

No. _____

IN THE
Supreme Court of the United States

KIM DAVIS,

Petitioner,

v.

DAVID ERMOLD; DAVID MOORE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Obergefell v. Hodges*, “five lawyers closed the debate,” and imposed “an act of will, not legal judgment. The right it announce[d] had no basis in the Constitution.” 576 U.S. 644, 687 (2015) (Roberts, J., dissenting). “[T]he Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text.” *Davis v. Ermold*, 141 S. Ct. 3, 3 (2020) (Thomas, J., Statement). As predicted at the time *Obergefell* was decided, it “would threaten the religious liberty of many Americans who believe that marriage is a sacred institution between one man and one woman.” *Id.* “As a result of this Court’s alteration of the Constitution, Davis found herself with a choice between her religious beliefs and her job. When she chose to follow her faith . . . she was sued almost immediately for violating the constitutional rights of same-sex couples.” *Id.* And, after being sued, she was thrown in jail for doing so and then faced a jury verdict of \$100,000 (plus \$260,000 in attorney’s fees) based solely on emotional distress damages for “hurt feelings” with no actual damages in her *individual capacity* because the lower courts held that she was entitled to no First Amendment protection. If ever a case deserved review, the first individual who was thrown in jail post-*Obergefell* for seeking accommodation for her religious beliefs should be it.

The Questions Presented are:

(1) Whether the First Amendment Free Exercise Clause provides an affirmative defense to tort liability

based solely on emotional distress damages with no actual damages in the same manner as the Free Speech Clause under *Snyder v. Phelps*, 562 U.S. 443 (2011).

(2) Whether a government official stripped of Eleventh Amendment immunity and sued in her individual capacity based solely on emotional distress damages with no actual damages is entitled to assert individual capacity and personal First Amendment defenses in the same or similar manner as any other individual defendant like in *Snyder v. Phelps*, 562 U.S. 443 (2011), or does she stand before this Court with no constitutional defenses or immunity whatsoever.

(3) Whether *Obergefell v. Hodges*, 576 U.S. 644 (2015), and the legal fiction of substantive due process, should be overturned.

PARTIES

Petitioner is Kim Davis. Respondents are David Ermold and David Moore.

DIRECTLY RELATED PROCEEDINGS

Davis v. Ermold, 141 S. Ct. 3 (2020), Denying Petition for Writ of Certiorari.

Ermold v. Davis, No. 24-5524, 2025 WL 1409285 (6th Cir. Apr. 28, 2025), Order Denying Petition for Rehearing/Rehearing En Banc.

Ermold v. Davis, 130 F.4th 553 (6th Cir. 2025), Opinion Affirming District Court's Judgment.

Ermold v. Davis, No. 22-5260, 2022 WL 4546726 (6th Cir. Sept. 29, 2022), Opinion Affirming District Court's Denial of Qualified Immunity.

Ermold v. Davis, 936 F.3d 429 (6th Cir. 2019), Opinion Affirming District Court's Grant of Sovereign Immunity and Denial of Qualified Immunity.

Ermold v. Davis, 855 F.3d 715 (6th Cir. 2017), Order Reversing District Court's Dismissal of Complaint.

Ermold v. Davis, No. 15-46-DLB-EBA, 2024 WL 2789426 (E.D. Ky. Apr. 23, 2024), Order Denying Petitioner's Renewed Motion for Judgment as a Matter of Law.

Ermold v. Davis, No. 15-46-DLB-EBA, 2023 WL 9058371 (E.D. Ky. Dec. 28, 2023), Order Granting Plaintiffs' Motion for Attorney's Fees and Costs.

Ermold v. Davis, No. 15-46-DLB-EBA, 2022 WL 830606 (E.D. Ky. Mar. 18, 2022), Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.

Ermold v. Davis, No. 15-46-DLB-EBA, 2017 WL 4108921 (E.D. Ky. Sept. 15, 2017), Order Denying Defendant's Motion to Dismiss.

TABLE OF CONTENTS

| | |
|---|------|
| QUESTIONS PRESENTED | i |
| PARTIES | iii |
| DIRECTLY RELATED PROCEEDINGS..... | iii |
| TABLE OF CONTENTS | v |
| TABLE OF APPENDICES | viii |
| TABLE OF AUTHORITIES | ix |
| OPINIONS AND ORDERS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT OF THE CASE..... | 2 |
| I. Introduction..... | 2 |
| II. Statement Of The Facts And Procedural Background..... | 5 |
| A. Kentucky’s marriage licensing scheme before <i>Obergefell v. Hodges</i> and the Governor’s same- sex marriage mandate..... | 5 |
| B. Petitioner’s sincerely held religious beliefs about marriage | 6 |
| C. The proceedings below. | 7 |
| D. The incarceration of Petitioner for the exercise of her sincere religious beliefs..... | 8 |
| E. Petitioner’s quest for a religious accommodation and the ultimate change enacting Petitioner’s requested relief..... | 9 |
| F. The jury verdict awarding emotional distress with no actual damages on nothing more than Petitioner’s exercise of religious beliefs..... | 13 |
| G. The lower court’s stripping Petitioner of any level of immunity and depriving her of any defenses..... | 14 |
| REASONS FOR GRANTING THE PETITION | 16 |

| | |
|---|----|
| I. The Sixth Circuit’s Decision Involves An Important Federal Question Of Whether A Government Official Stripped Of Sovereign Immunity And Standing Before the Court In Only Her Individual Capacity Is Entitled To Assert First Amendment Defenses To Tort Liability Based Solely On Emotional Distress Without Any Actual Damages. | 16 |
| A. The Sixth Circuit’s decision conflicts with this Court’s precedent on whether government officials sued in their individual capacity and stripped of Eleventh Amendment immunity come to the court as individuals rather than state actors. | 16 |
| B. The Sixth Circuit’s decision conflicts with precedent from the Fifth Circuit on whether individual-capacity defendants may assert defenses to tort liability, including claims for emotional distress. | 19 |
| C. This Court should grant the Petition to answer an important federal question of whether government officials sued in their individual capacity and stripped of sovereign immunity stand in a constitutional desert relating to their defenses to liability for damages based on emotional distress with no actual damages.22 | |
| II. The Sixth Circuit’s Decision Involves The Important Federal Question Of Whether The First Amendment Free Exercise Clause Provides A Defense To Tort Liability Based Solely On Emotional Distress Like The Free Speech Clause Defense Recognized In <i>Snyder v. Phelps</i> And Other Precedent From This Court | 24 |

- A. The Sixth Circuit’s decision directly conflicts with this Court’s precedents on whether the First Amendment Free Exercise Clause provides a defense to tort liability. 25
- B. The Sixth Circuit’s decision directly conflicts with decisions from the Ninth Circuit and authoritative precedents from state supreme courts and other federal courts. 27
- C. Whether the First Amendment Free Exercise Clause provides a defense to tort liability based on emotional distress with no actual damages is an important federal question that has not been but should be answered by this Court. 31
- III. This Court Should Revisit And Reverse *Obergefell* For The Same Reasons Articulated In *Dobbs v. Jackson Women’s Health Center*. 32
 - A. *Obergefell* was wrong when it was decided and it is wrong today because it was grounded entirely on the legal fiction of substantive due process. 32
 - B. Even if substantive due process is not overturned entirely, *Obergefell* should be because the right articulated is neither carefully described nor deeply rooted in the nation’s history. 36
 - C. *Obergefell* should be overturned because the Constitution makes no reference to same-sex marriage and no such right is implicitly recognized by any constitutional provision. . 37
 - D. The Respect for Marriage Act removes any argument based on reliance because same-sex couples who have a marriage license are grandfathered when this Court overrules *Obergefell*. Overruling *Obergefell* returns

| | |
|---|----|
| marriage policy to the states, where it belongs..... | 38 |
| CONCLUSION..... | 40 |

