No. 25-125

IN THE

Supreme Court of the United States

KIM DAVIS,

Petitioner,

v.

DAVID ERMOLD AND DAVID MOORE,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2015, following the Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), petitioner Kim Davis, who was then the Clerk of Rowan County, Kentucky, "'t[ook] the law into her own hands'" in "the most extreme way." Pet. App. 32a (Readler, J., concurring in part and in the judgment) (quoting *Ermold v. Davis*, 936 F.3d 429, 442 (6th Cir. 2019) (Bush, J., concurring in part and in the judgment)). "Rather than attempting to invoke a religious exemption for herself, Davis instead exercised the full authority of the Rowan County Clerk's office to enact an official policy of denying marriage licenses to same-sex couples, one every office employee had to follow." *Id.* Over the course of ten years, four appeals, and a trial, the courts below concluded that when Davis denied a marriage license to respondents David Ermold and David Moore, she violated their constitutional right to marry. She is therefore liable for damages under 42 U.S.C. § 1983 based on her actions taken under color of state law.

The questions presented are:

(1) Whether government officials, when exercising the state's authority in the course of their official duties, may assert a First Amendment right to engage in state action that violates the constitutional rights of private citizens.

(2) Whether the Court should overturn *Obergefell v. Hodges*, 576 U.S. 644 (2015), even though Davis expressly waived any intention to relitigate *Obergefell* in this case.

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INTRODUCTION

This is a "relatively easy" case that does not merit this Court's review. *Ermold v. Davis*, 936 F.3d 429, 441 (6th Cir. 2019) (Bush, J., concurring in part and in the judgment). In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court held that the right to marry extends to same-sex couples. *Id.* at 675. The Court "emphasized" the rights of private citizens to "advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 679. But, the Court held, "sincere, personal opposition" to same-sex marriage, even when "based on decent and honorable religious or philosophical premises," cannot justify excluding same-sex couples from marriage as a matter of "enacted law and public policy." *Id.* at 672.

Immediately following *Obergefell*, petitioner Kim Davis did exactly what the Court said was forbidden: she made it the official policy of the Rowan County Clerk's office to deny marriage licenses to same-sex couples, based on her personal objection to same-sex marriage. Under that policy, on three separate occasions, Davis exercised the authority of the Commonwealth of Kentucky to deny respondents David Ermold and David Moore the marriage license to which they were constitutionally entitled. Under 42 U.S.C. § 1983, Davis is liable in her individual capacity to respondents for damages because she engaged in state action that violated their constitutional rights.

Davis asks the Court to consider two issues: whether the Free Exercise Clause of the First Amend-

ment covers her official acts in a manner that provides an affirmative defense to liability under Section 1983, and whether the Court's decision in *Obergefell* should be overruled. Neither question merits this Court's review.

For several reasons, Davis's petition "does not cleanly present" the questions she asks the Court to resolve. *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (mem.) (statement of Thomas, J., respecting the denial of certiorari).

To start, Davis failed to adequately develop her First Amendment argument in the lower courts. The first time she unambiguously raised the current version of her First Amendment affirmative defense was in her Sixth Circuit reply brief in this final appeal, filed nine years into the case. By waiting so long to raise this argument, Davis deprived respondents and the lower courts of a fair opportunity to address it. Because the issue was not fully ventilated below, the Court should deny review.

In addition, resolving the question Davis presents about the First Amendment in her favor would entitle her to no relief. Even if the Court were to rule that government officials exercising state power may assert their private constitutional rights as an affirmative defense in suits under Section 1983, Davis would still lose this case. That is because, as Judge Readler explained in his concurring opinion below, Davis's "conduct here exceeded the scope of any personal right." Pet. App. 32a. "Rather than attempting to invoke a religious exemption for herself, Davis instead exercised the full authority of the Rowan County

Clerk's office to enact an official policy of denying marriage licenses to same-sex couples, one every office employee had to follow." *Id.* Because Davis's policy went beyond anything she arguably had a right to do, her First Amendment affirmative defense would fail even if such defenses are available to government officials engaged in state action.

Davis's request that *Obergefell* be overruled is likewise not properly presented for this Court's review. Beyond merely forfeiting this argument, Davis affirmatively waived it. In the district court, Davis "expressly stated that she did not 'want[] to relitigate the Supreme Court's decision in *Obergefell*.'" Pet. App. 29a n.3 (alteration in original) (quoting Dist. Ct. Dkt. 29-1 at 1). She reiterated that point when she petitioned for this Court's review in 2019, assuring the Court that "[t]his case is not about . . . a county clerk who wanted to re-litigate this Court's decision in *Obergefell v. Hodges*." Pet. for Writ of Cert. at 2, *Davis*, 141 S. Ct. 3 (No. 19-926). The Court should hold her to that representation. Reaching the question of whether to overrule *Obergefell* in the context of this case would also require the Court to first decide thorny questions about how such a ruling would affect Davis's liability under Section 1983, given that respondents' right to marry was clearly established at the time of Davis's actions.

All of those considerations counsel against using this case as a vehicle for addressing the questions presented.

In any event, Davis's arguments are simply wrong. Her First Amendment theory conflicts with this

Court's precedents holding that an official may be liable under Section 1983 only for actions taken on behalf of the State and that such official acts are not protected by the First Amendment. *See Lindke v. Freed*, 601 U.S. 187, 194-97 (2024). Even when the official is sued in their individual capacity for damages, their conduct remains that of the State. *Id.* at 195 n.1. The cases Davis cites recognizing a First Amendment affirmative defense to state tort liability all concerned the defendant's private conduct. Nor does Davis make a convincing case for revisiting *Obergefell*.

The Court should deny Davis's petition.

STATEMENT OF THE CASE

1. In 2015, at the time of this Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), petitioner Kim Davis was the elected Clerk of Rowan County, Kentucky. Trial Tr. 2-123 to -124. In that role, she was responsible for issuing marriage licenses on behalf of the State. *Id.* Davis had been following *Obergefell* closely. *See* Dist. Ct. Dkt. 89-12 (letter from Davis addressing the pending *Obergefell* litigation). When the opinion was released, she read it and understood its holding that the States could no longer deny same-sex couples the right to marry. *See* Dist. Ct. Dkt. 88-2 at 64; Trial Tr. 2-124.

