Nos. 15-5880, 15-5961, 15-5978

In the United States Court of Appeals for the Sixth Circuit

APRIL MILLER, PH.D; KAREN ANN ROBERTS; SHANTEL BURKE; STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY; L. AARON SKAGGS; AND BARRY SPARTMAN,
Plaintiffs-Appellees,

v.

KIM DAVIS, INDIVIDUALLY,
Defendant-Third-Party Plaintiff-Appellant,

and

STEVEN L. BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY, AND WAYNE ONKST, IN HIS OFFICIAL CAPACITY AS STATE LIBRARIAN AND COMMISSIONER, KENTUCKY DEPARTMENT FOR LIBRARIES AND ARCHIVES,
Third-Party Defendants-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CIVIL ACTION NO. 15-CV-00044, HON. DAVID L. BUNNING

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-5880 Case Name: Miller v. Davis

Name of counsel: Lawrence J. Joseph

Pursuant to 6th Cir. R. 26.1, Eagle Forum Education & Legal Defense Fund
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

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No.

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I certify that on November 9, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

RULES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, submits this *amicus* brief with the consent of all parties.[1] Since its founding in 1981, EFELDF has consistently defended traditional American values, including not only traditional marriage, defined as the union of husband and wife, but also the religious freedoms that were instrumental in this Nation's founding. Although the Supreme Court recently held that our "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," even the Court acknowledged that the "First Amendment ensures that religious organizations and persons are given proper protection." *Obergefell v. Hodges,* 135 S.Ct. 2584, 2607 (2015). This litigation presents the new issue of how to balance the important interests at stake on all sides. For the foregoing reasons, EFELDF has direct and vital interests in the issues raised here.

STATEMENT OF THE CASE

Plaintiffs are same-sex and opposite-sex couples (the "Couples") residing in Rowan County, Kentucky, who wish to obtain marriage licenses. The defendant is the Rowan County Clerk (the "Clerk"), whom Kentucky law authorizes to issue

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

marriage licenses. In its current configuration, Kentucky's marriage-license form would require the Clerk to violate her faith if she issued a marriage license bearing her name and imprimatur for a same-sex marriage, and she has filed a third-party complaint against appropriate Kentucky officials to achieve an accommodation under which the Couples' demands for same-sex marriage licenses would not infringe her religious-freedom rights.

Consequently, the Clerk ceased dispensing marriage licenses to anyone, consistent with the Supreme Court's recent holding that 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." *Obergefell v. Hodges,* 135 S.Ct. 2584, 2607 (2015) (emphasis added). Under Kentucky law, however, the Couples are free to obtain marriage licenses at numerous other locations statewide including every other county seat, both in person and by mail:

> The license shall be issued by the clerk of the county in which the female resides at the time, unless the female is eighteen (18) years of age or over or a widow, and the license is issued on her application in person or by writing signed by her, in which case it may be issued by any county clerk.

KY. REV. STAT. §402.080. Moreover, the Kentucky Religious Freedom Restoration Act ("Kentucky RFRA") ameliorates §402.080 by providing that the "right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing

evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest." KY. REV. STAT. §446.350.

Even without Kentucky RFRA's required accommodation of the Clerk's religious beliefs, §402.080 enables Kentucky adults and widows to obtain marriage licenses from any county clerk.[2] Indeed, marriage licenses were available in the two metropolitan areas to which the Couples have travelled to attend proceedings before the district court below, to say nothing of the several counties through which the Couples would have had to travel to attend those hearings. *See* Davis Br. at 14 (60 miles to Ashland and 100 miles to Covington).[3] The Couples' traveling those distances clearly did not present a significant burden.

Notwithstanding both Kentucky RFRA and the ease of the Couples' obtaining licenses via alternate means, the district court viewed the Clerk's failure

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[2] Even for minors, a marriage would not be invalid because the license was issued in the wrong county. *Gatewood v. Tunk,* 6 Ky. 246 (Ky. 1813) (decided under prior law).

[3] Catlettsburg (the county seat of Boyd County) is in the Huntington-Ashland-Ironton metropolitan area, Bureau of Labor Statistics, U.S. Dep't of Labor, "May 2014 Metropolitan and Nonmetropolitan Area Definitions" (Mar. 25, 2015) (available at http://www.bls.gov/oes/current/msa_def.htm#26580) (last visited Nov. 9, 2015), and Covington is one of the two county seats of Kenton County. *See* Kentucky Dep't for Libraries and Archives, "Kentucky County Formation Chart" (available at http://kdla.ky.gov/researchers/Pages/countyformationchart.aspx) (last visited Nov. 9, 2015).

to do her "statutorily assigned duties" under §402.080 as the key question:

> [T]he Court finds that Plaintiffs have one feasible avenue for obtaining their marriage licenses – they must go to another county. Davis makes much of the fact that Plaintiffs are able to travel, but she fails to address the *one question that lingers in the Court's mind.* Even if Plaintiffs are able to obtain licenses elsewhere, why should they be required to? The state has long entrusted county clerks with the task of issuing marriage licenses. It does not seem unreasonable for Plaintiffs, as Rowan County voters, to expect their elected official to perform her *statutorily assigned duties.* And yet, that is precisely what Davis is refusing to do.

