Case Nos. 21-5059, 21-5100
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNIVERSAL LIFE CHURCH MONASTERY STOREHOUSE, a Washington non-profit corporation; ERIN PATTERSON, an individual; GABRIEL BISER, an individual,
Plaintiffs Appellees Cross-Appellants
[Case Nos. 21-5048, 21-5055, 21-5057, 21-5058, 21-5059, 21-5100],
v.
WAYNE NABORS, in his official capacity as
County Clerk of Putnam County, TN,
Defendant Appellant Cross-Appellee [Case Nos. 21-5059, 21-5100],

HERBERT H. SLATERY, III, in his official capacity as Attorney General of the State of Tennessee; JENNINGS H. JONES, in his official capacity as District Attorney General for Rutherford County, TN; NEAL PINKSTON, in his official capacity as District Attorney General for Hamilton County, TN; BRYANT C. DUNAWAY, in his official capacity as District Attorney General for Putnam County, TN; KIM R. HELPER, in her official capacity as District Attorney General for Williamson County, TN,
Defendants Appellants Cross-Appellees [Case Nos. 21-5048, 21-5100],
ELAINE ANDERSON, in her official capacity as
County Clerk of Williamson County, TN,
Defendant Appellant Cross-Appellee [Case Nos. 21-5055, 21-5100],
LISA DUKE CROWELL, in her official capacity as
County Clerk of Rutherford County, TN,
Defendant Appellant Cross-Appellee [Case Nos. 21-5055, 21-5100],
WILLIAM F. KNOWLES, in his official capacity as
County Clerk of Hamilton County, TN,
Defendant Appellant Cross-Appellee [Case Nos. 21-5055, 21-5100], and
BILL LEE, in his official capacity as Governor of the State of Tennessee,
Defendant Appellee [Case No. 21-5100].

On appeal from the U.S. District Court, Middle Dist. of Tenn. (No. 2:19-cv-00049)

BRIEF OF APPELLANT WAYNE NABORS,
in his official capacity as County Clerk of Putnam County, Tennessee

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STATEMENT REGARDING ORAL ARGUMENT

Because this appeal presents important issues about a County Clerk's sovereign immunity related to the issuance and processing of marriage licenses on behalf of the State of Tennessee and the application of the exception to that immunity recognized in *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), as well as subject matter jurisdiction, Appellant Nabors requests oral argument.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1291 because a denial of immunity from suit is a final order subject to immediate appeal. *See Puerto Rico Aqueduct Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

The district court had jurisdiction under 28 U.S.C. § 1331. On December 22, 2020, the district court entered an order denying, in part, Nabors' Motion to Dismiss the Second Amended Complaint filed by Plaintiffs[1] against him in his official capacity as County Clerk for Putnam County, Tennessee. (Order, R.237, PageID #3247). Nabors maintained in his Motion to Dismiss that under the relevant immunity and jurisdictional doctrines, the district court lacked jurisdiction over Plaintiffs' claims against him in his official capacity as County Clerk for Putnam County. Nabors also maintained Plaintiffs' claims were subject to dismissal under Rule 12(b)(6) because the facts alleged in the Second Amended Complaint failed to state a plausible claim of relief against him. Finally, Nabors maintained the claims against him were subject to dismissal under Rule 12(b)(1) because Plaintiffs had failed to identify a justiciable case or controversy between Plaintiffs and Nabors in his official

[1]The references to Plaintiffs herein refers to all of the original plaintiffs, including Universal Life Church Monastery Storehouse; James Welch; Gale Plumm and Timeaka Farris, a married couple; Erin Patterson; and Gabriel Biser.

capacity as County Clerk. (Nabors' Motion, R.212, PageID #2818-21). The district court denied Nabors' Motion to Dismiss in part, concluding that ULC/Ministers'[2] claims against him were not barred by Eleventh Amendment immunity and that ULC/Ministers had Article III standing to pursue their claims. (Opinion, R.236, PageID #3215-3246).

On January 18, 2021, Nabors timely filed a Notice of Appeal from the district court's in part denial of his Motion to Dismiss. (Notice of Appeal, R.245, Page ID #3272-75). A district court's denial of a motion to dismiss on Eleventh Amendment immunity grounds is appealable immediately. See *In re Burke*, 146 F.3d 1313, 1316 (11th Cir.1998) (citing *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc*., 506 U.S. 139, 147, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993)), cert. denied, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (U.S. 1999); *Schopler v. Bliss*, 903 F.2d 1373, 1377 (11th Cir.1990). The collateral order doctrine provides jurisdiction over interlocutory appeals from the district court's denial of Eleventh Amendment sovereign immunity.

[2] The references to ULC/Ministers herein refers to the remaining plaintiffs, Universal Life Church Monastery Storehouse, Erin Patterson, and Gabriel Biser. James Welch is no longer a party consequent to an Order entered October 25, 2020 granting Nabors' Motion to Remove and Dismiss Plaintiff James Welch as a Party. (Order, R.235, PageID #3214). In its Order denying Nabors' Motion to Dismiss in part, the district court granted Nabors' Motion with respect to Plaintiffs Timeaka Farris and Gale Plumm, dismissing them as parties to the action with prejudice. (Order, R.237, PageID #3247).

See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993). This right to an interlocutory appeal stems from the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), as an exception to the finality requirement of 28 U.S.C. § 1291 (1994). Under *Cohen*, an order is appealable if it (1) "conclusively determines[a] disputed question," (2) "resolves an important issue completely separate from the merits of the action," and (3) "[is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). Because sovereign immunity "protects 'a State's dignitary interests,'" a denial of a claim of sovereign immunity is immediately appealable in an interlocutory appeal. *Kelly v. Great Seneca Fin. Corp.*, 447 F.3d 944, 948 (6th Cir. 2006) (quoting *Will v. Hallock*, 546 U.S. 345, 352, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)).

STATEMENT OF ISSUES

1. Whether the claims against Nabors in his official capacity as County Clerk of Putnam County, Tennessee are barred by Eleventh Amendment immunity.

2. Whether ULC/Ministers have Article III standing to pursue claims against Nabors in his official capacity as County Clerk of Putnam County, Tennessee.

STATEMENT OF CASE

Plaintiffs, a non-denominational religious organization, three of its ordained ministers, and Gale Plumm and Timeaka Farris, a married couple, initially filed this action against the county clerks for four counties in Tennessee, including Nabors. (Complaint, R.1, PageID #1-19). After the county clerks raised questions about whether they were proper defendants, Plaintiffs amended their Complaint to add as defendants six Tennessee state officials --- the Governor, Attorney General, and four District Attorneys General (the "State Defendants"). (Second Amended Complaint, R.80, PageID #477-78, 485-87). Plaintiffs sued the state officials and the four county clerks in their respective official capacities under the Declaratory Judgment Act, 28 U.S.C. § 2201 and 42 U.S.C. § 1983, challenging the constitutionality of certain amendments to Tenn.Code Ann. § 36-3-301 related to the authority of persons

ordained online to solemnize marriages.[3] Plaintiffs allege in their Second Amended Complaint that Tenn.Code Ann. § 36-3-301(a)(2), as amended by 2019 Tenn.Pub. Acts, Ch. 415, "unconstitutionally grants a preference to certain religions," burdens their free exercise of religion, and violates their freedom of speech. (Second Amended Complaint, R.80, PageID #495). Plaintiffs claim constitutional violations under the Establishment, Equal Protection, Free Exercise, Free Speech, and Due Process Clauses of the U.S. Constitution, Article VI of the U.S. Constitution, the "unconstitutional Conditions Doctrine" of the U.S. Constitution, and Article I, §§ 3, 4, and 19 of the Tennessee Constitution. (Second Amended Complaint, R.80, PageID #495). Plaintiffs allege that Tenn.Code Ann. § 36-3-301(a)(2) as amended by 2019 Tenn.Pub.Acts, Ch. 415, is unconstitutional under the U.S. and Tennessee Constitutions, both facially and as applied to Plaintiffs. (Second Amended Complaint, R.80, PageID #495).

A. Statutory Background

The State of Tennessee defines marriage and sets eligibility requirements. Tenn. Const. Art. XI, § 18; Tenn.Code Ann. § 36-3-101, et. seq. Tennessee has established by statute particular procedures for secular marriage in the State. *See*

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[3] Nabors takes no position as to the merits of the constitutional challenge to Tenn.Code Ann. § 36-3-301(a)(2).

Smith v. N. Memphis Sav.Bank, 115 Tenn.12, 89 S.W.392 (1905); *see also Bryant v. Townsend*, 221 S.W.2d 949, 950 (Tenn.1949) ("The law of marriage in Tennessee is not controlled by rules of the common law, but is a matter of statute."). Pursuant to its sovereign authority, the State has, since its founding, identified and defined the individuals authorized to solemnize the civil contract of marriage within the State. *See Bashaw v. State*, 9 Tenn. 177, 180-85 (1829).