Within hours of the decision, Davis also received a letter from then-Kentucky Governor Steve Beshear explaining that *Obergefell* "makes plain that the Constitution requires that Kentucky—and all states—must license and recognize the marriages of same-sex couples." Dist. Ct. Dkt. 27-1. The letter instructed

clerks that, although "[n]either your oath nor the Supreme Court dictates what you must believe," "as elected officials, they do prescribe how we must act." *Id.* Davis also consulted the Rowan County attorney, who advised her that she was legally required to issue marriage licenses to same-sex couples "because that's the law." Dist. Ct. Dkt. 88-2 at 77-78.

Davis did not follow that advice. *Id.* at 78. She quickly announced that her office, as a matter of official policy, would no longer issue marriage licenses. Dist. Ct. Dkt. 96-1 at 3. She instituted that policy based on her personal belief that marriage must be between one man and one woman. *Id.*

Respondents David Ermold and David Moore were also following the *Obergefell* litigation closely, but for different reasons. Trial Tr. 2-46. Ermold and Moore are a same-sex couple who, at the time *Obergefell* was decided, had been in a committed relationship for 17 years and had been living in Rowan County for a decade. Dist. Ct. Dkt. 1 at 2. They "already knew" they wanted to get married if it became legal to do so in Kentucky. Trial Tr. 2-47.

On July 6, 2015, ten days after *Obergefell*, respondents went to the Clerk's office seeking a marriage license. *Id.* at 2-16. Davis personally denied their application. Dist. Ct. Dkt. 88-2 at 55. Moore pointed out that Davis had likely given marriage licenses to rapists, murderers, and pedophiles. Trial Tr. 2-17 to -18, 2-35. Davis responded by saying that giving licenses to those people "was fine because they were straight." *Id.* Ermold described that interaction

as something he "can never forget" for the "rest of [his] life." *Id.* at 2-50.

Shortly after that initial encounter, respondents filed this lawsuit against Davis seeking damages based on her violation of their constitutional right to marry. *See* Dist. Ct. Dkt. 1. In a separate lawsuit filed by different plaintiffs, the district court entered a preliminary injunction requiring Davis to issue marriage licenses to same-sex couples in accordance with *Obergefell*. *See Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015), *vacated*, 667 F. App'x 537 (6th Cir. 2016). Following entry of the preliminary injunction, respondents tried twice more to obtain a marriage license from Davis, on August 13 and September 1. Trial Tr. 2-20, 2-22, 2-52. But she or her deputies denied them both times, in accordance with Davis's policy. Dist. Ct. Dkt. 96-1 at 4.

Those further denials added to respondents' humiliation. Moore "was getting more frustrated and more frustrated" and "couldn't believe that [they] were still doing this." Trial Tr. 2-22. For Ermold, it was a "devastating" experience: "She humiliated me in front of my husband, she humiliated him in front of me, and she humiliated us in front of that entire building." *Id.* at 2-49 to -51.

Soon after the third denial, the district court in *Miller* held Davis in contempt for violating the preliminary injunction and remanded her to the custody of the U.S. Marshals. *See* Min. Entry at 2, *Miller v. Davis*, No. 15-cv-44 (E.D. Ky. Sept. 3, 2015), ECF No.

75. While Davis was in custody, respondents were finally able to obtain a marriage license from one of her deputies. Dist. Ct. Dkt. 27 at 3.

2. The next year, Kentucky enacted Senate Bill 216 to resolve the controversy related to Davis's refusal to issue marriage licenses. *See* 2016 Ky. Acts 578. The law removed county clerks' names and signatures from the Commonwealth's marriage license forms, but it retained clerks' central role in issuing and recording marriage licenses. *Id.* at 578-79. County clerks in Kentucky still must "make available to the public the form . . . for the issuance of a marriage license," Ky. Rev. Stat. § 402.100; personally "see to it" that applicants fill in every required field, *id.* § 402.110; and "deliver" the completed license to the licensees, *id.*

Although Davis had previously objected to issuing marriage licenses to same-sex couples at all, she decided following the enactment of S.B. 216 that she was willing to issue the licenses without her name on them. *See* Mot. to Dismiss at 1-2, *Miller v. Davis*, Nos. 15-5880 and 15-5978 (6th Cir. June 21, 2016). She therefore moved to dismiss as moot her own appeals of the district court's orders in *Miller* granting a preliminary injunction and holding her in contempt. *Id.* With the agreement of the *Miller* plaintiffs, the Sixth Circuit dismissed as moot Davis's appeals in that case, including her objections to having been held in contempt. *Miller v. Davis*, 667 F. App'x 537, 538 (6th Cir. 2016).

3. Although the *Miller* litigation had been resolved, respondents' claims for damages in this case

moved forward. *See Ermold v. Davis*, 855 F.3d 715 (6th Cir. 2017). Respondents amended their complaint, Dist. Ct. Dkt. 27, and Davis moved to dismiss, Dist. Ct. Dkt. 29-1. In her motion to dismiss, Davis stated that this case "is not about . . . a county clerk who wanted to re-litigate the Supreme Court's decision in *Obergefell v. Hodges*." *Id.* at 1. The district court dismissed respondents' claim against Davis in her official capacity based on sovereign immunity, but the court denied the motion to dismiss with respect to respondents' claim against Davis in her individual capacity, rejecting her claim of qualified immunity. *Ermold v. Davis*, No. 15-cv-46, 2017 WL 4108921, at *10-11 (E.D. Ky. Sept. 15, 2017).

