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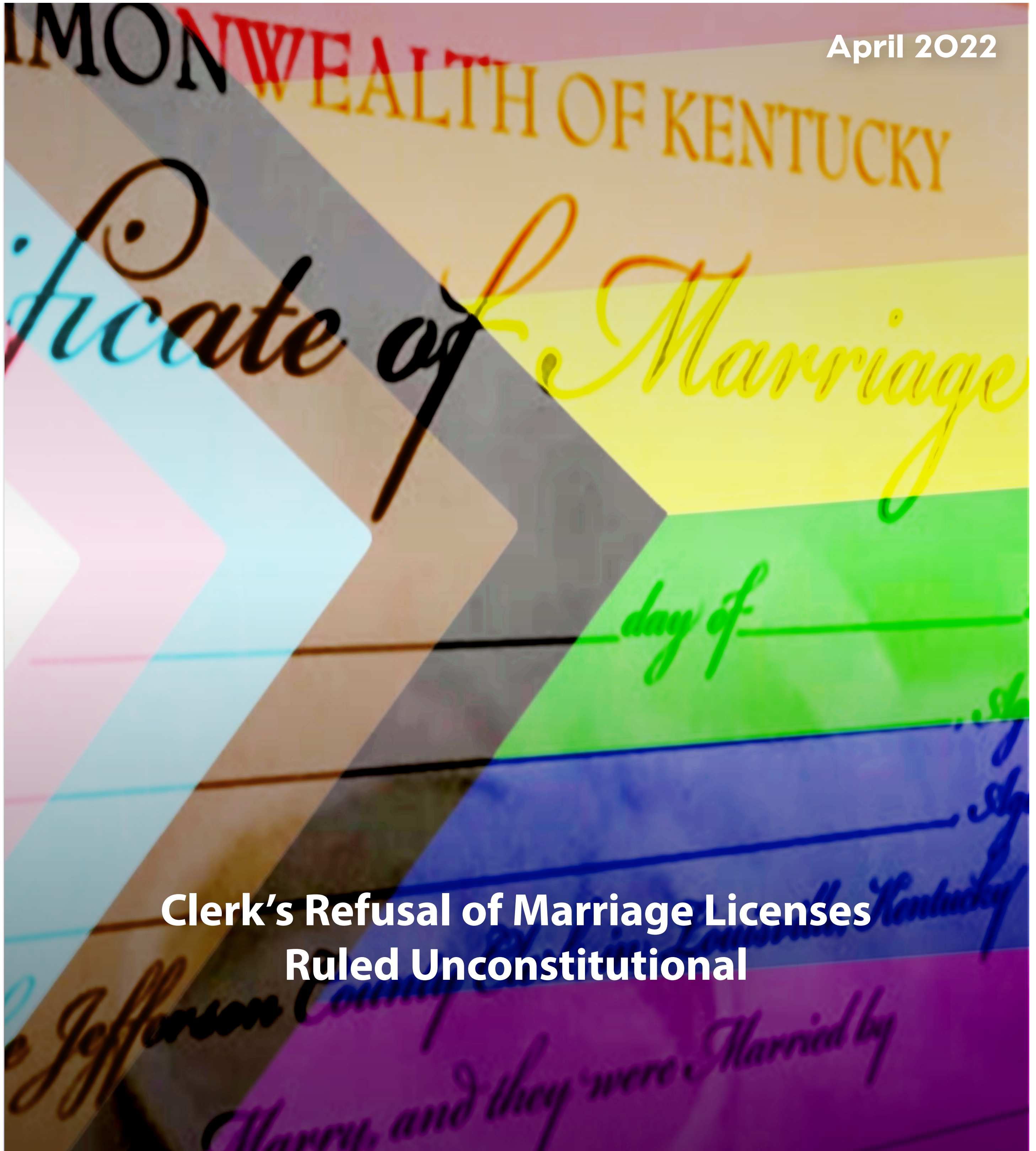

April 2022

Clerk's Refusal of Marriage Licenses Ruled Unconstitutional

Plaintiffs Win Summary Judgment Against Former Rowan County (Kentucky) Clerk Kim Davis in Marriage License Case

By Arthur S. Leonard

On March 18, U.S. District Court Judge David Bunning ruled that Kim Davis, who was the Rowan County (Kentucky) Clerk in 2015 when the Supreme Court ruled that same-sex couples had a right to marry, *see Obergefell v. Hodges*, 576 U.S. 644, had violated the plaintiff same-sex couples' constitutional rights by refusing to issue them marriage licenses. *Ermold v. Davis*, 2022 WL 830606, 2022 U.S. Dist. LEXIS 48411 (E.D. Ky.).

