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

Mathew D. Staver
Counsel of Record
Anita L. Staver
LIBERTY COUNSEL
109 Second St., NE
Washington, D.C. 20002
(202) 289-1776
court@LC.org

Horatio G. Mihet
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776

Counsel for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

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]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, 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 *Synder 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.

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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

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[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

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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*.

July 2025

Respectfully submitted,

Mathew D. Staver
Counsel of Record
Anita L. Staver
LIBERTY COUNSEL
109 Second St., NE
Washington, D.C. 20002
(202) 289-1776
court@LC.org

Horatio G. Mihet
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776

Counsel for Petitioner

TABLE OF APPENDICES

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 25a0049p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ERMOLD; DAVID MOORE,

Plaintiffs-Appellees,

v. No. 24-5524

KIM DAVIS, individually,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Kentucky at Ashland.
No. 0:15-cv-00046-David L. Bunning, District Judge.

Argued: January 30, 2025

Decided and Filed: March 6, 2025

Before: WHITE, READLER, and MATHIS, Circuit Judges

COUNSEL

ARGUED: Mathew D. Staver, LIBERTY COUNSEL, Orlando, Florida, for Appellant. William Powell,

INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, Washington, D.C., for Appellee. **ON BRIEF:** Mathew D. Staver, Daniel J. Schmid, LIBERTY COUNSEL, Orlando, Florida, A.C. Donahue, DONAHUE LAW GROUP, P.S.C., Somerset, Kentucky, for Appellant. William Powell, Kelsi Brown Corkran, INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, Washington, D.C., Michael J. Gartland, DELCOTTO LAW GROUP PLLC, Lexington, Kentucky, Joseph D. Buckles, BUCKLES LAW OFFICE, Lexington, Kentucky, for Appellee.

WHITE, delivered the opinion of the court in which MATHIS, J., concurred, and READLER, J., concurred in part and concurred in the judgment. READLER, J. (pp. 20–23), delivered a separate concurring opinion.

OPINION

HELENE N. WHITE, Circuit Judge. Defendant-Appellant Kim Davis, in her capacity as the clerk of Rowan County, Kentucky, refused to issue a marriage license to Plaintiffs-Appellees David Moore and David Ermold. Plaintiffs sued Davis under 42 U.S.C. § 1983, claiming that Davis violated their constitutional right to marry. After several interlocutory appeals, the district court entered judgment for Plaintiffs on liability and a jury awarded them compensatory damages. Davis now appeals, arguing that she is entitled to qualified immunity, that she has affirmative defenses to liability under the Free

Exercise Clause and the Kentucky Religious Freedom Restoration Act, and that Plaintiffs' evidence of their emotional distress was insufficient to support the jury's award. We AFFIRM.

I. Background.

In June 2015, when the Supreme Court held that same-sex couples have a constitutional right to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015), Defendant-Appellant Kim Davis was the elected county clerk for Rowan County, Kentucky. Kentucky county clerks were charged with providing licenses to county residents, including vehicle licenses, hunting licenses, and marriage licenses.

Soon after *Obergefell* issued, then-Governor of Kentucky Steve Beshear sent a letter to all Kentucky county clerks, including Davis, instructing them to immediately "license and recognize the marriages of same-sex couples." Davis, however, is religiously opposed to same- sex marriage, and did not want to issue marriage licenses to same-sex couples. After Davis received and read Beshear's letter, she consulted with the Rowan County attorney, who advised her that she had to issue marriage licenses to same-sex couples "because that's the law." R. 88- 2, PID 742–43. Davis chose not to follow that advice. Believing that she should not discriminate, Davis decided that her office would cease issuing marriage licenses altogether until the state passed legislation to grant her an accommodation. Under this moratorium policy, Davis and her deputies denied marriage licenses to several local same-sex couples.

Plaintiffs-Appellees David Moore and David

Ermold are one such couple. On July 6, 2015, ten days after the Supreme Court published *Obergefell*, Moore and Ermold, who had been in a relationship for nineteen years, visited the Rowan County Clerk's office seeking a marriage license. Davis refused to issue one, stating that she was acting "under God's authority." *Id.* at 739. Davis advised Plaintiffs to obtain a marriage license from a clerk's office in another county. When Plaintiff Moore remarked that Davis had likely given marriage licenses to "murderer[s], rapists, and people who have done all kinds of horrible things," Davis responded, "that was fine because they were straight." R. 169, PID 2785–86.

Plaintiffs filed this lawsuit several days later. They sought damages under 42 U.S.C. § 1983, alleging that Davis violated their constitutional right to marry. Around the same time, a group of county residents led by April Miller sued Davis in a parallel suit before the same district-court judge, seeking an injunction to prevent Davis from enforcing her no-marriage- license policy. *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015), *vacated*, 667 F. App'x 537 (6th Cir. 2016) (order). The district court entered a preliminary injunction in the *Miller* case and ordered Davis to issue marriage licenses. *Id.* at 944. Plaintiffs Moore and Ermold returned to the Rowan County Clerk's office for a second and third time over the next few weeks seeking a marriage license. Each time, Davis and her deputies refused.

In September 2015, the district court found that Davis had violated its preliminary injunction by continuing to refuse to issue marriage licenses. The court held Davis in contempt and ordered her incarcerated. *See* Min. Entry Order, *Miller v. Davis*,

No. 0:15-cv-00044 (E.D. Ky. Sept. 3, 2015), ECF No. 75. Moore and Ermold returned to the Rowan County Clerk's office while Davis was in jail and obtained a marriage license from one of Davis's deputies. Meanwhile, Davis appealed the preliminary injunction issued in the *Miller* suit. *See Miller*, 667 F. App'x at 538.