The Sixth Circuit affirmed. *Ermold v. Davis*, 936 F.3d 429, 438 (6th Cir. 2019). The Court held that respondents had adequately alleged a violation of their right to marry, which *Obergefell* had clearly established. *Id.* at 435-37. The court of appeals explained that *Obergefell* "both recognized the right to same-sex marriage and defined its contours." *Id.* at 436. *Obergefell* was "as sweeping as it was unequivocal" and "made no mention of a limit on that right, of an exception to it, or of a multi-factor test for determining when an official violates it." *Id.* "For a *reasonable* official, *Obergefell* left no uncertainty." *Id.* Judge Bush concurred. Although he would have applied a different standard to evaluate restrictions on the right to marry, he concluded that Davis's categorical refusal to issue marriage licenses to same-sex couples based on her personal religious views would violate the Constitution under even rational-basis review. *Id.* at 441-

42 (Bush, J., concurring in part and in the judgment). "Davis knew or ought to have known, to a legal certainty, that she could not refuse to issue marriage licenses, as was her duty under state law, because of moral disapproval of homosexuality." *Id.* at 442.

The Sixth Circuit rejected Davis's argument that she was entitled to qualified immunity based on her religious beliefs. *Id.* at 437 (majority opinion). The panel majority noted that *Obergefell* "said nothing to suggest that government officials may flout the Constitution by enacting religious-based policies to accommodate their own religious beliefs." *Id.* Given "the absence of any legal authority to support her novel" arguments, Davis "should have known that *Obergefell* required her to issue marriage licenses to same-sex couples—even if she sought and eventually received an accommodation." *Id.* Judge Bush agreed. His concurrence explained that Davis was not "entitled to *self*-create an accommodation" when "none was forthcoming from the state government." *Id.* at 442 (Bush, J., concurring in part and in the judgment). If Davis "truly believed" she was entitled to an accommodation, "she should have sought and obtained judicial confirmation of her claim." *Id.*

Davis's petitions for rehearing en banc and for certiorari were both denied. *See Davis v. Ermold*, 141 S. Ct. 3 (2020) (mem.). In her petition for certiorari, Davis again emphasized that "[t]his case is not about . . . a county clerk who wanted to re-litigate this Court's decision in *Obergefell v. Hodges*." Pet. for Writ of Cert. at 2, *Davis*, 141 S. Ct. 3 (No. 19-926). In a statement respecting the denial of certiorari, Justice Thomas

noted that Davis's petition "d[id] not cleanly present" any "questions about the scope of [the Court's] decision in *Obergefell*." *Davis*, 141 S. Ct. at 4 (statement of Thomas, J., respecting the denial of certiorari).

On remand, the parties filed cross-motions for summary judgment. *See* Dist. Ct. Dkt. 88, 93. The district court granted summary judgment to respondents, rejecting Davis's "recycled" qualified-immunity arguments. *Ermold v. Davis*, No. 15-cv-46, 2022 WL 830606, at *3 (E.D. Ky. Mar. 18, 2022). The district court explained that "Davis cannot use her own constitutional rights as a shield to violate the constitutional rights of others while performing her duties as an elected official." *Id.* at *7. Although Davis's "conscientious religious objection to same-sex marriage outside of her official duties is not actionable," she "is liable for her actions within the scope of her work as county clerk"—those actions taken under color of state law. *Id.* Indeed, the district court could "find no example, nor ha[d] Davis provided one, where a defendant's constitutional rights were found to be a valid defense for violating the constitutional rights of others." *Id.*

Davis filed another interlocutory appeal, and the Sixth Circuit again ruled against her, affirming the district court's denial of qualified immunity. *Ermold v. Davis*, No. 22-5260, 2022 WL 4546726, at *3 (6th Cir. Sept. 29, 2022). As the Court explained, respondents "ha[d] not only 'alleged' but also now 'shown' that Davis violated their constitutional right to marry." *Id.* at *2.

4. The district court then held a trial focused solely on damages. Dist. Ct. Dkt. 148, 149, 151. Both respondents testified about the profound emotional distress that they suffered because of Davis's repeated denial of their right to marry. Moore testified that "it's distorted [their] whole life forever," Trial Tr. 2-29, while Ermold testified that "[he] can never forget it for the rest of [his] life," *id.* at 2-50. Davis's actions caused tension in their marriage, *id.* at 2-23, 2-53; ruined their memories from their wedding, *id.* at 2-24, 2-26, 2-48; and triggered Ermold's PTSD on "a daily basis almost," *id.* at 2-86.

Based on that and other evidence, the jury awarded $50,000 in compensatory damages to each respondent. Dist. Ct. Dkt. 152. The district court entered final judgment for respondents. Dist. Ct. Dkt. 166.

5. Davis appealed the final judgment, and the Sixth Circuit ruled against her again, affirming the district court's finding of liability at summary judgment and the jury's award of damages at trial. Pet. App. 1a-34a.

As relevant to Davis's petition for certiorari, the Sixth Circuit concluded that her asserted First Amendment affirmative defense "fail[s] under basic constitutional principles." Pet. App. 14a. The court explained that "[t]he First Amendment protects 'private conduct,' not 'state action.'" *Id.* (quoting *Lindke v. Freed*, 601 U.S. 187, 196-97 (2024)). In this case, "Davis is being held liable for state action, which the First Amendment does not protect—so the Free Exercise

Clause cannot shield her from liability." *Id.* In her private life, Davis has her own constitutional rights. *Id.* But "when Davis denied [respondents] a marriage license, she was wielding the 'authority of the State'—not 'function[ing] as a private citizen.'" Pet. App. 16a (quoting *Lindke*, 601 U.S. at 197). That meant her "license denials were 'state action,' which cannot receive First Amendment protection." *Id.* (citation omitted). It was thus little surprise that Davis "ha[d] not found a case in which a government official has raised a successful First Amendment defense to a § 1983 claim." Pet. App. 17a. Her theory was "not how the Constitution works." Pet. App. 19a.

