No. 17-424

In the Supreme Court of the United States

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON, PETITIONERS

v.

JACK PIDGEON AND LARRY HICKS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented in the city's petition is misleading. The city correctly notes that the Supreme Court of Texas held that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), "did not hold that states must provide the same publicly funded benefits to all married persons," Pet. App. 27a, but the state supreme court's opinion does not say that *Obergefell* and *Pavan* leave open the possibility that a State might withhold spousal employment benefits specifically from same-sex couples. The state supreme court held only that *Obergefell* and *Pavan* do not require that every single married couple receive an identical package of publicly funded benefits, and it remanded for the trial court to decide whether the respondents' lawsuit can be maintained in light of *Obergefell* and *Pavan*. The question presented should be rephrased to avoid begging a question that the parties dispute, and to avoid mischaracterizing the state supreme court's opinion.

The respondents respectfully restate the question presented as follows:

> Do *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), compel state employers to provide the same publicly funded benefits to same-sex married couples that they provide to opposite-sex married couples?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

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The city's petition is shot through with jurisdictional problems that the city never even bothers to discuss. One of these jurisdictional obstacles is insurmountable: The city is seeking review of an interlocutory state-court ruling rather than a "final judgment or decree" under 28 U.S.C. § 1257. *See* Part I, *infra*. That alone compels denial of the city's petition.

On top of that, there are two *additional* jurisdictional problems that this Court must address and resolve before it can even consider the question presented. One is that Pidgeon and Hicks sued *as taxpayers*, so this Court lacks jurisdiction under Article III unless Pidgeon and Hicks would have standing to sue the city in federal court, or unless the city has suffered "direct injury" from

the state supreme court's decision under *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612–14 (1989). Pidgeon and Hicks dispute each of these propositions, *see* Part II, *infra*, and this Court would have to resolve these difficult Article III questions even if the city could somehow find a way around the section 1257 problem.

The other remaining jurisdictional problem is that the city never explains how the state supreme court's *judgment* to reverse the court of appeals and remand for further proceedings was in error. The petition complains about passages in the state court's *opinion*, but this Court reviews judgments—not opinions—and there is no federal constitutional error in the state supreme court's *judgment* even if the city were correct to accuse the *opinion* of understating the holding of *Obergefell*. *See Herb v. Pitcairn,* 324 U.S. 117, 126 (1945); Part III, *infra*.

The city appears to believe that the state supreme court's judgment should have done more to constrain the state trial court on remand—perhaps by explicitly directing the trial court to interpret the Fourteenth Amendment to require equal spousal benefits for same-sex and opposite-sex couples. But it is not federal constitutional error for a state supreme court to remand a constitutional question to a trial court rather than decide the issue for itself—even if the answer to that question is *compelled* by existing Supreme Court precedent, as the city claims. The state supreme court's judgment leaves the city's policy in effect, and it does not prevent the trial court from accepting the city's constitutional defenses on remand. Pet. App. 27a. How a *judgment* of this sort can

violate the Constitution or warrant correction from this Court is unexplained, and unless the city can credibly attack the judgment, its petition is nothing more than a request for an advisory opinion. *See Herb,* 324 U.S. at 126.

The petition should be denied even apart from these jurisdictional obstacles. The city's claim that the state supreme court "def[ied]" *Obergefell* and *Pavan* is untrue; the opinion was written carefully to avoid contradicting even the broadest possible understanding of *Obergefell*. The opinion never says that *Obergefell* leaves open the possibility of a regime that withholds spousal employment benefits *specifically from same-sex couples*. Its statement that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons," Pet. App. 27a, means only that *Obergefell* does not require a State to treat *every single married couple alike* for purposes of spousal employment benefits. And the opinion does not purport to resolve *which* distinctions among married couples might remain permissible after *Obergefell*.

Nor did the state supreme court open the door to discrimination against same-sex couples by observing that *Obergefell* "did not address and resolve" "the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples." Pet. App. 25a–26a. It remains possible, even after *Obergefell*, for a State to withdraw tax-funded benefits from married same-sex couples *so long as it also withdraws those benefits from opposite-sex couples*, and *Obergefell* does not resolve which tax-funded benefits qualify as "fundamen-

tal rights" that must be extended to married same-sex couples as a *substantive* constitutional entitlement. *See Obergefell*, 135 S. Ct. at 2601 ("States are *in general* free to vary the benefits they confer on all married couples." (emphasis added)). None of these statements in the state supreme court's opinion contradict the robust anti-discrimination rule that the city derives from *Obergefell*.

Finally, even if the state supreme court *did* understate the holding of *Obergefell* (and it didn't), and even if this Court *had* jurisdiction to review the state supreme court's judgment (and it doesn't), the petition should still be denied because no post-*Obergefell* court (to our knowledge) has *ever* ruled that States may withhold equal spousal employment benefits from married same-sex couples. The Court should await a ruling that actually holds that the Fourteenth Amendment permits such a policy, rather than launching a preemptive strike on an issue that may never arise.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or

> where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

Other relevant constitutional and statutory provisions appear in the city's petition.

STATEMENT OF THE CASE

The city's statement of the case is incomplete. And many of the city's omissions conceal the jurisdictional obstacles and vehicle problems that the petition fails to acknowledge. We will provide a thorough recitation of the procedural history — perhaps at the risk of including some not-so-important details — in the interest of providing this Court with the information it needs to assess the *ASARCO* problem, the city's failure to attack the state-court *judgment*, and the absence of a "final judgment or decree."

A. Mayor Parker's Directive Of November 19, 2013

On November 19, 2013, then-Mayor Annise Parker directed the city of Houston to extend spousal employment benefits to the same-sex spouses of city employees who had obtained marriage licenses from other States. App. 7a.

