No. 17-424

IN THE

Supreme Court of the United States

SYLVESTER TURNER, MAYOR OF THE CITY OF HOUSTON, TEXAS, ET AL.,
Petitioners,

v.

JACK PIDGEON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL AND FAMILY LAW IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Pursuant to Rule 37 of this Court, Amici Curiae, scholars with expertise in family law, constitutional law, and related subjects, respectfully submit this brief in support of Petitioners. Amici have substantial knowledge of state marriage and family laws and their interplay with federal constitutional standards. Amici support all of Petitioners' arguments in their petition for certiorari and submit this brief to provide the Court with additional insights about the meaning of relevant precedents and the ways in which the unequal and discriminatory treatment of married same-sex couples harms the economic security and stability of their families. Appendix A sets forth a list of all the amici on whose behalf this brief is submitted.

SUMMARY OF THE ARGUMENT

This Court has twice held that same-sex couples have a right to "civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015); *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam). The Texas Supreme Court fundamentally disregarded these repeated commands in the case below, where it asserted that this Court "did not hold that states must provide the same publicly funded benefits to all married persons." *Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350, at *10 (Tex. June 30, 2017).

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[1] Pursuant to rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Petitioners and Respondents were notified 10 days prior to the filing of this brief and consented to the filing of this brief. Petitioners' and Respondents' consent has been filed with the Clerk with this brief.

The decision below disregarded both the clear holding and the facts of *Obergefell v. Hodges*. Not only was *Obergefell*'s holding clearly applicable to the "constellation of benefits that the States have linked to marriage," *Obergefell*, 135 S. Ct. at 2601, but the consolidated cases decided in *Obergefell* concerned denial of those very benefits, along with the affront to the dignity of same-sex couples that denial entails. The Court reversed those cases because denying same-sex couples benefits afforded to opposite-sex couples barred same-sex couples from equal access to a fundamental right and therefore violated both the Equal Protection and Due Process Clauses.

Furthermore, the state and local DOMAs barring recognition of same-sex marriage, which comprise the entire basis for the challenge to the City of Houston's benefits, are so clearly unconstitutional after *Obergefell* that the state itself is supplying these benefits to its employees. The inarguable unconstitutionality of these laws alone should end this litigation as a matter of law.

In *Pavan v. Smith*, this Court reiterated "*Obergefell*'s commitment to provide same-sex couples the 'constellation of benefits that the States have linked to marriage'" and summarily reversed a state supreme court decision allowing the state to treat same-sex couples differently from opposite-sex couples. *Pavan*, 137 S. Ct. at 2077 (quoting *Obergefell*, 135 S. Ct. at 2601). The Texas Supreme Court also disregarded this clear command when it determined that *Obergefell* does not require states to provide the same publicly funded benefits to all married persons.

If the Texas Supreme Court's decision below is not reversed, the case will be remanded for trial on the issue of whether denying benefits to same-sex

couples protects children. This litigation thus unnecessarily risks subjecting same-sex couples—and their children—to the material and dignitary harms that both *Obergefell* and *Pavan* forbid.

In addition to the risk of inconsistent legal rulings, there also is a grave risk of injury to American families if the Texas state courts are allowed to effectively relitigate *Obergefell* and *Pavan*. Numerous academic studies have confirmed that same-sex couples today are raising thousands of children throughout both Texas and the United States. Denial of benefits to these families does not protect children and instead places their health, safety, and economic security at risk.

The Texas Supreme Court's decision must not be permitted to stand in defiance of both the law and reality of the fundamental constitutional right to marry. Amici respectfully request the Court grant the Petition for Writ of Certiorari and review the decision below of the Texas Supreme Court.

ARGUMENT

I. *OBERGEFELL* AND *PAVAN* GUARANTEE THE RIGHT OF SAME-SEX COUPLES TO "CIVIL MARRIAGE ON THE SAME TERMS AND CONDITIONS AS OPPOSITE-SEX COUPLES," INCLUDING THE "CONSTELLATION OF BENEFITS" STATES CHOOSE TO ATTACH TO MARRIAGE.

