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

DEFENDANT–APPELLANT'S PETITION FOR INITIAL HEARING EN BANC

A.C. Donahue
DONAHUE LAW GROUP, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
(606) 677-2741
ACDonahue@DonahueLaw-Group.com

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org |
dschmid@LC.org

Attorneys for Defendant–Appellant, Kim Davis

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

I. GROUNDS FOR INITIAL HEARING EN BANC

The last appeal in this case decided that Plaintiffs–Appellees had sufficiently *pleaded* a constitutional right-to-marry claim against Defendant–Appellant Kim Davis, despite Davis's qualified immunity defense. *See Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019). The current appeal, however, asks whether the district court erred in in denying Davis qualified immunity at the summary judgement stage. (Davis Br. 1.) And since the last appeal, the Supreme Court has decided three cases sharpening and amplifying the free exercise rights at the heart of Davis's qualified immunity defense. (Davis Br. 1–2, 29–59.) *See Masterpiece Cakeshop, Ltd. v. Co. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). Against these substantial developments in free exercise law since the last appeal (*Kennedy* was decided after Davis's opening brief), and pursuant to Rule 35(b)(1), Davis states the following grounds for initial hearing en banc in this appeal:

(1)(a) The panel majority opinion in the prior appeal, *Ermold*, 936 F.3d at 429–438, conflicts with binding precedent of the Supreme Court, *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Zablocki v. Redhail*, 434 U.S. 374 (1978), and of this Court, *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996), and *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703 (6th Cir. 2001), on the required analysis

for a constitutional right-to-marry claim. Although a new panel hearing the current summary judgment appeal is not bound by the prior majority's analysis where not pivotal to its pleadings-stage conclusions, and the intervening Supreme Court decisions further undermine the reasoning of both the prior majority and partially concurring opinions, the new panel would nonetheless be heavily influenced, if not constrained, to follow the prior majority's conflicting analysis where not clearly confined to dicta. Consideration by the full Court is therefore necessary to overcome the prior panel's conflicts and restore fidelity to Supreme Court and Sixth Circuit precedents. Fed. R. App. P. 35(a)(1).

The precedents require a tiered analysis of a claim that a government policy—other than an outright ban—violates the constitutional right to marry: Policies imposing a direct and substantial burden on the right to marry are subject to strict scrutiny, while policies imposing a lesser burden are subject to only rational basis review. *See, e.g.*, *Montgomery*, 101 F.3d at 1124–29. The panel majority, relying on *Obergefell*, expressly rejected this mandatory tiered analysis in favor of a strict liability standard, depriving Davis of the opportunity to demonstrate that her balancing of free exercise rights with Plaintiffs' right to marry satisfied the Constitution. *Ermold*, 936 F.3d at 437. The prior panel's opinion is therefore in conflict with decades of binding Supreme Court and Sixth Circuit precedent, including *Obergefell* itself, which the Supreme Court repeatedly said

is about the right of same-sex couples to marry "on the *same terms and conditions* as opposite-sex couples" (emphasis added), necessarily incorporating its prior right-to-marry precedents as to same-sex couples. 576 U.S. at 651, 664–65, 672, 675–76, 678–80. As the prior panel's partial concurrence reasoned, "I don't believe that the Supreme Court would abolish tiers-of-scrutiny analysis for all marriage regulations [in *Obergefell*] without explicitly telling us it was doing so." *Ermold*, 936 F.3d at 439 (Bush, J., concurring in part and in the judgment). Judge Bush also cautioned against allowing the majority's error to stand, admonishing, "This is not mere pedantry," and, "The next marriage-regulation case that our court hears may not be amenable to this type of judicial shortcut." *Id.* at 440–41. This is the next case, and the intervening Supreme Court decisions in *Masterpiece Cakeshop*, *Fulton*, and *Kennedy*, *supra*, make the prior majority's "judicial shortcut" even less defensible now.

(b) Put differently, the current appeal involves right-to-marry questions of exceptional importance, the consideration of which should be freed from any undue influence of the prior panel's conflicts: (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; and (2) whether the constitutional

right to marry is violated by 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. (Davis Br. 1–2.) More specifically, these questions necessarily involve the subsidiary but equally important question of whether a claimed violation of the constitutional right to marry, as extended to same-sex couples by *Obergefell*, is subject to the same tiered, "direct and substantial burden" analysis applicable to right-to-marry claims brought by opposite-sex couples prior to *Obergefell*. The full Court should hear Davis's appeal to correct the prior majority's negative answer to this exceptionally important question that misapprehended *Obergefell* and imposed an untenable strict liability standard on marriage licensing officials. *See* Fed. R. App. P. 35(a)(2). *See Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (statement of Thomas, J., respecting denial of Davis's certiorari petition from prior appeal) ("This petition implicates important questions about the scope of our decision in *Obergefell* . . . .").

