No. 17-424

In The
Supreme Court of the United States

SYLVESTER TURNER, MAYOR OF THE CITY OF HOUSTON, TEXAS, et al.,

Petitioners,

v.

JACK PIDGEON, et al.,

Respondents.

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

BRIEF FOR MARK PHARISS & VICTOR HOLMES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Did the Supreme Court of Texas correctly decide 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," regardless of whether their marriages are same-sex or opposite-sex?

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INTEREST OF *AMICI CURIAE*[1]

Mark Phariss and Victor Holmes have been together for more than 20 years. They were named plaintiffs in *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), whereby the Fifth Circuit vindicated their right to equal treatment under the law by applying *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015), to strike down the Texas statutes that discriminated against those who entered into—or sought to enter into—a same-sex marriage. After *Obergefell* and *De Leon* were decided, Mark and Vic were married.

Mark and Vic have a general interest in this case because they have a general interest in the nature and scope of the rights that were recognized in *Obergefell*. And they have a specific interest in this case because Vic—a retired Air Force Major—works for the University of North Texas Health Sciences Center, and Mark is currently covered by the healthcare plan that is provided to Vic as a public-employee benefit. The plaintiffs in this case argue that the right to marry does not include the right to be treated like other married couples—and, more specifically, that the right to marry does not include the right of equal access to the same public-employee benefits that are provided to

[1] The parties were notified ten days prior to the due date of this brief of the intention to file, and they have consented to the filing of this brief. No counsel for a party participated in the authoring of this brief, and no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

other married couples. Thus, Mark and Vic have a specific interest in this case because the plaintiffs seek to discriminate against Mark and Vic (and others) by denying them their equal right to a public-employee healthcare plan.

INTRODUCTION & SUMMARY OF ARGUMENT

The plaintiffs in this case—Jack Pidgeon and Larry Hicks—are Texas residents seeking license for state and local governments to discriminate against individuals based on sexual orientation. Specifically, they seek license for state and local governments to treat same-sex married couples worse than opposite-sex married couples by denying them equal access to public-employee benefits. To justify this discrimination, the plaintiffs contend that *Obergefell* recognized only the narrowest version of a right to marry, which does not include the right to be treated like other married couples.

Plaintiffs are wrong. The Court held explicitly in *Obergefell* that the Fourteenth Amendment guarantees same-sex couples the right to enter into and enjoy marriage "on the same terms and conditions as opposite-sex couples," with "equal dignity in the eyes of the law." *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2604–2605, 2608 (2015). And earlier this year, when faced with a similar attempt to deny same-sex married couples equal access "to the constellation of benefits

that the State has linked to marriage," the Court affirmed that "*Obergefell* proscribes such disparate treatment." *Pavan v. Smith*, ___ U.S. ___, 137 S. Ct. 2075, 2078 (2017) (per curiam) (cleaned up).[2] In short, through *Obergefell* and *Pavan*, the Court has invalidated any attempt by state or local governments to "treat[] same-sex couples differently from opposite-sex couples" in providing public benefits that are linked to marriage. *Ibid*.

Notwithstanding these clear holdings in *Obergefell* and *Pavan*, the Texas Supreme Court has followed the plaintiffs' promptings and proclaimed that *Obergefell* "did **not** hold that states must provide the same publicly funded benefits to all married persons." *Pidgeon v. Turner*, ___ S.W.3d ___, 60 Tex. Sup. Ct. J. 1502, 2017 WL 2829350, at *10 (2017) (emphasis added). In fact, because the consolidated cases in *Obergefell* involved the state laws of Michigan, Kentucky, Ohio, and Tennessee—but not Texas—the Texas Supreme Court proclaimed that *Obergefell* applied only to "the state DOMAs at issue" in those consolidated cases, and "did **not** hold that the Texas DOMAs are unconstitutional." See *id*. at *4–5, 7, 10 (emphasis added). The Texas Supreme Court acknowledged that the Fifth Circuit had applied *Obergefell* to rule that the Texas DOMAs were unconstitutional, in *De Leon v. Abbott*, 791 F.3d 619

[2] The parenthetical "cleaned up" indicates that internal quotation marks, alterations, or citations have been omitted from the quoted passage. Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018), available at https://ssrn.com/abstract=2935374; *e.g.*, *United States v. Reyes*, ___ F.3d ___, 2017 WL 3262281, at *4 (5th Cir. Aug. 1, 2017) (Reavley, J.).