The relevant statutory provision at issue in this case, Tenn. Code Ann. § 36-3-301(a), dates to a 1778 act that authorized "all regular ministers of the gospel of every denomination, having the care of souls, and all justices of the peace, to solemnize the rites of matrimony" in Tennessee. *Id*. at 183. Tenn.Code Ann. § 36-3-301(a)(1) currently authorizes "[a]ll regular ministers, preachers, pastors, priests, rabbis and other spiritual leaders of every religious belief, more than eighteen years of age, having the care of souls," as well as numerous current and former public officials, to solemnize marriages in Tennessee. Tenn. Code Ann. § 36-3-301(a)(1).

In 1998, the Tennessee General Assembly amended § 36-3-301(a) to add a new subsection defining the ministers and spiritual leaders authorized by subsection (a)(1) to solemnize marriages:

> In order to solemnize the rite of matrimony, any such minister, preacher, pastor, priest, rabbi or other spiritual leader must be ordained or otherwise designated in conformity with the customs

> of a church, temple or other religious group or organization; and such customs must provide for such ordination or designation by a considered, deliberate, and responsible act.
> 1998 Tenn. Pub. Acts, ch. 745, § 2.

Tenn. Code Ann. § 36-3-301(a)(2). The legislature adopted this definition of ministers and spiritual leaders from a 1997 opinion of the Tennessee Attorney General, which concluded that a "person who obtains a certificate of ordination solely by sending in a mail application and paying a fee" did not constitute a "regular minister . . . having the care of souls" within the meaning of § 36-3-301(a). Tenn. Att'y Gen. Op. U97-041 (Sept. 2, 1997) (Opinion, R.116-8, PageID #895-98).

The Tennessee General Assembly in 2019 further amended Tenn.Code Ann. § 36-3-301. As amended by 2019 Public Chapter 415 (with amendments underlined), effective July 1, 2019, the statute provides in part as follows:

> (2) In order to solemnize the rite of matrimony, any such minister, preacher, pastor, priest, rabbi or other spiritual leader must be ordained or otherwise designated in conformity with the customs of a church, temple or other religious group or organization; and such customs must provide for such ordination or designation by a considered, deliberate, and responsible act. Persons receiving online ordinations may not solemnize the rite of matrimony.
>
> (3) If a marriage has been entered into by license issued pursuant to this chapter at which any minister officiated before July 1, 2019, the marriage must not be invalid because the requirements of the preceding subdivision (a)(2) have not been met.
>
> Tenn.Code Ann. § 36-3-301.

As can be see above, Chapter 415 of the Tennessee Public Acts of 2019 amended § 36-3-301 in several ways. The amendment relevant to this pending case is the addition at the end of subdivision (a)(2), which added the following qualification, effective July 1, 2019: "Persons receiving online ordinations may not solemnize the rite of matrimony." 2019 Tenn. Pub. Acts, ch. 415, § 3. The amendment also added subdivision (a)(3), to provide that marriages entered into before July 1, 2019 are not "invalid because the requirements of the preceding subdivision (a)(2) have not been met." 2019 Tenn. Pub. Acts, ch. 415 § 4, codified at Tenn. Code Ann. § 36-3-301(a)(3).

Under the laws regulating secular marriage, individuals wishing to be married for purposes of Tennessee state law must first obtain a marriage license from a county clerk directed to the officiant who is to solemnize the marriage. See Tenn. Code Ann. § 36-3-103(a). To do so, parties obtaining the marriage license must provide their names, ages, addresses, and social security numbers to the clerk, as well as the names of their parents, guardians, or next of kin. *Id*. § 36-3-104(a)(1). There is no requirement that the parties provide the identity of the person who will be performing the marriage. If the parties are of age, not of incestual relationship (as defined by statute), not intoxicated or mentally ill, and not already married, the clerk must issue the marriage license; the clerk has no authority to examine the qualifications of the

officiant to whom the license is directed. *See id.* § 18-6-109; §§ 36-3-101, -102, -103(c)(1), -105, -109; see also Tenn. Att'y Gen. Op. 97-139 (Oct. 9, 1997) ("The General Assembly has not given county clerks the authority to examine the qualifications of a person seeking to solemnize a marriage."). (Tenn.Att'y Gen.Op. 97-139, R.116-1, PageID #823-26).

Tennessee sets out by statute the process required to be followed by a county clerk for licensing and recording a marriage and affords no "wiggle room" to the county clerk in doing so. Tenn. Code Ann. § 18-6-109 imposes the following duties on the county clerk related to marriages:

> (1) To endorse on or append to the marriage license the form of the return; and
>
> (2) To register, in a well-bound book, the names of the parties, and the date of the issuance of a marriage license, and to copy immediately, under or opposite thereto, the return of the proper functionary who solemnized the rights of matrimony, with the date thereof, and file and retain the license and return thereof in such clerk's office or other suitable facility.

The issuing clerk is responsible for preparing the license correctly and inputting the identifying information of the persons to be married. Tenn. Code Ann. § 68-3-401(b). The license, once issued by a county clerk, remains valid for thirty days. *Id*. § 36-3-103(a). The officiant who performs the marriage ceremony must sign and date the license, *id*. § 36-3-304, and must return the license to the county clerk who issued

the license within three days after the ceremony, *id*. §§ 36-3-303(a), 68-3-401(c). After the signed license has been returned to the clerk, the clerk forwards the marriage certificate to the Tennessee Office of Vital Records. *Id*. § 36-3-103(c)(1). Upon receipt of a marriage certificate forwarded by a Tennessee county clerk, the Office of Vital Records registers the marriage certificate and records for purposes of state law that the individuals identified in the certificate are married. *Id*. § 68-3-401.

The recording of a marriage license upon certification by the officiant remains a ministerial duty. With the 2019 amendment of the statute, there has been no change to Tennessee law in this regard. In response to this litigation, the Tennessee Attorney General has reiterated that county clerks do not have any discretion to examine the qualifications of a person solemnizing a marriage. (State Response to Motion for Temporary Restraining Order, R.42, PageID #223).

The statute addressing the general responsibilities of county clerks specifies they are responsible for those duties which may be "by law required of the county clerk. " Tenn. Code Ann. § 18-6-111. The above statutes prescribe exact duties "to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. .." *Lamb v. State, ex rel. Kisabeth*, 207 Tenn. 159, 163, 338 S.W.2d 584, 586 (1960). As can be seen, the Tennessee legislature has specifically defined the role of the county clerk for the issuance and recording of marriage

licenses. By statute, a county clerk acting in his official capacity pursuant to the statutory requirements of the marriage-licensing laws of the State of Tennessee has no leeway with regard to what must be done when issuing and recording marriage licenses.

B. Procedural History

The plaintiffs who instituted this lawsuit are the Universal Life Church Monastery Storehouse (ULC), a religious organization and Washington non-profit corporation; three individuals who have been ordained as ministers by ULC; and a married couple who reside in Putnam County, Tennessee. (Second Amended Complaint, R.80, PageID #477-78, 482-84). ULC adheres to the principle that anyone who feels so called can become a minister. (Second Amended Complaint, R.80, PageID #477, 480). Accordingly, ULC ordains minsters over the internet for free if they enter basic information and click on a "ordain me" button on their website, and, for a fee, will also send credentials to ministers by mail. (Second Amended Complaint, R.80, PageID, #480; TRO Appendix, Exh. G, R.42-1, PageID #269; Biser Dep. Excerpt, R.116-2; PageID #837). Plaintiffs sued the State Defendants and four county clerks, including Nabors, in their respective official capacities under 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, to challenge the

constitutionality of Tenn. Code Ann. § 36-3-301(a)(2), as amended by 2019 Tenn.Pub. Acts, Ch. 415. (Second Amended Complaint, R.80, PageID #477-496).

As relief, Plaintiffs seek a judgment "invalidating and declaring" unconstitutional, both facially and as applied, (1) the longstanding definition in § 36-3-301(a)(2) that the ministers and spiritual leaders authorized to solemnize civil marriages are ministers and spiritual leaders who have been ordained pursuant to a "considered, deliberate, and responsible act"; and (2) Chapter 415's provision that "[p]ersons receiving online ordinations may not solemnize the right of matrimony." (Second Amended Complaint, R.80, PageID #495-96). Plaintiffs also seek an injunction "prohibiting Defendants from enforcing the ordination requirements" of § 36-3-301(a)(2) "to the extent those requirements prevent ULC Monastery ministers from solemnizing marriages in Tennessee or invalidates marriages solemnized by ULC Monastery ministers in Tennessee," and they seek costs and attorneys' fees. (Second Amended Complaint, R. 80, PageID #496).