PgID.1159 (emphasis added). In granting injunctive relief, the district court relied on the *Ex parte Young,* 209 U.S. 123 (1908), exception to sovereign immunity for the authority to enjoin the Clerk's marriage policies. PgID.1153-54 & n.4. The district court subsequently imprisoned her for refusing to violate her religious beliefs by issuing same-sex marriage licenses. Davis Br. at 23-24.

STATEMENT OF FACTS

Amicus EFELDF adopts the facts as stated in the Clerk's brief. Davis Br. at 9-26. In summary, the Clerk has religious objections to distributing marriage licenses to same-sex couples in the Kentucky marriage license's current form, she has taken reasonable steps to cure the disconnect between her beliefs and the current form, she has applied her no-license policy evenhandedly to same-sex and opposite-sex couples, and the Couples could obtain marriage licenses more easily than filing this suit, either in person or by mail, without significant effort.

SUMMARY OF ARGUMENT

Although the Couples demand their rights under *Obergefell*, this litigation requires the Court to balance the Couples' asserted marriage rights with the Clerk's religious-freedom rights. Because *Obergefell* acknowledged but did not resolve that conflict by setting the appropriate test for striking that balance (Section I.A), federal law is "deficient … to furnish suitable remedies" under 42 U.S.C. §1988(a). Thus, a federal court evaluating this conflict could look to Kentucky RFRA to balance these interests (Section I.D). Without resort to Kentucky law, moreover, the Clerk's no-marriage-license policy does not violate purely federal law: (a) as to equal-protection, the Clerk evenhandedly denied licenses to all couples consistent with *Obergefell* (Section I.B), and (b) as to due-process, the minor imposition of seeking licenses in-person or via mail from adjacent counties or the capital does not sufficiently impair marriage rights under Circuit precedent to trigger stringent review, and Kentucky RFRA's accommodation of the Clerk's religious views qualifies as a sufficiently rational government interest to defeat the Couples' purely federal due-process claims (Section I.C).

As indicated, Kentucky law requires the balancing of the Clerk's obligations under §402.080 with the accommodations that Kentucky RFRA provides (Section II.A). Significantly, although the district court disagreed with the Clerk's reading of Kentucky RFRA, federal courts lack the authority to narrow state laws by

interpretation (Section II.B), which counsels for federal courts' avoiding this issue entirely under three separate jurisdictional or quasi-jurisdictional bases.

Kentucky clerks implementing state marriage policies share the State's sovereign immunity from suit under the Eleventh Amendment (Section III.A.1), and the *Young* exception to sovereign immunity requires an ongoing violation of *federal* law: mere violations of *state* law are insufficient to avoid the Clerk's immunity (Section III.A.3). Similarly, if the Clerk is not immune, the Couples could assert – but have not asserted – supplemental jurisdiction under 28 U.S.C. §1367; but supplemental jurisdiction is inappropriate where the state-law claim predominates or requires a novel or complex ruling under state law, which is precisely the case with the conflict between §402.080 and Kentucky RFRA (Section III.C). Finally, while incorporating Kentucky RFRA via §1988(a) might save the Clerk, the same is not true for incorporating §402.080 to aid the Couples. First, federal law is adequate to define due-process protections here, without incorporating §402.080's county-of-residence provisions into the Couples' federal claims; second, the Couples cannot cherry-pick Kentucky law by incorporating §402.080 without Kentucky RFRA's accommodations; and third, if the Court finds Kentucky RFRA inconsistent with federal law, §1988(a) cannot incorporate *any* Kentucky law into the Couples' federal claims, thus defeating the district court's reliance on perceived statutory duties (Section III.B).

ARGUMENT

I. THE CLERK DID NOT VIOLATE FEDERAL LAW.

The same-sex plaintiffs driving this litigation impatiently assert their new rights under *Obergefell* and thus frame this litigation exclusively as the denial of *their* claimed right to "secur[e] a valid marriage license in Rowan County, Kentucky." Compl. ¶¶48, 58 (PgID.11, 13). Even when viewed in the light most favorable to the Couples, however, this litigation requires the *balancing of competing rights.*[4] Moreover, in the context of balancing the competing federal rights at issue, federal civil-rights law provides for looking to state laws such as Kentucky RFRA when federal law itself does not provide a framework for striking the right balance.

