No. 15A250

In the Supreme Court of the United States

KIM DAVIS, *Applicant,*

v.

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

ON EMERGENCY APPLICATION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

UNOPPOSED APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* RESPONSE TO APPLICATION FOR STAY AND *AMICUS CURIAE* RESPONSE IN SUPPORT OF STAY APPLICATION BY EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND

LAWRENCE J. JOSEPH
1250 Connecticut Ave. NW, Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Applicant and Amicus Curiae Eagle Forum Education & Legal Defense Fund

No. 15A250

In the Supreme Court of the United States

KIM DAVIS, *Applicant,*

v.

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

UNOPPOSED APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* RESPONSE TO APPLICATION FOR STAY

To the Honorable Elena Kagan, Associate Justice of the Supreme Court, and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Applicant Eagle Forum Education & Legal Defense Fund ("Eagle Forum") respectfully requests leave to file the accompanying response in 8½-by 11-inch format as *amicus curiae* in support of the application by Kim Davis to stay the District Court's preliminary injunction pending her appeal.* Counsel for Eagle Forum conferred with the parties' counsel, and no party opposes the granting of Eagle Forum's application.

* By analogy to FED. R. APP. P. 29(c)(5) and this Court's Rule 37.6, counsel for Eagle Forum authored this application and response in whole, and no counsel for a party authored the application or response in whole or in part, nor did any person or entity, other than Eagle Forum and its counsel make a monetary contribution to preparation or submission of the application or response.

IDENTITY AND INTERESTS OF APPLICANT

Since its founding in 1981, Eagle Forum 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 this 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 that 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). The litigation thus presents the new issue of how to balance the important interests at stake on all sides. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues raised here.

REASONS TO GRANT *AMICUS* STATUS

By analogy to this Court's Rule 37.2(b), Eagle Forum respectfully seeks leave to file the accompanying *amicus curiae* response in support of application for an emergency stay. Given the emergency stay application's abbreviated schedule, Eagle Forum has elected to seek leave to file this application expeditiously before a request for a response, which will provide the party respondents an opportunity to address Eagle Forum's arguments and reduce the chance that Eagle Forum's filing will disturb whatever schedule this Court sets for the party respondents.

The Eagle Forum response will aid the Court in resolving the issues of first impression presented in this appeal and in determining whether to stay the District Court's preliminary injunction until the Sixth Circuit and ultimately this Court can

determine the appropriate balancing of the important constitutional rights asserted by the respective parties. In particular, the Eagle Forum response covers two important issues that the stay applicant did not address directly in her application, but which this Court can or even must consider.

First, Eagle Forum argues that – because the balancing test for weighing a county clerk's religious-freedom rights against a couple's right to a marriage license is unclear, federal courts can incorporate the standards from the Kentucky Religious Freedom Restoration Act, KY. REV. STAT. §446.350 ("Kentucky RFRA"), into the county clerk's federal claims under 42 U.S.C. §1988(a). Because the clerk presses Kentucky RFRA, the arguments that the Eagle Forum response makes under 42 U.S.C. §1988(a) are available to her, even if she did not argue precisely the same facet of the issue in her motion. *Yee v. City of Escondido,* 503 U.S. 519, 534-35 (1992).

Second, Eagle Forum argues that county clerks in Kentucky enjoy the state's sovereign immunity under the Eleventh Amendment, which is sufficiently in the nature of jurisdictional argument for the clerk to raise it for the first time on appeal. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). The asserted basis for suing the clerk is that her refusal to provide marriage licenses violates federal law as laid down in *Obergefell,* but the clerk has denied marriage licenses to both same-sex and opposite-sex couples (*i.e.,* equally to everyone), which cannot violate the Equal Protection Clause. *Heckler v. Mathews,* 465 U.S. 728, 740 (1984). Similarly, this Court has never found a due-process right to obtain marriage licenses in one's

county of residence, especially when marriage licenses are readily available nearby and by mail.

Without an ongoing violation of federal law, the plaintiffs-respondents cannot make out a case against a government officer like a county clerk. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002). Without an exception to sovereign immunity, this Court must remand with instructions to dismiss this litigation. Finally, if the Court entered judgment without resolving the immunity issues that Eagle Forum raises, the county clerk could collaterally challenge any relief. *Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 152-53 & n.6 (2009). As a result, not only judicial economy but also the needs to assure itself of the Article III redressability that underlies any relief compel this Court to consider these issues.

These issues are all relevant to this Court's decision on the application to stay the District Court's preliminary injunction pending the appeal, and the Eagle Forum response will therefore aid the Court's resolution of the stay application.