Parker's directive was controversial for several reasons. First, it contradicted the provisions of state law that forbade the city to extend spousal employment benefits to same-sex couples. *See, e.g.*, Tex. Family Code

§ 6.204(c)(2) (forbidding the state and its subdivisions to "give effect" to any "benefit . . . asserted as a result of a marriage between persons of the same sex"). And Parker took this action more than a year and a half before this Court's ruling in *Obergefell*, which held that states and their subunits must recognize same-sex marriages performed in other jurisdictions. Although this Court had decided *United States v. Windsor*, 133 S. Ct. 2675 (2013), at the time of Parker's directive, the holding of *Windsor* stopped short of requiring the States to license or recognize same-sex marriages.

Second, even if Parker were correct to think that *Windsor* or the Constitution had compelled the city to provide the same spousal employment benefits to same-sex and opposite-sex married couples, that *still* would not excuse her decision to violate section 6.204(c)(2) of the Texas Family Code. If the Constitution forbids the city to treat same-sex married couples differently from opposite-sex couples, but section 6.204(c)(2) forbids the city to award spousal employment benefits to same-sex couples, then the proper response is for the city to withdraw spousal benefits from *all* of its employees. There is no substantive constitutional right to spousal employment benefits, so if the city is violating a constitutional anti-discrimination rule by extending spousal employment benefits *only* to opposite-sex couples, then the city must withdraw spousal employment benefits from everyone rather than extend them to same-sex couples. The city cannot remedy a putative constitutional violation by defying state law when it remains possible for the city to

comply with both state law and its constitutional obligations.

B. Pidgeon And Hicks's Initial Lawsuit

On December 17, 2013, Jack Pidgeon and Larry Hicks sued Parker to enjoin her from providing spousal employment benefits to same-sex couples. Pidgeon and Hicks sued as taxpayers, and Texas law permits taxpayers to sue when they allege an unlawful expenditure of public funds. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000) ("[A] taxpayer has standing to sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury."). Later that day, the state trial court issued a temporary restraining order requiring the mayor and city to "cease and desist providing benefits to same-sex spouses of employees that have been married in jurisdictions that recognize same-sex marriage."

On December 27, 2013, shortly before the TRO was scheduled to expire, the city removed the case to federal court. The federal district court allowed the TRO to expire and waited nearly eight months before remanding on August 28, 2014. By that time, the state trial court had dismissed the case for lack of prosecution. Rather than reopen that case, Pidgeon and Hicks chose to file a new state-court lawsuit.

C. Pidgeon And Hicks's Second Lawsuit

On October 22, 2014, Pidgeon and Hicks filed their second lawsuit against Parker and the city. The state trial court granted a temporary injunction that prohibited the city from "furnishing benefits to persons who were

married in other jurisdictions to City employees of the same sex." Pet. App. 37a–41a. The city appealed to the Fourteenth Court of Appeals, and while the city's interlocutory appeal was pending, this Court issued its ruling in *Obergefell*, which held that states must license and recognize same-sex marriages.

Shortly after *Obergefell*, a federal district court enjoined the governor of Texas, the state Attorney General, the clerk of Bexar County, Texas, and the commissioner of the Texas Department of State Health Services "from enforcing Article 1, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage." *De Leon v. Perry*, No. 5:13-cv-982, Order Granting Plaintiffs' Emergency Unopposed Motion to Lift the Stay of Injunction, ECF No. 96 (W.D. Tex. June 26, 2015). The U.S. Court of Appeals for the Fifth Circuit affirmed this preliminary injunction on July 1, 2015, and remanded for entry of final judgment. *See De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015). On remand, the district court entered a final judgment that enjoined the four named defendants (the governor, the Attorney General, the clerk of Bexar County, and the commissioner of the Department of State Health Services) from "enforcing Texas's laws prohibiting same-sex marriage." *De Leon v. Perry*, No. 5:13-cv-982, Final Judgment, ECF No. 98 (W.D. Tex. July 7, 2015).

In response to these developments, the Fourteenth Court of Appeals reset the city's appeal for submission without oral argument. On July 28, 2015, the court of ap-

peals issued a per curiam opinion that "reverse[d]" the trial court's injunction. Pet. App. 33a–36a. The court of appeals noted that *Obergefell* had held that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." Pet. App. 35a (citation and internal quotation marks omitted). It also observed that the federal district court in *De Leon* had "found that article I, section 32 of the Texas Constitution and Texas Family Code section 6.204 are unconstitutional and enjoined the State of Texas from enforcing them," and that the Fifth Circuit had affirmed this injunction on appeal. Pet. App. 35a. The court concluded its opinion with the following passage:

> Because of the substantial change in the law regarding same-sex marriage since the temporary injunction was signed, we reverse the trial court's temporary injunction and remand for proceedings consistent with *Obergefell* and *DeLeon*.

Pet. App. 35a–36a (footnote omitted).

Pidgeon and Hicks then petitioned for review in the state supreme court. The state supreme court initially denied review, over dissent, but the court withdrew its order and granted review after Pidgeon and Hicks moved for rehearing. In the state supreme court, Pidgeon and Hicks asked the justices to reverse the court of appeals' judgment on several different grounds.

First, Pidgeon and Hicks claimed that the court of appeals erred by instructing the trial court to comply with *De Leon* on remand, because the *De Leon* rulings

came from inferior federal courts that a state court is under no obligation to follow. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.21 (1997).

Second, Pidgeon and Hicks claimed that the court of appeals erred by "reversing" rather than "vacating" the temporary injunction. By "reversing," the court of appeals implied that Pidgeon and Hicks would be precluded from seeking temporary injunctive relief on remand. Pidgeon and Hicks argued that the court of appeals should have "vacated" the injunction and allowed Pidgeon and Hicks to seek a new temporary injunction from the trial court.

