and provides:

> 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. . . .

KRS 446.350.

B. Kentucky Marriage Litigation Prior to *Obergefell*.

In February 2014, the Western District of Kentucky held Kentucky's definition of marriage unconstitutional. *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014). In March 2014, Kentucky's then-Attorney General, Jack Conway,

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[1] "Governor Beshear" hereinafter refers to Kentucky's 61st Governor, Steve Beshear (2007–2015), unless otherwise indicated.

tearfully proclaimed that, after prayer and consultation with his wife he could not continue defending Kentucky's marriage laws as an "inescapable" matter of conscience. (Article, R.89-9, PageID# 864.) Conway said:

> There are those who believe it's my mandatory duty, regardless of my personal opinion, to continue to defend this case through the appellate process . . . . However, I came to the inescapable conclusion that, if I did so, I would be defending discrimination. . . .
>
> That I will not do. . . .
>
> . . . .
>
> . . . . I can only say that I am doing **what I think is right**. . . .

(Article, R.89-6, PageID# 857 (emphasis added).)

Within minutes, Governor Beshear accommodated Conway's conscience conflict and announced he would hire private attorneys to appeal, and to represent Kentucky in a companion case.[2] (Article, R.89-9, PageID# 864.) Governor Beshear did not chastise Conway for his refusal to perform official duties due to conscience, though Conway's refusal cost the Commonwealth upwards of $200,000.00 for outside counsel. (Release, R.89-7, PageID## 859–860; Article, R.89-8, PageID# 862.)

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[2] The court ruled against Kentucky in the companion case, *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014). The Sixth Circuit reversed both in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), which the Supreme Court reversed in *Obergefell*.

C. *Obergefell* and Governor Beshear's Marriage License Mandate.

On June 26, 2015, moments after announcement of *Obergefell*, Governor Beshear dictated a new marriage license policy to all county clerks:

> Kentucky . . . must license and recognize the marriages of same-sex couples. . . .
>
> Effective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky. In accordance with my instruction, all executive branch agencies are already working to make any operational changes that will be necessary to implement the Supreme Court decision. Now that same-sex couples are entitled to the issuance of a marriage license, the [KDLA] will be sending a gender-neutral form to you today, along with instructions for its use.
>
> You should consult with your county attorney on any particular aspects related to the implementation of the Supreme Court's decision.

(Letter, R.92-1, PageID# 1666.)

Following Governor Beshear's dictate, the KDLA issued the new marriage license form, substituting "first party" and "second party" for "bride" and "groom." (Form, R.92-3, PageID## 1675–76.) The form retained all references to "marriage" and all requirements for the name and authorization of the county clerk for issuance. (*Id.*) The KDLA reiterated county clerks' statutory obligation to use the KDLA-prescribed form. (E-mail, R.92-3, PageID# 1673 (admonishing, "each county clerk shall use the form prescribed," and, "the revised Marriage License form **shall** replace the current form" (cleaned up)).)

In addition to the KDLA and county clerks, Governor Beshear's marriage license mandate included express "instruction [to] all executive branch agencies . . . to make any operational changes that will be necessary to implement the Supreme Court decision" (Letter, R.92-1, PageID# 1666), and an express directive to "[a]ll Cabinets of the executive branch . . . to immediately alter any policies necessary to implement the decision from the Supreme Court." (Release, R.89-2, PageID# 845.) He further declared that "[t]his Administration continues to identify statutes which must now be interpreted in a different way and is making the appropriate changes." (Release, R.89-4, PageID# 851.)

D. Governor Beshear's Denial of Accommodation for County Clerks' Sincerely Held Religious Beliefs About Marriage.

Davis is a professing Christian (V.Compl., R.89-10, PageID# 872.) She is heavily involved in her local church, attending weekly Bible study and worship services, and leads a weekly Bible study for women at a local jail. (*Id.*) Davis possesses a sincerely held religious belief, based on the Bible which she believes to be the Word of God, that "marriage" is exclusively a union between one man and one woman. (*Id.*; *see also Miller v. Davis*, 123 F. Supp. 3d 924, 932 (E.D. Ky. 2015), *vacated*, 2016 WL 11695944 (E.D. Ky. Aug. 18, 2016)).) According to her beliefs, there is no other union that is or can be called "marriage." (V.Compl., R.89-10, PageID# 872.)

As county clerk, as a matter of Kentucky law, Davis authorized and affixed her name to each and every marriage license issued from her office. (*Id.*) But Davis could neither authorize nor approve the "marriage" of a same-sex couple according to her conscience, because even calling the relationship of a same-sex couple "marriage" would violate her deeply and sincerely held religious beliefs. (*Id.*) Nor could Davis allow her name to appear as the source of authority and approval for any marriage license issued to a same-sex couple because providing such endorsement would violate her sincere religious beliefs and convictions. (*Id.*; Hr'g Tr., R.89-1, PageID# 802 ("Because if I say that I authorize that, I'm saying I agree with it, and I can't.").)

Before taking office as County Clerk in January 2015, Davis swore an oath to support the Constitutions and laws of the United States and the Commonwealth of Kentucky "so help me God." (V.Compl., R.89-10, PageID## 872–73.) Davis understood (and understands) this oath to mean that, in upholding the federal and state Constitutions and laws, she would not act in contradiction to the moral law of God, natural law, or her sincerely held religious beliefs and convictions. (*Id.*) Davis also understood (and understands) the Constitutions and laws she swore to uphold to incorporate legal protections for all individuals'

rights to live and work according to their consciences, as informed by their sincerely held religious beliefs, including her rights.[3] (*Id.*)

Davis's sincerely held religious belief regarding the definition of "marriage" was perfectly aligned with Kentucky marriage policy when she took office, as provided in the Kentucky Constitution, statutes, and controlling court decisions, and as effected by the Commonwealth through Governor Beshear and the KDLA Commissioner. (*Id.*, PageID# 873.)

On January 16, 2015, just two weeks after Davis took office as the Rowan County Clerk, the United States Supreme Court announced it would review the then-controlling Sixth Circuit decision upholding Kentucky's definition of marriage. (V.Compl., R.89-10, PageID# 873.) Davis immediately began a long quest for reasonable, neutral, and non-discriminatory accommodations for herself and other county clerks with sincere religious beliefs about marriage. On January 23, Davis wrote Kentucky legislators exhorting them to "get a bill on the floor to help protect clerks" who had a religious objection to participating in same-sex marriage:

> I am contacting you in hope of support of possible legislation that would give county clerks the option to exempt themselves from issuing marriage license, *not only to same sex couples but to all parties, as*

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[3] In 2018, Plaintiff Ermold told an Associated Press reporter that "Kim Davis has the integrity to stand up for what she believes in." (Dep. Tr., R.90-1, PageID## 1234, 1238; Article, R.91-18, PageID# 1598.)

> *to not discriminate* anyone. The LRC has determined in "the duties of the County Clerk", the Clerk may be exempted from selling other licenses, i.e .... fishing and hunting license by applying with written notice to that department. I wanted to have the option, as a person who has deep moral conviction, to choose *not to discriminate* any party, by allowing a Clerk to apply for an exemption for the issuance of marriage licenses.

(Letter, R.89-12, PageID# 899 (emphasis added); V.Compl., R.89-10, PageID# 873; Hr'g Tr., R.89-1, PageID## 793–96.)

On June 26, after receiving the new marriage license form, Davis submitted an inquiry to Kentucky County Clerk's Association (KCCA) official Bill May: "What about the Clerk[s] who have strong objections/moral convictions to this situation about issuing same sex marriage license? Can there be an 'opt out' for marriage licenses like there are for hunting & fishing license?" (E-mail, R.92-2, PageID# 1667.)[4]

Davis's religious beliefs do not compel her to stop any person from obtaining a marriage license from any other county clerk or official. (Hr'g Tr., R.89-16, PageID# 962.) Nor does Davis have a religious objection to issuing, signing, or otherwise approving a marriage license for any man and woman who otherwise satisfy all legal requirements, regardless of their identities, orientations, or practices, including sexual identities, orientations, and practices. (V.Compl., R.89-

[4] Kentucky county clerks may opt out of issuing state hunting and fishing licenses. *See* KRS 150.195(2).