Two of the couples who were denied licenses by Davis's office in July 2015 and repeatedly thereafter –David Ermold and David Moore, and James Yates and Will Smith – and who had sued Davis to get their licenses, then went on to sue her for damages for violation of their constitutional rights. Both couples were eventually able to get their marriage licenses after Judge Bunning jailed Davis for contempt of court when she defied his order to issue the licenses and a deputy clerk in the office issued the licenses as part of a deal to get Davis released.

Davis objected to same-sex marriage on religious grounds, and although she understood that her duty under the law was to issue the licenses, as she had been advised in a letter that Governor Steven Beshear had distributed to all the county clerks in Kentucky, and as she was also advised by the county attorney, she believed that under the 1st Amendment's Free Exercise Clause she had a right to obey her conscience rather than the law.

A major sticking point for Davis was that the county clerk's signature was required by a Kentucky statute to be on the marriage license, and she did not want this permanent and visible record of her acquiescence to exist. She had asked the legislature to amend the marriage law to eliminate that requirement, but it did not act in time to forestall the problems that arose when same-sex couples showed up at her office seeking licenses. She became a darling of the right-wing and a media sensation. David Ermold, a college professor, decided to challenge her for re-election. He lost the Democratic primary contest, but the successful Democratic candidate, Elwood Caudill, went on to defeat Davis for re-election. Eventually, the Kentucky legislature amended the law to dispense with the requirement of the county clerk's signature on marriage licenses.

The U.S. Court of Appeals for the 6th Circuit rejected Davis's argument that she enjoyed qualified immunity from being sued for damages, see *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019), rehearing *en banc* denied, cert. denied, 141 S. Ct. 3 (Oct. 5, 2020), while holding that she could be sued only in her personal capacity, not her official capacity. The Supreme Court's *certiorari* denial brought a "Statement" by Justice Clarence Thomas, joined by Justice Samuel Alito, harping on how the *Obergefell* ruling, from which they had dissented, had resulted in Davis being "one of the first victims of this Court's cavalier treatment of religion" in *Obergefell*, and concluded that "this petition provides a stark reminder of the consequences of *Obergefell*. By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix." Although speaking only for themselves, it is likely that President Trump's three appointees to the Court would be sympathetic to the views expressed by Thomas and Alito, a clear warning that the *Obergefell* ruling is not beyond attack as "fixed precedent" of the Court. The Court has continued to revisit religious liberty claims in the wake of *Obergefell*, and has granted a *certiorari* petition for next Term to confront the issue again. The Court has yet to rule directly on the merits that a person or entity objecting to same-sex marriages must recognize or cater to them.

District Judge Bunning ruled on March 18 on motions for summary judgment by all the parties. He granted summary judgment to the plaintiff couples and denied Davis's motion for summary judgment. However, he found that the question of what damages Davis should have to pay to the plaintiffs for her denial of their constitutional rights was a factual issue to be decided by a jury, so the case is not over yet.

Judge Bunning was appointed to the District Court in 2002 by President George W. Bush. The American Bar Association had rated him as "unqualified" at that time, finding that at age 35 he lacked the necessary experience to be a federal trial judge, but he was unanimously confirmed by the Senate. He had initially been somewhat hostile to the damage lawsuits, dismissing the complaints as moot since the legislature had changed the law in such a way that further refusals to issue licenses were unlikely, but the 6th Circuit reversed the dismissals, *see* 855 F. 3d 715 (6th Cir. 2017), and sent the case back for a ruling on the merits.

Early in the litigation against Davis, Judge Bunning wrote: "Our form of government will not survive unless we, as a society, agree to respect the U.S. Supreme Court's decisions, regardless of our personal opinions. Davis is certainly free to disagree with the Court's opinion, as many Americans likely do, but that does not excuse her from complying with it. To hold otherwise would set a dangerous precedent."

In his March 18 decision, he decisively rejected Davis's argument that she should enjoy qualified immunity from having to pay damages, because the Supreme Court had established in *Obergefell* that the gay couples had a constitutional right to get the marriage licenses, and Davis's testimony showed that "she knowingly violated the law." Elected officials enjoy

"qualified immunity" from personal liability for paying damages for their actions in office unless they are violating a clearly established right of which they had reason to know. "Any argument that Davis made a mistake, instead of a conscious decision to violate the law, is not only contrary to the record, but also borders on incredulous," wrote Judge Bunning.

