No. 15-13836

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PAUL HARD,
Plaintiff-Appellee,

v.

PAT FANCHER,
Intervenor Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

THE HONORABLE W. KEITH WATKINS

BRIEF OF APPELLEE

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CERTIFICATE OF INTERSTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, Plaintiff–Appellee Paul Hard hereby certifies that the list provided in the Principal Brief of Intervenor Defendant–Appellant Patricia Fancher describing persons and entities that may have an interest in the outcome of this case on appeal is a complete list.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff–Appellee Paul Hard believes that oral argument is not essential to the determination of the issues on appeal. The written submissions should provide sufficient basis for affirming the District Court's rulings.

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STATEMENT OF THE ISSUES

Intervenor Defendant–Appellant Pat Fancher's ("Mrs. Fancher") conception of the first issue presented, (Appellant's Br. at 1), is improper in three regards. First, it presumes that this Court will engage the substantive issue of retroactive application of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) even though the District Court never substantively ruled on that issue—instead dismissing the case for mootness. (July 14, 2015 Order (hereinafter "Dismissal Order"), ECF No. 89, App. 126-27; Final J., ECF No. 97, App. 144.) Second, the issue wrongly reflects an assumption that Alabama's discriminatory marriage laws were valid until the moment that the United States Supreme Court declared them unconstitutional. Third, the framing falsely suggests that Alabama's laws of intestate succession and wrongful death specifically excluded same-sex couples, whereas they actually utilize the general term "spouse." Alabama's marriage laws, rather than the intestate succession laws, acted to prevent recognition of same-sex marriages.

The second issue articulated by Mrs. Fancher is overly broad to be useful. But it is clear that she seeks two things: to revive the full discriminatory power of Alabama's marriage laws up to the moment of the *Obergefell* decision and to claw back all of the of $552,956.69 paid to Plaintiff–Appellee Dr. Paul Hard ("Dr. Hard") as the surviving spouse.

Examination of only one issue, listed first below, is needed to dispose of this appeal. The second issue is embedded within and related to the first. The third issue frames the merits of the appeal—never substantively addressed by the District Court.

1. Did the District Court abuse its discretion by rejecting Mrs. Fancher's Motion to Set Aside (*i.e.*, reconsider) on an issue that she had not raised until after the conclusion of the case, which lasted for more than one-and-a-half years in the District Court?

2. Did the District Court abuse its discretion by releasing the spousal share of wrongful death proceeds to Dr. Hard—the surviving spouse of the decedent?

3. Was it clear error for the District Court following *Obergefell* to release the spousal share of wrongful death proceeds to Dr. Hard because his husband's death occurred before *Obergefell*?

STATEMENT OF THE CASE

This case involves the clear-cut application of the United States Supreme Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) to this case, which was open and pending at the time *Obergefell* was decided and involves identical legal questions and similarly situated litigants as *Obergefell*.

Dr. Hard, a Montgomery widower, brought this lawsuit to challenge Alabama's refusal to recognize his Massachusetts marriage to his late husband, David Fancher ("Mr. Fancher"). Similar to the named plaintiff in *Obergefell*, Dr. Hard alleged that Alabama's marriage laws, namely the so-called "Marriage Protection Act," Ala. Code § 30-1-19(e),[1] and the "Sanctity of Marriage Amendment," Ala. Const. (1901) amend. 774(e)[2] (collectively hereinafter the "Sanctity Laws"), violated his rights under both the Due Process Clause and the Equal Protection Clause of the United States Constitution. Alabama's unconstitutional refusal to recognize Dr. Hard's marriage manifested itself for purposes of this case in the context of a wrongful death action brought in connection with Mr. Fancher's death. Under the Sanctity Laws, Alabama, like Ohio in *Obergefell*, refused to recognize Dr. Hard as the surviving spouse on Mr. Fancher's death certificate. Based on *Obergefell*, and because the State of Alabama, during the pendency of this case, had already issued a revised death certificate recognizing Dr. Hard as the surviving spouse, the District Court

[1] "The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued." Ala. Code § 30-1-19(e).

[2] "The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued." Ala. Const. (1901) amend. 774(e).

dismissed this case as moot and correctly distributed the wrongful death proceeds it was holding in its registry to Dr. Hard.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Mrs. Fancher's statement of facts is correct except where she injects legal conclusions in paragraphs designated four and nine. (Appellant's Br. at 3-4.) In addition, the following facts and procedural history are relevant to this appeal.

1. On May 20, 2011, Dr. Hard married Mr. Fancher in Massachusetts. The couple returned to their home in Alabama after their wedding. (Compl. ¶¶ 21, 25, ECF No. 1, App. 15.)

2. On August 1, 2011, Mr. Fancher died when the vehicle he was driving collided with an earlier trucking accident on an interstate as he traveled to work in early morning darkness. (*Id.* ¶¶ 27-28.)

3. On June 21, 2012, a wrongful death lawsuit was filed on behalf of Mr. Fancher's estate. Wrongful death proceeds are disbursed in Alabama in accordance with intestate succession notwithstanding that Mr. Fancher had named Dr. Hard as the sole beneficiary of his will. (*Id.* ¶¶ 20, 26, 34-43); *see also* Ala. Code § 6-5-410(c).[3]

[3] "The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions." Ala. Code § 6-5-410(c).

4. On December 16, 2013, Dr. Hard filed a lawsuit seeking a declaration that the Sanctity Laws are unconstitutional and seeking to be recognized as Mr. Fancher's surviving spouse on his death certificate, among other relief. (*Id.* ¶¶ 16-17.)

5. On February 12, 2014, Dr. Hard filed a Notice of Filing of Stipulation with the administrator of the estate who brought the wrongful death lawsuit, who agreed to maintain the spousal share that Dr. Hard would be entitled to if he were determined to be the surviving spouse. (Ex. A to Notice of Filing of Stipulation, ECF No. 6-1, Supp. App. [ ].[4])

6. On August 29, 2014, Dr. Hard and the Attorney General cross-moved for summary judgment. On October 1, 2014, Mrs. Fancher similarly moved for summary judgment. (Pl. Paul Hard's Mot. for Summ. J., ECF No. 59, App. 51-89; Defs.' Mot. for Summ. J., ECF No. 63, App. 91-96; Def.'s Mot. for Summ. J., ECF No. 65, App. 98-104.)