10, PageID# 873.) Furthermore, Davis's religious beliefs do not compel her to inquire as to any aspects of applicants' identities, orientations, or practices beyond the information required by the prescribed license form. (*Id.*)

Having received no accommodation from Governor Beshear or the legislature, on June 27, 2015, Davis discontinued issuing all marriage licenses because of her sincere religious beliefs. (V.Compl., R.89-10, PageID# 876; Dep. Tr., R.90-1, PageID## 1232–34; Dep. Tr., R.90-3, PageID## 1349–1352, 1358, 1418; Article, R.91-17, PageID# 1595; *see also Miller*, 123 F. Supp. 3d at 929–930.) This was not a "spur-of-the-moment decision" reached by Davis. (V.Compl., R.89-10, PageID# 876.) Rather, after exhorting legislators to provide conscience protection for county clerks upon taking office, Davis prayed and fasted during the months leading up to *Obergefell* over how she would respond to such a decision. (*Id.*) Though Davis's religious objection is limited to issuing licenses to same-sex couples, she suspended the issuance of *all licenses* to ensure that *all individuals and couples in Rowan County were treated the same*, and only until she could receive an accommodation of her religious beliefs. (Dep. Tr., R.90-3, PageID## 1358, 1360, 1418; V.Compl., R.89-10, PageID# 876; *see Miller*, 123 F. Supp. 3d at 929–930.) Davis and her deputy clerks advised those seeking marriage licenses that licenses were available from clerks in surrounding

counties. (Dep. Tr., R.90-3, PageID## 1363–64, 1418; *Miller*, 123 F. Supp. 3d at 930.)

On July 2, 2015, KCCA President Chris Jobe wrote all Kentucky county clerks to acknowledge religious objections to Governor Beshear's mandate, and to solicit participation in an urgent letter to the Governor requesting protection for clerks' free exercise rights: "I have spoken with many Clerks that firmly believe that forcing Co Clerks to issue same-sex marriage license[s] when it is against their deeply held beliefs is a direct violation of the U.S. Constitution's First Amendment." (E-mail, R.92-4, PageID# 1678.) Davis responded the same day, requesting to join in the letter. (E-mail, R.92-5, PageID# 1679.)

On July 8, Jobe distributed the draft letter. (E-mail, R.92-6, PageID## 1681–82.) Davis adopted and sent the letter the same day, appealing to Governor Beshear to uphold her religious conscience rights, and to call a special session of the General Assembly to address the conflict between her religious beliefs and the new Kentucky marriage license policy he effected. (V.Compl., R.89-10, PageID# 876; Letter, R.89-13, PageID# 900; Hr'g Tr., R.89-1, PageID## 805–807.)

Governor Beshear rejected the pleas of Davis and other county clerks for a special session or other accommodation of their sincere religious beliefs and publicly rebuked them, chiding that "[r]egardless of whatever their personal feelings

might be, the overwhelming majority of county clerks are . . . iss[uing] marriage licenses . . . and the courts will deal appropriately with the two or three clerks [out of 120] who are acting otherwise" (Release, R.89-4, PageID# 851); that "[i]t's time for everyone to take a deep breath" as "I will not be calling a special session on this topic" (*id.*, PageID# 852); and that county clerks who oppose issuing marriage licenses to same-sex couples due to "personal beliefs" or "personal convictions" should either issue the licenses in violation of conscience or "resign and let someone else step in" (Article, R.89-5, PageID# 854).

E. The *Miller v. Davis* Litigation.

On July 2, still less than a week after Governor Beshear issued his mandate, and while the KCCA was still working to protect the free exercise rights of its constituency, the plaintiffs in *Miller v. Davis* (two same-sex and two other-sex couples) filed the first lawsuit against Davis in the district court, alleging federal constitutional claims and seeking a preliminary injunction, demanding immediate issuance of marriage licenses in Rowan County, under Davis's name and authority. (*Miller v. Davis,* E.D. Ky. No. 0:15-cv-44-DLB, Compl., R.1, PageID## 1–15.) The *Miller* plaintiffs filed their case as a putative class action, on behalf of themselves and "individuals who are qualified to marry and who intend to seek a marriage license from the Rowan County Clerk." (*Id.*)

The Court conducted hearings on the *Miller* plaintiffs' preliminary injunction motion on July 13 and July 20. *See Miller*, 123 F. Supp. 3d at 930. On August 4, Davis filed a third-party complaint against Governor Beshear and the KDLA Commissioner (V.Compl., R.89-10, PageID# 866) asserting, *inter alia*, her right to religious accommodation from Governor Beshear's mandate as violating Davis's free exercise rights under the First Amendment and KRFRA. On August 7, Davis filed a motion for preliminary injunction against Governor Beshear and the KDLA commissioner (*Miller* R.39, PageID# 824) seeking immediate relief from Governor Beshear's mandate to violate her conscience or resign.

On August 12, prior to any hearing on Davis's claims against Governor Beshear, the district court granted the *Miller* plaintiffs' preliminary injunction motion, enjoining 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. Davis immediately appealed. (*Miller* R.44, PageID# 1174.) On August 25, the district court *sua sponte* stayed all proceedings on Davis's preliminary injunction motion against Governor Beshear, seeking accommodation of her religious beliefs, pending completion of Davis's appeal from the *Miller* preliminary injunction. (*Miller* R.58, PageID# 1289.)

On September 3, 2015, the court expanded the preliminary injunction to "other individuals who are legally eligible to marry in Kentucky," including

Plaintiffs here. (Order, R.89-16, PageID## 918–928; *Miller* R.74, PageID# 1557.) On the same day, the district court held Davis in contempt of the preliminary injunction, and jailed Davis pending compliance. (*Miller* R.75, PageID# 1558.) Davis appealed the expanded order and contempt order. (*Miller* R.82, PageID# 1785; *Miller* R.83, PageID# 1791.)

At the September 3 hearing, the district court expressed hope for a legislative or executive accommodation: "I recognize . . . 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." (Hr'g Tr., R.89-16, PageID# 1005.) "If legislative or executive remedies . . . come to fruition, as I stated, better for everyone." (*Id.*, PageID# 1006.)

At the same hearing, the Court granted Kentucky Senate President Robert Stivers' motion to file an amicus brief in support of Davis (Hr'g Tr., R.89-16, PageID## 928–29), in which Senator Stivers 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 . . . ." (Mot.,

R.89-14, PageID## 901–902.) The brief also advised the Court that the protections of KRFRA are a "mandate upon the Commonwealth" such that any revision of Kentucky's marriage licensing policies to accord with *Obergefell*, whether by the General Assembly or the Governor, must accommodate the religious conscience rights of Davis in "the least restrictive manner possible." (Br., R.89-15, PageID# 905.)

F. Plaintiffs' Lawsuit.

Plaintiffs filed the second marriage license lawsuit against Davis, after *Miller*, on July 10, 2015. (Compl., R.1, PageID# 1.) Plaintiffs are two males residing in Rowan County, Kentucky, who sued Davis for allegedly violating their constitutional right to marry by denying them a Kentucky marriage license. (Order, R.108, PageID# 1949; Am. Compl., R.27, PageID# 119.) Based on *Obergefell* and Governor Beshear's mandate, Plaintiffs claim their constitutional right to marry includes the right to be issued a marriage license by Davis, in Rowan County, without any accommodation for Davis's sincerely held religious beliefs. (Am. Compl., R.27, PageID## 119–121, 124.) Plaintiffs did not seek a marriage license through the lawsuit, only damages, including punitive damages, and attorney's fees. (*Id.*, PageID# 125.)

Plaintiffs' residence is located approximately 9 miles (11 minutes) from the Rowan County Clerk's office. (Map, R.92-9, PageID# 1687.) By comparison,

the county clerks' offices in the seven surrounding counties are located at the following approximate distances (and times) from Plaintiffs' residence (shortest to longest):

Bath County (Owingsville)	15 miles (16 minutes)
Menifee County (Frenchburg)	20 miles (27 minutes)
Fleming County (Flemingsburg)	24 miles (31 minutes)
Morgan County (West Liberty)	30 miles (34 minutes)
Elliott County (Sandy Hook)	33 miles (37 minutes)
Carter County (Grayson)	41 miles (38 minutes)
Lewis County (Vanceburg)	42 miles (54 minutes)

(Maps, R.92-10 to 92-16, PageID## 1688–1694.)

