Case No. 15-13836

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, Northern Division

REPLY BRIEF OF APPELLANT - PATRICIA FANCHER

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Appellee's brief dismisses Appellant's arguments in conclusory fashion, but fails to demonstrate the error of Appellant's analysis.

In May 2011 Mr. Fancher and Mr. Hard, both male, entered into a void marriage for purposes of Alabama law.[1] "A void marriage creates neither right nor duty and imposes no legal obligations…[and] is an absolute nullity for all purposes...it follows that such a void marriage would be ineffectual to alter the marital status of either party to it, and that one who participated in it, if otherwise unmarried, would 'remain unmarried.' " *See Sutton v. Leib*, 199 F.2d 163, 165 (7th Cir. 1952). Because his alleged marriage was void in Alabama when formed and because the alleged marriage ended only a couple months thereafter it would be inaccurate to suggest, as Mr. Hard now has, that his alleged marriage was ever anything but invalid in Alabama.

When the *Obergefell* opinion was released this year homosexual couples in the State of Alabama who were interested in validating a union went to their respective county offices to do so. Certainly some of them likely had void marriages from other states like Massachusetts prior to *Obergefell*'s release. Still, it was as clear to everyone then as it should be now, the only moments in history in which Alabama

[1] Ala. Const. (1901) Art. I, § 36.032 (e) "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."

has ever been compelled to recognize same-sex unions are the moments after the Supreme Court's *Obergefell* opinion. And to be clear, because of Alabama's strict wrongful death statute, the only feasible way in which Paul Hard can be successful in this suit is if he had entered into a same-sex marriage at a time when such a union imposed a right and duty, i.e. after June 2015 when *Obergefell* announced a right to such unions. Yet, Mr. Hard is asking the Eleventh Circuit to pretend facts and also ignore clear rules of law governing the distribution of wrongful death awards.

I. MR. HARD'S ASSERTION THAT MRS. FANCHER HAS NOT APPEALED THE ISSUE OF MOOTNESS IS BASELESS.

Mr. Hard's assertion that Mrs. Fancher has not argued against the dismissal of the case is baseless and attempts to redirect the Court's attention from the real issue in this case. In Appellee's brief, Mr. Hard alleges that Mrs. Fancher has not argued against the dismissal of her case. (Appellee's Br. at 9). Mr. Hard attempts to make a distinction of Mrs. Fancher's pleas where none is present. From the outset of this appeal, Mrs. Fancher has remained totally consistent concerning the issues on appeal and the judgments and orders appealed from. In her Notice of Appeal, Civil Appeal Statement, and in her attached documents for purposes of her Civil Appeal Statement it is repeatedly made clear that Mrs. Fancher seeks appeal of the dismissal of her case in the District Court as she believes that the controversy in this matter is very much alive.

To begin, in her Notice of Appeal Mrs. Fancher stated the following:

"Notice is herein given that Intervening Defendant in the above named case, Patricia Fancher, does hereby appeal to the United States Court of Appeals for the 11th Circuit from the final judgment (Doc. # 97) and order directing disbursement funds (Doc. # 96) entered in the above styled case on July 29, 2015 and from the earlier order of the Court issuing dismissal of the case (Doc. # 89) and the order denying defendant Fancher's motion to set aside dismissal (Doc. # 95)." [2]

Furthermore, on September 11th, 2015, Mrs. Fancher filed her Civil Appeal Statement with this Court and attached these same files as matters up for review.[3] Specifically, not only does Mrs. Fancher appeal from the order against her motion to set aside, but also appeals from the final judgment of the district court which dismissed the case as moot and prompted this appeal. Pursuant to Eleventh Circuit Rule 22-1(b), Mrs. Fancher timely filed her Civil Appeal Statement consisting of a statement of the issues on appeal and including attachments of "judgments and orders appealed from or sought to be reviewed." To that end, not only did she attach document 89 granting the dismissal of her case and document 95 denying her motion to set aside but also she attached document 96–the court's final order dispersing the disputed funds to Mr. Hard—and document 97, the final judgment of the district court which dismissed her case. Mrs. Fancher does not know how she could be more clear about the issues of her case and the matters which she respectfully requests this Court to review and reverse.

[2] Notice of Appeal, (Doc. 98).
[3] Appellant's Civ. App. Statement (filed 9/11/15).