Third, Pidgeon and Hicks asked the state supreme court to hold that *Obergefell* is not retroactive—and to impose a temporary injunction that requires the city to claw back the pre-*Obergefell* expenditures that violated section 6.204(c)(2) of the Texas Family Code.

Fourth, Pidgeon and Hicks asked the state supreme court to instruct the state trial court to construe *Oberegefell* narrowly on remand. Pidgeon and Hicks acknowledged that *Obergefell* had established a substantive "fundamental right" to have a same-sex marriage licensed and recognized by the State. But they argued that *Obergefell* does not establish a *substantive* constitutional entitlement to spousal employment benefits. A State could abolish *all* spousal employee benefits—for both same-sex and opposite-sex couples—without violating the Constitution or court-created substantive-due-process doctrines. *See, e.g.*, Cass R. Sunstein, *The Right To Marry*, 26 Cardozo L. Rev. 2081, 2092 (2005)

("[E]xisting doctrine does not require economic benefits to be provided to married people as such.").

Pidgeon and Hicks also argued that spousal employment benefits are government subsidies, and that the States may reserve these subsidies to the married couples who are most likely to advance the State's interests in procreation and childrearing. *See* 26 U.S.C. § 24 (providing a "child tax credit" to married couples who have children, but phasing out the tax credit for married couples whose joint adjusted gross income exceeds $110,000); *Harris v. McRae*, 448 U.S. 297 (1980) (allowing governments to subsidize the costs of childbirth but not abortion, notwithstanding the Court's recognition of a constitutional right to abort a fetus).

Finally, Pidgeon and Hicks argued that they remain entitled to injunctive relief even under the broadest possible interpretation of *Obergefell*. If one accepted the city's contentions that (1) *Obergefell* requires equal benefits for same-sex and opposite-sex married couples, and (2) *Obergefell*'s holding is fully retroactive, then the city must withdraw spousal benefits from *all* of its employees. This would remedy the city's violation of Texas Family Code § 6.204(c)(2), which prohibits the payment of "benefit[s]" asserted as the result of a same-sex marriage. And it would comply with *Obergefell* by providing identical treatment of same-sex and opposite-sex spouses.

D. The State Supreme Court's Ruling

On June 30, 2017, the Supreme Court of Texas "reverse[d]" the court of appeals' judgment because "the court's opinion and judgment impose—or at least can be

read to impose—greater restrictions on remand than *Obergefell* and this Court's precedent require." Pet. App. 2a. At the same time, the state supreme court "vacate[d]" the trial court's temporary-injunction order and remanded for the trial court to reconsider the plaintiffs' request for temporary relief. The state supreme court refused to rule on Pidgeon and Hicks's remaining arguments for a temporary injunction, leaving those arguments for the trial court to resolve on remand.

1. The State Supreme Court Holds That De Leon *Cannot Bind The State Judiciary*

The state supreme court first held that "the court of appeals should not have ordered the trial court to proceed on remand 'consistent with' *De Leon*." Pet. App. 17a. This instruction contradicted the longstanding rule that rulings from inferior federal courts do not bind the state judiciary. *See Arizonans for Official English*, 520 U.S. at 58 n.11; Pet App. 15a. That misguided instruction alone was sufficient to warrant reversal of the court of appeals.

At the same time, the state supreme court emphasized that the trial court remains free to consider and follow *De Leon* on remand if it finds its analysis persuasive. *See* Pet App. 19a ("Fifth Circuit decisions, particularly those regarding federal constitutional questions, can certainly be helpful and may be persuasive for Texas trial courts.").

2. The State Supreme Court Holds That The Court Of Appeals Should Have "Vacated" Rather Than "Reversed" The Trial Court's Temporary Injunction

The state supreme court also held that the court of appeals should not have "reversed" the temporary-injunction order, because a "reversal" would foreclose Pidgeon and Hicks from seeking temporary injunctive relief on remand. Pet. App. 20a–21a. Instead, the court of appeals should have "vacated" the temporary injunction, which would allow Pidgeon and Hicks to present their post-*Obergefell* arguments for temporary injunctive relief to the trial court. *Id.*

3. The State Supreme Court Declines To Rule On Whether Obergefell *Is Retroactive*

The state supreme court declined to rule on whether *Obergefell* is retroactive, or whether Pidgeon and Hicks have standing to seek a claw-back remedy that requires the city to undo its pre-*Obergefell* expenditures. Pet. App. 21a–24a. The Court left these issues for the trial court to decide on remand. Pet. App. 24a.

4. The State Supreme Court Declines To Rule On Whether Obergefell *Established A "Fundamental Right" To Spousal Employment Benefits, Or Whether The City Must Withdraw Spousal Benefits From All Its Employees*

The state supreme court also refused to rule on Pidgeon and Hicks's remaining arguments for temporary in-

junctive relief. Pidgeon and Hicks had argued that there is no *substantive* "fundamental right" to spousal employment benefits, and that a state may withhold spousal benefits from *all* of its employees without violating the Constitution. Pidgeon and Hicks had also argued that a state may withhold spousal benefits from *subsets* of its employees so long as its policy satisfies the appropriate tier of scrutiny under the Equal Protection Clause (*e.g.*, rational-basis review, intermediate scrutiny, or strict scrutiny). But the state supreme court refused to rule on any of this, leaving these issues for the trial court to resolve on remand. Pet. App. 24a–28a.

While declining to rule on these matters, the state supreme court offered two observations about the scope of *Obergefell*'s holding. First, the state supreme court noted that:

> *Obergefell* [held] that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, *but it did not hold that states must provide the same publicly funded benefits to all married persons* . . . .

