No. 22-5261

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES YATES; WILL SMITH

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-00062 before The Honorable David L. Bunning

REPLY 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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I. THIS SUMMARY JUDGMENT APPEAL IS NOT CONTROLLED BY THE COURT'S PRIOR PLEADINGS-STAGE CONCLUSIONS ON DAVIS'S QUALIFIED IMMUNITY DEFENSE.

A. The Court Expressly Limited Its Prior Decision to Whether Plaintiffs Pleaded a Constitutional Right-to-Marry Claim.

Plaintiffs' repetitious arguments that the prior appeal controls have no merit. (Pls.' Br. 10, 14–19.) In this appeal from the district court's order granting partial summary judgment to Plaintiffs, and denying summary judgment to Davis on her qualified immunity defense, the Court's review is to determine whether "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). In the prior appeal from the district court's order denying Davis dismissal on her qualified immunity defense, the Court's review was to determine whether Plaintiffs "adequately allege[d] the violation of a clearly established right." *Ermold v. Davis*, 936 F.3d 429, 435 (6th Cir. 2019); *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 . . . ."). To be sure, the Court confined its prior decision within unambiguous boundaries, at the beginning of the opinion, and at both the beginning and end of the qualified immunity analysis:

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

Ermold, 936 F.3d at 432 (beginning of opinion) (emphasis added). And, "Davis challenges the district court's denial of her motion to dismiss, which places our focus on plaintiffs' allegations." *Id.* at 435 (beginning of analysis). And, "In short, plaintiffs pleaded a violation of their right to marry . . . ." *Id.* at 437 (end of analysis).

Thus, this appeal presents an ultimate issue for the Court's decision that is fundamentally different from the issue in the prior appeal. Before, the Court "look[ed] at allegations" and merely held that Plaintiffs had pleaded enough. *Id.* at 432. Now, the Court must "look at evidence" and determine "whether Davis definitively violated plaintiffs' rights." *Id.* The Court should hold Davis did not, and the Court is not bound in that determination by its prior holding that Plaintiffs *alleged* she did. *See Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (explaining point of determining official's entitlement to qualified immunity "is usually summary judgment and not dismissal under Rule 12"); *cf. Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) ("Resolution of the immunity question may require more than one judiciously timed appeal, because the legally

relevant factors bearing upon the [qualified immunity] question will be different on summary judgment than on an earlier motion to dismiss." (cleaned up)).

B. The Law of the Case Doctrine Does Not Foreclose Davis's Qualified Immunity Defense in This Appeal.

1. The Court's holding on a pre-discovery motion to dismiss does not establish law of the case for purposes of post-discovery summary judgment.

As shown above, the fundamentally different issues before the Court in this summary judgment appeal are not controlled by the Court's prior pleadings-stage decision. Thus, the law of the case doctrine does not apply.

Under binding Sixth Circuit precedent, the Court's "holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery." *McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000). As shown above, the Court's prior decision reviewing the denial of Davis's motion to dismiss expressly cautioned that "*the parties haven't completed discovery*. That means we don't look at evidence; we look at allegations. So we ask not whether Davis definitively violated plaintiffs' rights but whether they adequately allege that she did." *Ermold*, 936 F.3d at 432 (emphasis added). Thus, the Court's prior, pre-discovery review of Plaintiffs' allegations is not binding here, where the Court must review the post-discovery evidence.

The district court implicitly acknowledged this binding rule in the Order on appeal. Although the court liberally cited this Court's prior decision, it did not reference the law of the case doctrine even once. This omission is persuasive because the doctrine, where applicable, "is intended to enforce a district court's adherence to an appellate court's judgment." *Moody v. Michigan Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017). To be sure, with respect to all of Davis's arguments on summary judgment—"that the Free Exercise Clause protected Davis from Plaintiffs' § 1983 claims and that Davis is entitled to qualified immunity because she did not violate Plaintiffs' constitutional right to marry, and if she did, that right was not clearly established"—the district court concluded that "Davis was entitled to make these arguments." (Order, R.99, PageID# 2020.)

2. Plaintiffs' inextricably intertwined First Amendment free exercise defense presents new factual and legal issues that the Court did not review in the last appeal.

As Davis showed in her jurisdictional statement (Davis Br. 1), in addition to Davis's collateral order appeal from the summary judgment denial of her qualified immunity defense, 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. *See Watkins v. Healy*, 986 F.3d 648, 658–59 (6th Cir. 2021). (Davis Br.

1–2, 25–58.) And since the last appeal, the Supreme Court has decided three cases sharpening and amplifying these free exercise rights at the heart of Davis's qualified immunity defense. *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) (decided after Davis's opening brief).

