No. 25-125

In the

Supreme Court of the United States

KIM DAVIS,

Petitioner,

v.

DAVID ERMOLD, *et al.*

Respondents.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR MARRIAGE AND THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
Counsel of Record
ALEXANDER HABERBUSH
CONSTITUTIONAL COUNSEL GROUP
444 W. Ocean Blvd. Ste 1403
Long Beach, CA 90802
(562) 435-3456
jeastman@ccg1776.com

Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE WRIT 3

I. *Obergefell* Was Wrongly Decided and Should Be Revisited. 3

A. The "Right" to Same-Sex Marriage Recognized in *Obergefell* Has No Basis in the Constitution's Text. 3

B. The "Right" of Same-Sex Couples to Marry Is Not Part of the Nation's Liberty and Traditions 5

C. *Obergefell* Replicates the Errors of *Roe* and *Casey*, and Its Doctrinal Instability Demands Review 7

II. As It Did With Its Decision in *Roe v. Wade,* This Court's Decision in *Obergefell* Cut Off a Robust, Democratic Debate. 8

III. The Threat to Religious Liberty Was Predictable, and Is Now Manifested in this Case. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991).....6

Bowers v. Hardwick,
478 U.S. 186 (1986).....6

Davis v. Ermold,
141 S. Ct. 3 (2020).....4, 10

Dobbs v. Jackson Women's Health Org.,
597 U.S. 215 (2022).....4, 5

Griswold v. Connecticut,
381 U.S. 479 (1965).....4, 5

Hollingsworth v. Perry,
570 U.S. 693 (2013).....1

Lawrence v. Texas,
539 U.S. 558 (2003).....3, 4, 5, 6

Planned Parenthood of Se. Pennsylvania v. Casey,
505 U.S. 833 (1992).....5

Reno v. Flores,
507 U.S. 292 (1993).....6

Romer v. Evans,
517 U.S. 620 (1996).....3

United States v. Windsor,
570 U.S. 744 (2013).....1

W. Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624, 638 (1943).....12

Washington v. Glucksberg,
521 U.S. 702 (1997).....5, 6

Statutes and Constitutional Provisions

Dec. of Ind. 1 Stat. 1 (1776).....1

U.S. Const. amend. I 10

U.S. Const. amend. XIV, § 1 (Due Process Clause)....5

Other Authorities

Brief for United States, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (filed Sept. 20, 2021).....5

Stevens, Justice John Paul (Ret.), Two Thoughts About *Obergefell v. Hodges*, 77 Ohio St. L.J. 913 (2016).....4

Rules

Sup. Ct. Rule 37.6.....1

INTEREST OF AMICI CURIAE[1]

The National Organization for Marriage ("NOM") is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. It was instrumental in securing legislation or voter-approved initiatives in numerous states codifying the long-standing understanding of marriage as between one man and one woman, until those efforts were preempted by this Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015). It participated as *amicus curiae* not only in *Obergefell* but in several related cases, including *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and *United States v. Windsor*, 570 U.S. 744 (2013).

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. At its core, those principles are rooted in the "laws of nature and of nature's God," Dec. of Ind. ¶ 1, 1 Stat. 1 (1776), both of which support marriage as an institution grounded in the natural complementarity of the sexes and necessary for both the survival of the human species and the optimal rearing of children. It has previously participated as *amicus curiae* in several related cases, including *Hollingsworth*, *Windsor*, and *Obergefell*.

---

[1] All parties received timely notice of the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici curiae* made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The dispute at issue in this case was triggered by this Court's decision in *Obergefell* and, despite the opinion's protestations to the contrary, the inevitable conflict it produced between the novel right it created and the long-standing religious views of millions of Americans.

Obergefell was wrong when it was decided, and it remains wrong now. The so-called "right" identified in *Obergefell* was not a right contained anywhere in the text of the Constitution and was no part of the history and traditions of this or any other country. By ruling as it did, the *Obergefell* Court cut off an important debate that was being waged in the democratic political process across the country, repeating the same mistake made in *Roe v. Wade*, 410 U.S. 113 (1973), that fractured this country for a half century.

Moreover, and predictably given the long-standing view of marriage as not just a civil institution but a sacramental one, the conflict between religious free exercise and the Court's newly-minted right has metastasized.

This case presents an important opportunity for this Court to abandon its erroneous decision in *Obergefell*, or at the very least, as a first step, to secure the religious liberty rights of those whose religious faith precludes them from accepting the redefinition of marriage, as was promised in the *Obergefell* decision itself.

REASONS FOR GRANTING THE WRIT

I. *Obergefell* Was Wrongly Decided and Should Be Revisited.

A. The "Right" to Same-Sex Marriage Recognized in *Obergefell* Has No Basis in the Constitution's Text.

As Chief Justice Roberts correctly noted in his dissent, the "right" announced in *Obergefell* "had no basis in the Constitution." 576 U.S. at 687 (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting). "The Constitution says nothing about a right to same-sex marriage," Justice Alito added. *Id.* at 737 (Alito, J., joined by Scalia and Thomas, JJ., dissenting). "The Court's decision … is at odds not only with the Constitution, but with the principles upon which our Nation was built," Justice Thomas elaborated. *Id.* at 721 (Thomas, J., joined by Scalia, J., dissenting). The majority's "distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic." *Id.* Justice Scalia described the decision as "a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government." *Id.* at 717 (Scalia, J., joined by Thomas, J., dissenting).