Pet. App. 26a–27a (emphasis added). The city claims that this passage "def[ies]" *Obergefell* and *Pavan* by suggesting that the city may single out same-sex couples for disfavored treatment and withhold publicly funded benefits specifically from same-sex couples. *See* Pet. 7. But that is not what the state supreme court said. It observed only that *Obergefell* does not require identical public benefits *for every single married couple*, and it did not indicate

which distinctions between married couples might remain permissible after *Obergefell*.

The state supreme court's opinion also includes this passage:

> We agree with the Mayor that any effort to resolve whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples without considering *Obergefell* would simply be erroneous. On the other hand, we agree with Pidgeon that *the Supreme Court did not address and resolve that specific issue in* Obergefell.

Pet. App. 25a–26a (emphasis added). The city claims that this passage allows States to *discriminate* against same-sex couples by withholding the tax-funded benefits *that opposite-sex couples receive*. Pet. 1, 6, 9. But the state court said only that *Obergefell* did not "address and resolve" the extent to which states *must* provide tax-funded benefits to same-sex couples as a matter of substantive constitutional entitlement; it did not endorse a regime that allows opposite-sex couples to keep the tax-funded benefits that a State withholds from married same-sex couples. *See Obergefell*, 135 S. Ct. at 2601 ("States are in general free to vary the benefits they confer on all married couples.").

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE THE STATE SUPREME COURT HAS NOT ISSUED A "FINAL JUDGMENT OR DECREE"

28 U.S.C. § 1257 allows this Court to review the "[f]inal judgments or decrees rendered by the highest court of a State." But the city is not seeking review of a "final judgment or decree." It is asking this Court to review an *interlocutory* ruling that does nothing more than allow Pidgeon and Hicks to resubmit their request for a temporary injunction to the trial court. The state supreme court did not enjoin the city's policy. And it did not rule on *any* of the federal constitutional defenses presented by the city, leaving all of that for the trial court to resolve on remand. This is about as far from a "final judgment or decree" as one can imagine.

This Court has held that interlocutory rulings that remand for further proceedings do not qualify as "[f]inal judgments or decrees" under section 1257. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 76 (1997) ("[A] state-court decision is not final unless and until it has effectively determined the entire litigation."); *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam) ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final as an effective determination of the litigation." (citations and internal quotation marks omitted)). And although this Court has recognized exceptions to section 1257's rule of finality, *see Cox Broadcasting*

Corp. v. Cohn, 420 U.S. 469, 476–87 (1975), none of these so-called *Cox* exceptions apply to the city's petition.

A. The Petition Does Not Fall Within The First *Cox* Exception

The first *Cox* exception applies when a state court remands for further proceedings after resolving a federal issue that is "conclusive" or that makes "the outcome of further proceedings preordained":

> In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final.

Id. at 479. The city's petition cannot fit within this first *Cox* exception for many reasons. First, the outcome on remand is not "preordained." *Id.* The state supreme court explicitly declined to rule on whether, and to what extent, the Fourteenth Amendment requires the States to provide spousal benefits to their employees. Pet. App. 27a. And it made clear that the state trial court could decide this question in *either* direction without contradicting the state supreme court's opinion. *Id.* ("[T]hat does not mean that the Texas DOMAs *are* constitutional or that the City may constitutionally deny benefits to its employees' same-sex spouses. Those are the issues that this case now presents in light of *Obergefell*.").

Second, this case is not "for all practical purposes concluded." *Cox*, 420 U.S. at 479. The appeal to the state supreme court concerned whether a *temporary injunction* should issue while the parties litigate in the trial court. And the state supreme court did not resolve even this preliminary question; it remanded the temporary-injunction issue for the trial court to decide. This litigation has not even gotten off the ground; Pidgeon and Hicks are *still* waiting for a ruling on their temporary-injunction request—among the most preliminary of all pre-trial matters. All that the state supreme court did was to instruct the trial court to take another look at the temporary-injunction question in light of *Obergefell*.

In addition to the temporary injunction, Pidgeon and Hicks are *still* awaiting rulings on: (1) whether they have standing to seek a "claw back" remedy for money already spent in violation of state law; (2) whether *Obergefell* applies retroactively; (3) whether any parts or applications of section 6.204(c)(2) survive *Obergefell*; (4) whether the Fourteenth Amendment establishes a *substantive* constitutional right to spousal employment benefits from state employers; and (5) whether *Obergefell*, when combined with section 6.204(c)(2), requires the city to withdraw spousal benefits from *all* city employees. None of the answers to *any* of these questions are dictated or determined by the state supreme court's opinion. This case is indistinguishable from *Florida v. Thomas*, 532 U.S. 774, 778 (2001), which refused to extend the first *Cox* exception to a state supreme court ruling that had remanded for further factfinding, and in

which the parties continued to dispute the legal questions that remained open on remand.

B. The Petition Does Not Fall Within The Second *Cox* Exception

The second *Cox* exception applies when the highest court of a state has "finally decided" a federal issue, but that federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480; *see also id.* at 480–81 (discussing *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945)).

This exception is inapplicable because the "federal issue" in this case will not necessarily survive the remand. The federal issue in the city's petition is whether *Obergefell* compels the city to offer same-sex married couples the same spousal employment benefits that opposite-sex couples receive. *See* Pet. i. But this issue will disappear if the state judiciary assumes, for the sake of argument, that *Obergefell* requires identical treatment of same-sex and opposite-sex married couples, yet rules for Pidgeon and Hicks on the ground that section 6.204(c)(2) requires the city to comply with *Obergefell*'s equal-treatment rule by withdrawing spousal employment benefits from *all* city employees.

