

No. 25-125

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**

**REPLY IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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REASONS FOR GRANTING THE PETITION

I. Petitioner has sought First Amendment protection from the beginning, and this case presents an ideal vehicle to vindicate important First Amendment defenses of government officials sued in their individual capacity for emotional distress.

A. Petitioner sought First Amendment accommodation of her religious beliefs in her official capacity and raised the First Amendment as a defense in her individual capacity.

Davis did not have an “official policy *** to deny marriage licenses to same-sex couples, based on her personal objection to same-sex marriage.” Br. in Opp. 1. Davis requested an accommodation to remove her name, which was printed on every marriage license. Pending that request, no licenses were issued to anyone. When her request was granted, licenses were issued to all applicants.

First, Davis did not discriminate against same-sex couples. She temporarily paused the issuance of *all* marriage licenses pending her accommodation request. As the Sixth Circuit recognized, “[b]elieving that she should not discriminate, Davis decided that her office would cease issuing marriage licenses *altogether*.” App. 3a (emphasis added).

Second, Davis’s pause was temporary to allow the Commonwealth to provide her with a religious

accommodation under the First Amendment. Again, the Sixth Circuit noted that the pause was temporary “until the state passed legislation to grant her an accommodation.” App. 3a. Actually, the pause was only from June 29 to early September 2015. Moreover, the Sixth Circuit noted that Davis raised the Free Exercise Clause as a defense to Respondents’ damages claims below, and it was adjudicated by the lower courts. App. 6a.

Davis’s request for religious accommodation has remained consistent. Immediately after this Court granted certiorari in *Obergefell v. Hodges*, 576 U.S. 644 (2015), Davis began seeking an accommodation for all clerks to avoid conflict with their religious beliefs. R.899; Pet. 9–13. She beseeched state legislators to pass a law removing the clerks’ names similar to what the legislature passed in April 2016, and she petitioned Governor Steven Beshear. R.899.

The accommodation she sought before and after litigation commenced was in her original official capacity to remove the clerks’ names from the licenses. App. 4a–5a. When the complaint was amended in 2017, seeking emotional distress damages against Davis in her individual capacity, she raised the First Amendment as affirmative defense while continuing to press her First Amendment accommodation and qualified immunity defenses. R.1868; App. 13a. At each step of the litigation and even pre-dating it, Davis sought refuge in the First Amendment.

Not only did Davis’s religious beliefs compel her to refrain from issuing a marriage license with her name on it, but Kentucky imposed criminal penalties on Davis for altering any vital record, such as a marriage license. See R.902. *Obergefell* placed Davis between a rock and a hard place. The pre-*Obergefell* form for marriage licenses statutorily required one man and one woman to be listed. Pet. 5 (citing Ky. Rev. Stat. §402.005). The Kentucky Senate President filed a brief in defense of Davis, arguing that *Obergefell* made it impossible for Davis to “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.

However, without any authority to do so, on same day *Obergefell* was decided, then-Governor Beshear mandated that a new form be created (still bearing the name of the county clerks) that accommodated same-sex couples. R.130. In early September 2015, when Davis was in prison for six days, a deputy clerk manually struck through her name and issued licenses. Beshear, who initially refused this same accommodation request, now said the altered license without Davis’s name was valid. R.134–135.

That was the precise accommodation Davis sought from Governor Beshear, the legislature, and the courts. But the Governor’s *ultra vires* alteration of the form came too late for Davis—she had already been incarcerated while her accommodation request was pending.

After Davis lost her liberty for six days, the Commonwealth enacted—through Executive Order and legislation—the very accommodation Davis had sought before and after *Obergefell*. In December 2015, the newly elected Governor, Matt Bevin, issued Executive Order 2015-048, explicitly recognizing the substantial burden on religious beliefs that the prior system imposed on Davis and other clerks, that the state had no compelling interest to refuse the accommodation, and requiring alteration of the marriage license form to remove the clerk’s name. R.174–176. Then in April 2016, the Kentucky legislature unanimously passed Senate Bill 216, which codified the religious accommodation that Davis had been seeking.

B. This case presents an ideal vehicle to vindicate the availability of the First Amendment as an affirmative defense for government officials sued in their individual capacity for emotional distress without any actual damages.

Davis presented the precise question before this Court to the lower courts. App. 13a (“As Davis sees it, issuing Plaintiffs a marriage license would have violated her own constitutionally protected religious beliefs; thus, she asserts that she cannot be held liable. We disagree.”); App. 14a (noting that the district court agreed with the Sixth Circuit). Thus, contrary to Respondents’ contention (at 14), Davis’s First Amendment defenses have been fully presented to and adjudicated by the lower courts. This case presents an ideal vehicle for this Court to establish

the scope of Free Exercise Clause protection for a government official sued in her individual capacity stripped of government immunity, especially where the claim is for emotional distress allegedly resulting in hurt feelings connected to religious expression.

Davis's Petition presents an ideal vehicle to address what the Sixth Circuit noted was "an issue of first impression," App. 14a, namely—whether a government official stripped of Eleventh Amendment immunity and sued in her *personal capacity* for emotional distress may raise the First Amendment as a defense like any other citizen. The question presented is an important one of first impression, which warrants certiorari review. *E.g.*, *Sheldon v. Metro-Goldwyn Pic. Corp.*, 309 U.S. 390, 396–97 (1940) ("In view of the importance of the question, which appears to be one of first impression * * * we granted certiorari."); *Am. Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) ("The question being an important one of first impression * * *, we granted certiorari."); *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Comm. Project*, 576 U.S. 519, 528 (2015) (same).

C. This case presents an ideal vehicle to establish that the Free Exercise Clause provides an identical affirmative defense to the Free Speech Clause for emotional distress claims this Court recognized in *Snyder v. Phelps*.

Respondents contend that government officials are not entitled to First Amendment protection in

suits against them in their individual capacity, so *Snyder v. Phelps*, 562 U.S. 443 (2011) has no application to Davis. Br. in Opp. 15. But it cannot be that government officials are stripped of all First Amendment defenses upon election. Ironically, to support their claim that Davis’s status as a government official eliminates her protection for religious expression, Respondents cite *Groff v. DeJoy*, 600 U.S. 447 (2023) and *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). Both cases involved *government* employees this Court said were entitled to First Amendment protection. Kennedy was a public-school employee, 597 U.S. at 527, and Groff was a United States Postal Service employee. 600 U.S. at 454. Thus, the protection afforded to religious exercise is not surrendered upon government employment, for as *Kennedy* noted, government employees do not “shed their constitutional rights to freedom of speech or expression.” 597 U.S. at 527.

Having admitted that government employees are entitled to *some* First Amendment protection, Respondents’ objection appears to be that the Court should not grant certiorari to address whether the Free Exercise Clause provides an identical affirmative defense to the Free Speech Clause. Br. in Opp. 23. “But how could that be? It is true that this Court and others often refer to the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause as separate units. But the three Clauses appear in the same sentence of the same Amendment.” *Kennedy* 597 U.S. at 532–533. Thus, this Court’s holding in *Snyder* that “[t]he Free Speech Clause of the First Amendment *** can serve as a

defense in state tort suits, including suits for intentional infliction of emotional distress,” 562 U.S. at 451, requires a finding that the Free Exercise Clause has “complementary purposes,” *id.*, providing complementary defenses to defendants, like Davis, who face individual liability for emotional distress claims.

“[A] citizen who works for the government is nonetheless a citizen,” and “[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict *** the liberties employees enjoy in their capacities as private citizens.” *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Davis was entitled to this protection once she was stripped of her government immunity and the Respondents sought damages against her *individually* based on emotional distress arising from her religious expression See Pet. 17–19. Davis was entitled to raise personal defenses when she was sued in her personal capacity. See *Hafer v. Melo*, 502 U.S. 21, 27 (1991). If the First Amendment provides protection for government employees in their personal capacity, there is no reason Davis is not entitled to seek refuge in the Free Exercise Clause in the same manner petitioners were afforded under the Free Speech Clause in *Snyder*. The Court should grant certiorari to establish that the complementary clauses provide complementary protection from liability for emotional distress damages claims like those brought against Davis.

D. Petitioner raised, and the Sixth Circuit adjudicated, the First Amendment affirmative defense arguments.

As the Sixth Circuit stated, Davis “argues the Free Exercise Clause provides her an affirmative defense to liability,” App. 13a, and recognized that Davis presented her First Amendment defenses to the district court. App. 14a (“The district court agreed, holding that Davis’s conscientious religious objection to same-sex marriage outside her official duties does not shield her.”). Davis’s defense has been raised at every level and is properly before the Court.

II. Petitioner did not waive any right to request this Court to overturn *Obergefell*.

A. The lower courts do not have authority to overturn *Obergefell*, but the issue was nevertheless briefed below.

Respondents’ contention (at 27) that Davis waived argument to overturn *Obergefell* is wrong factually and legally. Their theory would allow “anarchy to prevail within the federal judicial system.” *Hutto v. Davis*, 454 U.S. 370, 375 (1982). “[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.” *Id.* “Needless to say, only this Court may overrule one of its precedents.” *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). Legally, their contention makes no sense. Factually, as the Sixth Circuit noted, Davis did brief the argument that *Obergefell* was incorrigibly decided,

noting that she was aware lower courts did not have such authority to overrule the decision. Pet. App. 29a.

B. Petitioner raised the issue of *Obergefell* being incorrectly decided, and the lower court adjudicated it.

Respondents’ contention (at 27) is also factually incorrect. Davis—knowing the lower court had no authority to overturn *Obergefell*—nevertheless presented that very question to the Sixth Circuit below.¹ Pet. App. 29a. And the Sixth Circuit adjudicated the issue. Even if Davis had not sought to overturn *Obergefell* below, which she did, arguments need only be “fairly included” in the Petition. Sup. Ct. R. 14.1(a) (providing “any question presented is deemed to comprise every subsidiary question fairly included therein”); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992) (noting arguments for certiorari comprise those claims “‘fairly included’ within the questions presented”). Davis preserved every challenge to *Obergefell*.

III. This Court should grant certiorari to overturn *Obergefell*.

As Justice Thomas noted in a prior petition in this case, “[b]y choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, *** the Court has created a problem that only it can fix.” *Davis v.*

¹ Davis did not include the request in her 2019 Petition, No. 19-926, because the critical question was being immune from the consequences of *Obergefell*.

Ermold, 141 S. Ct. 3, 4 (2020). “In future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring). The reason is simple: *Obergefell* is “demonstrably erroneous,” and “we have a duty to correct the error established in those precedents.” *Id.* Davis may have been “one of the first victims of this Court’s cavalier treatment of religion in its *Obergefell* decision, but she will not be the last.” *Davis*, 141 S. Ct. at 4. As Justice Barrett has recently written, “*stare decisis* is only a presumption; the Court can and does fix mistakes.” Amy Coney Barrett, *Listening to the Law: Reflections on the Court and Constitution*, 209 (2025). The time has come for that course correction.

A. Petitioner’s case demonstrates the precise harms the dissenters feared would occur in the wake of *Obergefell*.

As the Petition (at 2–3) noted, the “ruinous consequences for religious liberty” that the dissenters in *Obergefell* predicted came true with Davis. “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.) The Court can and should fix this mistake.

B. *Obergefell* defied precedent and did not rely upon the substantive due process test in *Glucksberg*, and it may be overturned without impacting other cases as *Obergefell* stands alone on an island of its own making.

Obergefell is an outlier in relation to substantive due process. Rights recognized under substantive due process require a “careful description of the asserted fundamental liberty interest,” and the only rights protected are those “objectively, deeply rooted in the Nation’s history.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). *Obergefell* rejected that test and went “out of its way to jettison the careful approach to implied fundamental rights” required by *Glucksberg*.” *Obergefell*, 576 U.S. at 702 (Roberts, C.J., dissenting). Even former Justice Stevens has recognized that *Obergefell* could not have satisfied the *Glucksberg* analysis because it is “so unlikely that the Framers or the public at the time of the Framing believed that States could not limit the right to marry to heterosexual couples.” Justice John Paul Stevens, *Two Thoughts About Obergefell v. Hodges*, 77 U. Ohio L. Rev. 913, 913 (2016). Same-sex marriage is not deeply rooted in the Nation’s history. See Pet. 36–37.

If this Court is disinclined to revisit its substantive due process precedent as Justice Thomas has advocated, *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring), it can still correct the constitutional error of *Obergefell* without impacting other substantive due

process cases. As *Dobbs* noted, “Each precedent is subject to its own *stare decisis* analysis, and the facts that our doctrine instructs us to consider like reliance and workability are different for [each case].” 597 U.S. at 295. *Obergefell* stands on an island of its own making and can be overturned without affecting other decisions of this Court.

C. Overturning *Obergefell* even without reaching the First Amendment argument presented in this case would provide the relief sought by Petitioner.

Respondents suggest that overturning *Obergefell* would provide no relief to Davis. Br. in Opp. 29. This is incorrect. By analogy to qualified immunity, that defense protects a defendant “in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). “[T]he precise content of most of the Constitution’s civil-liberties guarantees rests upon an assessment of what *accommodation* between government need and individual freedom is reasonable.” *Anderson v. Creighton*, 483 U.S. 635, 643–44 (1987) (emphasis added).

A decision overturning *Obergefell*, as in *Dobbs*, would hold that it “was egregiously wrong *from the start*.” 597 U.S. at 231 (emphasis added). If *Obergefell* was egregiously wrong from the start, then the right it purported to create was neither clearly established nor established at all. It was, and is, a “legal fiction” and “a particularly dangerous one” given its

“disastrous ends” for Davis. *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring).

In defining the contours of her ten-year quest for refuge in the First Amendment, Davis’s reliance on First Amendment protection with historical pedigree and an accommodation under existing precedent clearly trumps any egregiously wrong decision that conflicted with her enumerated right. *A decision reversing Obergefell would recognize that it created no clearly established right to obtain a marriage license with the name of a specific clerk.* In short, overturning *Obergefell* would mean that Davis should never have stood trial in the first place and never faced liability. Davis’s “judgments in making these difficult determinations” were “objectively legally reasonable,” *Anderson*, 483 U.S. at 644, because she relied on enumerated rights under the First Amendment juxtaposed to a decision that was egregiously wrong from the start.

Finally, while *Obergefell* shredded the marriage laws of Kentucky, it did not create a framework that governed the daily operation and duties of the county clerks. Only the Kentucky legislature had such authority. *Obergefell* could not override the First Amendment, nor could it grant Respondents the right to obtain a marriage license with Davis’s name on it. This entire course of litigation has never been about getting a marriage license. Respondents continued this litigation long after obtaining their license in September 2015 to punish Davis for not placing *her name on their license*. Surely, *Obergefell* did not mean

what Respondents seek as the basis for their emotional distress claim. Overturning *Obergefell* would entitle Davis to the relief she deserves.

CONCLUSION

The Court should grant certiorari.

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