TABLE OF APPENDICES

| | |
|---|-----|
| APPENDIX A – DAVID ERMOLD, DAVID MOORE v. KIM DAVIS, individuals, No. 24-5524 (6th Cir. Mar. 6, 2025), Opinion Affirming District Court’s Judgment..... | 1a |
| APPENDIX B – DAVID ERMOLD, DAVID MOORE v. KIM DAVIS, individuals, No. 24-5524 (6th Cir. Mar. 6, 2025), Judgment..... | 35a |
| APPENDIX C – DAVID ERMOLD, DAVID MOORE v. KIM DAVIS, individuals, No. 15-46-dlb-eba (E.D. Ky. Dec. 28, 2023) Judgment..... | 36a |
| APPENDIX D – DAVID ERMOLD, DAVID MOORE v. KIM DAVIS, individuals, No. 24-5524 (6th Cir. Apr. 28, 2025), Order Denying Rehearing and Rehearing En Banc..... | 37a |

TABLE OF AUTHORITIES

Cases

| | |
|--|---------|
| <i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023) | 24 |
| <i>Ansell v. Ross Twp.</i> , 2012 WL 1038825 (W.D. Penn. Mar. 28, 2012) | 21 |
| <i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000) | 24 |
| <i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940) | 30 |
| <i>Connick v. Myers</i> , 461 U.S. 138 (1983) | 32 |
| <i>Connor v. Reinhard</i> , 847 F.2d 384 (7th Cir. 1988) . | 21 |
| <i>Davis v. Ermold</i> , 141 S. Ct. 3 (2020) | i, 35 |
| <i>Dep’t of State v. Munoz</i> , 144 S. Ct. 1812 (2024) | 36 |
| <i>Dobbs v. Jackson Women's Health Org.</i> , 597 U.S. 215 (2022)..... | 32, 39 |
| <i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)..... | 5 |
| <i>Ermold v. Davis</i> , 130 F.4th 553 (6th Cir. 2025)... | iii, 1 |
| <i>Ermold v. Davis</i> , 855 F.3d 715 (6th Cir. 2017) | iii, 7 |
| <i>Ermold v. Davis</i> , 936 F.3d 429 (6th Cir. 2019) .. | iii, 17 |
| <i>Ermold v. Davis</i> , No. 15-46-DLB-EBA, 2017 WL 4108921 (E.D. Ky. Sept. 15, 2017)..... | iv |
| <i>Ermold v. Davis</i> , No. 15-46-DLB-EBA, 2022 WL 830606 (E.D. Ky. Mar. 18, 2022) | iv |
| <i>Ermold v. Davis</i> , No. 15-46-DLB-EBA, 2023 WL 9058371 (E.D. Ky. Dec. 28, 2023) | iv |
| <i>Ermold v. Davis</i> , No. 15-46-DLB-EBA, 2024 WL 2789426 (E.D. Ky. Apr. 23, 2024) | iii, 1 |
| <i>Ermold v. Davis</i> , No. 22-5260, 2022 WL 4546726 (6th Cir. Sept. 29, 2022) | iii |
| <i>Ermold v. Davis</i> , No. 24-5524, 2025 WL 1409285 (6th Cir. Apr. 28, 2025)..... | iii, 1 |

| | |
|--|----------------|
| <i>Gaddy v. Corporation of President of Church of Jesus Christ of Latter-Day Saints</i> , 551 F. Supp. 3d 1206 (D. Utah 2021)..... | 30 |
| <i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006) | 32 |
| <i>Glass v First United Pentecostal Church</i> , 676 So.2d 724 (La. App. 3d Cir. 1996)..... | 30 |
| <i>Hafer v. Melo</i> , 502 U.S. 21 (1991)..... | 17, 19, 22 |
| <i>Hardin v. Straub</i> , 954 F.2d 1193 (6th Cir. 1992) | 19, 21 |
| <i>Holder v. Robbins</i> , 2006 WL 751238 (E.D. Ky. Mar. 21, 2006) | 21 |
| <i>Hubbard v. J Message Group Corp.</i> , 325 F. Supp. 3d 1198 (D.N.M. 2018)..... | 29 |
| <i>Kentucky v. Graham</i> , 473 U.S. 159 (1985) .. | 17, 18, 22 |
| <i>Laird v. Spencer</i> , 2025 WL 79826 (5th Cir. Jan. 13, 2025) | 20 |
| <i>Lindke v. Freed</i> , 601 U.S. 187 (2024) | 31 |
| <i>Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm’n</i> , 584 U.S. 617 (2018) | 23 |
| <i>Miller v. Davis</i> , 123 F. Supp. 3d 924 (E.D. Ky. 2015)..... | 5, 6 |
| <i>Murphy v I.S.K.Con. of New England, Inc.</i> , 571 N.E.2d 340 (Mass. 1991)..... | 30 |
| <i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)..... | 20, 28 |
| <i>New York Times.” Naoko Ohno v. Yuko Yasuma</i> , 723 F.3d 984 (9th Cir. 2013)..... | 29 |
| <i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)..... | ii, 33, 36, 37 |
| <i>Olson v. First Church of Nazarene</i> , 661 N.W.2d 254 (Minn. Ct. App. 2003) | 30 |

| | |
|--|--------------------|
| <i>Paul v. Watchtower Bible & Tract Society</i> , 819 F.2d 875 (9th 1987) | 26 |
| <i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984) | 22 |
| <i>Pleasant Glade Assembly of God v. Schubert</i> , 264 S.W.3d 1 (Tex. 2008) | 29 |
| <i>Sands v. Living Word Fellowship</i> , 34 P.3d 955 (Alaska 2001) | 29 |
| <i>Schneiderman v. United States</i> , 320 U.S. 118 (1943) | 3 |
| <i>Snyder v. Evangelical Orthodox Church</i> , 216 Cal. App. 3d 297 (Cal. Ct. App. 6th 1989) | 29 |
| <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011) | ii, 20, 23, 25, 31 |
| <i>Tauscher v. Hanshew</i> , 2023 WL 6787433 (N.D. Cal. Aug. 7, 2023) | 39 |
| <i>Thomas v. Review Bd. of Indiana Emp. Sec. Div.</i> , 450 U.S. 707 (1981) | 3 |
| <i>United States v. Ballard</i> , 322 U.S. 78 (1944) | 26, 27, 31 |
| <i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997) | 36 |
| <i>Will v. Michigan Dep't of State Police</i> , 491 U.S. 58 (1989) | 18 |
| Statutes | |
| 1 U.S.C. §7(a) | 38 |
| 28 U.S.C. §1254(1) | 1 |
| KRS 150.195(2) | 12 |
| KRS 402.240 | 11 |
| Ky. Rev. Stat. § 446.350 (2013) | 12 |

OPINIONS AND ORDERS BELOW

The Sixth Circuit’s order denying Petitioner’s Petition for Rehearing/Rehearing En Banc is unreported but available electronically at *Ermold v. Davis*, No. 24-5524, 2025 WL 1409285 (6th Cir. Apr. 28, 2025), and reproduced in the Appendix at 37a. The Sixth Circuit’s Opinion affirming the district court’s denial of Petitioner’s renewed motion for judgment as a matter of law and the jury’s verdict is reported at *Ermold v. Davis*, 130 F.4th 553 (6th Cir. 2025), and reproduced in the Appendix at 1a-35a. The district court’s Order denying Petitioner’s renewed motion for judgment as a matter of law is unreported but available electronically at *Ermold v. Davis*, No. 15-46-DLB-EBA, 2024 WL 2789426 (E.D. Ky. Apr. 23, 2024).