Even retired Justice Stevens, who had joined the majority's precursor decisions in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas,* 539 U.S. 558 (2003), recognized that the decision was incompatible with the original understanding of the Fourteenth Amendment. "Because I think it so unlikely that the Framers or the public at the time of the Framing believed that States could not limit the right to marry to

heterosexual couples," he wrote, "it seems clear that the majority's decision in *Obergefell* implicitly rejected the basic premise undergirding the originalist view of constitutional interpretation." Justice John Paul Stevens (Ret.), Two Thoughts About *Obergefell v. Hodges*, 77 Ohio St. L.J. 913 (2016).

Justices Thomas and Alito have continued to challenge the legitimacy of the *Obergefell* decision. "[T]he Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text," Justice Thomas, joined by Justice Alito, wrote in a statement regarding the denial of certiorari in an earlier iteration of the dispute between the parties here. *Davis v. Ermold*, 141 S. Ct. 3, 3 (2020) (Thomas, J., joined by Alito, J., Statement respecting denial of certiorari).

And while the majority in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 290 (2022), stated in *dicta* that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion, Justice Thomas in concurrence, Justices Breyer, Kagan, and Sotomayor in dissent, and even the Biden administration's Solicitor General, all recognized that the decision's rejection of a substantive due process "right" to an abortion called into question this Court's other substantive due process precedents, expressly including *Obergefell*.

"[I]n future cases," Justice Thomas wrote, we should reconsider all of this Court's substantive due process precedents, including *Griswold* [*v. Connecticut*, 381 U.S. 479 (1965)], *Lawrence*, and *Obergefell*." *Id.* at 332 (Thomas, J., concurring). Indeed, "[b]ecause any substantive due process decision is 'demonstrably

erroneous,'" he added, the Court has "a duty to 'correct the error' established in those precedents." *Id.*

"The right *Roe* and [*Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)] recognized does not stand alone," the *Dobbs* dissenters similarly pointed out. *Id.* at 362 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting). The "right to purchase and use contraceptives" and the "rights of same-sex intimacy and marriage" "are all part of the same constitutional fabric." *Id.* at 363. These "additional constitutional rights are under threat," the dissenters concluded. *Id.*

The Solicitor General agreed. Overruling *Roe* and *Casey* would "threaten the Court's precedents holding that the Due Process Clause protects other rights," including the "rights" recognized in *Obergefell*, *Lawrence*, and *Griswold*. Brief for United States at 26, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (filed Sept. 20, 2021). "None of those practices is explicitly mentioned in the Constitution," the Solicitor General conceded. *Id.*

B. The "Right" of Same-Sex Couples to Marry Is Not Part of the Nation's Liberty and Traditions

Even accepting the ongoing vitality of substantive due process, this Court has in most instances taken great care to recognize only those unenumerated rights that are "deeply rooted in the Nation's history and traditions." *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The right recognized in *Obergefell* does not remotely qualify or, to be precise, it qualifies only at such a high level of generality as to

make the "history and traditions" inquiry meaningless. *Cf. id.* ("the Court has required a 'careful description' of the asserted fundamental liberty interest" when assessing whether it was deeply rooted in the Nation's history and tradition) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

Indeed, the conduct that defines the same-sex relationship had, throughout most of our history, been prohibited by the criminal law, even treated as "*malum in se*" or "*contra bonos mores*." *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., conc. in judgment). "Against this background," the Court noted in *Bowers*, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* Even *Lawrence*, which overturned *Bowers*, contended that there was "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," 539 U.S. at 568, not that there was a tradition supporting a "right" to such conduct (at least, not when employing a "'careful description' of the asserted fundamental liberty interest" otherwise required by this Court's precedents, *see Glucksberg*, 521 U.S. at 721). As Chief Justice Roberts noted, the majority's "jettison[ing]" of "the 'careful' approach to implied fundamental rights … requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process." *Id.* at 702.

Certiorari is therefore warranted to confront the longstanding doctrinal illegitimacy of the Court's substantive due process precedent or, at the very least, to restore the "history and tradition" guardrails to the

doctrine, in order to prevent a bare majority of this Court from deciding fundamental policy disputes that, of right, should be decided by the people.

Nor can it be said that *Obergefell* created reliance interests warranting its preservation. To the contrary, it disregarded the reliance interests of generations of Americans who ordered their lives and communities around the natural institution of marriage between man and woman. Marriage is not an artificial construct but a reflection of the complementarity of the sexes, grounded in the "laws of Nature and of Nature's God" proclaimed in our Declaration of Independence. By severing marriage from those foundations, *Obergefell* disrupted, not secured, the reliance of the citizenry upon the fundamental building block of human society.

