No. 15-0688

IN THE SUPREME COURT OF TEXAS

JACK PIDGEON AND LARRY HICKS, PETITIONERS

v.

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON, RESPONDENTS

On Petition for Review from the
Court of Appeals for the Fourteenth District of Texas

AMICUS CURIAE BRIEF OF L. J. AND M. P., A MARRIED COUPLE, AND EQUALITY TEXAS

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AMICI'S IDENTITY AND INTEREST IN THIS PROCEEDING

This amicus curiae brief is filed on behalf of L. J. and M. P., a married couple, and Equality Texas. No fees or expenses have been incurred by amici in connection with this brief, which has been prepared by the undersigned law firm on a *pro bono* basis.

Amici L. J. and M. P.

L. J. and M.P.[1] are a female married couple living in Houston, Texas. They met and fell in love in the fall of 2009 and traveled to Boston to marry in 2013. They have a one-and-a-half year old son to whom L.J. gave birth in 2015.

L.J. teaches geometry and advanced mathematics at a public high school in a suburb west of Houston. She holds a gifted and talented certification and has a master's degree in education from the University of Texas at Arlington. M.P. is a home health nurse who works for a private home health agency on a part-time basis.

After the couple married, L.J. tried to obtain spousal health insurance for M.P., who suffers from Polycystic Ovarian Syndrome

[1] Amici L.J. and M. P. have requested that they be identified by their initials in this brief in order to protect the privacy of their minor child.

and asthma, through the school district for which L.J. works. She was unable to do so, because Texas did not recognize their marriage as a legal one. The cost of private insurance was more than they could afford, so M.P., a nursing student at the time, went without health insurance.

Following the Supreme Court's decision in *Obergefell v. Hodges,* L.J. was able to add M.P. to her employer-provided health care insurance and to cover their entire family through that plan. However, concern that this case might once again jeopardize M.P.'s access to spousal benefits has led M.P. to pay for back-up insurance coverage through her current employer. The cost for that coverage is $300 per month. That is money the couple could use for their other family needs, like diapers, food, and car maintenance.

If this Court accepts the arguments put forth by Petitioners, L.J. and M.P. will be forced to continue to overpay for their health insurance in a way that straight married couples in Texas do not. And, because she cannot afford to purchase health insurance privately, M.P. will have to continue to work outside the home even though the

couple's young son might be better served by having her at home full-time, as many opposite-sex married couples elect to do. Without equal recognition of their marriage, that will not be a decision L.J. and M.P. are free to make.

Amicus Equality Texas

For more than 25 years, Equality Texas has been the largest statewide civil rights organization dedicated to protecting equal rights for lesbian, gay, bisexual, and transgender Texans through political action, education, community organizing, and collaboration. Equality Texas has over 35,000 members located throughout the state, including married LGBT Texans like L.J. and M.P. whose rights are directly implicated by this case.

Amici's Concerns

Amici are deeply concerned that the arguments put forth by Petitioners in this case would upend settled constitutional law and strip the spouses of Texans employed by municipalities, school districts, and other local governmental entities of vital benefits. Acceptance of Petitioners' arguments would also create a fractured system of constitutional rights in which married persons employed by

local governmental entities in Texas would have less constitutional protection than those employed by the state. Amici file this brief to give voice to those whose lives will be directly impacted by this Court's decision and to urge this Court's faithful adherence to *Obergefell v. Hodges,* the Supremacy Clause of the United States Constitution, and the rule of law.

INTRODUCTION

This case carries profound implications for the families of gay and lesbian municipal and local government workers upon whom Texans depend every day. They are police officers, firefighters, teachers, librarians, public works and parks department employees, engineers, trash collectors, accountants, health inspectors, attorneys, municipal judges, and city planners. Like straight married employees, they rely on employment benefits to secure their spouses' health insurance, to take medical leave when their spouses are sick, and to designate their spouses as pension beneficiaries in the event of their deaths.

Petitioners ask this Court to strip benefits from the spouses of these government workers because they are same-sex. In doing so, Petitioners invite the Court to resurrect discriminatory laws in the municipal context that the state itself has been enjoined from enforcing with respect to its own employment benefit programs. That is an invitation to chaos and suffering, the reaches of which are difficult to overstate.

Though this case is of great importance, it is not a hard one. The City of Houston ordinance at issue limits the provision of benefits to employees and their "legal spouses." *Obergefell* established — unequivocally — that the United States Constitution requires inclusion of same-sex married persons within the definition of "legal spouses."

Obergefell also sounded the death knell for the Texas Constitution and Family Code provisions on which Petitioners rely, by holding that such laws — and efforts to limit marriage benefits afforded to same-sex couples based upon them — impermissibly impinge on the fundamental right of marriage. That is precisely the

reason the Fifth Circuit, with agreement from the state, has enjoined enforcement of those very laws.

