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

BRIEF OF *AMICI CURIAE* LGBT BAR ASSOCIATION AND EQUALITY TEXAS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The LGBT Bar Association is a national association of lawyers, judges, legal professionals, law students, activists, and affiliated lesbian, gay, bisexual, and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its diversity. Its members have a strong interest in clarity in the rule of law they must follow and advise their clients on, and they have an overriding interest in preserving the rights guaranteed by our Constitution as interpreted and applied by this Court.

Equality Texas is the largest Texas statewide civil rights organization dedicated to protecting equal rights for lesbian, gay, bisexual, and transgender Texans through political action, education, community organizing, and collaboration. Equality Texas has over 35,000 members throughout Texas, including married LGBT Texans whose rights are directly implicated by this case. Equality Texas has a strong interest in preserving vital benefits of same-sex spouses of Texans employed by municipalities, school districts, and other local governmental entities.

The Texas Supreme Court's decision is a deliberate attempt to ignore the federal judiciary. It undermines the precedential effect of this Court's decisions and

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. *Amici* understand that Petitioners and Respondents both consented to the filing of *amicus* briefs.

the persuasive impact of those of the Circuit Courts of Appeals on issues of constitutional law. It also attempts to undermine an injunction issued by a federal district court and affirmed by the Fifth Circuit applying this Court's precedent, to which no further challenge was made in this or any other court. Worse, it reflects an effort to undermine this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and the Court's decision earlier this year in *Pavan v. Smith,* that require governments to treat same-sex married couples the same as other married couples in their allocation and administration of marriage benefits. 137 S. Ct. 2075 (2017).

SUMMARY OF THE ARGUMENT

Respondents sued to enforce the Texas Defense of Marriage laws ("DOMA") to bar Houston from funding spousal benefits for City employees in same-sex marriages. The trial court granted Respondents' request to enjoin the City from funding benefits equally for all married employees. The Texas Court of Appeals reversed based upon *Obergefell* and the Fifth Circuit's subsequent decision in *De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015), which acknowledged the unconstitutionality of the Texas DOMA laws under *Obergefell* and affirmed a Texas District Court's injunction against their enforcement. On June 30, 2017, the Texas Supreme Court held that the opinion in *Obergefell* was not binding on Texas courts, and that the actual judgment was not dispositive because it dealt only with the specific state laws under review in that case (*e.g.,* the nearly identical Ohio DOMA). Although the Texas Supreme Court reviewed *Pavan*, under its interpretation of the precedential effect of this Court's opinions, it found that *Pavan's* application of *Obergefell*

to same-sex marriage benefits is not binding on Texas courts, nor is the judgment, because *Pavan* dealt only with a specific Arkansas statute. The Texas Supreme Court also held that the Fifth Circuit's *De Leon* decision was not entitled to deference, but rather while the trial court should consider its case "in light" of *De Leon* it was also free to discard its holding that Texas DOMA laws were unconstitutional.

The Texas Supreme Court provided a roadmap for states to disregard this Court's opinions and limit its constitutional precedent to the specific actions or statutes resolved in its judgment. Only by ignoring this Court's opinions in *Obergefell* and *Pavan* and limiting them to the specific state laws in the judgments, was the Texas Supreme Court able to circumvent this Court's clear directive that states cannot deny same-sex couples "the constellation of benefits . . . linked to marriage." *Obergefell*, 135 S. Ct. at 2601.

In *De Leon*, the Texas DOMA laws were found unconstitutional by both the Federal District Court for the Western District of Texas and the Fifth Circuit, which enjoined the Texas executive branch from enforcing those laws. The Texas Supreme Court expressly ruled that a Texas trial court may consider a dispute over how a decision of this Court interpreting the Constitution in "light of" a federal court of appeals decision, but is not required to act "consistent with" it; that is, a Texas trial court can decide to ignore a federal court of appeals' decision on point. But this Court cannot police every dispute over its interpretation of the Constitution and must rely on the lower federal courts to do so. The Fifth Circuit's decision applying *Obergefell* to hold unconstitutional the very same Texas DOMA laws as are

in issue here is entitled to a high degree of deference, and by instructing Texas courts to the contrary the Texas Supreme Court has greatly impaired the effectiveness of the federal judiciary in implementing this Court's rulings. By undermining not only the precedential value of this Court's opinions, but also the application of them by the Courts of Appeals in later cases, the Texas Supreme Court has dealt a serious blow to this Court's administration of federal constitutional law.