Judge Readler concurred in part and in the judgment. Pet. App. 29a. He agreed with the majority that Davis's free exercise defense failed, but for different reasons. Judge Readler concluded there was no need to address whether the Free Exercise Clause could ever provide government officials a defense to liability under Section 1983 because, even if such a defense might sometimes be available, Davis's "conduct here exceeded the scope of any personal right." Pet. App. 32a. Davis "'t[ook] the law into her own hands'" in "the most extreme way." *Id.* (quoting *Ermold*, 936 F.3d at 442 (Bush, J., concurring in part and in the judgment)). "Rather than attempting to invoke a religious exemption for herself, Davis instead exercised the full authority of the Rowan County Clerk's office to enact an official policy of denying marriage licenses to same-sex couples, one every office employee had to follow." *Id.* And "a government employee, acting in the scope of that employment, does not have a unilateral

free exercise right to use an arm of the state to infringe on a clearly established equal protection right of the public." Pet. App. 32a-33a.

The Sixth Circuit also rejected Davis's defense under the Kentucky Religious Freedom Restoration Act. The panel majority determined that Kentucky's RFRA applies only when the State is a party to the lawsuit, and thus had no role to play in this case. Pet. App. 19a-21a. In his concurrence, Judge Readler again "t[ook] a different route to [the same] conclusion." Pet. App. 34a. He determined that Kentucky's RFRA, as "a state law," "cannot immunize officials from a § 1983 claim, which serves to vindicate *federal* rights." *Id.* (citing *Williams v. Reed*, 604 U.S. 168, 174 (2025)).

The Sixth Circuit rejected Davis's petition for rehearing en banc. Pet. App. 37a. No judge requested a vote on the petition. *Id.*

REASONS FOR DENYING THE PETITION

I. Davis's First Amendment Defense Does Not Merit Review.

Davis's First Amendment argument, which she presents as two separate questions in her petition, boils down to a single issue: whether government officials may assert their private First Amendment rights as a defense to liability for their official actions taken on behalf of the State. This case is not a good vehicle for resolving that question because Davis failed to adequately develop her argument in the lower courts and because she would be entitled to no relief on her First Amendment defense even if she is

permitted to raise it. In any event, Davis's argument is simply wrong. The First Amendment does not protect officials engaged in state action.

A. The Petition Is a Poor Vehicle for Addressing Davis's First Amendment Argument.

The petition does not cleanly present Davis's First Amendment question, both because she failed to adequately present the question below and because her First Amendment defense would fail even if the Court resolved the question in her favor.

1. Although Davis has asserted her religious opposition to same-sex marriage throughout this case, she has repeatedly changed her theory for why her beliefs are legally relevant to respondents' damages claims.

Davis first argued that she had not violated respondents' right to marry because, under rational-basis review, the State's interest in denying marriage licenses as a means of accommodating her religious beliefs outweighed respondents' constitutional interest in obtaining a license. *See, e.g.*, Br. of Appellant at 19-20, *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019) (No. 17-6119). In other words, she contended that her religious beliefs provided an exception to the Fourteenth Amendment, not an affirmative defense to tort liability under the First Amendment. That argument failed below, *see Ermold v. Davis*, 936 F.3d 429, 436-37 (6th Cir. 2019), and Davis does not ask this Court to review it.

Davis also invoked her own free exercise rights, but she did so as part of a convoluted employment accommodation claim. And she consistently failed to explain what that accommodation claim had to do with her liability under Section 1983. Traditionally, accommodation claims are filed by an employee against their employer, not used as a defense to liability in lawsuits filed by third parties. *See, e.g.*, *Groff v. DeJoy*, 600 U.S. 447, 453 (2023) (noting that "Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees" in certain situations); *id.* at 467 n.14 (discussing "employment-related" accommodation claims raised under the Religious Freedom Restoration Act); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524-25 (2022) (discussing the scope of accommodation claims under the Free Exercise Clause in suit filed by an employee against his government employer).

Davis's accommodation argument initially arose in the related *Miller* litigation, where it took the typical form of an employee suing her employer. In *Miller*, Davis filed a third-party complaint against then-Governor Beshear, alleging that he had violated her religious rights by failing to provide an adequate accommodation. *See* Dist. Ct. Dkt. 89-10. But Davis's accommodation claim went nowhere in that case. *See Miller v. Davis*, No. 15-cv-44, 2015 WL 9461520, at *2-3 (E.D. Ky. Sept. 11, 2015) (holding that the accommodation claim belonged in state court).

At that point, Davis started copying her accommodation arguments from *Miller* into her briefing in this

case. But she never explained how her claim to an accommodation—originally asserted against Governor Beshear—provides a defense to respondents' damages claim. In her opening Sixth Circuit brief in the present appeal, Davis included among the issues presented whether she "was entitled to a reasonable accommodation of her religious beliefs." Br. of Appellant at 2, *Ermold v. Davis*, 130 F.4th 553 (6th Cir. 2025) (No. 24-5524). She did not, however, list a First Amendment affirmative defense among the issues to be decided, and the brief never connected her accommodation arguments to respondents' damages claims. Respondents answered by pointing out that they have no authority to give Davis an accommodation and that her accommodation claim was moot. It was only then, in her Sixth Circuit reply brief—filed nine years into the case—that Davis articulated her current theory of a First Amendment affirmative defense to liability under Section 1983, modeled on the First Amendment defense to tort liability recognized in *Snyder v. Phelps*, 562 U.S. 443 (2011). *See* Reply Br. at 14-16, *Ermold*, 130 F.4th 553 (No. 24-5524).

By failing to articulate this theory earlier, Davis deprived respondents and the lower courts of a fair opportunity to fully address it. "In the ordinary course, '[p]rudence . . . dictates awaiting a case in which the issue was fully litigated below, so that [the Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.'" *Food & Drug Admin. v. R. J. Reynolds Vapor Co.*, 145 S. Ct. 1984, 1996 (2025)

(quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992)).

2. This case is also a poor vehicle for deciding whether government officials may invoke the First Amendment in defense of their official acts because even if they could, Davis's First Amendment defense would fail on the facts here.

The Sixth Circuit correctly held that Davis cannot claim constitutional protection for her official acts at all. *See* Pet. App. 13a-21a. But even if that were wrong—even if the First Amendment protected state actors wielding state power in some circumstances—Davis would still be liable. Davis's violation of respondents' constitutional rights went far beyond anything that she could possibly claim a First Amendment right to do.

