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,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Texas**

## *AMICUS CURIAE* BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND TEXAS MUNICIPAL LEAGUE IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization with more than 2,500 members. The membership comprises local governmental entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the U.S. Supreme Court, the U.S. Courts of Appeals, and in state supreme and appellate courts.

The Texas Municipal League (TML) is a non-profit association of over 1,150 incorporated cities in Texas. TML provides legislative, legal, and educational services to its members.

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[1] No counsel for a party has authored any part of this brief, nor has any party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), on October 4, 2017, more than ten days prior to filing this *amicus curiae* brief, counsel for *Amici Curiae* provided notice to counsel of record for all parties of their intent to file this brief. Counsel of record for all parties granted consent to this filing.

Municipalities, as the level of government most closely connected to the communities they serve, bear a great burden when a targeted sector of their populace is denied the rights of a marriage *on equal terms* as a traditional marriage – rights that the U.S. Constitution guarantees. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Municipalities create and enforce local laws and policies, and therefore depend on uniform application of federal laws that inform their local enactments. As significant employers in their communities, municipalities must also be able to remain competitive in their efforts to attract a healthy, talented, and diverse workforce. IMLA and TML thus have a vested and significant interest in ensuring that this Court's decision in *Obergefell* is respected by state courts and applied uniformly. *Amici* also have a significant interest in preserving local autonomy and ensuring local governments can act as laboratories of democracy by providing whatever benefits they wish to their employees within the bounds of state and federal law.

## SUMMARY OF THE ARGUMENT

Texas has a Defense of Marriage Act ("DOMA") similar to those struck down in *Obergefell*. In this case, Respondents used Texas' DOMA to challenge a mayor's decision to expand the city's provision of health insurance benefits to spouses of employees in same-sex marriages just as it has been providing those spousal benefits to employees in opposite-sex marriages. Despite this Court's intervening opinion in *Obergefell*, the

Texas Supreme Court inexplicably concluded that the issue had "not yet been fully developed or litigated," stating that "the Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*."[2] *Pidgeon v. Turner*, 2017 WL 2829350, at *11 (Tex. June 30, 2017), n. 20.

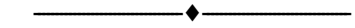
Some cases raise questions that are tangential to the core issue of whether those in same-sex marriages are entitled to the same constellation of benefits as those in opposite-sex marriages. But this one, like *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), does not.

*Obergefell* instructs that a same-sex marriage is on equal legal footing with a traditional marriage. There is no permissible basis for distinguishing the two; they are both legal marriages, on the same terms and conditions, entitled to equal dignity and respect under the law. Here, no constitutionally permissible limitation prohibits the City of Houston, or any other Texas municipality, from extending employment benefits to spouses of *all* legally married employees.

The Texas Supreme Court, instead of encouraging more litigation, should have recognized that the decision in *Obergefell* resolves the core question of whether Texas' DOMA can be used to prohibit a municipality from providing equal benefits to spouses of employees

[2] *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (affirming order enjoining Texas governmental officials from enforcing Texas' DOMA).

in same-sex marriages. That court's ruling leaves municipalities vulnerable to lawsuits from all sides and significantly hampers their ability to attract a healthy, talented, and diverse workforce.



## ARGUMENT

### I. This Court should grant the petition to avoid the piecemeal litigation over fundamental rights the Texas Supreme Court encouraged when it incorrectly declared the core issue unresolved.

The Texas Supreme Court concluded that "[t]he Supreme Court . . . in *Obergefell* . . . did not hold that states must provide the same publicly funded benefits to all married persons." *Pidgeon*, 2017 WL 2829350, at *10. Yet this Court did just that. Once a state or political subdivision decides to publicly fund benefits based on marital status, it has no legitimate basis to distinguish one "type" of legal marriage from another:

> while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities [including] workers' compensation benefits; health insurance. . . . 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.

*Obergefell*, 135 S. Ct. at 2601.

While states regulate certain aspects of the marriage relationship, such as by imposing age or consanguinity limits, they may not distinguish among legal marriages based on a constitutionally impermissible distinction such as the sex of the spouses. So once a state defines the bundle of benefits it affords to married couples, it cannot create hurdles that prevent one "type" of marriage from enjoying those benefits.[3] The Texas Supreme Court failed to recognize there is no possible interpretation or application of its DOMA that could prevent Petitioners from providing benefits to a subset of its legally married employees.

After declaring the key issue unresolved, the Texas court then invited "litigants throughout the country . . . [to] assist the courts in fully exploring *Obergefell*'s reach and ramifications. . . ." *Pidgeon*, 2017 WL 2829350, at *12. This impermissibly encourages the very case-by-case litigation this Court denounced in *Obergefell*. *Obergefell*, 135 S. Ct. at 2605, 2606. This Court should take the opportunity, as it did

[3] Of course, there is no such thing as a different "type" of marriage.

in *Pavan*, to assist reluctant courts in respecting *Obergefell's* reach.

The Texas court's ruling leaves municipalities with three untenable options: 1) they can choose to provide spousal benefits to all married employees and risk being sued by citizens such as Respondents; 2) they can, reluctantly, choose to provide spousal benefits to only those employees in opposite-sex marriages and risk being sued by gay and lesbian employees and civil rights groups as well as losing a significant part of their workforce; or 3) they can, also reluctantly, choose not to provide any spousal benefits and risk losing an even greater part of their workforce.