7. On or around September 2014, the wrongful death lawsuit resulted in a sizeable wrongful death settlement. (*See* Feb. 24, 2015 Order, ECF No. 75, Supp. App. [ ].)

8. Soon thereafter, the administrator of Mr. Fancher's estate disbursed nearly half of those settlement proceeds (minus attorneys' fees) to Mrs. Fancher as

[4] Dr. Hard plans to file a Supplemental Appendix to Appellant's Appendix pursuant to 11th Cir. R. 30-1(b)-(c).

the surviving mother, while holding the remainder of $552,956.69 ("Spousal Share") pending resolution of Dr. Hard's constitutional challenge of the Sanctity Laws. (*See* Mot. to Intervene, ECF No. 74, Supp. App. [ ]; Ex. A to Notice of Filing of Stipulation, ECF No. 6-1, Supp. App. [ ].)

9. On January 23, 2015, the United States District Court for the Southern District of Alabama declared Alabama's Sanctity Laws unconstitutional on the same grounds alleged by Dr. Hard. *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1290 (S.D. Ala. 2015).

10. On February 9, 2015, the State of Alabama issued a corrected death certificate recognizing Dr. Hard as Mr. Fancher's surviving spouse. (Ex. A to Wolfe Decl. in Supp. of Mot. to Lift Stay, Enter Summ. J., and Distribute Funds to Pl. (hereinafter "Corrected Death Cert."), ECF No. 80-3, Supp. App. [ ].) The certificate had previously stated, "never married." (Compl. ¶ 33, ECF No. 1, App. 16.)

11. On February 24, 2015, administrator of Mr. Fancher's estate intervened in this case for the limited purpose of paying the Spousal Share into the District Court's registry pending resolution of this case. (Feb. 24, 2015 Order, ECF No. 75, Supp. App. [ ].)

12. On March 10, 2015, the District Court stayed all proceedings pending resolution of the same issues by the U.S. Supreme Court in *Obergefell*. (Stay Order, ECF No. 77, App. 106.)

13. On June 26, 2015, the U.S. Supreme Court held that same-sex marriages are protected as a fundamental right under the Constitution. *Obergefell*, 135 S. Ct. at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

14. On July 14, 2015, the District Court granted Dr. Hard's motion to lift the stay of the case and disburse the Spousal Share to him from the District Court's registry. The District Court further granted the Attorney General's motion to dismiss the case for mootness and denied all of the parties' summary judgment motions as moot without reaching the merits of those motions. (Dismissal Order, ECF No. 89, App. 126-27.)

15. On July 15, 2015, after the District Court had dismissed the case, Mrs. Fancher filed a Motion to Set Aside Order of Dismissal—the first time she raised an issue concerning retroactivity. (Intervening Def.'s Mot. to Set Aside Order of

Dismissal and Her Renewed Prayer for Relief (hereinafter "Mot. to Set Aside"), ECF No. 90, Supp. App. [ ].[5])

16. On July 29, 2015, the District Court denied Mrs. Fancher's Motion to Set Aside Order of Dismissal, ordered the Clerk of Court to disburse the Spousal Share plus interest to Dr. Hard, (July 29, 2015 Order, ECF No. 96, App. 140-142), and entered Final Judgment, (Final J., ECF No. 97, App. 144). The Spousal Share was soon thereafter paid to Dr. Hard.

II. STANDARD OF REVIEW

Mrs. Fancher is mistaken in her assertion that the standard of review governing her entire appeal is *de novo*. (Appellant's Br. at 5.) She supports that proposition with references to cases dismissed for failure to state a claim—inapposite to this case dismissed for mootness. (Dismissal Order, ECF No. 89, App. 126-27.) It is correct that dismissals for mootness, like summary judgment rulings, are reviewed *de novo*. *Ala. Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 496 (11th Cir. 1996) ("The reviewing court determines questions of mootness under a plenary standard of review."); *Jaques v. Kendrick*, 43 F.3d 628, 630 (11th Cir. 1995) ("We review grants of summary judgment under a *de novo* standard of review."). Mrs. Fancher, however,

[5] Intervening Def.'s Mot. to Set Aside Order of Dismissal and Her Renewed Prayer for Relief was included in the table of Appellant's Appendix but is not reproduced therein.

does not argue that the dismissal for mootness was error. Neither does she challenge the District Court's denial of the parties' summary judgment motions—also denied for mootness. Instead, her appeal is of the denial of her Motion to Set Aside (*i.e.*, reconsider) the District Court's dismissal of the case and disbursement of the funds held in the District Court's registry after dismissal.

A denial of a motion to reconsider is reviewed for abuse of the trial judge's sound discretion—not *de novo*. *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1285 (11th Cir. 2001) ("The denial of a motion for reconsideration . . . is reviewed only for abuse of discretion."). Similarly, the District Court's decision to disburse funds held in its registry is reviewed under an abuse-of-discretion standard. *Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 753 (11th Cir. 2002) (release of funds held in registry of the court is reviewed for abuse of discretion); *Zelaya/Capital Int'l Judgment, LLC v. Zelaya*, 769 F.3d 1296, 1300-01, 1306 (11th Cir. 2014) (abuse-of-discretion standard applies to court's handling of disputed funds deposited into court's registry). A district court's exercise of discretion is abused only if its decision "constitute[s] a clear error of judgment." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (citation omitted). A district court is justified in rejecting a motion to set aside and/or releasing funds so long as it had "good cause" for those decisions. *See, e.g.*, *Rhines v. Weber*, 544

U.S. 269, 277, 125 S. Ct. 1528, 1535 (2005) (where there is good cause for a decision, the lower court has not abused its discretion).