As Judge Readler explained in his concurring opinion below, "[t]o the extent that the First Amendment offered Davis some shield from liability, her conduct here exceeded the scope of any personal right." Pet. App. 32a. "Rather than attempting to invoke a religious exemption for herself, Davis instead exercised the full authority of the Rowan County Clerk's office to enact an official policy of denying marriage licenses to same-sex couples, one every office employee had to follow." *Id.* At least one of Davis's deputies had no religious objection to issuing marriage licenses to same-sex couples. Dist. Ct. Dkt. 27 at 3. Davis could have permitted him to issue the licenses while removing her name from the form, which is how respondents ultimately obtained their license. Dist. Ct. Dkt. 27-2. But instead of merely recusing herself,

Davis imposed her religious views on the entire office. *See Ermold v. Davis*, No. 15-cv-46, 2022 WL 830606, at *4 (E.D. Ky. Mar. 18, 2022). As Judge Readler put it, "a government employee, acting in the scope of that employment, does not have a unilateral free exercise right to use an arm of the state to infringe on a clearly established equal protection right of the public." Pet. App. 32a-33a.

Nor did Davis follow the proper procedures for vindicating her religious rights. "If Davis truly believed that she had a right under [Kentucky's Religious Freedom Restoration Act] to not issue marriage licenses, she should have sought and obtained judicial confirmation of her claim." *Ermold*, 936 F.3d at 442 (Bush, J., concurring in part and in the judgment). But she never did. Davis's argument is thus not just that "she was entitled to an accommodation," but rather that "she was entitled to *self*-create an accommodation" of her own chosen scope. *Id.* "[I]t was not permissible for Davis to take the law into her own hands." *Id.*

In short, Davis's actions went "too far" on any possible understanding of the religious rights of government officials. *Id.* Based on that "unique set of facts," "the First Amendment does not shield Davis from liability." Pet. App. 32a (Readler, J., concurring in part and in the judgment).

B. Davis's First Amendment Argument Conflicts with This Court's Precedent.

The petition is also unworthy of review because the Sixth Circuit's decision is correct under this Court's precedent and does not conflict with any other authority.

1. The Sixth Circuit correctly concluded that "[t]he First Amendment protects 'private conduct,' not 'state action.'" Pet. App. 14a (quoting *Lindke v. Freed*, 601 U.S. 187, 196-97 (2024)); *see also, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019) ("[T]he First Amendment constrains governmental actors and protects private actors."). As this Court has held, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). When Davis denied respondents a marriage license, she was exercising her official authority on behalf of the Commonwealth of Kentucky. The First Amendment does not protect that state action. She therefore cannot invoke the Free Exercise Clause as a shield to liability under Section 1983 for violating respondents' rights while acting as the State.

Davis contends that she should not be treated as a government official for purposes of respondents' damages claim because "government officials are stripped of their governmental nature in an individual-capacity claim." Pet. 19. That is incorrect. "Section 1983 provides a cause of action against '[e]very person who,

under color of any statute, ordinance, regulation, custom, or usage, of any State' deprives someone of a federal constitutional or statutory right." *Lindke*, 601 U.S. at 194 (alteration in original) (quoting 42 U.S.C. § 1983). "As its text makes clear, this provision protects against acts attributable to a State, not those of a private person." *Id.* An official sued under Section 1983 based on their official acts is thus by definition treated as a government actor, not a private citizen, regardless of the capacity in which they are sued. *See id.* at 195 n.1.

Lindke is instructive. Like this case, *Lindke* involved a suit against a government official in his individual capacity seeking damages under Section 1983. *Id.* In that context, the Court considered the interplay between the First Amendment right of a private individual not to have his speech censored by government officials on social media and the government official's own First Amendment right to speak on matters of public concern in his private capacity. *Id.* at 196-97. Like the lower courts in this case, the Court held that the line between those rights depends on the state-action doctrine. *Id.* When a government official acts in his "private capacity," he may "exercise[] his own" constitutional rights. *Id.* at 197. But when the official takes actions that are "*fairly attributable to the State*," it is the public that has constitutional rights against the official. *Id.* at 198 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

A government official may therefore be liable for censoring speech on social media if the official "possessed actual authority to speak on the State's behalf"

and "purported to exercise that authority." *Id.* In other words, it is the capacity in which the official acted, not the capacity in which he is sued, that matters for determining whether an official can assert his own private constitutional rights as a defense. *See, e.g.*, *NRA v. Vullo*, 602 U.S. 175, 198 (2024) (holding that a former public official sued in her individual capacity for damages was liable for "coercive threats," notwithstanding her own free speech rights). Here, Davis is liable because she had official authority to issue marriage licenses on behalf of the State, and she purported to exercise that authority to deny respondents the license to which they were constitutionally entitled.

Obergefell likewise turned on the distinction between private rights and government action. 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." *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015). At the same time, however, the Fourteenth Amendment "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Id.* at 680. Accordingly, as the Sixth Circuit concluded, the First Amendment allowed Davis to advocate against same-sex marriage as a private citizen, but her "opposition to same-sex marriage [could] not constitutionally bear 'the imprimatur of the State itself.'" Pet. App. 18a (quoting *Obergefell*, 576 U.S. at 672).

2. Davis does not identify a single case recognizing a First Amendment affirmative defense to liability under Section 1983, and the cases she does cite provide no support for her position. Her argument rests instead on conflating the different ways this Court has used the words "private" and "personal" in cases arising under Section 1983.

The Court has explained that government officials "are also private citizens with their own constitutional rights," and when they engage in "'personal pursuits'" in their "private capacity," they do not satisfy Section 1983's state-action requirement and may not be held liable. *Lindke*, 601 U.S. at 196-97 (quoting *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality opinion)). That principle does not apply here because Davis acted in her official capacity when she denied respondents a marriage license.