Finally, in Mrs. Fancher's principal brief the matter is made clear once more that Appellant is and was appealing the dismissal of her case as well as her denied motion to set aside. Specifically, she stated the following issue as one which this Court should consider in light of her brief: "Whether the district court erred in granting Defendant Strange's motion to dismiss and issuing its final order concerning the distribution of funds." (Appellant's Principal Br. at 1). Clearly, the substance of Ms. Fancher's brief following this statement on the issues, consistent with her notice of appeal and civil appeal statement, was intended to demonstrate the reasons for which she believes her case was wrongfully dismissed. Thus, she argues there are a number of reasons based on Alabama's wrongful death statute and the limited doctrine of retroactivity which demonstrate that her cause of action is very much a live case and controversy. Nonetheless, Appellee's brief attempts to argue that this did not happen and that this Court should abandon the issues presented in this case because of procedural flaws. Such an argument seeks to distract the Court and disrupt the flow of justice as Mr. Hard's counsel attempts to avoid the real issue.

II. THE CORRECT STANDARD OF REVIEW IS DE NOVO.

Mr. Hard's contention that the Eleventh Circuit should not review this case de novo is simply wrong. (Appellee's Br. at 8). Mr. Hard puts forth the claims that Mrs. Fancher did not appeal the district court's dismissal for mootness but only appealed the motion to set aside the dismissal and disbursement of funds, each reviewed under

an abuse of discretion standard. (*Id*). Contrary to Mr. Hard's assertion, Mrs. Fancher did indeed appeal the issue of mootness. (Appellant's Principal Br. at 1). In fact, mootness is the very issue we have raised in this appeal. Mrs. Fancher has argued, and continues to argue, that this case should not have been dismissed for mootness, because it is not moot. Wrongful death statutes were not addressed in *Obergefell* and this case is not moot until that issue has been resolved.

Regardless, dismissals for mootness, as Mr. Hard correctly points out, are reviewed de novo. *See Stein v. Buccaneers*, 772 F.3d 698, 701 (11th Cir. 2014) ("We review factual findings underlying a mootness decision for clear error. We review de novo, whether based on the facts, a case is moot. Here the facts are undisputed, so our review of the only matter at issue—the legal effect of the undisputed facts—is de novo."). Similarly, the facts in the case are not in dispute.[4] The issue for this Court to decide is the legal effect of the undisputed facts, that Mr. Fancher was "married" under Massachusetts law for three months but never under Alabama law at the time of his death, supporting a de novo standard of review.

When the facts are not disputed but the dispute is instead a question of law, the proper standard of review is de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). The issues at stake in this case are questions of law: first, whether *Obergefell* operates to make Mr. Fancher's three-month marriage four years

[4] See e.g. (Doc. 83) at 1–4.

retroactive, and that question in turn will answer the question of law regarding the proper disbursement of Mr. Fancher's wrongful death settlement according to Alabama intestacy laws at the time of his death. These questions of law demand a de novo standard of review. *See United States v. Pistone*, 177 F.3d 957, 958 (11th Cir. 1999) ("The interpretation of a statute is a question of law subject to de novo review."); *see also Bradley v. Sebelius*, 621 F.3d 1330, 1335 (11th Cir. 2010) (reviewing the interplay between a federal statute and Florida's wrongful death statute de novo).

The cases Mr. Hard cites regarding disbursements of funds to bolster his argument that the disbursement of the wrongful death proceeds should be reviewed under an abuse of discretion standard are entirely distinguishable from the case at hand. The questions appealed to the Eleventh Circuit in the *Zelaya* case involved allowing a party to deposit funds into the court's registry pursuant to FRCP 67, dissolving writs of garnishment, a court's issuance of a satisfaction of a judgment, and awarding attorney's fees. *See Zelaya/Capital Int'l Judgment v. Zelaya*, 769 F.3d 1296, 1300 (11th Cir. 2014). On the other hand, this case involves a court's distribution of a wrongful death settlement. Wrongful death settlements are a matter of state law and involve the distributing court's interpretation of a state statute. The Supreme Court has said, "[t]he court of appeals should review de novo a district court's determination of state law. As a general matter, of course, the courts of

appeals are vested with plenary appellate authority over final decisions of district courts."[5] Mr. Hard also cites *Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 753 (11th Cir. 2002) for the proposition that a court's release of funds held in its registry is reviewed under the abuse of discretion standard. (Appellee's Br. at 9). That case actually refers to the release funds held pursuant to a preliminary injunction being reviewed for an abuse of discretion. (*Id).* In contrast, the funds at issue in this case were not released pursuant to a preliminary injunction; they were released pursuant to a wrongful death settlement. Again, the distribution of wrongful death settlements is a question of state law that this Court should review de novo. *Salve Regina College*, 499 U.S. at 231; *see also Price v. Time, Inc.*, 416 F.3d 1327, 1334 (11th Cir. 2005).

Furthermore, the case Mr. Hard cites for the proposition that a district court is justified in rejecting a motion to set aside and/or releasing funds so long as it has "good cause" for those decisions (Appellee's br. at 9, citing *Rhines v. Weber*, 544 US 269, 277 (2005)) has nothing to do with the case at hand. That particular case involved the question of a "stay and abeyance" of a federal habeas corpus petition. *Rhines*, 544 U.S. at 277. The Court there said that a district court would abuse its discretion if it were to grant a habeas petitioner a stay when his unexhausted claims were plainly meritless, even if the petitioner had good cause. (*Id.*) This has nothing

[5] *Russell*, 499 U.S. at 231

to do with motion to set aside or release funds in relation to a wrongful death settlement like this case.

Finally, even if, arguendo, the case is reviewed under the abuse of discretion standard, Mrs. Fancher should still prevail because the district court had no legal basis whatsoever for distributing funds to the wrong beneficiary in contradiction to Alabama law.[6] When applying the abuse of discretion standard, the Court need not affirm the district court's decision if "the district court has made a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004). In this case, the district judge made a clear error of judgment when he dismissed the case for mootness. *Obergefell* did not address the questions at issue in this case: whether wrongful death proceeds must be distributed in discord with the law at the time of one's death. Furthermore, the legal standard the district judge should have applied to the disbursement of the wrongful death proceeds was the state law standard in effect at the time of the decedent's death. *See Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1290 (11th Cir. 2001) ("In rendering a decision based on state substantive law, a federal court must decide the case the way it appears the state's highest court would."). Therefore, even

[6] See e.g. *Lowe v. Fulford*, 442 So.2d 29, 31 (Ala. 1983); *Mordecai v. Scott*, 320 So.2d 642, 644 (Ala. 1975); *Williams v. Overcast*, 155 So. 543, 545 (Ala. 1934); *Crosby v. Corley*, 528 So.2d 1141, 1143 (Ala. 1988); *Steele v. Steele*, 623 So.2d 1140, 1141 (Ala. 1993) Alabama Supreme Court clearly and consistently adhering to the principle that heirs are determined at decedent's time of death.

if this case is reviewed under an abuse of discretion standard, the district court's disbursement of the wrongful death settlement to Mr. Hard was clearly erroneous. The district court was bound to apply Alabama intestacy laws in effect at the time of Mr. Fancher's death, which demanded that the wrongful death proceeds go to Mrs. Fancher, Mr. Fancher's only living relative at the time of his death according to Alabama law.

II. THE LIMITED DOCTRINE OF RETROACTIVITY DOES NOT APPLY IN THIS CASE.

A. PLAINTIFF/APPELLEE HARD ASSERTS *OBERGEFELL* APPLIES RETROACTIVELY PURSUANT TO HARPER. IT DOES NOT.

Mr. Hard's "Argument II" section of his brief revolves around *Harper* and begins by dismissing *Chevron*. The Eleventh Circuit has not permitted such analysis. Instead, the Eleventh Circuit has expressly detailed that *Chevron* remains the legal analysis for retroactive applications of newly announced rules in this jurisdiction.[7]

Likewise, Mrs. Fancher has already explained that *Harper* is distinguishable in many ways from the present matter. Still, even if the issues of *Harper* and the issues of this case were relatable, Mr. Hard's arguments still fail. In *Harper*, the U.S. Supreme Court carved out a very important exception to retroactive application of newly fabricated rules. There the Court announced the importance of a state law exception, where the authoring Justice explains that case does not involve a matter

[7] *Howard v. Augusta-Richmond County*, 2015 U.S. App LEXIS 15584 (11th Cir. 2015).

where independent state law grounds adequately control the outcome of a case.[8] The same approach from the Court is repeated in *Hyde* as the Court explains retroactive application is not afforded where "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief" is present. *Hyde*, 514 U.S. at 759. Alabama's wrongful death statute and corresponding jurisprudence provide that basis here.

Moreover, even if *Harper* was identical and the state law exception did not apply, this Court has repeatedly stated that the *Chevron Oil* analysis remains the test for questions of retroactivity. *See Howard v. Augusta-Richmond County*, 2015 U.S. App LEXIS 15584 (11th Cir. 2015), explaining the "test from *Chevron*" remains the "governing analysis…in civil cases." That test favors Mrs. Fancher's position. (Appellant's Principal Br. at 8-9).

Finally, *Chevron Oil* is a test based upon Supreme Court precedent which identified exceptions to retroactivity that predated *Chevron*.[9] Thus, *Chevron* analysis is a summation of retroactivity exceptions, but even *Chevron* did not announce the final exception. *Harper* announced the state law exception. More recently, *Hyde* announced other considerations for a court's review when faced with questions of

[8] *See Harper*, 509 U.S. 86 at 94–98; *see also id.* (at syllabus of the court stating, "The decision below does not rest on independent and adequate state-law grounds."

[9] *Chevron Oil v. Huson*, 404 U.S. 97, 106 (1971) (citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968) as the basis for the rule that U.S. Supreme Court decisions which announce new rules of law are nonretroactive).

retroactivity. *Hyde* is clear: retroactivity will not apply where there is an independent basis for denying a plaintiff's relief having nothing to do with retroactivity. In this case, the independent basis for denial of retroactivity is that per Alabama wrongful death law, Mr. Hard did not have a right to receive any wrongful death award because that right vests immediately upon the moment of one's death according to laws in effect at one's time of death.[10] Therefore, *Obergefell* does nothing to help Mr. Hard.

Notwithstanding, *Hyde* goes on to state that nor will retroactivity apply when a case determined to be retroactive encounters resistance in the form of a legal principle. This exception is a powerful one. The Supreme Court makes it clear that despite whatever else has been said for or against the doctrine, retroactivity will not apply in the face of well settled principles of law.[11] As Mrs. Fancher explained in her principal brief, where retroactivity runs against other areas of settled law, it bends to those principals of law.

> "In *Hyde*, the Court recognizes that there are instances where retroactive application of new judicial opinions will run up against a principle of law. In such instances, it is not the principle that bends to the new decision but the decision which bends to the legal principle. [*Hyde* at 759]. The legal principle, says the Supreme Court, '*limits the principle of retroactivity itself*.' (*Id*.) (emphasis added)."[12]

One way of understanding this statement and the plethora of other exceptions to

[10] *Lowe v. Fulford*, 442 So. 2d 29, 31 (Ala. 1983).
[11] *Hyde* at 759.
[12] Mrs. Fancher's principal brief at 28.

retroactive application is that the Supreme Court considers retroactivity a lesser doctrine which must bend the knee to more consistent and more established principles.

Mr. Hard seems to suggest that *Harper* eliminated any and all non-retroactivity. (Appellee's Br. Section II, A). The reality is very different: not only did *Harper* itself announce an additional exception to retroactivity (state law exception), but a majority of Justices in *Harper* expressed the view that *Chevron Oil* analysis should still be adhered to in the civil case context and this Court has held the same.[13] (Appellant's Br. 12–13).

Only two years separate the decisions in *Harper* and *Hyde*. Moreover, each of *Hyde*'s mentioned exceptions apply to the present case and every one of these exceptions was written after *Harper* by the very same Court that considered *Harper*. Simply put, the *Hyde* Court, knowing full well what it had written in *Harper*, decided to create additional considerations for the doctrine of retroactivity which *Harper* left unspoken. Thus, Mr. Hard's assertion that *Harper* trumps these considerations necessarily fails.

B. APPELLEE'S RELIANCE UPON A WRONGFULLY ISSUED DEATH CERTIFICATE AS A BASIS FOR HIS UNION BEING MADE LEGAL IS MERITLESS.

Appellee's brief erroneously makes significance of the February 8th amended

[13] *See e.g., Harper,* 509 U.S. at 95; *Howard,* 2015 U.S. App LEXIS 15584 (11th Cir. 2015).

death certificate. (Appellee's Br. at 10). Appellee argues that this death certificate is valid and therefore the district court had grounds to dismiss the case as moot. That assertion is deeply flawed. The reality is, on February 8th, before the release of *Obergefell*, at least one individual from the state registrar's office, likely without any legal guidance, did unlawfully issue a death certificate to Mr. Hard naming him as the spouse of David Fancher.[14] It is absurd to suggest as Hard does that the, "State of Alabama had already recognized the legal validity of Mr. Hard's marriage to Mr. Fancher" based upon a confused registrar office employee's actions. Instead, the State of Alabama did speak as to the legal validity of the Hard-Fancher marriage five days earlier when the Chief Justice issued an order to probate officials clarifying that Alabama's sanctity laws were still valid. A few weeks later, the State of Alabama spoke again when the state's highest court followed with its opinion in *Ex rel API v. King* holding Alabama officials are to comply with Alabama's Sanctity of Marriage laws "by any and all lawful means available."[15]

That opinion clearly directed state employees not to issue such certificates and because that opinion clarified the validity of Alabama's sanctity laws as of that day (March 3rd), thus any certificate naming a male the spouse of another male was

[14] See *Alabama recognizes SPLC client Paul Hard as surviving spouse on husband's death certificate,*
available at: https://www.splcenter.org/news/2015/02/09/alabama-recognizes-splc-client-paul-hard-surviving-spouse-husband%E2%80%99s-death-certificate.

[15] *Ex Parte State of Alabama ex rel. Alabama Policy Institute v. King*, case no. 1140460 (Ala. 2015).

illegally issued, save a certificate pertaining to couples directly before the another federal district.[16] Ironically, by continuing to rely upon his February death certificate, Mr. Hard's insistence that retroactivity is the rule apparently does not apply to decisions of the Alabama Supreme Court. Either way, *API* stands in the way of retroactively reaching the events of 2011 because it was a decision from the state's highest court considering the legitimacy of the Sanctity Laws and upholding these laws. Only when *Obergefell* was announced three months after the *API* decision could one argue that *API* was overruled. Thus, retroactivity of *Obergefell* stands probably the lowest chance of success in the state of Alabama and it cannot be said that Alabama's Sanctity Laws were not considered legitimate before the release of *Obergefell*.

Relying on the death certificate again, Mr. Hard states, "As such there was no case or controversy left to be decided." On the contrary, even if the Alabama Supreme Court were silent as to same-sex marriage, the registrar's certificate still would not have rendered this case moot because this case involves a totally different question—whether *Obergefell* is retroactive in scope.

To support his general assertion that this case involves a "clear-cut application of…*Obergefell*," Mr. Hard argues that this matter is analogous to the facts of

[16] See *Searcy v. Strange*, 574 U. S. __ (2015) & *Strawser v. Strange*, Civ. Action no. 14-0424-CG-C (2015) (Southern District cases permitting recognition of same-sex marriages between two couples: Cari D. Searcy/Kimberly McKeand and John Humphrey/James Strawser).

Obergefell. (Appellee's Br. at 2). Though each case involves gay marriage, the similarities between the facts do not go much further. This case does not involve a question as to whether gay couples may now wed, but instead whether an unrecognized marriage in 2011 is to be revived and legitimized several years later. Secondly, unlike *Obergefell*, this case involves nothing of the validity of same-sex unions for purposes other than Alabama's wrongful death law. Finally, Mr. Hard's review of *Obergefell* in his "statement of case" includes a significant misstatement about the district court proceedings of *Obergefell*. Mr. Hard argues "similar to the named plaintiff in *Obergefell*" his death certificate validates the two men's marriage. (Appellee's Br. at 3). The case he cites states otherwise:

> "Longtime Cincinnati residents James Obergefell and John Arthur met in 1992 and lived together in a loving, committed relationship for more than 20 years. (Doc. 3–1 at 2–3). In 2011, Mr. Arthur was diagnosed with amyotrophic lateral sclerosis ("ALS"), a terminal illness. (Id. at 8). *976976 After the Supreme Court's decision in *Windsor* requiring the federal government to recognize valid same-sex marriages, Mr. Obergefell and Mr. Arthur decided to get married. (Id. at 11). On July 11, 2013, the couple boarded a medically equipped plane to travel to Maryland, a state that provides for same-sex marriages, and were married in the plane as it sat on the tarmac. (Id. at 12). *Under Ohio law, their marriage was not recognized for any purpose until this Court granted them a temporary restraining order requiring that upon Mr. Arthur's death, his death certificate reflect that he was married and that Mr. Obergefell is his surviving spouse.* (Id. at 13; Doc. 14). Mr. Arthur died on October 22, 2013, and his death certificate was issued in compliance with this Court's Order. (Docs. 51, 52). *Without this Court ordering a permanent injunction, Mr. Arthur's death certificate would need to be amended to remove any mention of his husband, Mr. Obergefell, or their marriage.* Ohio Rev.Code Ann. § 3705.22."
>
> *Obergefell v. Winslow*, 962 F.Supp.2d 968, 975-76 (S.D. Ohio 2014) (emphasis added).

In reality, the Federal District Court for the Southern District of Ohio, Western Division, issued the order to name James as a spouse on a future death certificate on July 22, 2013. Arthur died three months later on October 22, 2013. Thus, *Obergefell* and *Hard* involve a very crucial difference: *Obergefell* sought and received relief prospectively, whereas Mr. Hard seeks relief retroactively.