This is an untenable situation that will mushroom throughout Texas and likely other states (for example, those that filed *amicus* briefs in favor of the defense of marriage act in *Obergefell*.) Moreover, under the reasoning of the Texas Supreme Court in *Pidgeon v. Turner*, 2017 WL 2829350 (Tex. June 30, 2017), landmark precedents of this Court such as *Brown v. Board of Education* could be limited to the specific statutes or acts addressed in the judgment and thereby wholly disregarded by state courts that disagree with them. This not only threatens chaos in the administration of federal law but jeopardizes the civil rights of all Americans, gay and straight. This Court should act now to prevent the State of Texas and potentially others from ignoring this Court's opinion in *Obergefell* and other pronouncements on matters of federal constitutional rights.

ARGUMENT

I. *Certiorari* Is Warranted Because the Texas Supreme Court's Decision Directly Conflicts With This Court's Precedent

This suit started before the Court's *Obergefell* decision and should have ended there. Pre-*Obergefell*, the

Respondents sued in Texas state court to enjoin the City of Houston from treating all lawfully-married employees the same. They wanted instead to ***require*** Houston to discriminate against employees in same-sex marriages, citing Texas's constitution and state statutes limiting marriage and marital benefits to unions between one man and one woman ("DOMA").[2] After Respondents obtained a temporary injunction against Houston's provision of same-sex marriage benefits and while the matter was on appeal to a Texas intermediate court of appeals, this Court decided *Obergefell*. Thereafter, a federal district court and the Fifth Circuit in *De Leon* held unconstitutional the Texas laws on which this case is based and enjoined the Texas executive branch from enforcing them.

With *Obergefell* and *De Leon* decided and a federal injunction prohibiting enforcement of the Texas DOMA laws, the state intermediate court of appeals reversed the trial court injunction issued in favor of Respondents and remanded the case for further proceedings "consistent with" *Obergefell* and *De Leon*. Respondents sought review from the Texas Supreme Court, arguing that *Obergefell* and *De Leon* did not control.

The Texas Supreme Court was of two minds on whether to grant review of the case. It first declined review, but then reversed course after receiving *amicus* briefs from the Texas Governor and Attorney General and members of the Texas Legislature, as well as a number of direct communications from Texas voters unhappy with the *Obergefell* decision.

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2. Tex. Const. art. I, § 32; Tex. Fam. Code § 6.204(b)-(c); City of Houston Charter art. II, § 22.

The Texas Supreme Court held it was error for the Texas Court of Appeals to instruct the trial court to consider the case on remand "consistent with" *De Leon*, and instructed that, while the trial court could consider the case "in light of" *De Leon*, it was free to disregard that decision and the federal court injunction prohibiting the state's enforcement of the Texas DOMA laws. *Pidgeon*, 2017 WL 2829350 at *7. The Court also gave *Obergefell* no power beyond its own facts, finding that the case "did not hold that states must provide the same publicly funded benefits to all married persons" and rejecting any notion that *Obergefell* applies to other states, state courts, or statutes. *Pidgeon*, 2017 WL 2829350 at *10.

The Texas Supreme Court appears to have justified its refusal to follow *Obergefell* and *Pavan* by finding that this Court's grant of *certiorari* in *Masterpiece Cakeshop*,[3] dealing with whether a private baker could refuse service to a gay couple, showed that *Obergefell* was not the "last word" on "all of the tangential issues" relating to gay marriage. *Pidgeon*, 2017 WL 2829350 at *12 n.21. But, whatever the reach of *Obergefell* in this Court's resolution of *Masterpiece Cakeshop*, this is not a case involving an issue "tangential" to those decided in *Obergefell*. Rather, this case turns on the exact issue decided in *Obergefell* – whether government must provide the same constellation of benefits to gay and straight married couples. In holding that *Obergefell*, *Pavan*, and *De Leon* do not control the resolution of this case, the Texas Supreme Court created a direct conflict with the federal courts that necessitates this Court's grant of certiorari under Supreme Court Rules

3. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. June 26, 2017).

10(b) and 10(c). The *Pidgeon* decision directly contradicts this Court's holdings in its opinions in *Obergefell* and *Pavan.* It also grants the trial court license to order the City of Houston to treat LGBT married Texans in a way that the Fifth Circuit has said the state constitutionally cannot.