The Court has also used the word "personal" in a different sense, to describe both the type of liability and the type of immunities that apply when an official is sued in her individual capacity for damages based on official acts. *E.g.*, *Hafer v. Melo*, 502 U.S. 21, 28 (1991). The use of "personal" in that context distinguishes individual-capacity suits from official-capacity suits, the latter of which are in essence suits against the State itself and thus implicate state sovereign immunity. But despite the "personal" label, individual-capacity suits are nonetheless premised on state action, not on private conduct. The First Amendment therefore does not provide a defense to liability.

Illustrating Davis's confusion on this point, she cites *Hafer* for the proposition that a government official sued in a "personal or individual capacity" may assert "personal immunity and personal defenses to liability." Pet. 22. But *Hafer* holds only that government officials can be sued in their individual capacities for damages under Section 1983. *Hafer*, 502 U.S. at 25. It says nothing about whether officials can assert First Amendment defenses in such actions. And although *Hafer* referred to "personal liability," and "personal immunity defenses such as" qualified immunity, the Court made clear that such "personal" liability attaches to government officials' "acts within their authority and necessary to fulfilling governmental responsibilities." *Id.* at 25, 28. Even when sued in an individual capacity, the official is held liable for state action. As a result, the official's private constitutional rights are beside the point.

Davis also invokes *Snyder v. Phelps*, 562 U.S. 443 (2011), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* Pet. 20, 25, 31. But those cases involved state-law tort suits based on private conduct. In that context, the Court held that a private defendant can assert his free speech rights as a defense to the imposition of liability. *Snyder*, 562 U.S. at 458-59; *Sullivan*, 376 U.S. at 283-84. Neither decision suggests that the same First Amendment analysis would apply to a suit under Section 1983 seeking to hold a government official liable for actions taken under color of state law.

Davis claims that if government officials cannot assert their private constitutional rights to shield

their official acts, they will be rendered defenseless when sued for damages in their individual capacities. *See* Pet. 22-23. It is black letter law, however, that officials sued in their individual capacities can assert certain immunity defenses. *See Hafer*, 502 U.S. at 25; *see also, e.g.*, *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute prosecutorial immunity); *Pearson v. Callahan*, 555 U.S. 223 (2009) (qualified immunity). Davis herself is well acquainted with the ability of officials sued in their individual capacities to claim qualified immunity, having done so herself throughout this case. The only sense in which Davis has been "*stripped of any government immunity*," Pet. 4, is that the lower courts rejected her qualified-immunity arguments.

It is instead Davis's position that would lead to inequitable results. The Sixth Circuit noted the "dire possibilities that might follow if Davis's argument were accepted." Pet. App. 19a. On her theory of constitutional defenses, "[a]n election official who believes women should not vote could refuse to count ballots cast by females," or "[a] zoning official personally opposed to Christianity could refuse to permit the construction of a church." *Id.* Such officials could then assert their private constitutional rights as a defense in any ensuing lawsuit challenging their official, unconstitutional acts. As the Sixth Circuit explained: "That is not how the Constitution works." *Id.*

Finally, Davis seeks to bolster her First Amendment arguments with unrelated objections to the district court's order holding her in contempt in *Miller* and the jury's award of emotional-distress damages in

this case. *See* Pet. i-ii, 3, 8-9, 13-14, 22-23, 27, 30. But both issues are red herrings. Davis cannot use her petition for certiorari in this case to ask the Court to review a contempt ruling from a completely different case. And it is well established that "mental and emotional distress constitute compensable injury in § 1983 cases." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (citing *Carey v. Piphus*, 435 U.S. 247, 264 (1978)). There is thus nothing suspect about the jury's damages award.

3. Davis's purported circuit splits are illusory. She first cites cases recognizing that government officials sued in their individual capacities for damages can claim certain immunity defenses: absolute immunity for judges and prosecutors, legislative immunity for lawmakers, or qualified immunity for other officials. *See* Pet. 20-21. None of those cases involved a First Amendment defense to liability under Section 1983. Accordingly, they neither support Davis's First Amendment argument nor conflict with the decision below.

In *Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988), for instance, the Seventh Circuit reversed a district court decision granting qualified immunity to government officials. *See id.* at 393. And in *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992), the Eleventh Circuit granted legislative immunity to certain government officials while denying legislative and qualified immunity to another government official. *See id.* at 1062-65. Davis's discussion of *Yeldell* omits the word "immunity" from the phrase "personal immunity defenses." *Compare* Pet. 20 *with*

Yeldell, 956 F.2d at 1060. But in neither *Conner* nor *Yeldell* did a government official assert affirmative defenses based on his own constitutional rights.

The Fifth Circuit's unpublished decision in *Laird v. Spencer*, No. 20-30237, 2025 WL 79826 (5th Cir. Jan. 13, 2025), is even further afield. That case concerned a justice of the peace who asserted absolute judicial immunity as a defense to an official-capacity suit under the Americans with Disabilities Act. *Id.* at *2-6. *Laird* thus involved neither a claim under Section 1983, nor an official sued in his individual capacity, nor an affirmative defense based on the official's constitutional rights. It has no relevance to this case.

Davis also cites cases holding that private citizens and religious organizations sued for their private conduct may raise First Amendment defenses to state tort liability. Pet. 28-30. None of those cases involved a claim under Section 1983, a government-official defendant, or any actions taken under color of state law. *See, e.g.*, *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 879-83 (9th Cir. 1987) (suit against the governing body of the Jehovah's Witnesses for state-law torts); *Sands v. Living Word Fellowship*, 34 P.3d 955, 958-62 (Alaska 2001) (suit against a church and two of its members for state-law torts); *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 2 (Tex. 2008) (suit against a church and several of its members for state-law torts).

Those cases are consistent with the decision below. The Sixth Circuit held only that First Amendment affirmative defenses are unavailable to government officials sued under Section 1983 based on actions taken

under color of state law. That does nothing to undermine the ability of private defendants—or even government officials sued based on their private conduct—to raise the First Amendment as an affirmative defense to tort claims.