A state's attempt, such as through a DOMA, to limit the autonomy and authority of local municipalities to make decisions about the health and welfare of their citizenry should be met with skepticism, particularly when that limitation is driven by an animus the municipalities may not share. When such limitations are declared unconstitutional by this Court, states must recognize that their efforts have failed. Here, there is no constitutionally permissible basis for preventing the City of Houston, or any other Texas municipality, from extending employment benefits to spouses of *all* married employees.

## II. Municipalities need certainty and uniform application of the law.

### A. Texas cities have an interest in ensuring the health and welfare of their employees and their families.

Cities enjoy a large degree of autonomy when it comes to decisions about the health and welfare of their citizens and their employees. Long before states began recognizing marriage equality, many cities had enacted laws and regulations to protect against sexual orientation discrimination at the local level, and many mayors were calling for marriage equality. *See, e.g.*, Freedom to Marry, *U.S. Conference of Mayors Passes Resolution Calling for End to Marriage Discrimination*, http://www.freedomtomarry.org/blog/entry/u.s.-conference-of-mayors-passes-resolution-calling-for-end-to-marriage-dis (last visited Oct. 10, 2017).

Cities implementing these protections experienced significant positive benefits in their communities. For example, the city of San Francisco's Equal Benefits Ordinance increased the number of employees who were offered domestic partner benefits as well as the number of insurance companies that offered plans with such benefits. This, in turn, helped private companies recruit and retain talented employees, a boon to the local community. Mallory, C. & Sears, B., *Requiring Equal Benefits for Domestic Partners*, WHEN MANDATES WORK: RAISING LABOR STANDARDS AT THE LOCAL LEVEL 158-59 (Michael Reich et al., ed. 2014).

Municipalities attend to the daily needs of their populace, providing police and fire services, parks and recreation services, transportation, housing, and a host of other services. Some, including many cities in Texas, provide public health and emergency medical services. Local government employees number over one million in Texas,[4] and over 14 million nationwide.[5] In addition to having a keen interest in ensuring the health of their employees and their families, cities that provide health and medical services have an interest in reducing the costs of such services provided to the un- and under-insured. If a significant portion of a city's workforce is denied subsidized health insurance for spouses, this may place a greater strain on the city's publicly provided medical and other services.

### B. Texas cities must be able to attract and retain good employees.

Cities compete with other employers in both the public and private sector for quality employees, and benefits packages are an important factor for persons

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[4] According to the 2015 Census, there were over one million local government employees in Texas in 2015: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=GEP_2015_00A3&prodType=table (last visited Oct. 10, 2017).

[5] According to Governing Magazine, there were over 14 million local government employees in the U.S. in December 2015: http://www.governing.com/gov-data/public-workforce-salaries/monthly-government-employment-changes-totals.html (last visited Oct. 10, 2017).

making employment decisions.[6] Spousal coverage is often a significant portion of an employee's compensation.[7]

Denying spousal employment benefits to same-sex couples creates a hostile atmosphere of discrimination and unfairness. For municipalities, the work environment is particularly important as public entities cannot offer the kind of compensation packages available in the private sector. Fairness and equality in the workplace and quality of life benefits are critical for recruiting and retaining a talented, diverse, and motivated workforce.

Cities do not just compete with other in-state employers for quality employees. If Texas cities are prevented from offering attractive benefits for *all* married employees, they will lose talent to cities in other states that will no doubt abide by this Court's pronouncement of the law of the land.

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[6] The Kaiser Family Foundation reports that 99% of large employers that provide health benefits offer coverage to spouses. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, *Employer Health Benefits*, at 43 (2016), http://files.kff.org/attachment/Report-Employer-Health-Benefits-2016-Annual-Survey (last visited Oct. 10, 2017).

[7] *See, e.g.*, EMP. BENEFIT RESEARCH INST., *The Cost of Spousal Health Coverage*, NOTES (Jan. 2014), at 5, https://www.ebri.org/pdf/EBRI_Notes_01_Jan-14_SpslCvg-RetPlns.pdf (last visited Oct. 10, 2017).

### C. Lack of uniform application of federal law will impose significant burdens on Texas cities.

Under the leadership of mayors and governing bodies, municipalities create and enforce local laws and policies. They depend on uniform application of federal and state laws that impact these decisions. The uncertainty created by the Texas Supreme Court's ruling will impose increased administrative burdens on Texas municipalities. If they might be prohibited from providing employment benefits to spouses in same-sex marriages, they will have to revise forms and systems that are already in place to identify married employees to further identify what *type* of marriage each employee enjoys. Cities will be forced to re-visit the terms of their insurance coverage with the companies that supply that coverage. Human resources departments will have to understand, then attempt to explain, this uncertainty to a bewildered workforce.[8]

There is no doubt that Texas municipalities, as the City of Houston has already demonstrated, will continue to litigate their right to establish fair and non-discriminatory laws and policies for their communities and their employees. They will also face claims of discrimination if forced to distinguish between different types of married couples. Litigation expenses can be a

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[8] *See* Theodore B. Olson, *The Conservative Case for Gay Marriage: Why Same-Sex Marriage is an American Value*, Newsweek, http://www.newsweek.com/conservative-case-gay-marriage-70923, Jan. 8, 2010 (last visited Oct. 10, 2017) (lamenting the "crazy quilt of marriage regulation that makes no sense to anyone").

significant drain on scarce public resources. Uniform application of this Court's ruling in *Obergefell* will avoid such unnecessary litigation and its attendant costs.

This case merits this Court's review.



## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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