REASONS TO ALLOW FILING IN 8½-BY 11-INCH FORMAT

The Court's rules require applicants to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as Eagle Forum has done here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, Eagle Forum would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Moreover, Eagle Forum respectfully submits that it proffers a response, not a brief. Due to the expedited schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, Eagle Forum has elected to

file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, Eagle Forum files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, Eagle Forum commits to re-filing expeditiously in booklet format. *See* S. Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format).

REQUESTED RELIEF

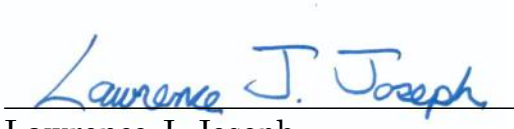
Applicant Eagle Forum respectfully requests leave to file the accompanying response as *amicus curiae* to Ms. Davis's application to stay the District Court's preliminary injunction pending appeal. In addition, applicant Eagle Forum also requests leave to file its response – at least initially – in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

CONCLUSION

For the foregoing reasons, the application for leave to file the accompanying response to Ms. Davis's emergency application to stay the preliminary injunction pending her appeal should be granted.

Dated: August 31, 2015

Respectfully submitted,



Lawrence J. Joseph
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: lj@larryjoseph.com

Counsel for Applicant Eagle Forum Education & Legal Defense Fund

No. 15A250

In the Supreme Court of the United States

KIM DAVIS, *Applicant,*

v.

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

ON EMERGENCY APPLICATION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

***AMICUS CURIAE* RESPONSE IN SUPPORT OF STAY APPLICATION BY EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND**

LAWRENCE J. JOSEPH
1250 Connecticut Ave. NW, Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

AMICUS CURIAE **RESPONSE TO APPLICATION TO STAY PRELIMINARY INJUNCTION**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court, and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") respectfully submits that the Circuit Justice (or the full Court if referred to the full Court) should grant the emergency application to stay the District Court's preliminary injunction pending the completion of a timely appeal to this Court. The interests of *amicus* Eagle Forum are set out in the accompanying application for leave to file.

INTRODUCTION

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 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 of all parties' rights under which the Couples could obtain marriage licenses without a violation of the Clerk's religious-freedom rights.

In the meantime, the Clerk has ceased dispensing marriage licenses to anyone, consistent with this 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. KY. REV. STAT. §402.080.[1] 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* Stay Appl. at 10 (60 miles to Ashland and 100 miles to Covington).[2] The Couples' traveling those distances does not appear to have presented a significant burden.

STANDARD OF REVIEW

Plaintiffs or applicants who seek interim relief must establish that they likely will succeed on the merits and likely will suffer irreparable harm without relief, that the balance of equities favors them versus the defendants' harm from interim

---

[1] For adults and widows, Kentucky law provides that marriage licenses are available from any county clerk. KY. REV. STAT. §402.080. 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).

[2] 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), and Covington is one of the two county seats of Kenton County. *See* Kentucky Dep't for Libraries and Archives, "Kentucky County Formation Chart" (last visited Aug. 31, 2015) (available at http://kdla.ky.gov/researchers/Pages/countyformationchart.aspx).

relief, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Further, even preliminary relief requires standing, *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983), and the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici. Turner v. Rogers,* 131 S.Ct. 2507, 2519-20 (2011); *see also id.* at 2521 (Thomas, J., dissenting).

SUMMARY OF ARGUMENT

Although the Couples claim to demand their rights under *Obergefell,* this litigation requires the Court to balance the Couples' asserted marriage rights with the Clerk's free-exercise rights. Because this Court has not yet devised the appropriate test for weighing these competing rights (Section I.A), federal law is therefore "deficient … to furnish suitable remedies" within the meaning of 42 U.S.C. §1988(a). Under the circumstances, a federal court evaluating this conflict in Kentucky can and should look to the Kentucky Religious Freedom Restoration Act, KY. REV. STAT. §446.350 ("Kentucky RFRA"), to balance these interests (Section I.B). Thus, were it appropriate for a federal court to hear this case, that court should look to Kentucky RFRA to resolve the case.