On June 25, 2019, Plaintiffs filed a motion for a temporary restraining order to enjoin the enforcement of § 36-3-301, as amended by Chapter 415, and requested an emergency hearing. (TRO Motion, R.11, PageID #47-81). The district court granted Plaintiffs' motion for an emergency hearing, directed defendants to respond to Plaintiffs' motion, and ordered that the "parties **SHALL MAINTAIN THE STATUS**

QUO pending the hearing." (June 25 Order, R.18, PageID #141). On July 3, 2019, the district court held a hearing on Plaintiffs' emergency motion for a temporary restraining order. The clerk defendants took no position with respect to Plaintiffs' motion or the constitutionality of the statute, informing the district court that "as ministerial officials, their only interest is in ensuring they execute their duties consistent with applicable law." (Clerk TRO Response, R.41, PageID #210). The State, on behalf of the Attorney General—the only state official named as a defendant at that time—opposed the TRO. (State TRO Response, R.42, PageID #213).

The district court did not rule on Plaintiffs' motion for a TRO, instead consolidating that motion with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). (July 3 Order, R.53, PageID #318). The Court directed that "[b]ecause the parties' focus should be on the trial on the merits, **NO DISPOSITIVE MOTIONS** shall be filed without leave of the Court." (Id). (bold and capitalization in original). The Court also ordered that "the **STATUS QUO SHALL BE MAINTAINED** and this **SHALL CONTINUE** until the Court issues a ruling after the trial." (Id). (bold and capitalization in original).

On July 11, 2019, the State informed the district court it was immune from suit under the Eleventh Amendment and its sovereign immunity and sought leave to file a motion to dismiss on those grounds and other threshold jurisdictional grounds.

(State Motion, R.56, PageID #343-45). After Plaintiffs subsequently amended their complaint to add the Governor and four District Attorneys General, the State Defendants again sought leave to raise its immunity defense. (Renewed Motion for Leave, R.99, PageID #599-600). The county clerks, including Nabors, also sought leave to file motions to dismiss. (See Crowell Motion for Leave, R.93, PageID #533-34; Anderson Motion for Leave, R.95, PageID #550-51; Nabors Motion for Leave, R.97, PageID #584-85; Knowles Motion for Leave, R.100, PageID #604-05).

After this Court subsequently concluded in *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019) that a Kentucky county clerk was acting as a state official when she denied marriage licenses to particular individuals and was entitled to sovereign immunity, the clerks filed supplemental notices informing the district court that they too would raise the Eleventh Amendment and state sovereign immunity in the motions to dismiss they sought leave to file. (See, e.g., Nabors Notice, R.105, PageID #681-82). Plaintiffs did not oppose the State Defendants' motion for leave to file a motion to dismiss, but did oppose the same motion by the clerks. (Plaintiffs' Response, R.102, PageID #619).

The district court did not immediately act on the pending motions for leave to file motions to dismiss based on sovereign immunity. On September 6, 2019, the State Defendants moved for a status conference on the pending motions and to

reconsider the pretrial and trial schedule in light of the fact that the immunity question had not yet been resolved. (Unopposed Motion for Status Conference, R.108, PageID #712-16). Citing this Court's precedents, the State Defendants pointed out that the "immunity issue must be resolved before proceeding to the merits of a case" and that the failure to decide the question of immunity before proceeding to the merits would be, in effect, a denial of immunity subject to immediate appeal. (Unopposed Motion for Status Conference, R.108, PageID #714). The State Defendants noted that the due date for pretrial briefs was fast approaching and would likely need to be reconsidered in order to allow the court time to first decide the question of immunity. (Unopposed Motion for Status Conference, R.108, PageID #715).

Shortly thereafter, the district court granted the State Defendants' leave to file a motion to dismiss but denied the clerks' motions for leave to file motions to dismiss. (Order, R.108, PageID #719-21). At the same time, the district court denied the State Defendants' motion for a status conference as moot and did not adjust the pretrial or trial schedule. (Order, R.108, PageID #720). All parties subsequently agreed to extend the due date for pretrial briefs by several weeks. (See Joint Motion for Enlargement of Time, R.110, PageID #723).

The State Defendants filed a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), arguing sovereign immunity and lack of subject matter jurisdiction.

(Motion to Dismiss, R.115, PageID #792-93, #804-13). Plaintiffs opposed the motion. (Response to Motion to Dismiss, R.121, PageID #940-71). The State Defendants submitted a reply in support of its motion. (Reply, R.129, PageID #1113-23).

Two weeks before the extended due date for pretrial briefs, the immunity issue remained pending. Accordingly, the State Defendants asked the district court to postpone the filing of pretrial briefs and proceedings on the merits until after the resolution of the question of immunity, reiterating the position it had most recently stated a month previously that this Court's precedent required the district court to decide the question of sovereign immunity before proceeding to the merits. (Motion for Enlargement of Time, R.126, PageID #1092-1102). The State Defendants also reiterated that the refusing to decide whether sovereign immunity applied while still forcing the entity claiming immunity to participate in the proceedings on the merits constituted a denial of that immunity from suit subject to immediate appeal as of right. (Id).

The district court refused to decide the question of immunity or postpone pretrial proceedings, however, holding instead that it could resolve the entire "case more quickly than most by combining Plaintiffs' request for a preliminary injunction with the trial on the merits." (October 23 Order, R.140, PageID #1271). In its view,

the expedited schedule satisfied the requirement that sovereign immunity be "resolved 'at the earliest possible stage in litigation,'" even if that approach required the entity claiming immunity to participate in the trial on the merits. (Id). (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Because that order was, in effect, a denial of the State Defendants' immunity from suit under this Court's precedent, the State Defendants appealed as of right. (Notice of Appeal, R.141, PageID #1273-74).

After the district court decided to nevertheless move forward to trial on the merits and continue to assert jurisdiction over the State Defendants despite its appeal, the State Defendants moved this Court to stay the proceedings in the district court pending the resolution of this appeal. The clerk defendants moved the district court to stay further proceedings given the State Defendants' appeal. See Anderson Motion, R.161, PageID #2178; Nabors Motion, R.163, PageID #2188-89; Crowell Motion, R.165, PageID #2226-27; Knowles Motion, R.169, PageID #2274-75). On December 6, 2019, the district court entered an order staying further proceedings until the resolution of the State Defendants' appeal. (Order, R.187, PageID #2471-76).

After Plaintiffs moved to dismiss the State Defendants' appeal in this Court for lack of jurisdiction, which was opposed by the State Defendants, this Court issued an Order denying Plaintiffs' Motion to Dismiss the appeal, indicating the following:

> Remand for a ruling by the district court in the first instance might be appropriate. That process, however, begins in the district court. If the district court issues an indicative ruling, see Fed. R. Civ. P. 62.1, then the parties can move in this court for a limited remand, see Fed. R. App. P. 12.1(b). In the absence of such a ruling, it is premature for us to remand the appeal.

(March 20 Order, R.192, PageID #2548-2550).

On April 3, 2020, Plaintiffs filed an Unopposed Motion for Indicative Ruling Under Fed.R.Civ.P. 62.1 on State and Clerk Defendants' Motions to Dismiss. (Motion, R.193, PageID #2551-53). On April 10, the district court entered an Order granting the Motion, and informing this Court that "should the case be remanded, the Court intends to address the Eleventh Amendment immunity arguments raised by the State Defendants before requiring any further substantive acts by those Defendants. The Court will also entertain motions to dismiss by the County Clerks on immunity or justiciability grounds to the extent they are authorized by the Sixth Circuit on remand." (Order, R.194, PageID #2560-62). In response, this Court issued an Order granting the motion for a limited remand to the district court for further proceedings and dismissing the appeal pending in this Court. (Order, R.197, PageID #2571-72).

Motions to Dismiss were filed by all defendants, including Nabors. (Crowell Motion, R.206, PageID #2594-95; State Defendants Motion, R.208, PageID #2624-25; Anderson Motion, R.210, PageID #2729-2730; Nabors Motion, R.212, PageID

#2818-19; Knowles Motion, R.215, PageID #2851). Plaintiffs filed responses to the Motions to Dismiss. (Responses, R.222, PageID #2935-3046 and R.223, PageID #3047-3079). While those Motions to Dismiss were pending, Nabors filed a Motion to Remove and Dismiss Plaintiff James Welch as a Party due to Welch no longer wishing to pursue his claims as set out in the Complaint and subsequent amendments, and to no longer be a party to the case. (Motion to Remove, R.218, PageID #2925-26). Prior to ruling on the Motions to Dismiss, the district court did grant the Motion to Remove and Dismiss Plaintiff James Welch as a Party. (Order, R.235, PageID #3214).

On December 22, 2020, the district court issued an Order granting the Motions to Dismiss of the defendants to the extent the Motions sought dismissal of Governor Bill Lee as a defendant, and dismissal of Timeaka Farris and Gale Plumm as plaintiffs in this action, dismissing those persons with prejudice. Otherwise, the Order denied the Motions to Dismiss in all other respects. (Order, R.237, PageID #3247-48).