(2015). But then the Texas Supreme Court held that, because *De Leon* is the decision of a lower federal court and not of this Court, *De Leon* is not binding on Texas courts. *Pidgeon*, 2017 WL 2829350, at *7 & n.16 ("We agree with Pidgeon that *De Leon* does not bind the trial court in this case."). Having thus concluded that no binding authority has yet determined that the Texas DOMAs are unconstitutional, the Texas Supreme Court held that the plaintiffs "are entitled" to continue their pursuit of a court-sanctioned license for state and local governments to discriminate against same-sex married couples like Mark and Vic. *Id*. at *12.

As demonstrated by the petitioners, the Texas Supreme Court's decision conflicts with the clear holdings of both *Obergefell* and *Pavan*. See Pet. 7–12. It also conflicts with the language and logic of *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675 (2013). For this reason alone, the Texas Supreme Court's decision should be summarily reversed. See *Pavan*, 137 S. Ct. at 2078–2079 (summarily reversing state supreme court's decision because it clearly conflicted with *Obergefell*).

But that isn't all. The Court also should summarily reverse the Texas Supreme Court's decision because—by relying on a procedural technicality and by distorting an important principle of federalism—the Texas Supreme Court's decision sets a dangerous precedent for states to avoid or disregard the constitutional authority of this Court and of the U.S. Court of Appeals.

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ARGUMENT

1. The Texas Supreme Court's decision should be summarily reversed because it conflicts with *Windsor*, *Obergefell*, and *Pavan*.

As demonstrated by the petitioners, the Texas Supreme Court's decision conflicts with the holdings of both *Obergefell* and *Pavan*. See Pet. 7–12. And it also conflicts with the language and logic of *Windsor*.

In *Windsor* the Court had not yet recognized the federal constitutional right of same-sex couples to marry. But the Court did recognize that, where same-sex couples did have the right to marry, the federal government could not treat those same-sex married couples worse than opposite-sex married couples when it provided federal rights or benefits linked to marriage. See 133 S. Ct. at 2694–2696 (holding federal DOMA unconstitutional because its "principal effect is to identify a subset of state-sanctioned marriages and make them unequal.").

Under the language and logic of *Windsor*, married is married, and all married couples must have equal access to the public benefits that have been linked to marriage. Under the language and logic of *Windsor*, if the federal DOMA is unconstitutional for denying same-sex married couples equal access to federal benefits that are linked to marriage, then state DOMAs must be likewise unconstitutional for denying same-sex married couples equal access to state benefits that are linked to marriage. Indeed, the language and logic of *Windsor* is, in part, what led to *Obergefell*.

In *Obergefell* the Court held explicitly that the Fourteenth Amendment guarantees same-sex couples the right to enter into and enjoy marriage "on the same terms and conditions as opposite-sex couples," with "equal dignity in the eyes of the law." 135 S. Ct. at 2604–2605, 2608. And the Court noted explicitly that this right to equal treatment includes the right of equal access to benefits such as healthcare. "[T]he States . . . have throughout our history made marriage the basis for an expanding list of government rights, benefits, and responsibilities," the Court said. *Id*. at 2601. "These aspects of marital status include: taxation; inheritance and property rights; . . . adoption rights; . . . birth and death certificates; . . . workers' compensation benefits; **health insurance**; and child custody, support, and visitation rules." *Ibid*. (emphasis added). These various rights, benefits, and responsibilities have been subsumed in "the fundamental character of the marriage right" because the states have attached these various rights, benefits, and responsibilities to marriage. *Ibid*. And in *Obergefell* the Court explicitly recognized that the harm in denying same-sex couples the right to marry included the harm of denying same-sex couples "the constellation of benefits that the States have linked to marriage." *Ibid*.

Thus, when the Court held in *Obergefell* that same-sex couples have the right to enter into and enjoy marriage "on the same terms and conditions as opposite-sex couples," *id*. at 2604–2605, the Court meant that same-sex married couples have the same right as opposite-sex married couples to all the rights

and benefits that have been linked to marriage. This is clear from any fair reading of *Obergefell*.

