FILED
15-0688
5/9/2016 5:16:19 PM
tex-10538245
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 15-0688

In the Supreme Court of Texas

JACK PIDGEON AND LARRY HICKS,
Petitioners,

v.

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON,
Respondent.

On Petition for Review from the
Fourteenth Court of Appeals, Houston, Texas
Nos. 14-14-00899-cv, 14-14-00932-cv

PETITIONER'S BRIEF ON THE MERITS

JARED R. WOODFILL
State Bar No. 00788715
Woodfill Law Firm, P.C.
River Oaks Green
3131 Eastside, Suite 450
Houston, Texas 77098
(713) 751-3080
jwoodfill@woodfilllaw.com

JONATHAN M. SAENZ
TEXAS VALUES
State Bar No. 24041845
900 Congress Avenue, Suite 220
Austin, Texas 78701
jsaenz@txvalues.org

Counsel for Petitioners

Identity of Parties and Counsel

Petitioners:

Jack Pidgeon
Larry Hicks

Counsel for Petitioners:

Jared R. Woodfill
State Bar No. 00788715
Woodfill Law Firm, P.C.
River Oaks Green
3131 Eastside, Suite 450
Houston, Texas 77098
(713) 751-3080
jwoodfill@woodfilllaw.com

Jonathan M. Saenz
State Bar No. 24041845
900 Congress Avenue, Suite 220
Austin, Texas 78701
jsaenz@txvalues.org

Respondents:

Mayor Sylvester Turner
City of Houston

Counsel for Respondents:

Judith L. Ramsey
Chief, General Litigation Section
Texas Bar No. 16519550
judith.ramsey@houstontx.gov

John B. Wallace
Senior Assistant City Attorney
Texas Bar No. 20769750
john.wallace@houstontx.gov

Kathleen Hopkins Alsina
Texas Bar No. 09977050
kate.alsina@houstontx.gov

Darah Eckert
Texas Bar No. 24007141
darah.eckert@houstontx.gov

David L. Red
Texas Bar No. 16656900
david.red@houstontx.gov

City of Houston Legal Department
900 Bagby, 4th Floor
Houston, Texas 77002
(832) 393-6491

Table of Contents

Identity of parties and counsel i

Table of contents ii

Index of authorities iii

Statement of the case vi

Statement of jurisdiction vii

Statement of issues xiii

Statement of facts 2

Summary of argument 4

Argument 6

I. The court of appeals erred by instructing the trial court to follow *De Leon* on remand 6

II. The court of appeals should have preserved the temporary injunction to the extent it requires the mayor and city to undo expenditures made before *Obergefell* 8

III. The trial court should be instructed to narrowly construe *Obergefell* on remand 12

Conclusion 15

Certificate of service 16

Certificate of compliance 17

Index of Authorities

Cases

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) ..... xii, 4, 6

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 6

Baker v. Nelson, 409 U.S. 810 (1972) 5, 9, 11

De Leon v. Abbott, 791 F.3d 619 (5th Cir. 2015) ..... passim

De Leon v. Abbott, No. 5:13-cv-00982 (W.D. Tex. Feb. 26, 2014) 4

Desist v. United States, 394 U.S. 244 (1969) 10

Eisenstadt v. Baird, 405 U.S. 438 (1972) 14

Ex parte Young, 209 U.S. 123 (1908) ..... xii, 4, 7

G.T. Leach Builders, LLC v. Sapphire V.P., LP,
458 S.W.3d 502 (Tex. 2015) ..... viii, xi

Graves v. New York, 306 U.S. 466 (1939) 6, 12

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 10

Harris v. McRae, 448 U.S. 297 (1980) 5, 13, 14

In re Marriage of J.B. and H.B.,
326 S.W.3d 654 (Tex. App.—Dallas 2010) ..... vii, ix, x