Amici urge the Court to hold that the Supremacy Clause of the United States Constitution means what it says and that no taxpayer in the State of Texas may compel a municipality to violate the United States Constitution.

ARGUMENT AND AUTHORITIES

A. Same-Sex Spouses Are "Legal Spouses."

The singular question in this case is whether Petitioners have stated any valid basis to enjoin the City of Houston from offering employment benefits to same-sex spouses. They have not. The city ordinance in dispute provides,

> Except as required by State or Federal law, the City of Houston shall not provide employment benefits, including health care, to persons other than employees, their **legal spouses** and dependent children.

City of Houston, Tex., Charter, art. II, § 22 (emphasis added).

The United States Supreme Court in *Obergefell v. Hodges* conclusively held that same-sex spouses are "legal spouses." 135 S. Ct. 2584 at 2595, 2608 (2015). *Obergefell* is the law in every corner of this

nation by virtue of the Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Accordingly, under binding precedent, a plain reading of the City's ordinance authorizes the provision of employment benefits to same-sex spouses of City employees.

B. Ruling Counter to *DeLeon* Would Result In Unequal Constitutional Rights Among the Employees of Different Governmental Bodies in Texas.

Beyond the City's ordinance, Petitioners cite only Article I, Section 32 of the Texas Constitution and Section 6.204(c)(2) of the Texas Family Code to support their claim that the City is prevented from giving benefits to same-sex spouses. Neither of those provisions holds sway after *Obergefell*.

In 2015, the State of Texas submitted a letter to the Fifth Circuit wherein it stated "the Court should affirm the district court's

preliminary injunction in light of *Obergefell*."[2] Based at least partially on that recognition, the Fifth Circuit barred State officials from enforcing, *inter alia*, Article I, Section 32 and Section 6.204(c)(2). *De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015) (noting "both sides now agree" that the lower court's injunction preventing enforcement of those provisions is correct under *Obergefell*). As a result, consistent with *Obergefell*'s requirements, same-sex spouses of Texas state employees now enjoy the "entire constellation of benefits" available to opposite-sex spouses.[3] *Obergefell*, 135 S. Ct. at 2601–02.

Petitioners urge this Court to adopt a different constitutional interpretation (or instruct the district court to do so) for employees of

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[2] *See* the City's Response to Motion for Rehearing, at Tab 2.

[3] *See also* Tom Benning, *Benefits to be extended to spouses of Texas' gay state workers*, Dallas Morning News (June 29, 2015), http://www.dallasnews.com/news/texas/2015/06/29/benefits-to-be-extended-to-spouses-of-texas-gay-state-workers ("Starting Wednesday — less than a week after the decision — the Employees Retirement System of Texas, the University of Texas System and the Texas A&M University System will extend benefits to spouses of gay and lesbian employees."); Alexa Ura, *Texas Concedes Case Over Benefits for Same-Sex Couples*, The Texas Tribune (July 20, 2015), https://www.texastribune.org/2015/07/20/texas-concedes-case-over-benefits-same-sex-couples/ ("Almost a month after the U.S. Supreme Court ruled that same-sex marriage bans are unconstitutional, Texas Attorney General Ken Paxton quietly conceded a case against the federal government over medical leave benefits for certain same-sex couples.").

local governmental entities. They do so by arguing that the Fifth Circuit's *DeLeon* decision binds only the State's executive branch officials, not the judiciary.[4] That is a technically accurate statement of the scope of the *DeLeon* injunction, but it is far too glib an assertion given the procedural posture of this case and the weight of the rights at issue.

Decisions of the Fifth Circuit interpreting federal constitutional law are of course persuasive. *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 455 (Tex. 2008). They carry especially great weight where, as here, a branch of the state has legally bound itself in agreement with them concerning matters of individual constitutional rights. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008) (noting that a party is estopped when it asserts a position clearly inconsistent with a previous position accepted by a different court).

Were this Court to reject the reasoning of *DeLeon* and hold that *Obergefell* means something less than what it says, LGBT married

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[4] *See* Petitioners' Reply at 4-5; Amicus Curiae Brf. of Gov. Greg Abbott, Lt. Gov. Dan Patrick, and Att. Gen. Ken Paxton at 5.

persons working for the state, which remains enjoined from restricting the rights of same-sex married couples, would enjoy constitutional rights that married LGBT employees of municipalities, school districts, and counties would not. For example, an employee of a state university could obtain health care insurance for his same-sex spouse through his university insurance plan, but a lesbian employee of a school district could not. Similarly, a district court judge could list her same-sex spouse as the beneficiary of her pension or retirement benefit, but a municipal police officer could not. The effect would be to permanently entrench disparate treatment for a subset of married Texans, depending on their particular public employer, into the laws of this state in clear violation of the Fourteenth Amendment's equal protection guarantee.