But federal courts lack jurisdiction over Kentucky county clerks for the issues raised by the Couple's complaint. In Kentucky, the county clerk is a constitutional office that enjoys sovereign immunity from suit in federal court under the Eleventh Amendment (Section II.A.1). No decision of this Court has ever addressed – much

less found – a due-process right to obtain a marriage license in one's county of residence, particularly where marriage licenses are readily available elsewhere and nearby in the state. Moreover, the Clerk here ceased providing marriage licenses to anyone, thereby ensuring the equal treatment that *Obergefell* mandates. Under the circumstances, there is no ongoing violation of federal law (Section II.A.4), which is a precondition for sidestepping sovereign immunity under the *Ex parte Young,* 209 U.S. 123 (1908), exception to sovereign immunity (Section II.A.3). Because the Clerk may raise her immunity not only for the first time on appeal but also collaterally after an adverse judgment (Section II.A.2), this Court must consider her immunity in deciding the stay application to ensure that federal courts have jurisdiction and can issue an order that redresses the Couples' injuries (Section II.B).

ARGUMENT

Amicus Eagle Forum fully supports the Clerk's religious-freedom arguments but writes separately in the abbreviated consideration of her stay application to make two primary points that appellate courts can consider at this stage and on the merits. First, this Court can and should rely on Kentucky RFRA to balance the parties' respective interests here under 42 U.S.C. §1988(a). Second, the Clerk is immune from suit under the Eleventh Amendment. The former sufficiently relates to the Clerk's arguments under Kentucky RFRA to apply here under *Yee v. City of Escondido,* 503 U.S. 519, 534-35 (1992), and the latter is sufficiently jurisdictional for the Clerk to raise at any time under *Edelman v. Jordan,* 415 U.S. 651, 678 (1974).

I. THE DISTRICT COURT DID NOT PROPERLY BALANCE THE CLERK'S RELIGIOUS-FREEDOM RIGHTS WITH THE COUPLES' MARRIAGE RIGHTS

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 (docket entry #01). Even when viewed in the light most favorable to the Couples, however, *amicus* Eagle Forum respectfully submits that this litigation requires the *balancing of competing rights.*[3] 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. No Precedent of this Court Expressly Provides a Balancing Test for the Two Competing Rights at Issue Here

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 all circumstances. *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968); *cf. Sherbert v.*

---

[3] As explained in Section II.A.4, *infra, amicus* Eagle Forum respectfully submits that the Couples do not, in fact, have a federal right to assert here.

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, this 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 allows this Court to infer such rights. *Obergefell,* 135 S.Ct. at 2598. The implications of that decision necessarily remain for this Court to resolve.

Specifically, this Court has created a new right to same-sex marriage, recognized that that new right may conflict with religious liberty, but not as 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., Dept. 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, this Court 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 those asserted by the Couples.

B. The Clerk's Rights under Kentucky RFRA Are Enforceable in this Federal Challenge

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 in that context. *Amicus* Eagle Forum 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 to balance the sensitive civil rights issues here:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such

> civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause[.]

42 U.S.C. §1988(a).[4] Because existing federal precedents and laws do not guide federal courts on how to balance the rights at issue here, this Court can 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.

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 the state cause of action." *Wilson v. 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

---

[4] 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). Although 28 U.S.C. §1343(4) and 42 U.S.C. §1988(a) do not elevate Kentucky law to an independent federal cause of action, *Moor v. County of Alameda,* 411 U.S. 693, 700-04 (1973), they do allow federal courts to resort to state law, as necessary, to declare the law "not inconsistent with the Constitution… of the United States." 42 U.S.C. §1988(a).

modeled on existing law previously adopted by the ratifying generation.

To be sure, this 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 this 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 *City of 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 *City of 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 *City of Boerne* decision: it remains "not inconsistent" with federal law to use standards that this Court has used in religious-freedom cases, even if that is not the standard of review that this Court ultimately will adopt for this *Obergefell* context. Third, until this Court clears the religious-freedom ambiguity left unresolved by *Obergefell,* there is no federal law against which to measure Kentucky RFRA's consistency.[5]

---

[5] 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 KY. REV. STAT. §402.080 into their federal cause of action.

(Footnote cont'd on next page)

II. THE LOWER FEDERAL COURTS LACK JURISDICTION TO COMPEL THE CLERK TO ACT AGAINST HER RELIGION

As explained below, the Clerk's constitutional office is entitled to sovereign immunity under Kentucky law, and she may assert that immunity for the first time on appeal or even collaterally after judgment. Nothing in *Obergefell* creates an absolute right to receive marriage licenses in Rowan County – at least not when marriage licenses are readily available elsewhere in Kentucky – and the Clerk's even-handed denial of licenses to both same-sex couples and opposite-sex couples easily satisfies the equality principles in *Obergefell.* For that reason, there is no ongoing violation of federal law and thus no basis for sidestepping the Clerk's immunity under the *Ex parte Young* exception to sovereign immunity. In sum, the federal courts have no power to compel the Clerk to act.