Johnson v. New Jersey, 384 U.S. 719 (1966) 10

Katz v. United States, 389 U.S. 347 (1967) 10

Lockhart v. Fretwell, 506 U.S. 364 (1993) 6

Miranda v. Arizona, 384 U.S. 436 (1966) 10

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) .....passim

Owen v. City of Independence, 445 U.S. 622 (1980).....xi, 9

Roe v. Wade, 410 U.S. 113 (1973) 5, 13

Steffel v. Thompson, 415 U.S. 452 (1974).....7

Teague v. Lane, 489 U.S. 288 (1989) 10

Ullmann v. United States, 350 U.S. 422 (1956).....12

Statutes

42 U.S.C. § 1983 .....xi, 9

Tex. Family Code § 6.204..... vii, xiii, 15

Tex. Family Code § 6.204(b) 2

Tex. Family Code § 6.204(c)(2)..... 2

Tex. Gov't Code § 22.001(a)(3).....vii

Tex. Gov't Code § 22.001(a)(6).....vii

Tex. Gov't Code § 22.225(b)(3) .....viii, xi

Tex. Gov't Code § 22.225(c) viii

Other Authorities

Letter from Donna L. Edmunson, City Attorney of Houston, to Blake A. Hawthorne, Clerk of the Supreme Court of Texas (Jan. 4, 2016)..... ix, x, xi

John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203 (1997) x

Cass R. Sunstein, *The Right To Marry*, 26 Cardozo L. Rev. 2081 (2005) 5, 13

Constitutional Provisions

Tex. Const. art. I, § 32 2

U.S. Const. art. III § 2 x

Statement of the Case

Nature of the Case:	Jack Pidgeon and Larry Hicks sued to enjoin then-Mayor Annise Parker and the city of Houston from providing employee benefits to homosexual partners of city employees, in violation of Texas Constitution article I, § 32, and Texas Family Code § 6.204.
Trial Court:	The Honorable Lisa Millard, 310th District Court, Harris County, Texas
Trial Court Disposition:	The trial court granted a temporary injunction forbidding the Mayor and the city to spend funds on employee benefits for the homosexual partners of city employees.
Parties in the Court of Appeals:	Appellants: then-Mayor Annise Parker, City of Houston Appellees: Jack Pidgeon and Larry Hicks
Court of Appeals:	Fourteenth Court of Appeals at Houston, Texas (Boyce, McCally, and Donovan, JJ.)
Court of Appeals's Disposition:	The court of appeals, a per curiam opinion, reversed the temporary injunction and remanded for proceedings "consistent with *Obergefell* [*v. Hodges*, 135 S. Ct. 2584 (2015)], and *De Leon* [*v. Abbott*, 791 F.3d 619 (5th Cir. 2015)]." *Parker v. Pidgeon*, App. C.

Statement of Jurisdiction

This Court has jurisdiction under Texas Government Code § 22.001(a)(3) because it involves the construction of Texas Family Code § 6.204, and the extent to which that provision can survive the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The Court also has jurisdiction under Texas Government Code § 22.001(a)(6) because the court of appeals committed two errors of law. First, the court of appeals erred by treating a ruling from a federal court of appeals as binding on the state judiciary. Second, the court of appeals erred by failing to preserve the district court's temporary injunction to the extent it requires the mayor and city to claw back illegal expenditures made before the ruling in *Obergefell*.

Finally, this court has jurisdiction under Texas Government Code § 22.001(a)(2) because the decision below holds differently from a prior decision issued by the fifth court of appeals. *Compare* PFR App. C *with In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010). *J.B.* held that article I, section 32(a) of the Texas Constitution and section 6.204 of the Texas Family Code deprive the state courts of jurisdiction over same-sex divorce proceedings. *See* 326 S.W.3d at 659, 665–67. It further held that Texas's marriage laws comply with the equal-protection clause and should be enforced. *Id.* at 670–81. The fourteenth court of appeals, by contrast, instructed the trial court to comply with the injunction in *De Leon*, which declared article I, section 32(a) of the Texas Constitution and section 6.204 of the Texas Family Code unconstitutional in all their applications. The four-

teenth court of appeals' treatment of Texas's marriage law "holds differently from a prior decision of another court of appeals . . . on a question of law material to a decision of the case"—namely, the enforceability of Texas's marriage laws.