SUMMARY OF ARGUMENT

The District Court's decision to deny Mrs. Fancher's Motion to Set Aside the District Court's dismissal of the case as moot was not an abuse of discretion. Because the State of Alabama had already recognized the legal validity of Dr. Hard's marriage to Mr. Fancher and listed him as Mr. Fancher's surviving spouse on his death certificate, the District Court concluded that the case had become moot. As such, there was no case or controversy left to be decided. Mrs. Fancher did not attack the mootness rationale in her Motion to Set Aside (nor does she do so in this appeal), choosing instead to dispute, for the first time, the retroactive application of *Obergefell*. The District Court was well within its discretion to deny the motion and refrain from entertaining the new argument. Once the District Court had dismissed the case as moot, it was also within its discretion to order the funds held in the District Court's registry be disbursed to Dr. Hard. Given that the State of Alabama had already recognized Dr. Hard as the surviving spouse of Mr. Fancher on his death certificate, good cause existed for the District Court to order the funds disbursed to Dr. Hard.

Even if the District Court's dismissal is to be reviewed *de novo*, the District Court did not err in applying *Obergefell* to this case and dismissing it on that basis.

It is well-established that the constitutional decisions of the United States Supreme Court operate retrospectively. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993). *Harper* held that "[w]hen [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97, 113 S. Ct. at 2517.

In *Obergefell*, the Supreme Court held that states could not constitutionally refuse to recognize the valid out-of-state marriages of same-sex couples. 135 S. Ct. at 2608. It then applied this holding to the litigants before it in that case. Specifically the Supreme Court invalidated the Ohio statute that prohibited recognition of James Obergefell's valid Maryland marriage to his late husband, John Arthur. The Supreme Court let stand the trial court's ruling that Ohio must list Obergefell as Arthur's surviving spouse on his death certificate. *Id*. By applying its holding to the parties before it (and retroactively to Obergefell's and Arthur's marriage and death certificate), the Supreme Court decided the issue of retroactivity and placed its *Obergefell* decision squarely within the general rule of retrospective application and *Harper*.

This case was open and pending when the *Obergefell* decision was handed down and involves similarly situated litigants and the same legal issues as *Obergefell*. Accordingly, *Harper* controls and the District Court was bound to give *Obergefell*'s holding "full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Supreme Court's] announcement of the rule." 509 U.S. at 97, 113 S. Ct. at 2517. Mrs. Fancher's attempts to distinguish *Harper*, to argue that this case presents an exception to the general rule of retrospective application of constitutional decisions, or to analyze retroactivity under *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971), are all without merit. The District Court's decision should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION TO SET ASIDE OR BY ORDERING THE DISBURSEMENT OF THE FUNDS HELD IN THE COURT'S REGISTRY

Mrs. Fancher has not disputed or challenged the District Court's dismissal of the case as moot. She did not argue in her Motion to Set Aside and does not argue in this appeal that the District Court's determination that the case was mooted, *i.e.*, that there was no longer a live case or controversy, when the State of Alabama, during the pendency of the case, recognized Dr. Hard as Mr. Fancher's surviving spouse by issuing a corrected death certificate was incorrect as a matter of law. By

not addressing the mootness ground on appeal, Mrs. Fancher has waived any arguments on that subject. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (party "waived [] issue by failing to argue it in its brief on appeal").

After that, all that is left to review is the District Court's denial of Mrs. Fancher's Motion to Set Aside and its order disbursing the funds held in the District Court's registry to Dr. Hard. Both of these decisions are properly reviewed under the deferential abuse-of-discretion standard of review. Mrs. Fancher first presented her arguments concerning retroactivity in her Motion to Set Aside. (Mot. to Set Aside, ECF No. 90, Supp. App. [ ].) That motion came after the District Court had granted the Attorney General's motion to dismiss the case as moot. (Dismissal Order, ECF No. 89, App. 126-27.) Mrs. Fancher's Motion to Set Aside did not address mootness at all and instead focused on the new issue of retroactivity. The District Court did not review the merits of the retroactivity argument and accept or reject it. Instead, having already determined the case to be moot (and not hearing any argument on that subject at all in the request to reconsider that decision), the District Court summarily denied Mrs. Fancher's motion. (July 29, 2015 Order, ECF No. 96, App. 140-142.) The District Court was well within its discretion to deny the Motion to Set Aside because Alabama had earlier, during the pendency of the case, recognized Dr. Hard as Mr. Fancher's

surviving spouse by correcting Mr. Fancher's official death certificate. (Corrected Death Cert., ECF No. 80-3, Supp. App. [ ].) Based on these circumstances, the District Court cannot be found to have committed a clear error of judgment and that decision is due to be affirmed. Mrs. Fancher asks this Court to second guess the District Court's denial of her motion to reconsider, but under the deferential abuse-of-discretion standard it is not enough that faced with the same choice this Court might have come to a different conclusion. *See Frazier*, 387 F.3d at 1259 (discussing the abuse-of-discretion standard of review).

For the same reasons, the District Court had good cause to order that the funds held in the District Court's registry be disbursed to Dr. Hard because he was due the Spousal Share by operation of law once the Sanctity Laws were found to be unconstitutional and Alabama had recognized him as Mr. Fancher's surviving spouse. Ala. Code § 43-8-41(2).[6] The District Court's order regarding the disbursement of the funds is likewise due to be affirmed because Mrs. Fancher has presented no valid argument that the District Court made a clear error of judgment in disbursing the funds to Dr. Hard.

[6] "The intestate share of the surviving spouse is as follows: . . . (2) If there is no surviving issue but the decedent is survived by a parent or parents, the first $100,000.00 in value, plus one-half of the balance of the intestate estate." Ala. Code § 43-8-41(2).

II. THE DISTRICT COURT DID NOT ERR BY DISMISSING THE CASE AND DISBURSING THE FUNDS TO DR. HARD

In the event this Court is inclined to review the decisions below *de novo*, the District Court did not err.[7]

Mrs. Fancher's only argument on appeal is that the District Court erred to the extent it applied *Obergefell* to this case because: (1) *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971), *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Ex parte State ex rel. Alabama Policy Inst.*, --- So. 3d ----, Case No. 1140460, 2015 WL 892752 (Ala. Mar. 3, 2015), *abrogated by Obergefell*, preclude the retroactive application of *Obergefell*'s holding that states must recognize the out-of-state marriages of same-sex couples; (2) *Obergefell*, by its own terms, mandates only prospective application; and (3) there are strong public policy and state law grounds for refusing retroactive application of *Obergefell*. Each of these arguments is without merit and the District Court's decision should be affirmed.

