FILE COPY

RE: Case No. 21-0510 DATE: 5/27/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Devine delivered an opinion dissenting to the denial of the petition for review. (Justice Blacklock not participating)

DISTRICT CLERK HARRIS COUNTY
HARRIS COUNTY CIVIL COURTHOUSE
P.O. BOX 4651
HOUSTON, TX 77210
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 5/27/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Devine delivered an opinion dissenting to the denial of the petition for review. (Justice Blacklock not participating)

MR. JARED R. WOODFILL
WOODFILL LAW FIRM, P.C.
3 RIVERWAY, SUITE 750
HOUSTON, TX 77056
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 5/27/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Devine delivered an opinion dissenting to the denial of the petition for review. (Justice Blacklock not participating)

MS. JUDITH LEE RAMSEY
CHIEF, GENERAL LITIGATION SECTION
CITY OF HOUSTON LEGAL DEPARTMENT
P.O. BOX 368
HOUSTON, TX 77001-0368
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 5/27/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Devine delivered an opinion dissenting to the denial of the petition for review. (Justice Blacklock not participating)

MR. RONALD C. LEWIS
HOUSTON CITY ATTORNEY
900 BAGBY, 4TH FLOOR
HOUSTON, TX 77002-4995
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 5/27/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Devine delivered an opinion dissenting to the denial of the petition for review. (Justice Blacklock not participating)

BRIAN KLOSTERBOER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
PO BOX 8306
HOUSTON, TX 77288
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 5/27/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Devine delivered an opinion dissenting to the denial of the petition for review. (Justice Blacklock not participating)

MS. COLLYN A. PEDDIE
CITY OF HOUSTON LEGAL DEPARTMENT
900 BAGBY STREET, 4TH FLOOR
CITY HALL ANNEX
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 5/27/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Devine delivered an opinion dissenting to the denial of the petition for review. (Justice Blacklock not participating)

MR. CHRISTOPHER A. PRINE (14TH COA)
CLERK, FOURTEENTH COURT OF APPEALS
HARRIS COUNTY 1910 COURTHOUSE
301 FANNIN SUITE 245
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

Supreme Court of Texas

No. 21-0510

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 Review from the Court of Appeals for the Fourteenth District of Texas

(Filed May 27, 2022)

JUSTICE DEVINE, dissenting to the denial of the petition for review.

Five years ago, we deemed this case sufficiently important to the jurisprudence of the state to grant review.[1] This iteration of the case involves the same parties, same facts, same causes of action,[2] and much of the same requested relief. 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.*

[1] *See* TEX. GOV'T CODE § 22.001(a); *Pidgeon v. Turner*, 538 S.W.3d 73, 80 (Tex. 2017) (*Pidgeon II*).

[2] *See Pidgeon II*, 538 S.W.3d at 78-79.

Hodges.[3] 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*,[4] govern the outcome here.

I

In this case, Houston taxpayers allege the City of Houston and its current and former mayors have violated clear and express state and local laws by extending tax-funded benefits to same-sex partners of public employees. The Houston City Charter provides that, "[e]xcept 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."[5] While not "expressly refer[ring] to same-sex relationships, the voters' intent to deny tax-funded employment benefits to same-sex partners was undisputed" and

---

[3] *Id.* at 89.

[4] 570 U.S. 744 (2013).

[5] HOUS., TEX., CHARTER ART. II, § 22 (2001).

expressed with clarity by its title: "Denial of Benefits to Same-Sex Partners and Related Matters."[6] Augmenting this local prohibition, the Texas Constitution elucidates on who "legal spouses" are:

> (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.[7]

Similarly, Section 6.204(c)(2) of the Texas Family Code prohibits "[t]he state or an agency or political subdivision of the state" from "giv[ing] effect to a . . . 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."[8] The actions petitioners challenge are directly contrary to these laws, which neither this Court nor the Supreme Court has ever invalidated. The question my colleagues decline 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.

In 2013, the Supreme Court decided *Windsor*, decreeing unconstitutional a section of the federal Defense of Marriage Act (DOMA) that defined marriage

---

[6] *Pidgeon II*, 538 S.W.3d at 79; HOUS., TEX., CHARTER ART. II, § 22.

[7] TEX CONST. art. I, § 32.

[8] TEX. FAM. CODE § 6.204(c)(2).

as a legal union between spouses of the opposite sex and "spouse" as referring only to a person of the opposite sex who is a husband or wife.[9] After that decision issued, Houston's city attorney advised then-Mayor of Houston Annise Parker that the City of Houston " 'may extend benefits' to City employees' same-sex spouses who were legally married in other states 'on the same terms it extends benefits to heterosexual spouses.' "[10] In November 2013, Mayor Parker directed "that same-sex spouses of employees who have been legally married in another jurisdiction [will] be afforded the same benefits as spouses of a heterosexual marriage." This was a direct violation of Texas law.[11]

A month later, Jack Pidgeon and Larry Hicks (collectively, Pidgeon) sued the City and the Mayor (collectively, the Mayor) in state court (*Pidgeon I*), challenging the Mayor's directive and the concomitant provision of benefits.[12] The court issued a temporary restraining order, requiring the Mayor "and any other person(s) with knowledge of [the court's] Order, to cease and desist providing benefits to same-sex spouses of employees that have married in jurisdictions that recognize same-sex marriage."[13] Pursuant to that order, the Mayor informed City employees that

---

[9] *United States v. Windsor*, 570 U.S. 744, 752 (2013) (quoting and invalidating 1 U.S.C. § 7).

[10] *Pidgeon II*, 538 S.W.3d at 78.

[11] *Id.*

[12] *Id.*

[13] Original Complaint at 7, *Freeman v. Parker* (S.D. Tex. Dec. 26, 2013) (No. 4:13-cv-3755).

spousal benefits for same-sex employees "may be interrupted, may not be available . . . , or . . . may be terminated at some point during the litigation."[14] The Mayor removed *Pidgeon I* to federal court. The federal district court ultimately remanded the case back to state court, but by then, the state court had dismissed the suit for want of prosecution.[15]

In the interim, three City employees filed a friendly suit against the Mayor in federal court (*Freeman v. Parker*), requesting, among other things, that the Mayor "be preliminarily and permanently enjoined from prohibiting legally married lesbian or gay employees from accessing spousal benefits for their same-sex spouses as part of their compensation on the same basis as their non-gay legally married co-workers."[16] In August 2014, the federal district court in *Freeman* issued a preliminary injunction prohibiting the Mayor "from discontinuing spousal employment benefits to same-sex spouses of City employees."[17]

In October 2014, Pidgeon again sued the Mayor (*Pidgeon II*).[18] In that case, from which this appeal derives, the trial court denied the Mayor's jurisdictional

---

[14] *Id.* at Ex. C.

[15] *Pidgeon II*, 538 S.W.3d at 78.

[16] Original Complaint at 11, *Freeman v. Parker* (S.D. Tex. Dec. 26, 2013) (No. 4:13-cv-3755).

[17] *See Freeman v. Parker*, No. 4:13-cv-3755 (S.D. Tex. Aug. 29, 2014) (Lake, J.). This injunction was to last "until such time as final judgment is entered in this case or it is dismissed[.]"

[18] *Pidgeon II*, 538 S.W.3d at 78.

pleas and temporarily enjoined her from extending benefits contrary to Texas law.[19]

While the Mayor's subsequent interlocutory appeal was pending in the court of appeals,[20] the legal landscape changed dramatically when the Supreme Court handed down its sharply divided opinion in *Obergefell*, which holds that "same-sex couples may now exercise the fundamental right to marry in all [s]tates," and "there is no lawful basis for a [s]tate to refuse to recognize a lawful same-sex marriage performed in another [s]tate on the ground of its same-sex character."[21] The result was that "every [s]tate" must now "license and recognize same-sex marriage."[22]

With *Obergefell* in view, the Texas appeals court vacated the trial court's temporary injunction against the Mayor.[23] We unanimously reversed the court of appeals' judgment and remanded, holding that (1) the Fifth Circuit's decision in *De Leon v. Abbott*[24] did not bind the trial court on remand, and the trial court was

---

[19] *Id.* at 79-80.

[20] *Id.* at 80.

[21] 576 U.S. 644, 681 (2015).

[22] *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting). After both *Obergefell* and *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), were decided and a court of appeals had reversed and dissolved the temporary injunction imposed by the first trial court, the federal district court lifted the *Freeman* injunction against the Mayor. *See Parker v. Pidgeon*, 477 S.W.3d 353, 355 (Tex. App.—Houston [14th Dist.] 2015), *rev'd sub nom. Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. 2017) (*Pidgeon II*).

[23] *Parker*, 477 S.W.3d at 354.

[24] 791 F.3d 619 (5th Cir. 2015).

"not required to conduct its proceedings 'consistent with' [*De Leon*]"; (2) Pidgeon could seek all appropriate relief on remand; and (3) the court of appeals "did not err by failing to affirm the temporary injunction 'to the extent' it required the City to claw back payments made prior to *Obergefell*"[25] because Pidgeon had never requested, and the trial court had never granted, such an injunction.[26] We "decline[d] to instruct the trial court how to construe *Obergefell* on remand."[27] To the contrary, we expressly recognized that *Obergefell* was "not the end" and that the full extent of its "reach and ramifications" on issues not addressed in that case remain to be explored by the courts.[28]

Back in the trial court, Pidgeon filed an amended petition, seeking to "enjoin the mayor's *ultra vires* expenditures of public funds." He also pursued temporary and permanent injunctions requiring city officials to "claw back public funds that were spent in violation of" state law and the City's charter and that the Mayor "comply with section 6.204(c)(2) of the Texas Family Code." He further asked the trial court to declare that (1) the Mayor's directive to provide same-sex spousal benefits and continued enforcement of that directive violate the Texas Constitution, Section 6.204(c) of the Family Code, and the Houston City Charter; and (2) "the mayor and city officials have no authority to

---

[25] *Pidgeon II*, 538 S.W.3d at 89.

[26] *Id.* at 85.

[27] *Id.* at 89.

[28] *Id.*

disregard state law merely because it conflicts with their personal beliefs of what the U.S. Constitution or federal law requires."

On motion for summary judgment, Pidgeon argued that *Obergefell* cannot "justify the defendants' past and present violations of state law." The Mayor filed a plea to the jurisdiction and a cross-motion for summary judgment, both of which the trial court granted.[29] The court of appeals affirmed,[30] and Pidgeon now petitions for review.

We should grant the petition because the underlying issues have never been resolved, by either this Court or the Supreme Court. Past Supreme Court opinions do not inexorably dictate the outcome of this case because none of them address its central question: whether the same-sex spouses of City employees are constitutionally entitled to receive tax-funded spousal benefits under state law.

II

The Supreme Court's opinions about same-sex marriage are distinguishable on several counts. Start with *Windsor*, which adjudicated provisions of *federal* DOMA unconstitutional[31] but said absolutely nothing about the Texas laws defining marriage. Any

---

[29] *Pidgeon v. Turner*, 625 S.W.3d 583, 593 (Tex. App.—Houston [14th Dist.] 2021).

[30] *Id.* at 590, 609.

[31] 570 U.S. at 769-75.

resemblance between the two statutes is of no moment. To state the obvious, federal statutes aren't state statutes, and to decide that a federal statute is unconstitutional is not to say that a state statute is, too, however similar the laws may be. Beyond that, the principles animating the *Windsor* decision are not in play here. The Court deemed federal DOMA unconstitutional because it "deviat[ed]" from "the usual tradition of recognizing and accepting state definitions of marriage" and invaded the arena of domestic relations—long "regarded as a virtually exclusive province of the [s]tates."[32] The Texas laws, by which the state regulates its own "exclusive province," do not implicate the same considerations. This case presents the inverse of *Windsor*.

Next, *Obergefell*, which holds that "same-sex couples may exercise the fundamental right to marry in all [s]tates"[33] and states must now "license and recognize same-sex marriage."[34] That's all. That holding "hinged on marriage's status as a fundamental right."[35] Alleged infringement of fundamental rights is subject to review under the strict-scrutiny standard, but such "[s]trict review gives way to substantial deference when fundamental rights or protected classes

---

[32] *Id.* at 766 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)); *see id.* at 775.

[33] *Obergefell*, 576 U.S. at 681.

[34] *Id.* at 687 (Roberts, C.J., dissenting).

[35] *See Pidgeon v. Turner*, 549 S.W.3d 130, 132 (Tex. 2016) (Devine, J., dissenting to the denial of the petition for review) (citing *Obergefell*, 576 U.S. at 675).

are not at stake."[36] Where no fundamental rights are involved, the laws at issue are "presumed to be valid"[37] if "the distinctions made by the statute are 'rationally related to a legitimate state interest.' "[38]

This case involves no fundamental rights—the central question is about entitlement to employment benefits, which the City has no constitutional duty to offer to its employees or their spouses.[39] Thus, any analysis of that question would employ a standard far more deferential to state law than the strict scrutiny by which the Court decided *Obergefell*. As a result, that case's enumeration of "governmental rights, benefits, and responsibilities" states *may* confer on married couples if they choose, including workers' compensation benefits, does not prejudge the outcome of Pidgeon's case.[40]

Even if *Windsor* plus *Obergefell* equals an outcome in the Mayor's favor, we won't know that until the issues have been fully litigated, which includes consideration by the highest courts. In short, no previous case

---

[36] *Id.* at 131 (citing *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 426 (2010); and then citing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001)).

[37] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

[38] *See Pidgeon*, 549 S.W.3d at 132 (Devine, J., dissenting to the denial of the petition for review) (quoting *Cleburne*, 473 U.S. at 440).

[39] *See id.* (citing *Obergefell*, 576 U.S. at 675).

[40] *Obergefell*, 576 U.S. at 669-70; *see also id.* (explaining that "the States are in general free to vary the benefits they confer on all married couples").

commands a certain outcome in *this* case because none has involved the issues and laws presented here. In my view, the outcome is far from inevitable.

Finally, the existence of the federal district court's preliminary injunction when Pidgeon filed this lawsuit should not inhibit us from granting his petition. Pidgeon argues that the Mayor acted without legal authority, or *ultra vires*. Though the injunction was lifted in the wake of *Obergefell* and *De Leon*, the Mayor asserts that she was required to comply with it when it was extant. She argues that because the injunction was in full force when Pidgeon filed his lawsuit, she could not have acted without legal authority by continuing to provide benefits to same-sex spouses of City employees as the injunction required. And she further maintains that, before this suit was filed, other laws changed that validated or required her actions. These arguments should not discourage us from granting review. Five years ago, we deemed the case important enough to the state's jurisprudence to merit our review despite the existence of the injunction.[41] It has not become less important with the passage of time. If it warranted our review then, it warrants it now.

III

Many may assume that we know the final answer to the questions at the core of this litigation. We do not. *Obergefell* and related cases may have sweeping consequences, but we do not yet know what the

[41] *See* TEX. GOV'T CODE § 22.001(a).

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.*[42] We should say it.

For all these reasons, I would grant the petition for review. Because the Court does not, I respectfully dissent.

John P. Devine
Justice

OPINION DELIVERED: May 27, 2022

[42] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

FILE COPY

RE: Case No. 21-0510 DATE: 9/2/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Devine notes his dissent from the Court's denial of the motion for rehearing. (Justice Blacklock not participating)

DISTRICT CLERK HARRIS COUNTY
HARRIS COUNTY CIVIL COURTHOUSE
P.O. BOX 4651
HOUSTON, TX 77210
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 9/2/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Devine notes his dissent from the Court's denial of the motion for rehearing. (Justice Blacklock not participating)

MR. JARED R. WOODFILL
WOODFILL LAW FIRM, P.C.
3 RIVERWAY, SUITE 750
HOUSTON, TX 77056
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 9/2/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Devine notes his dissent from the Court's denial of the motion for rehearing. (Justice Blacklock not participating)

MS. JUDITH LEE RAMSEY
CHIEF, GENERAL LITIGATION SECTION
CITY OF HOUSTON LEGAL DEPARTMENT
P.O. BOX 368
HOUSTON, TX 77001-0368
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 9/2/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Devine notes his dissent from the Court's denial of the motion for rehearing. (Justice Blacklock not participating)

MR. RONALD C. LEWIS
HOUSTON CITY ATTORNEY
900 BAGBY, 4TH FLOOR
HOUSTON, TX 77002-4995
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 9/2/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Devine notes his dissent from the Court's denial of the motion for rehearing. (Justice Blacklock not participating)

BRIAN KLOSTERBOER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
PO BOX 8306
HOUSTON, TX 77288
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 9/2/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Devine notes his dissent from the Court's denial of the motion for rehearing. (Justice Blacklock not participating)

MS. COLLYN A. PEDDIE
CITY OF HOUSTON LEGAL DEPARTMENT
900 BAGBY STREET, 4TH FLOOR
CITY HALL ANNEX
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 21-0510 DATE: 9/2/2022
COA #: 14-19-00214-CV TC#: 2014-61812
STYLE: PIDGEON v. TURNER

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Devine notes his dissent from the Court's denial of the motion for rehearing. (Justice Blacklock not participating)

MR. CHRISTOPHER A. PRINE (14TH COA)
CLERK, FOURTEENTH COURT OF APPEALS
HARRIS COUNTY 1910 COURTHOUSE
301 FANNIN SUITE 245
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

Affirmed and Majority Opinion and Concurring and Dissenting Opinion filed April 29, 2021.

[SEAL]

In The

Fourteenth Court of Appeals

NO. 14-19-00214-CV

JACK PIDGEON AND LARRY HICKS,
Appellants

V.

SYLVESTER TURNER, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF HOUSTON, AND THE CITY OF HOUSTON,
Appellees

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2014-61812

MAJORITY OPINION

Appellants Jack Pidgeon and Larry Hicks (collectively, "appellants"), individual taxpayers, bring this interlocutory appeal challenging the trial court's order granting the plea to the jurisdiction of appellee Sylvester Turner, in his official capacity as the Mayor of the City of Houston ("Mayor Turner") and appellee City of Houston ("the City"). We affirm the trial court's order.

I. BACKGROUND

In 2013, after a decision of the U.S. Supreme Court invalidated part of the federal Defense of Marriage Act ("DOMA"),[1] the then-Houston Mayor Annise Parker ("Mayor Parker"), on advice from the city attorney,[2] on November 19, 2013, "direct[ed] that same-sex spouses of employees who have been legally married in another jurisdiction be afforded the same benefits as spouses of a heterosexual marriage."[3]

Appellants, who identify themselves as Houston residents and taxpayers, oppose Mayor Parker's directive and seek to enjoin Mayor Turner and the City from continuing to spend public funds for the extension

---

[1] On June 26, 2013, in *United States v. Windsor*, the Supreme Court examined the constitutionality of the federal DOMA, which defined marriage for federal-law purposes as limited to unions between a man and a woman and denied same-sex couples, including those legally married in a state in which same-sex marriage was recognized, the federal benefits and protections granted to heterosexual married couples. 570 U.S. 744 (2013). The Supreme Court held that Section 3 of the federal DOMA violated the Fifth Amendment. *Windsor*, 570 U.S. at 774-75. The Court recognized that the federal DOMA "depart[ed] from [a] history and tradition of reliance on state law to define marriage." *Id.* at 768.

[2] The city attorney issued a legal opinion finding "the continued application of Article II, Section 22 of the Houston City Charter to deny benefits to legally married same-sex spouses to be unconstitutional, primarily because it denies the employees of such spouses equal protection of the laws."

[3] Before November 19, 2013, appellees interpreted the Houston City Charter and the Texas Family Code as requiring them to deny benefits to same-sex spouses of city employees who were legally married in states where same-sex marriage was recognized.

of benefits to same-sex spouses of city employees by claiming those benefits violate state and city DOMAs contained in the Texas Constitution, Texas Family Code, and Houston City Charter.[4] Appellants also seek an injunction to "claw back" taxpayer money that Mayor Parker and other city officials allegedly have "unlawfully spent" on same-sex spousal benefits of city employees. Appellants further seek declarations regarding Mayor Parker's directive and its continued enforcement.

A. Prior Procedural History

This case was filed on October 22, 2014; however, the parties were embroiled in prior litigation, which we briefly review. On December 17, 2013, appellants sued Mayor Parker and the City of Houston in Harris County, Texas state court (*Pidgeon I*), challenging Mayor Parker's directive and the City's provision of benefits pursuant to that directive and seeking temporary and permanent injunctions preventing the defendants from providing such benefits. They were initially successful, and a state trial judge issued a temporary injunction prohibiting the city from "furnishing benefits to persons who were married in other jurisdictions to City employees of the same sex." Shortly before the injunction expired, the Mayor removed the case to federal district court in the Southern District of Texas, asserting federal-question

[4] The state and city DOMAs at issue are set forth, *infra*, at Section II.

jurisdiction, 28 U.S.C. § 1441(a). The case was eventually remanded back to state court on August 28, 2014. *See Pidgeon v. Parker*, 46 F. Supp.3d 692, 700 (S.D. Tex. 2014) (Rosenthal, J.). Prior to the remand, however, the state court gave notice to appellants that a motion to retain was required to keep the case on its docket. Appellants did not file a motion to retain. Thus, the state court dismissed the case for want of prosecution on May 9, 2014. Appellants did not challenge the dismissal of *Pidgeon I*.

B. The Current Litigation

On October 22, 2014, appellants filed this case (*Pidgeon II*). In their Original Petition and Application for Temporary Restraining Order, Application for Temporary Injunction, and Application for Permanent Injunction, appellants allege that they are Houston taxpayers and qualified voters, that Mayor Parker's directive to the City to offer benefits to same-sex spouses of city employees who are married in a state that recognizes same-sex marriage is a "violation of Texas Family Code § 6.204, Texas Constitution Article I, § 32, and Article II, § 22 of the City of Houston Charter." Appellants sought unspecified actual damages as well as temporary and permanent injunctive relief prohibiting the City from providing these benefits.

Mayor Parker and the City filed pleas to the jurisdiction asserting governmental immunity and challenging appellants' standing to assert their claims. The trial court denied the pleas and granted appellants'

request for a temporary injunction prohibiting Mayor Parker "from furnishing benefits to persons who were married in other jurisdictions to City employees of the same sex." Mayor Parker and the City filed an interlocutory appeal challenging both the order denying the pleas to the jurisdiction and the order granting the temporary injunction.

While Mayor Parker's and the City's appeal was pending before our court, on June 26, 2015, the U.S. Supreme Court issued its opinion in *Obergefell*, in which it held that same-sex couples had a constitutional "right to marry." *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015). In particular, the Court ruled that similar statutes in four other states, which defined marriage as a union between one man and one woman, were unconstitutional to the extent that they excluded "same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 647. Shortly thereafter, in response to *Obergefell*, the Fifth Circuit upheld a lower court's ruling enjoining the State of Texas from enforcing the provisions in the Texas Constitution and the Family Code, or any other laws or regulations, that prohibit "a person from marrying another person of the same sex or recognizing same-sex marriage." *De Leon v. Abbott*, 791 F.3d 619, 624–25 (5th Cir. 2015).

On July 28, 2015, our court, in a per curiam opinion, reversed the trial court's temporary injunction and remanded for proceedings consistent with *Obergefell* and *De Leon*. *See Parker v. Pidgeon*, 477 S.W.3d 353, 355 (Tex. App.—Houston [14th Dist.] 2015), *rev'd sub*

nom. Pidgeon v. Turner, 538 S.W.3d 73 (Tex. 2017). Appellants filed a petition for review with the Texas Supreme Court, which was granted.[5]

In a decision dated June 30, 2017, the Texas Supreme Court reversed our decision, holding that the case should be remanded to the trial court so it could consider the impact of both *Obergefell* and *DeLeon* on appellants' claims. *Pidgeon v. Turner*, 538 S.W.3d 73, 83–84, 89 (Tex.), *cert. denied*, 138 S. Ct. 505 (2017). It further explained:

> The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and – unlike the 5th Circuit in *De Leon* – it did not hold that the Texas DOMAs are unconstitutional.

Id. at 86–87.[6] The City requested review from the U.S. Supreme Court, but it denied *certiorari*. *See Turner v. Pidgeon*, 138 S. Ct. 505 (2017).

---

[5] Initially, on September 2, 2016, the Texas Supreme Court denied review. *See Pidgeon v. Turner*, 549 S.W.3d 130 (Tex. 2016).

[6] *See City of Fort Worth v. Rylie*, 602 S.W.3d 459, 469 (Tex. 2020) (citing *Pidgeon* for the proposition that where a question "presents an important issue of first impression in this Court, we decline to address the question in the first instance and defer instead for the court of appeals to address it after full briefing and argument by the parties."); *see also In re Occidental Chem. Corp.*, 561 S.W.3d 146, 173 (Tex. 2018) (citing *Pidgeon* for the proposition that before the Supreme Court will resolve a dispositive

While the Texas Supreme Court still had jurisdiction over the case and no mandate had been issued, appellants filed their First Amended Petition and Application for Temporary Injunction. In their amended petition against Mayor Turner and the City,[7] appellants set forth two causes of action:

- Plaintiffs Pidgeon and Hicks bring suit as taxpayers to enjoin the mayor's *ultra vires* expenditures of public funds, and to secure an injunction that requires city officials to claw back public funds that were spent in violation of section 6.204(c)(2) of the Texas Family Code; article I, section 32 of the Texas Constitution; and article II, section 22 of the City of Houston charter.
- Plaintiffs Pidgeon and Hicks bring suit under the Declaratory Judgment Act, asking this Court to declare that the mayor's directive of November 19, 2013, violated state law, and to declare further that the mayor and city officials have no authority to disregard state law merely because it conflicts with their personal

---

issue, the "preferred and proper process" is to allow a "complete vetting of the parties' potential arguments in the lower courts" so that the Court has a "full record" before it).

[7] After Mayor Parker's term in office concluded at the end of 2015, her successor, Mayor Turner, left the directive in place, and appellants have continued their lawsuit against Mayor Turner and the City.

beliefs of what the U.S. Constitution or federal law requires.

In their request for relief, they sought:

- a declaration that the mayor's directive of November 19, 2013, violated state and city law;
- a declaration that the mayor and city officials have no authority to disregard state or city law merely because it conflicts with their personal beliefs of what the U.S. Constitution or federal law requires;
- a declaration that the mayor and the city are violating state law by continuing to enforce the mayor's directive of November 19, 2013;
- a temporary and permanent injunction requiring the mayor and the city to claw back all public funds that they illegally spent on spousal benefits for the homosexual partners of city employees;
- a temporary and permanent injunction requiring the mayor and the city to comply with section 6.204(c)(2) of the Texas Family Code;
- reasonable attorney's fees;
- pre- and post-judgment interest as allowed by law;
- all costs of suit; and

- all other relief that this Court deems appropriate.

On July 2, 2018, appellants filed a motion for summary judgment. In their motion, appellants argued that the only issues for the trial court to resolve were questions of law: "(1) Whether the city can defend its present-day defiance of section 6.204(c)(2) by relying on the Supreme Court's decisions in *Obergefell* and *Pavan v. Smith*, 137 S. Ct. 2075 (2017); and (2) Whether the city can defend its *pre-Obergefell* defiance of section 6.204(c)(2) by relying on then-mayor Parker's personal beliefs that the statute was unconstitutional." Appellants also argued in their motion that they were entitled to an injunction requiring Mayor Turner and the City to "claw back" public funds that they previously spent in violation of Section 6.204(c)(2).

On August 21, 2018, Mayor Turner and the City filed a First Amended Answer to Plaintiffs' First Amended Petition and Application for Temporary Injunction, including affirmative defenses – of lack of jurisdiction for declaratory relief; lack of subject matter jurisdiction; no standing to bring claims; failure to join necessary parties, enforcement is preempted by federal law and the U.S. Constitution; no entitlement to "claw back" money paid; no entitlement to attorney's fees; and the requested relief would be unconstitutional under the Due Process and Equal Protection Clauses and violate state and federal laws. On that same day, Mayor Turner and the City filed their plea to the jurisdiction and/or counter motion for summary judgment.

Additionally, Mayor Turner and the City also filed a response to appellants motion for [partial] summary judgment, and reply to appellant's response to appellees' plea to the jurisdiction, arguing appellants were not entitled to summary judgment because their claims were barred by governmental immunity.

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 appellants' 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 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*, 135 S. Ct. 2534 (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.

Appellants filed a timely notice of appeal in this Court.

II. STATE AND CITY DOMAS AT ISSUE

A. TEXAS FAMILY CODE § 6.204(c)

In 2003, the Texas legislature amended the Texas Family Code to add Section 6.204, which among other things, prohibits recognition in Texas of lawful same-sex marriages executed in other jurisdictions. Tex. Fam. Code § 6.204; *see* Act of Sept. 1, 2003, 78th Leg., R.S., ch. 124, § 1 (West 2003). Section 6.204(b) declares void a marriage or a civil union of persons of the same sex. *Id.* § 6.204(b). Additionally, Section 6.204(c) prohibits the State and any of its agencies and political subdivisions from giving effect to any:

> (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 the 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.

Id. § 6.204(c).

B. TEXAS CONSTITUTION § 32

In 2005, after approval by the Texas Legislature and Texas voters, Article I of the Texas Constitution was revised to include the following amendments under Section 32:

> (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; *see* H.J.R. Res. 6, 79th Leg., Reg. Sess. (Tex. 2005).

C. Houston City Charter[8]

In 2001, voters petitioned and approved an amendment to Article II of the Houston City Charter, which provides, in relevant part, as follows:

---

[8] Houston is a Texas municipal corporation and home-rule city, which is governed by a city charter. *See* Tex. Const. art. XI, § 5. We take judicial notice of Houston's City Charter as required by Section 9.008(b) of the Texas Local Government Code. Tex. Loc. Gov't Code § 9.008(b) ("Recorded charters or amendments are public acts. Courts shall take judicial notice of them, and no proof is required of their provisions.").

> 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.

Article II, § 22.

III. ISSUES

Appellants assert the following as "issues" on appeal:

> I. The Trial Court Should Have Denied Defendant's Plea to Jurisdiction
>
> II. *Obergefell* and *DeLeon* do not compel states to pay taxpayer-funded benefits to same sex relationships, and federal courts do not commandeer state spending decisions
>
> III. Just as *Harris v. McRae* rejected demands for compelling taxpayer-funded abortion, courts should reject attempts to compel taxpayer funding of same-sex relationship
>
> IV. The religious liberty protections *Obergefell* and *DeLeon* reinforce the safeguard against compelling taxpayers to fund same sex relationships
>
> V. Defendants miss the point by arguing about "access" and "recognition" rather than addressing the exact statute that protects taxpayers

VI. The Plaintiffs are entitled to an injunction that forbids the Mayor to spend public funds in violation of section 6.204(c)(2)

VII. The Appellants are entitled to an injunction requiring the Defendants to claw back public funds that they previously spent in violation of section 6.204(c)(2)

VIII. The Mayor and the City officials have no right to violate state law merely on account of their personal belief that state law violates the Constitution

IX. The Plaintiffs satisfy all the requirements for a temporary injunction

IV. Analysis

A. Standard of Review and Governing Law

1. Plea to the Jurisdiction

We review de novo the trial court's ruling on a plea to the jurisdiction. *See Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020); *Chambers-Liberty Counties. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019). A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). A plea to the jurisdiction may challenge whether the plaintiff has met its burden of alleging jurisdictional facts or it may challenge the existence of jurisdictional facts. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004).

When a plea to the jurisdiction challenges the existence of jurisdictional facts with supporting evidence, our standard of review mirrors that of a traditional summary judgment: we consider all of the evidence relevant to the jurisdictional issue in the light most favorable to the nonmovant to determine whether a genuine issue of material fact exists. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) (citing *Miranda*, 133 S.W.3d at 227–28).[9] "[A] court deciding a plea to the jurisdiction . . . may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). A court may consider such evidence as necessary to resolve the dispute over the jurisdictional facts even if the evidence "implicates both the subject matter jurisdiction of the court and the merits of the case." *Miranda*, 133 S.W.3d at 226.

We take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Miranda*, 133 S.W.3d at 226. If the defendant establishes that the trial court lacks jurisdiction, the plaintiff is then required to show that there is a material fact question about jurisdiction. *Id.* at 227–28. If the evidence raises a fact issue regarding jurisdiction, the plea must be

---

[9] "[T]his standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c). . . . By requiring the [S]tate to meet the summary judgment standard of proof . . . , we protect the plaintiff[ ] from having to put on [its] case simply to establish jurisdiction." *Miranda*, 133 S.W.3d at 228 (internal quotations omitted) (internal citations omitted); *see also* Tex. R. Civ. P. 166a(c).

denied pending resolution of the fact issue by the fact finder. *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632 (Tex. 2015) (citing *Miranda*, 133 S.W.3d at 227–28). If, on the other hand, the evidence is undisputed or fails to raise a question of fact, the plea to the jurisdiction must be determined as a matter of *law. Id.* (citing *Miranda*, 133 S.W.3d at 228).

2. Immunity

Unless waived, governmental immunity protects political subdivisions of the state, such as cities and their officers, from suit and liability.[10] *Chambers-Liberty Counties Navigation Dist.*, 575 S.W.3d at 344; *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 157 (Tex. 2016); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Governmental immunity is a fundamental principle of Texas law, intended "to shield the public from the costs and consequences of improvident actions of their governments." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). Governmental immunity deprives a trial court of subject matter jurisdiction and is properly

[10] "Official-capacity suits . . : 'generally represent only another way of pleading an action against an entity of which [the official] is an agent.' " *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (quoting *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 n.55 (1978)). A suit brought against an employee in his official capacity "actually seeks to impose liability against the governmental unit rather than on the individual specifically named" and "is, in all respects other than name, . . . a suit against the entity." *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007).

asserted in a plea to the jurisdiction. *City of Houston v. Houston Mun. Employees Pension Sys.*, 549 S.W.3d 566, 575 (Tex. 2018) (citing *Reata Constr. Corp*, 197 S.W.3d at 374); *Miranda*, 133 S.W.3d at 225–26.

The Texas Supreme Court, however, has recognized that "immunity does not bar a suit in at least two circumstances relevant to appellants' claims: (1) when the suit seeks to determine or protect a party's rights against a government official who has acted without legal or statutory authority—commonly referred to as an *ultra vires* claim; or (2) when the suit challenges the validity of a statute." *Tex. Transp. Comm'n v. City of Jersey Vill.*, 478 S.W.3d 869, 875 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

In this case, appellants argue that Mayor Turner is not immune from suit under the first circumstance. Appellants further contend the City is not immune under the second circumstance because it is a necessary party under the Uniform Declaratory Judgments Act ("the UDJA"). *See* Tex. Civ. Prac. & Rem. Code § 37.002, *et seq*. Each exception to immunity is discussed below.

3. SUITS ALLEGING *ULTRA VIRES* CLAIMS

An *ultra vires* claim against a government official–that is, a suit against a government official for acting outside his or her authority and seeking to require the official to comply with statutory or constitutional provisions–is not barred by immunity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009); *Turner v. Robinson*, 534 S.W.3d 115, 125–26 (Tex.

App.—Houston [14th Dist.] 2017, no pet.); *Lazarides v. Farris*, 367 S.W.3d 788, 800 (Tex. App.—Houston [14th Dist.] 2012, no pet.). An *ultra vires* claim cannot be asserted against a governmental entity but must instead be brought against a government official or employee of a governmental entity. *See Heinrich*, 284 S.W.3d at 372–73. "The basic justification for this *ultra vires* exception to [governmental] immunity is that *ultra vires* acts—or those acts without authority—should not be considered acts of the [the entity] at all." *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017). "Consequently, '*ultra vires* suits do not attempt to exert control over the [governmental entity]—they attempt to reassert the control of the [governmental entity]' over one of its agents." *Id.* (quoting *Heinrich*, 284 S.W.3d at 372).

To fall within this *ultra vires* exception to governmental immunity, "a suit must not complain of a government [official's] exercise of discretion, but rather must allege, and ultimately prove, that the [official] acted without legal authority or failed to perform a purely ministerial act." *Heinrich*, 284 S.W.3d at 372.

Because an *ultra vires* suit is, for all practical purposes, a suit against the governmental entity, relief is limited. *Heinrich*, 284 S.W.3d at 374. Therefore, a plaintiff alleging an ultra vires claim cannot recover retrospective monetary relief, but is instead limited to prospective declaratory and injunctive relief. *Lazarides*, 367 S.W.3d at 800, 805. "As *Heinrich* made clear, immunity for an ultra vires act is only a waiver with regard to bringing future acts into compliance

with the law." *City of Galveston v. CDM Smith, Inc.*, 470 S.W.3d 558, 569 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Heinrich*, 284 S.W.3d at 374).

4. Suits Challenging the Validity of a Statute

The UDJA is a remedial statute designed to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, or other legal relations." *Heinrich*, 284 S.W.3d at 370; *see* Tex. Civ. Prac. & Rem. Code § 37.002(b). The UDJA does not enlarge a trial court's jurisdiction, and a party's request for declaratory relief does not alter the suit's underlying nature. *See Heinrich*, 284 S.W.3d at 370. Private parties cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory relief. *See Heinrich*, 284 S.W.3d at 371; *see also Tex. Nat. Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 856 (Tex. 2002) (noting that a party cannot circumvent the State's sovereign immunity by characterizing a suit for money damages as a declaratory judgment claim).

However, "the state may be a proper party to a declaratory judgment action that challenges the validity of a statute." *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *see also Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633, 634 n. 4 (Tex. 2010) ("[W]hen the validity of ordinances or statutes is challenged, the [U]DJA waives immunity to the extent it requires relevant governmental entities

be made parties.") (emphasis in original); *City of McKinney v. Hank's Rest. Group, L.P.*, 412 S.W.3d 102, 112 (Tex. App.—Dallas 2013, no pet.) ("To summarize, the Declaratory Judgments Act waives governmental immunity against claims that a statute or ordinance is invalid. The Act does not waive immunity against claims seeking a declaration of the claimant's statutory rights or an interpretation of an ordinance.") (citation omitted).

B. Governmental Immunity Bars Appellants' Claims

Appellants assert *ultra vires* claims against Mayor Turner for violating Tex. Family Code § 6.204(c)(2); however, they seek injunctive relief requiring both Mayor Turner and the City 1) to "comply with section 6.204(c)(2) of the Texas Family Code" [by ordering the mayor to withdraw spousal benefits from all City employees] and 2) to "claw back" public funds allegedly spent on spousal benefits to same-sex married couples.

Appellants also seek declaratory relief against both Mayor Turner and the City.

1. Governmental Immunity Bars Appellants' Claims and Injunctive Relief Against the City

a. *Ultra Vires* Claims Prohibited against the City

To the extent any part of appellants' amended petition may be interpreted as lodging *ultra vires* claims

against the City, these claims are foreclosed. As set forth, *supra*, an *ultra vires* claim cannot be asserted against a governmental entity but must instead be brought against a government official or employee of a governmental entity. *See Heinrich*, 284 S.W.3d at 372–73. As applied to this case, the Texas Supreme Court reaffirmed this principle of law stating that, "unlike the Mayor . . . the City is not a proper party to an ultra-vires claim." *Pidgeon v. Turner*, 538 S.W.3d at 88 (citing *Heinrich*, 284 S.W.3d at 372–73). Pursuant to *Heinrich* and the law of this case,[11] we hold the City is immune from any alleged *ultra vires* claim.

b. The City's Immunity is not Waived by Assertion of Claims under the UDJA

The UDJA does not provide a separate basis for standing since it is "merely a procedural device for deciding cases already within a court's jurisdiction." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Moreover, the UDJA does not confer jurisdiction where none exists. *See IT-Davy*, 74 S.W.3d at 855 (the UDJA "does not extend a trial court's jurisdiction, and a litigant's request for declaratory relief does not confer jurisdiction on a court or change a suit's underlying nature.").

---

[11] "The law of the case' doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages." *Loram Maint. of Way, Inc. v. Lanni*, 210 S.W.3d 593, 596 (Tex. 2006) (quoting *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986)).

"The central test for determining jurisdiction is whether the 'real substance' of the plaintiff's claims falls within the scope of a waiver of immunity from suit." *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 389 (Tex. 2011). "While the [U]DJA waives sovereign immunity for certain claims, it is not a general waiver of sovereign immunity." *Id.* at 388. "Consequently, sovereign immunity will bar an otherwise proper [U]DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity." *Id.*

As discussed above, it is well-settled that *ultra* vires suits cannot be brought against the City, but must be brought against the government official in their official capacity. *See Heinrich*, 284 S.W.3d at 380. Thus, appellants' assertion of claims against the City under the UDJA does not waive City's immunity against *ultra vires* claims.

Although the UDJA itself waives a city's immunity for claims challenging the validity of its "ordinance[s] or franchise[s]," appellants assert no such claims in this case. *See Heinrich*, 284. S.W.3d at 373 n.6; *see also* Tex. Civ. Prac. & Rem. Code § 37.006(b). Appellants, in their amended petition, request declarations to address violations of state law;[12] none

[12] Despite the U.S. Supreme Court's holdings in *Windsor, Obergefell, Pavan*, and *Bostock*, discussed *infra*, the declaratory relief sought by appellants in this case presumes that Section 22 of the Houston City Charter, Section 6.204(c) of the Texas Family Code and Article I, Section 32 of the Texas Constitution remain valid and enforceable. We disagree.

challenge a statute or ordinance. Because appellants seek only to enforce existing law, this exception to governmental immunity is not available. *See Heinrich*, 284 S.W.3d at 372. We reject appellants' attempts to recharacterize their claims as constitutional challenges to existing legislative acts to save those claims from the City's immunity bar. Mayor Parker's discretionary act, made on advice of the city attorney, was not legislative, and thus does not represent a "municipal ordinance or franchise," nor a "statute," and, thus, is not subject to Section 37.006(b). *See Univ. Scholastic League v. Sw. Officials Ass'n, Inc.*, 319 S.W.3d 952, 965 (Tex. App.—Austin 2010, no pet.). "[A] party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment." *See City of Dallas v. Albert*, 345 S.W.3d 368, 378 (Tex. 2011) (analyzing whether UDJA waived a municipality's immunity); *City of Houston v. Williams*, 216 S.W.3d 827, 828–29 (Tex. 2007) (per curiam).

Consequently, immunity bars appellants' UDJA claims against the City.

2. Governmental Immunity Bars Appellants' Suit against Mayor Turner

Mayor Turner is shielded from suit and liability by governmental immunity unless appellants can demonstrate immunity has been waived. *See Chambers-Liberty Cntys. Navigation Dist.*, 575 S.W.3d at 344. As set forth above, to fall within this *ultra vires* exception to governmental immunity, appellants must allege,

and ultimately prove, that Mayor Turner acted *without legal authority* or failed to perform a *purely ministerial act. See Heinrich*, 284 S.W.3d at 372.

Jurisdiction is determined at the time suit is filed in the trial court. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 n.9; *see Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 570 (2004) ("The jurisdiction of the Court depends on the state of things at the time of the action brought. This time-of-filing rule is hornbook law. . . .").

In their brief appellants assert that the trial court "had jurisdiction over those claims when this suit was filed in *2013"* and cites to the original petition –trial court No. 2013-75301, which was dismissed on May 9, 2014. This case began on October 22, 2014 – trial court No. 2014-61812. Thus, the relevant date for jurisdiction to be determined is October 22, 2014.

a. MAYOR PARKER'S DIRECTIVE WAS A DISCRETIONARY ACT AND, THUS, COULD NOT BE *ULTRA VIRES*

One method to waive immunity as *ultra vires* is to plead and prove that the government official "failed to perform a purely ministerial act." *Heinrich*, 284 S.W.3d at 372. "Ministerial acts are those 'where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.'" *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (quoting *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex.1994)). "Discretionary acts on the other hand

require the exercise of judgment and personal deliberation." *Emmett*, 459 S.W.3d at 587.

Here, appellants do not plead or dispute that Mayor Parker failed to perform a purely ministerial act. Appellants also do not contest by pleading or otherwise that under the Houston City Charter, art. VI, § 7a, the Mayor of the City of Houston has the authority to enforce laws and ordinances and to prescribe rules governing each department "necessary or expedient for the general conduct of the administrative department." Further, appellants do not plead or dispute that Mayor Parker's decision to interpret extrinsic law as requiring the City to continue to provide spousal benefits to same-sex spouses of city employees on an equal basis falls within Mayor Parker's discretion under the Houston City Charter. In fact, in their amended petition, appellants allege that Mayor Parker and city officials "disregard[ed] state law merely because it conflicts with their personal beliefs of what the U.S. Constitution or federal law requires." In so doing, appellants concede Mayor Parker's directive and its implementation was a discretionary act.

We conclude appellants have failed to both plead and establish a waiver of immunity based on the Mayor Parker's failure to perform a purely ministerial act. *See Emmett*, 459 S.W.3d at 587. Thus, there is no waiver of governmental immunity on this basis.

b. Failure to Plead or Prove Mayor Parker Acting "Without Legal Authority" in October 2014

Another method of waiving governmental immunity is to assert an *ultra vires* claim based on actions taken "without legal authority." *Heinrich*, 284 S.W.3d at 372. To assert an *ultra vires* claim under this approach, appellants had to plead and prove two elements: "(1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority." *McRaven*, 508 S.W.3d at 239.

Appellants fail to plead and prove that Mayor Parker acted outside of her legal authority. Indeed, the events occurring in October 2014 prove just the opposite–that Mayor Parker's actions were within her authority. At that time, a section of the federal DOMA had been struck down by *Windsor*. *See* 570 U.S. at 774–75. Additionally, although not binding, but offering persuasive authority, the State of Texas was appealing an injunction enjoining the State "from enforcing Article I, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage." *DeLeon v. Perry*, 975 F. Supp.2d 632, 666 (W.D. Tex. 2014) (Garcia, J.), *aff'd sub nom., DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).[13] Federal district

[13] While the appeal was under submission, in June 2015, the U.S. Supreme Court decided *Obergefell v. Hodges*, 576 U.S. 644 (2015), which held that "same sex couples may exercise their fundamental right to marry in all States," and that "that there is no

Judge Orlando Garcia, however, stayed execution of the February 26, 2014 injunction, allowing the State to appeal to the Fifth Circuit Court of Appeals. *Id.*

Further, at the time suit was filed, the City of Houston was specifically enjoined from discontinuing the spousal benefits appellants challenge here. On August 29, 2014, federal district Judge Sim Lake entered a preliminary injunction order "preserving the status quo and enjoining the City of Houston from discontinuing spousal employment benefits to same-sex spouses of City employees until such time as final judgment is entered in this case or it is dismissed." *See Freeman v. Parker*, Case No. 4:13-cv-3755 (S.D. Tex. Aug. 29, 2014) (Lake, J.) ("*Freeman* Injunction"). The *Freeman* injunction stayed the proceedings "pending final resolution of the constitutionality of the Texas marriage ban in *DeLeon v Perry*." *See id.* At the time this suit was filed, the *Freeman* injunction was in effect, as it had neither been stayed, reversed, or lifted.

Under these circumstances, Mayor Parker's actions in October 2014–continuing to provide spousal benefits to all spouses of city employees on an equal basis–were authorized and, thus, not *ultra vires*. Because appellants have failed to demonstrate a fundamental component of their assertion that on October

---

lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Obergefell*, 576 U.S. at 681. The parties in *DeLeon* agreed that the injunction appealed was correct in light of *Obergefell* and on July 1, 2015, the Fifth Circuit affirmed the district court's preliminary injunction. *DeLeon*, 791 F.3d. at 624-25.

22, 2014, Mayor Parker acted "without legal authority," governmental immunity has not been waived. *See McRaven*, 508 S.W.3d at 239.

c. Alternatively, Mayor Parker's Interpretation of Extrinsic Law, Even if Mistaken, is not *Ultra Vires*

The standard for an *ultra vires* act is whether it was done without legal authority, not whether it was correct. *See McRaven*, 508 S.W.3d at 243.

Appellants argue that the federal courts have no jurisdiction to intrude upon state-court rulings and that the *Freeman* injunction was void. Even assuming, *arguendo*, that Mayor Parker was wrong in relying upon federal authority (*e.g.*, *Windsor*, the Constitution, the Equal Protection and Due Process clauses, the *Freeman* injunction, and the federal district court's *De Leon* decision), the city attorney's legal opinion, and the then-existing persuasive authority overturning as unconstitutional the denial of full rights, benefits, and marital status to same-sex spouses and couples, Mayor Parker's continuing directive and actions to offer spousal employment benefits to same-sex spouses of city employees would still not have been *ultra vires* acts in October 2014 or thereafter.

In *McRaven*, the Texas Supreme Court held that even serious mistakes by government officials in interpreting extrinsic law cannot not be considered *ultra vires* acts for waiver of immunity purposes. 508 S.W.3d at 242–43. Instead, "only when these improvident

actions are unauthorized does an official shed the cloak of the sovereign and act *ultra vires*." *Id.* at 243.

> When the ultimate and unrestrained objective of an official's duty is to interpret collateral law, a misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous. Our intermediate courts of appeals have repeatedly stated that it is not an *ultra vires* act for an official or agency to make an erroneous decision while staying within its authority. . . . As important as a mistake may be, sovereign immunity comes with a price; it often allows the `improvident actions' of the government to go unredressed. Only when these improvident actions are unauthorized does an official shed the cloak of the sovereign and act *ultra vires*.

Id. Thus, even if the Mayor misinterpreted the extrinsic law, this mistake would not waive the Mayor's immunity under the *ultra vires* exception.

Although appellants attempt to limit *McRaven* to officials who enjoy absolute authority, the Texas Supreme Court did not. While McRaven himself enjoyed broad authority, that decision requires only a showing that the official enjoys "some (but not absolute) discretion to act." *McRaven*, 508 S.W.3d at 239. As set forth above, in this case, appellants failed to plead and show that any Houston mayor lacked the authority to make enforcement decisions or to interpret extrinsic law. Appellants argue, instead, that Mayor Parker acted without legal authority because in issuing her directive she

did not follow *Baker v. Nelson*, 409 U.S. 810 (1972), *overruled by Obergefell*, 576 U.S. at 675.[14]

In October 2014, the precedential value of *Baker* was being called into doubt due to the "doctrinal developments" in the Supreme Court's equal protection jurisprudence in the forty years after *Baker*. *See De Leon*, 975 F. Supp. 2d at 64748 (examining cases). The doctrinal developments include the 2013 decision by the U.S. Supreme Court in *Windsor*. *See Windsor v. United States*, 699 F.3d 169, 178–79 (2d Cir. 2012) (calling *Baker* into doubt), *aff'd*, 570 U.S. 744 (2013) (citation omitted). Thus, we reject appellants' contention that the Mayor was without legal authority to interpret extrinsic law to conclude that providing same-sex spouses with access to spousal benefits was legally required.

---

[14] In 1972, the U.S. Supreme Court summarily dismissed for want of substantial federal question an appeal from a Minnesota Supreme Court decision finding no right to same-sex marriage as violative of due process and equal protection rights under the Fourteenth Amendment. *Baker v. Nelson*, 291 Minn. 310, 313, 191 N.W.2d 185, 187 (1971), *appeal dismissed*, 409 U.S. 810 (1972), *overruled by Obergefell*, 576 U.S. at 675. "*Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell*, 576 U.S. at 675.

d. ALTERNATIVELY, APPELLANTS HAVE NOT PLEADED AND CANNOT ESTABLISH THAT MAYOR PARKER WAS ACTING "WITHOUT LEGAL AUTHORITY" IN OCTOBER 2014 WHEN MAYOR PARKER DECLINED TO ENFORCE STATE AND LOCAL LAWS THAT WERE UNCONSTITUTIONAL AND UNENFORCEABLE

Even if affording spousal benefits to same-sex spouses of city employees was not mandated by the *Freeman* injunction in August 2014, the Mayor's directive and its implementation were discretionary actions, as set forth *supra*, within the Mayor's powers afforded to her under the Houston City Charter and Mayor Parker's decision was based on well-grounded legal authority, at the time suit was filed, if not before.

Appellants' claims, therefore, do not fall into the *ultra vires* exception to governmental immunity.

e. APPELLANTS HAVE NOT PLEADED AND CANNOT ESTABLISH THAT EITHER MAYOR PARKER OR MAYOR'S TURNER'S CONTINUATION OF THE DIRECTIVE TO PROVIDE SPOUSAL EMPLOYMENT BENEFITS TO SAME-SEX SPOUSES OF CITY EMPLOYEES IS "WITHOUT LEGAL AUTHORITY"

Through a series of opinions following *Windsor*,[15] the U.S. Supreme Court has made clear that the Due

[15] The U.S. Supreme Court in *Windsor* observed the fact that DOMA "reject[ed] the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married

Process and Equal Protection Clauses require States to grant same-sex married couples the same legal rights, benefit, and responsibilities as different-sex married couples. Although appellants argue that we should apply these decisions retroactively, we decline to do so because appellants' contention is inconsistent with our requirement under the law to apply U.S. Supreme Court precedent to cases pending on appeal. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96–97 (1993) (explaining "a decision extending the benefit of the judgment to the winning party is to be applied to other litigants whose cases were not final at the time of the first decision . . . whether such event predate or postdate our announcement" of the decision) (quotation and alteration omitted). This case is not final and, as such, we follow the Supreme Court's holdings in *Obergefell, Pavan, and Bostock* in reaching our decision.

Obergefell v. Hodges

In 2015, the U.S. Supreme Court concluded that the state DOMAs at issue violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, based on that conclusion, the Court held

---

couples within each State, though they may vary . . . from one State to the next." 570 U.S. at 768. The Court further expounded that the "create[ion of] two contradictory marriage regimes within the same State" impermissibly "place[d] same-sex couples in an unstable position of being in a second-tier marriage" and "wr[o]te[] inequality into the entire United States Code." *Id.* at 771–72.

states may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" and may not "refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Obergefell v. Hodges*, 576 U.S. 644, 675, 681 (2015).

While the Court recognized that a state is free to decide in the first instance what benefits flow from marriage, once that question is decided, Due Process and Equal Protection Clauses preclude states from denying married same-sex couples the "constellation of benefits that States have linked to marriage." *See Obergefell*, 576 U.S. at 646–47. Those material benefits include employment benefits. *See id.* at 670. The Court in *Obergefell* explained:

> The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.
>
> There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are

> unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.
>
> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Id. at 670–71.

Nevertheless, appellants urge us to enforce a law providing for marriage on separate terms and conditions as applied to employment benefits: one for different-sex couples that includes benefits and one for same-sex couples that excludes them. Because appellants' attempt to prevent the City from offering employment benefits to married same-sex couples on the same terms and conditions as married different-sex couples cannot be reconciled with the requirements of the U.S. Constitution; we reject it.

Pavan v. Smith

Two years later, in 2017, the Court addressed an Arkansas law that listed a birth mother's different-sex spouse on their child's birth certificate, but not a birth

mother's same-sex spouse. *See Pavan v. Smith,* ___ U.S. ___, 137 S. Ct. 2075, 2078 (2017) (per curiam). The Arkansas Supreme Court held that *Obergefell* did not apply, but the U.S. Supreme Court disagreed and summarily reversed. The U.S. Supreme Court held that under the challenged law, "same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate." *Id.* The Court reiterated its holding that *Obergefell* "proscribes such disparate treatment." *Id.* "Indeed, in listing those terms and conditions–the 'rights, benefits, and responsibilities' to which same-sex couples, no less than opposite-sex couples, must have access," was "no accident." *Id.*; *see Treto v. Treto*, No. 13-1800219-CV, ___ S.W.3d ___, 2020 WL 373063, at *4 (Tex. App.—Corpus Christi Jan. 23, 2020, no. pet. h.) ("Accordingly, it follows that under *Pavan*, we are to give effect to the ancillary benefits of a same-sex marriage, including [application of the marital presumption equally to] the non-gestational spouse of a child born to the marriage.").

Bostock v. Clayton Cnty, Ga.

While the prior federal cases relied upon by the trial court focus on the equal protection and due process violations that would attend denying same-sex spouses access to city benefits, last year, in 2020, the U.S. Supreme Court provided an additional ground to hold that denying benefits to same-sex spouses of city employees would be improper: because it would likely violate the Civil Rights Act of 1964. *See Bostock v.*

Clayton Cnty., Ga., ___ U.S. ___, 140 S. Ct. 1731, 1737 (2020).

In *Bostock*, the Court reviewed three cases challenging the employment termination of individuals based upon their sexual orientation or gender identity and held that such terminations violated Title VII of the Civil Rights Act. *See Bostock*, 140 S. Ct. at 1737. The Court explained:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Id. These same reasons would also prohibit enforcing Texas DOMAs and the discriminatory law appellants seek to advance.

In sum, there can be no uncertainty as to the propriety and legality of affording spousal benefits equally to all married City employees under *Windsor*, *Obergefell*, *Pavan*, and *Bostock*. The U.S. Supreme Court rulings in these cases support the trial court's ruling here that the Mayor and the City have not committed any *ultra vires* or impermissible act.

f. No Basis To Eliminate Spousal Benefits for all City Employees

Although appellants did not plead that the Mayor is committing an *ultra vires* act by declining to withdraw spousal benefits from all spouses of City employees in alleged defiance of § 6.204(c)(2), they argued it in their summary judgment and now on appeal. Appellants argue that if *Obergefell* and *Pavan* require Houston to pay equal spousal benefits to all married couples, the only way to reconcile these decisions with Texas Family Code § 6.204(c)(2) is for the City to withdraw spousal benefits for all municipal employees. Appellants contend this would ensure equal treatment and be compliant with Section 6.204(c)(2) of the Texas Family Code.

Appellants' argument presupposes that the City providing employee benefits for married same-sex couples has been compelled by the federal government to do so. Appellants argue that spousal employment benefits are a "taxpayer-funded gratuity" that is "entirely different from the licensing and recognition of marriage. Appellants analogize this to *Harris v. McRae*, where the U.S. Supreme Court held that, "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 448 U.S. 297, 317–18 (1980). Appellants' argument misstates the holding in *Obergefell*. States are not required to subsidize marriage. *See*

Obergefell, 576 U.S. at 669–70 ("[T]he States are in general free to vary the benefits they confer on all married couples. . . ."). However, once a state decides to grant certain benefits as an incident of marriage, it must grant that benefit to all married couples, regardless of sex. *See Windsor*, 570 U.S. at 772 (placing same-sex couples in a "second-tier marriage" without federal benefits "demeans the couple, whose moral and sexual choices the Constitution protects"). Further, while the State might be able to condition certain benefits on Medicare eligibility or tobacco use without running afoul of *Obergefell*, it may not condition those benefits on whether the marriage is between a same-sex or different-sex couple.

Appellants' contention that the State can refuse to provide same-sex couples the same benefits as different-sex couples based on its interest in furthering procreation and child-rearing was rejected in *Obergefell*. *See* 576 U.S. at 679. In *Obergefell*, the court concluded that excluding same-sex couples from the protections of marriage would hinder a state's interest in child-drearing, procreation, and education. *See id.* at 668–69 ("Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. . . . The marriage laws at issue here thus harm and humiliate the children of same-sex couples."); *see also Windsor*, 570 U.S. at 773 ("DOMA also brings financial harm to children of same-sex couples.").

Finally, to the extent that appellants suggest that their interest in religious liberty "weighs heavily"

against treating same-sex and different-sex couples the same, appellants' contention is foreclosed. The City is not a religious organization and "[t]he Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," despite any individual person's religious disagreement. *Obergefell*, 576 U.S. at 679–80. Moreover, appellants' reliance on *Burwell v. Hobby Lobby Stores*, which was brought under the Religious Freedom Restoration Act ("RFRA") and addressed whether the contraceptive mandate in the Affordable Care Act substantially burdened private employers' "religious exercise," is misplaced, because it is not analogous. *See* 573 U.S. 682 (2014). Moreover, RFRA has a statutory standing provision that does not apply to state *ultra vires* claims. *See* 42 U.S.C. § 2000bb-1(c) (West 2019).

Appellants neither plead nor provide proof that Mayor Turner is committing an *ultra vires* act by declining to withdraw spousal benefits from all spouses of city employees. Additionally, appellants provide no basis to strip spousal benefits from all employees of the City. Appellants' arguments are merely attempting to relitigate that which has been foreclosed by *Obergefell* and subsequent U.S. Supreme Court cases that we are bound to follow.[16]

---

[16] We take judicial notice that after *Obergefell* was decided, on July 1, 2015, the Fifth Circuit upheld a lower court's ruling enjoining the State from enforcing the provisions in the Texas Constitution and the Family Code, or any other laws or regulations, that prohibit "a person from marrying another person of the

3. Appellants Not Entitled to Injunctive Relief

In their amended petition, appellants sought both temporary and permanent injunctive relief. Specifically, appellants sought to enjoin "the mayor and the city to comply with section 6.204(c)(2) of the Texas Family Code."

a. Standard of Review and Governing Law

A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Id.* "To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Id.* Similarly, an applicant seeking permanent injunctive relief must demonstrate: (1) a wrongful act; (2) imminent harm; (3) irreparable injury; and (4) the absence of an adequate remedy at *law. See Messier v. Messier*, 389

---

same sex or recognizing same-sex marriage." *De Leon v. Abbott*, 791 F.3d 619, 624–25 (5th Cir. 2015). In so doing, the Fifth Circuit noted that "both sides now agree" that "the injunction appealed from is correct in light of *Obergefell." Id.* at 625. Additionally, we take judicial notice that the State now follows *Obergefell* in providing employee benefits to same-sex spouses of state employees. *See*, *e.g.*, https://www.ers.texas.gov/PDFs/Dependent-eligibility-chart (accessed March 29, 2021).

S.W.3d 904, 908 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

"An applicant for injunction must establish its probable right to recovery and a probable injury by competent evidence adduced at a hearing." *Ron v. Ron*, 604 S.W.3d 559, 568 (Tex. App.—Houston [14th Dist.] 2020, no pet.). "An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204; *accord Cheniere Energy, Inc. v. Parallax Enters. LLC*, 585 S.W.3d 70, 76 (Tex. App.—Houston [14th Dist.] 2019, pet. dism'd).

The decision to grant or deny a temporary injunction lies in the sound discretion of the trial court, and the court's grant or denial is subject to reversal only for a clear abuse of that discretion. *Butnaru*, 84 S.W.3d at 204; *see Wiese v. Heathlake Cmty. Ass'n, Inc.*, 384 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("We review a trial court's decision to grant or deny a permanent injunction for an abuse of discretion."). A trial court does not abuse its discretion if it applies the law correctly and some evidence reasonably supports its ruling. *See Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 916 (Tex. 2020). We view the evidence in the light most favorable to the trial court's decision. *Wash. DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 740 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en Banc).

b. Failure to Establish Requisite Elements

Appellants fail to plead or establish the elements required to obtain any temporary or permanent injunctive relief.

i. No probable, irreparable injury, or imminent harm

Appellants have not pleaded that they will suffer a probable, irreparable injury or any imminent harm. Indeed, appellants have not pleaded any imminent consequence that will flow from the City's continued provision of spousal benefits to same-sex spouses. Rather appellants alleged only that they regard same-sex relationships "as immoral and sinful, in violation of their sincerely held religious beliefs" and, therefore, are harmed because they believe their tax dollars have been "compelled to subsidize homosexual relationship." Appellants, however, make no effort to show that such allegations are sufficient, as a matter of law, to demonstrate probable, irreparable injury or imminent harm. As such, appellants' request for injunctive relief was properly dismissed.

ii. No Probable Right to Recovery

As set forth, *supra*, appellants also could not show a probable right to recovery or any wrongful act by Mayor Parker, Mayor Turner, or the City, which is an essential requirement to obtain the injunctive relief requested.

iii. Purpose of Preserving Status Quo not Met

The purpose of a temporary injunction is to preserve the status quo pending a trial on the merits. *Butnaru*, 84 S.W.3d at 204. The status quo here is the City's continuing to offer equal benefits to all spouses of city employees. Instead of preserving the status quo, the requested injunctive relief would dramatically disrupt the status quo, and provide appellants essentially all relief appellants would be entitled to if they prevailed on final judgment. *See Tex. Foundries, Inc. v. Int'l Molders & Foundry Workers' Union*, 248 S.W.2d 460, 464 (Tex. 1952) ("It is settled law that a court will not decide disputed ultimate fact issues in a hearing on an application for a temporary injunction; nor will a temporary injunction issue if the applicant would thereby obtain substantially all the relief which is properly obtainable in a final hearing."). Appellants cannot show a preservation of status quo element, which is a requirement for the injunctive relief sought.

Appellants' issues I, II, III, IV, V, and VI are overruled.

C. Appellants Failed to Establish Standing to Order the City and Mayor to "Claw Back" Any Public Funds Spent in the Past

Appellants also seek a "temporary and permanent injunction requiring the mayor and the city to claw back all public funds that they illegally spent on spousal benefits for the homosexual partners of city

employees." It is unclear what appellants mean by the phrase "claw back." Appellants do not identify what funds would have to be recovered by the City and from whom reimbursement would have to be sought. Appellants also do not indicate if monies are to be sought from and reimbursed by third-party insurers, beneficiaries, or City employees themselves.

Appellants have not shown they have standing to seek or that the court has jurisdiction to order, a "claw back" or other recoupment. A cause of action to recover public funds improperly or illegally spent belongs exclusively to the governmental entity that spent them. *See Blue*, 34 S.W.3d 547, 556 (Tex. 2000). Consequently, appellants have no standing to pursue a claim for recoupment as that claim belongs to the City. Their demand for a "claw back" remedy was, therefore, properly dismissed.