A. Although it created and acknowledged the conflict between same-sex marriage and religious freedom, *Obergefell* did not resolve that conflict.

Although the Couples emphasize that the Clerk is a public officer, we are long past the era of Justice Holmes' famous dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (Mass. 1892) (Holmes, J.). As a result, public officers and employees no longer "may constitutionally be compelled to relinquish the First Amendment rights" in

[4] As explained herein, EFELDF respectfully submits that the Couples do not, in fact, have significant federal rights to assert here.

all circumstances. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *cf. Sherbert v. Verner*, 374 U.S. 398 (1963) (government cannot condition public benefits on accepting Saturday employment if that is contrary to religious faith). The question presented here is how to balance the Couples' new rights with the Clerk's rights.

Of course, courts routinely balance rights against each other. *See, e.g., Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 874 (1992) (women's right to abortion versus states' right to regulate women's health and interest in the unborn child's life); *Gannett Co. v. DePasquale*, 443 U.S. 368, 398-99 (1979) (criminal defendants' due-process rights versus the media's and the public's freedom of the press). When federal courts strike such balances in specific contexts – especially in areas of judge-made law – the resulting balancing test necessarily appears nowhere in the Constitution. *See, e.g., Casey*, 505 U.S. at 878 (creating "undue-burden" test); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 547-48 (1989) (Blackmun, J., dissenting). Here, the Supreme Court recognized more than 100 years after the States ratified the Fourteenth Amendment that the States did not intend to create a right to same-sex marriage, *Baker v. Nelson*, 409 U.S. 810 (1972), but the Court has found in that Amendment a principle that purportedly allows it to infer such rights. *Obergefell*, 135 S.Ct. at 2598. The implications of *Obergefell* necessarily remain for the lower federal courts and ultimately for the Supreme Court to resolve.

Specifically, the Court created a new right to same-sex marriage, recognized that that new right may conflict with religious liberty, but has not yet provided a balancing test for resolving the inevitable conflicts. *Obergefell,* 135 S.Ct. at 2607. The Court may ultimately adopt the rule of *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-79 (1990) ("an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"), but it may not. Alternatively, or in addition, federal courts may look to state law under *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) ("prudent course … is often to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation") (internal quotation omitted), but it may not. This case of first impression therefore requires this Court to strike a balance between the Clerk's rights and the Couples' rights.

B. The Clerk did not violate the Equal Protection Clause.

As signaled above, *Obergefell* found the same-sex marriage rights to lie under both the Equal Protection Clause and the Due Process Clause. As explained here and in the next subsection, however, the Clerk's actions do not directly violate either of those two clauses of the Fourteenth Amendment.

First, the evenhandedness of the Clerk's denying marriage licenses to both same-sex couples and opposite-sex couples defeats any claim to an equal-

protection violation:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). The Clerk has adopted an interim solution that, quite frankly, could qualify as a permanent solution under the Equal Protection Clause. The treatment is entirely equal. But even the Clerk does not propose that her interim solution remain in place forever. Instead, her third-party complaint seeks relief from Kentucky that would alleviate the need for her to violate her religious beliefs while enabling Couples (and future couples) to obtain marriage licenses even in Rowan County. *See* Davis Br. at 15-16. In any event, there clearly is no ongoing violation of the Equal Protection Clause.

C. The Clerk did not violate the Due Process Clause.

Second, although the due-process analysis requires more rigor than the equal-protection analysis, there is no due-process violation, either. Even without the problem of a court's needing to balance *competing federal rights* discussed in Section I.A, *supra,* no appellate marriage-rights decision has ever found an absolute due-process right to obtain a marriage license in one's county of residence, especially when marriage licenses are readily available nearby. *Cf.*

Casey, 505 U.S. at 874 (significant travel distances for women seeking an abortion do not violate that judge-made right). Accordingly, there is no substantive due-process right to obtain marriage licenses in Rowan County arising directly from the Due Process Clause.

Viewed in its entirety as applied here, Kentucky law creates a marriage-license doughnut hole, with licenses available to the Couples statewide, either in person or by mail, under §402.080, but not in Rowan County under Kentucky RFRA. If the Clerk prevails in her suit against Kentucky, she will have established either a process or a form that will ensure the availability of marriage licenses in Rowan County, as well. Given the travel distances permissibly imposed in the abortion context, *Casey*, 505 U.S. at 874, it would be risible to claim a substantive due-process violation if Kentucky's Legislature had affirmatively enacted the same doughnut hole[5] that has resulted from the operation of Kentucky RFRA. In order for the Couples to prevail under a due-process theory, this Court would need to hold that marriage licenses must be available in each county. That would mean that states could not make licenses available only by mail from the capital. While such

[5] Although the doughnut-hole concept apparently has legal meaning, *Buono v. Kempthorne,* 527 F.3d 758, 783 (9th Cir. 2008); 152 Cong Rec H162 (Feb. 8, 2006) (Mr. DeFazio); Lancaster, South Carolina Code of Ordinances §28-1(5), Rowan County is more of a pinhole vis-à-vis Kentucky's 120 counties. Only if viewed in isolation as Rowan County and the seven counties that surround it would Rowan County qualify as something as big as a doughnut hole.

a holding would be absurd, it is the clear – if unexamined – implication of the district court's decision.