A. *Obergefell* Applies Retroactively Pursuant to *Harper*.

Contrary to Mrs. Fancher's assertion, *Harper*, 509 U.S. 86, 113 S. Ct. 2510, requires that *Obergefell*'s holding be applied retroactively in deciding the case

[7] Clear error—rather than *de novo review*—applies to the issue of retroactivity for the reasons explained *supra*.

below without any need to consider the *Chevron Oil* analysis, which does not apply.

In *Harper*, the Supreme Court reiterated the long-standing rule that its constitutional decisions operate retrospectively. 509 U.S. at 94, 113 S. Ct. at 2516 ("Both the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court. Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed judicial decisions . . . for near a thousand years." (citations and alterations omitted)); *see also Glazner v. Glazner*, 347 F.3d 1212, 1216 (11th Cir. 2003) ("Generally, new rules of law are applied retroactively as well as prospectively."); *Smith v. Jones*, 256 F.3d 1135, 1140, 1144 (11th Cir. 2001) (noting general rule of retroactivity and citing *Harper*); *Rodgers v. Singletary*, 142 F.3d 1252, 1253 (11th Cir. 1998) (same). Furthermore, in *Harper*, the Supreme Court adopted the rule, based on its decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991), that "[w]hen [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97, 113 S. Ct. at

2517; *see also Glazner*, 347 F.3d at 1217–18; *Smith*, 256 F.3d at 1140; *Rodgers*, 142 F.3d at1253.

Based on this rule, the relevant question with respect to the application of *Obergefell* is whether the Supreme Court applied its holding in *Obergefell* to the parties before it in that case. It did. A review of the procedural history and the plaintiffs' factual circumstances in *Obergefell* demonstrates the point.

James Obergefell and John Arthur, residents of Ohio, married in Maryland on July 11, 2013. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 976 (S.D. Ohio 2013). Arthur had been diagnosed with terminal Lou Gerhig's disease in 2011. *Obergefell*, 135 S. Ct. at 2594. Because Ohio did not recognize Obergefell's and Arthur's Maryland marriage, they sued to secure recognition of their marriage so that Obergefell would be listed as Arthur's surviving spouse on Arthur's death certificate. *Id*. at 2594–95. After Arthur passed away on October 22, 2013, Obergefell obtained a permanent injunction that required Ohio to recognize his marriage to Arthur and list Obergefell as Arthur's surviving spouse. *Wymyslo*, 962 F. Supp. 2d at 976, 997–98.

On appeal, the Sixth Circuit Court of Appeals reversed the district court decision. Obergefell appealed that decision to the Supreme Court. The Supreme Court held that the Ohio law prohibiting recognition of Obergefell's marriage to Arthur and Obergefell as Arthur's surviving spouse was unconstitutional and

reversed the Sixth Circuit's decision. *Obergefell*, 135 S. Ct. at 2608. In doing so, the Supreme Court held that the State of Ohio must recognize Obergefell's same-sex marriage and that Ohio must list Obergefell as the surviving spouse of Arthur on his death certificate even though their marriage was not legally recognized in Ohio at the time of the marriage or at the time of Arthur's death. In other words, the Supreme Court applied the holding in its decision in *Obergefell* to the litigants in that litigation. *Id.*

The conclusion that the Supreme Court applied its holding from *Obergefell* to the litigants in that case is also supported by the fact that the Supreme Court simply reversed the Sixth Circuit's decision and did not specifically and expressly reserve the question of retroactivity by remanding the case to the lower courts for them to decide that issue. *See James B. Beam Distilling Co.*, 501 U.S. at 539–40, 111 S. Ct. at 2445–46 (noting that decision applies its own holding to litigants in cases where case is reversed and remanded "without further ado") (opinion of Souter, J.). "When [the Supreme] Court does not reserve the question whether its holding should be applied to the parties before it, however, an opinion announcing a rule of federal law is properly understood to have followed the normal rule of retroactive application and must be read to hold . . . that its rule should apply retroactively to the litigants then before the Court." *Harper*, 509 U.S. at 97–98, 113 S. Ct. at 2518 (citations and alterations omitted). Where the Supreme Court

intends to reserve the question of whether its decision should apply retroactively, it can be seen doing so expressly. *See, e.g.*, *Am. Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 297–98, 107 S. Ct. 2829, 2847–48 (1987) (remanding case for further proceedings to determine whether ruling "should be applied retroactively"). No such express reservation is found in *Obergefell*. *Obergefell*, 135 S. Ct. at 2608. As a result, the holding from *Obergefell* was applied to the litigants in that case, and, pursuant to *Harper*, this Court is bound to apply that same rule retroactively to the litigants in this case. *Harper*, 509 U.S. at 97, 113 S. Ct. at 2517.

Mrs. Fancher's assertions that *Obergefell*, by its own terms, announced a departure from the general rule of retroactive application in favor of a purely prospective application are without merit. (Appellant's Br. at 14–15.) Her argument that *Obergefell* created a new right to same-sex marriage ignores *Obergefell*'s express rejection of the "new" right framing and its decision not to apply the test for the recognition of new fundamental rights found in *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258 (1997). *Obergefell*, 135 S. Ct. at 2602. Instead of deciding whether Obergefell sought recognition of a new, nonexistent right to same-sex marriage, the Supreme Court analyzed whether same-sex couples were being denied the right to exercise the existing, long-established fundamental right to marry "in its comprehensive sense." *Id*.

In any event, this argument is of no moment. Under the general rule of retroactive application of the Supreme Court's constitutional decisions, the Supreme Court need not announce that litigants have always possessed a particular right because that is assumed as part of the general rule of retroactivity. The Supreme Court would only be expected to announce it was departing from the general rule of retroactivity if it was actually intending to depart from the rule by having its decision apply only prospectively. The Supreme Court did not do so in *Obergefell*. The logical conclusion is that it intended *Obergefell* to be applied under the normal rule of retroactive application. *See Harper*, 509 U.S. at 97–98, 113 S. Ct. at 2517. That the Supreme Court used the present tense and the word "now" on occasion in announcing its decision in *Obergefell* does not change the fact that the Supreme Court applied the holding to the litigants before it and cannot reasonably be interpreted to mean that the Court was departing from the general rule that the decision would have retroactive application.

Mrs. Fancher's attempt to distinguish *Harper* fares no better. Mrs. Fancher contends that this case need not be decided under *Harper* because there exists an independent state law ground that controls the outcome of the case without the need to resort to application of *Obergefell* even if it is applied retroactively. (Appellant's Br. at 11–12.) In addition, Mrs. Fancher seems to suggest that *Harper* only applies where a state court interprets federal laws. (Appellant's Br. at 12.)

Neither of these propositions is a correct interpretation of *Harper* or diminishes its binding effect.

Harper involved the question of whether the Supreme Court of Virginia was required to apply the United States Supreme Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989), to tax cases involving taxes imposed prior to the issuance of *Davis*. 509 U.S. at 89–90, 113 S. Ct. 2513–14. In *Davis*, the Supreme Court ruled that the Michigan tax scheme that exempted from taxation all retirement benefits paid by the state but levied an income tax on retirement benefits paid by the federal government was invalid because it violated the constitutional doctrine of intergovernmental tax immunity. *Id*. at 90–91, 113 S. Ct. at 2513–14. Virginia had a similar tax scheme but the Virginia Supreme Court, using the *Chevron Oil* analysis, refused to apply *Davis* retroactively. *Id*. The Virginia Supreme Court also held that *Davis* need not be applied retroactively because, as a matter of Virginia state law, a ruling declaring a taxing scheme unconstitutional is to be applied prospectively only. *Id*. at 91–92, 113 S. Ct. at 2514–15.

The United States Supreme Court reversed the Virginia Supreme Court, holding that "[the United States Supreme] Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Id*. at 90, 113 S. Ct. at 2513. As previously discussed, the *Harper*

Court determined that the newly announced rule in *Davis* had been applied to the litigants in that case, and therefore, the Virginia Supreme Court was required to apply the *Davis* rule retroactively to the cases before it. *Id*. at 97, 98–99, 113 S. Ct. at 2517, 2518. In addition, the *Harper* Court rejected Virginia's contention that it could supplant the federal law on retroactivity with its own state law holding that decisions invalidating tax laws should only be applied prospectively. *Id*. at 100, 113 S. Ct. at 2519.

Finally, the *Harper* Court rejected Virginia's assertion that there was an independent and adequate state law ground to deny the taxpayers refunds. *Id*. Virginia argued that its refund statute did not provide for retrospective refunds for taxable years concluded before *Davis* was announced because the tax assessments from those years were neither erroneous nor improper within the meaning of the statute at that time. *Id*. That argument was rejected because it was grounded in the erroneous determination that *Davis* did not apply retroactively. *Id*. In other words, the purported independent state law justification itself was built upon the misapplication of *Davis* as applying only prospectively. *Id*.

Rather than being distinguishable from the facts of this case, *Harper* is directly applicable. Here, the District Court and this Court are required to apply *Obergefell*'s holding retroactively to this case because the Supreme Court applied its holding in *Obergefell* to the litigants in that case and this case was pending at

the time the *Obergefell* rule was announced. *Id*. at 97, 113 S. Ct. at 2517. This is entirely consistent with this Circuit's retroactivity decisions. *See, e.g.*, *Glazner*, 347 F.3d at 1217–18; *Smith*, 256 F.3d at 1140, 1144.

Mrs. Fancher's contention that this case involves the interpretation of Alabama state law is both incorrect and irrelevant. (Appellant's Br. at 11.) The District Court did not interpret the Alabama marriage or wrongful death laws nor does this Court have to. The only issues presented in this case are federal ones: whether the State of Alabama could refuse to recognize the validity of Dr. Hard's marriage and whether *Obergefell* has retroactive effect. There is no—nor has there ever been—dispute over state law with respect to the distribution of wrongful death proceeds. Mrs. Fancher's only argument with respect to state law is that Dr. Hard could not be considered a surviving spouse at the time of Mr. Fancher's death because the Alabama marriage laws at the time did not recognize same-sex marriages. That is not a question of state law; it is a question of federal law that was directly decided in *Obergefell* in favor of Dr. Hard's position.

Mrs. Fancher's contention that this Court is bound to apply *Chevron Oil* is also incorrect. (Appellant's Br. at 13.) Because the Supreme Court has already applied the rule it announced in *Obergefell* to the parties in that case, this Court need not apply the test set forth in *Chevron Oil*. *See Glazner*, 347 F.3d at 1217–18 ("The main principle for which *Harper* and *Beam* stand is that once a court applies

a newly announced rule to the parties before it, all other courts must apply that rule to all pending cases. Therefore, the limitation on prospectivity outlined in *Harper* and *Beam* is also of limited relevance [] where we are confronted with the question of whether to apply a newly announced rule prospectively in the first instance."); *Smith*, 256 F.3d at 1140, 1144 (applying *Harper* and not *Chevron Oil* and noting that "[t]he Supreme Court emphatically held in *Harper* that its civil and criminal decisions are to be given full retroactive effect 'as to all events, regardless of whether such events predate or postdate our announcement of the rule, and regardless of the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule. The Supreme Court's application of its new rule to the *Boerckel* case itself requires that we apply that rule to this and all other pending cases.") (citations omitted).

In other words, this case does not require this Court in the first instance to determine whether *Obergefell* is to be applied retroactively consistent with the general rule or, as an exception to that rule, only prospectively. The United States Supreme Court has already decided that question in favor of the former and that determination is binding on this Court. *Harper*, 509 U.S. at 97–98, 113 S. Ct. at 2518 ("the legal imperative to apply a rule of federal law retroactively after the case announcing the rule has already done so must prevail over any claim based on a *Chevron Oil* analysis.") (citations and alterations omitted).