And earlier this year, when faced with an attempt by the Arkansas Supreme Court to deny same-sex married couples equal access to this "constellation of benefits that the State has linked to marriage," the Court stated plainly: "*Obergefell* proscribes such disparate treatment." *Pavan*, 137 S. Ct. at 2078. To quash any lingering confusion, the Court explained in *Pavan* that when the Court recognized the right of same-sex couples to enter into and enjoy marriage "on the same terms and conditions as opposite-sex couples," those "terms and conditions" referred directly to the various "rights, benefits, and responsibilities" that the Court had listed as being linked to marriage (including birth certificates and health insurance). *Ibid*. (citing *Obergefell*, 135 S. Ct. at 2601, 2605). In other words, in *Pavan* the Court said that *Obergefell* had already answered the question being raised—and the answer is that state and local governments cannot "treat[] same-sex couples differently from opposite-sex couples" when those governments provide rights or benefits that are linked to marriage. *Ibid*. (citing *Obergefell*, 135 S. Ct. at 2605).

Thus, after *Pavan* it could not be clearer that the Court has invalidated any attempt by state or local governments to treat same-sex married couples differently from opposite-sex married couples when they provide public benefits linked to marriage.

Nevertheless, even after *Pavan* was decided the Texas Supreme Court proclaimed that this question

remains unsettled. Though *Pavan* stated explicitly that *Obergefell* had already answered this question (see 137 S. Ct. at 2078), the Texas Supreme Court cited *Pavan* as an example of a case that raised a question "not address[ed] in *Obergefell*." *Pidgeon*, 2017 WL 2829350, at *12. And instead of accepting what *Obergefell* and *Pavan* said about the right of same-sex married couples to have equal access to public benefits that are linked to marriage, the Texas Supreme Court proclaimed that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons." *Id*. at *10.

Because the Texas Supreme Court's decision clearly conflicts with both *Obergefell* and *Pavan*, as well as with the language and logic of *Windsor*, the Court should grant this petition and summarily reverse the state court's decision, as it did in *Pavan*. See *Pavan*, 137 S. Ct. at 2076–2079 (summarily reversing Arkansas Supreme Court's decision because it clearly conflicted with *Obergefell*).

2. The Texas Supreme Court's decision should be summarily reversed because it sets a dangerous precedent for state courts to avoid or disregard this Court's constitutional rulings.

The Texas Supreme Court relied on a procedural technicality, then distorted an important principle of federalism, to avoid and disregard the constitutional authority of this Court.

First, the procedural technicality: because the consolidated cases in *Obergefell* involved the state laws of Michigan, Kentucky, Ohio, and Tennessee—but not Texas—the Texas Supreme Court proclaimed that *Obergefell* applied only to "the state DOMAs at issue" in those consolidated cases, and "did not hold that the Texas DOMAs are unconstitutional." See *Pidgeon*, 2017 WL 2829350, at *4–5, 7, 10. It is, of course, technically true that the Texas DOMA was not directly before the Court, among the cases consolidated under *Obergefell*. But the Texas DOMA is essentially identical to the other state DOMAs that were before the Court. Compare Tex. Fam. Code § 6.201(b)–(c) with, *e.g.*, Ohio R.C. § 3101.01(C). And, as the Fifth Circuit recognized, *Obergefell*'s holding obviously extended to and compelled the holding that the Texas DOMA was unconstitutional. See *De Leon*, 791 F.3d at 625. Indeed, the State of Texas itself agreed that, after *Obergefell*, the Texas DOMA was unconstitutional. *Ibid*. (noting that after *Obergefell* "both sides now agree" Texas DOMA was unconstitutional).

To avoid the Fifth Circuit's application of *Obergefell* to the Texas DOMA, the Texas Supreme Court distorted an important principle of federalism. Generally, in the balance of power between the states and the federal government, a state court's interpretation of federal law "is no less authoritative than that of the federal court of appeals," and the state court is not bound by a federal court of appeals' interpretation of federal law, where this Court has not yet addressed the issue. *Lockhart v. Fretwell*, 506 U.S. 364, 375–376

(1993) (Thomas, J., concurring) (citing *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring)). This is an important principle of federalism. However, a key component of this principle is the last clause: "where this Court has not yet addressed the issue."