SUMMARY OF ARGUMENT

The Second Amended Complaint filed in this action alleges Putnam County Clerk Wayne Nabors is "the County Clerk of Putnam County, Tennessee and is sued in his official capacity." (Second Amended Complaint, R.80, PageID #478). Nabors does not argue that a county clerk can never be sued in a challenge to marriage laws, but rather that he is not properly subject to suit in his case. There is no allegation by ULC/Ministers that Nabors has refused or threatened to refuse to issue or record a marriage license signed by a ULC minister or that he has issued or recorded such a license or that he has or ever will be presented with such an opportunity. Based on the decision of this Court in *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019), Nabors, sued only in his official capacity as county clerk of Putnam County, is immune from suit in this case under the doctrine of sovereign immunity.

The exception to state sovereign immunity recognized in *Ex Parte Young*, 209 U.S. 123 (1908), relies on the "fiction" that a state official enforcing a law that violates the Constitution or federal law is not acting on behalf of the State. *Crugher v. Prelesnik*, 761 F.3d 610, 616 (6th Cir. 2014). Suits for prospective injunctive relief against that official are thus not suits against the State; they are suits to enjoin prospectively that official's unconstitutional or unlawful action, which cannot, by definition, be performed on behalf of the State. For that reason, *Ex Parte Young*

requires there be a "connection" between the state officials named as defendants and the unlawful action or enforcement that allegedly harmed the plaintiff. See *Ex Parte Young* , 209 U.S. 123, 157, 28 S. Ct. 441, 52 L. Ed. 714 (1908). This Court has been clear that the required connection is present only when the named state official has authority to enforce **and** has either enforced or threatened to enforce the challenged act against the plaintiffs. See, e.g., *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996)(emphasis added).

There is no action to enjoin here as to Nabors acting in his official capacity of County Clerk for Putnam County, Tennessee. ULC/Ministers have not, and cannot, allege any connection between Nabors and enforcement of the challenged law, which relates only to the secular, state-law status of a domestic relationship between two private individuals. The factual allegations do not reveal any threat of enforcement of the alleged law by Nabors as is required to overcome his sovereign immunity defense. Nabors has no authority to enforce the challenged law; nor has he attempted or threatened to enforce it against ULC or either Ministers Biser or Patterson. The factual allegations do not reveal any injury that is fairly traceable to Nabors for purposes of standing or any ripe claims against him. Nabors is a defendant only because he is a county clerk who by the statutes of the State of Tennessee is responsible for the ministerial duty of issuing and processing marriage licenses; not

on the basis of any action he has taken or threatened to take as to ULC/Ministers. There is no prospective, injunctive relief that ULC/Ministers can seek that would enjoin unlawful action by Nabors. *Ex Parte Young* thus does not apply.

That lack of enforcement as to Nabors also deprives federal courts of subject matter jurisdiction over ULC/Ministers' claims as to Nabors. ULC/Ministers have not alleged any Article III injury that would be redressed by the injunctive relief they seek, and their constitutional claims are not ripe for adjudication but depend on remote future contingencies. There is no allegation that anyone has sought or expressed future intent to seek a Putnam County marriage license signed by a ULC minister. The same basic deficiency in ULC/Ministers' *Ex Parte Young* claims applies equally to subject matter jurisdiction. ULC/Ministers allege no ongoing or threatened enforcement by Nabors in his official capacity as County Clerk for Putnam County that injures them and could be redressed by a federal court.

STANDARD OF REVIEW

The jurisdiction of federal courts is limited by Article III to consideration of actual cases and controversies. *Bigelow v. Michigan Dep't of Natural Res.,* 970 F.2d 154, 157 (6th Cir.1992). Article III standing is a question of subject matter jurisdiction properly decided under 12(b)(1). *Am. BioCare Inc. v. Howard & Howard Attys. PLLC*, 702 F. Appx. 416, 419 (6th Cir. 2017); *see also Bigelow*, 970 F.2d at 157 (federal courts lack subject matter jurisdiction over unripe claims). A motion to dismiss for lack of justiciability pursuant to Rule 12(b)(1) tests whether allegations in a complaint are sufficient to confer subject matter jurisdiction. *Mays v. TVA*, 699 F. Supp. 2d 991 (E.D. Tenn. 2010). Where a defendant moves to dismiss a complaint for lack of subject matter jurisdiction, “the plaintiff has the burden of proving jurisdiction in order to survive the motion.” *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990) . Where a defendant asserts a facial attack on the subject matter jurisdiction alleged in the complaint, the Court questions merely the sufficiency of the pleading, taking the allegations as true, just as it would when evaluating a Rule 12(b)(6) motion. *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007).

When a defendant raises a challenge to subject matter jurisdiction under Rule 12(b)(1), “the *plaintiff* has the burden of proving jurisdiction in order to survive the

motion" to dismiss. *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 817 (6th Cir. 2017) (emphasis in original) (quoting *Rogers v. Stratton Indus., Inc.,* 798 F.2d 913, 915 (6th. Cir. 1986)). If the plaintiff cannot meet that burden, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3). "[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity, *i.e.*, that it is an arm of the state." *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002). But, once an official or entity has demonstrated it falls within the scope of the State's immunity, the plaintiff bears the burden of demonstrating that subject matter jurisdiction exists pursuant to an exception to that immunity, such as *Ex Parte Young. See Wayside Church v. Van Buren Cty.*, 847 F.3d at 817; *see also U.S. ex rel. Wall v. Circle C. Constr., LLC*, 868 F.3d 466, 471 (6th Cir. 2017) ("[T]he burden of proving an exception rests with the party invoking it."); *Doe v. Univ. of Miss.*, 361 F.Supp. 3d 597, 605 (S.D. Miss. 2019)(holding the plaintiff "ha[d] not met his burden of establishing the *Ex Parte Young* exception to Eleventh Amendment immunity").

When reviewing a motion to dismiss for lack of jurisdiction, the court must "'take[] the allegations in the complaint as true,' just as in a Rule 12(b)(6) motion." *Wayside Church*, 847 F.3d at 816 (quoting *Gentek Bldg. Prods., Inc. v. Sherwin-Williams, Co.*, 491 F.3d 320, 330 (6th Cir. 2007)). A facial attack on jurisdiction "questions merely the sufficiency of the pleading." Id. (quoting *Gentek*

Bldg. Prods., 491 F.3d at 330). The questions of whether *Ex Parte Young* applies and of this Court's subject matter jurisdiction over ULC/Ministers' claims are questions of law subject to *de novo* review. *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360, 362 (6th Cir. 1998).

ARGUMENT

I. ULC/MINISTERS' CLAIMS AGAINST NABORS IN HIS OFFICIAL CAPACITY AS COUNTY CLERK OF PUTNAM COUNTY, TENNESSEE ARE BARRED BY ELEVENTH AMENDMENT IMMUNITY.

The Second Amended Complaint filed in this action alleges Putnam County Clerk Wayne Nabors is "the County Clerk of Putnam County, Tennessee and is sued in his official capacity." (Second Amended Complaint, R.80, PageID #478). A claim against an official in his official capacity is a claim against the governmental entity. *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). Unless a State consents to be sued, it enjoys immunity from private lawsuits seeking damages. U.S. Const. amend. XI; *Crabbs v. Scott*, 786 F.3d 426, 428 (6th Cir. 2015). Because lawsuits against state officials in their official capacities equate to lawsuits against the State itself, see *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985), sovereign immunity shields state officials as well. *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019). However, the doctrine of sovereign immunity generally does not extend to counties and county officials. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

But, depending on a county official's role in government, sovereign immunity can protect a county official from being sued in his official capacity. Not all officials

operate within jurisdictional silos –some have hybrid duties in which they serve both state and local government. *Ermold* at 433. Immunity depends on which entity the official serves when engaging in the challenged conduct. *Macmillan v. Monroe Cty*., 520 U.S. 781, 785 & n. 2, 117 S.C. 1734, 138 L. Ed. 2d 1 (1997). The inquiry also turns on how state and local law treat the official. Id. at U.S. 786. Relevant factors include: (1) the State's potential liability for a judgment; (2) how state statutes and courts refer to the official; (3) who appoints the official; (4) who pays the official; (5) the degree of state control over the official; and (6) whether the functions involved fell within the traditional purview of state of local government. *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019)(Petitions for Rehearing *en banc* denied, 2019 U.S. App. LEXIS 31990; Petition for Writ of Certiorari to the United States Supreme Court filed January 22, 2020 by Kim Davis, Individually[4]).

In the *Ermold* case recently considered by this Court, this Court evaluated these factors and determined that a county clerk in Kentucky acted as a state official with respect to the issuance and recording of marriage licenses. *Id*. at 435. Tennessee law does not materially differ from Kentucky law with respect to the relevant factors and

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[4] Although a Petition for Writ of Certiorari was filed with the United States Supreme Court, the issue of sovereign immunity of Davis was not one of the issues included in the Petition.

therefore, the same result is true in Tennessee. Consequently, based on the *Ermold* case, Nabors, who has been sued in this case only in his official capacity as county clerk of Putnam County, is immune from suit under the doctrine of sovereign immunity and the case against him should be dismissed.