(2)(a) The prior majority opinion also conflicts with binding precedent of the Supreme Court, *Plumhoff v. Rickard*, 572 U.S. 765 (2014), and of this Court, *Occupy Nashville v. Haslam*, 769 F.3d 434 (6th Cir. 2014), on determining clearly established law for purposes of qualified immunity where a government official's

free exercise rights are viewed to conflict with another's asserted constitutional rights. And while a new panel hearing this appeal is not bound by the prior panel's decision in all respects, and intervening Supreme Court decisions further free the new panel to decide the issues anew, the influence and perceived constraints of the prior majority's opinion nonetheless loom large. (*See* (1)(a), *supra*.) Thus, consideration by the full Court is again necessary to overcome the prior panel's conflicts and restore fidelity to Supreme Court and Sixth Circuit precedents. Fed. R. App. P. 35(a)(1).

In *Occupy Nashville*, deciding whether a public official was entitled to qualified immunity, this Court recognized, "The Supreme Court has repeatedly told courts not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." 769 F.3d at 443 (cleaned up) (quoting *Plumhoff*, 572 U.S. at 779)). The prior majority disregarded this clear instruction and defined—at the highest possible level of generality—the right Plaintiffs sought to enforce as the "right to marry." *Ermold*, 936 F.3d at 436. But this generalized right is no more specific than the "right to air grievances" the *Occupy Nashville* Court rejected as too generalized to begin the "clearly established" inquiry for qualified immunity purposes, focusing instead on the particularized right claimed by the plaintiffs: the right to a "24-hour-a-day,

seven-day-a-week occupation" of a public park to air grievances. 769 F.3d at 444–46. Thus, the majority should have focused on the Plaintiffs' claimed right to marry *on a marriage license issued in Rowan County, by Davis*, "in the particular circumstances [Davis] faced," *id.* at 443, which included consideration of Davis's free exercise rights. *See Kennedy*, 142 S. Ct. at 2447 (Sotomayor, J., dissenting) ("The proper response where tension arises between the two [constitutional rights] is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis . . . .").

(b) Put differently, the current appeal involves qualified immunity questions of exceptional importance, the consideration of which should be freed from any undue influence of the prior panel's conflicts: (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. (Davis Br. 2.) More specifically, these questions necessarily involve the subsidiary but equally important question of whether the Court must heed the Supreme Court's repeated instruction "'not to define clearly established

law at a high level of generality,'" *Occupy Nashville*, 769 F.3d at 443, in determining whether a public official violated a clearly established right for qualified immunity purposes. By portraying *Obergefell* as a blanket "condemn[ation]" of "refusing to license same-sex marriage," *Ermold*, 936 F.3d at 437, the prior majority departed from the Supreme Court's repeated instruction as recognized by this Court. The full Court should hear this appeal and return to uniformity with the binding precedents.

II. BACKGROUND SUMMARY

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.

Kentucky, acting through its then-Governor Steve Beshear, immediately changed the Kentucky marriage license form to comply with *Obergefell*, treating all couples the same. (Davis Br. 7–8.) But Governor Beshear expressly rejected any accommodation of the religious free exercise rights of county clerks like Davis. (Davis. Br. 8–14.) Six months later, Kentucky, acting through its next

Governor, Matt Bevin, changed the marriage license form again by Executive Order 2015-048, to comply with Kentucky RFRA by accommodating the free exercise of county clerks like Davis, while still treating all couples the same. (Davis Br. 22.) In between, Davis treated all couples the same, first by recusing herself from issuing any marriage licenses, and then by allowing her deputies to issue marriage licenses with alterations ratified by Governor Beshear—which ratification implicitly provided Davis the free exercise accommodation she sought and needed until Kentucky, in the form of Governor Bevin's Executive Order, expressly agreed she was entitled to accommodation. (Davis Br. 8–17, 21–22.)

A Kentucky marriage license issued anywhere in the Commonwealth is good anywhere in the Commonwealth, regardless of the residence of the licensee. (Davis Br. 4–5.) Plaintiffs sought marriage licenses from Davis's office—and nowhere else—during the two months she was not issuing licenses, while Kentucky marriage licenses were otherwise available everywhere else in the Commonwealth, including in the seven counties surrounding Rowan County. (Davis. Br. 17–21.)