While that appeal was pending, Kentucky passed a law intended to provide an accommodation to county clerks who opposed same-sex marriage. *See* 2016 Ky. Acts 578. S.B. 216. The law still required county clerks to issue marriage licenses, but it removed the clerks' names and signatures from the license forms. *Id.* Finding this accommodation sufficient, Davis ended her no-marriage-license policy and moved to dismiss the *Miller* appeal as moot. Appellant's Motion to Dismiss, *Miller v. Davis*, Nos. 15-5880 and 15-5978 (6th Cir. June 21, 2016). This court granted that motion with agreement from the *Miller* plaintiffs. *Miller*, 667 F. App'x at 538. The district court then dismissed this case as well, believing that both were moot. Plaintiffs Moore and Ermold appealed, and this court reversed and remanded, holding that this case was not moot because Plaintiffs sought damages. *Ermold v. Davis*, 855 F.3d 715, 720 (6th Cir. 2017).

On remand, Plaintiffs amended their complaint, and Davis moved to dismiss. Davis argued that the claim against her in her official capacity was barred by sovereign immunity, and the claim against her in her personal capacity was barred by qualified immunity. The district court agreed in part. It dismissed the official-capacity claim on sovereign-immunity grounds, but declined to dismiss the individual-capacity claim, holding that Plaintiffs had

pled sufficient facts to show the violation of a clearly established right.

Both parties appealed,[1] and this court affirmed in all respects and remanded. *See Ermold Davis*, 936 F.3d 429 (6th Cir. 2019). We held that sovereign immunity barred the official- capacity claim "[b]ecause Davis acted on Kentucky's behalf when issuing (and refusing to issue) marriage licenses." *Id.* at 435. As for qualified immunity, we agreed that Plaintiffs had pled the violation of a clearly established right. *Id.* "For a *reasonable* official, *Obergefell* left no uncertainty." *Id.* at 436. But "[f]or Davis," "the message apparently didn't get through." *Id.*

After discovery on remand, Plaintiffs moved for summary judgment on their § 1983 claim. Davis also sought summary judgment and re-asserted her qualified-immunity defense. She additionally argued that even if she is not entitled to qualified immunity, she has independent defenses to liability under the Free Exercise Clause of the First Amendment and Kentucky's Religious Freedom Restoration Act (RFRA).

The district court granted summary judgment to Plaintiffs on Davis's liability and held that a jury must decide whether Plaintiffs are entitled to damages. The district court denied Davis's cross-motion, noting that Davis's qualified-immunity arguments were "recycled from her Motion to Dismiss

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[1] When Davis appealed the qualified-immunity ruling, the district court granted Plaintiffs' request for a certificate of appealability so that this court could consider both the sovereign-immunity defense and the qualified- immunity defense in the same appeal

briefing." R. 108, PID 1953. The district court also rejected Davis's Free Exercise Clause and Kentucky RFRA defenses. The court found "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.* at 1963.

Davis appealed, and this court again affirmed, explaining that "discovery proved the facts plaintiffs pleaded," so Davis was "still not entitled to qualified immunity." *Ermold v. Davis*, No. 22-5260, 2022 WL 4546726, at *1 (6th Cir. Sept. 29, 2022). Beyond that, we declined to consider Davis's Free Exercise and Kentucky RFRA defenses because the interlocutory appeal was limited to qualified immunity, which is unrelated to "whether [Davis] has an affirmative free exercise defense under the First Amendment for her decision not to issue marriage licenses." *Id.* at *3 (quotations omitted). Rather, that defense "can be effectively reviewed after a final judgment." *Id.* (quotation omitted).

On remand, the district court held a trial on damages, at which Plaintiffs Ermold and Moore testified. The jury awarded $50,000 in compensatory damages to each Plaintiff. Davis moved post-trial for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), arguing that Plaintiffs had presented insufficient evidence of their emotional distress to warrant a damage award. The district court denied the motion, finding that "[a] jury could, and did, reasonably infer from the testimony the emotional damage suffered and awarded a sum accordingly." R. 175, 3125–30. This appeal followed.

II. Analysis

A. Qualified Immunity.

Davis argues that she is entitled to qualified immunity because she did not violate any right that *Obergefell* "clearly established." Appellant's Brief at 42–50. This court has rejected that argument twice—first on Davis's appeal at the motion-to-dismiss stage, *see Ermold*, 936 F.3d at 435, and again on Davis's appeal at the summary-judgment stage, *see Ermold*, 2022 WL 4546726, at *2. Plaintiffs argue that the law-of-the-case doctrine bars this court from reconsidering qualified immunity.

Under the law-of-the-case doctrine, a court "should not reconsider" a legal issue it "resolved" at a prior stage of the same case. *Howe v. City of Akron*, 801 F.3d 718, 739 (6th Cir. 2015) (quotation marks omitted). In other words, when the "*same* issue" is presented "in the *same case*" to the "*same court*," the "*same result*" should follow. *Id.* (quoting *Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012)). The doctrine thus "encourage[s] efficient litigation" and "deter[s] indefatigable diehards." *Id.* at 740 (quotation marks omitted). Indeed, without it, "an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again." *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016) (Gorsuch, J.). Thus, only in "exceptional circumstances" will this court reconsider a legal issue decided by a prior panel in the same case. *Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021).

Applying those principles here, the law-of-the-case

doctrine dictates that we refrain from reconsidering Davis's qualified-immunity defense. This court has already decided all legal issues involved in that defense. In the first appeal, we held that Plaintiffs "adequately alleged the violation" of their right to marry—a right that "was clearly established when Davis acted." *Davis*, 936 F.3d at 435. In the second appeal, we held that "discovery proved the facts plaintiffs pleaded," so Davis was "still not entitled to qualified immunity." *Davis*, 2022 WL 4546726, at *1. Qualified immunity has been decided twice by the same court in the same case—so the "*same result*" should follow this time. *Howe*, 801 F.3d at 739 (quotation marks omitted).

Nor has Davis identified any "exceptional circumstances" to warrant departing from the law-of-the-case doctrine. *See Daunt*, 999 F.3d at 308. There are three circumstances in which this court may disturb a prior panel's ruling in the same case: (1) "where substantially different evidence" is discovered between appeals, (2) where the "controlling" legal precedent changes between appeals, and (3) "where a decision is clearly erroneous and would work a manifest injustice." *Id.* (cleaned up). No such circumstances are present here. Davis points to no "different evidence" unearthed since her last appeal. *Id.* (quotation marks omitted). Nor has the relevant legal precedent changed; *Obergefell* remains controlling. And although Davis claims that denying qualified immunity "would be a manifest injustice," she supports that assertion only by repeating the same arguments this Court has already rejected. Appellant's Reply Brief at 23-25.