In *Ermold*, this Court held that because the State of Kentucky controlled every aspect of how county clerks issue marriage licenses, a county clerk acted on Kentucky's behalf when refusing to issue marriage licenses, so sovereign immunity protected the county clerk from an official capacity suit filed against her by same-sex couples who had sought and been refused marriage licenses. *Ermold v. Davis,* 936 F.3d 429, 435 (6th Cir. 2019). In that case, this Court determined "Kentucky law governs everything about marriage", as follows:

> It defines marriage and sets eligibility requirements (citations omitted). It vests courts with the authority to declare certain marriages void (citations omitted). It describes who may solemnize a marriage and requires a couple to obtain a marriage license prior to marrying (citations omitted). It sets out the process for licensing and recording a marriage (citations omitted). And, specific to Davis, Kentucky law vests county clerks with the duty of issuing marriage licenses, recording marriage certificates, and reporting marriages (citations omitted). So Kentucky controls every aspect of how county clerks issue marriage licenses. Rowan County has no say whatsoever.
> Id at 434.

As in Kentucky, the State of Tennessee governs every aspect of marriage and the process for the issuance of marriage licenses by a county clerk. The State of Tennessee defines marriage and sets eligibility requirements. Tenn. Const. Art. XI, § 18; Tenn. Code Ann. § 36-3-101, et. seq. It vests courts with the authority to declare certain marriages void. *Id.* It describes who may solemnize a marriage. Tenn.Code Ann. § 36-3-301.

In the *Ermold* case, the plaintiffs acknowledged state control over marriage in Kentucky, but contended the county clerk's refusal to issue marriage licenses in that case was a discretionary policy made by the county clerk on behalf of the county and as such, sovereign immunity would not shield the clerk "because when an official applies state law that leaves the method of application to her discretion, she acts on behalf of local government. *Ermold* at 434. This Court did not agree with that contention, noting that the Kentucky laws regarding marriage licensing provided a county clerk "no wiggle room" with regard to the issuance of marriage licenses in an official capacity. *Ermold* at 435.

Tennessee, like Kentucky, sets out by statute the process required to be followed by a county clerk for licensing and recording a marriage and affords no "wiggle room" to the county clerk in doing so. A county clerk in Tennessee has no say at all regarding the issuance and processing of marriage licenses. Tenn. Code

Ann. § 18-6-109 imposes the following duties on the county clerk related to marriages:

> (1) To endorse on or append to the marriage license the form of the return; and
>
> (2) To register, in a well-bound book, the names of the parties, and the date of the issuance of a marriage license, and to copy immediately, under or opposite thereto, the return of the proper functionary who solemnized the rights of matrimony, with the date thereof, and file and retain the license and return thereof in such clerk's office or other suitable facility.

The Tennessee legislature has specifically defined the role of the county clerk for the issuance and recording of marriage licenses. Further, the law has not created any discretion for a clerk acting in his official capacity in that process, including examination of the qualifications of persons solemnizing the marriage. The Tennessee Attorney General reached this conclusion in 1987 and again in 1997. See Tenn. Att'y. Gen. Op. 97-139 (1997) (the duty of the county clerk to record marriage licenses upon certification by the officiant is a purely ministerial duty which does not permit the exercise of discretion and must be performed as prescribed). (Ag. Opinion, R.116-1, PageID #825). In Tennessee, the recording of a marriage license upon certification by the officiant remains a ministerial duty. There has been no change to Tennessee law in this regard. In response to this litigation, the Tennessee Attorney General has reiterated that county clerks do not have any discretion to examine the

qualifications of a person solemnizing a marriage. (State's TRO Response, R.42, PageID #223).

Without question Tennessee, like Kentucky, controls every aspect of how county clerks issue marriage licenses. The above statutes prescribe exact duties "to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. .." *Lamb v. State, ex rel. Kisabeth*, 207 Tenn. 159, 163, 338 S.W.2d 584, 586 (1960). The statute addressing the general responsibilities of county clerks specifies they are responsible for those duties which may be "by law required of the county clerk. " Tenn. Code Ann. § 18-6-111.

When fulfilling his statutory duties related to marriage licensing and recording, Nabors acts as a state official pursuant to the statutory requirements of the marriage-licensing laws of the State of Tennessee, with no leeway or say whatsoever with regard to what must be done when issuing and recording marriage licenses. Because the State of Tennessee, like the State of Kentucky in the *Ermold* case controls every aspect of how county clerks issue marriage licenses, Nabors acts on Tennessee's behalf when issuing and processing marriage licenses, so sovereign immunity protects him from this official capacity suit filed against him.

A. The *Ex Parte Young* Exception to Sovereign Immunity Applies Only When a State Official Enforces or Has Threatened to Enforce the Challenged Law.

Under the doctrine announced in *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), the Supreme Court has recognized an exception to sovereign immunity "whereby 'a suit challenging the constitutionality of a state official's action is not one against the State'" and is thus not barred by its sovereign immunity. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046-47 (6th Cir. 2015) (quoting *Pennhurst State Sch. & Hosp. v. Holderman*, 465 U.S. 89, 98-100 (1984)). "In order to fall within the *Ex Parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law." *Diaz v. Mich. Dep't of Corr.,* 703 F.3d 956, 964 (6th Cir. 2013).

However, the *Ex Parte Young* exception "does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute." *Children's Health is a Legal Duty, Inc. v. Deters,* 9 F.3d 1412, 1415 (6th Cir. 1996). And "*Young* does not reach state officials who lack a 'special relation to the particular statute' and '[a]re not expressly directed to see to its enforcement.'" *Russell*, 804 F.3d at 1047 (alterations in original) (quoting *Young*, 209 U.S. at 157). A state official is subject to suit under the *Ex Parte Young* exception only if he "ha[s] some connection with the enforcement of the act." *Id.*

That required connection "is the important and material fact" that allows the claim to proceed. *Id.; see also Deters*, 9 F.3d at 1415-16.

Enjoining a state official under *Ex Parte Young* is appropriate only when there is a realistic possibility the official will take enforcement action against the plaintiff. *Russell*, 784 F.3d at 1048; *see also Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001) (en banc) (plurality opinion) ("*Young* requires both a close connection between the official and the act and the threatening or commencement of enforcement proceedings by the official."). This "requirement that there be some actual or threatened enforcement" has been "repeatedly applied by the federal court "to dismiss suits against various state officials". *Okpalob*, 244 F.3d at 415.

B. The *Ex Parte Young* Exception Does Not Apply to Nabors Because He Does Not Enforce and Has Not Threatened to Enforce The Challenged Provisions of The Statute.

In order to warrant application of the *Ex Parte Young* exception to Nabors, ULC/Ministers must allege as a facial matter or establish as a factual matter a sufficient connection between Nabors and the enforcement of Tenn.Code Ann. § 36-3-301(a)(2), as amended by 2019 Public Chapter 415. ULC/Ministers have not done so. Even after two amendments to their Complaint, ULC/Ministers do not allege nor do the facts of the case demonstrate that Nabors has commenced or threatened to commence proceedings against them or has taken other actions that would constitute

"enforcement" of the challenged laws by Nabors. (Case Management Order, R.67, PageID #394-95).

ULC/Ministers in their Second Amended Complaint infer Nabors can enforce the statute by refusing to record and certify marriages performed by ULC Monastery ministers. (Case Management Order, R.67, PageID #394-5). In support of their claims against Nabors, ULC/Ministers relied in their Complaint on the allegations of Plaintiffs Plumm and Farris that Nabors and his staff refused to issue them a marriage license because they were planning to be married by a ULC minister. (Second Amended Complaint, R.80, PageID #484-85). Nabors denies these allegations. (Nabors Answer, R.111, PageID #732-33). Further, Plumm and Farris have been dismissed as plaintiffs in this lawsuit with prejudice. (December 22, 2020 Order, R.237, PageID #3247). With the dismissal of the other individual plaintiff, James Welch, there are no individual plaintiffs in this lawsuit with regard to Nabors. (Order, R.235, PageID #3214).

Even if the allegations of Plumm and Farris are true, such a refusal does not rise to enforcement of the statute by Nabors in his official capacity as county Clerk. ULC/Ministers have not alleged that Nabors has engaged in enforcement of Tenn.Code Ann. § 36-3-301(a)(3), as amended by 2019 Public Chapter 415. The Second Amended Complaint does not allege that Nabors has any enforcement

authority with regard to any of the criminal penalties recited in the Second Amended Complaint. (Second Amended Complaint, R.80, PageID #481-82). In fact, in his official capacity of county clerk for Putnam County, Nabors is not responsible for nor is he even authorized to take any enforcement action with regard to perceived violations of the statute as amended. The challenged provisions themselves provide no enforcement mechanism. Even if criminal prosecution were a possibility, it is absolutely clear Nabors has no authority to enforce the criminal laws of the State of Tennessee and therefore no authority to take enforcement action against ULC/Ministers or anyone else with regard to perceived violations of the challenged statute. The *Ex Parte Young* exception does not apply and Nabors in his official capacity as county clerk should be dismissed.