A state law cannot be unconstitutional when applied by the state but suddenly regain constitutionality when applied by a municipality, yet that is exactly the absurd dichotomy the Texas Supreme Court has embraced. The result is that municipalities in Texas will have to choose between being sued for providing same-sex marriage benefits, being sued for failing to provide same-sex marriage benefits, or not providing benefits to any married couples. Whatever their choice, the rights of LGBT married Texans to have their marriages treated equally under the law, so clearly established in *Obergefell*, will go unfulfilled while years of litigation ensue.

"Controversial decisions, such as *Brown v. Board of Education* (school desegregation), *Roe v. Wade* (abortion) and, most recently, *Obergefell v. Hodges* (same-sex marriage), often are challenged for decades by opponents seeking their reversal or limitation."[4] Sadly, *Obergefell* seems to fall into that rare category of "controversial" cases where elements of state governments and society simply refuse to implement it.

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4. Boegel, *Will Lower Courts Restrict Same-Sex Marriage's Legal Influence?*, America, The Jesuit Review (July 27, 2017), *available at* https://www.americamagazine.org/politics-society/2017/07/27/will-lower-courts-restrict-same-sex-marriages-legal-influence.

For example, former Alabama Supreme Court Chief Justice, Roy Moore, instructed Alabama authorities that they need not follow *Obergefell*. While he was ultimately suspended for this attempt to disregard *Obergefell*, that process took nine months. *See* Campbell Robertson, *Roy Moore, Alabama Chief Justice, Suspended Over Gay Marriage Order*, N.Y. Times, Sept. 30, 2016.

Here, the Governor and Attorney General of Texas, in addition to the Lt. Governor and a number of other state legislators, urged limitations on *Obergefell*.[5] The legislators and their allies even made a thinly-veiled threat of retribution against any Texas Supreme Court Justice who was subject to challenge in the next Republican primary election: "Judicial candidates, especially those in a party primary, campaign on the issues. . . They give their opinions on the political concerns of the day and pledge allegiance to their party platform. As we will soon see on November 8th — elections have consequences." *Amicus* Brief of State Senators, State Representatives, and numerous Conservatives leaders throughout Texas, 2016 WL 7638349 at *22 (Oct. 14, 2016). (All members of the Texas Supreme Court are subject to this disguised threat as all of them are Republicans and will run in Republican primaries at some point if they seek re-election – it may not be a coincidence that the *Pidgeon* decision was unanimous).

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5. For example, their *amicus* brief states: "While the *judgment* in *Obergefell* is authoritative, Justice Kennedy's lengthy *opinion* explaining that judgment is not an addendum to the federal constitution and should not be treated by state courts as if every word of it is the preemptive law of the United States." *Amicus* Brief on Motion for Rehearing, *Pidgeon v. Texas*, by Governor Abbott, Lieutenant Governor Dan Patrick and Attorney General Ken Paxton, October 26, 2016 at 4.

The Texas Legislature has also turned a deaf ear to the rights pronounced in *Obergefell*. The 2017 Texas Legislature saw multiple bills introduced to implement *Obergefell*'s holding, and none progressed to a vote in either house. *See, e.g.,* H.B. 573, 85th Leg. (Tex. 2017) (Repealing the unconstitutional provision on "homosexual conduct" and other statutory references to it, plus post-*Obergefell* statutory modifications to reflect marriages of same-sex couples and their family relationships. Companion: S.B. 251, 85th Leg. (Tex. 2017)); *see also* S.B. 236, 85th Leg. (Tex. 2017) (Relating to the repeal of statutes regarding the criminality or unacceptability of homosexual conduct and to the recognition of certain same-sex relationship statuses). *Pidgeon* would have been moot if the unconstitutional Texas laws on which the plaintiffs based their claims had been repealed.

The continued attack on *Obergefell* by those in power in Texas and the Texas Supreme Court's direct contradiction of this Court's pronouncement of constitutional law is a wholly unacceptable limitation on Article III in favor of "states rights." The Texas Supreme Court's opinion is a roadmap back to darker days. The Texas executive branch is yelling "charge," despite the injunction barring it from adverse action against LGBT citizens, and the Texas Supreme Court has answered the call. Action by this Court is needed now.