Indeed, accepting Davis's position would likely

work injustice *in the other direction*: Plaintiffs have spent nearly six years litigating this case in reliance on our holding that if they prove the facts alleged in their complaint, Davis would not be entitled to qualified immunity. *Davis*, 936 F.3d at 435–37. It would be unfair to reverse course now—after Plaintiffs prevailed at trial—and hold that their case was doomed from the start. The law-of-the-case doctrine exists precisely to prevent that sort of "extended game of litigation whack-a-mole." *Entek*, 840 F.3d at 1242.

Davis's contrary arguments are unpersuasive. First, Davis argues that the district court's "interlocutory decisions" merged into the final judgment she has appealed here. Appellant's Reply Brief at 19–21. Thus, in her view, this court may freely review any order the district court issued during the litigation. That argument misunderstands how the law-of-the-case doctrine works. Of course, the doctrine does not prevent a circuit court from "assess[ing] a lower court's rulings." *Musacchio v. United States*, 577 U.S. 237, 245 (2016) (citation omitted). "An appellate court's function *is* to revisit matters decided in the trial court," and the law-of-the-case doctrine does not invert the judicial norm such that a circuit court is "bound by district court rulings." *Id.* Rather, the doctrine requires consistency only between decisions issued by the "*same* court." *Howe*, 801 F.3d at 739 (quotation marks omitted). So although the doctrine does not hold a circuit court to the district court's decisions, it does hold a circuit court to "a ruling that it made in a prior appeal in the same case." *Musacchio*, 577 U.S. at 245. Here, Plaintiffs do not argue that the law of the case bars

this court from reviewing the district court's qualified- immunity orders. Rather, they argue that this court *already* reviewed those orders (twice), and that this panel ought not engage in the same review for a third time. Plaintiffs are correct.

Second, Davis argues that the law-of-the-case doctrine "does not apply post-final judgment" and thus, because the district court has issued a final judgment below, this court is now free to "chang[e] its earlier decisions." Appellant's Reply Brief at 21–22. This argument rests on several out-of-context quotations in which courts have discussed the relationship between a final judgment and the law of the case. Davis notes, for instance, that courts have stated that "[l]aw of the case is not synonymous with preclusion by final judgment," and that the doctrine "regulate[s] judicial affairs *before final judgment*." Appellant's Reply Brief at 22 (quoting *Pit River Home & Agr. Ass'n v. United States*, 30 F.3d 1088, 1097 (9th Cir. 1994); *Patterson v. Haskins*, 470 F.3d 645, 661 (6th Cir. 2006)).

These statements of law are correct, but the inferences Davis draws from them are not. There is no authority for the proposition that an appellate court can freely ignore its ruling in a prior appeal in the same case simply because the district court issued a final judgment between appeals. And Davis's selected quotations merely illustrate the general rule that the law-of-the- case doctrine applies only to judicial decisions issued "within a single action." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (3d ed.2024) (Wright & Miller). In other words, a case ends once the district court issues a judgment

resolving all claims by all parties, and all appeals of that judgment conclude. From that point forward, the law-of-the-case doctrine does not apply because "the case" is over. *See, e.g.*, *id.* And the preclusive effect that the final judgment may have "on later courts and cases" is governed by "[o]ther doctrines," "such as stare decisis, res judicata, and the mandate rule." *Edmonds v. Smith*, 922 F.3d 737, 740 (6th Cir. 2019). That is why it has been said that law of the case "regulate[s] judicial affairs before final judgment," *see, e.g.*, Wright & Miller § 4478— because the doctrine no longer applies after appeals of the final judgment are resolved. Davis's cited quotations do not stand for the proposition that a circuit court may disregard its interim interlocutory decisions once the district court enters a final judgment.[2]

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[2] Even if we were not bound by the law of the case and could properly entertain Davis's assertion of qualified immunity, Davis's argument is weak. Qualified immunity protects government officials from personal liability so long as they do not violate a plaintiff's "clearly established" constitutional rights. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). The defense ensures that an official facing a claim asserting the violation of a constitutional right had "fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). An official has fair notice where it is clear that her "particular conduct" was unconstitutional. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). In making that determination, we do not define a right at "a high level of generality." *Id.* Davis argues that *Obergefell* did not establish a constitutional right to same- sex marriage with the specificity needed to put her on notice that her acts were unconstitutional. We disagree. The "particular conduct" for which Davis is being held liable is her decision—in her capacity as a state official—to deny Plaintiffs a marriage license. And in *Obergefell*, the Supreme Court held that "States are required by the Constitution to issue marriage licenses to same-sex couples." 576

B. Other Affirmative Defenses

Davis alternatively argues that if she is not entitled to qualified immunity, she has a "defense to liability" under the Free Exercise Clause of the First Amendment and Kentucky's RFRA. As Davis sees it, issuing Plaintiffs a marriage license would have violated her own constitutionally protected religious beliefs; thus, she asserts, she cannot be held liable. We disagree.

1. Davis cannot raise a Free Exercise Clause defense because she is being held liable for state action, which the First Amendment does not protect.

Davis first argues that the Free Exercise Clause provides her an affirmative defense to liability. She analogizes this case to *New York Times v. Sullivan*, 376 U.S. 254 (1964), and other cases in which the Supreme Court has held that the First Amendment can be a defense to tort claims. Plaintiffs respond that the Free Exercise Clause protects private conduct, not government action, and because Davis denied Plaintiffs a marriage license while "acting in her role

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U.S. at 680; *see also id.* at 687 (Roberts, C.J., dissenting) (recognizing that the Court "order[ed] every State to license and recognize same-sex marriage"). Indeed, one set of Plaintiffs in *Obergefell* was a same-sex couple from Kentucky who sued state officials and argued that "the Fourteenth Amendment requires a State to license a marriage between two people of the same sex." *Id.* at 654–56. This court "held that a State has no constitutional obligation to license same-sex marriages," *id.* at 656 (citing *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014)), but the Supreme Court reversed and held the opposite. Thus, after *Obergefell*, no reasonable state official could claim to lack notice that it is unconstitutional to refuse to "issue marriage licenses to same-sex couples." *Id.* at 680.

as a government official," the denials are not protected by the First Amendment. Appellee's Brief at 41–46. The district court agreed, holding that "Davis's conscientious religious objection to same-sex marriage outside of her official duties" does not shield her from the constitutional violations she commits when "acting under color of state law." R. 108, PID 1962.

