No. _____

In the
Supreme Court of the United States

TOMMIE RAE BROWN,
Petitioner,

v.

DEANNA BROWN-THOMAS, INDIVIDUALLY AND IN HER CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VENISHA BROWN, AND YAMMA BROWN,
Respondents.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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January 20, 2021

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QUESTIONS PRESENTED

On June 17, 2020, the South Carolina Supreme Court declared the 2001 marriage between petitioner Tommie Rae Brown and the late entertainer James Brown void *ab initio* for bigamy, articulating a new rule that a person in a void marriage must obtain a judicial declaration of its invalidity before he or she may seek remarriage. The South Carolina Supreme Court applied this new rule retroactively to petitioner's 2001 marriage to Brown, but not to petitioner's 1997 marriage to a Pakistani national in Texas, which a South Carolina court had declared void *ab initio* for bigamy in 2004.

The questions presented are:

I. Whether requiring the class of persons in marriages that are void *ab initio* to obtain a judicial decree of invalidity before remarrying violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and particularly violates the fundamental right to marry.

II. Whether allowing non-parties to attack the *in rem* order annulling petitioner's 1997 marriage violates long-settled precedent of the Court and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and particularly violates the fundamental right to marry.

III. Whether applying a decision affecting the fundamental right of marriage neither fully retroactively nor purely prospectively violates precedent of the Court, as to which the courts of appeals are in conflict.

STATEMENT OF RELATED PROCEEDINGS

In Re: The Estate of James Brown a/k/a James Joseph Brown

Tommie Rae Brown, respondent
v.
David Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, Michael Deon Brown, and Daryl Brown, defendants

Of whom Deanna Brown-Thomas, Yamma Brown, and Venisha Brown are petitioners

South Carolina Supreme Court case number 2018-001990

* * *

In Re: The Estate of James Brown a/k/a James Joseph Brown

Tommie Rae Brown, respondent
v.
David Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, Michael Deon Brown, and Daryl Brown, defendants

Of whom Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown are appellants

South Carolina Court of Appeals case number 2015-002417

* * *

In re the Estate of James Brown a/k/a James Joseph Brown

Aiken County, South Carolina, Court of Common Pleas case numbers 2013-CP-02-02849 and 2013-CP-02-02850

* * *

In re the Estate of James Brown a/k/a James Joseph Brown

Aiken County, South Carolina, Probate Court case number 2007-ES-02-0056

* * *

James Joe Brown, Jr., plaintiff
v.
Tommie Rae Hyne [sic] *Ahmed Brown, defendant*

Aiken County, South Carolina, Family Court case number 2004-DR-02-175

* * *

Tommie Rae Hynie a/k/a Tommie Rae Brown, plaintiff
v.
Javed Ahmed, defendant

Charleston County, South Carolina, Family Court case number 2003-DR-10-4609

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tommie Rae Brown respectfully petitions for a writ of certiorari to review the decision and opinion of the South Carolina Supreme Court in this case. The Court's intervention is urgently needed to relieve the impossible burden the South Carolina Supreme Court's decision places on persons in void marriages who seek to remarry, and on any person who has obtained an order of annulment or potentially a divorce, thereby denying federal constitutional rights.

The Court's intervention is also needed to resolve a circuit split on the prospectivity or retroactivity of judicial decisions, and this case is an ideal vehicle to do so.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 430 S.C. 474, 846 S.E.2d 342. (App. 1-31). The opinion of the South Carolina Court of Appeals is reported at 424 S.C. 589, 818 S.E.2d 770. (App. 32-48). The orders of the Aiken County Circuit Court are unreported. (App. 49-135). The order of the Aiken County Family Court is unreported. (App. 136-139). The order of the Charleston County Family Court is unreported. (App. 140-146).

JURISDICTION

The opinion of the South Carolina Supreme Court was issued on June 17, 2020, and rehearing denied by order dated August 24, 2020. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> No State shall…deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, not to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code § 20-1-80.

STATEMENT OF THE CASE

I. Background and Proceedings before the South Carolina Supreme Court's decision in *Wilson v. Dallas*.

1. Legendary entertainer James Brown died on December 25, 2006, leaving a generations-long musical legacy, a number of children, and, until June 17, 2020, a widow. James Brown's widow, Tommie Rae Brown (née Hynie) (Tommie Rae) is the petitioner in this matter. The respondents are James Brown's daughters: Deanna Brown-Thomas, both individually and in her

capacity as the Personal Representative of the estate of his daughter Venisha Brown, and Yamma Brown.

2. While Brown executed a will and trust instrument in 2000, neither provided for Tommie Rae, whom Brown subsequently married in 2001, nor his son James Brown II, who was born to Tommie Rae in 2001. On February 1, 2007, Tommie Rae filed in Brown's estate a petition for her elective share and omitted spouse's share of the estate under the applicable South Carolina probate statutes. On October 30, 2007, and again on November 26, 2007, Tommie Rae filed motions for summary judgment on the issue of her status as surviving spouse of James Brown.

3. On December 20, 2007, Tommie Rae also filed petitions to set aside James Brown's will and trust. On December 26, 2007, Respondents and other children[1] of James Brown likewise filed petitions to set aside the will and trust.