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

Fulton illuminated the unconstitutionality, under the Free Exercise Clause, of Governor Beshear's marriage license mandate, which comprised several official and unilateral pronouncements of Kentucky marriage policy by the Governor.[1] (Davis Br. 5–14, 20–21, 30–45.) As shown 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. 28–34.) Moreover, *Fulton* makes clear that Governor Beshear's reservation to himself of the power to make individualized exceptions

[1] Davis has never argued, as Plaintiffs disingenuously assert, that Governor Beshear's marriage license mandate is limited to his June 26, 2015 letter to county clerks. (Pls.' Br. 14–15.) As shown in Davis's brief, the June 26 letter is but one of many communications and pronouncements evidencing Governor Beshear's unilateral policies comprising his unconstitutional marriage license mandate. (Davis Br. 5–14, 20–21, 30–45.)

to his marriage license mandate subjects the mandate to strict scrutiny, which it cannot survive. (Davis Br. 38–45.)

In the prior appeal, the full extent of Governor Beshear's marriage license mandate had not been developed in the record, and *Fulton* had not been decided. In this appeal, *Fulton* requires the Court to hold that imposing liability on Davis under Governor Beshear's mandate would violate Davis's free exercise rights under the First Amendment, and that her free exercise rights justified the accommodation from the mandate that she effected when Governor Beshear refused, but which Governor Beshear ultimately ratified when expedient. (Davis Br. 5–14, 20–21, 30–45.)

b. *Kennedy* requires balancing Davis's free exercise rights with Plaintiffs' marriage rights without picking a constitutional winner and 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, in this appeal, *Kennedy* requires the Court to look for a constitutional balance between Davis's free exercise rights and Plaintiffs' marriage rights, and hold that Davis's accommodation preserved both rather than holding 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 negates any assertion 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.

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

In *Masterpiece Cakeshop* the Supreme 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 precludes the conclusion of the prior panel's concurring Judge, that even if the panel majority had applied the correct tiered analysis to Plaintiffs' right-to-marry claims (Davis Br. 46–53; Pt. II.A, *infra*), 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 (Bush, J., concurring in part and in the judgment); *see also Davis v. Ermold*, 141 S. Ct. at 4 (statement of Thomas, J., lamenting victimization of Davis by "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.

II. THE COURT'S CLEARLY ERRONEOUS CONCLUSIONS IN ITS PRIOR OPINION ARE NOT THE LAW OF THE CASE.

To the extent any identical issue actually decided in the prior appeal (i.e., "fully briefed and squarely decided," *Burley v. Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016) (cleaned up), is not affected by evidentiary or legal developments

since, the law of the case doctrine still does not apply if the decision was clearly erroneous. *See Moody*, 871 F.3d at 426. Davis raised several points of error in the Court's prior decision, where the Court's conclusions conflicted with Supreme Court or Sixth Circuit precedent, in her petition for initial hearing en banc (Doc. 18), which the Court denied on August 1, 2022 (Doc. 21-1). Davis repeats and further discusses those points here in the context of the law of the case doctrine. Such clearly erroneous conclusions are not the law of the case.

A. The Panel Majority's Rejection of Tiers of Scrutiny Analysis of Plaintiffs' Right-to-Marry Claim Is Not Law of the Case Because Clearly Erroneous.

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, and is therefore clearly erroneous. 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 partially concurring Judge 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). The concurring Judge 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.

As shown in Davis's brief (Davis Br. 29–30, 46–53), 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.").

Where the majority previously stated that Davis "provides no legal authority for [the] proposition" that "we should focus broadly on Kentucky instead of narrowly on Davis," *Ermold*, 936 F.3d at 436, and that the majority could "find none," *id.*, the majority could have turned to Part I of its own opinion. There, the majority concluded, "for whom an official acts has nothing to do with how well she acts. Davis's refusal to issue licenses, then, did nothing to change the government she acted for. . . . Davis acted on Kentucky's behalf when issuing

(and refusing to issue) marriage licenses." *Id.* at 435; *see also Miller v. Caudill*, 936 F.3d 442, 452 (6th Cir. 2019); *Love v. Beshear*, 989 F. Supp. 2d 536, 540 (W.D. Ky. 2014) (entering pre-*Obergefell* summary judgment for plaintiffs who "requested a Kentucky marriage license from the Jefferson County Clerk's Office" because "[t]he *Commonwealth* refused to issue them a license . . . ." (emphasis added)). Thus, the proposition that Davis acted for Kentucky, as a Kentucky marriage-licensing official—even in recusing herself from issuing marriage licenses—*is* the law of the case. It follows, therefore, that the Court must ask whether *Kentucky* violated Plaintiffs' right to marry—i.e., Davis *acting for Kentucky*.

This is important because, in the qualified immunity analysis, the question of whether a constitutional right has been violated at all is separate from the question of the accused official's culpability for a violation, which depends on whether the right was clearly established and the reasonableness of the official's conduct under all the circumstances. *Campbell v. City of Springboro*, 700 F.3d 779, 786 (6th Cir. 2012). Thus, if the challenged deprivation was not a constitutional violation, then there is no need to make further inquiry into the accused official's role in or culpability for the conduct. *Id.* In other words, it does not matter what official was responsible for a claimed deprivation if it did not violate the Constitution. Contrary to the majority's prior conclusion, *this is* "how qualified

immunity works" and "how constitutional rights work" in the qualified immunity context—only half of the analysis is concerned with the accused official's individual conduct. *Ermold*, 936 F.3d at 436. If the challenged conduct was a constitutional violation, however, qualified immunity asks whether the right violated was clearly established and whether the accused official's conduct was reasonable. *Campbell*, 700 F.3d at 786; *Pearson v. Callahan*, 555 U.S. 223, 243–44 (2009). Thus, whether a constitutional violation occurred *at all* does not depend on what official authorized or effected the conduct at issue—e.g., the accused official or a higher official. But if the conduct at issue violated a constitutional right, the reasonableness of the accused official's conduct is relevant to whether qualified immunity is available.