This appears to be an issue of first impression. The parties have provided no case in which a government official raised a First Amendment affirmative defense to a § 1983 claim. The district court likewise noted that it found "no example" of such a case. *Id.* at 1963. Although Davis's assertions are novel, they fail under basic constitutional principles. Under § 1983, 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. The First Amendment protects "private conduct," not "state action." *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) (the First Amendment "constrains" the government and "protects" private acts). To be sure, not every act taken by a public official constitutes state action unprotected by the First Amendment. *Lindke*, 601 U.S. at 191. Government officials "have private lives and their own constitutional rights." *Id.* at 197. But when a public official wields the "authority of the state," she "engage[s] in state action," which, by definition, cannot be protected by the First Amendment. *Id.* at 196–98.

A recent Supreme Court case illustrates these principles. In *Lindke v. Freed*, an elected city manager

maintained a Facebook page in his name. *Id.* at 193. One of his constituents began posting negative comments about the city government on the Facebook page, and the city manager responded by blocking the constituent and deleting the comments. *Id.* The constituent sued under § 1983, alleging that the city manager had violated his First Amendment rights. *Id.* Unlike Davis, the city manager did not attempt to raise a First Amendment defense, but the Court explained that constitutional rights were at stake for both parties. On one hand, the First Amendment bars the government from silencing those who criticize it, so the constituent had a First Amendment right not to be blocked by public officials online. *Id.* at 191, 196–97. On the other hand, the First Amendment generally protects a person's right to control the content on his social-media profile—so the city manager may have had a First Amendment right to block unfriendly users from his Facebook page. *Id.* at 197. The Court explained that the key to adjudicating these competing rights is "[t]he distinction between private conduct and state action." *Id.* When a public official "function[s] as a private citizen," he may "exercise[] his own" constitutional rights. *Id.* at 196–97. But when he "engage[s] in state action," he can be liable in his individual capacity under § 1983 for violating another person's constitutional rights. *Id.* at 195–98 & n.1. The Court thus held that the city manager could be liable if he engaged in state action "when he blocked [the constituent] and deleted his comments." *Id.* at 197.

Just so here. The First Amendment shields Davis where she "functioned as a private citizen," but not where she "engaged in state action." *See id.* at 196–

97. That binary is outcome- determinative here because the act for which Davis is being held liable—denying Plaintiffs a marriage license—is quintessential state action. A state official engages in state action when she "possesse[s] state authority" and "purport[s] to act under that authority." *Mackey v. Rising*, 106 F.4th 552, 559 (6th Cir. 2024) (quotations omitted). So too where she exercises power that is "possible only because" she is "clothed with the authority of state law." *Lindke*, 601 U.S. at 198 (quotations omitted). In Kentucky, marriage licenses are issued by the government; a private party has no authority to grant or deny a marriage license to anyone. And Kentucky delegated that licensing authority to county clerks, who are charged with "issuing marriage licenses, recording marriage certificates, and reporting marriages." *Davis*, 936 F.3d at 434 (citing Ky. Rev. Stat. §§ 402.080, 403.220, 402.230). So, when Davis denied Plaintiffs a marriage license, she was wielding the "authority of the State"—not "function[ing] as a private citizen." *Lindke*, 601 U.S. at 197. That means the license denials were "state action," *id.*, which cannot receive First Amendment protection, and Davis cannot raise a First Amendment defense to liability.

Davis alternatively argues that *her* Free Exercise rights were violated by a *different* state action: Kentucky's delay in granting her a religious accommodation. But Plaintiffs had nothing to do with the timing of the accommodation, and Davis's argument is irrelevant to Plaintiffs' claim. Either way, Davis has been found liable for state action—not private conduct—so she cannot raise a First Amendment defense. Indeed, that is likely why Davis

has not found a case in which a government official has raised a successful First Amendment defense to a § 1983 claim. Section 1983 applies only to acts taken "under color of" state law—a synonym for "state action." *Lindke*, 601 U.S. at 195–96. Simply put, the First Amendment does not protect conduct to which § 1983 applies. For similar reasons, Davis is mistaken to rely on *New York Times v. Sullivan* and its progeny. Those cases involve *private* defendants being sued for *private* conduct—e.g., a newspaper being sued for an editorial advertisement, *see New York Times*, 376 U.S. at 265, or a church leader being sued for protesting a funeral, *see Snyder v. Phelps*, 562 U.S. 443 (2011). The First Amendment protects such private conduct, so the Court recognized a First Amendment defense to prevent state tort law from imposing "invalid restrictions" on "constitutional freedoms." *New York Times*, 376 U.S. at 265. But that logic is inapposite here because the First Amendment does not shield exercises of state power, even where that power is exercised by individuals, so there are no "constitutional freedoms" to protect. At oral argument, Davis's counsel insisted that Davis is no different from a private defendant in a case like *New York Times* because she is being sued in her individual capacity and has been denied qualified immunity. This conflates two legal concepts and is incorrect. A § 1983 individual-capacity claim seeks to impose personal liability on a government official for actions she takes under color of state law. *Kentucky v. Graham*, 473U.S. 159, 165 (1985). Such state actions are not protected by the First Amendment, regardless of the capacity in which the defendant is sued or whether the defendant is entitled to qualified

immunity. Indeed, like Davis, the defendant in *Lindke* was sued in his individual capacity, 601U.S. at 195 n.1, but the Court still held that he could be liable under § 1983 if he wielded "the State's power or authority," *id.* at 198. By definition, a § 1983 claim requires that the defendant engage in state action. Qualified immunity, on the other hand, is a "personal immunity defense[]," *Graham*, 473 U.S. at 166, that "operates to ensure that . . . [officials] are on notice their conduct is unlawful," *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quotation omitted). It comes into play only as a defense to a § 1983 claim, which requires state action. Davis's failure to establish that defense means only that she knew, or should have known, her conduct was unlawful; it does *not* transform her unconstitutional state action into constitutionally protected private conduct.