Plaintiff Ermold worked at the University of Pikeville (UPIKE) in Pikeville, Kentucky, from 2014 to 2018. (Dep. Tr., R.90-1, PageID## at 1106–1107, 1125.) Ermold made the 97-mile (2-hour) drive to and from UPIKE each week during the fall and spring semesters. (*Id.*, PageID# 1125; Interrog. Answers, R.91-7, PageID# 1547; Map, R.92-17, PageID# 1695.) For the five years prior, from 2009 to 2014, Ermold worked at Southern West Virginia Community and Technical College in Williamson, West Virginia, approximately 131 miles (2 hours 15 minutes) from Plaintiffs' home, and from 2010 to 2014 made the drive

to and from weekly. (Dep. Tr., R.90-1, PageID## 1107–1108, 1126–28: Interrog. Answers, R.91-7, PageID# 1547; Map, R.92-18, PageID# 1696.) From 2007 to the present Ermold also worked part time at several campuses of Maysville Community and Technical College, including at its Eastern Kentucky Correctional Complex (EKCC) campus in West Liberty, Kentucky, located approximately 31 miles (37 minutes) from Plaintiffs' home. (Dep. Tr., R.90-1, PageID## 1105–1106, 1123–25; Map, R.92-19, PageID# 1697.) In 2015, while working full time at UPIKE, Ermold also worked at the Maysville EKCC campus, stopping weekly in West Liberty to teach on the return trip from UPIKE. (Dep. Tr., R.90-1, PageID## 1125–26.) Ermold's 2015 weekly driving for work took him to or through the county seats of Morgan (West Liberty), Magoffin (Salyersville), Floyd (Prestonsburg), and Pike (Pikeville) Counties. (Map, R.92-17, PageID# 1695; Map, R.92-20, PageID# 1698.) Plaintiff Moore occasionally accompanied Ermold on his weekly work trips. (Dep. Tr., R.90-1, PageID## 1126–1130.)

Plaintiffs first went to the Rowan County Clerk's office to seek a marriage license on July 6, 2015, knowing that the office was not issuing licenses. (Dep. Tr., R.90-1, PageID## 1150, 1152–59; Dep. Tr., R.90-2, PageID## 1286–87; Letter, R.91-10, PageID## 1582–83; Article, R.91-11, PageID# 1587; Video,

R.91-12, 00:19–00:25.) Plaintiffs intended to make a video recording of a confrontation with Davis, having asked a friend to film them. (Dep. Tr., R.90-1, PageID## 1159–1160; Article, R.91-11, PageID# 1587; Video, R.91-12, 00:00–00:26.) On July 6, August 13, and September 1, 2015, with knowledge that no licenses were being issued in Rowan County but were available in all surrounding counties, Plaintiffs intentionally and repeatedly initiated confrontations with Davis and her office staff demanding a license, recorded their contrived confrontations—at times mocking Davis and shouting—and posted the recordings on social media for publicity.[5] (Dep. Tr., R.90-1, PageID## 1166, 1168, 1170–75, 1177–1185, 1230–32; Dep. Tr., R.90-2, PageID## 1288, 1290–91; Article, R.91-11, PageID# 1589; Video, R.91-12, 00:27–11:38; Video, R.91-13, 00:00–12:54; Video, R.91-14, 00:03–21:58.)

Plaintiffs identified no financial, physical, or legal obstacles to their seeking and obtaining a marriage license from any of the clerks' offices surrounding Rowan County, some of which they were near on a daily or weekly basis. Indeed, to make their September 1, 2015 confrontation video in Davis's office, Ermold

[5] A detailed written narrative of Plaintiffs' recorded confrontations in the clerk's office, with record citations, is in Davis's Motion for Summary Judgment, R.93, PageID## 1724–28.

canceled his UPIKE classes and drove the 2 hours to Morehead, passing 4 other county clerks' offices on the way.

G. Plaintiffs' Marriage License and Governor Beshear's After-the-Fact Accommodations.

On September 4, 2015, the day after Davis was jailed for contempt of the *Miller* injunction, Plaintiffs received a Kentucky marriage license from a Rowan County deputy clerk, without Davis's authorization, on a license form altered to remove Davis's name. (Dep. Tr., R.90-1, PageID## 1192–93; Am. Compl., R.27, PageID## 121–22; License, R.27-2, PageID# 130; Article, R.27-4, PageID## 134–135; Order, R.49, PageID## 296–97; Dep. Tr., R.90-3, PageID## 1412–17.) Governor Beshear, however, who first authorized and directed the alteration of Kentucky marriage license forms in response to *Obergefell*, authorized the altered form from the deputy clerk after-the-fact. (Article, R.27-4 PageID# 134 ("'I'm confident and satisfied that the licenses that were issued last week and this morning substantially comply with the law in Kentucky' . . . . 'And they're going to be recognized as valid in the Commonwealth.'" (cleaned up)); Dep. Tr., R.90-3, PageID## 1415–17.) Governor Beshear also authorized Davis's further alteration of the forms, to clarify the removal of her name and authorization, upon her return to work after imprisonment. (Article, R.27-4, PageID## 134–35.)

H. Governor Matt Bevin's Executive Order Accommodation.

On December 22, 2015, newly elected Kentucky Governor Matt Bevin issued Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form (the "Executive Order," R.29-1, PageID## 174–77), explicitly acknowledging KRFRA protections for county clerks, and adopting a new marriage license form to remove the requirements for a county clerk's name and authority. The Executive Order established that (1) Governor Beshear's mandate placed a substantial burden on the free exercise of religion by some county clerks and their employees, (2) KRFRA requires that the Commonwealth use the least restrictive means to effect Kentucky marriage license policy given that substantial burden, (3) there is no compelling governmental interest in requiring the name and authority of county clerks on all marriage licenses, and (4) a reasonable accommodation could easily and must be made under KRFRA. (*Id.*)

I. The General Assembly's Legislative Accommodation.

On July 14, 2016, Kentucky Senate Bill 216 ("SB 216") took effect, amending the Kentucky marriage licensing statutes KRS 402.100 and 402.110 to remove entirely a county clerk's name, personal identifiers, and authorization from marriage licenses. The Kentucky General Assembly unanimously passed SB 216, and Governor Bevin signed it into law on April 13, 2016. *See* 2016 Kentucky Acts ch. 132 (SB 216).

SB 216 rendered moot Davis's appeals from the *Miller* preliminary injunction orders. This Court dismissed the *Miller* appeals and remanded, instructing the district court to vacate the orders. *Miller v. Davis,* 667 F. App'x 537 (6th Cir. 2016). The district court vacated the orders. (*Miller* R.181, PageID## 2706–2707.)

J. Procedural History.

After vacating the *Miller* orders, the district court consolidated this case with *Miller* (the "lead case") and a third case, *Yates v. Davis*, E.D. Ky. No. 15-cv-00062, under the caption *In re: Ashland Civil Actions*, for the purpose of dismissing all three actions as moot. (Order, R.19, PageID## 95–97.) Plaintiffs appealed the dismissal of their case.[6] (Not. Appeal, R.20, PageID# 98.) This Court reversed and remanded for reinstatement of Plaintiffs' claims. (Docs. 21–23.) Plaintiffs filed their First Amended Complaint on June 8, 2017 (R.27, PageID# 119).

Davis moved to dismiss on the grounds that Davis is immune from Plaintiffs' damages claims—by Eleventh Amendment sovereign immunity in her official capacity as a state official, and by qualified immunity in her individual capacity; and on the jurisdictional grounds that Plaintiffs' claims present no cognizable

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[6] The *Miller* plaintiffs did not seek to reinstate their dismissed damages claims.

federal constitutional question. (Mot., R.29, PageID# 139; Mem., R.29-1, PageID# 141.) The district court granted dismissal of the official capacity claims on sovereign immunity grounds, holding Davis acted as a state official for purposes of marriage licensing, but denied dismissal of the individual claims on qualified immunity grounds, holding Plaintiffs alleged sufficient facts to plausibly make out a claim that Davis violated Plaintiffs' clearly established constitutional right to marry. (Order, R.49, PageID# 294.) Davis appealed the denial of qualified immunity. (Not. Appeal, R.51, PageID# 318.)

This Court affirmed the denial of qualified immunity, holding Plaintiffs adequately alleged a violation of their right to marry, and denied Davis's petition for rehearing en banc. *Ermold v. Davis*, 936 F.3d 429, 432 (6th Cir. 2019). Davis petitioned the Supreme Court for review in January 2020. (Not., R.71, PageID# 424.) In October 2020, the Supreme Court denied review of the pleadings-stage decision, prompting a statement by Justice Thomas, joined by Justice Alito, that "[t]his petition implicates important questions about the scope of our decision in *Obergefell*, but it does not cleanly present them." *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (statement of Thomas, J.).

On return to the district court, after completing discovery, the parties filed motions for summary judgment. (Pls.' Mot., R.88, PageID# 713; Davis's Mot., R.93, PageID# 1699.) The district court granted partial summary judgment for

Plaintiffs on liability, and denied summary judgment for Davis. (Order, R.108, PageID# 1948.) Davis timely appealed. (Not. Appeal, R.109, PageID# 1970.)

K. Order on Appeal.

The order on appeal consolidated the district court's decisions on the respective summary judgment motions of Plaintiffs and Davis in this case and the "nearly identical" *Yates* case.[7] (Order, R.108, PageID## 1948–49.) The district court concluded that *Obergefell* precludes any consideration of Davis's free exercise rights under the First Amendment and KRFRA, and that Davis is not entitled to qualified immunity because she knowingly violated the law by not issuing marriage licenses to Plaintiffs.[8] (Order, R.108, PageID## 1953–1963.)