II. ULC/MINISTERS DO NOT HAVE ARTICLE III STANDING TO PURSUE CLAIMS AGAINST NABORS IN HIS OFFICIAL CAPACITY AS COUNTY CLERK OF PUTNAM COUNTY, TENNESSEE.

This Court may exercise pendent jurisdiction "over issues that are not independently appealable when those issues are 'inextricably intertwined' with matters of which the appellate court properly and independently has jurisdiction." *Chambers v. Ohio Dep't of Human Servs*., 145 F.3d 793, 797 (6th Cir. 1998). Subject matter jurisdiction is precisely such an issue. As the Eighth Circuit has explained, subject matter jurisdiction is inextricably intertwined with an interlocutory appeal

from a denial of immunity from suit because a court "must always ensure that a dispute presents a live case or controversy under Article III such that an assertion of jurisdiction is proper." *McDaniel v. Precythe*, 897 F.3d 946, 949 (8th Cir. 2018) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95(1998)). The Fourth Circuit has reached the same conclusion. See *S. C. Wildlife Fed. v. Limehouse*, 549 F.3d 324, 329 (4th Cir. 2008).

Even if subject matter jurisdiction and immunity are not always inextricably intertwined sufficient to warrant pendent jurisdiction, they undoubtedly are here. The question of whether the *Young* exception applies is in many respects identical to the inquiries appropriate to standing and ripeness. See *Russell*, 784 F.3d at 1047 (equating the *Young* inquiry with the requirement for Article III standing); *Doe v. Holcomb*, 883 F.3d 971, 975 (7th Cir. 2018) (noting "the requirements of *Ex Parte Young* overlap significantly" with the standing inquiry). The same reasons that the *Young* exception does not apply—the lack of any enforcement authority or action—also demonstrate that ULC/Ministers cannot meet their burden to establish standing and subject matter jurisdiction. See *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (noting that the standing inquiry and Young's requirement of enforcement share a "common denominator"); see also *Bevan & Assocs. v. Dewine*, No. 2:16-CV-0746, 2017 WL 2599225, at *9 (S.D. Ohio

June 15, 2017) ("The Court already has found that the threatened injury here has met the requirements of Article III standing. . . . Therefore, 'that threat of enforcement is also sufficient to satisfy this element of *Ex parte Young*.'" (quoting *Russell*, 784 F.3d at 1047)). "Given the relatedness" of the enforcement requirement of *Ex Parte Young* and jurisdictional doctrines such as standing and ripeness, "judicial economy would counsel hearing these two issues together." *O'Bryan v. Holy See*, 556 F.3d 361, 377 n.7 (6th Cir. 2009).

Article III of the U.S. Constitution limits the jurisdiction of federal courts to cases and controversies, and a series of "justiciability doctrines" enforce that limitation. *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997). "Perhaps the most important" of these doctrines is standing, id., which requires the plaintiff to demonstrate "(1) that he has suffered an 'injury in fact,' (2) that there is 'a causal connection between the injury and the conduct complained of,' and (3) that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision,'" *Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

When plaintiffs bring suit under the Declaratory Injunction Act, 28 U.S.C. § 2201, they are not excused from the requirements of Article III. See *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 961-62 (6th Cir. 2009). ULC/Ministers do not have to

subject themselves to liability before challenging a statute under the Declaratory Judgment Act, but they must demonstrate "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Kiser*, 765 F.3d at 608 (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

ULC/Ministers cannot satisfy that requirement. The challenged provision governs only which individuals the State has decided to authorize to solemnize marriages for purposes of secular state law and does not "proscribe[]" any conduct at all. Moreover, the conduct in which ULC/Ministers wish to engage—solemnizing marriages for civil purposes—is not "affected with a constitutional interest." There is no recognized constitutional right to perform a marriage ceremony, let alone a constitutional right to solemnize a marriage for purposes of secular state law. See *Jones v. Bradley*, 590 F.2d 294, 296 (9th Cir. 1979) (finding "no support for th[e] proposition" that "a pastor of the ULC" has "a First Amendment free exercise right to perform marriages"); *Rubino v. City of New York*, 480 N.Y.S. 2d 971, 937 (Sup. Ct. N.Y.C. 1984) (concluding a ULC minister had "no recognized First Amendment free exercise right to perform marriage").

The constitutional minimum of standing requires that a plaintiff satisfy three criteria. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must

have suffered an injury in fact – an invasion of a legally protected interest that is both (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id.* Second, there must be a causal connection between that injury and the action of the defendant – the injury must be "fairly traceable" to the defendants, and not the result of the independent action of a third party. *Id.* Finally, it must be likely, not merely speculative, that a favorable judgment would redress the plaintiff's injury. *Id.* at 561. A plaintiff has the burden of establishing each of these three elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). The requirement of an actual case or controversy applies equally to claims under the Declaratory Judgment Act, 28 U.S.C. § 2201. *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009).

A. ULC/Ministers Cannot Establish An Injury In Fact.

The first of the three criteria which a plaintiff must satisfy to meet the constitutional minimum of standing requires that the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest that is both (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As to this first element, ULC/Ministers suffer no cognizable injury from the fact that ULC ministers lack authority to solemnize marriages civilly in Tennessee. They remain free to conduct whatever

religious ceremonies they wish. ULC/Ministers' allegations to the contrary conflate the ability to perform or participate in a religious wedding ceremony with the ability to solemnize marriage for secular legal purposes. Ministers and their organizations have no religious interest in the secular status of a private couple under state law. And a religious officiant suffers no injury if a couple decides to have a religious ceremony and then go to a public official for secular recognition. ULC has, itself, advised its ministers that such a procedure does not impair their religious practice. See Initial Disclosures Exhibit, R. 116-7, PageID #816.

ULC/Ministers have also failed to allege a "credible threat" of prosecution or enforcement sufficient to create Article III standing. ULC/Ministers' contention that "[m]inisters who violate [Chapter 415] face the threat of criminal liability," (Second Amended Complaint, R.80, PageID #481-82), has no statutory, historical, or precedential support. ULC/Ministers have cited no law or practice in support of that contention. Contrast *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (finding the "threat of future enforcement . . . substantial" because "[m]ost obviously, there is a history of past enforcement here"); *Russell*, 784 F.3d at 1049 (relying on the "Defendants' historical conduct" to find a credible threat of prosecution). And, in the limited discovery undertaken in this case, Ministers Biser and Patterson stated

definitively they had not been threatened with prosecution. (See Biser Dep. Excerpt, R.116-2, PageID #844; Patterson Dep. Excerpt, R.116-3, PageID #860).

ULC/Ministers mount a pre-enforcement challenge and seek declaratory relief based on their subjective perception of the law as discriminatory. In such circumstances, binding precedent requires a credible threat of prosecution—or at least of some threat of enforcement or other injury to establish standing. *Kiser*, 765 F.3d at 608; see also *Faith Baptist Church v. Waterford Twp.*, 522 Fed. Appx. 322, 330 (6th Cir. 2013) (finding standing because the "Defendants admit[ted] Plaintiffswere threatened with prosecution"); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011) (finding standing because plaintiffs had "direct and unwelcome contact" with a religious symbol). No such injury exists here with respect to Nabors. Because ULC/Ministers have not met the first required element of standing with regard to Nabors, dismissal of the claims against Nabors is proper.

B. ULC/Ministers Cannot Establish a Causal Connection Between any Injury and Any Action or Inaction of Nabors.

Even if ULC/Ministers could make the requisite showing of an injury in fact, any such injury is certainly not "fairly traceable" to Nabors. There is no causal connection between ULC/Ministers' alleged injury and any action of Nabors. There is no allegation Nabors has taken or threatened to take any action which would

present a substantial likelihood of causing harm to ULC/Ministers. Neither Nabors nor Putnam County dictate the laws of the State of Tennessee. Nabors did not promulgate the statute as amended by 2019 Public Chapter 415 that is being challenged by ULC/Ministers nor is he responsible for, or even authorized to take, enforcement action with regard to perceived violations of the statute as amended.

Nabors has a purely ministerial duty to issue marriage licenses and to record and certify marriage certificates. He is not required, and, more importantly, is not even authorized to inquire into an officiant's compliance with the statute. The Tennessee Attorney General reached this conclusion in 1987 and again in 1997. See 87 Op. Tenn. Att'y Gen. 151 (Sept.17, 1987), 1987 Tenn. AG LEXIS 48 (county clerks do not have the authority to require proof that an officiant meets the statutory requirements for solemnizing a marriage); 97 Op. Tenn. Att'y Gen. 139 (Oct. 9, 1997), 1997 Tenn. AG LEXIS 172) (the duty of the county clerk to record marriage licenses upon certification by the officiant is a purely ministerial duty which does not permit the exercise of discretion and must be performed as prescribed).