C. *Obergefell* Did More Than Guarantee a Marriage License; It Established the Constitutional Right of Same-Sex Married Couples to Equal Marital Benefits.

Even without *DeLeon*, there is no footing for Petitioners' arguments; *Obergefell* directly rejected them. In urging that *Obergefell* pronounced nothing more than a right to a marriage license,

Petitioners ignore the Supreme Court's application of its constitutional finding to the laws at issue in that case. To be clear, *Obergefell* both recognized the fundamental right of same-sex couples to marry ***and*** determined that state laws that restrict the benefits afforded to same-sex married couples in a way not applicable to opposite-sex couples do not pass constitutional muster.

An examination of the precise claims decided in *Obergefell* leaves no room for doubt as to its holding. The petitioners were fourteen individual same-sex couples and two men who had lost their same-sex spouses to tragic illnesses. *Id*. at 2594. They sought to overturn state constitutional provisions restricting marriage to unions between a man and a woman in Kentucky, Tennessee, Ohio, and Michigan. *Id*.

None of the petitioning couples in *Obergefell* were in need of marriage licenses; all had been legally wed in states recognizing same-sex marriages. *Id*. What they sought was something greater — equal treatment of their marriages under the law.

Indeed, among the particularized injuries in *Obergefell* for which the Court's decision gave redress were the denial of spousal

recognition on death certificates, the denial of parental recognition on birth certificates, and numerous other deprivations of rights attendant to the marital status in the areas of "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; . . . professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules." *Id*. at 2594-95; 2601.

In finding that the challenged laws were unconstitutional, the majority in *Obergefell* reasoned that:

> The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage.

Id. at 2601. Thus, *Obergefell* was clear in its endorsement of marriage as a fundamental right whose "constellation of benefits" cannot be

carved up according to the legislature's or the populace's attitudes toward homosexuality. *Id*.

All of the justices writing for the Court — both those in the majority ***and those dissenting*** — recognized the scope of the majority's holding:

- Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of ***specific public benefits*** to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage. *Id*. at 2606.

- The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective ***claims will not arise now*** that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples. *Id.* at 2623–24 (Roberts, J., dissenting).

- The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them ***favorable civil consequences, from tax treatment to rights of inheritance***. *Id.* at 2626–27 (Scalia, J., dissenting).

And every court to decide the issue since *Obergefell* has held that it mandates that any benefits offered to "spouses" be offered to same-

sex spouses.[5] The matter is settled. There are no "classes" of marriage. Nor can the rights afforded to married couples be doled out unequally based upon perceived government interests in affording different benefits to different subgroups of married people.

It is true that the City has no constitutional duty to offer benefits to any employee's spouse. But once a governmental entity chooses to afford a benefit to the spouses of some married persons, it must offer

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[5] *See, e.g.*, *Hard v. Attorney Gen., Ala.*, 648 Fed. App'x 853, 856 (11th Cir. 2016) (same-sex spouse entitled to wrongful death proceeds from deceased spouse); *Marie v. Mosier*, 196 F. Supp. 3d 1202 (D. Kan. 2016) (interpreting *Obergefell*'s holding as a "broad one"); *Campaign for S. Equal. v. Mississippi Dep't of Human Servs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016) (finding prohibition of adoption by married gay couples violates constitution based on the Supreme Court's holding in *Obergefell*); *Henderson v. Adams*, 115CV00220TWPMJD, 2016 WL 3548645, at *15 (S.D. Ind. June 30, 2016) (permanently enjoining the differentiation between male and female spouses of women who give birth with the aid of artificial insemination by a third-party); *Taylor v. Brasuell*, No. 1:14–cv–00273-REB, 2015 WL 4139470, at *7–8 (D. Idaho July 9, 2015) (issuing limited permanent injunction enjoining defendants from "enforcing any constitutional provision, statute, regulation, or policy preventing qualified same-sex couples from being buried or interred together at the Idaho State Veterans Cemetery which, if the spouses were not of the same sex, would be otherwise valid under the laws of the state"); *McLaughlin v. Jones*, 382 P.3d 118, 122 (N.M. Ct. App. 2016) (holding that same-sex spouse was presumptively the legal parent of child conceived through artificial insemination); *Kelly S. v. Farah M.*, 139 A.D.3d 90, 105 (N.Y. App. Div. 2016) (holding that same-sex spouse of biological mother of two children conceived through artificial insemination had standing to seek visitation); *Legg v. Commonwealth*, 500 S.W.3d 837, 840 (Ky. Ct. App. 2016) (holding that trial court could order non-biological mother to pay child support to spouse); *Stankevich v. Milliron*, 882 N.W.2d 194, 195 (2015) (holding that biological mother's same-sex spouse could seek custody); *Ramey v. Sutton*, 362 P.3d 217, 221 (Okla. 2015) (same).