C. OBERGEFELL ABSOLUTELY CREATED A NEW RIGHT AND PUBLIC POLICY IS A LEGITIMATE CONSIDERATION FOR THIS COURT'S REVIEW.

Mr. Hard asserts that *Obergefell* recognized a pre-existing right. (Appellee's Br. at 19). On the contrary, the opinion literally creates a brand new right to same-sex marriage, and the Court goes out of its way to emphasize the legitimacy of past interpretations of marriage law: "[i]t cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners." Therefore, defining legal marriage as between opposite-sex couples "may long have seemed natural and just." *Obergefell*, 576 US.___ at 17 (2015). In 2011, when the contested union began and ended, it seemed natural and just to limit marriage to opposite-sex couples in both the majority of the fifty states and by federal statute.[17]

To support his assertion that *Obergefell* did not create a new right, Mr. Hard

[17] *See e.g., State Policies on Same-Sex Marriage Over Time*, available at: http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/; *see also The Defense of Marriage Act* (DOMA) (Pub. L. 104–199, 110 Stat. 2419; 1 U.S.C. § 7; & 28 U.S.C. § 1738(C).

suggests that Obergefell distinguishes the gay marriage right from other rights. In part Mr. Hard is correct; it does not take a historian to conclude that same-sex marriage has never been deeply rooted in this nation's history nor its tradition. However, because the *Obergefell* Court did not overturn the 2013 *Windsor* opinion—which held that New York could define marriage in contradiction to federal law because marriage was a unique state law issue—*Obergefell* necessarily created a *new* right to marriage in 2015 which would then take hold despite state laws. DOMA, said the Court in *Windsor*, "deviat[es] from the usual tradition of recognizing and accepting state definitions of marriage."[18] Furthermore, the Court explained, "[t]he Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *See United States v. Windsor*, 133 S.Ct. 2675, 2691 (2013) (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)).

If Mr. Hard's assertion[19] under this point is true, then the Supreme Court has crafted a conundrum for itself where either, as Hard asserts, *Glucksburg* that *Obergefell* merely identifies a pre-existing right and this precedent from *Windsor* is worthless, or alternatively, *Windsor*'s holding -and the abundance of case law *Windsor* cites that states the federal government cannot define marriage and impose it upon the states- should have been overruled. Rights aside, as to this the Court

[18] United States v. Windsor, 133 S.Ct., 2675, 2693 (2013).
[19] (Appellee's Br. at 19).

has remained clear:

> "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decision"
> *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Therefore, *Windsor*, having not been overturned by *Obergefell* along with *Baker v. Nelson*, communicates that the rule announced in *Obergefell* is absolutely a new one. Additionally, because *Windsor* was not overruled, *Windsor* now stands in the way of retroactively applying *Obergefell* beyond the veil of 2013.

Finally, Mr. Hard's brief asserts the claim that the public policy concerns outlined in Mrs. Fancher's brief are nothing but "anxiety-inducing scenarios imagined by Mrs. Fancher…based solely on her speculative handwringing." (Appellee's Br. at 28). It is difficult to imagine how one could read Mrs. Fancher's brief and come to this conclusion. Mrs. Fancher showed that not only is the current case one which may produce devastating long-term consequences, but also presented this Court with another very disconcerting scenario in *Christina "Chris" Renee Strickland v. Kimberley Lynn Jaroe Strickland*, Cause No. 2401-15-2030(4). (Appellant's Br. at 21). The Eleventh Circuit should take Mrs. Fancher's public policy considerations seriously. This is especially true because of the *Obergefell* Court's mistaken belief that the opinion would "pose no risk of harm to themselves or third parties." We now know better.

D. EVEN IF RETROACTIVITY COULD APPLY TO *OBERGEFELL* IT DOES NOT APPLY HERE IN THE FACE OF ALABAMA'S WRONGFUL DEATH STATUTES.

Mr. Hard argues that "Appellant's Wrongful death statute argument lacks merit." (Appellee's Br. at 30). Mr. Hard cites no authority for this position and instead misstates the law. Mr. Hard asserts that even though Alabama wrongful death jurisprudence suggests otherwise, wrongful death rights in this case "still vest in… the surviving spouse (Mr. Hard)." This is an assertion that the Alabama Supreme Court has specifically rejected. See *Crosby v. Corley*, 528 So.2d 1141 (Ala. 1988) (holding Alabama courts strictly interpret the intestacy statute when awarding wrongful death damages). The goal of a federal court deciding a state law issue is to resolve it the same way the state's highest court would. *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1290 (11th Cir. 2001); *Price v. Time, Inc.*, 416 F.3d 1327, 1334 (11th Cir. 2005).