II. The Court Should Decline Davis's Invitation to Reconsider *Obergefell*.

A. This Case Is a Poor Vehicle for Revisiting *Obergefell*.

Davis also asks the Court to grant review to overrule *Obergefell*. But her petition "does not cleanly present" that question, either. *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (mem.) (statement of Thomas, J., respecting the denial of certiorari). Throughout the case, Davis has affirmatively waived any intention to seek reconsideration of *Obergefell*. And reaching that question in the context of this case would first require the Court to address thorny questions about the nature of liability under Section 1983, given that *Obergefell* had clearly established respondents' right to marry at the time of Davis's conduct.

1. As an initial matter, Davis has waived any request to overrule *Obergefell*. As the Sixth Circuit observed, Davis's motion to dismiss "expressly stated that she did not 'want[] to relitigate the Supreme Court's decision in *Obergefell*.'" Pet. App. 29a n.3 (alteration in original) (quoting Dkt. 29-1 at 1). That express waiver, made "in no uncertain terms," constitutes the "intentional relinquishment or abandonment of a known right." *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (quoting *Kontrick v. Ryan*, 540 U.S.

443, 458 n.13 (2004)). Federal courts lack "authority to resurrect" a defense that has been waived in that manner. *Id.* at 471 n.5.

Likewise, when Davis sought this Court's review in 2019, her petition opened with the following:

> This case is not about whom a person may marry under Kentucky law, whether Kentucky must license the marriage of a same-sex couple, or even whether Respondents could obtain a Kentucky marriage license when they wanted one. Nor is this case about a county clerk who wanted to re-litigate this Court's decision in *Obergefell v. Hodges*, or to prevent Respondents or any other same-sex couple from receiving a marriage license in Kentucky.

Pet. for Writ of Cert. at 2, *Davis*, 141 S. Ct. 3 (No. 19-926).

Nothing prevented Davis from asking this Court to overrule *Obergefell* the last time she petitioned for review, or from at least preserving the issue in the district court for later consideration by this Court. Instead, she explicitly stated that she was not challenging *Obergefell*. She should be held to that waiver.

2. This case would be a poor vehicle for overruling *Obergefell* even if the issue had been preserved. To overturn *Obergefell* in this case, the Court would first have to determine whether such a decision would allow Davis to escape liability under Section 1983. Oth-

erwise, the Court's decision "would amount to an advisory opinion without the possibility of any judicial relief" for Davis. *California v. Texas*, 593 U.S. 659, 673 (2021) (internal quotation marks omitted).

But it is not at all clear that a public official who has acted contrary to this Court's decisions can avoid Section 1983 liability by asking the Court to overrule the very precedent she defied. Liability under Section 1983 generally depends on the law "*at the time* of defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (emphasis added). Before the Court could even begin to consider overruling *Obergefell* in the context of this case, the Court would first have to resolve novel and difficult questions about what law, as established at what time, matters for purposes of liability under Section 1983.

And resolving that issue in Davis's favor could lead to unsettling consequences. If government officials can intentionally violate clearly established law, and then later be exonerated for doing so based on the reversal of precedent, "the law becomes not a chart to govern conduct but a game of chance," *Mahnich v. S. S.S. Co.*, 321 U.S. 96, 112 (1944) (Roberts, J., dissenting). It would incentivize other officials to violate constitutional rights they dislike, in the hope that this Court will someday bail them out by overruling the precedent they disregarded. "Respect for tribunals [will] fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." *Id.* at 113.

B. *Obergefell* Should Not Be Overruled.

Obergefell was correctly decided, and there is no need to revisit it. Davis's primary argument for doing so—that the Due Process Clause does not protect any substantive rights—is at odds with more than a century of this Court's precedent and ignores the equal protection aspect of *Obergefell*'s rationale.

1. Davis argues that this case "presents the ideal opportunity to revisit substantive due process." Pet. 34. But the Due Process Clause's protection of some substantive rights has been settled for more than a century. And in any event, *Obergefell* rested on both due process and equal protection rationales, but Davis says nothing about equal protection.

As this Court reiterated just last year, the Due Process Clause "promises more than fair process: It also 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Dep't of State v. Muñoz*, 602 U.S. 899, 909-10 (2024) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)); *see also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022) (recognizing that the Due Process Clause protects a "select list of fundamental rights that are not mentioned anywhere in the Constitution"). Included among those rights are the right to make decisions about the education of one's children, *see Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); the right not to be sterilized without consent, *see Skinner v. Oklahoma ex rel. William-*

son, 316 U.S. 535 (1942); and the right to marry irrespective of race, *see Loving v. Virginia*, 388 U.S. 1 (1967). Davis provides no persuasive reason for this Court to discard the doctrine underpinning some of our Nation's most cherished rights.

2. In the alternative, Davis argues that even if the Court is not prepared to overrule all of substantive due process, the Court should still revisit *Obergefell* based on the specific reasoning of that case. Pet. 36. But *Obergefell* was correctly decided and should not be overruled.

"[T]o overrule an important precedent is serious business." *Ramos v. Louisiana*, 590 U.S. 83, 120 (2020) (Kavanaugh, J., concurring in part) (internal quotation marks omitted). Stare decisis is "a foundation stone of the rule of law." *Kimble v. Marvel Ent. LLC*, 576 U.S. 446, 455 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). It "serves many valuable ends." *Dobbs*, 597 U.S. at 263. Stare decisis protects the interests of those who have relied on precedent; "reduces incentives for challenging settled precedents"; "fosters evenhanded decision-making by requiring that like cases be decided in a like manner"; and "contributes to the actual and perceived integrity of the judicial process." *Id.* at 263-64 (internal quotation marks omitted). Accordingly, the Court has repeatedly stated that "an argument that [it] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble*, 576 U.S. at 455. Rather, "[t]o re-

verse course," this Court requires a "'special justification.'" *Id.* at 455-56 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

Davis's petition cannot get out of the starting blocks in its attack on precedent: *Obergefell* correctly held that the Due Process and Equal Protection Clauses extend the right to marry to same-sex couples. *Obergefell*'s holding falls comfortably within this Court's precedents, which have "long held the right to marry is protected by the Constitution." *Obergefell*, 576 U.S. at 664. As *Obergefell* observed, "[o]ver time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause." *Id.* That right is "based in history, tradition, and other constitutional liberties inherent in this intimate bond." *Id.* at 665. Indeed, "the annals of human history reveal the transcendent importance of marriage." *Id.* at 656.