Although this case presents an interlocutory appeal, this Court's jurisdiction remains secure for two reasons. *Cf.* Texas Gov't Code § 22.225(b)(3) (limiting this Court's jurisdiction over interlocutory appeals). First, section 22.225(b)(3)'s prohibition on interlocutory appeals is inapplicable because the decision below "holds differently from" a prior decision of another court of appeals on a material question of law. *See* Tex. Gov't Code § 22.225(c) ("This section does not deprive the supreme court of jurisdiction of a civil case brought to the court of appeals from an appealable judgment of a trial court in which the justices of the courts of appeals disagree on a question of law material to the decision or in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court, as provided by Subdivisions (1) and (2) of Section 22.001(a)."). The fifth court of appeals had held in *J.B.* that Texas's marriage laws are fully enforceable and comply with the equal-protection clause; the court below held otherwise. *See supra* at v–vi.

Second, section 22.225(b)(3) is inapplicable because the decision below "creates an inconsistency with prior precedent that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 510 n.7 (Tex. 2015) (citation omitted); *see also* Tex. Gov't Code § 22.225(e). The court of appeals' ruling creates inconsisten-

cy with all prior decisions enforcing Texas's marriage laws, and it generates uncertainty by implying that *Obergefell* is fully retroactive and that lower federal-court decisions bind the state judiciary.

The mayor and city deny that the conflict between the fifth court of appeals's decision in *J.B.* and the fourteenth court of appeals's decision below can confer jurisdiction under Texas Government Code § 22.001(a)(2) or § 22.225(c). *See* Letter from Donna L. Edmunson, City Attorney of Houston, to Blake A. Hawthorne, Clerk of the Supreme Court of Texas at 1–2 (Jan. 4, 2016). But they do not deny that the decision below "holds differently from" the prior decision in *J.B.* on the enforceability of Texas's marriage laws—and that is all that the statute requires to establish jurisdiction in this Court. The mayor and city contend that *J.B.* is "no longer good law" after *Obergefell*, *id.* at 1, but that does not change the fact that the fourteenth court of appeals "[held] differently" from *J.B.* on a material question of law, and nothing in the statute precludes jurisdiction when the earlier appellate decision has been undermined by a subsequent Supreme Court pronouncement. And in all events, the mayor and city never explain their assertion that *J.B.* is "no longer good law." *J.B.* most assuredly remains "law" to the following extent: It will govern the trial courts in the fifth court of appeals if *Obergefell* is overruled by a future Court or by a constitutional amendment, or if Congress enacts a statute depriving the Supreme Court of appellate jurisdiction over state-court cases involving same-sex marriage. *See* U.S. Const. art. III § 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such

Regulations as the Congress shall make."); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203 (1997).

The mayor and city also observe that the fourteenth court of appeals "did not itself rule on the constitutionality of the Texas law, but reversed based on the change in the law after *Obergefell*." Letter from Donna L. Edmunson, City Attorney of Houston, to Blake A. Hawthorne, Clerk of the Supreme Court of Texas at 1–2 (Jan. 4, 2016). That, once again, does nothing to refute the fact that the decision below "holds differently from" the prior decision in *J.B.* on a material question of law. The fifth court of appeals had held in *J.B.* that the State's marriage laws were constitutional and should be enforced. *See In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 670–81 (Tex. App.—Dallas 2010). The decision below held otherwise, reversing a temporary injunction that required the mayor and city to comply with the State's marriage laws and remanding "for proceedings consistent with *Obergefell* and *De Leon*." PFR App. C. That the fourteenth court of appeals never announced its own views on the constitutionality of the State's marriage laws, and instead treated the issue as foreclosed by *Obergefell* and *De Leon*, does not change the fact that its *holding* on this material legal question differs from the *holding* in *J.B.*

Finally, the mayor and city claim that the fifth court of appeals "was not controlled by the law that guided the Fourteenth Court's ruling." Letter from Donna L. Edmunson, City Attorney of Houston, to Blake A. Hawthorne, Clerk of the Supreme Court of Texas at 2 (Jan. 4, 2016). But the fact remains that the *holding* of

J.B. differs from the *holding* of the court below—and that is all that is needed to surmount the jurisdictional obstacle in Texas Government Code § 22.225(b)(3). The mayor and city are trying to impose additional prerequisites for this Court's jurisdiction that cannot be found anywhere in the text of the statute.