III. ADDITIONAL ARGUMENT IN SUPPORT OF HEARING EN BANC

A. The Full Court Should Hear This Appeal Because the Prior Majority's Conflicting Analysis May Constrain a New Panel to the Extent Not Clearly Confined to Dicta.

Like most circuits, this Court follows the rule that a panel's published opinion is binding on subsequent panels unless overruled or abrogated by the Court en banc or by the Supreme Court. *See, e.g.*, *Freed v. Thomas*, 976 F.3d 729, 738 (6th Cir. 2020); *Miller v. Caudill*, 936 F.3d 442, 447–48 (6th Cir. 2019). A panel is not bound, however, by the dicta of a prior panel, only the holding. *Freed*, 976 F.3d at 738. But "the line between a holding and dictum is not always clear." *Id.* (cleaned up). Thus, although this is a new appeal from a final judgment, the prior panel's decision in the pleadings-stage appeal has already had an outsized effect. The prior panel's decision, reviewing the denial of Davis's motion to dismiss Plaintiffs' complaint, only *held* that Plaintiffs 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 . . . ."). But both the district court, in its summary judgment order on appeal, and Plaintiffs, in their brief, consider the prior panel's rejection of Davis's qualified immunity defense to be controlling now, at the summary judgment stage. (*See* Order, R.108, PageID## 1949–1950, 1955, 1957, 1960, 1962–63; Pls.' Br. 13 ("The law of the case doctrine is outcome

determinative here. It precludes reconsideration of this Court's August 23, 2019 precedential determination that Davis is not entitled to qualified immunity.").)

As shown above (Grounds, *supra*, pp. 1–4), in deciding whether Davis violated a clearly established right of Plaintiffs for purposes of her qualified immunity defense, the prior majority asked the wrong question. Having concluded unequivocally that Davis acted for Kentucky both in issuing marriage licenses, and in not issuing marriage licenses to Plaintiffs, *Ermold*, 936 F.3d at 435, the majority should have asked whether *Kentucky* (acting through Davis) directly and substantially burdened Plaintiffs' ability to marry whom they wanted, which is necessary to establishing the appropriate level of review. Instead, the majority imposed a novel, strict liability on Davis because *she* did not license Plaintiffs to marry, regardless of the extent to which Plaintiffs were burdened by Davis herself. *Id.* at 435–437; *cf. id.* at 439 (Bush, J., concurring in part and in the judgment) ("They suffered a hardship . . . . What they did not suffer was a prohibition on getting married."). (*See* Davis Br. 30–31, 47–54.) As also shown above (Grounds, *supra*, pp. 4–7), in deciding whether Plaintiffs' claimed right was clearly established, the majority considered the right at too high a level of generality—the "right to marry"—instead of asking whether Plaintiffs had a right to marry *on a marriage license issued in Rowan County, by Davis*, and then asking whether Davis (on Kentucky's behalf) acted reasonably in removing but one

of the many Kentucky marriage licensing options available to Plaintiffs under Kentucky law, in order to balance Davis' free exercise rights and Plaintiffs' right to marry.

To the extent a new panel may join with the district court and Plaintiffs in finding the prior panel's decision controlling, the full Court should hear this appeal to avoid any perpetuation of the prior panel's conflicts with Supreme Court and Sixth Circuit precedent. "Rule 35(a) . . . provides for in banc hearings to maintain uniformity of decisions and to deal with questions of exceptional importance." *Reid v. Memphis Pub. Co.*, 525 F.2d 986, 986 (6th Cir. 1975) (Edwards, J., dissenting from denial of reh'g en banc). Where, as here, the prior panel's decision conflicts with decisions of the Supreme Court and this Court on the appropriate standards for constitutional right-to-marry claims and the qualified immunity defense of marriage officials, "[f]ull consideration is essential to establishing a consistent rule of law . . . ." *Id.* And, even if the prior majority's opinion and the cited precedents are not "diametrically opposed," but instead "point in opposite directions," en banc hearing should be granted because "[s]uch hearings are primarily useful in facilitating the orderly development of a consistent body of jurisprudence." *United States v. Rosciano*, 499 F.2d 173, 176 n.3 (6th Cir. 1974) (Stevens, J., dissenting).

B. The Full Court Should Hear This Appeal Because Intervening Supreme Court Decisions Compel Departure from the Prior Panel's Decision.