1. *Obergefell* did not find a due-process right to in-person marriage licenses in one's county of residence.

The consolidated *Obergefell* cases addressed the availability of marriage licenses to same-sex couples, not where or how states must dispense those licenses. As such, and regardless of its grandiose language, *Obergefell* did not – and could not –decide *where* or *how* states must dispense marriage licenses: "our remark in [an earlier decision] … is obviously not controlling, coming as it did in an opinion that did not present the question we decide in these cases." *United States Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 463, n.11 (1993) (emphasizing "the need to distinguish an opinion's holding from its dicta"). To the extent that any *Obergefell* language would support that perceived right, that language would be mere *dicta* because the Court did not face that specific question: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill,* 511 U.S. 661, 678 (1994). As to the issues that *Obergefell* did not *necessarily* decide against the state defendants there, marriage policy remains "a virtually exclusive province of the States." *U.S. v. Windsor,* 133 S.Ct. 2675, 2691 (2013). *Obergefell* itself clearly did not decide this case.

2. The Due Process Clause does not guarantee a due-process right to in-person marriage licenses in counties of residence.

Nothing in the *Windsor* or *Obergefell* decisions even remotely suggests that states could not elect to evenhandedly distribute marriage licenses online or from the state capitol via the mail. The district court rejected these potential "someday" modes of dispensing licenses as irrelevant, PgID.1159 ("these options may be available someday, [but] they are not feasible alternatives at present"), but that is only because the district court held the Clerk to perceived "statutorily assigned duties" under Kentucky law. *Id.* In taking that approach, the district court improperly incorporated state law into the federal due-process analysis.[6] For purposes of a purely *federal* due-process analysis, nothing credibly suggests that states must dispense marriage licenses in-person to residents in every county.

3. The Clerk's policy would not violate a due-process right to in-person marriage licenses in one's county of residence, even if such a right existed.

Even assuming *arguendo* that the Couples have a federal due-process right to marriage licenses in their county of residence, the Clerk's policy would not violate that right. In the interest of the religious-freedom rights that *Obergefell* itself recognized, Kentucky RFRA burdens marriage rights by allowing accommodation of the Clerk's religious beliefs with the minor burdens imposed on

[6] While §1988(a) may allow the incorporation of *some* state-law standards into a federal due-process claim, that is not the case for Kentucky law here. *See* Sections II, III.B, *infra*.

the Couples. For burdens on even fundamental rights to become impermissible, those burdens must "directly and substantially" interfere with the right. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978); *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 942 (6th Cir. 2004). "Our analysis of the case law … 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." *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001).Thus, the Couples' claimed injuries do not trigger stringent review.

Short of that, rational-basis review applies, *Akers v. McGinnis*, 352 F.3d 1030, 1040 (6th Cir. 2003), and is easily met by the need for religious accommodation. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (alleviating burdens on religious freedom is a permissible legislative purpose). Even if the Couples had the rights they claim – and they do not – the Couples would not prevail.

D. Section 1988(a) *potentially* imports state law into federal claims.

The Clerk has asserted rights under Kentucky RFRA against compelling her to violate her religious beliefs, but the district court rejected the use of Kentucky law. *Amicus* EFELDF respectfully submits that, given the absence of federal law to

resolve the balancing of the Clerk's religious freedom versus the Couples' marriage rights, a federal court should look to state law "so far as the same is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. §1988(a).[7] Because existing federal precedents and laws do not guide federal courts on how to balance the rights at issue here, this Court could look to Kentucky RFRA. *See Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *Wilson v. Morgan,* 477 F.3d 326, 332 (6th Cir. 2007). Nothing in Kentucky RFRA is affirmatively *inconsistent* with federal law.[8]

By way of background, Congress enacted §1988(a)'s precursor on April 9, 1866, before the Fourteenth Amendment's ratification, Ch 31, §3, 14 Stat. 27 (1866), then re-enacted it pursuant to Section 5 of the Fourteenth Amendment in 1870. Ch. 114, §18, 16 Stat. 140, 144 (1870). Where it applies, §1988(a) "adopt[s] the statute governing an analogous cause of action under state law" so that "federal law incorporates the State's judgment on the proper balance between the policies [at issue, such as repose] and the substantive policies of enforcement embodied in

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[7] As used in §1988(a), "Title 24" includes 28 U.S.C. §1343 and 42 U.S.C. §1983. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 n.7 (1972).