that same benefit to all legal spouses. Just as the City cannot constitutionally exclude from its provision of employment benefits married couples who are divorcees, those who owe child support, or those who are childless, so too is it prohibited from excluding same-sex married couples. In deciding the case on substantive due process grounds, the Court in *Obergefell* established the state of being married as the trigger for constitutional protection for same-sex couples, not the identity or class of the married persons.[6]

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[6] Neither *Parella v. Johnson*, 115CV0863LEKDJS, 2016 WL 3566861 (N.D.N.Y. June 27, 2016), nor *Califano v. Jobst*, 434 U.S. 47 (1977), nor *Bowen v. Owens*, 476 U.S. 340 (1986) supports a different conclusion. In *Parella*, the Adam Walsh Child Protection and Safety Act barred a male American citizen who had previously been convicted of sexual assault against a 15 year old girl from bringing his female alien spouse to the United States on a visa. *Id*. at *1. The case in no way touched upon the legal recognition to be afforded a same-sex marriage. "Instead, this case is about the right to obtain a visa for an alien spouse." *Id*. The court questioned whether there even exists a legal right for any married couples to live together, but ultimately determined that it need not answer the question, "since even if there were a fundamental right to live with one's spouse when both partners are citizens of the United States, the immigration context of this case significantly alters the constitutional analysis. 'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Id*. at *10 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)). *Jobst* is equally inapposite. That case involved a statute that terminated Social Security disability benefits upon marriage, which was Congress's attempt to allocate resources to those who need them most. Congress reasonably assumed that a married person is less likely to be dependent on disability benefits than a single person. *Id.* The plaintiff was a married beneficiary who had lost his benefits and challenged Congress's conclusion. While the Court held that a similar

This is the point Petitioners miss in asserting that *Obergefell* left marriage-associated rights to be determined through a benefit-by-benefit Equal Protection analysis under rational basis review. Where a fundamental right is concerned, government actions that would burden it are subject to strict scrutiny and cannot be sustained absent a compelling justification. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Applying that analytical framework, the Supreme Court in *Obergefell* determined both that the right of persons to marry is fundamental and that no compelling justification exists for impinging upon it based upon the sex of the betrothed. *Obergefell,* 135 S. Ct. at 2605. This decisional approach of declaring a fundamental right and concluding that there is no compelling justification that would permit

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restriction based on race or religion would be invalid, "a distinction between married persons and unmarried persons" is acceptable. *Id.* That was not in impingement on the fundamental right to marry; it did not create two classes of married persons. So too with *Bowen*. There, Congress passed a law that a person could no longer receive Social Security benefits if he or she remarried. Again, Congress was trying to allocate resources among those who needed them most, concluding that remarried persons needed them less than widowed persons. 476 U.S. at 345. And again, it did so by distinguishing between married and unmarried persons, not by distinguishing between groups of married persons. *Id*.

its infringement is not a new one. *See Troxel v. Granville*, 530 U.S. 57, 64 (2000) (holding that any state action that places a substantial burden on the fundamental right of a parent to raise her children is impermissible); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (holding unconstitutional a statute that burdened the fundamental rights to associate and to vote); *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (holding that Wisconsin could not prevent people who owed child support from marrying because marriage is a fundamental right).

No legitimate reading of *Obergefell* supports Petitioners' arguments in this case. The Supreme Court has pronounced the fundamental constitutional right of same-sex married couples to be afforded equal treatment under the law, and our democracy does not allow for selective adherence to its decisions. Whatever their personal feelings about same-sex marriage, citizens — even taxpaying ones — cannot compel Texas governmental bodies to defy the United States Supreme Court.

CONCLUSION

When it comes to the rights afforded by the Fourteenth Amendment, the decisions of the United States Supreme Court are the supreme law of the land. This Court has a duty to uphold that bedrock principle of our democracy, and to avoid a fractured system of constitutional rights wherein married municipal employees enjoy lesser rights than those working for the state. Amici respectfully urge the Court to render judgment that Petitioners have failed to present any legally valid basis for enjoining the City of Houston from providing equal benefits to the spouses of all legally married persons within its employ.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the computer program used to prepare it, the foregoing document contains 3,631 words, excluding those portions of the document excepted under Tex. R. App. P. 9.4(i)(1).

/s/ Kelly Sandill
Kelly Sandill

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record for the parties via the Court's electronic filing system on this 27th day of February, 2017.

/s/ Kelly Sandill
Kelly Sandill