In its decision below, the Texas Supreme Court failed to instruct lower courts what this Court has twice held: same-sex couples have a right to "civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell*, 135 S. Ct. at 2605; *Pavan*, 137 S. Ct. at 2078. The Texas court left lower courts free

to authorize the denial of equal marital benefits by asserting that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons" and "did not hold that the Texas DOMAs are unconstitutional." *Pidgeon*, 2017 WL 2829350, at *10.

These assertions are plainly wrong. After *Obergefell* and *Pavan*, there is no question that same-sex couples are entitled to the same marital benefits, whether "publicly funded" or not, as opposite-sex couples.[2] The Texas court purported to find legal uncertainty on this critical holding where none exists. The resulting legal confusion is not only needless but harmful. It places married same-sex couples in precisely the untenable position *Obergefell* sought to avoid: they must litigate case-by-case for equal benefits and respect for their equal dignity. The Due Process and Equal Protection Clauses, as authoritatively and clearly interpreted by this Court, forbid that consequence.

A. *Obergefell* Guarantees Equal Marital Benefits to Same-Sex Couples.

Married same-sex couples have a right to "civil marriage on the same terms and conditions as opposite-sex couples." *See Obergefell*, 135 S. Ct. at 2605; *id.* at 2593 ("The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the

[2] After *Obergefell*, there is also no doubt that the state and local Texas DOMAs—the sole basis upon which the Houston taxpayers filed their suit—are unconstitutional. *See Obergefell*, 135 S. Ct. at 2605 (striking down substantially identical DOMA laws of Kentucky, Michigan, Ohio, and Tennessee).

opposite sex."); *id.* at 2607 ("The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."); *id.* at 2605 ("[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."); *id.* at 2602 ("Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.").

This holding, and its reaffirmation in *Pavan*, reflect this Court's view that the right of same-sex couples to marry arises from both the Due Process and Equal Protection Clauses. *Pavan*, 137 S. Ct. at 2078 (2017); *Obergefell*, 135 S. Ct. at 2602-05. A state or local law denying to married same-sex couples benefits available to opposite-sex couples is a literal exclusion from "civil marriage on the same terms and conditions as opposite-sex couples." *Pavan*, 137 S. Ct. at 2078; *Obergefell*, 135 S. Ct. at 2605; *cf. United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (invalidating DOMA in part because its effect was "to identify a subset of state-sanctioned marriages and make them unequal"). It makes no difference whether those benefits are supported by public funds. *See infra* Section I.E.

This Court flatly rejected the proposition that, after *Obergefell*, same-sex couples would have to litigate for equal marital benefits on a case-by-case basis. "Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities

intertwined with marriage." *Obergefell*, 135 S. Ct. at 2606; *see also id*. at 2623-24 (Roberts, C.J., dissenting) ("[Cases involving selective tangible 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.").

The fundamental right of same-sex couples to marry cannot be disentangled from the equal right to the benefits and privileges that states themselves have decided should come with that status.

B. Marital Status and Equality of Rights Within Marriage Were the Issues in *Obergefell*.

Same-sex couples in *Obergefell* sought marriage both as a status and as a vehicle to obtain equal access to marriage-related benefits. *Obergefell*, 135 S. Ct. at 2602; *see also id.* at 2620 (Roberts, C.J., dissenting) ("[T]hey seek public recognition of their relationships, along with corresponding government benefits."). The cases consolidated in *Obergefell* specifically challenged the exclusion of married same-sex couples from certain benefits and other rights made available to all opposite-sex married couples, making marital benefits a key component of *Obergefell*. *See Tanco v. Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014) (property protection, combining separate health insurance plans into a family plan, and legal rights associated with a child's birth); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 546 (W.D. Ky. 2014) (inheritance tax exemption, healthcare benefits, intestacy, loss of consortium damages, and workers compensation); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1041 (S.D. Ohio 2014) (listing both parents on birth certificate); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 976 (S.D. Ohio 2013) (including spouse's name on death certificate). Some of the cases

involved publicly funded benefits, like Social Security payments or special tax exemptions. In each, the plaintiffs won the identified benefit at the district court level, lost it on appeal to the Sixth Circuit, *see DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (consolidating cases), and won it back in this Court with the ruling in *Obergefell*. Were the benefits of marriage not in play in *Obergefell*, the Sixth Circuit's ruling as applied to these four cases would not have been reversed.

While the case before this Court involves only spousal benefits for city employees, the Texas Supreme Court's decision would leave unanswered whether government could exclude legally married same-sex couples, and them alone, from the full panoply of rights and responsibilities that State government freely chooses to provide to married opposite-sex couples. The decision of the Texas Supreme Court would potentially expose same-sex couples to a hollowed out and hitherto unknown version of second-tier marriage: the government would be bound to give them abstract "recognition" and perhaps a physical certificate, but nothing more.

Under this blinkered view of the right to marry, a James Obergefell living in Dallas could have his marriage certificate but might have to litigate again the right "to be shown as the surviving spouse on [his husband's] death certificate." *Obergefell*, 135 S. Ct. at 2594-95. An April DeBoer and Jayne Rowse from San Antonio could get official marital status but might be left to plead again that their child should not "have only one [of them] as his or her legal parent." *Id*. at 2595. An Army Reserve Sergeant First Class who served his country in Afghanistan could marry at the county courthouse in Cotula but might exit the building only to suffer "severe hardship in the event of

a spouse's hospitalization"—this time without even leaving his home state. *Id*. at 2595, 2607. They and their children alone would be left to the mercy of the legislature.

Obergefell does not permit such a piecemeal dismantling of their right to equality within marriage and the Texas Supreme Court should have forthrightly said so.

C. The Due Process and Equal Protection Roots of the Right to Marry Confirm the Constitutional Requirement for Equal Treatment Within Marriage.

Requiring equality of treatment among marriages is explained by the Court's insight that Due Process and Equal Protection work in tandem to protect access to—and equality within—the institution of marriage.

It is error to read *Obergefell* as concerned only with bare recognition and a certificate. This Court has a strikingly different view: "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Obergefell*, 135 S. Ct. at 2602. Under *Obergefell*, there is an equal protection component within the due process right to marry.

This Court has always understood that the two great clauses of the Fourteenth Amendment are "connected in a profound way," that "each may be instructive as to the meaning and reach of the other," and that they "converge in the identification and definition of the right." *Id.* at 2602-03. The "synergy" between the two clauses has repeatedly helped the Court "to identify and correct inequalities *in* the institution of marriage." *Id.* at 2604 (emphasis added) (citing cases

correcting sex-based inequality within the law of marriage). Indeed, among the first cases to establish the fundamental right to marry were two that explicitly noted both equal protection and due process principles. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (invalidating a Wisconsin law that required unwed parents with child support arrearages to obtain court approval before marrying under the fundamental rights branch of the Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating Virginia's anti-miscegenation law under both the Equal Protection and Due Process Clauses).

Due Process and Equal Protection principles together make the constitutional connection from marital status to equal benefits and dignity. This realization explains this Court's conclusion that same-sex couples have a right to "civil marriage on the same terms and conditions as opposite-sex couples." *Id*. at 2605.

Furthermore, the right to marry under the Due Process Clause is fundamental in part precisely because the States have attached so much legal significance to it through "an expanding list of governmental rights, benefits, and responsibilities." *Obergefell*, 135 S. Ct. at 2601 (listing "aspects of marital status" like inheritance and property rights, rules of intestacy, spousal testimonial privileges, hospital access, medical decision-making authority, adoption rights, rights of survivors, birth and death certificates, workers' compensation benefits, health insurance, and child custody, support, and visitation rules).

> The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. There is no difference between same- and opposite-sex

> couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage.

Id. at 2601.

It is the "symbolic recognition *and* material benefits" that "protect and nourish the union." *Id.* (emphasis added). The federal government, too, privileges marriage in "over a thousand provisions of federal law," *id.*, which *Windsor* declared must be equally available to same-sex couples under equal protection principles. *Windsor*, 133 S. Ct. at 2694.

But in case there was any doubt, this Court made it unmistakable that the discriminatory denial of marital benefits itself was unconstitutional, independent of the denial of a marriage license:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are *denied all the benefits* afforded to opposite-sex couples *and* are barred from exercising a *fundamental right*.

Obergefell, 135 S. Ct. at 2604 (emphasis added).

The upshot is not complicated. This Court confronted inseparable constitutional wrongs in *Obergefell*: the exclusion of same-sex couples from marriage and the denial to them of the "constellation of benefits" provided to opposite-sex couples. The Due Process fundamental right to marry guarantees equal entrance

into marriage for same-sex couples. The Equal Protection Clause guarantees that, once married, same-sex couples are entitled to any associated benefits and rights "on the same terms and conditions as opposite-sex couples."

D. *Pavan* Unambiguously Reinforced and Reaffirmed the Equal Marital Benefit Mandate of *Obergefell*.

This Court has explicitly confirmed "*Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" *Pavan*, 137 S. Ct. at 2077 (quoting *Obergefell*, 135 S. Ct. at 2601). In doing so, this Court reversed an Arkansas Supreme Court decision that allowed differential treatment of same-sex and opposite-sex couples. *See id.* at 2078-79. In *Pavan*, although the state required that a male spouse be listed on a child's birth certificate, the lower court permitted the state to omit a same-sex spouse's name. *See id.* at 2077-78. Simply put, this Court proclaimed, "*Obergefell* proscribes such disparate treatment." *Id.* at 2078.[3]

In *Pavan*, even Arkansas had "repeatedly conceded that the benefits afforded nonbiological parents under § 9–10–201 must be afforded equally to both same-sex and opposite-sex couples." *Pavan*, 137 S. Ct. at 2080 (Gorsuch, J., dissenting). The apparent difference between the majority and dissent in *Pavan* was only on the question whether the Arkansas birth certificate

[3] This conclusion was also recently embraced by the Arizona Supreme Court, which held "[t]he marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses." *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492, 498 ¶ 23 (Ariz. 2017).

system was marriage-based or biology-based—not on the underlying principle that truly marital benefits must be distributed equally to gay couples under *Obergefell*.

Spousal benefits are—by definition—marital benefits. And in fact, workplace benefits for married couples were among the issues raised in the consolidated cases decided by *Obergefell*. *Bourke*, 996 F. Supp. 2d at 546 ("[A] same-sex spouse must pay to add their spouse to their employer-provided health insurance, while opposite-sex spouses can elect this option free of charge."). "That was no accident. . . . In considering those challenges [in *Obergefell*], we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples." *Pavan*, 137 S. Ct. at 2078. There is no question that the benefits at issue here offered by the City of Houston to its employees are marital. They extend to the spouses of city employees based on marriage alone.

Treating the availability of marital benefits for same-sex couples as if it is still an open question, as the Texas Supreme Court did, leaves in place the very stigma that *Obergefell* sought to remove.

E. The Texas Supreme Court Plainly Erred in Stating That Equal Marital Benefits for Same-Sex Couples Was Unresolved by *Obergefell*.

The Texas Supreme Court contradicted *Obergefell*'s core holding and its reiteration in *Pavan* when it refused to confirm that marital benefits are inextricably tied to marriage and cannot be distributed unequally. In *Pidgeon*, the Texas court stated:

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

> and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but *it did not hold that states must provide the same publicly funded benefits to all married persons*, and—unlike the Fifth Circuit in *De Leon—it did not hold that the Texas DOMAs are unconstitutional*.

Pidgeon, 2017 WL 2829350, at *10 (emphasis added). The Texas court added, "We need not instruct to [sic] the trial court to 'narrowly construe' *Obergefell* to confirm that *Obergefell* did not directly and expressly resolve those issues." *Id.* at *11.

The errors here are multiple and fly in the face of this Court's decisions in *Obergefell* and *Pavan.* First, contrary to *Pidgeon*, this Court has twice directly and expressly resolved the issue of equal marital benefits for same-sex couples. *See supra* Sections I.A-D (discussing *Obergefell* and *Pavan*).

Second, there is no doubt that the local and state DOMAs in Texas are unconstitutional under *Obergefell*. Substantively identical DOMAs in Kentucky, Michigan, Ohio, and Tennessee were declared unconstitutional in *Obergfell*. The Texas DOMA itself was declared unconstitutional in *DeLeon*, which straightforwardly and summarily applied *Obergefell. DeLeon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015). The remaining state and local DOMAs around the country, though not formally challenged in the *Obergefell* litigation, are as obviously unconstitutional under *Obergefell* as were the remaining public segregation laws around the country not formally challenged in *Brown v. Board of Education*, 347 U.S. 483, 487 (1954) (challenging segregation of schools in Kansas, South Carolina,

Virginia, and Delaware).[4] Yet the state supreme court identified only the continued existence of the unconstitutional Texas and Houston DOMAs as the reason "why Pidgeon is able to bring this claim." *Pidgeon*, 2017 WL 2829350, at *11 n.20. That fact alone should end this litigation as a matter of law.

Ironically, Texas is already paying equal workplace benefits to state employees because Governor Greg Abbott agreed in federal litigation that a federal court injunction barring enforcement of the Texas DOMA was "correct in light of *Obergefell*." *De Leon*, 791 F.3d at 625. The fact that state employees in same-sex marriages are already getting equal benefits "could potentially affect" whether city employees should get them, the *Pidgeon* court noted, but then carried on without considering what effect this incongruity should have on how to understand *Obergefell*. *Pidgeon*, 2017 WL 2829350, at *7.

Third, the fact that some marital benefits are "publicly funded" is irrelevant to the equal right to marry recognized by *Obergefell*. Presumably, "public funding" is a reference to the compensation government employees receive in the form of employment benefits available to family members. Yet *Obergefell* itself involved the equal right to "publicly funded" spousal benefits. While some citizens may not want to "support same-sex marriages with their tax dollars," *Pidgeon*, 2017 WL 2829350, at *11, those preferences cannot

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[4] *See, e.g.*, *McKinney v. Blankenship*, 282 S.W.2d 691, 694–95 (Tex. 1955) (rejecting the argument that Texas courts were not bound by *Brown* because Texas's own segregation laws "were not before the Supreme Court" in *Brown* as "so utterly without merit that we overrule it without further discussion"). The Texas Supreme Court cited this precedent in *Pidgeon*——and then disregarded it. *Pidgeon*, 2017 WL 2829350, at *10.

supersede equality of constitutional rights. "[W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell*, 135 S. Ct. at 2602. The "sincere, personal opposition" of individual private citizens to public funding cannot be used to deny same-sex couples "the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." *Id.*

Fourth, while the Texas Supreme Court formally declined to issue the "narrow construction" of *Obergefell* urged by Jack Pidgeon and Larry Hicks, the *Pidgeon* decision effectively issued a narrowing construction by declaring that *Obergefell* did not "directly and expressly resolve" the issue of equal marital benefits. The state supreme court placed its institutional weight behind a false proposition about the supposedly limited reach of *Obergefell*. While lower state courts could in theory mandate equal benefits despite this false conclusion, they have been instructed that they may not do so on the correct and straightforward grounds that *Obergefell* requires it. Consequently, the Texas Supreme Court impermissibly left open the possibility of discrimination against same-sex marriages by government officials in Texas.

Finally, in an attempt to support its erroneously-limited reading of *Obergefell*, the Texas Supreme Court cited this Court's grant of a petition for writ of certiorari in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 137 S. Ct. 2290 (2017), a First Amendment case involving application of a state antidiscrimination law to a baker who refused to sell

a wedding cake to a same-sex couple. "The Court's decision to hear and consider *Masterpiece Cakeshop*," asserted the state court, "illustrates that neither *Obergefell* nor *Pavan* provides the final word on the tangential questions *Obergefell*'s holdings raise but *Obergefell* itself did not address." *Pidgeon*, 2017 WL 2829350, at *12 n.21. Certainly some "tangential questions" related to marriage remain unresolved, and the First Amendment issues raised in the *Masterpiece Cakeshop* litigation are among them. But there is nothing "tangential" about the marital benefits challenged here. Equal marital benefits and equal dignity under law were the core issues in both *Obergefell* and *Pavan*.

These considerations should have led the Texas Supreme Court to the conclusion that the Constitution has not left open the question whether same-sex couples are entitled to "civil marriage on the same terms and conditions as opposite-sex couples," that they cannot be "denied the constellation of benefits that the States have linked to marriage," *Obergefell*, 135 S. Ct. at 2601, and that the Texas DOMA and its parallel Houston ordinance under which this litigation was brought are plainly unconstitutional after *Obergefell*.

Just two years ago when *Obergefell* was decided, eight members of this Court (including three in dissent) unequivocally acknowledged that its holding required equality within the institution of marriage, and specifically equal rights to marital benefits. Less than four months ago, on the eve of the state supreme court decision, this Court affirmed that core holding. This case is an opportunity for the Court to send the clear and simple message—hopefully for the last time—that *Obergefell* means what it says.

II. THE THREAT TO MARRIED, SAME-SEX COUPLES' FAMILIES MERITS INTERVENTION BY THIS COURT.

A. Denial of Equal Benefits to Same-Sex Married Couples Furthers No Legitimate State Interest.

As argued above, the Texas Supreme Court's ruling in *Pidgeon* flouts this Court's holding in *Obergefell*, *Pavan*, and *Windsor*. It does so at a great cost to same-sex-couples' families, who face the threat of unequal treatment that threatens the dignity and stability of their households. Respondents have suggested throughout this litigation that the state has a legitimate interest in favoring heterosexual marriage because it is the only relationship in which married parents might raise biological children related to both of them. This argument was made and rejected in *Obergefell*. "The right to marry," the Court wrote, is not conditioned "on the capacity or commitment to procreate." *Obergefell*, 135 S. Ct. at 2601. Indeed, that marriage "safeguards children and families" is one reason to protect the right to marry in the first instance rather than a reason to undermine it. *Id*. at 2600. *Obergefell* plainly does not permit a state to deny benefits to same-sex couples in order to "protect the children," and the ruling does not permit this case to be remanded for trial on this issue.

Moreover, despite the suggestion that the state might choose to privilege relationships that result in genetic offspring, Texas law treats an adoptive parent-child relationship as the legal equivalent of a biological parent-child one. *See* Tex. Fam. Code § 101.024(a) ("'Parent' means . . . an adoptive mother or father."). This belies any suggestion that state policy justifies supporting only one type of parent-child relationship.

The State of Texas has also recognized that same-sex couples can provide safe and loving homes for children. The state does not bar married, same-sex couples from jointly adopting children, nor does it prohibit gay or lesbian adults from serving as foster parents. *Hobbs v. Van Stavern*, 249 S.W.3d 1, 4 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Respondents are as wrong about the facts as they are about the law. They characterize marriages by same-sex couples as non-procreative—and thus not in need of whatever protections the state deems suitable to provide. But this characterization is unsupported. More than 125,000 same-sex couples are raising nearly 220,000 children in the United States, *see* Gary J. Gates, Williams Inst., UCLA Sch. of Law, *LGBT Parenting in the United States* 1 (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf, a fact that informed the Court's decision in *Obergefell* to recognize the right of same-sex couples to marry. *Obergefell*, 135 S. Ct. at 2600 (finding in the record "powerful confirmation from the law itself that gays and lesbians can create loving, supportive families"). In 2016, an estimated 23% of same-sex couples in Texas (11,000 couples) were raising more than 18,000 children. *See* Williams Inst., *LGBT People in Texas*, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Texas-fact-sheet.pdf (last visited Oct. 19, 2017). These couples are six times more likely to be raising adopted children than different-sex couples. *Id.* As the Court recognized in *Obergefell*, it is vital to the welfare of these children that their parents have access to the institution of marriage and the benefits that it provides. *Obergefell*, 135 S. Ct. at 2600. The stability of these families requires that they not be forced to bear the continuous stress of anticipating denials of benefits offered to other married families.

B. Denial of Marriage Benefits Negatively Impacts Children of Same-Sex Couples.

The Texas Supreme Court's holding that *Obergefell* does not necessarily require the provision of equal benefits to same-sex married couples means that those families may be deprived of critical, tangible protections necessary for their well-being. The benefit at issue in this case—spousal health insurance—is of obvious importance. Research has shown that depriving same-sex couples of the benefits of marriage also imposes unnecessary, and far-reaching, hardships on their children. Am. Psychol. Ass'n, *Resolution on Sexual Orientation, Parents, and Children* (2004). Economic repercussions, such as the denial of family healthcare coverage, social security benefits, and hundreds of other critical marital benefits, contribute to the unfortunate reality that children raised by same-sex couples are twice as likely to be raised in poverty as those raised by opposite-sex couples. Williams Inst. UCLA Sch. of Law, *The Impact of Stigma and Discrimination Against LGBT People in Texas* (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Texas-Impact-of-Stigma-and-Discrimination-Report-April-2017.pdf [hereinafter Williams Inst., *Impact of Stigma and Discrimination*]. The correlation between denying marriage benefits and poverty is clear: marriage decreases the chance of child poverty from 32% for the children of unmarried same-sex couples to 9% for married couples; the chance of poverty for children of different-sex couples drops from 44% (unmarried) to 11% (married). *See* Gary J. Gates, Williams Inst. UCLA Sch. of Law, *Demographics of Married and Unmarried Same-Sex Couples: Analyses of the 2013 American Community Survey* 7 (Mar. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-

March-2015.pdf. While studies have shown that same-sex parentage imposes no harmful effects on children, research has consistently proven that poverty negatively affects a child's health and wellbeing. Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes*, 1136 Annals N.Y. Acad. Sci. 243, 244 (2008). Children benefit from the legal and social benefits of married parents, regardless of the parents' sexual orientation. Carlos A. Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 Wm. & Mary Bill Rts. J. 691, 735-36 (2013).

Studies show that LGBT people in Texas experience disparate economic instability, which is often exacerbated by discriminatory workplace policies. Currently, only 14% of Texas's workforce is covered by local laws that protect workers from discrimination based on sexual orientation or gender identity. Christy Mallory & Brad Sears, Williams Inst. UCAL Sch. of Law, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Texas* 1 (Apr. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Texas-ND-May-2015.pdf. In states that do not ban this type of workplace discrimination, LGBT couples with children experience an income gap of approximately $11,000 compared to married heterosexual couples with children. Williams Inst. UCAL Sch. of Law, *Impact of Stigma and Discrimination* at 40. This gap reduces by almost two-thirds in states that pass laws prohibiting sexual orientation discrimination. *Id.* Further, inclusive workplace policies consistently result in more productive LGBT employees, and discriminatory environments often result in the employee's quitting or being fired from his or her job. *Id.* at 60-61. Businesses spend about one-fifth of an employee's annual salary to replace a worker, and based on

the average mean salary of Texas workers, employers risk losing about $9,300 per employee that resigns as a result of workplace discrimination. *Id* at 61. The City of Houston should not be sued for providing equal benefits to same-sex married couples when that is precisely what is required by this Court's holding and, in any event, is in the City's financial best interests.

CONCLUSION

To correct and prevent Texas state court rulings that are inconsistent with the law that same-sex couples have a right to "civil marriage on the same terms and conditions as opposite-sex couples" and to protect same-sex couples—and their children—from the harm of loss of benefits afforded to opposite-sex couples—Amici Curiae respectfully request the Court grant the Petition for Certiorari in this matter and review the Texas Supreme Court's decision below. That decision must not be permitted to stand in defiance of both the law and reality of the fundamental constitutional right to marry.

Respectfully submitted,

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APPENDIX

APPENDIX

Amici Curiae are scholars with a wide range of expertise relating to family law, constitutional law, and the regulation of marriage. Their expertise thus bears directly on the issues before the Court in this case. These *Amici* are listed below. Their institutional affiliations are listed for identification purposes only.

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