No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON,

PETITIONERS,

v.

JACK PIDGEON AND LARRY HICKS,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Texas correctly decide that *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), and *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017) (per curiam), "did not hold that states must provide the same publicly funded benefits to all married persons," regardless of whether their marriages are same-sex or opposite-sex?

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INTRODUCTION

The Fourteenth Amendment prohibits a State from discriminating between same-sex and opposite-sex married couples in the provision of the benefits the State links to marriage. *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017) (per curiam); *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015); see also *De Leon* v. *Abbott*, 791 F.3d 619, 625 (5th Cir. 2015) (following *Obergefell* and affirming injunction against the enforcement by Texas's governor and other State officials of Texas laws limiting marital benefits to opposite-sex spouses). Consistent with these decisions, the City of Houston provides marital benefits to its employees' spouses regardless of whether those spouses are same-sex or opposite-sex.

The plaintiffs here argue that the City is spending funds illegally because Texas prohibits extending tax-funded benefits to same-sex spouses of State employees. In *Obergefell*, this Court rejected that argument, holding unconstitutional a Tennessee statute that denied marital health-insurance benefits to a married couple employed by the State solely because theirs was a same-sex marriage.

Despite this clear precedent, the Supreme Court of Texas held that *Obergefell* "did not address and resolve th[e] specific issue" of "whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples." App. 26a. *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons." App. 27a.

The Texas court's decision conflicts with *Obergefell*, *Pavan*, and *De Leon* and threatens to undermine same-

sex married couples' rights to equal recognition in Texas and beyond.

The City respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App. 1a–32a) is not yet reported but is reprinted at 60 Tex. Sup. Ct. J. 1502, and is available at 2017 WL 2829350. The opinion of the Fourteenth Court of Appeals of Texas (App. 33a–36a) is reported at 477 S.W.3d 353. The temporary injunction of the 310th Judicial District Court, Harris County, Texas (App. 37a–41a) is unreported.

JURISDICTION

The Supreme Court of Texas issued its opinion and judgment on June 30, 2017. This Court has jurisdiction under 28 U.S.C. 1257(a) and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477–83 (1975).

CONSTITUTIONAL, STATUTORY, AND CITY CHARTER PROVISIONS

The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Article I, section 32, of the Texas Constitution provides:

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

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

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

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

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

> ***Denial of benefits to same sex partners and related matters.***
>
> Except as required by State or Federal law, the City of Houston shall not provide employment benefits, including health care, to persons other than employees, their legal spouses and dependent children. * * *

STATEMENT OF THE CASE

I. Factual Background

After this Court's 2013 decision in *United States* v. *Windsor*, 133 S. Ct. 2675, 2693, striking down the federal Defense of Marriage Act (DOMA),[1] the Houston City Attorney advised then-Mayor Annise Parker that the City "may extend benefits" to employees' same-sex spouses "on the same terms it extends benefits to heterosexual spouses." App. 7a. Mayor Parker directed "that same-sex spouses of employees who have been legally married in another jurisdiction [must] be afforded the same benefits as spouses of a heterosexual marriage." *Ibid.*

II. Proceedings Below

A. Trial Court

Houston residents Jack Pidgeon and Larry Hicks sued the City and its Mayor, seeking to enjoin the City's extension of benefits to the same-sex spouses of City employees.[2] App. 7–8a, 34a n.1.

Pidgeon relied on the State's and City's DOMA provisions, which ban recognition of same-sex marriage in Texas and prohibit political subdivisions from giving effect to same-sex marriages from other States. See Tex. Const. art. I, § 32; Tex. Fam. Code § 6.204(b)–(c); City of Hous. Charter art. II, § 22; see also App. 7–10a. He asserted that the DOMA provisions were enforceable despite *Windsor*, 133 S. Ct. at 2693, and that the City was illegally spending public funds. App. 10a. After preliminary proceedings in state and federal court, and

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[1] DOMA refers to "Defense of Marriage Act" but is used more broadly to refer to any laws restricting marriage and its benefits to opposite-sex couples. See App. 3a n.2.