[8] On the other hand, it is entirely unclear whether §1988(a) would allow the Couples to incorporate §402.080 into their due-process claim: "The express terms of § 1988(a) prevent us from *replacing* federal law with more favorable state law." *Morgan,* 477 F.3d at 332 (emphasis in original); *cf.* Section I.C.2, *supra* (resolving the Couples' due-process claim under purely federal law).

the state cause of action." *Garcia,* 471 U.S. at 271. This Court should not lightly reject an act of Congress pursuant to the Fourteenth Amendment that was not only enacted contemporaneously with the Amendment's ratification but also modeled on existing law previously adopted by the ratifying generation.

To be sure, the Supreme Court has held the *federal* Religious Freedom Restoration Act ("Federal RFRA") to lie outside the scope of Section 5 because Federal RFRA simultaneously sought both to restore a strict-scrutiny standard in place of the Supreme Court's holding in *Smith* and to adopt federal law over state law in countless areas. *See City of Boerne v. Flores,* 521 U.S. 507, 534-36 (1997). Here, of course, one half of the *Boerne* rationale is wholly absent: Congress did not offend federalism in 1866 or 1870 by adopting Kentucky law for federal civil-rights actions in Kentucky.

The remaining *Boerne* rationale – separation of powers – would be inadequate by itself to deny the Clerk resort to Kentucky RFRA for three reasons. First, as she argues, her religious-freedom rights under state law outweigh the minor burden (*if any*) on the Couples' federal rights under the *Obergefell* decision. Second, §1988(a)'s standard of "not inconsistent" is an easier standard to meet than the "enforce versus legislate" distinction at issue in the *Boerne* decision: it would remain "not inconsistent" with federal law to use standards that the Supreme Court has used in religious-freedom cases, even if that were not the standard of

review that that Court ultimately adopts to fill the gap that *Obergefell* left open. Third, until the Supreme Court clears the religious-freedom ambiguity left unresolved by *Obergefell,* there is no federal law against which to measure Kentucky RFRA's consistency.[9]

II. THE CLERK DID NOT VIOLATE KENTUCKY LAW.

To the extent that it relied on §402.080, PgID.1159 (discussing the Clerk's "statutorily assigned duties"), the district court failed adequately to consider how Kentucky RFRA modifies the Clerk's §402.080 obligations. As explained in this section, Kentucky RFRA requires accommodating the Clerk's religious views, and this Court lacks the power to ameliorate Kentucky law to avoid any perceived unconstitutionality of Kentucky RFRA. Consequently, the Clerk did not violate §402.080, and this Court cannot enforce §402.080 by disregarding or narrowing Kentucky RFRA.

A. Kentucky RFRA modifies the Clerk's obligations under §402.080.

As indicated, the district court gave short shrift to Kentucky RFRA's ameliorating §402.080's requirements. Given the minimal burdens imposed on the Couples, Kentucky RFRA clearly allows the Clerk's reasonable accommodations.

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[9] A fourth distinction under §1988(a) applies in reverse. Even if this Court finds Kentucky RFRA inconsistent with *Obergefell* and *Smith*, the Couples cannot rely on §1988(a) to import §402.080 into their federal claims: either this Court adopts Kentucky law as a whole, or it does not adopt Kentucky law at all. *See* Section III.B, *infra*.

Significantly, Kentucky RFRA was codified in Chapter 446, which concerns the "construction of statutes." *See* KY. REV. STAT. §446.350. Under Kentucky law, "the more specific and later-enacted statute … supersede[s] and supplant[s] any conflicting provisions … contained in … widely dispersed statutes." *Pearce v. Univ. of Louisville,* 448 S.W.3d 746, 759 (Ky. 2014). For both reasons, an appropriate court should find that – as a matter of Kentucky law – Kentucky RFRA supplants §402.080's obligations to require accommodating the Clerk's religion.

First, Kentucky RFRA postdates §402.080 and thus has a superior claim to control here. *Compare* 1984 Ky. Acts ch. 279, §1 (§402.080 last amended in 1984) *with* 2013 Ky. Acts ch. 111, §1 (Kentucky RFRA enacted in 2013). Kentucky RFRA thus controls interpreting §402.080's scope.

Second, Kentucky RFRA was obviously specifically intended to control general statutes such as §402.080. Same-sex-marriage supporters recently vilified Arkansas and Indiana for adopting state RFRAs that would allegedly negatively impact rights like those that the Couples assert. *See, e.g.,* Monica Davey, *et al., After Rights Clash, Two States Revise Legislation,* N.Y. TIMES, Apr. 2, 2015, at A12. Claiming that Kentucky RFRA has no bearing here represents a remarkably disingenuous reversal.

