

Nos. 22-5260/5261

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

DAVID ERMOLD; DAVID MOORE

Plaintiffs–Appellees

v.

KIM DAVIS, Individually

Defendant–Appellant

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 Nos. 15-cv-00046 & 15-cv-00062
before The Honorable David L. Bunning

**DEFENDANT–APPELLANT’S
PETITION FOR REHEARING EN BANC**

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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. GROUNDS FOR REHEARING EN BANC

The panel, like the district court below, misconceived Kim Davis’s essential defense. Davis has never argued that her free exercise rights gave her cover to violate the marriage rights of Plaintiffs. (Op., Doc. 25-2, at 4–5; Order, R.108, PageID# 1963.¹) Rather, Davis has always argued that accommodating her free exercise rights never violated Plaintiffs’ right to marry. (Davis Br., Doc. 15, at 26, 47–54.) The panel also, again, disregarded decades of Supreme Court and Sixth Circuit precedent requiring a tiered analysis of Plaintiffs’ right to marry claims against Davis, and requiring the identification of clearly established rights at a high level of specificity in the qualified immunity analysis. The panel’s repetition of these errors was not unforeseen—Davis petitioned the Court for initial hearing en banc because of the likelihood (though not necessity) that the panel in this summary judgment appeal would extend the errors of the panel majority in Davis’s prior pleadings stage appeal, *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019). The panel also committed a new error in refusing to engage Davis’s free exercise defense, which is at least inextricably intertwined with—if not integral

¹ Two separate appeals were consolidated for the panel’s decision, *Ermold v. Davis*, No. 22-5260, and *Yates v. Davis*, No. 22-5261. Unless otherwise indicated, references to this Court’s record are by “Doc. #” in *Ermold*, No. 22-5260, and references to the district court record are by “R.#” and “PageID#” in the *Ermold* district court proceedings, E.D. Ky. No. 15-cv-00046.

to—her qualified immunity defense, especially given the Supreme Court’s recent decisions in between the appeals, sharpening and amplifying the free exercise rights at the heart of Davis’s 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). (*See also* Davis Br., Doc. 15, at 1–2, 29–59.) Against these substantial developments in free exercise law, and pursuant to Rule 35(b)(1), Davis states the following grounds for rehearing en banc:

(1)(a) The panel opinion extends the erring analysis of the panel majority opinion in the prior appeal, *Ermold*, 936 F.3d at 429–438, conflicting 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. Consideration by the full Court is therefore necessary to overcome the 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, relying on *Obergefell* and the prior panel majority opinion, 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. (Op., Doc. 25-2, at 1–2, 4; *Ermold*, 936 F.3d at 437.) The panel’s decision 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 for 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 the 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., Doc. 15, at 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 rehear Davis’s appeal to correct the panel’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 also* *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 panel also extended the erring analysis of the prior panel majority, conflicting 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. Consideration by the full Court is necessary to overcome the 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.” (Op., Doc. 25-2, at 1–2, 4; *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 panel should have focused on 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., Doc. 15, at 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 rehear 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., Doc. 15, at 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., Doc. 15, at 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., Doc. 15, at 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., Doc. 15, at 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 REHEARING

A. The Full Court Should Engage Davis’s First Amendment Defense That the Panel Disregarded.

In this appeal, the panel was tasked with determining whether Davis was 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 first step directly implicates Davis’s First Amendment defense, so the panel’s declining to consider it was error.

As shown above (Grounds, *supra*, pp. 1–5), in deciding whether Davis violated a clearly established right of Plaintiffs for purposes of her qualified immunity defense, the panel 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, *see Ermold*, 936 F.3d at 435, the panel 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 panel 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. (Op., Doc. 25-2, at 1–2, 4; *Ermold*, 936 F.3d 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., Doc. 15, at 30–31, 47–54.) As also shown above (Grounds, *supra*, pp. 5–7), in deciding whether Plaintiffs’ claimed right was clearly established, the panel 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’s free exercise rights and Plaintiffs’ right to marry.

If the First Amendment still requires protection of free exercise rights after *Obergefell*,² and Kentucky’s accommodation of Davis’s free exercise rights does not violate Plaintiffs’ right to marry, then Davis has not violated Plaintiffs’ right

² “The First Amendment ensures that religious . . . persons are given proper protection” *Obergefell*, 576 U.S. at 679.

to marry by effecting the accommodation as a Kentucky official. Thus, Davis’s First Amendment free exercise rights, and her First Amendment defense to enforcement of Governor Beshear’s mandate against her in a 42 U.S.C. § 1983 action, are inextricably intertwined with—if not integral to—Davis’s qualified immunity defense, and the panel had jurisdiction to consider it. *See Watkins v. Healy*, 986 F.3d 648, 659 (6th Cir. 2021).

Contrary to the panel’s misconceived framing, Davis did not ask the Court to determine whether “Davis had a justification for taking the action (or, as here, inaction) that violated plaintiffs’ constitutional rights.” (Op., Doc. 25-2, at 4–5.) Rather, Davis asked the Court—and asks the full Court now—to determine whether the accommodation of Davis’s free exercise rights violated Plaintiffs’ rights at all, which is the first step of the qualified immunity analysis. Under the correct, tiered analysis of Plaintiffs’ right-to-marry claims (*see Grounds, supra*, pp. 1–5), a burden on the right to marry is not synonymous with a violation of the right to marry, and the minor burden on Plaintiffs’ access to a marriage license satisfies the applicable rational basis scrutiny because allowing Davis’s recusal from issuing licenses is rationally related to Kentucky’s legitimate government interest in accommodating Davis’s free exercise rights. Moreover, the question of Davis’s justification for her recusal from issuing marriage licenses is essential to the second step of the qualified immunity analysis, asking whether

Plaintiffs had a “clearly established” right to receive a license *from Davis, irrespective of Davis’s free exercise rights.* (*See Grounds, supra*, pp. 5–7.)

Furthermore, although the district court barely mentioned Davis’s First Amendment defense, it already decided the issue against Davis. (Order, R.108, PageID# 1963 & n.2.) On remand, the district court will not take it up again— if the panel’s decision stands, all that remains for the district court is a trial on the amount of damages. (Op., Doc. 25-2, at 3.) Thus, there is no purpose to be served by delaying engagement with Davis’s First Amendment defense until after a damages trial. The full Court should rehear this appeal now and correct the panel’s error.

B. The Full Court Should Rehear This Appeal Because Intervening Supreme Court Decisions Compel Departure from the Panel’s Decisions.

Between the prior, pleadings stage appeal and this summary judgment appeal, the Supreme Court decided three cases sharpening and amplifying the free exercise rights at the heart of Davis’s qualified immunity defense. (Davis Br., Doc. 15, at 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). The full Court should rehear this appeal to fully conform its decision to these 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 panel’s decisions, specifically Judge Bush’s partial concurrence in the prior majority opinion, 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 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., Doc.

15, at 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., Doc. 15, at 39–46.) Thus, *Fulton* requires departure from the panel’s decisions 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 panel’s decisions 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 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

For the foregoing reasons, the Court should grant rehearing en banc to answer the exceptionally important questions raised herein and restore uniformity to Circuit precedents and fidelity to Supreme Court precedents.

Respectfully submitted:

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DATED this October 13, 2022.

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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 October 13, 2022.

/s/ Roger K. Gannam
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