This exception is also inapplicable because the state supreme court did not "finally decide" any federal-law issues raised by the litigants. It did not resolve whether *Obergefell* defeats the claims brought by Pidgeon and Hicks. It did not resolve whether the city may selectively withhold spousal benefits from employees in same-sex marriages. And it did not even resolve whether *Oberge-*

fell and *Pavan* leave open the possibility of a regime that withholds spousal employment benefits specifically from same-sex couples.

All that the state supreme court offered were the unremarkable (and obvious) observations that: (1) *Obergefell* did not establish a *substantive* constitutional entitlement to spousal employment benefits, Pet App. 26a ("The extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples" is an issue that *Obergefell* "did not address and resolve."); and (2) *Obergefell* does not require that every single married couple receive an identical package of publicly funded benefits, Pet. App. 27a ("*Obergefell* did not hold that states must provide the same publicly funded benefits to all married persons."). The city does not dispute these propositions, and the city remains free to argue on remand that the Fourteenth Amendment compels the city to provide equal spousal employment benefits to same-sex and opposite-sex couples. Pet. App. 27a.

C. The Petition Does Not Fall Within The Third *Cox* Exception

The third *Cox* exception applies when a state court finally decides a federal claim that will be impossible for this Court to review at the conclusion of state-court proceedings—regardless of which side prevails. *See Cox*, 420 U.S. at 481; *Thomas*, 532 U.S. at 779. In *New York v. Quarles*, 467 U.S. 649 (1984), for example, the highest state court had suppressed evidence in a pre-trial hearing after concluding that the police had violated *Miranda*. This Court allowed the State to seek review under

section 1257 because the issue would become impossible to review after trial. If the State were to secure a conviction, then its claim that the court had wrongfully suppressed evidence would become moot. And if the defendant were to be acquitted, then the double-jeopardy clause would forbid an appeal by the State. *See id.* at 651.

In this case, it remains possible for the Court to review the federal issue when the state proceedings conclude. If the state judiciary rules that *Obergefell* or the Fourteenth Amendment requires the city to maintain its existing policy, then Pidgeon and Hicks can seek review of that "final judgment or decree" under section 1257. And if the state judiciary concludes that *Obergefell* and the Fourteenth Amendment are no defense to Pidgeon and Hicks's claims, then the city can seek review of that final decision in this Court. This case is nothing like *Quarles* or any case in the third *Cox* category.

D. The Petition Does Not Fall Within The Fourth *Cox* Exception

The fourth and final *Cox* exception extends to situations in which:

> (1) a state court has "finally decided" a federal issue and remanded for further proceedings;
>
> (2) the party seeking review in this Court "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court";

> (3) reversing the state court on the federal issue would resolve the entire case and preclude further litigation; and
>
> (4) a refusal to immediately review the state-court decision "might seriously erode federal policy."

Cox, 420 U.S. at 482–83; *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 658–59 (2003) (Stevens, J., concurring). The city's petition fails to meet the second and third requirements of this four-part test.

There is no conceivable "nonfederal ground[]" on which the city might "prevail on the merits." The city has contested Pidgeon and Hicks's standing to seek retrospective claw-back relief, Pet. App. 22a–23a, but the city would not prevail "on the merits" if the state courts accepted that argument, and these standing objections would not affect Pidgeon and Hicks's ability to seek prospective relief.

In addition, a reversal from this Court on the "federal issue" would *not* terminate the case. If this Court grants certiorari and holds that *Obergefell* forbids the city to differentiate in any way between same-sex and opposite-sex married couples, then Pidgeon and Hicks can *still* seek an injunction on remand that requires the city to comply with section 6.204(c)(2) by withholding spousal employment benefits from *everyone*. This remedy would comply with *Obergefell* by treating same-sex and opposite-sex couples equally, and it would enforce section 6.204(c)(2) by withholding "benefits" asserted as a result of a same-sex marriage. The city's *Obergefell* defense cannot dispose of Pidgeon and Hicks's lawsuit; it

affects only whether the state judiciary should enjoin *only* the provision of spousal employment benefits to same-sex couples, or whether it should go further and enjoin the provision of spousal employment benefits to anyone.

The city's petition is even weaker than the petition in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). The *Nike* litigation arose after Nike had issued statements defending the labor conditions at its overseas factories. A California resident alleged that these statements were false and misleading, and he sued Nike under California's unfair-competition and false-advertising laws. *Id.* at 656 (Stevens, J., concurring). Nike argued that its statements were protected by the First Amendment and could not become grounds for a private lawsuit. The state trial court agreed with Nike and dismissed the case, but the California Supreme Court reversed and remanded for trial. *Id.* at 656–57. Then Nike asked this Court to grant certiorari and hold that its statements were protected by the First Amendment.

The Court granted certiorari but later dismissed the writ as improvidently granted. In a concurring opinion, Justice Stevens explained that Nike could not satisfy the finality requirement of section 1257—even though Nike had asked this Court for a broad First Amendment holding that would preclude *all* further litigation. *Id.* at 659–60. Justice Stevens acknowledged that the Court *could* reverse the California Supreme Court in the manner proposed by Nike, and that a reversal along those lines

would end the case.[1] But Justice Stevens also noted that the Court could reverse the California Supreme Court on narrower grounds that would allow the litigation to continue. *Id.* at 660. The Court, for example, might hold that Nike's statements were protected only if made without "actual malice"—a holding that would require the state trial court to determine on remand whether the "actual malice" standard is met. *Id.* Because it remained *possible* to reverse the California Supreme Court in a manner that did not foreclose further litigation, Justice Stevens concluded that Nike could not fall within the fourth *Cox* exception.