[2] This petition collectively refers to the two plaintiffs as "Pidgeon" and to the City and Mayor as "the City."

based upon Texas's DOMAs, a state trial judge issued a temporary injunction prohibiting the City from "furnishing benefits to persons who were married in other jurisdictions to City employees of the same sex." App. 40a; see also App. 7–10a.

B. Court of Appeals

While the City's appeal from the injunction was pending, this Court held that a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015). Following *Obergefell*, the United States Court of Appeals for the Fifth Circuit affirmed an injunction prohibiting Texas's Governor, Attorney General, and Commissioner of State Health Services from enforcing any aspect of the State's DOMAs. *De Leon* v. *Abbott*, 791 F.3d 619, 625 (5th Cir. 2015) (affirming 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014)).

Citing *De Leon*, the City argued that *Obergefell* compelled the trial court's injunction's reversal. See App. 12a. Pidgeon, however, asserted that even if *Obergefell* required Texas to recognize same-sex marriages, it did not obligate a State "to pay taxpayer-funded benefits to same-sex relationships." *Ibid.*

The court of appeals reversed the trial court's injunction and remanded for additional proceedings "consistent with *Obergefell* and *De Leon*." App. 36a & n.3.

C. Supreme Court of Texas

Pidgeon sought discretionary review from the Supreme Court of Texas. That Court initially denied review, *Pidgeon* v. *Turner*, No. 15-0688, 2016 WL 4938006 (Tex. Sept. 2, 2016), but later withdrew that order on rehearing and granted review, App. 13a.

Four days after this Court reaffirmed in *Pavan* that *Obergefell* invalidated state statutes "to the extent they

treated same-sex couples differently from opposite-sex couples" in the provision of benefits the States link to marriage, 137 S. Ct. at 2078, the Supreme Court of Texas issued its decision. App. 32a.

The Texas court ruled that *Obergefell* merely

> require[d] states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but *it did not hold that states must provide the same publicly funded benefits to all married persons* and * * * * it did not hold that the Texas DOMAs are unconstitutional.

App. 27a (emphasis added).

The Texas court thus held that *Obergefell* "did not address and resolve" the "specific issue" of "whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples." App. 26–27a. The court barely mentioned *Pavan,* dismissing it as a case presenting a "tangential question[]" that "*Obergefell* itself did not address." App. 31–32a n.21.

The Texas court "remanded this case to the trial court for further proceedings consistent with [its] judgment and [its] opinion." App. 32a.

REASONS FOR GRANTING THE PETITION

Consistent with *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), and *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017) (per curiam), the City of Houston provides employment benefits to married couples equally. Defying those decisions, the Supreme Court of Texas ruled that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons." App. 27a.

The Texas high court also invited "litigants throughout the country" to "assist the courts in fully exploring *Obergefell*'s reach and ramifications." App. 32a. Yet this Court has already defined *Obergefell*'s reach and ramifications: its holding extends to the full "constellation of benefits that the States have linked to marriage," 135 S. Ct. at 2601, including those at issue here.

Because the Texas court's ruling is incompatible with *Obergefell* and *Pavan*, this Court should grant certiorari.

I. The Supreme Court of Texas's decision directly conflicts with *Obergefell* and *Pavan*.

A. *Obergefell* and *Pavan* held that the benefits a State attaches to marriage must be provided equally to same-sex and opposite-sex married couples.

"[T]he reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." *Obergefell*, 135 S. Ct. at 2599. Equal recognition of same-sex marriage requires more than a marriage license; it requires equal "access to the 'constellation of benefits that the Stat[e] ha[s] linked to marriage.'" *Pavan*, 137 S. Ct. at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601). Indeed, "marriage is a keystone of our social order" precisely because States have chosen to make that legal status "the basis for an expanding list of governmental rights,

benefits, and responsibilities." *Obergefell*, 135 S. Ct. at 2601.