B. Mrs. Fancher's Argument that *Windsor* and *Ex parte State ex rel. Alabama Policy Institute* Prevent Retroactive Application of *Obergefell* is Incorrect.

Mrs. Fancher argues that the decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Ex parte State ex rel. Alabama Policy Inst.*, --- So. 3d ----, 2015 WL 892752 (Ala. Mar. 3, 2015), "stand in the way" of applying *Obergefell* retroactively to this case.[8] This is incorrect.

First, Mrs. Fancher in no way explains how the decisions in these two cases, which occurred between the death of Mr. Fancher in 2011and the decision in *Obergefell*, require this Court to refrain from giving *Obergefell*'s holding retroactive effect. Even if the cases stood for the proposition that Mrs. Fancher argues they do—that each upheld the State of Alabama's right not to recognize another state's opinion regarding marriage—she does not explain how *Obergefell*'s

[8] Mrs. Fancher suggests that even if *Obergefell* must be applied retroactively—which it must—then there is an open question of "how far back does *Obergefell* apply?" (Appellant's Br. at 17.) This is nothing more than idle musing by Mrs. Fancher. She cites no authority either posing or answering her question. In any event, the Supreme Court has applied its decisions retroactively to reach back to conduct as far removed from the announcement of the new rule as twenty years. *See Smith*, 256 F.3d at 1140 (applying *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728 (1999), retroactively and noting "The Supreme Court's decision announcing the rule under which Boerckel's conduct constituted a failure to exhaust amounting to a procedural default did not come until twenty years after his conduct, yet the Supreme Court applied the new rule to Boerckel. The *Boerckel* rule must be applied with equal force to any other habeas petitioner, regardless of when the failure to seek state discretionary review occurred.").

contrary and more recent holding does not overrule or supplant those decisions and apply retroactively.[9] (Appellant's Br. at 17–19.)

Second, Mrs. Fancher misunderstands the holding of *Windsor*. *Windsor* involved a challenge to a provision of the *federal* Defense of Marriage Act that prohibited the recognition of same-sex marriages for purposes of federal law. *Windsor*, 133 S. Ct. at 2695. The constitutionality of state marriage laws, let alone Alabama's Sanctity Laws specifically, was not before the Supreme Court in *Windsor*, and therefore it did not, as Mrs. Fancher argues, "uph[o]ld the State of Alabama's right to not recognize another state's opinion regarding marriage," hold "that States were entirely justified in not recognizing same-sex marriages officiated in foreign states," or "confirm[] that the State of Alabama need not recognize the Hard-Fancher Massachusetts marriage." (Appellant's Br. at 17-19.) Contrary to Mrs. Fancher's argument, Alabama's Sanctity Laws were never valid—as confirmed in *Obergefell*. They were invalid from their inception because they "burden[ed] the liberty of same-sex couples" and "abridge[d] central precepts of equality." *Obergefell*, 135 S. Ct. at 2604. The Sanctity Laws at all times worked an "unjustified inequality." *Id*. at 2603-04.

[9] With respect to the Alabama Supreme Court's decision in *Ex parte State ex rel. Alabama Policy Institute*, it should go without saying that under the Supremacy Clause the United States Supreme Court's decision in *Obergefell* trumps and abrogates any contrary state decision.

At most, *Windsor* merely acknowledged that states are generally afforded responsibility for domestic relations laws.[10] *Windsor*, 133 S. Ct. at 2691–92. While Mrs. Fancher quotes liberally from this portion of the *Windsor* opinion, she omits the important caveat that "[t]he States' interest in defining and regulating the marital relationship" is "subject to constitutional guarantees"—the very guarantees that *Obergefell* held two years later were violated by *state* bans on same-sex marriage. *Id*. at 2692. In addition, far from standing in the way of *Obergefell*, the holding in *Windsor* provided the foundation for many of the subsequent federal cases that struck down state marriage bans leading up to the *Obergefell* decision, including the district court decision in *Obergefell* that the Supreme Court affirmed, *see, e.g.*, *Wymyslo*, 962 F. Supp. 2d at 980–82, 984–85, and relied upon in the *Obergefell* decision, *see, e.g.*, 135 S. Ct. at 2600–01.[11]

[10] Based on this proposition, Mrs. Fancher argues that this Court should certify the question of *Obergefell*'s retroactive effect to the Alabama Supreme Court. (Appellant's Br. at 18.) Certification to the Alabama Supreme Court is both unnecessary and inappropriate. The question of the retroactivity of the constitutional decisions of the United States Supreme Court is a question of federal law, not state law. Furthermore, this case does not require the interpretation of state law at all. This Court is competent to resolve all issues on appeal without the help of the Alabama Supreme Court.

[11] Mrs. Fancher also asserts that Dr. Hard is now attempting "to use *Obergefell* to support a claim that the Eleventh Circuit should construe the Constitution's Full Faith and Credit Clause to revive his same-sex Massachusetts marriage from four years ago." (Appellant's Br. at 19.) This is both unexplained and untrue. Dr. Hard has never made a claim based on the Full Faith and Credit Clause and he does not do so now. Nor does the majority opinion in *Obergefell* even mention the

C. There is No Public Policy Exception to *Harper*'s Rule of Retroactivity.

Mrs. Fancher invites this Court to carve out an exception to *Harper*'s rule of retroactivity—without the support of a single legal authority—based on the purported "devastating long-term consequences" of applying *Obergefell* retroactively. (Appellant's Br. at 20–22.) The anxiety-inducing scenarios imagined by Mrs. Fancher are based solely on her speculative handwringing. For example, she worries that "[e]states that have been probated and put to rest might have to be re-opened" and that same-sex couples might want to amend their tax returns. (Appellant's Br. at 20.) These are not questions or issues that are before this Court, nor would holding that *Obergefell* applies retroactively in this case which was open and pending when the *Obergefell* rule was announced mean that all certainty would be lost and that chaos would ensue. No such legal tempests materialized in the more than a decade since Massachusetts legalized same-sex marriage. Nor has there been a flood of cases in the period since *Windsor* invalidated the ban on the recognition of same-sex marriage for purposes of federal law. Federal agencies, including the Internal Revenue Service and the tax courts, have not been inundated with the "scenarios beyond the imagination" of which Mrs. Fancher warns.

Full Faith and Credit Clause. Dr. Hard simply asks this Court to apply *Obergefell* retroactively consistent with *Harper*. *See supra* II(A).

In any event, applying *Obergefell* retroactively to this case, which was still open and under direct review at the time of the *Obergefell* holding, would not necessarily mean that *Obergefell* would apply to cases long closed and disputes well settled. "New legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758, 115 S. Ct. 1745, 1751 (1995). *Cf. United States v. Estate of Donnelly*, 397 U.S. 286, 296, 90 S. Ct. 1033, 1039 (1970) (Harlan, J., concurring) (at some point, "the rights of the parties should be considered frozen" and a "conviction ... final"). In this case, Mr. Fancher's will was probated and his estate distributed and closed in a separate proceeding. Retroactive application of *Obergefell* to this case would not even require a re-opening of that probated estate because, pursuant to Alabama law, proceeds from a wrongful death action are distributed in accordance with the law of intestacy and not through the decedent's will. There is no disagreement among the parties on this point.

With respect to the Mississippi divorce petition highlighted by Mrs. Fancher, that case is not before this Court and should have no bearing on the legal validity of Dr. Hard's claims in this case. That case is outside the record in this case. It is apparently in the complaint stage and it is impossible for this Court to assess any of the factual or legal claims purportedly made, especially in what appears to be a complicated and potentially heated divorce case. That case has not been decided

and should be left to the Mississippi court. In any event, this Court's decision would have no binding effect on it. Mrs. Fancher's concern with this matter is a side show and should be treated as such. It certainly is not a basis for this Court to depart from *Harper*'s binding precedent.

D. Mrs. Fancher's Argument that Alabama's Wrongful Death Statute Prevents Distribution of the Wrongful Death Proceeds to Dr. Hard Lacks Merit.

Mrs. Fancher devotes a large portion of her brief explaining the unremarkable proposition that, under Alabama law, the laws of intestacy and wrongful death in effect at the time of Mr. Fancher's death control the distribution of the proceeds from the wrongful death action arising from his death. Dr. Hard does not disagree with this proposition, but it is entirely beside the point.

Contrary to Mrs. Fancher's assertion, applying *Obergefell* retroactively would not have the effect of "overrul[ing] all of Alabama's precedent regarding the time at which wrongful death benefits vest." (Appellant's Br. at 26.) There is no dispute that, according to Alabama law at the time of Mr. Fancher's death, his heirs for purposes of the distribution of wrongful death proceeds included his surviving spouse and his mother. The question is simply: did Mr. Fancher have a surviving spouse at the time of his death? He did in Dr. Hard. At the time of Mr. Fancher's death Alabama's discriminatory marriage laws admittedly refused to legally recognize his spouse. Under *Obergefell*'s holding, however, Alabama's refusal to

recognize Mr. Fancher's valid Massachusetts marriage to Dr. Hard is an unconstitutional violation of Dr. Hard's rights to due process and equal protection. For the reasons outlined above, *Obergefell* "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97, 113 S. Ct. at 2517. Therefore, just as the Supreme Court held that the State of Ohio must recognize Obergefell as the surviving spouse of his deceased husband even though Ohio refused to recognize Obergefell's Maryland marriage at the time of his husband's death, Alabama must recognize Dr. Hard as the surviving spouse of Mr. Fancher at the time of Fancher's death, even though at the time of Mr. Fancher's death Alabama impermissibly refused to recognize his and Dr. Hard's Massachusetts marriage.[12] Such an application of *Obergefell* does not change when or with whom the wrongful death proceeds vest. They still vest in the persons identified in the statute in effect at the time of Fancher's death, *i.e.*, the surviving spouse (Dr. Hard) and the mother of the decedent (Mrs. Fancher). Applying *Obergefell* correctly does not substantively change Alabama's current wrongful death or intestacy law or the law on those subjects as they existed at the time of Fancher's death. *Obergefell* simply holds that Dr. Hard must be

[12] Failure to apply *Obergefell* retroactively in this case would improperly produce a result inconsistent with *Obergerfell* itself, *see Smith*, 256 F.3d at 1140, and impermissibly "treat similarly situated litigants differently." *Harper*, 509 U.S. at 97, 113 S. Ct. at 2517.

recognized as the surviving spouse for purpose of those statutes because Alabama could not legally refuse to give Dr. Hard's marriage full legal effect at the time of Fancher's death.[13]

E. Mrs. Fancher's Reliance on *Hyde* is Misplaced.

Mrs. Fancher argues that this case falls within two of the exceptions to *Harper*'s general rule of retroactive application identified in *Hyde*. (Appellant's Br. at 27–29.) This contention is without merit.

Hyde reaffirmed *Harper*'s holding that "when (1) the [Supreme] Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events." 514 U.S. at 752, 115 S. Ct. at 1748.

Mrs. Fancher argues that *Obergefell*'s holding should give way to the well-established principle of Alabama law that wrongful death beneficiaries are determined according to statutes in effect at the time of one's death. (Appellant's Br. at 28–29.) This is incorrect because, as discussed above, there is no conflict. Furthermore, with respect to the third *Hyde* exception, the old rule can only trump the retroactive application of the more recent rule where the well-established

[13] The State of Alabama has in any case already applied *Obergefell* retroactively and recognized Dr. Hard's Massachusetts marriage by listing him as Mr. Fancher's surviving spouse at the time of Mr. Fancher's death on the decedent's official state death certificate. This is likely why the District Court dismissed the case as moot.

general rule implicates "reliance interests." *Hyde*, 514 U.S. at 758–59, 115 S. Ct. at 1751. Mrs. Fancher does not demonstrate any valid reliance interest.