Supreme Court Rule 10(c) states that *certiorari* lies when a state supreme court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Given the direct conflict between the Texas Supreme Court's decision and federal law as pronounced by this Court and the Fifth Circuit, as well as the resulting impact on the rights of LGBT married

Texans, this Court should grant *certiorari* to confirm, once again, that *Obergefell* is the law of the land, it applies in every state, and that state courts may not disregard its holding.

II. *Certiorari* Is Warranted Because the Texas Supreme Court Opinion Directly Conflicts with a Decision of the Fifth Circuit

Supreme Court Rule 10(b) expressly contemplates *certiorari* to resolve conflicts between federal Courts of Appeals and state supreme courts. That is precisely the situation presented here. The Fifth Circuit in *De Leon* expressly held the Texas DOMA laws unconstitutional under this Court's precedent and enjoined the Texas executive branch, which agreed that the federal court injunction was "***correct in light of Obergefell***," from enforcing those provisions. *De Leon*, 791 F.3d at 625 (emphasis added). Contrary to the Texas Supreme Court's ruling, importantly, orders of Texas's courts are not self-executing: execution falls to the state's executive branch. *See* Tex. Const. art. IV, § 10 (requiring that the "[Governor] shall cause the laws to be faithfully executed."); *see also Gulf Ref. Co. v. Dallas*, 10 S.W.2d 151, 158 (Tex. Civ. App. 1928).[6]

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6. This Court has previously addressed separation of powers issues as they relate to the federal government. As Chief Justice Taney wrote in *Ex Parte Merryman*, "[i]t is thus made [the President's] duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments." 17 F. Cas. 144, 149 (C.C.D. Md. 1861); *see also* 41 U.S. Op. Atty. Gen. 313 (1957) (The "President has the power, under the Constitution and laws of the United States . . . to

Thus, the Texas Supreme Court's holding that the lower court need not proceed "consistent with" *De Leon* directly conflicts with *De Leon* in that it purports to authorize the Texas executive branch to enforce court orders premised on laws that *De Leon* has said the executive cannot enforce.

Conflicts like this between the decisions of federal Courts of Appeals and state supreme courts present a serious threat to the orderly administration of justice that warrants this Court's intervention. As noted by the Ninth Circuit Court of Appeals, "[i]t is the federal courts that are the final arbiters of federal constitutional rights, not the state courts." *Hopkins v. Bonvicino*, 573 F.3d 752, 769 (9th Cir. 2009); *Bennett v. Mueller*, 322 F.3d 573, 582 (9th Cir. 2003) ("[S]tate courts will not be the final arbiters of important issues under the federal constitution.") (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).[7] As they must often be the "final arbiters of federal constitutional rights," federal Courts of Appeals' decisions applying this Court's opinions on federal constitutional rights are entitled to extreme deference and should be treated as highly persuasive by state courts.[8] This is especially true when the federal

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suppress domestic violence, obstruction and resistance to Federal law and ***Federal court orders***." (emphasis added)).

7. *But see U. S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.").

8. Many states have explicitly held that lower federal courts' opinions on federal law should be treated as highly persuasive, if not controlling. *E.g.*, *King v. Grand Casinos of Mississippi, Inc.*-

Courts of Appeals are implementing this Court's decisions as opposed to interpreting how this Court might rule in the future.

If state courts are free to ignore decisions by federal courts on federal questions implementing recent Supreme Court decisions, there would be "considerable friction between the state and federal courts as well as duplicative litigation." *Yniguez v. State of Ariz.*, 939 F.2d 727, 736–37 (9th Cir. 1991). Indeed, as the Supreme Court of Connecticut noted in 2005, "[d]eparture from [Circuit Court] precedent on issues of federal law . . . should be constrained in order to prevent the plaintiff's decision to file an action in federal District Court rather than a state court located 'a few blocks away' from having the 'bizarre' consequence of being outcome determinative." *Szewczyk v. Dep't of Soc. Servs.*, 881 A.2d 259, 266 n.11 (Conn. 2005); *Red Maple Properties v. Zoning Comm'n of Town of Brookfield*, 610 A.2d 1238, 1242 n.7 (Conn. 1992) (same).

