No. 19-926

IN THE
Supreme Court of the United States

KIM DAVIS,
Petitioner,
v.

DAVID ERMOLD, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

MATTHEW J. CLARK
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
matt@morallaw.org

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutions, Statutes, and Regulations

Other Authority

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes that religious liberty is the foremost gift of God, and Kim Davis was deprived of her religious liberty because of this Court's decision in *Obergefell*. In addition, the Foundation believes that the Framers of the Fourteenth Amendment did not intend for it to protect a right to same-sex marriage. This Court's decision in *Obergefell* to the contrary redefined marriage and set it on a collision course with religious liberty. The Foundation takes an interest in this case because of its importance for both religious liberty and the rule of law.

SUMMARY OF ARGUMENT

This case arose because Kim Davis refused to issue the Respondents a marriage license with her name on it. She objected because the Respondents were a same-sex couple, and her Christian faith

[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The parties were provided with more than ten-days' notice that the brief was coming. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

teaches that marriage is between one man and one woman. Kentucky law did not require Davis to issue the marriage license to the Respondents. The only basis for their lawsuit against her was this Court's decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Obergefell was decided 5-4,[2] and the makeup of the Court has changed since then. As the *Obergefell* dissenters argued, the Court's decision did not comport with the text or history of the Constitution. It also did not comport with the Court's traditional substantive-due-process analysis. Instead, as Chief Justice Roberts lamented, it came down to the personal views of five unelected lawyers, who read their own philosophies of "liberty" into the Fourteenth Amendment. Consequently, the Supreme Court took an incredibly important issue away from the democratic process, imposed same-sex marriage by judicial fiat, and put the religious liberty of millions of Americans like Kim Davis in jeopardy.

Obergefell was wrongly decided and must be overruled. The validity of *Obergefell* is an issue that is "antecedent to ... and ultimately dispositive of the present dispute." *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). The Court should therefore not only

---

[2] Arguably, Justices Ginsburg and Kagan, who voted for the majority of the opinion, should have recused themselves, because they conducted same-sex marriage ceremonies while *Obergefell* was impending. *See* Motion for Recusal by *Amicus Curiae* Foundation for Moral Law, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

grant Davis's petition but also ask the parties to address whether *Obergefell* should be overruled.

ARGUMENT

I. *Obergefell* Was Fundamentally Flawed Because the Constitution Does Not Create a Right to Same-Sex Marriage.

There are two questions presented in this case. The first is whether the Sixth Circuit erred in deviating from the standard analysis in right-to-marry cases because of *Obergefell*, and the second is whether it erred in its qualified-immunity analysis in *Obergefell*'s aftermath. Pet. at i. Neither of these questions would be presented but-for *Obergefell*.

The threshold issue, therefore, is whether the Constitution actually supports *Obergefell*'s conclusion that the Fourteenth Amendment creates a right to same-sex marriage. If it does not, then the Court should use this case as an opportunity to correct the mistake it made in *Obergefell*. If the Court believes that *Obergefell* was wrongly decided, then refusing to address that threshold issue is like arguing about the color of the emperor's new clothes when everyone can see that he is wearing no clothes at all.[3]

---

[3] Hans Christian Andersen, *The Emperor's New Clothes*, in *Andersen's Fairy Tales* (1837).

A. The Due Process Clause's Original Meaning

The Due Process Clause of the Fourteenth Amendment says, "No State shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const., amend. XIV, § 1. Grammatically, this Clause does not prohibit the government from abridging *substantive* rights, such as free exercise of religion, the right to keep and bear arms, or the like. Instead, it guarantees the people of the states the right to due *process* of law before the states deprive them of life, liberty, or property. It is procedural, not substantive; therefore it cannot be construed to recognize rights that are not in the Constitution. *See Timbs v. Indiana*, 139 S.Ct. 682, 692 (2019) (Thomas, J., concurring in judgment) (explaining that "due process" meant "by the law of the land"); *id.* at 691 (Gorsuch, J., concurring); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2632-34 (2015) (Thomas, J., dissenting) (explaining that "liberty" meant "freedom from physical restraint").

That alone should end the matter. The Due Process Clause does not address marriage because it applies only to the procedure the government must follow before it physically restrains a person. It does not address substantive rights, and therefore it does not create a right to same-sex marriage.