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

---

(Footnote cont'd from previous page.)

Either this Court adopts Kentucky law as a whole, or it does not adopt state law at all. *See* note 8, *infra.* Without KY. REV. STAT. §402.080, the Couples must rely solely on the Due Process Clause or the Equal Protection Clause for their cause of action.

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.

Under the officer-suit exception of *Ex parte Young,* however, sovereign immunity does not bar some 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. United States 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 *Young*.

Although the Clerk did not raise sovereign immunity in her stay application, 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* Eagle Forum respectfully submits that, under the circumstances at issue here, this Court must consider the Clerk's immunity: "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 II.A.2, *infra.* In any event, the Clerk remains free to assert her immunity in her reply, and 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, 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). "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.[6]

Although the Couples have styled their suit against the Clerk individually, their request for declaratory and injunctive relief is necessarily a representative-capacity suit: if she left office, the Clerk would be wholly unaffected by declaratory or injunctive relief and would be without power to redress any injury. *Snyder v. Buck,* 340 U.S. 15, 18 (1950). Indeed, suits against officials in their "individual capacity under color of legal authority" are simply the flip side of representative-capacity suits against them in their "official capacity," where the former denies any authority whatsoever for the challenged action taken "under the color of authority." See *Stafford v. Briggs,* 444 U.S. 527, 539 (1980); *cf.* 5 U.S.C. §702, 28 U.S.C. §1391(e) (listing official-capacity and color-of-legal-authority actions as distinct). "Astute practitioners know [to name officers individually], and suits against officers in their personal capacity are likely to be numerous in the future as they have been in the past." Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 CHI. L. REV. 435, 453-54 (1962). At least for purposes of injunctive

---

[6] 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).

and declaratory relief, the Couples have brought a representative-capacity suit.

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 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) (ability of state defendants to waive immunity is a question of state law), federal courts generally can ignore sovereign immunity until the state 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. For that reason, *amicus* Eagle Forum argues in Section II.B, *infra,* that non-waivable immunity goes to the question of Article III redressability and this should be considered by federal courts, even *sua sponte.*

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 raise her immunity not only at this stage of her stay application, but even to attack the preliminary injunction collaterally. *Bailey,* 557 U.S. at 152-53 & n.6. Under the circumstances, federal courts reviewing litigation against Kentucky officials should consider whether immunity applies.[7]

Where they apply, these state no-waiver rules are honored in federal court. *Mixon v. Ohio,* 193 F.3d 389, 396-97 (6th Cir. 1999) (Ohio can raise immunity for the first time on appeal, notwithstanding counsel's failure to raise it earlier, because Ohio's Attorney General lacks authority to waive immunity); *Dagnall v. Gegenheimer,* 645 F.2d 2, 3-4 (5th Cir. 1981); *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 a reply in support of her application for a stay.

---

[7] The question whether Kentucky has waived the Clerk's sovereign immunity for suits in state court is immaterial, because that waiver would not apply to suits in federal court. *Port Auth. Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 306 (1990).

3. The *Ex parte Young* Exception to Sovereign Immunity Does Not Apply to Violations of State Law

To the casual observer, this litigation apparently presents a clear case of a public officer shirking her public duty for personal reasons, contrary to the Couples' rights. As explained, however, and regardless of the ultimate merits, the Clerk is immune from suit in federal court unless the Couples assert an ongoing violation of *federal* law sufficient to invoke the *Ex parte Young* officer-suit exception to her immunity. Evaluating that question requires an analysis of what specific law the Couples claim the Clerk is violating. The obvious candidates are the Due Process Clause, the Equal Protection Clause, and KY. REV. STAT. §402.080. Of these, only the first two qualify as federal law, but only the third arguably contemplates marriage licenses specifically in Rowan County.

If the Couples case merely seeks to enforce KY. REV. STAT. §402.080, their case is insufficient to trigger the *Ex parte Young* exception to the Clerk's immunity from suit in federal court:

> 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); *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.

4. The Couples Cannot Allege a Violation of Federal Law Sufficient to Invoke the *Ex parte Young* Exception to Sovereign Immunity

In order to avoid the Clerk's immunity, the Couples must assert an ongoing violation of either the Equal Protection Clause or the Due Process Clause. The Couples cannot make a federal case out of an alleged failure to comply with Kentucky law.[8]

First, the Clerk's denying marriage licenses to both same-sex 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

---

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

> 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* Stay Appl. at 17-18. In any event, there clearly is no ongoing violation of the Equal Protection Clause.