4. On August 10, 2008, Tommie Rae, Respondents, the South Carolina Attorney General (on behalf of the beneficiaries of the 2000 trust) and other children of James Brown reached a settlement agreement before the parties' petitions or Tommie Rae's motions were decided. The settlement agreement (restated March 3, 2009) provided, *inter alia*, that Tommie Rae was the surviving spouse of James Brown. The Aiken County Circuit Court approved this settlement by order dated May 26, 2009.

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[1] For the purposes of this petition, "children" will refer to both confirmed and putative children of James Brown.

5. The order approving the settlement also removed the personal representatives of James Brown's probate estate and the trustees of his trust. The removed personal representatives and trustees appealed to the South Carolina Court of Appeals, who transferred the appeal to the South Carolina Supreme Court. The South Carolina Supreme Court affirmed the removal of the personal representatives and the trustees, but invalidated the settlement agreement, finding the "settlement reached in this case was not a fair and just resolution of a good faith controversy and that court approval is not appropriate [under the South Carolina Probate Code]." *Wilson v. Dallas*, 403 S.C. 411, 450, 743 S.E.2d 746, 767 (2013).

II. The Circuit Court's Consideration of Tommie Rae's Status as Surviving Spouse after *Wilson v. Dallas*.

1. Upon remand, the Aiken County Circuit Court appointed David C. Sojourner, Jr. as limited special trustee of James Brown's trust on October 1, 2013. The Aiken County Probate Court appointed Sojourner as limited special administrator of the estate on October 10, 2013. On April 28, 2014, Tommie Rae again moved for summary judgment on the issue of her marriage to James Brown. On May 29, 2014, Sojourner filed his own motion for summary judgment, alleging Tommie Rae's 2001 marriage to James Brown was void *ab initio* for bigamy. In order to decide these motions, the state trial court was forced to re-examine a dispute Tommie Rae and James Brown resolved and reduced to judgment over a decade earlier.

2. In 2003, a third party informed James Brown that in 1997 Tommie Rae married Javed Ahmed, a Pakistani national, in Texas and had not subsequently obtained a divorce. On December 15, 2003, Tommie Rae filed an action to declare the putative marriage to Ahmed void *ab initio* on the grounds of, *inter alia*, bigamy, alleging Ahmed had three or more wives to whom he was legally married under Pakistani law when Tommie Rae and Ahmed participated in a putative marriage ceremony in 1997. (App. 78, 80-81). Tommie Rae pursued this action at James Brown's request, and with his support. (Nov. 15, 2007 Aff. of Tommie Rae ¶¶ 4, 6, 9, 10). James Brown paid Tommie Rae's attorney's fees to bring this action, and he was kept apprised of these proceedings through his attorney. (App. 78, 81, 133). The couple quarreled regarding a different issue and temporarily separated, and on January 29, 2004, James Brown filed an action to declare his 2001 marriage to Tommie Rae void *ab initio* on the ground of bigamy. (App. 35, 81-82).

3. Tommie Rae's annulment action was tried before the Charleston County Family Court on April 15, 2004. (App. 80-81). Ahmed, served via publication, did not appear. Tommie Rae testified Ahmed would not allow her to enter his home. (*Brown v. Ahmed* trial trans. p. 8 ll. 17-20). Tommie Rae further testified Ahmed admitted to her after their putative marriage ceremony that he already had three wives in Pakistan and that he married her only to remain in the United States. (App. 34, 78, 80-81). Tommie Rae's testimony was the only evidence presented to the Family Court. The Family Court issued an order declaring Tommie Rae's purported 1997 marriage void *ab initio* on the grounds

of Ahmed's bigamy, lack of consummation, and fraud. (App. 140-146). This order was never appealed.

4. On May 5, 2004, (while the couple was still temporarily separated) James Brown amended his complaint for annulment, requesting the trial court issue a judgment that the "Findings of Facts [sic] of the Charleston Family Courts [sic] are binding on [the Aiken County Family Court]…" and "[p]ursuant to the Order of the Charleston Family Court, Defendant is collaterally and judicially estopped from denying the allegations in [Mr. Brown's annulment action]." (App. 81-82). Tommie Rae answered Brown's amended complaint, asserting a counterclaim for divorce. (App. 82). Tommy Rae and James Brown reconciled, and on August 14, 2004, the Aiken County Family Court dismissed James Brown's annulment action without prejudice via a consent order. (App. 136-139). According to the consent order, signed by the attorneys for Tommie Rae and James Brown: "The parties have resolved their differences and are currently residing together." (App. 137). They resided together as husband and wife until James Brown's death on December 25, 2006. (App. 35).

5. On January 13, 2015, the Aiken County Circuit Court issued an order granting Tommie Rae's motion for summary judgment confirming her status as surviving spouse of James Brown and denying Sojourner's. (App. 72-135). This decision was based upon a joint stipulation of facts filed by the parties to this action, David C. Sojourner, and children Daryl Brown, Larry Brown, and Terry Brown. (App. 51, 73). The Aiken County Circuit Court held the April 15,

2004, annulment order was binding, Tommie Rae's purported 1997 marriage to Ahmed was void *ab initio*, and Tommie Rae's 2001 marriage to James Brown was valid due to a lack of impediment. (App. 134). The Aiken County Circuit Court denied subsequent motions to reconsider by order dated October 20, 2015. (App. 49-71).