If any doubt remains, then as Justice Scalia said in his *Obergefell* dissent, we should examine whether the Framers of the Fourteenth Amendment thought that the Due Process Clause would somehow protect

the right to same-sex marriage in 1868. Justice Scalia said:

> When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.

Obergefell, 135 S.Ct. at 2628 (Scalia, J., dissenting).

B. The Court's Traditional Substantive-Due-Process Analysis

In 2010, the Court declined an opportunity to reconsider the doctrine of substantive due process but continued to hold that the Due Process Clause protects rights that are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (emphasis deleted). As Justice Alito observed in his *Obergefell* dissent, these limitations are essential "[t]o prevent five unelected Justices from imposing their personal vision of liberty upon the American people." *Obergefell*, 135 S.Ct. at 2640 (Alito, J., dissenting).

With that in mind, Justice Alito concluded that "it is beyond dispute that the right to same-sex marriage is not among those rights." *Id.* Justice Alito explained:

> In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. *See Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000. What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

Id. at 2715 (citations and quotation marks omitted; alteration in original).

C. The Abuse of Substantive Due Process: From *Dred Scott* to *Lochner* to *Obergefell*

If the Court were willing to limit the recognition of substantive due process rights to only those deeply rooted in our history, then as Justice Scalia said, the harm to our Constitution might be "narrowly limited." *McDonald*, 561 U.S. at 791 (Scalia, J., concurring). But as Justice Thomas observed, "the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights." *Id.* at 811 (Thomas, J., concurring in part and concurring in judgment).

As Justice Thomas explained in his *Obergefell* dissent, "substantive due process" is a "dangerous fiction" that "distorts the constitutional text" and invites judges to "roam at large in the constitutional field guided only by their personal views...." *Obergefell*, 135 U.S. at 2631 (Thomas, J., dissenting) (quotations, citations, and alterations omitted). "And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions." *Timbs,* 139 S.Ct. at 692 (Thomas, J., concurring in judgment) (citing *Dred Scott* and *Roe v. Wade*).

A brief review of this Court's precedents reveals that Justice Thomas was absolutely correct.

1. *Dred Scott*

As Justice Gorsuch has recognized, the doctrine of substantive due process was born in *Dred Scott*. Relying on the Fifth Amendment's Due Process Clause, this Court held:

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

Dred Scott v. Sandford, 60 U.S. 393, 450 (1857). In his dissent, Justice Curtis demonstrated that this understanding of due process was unheard of from the time of the Magna Charta until then, and would by its terms prohibit Congress from eliminating the slave trade or even the States from banning slavery. *Id.* at 624-27 (Curtis, J., dissenting).

For the first time, the Court interpreted the Due Process Clause to confer a *substantive* right to keep human beings as slaves, not a *procedural* right against arbitrary government power. Thus, Justice Gorsuch concludes that, in *Dred Scott*,

> the Court went out of its way to bend the Constitution's terms in an effort to try to quell

> unrest in the country over the question of slavery. The Court invented the legal doctrine of substantive due process, and then proceeded to use it to hold that Congress had no power to regulate slavery in the territories.

Neil Gorsuch, *A Republic, If You Can Keep It* (2019) (audiobook 6:58:10-6:58:32). *Accord Obergefell*, 135 U.S. at 2616-17 (Roberts, C.J., dissenting).

The Court's new invention of substantive due process did not accomplish the result it intended. It set America on a course for Civil War, which cost over three million lives.[4]

2. *Lochner*

After the debate of whether the Due Process Clause protects a right to slavery was settled on the battlefield and sealed by the Thirteenth Amendment, the Court embarked on another substantive-due-process journey in *Lochner v. New York*, 198 U.S. 45 (1905). In that case, this Court concluded that the Due Process Clause prohibited state interference with freedom of contract. 198 U.S. at 64. Justice Holmes famously dissented, arguing that the Court's decision was based on economic theory instead of the Constitution of the United States. *Id.* at 75 (Holmes, J., dissenting). Holmes's position eventually prevailed. *See West Coast Hotel Co. v. Parrish*, 300

[4] *America's Wars*, U.S. Department of Veterans Affairs, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited Dec. 11, 2019).