The statute regarding recording of a returned marriage license by a county clerk provides in part as follows:

> (c)(1) The county clerk issuing a marriage license is hereby authorized to record and certify any license used to solemnize a

> marriage that is properly signed by the officiant when such license is returned to the issuing county clerk.
>
> Tenn.Code Ann. § 36-3-103(c)(1).

The statute only provides the returned marriage license be "properly signed by the officiant", whoever that may be. It does not provide the licensed be signed by a "proper officiant". County clerks are required to record and certify any marriage license that is "properly signed" and returned to the clerk by the officiant. While the final sentence of the statute prohibits clerks from issuing a license for a marriage that is expressly prohibited (for example, a marriage between close relatives, minors, or intoxicated individuals)[5], it does not give clerks discretion to examine an officiant's qualifications to determine whether to record a signed certificate. Upon return of the license to the clerk by the officiant, the law requires that the county clerk record and certify the license. Tenn. Code Ann. § 36-3-103(c)(1); Tenn. Code Ann. § 18-6-109. The statute plainly does not give the county clerks the authority to scrutinize the qualifications of an officiant who has returned a signed license. This is further support for the fact that the recording of a marriage license upon certification by the officiant is a ministerial duty of the county clerk.

[5] See Tenn. Code Ann. §§ 36-3-101 to -112.

In response to this litigation, the Tennessee Attorney General has reiterated that county clerks do not have any discretion to examine the qualifications of a person solemnizing a marriage. (State Response to Motion for TRO, R.42, PageID #223). ULC/Ministers have not alleged that Nabors has treated this duty regarding the issuance and processing of marriage licenses as anything other than ministerial. Even if county clerks did have discretion to verify the qualifications of an officiant, there is no allegation Nabors has declined to record a marriage license signed by a ULC Minister[6] or otherwise exercised any such discretion in an unconstitutional manner.

With the 2019 amendment to the statute, there has been no change to Tennessee law with regard to the county clerk's issuance and processing of a marriage license. ULC/Ministers' arguments that a causal connection exists are without merit. ULC/Ministers assert that because county clerks must "record and certify any license used to solemnize a marriage that is properly signed by the officiant when such license is returned to the issuing county clerk" under Tenn. Code Ann. § 36-3-103(c)(1), that they have the power to enforce the statute as amended by 2019 Public Chapter 415 because they might decide to refuse to record and certify

[6] Nabors does not aver such an allegation is sufficient to confer standing, but is merely pointing out the clear lack of standing in the absence of any such allegation against him.

marriages performed by ULC ministers. (Case Management Order, R.67, PageID #394). ULC/Ministers do not allege that Nabors has taken or threatened to take such an action. Instead, ULC/Ministers have raised this purely hypothetical scenario in an effort to manufacture justiciability where there is none. Even if a claim that Nabors refused to record and certify a marriage performed by a ULC Monastery minister was sufficient to confer standing upon the minister, such a claim certainly is not ripe where ULC/Ministers have not alleged any such action on the part of Nabors and instead base their argument on a purely hypothetical scenario. *Texas v. U.S.*, 523 U.S. 296 (1998) (A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all.").

ULC/Ministers claim they would be harmed by Nabors if he issued and recorded marriage licenses for marriages solemnized by ULC ministers. This theory is also not sufficient to confer standing both because it was not included in the pleadings filed by ULC/Ministers and because it fails on the merits. The Second Amended Complaint did not allege any injury resulting from the recording of marriage licenses signed by ULC ministers and certainly did not connect any such injury to Nabors. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (at the pleading stage, the plaintiffs bear the burden of "clearly … alleg[ing] facts demonstrating" each element of standing).

Nabors has not taken or threatened to take any action that would deprive ULC/Ministers of any right. Accordingly, even if ULC/Ministers could show an injury in fact, they cannot demonstrate that their injury was caused by Nabors in his official capacity as County Clerk for Putnam County, Tennessee. Because the ULC/Ministers have not met the second required element of standing with regard to Nabors, dismissal of the claims against Nabors is proper.

C. ULC/Ministers Cannot Show That a Favorable Judgment Against Nabors Would Redress Any Alleged Injury.

ULC/Ministers have failed to show that a judgment against Nabors in this action would likely redress their alleged injury. In this case, like many, "redressability and traceability overlap as two sides of a causation coin." *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005). Redress is sought "through the court, but from the defendant*." Hewitt v. Helms*, 482 U.S. 755, 761 (1987). This is no less true of a declaratory judgment suit than of any other action. *Id.* "The real value of the judicial pronouncement -- what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion -- is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff." Id.* (emphasis in original).

A judgment against Nabors will not redress ULC/Ministers' alleged injury. ULC/Ministers seek to "enjoin the clerks from withholding marriage licenses or turning away ULC Monastery ministers" and claim that "[a] judgment will redress Plaintiffs' injuries by forcing the clerks to issue marriage licenses" (Plaintiffs Response to Clerk Defendants Trial Brief, R.174, PageID #2359-60) without a concern of a threat of criminal prosecution. The Tennessee Attorney General has argued that prosecution under the statutes challenged by ULC/Ministers is not even possible. (State Response to Plaintiffs' TRO Motion, R.42, PageID #221-22; State Motion to Dismiss Memorandum, R.116, PageID #806-07). Even if criminal prosecution were a possibility, it is clear that Nabors has no authority to enforce the criminal laws of Tennessee and therefore no authority to take enforcement action against ULC/Ministers or anyone else with regard to perceived violations of the challenged statute.

Because ULC/Ministers have not met the third required element of standing with regard to Nabors, dismissal of the claims against Nabors is proper.

D. ULC/Ministers Do Not Have Standing Based on Subjective Chill.

In order to rely on subjective chill for standing purposes, ULC/Ministers must point to some combination of the following factors to show the potential of enforcement by Nabors: (1) a history of past enforcement against the plaintiffs or

others; (2) enforcement warning letters sent to the plaintiffs regarding specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action. *Plunderbund Media, L.L.C. v. DeWine*, Case No. 18-3270, 753F. App'x 362, 366-67 (6th Cir. Nov. 27, 2018). Mere allegations of "subjective chill" are insufficient to establish an injury-in-fact. Here, none of the subjective chill factors have been met, particularly in light of the dismissal of Plumm, Farris and Welch as Plaintiffs in this case.

E. ULC/Ministers Do Not Have Third Party Standing.

ULC/Ministers have not alleged that any third party would have a viable claim against Nabors nor have they demonstrated entitlement to third party standing with respect to any claim against Nabors. Generally, a plaintiff must assert his own legal rights and "cannot rest his claim to relief on the legal rights or interests of third parties." *Crawford v. U.S. Dep't of the Treasury*, 868 F.3d 438, 455 (6th Cir. 2017). The rare third party standing exception allows a federal court to hear a case when a plaintiff can show: "(1) it has suffered an injury in fact; (2) it has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests." *Id.* ULC/Ministers have not met these requirements.

F. Nabors Is Not A "Real and Adverse" Party to ULC/Ministers.

ULC/Ministers have failed to establish a justiciable controversy because Nabors does not have a "real and adverse" interest to ULC/Ministers. For justiciability, there must be "conflicting contentions of the parties" that present a "real, substantial controversy between parties having adverse legal interests." *Haskell v. Wash. Twp.*, 864 F.2d 1266, 1275 (6th Cir. 1988) (citing *Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979)).* As the United States Supreme Court has explained, "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 72 (1978).

ULC/Ministers have failed to plead facts stating a claim against Nabors. Fed.R.Civ.P. 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Under *Bell Atlantic Corp v. Twombly,* 550 U.S. 544, 570 (2007), dismissal under is proper where there are no factual allegations against a defendant stating a claim that is plausible on its face. A claim is "plausible" when the pleaded factual context allows a court to draw a reasonable inference that the

defendant is liable for misconduct alleged. *Id*. at 556. While detailed factual allegations are not required under the "short and plain statement" rule of Rule 8, the law demands more than a complaint that consists of "labels and conclusions" or assertions devoid of "factual enhancement." *Id.* at 55-57. In *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the U.S. Supreme Court noted that where a complaint does not establish a plausible entitlement to relief, particularly where such a claim involves government officials, it is not appropriate to allow a claim to go forward, forcing such official to participate in litigation.

ULC/Ministers' challenge to the constitutionality of a Tennessee statute does not state a claim against Nabors. The Second Amended Complaint alleges that Tenn. Code Ann. § 36-3-301, as amended by 2019 Public Chapter 415, violates the U.S. and Tennessee Constitutions.[7] ULC/Ministers do not allege, nor could they, that Nabors is responsible for the promulgation of that statute or any amendment thereto. ULC/Ministers have not alleged that Nabors has engaged in enforcement of that statute, as amended by 2019 Public Chapter 415. Naming Nabors as a defendant and

[7] Specifically, Plaintiffs allege violations of the Establishment Clause, Equal Protection Clause, Free Exercise Clause, Free Speech Clause, Due Process Clause, Article VI (prohibition of religious tests as qualification for office), the Unconstitutional Conditions Doctrine under the U.S. Constitution and violations of Article 1, Sections 3, 19, and 4 of the Tennessee Constitution. (Second Amended Complaint, R.80, PageID #476-497).

alleging that a Tennessee statute (over which he has no control) is unconstitutional is simply not sufficient to state a claim upon which relief can be granted. The "short and plain statement" rule of Rule 8 demands more. Taking as true all of the allegations of the Second Amended Complaint, ULC/Ministers have not stated a claim against Nabors and all of the federal and state law claims against him should therefore be dismissed.