Obergefell itself supports this conclusion. There, the Court acknowledged that many people "deem same-sex marriage to be wrong" based on "religious or philosophical premises." *Obergefell*, 576 U.S. at 672. These people retain the First Amendment right "to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 679. But those opposed to same-sex marriage do not have a right to transform their "personal opposition" into "enacted law and public policy." *Id.* at 672. Put differently, opposition to same-sex marriage cannot constitutionally bear "the imprimatur of the State itself." *Id.* Davis's contrary view would subvert the Bill of Rights. As Davis sees it, a public official can wield the authority of the state to violate the constitutional rights of citizens if the official believes she is "follow[ing] her conscience."

Appellant's Brief at 26. That cannot be correct. "The very purpose of a Bill of Rights" is to place certain freedoms "beyond the reach of . . . [government] officials." *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). Thus, when an official's discharge of her duties according to her conscience violates the constitutional rights of citizens, the Constitution must win out. The Bill of Rights would serve little purpose if it could be freely ignored whenever an official's conscience so dictates.

Indeed, it is not difficult to imagine the dire possibilities that might follow if Davis's argument were accepted. A county clerk who finds interracial marriage sinful could refuse to issue licenses to interracial couples. An election official who believes women should not vote could refuse to count ballots cast by females. A zoning official personally opposed to Christianity could refuse to permit the construction of a church. All these officials would have wielded state power to violate constitutional rights—but they would have followed their conscience, which Davis believes provides a "defense to liability." Reply Brief at 13.

That is not how the Constitution works. In their "private lives," *Lindke*, 601 U.S. at 196, government officials are of course free to express their views and live according to their faith. But when an official wields state power against private citizens, her conscience must yield to the Constitution.

2. Kentucky RFRA does not provide a defense to tort liability under §1983.

Davis also argues that Kentucky's RFRA shields her from liability. But that statute does not apply here. This court has held that the federal RFRA

statute "does not apply in suits between private parties." *Gen. Conf. Corp. v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010). Under federal RFRA, the government may substantially burden religious exercise "only if it demonstrates" that the burden furthers "a compelling governmental interest" and "is the least restrictive means" of doing so. 42 U.S.C. § 2000bb-1(b). But the government cannot make this demonstration if it "is not a party" to the case. *McGill*, 617 F.3d at 410 (quotations omitted). By creating a statutory framework under which "the government must make a showing," *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015), Congress plainly "did not intend the statute" to apply when the government is not a party, *McGill*, 617 F.3d at 411. The same logic applies to Kentucky's RFRA. That statute similarly requires the state government to "prove[] by clear and convincing evidence that it has a compelling governmental interest," and "has used the least restrictive means." Ky. Rev. Stat. § 446.350. Of course, the state government cannot prove anything by any evidentiary standard if it "is not a party" to the case. *McGill*, 617 F.3d at 410 (quotations omitted). Kentucky is not a party here, so Kentucky's RFRA does not apply. Davis asserts that in *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Supreme Court "called into doubt" this court's holding that Federal RFRA does not apply in suits between private parties. Reply Brief at 18 n.2. In *Bostock*, the Supreme Court held that Title VII bars an employer from discriminating against an employee "simply for being homosexual or transgender." *Id.* at 651. At the end of the opinion, the Court noted that RFRA "might supersede Title VII's commands in appropriate

cases"—although it ultimately left that question for a "future case[]." *Id.* at 682. That vague dicta did not displace this court's holding that RFRA does not apply where the government is not a party. *McGill*, 617 F.3d at 412. Indeed, the *Bostock* dicta is not even inherently inconsistent with this court's holding because Title VII can be enforced by the EEOC, *see, e.g.*, *EEOC v. Ferrellgas, L.P.*, 97 F.4th 338 (6th Cir. 2024), so the "appropriate cases" in which RFRA could provide a defense to Title VII claims may be the cases in which a government agency is a party.

Further, this case does not involve a Title VII claim; it involves a § 1983 claim alleging the violation of constitutional rights. Even if Davis is right that Kentucky's RFRA can somehow displace the normal operation of federal statutes, it certainly cannot displace the operation of federal constitutional rights. Perhaps for that reason, Davis has provided no case in which a court has recognized a RFRA defense to a § 1983 claim.

C. Damages

1. The district court correctly denied Davis's motion for judgment as a matter of law.

Davis argues that Plaintiffs "failed to offer competent evidence of damages," and that the district court thus erred in denying her motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). Appellant's Brief at 15. This court reviews the denial of a Rule 50(b) motion de novo. *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC*, 774 F.3d 1065, 1072 (6th Cir. 2014). In doing so, the court is "deferential" to the jury's conclusion and does not "weigh the evidence, question the credibility

of the witnesses, or substitute our judgment for that of the trier of fact." *Id.* (citation omitted). Reversal is appropriate only if no "reasonable mind[]" could agree with the jury's verdict when viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in the non-moving party's favor. *Id.* (citation omitted).