Obergefell was also grounded in the Fourteenth Amendment's "guarantee of the equal protection of the laws." *Id.* at 672. The Court's precedents recognize that, at least with respect to marriage, the rights protected by the Due Process and Equal Protection Clauses are "connected." *Id.* For example, in *Loving*, this Court invalidated a ban on interracial marriage both because "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" and because the marriage ban denied a "fundamental freedom" protected by the Due Process Clause. *Id.* at 672-73 (quoting *Loving*, 388 U.S. at 12). And in *Zablocki v. Redhail*, 434 U.S. 374 (1978), this Court invalidated a

law barring fathers who were behind on child-support payments from marrying without judicial approval because the "essential nature of the marriage right . . . made apparent the law's incompatibility with requirements of equality." *Obergefell*, 576 U.S. at 673. By the same token, laws prohibiting same-sex marriage "are in essence unequal: same-sex couples are denied all the benefits afforded to opposite sex-couples and are barred from exercising a fundamental right." *Id.* at 675; *see also Pavan v. Smith*, 582 U.S. 563, 566 (2017) (per curiam) (reiterating that "a State may not 'exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples'" (quoting *Obergefell*, 576 U.S. at 675-76)).

Davis contends that *Obergefell*'s reasoning failed to "satisfy *Glucksberg*'s primary requirement of *carefully describing* the right at issue." Pet. 36. But this Court "has long held the right to marry is protected by the Constitution," *Obergefell*, 576 U.S. at 664, and the Court has "inquired about" that right "in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right," *id.* at 671. For example, "*Loving* did not ask about a 'right to interracial marriage'; *Turner* [*v. Safley*, 482 U.S. 78 (1987)] did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.'" *Id.* In any event, the right recognized in *Obergefell* was grounded in not only the Due Process Clause but also the Equal Protection Clause. *See id.* at 672-75. Davis provides no reason why this Court

should revisit its conclusion that denying the fundamental right of marriage to same-sex couples "abridge[s] central precepts of equality." *Id.* at 675.

At a minimum, Davis cannot show that the "nature of [the Court's] error" or the "quality of [its] reasoning" in *Obergefell* warrant revisiting the decision. *Dobbs*, 597 U.S. at 268. *Obergefell*'s constitutional analysis was not "far outside the bounds of any reasonable interpretation of the various constitutional provisions" on which it relied. *Id.*; *cf. id.* at 295 (stating that "[n]othing" in *Dobbs* "should be understood to cast doubt on" *Obergefell*). On the contrary, *Obergefell* was entirely consistent with this Court's cases, which have long recognized that the "right to marry is fundamental as a matter of history and tradition." *Obergefell*, 576 U.S. at 671.

Regardless, Davis provides no "special justification" for revisiting *Obergefell*. *Halliburton*, 573 U.S. at 266. None of the other factors that this Court has identified when deciding whether to overturn its precedents supports doing so here. *See Dobbs*, 597 U.S. at 268 (listing factors). With respect to workability, Davis makes no effort to contest that *Obergefell* can "be understood and applied in a consistent and predictable manner." *Id.* at 280-81. In fact, the right recognized in *Obergefell* has proven remarkably workable. A decade since *Obergefell*, there are now nearly 800,000 married same-sex couples living across the United States. *See* Jake Hays & Rachel Minkin, *Rising Number of U.S. Households Are Headed by Married Same-Sex Couples*, Pew Rsch. Ctr. (June 12,

2025), https://perma.cc/9T67-3T93. Those families were built around the right this Court recognized.

Nor has *Obergefell* "distort[ed] . . . important but unrelated legal doctrines." *Dobbs*, 597 U.S. at 286. Contrary to Davis's suggestion, *see* Pet. 35, *Obergefell* did not privilege the right to marry over religious liberty. *Obergefell* itself "emphasized that religions, and those who adhere to religious doctrines, may continue to advocate . . . that, by divine precepts, same-sex marriage should not be condoned," and that the First Amendment affords individuals and religious organizations "proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." 576 U.S. at 679-80. And since *Obergefell*, the Court has provided robust protection to individuals' free speech and free exercise rights in cases involving same-sex relationships, allowing those rights to workably coexist. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018).

Overruling *Obergefell* would also "upend substantial reliance interests." *Dobbs*, 597 U.S. at 287. Marriage is "the foundation of the family and of society." *Obergefell*, 576 U.S. at 669 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)). It also provides protection. Marriage secures "recognition, stability, and predictability" for families, their children, and society. *Id.* at 668. States, the federal government, and private actors direct legal entitlements to married couples and their families, including Social Security benefits, health insurance, rights related to child custody and

adoption, and various property rights. *Id.* at 667-70. Stare decisis has "added force" where, as here, "citizens, in the private realm, have acted in reliance on a previous decision." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *see also Ramos*, 590 U.S. at 107 (listing the decision to "enter[] a marriage" among the forms of reliance that would support "preserv[ing] precedent"). Overruling *Obergefell* could call into question the constitutional status of existing same-sex marriages and disrupt the lives of those who aspire to, plan their affairs around, and benefit from same-sex marriage.

Davis argues that the Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022), "has eliminated any basis upon which to assert reliance." Pet. 38-39. Respondents agree that the Act prohibits the federal government and States from refusing to recognize marriages legally entered into in any State and from denying any "right or claim arising from such a marriage." 28 U.S.C. § 1738C(a). But the Act does not prevent States from banning same-sex weddings within their borders, meaning that, if *Obergefell* is overturned, couples may not be able to marry in their home communities and places of worship. Overruling *Obergefell* would also affect institutions—including businesses, universities, and the military—that rely on the ability of same-sex couples to marry in the States where they operate, in order to recruit and retain talent. More broadly, a statute does not provide the kind of durable protection afforded by a constitutional right. Those concerns further support the conclusion that this Court should not revisit *Obergefell*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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