The city is in a worse position than Nike because it is impossible for *any* reversal requested by the city to preclude further litigation in the state courts. Even if this Court gives the city everything it asks for—and holds that *Obergefell* requires the same spousal employment benefits for same-sex and opposite-sex couples—Pidgeon and Hicks can *still* litigate their claim that *Obergefell* is not retroactive and cannot immunize the city's pre-*Obergefell* defiance of state law. Pet. App. 21a–24a. The city has not sought certiorari on the retroactivity question and it is outside the scope of the question presented. *See* Sup. Ct. Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court"). Pidgeon and Hicks would also

1. *Id.* at 659–60 (Stevens, J., concurring) ("Theoretically, Nike is correct that we could hold that *all* of Nike's allegedly false statements are absolutely privileged thereby precluding any further proceedings or amendments that might overcome Nike's First Amendment defense.").

be able to seek an injunction on remand that requires the city to withdraw spousal benefits from *all* its employees.

We want to be careful not to overstate our reliance on *Nike*. Justice Stevens's concurrence is not an opinion of this Court, and there was a separate jurisdictional problem in *Nike* that may have contributed to the Court's "DIG." *See* 539 U.S. at 661–63 (Stevens, J., concurring). But the city cannot fit within the fourth *Cox* exception unless this Court repudiates Justice Stevens's well-reasoned concurrence in *Nike*, and the jurisdictional problems that Justice Stevens flagged in *Nike* persuaded at least five members of this Court to take the extraordinary step of dismissing a writ of certiorari after merits briefing and oral argument. It is hard to imagine how a Court that dismissed a writ of certiorari in response to the situation in *Nike* could turn around and grant certiorari in this case.

* * *

The city's petition does not even attempt to explain how the decision below could qualify as a "final judgment or decree" under 28 U.S.C. § 1257, although it does gesture toward the lack-of-finality issue in its statement of jurisdiction. *See* Pet. 2 ("This Court has jurisdiction under 28 U.S.C. 1257(a) and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477–83 (1975)."). It is hard to comprehend how the city could think that a bald assertion of jurisdiction, combined with an unexplained citation of *Cox*, would be enough to show that this obviously interlocutory ruling qualifies as a "*final* judgment or decree" under section 1257. The city's petition does not even tell us which of the four *Cox* exceptions it is relying upon; the

pincite it provides encompasses all four exceptions discussed in that opinion.

As the petitioner, the city bears the burden of showing this Court that its jurisdiction is secure, and it must candidly and thoroughly discuss arguments that might be raised to challenge this Court's jurisdiction under section 1257. As the leading treatise on Supreme Court practice explains:

> In cases where finality of the state court judgment presents a serious jurisdictional problem, the matter should be presented as a Question Presented and then candidly discussed in the petition for certiorari, as well as in the opposition brief. Indeed, since finality of a state court judgment is of jurisdictional dimensions, both the petitioner and the respondent are obliged by the Supreme Court Rules to discuss such a finality problem.

S. Shapiro, et al., *Supreme Court Practice* 156 (10th ed. 2013). Even if one could somehow find a way to characterize the decision below as "final" under section 1257, the finality issue was serious enough to merit its own questioned presented, and it deserved far more than the wave of the hand it received in the city's petition.

If the Court decides to grant certiorari notwithstanding this jurisdictional obstacle, then we respectfully ask the Court to add the finality issue to the questions presented. We would also ask this Court to consider whether any of the so-called *Cox* exceptions should be reconsid-

ered or narrowed as inconsistent with the language of section 1257.[2] The rulings that have established "exceptions" to the statutory finality requirement make little effort to derive their holdings from the text of section 1257, and some of them justify their decisions simply by asserting that allowing immediate review would produce normatively desirable consequences. *See Mills v. Alabama*, 384 U.S. 214, 217–18 (1966) (reviewing a state-court decision that remanded a case for trial because waiting for finality would produce "an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court" and would "result in a completely unnecessary waste of time and energy"); *Cox*, 420 U.S. at 481 (observing that this Court will review non-final decisions of state courts if "later review of the federal issue cannot be had"). Some of the cases even appear to admit that the Court is departing from the statutory command of section 1257. *See Radio Station WOW*, 326 U.S. at 124 ("Considerations of English usage . . . would readily justify an interpretation of 'final judgment' so as to preclude reviewability here where anything further remains to be determined by a State court . . ."). The recent decisions of this Court have shown more solicitude toward the text of jurisdictional statutes. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005). If certiorari is granted, Pidgeon and Hicks intend to contest not only this Court's jurisdiction under existing finality doctrine, but also the propriety of

2. We have not filed a conditional cross-petition on these questions because we are not seeking a change in the judgment below.

previous decisions that have reviewed interlocutory state-court rulings.

II. THERE ARE GRAVE QUESTIONS ABOUT WHETHER THE COURT MAY ASSERT JURISDICTION OVER THIS TAXPAYER LAWSUIT

Pidgeon and Hicks sued as taxpayers. Pet App. 8a. The law of Texas gives taxpayers standing to challenge unlawful government expenditures in state court, but Article III is far less generous toward lawsuits of this sort. *Compare Bland Indep. Sch. Dist.*, 34 S.W.3d at 556, *with Frothingham v. Mellon*, 262 U.S. 447, 486–89 (1923). That means that this Court lacks jurisdiction unless the city shows that Pidgeon and Hicks would have Article III standing to sue in federal court, or unless the city can show that it has suffered "direct injury" from the state supreme court's judgment. *See ASARCO*, 490 U.S. at 612–24. It is doubtful that the city can make either showing.