Under this qualified immunity framework and binding Supreme Court and Sixth Circuit precedent, whether Davis's recusal from issuing marriage licenses in the Rowan County Clerk's Office (as an accommodation of her free exercise rights) deprived Plaintiffs of the constitutional right to marry does not depend on whether Governor Beshear or Davis effected the accommodation. Rather, it depends on whether the accommodation imposed a direct and substantial burden on Plaintiffs' ability to marry whom they wanted and, depending on the answer, whether the reasons for the accommodation satisfy the appropriate level

of scrutiny—i.e., strict or rational basis. Only if a constitutional violation is revealed by application of this objective standard can any liability attach and, even then, only if the particulars of the right were clearly established and Davis acted unreasonably in light of those particulars. Thus, Davis cannot be liable if her accommodation was not a constitutional violation under the applicable objective standard, regardless of who effected the accommodation. Moreover, qualified immunity excuses Davis for effecting the accommodation, even if it were a colorable violation of Plaintiffs' right to marry, if Davis reasonably believed the discontinuance was justified under all the circumstances.

An example illustrating this principle supposes that within the Rowan County Clerk's Office all deputy clerks are authorized to issue marriage licenses, but one of the deputy clerks is excused from all marriage license handling as an accommodation of her sincerely held religious beliefs about marriage, leaving all the other deputies to issue marriage licenses. If a couple seeking a marriage license approaches the window of the accommodated deputy, but upon requesting a marriage license is referred by the deputy to any of the surrounding windows where licensing deputies are stationed, the negligible burden on the couple's ability to get a marriage license would not violate the couple's right to marry under any applicable standard, even though a state official (the accommodated deputy clerk) in fact "denied" or "refused" the couple a marriage

license. Moreover, the deputy's conduct would not violate the couple's right to marry regardless of whether the accommodation—which left marriage licenses readily available from surrounding deputies—was effected by the Governor, the County Clerk, or the agreement of the deputy clerks themselves.[2]

Like the hypothetical "next window" accommodation above, the constitutionality of the "next office" accommodation challenged by Plaintiffs does not depend on whether the policy was effected by Governor Beshear or Davis herself. Rather, it depends on whether the accommodation imposed a direct and substantial burden on Plaintiffs' right to marry. Because the "next office" accommodation did not impose a direct and substantial burden on Plaintiffs' right

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[2] The deputy clerks of the Rowan County Clerk's Office effected such an accommodation by mutual agreement while Davis was in federal custody for contempt of the district court's preliminary injunction in *Miller*, but the actual agreement designated one deputy clerk to handle all marriage licenses as an accommodation of all the other deputies. (*See Miller v. Davis*, E.D. Ky. No. 15-cv-00044-DLB, Notice, R.114, PageID# 2293 ("He is the only deputy clerk that is doing so by mutual agreement between the others wherein Mr. Mason agreed he would take care of those matters himself . . . ."); *id.*, Notice, R.116, PageID# 2304; *id.*, Notice, R.117, PageID# 2306 ("[B]y mutual agreement of the deputy clerks employed by the Rowan County (KY) Clerk's Office, Mr. Mason will issue those licenses."); *id.*, Am. Notice, R.122, PageID# 2334 ("Mr. Mason is the only deputy clerk issuing the licenses currently pursuant to a mutual agreement between all the deputy clerks."); *id.*, Order, R.161, PageID# 2657; *Miller v. Caudill*, 936 F.3d at 446.) There has never been an allegation that the unavailability of marriage licenses from all but one of the deputy clerks in the Rowan County Clerk's Office violated any person's right to marry, nor could such an allegation be seriously entertained.

to marry, it was not a violation of Plaintiffs' right to marry if it passes rational basis review, which it easily does. (Davis Br. 46–53.)

B. The Court's Evaluation of Plaintiffs' Clearly Established Rights at Too High a Level of Generality Is Not the Law of the Case Because Clearly Erroneous.

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. 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" that the *Occupy Nashville* Court rejected as too generalized to begin the "clearly established" inquiry for qualified immunity purposes, and instead focused 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 prior 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 . . . .").

As shown in Davis's brief (Davis Br. 53–58), in deciding whether Plaintiffs' claimed right was clearly established, the prior 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.

CONCLUSION

The easy availability of marriage licenses in all surrounding counties made the burden of Davis's accommodation on Plaintiffs' right to marry insubstantial. Davis's knowledge and communication of the easy availability of licenses in all surrounding counties made her conduct reasonable. For these and all the foregoing reasons, and the reasons in Davis's brief, 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 August 11, 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 August 11, 2022.

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