In addition, the wrongful death and intestacy statutes and the legal principal that wrongful death beneficiaries are established at the time of one's death also do not constitute permissible independent state law grounds on which to deny retroactive application of *Obergefell*. Those statutes and that principle of law do not dictate who may be considered a legally recognized spouse or surviving spouse. They simply establish that an individual qualifying as a "surviving spouse" is entitled to a portion of wrongful death proceeds. They do not say that a person in a same-sex marriage cannot be a surviving spouse. The Alabama law that excluded Dr. Hard from being recognized as a surviving spouse was the discriminatory marriage law which Mrs. Fancher concedes is unconstitutional under *Obergefell*. The wrongful death and intestacy statutes cannot be interpreted to achieve the same exclusionary and discriminatory effect of the marriage laws by failing to recognize Dr. Hard as the surviving spouse. Such an interpretation would be invalid in the same way that *Obergefell* held the marriage law to be unconstitutional.

Mrs. Fancher has not established that this case falls within any of the exceptions to the general rule of retroactivity or presents the exceptional circumstances justifying a departure from *Harper*. *See Hyde*, 514 U.S. at 758–59,

115 S. Ct. at 1751–52 (applying *Harper* and requiring Ohio to apply newly announced rule retroactively).

F. Even if *Chevron Oil* Applies, *Obergefell* Should Be Applied Retroactively.

As previously discussed, *Chervon Oil* does not apply in this case because the United States Supreme Court has already decided that *Obergefell*'s holding should have retrospective application. *See supra* II(A). However, even if this Court were to conclude that it must conduct an analysis under *Chevron Oil* to determine whether *Obergefell* should apply only prospectively, the *Chevron Oil* factors weigh in favor of applying *Obergefell* retroactively.

Under *Chevron Oil*, a court is asked to "examine whether retrospective operation will further or retard the [newly announced] rule's operation." *Glazner*, 347 F.3d at 1220 (citation and alteration omitted). The *Obergefell* decision holds that states may not prevent same-sex couples from exercising their fundamental right to marriage. According to *Obergefell*, state bans on the recognition of same-sex marriage "inflict substantial and continuing harm on same-sex couples." *Obergefell*, 135 S. Ct. at 2607. *Obergefell* puts an end to this harm and provides that "the Constitution protects the right of same-sex couples to marry." *Id.* at 2606. Retroactive application of this decision furthers and does not retard its operation. In fact, retroactive application was necessary to vindicate Obergefell's rights and to prevent the State of Ohio from "eras[ing] his marriage . . . for all time." *Id.* at

2606. The Supreme Court did this by holding that Ohio must recognize Obergefell as Arthur's spouse at the time of Arthur's death even where the creation of that marriage and Arthur's death both predated *Obergefell*.

Mrs. Fancher asserts that "the *Obergefell* decision is in no way harmed, delayed, hindered, or retarded by applying it prospectively." (Appellant's Br. at 10.) This is nothing more than a conclusory statement without any explanation or support. Moreover, it answers the wrong question under this prong of *Chevron Oil*. The relevant question is not whether the holding that marriage equality is a fundamental right will be furthered or retarded by *prospective* application, but *retrospective* operation. Not applying *Obergefell* retroactively in this case would produce a result inconsistent with *Obergefell* itself because Obergefell and Dr. Hard are similarly situated litigants, *see Harper*, 509 U.S. at 97, 113 S. Ct. at 2517; *Smith*, 256 F.3d at 1140, and would cause Dr. Hard (and others like him) to continue to experience the "substantial . . . harm" inflicted by discriminatory marriage laws which *Obergefell* ended. *Obergefell*, 135 S. Ct. at 2607.

Finally, *Chevron Oil* inquires "whether making the rule retroactive would be inequitable." *Glazner*, 347 F.3d at 1220. It would not. In fact, it would be inequitable *not* to apply the rule retroactively because doing so would effectively erase Dr. Hard's marriage to Fancher for all time and deny him the spousal share of the wrongful death proceeds. Moreover, *Obergefell* held that our Constitution

does not allow denial of "the constellation of benefits that the States have linked to marriage" to same-sex couples. *Obergefell*, 135 S. Ct. at 2601. Rules of intestate succession are part of those benefits. *Id*.

Mrs. Fancher's argument as to this prong of *Chevron Oil* is also without merit. She does not explain how applying *Obergefell* retroactively would be inequitable or "would undoubtedly result in hardship" to her, (Appellant's Br. at 10), by not receiving all of the wrongful death proceeds. It is hard to see how her not receiving Dr. Hard's spousal share would constitute a qualifying hardship to her when the wrongful death proceeds are essentially a windfall resulting from the unexpected wrongful death of Mr. Fancher. The real hardship and "substantial harm" would result from denying Dr. Hard his spousal share, effectively stripping him of his fundamental right to marriage recognition anew. Dr. Hard has never attempted to deny Mrs. Fancher her rightful share as decedent's mother, and retroactive application of *Obergefell* would have no effect on the share of the wrongful death proceeds she has already received.

CONCLUSION

Mrs. Fancher has failed to challenge the District Court's dismissal of this case as moot and she has given this Court no reason to disturb that decision on appeal. In addition, Mrs. Fancher has failed to demonstrate that the District Court committed clear error by denying her motion to reconsider the dismissal for

mootness and in ordering that the Spousal Share held in the District Court's registry should be disbursed to Dr. Hard. That is enough to resolve this appeal and affirm the District Court's rulings.

Even under the *de novo* standard of review, Mrs. Fancher's argument that *Obergefell* should not be applied retroactively to this case is unavailing. Under the general rule of retrospective application of the constitutional decisions of the Supreme Court and *Harper*, this Court is bound to give *Obergefell*'s holding "full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97, 113 S. Ct. at 2517. This case involves a clear-cut application of *Obergefell* to similarly situated litigants in a case that was open and pending when *Obergefell* was decided. Because the Supreme Court applied *Obergefell*'s holding to the litigants in that case, it has already decided that *Obergefell* follows the general rule of retrospective application and this Court is not required to make a determination of retroactive application in the first instance through a *Chevron Oil* analysis. Finally, this case does not fall into any of the few exceptions to the general rule.

Therefore, this appeal should be denied in its entirely and the District Court's decisions should be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 9,089 words.

Dated this November 5, 2015.

Respectfully submitted,

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I hereby certify that I have filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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Dated this November 5, 2015.

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