"[M]ental and emotional distress constitute compensable injury in § 1983 cases." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (citation omitted). To be sure, emotional-distress damages are inherently "subjective," but a jury may properly award such damages where a plaintiff shows "the nature and circumstances of the wrong and its effect." *Carey v. Piphus*, 435 U.S. 247, 264 & n.20 (1978). And emotional distress need not be "severe," "outrageous," or "extreme" to warrant damages; so long as "any harm is shown," "damages proportionate to that harm should be awarded." *Chatman v. Slagle*, 107 F.3d 380, 384–85 (6th Cir. 1997). Thus, this court will not disturb a jury's award of emotional-distress damages unless the testimony regarding the plaintiff's emotional distress is "merely conclusory." *Smith v. LexisNexis Screening Sols., Inc.*, 837 F.3d 604, 611 (6th Cir. 2016). For example, we held that judgment for the defendant was appropriate where the "only proof of emotional harm" at trial was the plaintiff's bare statement that he was "highly upset." *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985). On the other hand, judgment for the defendant is not appropriate if the plaintiff "explain[s] the circumstances surrounding [his] emotional injuries," such that a jury could find that "a reasonable person in the same situation would

suffer emotional distress." *Smith*, 837 F.3d at 611 (cleaned up).

In *Smith*, a faulty background check caused an employer to incorrectly believe that a prospective employee was a felon, resulting in a six-week delay in his start date. *Id.* at 607. The employee testified that the hiring delay caused him to "fall on hard times," which made him feel "depressed" and "down in the dumps." *Id.* at 608, 611. His wife "corroborated" these assertions, testifying that her husband was "a bit angry about not being able to pay the bills" and "depressed that he couldn't provide for his family." *Id.* at 608. After the jury awarded more than $72,000 in emotional-distress damages, the background-check servicer moved for judgment under Rule 50(b), arguing—as Davis does here—that the evidence of damages was "not sufficient." *Id.* at 611. This court affirmed the district court's denial of the motion, holding that the testimony was more than "merely conclusory," and adequately "describe[d] [the employee's] shame, anger, and stress." *Id.* The plaintiff's situation was one "with which reasonable jurors could identify," and a jury could "infer that a reasonable person in the same situation would suffer emotional distress." *Id.*; *see also Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) (affirming the denial of judgment for the defendant because several witnesses testified that the plaintiff was, among other things, "upset and frightened"); *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 210 (6th Cir. 1990) (affirming the denial of judgment for the defendant where the plaintiff "testified that he was shocked and humiliated, and he explained why," and his wife corroborated the

testimony).

Under these standards, Plaintiffs presented enough evidence to sustain the jury's verdict. They testified extensively about the "circumstances surrounding their emotional injuries." *Smith*, 837 F.3d at 611 (internal quotation marks omitted). When Plaintiffs first attempted to obtain a marriage license, they got into "an argument" with Davis at the clerk's office because Davis "was saying . . . she didn't want to give [licenses] to gay people." R. 169, PID 2785. When Plaintiff Moore remarked that Davis had given marriage licenses to "murderer[s], rapists, and people who have done all kinds of horrible things," Davis responded, "that was fine because they were straight." *Id.* at 2785–86. This interaction made Moore feel like he was "a second class citizen," "less than a person," "just a dog," and "subhuman." *Id.* at 2785–86, 2812. And Plaintiff Ermold felt "disgusted" and "humiliated." *Id.* at 2818–19.

Davis advised Plaintiffs that they could get their marriage licenses in another county, but that comment only compounded the stigma. Moore "wanted to get a license in [his] home county," not elsewhere. *Id.* at 2787–89. As he explained, "[n]o one's ever said, [g]o to another county and get your car tags" or "[g]o to another county and pay your property taxes." *Id.* at 2787–88. But when it came to their marriage license, Plaintiffs were told to "go someplace else." *Id.* at 2789. These emotional harms grew as Davis denied Plaintiffs a marriage license on two more occasions. Moore got "more frustrated and more frustrated." *Id.* at 2790. He was "pretty upset" and "screaming." *Id.* Ermold had "a lot of stress and anxiety." *Id.* at 2824. He still thinks about the events

of this case "[e]very day"—it is one of the "most difficult thing[s]" he has ever experienced. *Id.* at 2823–24, 2829. Ermold testified that Davis "tainted" Plaintiffs' wedding. *Id.* at 2816. And Plaintiffs' marriage is so intertwined with the license denials that Moore sees Davis's face when he looks at his wedding pictures. *See also id.* at 2797 (Moore testifying, "it's distorted your whole life forever. You're just going to have those memories forever, have to think about that forever.").

As *Obergefell* explained, denying same-sex couples a right to marry "demeans" and "stigmatizes" them, "diminish[es] their personhood," and "subordinate[s] them." 576 U.S. at 670, 672, 675. Davis caused Plaintiffs to suffer these indignities three times and did so while implying that Plaintiffs were inferior to murderers and rapists. Given the sense of stigma and powerlessness Davis's actions caused, a reasonable jury could find that "a reasonable person in the same situation" as Plaintiffs "would suffer emotional distress." *Smith*, 837 F.3d at 611.

Davis's counterarguments are unpersuasive. She relies heavily on opinions in which this court has stated that a plaintiff's "brief testimony" about being upset is insufficient to support an award for emotional-distress damages. *See Rodgers v. Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102, 1108 (6th Cir. 1984); *Erebia*, 772 F.2d at 1259. But those cases merely illustrate the rule that emotional-distress testimony must be more than "merely conclusory." *Smith*, 837 F.3d at 611. For example, in *Rodgers*, this court ordered judgment for the defendant because the plaintiff's "only evidence" of distress was his statement that he suffered a "very

humiliating type of experience." 739 F.2d at 1108. In *Erebia*, the plaintiff testified only that he was "highly upset." 772 F.2d at 1259. In each case, the entirety of the plaintiff's evidence of emotional distress was a single answer at trial, unadorned by a more fulsome explanation of "the circumstances surrounding the[] emotional injuries." *Smith*, 837 F.3d at 611 (internal quotation marks omitted). In contrast, Ermold and Moore described—in extensive detail—*how* and *why* Davis's actions harmed them, and how that harm continues to affect their lives.

Davis also asserts that Plaintiffs did not corroborate *each other's* testimony, and that neither Plaintiff's testimony was supported by a medical expert. But "emotional injury may be proved without medical support." *Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 485 (6th Cir. 2005) (collecting cases). Nor is there a per se rule that a plaintiff must always present testimony from another witness to corroborate his emotional distress. Rather, "[a] plaintiff's own testimony, along with the circumstances of a particular case, can suffice." *Turic*, 85 F.3d at 1215 (citation omitted). To be sure, corroborating testimony from a witness who is close to the plaintiff can bolster the case for emotional-distress damages, *see, e.g.*, *Smith*, 837 F.3d at 611, but that does not mean such testimony is always required.