III. Proceedings on Appeal.

1. On November 20, 2015, respondents Deanna Brown-Thomas, Yamma Brown, and Venisha Brown appealed the trial court's January 13, 2015 and October 20, 2015 orders to the South Carolina Court of Appeals. Terry Brown, Michael Deon Brown, and Daryl Brown also appealed on November 24, 2015. No other children of James Brown appealed the Aiken County Circuit Court's decisions. Court-appointed fiduciary David C. Sojourner also filed a notice of appeal, but he settled with Tommie Rae, abandoning the estate's challenge to her status as surviving spouse and supporting her claim, and the South Carolina Court of Appeals dismissed him from the appeal on September 19, 2017.

2. By opinion dated July 25, 2018, the South Carolina Court of Appeals affirmed the trial court's finding that Tommie Rae's purported 1997 marriage was void *ab initio* and thus she was James Brown's surviving spouse because she had no impediment to their marriage. (App. 32-48). The South Carolina Court of Appeals also found the trial court did not have subject matter jurisdiction to review the 2004 annulment order, and, under the doctrine of collateral estoppel, the appellants had no standing to challenge that order. (App. 45-47).

3. James Brown's children Deanna Brown-Thomas, Yamma Brown, and Venisha Brown petitioned the South Carolina Supreme Court for a writ of certiorari, which it issued on February 1, 2019. Terry Brown, Michael Deon Brown, and Daryl Brown attempted to join the petition of Brown-Thomas, *et al.*, but on January 23, 2020, the South Carolina Supreme Court removed them as parties for failure to file a petition for certiorari or a merits brief. On June 25, 2020, the South Carolina Supreme Court issued its opinion reversing the South Carolina Court of Appeals. (App. 1-31). The majority opinion held first the April 15, 2004 annulment order was an *in rem* judgment binding on the world, but also held Brown-Thomas, *et al.* could contest the order's underlying factual findings, applying a new, incorrect interpretation of *Tilt v. Kelsey*, 207 U.S. 43, 52-53 (1907) and *Gratiot Cty. State Bank v. Johnson*, 249 U.S. 246, 248-49 (1919). (App. 14). Applying this new rule to the April 15, 2004 annulment order, the majority found "the factual findings underlying the annulment order [*i.e.*, bigamy] are not conclusive," and reversed the grant of summary judgment. (App. 18-19, 24).

4. Second, the South Carolina Supreme Court created another new rule requiring a person in a void marriage to obtain a judicial declaration of its invalidity before he or she may seek remarriage. (App. 26-27, 29). The court then applied this new rule to Tommie Rae's 2001 marriage to James Brown, declaring it void *ab initio* for Tommie Rae's failure to obtain a judicial declaration of invalidity prior to marriage. (App. 29-30). As a result, Tommie Rae was deprived of her status as the "surviving spouse" of

James Brown. The South Carolina Supreme Court remanded the action for further proceedings.[2] (App. 31). The court did not apply this new rule to Tommie Rae's purported 1997 marriage to Ahmed.

5. Tommie Rae timely sought rehearing, asserting in her petition, *inter alia*, that the South Carolina Supreme Court's attack on the 2004 annulment order and its new rule requiring a judicial decree of invalidity unconstitutionally impaired Tommie Rae's fundamental right to marry, depriving her of Due Process and Equal Protection of the law. (App. 150-159). Tommie Rae also argued this new rule should apply prospectively, and not retrospectively to the marriages at issue in this case, but if the new rule were applied retroactively, it should apply consistently to both marriages at issue, rather than just one. (App. 159-160, 166-167). The South Carolina Supreme Court denied Tommie Rae's petition for rehearing by order dated August 24, 2020. (App. 147-148).

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[2] The finding Tommie Rae was not James Brown's spouse is dispositive of Tommie Rae's petition for elective share or omitted spouse share, rendering the South Carolina Supreme Court's ruling a "final judgment" reviewable by the Court. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

REASONS FOR GRANTING THE WRIT

On December 25, 2006, James Brown died knowing he was married to Tommie Rae Brown: after dismissing by consent his 2004 annulment action, he never sought an annulment or a divorce. Yet more than 13 years after his death, the South Carolina Supreme Court created a new rule that invalidated his marriage, deprived Tommie Rae of her status as his widow, and subjected his son James II, who passed two DNA tests, to questions about his legitimacy.

Without the Court's intervention, this injustice will repeat itself for countless people who previously obtained a divorce or annulment of a prior marriage. By allowing non-parties to attack an *in rem* status order, a person who obtained an annulment or divorce can never be sure that a subsequent marriage will be upheld without bringing an action against his or her intended spouse to confirm the prior divorce or annulment.

Moreover, only those with the resources to prevail in the marital equivalent of a quiet title action can enter into a valid marriage. For those lacking those resources, the South Carolina Supreme Court has denied them "the constellation of benefits that the States have linked to marriage." *Obergefell v. Hodges*, 576 U.S. 644, 646-47 (2015). Even those with the resources to pursue a "marital quiet title" action would be denied a fundamental right unless they pursued the action.

Even if the South Carolina Supreme Court's decision does not violate Due Process and Equal Protection, it must be applied purely prospectively (*i.e.*, to persons contracting marriage after June 17, 2020). The courts of appeals are split almost evenly on what circumstances, if any, require purely prospective judicial decrees. The Court's intervention is necessary to provide clarity on this important issue of federal law.

I. The South Carolina Supreme Court's Decision Violates the United States Constitution's guarantees of Due Process and Equal Protection.

"A conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, SUPREME COURT PRACTICE § 4.25, p. 4-72 (11th ed. 2019) (citing, *inter alia*, *Kentucky v. King*, 563 U.S. 452 (2011)). The right to marry is a fundamental right, protected by the due process guarantees of the Fifth Amendment, applicable to the states via the Fourteenth Amendment. *See Obergefell, supra.* As set forth herein, the South Carolina Supreme Court's decision, which creates an impossible burden on a class of persons seeking to marry, does not survive the strict scrutiny to which protection of that fundamental right is entitled.[3]

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[3] Some of Tommie Rae's arguments were made and considered in the briefing before the South Carolina Supreme Court (*e.g.*, attack of *in rem* judgments, prospective application of the decision, and disparate treatment of the two marriages). (App. 171-178). Other arguments appeared for the first time in Tommie Rae's petition for

A. Requiring a class of persons to obtain a judicial decree in order to marry violates Due Process and Equal Protection.

1. The South Carolina Supreme Court's new rule prohibits marriage by persons who had been in a void marriage (*e.g.*, a bigamous marriage), unless these persons first obtain a judicial declaration of invalidity from a competent court. (App. 26-29). Under this new rule, marriages that fail to obtain this declaration beforehand are void. (App. 29). Such a new rule is completely antithetical to the historical, universal treatment of a bigamous marriage as void *ab initio* – *i.e.*, it was never a marriage. The court's imposition of this new rule, which it selectively applied retroactively to the marriage of Tommie Rae and James Brown, deprived them of their vested constitutional right to marry. That rule applied to others similarly situated will similarly deprive them of their vested constitutional right to marry.

2. The Court invalidated a strikingly similar prohibition in *Zablocki v. Redhail*, 434 U.S. 374 (1978). The statute at issue in *Zablocki* prohibited Wisconsin residents delinquent in their child support obligations from entering into marriage without a court order. *Id.* at 376. Marriages in violation of this statute were void, and violators were subject to criminal penalties. *Id.*

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rehearing (App. 150-168), but the Court may appropriately consider the rehearing arguments, as the violations of federal law at issue in this case manifested in the South Carolina Supreme Court's opinion. *See e.g. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 712 n.4 (2010).

The *Zablocki* court found the statute at issue violated the Equal Protection rights of persons who lacked the means or proof to obtain a court order permitting marriage. *Id.* at 387. It also found it violated the Equal Protection rights of persons who would be so burdened by the statute's requirements that they would forgo marriage altogether. *Id.*

3. The *Zablocki* court also found the statute at issue violated Substantive Due Process by unnecessarily impinging on the fundamental right to marry. *Id.* at 388. Any government infringement of a fundamental right must be narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). The *Zablocki* court found Wisconsin's interests in compelling marriage counseling and compelling payment of child support were insufficient to justify its imposition on the right to marry.

4. The state interests in this case are equally insufficient. According to the South Carolina Supreme Court, its new rule exists to promote "[t]his state's abiding interest in the accuracy of its records regarding a party's marital status…" (App. 28). South Carolina can maintain accurate marriage records without prohibiting marriage to a significant percentage of its residents. For example, South Carolina already provides for criminal penalties for false statements in a marriage license application. *E.g.*, S.C. Code § 16-9-30 (false swearing). Further, the South Carolina Supreme Court's new rule does nothing to improve the accuracy of South Carolina's Bureau of Vital Statistics marriage records, as this agency does not, and cannot, keep complete records of marriages, divorces,

annulments, &c. from other states. It is not possible for South Carolina to maintain records that determine the marriage status of every individual because any person could get married, or obtain a divorce or annulment in another state or country, and those records would not be part of South Carolina's record system.

5. The South Carolina Supreme Court's new rule has a nearly identical effect to the statute in *Zablocki*, prohibiting marriage for a class of persons who are parties to a void marriage, but lack the means to obtain a court order. The class of persons who have the means to petition a court, but cannot marshal proof of invalidity (*e.g.*, missing witnesses, destruction of records, &c.) are likewise barred. Persons unable to satisfy this rule's requirements will be, in effect, coerced into forgoing their right to marry. Though the South Carolina Supreme Court's new rule does not explicitly provide for criminal liability, it does not foreclose the potential for a bigamy prosecution after the rule voids a marriage.