ULC/Ministers' arguments to the contrary are unavailing. ULC/Ministers' assertion in the Case Management Order that county clerks "have the power to enforce" the statute as amended by 2019 Public Chapter 415 by refusing to record and certify marriages performed by ULC ministers does not state a claim against Nabors where, even after two amendments to their Complaint, ULC/Ministers have not included any allegation that Nabors has engaged in or threatened to engage in any such activity. (Case Management Order, R.67, Page ID# 394).

Further, with the dismissal of Plaintiffs Welch, Plumm and Farris, there is no named individual plaintiff remaining that has any nexus with Nabors. Without any individual plaintiffs claiming individual injury caused by Nabors, ULC does not have organizational standing to continue its claims against Nabors. Organizational standing is derivative of its members' standing, or lack thereof. See *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Because no individual has

standing to pursue claims against Nabors, ULC does not have representational standing to pursue claims against Nabors. See *Am. Atheists, Inc. v. Shulman*, 21 F. Supp. 3d 856, 866 (E.D. Ky. 2014). Further, ULC has not demonstrated any basis for direct organizational standing as to its claims against Nabors. It is not appropriate to allow the claims against Nabors to go forward, forcing him to participate in this litigation.

G. ULC/Ministers' § 1983 Claims Against Nabors Must Be Dismissed.

ULC/Ministers' claims against Nabors under 42 U.S.C. § 1983 should be dismissed because ULC/Ministers have failed to make the requisite showing that their constitutional rights were violated by a policy or custom of Nabors or Putnam County.[8] ULC/Ministers have named Nabors in his official capacity only.[9] A claim

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[8] Some courts have found they lacked subject matter jurisdiction over § 1983 claims when a plaintiff failed to identify a government policy or custom that violated the plaintiff's rights. *Ra Horakhty Ra'El Allah v. Child Support Enf't Agency*, No. 1:18 CV 872, 2018 U.S. Dist. LEXIS 132630, at *14 (N.D. Ohio Aug. 7, 2018); *Simpson-Gardner v. City of Southfield*, No. 17-CV-10636, 2016 U.S. Dist. LEXIS 185076, at *2-3 (E.D. Mich. Mar. 11, 2016). Accordingly, out of an abundance of caution, Nabors has argued alternatively that the claims against him should be dismissed under Rule 12(b)(1).

[9] While Plaintiffs have only asserted claims against Nabors in his official capacity, claims against him in his individual capacity would also fail as a matter of law because there is no allegation of any alleged personal unconstitutional conduct on the part of Nabors. *See Miller v. Calhoun Cnty.,* 408 F.3d 803, 817, n.3 (6th Cir. 2005) (personal involvement in alleged unconstitutional conduct is a threshold

against an official in his official capacity is a claim against the municipality. *Matthews v. Jones,* 35 F.3d 1046, 1049 (6th Cir. 1994). A plaintiff raising a municipal liability claim under § 1983 must demonstrate that the alleged constitutional violation occurred because of a municipal policy, practice or custom. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). A plaintiff asserting a § 1983 claim must, "identify the policy, connect the policy to the [County] itself and show that the particular injury was incurred because of the execution of that policy." *Graham ex rel. Estate of Graham v. Cnty. Of Washtenaw*, 358 F.3d 377, 383 (6th Cir. 2004). To succeed in a *Monell* claim against an officer in his official capacity, a plaintiff must show that the municipality's policy or custom played a part in the constitutional violation. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Monell's policy or custom requirement applies when plaintiffs seek prospective relief, such as an injunction or a declaratory judgment, not just when damages are sought. *L.A. County v. Humphries*, 562 U.S. 29, 39 (2010); *Smith v. Leis*, 407 Fed. Appx. 918, n. 8 (6th Cir. 2011). This requirement is intended to ensure liability rests

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requirement for individual liability under §1983); *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002) (to survive dismissal, a complaint must set forth allegations that a defendant "personally participated in, or otherwise authorized, approved, or knowingly acquiesced in" the alleged unlawful conduct).

on a municipality's own violations, not on the violations of others. *Humphries*, 562 U.S. at 37.

The Second Amended Complaint does not set forth facts upon which Nabors or Putnam County can be found liable under § 1983. As stated above, *Iqbal* and *Twombly* require that to avoid dismissal for failure to state a claim, a complaint must contain more than "labels and conclusions," or "naked assertions devoid of further factual enhancement." "In the context of Section 1983 municipal liability, district courts in the Sixth Circuit have interpreted *Iqbal's* standards strictly." *Hutchison v. Metro. Gov't of Nashville & Davidson Cty.*, 685 F.Supp.2d 747, 751 (M.D. Tenn. 2010) (collecting cases). Failure to allege an unconstitutional government policy, which then caused a deprivation of a protected interest, precludes government liability under § 1983. *Arnold v. Metro. Gov't of Nashville and Davidson Cty.*, No. 3:09cv0163, 2009 U.S. Dist. LEXIS 68865, at *9 (M.D. Tenn. Aug. 6, 2009). The Second Amended Complaint does not contain factual allegations supporting a *Monell* claim against Nabors.

The Second Amended Complaint alleges Nabors is "the County Clerk of Putnam County, Tennessee, and is sued in his official capacity." (Second Amended Complaint, R.80, PageID #478). ULC/Ministers have not identified any policy, practice or custom of Nabors in his official capacity that deprived ULC/Ministers of

any right. ULC/Ministers argue "*Monell* is irrelevant" and that they need not meet its requirements because they do not allege an unconstitutional municipal policy or practice, but rather rely on "an unconstitutional statute implemented by the Clerks." (Plaintiff Response to County Motion, R.73, Page ID #440). However, there is no allegation Nabors "implemented" the allegedly unconstitutional provision of the amended statute at all. In the absence of such an allegation, ULC/Ministers' claims against Nabors cannot proceed. Similarly, ULC/Ministers' reliance on *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015) is misplaced. In that case, the county clerk took action – refusing to issue <u>any</u> marriage licenses following the Supreme Court's decision in *Obergefell v. Hodges*, 135 S.C. 2584 (2015) – that caused the plaintiffs' alleged injury. Here, there is no such allegation against Nabors.

ULC/Ministers claim they are entitled to file this action against Nabors simply because he is "charged with implementing an unconstitutional law." (Plaintiff Response Opposing Leave to File Motion to Dismiss, R.73, PageID# 440). That a county official has some role in implementing a statute is not sufficient to state a § 1983 claim against the county (or its officer in her official capacity). *Monell* requires more and those requirements exist to ensure that a municipality is held liable only for its own violations and not constitutional violations caused by others. *See Humphries*, 562 U.S. at 37. That purpose would not be served if, as ULC/Ministers assert, a

county can be liable for damages, costs and attorneys' fees simply because one of its public official's duties is related to a challenged statute, especially where, as here, the county official has not engaged in implementation of the allegedly unconstitutional provision of the statute as amended by 2019 Public Chapter 415. Because ULC/Ministers cannot meet the requirements of *Monell*, and in fact, have not even tried, the § 1983 claims against Nabors in his official capacity (which are claims against Putnam County) must be dismissed.

In conjunction with their § 1983 claims for declaratory and injunctive relief, ULC/Ministers are seeking damages, costs, and attorneys' fees under 42 U.S.C. § 1988. (Second Amended Complaint, R.80, PageID #495-96). Because their § 1983 claims against Nabors fail as a matter of law, ULC/Ministers are not entitled to any monetary relief against Nabors.

CONCLUSION

For the foregoing reasons, this Court should find that Nabors has immunity from suit for the claims ULC/Ministers have made against him. This Court otherwise lacks subject matter jurisdiction over ULC/Ministers' claim against Nabors. Accordingly, ULC/Ministers' claims against Nabors in his official capacity as County Clerk for Putnam County should be dismissed.

Respectfully submitted,

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April 19, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because it contains 12,908 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirement of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in proportionally spaced typeface in Times New Roman 14-point font.

/s/ Jeffrey G. Jones
JEFFREY G. JONES

April 19, 2021

CERTIFICATE OF SERVICE

I, Jeffrey G. Jones, hereby certify that on April 19, 2021, a copy of the Brief of Appellant Wayne Nabors, in his official capacity of County Clerk for Putnam County, Tennessee, was filed electronically through the appellate CM/ECF System. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated below and on the electronic filing receipt.

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ADDENDUM

Designation of Court Documents A-2

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