And, in any event, the Plaintiffs' testimony *was* corroborated—not only by each other, but by Davis herself. For example, Moore testified that Ermold "got really emotional" when Davis denied them a license, and that Ermold still gets "upset" when talking about Davis. R. 169, PID 2786, 2794; *see also id.* ("[W]e talk

about it all the time. Dave [Ermold] brings it up. He's upset right now."). And Ermold confirmed Moore's testimony that Davis said she would give marriage licenses to straight murderers and rapists. Davis, too, testified that Moore and Ermold were "upset," "mad," and "yelling and screaming." *Id.* at 2898, 2901–02. And she agreed that she told Moore she would give a marriage license to a "heterosexual" murderer or rapist. R. 170, PID 2977. Accordingly, Plaintiffs have proven their emotional damages through their "own testimony, along with the circumstances" of this case. *Turic*, 85 F.3d at 1215 (citation omitted).

Finally, Davis makes much of Plaintiffs' testimony that they "did not know how to calculate" emotional-distress damages. Appellant's Brief at 21–23. True, Ermold stated on cross-examination that he did not "know how to calculate pain and suffering [or] emotional damages." R. 169, PID 2878–79. And Moore testified that he did not "know how people calculate" emotional damages. *Id.* at 2808–09. But Davis misunderstands the significance of that testimony. In full context, Plaintiffs did not concede that their emotional distress was valueless, as Davis asserts. Rather, Plaintiffs simply testified that they did not personally understand the legal rules for calculating emotional-distress damages. Moore explained that he did not know "the criteria" for damages calculation, *id.* at 2811–12, and Ermold stated that he did not understand "how to calculate those things," *id.* at 2878–79.

These candid admissions by lay witnesses merely reflect that "[n]o formula exists to determine with precision compensatory damages" in § 1983 cases. *Smith v. Heath*, 691 F.2d 220, 227 (6th Cir. 1982). A

plaintiff's role at the damages stage of a § 1983 case is not to invent a damages formula, but to "explain the circumstances surrounding [his] emotional injuries." *Smith*, 837 F.3d at 611 (internal quotation marks omitted). From there, "[t]he determination of the amount of damages to be awarded is left to the discretion and good judgment of the fact finder." *Heath*, 691 F.2d at 226 (citation omitted). Here, both Plaintiffs and the jury fulfilled their respective roles. Davis fails to explain why that provides a reason for reversal.

2. Davis has forfeited any request for remittitur.

In her opening brief, Davis argues only that she is entitled to judgment as a matter of law. But in her reply, Davis states for the first time that this court may "remand[] for the district court to redetermine the amount" of damages. Reply Brief at 4. When a court believes the jury has awarded excessive damages, it may impose a remedy known as "remittitur," in which the court "recalculate[s] the damages." *See, e.g.*, *Hetzel v. Prince William County*, 523 U.S. 208, 211–12 (1998) (per curiam). This appears to be the alternative remedy Davis seeks in her reply.

Davis failed to preserve this late-breaking request below and on appeal. Davis's Rule 50(b) motion sought a single form of relief—that the court "direct entry of judgment in Defendant's favor." R. 172, PID 3089. Davis never asked the district court to reduce the damages award to some number below the $50,000 the jury awarded each Plaintiff. *Id.* And the first time Davis mentioned recalculating damages on appeal was in her reply brief before this court. "[E]ven

well-developed arguments raised for the first time in a reply brief come too late." *Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 457 (6th Cir. 2021) (citing *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018)). Accordingly, we will not address the merits of Davis's request that we remand for the district court to redetermine the amount of damages.[3]

III. Conclusion

For the reasons set out above, we AFFIRM.

CONCURRENCE

CHAD A. READLER, Circuit Judge, concurring in part and concurring in the judgment.

Obergefell v. Hodges presented the Supreme Court with an issue that had deeply divided the nation: the right to same-sex marriage. That was certainly true as a question of public policy. *Obergefell v. Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting) (noting "the electorates of 11 States . . . chose to expand the traditional definition of marriage" but that "[m]any more decided not to"). It was arguably even more true as a question of constitutional law. In the end, the *Obergefell* majority recognized a

[3] Davis also argues that *Obergefell* should be overturned. She acknowledges that this court cannot overturn *Obergefell*, but she asserts she is raising the issue to preserve it for Supreme Court review. Ironically, however, it appears that Davis did *not* preserve this issue because she never raised it below. She did not argue that *Obergefell* should be overturned in her motion to dismiss, her motion for summary judgment, or her motion for judgment as a matter of law. Indeed, in moving to dismiss, Davis expressly stated that she did not "want[] to relitigate the Supreme Court's decision in *Obergefell*." R. 29-1, PID 147.

fundamental right to same-sex marriage. *Id.* at 656, 670, 681 (majority opinion) (invoking "the transcendent importance of marriage," its promise of "nobility and dignity," and its ability to allow same-sex couples to "seek fulfillment in its highest meaning" to hold that "same-sex couples may exercise the fundamental right to marry in all States"). But that view was far from unanimous. *See, e.g.*, *id.* at 687 (Roberts, C.J., dissenting) ("The 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."). In perhaps the opinion's sharpest rebuke, Justice Scalia described *Obergefell* as having "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." *Id.* at 718 (Scalia, J., dissenting).

But right or wrong, the fact remains that we all must follow *Obergefell*, the law of the land. That includes Kim Davis, in her role as Rowan County Clerk. Accordingly, I agree that we should affirm the judgment against Davis. I write separately to emphasize two points with respect to Davis's claimed defenses under the First Amendment and Kentucky's Religious Freedom Restoration Act.

A. *The First Amendment*. Davis contends that, in her role as a county employee, the First Amendment's free exercise protections provide her an affirmative defense against a § 1983 claim. As it relates to the public workplace, First Amendment jurisprudence can be difficult to distill. The case law backdrop is not entirely settled. And the varying contexts in which these cases arise can make analogizing a difficult endeavor.