C. *Obergefell* Replicates the Errors of *Roe* and *Casey*, and Its Doctrinal Instability Demands Review.

Obergefell suffers from the same jurisprudential instability that doomed *Roe* and *Casey*. The majority never settled whether its ruling rested on substantive due process or equal protection, and it brushed aside the controlling framework of *Glucksberg*, which required that unenumerated rights be carefully defined and deeply rooted in the Nation's history and tradition. By refusing to apply that test, *Obergefell* departed from established precedent just as *Roe* had done decades earlier. *Dobbs* has now reaffirmed *Glucksberg* and underscored *Obergefell*'s error. As in *Roe* and *Casey*, the Court's invention of a right without textual or historical foundation has short-circuited democratic deliberation, fractured the body politic, and left the Court to police the consequences of its

own mistake. Unless corrected, that error will draw this Court into an endless cycle of litigation, compelled to referee recurring collisions between the novel right it created and the Constitution's express guarantees.

II. As It Did With Its Decision in *Roe v. Wade*, This Court's Decision in *Obergefell* Cut Off a Robust, Democratic Debate.

"Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage." *Obergefell*, 576 U.S. at 736 (Alito, J., joined by Scalia and Thomas, JJ., dissenting). As these dissenters correctly recognized, "[t]he question … is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State." *Id.*

Justice Scalia made the same point in his separate dissent:

> Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can

> be negated by a later electoral win. That is exactly how our system of government is supposed to work.

Id. at 714 (Scalia, J., joined by Thomas, J., dissenting). Chief Justice Roberts did as well:

> Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

Id. at 687 (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting).

Quite apart from the illegitimacy of foreclosing democratic debate among the citizens of the United States without clear command in the Constitution, shutting off the debate regarding whether (if at all) to redefine marriage had the added detriment of depriving the people of the ability to craft religious accommodations for those citizens who were compelled by their faith, such as Petitioner here, to adhere to the longstanding and biblical understanding of marriage. Constitutionalizing the issue, as this Court's decision in *Obergefell* did, thus operated as an uncompromising sledgehammer against religious views. "Federal courts are blunt instruments when it comes to creating rights," after all. "[T]hey do not have the flexibility

of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right." *Id.* at 711.[2]

Certiorari is therefore warranted to restore the ability of the American people to deliberate, perhaps to compromise and accommodate, the competing interests at issue in this dispute.

III. The Threat to Religious Liberty Was Predictable, and Is Now Manifested in this Case.

The decision in *Obergefell* "create[d] serious questions about religious liberty" because "[m]any good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution." *Id.* (citing U.S. Const. amend. I). It "threaten[ed] the religious liberty our Nation has long sought to protect." *Id.* at 733 (Thomas, J., joined by Scalia, J., dissenting). Because, "[i]n our society, marriage is not simply a governmental institution [but] a religious institution as well … [i]t appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples." *Id.*

It was therefore predicted at the time that the ruling "would threaten the religious liberty of many Americans who believe that marriage is a sacred institution between one man and one woman." *Davis,*

---

[2] By contrast, in nearly every other nation where same-sex marriage has been recognized, that step was taken through the ordinary processes of legislation, not by judicial decree.

141 S. Ct. at 3 (Thomas, J., Statement respecting denial of certiorari). The majority eschewed such concerns, of course, but it did so only by watering down the protections of the First Amendment, limiting it to advocacy and teaching, not "exercise." "[I]t must be emphasized," the majority asserted, "that religions, and those who adhere to religious doctrines, may continue to *advocate* with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 679 (emphasis added). "The First Amendment ensures that religious organizations and persons are given proper protection as they seek *to teach* the principles that are so fulfilling and so central to their lives and faiths." *Id.* at 679-680 (emphasis added). The First Amendment protects the free *exercise* of religion, not just advocacy and teaching of religious beliefs.

So, despite the majority's protestations, the predictions of conflict with religious *exercise* have come to pass, and are manifested in this case. "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 she was even jailed for refusing to violate her faith when her faith could easily have been accommodated by simply removing her name from the marriage certificate.

As the Petition points out, the dispute here was not about whether Respondents were entitled, under *Obergefell*, to obtain a marriage license. They could have obtained one in a number of ways, and in fact

did. The dispute is whether they could compel the issuance of a marriage license by a particular county clerk whose sincerely-held religious faith precluded her from issuing such a license in her own name.

That kind of "bend the knee" demand is not permissible in our society. *See*, *e.g.*, *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Certiorari is therefore warranted to, at the very least, ensure that religious faith is protected in its *exercise*, not just in its advocacy.

CONCLUSION

The Court should grant the petition for writ of certiorari in this case to correct the manifestly erroneous decision in *Obergefell* or, at the very least, to ensure that the new-found, unenumerated "right" created in that case does not infringe upon the Constitution's express textual protection of the free exercise of religion.

September 2025 Respectfully submitted,

JOHN C. EASTMAN
Counsel of Record
ALEXANDER HABERBUSH
CONSTITUTIONAL COUNSEL GROUP
444 W. Ocean Blvd. Ste 1403
Long Beach, CA 90802
(562) 435-3456
jeastman@ccg1776.com

Counsel for Amici Curiae
National Organization for Marriage and

The Claremont Institute's
Center for Constitutional Jurisprudence