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[7] Davis appealed from the same order in the *Yates* case, and files a substantially similar brief therein. (*See* 6th Cir. No. 22-5261.)

[8] The district court also denied Davis summary judgment on Plaintiffs' damages, which denial is not at issue in this appeal.

SUMMARY OF THE ARGUMENT

Davis has never argued, as the district court erringly conceived, that her free exercise rights gave her cover to violate the marriage rights of Plaintiffs. (Order, R.108, PageID# 1963.) Rather, Davis has always argued that accommodating her free exercise rights never violated Plaintiffs' right to marry. As a state official administering Kentucky's statewide marriage licensing scheme, Davis's temporary stoppage of marriage licenses from her office while licenses remained available in all surrounding clerks' offices—to any of which Plaintiffs could have driven instead of driving to Davis's office—minimally burdened Plaintiffs' ability to obtain a Kentucky marriage license. Under longstanding Supreme Court and Sixth Circuit precedent, such minimal burdening of Plaintiffs' access to a marriage license, with no restrictions on where or whom Plaintiffs could marry, is no violation of the constitutional right to marry because it is rationally related to the legitimate governmental interest of accommodating religious free exercise. If Governor Beshear had effected such an accommodation of Davis's free exercise immediately following *Obergefell*—allowing the recusal of Davis and a few other clerks from issuing marriage licenses while licenses were available everywhere else—a constitutional challenge would have been highly unlikely, and even less likely to prevail. Constitutionally, it makes no difference that Davis, acting within state and federal law as a state marriage licensing official, effected

the accommodation. No constitutional principle precludes a state official from benefitting from a lawful religious accommodation effected by that official. On the other hand, the First Amendment is violated by imposing liability on such an official for only minimally burdening access to marriage.

Furthermore, *Obergefell* did not clearly establish—or even suggest—that the right of same-sex couples to marry on the same terms extended by states to other-sex couples preempted the free exercise rights of a state's marriage licensing officials. Davis's accommodation was objectively reasonable and did not violate any clearly established right of Plaintiffs, entitling Davis to qualified immunity.

STANDARDS OF REVIEW

The Court reviews de novo the district court's grant and denial of cross-motions for summary judgment. *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 387 (6th Cir. 2016). Summary judgment is required "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To avoid summary judgment, the nonmoving party must establish a factual issue that is both material ("might affect the outcome of the suit under the governing law") and genuine ("such that a reasonable jury could return a verdict for the nonmoving party"). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

It is Plaintiffs' burden to overcome Davis's qualified immunity defense. *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015). "At the pleading stage, this burden is carried by alleging facts plausibly making out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time . . . ." *Id.* Thus, this Court's prior decision, reviewing the denial of Davis's motion to dismiss, only determined that Plaintiffs had pleaded enough. *Ermold*, 936 F.3d at 432 ("[W]e ask not whether Davis definitively violated plaintiffs' rights but whether they adequately allege that she did."); *id.* at 437 ("In short, plaintiffs pleaded a violation of their right to marry . . . ."). Indeed, the point of determining an official's entitlement to qualified immunity "is usually summary judgment and not dismissal under Rule 12." *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (cleaned up).

At this stage, the Court must determine whether Davis 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)). The order of inquiry is not mandatory. *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009). "If *either* inquiry is answered in the negative, the defendant official is

entitled to summary judgment." *Gibbs v. Lomas,* 755 F.3d 529, 537 (7th Cir. 2014).

ARGUMENT

I. DAVIS IS ENTITLED TO QUALIFIED IMMUNITY FROM PLAINTIFFS' CLAIMS BECAUSE THE ACCOMMODATION OF DAVIS'S FREE EXERCISE RIGHTS DID NOT VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHT TO MARRY.

In holding Kentucky's marriage laws "invalid *to the extent* they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015) (emphasis added), the Supreme Court did not elevate same-sex marriage to a higher constitutional rung than the preexisting fundamental marriage right. Nor did *Obergefell* create a new personal cause of action against state officials who apply state marriage policy to same-sex and opposite-sex couples equally. Thus, Plaintiffs' § 1983 claims for violation of their constitutional right to marry are governed by the same marriage precedents applicable to opposite-sex couples, and subject to *Obergefell*'s express boundary and affirmation that "[t]he First Amendment ensures that religious . . . persons are given proper protection . . . ." 576 U.S. at 679.

If the First Amendment requires protection of free exercise rights after *Obergefell*, and Kentucky's accommodation of Davis's free exercise rights does not

violate Plaintiffs' right to marry, then Davis has not violated Plaintiffs' right to marry by effecting the accommodation as a Kentucky official. Thus, Davis's First Amendment rights, and her First Amendment defense to enforcement of Governor Beshear's mandate against her in a § 1983 action, are inextricably intertwined with Davis's qualified immunity defense. (*See* Jurisdiction*, supra*, p.1.)

A. The Relevant Inquiry Is Whether Kentucky Violated Plaintiffs' Right to Marry.

Whether Plaintiffs' right to marry was violated is a state-level inquiry because Davis acted for Kentucky as a state marriage licensing official when she did not issue licenses to Plaintiffs. *Ermold v. Davis*, 936 F.3d 429, 434 (6th Cir. 2019). The Kentucky case consolidated with Michigan, Ohio, and Tennessee cases for decision in *Obergefell* confirms this. In *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), Senior District Judge Heyburn entered summary judgment for the plaintiffs who "requested a Kentucky marriage license from the Jefferson County Clerk's Office," because "[t]he *Commonwealth* refused to issue them a license . . . ." *Id.* at 540 (emphasis added).

Kentucky marriage licensing is an exclusively state-level function; 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,

Kentucky Revised Statutes. The duty of county clerks to issue marriage licenses is governed by section 402.080, and the form county clerks must use for marriage licenses by section 402.100. County clerks are statutorily conferred duties and jurisdiction "coextensive with that of the Commonwealth." *See* KRS 64.5275(1); *see also* Ky. Const. § 246. "Kentucky controls every aspect of how county clerks issue marriage licenses." *Ermold*, 936 F.3d at 434.

B. Plaintiffs' § 1983 Claims Against Davis Depend on the Constitutionality of Governor Beshear's Marriage License Mandate Under the First Amendment.

Plaintiffs claim Davis violated their constitutional right to marry based on *Obergefell* and Davis's alleged violation of Governor Beshear's marriage mandate. (Am. Compl., R.27, PageID# 120.) Indeed, Plaintiffs' claims depend entirely on Governor Beshear's mandate because, but for his directives to KDLA to issue new uniform license forms, and to county clerks to use them, neither Davis nor any other clerk could have issued a marriage license to a same-sex couple. Conversely, had Governor Beshear's mandate initially provided the reasonable accommodation that Davis sought (or any other reasonable accommodation), Plaintiffs would have received their marriage license without incident or fanfare, and Plaintiffs would have no claim against Davis.

Moreover, Plaintiffs' use of the courts to impose § 1983 liability on Davis for allegedly violating a Kentucky marriage policy is subject to Davis's free exercise

defenses under the First Amendment. *See NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 916 n. 51 (1982) (explaining, in private civil litigation, application of rules of law "in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment" (citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964))); *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 741–42 (7th Cir. 2015) ("[N]ot all rights require the government be a party in the case. The [Supreme] Court's practice makes clear that free exercise is one of those rights." (citing *McDaniel v. Paty,* 435 U.S. 618, 620–21, 629 (1978)); *Billard v. Charlotte Cath. High Sch.*, No. 3:17-CV-00011, 2021 WL 4037431, at *15 (W.D.N.C. Sept. 3, 2021) (recognizing Free Exercise Clause "reads the same way" as Free Speech Clause insofar as it may be used as a defense in state tort suits); *cf. Claybrooks v. Am. Broad. Companies, Inc.*, 898 F. Supp. 2d 986, 992–93 (M.D. Tenn. 2012) ("The First Amendment shields protected speech and expression from private litigation, as well as from statutory restrictions and criminal penalties." (citing *Sullivan,* 376 U.S. at 277–78)). Thus, Plaintiffs' claims against Davis depend on the constitutionality of Governor Beshear's marriage mandate under the Free Exercise Clause of the First Amendment.

1. Governor Beshear's mandate is subject to strict scrutiny under the First Amendment because it burdened Davis's religious exercise and was neither neutral nor generally applicable.

a. The mandate burdened Davis's religious exercise.

Governor Beshear's mandate, forcing Davis to authorize marriage licenses for same-sex couples, substantially burdened her constitutionally protected religious exercise. As shown above, Kentucky marriage law predating *Obergefell* required county clerks to use a prescribed marriage license form. (Case, Pt. II.A.1.) KDLA provided the form, and Davis had no local discretion to alter it. The pre-*Obergefell* form included an "authorization statement of the county clerk issuing the license" and "the name of the county clerk under whose authority the license was issued." (*Id.*) Thus, before *Obergefell*, Kentucky law required every marriage license issued by Davis's office to include her authorization to marry, in her name. (*Id.*)

Governor Beshear *unilaterally* directed the KDLA to revise the form in response to *Obergefell*, which the KDLA distributed to county clerks for immediate and mandatory use. (Case, Pt. II.C.) The Governor's mandate provided no alternative for county clerks with religious objections to participating in same-sex marriage. (Letter, R.92-1, PageID# 1666.) The new form, like the old, required Davis's authorization and name. (V.Compl., R.89-10, PageID## 869–870, 874–75; Hr'g Tr., R.89-1, PageID## 797–98, 800–801, 810, 837–38.)

But Davis cannot endorse as "marriage" a union of two persons which, according to her sincerely held religious beliefs, is not marriage. (Case, Pt. II.D.) Governor Beshear's coercing Davis to choose between violating her conscience or resigning burdened her religious exercise as a matter of law. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

In *Fulton*, the City of Philadelphia excluded Catholic Social Services (CSS) from the city's foster care referral system because CSS "would not certify same-sex couples to be foster parents due to its religious beliefs about marriage." 141 S. Ct. at 1874. CSS challenged the exclusion under the Free Exercise Clause of the First Amendment. *Id.* at 1876. The Supreme Court concluded at the outset that Philadelphia burdened CSS's protected religious exercise:

> It is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. **But CSS believes that certification is tantamount to endorsement. And religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.** Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

141 S. Ct. at 1876 (cleaned up) (emphasis added).

Here, as in *Fulton*, "the religious views of [Davis] inform" her life and work. *Id.* at 1875. Davis, like CSS, deeply believes that "marriage is a sacred bond

between a man and a woman," and "understands [her authorization] of prospective [married couples] to be an endorsement of their [marriage]." *Id.* There is no evidence or basis upon which to dispute the sincerity of Davis's religious belief. Thus, even if Plaintiffs or the Court would view Governor Beshear's mandate as simply requiring Davis "to signify that couples meet the legal requirements to marry" and "not asking her to condone same-sex unions on moral or religious grounds," *see Miller v. Davis*, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015), Davis's sincere belief that issuance of a marriage license bearing her authorization and name "is tantamount to endorsement" compels the conclusion that the mandate burdens her religious exercise under the Free Exercise Clause.[9] *See Fulton*, 141 S. Ct. at 1877.

b. The mandate was not neutral towards religion.

Laws that burden religious exercise which are not neutral and generally applicable violate the Free Exercise Clause unless they satisfy strict scrutiny. *See Fulton*, 141 S. Ct. at 1876–77 (citing *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877–78 (1990)).[10] "Neutrality and general

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[9] Kentucky, acting through Governor Bevin in December 2015, confirmed Governor Beshear's mandate issued a few months earlier substantially burdened the religious exercise of county clerks. (Case, Pt. II.H.)

[10] Though this Court is bound by *Smith,* it should be overruled by the Supreme Court if it bars the vindication of Davis's free exercise rights.

applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) [hereinafter *Lukumi*].

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. Courts first look to the text, but "facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Lukumi*, 508 U.S. at 533–34 (cleaned up). The First Amendment prohibits hostility that is "masked, as well as overt." *Id.* Governor Beshear's marriage license mandate was not neutral, as demonstrated by the mandate's overt hostility towards particular religious beliefs and the intentional denial of KRFRA rights implicit in the mandate.

Governor Beshear's marriage license mandate comprised several official and unilateral pronouncements of Kentucky marriage policy by the Governor, beginning with his public assent to Attorney General Conway's refusal to defend Kentucky's marriage laws on appeal, based on Conway's "pray[ing] over this decision" and "doing what I think is right." (Case, Pt. II.B.) Unlike his mandate pronouncements to county clerks such as (and specifically) Kim Davis, Governor Beshear did not lecture Conway that "[n]either your oath nor the Supreme Court dictates what you must believe. But as elected officials, they do prescribe

how we must act," or that "when you accepted this job and took that oath, it puts you on a different level," or "[y]ou have official duties now that the state law puts on you." (Case, Pt. II.D.) Nor did Governor Beshear publicly chastise Conway for "refusing to perform [his] duties" and failing to "follow[] the law and carry[] out [his] duty," or admonish Conway to "comply with the law regardless of [his] personal beliefs." (*Id.*) Nor did Governor Beshear give Conway the ultimatum that "if you are at that point to where your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, then obviously the honorable course to take is to resign and let someone else step-in who feels that they can fulfill these duties," or ominously declare that "[t]he courts and voters will deal appropriately with" Conway. (*Id.*) But Governor Beshear publicly directed all of these criticisms to the "two or three" county clerks who were not issuing marriage licenses due to sincerely held religious beliefs. (*Id.*) Thus, although Governor Beshear assuaged Conway's conscience without reprisal, the Governor repeatedly told clerks like Davis to abandon their religiously informed beliefs or resign.

Moreover, Governor Beshear flatly denied any accommodation to clerks seeking a way to avoid having to issue the KDLA-prescribed marriage licenses under their name and authority, but subsequently and gratuitously granted that

very accommodation to same-sex couples who received altered marriage licenses while Davis was in jail. (Case, Pt. II.G.) Refusing an accommodation on religious grounds and then granting it on nonreligious grounds is the opposite of neutrality.

Furthermore, Governor Beshear's marriage license mandate implicitly denied county clerks statutory KRFRA protections pursuant to a bald claim of executive power to "alter policies" and interpret statutes "in a different way" to comply with *Obergefell*. (Case, Pt. II.D.) Having vetoed KRFRA, only to see it overridden by the General Assembly, Governor Beshear was well aware of KRFRA's protections for "a person's . . . right to act or refuse to act in a manner motivated by a sincerely held religious belief." KRS 446.350. But Governor Beshear's unequivocal "issue licenses or resign" pronouncement, by necessary implication, denied KRFRA's protections to the few county clerks who had sincere religious objections to issuing marriage licenses to same-sex couples. Governor Beshear's mandate effectively vetoed KRFRA all over again. This intentional and unnecessary denial of a preeminent religious right of the Commonwealth negates any claim to religious neutrality for Governor Beshear's mandate.

c. The mandate was not generally applicable.

Governor Beshear's marriage license mandate not only fails neutrality, it also fails general applicability. "[N]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (cleaned up). A law can also fail general applicability "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*

In *Fulton*, the Philadelphia policy that disqualified CSS from receiving foster care referrals reserved to a single city official the sole discretion to grant exceptions to the policy. 141 S. Ct. at 1878. The Supreme Court held that this "system of individualized exemptions" rendered the policy not generally applicable, such that the city "may not refuse to extend that exemption system to cases of religious hardship without compelling reason." *Id.* (cleaned up); *see also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) ("The real question goes to exceptions."); *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) ("Faith-based discrimination can come in many forms.").

Here, Governor Beshear's authorizing alterations to the KDLA-prescribed marriage license form, twice—once for same-sex couples who received licenses while Kim Davis was in jail, and again when Davis returned to work—proves that Governor Beshear reserved to himself the discretion to grant individualized exceptions to his marriage license mandate. Under *Fulton*, this "system of individualized exemptions" negates general applicability, prohibiting Beshear from "refus[ing] to extend the exemption system to cases of religious hardship without compelling reason." *Fulton*, 141 S. Ct. at 1878 (cleaned up); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Gorsuch, J., statement) ("When a State so obviously targets religion for differential treatment, [the Court's] job becomes that much clearer."). Thus, Governor Beshear's refusal to grant the same exception to Davis, who sought the accommodation on religious grounds, is an unconstitutional burden on Davis's religious exercise unless the refusal satisfies strict scrutiny, which it cannot.

Governor Beshear's mandate also fails general applicability because of the individualized exemption Governor Beshear extended to Attorney General

Conway to accommodate Conway's conscientious objection to defending Kentucky's traditional definition of marriage on appeal, while denying a comparable exemption to Davis who sought accommodation, on religious grounds, to uphold the traditional definition of marriage as a matter of conscience. (Case, Pt. II.B.) Another exception that negates the general applicability of Governor Beshear's mandate is the statutory exception that allows a county judge/executive to license a marriage by "a memorandum thereof" as an alternative to the KDLA-prescribed form. *See* KRS 402.240.[11] Still another exception that negates general applicability is the statutory exception to county clerk licensing duties for hunting and fishing licenses, which any county clerk may claim simply by submitting a written memorandum. *See* KRS 150.195(2).

Thus, Governor Beshear's marriage license mandate not only fails neutrality, but it also fails general applicability at numerous levels. So, the Governor's refusal to grant a religious accommodation to Davis is unconstitutional unless it satisfies strict scrutiny, which it cannot.

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[11] The County Judge/Executive of Rowan County, Walter Blevins, would not have objected to issuing marriage licenses to same-sex couples under the authority of KRS 402.240. (V.Compl., R.89-10, PageID## 876–77.) He refused to issue any marriage licenses, however, because he believed Davis's stoppage of marriage licenses did not count as her "absence" under the statute. (*Id.*; *Miller*, 123 F. Supp. 3d at 930.)

2. Governor Beshear's mandate cannot survive strict scrutiny because it was not the least restrictive means of advancing a compelling government interest.

Governor Beshear's mandate cannot survive strict scrutiny unless he (1) had a compelling governmental interest in burdening Davis's free exercise, and (2) used the least restrictive means to accomplish that interest. Under this strict scrutiny analysis, the mandate had to have furthered an interest "of the highest order," *Lukumi*, 508 U.S. at 546, and, "[i]f a less restrictive alternative would [have served] the Government's purpose," then the government was required to use that alternative. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 US. 507, 534 (1997).

To meet this burden, the government would have to show it "seriously undertook to address the problem with less intrusive tools readily available to it," meaning that it "considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). And the government would have to "show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interests, not simply that the chosen route was easier.'" *Agudath*

Israel of Am. v. Cuomo, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *McCullen*, 573 U.S. at 495).

There is no compelling governmental interest justifying forcing Davis to violate her conscience. The Supreme Court emphasized that the parallel strict scrutiny analysis under federal RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006), and courts "to look beyond broadly formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants—in other words, to look to the marginal interest in enforcing" the marriage license mandate in this case. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014) (cleaned up); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (explaining compelling interest determination "is not to be made in the abstract" but "in the circumstances of this case" as "addressed by the law at issue").

No governmental interest can justify forcing Davis to violate her religious beliefs when marriage licenses were readily available in nearby and surrounding county clerks' offices. Moreover, forcing Davis to authorize marriage licenses over and against her sincere religious objections is not the least restrictive means

of nondiscriminatory distribution of Kentucky marriage licenses. "The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728. There is no evidence that Kentucky "lack[ed] other means" of issuing marriage licenses. "without imposing a substantial burden" on Davis's "exercise of religion." *See id.*

Indeed, many less restrictive means were available Governor Beshear to accomplish the goal of providing all Kentuckians with Kentucky marriage licenses without burdening any Kentuckians' religious exercise, as conclusively demonstrated by the subsequent implementation of several. First, Governor Beshear could have prescribed a license form removing the name and authorization of a county clerk—which is what he effectively did when he approved the marriage license forms altered to remove Davis's name and authorization while she was in jail, and again upon her return to work. Moreover, Governor Bevin effected this accommodation on a statewide basis through his Executive Order 2015-048, as did the General Assembly on a permanent basis by enacting SB 216. (Case, Pts. II.H, I.) There is no reason why these less restrictive means could not have been implemented by Governor Beshear *ab initio*, instead of his broad and unforgiving mandate.

Second, Governor Beshear could have invoked his apparent power to "alter policies" and interpret statutes "in a different way" (Case, Pt. II.D) to expressly

enable county judge/executives to stand in for county clerks requesting accommodation under the existing statute, KRS 402.240, allowing a judge/executive to issue marriage licenses in the absence of the clerk. The Rowan County Judge/Executive would have issued licenses to Plaintiffs if Davis's recusal was a statutory "absence." (*See* note 11, *supra*.)

Third, and similar to the above, Governor Beshear could have expressly provided a recusal option for county clerks requesting accommodation, like the recusal option for marriage licensing and solemnization officials enacted by North Carolina in June 2015. *See* N.C. Gen Stat. § 51-5.5. If Governor Beshear had authorized the recusal that Davis effected herself, there is no serious argument that the recusal would have violated any Kentuckian's right to marry. *Cf. Ansley v. Warren*, 861 F.3d 512 (4th Cir. 2017) (affirming dismissal of challenge to N.C. Gen Stat. § 51-5.5 for lack of standing).

Fourth, Governor Beshear could have effected the issuance of marriage licenses through an online or other centralized licensing scheme that removed county clerks as state agents for authorizing licenses.

These options and others were available. Indeed, Kentucky, through Governor Bevin, agreed and acknowledged that less restrictive alternatives to Governor Beshear's mandate were available and could easily have been implemented. (Case, Pt. II.H.) By refusing to adopt any of these less-restrictive

alternatives, Governor Beshear's mandate violated Davis's free exercise rights. And Plaintiffs cannot now use a lawsuit to punish Davis for her conscientious objection to an unconstitutional mandate. *See, e.g.*, *Claiborne Hardware Co.,* 458 U.S. at 916 n. 51; *Listecki*, 780 F.3d at 741–42.

3. Governor Beshear's mandate cannot satisfy rational basis scrutiny.

Even if strict scrutiny does not apply, Governor Beshear's mandate cannot survive rational basis scrutiny. Whatever interest Kentucky had in a marriage license policy that treated same-sex couples the same as different-sex couples in accordance with *Obergefell*, Kentucky had no legitimate interest in adopting a policy that denied the free exercise protections of the First Amendment and KRFRA, as Governor Beshear's mandate necessarily did, while reserving to Governor Beshear the discretion to grant individualized, non-religious exceptions as he saw fit. Put differently, the Governor's mandate was not reasonably related to the equal treatment goal dictated by *Obergefell* because numerous alternatives could have ensured equal treatment for all couples while not coercing any county clerk to violate his or her conscience. (*See* Pt. I.B.2, *supra.*) Indeed, Kentucky's subsequent implementation of these alternatives with no adverse effect on access to marriage establishes that no rational basis existed for denying accommodation to Davis in the first place.

C. Kentucky's Temporary, Non-Discriminatory Suspension of Marriage Licenses in One County to Accommodate Davis's Free Exercise Rights Did Not Violate Plaintiffs' Constitutional Right to Marry.

1. Rational basis scrutiny applies to Davis's accommodation under the Fourteenth Amendment.

Critically, Plaintiffs cannot prove that Kentucky discriminated against any same-sex couples, or otherwise prevented Plaintiffs from marrying whom they wanted to marry or barred them from obtaining a marriage license. At most, Plaintiffs have shown that Kentucky prevented them from obtaining a marriage license in a particular county to accommodate its official's sincerely held religious beliefs, while making licenses available everywhere else and treating all couples the same. It is undisputed that marriage licenses, including for same-sex couples, were readily available throughout the state, including in the surrounding counties and every county on Plaintiff Ermold's commute. (Case, Pt. II.F.) Plaintiffs have proved no obstacle to accessing any of these clerks' offices, the closest of which was just 6 miles (5 minutes) farther from their residence than Davis's office, and 1 hour 44 minutes closer to their residence than UPIKE where Plaintiff Ermold worked. (Case, Pt. II.F.)

To determine whether Kentucky violated Plaintiffs' constitutional right to marry by making all marriage licenses temporarily unavailable in one county, to

accommodate the free exercise rights of a state official, the Court must first determine whether rational basis or strict scrutiny applies to Kentucky's action.[12] *See Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996). Importantly, "not every state action 'which relates in any way to . . . the prerequisites for marriage must be subjected to rigorous scrutiny.'" *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1134 (6th Cir. 1995) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)). "[M]erely placing a non-oppressive burden on the decision to marry . . . is not sufficient to trigger heightened constitutional scrutiny." *Montgomery*, 101 F.3d at 1125. Heightened scrutiny only applies to restrictions on the right to marry that are "direct and substantial," *id.* at 1124, meaning an "absolute barrier" in which individuals are "absolutely or largely prevented from marrying" whom they want to marry or "absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses." *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001).

Under Supreme Court and Sixth Circuit precedent, the minimal burden placed on Plaintiffs compels the conclusion that rational basis scrutiny applies

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[12] "The right to marry is both a fundamental substantive due process and associational right." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996). "Supreme Court precedent, however, specifically establishes that the same level of scrutiny applies in both the First Amendment and substantive due process contexts." *Id.*

to Kentucky's action in this case. In *Montgomery*, this Court affirmed summary judgment for governmental defendants after applying rational basis scrutiny to their anti-nepotism policy. 101 F.3d at 1118. The plaintiffs were a couple employed at the same campus of the defendants' large secondary school system serving thirty-five school districts. *Id.* The defendants' policy prohibited married couples from working at the same campus. *Id.* Under the policy, upon the plaintiffs' marriage, the wife's employment was transferred to another campus in the system. *Id.* at 1119. Thus, the policy caused the couple "to drive collectively about 65 miles per day more," and for the wife added "an extra hour per day in commuting time." *Id.* at 1120.

Despite the plaintiffs' increased daily commute and resulting psychological ailments, the Court concluded the defendants' policy did not impose a "direct and substantial" burden on the plaintiffs' right to marry. *Id.* at 1124–26. Thus, the Court concluded, rational basis scrutiny applied to the Court's review. *Id.* at 1124–29.

The Court distinguished the case from two Supreme Court cases:

> Two examples of "direct and substantial" burdens on the right of marriage derive from the facts of *Loving [v. Virginia*, 388 U.S. 1 (1968),] and *Zablocki.* In *Loving,* the anti-miscegenation statute at issue was a "direct and substantial" burden on the right of marriage because it absolutely prohibited individuals of different races from marrying. In *Zablocki,* the burden on marriage was "direct and substantial" because the Wisconsin statute in that case required non-

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

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

In *Vaughn*, the Court held that a similar anti-nepotism policy "must be considered a non-oppressive burden on the right to marry, and so subject only to rational basis review by this court." 269 F.3d at 712. The Court explained:

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

Id. at 710 (emphasis added). The policy in *Vaughn* did not meet the "direct and substantial" test, the court reasoned, because "the policy did not bar [the plaintiff

couple] from getting married, nor did it prevent them from marrying a large portion of population even in [their home] County." *Id.*

Under *Montgomery* and *Vaughn*, and *Loving* and *Zablocki*, the temporary suspension of marriage licenses in Rowan County placed no direct and substantial burden on Plaintiffs' right to marry. Plaintiffs could have obtained a marriage license from "any county clerk," KRS 402.080, and Kentucky law neither required that they obtain a license in Rowan County, nor tied any legal benefit or significance to a license issued there.[13] Plaintiffs have not proved any obstacle, economic or otherwise, to their traveling to a clerk's office in one of the seven counties surrounding Rowan County, or any of the over 130 Kentucky marriage license outlets. Nor have Plaintiffs proved that such travel, one time, would absolutely or largely prevent a large number of people from marrying, or absolutely or largely prevent anyone from marrying a large portion of the otherwise eligible population of spouses. The lack of a marriage license "from the Rowan County Clerk" (Am. Compl., R.27, PageID# 121) "does not change the essential fact" that Plaintiffs were never barred "from getting married, nor did it prevent them from marrying a large portion of population even in [Rowan] County." *Vaughn*,

[13] This case does not present any constitutional question arising from a state, unlike Kentucky, that restricts marriage licensing to the county of residence or marriage solemnization.

269 F.3d at 712. The resulting burden on Plaintiffs was minimal, and non-oppressive as a matter of constitutional law.

2. Kentucky's accommodation of Davis's religious beliefs satisfies rational basis scrutiny as a reasonable means of advancing a legitimate governmental interest.

Under rational basis review, Plaintiffs' right to marry was not violated because Kentucky's temporary suspension of all marriage licenses in one office until its marriage policies could be revised was a reasonable means of advancing its legitimate governmental interest in accommodating the protected free exercise rights of its official. *See Vaughn*, 269 F.3d at 712; *Montgomery*, 101 F.3d at 1129–1130. Through the temporary stoppage, Kentucky ensured fundamental free exercise rights secured by the First Amendment and KRFRA (including Davis's) were protected, while treating all couples the same and leaving ample outlets for marriage licenses open. The stoppage was reasonable under all the circumstances because Davis, as the state official responsible for the stoppage, did not possess any obvious authority when *Obergefell* was decided to unilaterally alter the Kentucky marriage license form to effect the accommodation she later received from Governor Beshear's post hoc approval of license form alterations

made by others, Governor Bevin's Executive Order, and the General Assembly.[14] Issuing no licenses at all was reasonable because it was the only policy Davis could effect at the time to (i) treat all couples the same, and (ii) rightfully accommodate religious free exercise under the First Amendment and KRFRA, while (iii) leaving marriage licenses readily available to every couple throughout every region of the state.

3. Kentucky's accommodation of Davis also satisfies strict scrutiny because free exercise rights are entitled to the highest constitutional protection.

Indeed, protecting natural and inalienable religious liberties is not merely a legitimate government interest, it is a compelling interest of the highest degree. *See*, *e.g.*, U.S. Const. amend. I; Ky. Const., Preamble (referring to Kentuckians' "religious liberties"); Ky. Const. § 5 ("No human authority shall, in any case whatever, control or interfere with the rights of conscience."); KRFRA ("Government shall not substantially burden a person's freedom of religion.") And given that Davis's policy was not only reasonable, but also the only policy she

[14] Davis altered the forms issued from her office only after she had returned to work following her incarceration, and after Governor Beshear had approved a prior alteration effected by her deputy clerks while she was in jail. Governor Beshear's post hoc approval of both alterations was a change from the marriage license mandate he first imposed on Davis and other clerks. (Case, Pt. II.G; Am. Compl., R.27, PageID## 121–22 & n.2; Article, R.27-4, PageID# 134.)

could enact to respect all rights involved, the policy was closely tailored to effectuate Kentucky's compelling religious liberty interests. Thus, the policy satisfies strict scrutiny, and Plaintiffs' right to marry was not violated. *See Montgomery*, 101 F.3d at 1124.

II. DAVIS IS ENTITLED TO QUALIFIED IMMUNITY FROM PLAINTIFFS' CLAIMS BECAUSE PLAINTIFFS HAD NO CLEARLY ESTABLISHED RIGHT TO DEMAND THAT DAVIS ABANDON HER FREE EXERCISE RIGHTS.

The district court improperly reduced the qualified immunity analysis to the single question of whether Plaintiffs' rights were violated. (Order, R.108, PageID# 1960.) But determining whether Plaintiffs' asserted rights were clearly established necessarily requires consideration of the reasonableness of Davis's conduct under all the circumstances. (*See* Standards of Review, *supra*, p.28.) Davis has already demonstrated that she did not violate Plaintiffs' right to marry, and the reasonableness of her conduct. (*See* Pt. I, *supra*.) But even if a colorable marriage right violation could be found, Davis is entitled to qualified immunity because, in balancing her free exercise rights with Plaintiffs' right to marry, her conduct was objectively reasonable and did not violate any clearly established right.

A. There Was No Violation of a Clearly Established Right of Plaintiffs.

Plaintiffs have not demonstrated a violation of any "clearly established" constitutional right. Qualified immunity "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) (cleaned up). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Obergefell did not clearly establish that Davis was required to abandon any preexisting free exercise protections under the First Amendment and KRFRA, neither of which was limited by the decision. *Obergefell* only answered a narrow constitutional question: "The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." 576 U.S. at 680. *Obergefell* did not clearly define every right relating to a state's regulation of marriage in relation to religious liberty. *See Pidgeon v. Turner*, 538 S.W.3d 73, 89 n.22 (Tex. 2017) ("[N]either *Obergefell* nor *Pavan [v. Smith*, 137 S. Ct. 2075 (2017),] provides the final word on the tangential questions *Obergefell*'s holdings raise but *Obergefell* itself did not address."

Because the accommodation effected by Davis left marriage licenses available for all couples, on equal terms, throughout Kentucky, *Obergefell*'s invalidation of state marriage laws "to the extent" they treat same-sex couples

differently from opposite-sex couples, 576 U.S. at 675–76, was not directly implicated. Plaintiffs' implicit claim—that *Obergefell* gave them an "on demand" right to a marriage license in a particular county from a particular official—is not supported by *Obergefell* at all. To hold Davis liable for violating *this* right, Plaintiffs would have to prove it was clearly established, in all its specifics. They cannot, however, because the qualified immunity 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) (cleaned up).

The specifics of marriage licensing laws differ from state to state, and *Obergefell* had nothing to say about their differences, provided they treat all couples the same. Some states *require* a prospective couple to obtain their license in their home county, *see*, *e.g.*, Mich. Comp. Laws § 551.101; Ohio Rev. Code Ann. § 3101.05(a), while some require a license in the county of solemnization, *see*, *e.g.*, Md. Code Ann., Fam. Law § 2-401(a). Some impose a waiting period after application, *see*, *e.g.*, Mich. Comp. Laws § 551.103a (3 days); Minn. Stat. § 517.08(a) (5 days). Even during Davis's recusal from issuing marriage licenses, Kentucky's geographically permissive licensing program was far less restrictive than these other states'. There is no plausible argument that *Obergefell* requires every state to issue licenses in the home county of every applicant, regardless of

the availability of licenses elsewhere. Just as this Court held in *Occupy Nashville v. Haslam*, that the *general* First Amendment right to air grievances against the government does not clearly establish a right to a "24-hour-a-day, seven-day-a-week occupation" of a public park to air grievances, 769 F.3d 434, 444–46 (6th Cir. 2014), the general right to marry claimed by Plaintiffs under *Obergefell* (Am. Compl., R.27, PageID## 121–24) does not clearly establish the right to demand a marriage license from a particular official at a particular time and place.