Begin with what we know. Public employees retain some First Amendment rights. In the traditional free speech setting, it is well established that when acting "pursuant to their official duties . . . employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). When speaking on matters of public concern, on the other hand, the First Amendment is more directly implicated. *Id.* at 417. In such cases, courts engage in a delicate balancing, asking whether an employee's speech interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968).

Today's case, however, involves free exercise aspects of the First Amendment. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421–23 (2022) (applying the First Amendment's Free Exercise Clause to a public employee in a suit against a school district). And the exact bounds of that right in the public workplace are even less defined, making it difficult to speak in absolutes. *See id.* at 2433 (Thomas, J., concurring) (observing that the Court has not decided "whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public"). But it seems fair to say that, at least under current law, those protections are likely diminished in the setting here—a religiously neutral job requirement to issue marriage licenses imposed upon a public employee's core job functions. *Cf. Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free

exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." (citations omitted)). *Contra Kennedy*, 142 S. Ct. at 2421–22 (holding that a school district's policy toward employee prayer violated the Free Exercise Clause because it was neither neutral nor generally applicable). To the extent that the First Amendment offered Davis some shield from liability, her conduct here exceeded the scope of any personal right. As Judge Bush recognized in a prior iteration of this case, Davis "t[ook] the law into her own hands." *Ermold v. Davis*, 936 F.3d 429, 442 (6th Cir. 2019) (Bush, J., concurring in part and in the judgment). And she did so in the most extreme way. 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. Under this unique set of facts, I agree that the First Amendment does not shield Davis from liability.

I would rest our analysis there. As the majority opinion notes, whether the First Amendment can provide an affirmative defense to a § 1983 claim "appears to be an issue of first impression." Maj. Op. at 11. Writing on this blank slate, we are wise to tread lightly. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring) ("It is no less incumbent upon this Court to avoid putting fetters upon the future by needless pronouncements today.") To that end, the fact-specific nature of our holding again bears emphasis: 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. Change the factual setting, and a free exercise defense to a civil rights lawsuit may have more traction. It is always the case that "[a] later court assessing a past decision must . . . appreciate the possibility that different facts and different legal arguments may dictate a different outcome." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2281 (2024) (Gorsuch, J., concurring); *see also* Advisory Opinions, *Did Hunter Biden Get a Sweetheart Deal . . . ?*, The Dispatch, at 1:26 (June 20, 2023), https://thedispatch.com/podcast/advisoryopinions/did-hunter-biden-get-a-sweetheart-deal ("Other cases presenting different allegations and different records may lead to different conclusions." (quoting *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1231 (2023) (Jackson, J., concurring))). Especially so, it bears emphasizing, in the evolving field of religious liberties. *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting) (observing that the majority opinion raises "serious questions about religious liberty"). Today's holding should thus be read in this same light.

B. *The Kentucky Religious Freedom Restoration Act.* Turn next to Davis's claim that Kentucky's Religious Freedom Restoration Act also shields her from liability under § 1983. The majority opinion concludes that Kentucky's RFRA does not apply here because the state is not a party in this litigation. That conclusion seemingly presupposes that a state law,

under the right circumstances, may provide a defense in § 1983 litigation. While I agree that Kentucky's RFRA does not afford Davis any protection, I take a different route to that conclusion. Kentucky's RFRA, codified at Kentucky Revised Statutes § 446.350, is a state law. State law cannot immunize officials from a § 1983 claim, which serves to vindicate *federal* rights. 42 U.S.C. § 1983; *Williams v. Reed*, No. 23-191, 604 U.S. ——, 2025 WL 567335, at *4 (Feb. 21, 2025) ("States possess no authority to override Congress's decision to subject state officials to liability for violations of federal rights." (quotation marks and citation omitted)); *Brown v. Taylor*, 677 F. App'x 924, 930 n.4 (5th Cir. 2017) (rejecting an official's claim of immunity under the Texas Health and Safety Code); *Walker v. Norris*, 917 F.2d 1449, 1458 n.14 (6th Cir. 1990) (noting a state law cannot provide immunity with respect to a § 1983 claim). Simply put, "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law." *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (citation omitted). Construing a "federal statute [to] permit[] a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced." *Id.* Davis may not thwart this clear principle of law. On that basis, I concur in the majority opinion's conclusion that Davis's Kentucky RFRA defense fails.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5524

DAVID ERMOLD; DAVID MOORE,

Plaintiffs-Appellees,

FILED
Mar. 6, 2025

v.

KIM DAVIS, individually,

Defendant-Appellant.

Before: WHITE, READLER, and MATHIS, Circuit Judges.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Kentucky at Ashland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgement of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND
CIVIL ACTION NO. 15-46-DLB-EBA

DAVID ERMOLD and DAVID MOORE
PLAINTIFF

v. **JUDGMENT**

KIM DAVIS, *individually* **DEFENDANT**

*** * * * * ***

Pursuant to Rules 58 of the Federal Rules of Civil Procedure, and with the Court being otherwise sufficiently advised,

IT IS ORDERED AND ADJUDGED as follows:

(1) Judgment is entered in favor of Plaintiff David Ermold in the amount of $50,000.00 pursuant to the Jury's Verdict;

(2) Judgment is entered in favor of Plaintiff David Moore in the amount of $50,000.00 pursuant to the Jury's Verdict;

(3) Plaintiffs are awarded $246,0246.40 in attorney's fees;

(4) Plaintiffs are awarded $14,058.30 in expenses; and

(5) The matter is **STRICKEN** from the Court's active docket.

This is a **FINAL and APPEALABLE** Order, and no just cause for delay exists.

This 28th day of December, 2023

Signed By:
David L. Bunning DB
United States District Judge

No. 24-5524

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ERMOLD; DAVID MOORE,

Plaintiffs-Appellees, **ORDER**

v.

KIM DAVIS, individually,

Defendant-Appellant.

BEFORE: WHITE, READLER, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and conclude that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk