No. 22-_____

In The
Supreme Court of the United States

JACK PIDGEON and LARRY HICKS,

Petitioners,

v.

SYLVESTER TURNER, in His Official Capacity as Mayor of the City of Houston, and the CITY OF HOUSTON,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Texas Constitution article I, § 32 prohibiting the state or political subdivision of the state from creating or recognizing any legal status identical or similar to marriage violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

2. Whether Texas Family Code § 6.204 prohibiting a state agency or political subdivision of a state from giving effect to a public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners in this Court (petitioners in the trial court – appellants in the state court of appeals – petitioner in the Texas Supreme Court) are Jack Pidgeon and Larry Hicks. Respondents in this Court (respondents in the trial court – appellees in the state court of appeals – respondents in the Texas Supreme Court) are Sylvester Turner,[1] in his official capacity as mayor of the City of Houston, and the City of Houston.

RELATED CASES

Supreme Court of Texas, No. 21-0510; *Jack Pidgeon and Larry Hicks v. Sylvester Turner, in His Official Capacity as Mayor of the City of Houston, and City of Houston*, Petition for Rehearing denied September 2, 2022.

Supreme Court of Texas, No. 21-0510; *Jack Pidgeon and Larry Hicks v. Sylvester Turner, in His Official Capacity as Mayor of the City of Houston, and City of Houston*, Petition for Review denied May 27, 2022.

Fourteenth Court of Appeals for the State of Texas, No. 14-19-00214; *Jack Pidgeon and Larry Hicks v. Sylvester Turner, in His Official Capacity as Mayor of the City of Houston, and City of Houston*, Judgment entered April 29, 2021.

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[1] During the course of these proceedings, Mayor Annise Parker left office and was replaced by Mayor Sylvester Turner.

RELATED CASES – Continued

310th Judicial District Court of Harris County, Texas, No. 2014-61812; *Jack Pidgeon and Larry Hicks v. Sylvester Turner, in His Official Capacity as Mayor of the City of Houston, and City of Houston*, Summary Judgment entered February 18, 2019.

United States Supreme Court, No. 17-424; *Sylvester Turner, Mayor of the City of Houston, Texas, et al. v. Jack Pidgeon, et al.*, Writ of Certiorari denied December 4, 2017.

Supreme Court of Texas, No. 15-0688; *Jack Pidgeon and Larry Hicks v. Sylvester Turner, in His Official Capacity as Mayor of the City of Houston, and City of Houston*, Judgment entered June 30, 2017.

Fourteenth Court of Appeals for the State of Texas, 14-14-00899-CV; *Jack Pidgeon and Larry Hicks v. Annise Parker, in her Official Capacity as Mayor of the City of Houston, and City of Houston*, Judgment entered July 28, 2015.

Fourteenth Court of Appeals for the State of Texas, 14-14-00932-CV; *Jack Pidgeon and Larry Hicks v. Annise Parker, in her Official Capacity as Mayor of the City of Houston, and City of Houston*, Judgment entered July 28, 2015.

310th Judicial District Court of Harris County, Texas, No. 2014-61812; *Jack Pidgeon and Larry Hicks v. Annise Parker, in her Official Capacity as Mayor of the City of Houston, and City of Houston*, Temporary Injunction entered November 5, 2014.

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JURISDICTION

The Supreme Court of Texas issued its final judgment on September 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-83 (1975).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves United States Constitution amendment XIV, § 1, Texas Constitution art. I, § 32, Texas Family Code § 6.204, and Article II, § 22 of the City of Houston Charter. Article I, § 32 of the Texas Constitution provides:

> (a) Marriage in this state shall consist only of the union of one man and one woman.

> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

Sections 6.204(b) and (c) of the Texas Family Code provide in relevant part:

> (b) A marriage between persons of the same sex * * * is contrary to the public policy of this state and is void in this state.
>
> (c) The state or an agency or political subdivision of the state may not give effect to a:
>
> > (1) Public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
> >
> > (2) Right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Article II, section 22 of the City of Houston Charter provides in relevant part:

> ***Denial of benefits to same sex partners and related matters.***
>
> Except as required by State or Federal law, the City of Houston shall not provide employment benefits, including health care,

to persons other than employees, their legal spouses and dependent children. * * *

INTRODUCTION AND STATEMENT OF THE CASE

In *Dobbs v. Jackson Women's Health Org.*, Justice Thomas concluded, "[I]n future cases, we should 'follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.' " No. 19-1392, 597 U.S. ___ (2022) (Thomas, J., concurring) (quoting *United States v. Carlton*, 512 U.S. 26, 42 (1994) (Scalia, J., concurring)). This is a "future case" where the text of the Constitution should be followed and the concept of "substantive due process" should be eliminated from our jurisprudence. "Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity." *Dobbs*, 597 U.S. ___ (2022) (Thomas, J., concurring).

The Texas Constitution defines marriage as the union of one man and one woman, and prohibits the State and its subdivisions from recognizing same-sex marriages.[1] Tex. Const. Art. I, § 32. The Texas Family

[1] "32. MARRIAGE. (a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." Tex. Const. Art. I, § 32.

Code further declares that any form of "marriage" other than a union of one man and one woman violates the State's public policy and is void, and forbids the State and its subdivisions to give effect to a "right or claim to any legal protection, benefit, or responsibility asserted as a result of" such a union. Tex. Fam. Code § 6.204(b), (c)(2). Finally, the City of Houston's charter bars the City from providing employment benefits to anyone other than city employees and their legal spouses and dependent children, except to the extent required by federal or state law.

In November 2013, before the Supreme Court's ruling in *Obergefell v. Hodges*, 574 U.S. 1118 (2015), Houston Mayor Annise Parker defied these provisions of state and city law by extending spousal employment benefits to the partners of homosexual employees who had obtained marriage licenses in other States. Parker took this step based on her personal belief that the State's marriage laws violated the federal Constitution.

Petitioners Jack Pidgeon and Larry Hicks sued Parker and the city in December 2013, seeking a Temporary Restraining Order and temporary injunction against Parker's actions. The trial court issued the Temporary Restraining Order. But Parker and the city removed the case to federal court before the trial court could rule on the temporary injunction. Pidgeon and Hicks promptly moved to remand. Nine months later, the federal district court remanded, but at that point, the state trial court had already dismissed the case for want of prosecution. Pidgeon and Hicks then filed a

new lawsuit against Parker and the city. Parker and the city filed a plea challenging the trial court's jurisdiction. The trial court overruled the plea and temporarily enjoined Parker and the city from extending benefits to the homosexual partners of city employees. Parker and the city appealed the temporary injunction and the denial of their plea to the jurisdiction.

While the appeal was pending, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment requires States to license and recognize marriages between persons of the same sex. 574 U.S. 1118 (2015). Later that day, a federal district court lifted a stay on a preliminary injunction that had enjoined the governor, the Attorney General, the Commissioner of the Texas Department of State Health Services, and the clerk of Bexar County from enforcing "any other laws of regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage." Order Granting Motion for Preliminary Injunction, *De Leon v. Abbott*, No. 5:13-cv-00982 (W.D. Tex. Feb. 26, 2014), ECF No. 73. The U.S. Court of Appeals for the Fifth Circuit affirmed that preliminary injunction in light of *Obergefell*, and remanded for entry of a final judgment. *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).

In response to these developments, the Texas fourteenth court of appeals reversed the trial court's temporary injunction and remanded "for proceedings consistent with *Obergefell* and *De Leon*."

On remand, the trial court granted Turner[2] and the City of Houston's Motion for Summary Judgment on February 18, 2019. Pidgeon and Hicks promptly appealed. The appeals court affirmed the trial court order on April 29, 2021 with Justice Wilson concurring and dissenting.

Due to the COVID-19 pandemic, Pidgeon and Hicks were granted extensions and ultimately filed their Petition for Review with the Supreme Court of Texas on September 13, 2021. On May 27, 2022, the Petition for Review was denied with Justice Devine dissenting. On June 20, 2022, Pidgeon and Hicks filed a Motion for Rehearing. The Motion for Rehearing was denied on September 2, 2022 with Justice Devine dissenting.

REASONS FOR GRANTING THE PETITION

I. SUBSTANTIVE DUE PROCESS LACKS ANY BASIS IN THE CONSTITUTION

There is no constitutional right to same-sex marriage. Respondents have previously invoked as the source for that right: the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property without due process of law." In *Dobbs v. Jackson Women's Health Org.*, the "Court well explains why, under . . . [its] substantive due process precedents, the purported right to abortion is not a

[2] In the 2016 election, Sylvester Turner succeeded Annise Parker as mayor of the City of Houston.

form of 'liberty' protected by the Due Process Clause." No. 19-1392, 597 U.S. ___ (2022). "'[S]ubstantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'" *Id.* (quoting *Johnson v. United States*, 576 U.S. 591, 607-608 (2015) (opinion of Thomas, J.)); *see also*, *e.g.*, *United States v. Vaello-Madero*, 142 S. Ct. 1539, 212 L. Ed. 2d 496, 504, 2022 U.S. LEXIS 2094, 29 Fla. L. Weekly Fed. S 209, 2022 WL 1177499 (Thomas, J., concurring) ("[T]ext and history provide little support for modern substantive due process doctrine"). "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *Dobbs*, No. 19-1392. 597 U.S. ___ (2022) (Thomas, J., concurring) (quoting *McDonald v. Chicago*, 561 U.S. 742, 811, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Thomas, J., concurring in part and concurring in judgment)); *see also United States v. Carlton*, 512 U.S. 26, 40, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (Scalia, J., concurring in judgment). Similarly, the purported right to same-sex marriage is not a form of "liberty" protected by the Due Process Clause. The purported right to same-sex marriage is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). In *United States v. Windsor*, Justice Kennedy noted:

> "It seems fair to conclude that, until recent years, many citizens had not even considered

> the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."

570 U.S. 744, 763 (2013) (also noting that "[t]he limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental," *id.*).

A. Framers of the Constitution Did Not Extend Due Process Clause to Same-Sex Marriage

Like abortion, the idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to same-sex marriage is farcical. *See Dobbs*, No. 19-1392, 597 U.S. ___ (2022) (Thomas, J., concurring) (concluding that "[T]he idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical." *June Medical Services L.L.C. v. Russo*, 591 U.S. ___, ___, 140 S. Ct. 2103, 207 L. Ed. 2d 566, 617 (2020) (Thomas, J., dissenting)). Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to same-sex marriage.

B. Texas Marriage Amendment and Family Code Do Not Violate Equal Protection Clause

"[S]ubstantive due process distorts other areas of constitutional law." *Dobbs*, No. 19-1392, 597 U.S. ___ (2022) (Thomas, J., concurring). Once this Court identifies a "fundamental" right for one class of individuals, it then invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. *See*, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (relying on *Griswold v. Connecticut*, 381 U.S. 479 (1965) to invalidate a state statute prohibiting distribution of contraceptives to unmarried persons). "Therefore, regardless of the doctrinal context, the Court often 'demand[s] extra justifications for encroachments' on 'preferred rights' while 'relax[ing] purportedly higher standards of review for less-preferred rights.'" *Dobbs v. Jackson Women's Health Org*., No. 19-1392, 597 U.S. ___ (2022) (Thomas, J., concurring) (citing *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 640-642 (2016) (Thomas, J., dissenting). Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments. Like *Roe v. Wade*, 410 U.S. 113 (1973), *Obergefell v. Hodges* employed the concept of substantive due process to recognize a "fundamental right" that does not exist in the United States Constitution. Once the right to same-sex marriage was recognized by this Court, heightened scrutiny was applied by the Texas courts to effectively invalidate Texas Constitution art. I, § 32, Texas Family

Code § 6.204, and the City of Houston Charter Article I, section 32. Here, the trial court, court of appeals, and the Texas Supreme Court concluded that the Respondent Mayor's conduct was not illegal or ultra-virus due to this Court's ruling in *Obergefell*. Accordingly, the Texas courts then concluded that because the Respondent Mayor's conduct was not illegal or ultra vires, Petitioners lacked standing to bring their claims.

Respondent Mayor Parker used city funds to pay benefits to same-sex couples in violation of Texas Constitution, article I, § 32, Texas Family Code § 6 and City of Houston Charter, article I, § 32. The Texas Supreme Court and the state court of appeals concluded that Petitioners lacked standing to pursue their claims because Mayor Parker's conduct was not illegal or ultra-virus based on this Court's ruling in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

In his dissenting opinion to the Texas Supreme Court's denial of Petitioners' Motion for Rehearing, Justice John Devine concluded:

> "*Obergefell* and related cases may have sweeping consequences, but we do not yet know what the consequences are for this litigation because no case compels the resolution of the underlying issues *here*. When a case is important to the jurisprudence of the state, we abdicate our role as judges if we simply sit back and refuse to decide based on an assumption about what law will be declared down the road. We have a responsibility to say what it is *now*."

App. 18-19.

II. WHILE *STARE DECISIS* PLAYS AN IMPORTANT ROLE IN ADJUDICATION, THAT DOCTRINE CANNOT EXALT KNOWINGLY INCORRECT SUPREME COURT DECISIONS OVER THE CONSTITUTION ITSELF

The doctrine of *stare decisis* – namely, the judicial practice of presumptively (but not always) declining to revisit settled legal matters – is essential to judicial efficiency. A court (not to mention the litigants) simply would not have the time to revisit and reanalyze from scratch every single step of a legal adjudication in every single case. Instead, a court properly relies upon the body of previous court decisions absent some good reason to reopen the particular matter in question. However, the default assumption that prior decisions are correct cannot justify a *knowing* failure to follow *the Constitution*. The Supremacy Clause of the Constitution does *not* state, The Decisions of the supreme Court shall be the supreme Law of the Land, any Thing in this Constitution to the Contrary notwithstanding.

Not U.S. Const. art. VI, cl. 2.

The Court need not *sua sponte* address and correct prior erroneous constitutional rulings. Indeed, this Court often notes when the parties have not asked the Court to revisit past precedents. *E.g.*, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 483 (2010) ("The parties do not ask us to reexamine any of these precedents, and we do not do so"); *Fisher v. University of Texas*, 570 U.S. 297, 311

(2013) ("There is disagreement about whether *Grutter* [*v. Bollinger*, 539 U.S. 306 (2003),] was consistent with the principles of equal protection in approving this compelling interest in diversity. . . . But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding"); *Northern Ins. Co. v. Chatham County*, 547 U.S. 189, 193 (2006) (discussing constitutional principles "which no party asks us to reexamine today"); *Barr v. Amer. Ass'n of Political Consultants*, No. 19-631, slip op. at 9 n.5 (U.S. July 6, 2020) (plurality) ("Before overruling precedent, the Court usually requires that a party ask for overruling, or at least obtains briefing on the overruling question"). Here, Petitioners are asking the Court to revisit *Obergefell v. Hodges*.

Moreover, the Court may decline an invitation to reexamine past precedent where there do not appear to be strong reasons to believe the past decision improperly construed the Constitution. As this Court explained in *Cook v. Moffat & Curtis*, 46 U.S. 295, 309 (1847), where

> the [constitutional] questions involved . . . have already received the most ample investigation by the most eminent and profound jurists, both of the bar and the bench, [and thus] it may be well doubted whether further discussion will shed more light, or produce a more satisfactory or unanimous decision[, then] the court do [sic] not think it necessary or prudent to depart from the safe maxim of *stare decisis*.

See also, *e.g.*, *Evans v. Michigan*, 568 U.S. 313, 328 (2013) (declining to overrule precedents when, *inter alia*, "the logic of these cases still holds"); *United States v. Reidel*, 402 U.S. 351, 356 (1971) (noting that Supreme Court precedent "has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today" and noting that a subsequent decision "did not overrule [the prior holding] and we decline to do so now"). Here, this Court's decision in *Dobbs v. Jackson Women's Health Org.* presents strong reasons.

If fidelity to the Constitution is to be a hallmark of this Court as an institution of laws, not of men, then the Justices *must* prefer a faithful reading of the Constitution to an acknowledged false reading, regardless of whether a past majority of this Court, in a previous ruling, has embraced the false interpretation. "No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942). Hence, there is no proper place under our Constitution for a Court or Justice to say, "We are persuaded that *Ruling A* erroneously interpreted the Constitution, but we will nevertheless adhere to that ruling in preference to the Constitution itself."

To embrace an incorrect judicial interpretation of the Constitution (*stare decisis* is not needed to defend *correct* decisions) rather than ruling as required by the Constitution, is to exalt court rulings above the

Constitution, in violation of both the *actual* Supremacy Clause, U.S. Const. art. VI, cl. 2 (the constitution is the "supreme Law of the Land"),[3] and the judicial oath of office (in which the judge or Justice pledges fidelity to the Constitution).

To reach this conclusion one need only look to the logic of *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, this Court addressed the question whether the judiciary could rule that a legislative act was "repugnant to the constitution" and thus "void" – i.e., unconstitutional. *Id*. at 180. The answer was "yes" – Precisely because the Constitution bound both the legislature and the judiciary.

Based on this Court's opinion in *Obergefell v. Hodges*, 576 U.S. 644 (2015), on February 18, 2019, the trial court granted Mayor Turner's and the City's plea to the jurisdiction and/or counter-motion for summary judgment, dismissing Petitioners' claims with prejudice. In its order, the trial court stated:

> On June 30, 2017, the Texas Supreme Court remanded this case to the 310th Court for both parties to have a "full and fair" opportunity to litigate their legal positions in light of *Obergefell*. The Texas Supreme Court noted that Pidgeon sued the Mayor pre-*Obergefell* for acting *ultra vires* in issuing and enforcing

[3] "The Supremacy Clause conspicuously does not include 'decisions by the United States Supreme Court' when naming the sources of law at the top of the legal food chain." Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1, 6 (2007).

> the directive to provide benefits to employees' same-sex spouses in violation of DOMA. The issue now before this trial court on a plea to the jurisdiction and motions for summary judgment is whether Mayor Turner's directive was unlawful and unauthorized in light of the United States Supreme Court's opinion in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). Both parties have briefed the issue and the parties have filed competing motions for summary judgment.
>
> After considering said plea/motion and the summary judgment evidence filed by Defendants, the Court is of the opinion that said plea/motion should be GRANTED.
>
> It is therefore ORDERED that all of Plaintiffs' claims are dismissed with prejudice.
>
> All other relief not expressly granted herein is denied. This is a final order.

Petitioners timely appealed. The state court of appeals concluded that Texas Family Code § 6.204(c) and the Texas marriage amendment, Article I Constitution § 32 were unconstitutional.

The Texas Supreme Court denied Petitioners' request for review, allowing the court of appeals' decision to stand. In his dissenting opinion to the Texas Supreme Court's refusal to review the lower court's opinion, Texas Supreme Court Justice John Devine concluded the following:

The ultimate outcome hinges on the resolution of the same underlying questions, including "the reach and ramifications" of the United States Supreme Court's opinion in *Obergefell v. Hodges*. If the case was important enough to grant review five years ago, it is just as important now. What's more, the issues undergirding this particular case have never been decided by either this Court or the Supreme Court, so the outcome is not preordained. Denying review will leave significant constitutional issues undetermined and subject to assumption. Because we have a clear and compelling duty to say what the law is in light of Supreme Court opinions that are distinguishable from this one, I would grant the petition for review to determine the extent to which those cases, including *Obergefell* and *United States v. Windsor*, govern the outcome here.

The Texas Supreme Court was asked to decide whether *Obergefell* and *United States v. Windsor* invalidate Texas Constitution, article I, § 32, Section 6.204(c)(2) of the Texas Family Code, and Houston City Charter, article II, § 22. The question the Texas Supreme Court failed to answer "is whether and to what extent the Supreme Court's subsequently issued opinions in *Windsor* and *Obergefell*, and their progeny, invalidate these laws." The actions petitioners challenge are directly contrary to these laws, which neither this Court nor the Texas Supreme Court has ever invalidated. The question to be answered is whether and to what extent the Supreme Court's subsequently

> issued opinions in *Windsor* and *Obergefell*, and their progeny, invalidate these laws. *Pidgeon v. Turner*, 2022 Tex. LEXIS 485, *3, 65 Tex. Sup. J. 1266.

III. STATUTES DECLARED UNCONSTITUTIONAL CONTINUE TO EXIST AS LAWS UNTIL THEY ARE REPEALED

The federal courts do not wield a "writ-of-erasure"[4] over statutes that they declare unconstitutional, and these statutes continue to exist as laws until they are repealed by the legislature that enacted them. *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) ("[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* 'struck down' any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it. Thus, the Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim."); *Texas v. United States*, 945 F.3d 355, 396 (5th Cir. 2019) ("The federal courts have no authority to erase a duly enacted law from the statute books, [but can only] decline to enforce a statute in a particular case or controversy." (Citation omitted)).

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[4] Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 993 (2018).

The Respondents are therefore acting in violation of Texas Law and Petitioners requested a declaration of same, which was denied.

The wisdom of the Texas legislature in enacting Tex. Fam. Code § 6.204(c)(2), and then declining to modify it in anticipation of or after the Supreme Court ruling in *Obergefell*, clearly defines Texas' position on same-sex marriage. *Obergefell* was decided in 2015, the Texas Legislature has had three sessions and numerous special sessions, 2017, 2019, and 2021, to amend Tex. Fam. Code § 6.204(c)(2). During the three sessions and special sessions, the Texas Legislature chose not to amend the language at Texas Fam. Code § 6.204(c)(2), and the language of the statute remains identical to the language originally enacted in 2003 during the 78th Legislative Session. It is controlling here that Texas law clearly prohibits payment at taxpayer expense of benefits to same-sex spouses.

The Supreme Court should therefore grant this petition for writ of certiorari in order to clarify the issue of whether it is a power of the state to issue laws related to marriage.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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