JURISDICTION

The Sixth Circuit issued its Opinion and Judgment on March 6, 2025, App.1a-35a, and issued its Order denying Rehearing/Rehearing En Banc on April 28, 2025. App.37a. Petitioner invokes the Court’s jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. Const. amend. I.

STATEMENT OF THE CASE

I. Introduction.

As the Chief Justice recognized at the time *Obergefell* was decided, “[t]he majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.” 576 U.S. at 687 (Roberts, C.J., dissenting). “In *Obergefell v. Hodges*, the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text.” *Davis v. Ermold*, 141 S. Ct. 3 (2020) (Thomas, J., Statement).

As was predicted at the time *Obergefell* was decided, it “would threaten the religious liberty of many Americans who believe that marriage is a sacred institution between one man and one woman.” *Id.* Indeed, *Obergefell* “creates serious questions about religious liberty,” and “people of faith can take no comfort in the treatment they receive[d] from the majority.” 576 U.S. at 711 (Roberts, C.J., dissenting). As Justice Alito opined, “those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes” but little else without staggering consequences. *Id.* at 741 (Alito, J., dissenting). Justice Thomas’s prediction proved more prescient, noting that *Obergefell* had “potentially ruinous consequences for religious liberty.” *Id.* at 735 (Thomas, J., dissenting). His prediction proved true. “As a result of this Court’s alteration of the Constitution, Davis found herself with a choice between her religious beliefs and her job. When she chose to follow her faith

. . . she was sued almost immediately for violating the constitutional rights of same-sex couples.” *Davis*, 141 S. Ct. at 3 (Thomas, J.). *And, after being sued, she was thrown in jail for insisting that her name be removed from the marriage certificates (which was done within five months by Executive Order and later by state law) and then found liable for hundreds of thousands of dollars.*

In a country begat by those “who sought refuge in a new world from the cruelty and oppression of the old, where men have been burned at the stake, imprisoned, and driven into exile in countless numbers for their political and religious beliefs,” *Schneiderman v. United States*, 320 U.S. 118, 120 (1943), we can do better, and the Constitution demands we do so. Davis was “put to a choice between fidelity to religious belief or cessation of work” (and ultimately jail and hundreds of thousands of dollars in damages). *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). The First Amendment precludes that Hobson’s choice, yet the lower courts declined to protect Davis. If ever there was a case of exceptional importance, the first individual in the Republic’s history who was jailed for following her religious convictions regarding the historic definition of marriage, this should be it.

Nevertheless, the lower court held that the First Amendment provides no shield for Davis as an individual because she was originally sued as a state actor and allegedly remained a state actor—even to this day, long after she left office, and even though she was stripped of all government immunity. As the

Sixth Circuit saw the matter, “Davis cannot raise the First Amendment as a defense because she is being held liable for state action, which the First Amendment does not protect.” App.14a. At the beginning when she was an elected clerk sued in her official capacity, Davis asked for a religious *accommodation*. The lower courts denied this simple request during the first five months after *Obergefell* was decided. Then, in December 2015, the newly elected governor granted the accommodation request by Executive Order. This was followed by the Kentucky legislature unanimously passing a law in April 2016 that codified the accommodation Davis sought for all clerks. But to punish Davis, Plaintiffs continued to press their claims and thereby strip Davis of qualified immunity, thus exposing her to an individual capacity lawsuit. In her individual capacity, Davis raised the First Amendment as an affirmative defense, but the lower courts denied her defense. Now *Davis stands before the Court solely as an individual—stripped of any government immunity*. In her *official* capacity, the lower courts denied her simple religious accommodation request. Now in her *individual* capacity, the lower courts denied her First Amendment affirmative defense. This cannot be. Davis was left with no defenses, constitutional or otherwise.

As the Sixth Circuit acknowledged, Davis’s contention “that the Free Exercise Clause provides her an affirmative defense to liability” is “an issue of first impression.” App.13a-14a. Because the questions presented in this Petition involve a critically important federal question that has not been, but

should be, answered by this Court, and because First Amendment rights are “of transcendent value to all of society, and not merely to those exercising their rights,” *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), the Court should grant the Petition. Anything less would leave the First Amendment’s promises hollow to those who agree to public service and are sued for exercising their religious beliefs during that time.

II. Statement Of The Facts And Procedural Background.

A. Kentucky’s marriage licensing scheme before *Obergefell v. Hodges* and Governor Beshear’s same-sex marriage mandate.

Prior to *Obergefell*, Kentucky constitutionally and statutorily defined marriage as the union between one man and one woman. Ky. Const. § 233A (2004); Ky. Rev. Stat. § 402.005 (1998). The pre-*Obergefell* statutory marriage license form included a license to marry under the name and authority of the county clerk. Ky. Rev. Stat. § 402.100 (2006); *Miller v. Davis*, 123 F. Supp. 3d 924, 931-32 (E.D. Ky. 2015), *vacated*, 667 F. App’x 537 (6th Cir. 2016).

On June 26, 2015, moments after this Court announced its opinion in *Obergefell*, former Kentucky Governor Steve Beshear issued a directive to all Kentucky county clerks (“Mandate”) to “recognize as valid all same sex marriages performed in other states and in Kentucky.” R.128. In this Mandate, Governor Beshear further commanded, Kentucky

“must license and recognize the marriages of same-sex couples,” and ordered the creation and distribution of new marriage license forms to accommodate same-sex couples. *Id.* The new form retained the requirement to issue the license under the name and authority of the county clerk. R.130.

B. Petitioner’s sincerely held religious beliefs about marriage.

Davis possesses a sincerely held religious belief that marriage is a union between one man and one woman. R.121. Davis could not affix her name to a marriage of same-sex couples because it violates her core religious beliefs. In her sincere belief, the endorsement of her name and authorization equates to approval and agreement. *See Miller*, 123 F. Supp. 3d at 932. Following the Mandate, Davis discontinued issuing *any and all* marriage licenses. R.121. *See also Miller*, 123 F. Supp. 3d at 929-30. Rather than withdraw her authorization for only same-sex marriages, Davis withdrew her authorization to issue *any* marriage license in her name to *any* couple. *Id.* Her intent in doing so was a temporary policy until her religious beliefs could be accommodated, and, as the President the Kentucky Senate wrote in an amicus brief in support of Davis, “the concept of marriage as between a man and a woman is so interwoven into KRS Chapter 402 that the defendant County Clerk cannot reasonably determine her duties until such time as the General Assembly has clarified the impact of *Obergefell* by revising KRS Chapter 402 through legislation.” R.902.

C. The proceedings below.

Plaintiffs filed suit against Davis on July 10, 2015, after the virtually identical *Miller v. Davis* suit was filed, but before the Executive Order and enactment of SB 216 that granted Davis an accommodation. R.1-7.¹ Following the Sixth Circuit's vacatur of the *Miller* preliminary injunction orders, the district court consolidated the instant case with *Miller* and *Yates v. Davis*, another case challenging Davis's accommodation under the caption *In re: Ashland Civil Actions*, for the purpose of dismissing all three actions as moot. R.95-97.

Plaintiffs appealed the dismissal of their case. R.98-100. The Sixth Circuit reversed the dismissal and remanded the case for reinstatement of Plaintiffs' claims. *Ermold v. Davis*, 855 F.3d 715 (6th Cir. 2017). The district court granted Plaintiffs leave to amend their complaint, R.117, which Plaintiffs did on June 8, 2017. R.119-136.

According to the Amended Complaint, Plaintiffs are two males residing in Rowan County, Kentucky, who desired but were denied a Kentucky marriage license from *Kim Davis*. R.119, 121, 123.² Based on

¹ After winning the election for governor on November 3, 2015, Matt Bevin granted the accommodation Davis sought by Executive Order on December 22, 2015. Then, in April 2016, the Kentucky legislature unanimously codified the accommodation Davis sought for Davis and all clerks.

² Plaintiffs could have obtained a marriage license from any clerk in Kentucky, but they demanded that Davis issue the license in

Obergefell and Governor Beshear’s Mandate, Plaintiffs alleged that their constitutional right to marry includes the right to be issued a marriage license by *Kim Davis*, in Rowan County. R.119-121, 124. Davis’s observance of her “deeply held Christian beliefs” about marriage, Plaintiffs claim, violated their constitutional right to marry. R.121, 124. Plaintiffs sought actual and punitive damages, pre- and post-judgment interest, and attorneys’ fees and costs against Davis. R.25.

D. The incarceration of Petitioner for the exercise of her sincere religious beliefs.

Plaintiffs were not the first to file suit against Davis following *Obergefell*. On July 2, 2015, less than one week after Governor Beshear issued his Mandate, the plaintiffs in *Miller v. Davis* (two same-sex and two different-sex couples) filed suit alleging federal constitutional claims and demanding issuance of marriage licenses to them in Rowan County, under Kim Davis’s name and authority. *Miller*, 123 F. Supp. 3d at 930-31. The *Miller* Plaintiffs filed the action on behalf of themselves and “a putative class of individuals who are qualified to marry and who intend to seek a marriage license from the Rowan County Clerk.” *Id.* On August 12, 2015, the district court preliminarily enjoined Davis, in her official capacity, “from applying her ‘no marriage licenses’ policy to future marriage license requests submitted

her name. On September 4, 2015, they did receive a license from another clerk in Davis’ office that struck out her name on the license.

by Plaintiffs.” *Id.* at 930, 944. On September 3, 2015, the court expanded the preliminary injunction to apply to other individuals who are legally eligible to marry in Kentucky. On the same day, the district court held Davis in contempt of the preliminary injunction, and remanded Davis to the custody of the United States Marshal pending compliance where she remained in prison for six days. R.296.

E. Petitioner’s quest for a religious accommodation and the ultimate change enacting Petitioner’s requested relief.

Prior to this Court’s decision in *Obergefell*, Davis began seeking an accommodation for her religious convictions and those of her fellow clerks. Soon after this Court granted certiorari in *Obergefell*, Davis wrote to State Senator Robertson requesting that the Commonwealth take action to protect the religious convictions of county clerks. R.899. Davis wrote that “in light of the Supreme Court’s decision to look at the issue in April, I feel it is imperative that we be ready to stand with our uncompromising convictions, holding strong to our morals, and beliefs.” R.899. She noted, “I beseech you to give thoughtful consideration to this matter, as it is of vital importance, not only to me, as a new Clerk, but to the Kentucky County Clerk’s Association who has formed a formal committee to address this issue.” R.899.

In addition to seeking a legislative solution prior to *Obergefell*, Davis also petitioned Governor Beshear in the immediate aftermath of *Obergefell* so that she could avoid the scenario that led to the instant

lawsuit. On July 8, 2015 (a mere twelve days after the opinion), Davis wrote a letter to Governor Beshear informing him of the sincere religious convictions of many clerks and that the decision was on a collision course with those religious beliefs. R.900. Davis requested that Governor Beshear—who was the only individual with authority to do so—convene a special session of the legislature to consider “commonsense legislation that would modify Kentucky’s marriage laws to satisfy the concerns of the majority of Clerks, while still abiding by the *Obergefell* ruling.” *Id.* He did not call that session.

Despite his newly minted mandate that all Kentucky officials follow their duties (as he defined them), the Governor did not impose that same mandate on his Attorney General. According to the Attorney General’s proclamation in 2014 regarding the defense of the state’s marriage amendment, “There are those who believe it’s my mandatory duty, regardless of my personal opinion, to continue to defend this case...I can only say that I am doing what I think is right. In the final analysis, I had to make a decision that I could be proud of – for me now, and my daughters’ judgment in the future.” R.749-750. Governor Beshear accommodated the Attorney General and hired outside counsel to represent Kentucky in defending its own Constitution before this Court—which cost Kentucky upwards of \$200,000. R.749-750, 756-757. Thus, the Governor’s “do your job or resign” policy applied *only* to Davis, not the Attorney General – on the same marriage issue. In other words, Governor Beshear accommodated one side of the issue (not to defend

marriage as one man and one woman because of conscience) but not the other side of the same issue (to remove the clerks' name from the licenses because of conscience concerning same-sex marriage).

On September 4, 2015, the day after Davis was jailed for contempt of the *Miller* injunction, Plaintiffs received a Kentucky marriage license from a Rowan County deputy clerk, on a license form altered to remove Davis's name, and without Davis's authorization. R.121-22, 130. Governor Beshear, however, who first authorized and directed the alteration of Kentucky marriage license forms in response to *Obergefell*, authorized the altered form from the deputy clerk after-the-fact. R.134 ("I'm . . . confident and satisfied that the licenses that were issued last week (and) this morning substantially comply with the law in Kentucky' 'And they're going to be recognized as valid in the Commonwealth."). The Governor's authorization also extended to marriage license forms which were further altered by Davis, to clarify the removal of her name and authorization, upon her return to work after her imprisonment. R.134-35.

Kentucky law provides a statutory exception for the sincerely held religious beliefs of Commonwealth officials that object to providing or issuing other forms of licensure. One exception that already existed that could have accommodated Davis's sincere religious convictions would have been to allow the county judge/executive to license a marriage by "a memorandum thereof" as an alternative to the KDLA-prescribed form. *See* KRS 402.240. Additionally,

Kentucky law provides that a county clerk may be excused (*i.e.*, accommodated) from issuing hunting and fishing licenses, which any county clerk may claim simply by submitting a written memorandum. *See* KRS 150.195(2).

On December 22, 2015, the newly elected Governor Matt Bevin issued Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form ("Executive Order"), which explicitly acknowledged the protections afforded county clerks under Kentucky's Religious Freedom Restoration Act, KRS § 446.350 (2013). R.174-176. Specifically, the Executive Order established that (1) the previous Governor's Mandate placed a substantial burden on the free exercise of religion by some county clerks and their employees, (2) the Kentucky RFRA [Religious Freedom Restoration Act] requires that the Commonwealth use the least restrictive means available to carry out Kentucky marriage license policy in light of that substantial burden, (3) there is no compelling governmental interest to justify requiring the name and authority of county clerks on marriage licenses, (4) a reasonable accommodation for county clerks could easily and must be made, and (5) the Commonwealth is legally obligated to comply with Kentucky RFRA through the creation and provision of a revised marriage license form removing the requirement of a county clerk's name and authority. *Id.*

On April 13, 2016, the Kentucky Legislature unanimously passed Senate Bill 216 ("SB216") and Governor Bevin signed it into law, thereby amending

KRS §§ 402.100 and 402.110. *See* 2016 Kentucky Laws Ch. 132 (SB216), General Assembly Reg. Sess. (Ky. 2016). On July 14, 2016, SB216 took effect, permanently modifying Kentucky law regarding the issuance and authorization of marriage licenses beyond the Executive Order. Specifically, SB216 expressly modified the Kentucky marriage licensing scheme to remove entirely a County Clerk's name, personal identifiers, and authorization from any license. This provided a permanent change in the law *that was the precise religious accommodation Davis sought* before and after *Obergefell*.

F. The jury verdict awarding emotional distress with no actual damages on nothing more than Petitioner's exercise of religious beliefs.

Discontent with the prospective injunctive relief afforded them under *Miller* and despite obtaining the marriage license they sought, Plaintiffs pursued "retrospective money damages." R.295. After the district court denied Davis's First Amendment defenses at summary judgment, Davis was forced to trial on Plaintiffs' alleged damages. Plaintiff Ermold testified that he "wanted [Davis] to receive consequences for her actions." R.2883. He further testified that he agreed with commenters on his social media accounts that Plaintiffs should "Go for [Davis's] throat," because "[t]hat nasty bitch deserves to die." *Id.* Plaintiff Ermold has also testified that he liked the comment that: "I would love to see [Davis] hang . . . slowly." R.2886.

Plaintiffs’ testimony at trial demonstrated that they could prove no damages. Plaintiffs testified that they had no lost wages, incurred no out of pocket expenses for treatment of their alleged emotional distress, and had no other actual damages. R.2804-2807; 2854-2879. In fact, Plaintiffs were forced to admit that they “don’t know what the value is,” and that “maybe it has no value.” R.2797. In other words, Plaintiffs had no basis upon which to support their claimed damages.

At trial, despite presenting no evidence of actual damages, the jury awarded Plaintiffs \$50,000 each. Before a separate jury sitting at the same time during the same trial as the Plaintiffs matter below, the jury in the *Yates v. Davis* case awarded a verdict of \$0.00. No. 0:15-cv-62, *Yates v. Davis*, R.2264.

G. The lower court’s stripping Petitioner of any level of immunity and depriving her of any defenses.

The Sixth Circuit held that the First Amendment provides no shield for Davis as an individual because she is allegedly a state actor—even to this day, despite the fact she is now before this Court in her *individual* capacity. As the Sixth Circuit saw the matter, “Davis cannot raise the First Amendment as a defense because she is being held liable for state action, which the First Amendment does not protect.” App.14a. The court held that Davis is shielded by *no defenses* because her actions “are not protected by the First Amendment, *regardless of the capacity in which the defendant is sued.*” App.17a (emphasis added).

When she was sued in her *official capacity*, Davis argued she was entitled to an *accommodation* of her sincere religious beliefs under the First Amendment. The lower courts rejected that argument. When Davis received the accommodation she sought from Governor Bevin and the Kentucky legislature, Plaintiffs amended their claim against Davis in her *individual* capacity. The lower courts rejected her argument. So now Davis *stands before the Court solely as an individual—stripped of any government immunity*, a consequence that began with this Court’s *Obergefell* opinion. Nevertheless, as the Sixth Circuit acknowledged, Davis’s contention “that the Free Exercise Clause provides her an affirmative defense to liability” is “an issue of first impression.” App.14a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit’s Decision Below Involves An Important Federal Question Of Whether A Government Official Stripped Of All Immunity And Standing Before the Court Only In Her Individual Capacity Is Entitled To Assert First Amendment Defenses To Tort Liability Based Solely On Emotional Distress Without Any Actual Damages.

A. The Sixth Circuit’s decision below conflicts with this Court’s precedent on whether government officials sued in their individual capacity and stripped of Eleventh Amendment immunity come to the court as individuals rather than state actors.

The Sixth Circuit held that Davis “is being held liable for state action,” App.14a, because “[a] §1983 individual-capacity claim seeks to impose personal liability on a government official for actions she takes under color of state law.” App.17a. It concluded that “[s]uch state actions are not protected by the First Amendment, *regardless of the capacity in which the defendant is sued.*” *Id.* (emphasis added). Simply put, the Sixth Circuit held that Davis, despite standing before the Court as an *individual*, “by definition, cannot be protected by the First Amendment.” App.14a. That decision conflicts with this Court’s precedents, and the prior decisions of the lower courts.

First, as the Sixth Circuit previously recognized in Davis’s case, “the law treats Davis *not as one person, but as two*: an official *and an individual*.” *Ermold v. Davis*, 936 F.3d 429, 432 (6th Cir. 2019) (emphasis added) *See also id.* at 432 (“plaintiff pleaded a plausible case that Davis, *as an individual*, violated their right[s].” (emphasis added)) More to the point, even the caption from the lower court’s own opinion—in this appeal—recognizes how Davis stands before the Court:

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DAVID ERMOLD; DAVID MOORE,
Plaintiffs-Appellees,

v. No. 24-5524
KIM DAVIS, individually,

Defendant-Appellant.

Conspicuously absent is any reference to official capacity claims remaining against Davis in this appeal. The reason is simple: *there aren’t any*. Davis, when she appeared before the jury and the Sixth Circuit below, did so ***only individually***—not as a state actor and not as a government official with some form of sovereign or qualified immunity—but solely as Davis the *person*.

In addition to conflicting with the Sixth Circuit’s own treatment of how Davis stands before the Court, the court’s decision conflicts with this Court’s precedent in *Hafer v. Melo*, 502 U.S. 21, 25 (1991) and *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In

Hafer, the Court made clear that “the distinction between official-capacity suits and personal-capacity suits is more than a mere pleading device.” 502 U.S. at 27 (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989)). The Sixth Circuit below held that this distinction requires a “binary outcome,” App.16a, but then the court ignored the critical distinction between the two capacities. As this Court has held, “officers sued in their personal capacity come to the Court *as individuals*.” 502 U.S. at 27 (emphasis added).

Indeed, “[p]ersonal-capacity suits seek to impose *personal liability* upon a government official.” *Graham*, 473 U.S. at 165 (emphasis added). By contrast, an “official-capacity suit, is, in all respects other than name, to be treated as a suit against the entity. . . . It is *not* a suit against the official personally.” *Id.* (emphasis original). “[A]n award of damages against an official in his personal capacity can be executed *only* against the official’s *personal* assets.” *Id.* at 166 (emphasis added). Thus, in all respects, an individual stripped of all government immunity and standing before the Court solely as an individual stands to lose *personally* with no shield of government immunity. An individual-capacity defendant cannot stand before the Court as an individual, on the hook for tort liability as a person, yet have no personal defenses available to her. Just as the Eleventh Amendment would provide certain immunities to that individual for official capacity actions, the First Amendment must provide certain immunities for that individual in her personal capacity.

In *Hafer*, this Court noted that because government officials are stripped of their governmental nature in an individual-capacity claim, they may assert *personal* defenses. 502 U.S. at 25 (“officials sued in their personal capacities, unlike those sued in their official capacities, may assert *personal immunity defenses*” (emphasis added)). In *Graham*, the Court noted that “[w]hen it comes to defenses to liability, an official in a personal-capacity action” are able to “assert *personal immunity defenses*.” 473 U.S. at 166 (emphasis added); *id.* at 167 (“A victory in a personal-capacity action is a victory against the individual defendant.”). *See also Hardin v. Straub*, 954 F.2d 1193, 1198-99 (6th Cir. 1992) (same).

This Court should grant the Petition and make clear that personal capacity defendants maintain constitutional defenses otherwise available to them.

B. The Sixth Circuit’s decision conflicts with precedent from the Fifth, Seventh, and Eleventh Circuits, as well as other federal courts, on whether individual-capacity defendants may assert defenses to tort liability, including claims for emotional distress.

The Sixth Circuit’s decision below conflicts with this Court’s precedent and other authoritative circuit court precedent on whether individual-capacity defendants can assert personal affirmative defenses,

such as the First Amendment. As a starting point, there is no question that the First Amendment provides an affirmative defense to emotional distress claims for individuals. *Snyder v. Phelps*, 562 U.S. 443 (2011); *New York Times v. Sullivan*, 376 U.S. 254 (1964). The lower court agreed. App.13a. But the Sixth Circuit’s decision that such defenses were not available to an individual-capacity defendant conflicts with this Court’s precedent and the authoritative decisions of the other circuits.

In addition to conflicting with *Graham* and *Hafer*, the Sixth Circuit’s decision below conflicts with precedent from the United States Court of Appeals for the Fifth Circuit in *Laird v. Spencer*, 2025 WL 79826, *2 (5th Cir. Jan. 13, 2025). There, the Fifth Circuit noted that “the Supreme Court observed a distinction between personal-capacity suits—in which defendants may assert personal immunity defenses—and official-capacity suits—in which personal defenses are unavailable.” *Id.*

The Eleventh Circuit’s decision in *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056 (11th Cir. 1992), is in direct conflict with the Sixth Circuit’s decision below. There, the Eleventh Circuit held that “officials sued in their personal capacity, unlike those sued in their official capacities,” may assert *personal defenses*. *Id.* at 1060.

The Seventh Circuit, too, is in conflict with the Sixth Circuit below. In *Connor v. Reinhard*, 847 F.2d 384 (7th Cir. 1988), the Seventh Circuit noted that “[a] government official sued in his personal capacity

. . . presents a different case” than those sued in their official capacity. *Id.* at 395. Indeed, “different defenses are available to a defendant who is sued in his personal capacity,” and courts do not generally consider an official sued in his personal capacity as being in privity with the government.” *Id.* In other words, personal capacity defendants are fundamentally different than official capacity defendants and can raise different defenses altogether.

The court below unnecessarily limited the reach of *Hafer* to suggest it was inapplicable to Davis because she was sued solely for her alleged actions as a government official. The Sixth Circuit held that Davis is shielded by *no defenses* because her actions “are not protected by the First Amendment, *regardless of the capacity in which the defendant is sued.*” App.17a (emphasis added). This is not only incorrect, but it is in direct conflict with the precedent of the Fifth, Seventh, and Eleventh Circuits discussed *supra*, and also that of numerous courts. *Hardin*, 954 F.2d at 1199 (“officials sued in their personal capacities . . . may assert personal immunity defenses”). *See also Holder v. Robbins*, 2006 WL 751238, *1 (E.D. Ky. Mar. 21, 2006) (“Personal *defenses* are available to the defendant in an individual capacity suit.”) (emphasis added). *Ansell v. Ross Twp.*, 2012 WL 1038825, *17 (W.D. Penn. Mar. 28, 2012) (“A personal-capacity defendant may rely on personal defenses *or* immunities.” (emphasis added)).

C. This Court should grant the Petition to answer an important federal question of whether government officials sued in their individual capacity and stripped of all immunity stand in a constitutional desert relating to their defenses to liability for damages based on emotional distress with no actual damages.

When a government official is sued in her official capacity, the Eleventh Amendment provides complete immunity to that official. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 113 (1984). This Court has held that personal or individual capacity defendants may assert personal immunity and personal defenses to liability. *Hafer*, 502 U.S. at 25 (“officials sued in their personal capacities, unlike those sued in their official capacities, may assert *personal immunity defenses*” (emphasis added)). “When it comes to defenses to liability, an official in a personal-capacity action” are able to “assert *personal immunity defenses*.” *Graham*, 473 U.S. at 166. Thus, individual capacity defendants—even when government officials—are permitted to raise personal defenses.

What this Court has never decided, but which creates an important federal issue that should be resolved by this Court, is whether the individual capacity defendant—such as Petitioner below, who was stripped of government immunity under the Eleventh Amendment and stands before the Court solely as an individual defendant on the hook *personally* for tort liability based solely on Plaintiffs’

alleged emotional distress (but no actual or concrete) damages—has a First Amendment defense to which she would otherwise be entitled as a non-government individual, or whether that individual stands as a defenseless constitutional orphan.

“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain.” *Snyder*, 562 U.S. at 460-61. But, notwithstanding the potential for impact of expressive activity and speech protected under the First Amendment, it cannot serve as a basis for tort liability particularly when it is on a matter of public concern. *Id.* at 451. Speech and expression—like Davis’s here—that involves social, political, and governmental issues “are at the heart of the First Amendment.” *Id.* at 453. This includes religious expression—like Davis’s here—that involves the national discussion on issues pertaining to homosexuality. *Id.* at 454 (noting that discussions pertaining to “political and moral conduct of the United States,” such as “homosexuality . . . are matters of public import”).

The same is true of religious exercise, and there is no sound constitutional basis for making a distinction between the two clauses. This Court has recognized that the First Amendment Free Exercise Clause provides a defense to private business owners in state administrative proceedings for refusing to violate their religious convictions by providing specialized services to a same-sex marriage. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm’n*, 584 U.S. 617 (2018). The First Amendment Free Speech

Clause likewise provides an individual a defense to application of state laws that require her to speak a message concerning same-sex marriage that is inconsistent with her religious beliefs. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). Likewise, the Court has noted that the First Amendment's right to association provides a defense to application of state laws to an individual for excluding homosexuals that would otherwise diminish the message that individual or group was espousing. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). In each of these cases, the Court has recognized that *individuals* are entitled to a defense to tort liability or other application of state law to their First Amendment activity. There is no reason, and certainly no sound constitutional basis, to treat an *individual capacity* defendant any differently. To do so would mean government officials surrender certain constitutional rights at their swearing-in ceremonies. That cannot be right. The Court should grant the Petition.

II. The Sixth Circuit's Decision Below Involves The Important Federal Question Of Whether The First Amendment Free Exercise Clause Provides A Defense To Tort Liability Based Solely On Emotional Distress Like The Free Speech Clause Defense Recognized In *Snyder v. Phelps* And Other Precedent From This Court.

The Sixth Circuit's decision below directly conflicts with this Court's precedents on whether the First Amendment Free Exercise Clause provides a defense to tort liability. The Sixth Circuit's decision

below directly conflicts with decisions from the Ninth Circuit and authoritative precedents from state supreme courts and other federal courts. Whether the First Amendment Free Exercise Clause provides a defense to tort liability based on emotional distress with no actual damages is an important federal question that has not been but should be answered by this Court.

A. The Sixth Circuit’s decision below directly conflicts with this Court’s precedents on whether the First Amendment Free Exercise Clause provides a defense to tort liability.

As the Sixth Circuit recognized, the use of the First Amendment Free Exercise Clause as an affirmative defense to tort liability is a question of first impression. App.14a. This Court has plainly held that the First Amendment is a defense to tort liability. *See Snyder v. Phelps*, 562 U.S. 443 (2011). Indeed, the First Amendment “can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.” *Id.* at 451. This is particularly true where the speech or religious expression at issue involves a matter of public concern, *id.* at 452-53, such as the Nation’s stance on same-sex marriage and the political and moral conduct of the United States. *Compare id.*, with App. 3a-5a.

The Sixth Circuit’s decision that Davis did not have a free exercise defense to tort liability for claims against her in her individual capacity conflicts with

precedent from this Court and the Ninth Circuit Court of Appeals. *See, e.g., United States v. Ballard*, 322 U.S. 78, 86-87 (1944); *Paul v. Watchtower Bible & Tract Society*, 819 F.2d 875 (9th 1987).