6. The policies underlying *Zablocki* are as sound today as they were in 1971. The *Obergefell* court cited *Zablocki* extensively in its finding that the right to marry was fundamental to all persons. *E.g.*, *Obergefell*, 576 U.S. at 637 ("It was the essential nature of the marriage right…that made apparent the [law in *Zablocki*'s] incompatibility with requirements of equality."). For example, state regulation of the fundamental right to marry "must stop short of telling people that they may not marry because they are too poor." *Zablocki*, 434 U.S. at 395; s*ee also Id.* at 404 (Stevens, J., concurring) (noting that a rule that "the

rich may marry and the poor may not" would be "inconsistent with our tradition of administering justice equally to the rich and to the poor"); *cf. Boddie v. Connecticut,* 401 U.S. 371 (1971) (holding that Connecticut statutes governing payment of fees and costs in divorce cases violated the Due Process clause, where their effect was to prevent poor persons from obtaining divorces at all).

B. The South Carolina Supreme Court's decision arbitrarily deprives Tommie Rae of her fundamental right to marry.

1. A rule against bigamy is not a "reasonable regulation" of the fundamental right to marry if the state's procedures for determining the existence of a bigamous marriage are applied arbitrarily. When a spouse follows a settled legal process for determining whether a valid prior marriage exists, the state must accept the results; it cannot disregard the results arbitrarily. To establish a reasonable process, but then to disregard that process arbitrarily, is not materially different from having an unreasonable and arbitrary process to begin with or no process at all.

2. Tommie Rae utilized a settled legal process expressly permitted by South Carolina law: she filed an action to annul her putative marriage to Ahmed to confirm that the putative marriage was never valid and thus not an impediment to her marriage to James Brown. That action resulted in a final (unappealed) judgment determining that Tommie Rae did not have a valid marriage to Ahmed at the time that she married James Brown. Mr. Brown paid the legal fees

for this action, so he was aware of the proceedings and approved of them.

3. However, 16 years later, the South Carolina Supreme Court arbitrarily changed the law. It determined Tommie Rae effectively had a valid marriage to Ahmed at the time she married James Brown because the South Carolina Supreme Court created a new rule that the bigamous Texas marriage was effectively valid until the annulment order. By arbitrarily changing South Carolina's prior law that Tommie Rae's marriage to Ahmed was void for Ahmed's bigamy, the South Carolina Supreme Court arbitrarily denied Tommie Rae her fundamental right to marry. Not only did the court deprive Tommie Rae and James Brown of their vested constitutional right to marry, it effectively prevents Tommie Rae, and others who have obtained an annulment or divorce, from being certain about the validity of any future marriage. See the discussion at I.C. below.

4. States cannot infringe upon the right to remarry unless the restrictions are "reasonable regulations." *Zablocki*, 434 U.S. at 386-87. A rule that arbitrarily changes the result of a final judgment of annulment and effectively requires previously married persons to sue their spouses before marrying them, is not a reasonable regulation. The South Carolina Supreme Court's new rule is an unreasonable restraint upon the fundamental right of marriage.

C. Allowing third parties to attack an *in rem* judgment adjudicating vested federal rights violates long-settled precedent and Due Process.

1. In addition to violating Tommie Rae's constitutional right to marry, the South Carolina Supreme Court's decision also deprives Tommie Rae of vested rights to which she was entitled under the final judgment annulling her marriage to Ahmed. Federal law prevents state action, legislative or judicial, from taking away private rights that have vested under final judgments. *See e.g. McCullough v. Commonwealth of Virginia*, 172 U.S. 102, 123-24 (1898); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 679-80 (1930).

2. The status of the marriage between Tommie Rae and Ahmed, in the language of the *McCullough* Court, has "passed into judgment." 172 U.S. at 123-24. Once private rights have passed into judgment, they cannot therefore be taken away by state action. A state legislature cannot take away those rights by statute, and a state judiciary cannot take away those rights by court decision.

3. The facts of *Brinkerhoff-Faris* are analogous to the facts presented here. *Brinkerhoff-Faris* was an action in equity by a stockholder questioning the value given to the stock by a local tax assessor. The Missouri Supreme Court, overruling precedent, created a new rule requiring the petitioner to complain directly to the state tax commission. Six years previously, the Missouri Supreme Court had held that no such complaint could be brought. Indeed, it termed the

concept of a complaint to the tax commission "preposterous" and "unthinkable." 281 U.S. at 676. It had followed that ruling in later cases.

The Missouri Supreme Court's prior decisions in effect conferred upon the plaintiff a vested right to file an action in equity without first complaining to the tax commission. The Court held that while the Missouri Supreme Court was free to require prospectively that complaints about assessments be presented first to the tax commission, it was not free to impose such a rule retroactively in a manner that penalized parties who relied in good faith upon the Missouri Supreme Court's strong prior case law.

4. Although Tommie Rae believed her putative marriage to Ahmed was a nullity, she sought confirmation of this fact by filing, with James Brown's assistance and support, an action to annul her marriage to Ahmed. That action resulted in a final judgment finding that Tommie Rae's marriage to Ahmed was void *ab initio* for Ahmed's bigamy. That final judgment gave Tommie Rae a vested legal right in the invalidity of her marriage to Ahmed and therefore necessarily a legal right in the validity of her marriage to James Brown. By holding that Tommie Rae's marriage to James Brown was invalid, the South Carolina Supreme Court violated the Due Process Clause by taking away a right that had vested by law under a prior judgment.

5. The South Carolina Supreme Court also modified South Carolina law in a way similar to the Missouri Supreme Court's modification in *Brinkerhoff-Faris*.

The law of South Carolina has always been that a bigamous marriage was void *ab initio*:

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, no[r] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code § 20-1-80; *see also State v. Smith*, 101 S.C. 293, 85 S.E. 958, 960 (1915) ("A marriage is termed void when it is good for no legal purpose, and its invalidity may be maintained in any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally."); *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable"). The statute quoted above means just what it says: a bigamous marriage is void. Thus, according to the statute's first sentence, Tommie Rae's putative marriage to Ahmed was void because Ahmed was already married. Even if the first sentence of the statute quoted above were not controlling, Tommie Rae also prevails under its subsequent language: a second marriage is not void for bigamy if a first marriage "shall be declared void by the sentence of a competent court." *Id.* That is exactly

what happened in this case. The statute makes no reference to who was or was not a party to the annulment action. It makes no reference to whether the first marriage was declared void before or after the date of the second marriage. The statute states, simply and directly, that a bigamous marriage is void and that a marriage is not void for bigamy if a prior marriage has been declared void.

6. The lesson of *Brinkerhoff-Faris* is that the federal vested rights doctrine applies with particular force when a state makes a substantial, sudden, and surprising change in state law. The South Carolina Supreme Court's decision in this case made exactly the sort of major, unexpected change in state law that the Missouri Supreme Court made in *Brinkerhoff-Faris*. Disregarding the applicable statute and all prior case law, the decision before the Court holds that a bigamous marriage is not invalid until a court rules that it is invalid and that a judgment on the validity of a disputed marriage is conclusive only upon the parties, not upon "all persons concerned."

7. Tommie Rae's case is even stronger than the petitioner of *Brinkerhoff-Faris*. The petitioner in *Brinkerhoff-Faris* was not directly a party to the prior Missouri Supreme Court cases rejecting the concept of filing a complaint directly with the tax commission; it was an entity incidentally harmed by the overruling of those cases. Here, by contrast, Tommie Rae was a party to, and a direct beneficiary of, the judgment annulling her marriage to Ahmed. If the Due Process Clause protects the rights of an incidental beneficiary of a prior judgment, it certainly protects the rights of a

direct party to a prior judgment. The South Carolina Supreme Court's decision in this case violates the Due Process Clause.

II. The Questions Presented are Important and Recurring.

1. The implications of the South Carolina Supreme Court's ruling are quite radical. It is increasingly common for Americans to enter into successive marriages: a 2015 census report found that 32.3 million Americans had been married twice and that another 8.6 million had been married three or more times. United States Census Bur., J. Lewis, A. Kreider, Remarriage in the United States 7 (ACS-30 March 2015). In order for a person to have an effective right to remarry, procedures must exist for obtaining an authoritative determination of the validity of a prior marriage. Before the South Carolina Supreme Court's new rule, a person proposing to enter into a subsequent marriage could safely assume that a judgment of annulment or divorce terminated the prior marriage so that the subsequent marriage could safety and properly be entered into – that is, a court order of an annulment or divorce would be binding on the world as an *in rem* judgment of status.

2. If this ruling is allowed to stand it will no longer be possible for any person subject to its ruling to rely upon a final judgment of annulment or divorce. Almost by definition, the person's subsequent spouse will not have been a party to the annulment or divorce that ended the person's previous marriage. Under the South Carolina Supreme Court's ruling, therefore, the subsequent spouse would have the right at will to

attack the judgment of annulment or divorce. Even if that judgment is nominally binding as to status, it will not be binding as to the facts underlying the status, which means that the judgment is truly not binding at all.

3. Permitting non-parties to attack the validity of an annulment or divorce order means that the party to the divorce or annulment order can never reliably enter into a subsequent marriage. Under the South Carolina Supreme Court's ruling, the only way for a person to safely enter into a subsequent marriage would be to sue his or her intended spouse for a declaratory judgment that the previous annulment or divorce is valid. Only then will a judgment of annulment or divorce bind a subsequent spouse who was not a party to the original annulment action. A rule requiring any person to sue a new spouse before safely marrying him or her is a substantial and unjustified infringement upon the right to marry, and an equally substantial burden on the courts which would entertain these actions, invoking *Zablocki*.

4. The South Carolina Supreme Court's ruling also has the unintended and surprising (if not shocking) consequence of facilitating two ancient *mala in se*: bigamy and polygamy. Under this ruling, a bigamous marriage is not void until a court declares it so, making such marriages effectively voidable, rather than void, as they have always been. Accordingly, a person who is already married and who then marries another is in two valid marriages until the innocent person in the subsequent (bigamous) marriage obtains an annulment, which only then triggers the bigamy

statute to void the subsequent (bigamous) marriage. No other state offers such an opportunity for plural marriage.

5. Under the South Carolina Supreme Court's ruling, final judgments of annulment are open to collateral attack by anyone who was not a party to the original action. If any nonparty successfully attacks the annulment, a person who remarried in reliance upon the annulment would then be guilty of unintentional bigamy, and could be subject to criminal prosecution at any time (the crime of bigamy has no statute of limitations in South Carolina).

III. There is a Circuit Split over the Prospective or Retroactive Application of Judicial Decrees.

1. As the Court recently noted, "certiorari jurisdiction exists to clarify the law." *City & Cty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1774 (2015). The courts of appeals conflict on what circumstances justify pure prospectivity of judicial decisions, and *Obergefell* provides no guidance on whether decisions affecting the fundamental right to marry should be applied purely prospectively. The disparity of the standard for pure prospectivity within the courts of appeals described *infra* is profoundly unfair to litigants seeking uniformity on whether they can avoid the harshness of a judicial decree applied retroactively. Such unfairness renders this circuit split "intolerable" and necessitates the Court's intervention. *See* Judicial Conference of the United States, Report of the Federal Courts Study Committee 125 (April 2, 1990) (examples of so-called "intolerable" conflicts).

2. In the past century, the Court's decisions have been inconsistent on the issue of prospectivity or retroactivity of judicial decrees. *See generally* Stephen J. Hammer, *Retroactivity and Restraint: An Anglo-American Comparison*, 41 Harv. J.L. & Pub. Pol'y 409 (2018). For decades, *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), set the standard for when a decision should have prospective effect. Under *Chevron Oil*, nonretroactivity of judicial decisions is appropriate where (1) the decision "establish[es] a new principle of law"; (2) "retrospective operation will further or retard [the rule's] operation" in light of its history, purpose, and effect; and (3) the decision "could produce substantial inequitable results if applied retroactively." *Id.* (internal quotation marks omitted).

3. The Court's subsequent decisions on pure prospectivity leave questions as to the continued viability of *Chevron Oil*. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). The Court has nonetheless signaled that utilization of *Chevron Oil* is appropriate under circumstances of "grave disruption or inequity". *Ryder v. United States*, 515 U.S. 177, 185 (1995); *see also Harper*, 509 U.S. at 110 (Kennedy, J. and White, J., concurring in part and concurring in the judgment) ("I remain of the view that it is sometimes appropriate in the civil context to give only prospective application to a judicial decision."); *Reynoldsville Casket*, 514 U.S. at 761 (Kennedy, J. and O'Connor, J., concurring in the judgment) (Court may "shape relief" in "exceptional cases".). However, the late justices Scalia, Marshall, and Blackmun all believed that prospectivity of judicial decisions is beyond the powers

granted by Article III of the Constitution. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547-48 (1991) (Blackmun, Marshall, Scalia, JJ., concurring in the judgment); *Id.* at 548-49 (Scalia, Marshall, Blackmun, JJ., concurring in the judgment).

4. *Chevron Oil* has never been squarely overruled, and, as a result, disputes over the application of pure prospectivity roil the courts of appeals.[4]

A. Five circuits continue to use the test of *Chevron Oil*.

1. The first circuit, reversing a prior decision that required the use of a Fed. R. Civ. P. 60(a) motion to address prejudgment interest, applied its new decision purely prospectively under *Chevron Oil*. *Crowe v. Bolduc*, 365 F.3d 86, 93 (CA1 2004).

2. The second circuit, applying the Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), applied it purely prospectively under *Chevron Oil*. *Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 92 (CA2 1998).

3. The eighth circuit, reversing a state products liability verdict, found, in dicta, judicial decisions may

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[4] This dispute is not limited to the courts of appeals: "Almost every state that has considered the question has declined to follow the Supreme Court's reasoning in *Harper* and retained *Chevron Oil* or a variation thereof." RETROACTIVITY AND RESTRAINT at 430; *but see Bass v. South Carolina*, 509 U.S. 916 (1993), *vacating* 302 S.C. 250, 395 S.E.2d 171 (1990) (summary vacatur, citing *Harper*, of a South Carolina Supreme Court decision applying the Court's prior decision in the case purely prospectively).

have prospective effect if the *Chevron Oil* factors were met. *Baker v. Gen. Motors Corp.*, 86 F.3d 811, n. 8 (CA8 1996), *reversed on other grounds*, 522 U.S. 222 (1998);

4. The ninth circuit, reversing a prior immigration law decision, recognized and analyzed the circuit split concerning the continued viability of *Chevron Oil*. *Nunez-Reyes v. Holder*, 646 F.3d 684, 690-95 (CA9 2011) (en banc). Though the ninth circuit appeared to recognize modifications to *Chevron Oil*, it ultimately held its rule would be considered purely prospectively under an unmodified version of the *Chevron Oil* test. *Id.* at 692. However, Judges Ikuta, O'Scannlain, and Callahan objected to the broad use of *Chevron Oil* in their partial dissent. *Id.* at 698-703.

5. The tenth circuit noted: "Since *Chevron*, the Court's standard has evolved in many ways, leaving in its wake a confusing path for courts to navigate." *In re Mersmann*, 505 F.3d 1033, 1052 (CA10 2007) *abrogated on other grounds by United Student Aid Funds, Inc. v. Espinoza*, 559 U.S. 260 (2010). However, it applied purely prospectively, under *Chevron Oil*, its interpretation of the preclusive effect of a confirmation finding of "undue hardship" in adversary proceedings under the Bankruptcy Code. *Id.* at 1051-1052.

B. Five circuits use standards set by *Harper* or its progeny.

1. The fifth circuit, reviewing a provision of the Class Action Fairness Act, noted, in dicta, *Chevron Oil* was "limit[ed]", but "not repudiat[ed]" by *Harper*. *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, n. 32 (CA5 2009).