The rules on municipal taxpayer standing are far from clear and this Court has issued few pronouncements on the question. When this Court disapproved federal taxpayer standing in *Frothingham*, it stated in dictum that taxpayers would have more latitude to challenge a municipality's unlawful expenditures:

> [R]esident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to

> prevent their misuse is not inappropriate. . . . The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

262 U.S. at 486–87. But in *ASARCO*, four members of this Court downplayed the significance of this passage, claiming that it means only that the prohibition on federal taxpayer standing "*may not hold* for municipal taxpayers, *if* it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" *ASARCO*, 490 U.S. at 613 (opinion of Kennedy, J.) (emphases added); *see also D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988) (Williams, J., concurring) (arguing that municipal taxpayer standing is "inconsistent with current principles of constitutional standing."). Pidgeon and Hicks have not attempted to show a "direct and immediate" interest in the city's expenditures because Texas law does not require them to do so. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 556.

Lower federal courts have also held that Article III requires municipal taxpayers to demonstrate more than a mere unlawful expenditure of public funds. In the Second and D.C. Circuits, a municipal taxpayer must show that the challenged activity "involves a measurable appropriation or loss of revenue." *Altman v. Bedford Cent.*

School Dist., 245 F.3d 49, 73 (2d Cir. 2001); *see also United States v. City of New York*, 972 F.2d 464, 466 (2d Cir. 1992) ("[U]nder *Frothingham* we presume a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue" (citation and internal quotation marks omitted)); *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988) ("When a municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement is satisfied."). Once again, Pidgeon and Hicks have not made this showing because it is not required by state law. The city is the one invoking the jurisdiction of the federal courts, so it is the city's task to show how Pidgeon and Hicks have a "direct and immediate interest" in the city's allegedly unlawful expenditures. Its petition makes no effort to do so.

As for the *ASARCO* question: The city has not suffered "direct injury" from the state supreme court's judgment because the court did not enjoin the city's policy or reject the city's constitutional defenses. The petitioners in *ASARCO*, by contrast, had challenged a state supreme court ruling that declared a statute "unconstitutional and invalid" and produced "a declaratory judgment adverse to petitioners" which immediately threatened the validity of their mineral leasehold interests. *See ASARCO*, 490 U.S. at 610, 618. Unlike the petitioners in *ASARCO*, the city has not been placed under a "defined

and specific legal obligation" by the state court's ruling. *Id.* at 618.

This Court cannot decide the question presented unless it resolves this difficult jurisdictional question—and the city has not even offered a theory for Article III standing under *ASARCO* or the taxpayer-standing doctrine. This is a major vehicle problem, and Pidgeon and Hicks will vigorously contest Article III standing if certiorari is granted.

III. THE CITY DOES NOT APPEAR TO CHALLENGE THE STATE SUPREME COURT'S JUDGMENT

Perhaps the most bizarre aspect of the city's petition is that it never explains how the state supreme court's *judgment* reversing the court of appeals' decision was in error. And it does not appear to us that any constitutional attack on the state supreme court's *judgment* can be made. Instead, the city complains about two passages that appear in the state supreme court's *opinion*. Pet. 6 (attacking the statements that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons," and "did not address and resolve" the "specific issue" of "whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples." (quoting Pet. App. 26a–27a)). But this Court has no authority to make line edits to a state court's opinion, and this Court lacks jurisdiction to correct errors that do not alter the *judgment* that the state court rendered. *See Herb,* 324 U.S. at 126 ("[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an

advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."); *see also* 28 U.S.C. § 1257 (authorizing this Court to review "[f]inal *judgments or decrees*" (emphasis added)).

The state supreme court's *judgment* includes three components: (1) a "reversal" of the court of appeals' judgment; (2) a "vacatur" of the trial court's temporary injunction; and (3) a "remand" to the trial court for further proceedings "consistent with our judgment and this opinion." Pet. App. 32a; *see also id.* at 2a. The decision to "reverse" the court of appeals' judgment rests on an independent and unassailable principle of judicial federalism: The state judiciary is not required to follow rulings of inferior federal courts as binding precedent. *See Arizonans for Official English*, 520 U.S. at 58 n.11; Pet. App. 18a–19a ("We agree with Pidgeon that *De Leon* does not bind the trial court . . . and the court of appeals should not have instructed the trial court to conduct further proceedings 'consistent with' *De Leon*."). The city's petition does not contest any of this, so it is impossible for the city to argue that the *judgment* to reverse the state court of appeals warrants reversal in this Court. No matter what this Court might have to say on the *Obergefell* question, the judgment "reversing" the court of appeals must remain.

The decision to "vacate" the trial court's temporary-injunction is equally unimpeachable. The temporary-injunction order was issued before *Obergefell*, and the state supreme court properly vacated that order in re-

sponse to the intervening rulings of this Court. The state supreme court did not commit federal constitutional error by failing to "reverse" the temporary injunction, because Pidgeon and Hicks had argued that even under the broadest possible interpretation of *Obergefell* they could *still* seek an injunction that forbids the city to extend spousal employment benefits to *anyone*.

Finally, the state supreme court's judgment "remands" for further proceedings "consistent with our judgment and this opinion." Nothing in these remand instructions violates the federal constitution. The state supreme court did not instruct the trial court to issue an injunction, and it did not in any way foreclose the trial court from accepting *any* of the city's constitutional defenses on remand.

The city appears to be suggesting that the state supreme court's judgment should have done more to handcuff the trial court on remand, although it never tells us exactly what the state supreme court's judgment should have said. But the state supreme court did not commit constitutional error by leaving it to the trial court to resolve the city's constitutional defenses, rather than deciding those issues for itself. It is common for appellate courts to give trial judges the first crack at resolving the contested legal issues in a case, and it certainly cannot be constitutional error for a state supreme court's judgment to forgo the opportunity to resolve a disputed issue in favor of allowing a trial court to decide the issues first. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view").