In *Ballard*, this Court recognized:

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. *If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern*

of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. *When the triers of fact undertake that task, they enter a forbidden domain.*

322 U.S. at 86-87 (emphasis added).

The Sixth Circuit's decision below directly conflicts with this precedent. In fact, the decision below said that accepting Davis's free exercise defense "would subvert the Bill of Rights," and "dire possibilities might follow if Davis's argument were accepted." App.18a-19a. But this Court has found that subjecting people to trial, jail, and other penalties were—in fact—the dire possibilities unimaginable to the Framers of the First Amendment if the Free Exercise Clause is not a defense to liability. 322 U.S. at 86-87. The decisions cannot be reconciled.

B. The Sixth Circuit's decision below directly conflicts with decisions from the Ninth Circuit and authoritative precedents from state supreme courts and other federal courts.

The Sixth Circuit's decision conflicts with decisions from the Ninth Circuit and other

authoritative precedents. The Ninth Circuit, in *Paul*, held that the Free Exercise Clause provides a defense to tort liability. It held:

State laws whether statutory or common law, including tort rules, constitute state action. In *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964), the Supreme Court ruled that state libel laws are subject to the constraints of the first amendment. “The test,” according to the Court, “is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.” 376 U.S. at 265. . . . For purposes of this test, we see no difference between libel and other forms of torts. *Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred.*

819 F.2d at 880 (emphasis added). *See also id.* (“The Jehovah’s Witnesses argue that their right to exercise their religion freely entitles them to engage in the practice of shunning. The Church further claims that assessing damages against them for engaging in that practice would directly burden that right. . . . *We agree that the imposition of tort damages on the Jehovah’s Witnesses for engaging in the religious practice of shunning would constitute a direct burden on religion.*” (emphasis added)).

The Ninth Circuit’s decision in *Paul* “applied an analysis similar to *New York Times*.” *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 (9th Cir. 2013). “[T]he application of domestic tort law to activities of a church or its adherents in furtherance of their religious beliefs is an exercise of state’s power,” *id.*, and thus warrants a defense under the First Amendment. *Id.* The Ninth Circuit’s decision in *Paul*, that First Amendment affirmative defenses are available against tort liability, conflicts with the Sixth Circuit’s decision that *New York Times* has no application to Davis. App.13a-14a. Those decisions cannot be reconciled.

Other courts have also held that the Free Exercise Clause provides a defense to tort liability. *E.g.*, *Sands v. Living Word Fellowship*, 34 P.3d 955, 959 (Alaska 2001) (holding that liability for emotional distress and negligence claims are “barred” by the Free Exercise Clause of the First Amendment to the U.S. Constitution”); *Snyder v. Evangelical Orthodox Church*, 216 Cal. App. 3d 297, 305 (Cal. Ct. App. 6th 1989) (holding that “where the imposition of [tort] liability would result in abridging the free exercise of those beliefs, *it is barred*” (emphasis added)); *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 10 (Tex. 2008) (holding that the Free Exercise Clause provides an affirmative defense to a tort suit alleging “intangible, psychological injury” and “emotional distress”); *Hubbard v. J Message Group Corp.*, 325 F. Supp. 3d 1198, 1212-13 (D.N.M. 2018) (holding that “recovery in tort is barred” when it would infringe the Free Exercise Clause”); *Gaddy v. Corporation of President of Church of Jesus Christ of Latter-Day*

Saints, 551 F. Supp. 3d 1206, 1222 (D. Utah 2021) (“the First Amendment applies as a defense” when the alleged tort arises from a defendant’s religious exercise); *Glass v First United Pentecostal Church*, 676 So.2d 724, 738 (La. App. 3d Cir. 1996) (“courts have extended free exercise protection to bar recovery for intentionally tortious activity”); *id.* at 737 (“Offense to someone’s sensibilities resulting from religious conduct is simply not actionable in tort.” (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940))); *Murphy v I.S.K.Con. of New England, Inc.*, 571 N.E.2d 340, 350 (Mass. 1991) (“[T]he First Amendment free exercise clause provide[s] a complete defense to claims of outrageous conduct, defamation, invasion of privacy, and fraud.”); *id.* (“free exercise concerns barred recovery despite the real and substantial harms suffered by the plaintiff”); *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 266 (Minn. Ct. App. 2003) (“[W]e hold that the First Amendment precludes exercise of jurisdiction over [tort] claim[s].”).

As these decisions makes clear, the First Amendment *as a whole* provides an affirmative defense to tort liability, including the Free Exercise Clause. The reason is simple: “If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.” *Ballard*, 322 U.S. at 87. Yet, that is what happened here. Davis was jailed, haled before a jury, and now faces crippling monetary damages based on nothing more than purported emotional distress. App.5a-7a. “[T]he First Amendment

precludes such a course.” *Ballard*, 322 U.S. at 85. So, too, should this Court.

The Sixth Circuit’s decision conflicts with each of these decisions. And the Court should grant the Petition, resolve the conflicts, answer the question of first impression and exceptional importance, and hold that Davis—as an individual standing before the Court in her personal capacity—is entitled to an affirmative defense under the Free Exercise Clause.

C. Whether the First Amendment Free Exercise Clause provides a defense to tort liability based on emotional distress with no actual damages is an important federal question that has not been but should be answered by this Court.

The conclusion that all clauses—including the Free Exercise Clause—of the First Amendment should provide an affirmative defense to individual capacity government defendants stripped of their governmental immunity is necessary to ensure First Amendment protection is afforded to all citizens. Indeed, *Snyder* did not limit its decision to merely speech but said the First Amendment bars recovery. 562 U.S. at 460 (“we find that *the First Amendment* bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion” (emphasis added)).

After all, Davis “did not relinquish [her] First Amendment rights when [s]he became [clerk],” *Lindke v. Freed*, 601 U.S. 187, 196 (2024), and

remained “[a] private citizen with [her] own constitutional rights.” *Id.* As the Court recognized in *Garcetti v. Ceballos*, “a citizen who works for the government *is nonetheless a citizen.*” 547 U.S. 410, 419 (2006) (emphasis added). More specifically, the Court stated in *Connick v. Myers* that “[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.” 461 U.S. 138, 147 (1983). A decision—like that of the Sixth Circuit below—depriving Davis, and other government defendants stripped of their government immunity and standing before the Court solely as individuals, would mean government officials shed their constitutional rights upon election, appointment, or other entrance of government service. *That cannot be right.*

III. This Court Should Revisit And Reverse *Obergefell* For The Same Reasons Articulated In *Dobbs v. Jackson Women’s Health Center*.

A. *Obergefell* was wrong when it was decided and it is wrong today because it was grounded entirely on the legal fiction of substantive due process.

As the Court noted in *Dobbs v. Jackson Women’s Health Organization*, “*stare decisis* is not an inexorable command” and “is at its weakest when we interpret the Constitution.” 597 U.S. 215, 264 (2022). “[W]hen it comes to the interpretation of the Constitution—the ‘great charter of our liberties,’ which was meant to endure through the long lapse of

the ages—we place a high value on having the matter settled right.” *Id.* (cleaned up). And, “when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake.” *Id.* Therefore, in appropriate circumstances we must be willing to reconsider, and if necessary, overrule constitutional decisions.” *Id.*

The Court’s decision in *Obergefell*—grounded in the erroneous fiction on substantive due process—is such a decision, and the mistake must be corrected. Indeed, three of the “five lawyers who happen[ed] to hold commissions authorizing them to resolve legal disputes” in 2015 and who “announce[d]” a right that “has no basis in the Constitution or this Court’s precedent” are no longer so commissioned. See *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting).