U.S. 379 (1937) (signaling the end of the *Lochner* era).

This Foundation is a conservative organization and is generally in favor of free-market economics. However, even if *Lochner* created a favorable *policy*, the problem is that the Constitution of the United States did not give the Court the power to create that policy. As George Washington warned in his Farewell Address:

> "If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

George Washington, *Farewell Address* (Sep. 19, 1796). Fortunately the Court saw *Lochner* and its progeny for what it was: a judicial overreach and an attempt to read *laissez-faire* economic policy into the Constitution. However desirable that policy may be, the Court has no authority to decide that issue.[5]

---

[5] One could argue that there is a deeply-rooted tradition in our Nation's history of freedom of contract that is fundamental to our scheme of ordered liberty. However, it does not follow that such a right is limitless. The States have traditionally reserved the right to legislate for the public health, safety, welfare, and morals. If freedom of contract had no limits, then

After the Thirteenth Amendment invalidated *Dred Scott* and the Court repudiated *Lochner*, one would think the Court would have ceased from creating new rights under the substantive-due-process doctrine.

3. "Personal Autonomy," from *Griswold* to *Roe* to *Obergefell*

But think again. For the third time, the Court embarked on a new era of inventing substantive-due-process rights. The third round was not based on slavery or economics, but (supposedly) on personal autonomy. As Justice Kennedy put it in *Planned Parenthood v. Casey* 505 U.S. 833, 851 (1992), "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[6]

This line of cases began in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognized a right of privacy. From this case spawned a long line

---

the State would be powerless to limit prostitution, drug sales, and a number of other evils that the States have traditionally prohibited.

[6] Judge Robert Bork offered the following criticism of Justice Kennedy's quote from *Casey*: "This is not an argument but a Sixties oration. It has no discernible intellectual content; it does not even tell us why the right to define one's own concept of 'meaning' includes a right to abortion or homosexual sodomy but not a right to incest, prostitution, embezzlement, or anything else a person might regard as central to his dignity and autonomy." Robert A. Bork, *A Country I Do Not Recognize: The Legal Assault on American Values* xviii (2005).

of cases involving fundamental rights to engage in sexual activities and be free of the consequences thereof. *See, e.g.*, *Eisenstadt v. Bard*, 405 U.S. 438 (1972) (invalidating a law prohibiting the distribution of contraceptives to married persons); *Roe v. Wade*, 410 U.S. 173 (1973) (invalidating laws banning abortion); *Casey*, 505 U.S. at 851 (affirming abortion because "matters involving the most and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating law prohibiting sodomy for the same reason). The latest in this line of cases is *Obergefell*, which mandated the legalization of same-sex marriage.

Judge Henry Friendly of the Second Circuit, echoing Justice Holmes's dissent in *Lochner*, recognized that the personal-autonomy rationale has nothing to do with the Constitution. In a draft opinion that was prepared two years before *Roe* was decided, Judge Friendly addressed the argument "that a person has a constitutionally protected right to do as he pleases with his—in this instance, her—own body so long as no harm is done to others." A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion* 7 (Apple Books 2006) (republishing 29 Harv. J. L. & Pub. Pol. 1035 (2006)).[7] Judge Friendly wrote,

---

[7]https://itunes.apple.com/WebObjects/MZStore.woa/wa/viewBook?id=512716719.

> Plaintiffs' position is quite reminiscent of the famous statement of J[ohn] S[tuart] Mill.... Years ago, when courts with considerable freedom struck down statutes that they strongly disapproved, Mr. Justice Holmes declared in a celebrated dissent that the Fourteenth Amendment did not enact Herbert Spencer's Social Statistics. No more did it enact J.S. Mill's views on the proper limits of law-making.

Id. at 7-8.

As Justice Holmes recognized in *Lochner*, and as Judge Friendly recognized in his abortion case, the Due Process Clause of the Fourteenth Amendment does not give federal judges the right to read their own philosophies of the limits of law-making into Constitution. However, that is exactly what the Court did in *Obergefell*. Recognizing this, Chief Justice Roberts concluded his dissent in *Obergefell*:

> "If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

Obergefell, 135 S.Ct. at 2626 (Roberts, C.J., dissenting).