Since the last appeal, the Supreme Court has decided three cases sharpening and amplifying the free exercise rights at the heart of Davis's qualified immunity defense. (Davis Br. 1–2, 29–59.) *See Masterpiece Cakeshop, Ltd. v. Co. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). And while a new panel hearing this appeal is authorized to depart from any legal holding in the prior panel decision that is abrogated by an intervening Supreme Court decision, only the full Court will have an entirely free hand to fully conform its decision to the substantial recent developments in free exercise jurisprudence.

1. *Masterpiece Cakeshop* forbids judicial hostility towards Davis's religious beliefs about marriage.

In *Masterpiece Cakeshop* the Court held that "official expressions of hostility to religion" violate free exercise rights. 138 S. Ct. at 1722; *see also Kennedy*, 142 S. Ct. 2422 n.1. This development requires departure from the prior panel's decision, specifically Judge Bush's partial concurrence, where he concluded that even if the panel majority had applied the correct tiered analysis to Plaintiffs' right-to-marry claims, Davis must still lose because her sincere religious beliefs equate to "anti-homosexual animus" unworthy of consideration in the qualified immunity analysis. *Ermold*, 936 F.3d at 438; *see also Davis v. Ermold*, 141 S. Ct.

at 4 (statement of Thomas, J., lamenting victimization of Davis by, *inter alia*, Judge Bush's "read[ing *Obergefell*] to suggest that being a public official with traditional Christian values was legally tantamount to invidious discrimination toward homosexuals"). Under *Masterpiece Cakeshop*, such judicial hostility towards Davis's religious beliefs is itself violative of her free exercise rights.

2. *Fulton* amplifies Davis's free exercise defense to Plaintiffs' attempt to enforce Governor Beshear's marriage license mandate against her.

As already argued in Davis's Brief, under *Fulton*, Governor Beshear's coercing Davis to choose between violating her conscience or resigning from her position as county clerk burdened her religious exercise as a matter of law. (Davis Br. 29–35.) Moreover, *Fulton* makes clear that Governor Beshear's reservation to himself of the power to make individualized exceptions to his marriage license mandate subjects the mandate to strict scrutiny, which it cannot survive. (Davis Br. 39–46.) Thus, *Fulton* requires departure from the prior panel's decision which refused any consideration of Davis's free exercise rights in imposing its strict liability interpretation of *Obergefell* against her.

3. *Kennedy* requires balancing Davis's free exercise rights with Plaintiffs' marriage rights without picking a constitutional winner and a loser.

In *Kennedy*, the Supreme Court further amplified and sharpened the free exercise rights applicable to Davis's qualified immunity defense in this case. First, the Court made clear,

> The [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts.

142 S. Ct. at 2421 (cleaned up). Second, *Kennedy* rejects the proposition that where a free exercise right is in tension with another constitutional guarantee, one must yield to the other. *See id.* at 2426–2432 (finding no "sound reason to prefer one constitutional guarantee over another"); *cf. id.* at 2447 (Sotomayor, J., dissenting) ("The proper response where tension arises between the two [constitutional rights] is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis . . . ."). Thus, *Kennedy* requires departure from the prior panel's decision which refused to look for a constitutional balance between Davis's free exercise rights and Plaintiffs' marriage rights, instead insisting that Davis's rights necessarily must yield to Plaintiffs'.

Kennedy is also relevant for Justice Thomas's concurrence, in which he observed that the Supreme Court has not decided "whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public." *Id.* at 2433. This reality undermines any assertion by the prior panel that Davis is not entitled to qualified immunity because it was "clearly established" that *Obergefell* necessarily deprived her of free exercise rights in connection with marriage licensing.

IV. CONCLUSION

State officials and district courts should be able to look to this Court's opinions for guidance on future conduct and disputes, and they will be deprived of this important benefit if a new panel hearing this appeal is constrained to follow the prior majority opinion—applying the wrong constitutional analysis, in conflict with Supreme Court and Sixth Circuit precedent. For the foregoing reasons, the full Court should grant initial hearing en banc to restore uniformity to Circuit precedents and answer the exceptionally important questions raised herein.

Respectfully submitted:

/s/ Roger K. Gannam

A.C. Donahue
Donahue Law Group, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
(606) 677-2741
ACDonahue@DonahueLawGroup.com

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Attorneys for Defendant–Appellant, Kim Davis

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 3,387 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Calisto MT font.

DATED this July 14, 2022.

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

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 July 14, 2022.

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