Obergefell was “egregiously wrong,” “deeply damaging,” “far outside the bound of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed,” and set out “on a collision course with the Constitution from the day it was decided.” 597 U.S. at 268. Moreover, *Obergefell*’s “errors do not concern some arcane corner of the law of little importance to the American people,” but “usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.” *Id.*

Indeed, “five lawyers closed the debate,” and imposed “an act of will, not legal judgment. The right it announce[d] had no basis in the Constitution. *Id.* at 687 (Roberts, J., dissenting).

As Justice Thomas correctly opined in *Dobbs*, “historical evidence indicates that ‘due process of law’ merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property.” *Id.* at 331 (Thomas, J., concurring). Other interpretations, he continued, merely required that an individual be afforded “the customary procedures to which freemen were entitled by the old law of England.” *Id.* “Either way, the Due Process Clause at most guarantees *process*.” *Id.* “It does not, as the Court’s substantive due process cases suppose, forbid the government to infringe certain fundamental liberty interests *at all*, no matter what process is involved.” *Id.* (cleaned up). As with abortion in *Dobbs*, “[b]ecause the Due Process Clause does not secure *any* substantive rights, it does not secure a right to [same-sex marriage],” *id.*, and especially not a right to receive a same-sex marriage license from a specific government official, regardless of that individual’s religious convictions.

The instant case presents the ideal opportunity to revisit substantive due process that “lacks any basis in the Constitution.” *Id.* The reason for that is simple: “[b]ecause any substantive due process decision is demonstrably erroneous, we have a duty to correct the error established in those precedents.” *Id.*

Davis’s appeal demonstrates why the “legal fiction” of substantive due process is “particularly dangerous.” *Id.* It “exalts judges at the expense of the People from whom they derive their authority,”

“distorts other areas of constitutional law,” and is “wielded to disastrous ends.” *Id.* at 333-35. Davis sought refuge in the textual protection of the First Amendment’s Free Exercise Clause for an accommodation of her sincerely held religious beliefs, but *Obergefell* was wielded to land her in prison for seeking protection in the Constitution’s plain text.

As Justice Thomas previously opined in this case: “By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix.” *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (Thomas, J., concurring). The time has come for a course correction.

“Davis may have been one of the first victims of th[e] Court’s cavalier treatment of religion in its *Obergefell* decision, but she will not be the last.” *Id.* at 3. This flawed opinion has produced disastrous results leaving individuals like Davis “find[ing] it increasingly difficult to participate in society without running afoul of *Obergefell* and its effect on other antidiscrimination laws.” *Id.* at 3-4. And, until the Court revisits its “creation of atextual constitutional rights,” *Obergefell* “will continue to have ruinous consequences for religious liberty.” *Id.* at 4.

B. Even if substantive due process is not overturned entirely, *Obergefell* should be because the right articulated is neither carefully described nor deeply rooted in the nation’s history.

Obergefell should be overturned because—assuming that the substantive due process fiction remains—it failed to follow the judge-invented inquiry outlined in *Washington v. Glucksberg*, 521 U.S. 702 (1997). See *Dep’t of State v. Munoz*, 602 U.S. 899, 910-11 (2024). *Glucksberg* requires the Court to “insist on a careful description of the asserted fundamental liberty interest,” and “protects only those fundamental rights and liberties which are objectively, deeply rooted in this Nation’s history and tradition.” *Id.* at 910 (quoting *Glucksberg*, 521 U.S. at 720-21). *Obergefell* satisfied neither requirement and should be overturned.

In *Obergefell*, the Court did not even attempt to satisfy *Glucksberg*’s primary requirement of *carefully describing* the right at issue. Rather, the *Obergefell* opinion explicitly disclaimed any efforts to provide a careful description of the alleged right. *Obergefell* plainly recognized that “*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices.” 576 U.S. at 671. But, rather than attempt to meet that high bar, the Court discarded it to reach the basis for the so-called right to same-sex marriage. Specifically, *Obergefell* stated that while such an arcane “approach may have been appropriate for the asserted right

there involved,” it was not pertinent to its quest to ascertain a new, heretofore historically unknown right. *Id.* As Chief Justice Roberts put it, *Obergefell* went “out of its way to jettison the careful approach to implied fundamental rights” required by *Glucksberg*.” 576 U.S. at 702 (Roberts, C.J., dissenting). The reason for that was simple, *Obergefell* could find “little support” from the Court’s precedent. Simply put, “[n]obody could rightly accuse the majority of taking a careful approach” in determining and describing the alleged fundamental right. *Id.* at 702-03.

C. *Obergefell* should be overturned because the Constitution makes no reference to same-sex marriage and no such right is implicitly recognized by any constitutional provision.

Obergefell was not grounded in the Nation’s history or traditions, nor could it have been because it was not rooted in any Nation’s history or traditions. As Chief Justice Roberts noted, the right that *Obergefell* created out of whole cloth was inconsistent with “the meaning of marriage that has persisted in every culture throughout human history.” 576 U.S. at 687 (Roberts, C.J., dissenting). Indeed, “marriage has existed for millennia and across civilizations [and] [f]or all those millennia, across all those civilizations, marriage referred to only one relationship: the union of a man and a woman.” *Id.* See also *id.* at 718 (Scalia, J., dissenting) (noting that marriage as the union of a man and a woman was “the unanimous judgment of all generations and all societies”); *id.* (noting that the

majority in *Obergefell* “discovered in the Fourteenth Amendment a ‘fundamental right’ overlooked by every person alive at the time of ratification, and almost everyone else in the time since.”).

D. The Respect for Marriage Act removes any argument based on reliance because same-sex couples who have a marriage license are grandfathered when this Court overrules *Obergefell* and thereby returns marriage policy to the states, where it belongs.

The Respect for Marriage Act, passed by Congress and signed into law, precludes any argument that reliance interests preclude this Court from reversing its *Obergefell* opinion. The Respect for Marriage Act states,

For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State.

1 U.S.C. §7(a).

It further provides that “in determining whether a marriage is valid in a State or the place where entered into, if outside of any State, only the law of the jurisdiction applicable at the time the marriage was entered into may be considered.” 1 U.S.C. §7(c). *See also Tauscher v. Hanshew*, 2023 WL 6787433, *3 (N.D. Cal. Aug. 7, 2023) (“The Respect for Marriage Act (1) repeals the Defense of Marriage Act and requires federal and state governments to recognize same-sex marriages that were valid where and when they were entered into, and (2) prohibits states from refusing to recognize marriages that were legally entered into in other states.”). As the Court has noted, “[t]raditional reliance interests arise where advance planning of great precision is most obviously a necessity.” *Dobbs*, 597 U.S. at 287 (cleaned up). The Respect For Marriage Act has eliminated any basis upon which to assert reliance. Overturning *Obergefell* will simply send the matter of marriage back to the States where it belongs, and remove it from the federal Constitution where it does not.

In other words, overturning *Obergefell* would not undo any marriage licenses in effect at the time. All marriage licenses, including those between same-sex couples, would continue to be recognized. They would be “grandfathered.” Going forward, marriage would return to the states as it was prior to *Obergefell*. It would be up to each state to define marriage. The damage done by *Obergefell*’s distortion of the Constitution is reason enough to overturn this opinion and reaffirm the rule of law and the proper role of this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition, resolve the conflicts, and overturn *Obergefell*.

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