2. The sixth circuit, applying retroactively a statute of limitations to civil rights actions established *Cooey v. Strickland*, 479 F.3d 412, 424 (CA6 2007), found, in dicta, pure prospectivity appropriate only in the four very limited circumstances identified in one of *Harper*'s progeny. *Broom v. Strickland*, 579 F.3d 553, 556 (CA6 2009) (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995)).

3. The seventh circuit, applying the Court's decision in *Janus v. American Federation of State, County & Municipal Employees*, 138 S.Ct. 2448 (2018), found new rules of federal law must be given "full retroactive effect" under *Harper*. *Janus v. American Federation of State, County & Municipal Employees*, 942 F.3d 352, 359-60 (CA7 2019). The seventh circuit also recognized, again citing *Harper*, that retroactivity did not always mean uniformity of remedy. *Id.* at 360. The seventh circuit also noted pure prospectivity could be appropriate in circumstances of "'grave disruption or inequity involved in awarding retrospective relief to the petitioner'". *Id.* (quoting *Ryder v. United States*, 515 U.S. 177, 184-85 (1995)).

4. The eleventh circuit, overturning, with retroactive effect, an interspousal wiretapping exception to federal civil wiretapping liability, applied the *Chevron Oil* factors. *Glazner v. Glazner*, 347 F.3d 1212, 1219-1220 (CA11 2003). However, the eleventh circuit applied these factors objectively, a modification derived from *Harper*. *Id.*

5. The D.C. circuit, reviewing the Federal Energy Regulatory Commission's decision to apply a D.C. circuit decision retroactively found pure prospectivity

possible only in the four very limited circumstances identified in one of *Harper*'s progeny. *Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 59 F.3d 1281, 1288 (CADC 1995) (quoting *Reynoldsville Casket*, 514 U.S. at 759).

C. Three circuits' positions are unclear.

1. The third circuit, affirming an immigration appeal on procedural grounds, noted, in dicta, its power to order purely prospective relief "unclear" in light of *Harper*. *Kolekevich v. Attorney General*, 501 F.3d 323, n. 9 (CA3 2007).

2. The fourth circuit, overturning a state regulation establishing different school facility rental rates for churches, held its decision should be applied retroactively, without taking a position on whether pure prospectivity was possible. *Fairfax Covenant Church v. Fairfax Cty. Sch. Bd.*, 17 F.3d 703, 710 (CA4 1994). However, it did note: "It might not be reading too much into *Harper* and *James B. Beam* if we were to conclude that *Chevron*, adopting the test for determining when cases may be enforced prospectively, has lost all vitality." *Id.*

3. The federal circuit, in a patent infringement appeal, refused to consider *Chevron Oil* (and thus prospectivity) on preservation grounds. *Fuji Photo Film Co., Ltd. v. Jazz Photo Corp.*, 394 F.3d 1368, 1376 (CA Fed. 2005).

D. The South Carolina Supreme Court was obligated to apply either pure prospectivity or full retroactivity to its decision affecting a federal right, but it applied a selective retroactivity.

1. Tommie Rae has consistently argued that if the South Carolina Supreme Court's new rule is to be given any effect, it should apply purely prospectively, thus sparing her from its gross inequity and depriving her of her vested constitutional right to marry. (App. 160, 166, 173). Applying the *Chevron Oil* test, pure prospectivity is appropriate: *First*, the South Carolina Supreme Court established a new principle of law by reversing the South Carolina Court of Appeals and all prior cases while disregarding legislative intent. *Second*, while the new rule's purported goal is to promote accuracy in marriage records (App. 28), which it fails to do, this rule creates "chaos" described in argument II. *Third*, the gross inequities described in argument II not only meet the requirements of *Chevron Oil*, but they also rise to the level of a "grave disruption or inequity" making pure prospectivity applicable under *Harper* and *Ryder*.

2. If pure prospectivity is not appropriate for the South Carolina Supreme Court's decision, then the decision must be *fully* retroactive. *See Harper*, 509 U.S. at 100 ("Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law…cannot extend to their interpretations of federal law."). The court selectively applied the new rule only to the marriage of Tommie Rae and James Brown and not to the putative marriage

of Tommie Rae and Ahmed. If the court had fairly applied its new rule to both marriages, Tommie Rae would have had no impediment to her marriage to James Brown. The effects of the South Carolina Supreme Court's new rule will be felt nationwide, as the statute it purports to interpret is applicable in other states. *E.g. In re Estate of Bivians*, 98 N. M. 722, 726, 652 P.2d 744, 748 (N.M. App. 1982) (In New Mexico, the validity of a marriage is governed by the law of the jurisdiction in which the marriage was celebrated.).

3. By failing to recognize that the purported 1997 marriage to Ahmed was void *ab initio*, the South Carolina Supreme Court violated *Harper* with its *selective* retroactivity, which has never been allowed. *See Harper*, 509 U.S. at 100. To the extent the South Carolina Supreme Court's decision is not retroactive, it still has no basis in law, as selective prospectivity of decisions on federal law is not possible. *Id.* at 97.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 20, 2021
Bennettsville, South Carolina