The gay couples had not sought to have Judge Bunning rule on the amount of damages in their summary judgment motion, acknowledging that they had yet to provide the necessary evidence to document their injuries. Nominal damages (a small symbolic amount) would always be available for a constitutional violation, but their claims are more wide-ranging. They seek compensatory and punitive damages, pre and post judgment interest (for litigation that dates back to 2015), and costs and attorneys' fees, which are authorized under federal law for successful plaintiffs who sue to vindicate their constitutional rights. The compensatory damage claims are for "mental anguish, emotional distress, humiliation and reputation damages." Testimony by therapists would be provided to the jury to gauge the extent of the emotional damages.

In addition, Bunning wrote, "Based on the record before the Court, it seems plausible that Davis could have acted with reckless indifference to the constitutional rights of Plaintiffs," which means they could also win punitive damages, intended to punish Davis for violating her oath of office in way likely to cause injury to the plaintiffs.

The plaintiffs are represented by Rene B. Heinrich of Newport, Kentucky, and William Kash Stilz, Jr., of Covington, Kentucky. Davis is represented by Liberty Counsel and attorneys affiliated with that organization, which virtually guarantees that this ruling will be appealed to the 6th Circuit again, and that an ultimate ruling on the merits will have Davis knocking on the Supreme Court's door again. ■

Arthur S. Leonard is the Robert F. Wagner Professor of Labor & Employment Law Emeritus at New York Law School.

Texas Court Blocks Investigation or Prosecution of Parents and Doctors for Providing Gender-Affirming Treatment for Transgender Youths

By Arthur S. Leonard

In February, Texas Attorney General Ken Paxton issued Opinion No. KP-0401 at the request of a state legislator, asserting that parents and health care workers who provide gender-affirming treatment for transgender minors are engaging in "child abuse" in violation of Teas penal law. Acting immediately on the letter, Governor Greg Abbott issued a written directive (in the form of a letter) to the Texas Department of Family and Protective Services (DFPS) on February 22, directing the Department to act consistently with Paxton's opinion to immediately begin investigating parents and others believed to be providing such treatment, and to bring criminal actions to enforce the "child abuse" statute. On the same date, DFPS issued a statement incorporating the Governor's directive. The speed with which all of this happens suggests a high degree of collaboration between Paxton, Abbott, and DFPS Commissioner Jaime Masters to act after proposed legislation to the same effect had not been approved by the legislature. "Jane Doe," an employee of DFPS, the mother of a transgender youth ("Mary Doe") who is receiving gender-affirming treatment, was immediately suspended from her job ("administrative leave") and subjected to investigation together with her husband, "John Doe." ACLU of Texas and Lambda Legal quickly swung into action with local counsel, filing suit in the Travis County (Austin) District Court challenging the constitutionality of Abbott's directive and DFPS's actions and seeking a temporary restraining order (TRO).

On March 2, Travis County District Judge Amy Clark Meachum granted the motion for a TRO by plaintiffs Jane and John Doe, parents of minor Mary Doe, and of co-plaintiff Dr. Megan Mooney, who provides gender-affirming care to minors, in *Doe v. Abbott*, Case No. D-1-GN-22-000977, 2022 WL 628912. The focus of Judge Meachum's short opinion, which was based on assuming the truth of plaintiff's allegations, was that plaintiffs "will suffer irreparable injury unless Defendants are immediately restrained from enforcing the Governor's letter and the DFPS statement, both issued February 22, 2022, and which make reference to and incorporate Attorney General Paxton's Opinion No. KP-0401." The court noted three aspects of irreparable injury for the Does: (1) Jane Doe being placed on administrative leave and at risk of losing her job; (2) the Does facing "imminent and ongoing deprivation of their constitutional rights, the potential loss of necessary medical care, and the stigma attached to being the subject of an unfounded child abuse investigation," and (3) the likelihood that Jane Doe, if placed on a child abuse registry, could lose the ability to practice her profession and (3) both Does could "lose their ability to work with minors and volunteer in the community." The court also found that Dr. Mooney "could face civil suit by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics if she complies with Defendants' orders and actions," as well as possible criminal prosecution by the state "as set forth in the Governor's letter."

Judge Meachum issued a TRO limited in effect to the plaintiffs, which the state promptly appealed to the Court of Appeals of Texas in Austin. Meanwhile, Lambda and ACLU were receiving reports that investigations had been launched into other parents. On March 9, a three-judge panel of the 3rd Court of Appeals of Texas (Justices Byrne, Kelly, and Smith), issued a *per curiam* opinion granting a