D. *Obergefell*'s Incoherence Undermines the Rule of Law

Justice Kavanaugh wrote in 2017 about the importance of Justice Scalia's view that the rule of law is a law of rules. Brett Kavanaugh, *Keynote Address: Two Challenges for the Judge as an Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1909 (2017). He also stated that he shared Chief Justice Roberts's view of the judiciary as an umpire that calls balls and strikes rather than deciding who wins and who loses. *Id.* Justice Kavanaugh noted that this vision of the judiciary is threatened when the Court uses "vague and amorphous tests" because they are "antithetical to impartial judging and to the vision of the judge as umpire." *Id.* at 1919.

If ever there was a "vague and amorphous test" used to determine a constitutional issue of immense magnitude, it was found in *Obergefell*. Justice Scalia lamented the ambiguity of the majority opinion:

> Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think

Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way" ? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go

> on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

Obergefell, 135 S.Ct. at 2630 (Scalia, J., dissenting) (alterations in original).

Justice Scalia's laments echo Justice Kavanaugh's concerns about ambiguity being a threat to the rule of law. At the end of his keynote address, Justice Kavanaugh argued that "we should square up to the problem." Kavanaugh, *supra*, at 1919. *Amicus* agrees and respectfully calls on this Court to square up to the problem that *Obergefell* created for the rule of law.[8]

E. Conclusion: The Due Process Clause Does Not Create a Right to Same-Sex Marriage

The right to same-sex marriage cannot be logically deduced from the text of the Fourteenth Amendment, nor can it be found in the history or traditions of our people. *Obergefell* does not comport with the original public meaning of the Due Process Clause. *Obergefell*, 135 S.Ct. at 2631-37 (Thomas, J., dissenting). It does

---

[8] In context, Justice Kavanaugh was talking about the problem of constitutional exceptions. The same logic applies to substantive due process, though. The substantive-due-process doctrine itself is an exception to the constitutional rule that rights must appear in the Constitution itself.

not comport with this Court's traditional substantive-due-process analysis. *Id.* at 2640 (Alito, J., dissenting). It does not comport with the decisions of 35 state legislatures that decided this issue democratically. *See id.* at 2626-29 (Scalia, J., dissenting) (discussing *Obergefell*'s threat to American democracy); *id.* at 2638 (Alito, J., dissenting) (noting that 35 legislatures had decided this issue democratically, 32 of which recognized marriage as between a man and a woman). Instead, it is only the judicial will of "five lawyers" that have "imposed their own vision of a marriage as a matter of constitutional law." *Id.* at 2611-12 (Roberts, C.J., dissenting).

The Constitution does not grant this Court a "*super*-legislative power" to create a right to same-sex marriage. *Id.* at 2629 (Scalia, J., dissenting). The Court should therefore not only examine the merits of the claims that Davis raises in her petition, but it should also reexamine the "naked judicial claim to legislative power" that made Davis the target of the present lawsuit. *Id.* This Court should not only grant Davis's petition but also call for briefing on whether *Obergefell* should be overruled.

II. The Clash with Religious Liberty Is Another Important Reason to Reconsider *Obergefell*

All nine Justices in *Obergefell* saw the inevitable collision course with religious liberty. The majority addressed that issue as follows:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell, 135 S.Ct. at 2607.

The dissenters, however, were not satisfied with this concession. Chief Justice Roberts noted, "The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage.... The First Amendment guarantees, however, the freedom to 'exercise' religion. Ominously, that is not a word the majority uses." *Id.* at 2625 (Roberts, C.J., dissenting). Justice Thomas described the majority's concession as a "weak gesture" that "indicates a serious misunderstanding of religious liberty in our Nation's tradition," which is "about freedom of *action*[.]" *Id.* at 2638 (Thomas, J., dissenting) (emphasis added). And Justice Alito warned, almost prophetically,

> I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being

> labeled as bigots and treated as such by governments, employers, and schools.

Id. at 2642-43 (Alito, J., dissenting).

