SIXTH CIRCUIT REVIEW

Ermold v. Davis and Judicial Shortcuts: Avoiding Tiers-of-Scrutiny Analysis in Same-Sex Marriage Cases

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Kim Davis, beloved conservative celebrity and religious freedom advocate, was in the headlines yet again in the wake of the Sixth Circuit's opinions in *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019), and *Yates v. Davis*, and *Miller v. Caudill*, 936 F.3d 442 (6th Cir. 2019), this past August. All three cases center around Kim Davis, a Kentucky county clerk, and her refusal to issue marriage licenses to same-sex couples after the *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), ruling in 2015. The *Ermold* and *Yates* appeals centered on Davis's sovereign or qualified immunity as the County Clerk for Rowan County, Kentucky, while the *Miller* appeal focused on whether the Commonwealth of Kentucky, Rowan County, or Kim Davis in her individual capacity is liable for the payment of attorney fees. *Ermold*, 936 F.3d at 432; *Miller*, 936 F.3d at 446.

At first glance, these cases appear simple. The majority opinion writes that Davis's claim of immunity is what complicates matters — and it does. However, *Ermold v. Davis* brings to light another issue: what level of scrutiny, if any, should apply in same-sex marriage discrimination cases.

As in the Supreme Court's decision in *Obergefell*, the Sixth Circuit in *Ermold v. Davis* declined to invoke the tiers-of-scrutiny analysis present in many other constitutional questions. *Ermold*, 936 F.3d at 437. Using the silence in *Obergefell* to her advantage, Davis argued that rational-basis scrutiny should apply to her decision to not issue marriage licenses in Rowan County, Kentucky. She contends that her right to act on her beliefs against same-sex marriage is protected by Kentucky's Religious Freedoms Restoration Act (RFRA), Ky. Rev. Stat. § 446.350, and that Kentucky has a "compelling interest of the highest degree" in accommodating Davis's religious views.

This argument is familiar ground in the tension between equal protections for same-sex marriage and religious objectors. For example, in *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), a Catholic licensed foster care agency argued that Philadelphia targeted CSS for acting on its religious beliefs when discriminating against same-sex foster

parents, in violation of Pennsylvania's Religious Freedom Restoration Act, which provides that "an agency shall not substantially burden a person's free exercise of religion." While the majority opinion in *Ermold*, chose to avoid the tiers-of-scrutiny question entirely, the concurrence by Judge John K. Bush gives this argument some credence. Judge Bush's concurrence signals that rational-basis scrutiny may gain some favor as a means of analyzing future same-sex marriage discrimination cases.

A state's discriminatory activity enjoys a presumption of constitutionality if the end goal is permissible, and the means are rationally designed to achieve that goal. *Ermold*, 936 F.3d at 441. Rational-basis review is a relatively low bar to pass. To fail, the government's actions must be so unrelated to its stated purpose so as to be irrational. Moral disapproval of same-sex marriage, on its own, cannot pass even rational-basis scrutiny, as established in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). Despite this lower standard available within the tiers-of-scrutiny analysis, some scholars have proposed that the Court's jettisoning of tiers of scrutiny in *Obergefell* provides freedom and more flexible standards for same-sex marriage proponents. However, this freedom for its proponents necessarily means that its opponents can also use this freedom to lower the standard of scrutiny and apply a rational-basis standard instead.

That is just what Judge Bush has done in *Ermold v. Davis*. He notes that *Obergefell* left many questions unanswered—namely, which level of scrutiny should apply to same-sex marriage discrimination, or when and how to apply that analysis. Judge Bush states that he didn't believe that the Supreme Court would act to "abolish tiers-of-scrutiny analysis for all marriage regulations without explicitly telling us it was doing so." And, in finding a total ban on same-sex marriage unconstitutional, the Supreme Court did not mean that the tiers-of-scrutiny analysis is inapplicable when reviewing marriage restrictions amounting to less than a total ban.

Judge Bush finds nuance in Davis's argument for rational-basis scrutiny and opens the door to a lower level of scrutiny in same-sex marriage discrimination cases. He finds a distinction between Davis's restriction of marriage licenses to same-sex applicants in Rowan County specifically and a total prohibition on marriage. Although he agrees in his concurrence that Davis's actions would not survive even rational-basis review because of her anti-LGBTQIA+ animus, Judge Bush puts forth rational-basis as the appropriate level of scrutiny and explores *Ermold v. Davis* through this lens.

Judge Bush's analysis in the concurrence is telling, however,

compared to opinions on similar issues in other courts. The Third Circuit's unanimous decision earlier this year in *Fulton v. City of Philadelphia*, 922 F.3d at 146–47, reads similarly to the majority opinion here. *Fulton* was also a simpler case at its core: a Catholic foster agency refused to place children with same-sex couples, and such discrimination was determined to be unconstitutional post-*Obergefell*. Both *Fulton* and the majority opinion in *Ermold* ignore the tiers-of-scrutiny question altogether. Until the applicable level of scrutiny is clarified in these cases, courts may choose to apply rational-basis scrutiny, leaving *Obergefell*'s protections for same-sex couples vulnerable.

Courts discredit the necessity of a tiers-of-scrutiny analysis by avoiding the question. Instead, courts should definitively rule on the appropriate level of scrutiny—possibly strict scrutiny, if same-sex couples are seen as a suspect class, or at least intermediate scrutiny, as in gender discrimination cases. Given the Supreme Court's own reluctance, however, it is unlikely that lower courts will soon establish which level of scrutiny should apply to same-sex marriage cases.