The city must explain how the state supreme court's *judgment*—not its *opinion*—warrants correction by this Court. Its petition makes no effort to do so.

IV. THE STATE SUPREME COURT'S OPINION IS CONSISTENT WITH EVEN THE BROADEST POSSIBLE INTERPRETATION OF *OBERGEFELL*

The city's petition should also be denied because the state supreme court's opinion is consistent with even the broadest possible interpretation of *Obergefell*. The state court never said that *Obergefell* might allow the city to withhold spousal employment benefits *only* from same-sex couples, or to discriminate against same-sex couples in any manner. The statements that the city criticizes mean only that *Obergefell* does not establish a *substantive* constitutional right to spousal employment benefits, and that *Obergefell* does not preclude a remedy that would require the city to withdraw spousal benefits from *both* same-sex and opposite-sex couples.

Let us begin with what *Obergefell* said:

First, *Obergefell* holds that the "right to marry" is a *substantive* constitutional right. By grounding its decision in the Due Process Clause, rather than relying solely on equal protection, *Obergefell* makes clear that a State may not deny same-sex couples the right to marry by abolishing the institution of marriage for everyone. *See Obergefell*, 135 S. Ct. at 2597.

Second, *Obergefell* makes clear that it is *not* establishing a substantive constitutional right to receive spousal benefits from a state employer. *See id.* at 2601

("States are in general free to vary the benefits they confer on all married couples."). Unlike the "right to marry," which the State may not withhold from anyone, the right to receive spousal employment benefits is *not* unconditional and depends entirely on whether a State chooses to extend these benefits to married couples.[3]

Third, *Obergefell* does not forbid a state employer to withhold or vary spousal benefits on grounds that do *not* involve the same-sex or opposite-sex nature of the marriage. After *Obergefell*, a State remains free to withhold spousal employment benefits from those who are eligible for Medicare, and a State remains free to charge tobacco users higher premiums for health insurance. Whether *Obergefell* might allow a State to distinguish between same-sex and opposite-sex married couples is an issue that the parties dispute, but we will assume for the sake of argument that the city's position is correct and that *Obergefell* forbids *any* form of state-sponsored differentiation between same-sex and opposite-sex married couples.

Everything in the state supreme court's opinion is consistent with the city's understanding of *Obergefell*. Consider its statement that *Obergefell* "did not address and resolve" the "specific issue" of "whether and the extent to which the Constitution requires states or cities to

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3. *Obergefell* leaves open the possibility that some marriage-related "benefits" *might* be constitutionally required as a matter of substantive due process. *Id.* (observing that states are "*in general* free to vary" these benefits (emphasis added)). But *Obergefell* does not purport to define or resolve what those constitutionally mandated benefits might be.

provide tax-funded benefits to same-sex couples." Pet. App. 26a–27a. This statement is entirely true; even after *Obergefell*, a state or city may withdraw spousal employment benefits from same-sex couples *if it also withdraws those benefits from opposite-sex couples*, and *Obergefell* declined to resolve which (if any) benefits of marriage qualify as *substantive* constitutional entitlements that *must* be extended to same-sex couples. *See* 135 S. Ct. at 2601.

The statement that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons" is equally accurate. Pet. App. 27a. *Obergefell* does not require that *every single married couple* be treated the same for purposes of publicly funded benefits. The city wants this Court to pretend as though the state supreme court said that *Obergefell* "did not hold that states must provide the same publicly funded benefits *to same-sex couples that it provides to opposite-sex couples*," but the state supreme court was careful to avoid phrasing its opinion this way. And nothing in *Obergefell* purports to foreclose *other* types of distinctions that States might draw in their employee-benefit policies.

The state supreme court's reluctance to announce that *Obergefell* had established an unequivocal equal-treatment mandate was understandable, given that Pidgeon and Hicks had argued that this interpretation of *Obergefell*—when combined with section 6.204(c)(2)—would compel the city of Houston to withdraw spousal benefits from *all* of its employees. The state supreme court's effort to avoid a pronouncement that would un-

dercut the legality of *all* spousal benefits for public employees should not be interpreted as defiance of *Obergefell*, especially when the court was careful to avoid *any* statement that endorses discriminatory treatment of same-sex couples or suggests that such discriminatory treatment might remain legal after *Obergefell*.

V. THE QUESTION PRESENTED IS NOT CERTWORTHY EVEN APART FROM THE JURISDICTIONAL OBSTACLES

The city does not cite a single court decision from *any* jurisdiction that allows a State to withhold publicly funded benefits specifically from same-sex couples after *Obergefell.* And as far as we are aware, no such decision exists. Every state and local jurisdiction—including every jurisdiction in Texas—is currently extending the same publicly funded benefits to same-sex married couples that it extends to opposite-sex couples. And even if one reads the state supreme court's opinion in the *worst* possible light, it says nothing more than that the issue of equal benefits for same-sex and opposite-sex couples was not specifically resolved in *Obergefell*.[4] The state trial court remains free to hold that the Fourteenth Amendment requires equal treatment in this regard, or that *Obergefell* should be extended to require equal benefits. None of this warrants the Court's intervention.

If a court *actually holds* that discriminatory treatment of same-sex couples remains permissible, then the

4. And, as we explained in Part IV, the state supreme court's opinion does not even say that.

question presented in the city's petition will become certworthy (although the city's petition itself would still encounter the insuperable jurisdictional obstacles described in Parts I–III). Until that happens, there is no basis for this Court to resolve a question that has yet to generate a division of authority.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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