B. Davis's Balancing of Rights Was Objectively Reasonable.

Davis is entitled to qualified immunity because her conduct was not objectively unreasonable in light of clearly established law. *See*, *e.g.*, *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010); *see also Anderson*, 483 U.S. at 640. "For a constitutional right to be clearly established, as this Court has repeatedly noted, the law must be clear in regard to the official's *particular actions in the particular situation*." *Saylor v. Bd. of Educ. of Harlan Cnty.*, 118 F.3d 507, 515 (6th Cir. 1997) (cleaned up) (emphasis added). "In other words, 'existing precedent must have placed the statutory or constitutional question confronted by the official beyond debate.'" *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014).

The district court correctly noted that Davis knew what *Obergefell* said, and what Governor Beshear and Judge/Executive Blevins told her to do. (Order, R.108, PageID## 1958–1960.) But neither Beshear nor Blevins could clearly

establish the abrogation of free exercise protections for Davis's particular situation. Indeed, an "official will be immune if officers of reasonable competence could disagree on whether the conduct violated the plaintiffs' rights." *Caldwell v. Woodford Cnty. Chief Jailor*, 968 F.2d 595, 599 (6th Cir. 1992) (cleaned up). Thus, it was error for the district court to ignore the undisputed contrary judgments of the KCCA President, Kentucky Senate President, and successor Governor—Davis's peer official and Kentucky's highest elected officials—who all agreed that Davis was due an accommodation of her free exercise rights. Governor Beshear even reversed himself on Davis's accommodation when it was convenient, approving a license alteration when it was too late for Davis, but a few months before his successor's Executive Order implicitly rebuked his transgression. "[W]here there is a divergence of views on [the constitutional question], it is improper to subject [public officials] to money damages for their conduct." *Pearson v. Callahan*, 555 U.S. 223, 245 (2009).

Moreover, KRFRA required Davis to accommodate free exercise in her office. In her official capacity, Davis had a duty under KRFRA not to substantially burden "the right of any person" —*i.e.*, Davis in her individual capacity—"to . . . refuse to act in a manner motivated by a sincerely held religious belief . . . ." KRS 446.350. Thus, both in issuing marriage licenses, and in not issuing licenses

pursuant to KRFRA, Davis was complying with state law, and acting reasonably.

In *Miller*, the district court acknowledged the conflict driving this case:

> [T]his 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. Plaintiffs, and the district court, can only see a winner and a loser in the conflict. (Order, R.108, PageID# 1963.) But Davis balanced the competing rights such that neither was infringed, demonstrating the error of the district court's judgment. Given that Davis had protection under the First Amendment and KRFRA (and a duty under KRFRA), and only minimally burdened Plaintiffs' rights, her actions were objectively reasonable, and she is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the district court's summary judgment for Plaintiffs and denial of summary judgment for Davis should be reversed.

Respectfully submitted:

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DATED this June 14, 2022.

/s/ Roger K. Gannam
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically using the Court's Electronic Case Filing (ECF) system which will effect service by sending a Notice of Docket Activity (NDA) to all registered attorneys in the case.

DATED this June 14, 2022.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Defendant–Appellant

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

Record Entry No.	Document Description
Record Entries in *Ermold v. Davis*, No. 15-cv-46-DLB (E.D. Ky.)	
R.1 PageID# 1	Complaint with Jury Demand
R.19 PageID# 95	Order, In Re: Ashland Civil Actions, August 18, 2016
R.20 PageID# 98	Notice of Appeal
R.27 PageID# 119	First Amended Complaint with Jury Demand
R.27-2 PageID# 129	Marriage License
R.27-4 PageID# 134	Article: Kim Davis stands ground, but same-sex couple get marriage license
R.29 PageID# 139	Motion to Dismiss Amended Complaint
R.29-1 PageID# 141	Defendant's Memorandum of Law in Support of Motion to Dismiss Amended Complaint
R.29-1 PageID# 174	Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form
R.49 PageID# 294	Memorandum Opinion and Order, September 15, 2017
R.51 PageID# 317	Notice of Appeal
R.71 PageID# 424	Notice of Supreme Court Case Docketing
R.88 PageID# 713	Plaintiffs' Motion for Summary Judgment

Record Entry No.	Document Description
R.89-1 PageID# 761	Hearing Transcript July 20, 2015
R.89-2 PageID# 845	Release: Gov. Beshear's Statement on Supreme Court Ruling on Same-Sex Marriage
R.89-4 PageID# 851	Release: Gov. Beshear: No special session needed
R.89-5 PageID# 854	Article: Gov. Beshear Tells County Clerks to Fulfill Their Duties or Resign
R.89-6 PageID# 856	Article: Read and watch Jack Conway's statement on same-sex marriage
R.89-7 PageID# 859	Release: Gov. Beshear: State to Pursue Appeal in Same Sex Marriage Case
R.89-8 PageID# 862	Article: Ky. Pays $195K+ to defend gay-marriage ban
R.89-9 PageID# 864	Article: Beshear to hire $125-an-hour lawyer for gay marriage appeal after Conway bows out
R.89-10 PageID# 866	Verified Third Party Complaint of Defendant Kim Davis
R.89-11 PageID# 898	Marriage License Form
R.89-12 PageID# 899	Letter: Kim Davis to Senator Robertson
R.89-13 PageID# 900	Letter: Kim Davis to Governor Beshear
R.89-14 PageID# 901	Motion of the Kentucky Senate President, Hon. Robert Stivers, for Leave to File a Brief as *Amicus Curiae*
R.89-15 PageID# 904	*Amicus Curiae* Brief of the Kentucky Senate President, Hon. Robert Stivers
R.89-16 PageID# 910	Hearing Transcript September 3, 2015

Record Entry No.	Document Description
R.90-1 PageID# 1093	Ermold Deposition Transcript
R.90-2 PageID# 1262	Moore Deposition Transcript
R.90-3 PageID# 1349	Davis Deposition Transcript
R.91-7 PageID# 1546	Ermold Interrogatory Answers
R.91-10 PageID# 1582	Letter: David Ermold to Kim Davis
R.91-11 PageID# 1584	Article: Wed-Locked
R.91-12	Video, July 6, 2015
R.91-13	Video, August 13, 2015
R.91-14	Video, September 1, 2015
R.91-17 PageID# 1595	Article: Our Experience in Rowan County
R.91-18 PageID# 1597	Article: In Kim Davis race, her opponent is the one being accused of bigotry
R.92-1 PageID# 1666	Letter: Governor Beshear to County Clerks
R.92-2 PageID# 1667	E-mail: Kim Davis to Bill May
R.92-3 PageID# 1673	E-mail: KDLA to County Clerks
R.92-3 PageID# 1675	Marriage License Form

Record Entry No.	Document Description
R.92-4 PageID# 1678	E-mail: Chris Jobe (Bill May) to County Clerks
R.92-5 PageID# 1679	E-mail: Kim Davis to Chris Jobe (Bill May)
R.92-6 PageID# 1681	E-mail: Chris Jobe (Bill May) to County Clerks
R.92-7 PageID# 1683	Ky. Bill Tracking, House Bill 279
R.92-9 PageID# 1687	Map
R.92-10 PageID# 1688	Map
R.92-11 PageID# 1689	Map
R.92-12 PageID# 1690	Map
R.92-13 PageID# 1691	Map
R.92-14 PageID# 1692	Map
R.92-15 PageID# 1693	Map
R.92-16 PageID# 1694	Map
R.92-17 PageID# 1695	Map
R.92-18 PageID# 1696	Map
R.92-19 PageID# 1697	Map

Record Entry No.	Document Description
R.92-20 PageID# 1698	Map
R.93 PageID# 1699	Defendant's Motion for Summary Judgment
R.108 PageID# 1948	Memorandum Opinion and Order, March 18, 2022
R.109 PageID# 1970	Notice of Appeal
Record Entries in *Miller v. Davis*, No. 0:15-cv-44-DLB (E.D. Ky.)	
R.1 PageID# 1	Complaint
R.39 PageID# 824	Motion for Preliminary Injunction
R.44 PageID# 1174	Notice of Appeal
R.58 PageID# 1289	Order, August 25, 2015
R.74 PageID# 1557	Order, September 3, 2015
R.75 PageID# 1558	Minute Entry, September 3, 2015
R.82 PageID# 1785	Notice of Appeal
R.83 PageID# 1791	Notice of Appeal
R.181 PageID# 2706	Order, August 18, 2016