When interpreting a statute, the Alabama Supreme Court "looks to the plain meaning of the words as written by the legislature." *Thomas v. Clinton*, 607 Fed. Appx. 903, 905 (11th Cir. 2015). It is simply unfathomable that the Alabama Supreme Court would agree that the Alabama's wrongful death statute contemplated Mr. Hard as the surviving spouse of Mr. Fancher at the time of his death. To the contrary, Alabama's sanctity laws prove that the word "spouse" as used in the statute refers to members of the opposite sex and does not imply the statute applied to same-

sex couples who were not married at the time.

Moreover, whatever interests a person may or may not have in receiving a part to a later wrongful death award is determined at the moment of the decedent's death in accordance with laws "in effect at the time of death." *Lowe*, 442 So.2d at 31. As the Alabama Supreme Court explained, "[t]he probate process necessitates such mandates in order to simplify the process and avoid floods of litigation over who the deceased would have intended to inherit."[20]

Mr. Hard admits that the laws in effect at the time of death in Alabama control the distribution of wrongful death awards. "At the time of Mr. Fancher's death Alabama's discriminatory marriage laws admittedly refused to legally recognize his spouse." (Appellee's Br. at 30). Whether Mr. Hard agrees with Alabama's Sanctity Laws or not, these statutes and constitutional provisions were in place with full legal effect at the time of Mr. Fancher's death. Nothing in *Obergefell* stands to invalidate this legal reality. Mr. Hard does not refute this proposition because he cannot refute what is legally factual. By fact, at the moment Mr. Fancher passed away, Alabama's wrongful death laws held that any resulting settlement, judgment, or award immediately and completely vested in his mother by means of the laws in effect at the time of his death.[21] Thus, David's mother's interest took hold on August 1st, 2011. Paul Hard now asks this Court to pretend that Alabama's laws were

[20] *Corley*, supra.
[21] *Lowe*, 442 So.2d at 31.

different at the time of David's death and to instead hold that a 2015 Supreme Court case grants Mr. Hard the right to stand in the shoes of the decedent's mother to recover the wrongful death settlement. That request should fail by operation of law and by virtue of reason.

CONCLUSION

When Mr. Hard's complaint was filed in the District Court two years ago, Mr. Hard's arguments were very questionable standing on their own. At that stage, the case should have been dismissed, but against Mr. Hard, the Plaintiff/Appellee.

To summarize, Mr. Hard's brief alleges that on May 20th, 2011, Mr. Hard and Mr. Fancher created a legally valid marriage in every one of the fifty states because an unforeseeable judicial decision four years later suggests so. That assertion is in discord with reality as much as it is with the law. On the day the two men had a wedding ceremony only six states recognized same-sex marriage.[22] Moreover, the rest of the states were anything but neutral regarding the legitimacy of Mr. Hard and

[22] See e.g. *Research Guides: Same-Sex Marriage Laws*, available at: http://moritzlaw.osu.edu/library/samesexmarriagelaws.php; see also *State Policies on Same-Sex Marriage Over Time*, available at: http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/

Mr. Fancher's union.[23] At that time, such unions were the exception, not the rule, and the same is true for when the marriage ended two months later.

On the day of the ceremony, thirty nine states outlawed such unions and would not recognize same-gender marriages arising from the six-state minority which permitted same-gender unions. If Hard and Fancher chose to live in any of these thirty nine states, which they did, they would have known that the union would not be legal. Still, at that time Mr. Hard choose to live in Alabama, a state that did not recognize his union which he now claims was valid in that year.

To this end Appellee argues that the Alabama Sancitity Laws were "discriminatory" (Appellee's Br. at 1, 30, 33, 35). But as we have seen, in 2011 Sanctity of Marriage laws were dispositive rules under most state laws and even federal law.[24] The vast majority of the thirty nine states passed their respective

[23] At its peak, 41 of the 50 U.S. states explicitly outlawed same-sex marriage. By the time David and Hard sought to be married in Massachusetts only California and Iowa had reversed course to join four other states which chose to recognize the union; (neither state by the people's choosing).

[24] *The Defense of Marriage Act* (DOMA) (Pub. L. 104–199, 110 Stat. 2419; 1 U.S.C. § 7; & 28 U.S.C. § 1738(C): "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.")

Sanctity of Marriage Laws by referenda.[25] Thus, Hard argues that the vast majority of the people of the United States are a discriminatory group of individuals.

Mr. Hard's arguments are not merely a house build upon sand, these are a house made of sand as well. In order for Mrs. Fancher to be granted her requested relief this Court may hold that the district court should have granted her request for relief as per *Obergefell* is not retroactive because of legal grounds which preclude its retroactive effect; or that, whether or not that opinion could be retroactive for some purposes, it does not stand to invalidate Alabama's wrongful death jurisprudence which holds that wrongful death rights vest immediately at one's time of death according to the laws in effect at the time of one's death. Or both.

By contrast in order for Mr. Hard to be successful upon review he necessarily show that *Obergefell* goes deeper than now understood, that it works its way into the past into states like Alabama giving legal effect to unions which began and ended years before the opinion's birth, and in addition, that the opinion, which had nothing to do with wrongful death awards or intestate succession, now stands to invalidate the presumptively valid state laws, which have nothing to do with same-sex

[25] See e.g. *State Policies on Same-Sex Marriage Over Time*, available at: http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/ (the strong majority of the thirty nine states which by statute did not recognize gay marriage in 2011, also had constitutional amendments passed by popular vote in referendums which defined marriage as between opposite gender individuals only).

marriage, but instead govern distributions of wrongful death awards pursuant to laws then in effect in order to ensure clarity at the probate level.

Mr. Hard has not proven that this web of faulty connections should be strung. Thus, the Eleventh Circuit should not interpret an opinion like *Obergefell*, which may on its own be viewed as unsound in history, to apply via further erratic retroactivity doctrine grounds to revive a then void and now ended marriage in the face of settled Alabama wrongful death law.

The law is clear- wrongful death awards vest, if at all, in person's according to the laws at one's time of death: "In order to ascertain the proper allocation of wrongful death proceeds, one must look to the statute of distribution in effect at decedent's date of death. The heirs, ascertained at the date of death, are entitled to share, according to statute, in any proceeds forthcoming from a wrongful death action." *Lowe* 442 So.2d at 37. "The statutes of force at the date of the death of the intestate husband and father *fixed* the right of the widow and minor child as of that date[.]" *Williams v. Overcast*, 155 So. 543, 545 (Ala. 1934) (emphasis added).

What more can Mrs. Fancher do to show her entitlement to the disputed funds? Against this backdrop, Appellee has tied up Mrs. Fancher, an elderly widow to a Birmingham pastor, into litigation over this issue and for months has deprived her of her court-approved settlement for the loss of her son.

For the district court to award the wrong party the estate's finances is clear error by any standard of review. For Mr. Hard to suggest otherwise to this Court is frivolous and wrongful.

Obergefell simply does not grant Mr. Hard the relief he seeks for the following reasons: Under the pre-*Chevron* case law on reactivity, *Chevron* itself, *Harper*'s independent state grounds exception and *Hyde*'s further retroactive application exemptions, *Obergefell v. Hodges* should not be retroactively applied to this case. Moreover, considering the prospective-only language of *Obergefell*, the presence of *Windsor* and *API* on the timeline *after* the events of this case, and the deeply problematic public policy concerns of applying such a decision retroactively, *Obergefell v. Hodges* should be treated for what it is- a landmark decision creating a newly arisen right in June 2015.

Furthermore, well settled law holds that wrongful death rights vest immediately at one's time of death, according to the laws in effect at the time of one's death, with no regard for whether or not the heir is a morally upstanding person [which in this case the mother certainly is], and with no regard given to the decedent's possible desires.

Mrs. Fancher therefore requests that this Honorable Court take immediate action to alleviate the harm done to her in the present case. Mrs. Fancher prays this Court will hold that *Obergefell v. Hodges* is not retroactive as applied to the alleged

marriage in this case, that she as the only surviving heir to her son at his time of death is due the financial award from the wrongful death settlement, and that the district court erred in granting dismissal of the case.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B)(i) and the corresponding Eleventh Circuit rules as it contains less than 7,000 words in accordance therewith.

Respectfully submitted this 19th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court using the electronic filing system by which copies of said certificate are served upon each party registered in the case, including Appellee's counsel. This same day I have served one hardcopy of Appellant's reply brief with counsel for Appellee via First Class Mail by the United States Postal Office and have postmarked eight hardcopies to be delivered First Class Mail by the United States Postal Office to The Eleventh Circuit's Clerk's Office.

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