Additionally, as analyzed, *supra*, appellants are not entitled to any injunctive relief from the City for an *ultra vires* claim from which the City is immune.

Moreover, even if appellants could sue the City for alleged *ultra vires* acts by the Mayor, it is well-settled that, when plaintiffs assert only *ultra vires* claims, only prospective injunctive relief, measured from the date of the injunction, is available. *See Heinrich*, 284 S.W.3d at 380; *Sefzik*, 355 S.W.3d at 621. Consequently, appellants lack standing to request the trial court to impose retrospective monetary relief ordering any "claw back" of public funds already spent. *See Lazarides*, 367 S.W.3d at 800, 805.

Alternatively, appellants lack standing as taxpayers to seek "claw back" of public funds already spent. To establish standing as taxpayers, appellants cannot merely state residential addresses within the City, they must show that 1) they actually pay property taxes in the City,[17] and 2) there has been an actual, measurable expenditure of public funds on the allegedly illegal activity that is more than *de minimis*. *Andrade v. Venable*, 372 S.W.3d 134, 136 (Tex. 2012). Even assuming, *arguendo*, that appellant could establish the first element–that they are taxpayers in Houston, they cannot demonstrate the second element–any illegal City expenditures. As demonstrated above, Mayor Parker's actions were not illegal on the date this lawsuit was filed. When this suit was filed in October 2014, provision of same-sex benefits pursuant to Mayor Parker's directive was mandated by the *Freeman* injunction. Moreover, based upon the U.S. Supreme Court's decision in *Windsor* (holding federal DOMA unconstitutional) and the persuasive federal district court opinion in *De Leon* (holding Texas DOMA unconstitutional), both decided before this lawsuit was filed in 2014, the City Attorney could reasonably have concluded and advised the Mayor that Texas DOMA was unconstitutional and therefore unenforceable. Thus, appellants lacked standing, as taxpayers, to

---

[17] *See Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001); *see also Town of Flower Mound v. Sanford*, No. 2-07-032-CV, 2007 WL 2460329, at *3 (Tex. App.—Fort Worth Aug. 31, 2007, no pet.) (mem. op.).

challenge Mayor Parker's *legal* actions at the time suit was filed.

Appellants' issue VII and IX are overruled.

D. Appellants Not Entitled to Declaratory Relief

Appellants seek three declarations in their amended petition: a declaration that the Mayor's directive of November 19, 2013 violated state and City law; a declaration that the Mayor and City officials have no authority to disregard state or city law merely because it conflicts with their personal beliefs of what the U.S. Constitution or federal law requires; and a declaration that the Mayor and City are violating state law by continuing to enforce the Mayor's directive of November 19, 2013. They moved for summary judgment only on their second request; however, they are not legally entitled to any declaration as a matter of law.

Whether the Mayor or City violated state or local law in the past or is violating it now in providing spousal benefits to same-sex spouses is legally irrelevant if the City was under federal court order to do so on the date the lawsuit was filed. Whether the Mayor or City arguably violated state or local law in providing spousal benefits to same-sex spouses also is legally irrelevant if those laws were unconstitutional and unenforceable under *Windsor, De Leon*, or later *Obergefell, Pavan*, and *Bostock* as well as the United States Constitution.

The same is true of the completely improper proposed declaration that purports to blame the Mayor's and City's provision of spousal benefits to same-sex spouses solely on personal idiosyncrasies. Appellants have not and cannot demonstrate any legal purpose that would be served by such a declaration. Instead, it serves only as a political distraction from the federal legal authority that bound the City and Mayor as of the date this lawsuit was filed, if not before.

The uncontroverted evidence here shows that, at the time this lawsuit was filed, the City was under federal court order to maintain the status quo, the federal district court in *De Leon* had already declared Section 6.204 unconstitutional, and *Windsor* had mandated that spousal benefits offered to different-sex couples must be offered to same-sex couples on an equal basis.

Even at the time Mayor Parker issued her directive, it is undisputed that she consulted the city attorney, who interpreted *Windsor* to require the City to afford benefits to same-sex spouses. As set forth above, Mayor Parker exercised her discretion to follow the city attorney's legal advice. As such, there was no basis for ordering the declarations appellants seek.

Appellants' issue VIII is overruled.

V. CONCLUSION

Appellants' issues on appeal are overruled. Appellants have not shown a waiver of immunity provided the trial court with jurisdiction; thus, we affirm the

trial court's order granting the Mayor's and the City's plea to the jurisdiction and/or counter-motion for summary judgment.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Zimmerer, Poissant, and Wilson (Wilson, J., concurring and dissenting).

Affirmed and Majority Opinion and Concurring and Dissenting Opinion filed April 29, 2021.

[SEAL]

In The

Fourteenth Court of Appeals

NO. 14-19-00214-CV

JACK PIDGEON AND LARRY HICKS,
Appellants

V.

SYLVESTER TURNER, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF HOUSTON, AND THE CITY OF HOUSTON,
Appellees

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2014-61812

CONCURRING AND DISSENTING OPINION

In its final order, the trial court impliedly dismissed all claims asserted in this case for lack of subject-matter jurisdiction and, at the same time, impliedly granted summary judgment on the merits of the plaintiffs' claims. This court should employ a straightforward analysis explaining how the plaintiffs have

not shown the trial court erred in dismissing all claims for lack of subject-matter jurisdiction based on governmental immunity, affirming only this ruling of the trial court, and vacating the trial court's rulings on the merits. Instead, the majority includes substantial amounts of obiter dicta in its analysis. In addition, after correctly concluding that the plaintiffs have not shown that the trial court erred in dismissing all claims for lack of subject-matter jurisdiction, the majority proceeds to address the merits of the plaintiffs' claims, over which this court lacks subject-matter jurisdiction. An appellate court should strive to avoid unnecessary statements in its opinions, especially if the unnecessary statements address matters over which the court lacks subject-matter jurisdiction.

Appellants Jack Pidgeon and Larry Hicks (collectively, the "Pidgeon Parties") sued appellee Sylvester Turner, in his official capacity as the Mayor of the City of Houston (the "Mayor") and appellee City of Houston ("the City"). In their live petition, the Pidgeon Parties alleged two claims: (1) the Pidgeon Parties brought suit as taxpayers to enjoin the Mayor's alleged ultra vires expenditures of public funds, and to secure an injunction that requires city officials to claw back public funds that were spent in violation of section 6.204(c)(2) of the Texas Family Code; article I, section 32 of the Texas Constitution; and article II, section 22 of the City of Houston charter; and (2) the Pidgeon Parties brought suit under the Texas Declaratory Judgments Act, asking the trial court to declare that the Mayor Annise Parker's directive of November 19, 2013 violated state

law, and to declare further that the mayor and city officials have no authority to disregard state law merely because it conflicts with their personal beliefs of what the United States Constitution or federal law requires. The Pidgeon Parties asked the trial court to make various declarations, to issue a temporary and a permanent injunction, and to award them attorney's fees.

The Mayor and the City (collectively, the "City Parties") asserted in "Defendant's Plea to the Jurisdiction and/or Counter-Motion For Summary Judgment" (the "Hybrid Motion") that (1) the trial court lacks subject-matter jurisdiction over all of the Pidgeon Parties' claims because the City Parties enjoy immunity from suit under the doctrine of governmental immunity; (2) the trial court lacks subject-matter jurisdiction over the Pidgeon Parties' "claw back" claim because the Pidgeon Parties do not have standing to seek "claw back" of public funds already spent; (3) as a matter of law the Pidgeon Parties are not entitled to any declaratory relief or attorney's fees; and (4) as a matter of law the Pidgeon Parties are not entitled to any injunctive relief. Under the first two grounds of the Hybrid Motion, the City Parties would be entitled to a dismissal for lack of subject-matter jurisdiction. Under the second two grounds, the City Parties would be entitled to dismissal of claims on summary judgment on the merits. The trial court signed a final order granting the Hybrid Motion and dismissing all of the Pidgeon Parties' claims without specifying any ground on which the trial court relied. Thus, the trial court implicitly based the order on each ground stated in the Hybrid Motion,

dismissing for lack of jurisdiction based on the first two grounds and dismissing on the merits based on the third and fourth grounds. *See Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818, 824 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

When there is an issue as to the trial court's subject-matter jurisdiction, including an issue of governmental immunity, the trial court first must determine that it has subject-matter jurisdiction before addressing the merits. *See Hillman v. Nueces County*, 579 S.W.3d 354, 359 n.5 (Tex. 2019); *Curry v. Harris County Appraisal Dist.*, 434 S.W.3d 815, 820 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In the face of an issue or doubt as to whether a court has subject-matter jurisdiction, a court may not presume that it has subject-matter jurisdiction and proceed to adjudicate the merits. *See Zachary Const. Corp. v. Port of Houston Ayth. of Harris Cnty.*, 449 S.W.3d 98, 105 (Tex. 2014); *Curry*, 434 S.W.3d at 820. If a court determines that it lacks subject-matter jurisdiction over claims, the court cannot rule on the merits of the claims and must dismiss the claims for lack of subject-matter jurisdiction, or, if possible, the court may transfer the claims to a court that has subject-matter jurisdiction over the claims. *See In re Dow*, 481 S.W.3d 215, 220 (Tex. 2015) (stating that "Without jurisdiction, we may not address the merits of the case"); *Kormanik v. Seghers*, 362 S.W.3d 679, 693 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

When reviewing an order in which the trial court paradoxically dismisses claims for lack of subject-matter jurisdiction and also adjudicates the merits of those claims, this court should first address all the challenges to the trial court's subject-matter jurisdiction. *See Curry*, 434 S.W.3d at 820. If the trial court correctly determined that it lacked subject-matter jurisdiction, then this court should affirm this ruling and vacate that part of the order in which the trial court addressed the merits. *See Stamos v. Houston Indep. Sch. Dist.*, No. 14-18-00340-CV, 2020 WL 1528047, at *4 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, no pet.) (mem. op.); *Curry*, 434 S.W.3d at 820. If the trial court erred in dismissing the claims for lack of subject-matter jurisdiction, then the trial court had the power to adjudicate the merits, and only then should this court address the challenges to the grounds on which the trial court dismissed on the merits. *See Curry*, 434 S.W.3d at 820.

On appeal, the Pidgeon Parties have not shown that the trial court erred in dismissing all of their claims for lack of subject-matter jurisdiction based on governmental immunity under the first ground of the Hybrid Motion. The only bases for avoiding governmental immunity from suit that the Pidgeon Parties have asserted are (1) the waiver of immunity contained in the Texas Declaratory Judgments Act, and (2) their alleged ultra vires claim against the Mayor. The waiver of immunity contained in the Texas Declaratory Judgments Act applies only if the claimant seeks a declaratory judgment that a legislative pronouncement is

unconstitutional or otherwise invalid. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633-35 (Tex. 2010). Because the challenged directive in this case is not a legislative pronouncement, the waiver of immunity under the Texas Declaratory Judgments Act does not apply to the Pidgeon Parties' claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b); *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *First State Bank of DeQueen*, 325 S.W.3d at 633-35.

The only basis for avoiding the Mayor's immunity from suit the Pidgeon Parties assert on appeal is that this immunity does not apply to ultra vires claims. To fall within this exception to immunity, the Pidgeon Parties must not complain of the Mayor's exercise of discretion, but rather must allege, and ultimately prove, that the Mayor failed to perform a purely ministerial act or acted without legal authority. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 (Tex. 2009). The Pidgeon Parties have not alleged or argued that the Mayor failed to perform a purely ministerial act. Based on advice of counsel, Mayor Parker decided that federal law required the City to afford same-sex spouses of City employees the same benefits as opposite-sex spouses. In the Hybrid Motion, the City Parties argued that this decision was a discretionary act within Mayor Parker's powers as mayor of Houston, including her powers under article VI, section 7a of the Houston City Charter. On appeal, the Pidgeon Parties have not challenged the bases of this argument; instead, the Pidgeon Parties assert that Mayor

Parker did not have discretion or authority to violate the law. But, if Mayor Parker had the authority and discretion to determine whether federal law requires the City to afford same-sex spouses of City employees the same benefits as opposite-sex spouses, the exercise of this authority and discretion cannot be an ultra vires act, even if Mayor Parker made the wrong determination. *See Hall v. McRaven*, 508 S.W.3d 232, 242-43 (Tex. 2017). In addition, when the Pidgeon Parties filed this suit, a federal district judge in the *Freeman* case had issued a preliminary injunction, ordering the City not to discontinue spousal benefits to same-sex spouses of City employees. *See Freeman v. Parker*, Case No. 4:13-cv-3755 (S.D. Tex. Aug. 29, 2014). While the Pidgeon Parties allege that the *Freeman* suit was collusive, there was no question but the injunction was in effect and had not been invalidated by any court.

The above analysis alone suffices to explain why the trial court's jurisdictional dismissal based on governmental immunity should be affirmed. The majority need not and should not include the obiter dicta contained in subsections c, d, e, and f of section IV. B. 2. of the majority opinion[1] or in section IV.C. of the majority opinion.[2] Because the trial court correctly determined that it lacked subject-matter jurisdiction based on governmental immunity and because this court agrees with this determination, this court has no jurisdiction to adjudicate the merits of the Pidgeon Parties' claims,

---

[1] *See ante* at 21-30.

[2] *See ante* at 33-35.

and this court should not address the merits grounds in the Hybrid Motion, as the court does in section IV. B. 3. of the majority opinion[3] and in section IV.D of the majority opinion.[4] *See Hillman*, 579 S.W.3d at 359 n.5; *In re Dow*, 481 S.W.3d at 220. In its judgment, the majority affirms the trial court's order granting the Hybrid Motion. Instead of affirming the entire order granting the Hybrid Motion, this court should affirm the part of the order in which the trial court dismisses all claims for lack of jurisdiction based on governmental immunity and vacate the part of the order in which the trial court dismisses the claims on the merits. *See Stamos*, 2020 WL 1528047, at *4; *Curry*, 434 S.W.3d at 820. To the extent this court affirms the trial court's rulings on the merits, I respectfully dissent. To the extent the court affirms the trial court's jurisdictional dismissal based on governmental immunity, I respectfully concur in the judgment only.

/s/ Randy Wilson
Justice

Panel consists of Justices Zimmerer, Poissant, and Wilson (Poissant, J., majority).

---

[3] *See ante* at 30-33.

[4] *See ante* at 35-36.

CAUSE 2014-61812

JACK PIDGEON and LARRY HICKS	§	IN THE DISTRICT COURT OF
V.	§	
SYLVESTER TURNER, in his Official Capacity as Major of the City of Houston, and CITY OF HOUSTON	§	HARRIS COUNTY, TEXAS
	§	310TH JUDICIAL DISTRICT

ORDER ON DEFENDANTS' PLEA TO THE JURISDICTION AND/OR COUNTER-MOTION FOR SUMMARY JUDGMENT

(Filed Feb. 18, 2019)

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 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*, 135 S. Ct. 2534 (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.

SIGNED Feb. 18, 2019

/s/ Sonya Heath
HON. SONYA L. HEATH
Judge Presiding

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 4, 2017

Clerk
Supreme Court of Texas
Post Office Box 12248
Austin, TX 78711

Re: Sylvester Turner, Mayor of the City of Houston, Texas, et al. v. Jack Pidgeon, et al.
No. 17-424
(Your No. 15-0688)

Dear Clerk:

The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is denied.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

IN THE SUPREME COURT OF TEXAS

NO. 15-0688

JACK PIDGEON AND LARRY HICKS, PETITIONERS,

v.

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued March 1, 2017

(Filed Jun. 30, 2017)

JUSTICE BOYD delivered the opinion of the Court.

The trial court denied the City of Houston's and its Mayor's pleas to the jurisdiction and issued a temporary injunction prohibiting them from "furnishing benefits to persons who were married in other jurisdictions to City employees of the same sex." While their interlocutory appeal was pending in the court of appeals, the United States Supreme Court held that states may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2605 (2015). The court of appeals then

reversed the temporary injunction and remanded the case to the trial court for further proceedings.

Petitioners Jack Pidgeon and Larry Hicks contend that the court's opinion and judgment impose—or at least can be read to impose—greater restrictions on remand than *Obergefell* and this Court's precedent require. We agree. We reverse the court of appeals' judgment, vacate the trial court's orders, and remand the case to the trial court for further proceedings consistent with our opinion and judgment.

I.
Background

The "annals of human history reveal the transcendent importance of marriage." *Obergefell*, 135 S. Ct. at 2593-94. "Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together." *Id.* at 2594. For thousands of years, both the role of marriage and its importance to society were founded on the "understanding that marriage is a union between two persons of the opposite sex." *Id.* Until only recently, "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." *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 2689 (2013).

While "most people" have shared that view, others have not. In the early 1970s, for example, two men obtained a Texas marriage license when one of them

appeared before the county clerk dressed as a woman. *See* James W. Harper & George M. Clifton, Comment, *Heterosexuality; A Prerequisite to Marriage in Texas?*, 14 S. TEX. L.J. 220, 220 (1972-73). In response, the Texas Legislature amended the Texas Family Code to expressly provide that a marriage license "may not be issued for the marriage of persons of the same sex." *See* Act of June 15, 1973, 63rd Leg., R.S., ch. 577, § 1, 1973 Tex. Gen. Laws 1596, 1596-97 (amending former Texas Family Code section 1.01). Texas thus became the second state in the Union[1] to adopt what is often referred to as a "defense of marriage act" (DOMA).[2]

In response to early lawsuits, courts throughout the United States consistently rejected legal challenges to the historical understanding of marriage.[3]

---

[1] A few weeks earlier in 1973, Maryland adopted a statute providing that "[o]nly a marriage between a man and a woman is valid in this state." *See* 1973 Md. Laws 574 (enacting former MD. CODE art. 62, § 1 (1973)).

[2] For simplicity's sake, we use the acronym DOMA to refer generically to legislation intended to limit marriage to one man and one woman or otherwise defend or promote that historical view. In actuality, the laws we refer to as DOMAs include a variety of provisions and address the subject in different ways.

[3] *See*, *e.g.*, *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (holding federal statute limited marriage to one man and one woman and did not violate federal constitution); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (holding D.C. statute did not authorize same-sex marriage and did not violate federal constitution); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (holding state statute limited marriage to "the union of a man and a woman" and did not violate federal constitution); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (holding state statute limited marriage to two persons of the opposite sex and did not violate

Beginning in the 1990s, many other states and the federal government[4] enacted DOMAs to amend their statutes[5]—and in some states, their constitutions[6]—to

---

federal constitution), *appeal dism'd*, 409 U.S. 810, 810 (1972) (dismissing appeal "for want of a substantial federal question"); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (1971) ("The law makes no provision for a 'marriage' between persons of the same sex.").

[4] Congress passed the federal Defense of Marriage Act in 1996, and then-President Clinton signed it into law. *See* Pub. L. No. 104-199, Sept. 21, 1996, 110 Stat. 2419. The federal DOMA had two key sections. First, it provided that no state "shall be required to give effect to" any other state's legal recognition of "a relationship between persons of the same sex that is treated as a marriage" or "a right or claim arising from such relationship." *Id.* § 2(a) (codified at 28 U.S.C. § 1738C (1996)). Second, it provided that when used in any federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.* § 3(a) (codified at 1 U.S.C. § 7 (1996)).

[5] *See*, *e.g.*, ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (1996); ARIZ. REV. STAT. § 25-101(C) (1996); ARK. CODE § 9-11-109 (1997); CAL. FAM. CODE § 300 (1992); COLO. REV. STAT. § 14-2-104(1)(b) (2000); FLA. STAT. §§ 741.04(1), .212 (1997); GA. CODE § 19-3-3.1 (1996); HAW. REV. STAT. § 572-1 (1985); IND. CODE § 31-11-1-1 (1997); IOWA CODE § 595.2(1) (1998); KAN. STAT. §§ 23-2501, -2508 (1996); KY. REV. STAT. §§ 402.005, .020(1)(d), .040, .045 (1998); LA. CIV. CODE arts. 89, 3520(B) (1999); MICH. COMP. LAWS § 551.1 (1996); MISS. CODE. § 93-1-1(2) (1997); MO. ANN. STAT. § 451.022(2), (3) (1996); MONT. CODE § 40-1-401(1)(d) (1997); N.C. GEN. STAT. §§ 51-1, -1.2 (1995); N.D. CENT. CODE §§ 14-03-01, -08 (1997); OHIO REV. CODE § 3101.01 (2004); OKLA. STAT. tit. 43, § 3.1 (1997); 23 PA. CONS. STAT. § 1704 (1996); S.C. CODE § 20-1-15 (1996); S.D. CODIFIED LAWS § 25-1-1 (1996); TENN. CODE § 36-3-113 (1996); UTAH CODE §§ 30-1-2(5) (1977), -4.1 (2004); VA. CODE § 20-45.2 (1997); W. VA. CODE § 48-2-603 (2001); WYO. STAT. § 20-1-101 (1977).

[6] Twenty-three states passed constitutional amendments in addition to statutory provisions. *See* ALA. CONST. art. I, § 36.03;

preserve the traditional view of marriage. Around the same time, however, other states' courts became more receptive to legal and constitutional challenges to laws restricting marriage to the historical view.[7] Soon, some state legislatures began amending their laws to expressly permit and recognize same-sex marriages, and more courts began invalidating laws that did not.[8]

ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. LXXXIII, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; Fla. Const. art. I, § 27; GA. CONST. art. I, § 4, ¶ I; HAW. CONST. art. I, § 23; KAN. CONST. art. XV, § 16; Ky. Const. § 233A; La. Const. art. XII, § 15; MICH. CONST. art. 1, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; VA. CONST. art. I, § 15-A. Six additional states passed constitutional amendments without enacting a statutory provision. *See* Idaho Const. art. III, § 28; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29; WIS. CONST. art. XIII, § 13.

[7] *See*, *e.g.*, *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding that the Vermont Constitution's common-benefits clause requires state to provide "the same benefits and protections" to same-sex couples as to "married opposite-sex couples"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (mem. op.) (requiring state to show compelling reason to ban same-sex marriage); *Baehr v. Lewin*, 74 Haw. 530, 645, 852 P.2d 44, 67 (1993) (plurality op.) (holding Hawaii statute potentially violated Hawaii Constitution's equal-protection clause and was subject to "strict scrutiny," meaning it was unconstitutional unless it was "justified by compelling state interests" and was "narrowly drawn to avoid unnecessary abridgements of the [plaintiffs'] constitutional rights").

[8] *See*, *e.g.*, DEL. CODE tit. 13, § 129 (2013); D.C. CODE § 46-401 (2009); MD. CODE, FAM. LAW § 2-201 (2012); MINN. STAT. § 517.01 (2013); N.H. REV. STAT. ANN. § 457:1-a (2009); N.Y. DOM.

In 2013, the United States Supreme Court held in a 5-4 decision that the federal DOMA's provision defining the terms "marriage" and "spouse" to apply only to opposite-sex couples violates "basic due process and equal protection principles applicable to the Federal Government." *Windsor*, 133 S. Ct. at 2693 (citing U.S. Const. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954)). The Court noted that by then, twelve states and the District of Columbia had "decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons." *Id.* at 2689.

In the Court's view, the federal DOMA definitions did not merely preserve the traditional view of marriage. Instead, their "avowed purpose and practical effect [were] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of [the] States." *Id.* at 2693. Concluding that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom [a state], by its marriage laws, sought to protect in personhood and dignity," the Court found the federal definitions unconstitutional. *Id.* at 2696.

REL. LAW § 10-a (2011); 15 R.I. GEN. LAWS § 15-1-1 (2013); VT. STAT. ANN. tit. 15, § 8 (2009); WASH. REV. CODE § 26.04.010 (2012); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

Based on *Windsor*, the City of Houston city attorney advised then-Mayor Annise Parker that the City "may extend benefits" to City employees' same-sex spouses who were legally married in other states "on the same terms it extends benefits to heterosexual spouses." In the attorney's opinion, refusing to provide such benefits would "be unconstitutional." Relying on this advice, on November 19, 2013, Mayor Parker sent a memo to the City's human-resources director "directing that same-sex spouses of employees who have been legally married in another jurisdiction be afforded the same benefits as spouses of a heterosexual marriage." The City began offering those benefits soon after the Mayor issued her directive.

A month later, on December 13, 2013, Pidgeon and Hicks[9] filed suit against the City and the Mayor[10] in state court (*Pidgeon I*), challenging the Mayor's directive and the City's provision of benefits pursuant to that directive. The Mayor removed *Pidgeon I* to federal

---

[9] Except when helpful to distinguish the two, we will generally refer to Pidgeon and Hicks collectively as Pidgeon.

[10] Except when helpful to distinguish the two, we will generally refer to the Mayor and the City collectively as the Mayor. Pidgeon sued Mayor Parker in her official capacity, as is required for an *ultra-vires* action. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). Mayor Parker's term ended on January 2, 2016, and Sylvester Turner took office on that date. When a public officer who is sued in an official capacity ceases to hold office before an appeal is resolved, her successor in office is automatically substituted as a party. TEX. R. APP. P. 7.2(a). Although Mayor Turner did not initially issue the directive, he has expressed no intent to withdraw it and has continued to defend it in this appeal.

court, which ultimately remanded it back to state court. But by then, the state court had apparently dismissed the suit for want of prosecution. Instead of challenging the dismissal of *Pidgeon I*, Pidgeon and Hicks reasserted their claims by filing this suit (*Pidgeon II*) on October 22, 2014.

Pidgeon and Hicks alleged that they are Houston taxpayers and qualified voters, that the City is "expending significant public funds on an illegal activity," and that the Mayor's directive authorizing those expenditures violates Texas's and the City's DOMAs. Specifically, prior to *Windsor*, the City had amended its charter, and the State had amended the Texas Family Code and the Texas Constitution, to more forcefully preserve the traditional view of marriage:

- In 2001, the City's voters signed and then approved a petition to amend the City's charter to provide that, 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." CITY OF HOUSTON CHARTER art. II, § 22. Although this language did not expressly refer to same-sex relationships, the voters' intent to deny tax-funded employment benefits to same-sex partners was undisputed, as reflected in the title the City itself gave to the new provision:

"Denial of Benefits to Same-Sex Partners and Related Matters."[11]

- In 2003, the Texas Legislature amended the Family Code to expressly provide that (1) any "marriage between persons of the same sex . . . is contrary to the public policy of this state and is void in this state"; and (2) the state or any agency or political subdivision "may not give effect to" any "right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex . . . in this state or in any other jurisdiction," TEX. FAM. CODE § 6.204(b), (c)(2) (2003). *See* Act of May 14, 2003, 78th Leg., R.S., ch. 124, § 1, 2003 Tex. Sess. Law Serv. 124.

- In 2005, two-thirds of the Texas Senate and House approved a joint resolution to amend the Texas Constitution to expressly provide that:

  (a) Marriage in this state shall consist only of the union of one man and one woman[, and]

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

---

[11] *See also* "City Voters Reject Same-Sex Benefits," HOUS. CHRON. (Nov. 7, 2001), http://www.chron.com/news/houston-texas/article/City-voters-reject-same-sex-benefits-2072330.php ("Gay rights . . . was the burning issue.").

> Act effective Nov. 11, 2005, 79th Leg., R.S., Tex. Gen. Laws 5409. Later that year, over 76% of Texas voters approved the proposition.[12] *See* TEX. CONST. art. I, § 32.

Pidgeon alleged that these DOMAs remained valid and enforceable despite *Windsor* because *Windsor* addressed only the *federal* DOMA and its impact on persons married in states that had elected to allow same-sex marriages. In Pidgeon's view, *Windsor* merely required the federal government to acknowledge marriages the various states may recognize; it did not require Texas or any other state to license same-sex marriages or recognize same-sex marriages performed in other states. Pidgeon sought unspecified actual damages as well as temporary and permanent injunctive relief prohibiting the City from providing benefits to same-sex spouses of employees married in other jurisdictions.

The Mayor and City filed pleas to the jurisdiction asserting governmental immunity and challenging Pidgeon's standing to assert his claims.[13] The trial court denied the pleas and granted Pidgeon's request for a temporary injunction prohibiting the Mayor "from furnishing benefits to persons who were married

---

[12] *See* OFFICE OF THE SEC'Y OF STATE, RACE SUMMARY REPORT: 2005 CONSTITUTIONAL AMENDMENT ELECTION (2005), http://elections.sos.state.tx.us/elchist117_state.htm.

[13] The City challenged Pidgeon's standing to assert any of his claims against the City, but the Mayor initially challenged only his standing to sue her for damages and attorney's fees. She later filed a supplemental plea challenging all of Pidgeon's claims. The trial court heard and ruled on all of the challenges together.

in other jurisdictions to City employees of the same sex." The Mayor immediately filed this interlocutory appeal challenging both the order denying the pleas to the jurisdiction and the order granting the temporary injunction.

Meanwhile, courts across the country were hearing other lawsuits challenging the constitutionality of various state DOMAs. In *Obergefell*, the United States Supreme Court consolidated and agreed to hear five of those cases, in which the plaintiffs alleged that their states' laws denying same-sex couples the right to marry or prohibiting recognition of the legal validity of a same-sex marriage from another state violate the federal Constitution. 135 S. Ct. at 2593. On June 26, 2015—while this case (*Pidgeon II*) remained pending on interlocutory appeal before the Texas court of appeals—the United States Supreme Court issued its decision in *Obergefell*. *Id.* at 2608.

In another 5-4 decision, the Court concluded in *Obergefell* that the state DOMAs at issue violate "the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Id.* at 2604. Based on that conclusion, the Court held that the states may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," and may not "refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2605.

The Mayor then filed a supplemental brief in the court of appeals, arguing that *Obergefell* required the

court to reverse the injunction. In response, Pidgeon argued that even if *Obergefell* requires Texas to license and recognize same-sex marriages, it does not require "states to pay taxpayer-funded benefits to same-sex relationships." According to Pidgeon, *Obergefell* did not resolve his claims because federal courts cannot "commandeer state spending decisions."

On July 28, 2015, the court of appeals reversed the trial court's temporary injunction. 477 S.W.3d 353, 355 (Tex. App.—Houston [14th Dist.] 2015). In a brief *per curiam* opinion, the court recited *Obergefell*'s holdings that "same sex couples may exercise their fundamental right to marry in all States," and that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 354 (quoting *Obergefell*, 135 S. Ct. at 2604-05, 2607-08). Noting "the substantial change in the law regarding same-sex marriage since the temporary injunction was signed," the court reversed the injunction and remanded the case to the trial court for further proceedings. *Id.* at 355. We granted Pidgeon's petition for review.[14]

---

[14] Both before and after we granted review, we received numerous amicus curiae briefs urging us to consider the case and expressing various views on how we should rule. In support of Pidgeon, we received amicus briefs from one Texas Railroad Commissioner, eleven Texas Senators, forty Texas Representatives, and four then-candidates for the Texas Legislature; fifteen "Conservative Leaders throughout Texas," the U.S. Pastor Council, and Texas Leadership (aka the Texas Pastor Council); the Texas Governor, Lieutenant Governor, and Attorney General; and the Foundation for Moral Law and the Institute for Creation Research.

II.
Our Jurisdiction

We must first determine whether we have jurisdiction to review the court of appeals' interlocutory decision. The Mayor appealed from the trial court's orders denying her plea to the jurisdiction and granting the temporary injunction. Texas law permits interlocutory appeals from such orders, *see* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4), (8), but currently, this Court's jurisdiction over interlocutory appeals "is limited." *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 71 (Tex. 2016) (citing Tex. Gov't Code § 22.001(a)(1)).[17] We may only review the appellate court's interlocutory decision if (1) one or more justices dissented in the court of appeals, or (2) the court of appeals "holds differently from a prior decision of another court of appeals or of the supreme court." TEX. GOV'T CODE

In support of the Mayor, we received amicus briefs from Kenneth L. Smith; the International Municipal Lawyers Association and the Texas Municipal League; Lawyers for America; twenty-six Texas constitutional-law and family-law professors; L.J. and M.P., a Married Couple, and Equality Texas; the *De Leon* plaintiffs; the Anti-Defamation League; GLBTQ Legal Advocates & Defenders, Lambda Legal Defense and Education Fund, Inc., the National Center for Lesbian Rights, the American Civil Liberties Union of Texas, and the American Civil Liberties Union Foundation; and three "scholars who study same-sex couples and their families." We also received numerous emails, letters, and postcards expressing a wide variety of views, which we have treated as amicus briefs.

[17] The Legislature recently removed these and other limitations on our jurisdiction, but that change is not effective until September 1, 2017. Act of May 19, 2017, 85th Leg., R.S., ch. ___, § 1, 2017 Tex. Gen. Laws ___, ___.

§ 22.225(c) (incorporating TEX. GOV'T CODE § 22.001(a)(1)-(2)). One court "holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* § 22.225(e).

Pidgeon argues that the court of appeals' decision in this case creates an inconsistency that should be clarified. In its opinion, the court recited not only the Supreme Court's holdings in *Obergefell*, but also the United States Fifth Circuit Court of Appeals' holdings in a case called *De Leon v. Abbott*. *See* 477 S.W.3d at 354-55 (citing *De Leon v. Abbott*, 791 F.3d 619, 624-25 (5th Cir. 2015)). Concluding that both decisions created a "substantial change in the law regarding same-sex marriage since the temporary injunction was signed," the court reversed the temporary injunction and remanded the case to the trial court "for proceedings consistent with *Obergefell* and *De Leon*." *Id.* at 355. Pidgeon contends that the court's requirement that the trial court proceed "consistent with" *De Leon* conflicts with our previous decisions holding that Fifth Circuit decisions are not binding on Texas courts. *See*, *e.g.*, *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (holding that while "Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, . . . they are *obligated* to follow only higher Texas courts and the United States Supreme Court").

The Mayor agrees that *De Leon* is not binding on the trial court but contends that the court of appeals did not hold that it was. According to the Mayor, the

court of appeals "did not rule on how *Obergefell* and *De Leon* affect the ultimate outcome of [Pidgeon's] claims," and instead "simply reversed the temporary injunction based on the change in the law and remanded to the trial court, in the interest of justice, for proceedings consistent with those cases."

We agree with the Mayor that the trial court *could* read the court of appeals' opinion to hold merely that the trial court should consider *De Leon* as a persuasive authority when addressing Pidgeon's arguments. As the Mayor notes, the court of appeals suggested that it was remanding the case "in the interest of justice" because the case "has not been fully developed." 477 S.W.3d at 355 n.3 (citing TEX. R. APP. P. 43.3(b); *Ahmed v. Ahmed*, 261 S.W.3d 190, 196 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Chrismon v. Brown*, 246 S.W.3d 102, 116 (Tex. App.—Houston [14th Dist.] 2007, no pet.)). But without our review, Pidgeon has no assurance that the trial court *would* read the court of appeals' opinion that way. The court of appeals did not instruct the trial court to proceed "in light of" or "considering" *De Leon*. Instead, it instructed the court to proceed "consistent with" *De Leon*. We conclude that the court of appeals' language gives rise to the type of "unnecessary uncertainty in the law and unfairness to litigants" that our conflicts jurisdiction allows us to clarify. *See* TEX. GOV'T CODE § 22.225(e). We thus conclude that we have jurisdiction over this interlocutory appeal. *See Harry Eldridge Co. v. T.S. Lankford & Sons, Inc.*, 371 S.W.2d 878, 879 (Tex. 1963) ("[W]hen our jurisdiction is properly invoked as to one point set forth

in the application for writ of error, we acquire jurisdiction of the entire case.").

III.
Arguments and Requested Relief

We now turn to Pidgeon's substantive arguments. Pidgeon does not argue that the court of appeals erred by dissolving the temporary injunction and remanding the case to the trial court. Instead, he contends that the court of appeals (A) should not have instructed the trial court to conduct further proceedings "consistent with" *De Leon*; (B) should not have reversed the temporary injunction, but instead should have vacated or dissolved it; and (C) should have affirmed the temporary injunction "to the extent" it required the City to "claw back" benefits the City provided to same-sex spouses before *Obergefell*. In addition, he (D) urges us to instruct the trial court to "narrowly construe" *Obergefell* on remand. We address each argument in turn.

A *De Leon*

Pidgeon first argues that by instructing the trial court to conduct further proceedings "consistent with" the Fifth Circuit's decision in *De Leon*, the court of appeals' opinion could be misread to mean that *De Leon* is binding on the trial court. Whether *De Leon* is binding is crucial to Pidgeon's case because unlike *Obergefell*, *De Leon* specifically held that the Texas DOMAs violate the federal Constitution and cannot be enforced. *See De Leon v. Perry*, 975 F. Supp. 2d 632, 666

(W.D. Tex. 2014), *aff'd sub nom.*, *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). We agree with Pidgeon that the court of appeals should not have ordered the trial court to proceed on remand "consistent with" *De Leon*.

Two same-sex couples filed *De Leon* in federal court in San Antonio in 2013, shortly after *Windsor* issued. They sued the Texas Governor, the Texas Commissioner of the Department of State Health Services, and the Bexar County Clerk (collectively, the Governor), challenging the constitutionality of the Texas DOMAs under the federal Constitution. The federal district court enjoined the Governor from enforcing the Texas DOMAs, holding that "Texas' prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process," 975 F. Supp. 2d at 639, and "Texas' refusal to recognize . . . out-of-state same-sex marriage[s] violates due process," *id.* at 662. The Governor[15] promptly appealed the injunction to the Fifth Circuit, where it remained pending until the Supreme Court decided *Obergefell*.

After the Supreme Court announced its decision in *Obergefell*, the Governor agreed with the *De Leon*

---

[15] Rick Perry was the Texas Governor when *De Leon* was filed in 2013. By the time *Obergefell* issued in 2015, Greg Abbott was the Governor, having taken office in January of that year. Governor Abbott previously served as Texas Attorney General, and in that capacity, he represented Governor Perry in *De Leon*. When Abbott became Governor, Ken Paxton became Attorney General and began representing now-Governor Abbott in *De Leon*.

plaintiffs that the federal-court injunction was "correct in light of *Obergefell*." *Id.* at 625. The Fifth Circuit thus affirmed the injunction and remanded the case with instructions that the district court enter a final judgment on the merits in the plaintiffs' favor. *Id.* The Governor did not oppose this disposition or seek the Supreme Court's review. On July 7, 2015, the district court entered a final judgment declaring that the Texas DOMAs violate the federal Constitution's due-process and equal-protection clauses and permanently enjoining the Governor "from enforcing Texas's laws prohibiting same-sex marriage." The parties agree that the State of Texas has been providing benefits to state employees' same-sex spouses ever since.

We agree with Pidgeon that *De Leon* does not bind the trial court in this case and the court of appeals should not have instructed the trial court to conduct further proceedings "consistent with" *De Leon*. *Penrod Drilling*, 868 S.W.2d at 296.[16] That does not mean,

[16] *See also Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."), *cited by Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *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."). Texas courts of appeals have also consistently recognized this principle. *See*, *e.g.*, *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 337 (Tex. App.—Dallas 2011, pet. denied) ("Although decisions of the federal courts of appeals do not bind Texas courts, [state courts] receive them 'with respectful consideration.' ") (quoting *Hassan v. Greater Hous. Transp. Co.*, 237 S.W.3d 727, 731

however, that the trial court should not consider *De Leon* when resolving Pidgeon's claims. Fifth Circuit decisions, particularly those regarding federal constitutional questions, can certainly be helpful and may be persuasive for Texas trial courts. Moreover, *De Leon* could potentially affect the relief the trial court might provide on remand, since *De Leon* has enjoined the Governor from enforcing the Texas DOMAs and the State of Texas is thus providing benefits to state employees' same-sex spouses. The trial court should certainly proceed on remand "in light of" *De Leon*, but it is not required to proceed "consistent with" it.

B. "Reversal" of the injunction

Pidgeon next argues that by "reversing" the trial court's temporary injunction instead of vacating or dissolving it, the court of appeals' judgment might be taken to have a *res-judicata* effect prohibiting Pidgeon from seeking or obtaining the same or similar relief on remand. The Mayor contends, however, that the court of appeals could not have erred by reversing the injunction order because our rules only permit a court of appeals to "*reverse* the trial court's judgment and remand the case for further proceedings." TEX. R. APP. P. 43.2(d) (emphasis added); *compare* TEX. R. APP. P. 43.2(e) (permitting courts of appeals to "*vacate* the

---

(Tex. App.—Houston [1st Dist.] 2007, pet. denied)); *Barstow v. State*, 742 S.W.2d 495, 501-02 (Tex. App.—Austin 1987, writ denied) ("We are not bound to follow [Fifth Circuit precedent] merely because Texas lies within the geographical limits of the Fifth Circuit.").

trial court's judgment and *dismiss* the case" (emphases added)) *with* 60.2(f) (permitting this Court to "*vacate* the lower court's judgment and *remand* the case for further proceedings in light of changes in the law" (emphases added)); *but see* TEX. R. APP. P. 43.6 ("The court of appeals may make any other appropriate order that the law and the nature of the case require.").

Texas appellate courts have held that the "dissolution of a temporary injunction bars a second application for such injunctive relief." *See Sonwalkar v. St. Luke's Sugar Land P'ship*, 394 S.W.3d 186, 195 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *see also City of San Antonio v. Singleton*, 858 S.W.2d 411, 412 (Tex. 1993) (stating that the trial court's jurisdiction to "review, open, vacate or modify" an injunction based on changed conditions "must be balanced against principles of res judicata"). But that is not true if "the second request is based on changed circumstances not known by the applicant at the time of the first application." *Sonwalkar*, 394 S.W.3d at 195 (citing *State v. Ruiz Wholesale Co.*, 901 S.W.2d 772, 776 (Tex. App.—Austin 1995, no writ)). When conditions have changed, including a change in the law, the trial court may consider the injunction anew in light of the new law or circumstances. *See Smith v. O'Neill*, 813 S.W.2d 501, 502 (Tex. 1991) (per curiam) (citing *City of Tyler v. St. Louis Sw. Ry.*, 405 S.W.2d 330, 332 (Tex. 1966)); *Sonwalkar*, 394 S.W.3d at 195.

Obergefell undoubtedly constitutes a "change in the law" that justified the dissolution of the trial court's injunction in this case. But in light of that

change in the law, Pidgeon is not precluded from seeking the same or similar relief on remand. On remand, the trial court must consider both parties' arguments regarding the effect of *Obergefell* on Pidgeon's claims, and may grant whatever relief is then appropriate.

C. "Claw-back" Relief

Pidgeon next argues that the court of appeals should have affirmed the temporary injunction "to the extent" the injunction required the City to "claw back" tax dollars it expended on benefits for same-sex spouses prior to *Obergefell*. Pidgeon reasons that *Obergefell* does not apply retroactively to authorize pre-*Obergefell* expenditures because the Supreme Court acknowledged that it was attributing a new meaning to the Fourteenth Amendment based on "new insights and societal understandings." *Obergefell*, 135 S. Ct. at 2603. According to Pidgeon, Supreme Court decisions apply retroactively when the Court determines and enforces the Constitution's *original* meaning, *see Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 106-07 (1993) (Scalia, J., concurring), but not when it changes the Constitution's meaning as it did in *Obergefell*.[17] And since *Obergefell* is not retroactive, the

[17] Pidgeon also argues that *Obergefell* cannot apply retroactively because otherwise (1) same-sex couples who lived together and held themselves out as "married" in jurisdictions that recognize common-law marriage would in fact be retroactively married; (2) any such couples who since ended their relationships and entered into new relationships could be retroactively liable for alimony to the former "spouses" and subject to bigamy prosecutions; and (3) jurisdictions around the country will be liable for damages

Texas DOMAs remained fully in effect at least until June 26, 2015, and the Mayor had no authority to issue or enforce the directive before then.

In response, the Mayor contends that Pidgeon lacks standing to seek any retroactive relief. The Mayor argues that although Pidgeon—as a City taxpayer—may have standing to complain about the City's future illegal expenditures of public funds, taxpayers only have standing to seek retrospective relief against illegal expenditures if they can demonstrate a particularized injury. *See Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001).

Relying on *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S. Ct. 2751 (2014)—a challenge to federal health-insurance regulations under the federal Religious Freedom Restoration Act, *id.* at 2759—Pidgeon replies that he and Hicks have in fact suffered a particularized injury "because they are devout Christians who have been compelled by the mayor's unlawful edict to subsidize homosexual relationships that they regard as immoral and sinful." The Mayor, in turn, denies that *Hobby Lobby* grants Pidgeon standing under these circumstances, and contends that—even if Pidgeon had standing to seek retroactive monetary relief—he would not have standing to force the City to recover funds it previously paid to third parties. *See Hoffman v. Davis*, 100 S.W.2d 94, 96 (Tex. 1937) (holding that

---

to every same-sex couple that was denied a marriage license or recognition prior to *Obergefell*. We express no opinions on these hypotheticals at this time, as they are unnecessary to our resolution of this appeal.

when a taxing entity has already spent a taxpayer's tax money, "an action for its recovery is for the [taxing entity]," and the "cause of action belongs to it alone"); *see also Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000) (quoting *Hoffman* with approval).

We find these arguments both interesting and important, but at least two obstacles prevent us from reaching them today. First, Pidgeon never requested an injunction requiring the City to claw back benefits it provided before *Obergefell*; and second, the trial court never granted one. The temporary injunction at issue here prospectively prohibited the City "from furnishing benefits to persons who were married in other jurisdictions to City employees of the same sex." The order did not to any extent require the City to recover benefits it had previously paid. It was a *temporary* injunction, and its only "proper function" was to "preserve the status quo." *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53, 65 (Tex. 2016). We cannot conclude that the court of appeals erred by failing to preserve the injunction "to the extent" that it required a claw-back when it did not require a claw-back to any extent.

Because Pidgeon has never yet sought a claw-back injunction, we express no opinion on whether he has standing to seek one or whether he is entitled to one. We agree with Pidgeon, however, that the court of appeals' opinion and judgment do not prohibit him from seeking such an injunction or any other relief on remand. But we conclude that the court of appeals did

not err by reversing this temporary injunction in its entirety.

D. Instructions on Remand

Finally, Pidgeon urges us to instruct the trial court to "narrowly construe" *Obergefell* on remand and to "comply with *Obergefell* but not to expand on it," so as to "preserve as much of the [Texas DOMAs] as possible." Pidgeon argues that we should provide these instructions because *Obergefell* is "poorly reasoned," has "no basis in the text or history of the Constitution," and does not "faithfully interpret" the Constitution. So construed, *Obergefell* may have recognized a "fundamental right" to same-sex marriage and may "require States to license and recognize same-sex marriages," but, Pidgeon contends, it did not recognize a fundamental right "to spousal employee benefits" or "require States to give taxpayer subsidies to same-sex couples." Pidgeon argues that we should "remand for a new temporary injunction hearing" and the trial court should "consider on remand which applications of [the Texas DOMAs] can be preserved to the extent they prohibit taxpayer subsidies for same-sex marriages."

The Mayor agrees we should remand this case to the trial court, but contends that *Obergefell*, and *Windsor* before it, held that the Constitution protects not only the right of same-sex couples to marry, but also to receive all of the "benefits" of marriage. *See*, *e.g.*, *Obergefell*, 135 S. Ct. at 2606 (declining to adopt a "slower, case-by-case determination of the required availability

of specific public benefits to same-sex couples"); *Windsor*, 133 S. Ct. at 2694 (observing that the federal DOMA prevents "same-sex married couples from obtaining government healthcare benefits they would otherwise receive"). The Mayor also contends that Pidgeon lacks standing to challenge the Mayor's directive under *Obergefell*, and rejects Pidgeon's position that Texas courts can "narrowly construe" *Obergefell*, at least to the extent that means they can ignore its natural meaning and applications. *See*, *e.g.*, *McKinney v. Blankenship*, 282 S.W.2d 691, 694-95 (Tex. 1955) (rejecting argument that Texas courts could ignore *Brown v. Board of Education* since Texas's segregation laws "were not before the Supreme Court" in that case as "so utterly without merit that we overrule it without further discussion").

We agree with the Mayor that any effort to resolve whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples without considering *Obergefell* would simply be erroneous.[18] On the other hand, we agree

---

[18] *See*, *e.g.*, *Pavan v. Smith*, ___ U.S. ___, 2017 WL 2722472, at *2 (2017) (per curiam) (holding that "*Obergefell* proscribes" the "disparate treatment" resulting from state statute that requires listing married woman's husband's name on child's birth certificate but permits state to omit married woman's female spouse's name); *see also Obergefell*, 135 S. Ct. at 2601 (stating that "same-sex couples are denied the constellation of benefits that the States have linked to marriage"), at 2604 (stating that DOMAs "burden the liberty of same-sex couples" and deny "all the benefits afforded opposite-sex couples"), at 2626 (Roberts, C.J., dissenting) (inviting same-sex-marriage proponents to celebrate "the availability of new benefits"); *Windsor*, 133 S. Ct. at 2692 (stating that the

with Pidgeon that the Supreme Court did not address and resolve that specific issue in *Obergefell*. "Whatever ramifications *Obergefell* may have for sexual relations beyond the approval of same-sex marriage are unstated at best. . . ." *Coker v. Whittington*, 858 F.3d 304, 307 (5th Cir. 2017).[19] The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and—unlike the Fifth Circuit in *De Leon*—it did not hold that the Texas DOMAs are unconstitutional.