This case is a direct result of the clash between *Obergefell* and religious liberty. Recent cases before the Court arose from the clash between religious freedom and a state law that compelled the recognition of same-sex marriage. *See, e.g.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. State of Washington*, 138 S.Ct. 2671 (2018); *Klein v. Oregon Bureau of Labor & Indus.*, 139 S.Ct. 2713 (2019). In contrast, Kentucky had no statutory law that compelled Davis to provide services to same-sex couples. The only basis for compelling Davis to issue same-sex marriage licenses was this Court's decision in *Obergefell*.

When same-sex marriage and religious liberty clash, the latter must take precedence over the former. As Chief Justice Roberts noted in his dissent, the right to free exercise of religion is actually in the Constitution itself, whereas the right to same-sex marriage is merely "imagined." *Obergefell*, 135 S.Ct. at 2625 (Roberts, C.J., dissenting). Justice Scalia likewise noted that the "Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments." *Id.* at 2627 (Scalia, J., dissenting). One of those limitations they placed was on "prohibiting the free exercise of religion." *Id.*

The People of the United States insisted on protecting the free exercise of religion because they believed (correctly) that religious liberty was ultimately an unalienable right given to them by their Creator. As the Declaration of Independence states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed....

The Declaration of Independence para. 2 (U.S. 1776). Thus, the Founders did not necessarily believe that the government or even society created our unalienable rights, but rather they were given by God and merely *secured* by human governments.

Among all of these rights, religious liberty was the foremost. James Madison, applying the logic from the Declaration of Independence, said in his famous *Memorial and Remonstrance*:

> [W]e hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the

> conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

James Madison, *Memorial and Remonstrance* (June 20, 1785).

Thus, religious liberty is important not only because it is protected by the Constitution itself, but

also because it was given by our Creator. In contrast, the "right" recognized in *Obergefell* was only "imagined." *Obergefell*, 135 S.Ct. at 2625 (Roberts, C.J., dissenting). If this Court must decide between protecting either a God-given, constitutionally protected right or an imaginary right, then the answer to that dilemma is self-evident.

Applying the foregoing to the present case, the First Amendment's protection of religious liberty certainly entitled Kim Davis to at least qualified immunity (if not full immunity). As Chief Justice Roberts observed, "Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage[.]" *Id.* The whole purpose of qualified immunity is to protect state officials when such "hard questions" arise.

Obergefell held that same-sex couples had the right to marry. However, *Obergefell* did not address whether a state official with religious objections to same-sex marriage may decline to issue a marriage license with her name on it when the people seeking to get married could have received that license from literally any other county in the state. *See* Pet. at 27-35.

The Foundation would go a step further and say that the Free Exercise Clause, properly understood, entitled Davis to full immunity, not just qualified immunity. It is not necessary to fully explore that

issue in this case,[9] but the Foundation raises this point to illustrate how *Obergefell* has caused a serious problem for Americans like Davis who have religious objections to Court-created same-sex marriage. This is another reason why the Court should take this opportunity to reconsider *Obergefell* altogether.

III. The Doctrine of *Stare Decisis* Should Not Hinder This Court from Reconsidering *Obergefell*

It may be objected that *Obergefell* was wrongly decided but should still be followed under the doctrine of *stare decisis*. The Foundation believes this objection can be overcome with little discussion.

Last year, Justice Thomas issued a masterful concurrence, discussing the originalist view of *stare decisis*. *Gamble v. United States*, 139 S.Ct. 1960, 1984 (2019) (Thomas, J., concurring). Drawing on Blackstone's view of precedent, Justice Thomas concluded that an incorrect decision of this Court should not be followed when it is plainly contrary to the Constitution. In light of the common law view of

---

[9] The Foundation notes that this Court has just granted certiorari in *Fulton v. City of Philadelphia*, No. 19-123, which arose from a city ordinance that required a Catholic adoption agency to place children with same-sex couples contrary to their religious beliefs. One of the questions presented in that case is whether this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), should be overruled. The Foundation respectfully urges the Court in that case to overrule *Smith* and give the Free Exercise Clause the robust constitutional protection that the Framers of the First Amendment intended.

precedent that the Founders adopted, Chief Justice Roberts and Justice Alito have accurately said that *stare decisis* is not an "inexorable command" but rather a "principle of policy" that should not be followed when doing so would undermine the rule of law instead of promoting it. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). The Foundation agrees wholeheartedly with these propositions. In light of the discussions in Parts I and II of this brief, the Foundation believes that this Court should have no problem concluding that *Obergefell* was very wrongly decided.