Citing mostly Texas cases for this general principle of federalism, the Texas Supreme Court held that the Fifth Circuit's direct application of *Obergefell* to the Texas DOMA, in *De Leon*, was not binding on Texas courts. See *Pidgeon*, 2017 WL 2829350, at *7 & n.16 ("We agree with *Pidgeon* that *De Leon* does not bind the trial court in this case."). So, according to the Texas Supreme Court, because *Obergefell* did not directly involve the Texas DOMA—and because *De Leon*'s ruling on the Texas DOMA is not binding—it remains an open question in Texas whether local governments can discriminate against same-sex married couples when they provide public benefits that are linked to marriage. *Id*. at *7–12.

The Texas Supreme Court's avoidance of or disregard for *De Leon*'s authority—and, by extension, its avoidance of or disregard for this Court's authority—is based on its distortion of federalism. The Texas Supreme Court cited *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993), as its primary authority for the proposition that *De Leon* is not binding on Texas courts. See *Pidgeon*, 2017 WL 2829350, at *7. But *Penrod Drilling* was about the availability of punitive damages under the Jones Act and "general maritime law," and in that case the court held only that Texas

courts are not bound by the Fifth Circuit's interpretation of federal law, **where this Court has not yet addressed the issue**. See 868 S.W.2d at 296. Thus, *Penrod Drilling* does not support the Texas Supreme Court's holding that Texas courts are not bound by *De Leon*, because *De Leon* did not merely interpret federal law on an issue that this Court had not yet addressed. Here, the Court did address whether state DOMAs are unconstitutional, in *Obergefell*, and *De Leon* represents the Fifth Circuit's direct application of *Obergefell* to the Texas DOMA. *De Leon* is therefore the procedural vehicle by which this Court's constitutional authority was delivered to Texas.

Notably, the Texas Supreme Court also cites the concurring opinion by Justice Thomas in *Lockhart*, to bolster its reliance on federalism in avoiding or disregarding *De Leon*. See 2017 WL 2829350, at *7 n.16. But again, the Texas Supreme Court pushes things too far. The proposition put forward by Justice Thomas in *Lockhart* is not much different from the proposition put forward in *Penrod Drilling*. That is: state courts are not bound by the lower federal courts' interpretation of federal constitutional law, **where this Court has not yet addressed the issue**. See 506 U.S. at 376 (Thomas, J., concurring). Again, this proposition does not support the Texas Supreme Court's holding that Texas courts are not bound by a Fifth Circuit decision that directly applies this Court's prior constitutional ruling to Texas.

If left standing, the Texas Supreme Court's decision would set a dangerous precedent. According to the

Texas Supreme Court's decision, this Court's ruling that a state statute is unconstitutional (*e.g., Obergefell*) applies only to the state statute that was directly before the Court, and not to an identical statute in another state. And according to the Texas Supreme Court's decision, the federal court of appeals' application of this Court's ruling to an identical statute in another state (*e.g., De Leo*n) is not binding on the courts of that state. Thus, as the Texas Supreme Court would have it, a state can avoid or disregard the constitutional rulings of this Court until this Court rules directly on that state's statute. And that is precisely what the Texas Supreme Court is doing: avoiding or disregarding the constitutional rulings in *Windsor*, *Obergefell*, *Pavan*, and *De Leon*—and telling the lower Texas courts that they are free to come to their own conclusions about the constitutional rights of same-sex married couples, until this Court explicitly and directly says otherwise. See *Pidgeon*, 2017 WL 2829350, at *12.

In other words, the Texas Supreme Court's decision creates a world where, on some constitutional issues, this Court would be required to decide fifty separate cases (or more) to achieve uniformity in federal constitutional law. Until then, each state whose statute had not yet been ruled on directly by the Court would be free to disregard all of the Court's prior rulings and to go its own way. And in this world, the federal courts of appeals would be effectively useless, because the states could ignore them too. In this world, states like Texas can continue to discriminate against

couples like Mark and Vic, even in the face of decisions like *Obergefell* and *Pavan*.

This is not what federalism means. Texas courts must be bound by the constitutional rulings of this Court—whether they come directly from this Court or, by direct application, through the U.S. Court of Appeals. Because the Texas Supreme Court's decision sets a precedent that invites state courts to avoid or disregard this Court's constitutional authority, it should be summarily reversed.

CONCLUSION

For the reasons provided, the Court should grant the petition and summarily reverse the decision below.

Respectfully submitted,

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