But even assuming *arguendo* that the second factor – specificity – favored the Couples, while the temporal factor favors the Clerk, this would remain a suit

that belongs in *state* court. As explained below, federal courts cannot resolve novel and complicated issues of state law.

B. Federal courts lack authority to interpret Kentucky RFRA narrowly to cure perceived constitutional defects.

A federal court lacks the power to adjudicate this dispute under Kentucky law because federal courts cannot balance §402.080's obligation against Kentucky RFRA's accommodations. Consequently, although the Couples could have filed their suit in Kentucky's state courts, their chosen forum must dismiss this action to the extent that the Couples premise their alleged rights on §402.080.

Specifically, federal courts lack the authority to adopt the type of narrowing construction of *state* law needed to disregard Kentucky's RFRA's amelioration of §402.080: "Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction ... if the state courts have not already done so." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.,* 857 F.2d 422, 431 (8th Cir. 1988) (interior quotations omitted, alterations in original); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws"). Instead, "a federal court must take the state statute or municipal ordinance as written and cannot find the statute or ordinance constitutional on the basis of a limiting construction supplied by it rather than a state court." *Eubanks v. Wilkinson,* 937 F.2d 1118, 1126 (6th Cir. 1991). A federal court cannot, therefore, seek to impose §402.080's

perceived obligation on the Clerk by disregarding the accommodation that Kentucky RFRA requires.

III. FEDERAL COURTS LACK THE AUTHORITY TO ORDER THE CLERK TO ISSUE MARRIAGE LICENSES UNDER §402.080.

To non-lawyers in the media, this litigation apparently presents a clear case of a public officer shirking her public duty for personal reasons, contrary to the Couples' rights. That begs the question of what specific law the Couples claim the Clerk is violating. The obvious candidates are the Due Process Clause, the Equal Protection Clause, and §402.080. Of these three, only the first two qualify as federal law, but only the third arguably contemplates marriage licenses specifically in Rowan County. If this Court determines that the Fourteenth Amendment itself does not give the Couples a right to in-person marriage licenses in their county of residence, but – like the district court – believes that the Clerk should meet her perceived duty under §402.080, this Court must analyze its authority to order the Clerk to comply with §402.080.

For a variety of jurisdictional and quasi-jurisdictional reasons, federal courts lack the authority to compel the Clerk to comply with §402.080, regardless of the ultimate merits of whether her policies violate §402.080. First, under sovereign immunity, the Clerk would be immune from suit in federal court unless the Couples assert an ongoing violation of *federal* law sufficient to invoke the *Young* officer-suit exception to her immunity. Conversely, if the Clerk either lacks

sovereign immunity or declines to assert it, the Couples potentially could invoke §402.080 either by incorporating it into their federal claim under §1988(a) or by asserting supplemental jurisdiction over a state-law claim pursuant to §1367. Unfortunately for the Couples, the Kentucky-law conflict between Kentucky RFRA and §402.080 undermines all possible avenues for the couples to assert §402.080 in federal court.

A. Sovereign immunity denies federal courts the authority to compel the Clerk to issue marriage licenses.

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine,* 527 U.S. 706, 728-29 (1999), applying equally to suits by a state's own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). The Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity or Congress has abrogated immunity under the Fourteenth Amendment. *Alden,* 527 U.S. at 712-16. The test for waiver is "a stringent one," and "consent … must be unequivocally expressed." *Sossamon v. Texas,* 131 S.Ct. 1651, 1658 (2011) (interior quotations and citations omitted). Nothing suggests that Kentucky or the Clerk have waived sovereign immunity for

the Couples' suit.

Under the *Young* officer-suit exception, sovereign immunity does not bar suits in which the plaintiff seeks only prospective injunctive or declaratory relief to avert an ongoing violation of federal law. This analysis requires a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002) (interior quotations omitted). In the absence of an ongoing violation of federal law, the *Young* exception does not relieve plaintiffs of the defendant's immunity. *Verizon,* 535 U.S. at 645; *Green v. Mansour,* 474 U.S. 64, 66-67 (1985); *Diaz v. Mich. Dep't of Corr.,* 703 F.3d 956, 966 (6th Cir. 2013); *cf. U.S. v. Georgia,* 546 U.S. 151, 158-59 (2006) ("no one doubts that § 5 grants Congress the power to 'enforce … the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions") (emphasis in original). As explained below, the Couples have not identified an ongoing violation of federal law sufficient to trigger the *Young* exception to the Clerk's immunity.