Second, there is no due-process violation here, either. Even without the problem of a court's needing to balance *competing federal rights* discussed in Section I.A, *supra,* no marriage-rights decision of this Court 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). To the extent that the language of a decision would support that perceived right, that language would be mere *dicta* when 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). Accordingly, there is no substantive due-process right to obtain marriage licenses in Rowan County under 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 KY. REV. STAT. §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 contemplated to secure abortion rights in *Casey*, 505 U.S. at 874, *amicus* Eagle Forum finds it improbable that this Court would find a substantive due-process violation if Kentucky law had affirmatively enacted the same doughnut hole – or pinhole[9] – via the Legislature that has resulted from the operation of Kentucky RFRA in this as-applied challenge. 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 these examples appear absurd, they are the clear – if unexamined – implications of the lower courts' decisions.

Given that there is no violation of the Fourteenth Amendment, the Couples have no basis for sidestepping the Clerk's sovereign immunity to seek prospective relief to enforce federal law. As such, this Court should remand with orders to

---

[9] Although the concept of a doughnut hole apparently has meaning in the law, *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. Rowan County and the seven counties that surround it might make a doughnut hole.

dismiss the Couples' suit.

B. The Couples Cannot Establish Redressability Because the Clerk Would Remain Free to Attack the Federal Courts' Judgment Collaterally on Sovereign Immunity Grounds

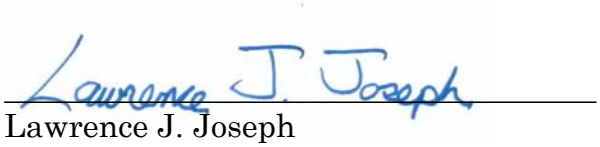
Under *Bailey,* 557 U.S. at 152-53 & n.6, if this Court does not resolve the immunity issue, the Clerk would remain free to attack a judgment of the federal courts collaterally on immunity grounds. As such, *amicus* Eagle Forum respectfully submits that the Couples will not have established that a federal court can redress their injury unless the immunity issue resolves in the Couples' favor. Without redressability, of course, an Article III court must not render judgment at all. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 105 (1998); *Wuliger v. Mfrs. Life Ins. Co.,* 567 F.3d 787, 793 (6th Cir. 2009). As explained, for the Couples to have standing for the preliminary injunction that the District Court issues, that order must satisfy Article III standing requirements. *Lyons,* 461 U.S. at 103. If the Clerk remains free to challenge the order collaterally on sovereign-immunity grounds, the order may not redress anything. Under the circumstances, *amicus* Eagle Forum respectfully submits that this Court must address the Clerk's immunity from suit.

CONCLUSION

This Court should stay the District Court's order dated August 12, 2015, pending final resolution of any timely appeal to this Court.

Dated: August 31, 2015

Respectfully submitted,



Lawrence J. Joseph
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: lj@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing application for leave to file and the accompanying response are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 5 and 20 pages (and 1,148 and 5,535 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: August 31, 2015

Respectfully submitted,

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: lj@larryjoseph.com

Counsel for Applicant and Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 31st day of August 2015, one true and correct copy of the foregoing application for leave to file and the accompanying response was served by U.S. Priority Mail on the following counsel:

William E. Sharp
ACLU of Kentucky
315 Guthrie Street Suite 300
Louisville, KY 40202-3820
sharp@aclu-ky.org

Daniel Mach
American Civil Liberties Union Found.
915 15th St., NW, Suite 600
Washington, DC 20005
dmach@aclu.org

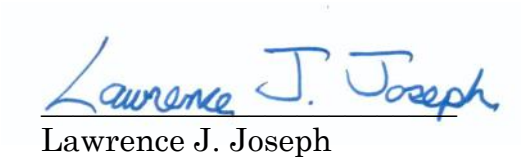
Daniel J. Canon
Clay Frederick Adams, PLC
101 Meidinger Tower
462 South 4th Street
Lousiville, KY 40202
dan@justiceky.com

Jonathan D. Christman
Horatio G. Mihet
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
jchristman@lc.org
hmihet@lc.org

(In addition to the foregoing service by mail, the undersigned also certifies that on the same day, a PDF courtesy copy of the foregoing was served via electronic mail on the parties' counsel of record to the email addresses shown above.)

The undersigned further certifies that, on this 31st day of August 2015, an original and ten true and correct copies of the foregoing application for leave to file and the accompanying response were served on the Court by hand delivery.

Executed August 31, 2015, at Washington, DC,



Lawrence J. Joseph