The Court sometimes engages in a more thorough analysis of whether a prior decision must be overruled. *See, e.g.*, *Janus v. American Federation of State, Cnty., & Mun. Employees, Council 31*, 138 S.Ct. 2448, 2478-79 (2018) (examining five factors for consideration). The Foundation respectfully submits that the Constitution requires this Court to examine only whether the decision was correctly decided rather than weighing various factors. Nevertheless, in order to ensure that the Court does not dismiss the argument that *Obergefell* should be overruled, the Foundation will briefly examine the five factors from *Janus*.

Before addressing the factors, the Court stated that the doctrine of *stare decisis* is at its weakest in examining constitutional questions, because it would require a constitutional amendment to reverse the Court's decision. *Id.* at 2478. The Court also said that "*stare decisis* applies with perhaps the least force of all to decisions that wrongly denied First

Amendment rights." *Id.* Such is the case here, because *Obergefell* failed to adequately protect the First Amendment's guarantee of free exercise of religion to people like Kim Davis. Thus, even before examining the five factors, the argument that *stare decisis* insulates *Obergefell* is already weak.

The five factors are: (1) the quality of *Obergefell*'s reasoning, (2) the workability of the rule it established, (3) its consistency with other related decisions, (4) developments since the decision was handed down, and (5) the reliance on the decision. *Janus*, 138 S.Ct. at 2478-79.

As established in Part I, the quality of *Obergefell*'s reasoning was poor. Justice Scalia argued that if he ever had to join an opinion that was reasoned like *Obergefell*, he would "hide [his] head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie." *Obergefell*, 135 S.Ct. at 2630 n.22 (Scalia, J., dissenting).

The second and fourth factors weigh against affirming *Obergefell* as well. The present case, as well as other cases like *Masterpiece Cakeshop* and *Fulton v. City of Philadelphia*, show that the decision is not workable because of the clash between same-sex marriage and religious liberty. The only developments of significance that have occurred since *Obergefell* are that people of faith are getting punished for what they believe.

The third factor rules against *Obergefell* as well. The Court had long recognized marriage as between a man and a woman. *See, e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (referring to marriage as "the union for life of one man and one woman"). That union formed "the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Consequently, the Court rejected attempts to redefine marriage in previous cases. *See Reynolds v. United States*, 98 U.S. 145 (1879) (rejecting argument that the First Amendment protects polygamy); *Baker v. Nelson*, 409 U.S. 810 (1972) (summarily dismissing appeal involving same-sex marriage for want of a substantial federal question). This Court's decision in *Loving v. Virginia,* 388 U.S. 1 (1967) struck down a law that prohibited interracial marriage, but it did not change the *definition* of marriage. *Obergefell*'s protection of same-sex marriage therefore "is not the protection of a deeply rooted right but the recognition of a very new right." *United States v. Windsor*, 570 U.S. 744, 808 (2013) (Alito, J., dissenting).

The only factor that could plausibly weigh in favor of *Obergefell* is reliance. Because of this Court's error in *Obergefell*, people have relied on that decision that will have to readjust their lives if *Obergefell* is overruled. But the greater harm is the one being done to people like Kim Davis. That harm will continue to get worse the longer the Court delays in overruling *Obergefell*, as will the harm to the people who have relied on it.

All things considered, therefore, the doctrine of *stare decisis* should not make the Court hesitate to overrule *Obergefell*.

CONCLUSION

The fundamental problem with this case is that Kim Davis never should have been sued in the first place. But for this Court's decision in *Obergefell*, she would not have been sued. *Obergefell* deviated from the text and original intent of the Constitution and even from the Court's traditional substantive-due-process analysis. Five lawyers read their personal views into the Constitution and decided a very important issue that should have been left to the states and the people. Kim Davis lost her religious liberty because of it, and many more Americans will as well—unless this Court recognizes *Obergefell*'s error and overrules it.

The Foundation therefore respectfully requests for this Court to grant Davis's petition and call for briefing on whether *Obergefell* should be overruled.

Respectfully submitted,

MATTHEW J. CLARK
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
matt@morallaw.org
Counsel for *Amicus Curiae*