Although the Clerk did not raise sovereign immunity in her opening brief, the defense is sufficiently jurisdictional that she can raise it at any time: the "Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman,* 415 U.S.

at 678; *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996). Indeed, sovereign immunity is one of the few jurisdictional arguments that defendants can raise collaterally to attack an adverse judgment. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 & n.6 (2009). For that reason, *amicus* EFELDF respectfully submits that this Court must consider the Clerk's immunity if she asserts it in her reply brief: "a federal court *must* examine each claim in a case to see if the court's jurisdiction is barred by the Eleventh Amendment." *Wilson-Jones*, 99 F.3d at 206 (emphasis in original, alterations and internal quotations omitted); *see* Section III.A.2, *infra*. Because the Clerk remains free to assert her immunity in her reply brief, the Couples would ignore her immunity at their peril.

1. Kentucky's sovereign immunity applies to county clerks.

Although county clerks in some states may lack their state's immunity from suit under the Eleventh Amendment for some purposes, county clerks in Kentucky are immune from suit to the same extent as the state, *Schwindel v. Meade Cnty.*, 113 S.W.3d 159, 163 (Ky. 2003), at least where they exercise a state function like issuing marriage licenses. *Ernst v. Rising*, 427 F.3d 351, 358-59 (6th Cir. 2005) (*en banc*). Under the arm-of-the-state doctrine, political subdivisions such as counties and municipalities – which are not generally eligible for sovereign immunity – can qualify as immune arms of the state under a multipart test. *Id.* Here, although they disagree about what Kentucky law requires here, the parties agree that the Clerk

here exercises state-law obligations, not anything originating with Rowan County. As such, the Clerk is entitled to sovereign immunity in her marriage-licensing transactions. *See Crabbs v. Scott,* 786 F.3d 426, 428-31 (6th Cir. 2015) ("Immunity hinges on whether the officer represents the State in the particular area or on the particular issue in question") (internal quotations omitted).

Under Kentucky law, moreover, "County Clerk" is a constitutional office, *St. Matthews Fire Prot. Dist. v. Aubrey,* 304 S.W.3d 56, 60 (Ky. Ct. App. 2009), and indeed "the existence of counties predates the Commonwealth itself." *Lexington-Fayette Urban County Gov't v. Smolcic,* 142 S.W.3d 128, 131 n.1 (Ky. 2004); *cf. Commonwealth Bd. of Claims v. Harris,* 59 S.W.3d 896, 899 (Ky. 2001). Further, "when an officer or employee of a governmental agency is sued in [a] representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled." *Yanero v. Davis,* 65 S.W.3d 510, 522 (Ky. 2001). As such, the Clerk is entitled to Eleventh Amendment immunity from suit.[10]

2. The Clerk can raise immunity for the first time on appeal and even collaterally after judgment.

Federal courts analyze immunity and waiver under state law and, because

[10] Significantly, district judges in Kentucky – *i.e.,* the judges closest to these issues – have found that county clerks enjoy Kentucky's immunity from suit in federal court. *Morehead v. Barnett,* 2014 U.S. Dist. LEXIS 83461, *4-5, 2014 WL 2801351 (E.D. Ky. June 19, 2014).

those state laws vary widely on the ability of officers and their counsel to waive immunity, *Sosna v. Iowa,* 419 U.S. 393, 396 n.2 (1975), federal courts generally can ignore sovereign immunity until a defendant asserts it. *Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998). Once raised – and even if first raised on appeal – the immunity is sufficiently jurisdictional to require its consideration. *Edelman,* 415 U.S. at 678. Indeed, sovereign immunity is one of the few defenses that a non-prevailing party can raise to attack a judgment collaterally. *Bailey,* 557 U.S. at 152-53 & n.6.

In Kentucky, only the Legislature can waive sovereign immunity: "It is the province of the General Assembly to waive immunity, if at all, and only to the extent it sees fit." *Commonwealth, Transportation Cabinet v. Roof, Ky,* 913 S.W.2d 322, 325 (1996); *Univ. of Kentucky v. Guynn,* 372 S.W.2d 414, 416 (Ky. 1963). Significantly, that means that neither state agencies and officers nor the lawyers who represent them have the authority to waive sovereign immunity, which "would be of small stature if its precepts could be 'waived' by any state officer or agent other than the general assembly." *Commonwealth, Department of Highways v. Davidson,* 383 S.W. 2d 346, 348 (Ky. 1964); *Bd. of Trs. of Ky. Ret. Sys. v. Commonwealth,* 251 S.W.3d 334, 340 (Ky. Ct. App. 2008). Further, because sovereign immunity can only be waived by the Legislature, that immunity can be raised as a defense for the first time on appeal. *Wells v. Commonwealth*

Department of Highways, Ky., 384 S.W.2d 308 (1964). Under these clear rules, the Clerk can first raise her immunity not only in this interlocutory appeal of the preliminary injunction, but also in a collateral attack on the injunction after this Court issues its mandate. *Bailey*, 557 U.S. at 152-53 & n.6. Consequently, this Court should consider whether immunity applies.