Other courts have recognized this same tension. For example, as the Supreme Court of Pennsylvania noted in *Commonwealth v. Negri*, "[i]f the Pennsylvania courts

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Gulfport, 697 So. 2d 439, 440 (Miss. 1997) ("[T]here is a Fifth Circuit Court of Appeals decision on point, which this Court considers to be controlling with regard to the present issue of federal law."); *State v. Ford Motor Co.*, 38 S.E.2d 242, 247 (S.C. 1946) (Federal Court authorities "are controlling of the meaning and effect of the Federal Constitution."); *Kuchenmeister v. Los Angeles & S.L.R. Co.*, 172 P. 725, 727 (Utah 1918) ("If . . . there is a decision from a federal court which is decisive of the question here . . . it is our duty to follow the federal court rather than the state court, since the question involved is one upon which the federal courts have the ultimate right to speak.").

refuse to abide by the [Third Circuit's] conclusions, then the individual to whom we deny relief need only to 'walk across the street' to gain a different result." 419 Pa. 117, 122 (1965) (*overruled in part on other grounds by Com. v. Senk*, 423 Pa. 129, 223 A.2d 97 (1966)). The court correctly found that "[s]uch an unfortunate situation would cause disrespect for the law," "would [] result in adding to the already burdensome problems of the Commonwealth's trial courts," and the "[f]inality of judgments would become illusory, disposition of litigation prolonged for years, the business of the courts unnecessarily clogged, and justice intolerably delayed and frequently denied." *Id.*

The Texas Supreme Court's actions here create exactly the "unfortunate situation" the Pennsylvania Supreme Court warned against — it refused to apply *Obergefell* to bar application of Texas DOMA laws to deny the same publicly funded benefits to all married persons. The Texas Supreme Court could not have reached this result without holding the "trial court . . . is not required to proceed 'consistent with' [*De Leon*]." *Pidgeon*, 2017 WL 2829350 at *12. The Court's Rule 10(b) can and should be used to prevent this wrong, pointless, and wasteful result.

Further, as the City pointed out in its petition for *writ of certiorari*, "in the aftermath of the Texas court's decision, three City employees and their same-sex spouses are seeking to enjoin the City from discontinuing the payment of employment benefits to same-sex married couples that are provided to opposite-sex married couples." Petition for a *Writ of Certiorari*, *Mayor Sylvester Turner and City of Houston v. Jack Pidgeon and Larry Hicks*, 17-424 (U.S. Sept. 20, 2017) (citing *Freeman v. Turner*, No. 4:17-cv-02448 (S.D. Tex. filed Aug. 10, 2017)).

Unlike the Texas trial court's proceedings, the federal trial court proceedings will be governed by *Obergefell*, *Pavan*, and *De Leon*, which have collectively held that states must provide the same "constellation of benefits that the States have linked to marriage . . . on the same terms and conditions as opposite-sex couples,"[9] and that Texas's DOMAs are unconstitutional in light of *Obergefell*. *De Leon*, 791 F.3d at 625. This is the ***exact opposite*** of the relief sought by Respondents.

Divergence between the federal and state courts would result in the rights of LGBT citizens being put at risk, finality of judgments becoming illusory, disposition of litigation being prolonged for years, and justice being intolerably delayed and/or denied. *Negri*, 419 Pa. at 122, 213 A.2d at 672. This Court's action is needed to avoid the very piecemeal litigation that *Obergefell* intended to foreclose in noting that "[w]ere the Court to stay its hand to allow slower, case-by-case determination of the required availability of ***specific public benefits to same-sex couples***, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Obergefell*, 135 S. Ct. at 2606 (emphasis added).[10] Further,

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9. *Pavan*, 137 S. Ct. at 2076 (citing *Obergefell*, 135 S. Ct. at 2605)).

10. As noted by all of the dissenting opinions in *Obergefell*, the provision of specific tangible public benefits was at issue in that case. *See, e.g.*, *id.* at 2620 ("[Petitioners] seek public recognition of their relationships, along with corresponding government benefits.") Roberts, C.J., dissenting); *id.* at 2635-36 ("Petitioners claim that as a matter of 'liberty,' they are entitled to access privileges and benefits that exist solely because of the government," and "they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as

Pidgeon adopts limitations on the power of federal courts that will inevitably detrimentally dilute this Courts authority as the final arbiter of federal law.

CONCLUSION

The petition for *writ of certiorari* should be granted.

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October 20, 2017

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a result of a work-related injury, or loss of consortium damages in tort suits.") (Thomas, J., dissenting); *id.* at 2640 n.1 (using phrase "recognize marriage" as "shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.") (Alito, J., dissenting).