In *Obergefell*, 135 S. Ct. at 2601, this Court catalogued some of these benefits:

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

Just as denying same-sex couples a marriage license violates the Due Process Clause, a government violates due process by excluding married same-sex couples from this constellation of benefits. *Ibid.*

Accordingly, a State may not link a benefit—like "health insurance" or "workers' compensation benefits"—to marriage and then declare that same-sex couples may not apply. *Obergefell*, 135 S. Ct. at 2601. Denying married same-sex couples "all the benefits afforded to opposite-sex couples" abridges "central precepts of equality." *Id.* at 2604. Once a State extends benefits to any married couple, it must treat same-sex couples with "equal dignity in the eyes of the law." *Id.* at 2608.

Arkansas recently tested these principles. See *Smith* v. *Pavan*, 505 S.W.3d 169, 176 (Ark. 2016), rev'd, 137 S. Ct. 2075. *Pavan* involved a challenge to an Arkansas statute that automatically listed the opposite-sex spouse, but not the same-sex spouse, of a child's biological parent on the child's birth certificate. See 137 S. Ct. at 2077. The Arkansas Supreme Court sidestepped *Obergefell*, holding that it "did not address Arkansas's statutory framework

regarding birth certificates, either expressly or impliedly." 505 S.W.3d at 176.

This Court reversed. *Obergefell* "expressly identified" birth certificates as among "the 'rights, benefits, and responsibilities' to which same-sex couples, no less than opposite-sex couples, must have access." *Pavan*, 137 S. Ct. at 2078. "That was no accident," as "several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouse on their children's birth certificates." *Ibid.* *Obergefell* had invalidated those challenged statutes "to the extent they treated same-sex couples differently from opposite-sex couples," and "[t]hat holding applie[d] with equal force to" Arkansas's statute. *Ibid.*

B. The Texas court disregarded *Obergefell*'s and *Pavan*'s holdings with respect to marital benefits.

1. The Texas high court announced that *Obergefell* "did not address and resolve" the "specific issue" of whether Texas "may constitutionally deny benefits to its employees' same-sex spouses" that it provides to its employees' opposite-sex spouses. App. 26–27a. Yet this Court declared, to the contrary, that the Constitution entitles same-sex couples to marriage "on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605. These "terms and conditions" include benefits the State links to marriage, including those—like health insurance—*Obergefell* explicitly named. *Id.* at 2601; see also *Pavan*, 137 S. Ct. at 2078

Even as it professed not to "instruct the trial court how to construe *Obergefell* on remand," App. 27a, the Texas court gave *Obergefell* a narrow interpretation binding upon all Texas courts. The Texas court recast *Obergefell*'s holding by diminishing the force of its command that States fully recognize same-sex marriage:

> The Supreme Court held in *Obergefell* that the Constitution requires states to license and

> recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but *it did not hold that states must provide the same publicly funded benefits to all married persons*. * * *

App. 27a (emphasis added).

2. *Obergefell* not only compelled States to license and recognize same-sex marriage, it also concluded that "the 'constellation of benefits that the Stat[e] ha[s] linked to marriage'" must be provided equally to same-sex and opposite-sex married couples. *Pavan*, 137 S. Ct. at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601).

Like the birth-certificate question in *Pavan*, the issue of equal access to publicly funded employment benefits was litigated in *Obergefell*. The lead plaintiffs in a suit consolidated into *Obergefell* challenged the refusal of Tennessee's State university health insurance system to provide the same benefits to opposite-sex and same-sex married couples. See *Tanco* v. *Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn.), rev'd sub nom., *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom., *Obergefell*, 135 S. Ct. 2584; see also Br. at 5, *Tanco* v. *Haslam*, No. 14-562 (U.S. filed Feb. 27, 2015).[3] *Obergefell* invalidated Tennessee's DOMAs "to the extent they treated same-sex couples differently from opposite-sex couples." *Pavan*, 137 S. Ct. at 2078. "That holding applies with equal force" to Texas's similar DOMAs, *ibid.*, as the Fifth Circuit recognized in *De Leon* v. *Abbott*, 791 F.3d 619, 625 (5th

[3] Another set of *Obergefell* petitioners argued that Kentucky's DOMA was unconstitutional because, among other things, it barred a person from receiving her same-sex spouse's publicly funded worker's compensation death benefit, to which an opposite-sex spouse would be entitled. Br. at 28–29, *Bourke* v. *Beshear*, No. 14-574 (U.S. filed Feb. 27, 2015).

Cir. 2015) (affirming 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014)).

3. This Court has foreclosed the piecemeal litigation the Texas Supreme Court endorsed. *Obergefell* rejected the "slower, case-by-case determination of the required availability of specific public benefits to same-sex couples." 135 S. Ct. at 2606; see also *id.* at 2624–25 (Roberts, C.J., dissenting, joined by Scalia and Thomas, JJ.) (explaining that "more selective claims" to specific benefits "will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples"); *id.* at 2640 n.1 (Alito, J., dissenting).

But the Texas court pronounced that "litigants throughout the country[] must now assist the courts in fully exploring *Obergefell*'s reach and ramifications." App. 32a. To justify this methodology, the court pointed to this Court's recent grant of certiorari in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 137 S. Ct. 2290 (2017), stating that it "illustrate[d] that neither *Obergefell* nor *Pavan* provides the final word on the tangential questions *Obergefell*'s holdings raise but *Obergefell* itself did not address." App. 31–32a n.21.

This case does not involve a "tangential question" that *Obergefell* "did not address." Like *Pavan*, it concerns an issue briefed in and decided by *Obergefell*. *Masterpiece Cakeshop*, by contrast, involves First Amendment questions easily distinguishable from States' obligations to afford same-sex marriages benefits on par with opposite-sex marriages.

The Texas court's strained interpretation of *Obergefell* is contrary to that decision's actual holding.

4. The Texas court erred in ruling that *Obergefell* did not answer whether a State must treat married couples equally in the provision of marital benefits. *Obergefell*

and *Pavan* both answered that question in the affirmative.

C. When presented with direct contradictions of its rulings, this Court has not hesitated to intervene.

1. In comparable circumstances, the Court has granted petitions to enforce its decisions. For example, in *James* v. *City of Boise,* 136 S. Ct. 685, 686 (2016), the Court granted certiorari after the Idaho Supreme Court "concluded that it was not bound by this Court's interpretation of § 1988," instructing that "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."

In *Nitro-Lift Technologies, LLC* v. *Howard*, 568 U.S. 17, 21 (2012) (per curiam), this Court granted certiorari to explain that the Oklahoma Supreme Court "must abide by the FAA, which is the supreme Law of the Land, and by the opinions of this Court interpreting that law," because "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law" (quotation and citation omitted). And in *Presley* v. *Georgia*, 558 U.S. 209, 209 (2010) (per curiam), this Court granted certiorari because "[t]he Supreme Court of Georgia's [decision] contravened this Court's clear precedents" regarding the right to public trial.

Similar examples abound. See, *e.g.*, *American Tradition P'ship, Inc.* v. *Bullock*, 567 U.S. 516, 516–17 (2012) (per curiam) (granting certiorari where the Montana Supreme Court failed to apply *Citizens United* to a state law similar to the federal law, and remarking that "[t]here can be no serious doubt" that *Citizens United* applied); *Michigan* v. *Fisher*, 558 U.S. 45, 47 (2009) (per curiam*)* (granting certiorari "[b]ecause the decision of the Michigan Court of Appeals is indeed contrary to our Fourth Amendment case law"); *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838, 840 (2009) (per curiam) (granting certiorari when "the Tennessee Court of Appeals misread and misapplied this Court's decision" in *Norfolk & W. Ry.*

Co. v. *Ayers*, 538 U.S. 135 (2003)); *Kirk* v. *Louisiana*, 536 U.S. 635, 635-36 (2002) (per curiam) (granting certiorari because the Louisiana Court of Appeal's decision "plainly violates our holding in *Payton* v. *New York*, 445 U.S. 573, 590 (1980)").

2. The Texas court observed that it was "dealing *only* with an interlocutory appeal from a trial court's order." App. 32a (emphasis added). Yet decisions on interlocutory appeals frequently make important law. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 342 (2011) (deciding on interlocutory appeal that certified plaintiff class did not satisfy Federal Rules of Civil Procedure 23(a) and (b)(2)); *City of Boerne* v. *Flores*, 521 U.S. 507, 511 (1997) (determining on interlocutory appeal that Congress exceeded enforcement power under Section 5 of the Fourteenth Amendment in enacting Freedom of Religion Restoration Act); *Mitchell* v. *Forsyth,* 472 U.S. 511, 520–23, 526–27 (1985) (deciding that U.S. Attorney General does not have absolute immunity for national security functions and that denials of qualified immunity are immediately appealable orders). As shown below, not only did the Texas court contradict this Court's precedents, it set the stage for skirmishes between State and federal courts, and between different government agencies within Texas itself.

The Supreme Court of Texas's ruling is no less binding on all lower courts in Texas because it is interlocutory, nor is its direct conflict with this Court's decisions in *Obergefell* and *Pavan* any less substantial.

II. This case merits this Court's review.

A. The Texas court's opinion generates inconsistency, unpredictability, and geographic disparity in the law.

By refusing to apply this Court's precedent, the Texas Supreme Court created two geographical disparities in

the law: one between Texas and the other States, and one within Texas.

1. Same-sex married couples in Texas must now anticipate denials of governmental rights and benefits that they would not face in States that heed *Obergefell*.

Already, Texas couples are expending time and resources as supplicants for benefits *Obergefell* already guarantees. For example, in the aftermath of the Texas court's decision, three City employees and their same-sex spouses are seeking to enjoin the City from discontinuing the payment of employment benefits to same-sex married couples that are provided to opposite-sex married couples. See *Freeman* v. *Turner*, No. 4:17-cv-02448 (S.D. Tex. filed Aug. 10, 2017).

While these federal proceedings will be governed by *Obergefell* and *De Leon*, the Texas court's decision will govern the parallel State-court proceeding. The potential for divergence between the two courts is intolerable in light of the clarity with which this Court has already spoken.

2. The Texas court's decision also creates a disparity between the rights of State of Texas employees and municipal employees. After the Fifth Circuit in *De Leon* affirmed the district court's preliminary injunction barring State of Texas officials from enforcing the Texas DOMAs, 791 F.3d at 625, the district court permanently enjoined State officials from enforcing those laws, *De Leon* v. *Abbott*, No. SA-13-CA-00982-OLG, ECF No. 98 (W.D. Tex. July 7, 2015) (final judgment).

Pursuant to *De Leon*, Texas has been providing equal benefits to State employees' same-sex spouses for more than two years. App. 18a. Yet the Texas Supreme Court's holding sows doubt about *Obergefell*'s application to similarly-situated municipal employees. Two levels of Texas government now operate under starkly divergent views of this Court's precedent. And it is unnecessarily

unclear which holding will govern Texas counties, school districts, and other governmental units.

3. The Texas court's decision also threatens Texas governmental units' ability to predictably and consistently administer public rights and benefits. The incongruous holdings—*De Leon* and *Obergefell* versus *Pidgeon*—present practical dilemmas for governmental officials faced with competing court decisions and tasked with administering employee benefits.

This Court's review is warranted to ensure the correct application of *Obergefell* and *Pavan*, and to eliminate nationwide uncertainty about critical constitutional rights and protections.

B. Left unaddressed, the Texas court's decision encourages other litigants and courts to undermine *Obergefell* and *Pavan*.

The Texas court's decision invites litigation on settled questions. The Texas court foresees a cauldron of cases testing *Obergefell*'s bounds. See App. 32a (sketching out a future of "litigants throughout the country * * * exploring *Obergefell*'s reach and ramifications").

Obergefell articulated its own bounds. Its holding reaches the very issue this case presents. The Supreme Court of Texas erred in holding that the question is unsettled, and its decision expressly encourages endless lawsuits aimed at rolling back the rights *Obergefell* secured and *Pavan* confirmed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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