This Court honors these state no-waiver rules when applicable. *Mixon v. Ohio*, 193 F.3d 389, 396-97 (6th Cir. 1999) (Ohio can raise immunity on appeal, notwithstanding counsel's failure to raise it earlier, because Ohio's Attorney General lacks authority to waive immunity); *Freimanis v. Sea-Land Serv., Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981) (because a state "has clearly expressed its intention to preserve its immunity," an "attorney for [a state] Department had no clearly expressed authority to waive Eleventh Amendment immunity"). Thus, unless the Couples can establish an ongoing violation of federal law, the Clerk can assert her immunity in her reply brief.

3. Unless §1988(a) applies, the *Young* exception to sovereign immunity does not cover violations of state law.

If the Couples merely seek to enforce §402.080, their case is insufficient to trigger the *Young* exception to the Clerk's immunity from suit in federal court. Simply put, *Young* does not apply to violations of *state* law:

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. In such a case the entire

> basis for the doctrine of *Young* … disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (emphasis in original); *accord Huron Valley Hosp., Inc. v. City of Pontiac,* 887 F.2d 710, 714 (6th Cir. 1989) ("Section 1983 … is thus limited to deprivations of *federal* statutory and constitutional rights" and "does not cover official conduct that allegedly violates *state* law) (emphasis in original); *Williams v. Kelley,* 624 F.2d 695, 697 (5th Cir. 1980) (courts must examine "defendants' conduct independent of its lawfulness or unlawfulness at state law"); *Wideman v. Shallowford Community Hosp., Inc.,* 826 F.2d 1030, 1032 (11th Cir. 1987); *Washington v. District of Columbia,* 802 F.2d 1478, 1480 (D.C. Cir. 1986). Unless the Couples can assert an ongoing violation of *federal* law, this case simply has no place in federal court.[11]

B. Incorporating state law under §1988(a) cannot save the Couples' federal claims because the Clerk has not violated Kentucky law.

Under state law, an appropriate court would need to resolve any conflict between Kentucky RFRA and §402.080 because both provisions must be read together under state law. *Jefferson County Bd. of Educ. v. Fell,* 391 S.W.3d 713,

[11] As explained in note 8, *supra,* the Couples arguably cannot rely on §1988(a).

718-19 (Ky. 2012); *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). Litigants cannot cherry-pick the laws to enforce. *Thompson v. Goetzmann*, 337 F.3d 489, 501 (5th Cir. 2003); *In re United Airlines, Inc.*, 368 F.3d 720, 725 (7th Cir. 2004); *Babineau v. Fed'l Express Corp.*, 576 F.3d 1183, 1193 (11th Cir. 2009) ("Plaintiffs may not cherry-pick only those regulations that work in their favor"). For purposes of §1988(a), the Couples would lose under either of the two available scenarios: (1) §1988(a) incorporates both Kentucky RFRA and §402.080, and the Couples lose their §1988(a)-incorporated due-process claim on the state-law merits, *see* Section II, *supra*; or (2) this Court deems Kentucky RFRA inconsistent with federal law and thus cannot incorporate *any* Kentucky law under §1988(a), and the Couples lose their due-process claim on the purely federal merits, *see* Sections I.B-I.C, *supra*.

C. Even if the Clerk lacked – or declined to assert – sovereign immunity, federal courts would lack supplemental jurisdiction for the Couples' state-law claim.

Assuming *arguendo* that sovereign immunity would not preclude review, a plaintiff can assert some state-law claims in federal courts under the supplemental-jurisdiction statute: "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a). Federal courts should decline

that jurisdiction, however, under certain circumstances, including when: (1) "the claim raises a novel or complex issue of State law," or (2) "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. §1367(c)(1)-(2). Because both exceptions apply here, this Court should vacate the preliminary injunction to the extent that it relies upon supplemental jurisdiction.[12]

Significantly, the Couples and the district court have not yet claimed supplemental jurisdiction for §402.080-based claims. While this Court could remand the initial supplemental-jurisdiction question to the district court, *Cooper v. Parrish,* 203 F.3d 937, 953 (6th Cir. 2000), this appeal requires an answer *now.* Under the exceptions in §1367(c)(1) and §1367(c)(2), this Court should not exercise its discretion to allow the Couples to press their §402.080-based claims under §1367 because the state §402.080 claim predominates here and, what is worse, requires a novel state-law balancing with Kentucky RFRA that this Court lacks authority to perform.

CONCLUSION

The preliminary injunction must be reversed.

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[12] Even rejecting the Couples' federal claims while allowing them to enforce §402.080 under §1367 would be significant; unlike federal claims under 42 U.S.C. §1983, state-law claims under §1367 pose no attorney-fee liability. 42 U.S.C. §1988(b).

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,996 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2015, I electronically submitted the foregoing brief to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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