Of course, that does not mean that the Texas DOMAs *are* constitutional or that the City may constitutionally deny benefits to its employees' same-sex

---

federal "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State"), at 2693 (stating that the federal DOMA "operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages").

[19] *See*, *e.g.*, *Parella v. Johnson*, No. 1:15-cv-0863, 2016 WL 3566861, at *9-10 (N.D.N.Y. June 27, 2016) (holding that even after *Obergefell*, the "fundamental right to marry" does not include "the right to obtain a visa for an alien spouse"); *Solomon v. Guidry*, 155 A.3d 1218, 1221 (Vt. 2016) ("[B]ecause civil marriage and civil unions remain legally distinct entities in Vermont and because *Obergefell* mandated that states recognize only same-sex *marriage*, uncertainty remains as to whether *Obergefell* requires other states to recognize and dissolve civil unions established in Vermont."); *In re P.L.L.-R.*, 876 N.W.2d 147, 153 (Wis. Ct. App. 2015) ("*Obergefell* did not answer questions regarding Wisconsin's presumption of paternity statute.").

spouses. Those are the issues that this case now presents in light of *Obergefell*. We need not instruct to the trial court to "narrowly construe" *Obergefell* to confirm that *Obergefell* did not directly and expressly resolve those issues. But neither will we instruct the trial court to construe *Obergefell* in any manner that makes it irrelevant to these issues. Pidgeon contends that neither the Constitution nor *Obergefell* requires citizens to support same-sex marriages with their tax dollars, but he has not yet had the opportunity to make his case. And the Mayor has not yet had the opportunity to oppose it. Both are entitled to a full and fair opportunity to litigate their positions on remand.

Although both parties agree that we should remand this case for the parties to have that full and fair opportunity, some amici have argued that we should resolve the parties' dispute here on this interlocutory appeal. We cannot resolve the parties' claims now, however, because they have not yet been fully developed or litigated. The parties' arguments address the meaning and ramifications of *Obergefell*, which was not announced until after the parties had filed their briefs in the court of appeals. Naturally, the parties did not raise their current arguments in the trial court or in the court of appeals, and neither court ruled on them. Many of the arguments—including those addressing standing and retroactivity, for example—depend on an evidentiary record that the parties have not yet had the opportunity to develop. "Without an actual challenge . . . , without full briefing from all parties . . . , and without complete vetting of the parties' potential

arguments in the lower courts, we are ill-prepared to offer—and constitutionally prohibited from offering—an advisory interpretation . . . that could have significant, lasting consequences." *Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 792 (Tex. 2016) (citing *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004)); *see also Pub. Affairs Assocs. v. Rickover*, 369 U.S. 111, 113 (1962) ("These are delicate problems; their solution is bound to have far-reaching import. Adjudication of such problems, certainly . . . should rest on an adequate and full-bodied record. The record before us is woefully lacking in these requirements."). We decline the amici's requests that we render a final ruling on the merits before the parties have had a full opportunity to make their case.

IV.
Immunity

Finally, we address the Mayor's and the City's interlocutory appeals from the trial court's orders denying their pleas to the jurisdiction based on governmental immunity. Although the parties briefed this issue in the court of appeals, they did so before *Obergefell*, and the court did not address the issue in its opinion or its judgment. The Mayor noted the issue but reserved briefing in this Court. We are hesitant to ignore the issue because governmental immunity implicates the courts' subject-matter jurisdiction to hear Pidgeon's claims. *See Engelman Irrig. Dist. v. Shields Bros.*, 514 S.W.3d 746, 751 (Tex. 2017). But neither

party has briefed the issue since *Obergefell*, which may also affect the immunity defenses.

The parties agree, for example, that Pidgeon sued the Mayor in her official capacity for acting *ultra vires*, that is, "without legal authority." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (2009). Pidgeon alleges that the Mayor acted unlawfully and without authority by issuing and enforcing the directive because the Texas and Houston DOMAs prohibit the City from providing benefits to employees' same-sex spouses. Governmental immunity does not bar an *ultra-vires* claim, but the parties disagree whether the Mayor's directive remains unlawful and unauthorized after *Obergefell*.[20] This disagreement may present the ultimate issue in this case, both on the merits and for purposes of determining whether the Mayor has acted *ultra vires.*

The trial court denied the Mayor's plea, but it did so in 2014, prior to *Obergefell*. Whether (or the extent to which) Pidgeon alleges *ultra-vires* conduct even after *Obergefell* is an issue that the trial court must address in the first instance. *See* Tex. R. App. P. 60.2(f) (providing that this Court may "vacate the lower

---

[20] We note that neither 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.

court's judgment and remand the case for further proceedings in light of changes in the law"); *In re Doe 2*, 19 S.W.3d 278, 283 (Tex. 2000) (noting that rule 60.2(f) is "particularly well-suited" to situations in which courts must address novel situations).

Unlike the Mayor, however, the City is not a proper party to an *ultra-vires* claim. *See Heinrich*, 284 S.W.3d at 372-73 ("[T]he governmental entities themselves—as opposed to their officers in their official capacity—remain immune from suit. . . . [I]t follows that [*ultra-vires*] suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity."). The City argued in its plea that the trial court must dismiss Pidgeon's claims against it because Pidgeon failed to plead or establish any waiver of the City's immunity. In response, Pidgeon argued that the Texas Uniform Declaratory Judgments Act (the DJA) waives the City's immunity against Pidgeon's claim. *See* TEX. CIV. PRAC. & REM. CODE §§ 37.001-.011.

The City pointed out, however, that Pidgeon never mentioned the DJA in his petition, much less pleaded that it waived the City's governmental immunity. At the hearing on the City's plea, and in his brief in the court of appeals, Pidgeon acknowledged that he had not expressly pleaded a claim or waiver under the DJA, but offered to amend his pleadings "to make the request for a declaration more explicit." On remand, Pidgeon will have the opportunity to replead his claims against the City, and the City will have the opportunity

to file a new plea to the jurisdiction as to any such claims.

V.
Conclusion

In *Obergefell*, the Supreme Court acknowledged that our historical view of marriage has long been "based on the understanding that marriage is a union between two persons of the opposite sex." 135 S. Ct. at 2594. It concluded, however, that this "history is the beginning of these cases," and it rejected the idea that it "should be the end as well." *Id.* But *Obergefell* is not the end either. Already, the Supreme Court has taken one opportunity to address *Obergefell*'s impact on an issue it did not address in *Obergefell*, and there will undoubtedly be others. *See Pavan*, ___ U.S. at ___, 2017 WL 2722472, at *2.[21] Pidgeon and the Mayor, like many other litigants throughout the country, must now assist the courts in fully exploring *Obergefell*'s reach and ramifications, and are entitled to the opportunity to do so.

---

[21] On the same day the Supreme Court issued its per curiam opinion in *Pavan*, it also granted certiorari in another case involving a same-sex-marriage issue *Obergefell* did not address. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, ___ U.S.L.W. ___ (U.S. June 26, 2017) (No. 16-111). The Court's decision to hear and consider *Masterpiece Cakeshop* illustrates that neither *Obergefell* nor *Pavan* provides the final word on the tangential questions *Obergefell*'s holdings raise but *Obergefell* itself did not address.

Today, however, we are dealing only with an interlocutory appeal from a trial court's orders denying a plea to the jurisdiction and granting a temporary injunction. For the reasons explained, we hold that the Fifth Circuit's decision in *De Leon* does not bind the trial court on remand, and the trial court is not required to conduct its proceedings "consistent with" that case. We hold that the court of appeals' judgment does not bar Pidgeon from seeking all appropriate relief on remand or bar the Mayor from opposing that relief. We hold that the court of appeals did not err by failing to affirm the temporary injunction "to the extent" it required the City to claw back payments made prior to *Obergefell*. And we decline to instruct the trial court how to construe *Obergefell* on remand. We reverse the court of appeals' judgment, vacate the trial court's temporary injunction order, and remand this case to the trial court for further proceedings consistent with our judgment and this opinion.

Jeffrey S. Boyd
Justice

Opinion delivered: June 30, 2017

Reversed and Remanded and Per Curiam Opinion filed July 28, 2015.

[SEAL]

In The

Fourteenth Court of Appeals

NO. 14-14-00899-CV
NO. 14-14-00932-CV

MAYOR ANNISE PARKER AND CITY OF HOUSTON, Appellants

V.

JACK PIDGEON AND LARRY HICKS, Appellees

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2014-61812

PER CURIAM OPINION

Appellees Jack Pidgeon and Larry Hicks (collectively, Appellees) sued to enjoin Mayor Annise Parker and the City of Houston (collectively, the City) from providing employee benefits to the same-sex spouses of employees legally married in another state. Appellees relied on provisions of the Texas Constitution and Family Code banning recognition of same-sex

marriage in Texas, declaring same-sex marriages against public policy and void, and prohibiting political subdivisions from giving effect to same-sex marriages from other states. *See* Tex. Const. art. I, § 32; Tex. Fam. Code § 6.204. The trial court signed a temporary injunction requested by the Appellees,[1] determining that:

> 4. Spending funds in that manner will recognize a union between two people of the same sex as a status identical to the Texas Constitution's definition of marriage. That expenditure is thus barred by the Texas Constitution.
>
> 5. Spending funds in that manner recognizes and validates a marriage between persons of the same sex. That expenditure is thus barred by the Family Code.
>
> 6. Spending funds in that manner gives effect to a right or claim to benefits asserted as the result of a marriage between persons of the same sex. That expenditure is thus barred by the Family Code.

---

[1] The City challenged Appellees' standing to sue. Appellees' pleading that they are residents of Houston, Texas, Harris County, and "taxpayer[s] . . . residing within the boundaries of the City of Houston and Defendants are expending significant public funds on an illegal activity," construed liberally, supports Appellees' standing to sue as taxpayers without showing a particularized injury. *See Lone Star Coll. Sys. v. Immigration Reform Coal. of Tex. (IRCOT)*, 418 S.W.3d 263, 267-68, 274 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (op. on reh'g).

> 7. Spending funds in that manner will furnish employment benefits to persons who are not an employee's legal spouse or dependent children. That expenditure is thus barred by the City's charter.

Thus, the trial court concluded that "[t]he City is prohibited from furnishing benefits to persons who are married in other jurisdictions to City employees of the same sex."

In light of recent decisions from the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit,[2] we conclude that we must reverse the trial court's injunction. In *Obergefell*, the United States Supreme Court determined that "same sex couples may exercise their fundamental right to marry in all States." *Obergefell*, 135 S. Ct. 2584, 2604-05, 2607 (2015). The United States Supreme Court held that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2607-08. Further, in *DeLeon*, a federal district court found that article I, section 32 of the Texas Constitution and Texas Family Code section 6.204 are unconstitutional and enjoined the State of Texas from enforcing them; the United States Court of Appeals for the Fifth Circuit affirmed the trial court's determination in light of *Obergefell*. *DeLeon*, No. 14-50196, ___

---

[2] *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *DeLeon v. Abbott*, No. 14-50196, ___ F.3d ___, 2015 WL 4032161 (5th Cir. July 1, 2015).

F.3d ___, 2015 WL 4032161, at "1-2 (5th Cir. July 1, 2015).

Because of the substantial change in the law regarding same-sex marriage since the temporary injunction was signed,[3] we reverse the trial court's temporary injunction and remand for proceedings consistent with *Obergefell* and *DeLeon*.

PER CURIAM

Panel consists of Justices Boyce, McCally, and Donovan.

[3] We have broad discretion to remand a case in the interest of justice after reversing the trial court's judgment. *See* Tex. R. App. P. 43.3(b); *Ahmed v. Ahmed*, 261 S.W.3d 190, 196 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Chrismon v. Brown*, 246 S.W.3d 102, 116 (Tex. App.—Houston [14th Dist.] 2007, no pet.). We may exercise our discretion to remand as long as there is a probability that the case, for any reason, has not been fully developed. *See Ahmed*, 261 S.W.3d at 196.

CAUSE 2014-61812

/s/ [illegible]
/s/ [illegible]
/s/ [illegible]

JACK PIDGEON AND LARRY HICKS, PLAINTIFFS	§	IN THE DISTRICT COURT
v	§	HARRIS COUNTY, TEXAS
MAYOR ANNISE PARKER AND CITY OF HOUSTON, DEFENDANTS	§	~~245TH~~ [310TH] JUDICIAL DISTRICT

Temporary ~~Restraining Order~~ [Injunction]

(Filed Nov. 5, 2014)

The Court considered the Plaintiffs' application for a temporary ~~restraining order~~ [injunction] at a hearing on ~~October~~ [November] 5, 2014. It has the parties' pleadings and filings, the parties' arguments, and the evidence presented, and it takes judicial notice of the earlier arguments and rulings in this case The Court renders this temporary ~~restraining order~~ [injunction] based on that consideration

Findings

There is evidence that, and the Court finds, that

A Law

1 The City's charter prohibits the City's furnishing employment benefits to anyone other than employees, their spouses, and their dependent children

2 The Texas Family Code prohibits political subdivisions of the state from giving effect to (1) government proceedings that create, recognize, or validate a marriage between persons of the same sex and (2) rights or claims to legal benefits a person asserts as a result of a marriage between persons of the same sex

3 The Texas Constitution defines marriage as a union of one man and one woman, and it prohibits the state's political subdivisions from recognizing a legal status identical to marriage

B City's status and actions

1 The City is a political subdivision of the State of Texas

2 Parker has ordered the City's Human Resources Department to furnish spousal benefits to persons who were married m another Jurisdiction to a City employee of the same sex

3 The Defendants have spent, or absent this restraining order will spend, City funds to extend those benefits to those persons

C City's violations of the law

4 Spending funds in that manner will recognize a union between two people of the same sex as a status

identical to the Texas Constitution's definition of marriage That expenditure is thus barred by the Texas Constitution

5 Spending funds in that manner recognizes and validates a marriage between persons of the same sex That expenditure is thus barred by the Family Code

6 Spending funds m that manner gives effect to a right or claim to benefits asserted as the result of a marriage between persons of the same sex That expenditure is thus barred by the Family Code

7 Spending funds in that manner will furnish employment benefits to persons who are not an employee's legal spouse or dependent children That expenditure is thus barred by the City's charter

D Entitlement to temporary restraint

8 The Plaintiffs have standing as taxpayers to sue to prevent those illegal expenditures

9 Because the City has already spent, or absent this restraining order will spend, those funds, the harm from those illegal expenditures is imminent If the City has already spent those funds, the harm is actual, if it is about to spend those funds, it is probable

10 The harm from those illegal expenditures is, and will be, irreparable

11 There is no legally adequate remedy for the City's illegal expenditures

12 The Plaintiffs have introduced evidence tending to sustain their claims against the Defendants

13 That evidence demonstrates the Plaintiffs' entitlement to have the last peaceable, uncontested status preserved pending the outcome of this suit

Order

Based on these findings, the Court orders that

A Temporary restraint

The City is prohibited from furnishing benefits to persons who were married in other jurisdictions to City employees of the same sex

B Bond

The Plaintiffs' bond for this order is set at $250 per plaintiff—$500 in total Bonds previously deposited with the clerk are continued

C Hearing

The Court ~~will hear the Plaintiffs' request for a temporary injunction~~ [will try the case] on December 14, 2014~~[~~5], ~~at~~ _____ [@ 9:00 a.m]

~~D Expiration~~

~~This order expires on _____, 2014.~~

Signed on ~~October~~ [November] ___, 2014, at Houston, Texas

NOV - 5 2014 /s/ [Illegible]
PRESIDING JUDGE

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 28 U.S.C. 1257(a)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

2. U.S. Const. Amend. XIV, § 2

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

3. U.S. Const., Art. 6, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. TX Const. Art. I, sec. 32

Sec. 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.

5. Texas Family Code § 6.204

(b) A marriage between persons of the same sex or a civil union 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.

6. Houston City Charter, Art. II, Sec. 22

Section 22. – 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; nor shall the City provide any privilege in promotion, hiring, or contracting to a person or group on the basis of sexual preference, either by a vote of the city counsel or an executive order by the Mayor. Further, the City of Houston shall not require entities doing business with the City to have any of the above benefits or policies.

If any portion of this proposed Charter amendment is declared unlawful, then such portion shall be removed and the remainder of the Charter amendment will remain in effect. Any ordinance in conflict with this section of the Charter is hereby repealed and declared invalid.

(Added by amendment November 6, 2001)