The mayor and city also deny that the decision below qualifies for interlocutory review under *G.T. Leach* and Texas Government Code § 22.225(e). *Compare G.T. Leach*, 458 S.W.3d at 510 n.7 (allowing interlocutory review when an appellate-court decision "creates an inconsistency with prior precedent that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.") *with* Letter from Donna L. Edmunson, City Attorney of Houston, to Blake A. Hawthorne, Clerk of the Supreme Court of Texas at 2 (Jan. 4, 2016) (arguing that there is "no uncertainty" in the law now that the Supreme Court has issued its pronouncement in *Obergefell*). But the mayor and city do not answer the petitioners' jurisdictional argument. The court of appeals's decision generates uncertainty in two respects. First, it implies that *Obergefell* is fully retroactive and allowed the mayor to defy the State's marriage laws before the Supreme Court issued its decision on June 26, 2015. At the very least, the court of appeals should have preserved the temporary injunction to the extent it requires the city to claw back its pre-*Obergefell* expenditures on same-sex health benefits. If *Obergefell* is retroactive, as the court of appeals implies, then the city of Houston (and every other municipality in the United States) will be liable for money damages under 42 U.S.C. § 1983 to every same-sex couple that was denied marriage licenses or recognition before *Obergefell*. *See Owen*

v. City of Independence, 445 U.S. 622 (1980) (municipalities cannot claim qualified immunity under 42 U.S.C. § 1983). This Court should clarify that uncertainty produced by the decision below.

Second, the court of appeals's decision improperly instructs the trial court to comply with *De Leon* on remand, even though decisions of federal district courts and federal appellate courts are incapable of binding the State judiciary. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.21 (1997); *see also* PFR at 7–8 (collecting authorities). Indeed, the city appears to agree that the Fifth Circuit's decision in *De Leon* and the federal district court's injunction in that case are not binding on the state judiciary. *See* Response at 14; *see also Ex parte Young*, 209 U.S. 123, 162 (1908) ("An injunction against a state court would be a violation of the whole scheme of our government."). So the decision below, at the very least, creates "uncertainty in the law" by suggesting that lower federal court rulings such as *De Leon* are legally binding on state courts.

Statement of Issues

1. Is an inferior federal court's interpretation of federal law binding on the state judiciary?

2. Is the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), retroactive to the moment that the fourteenth amendment was enacted, so that it allowed the mayor and city of Houston to violate state law and provide employee benefits to same-sex spouses *before* the *Obergefell* decision?

3. Should the trial court be instructed to interpret *Obergefell* narrowly on remand and preserve as much of Texas Family Code § 6.204 as possible?

In the Supreme Court of Texas

Jack Pidgeon and Larry Hicks,
Petitioners,

v.

Mayor Sylvester Turner and City of Houston,
Respondent.

On Petition for Review from the
Fourteenth Court of Appeals, Houston, Texas
Nos. 14-14-00899-cv, 14-14-00932-cv

PETITION FOR REVIEW

To the Honorable Supreme Court of Texas:

Before the Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), then-Mayor Annise Parker and the city of Houston defied state law and extended employee benefits to same-sex spouses of city employees who had obtained marriage licenses from other States. Jack Pidgeon and Larry Hicks sued to enjoin these unlawful expenditures of taxpayer money, and the trial court granted a temporary injunction. While the temporary injunction was on appeal, the Supreme Court held in *Obergefell* that the fourteenth amendment requires the States to license and recognize same-sex marriages. The fourteenth court of appeals then reversed the temporary injunction in its entirety and remanded for proceedings "consistent with *Obergefell* [*v. Hodges*,

135 S. Ct. 2584 (2015)], and *De Leon* [*v. Abbott*, 791 F.3d 619 (5th Cir. 2015)]." *Parker v. Pidgeon*, App. C.

Pidgeon and Hicks respectfully ask this Court to grant a petition for review and: (1) hold that the Fifth Circuit's ruling in *De Leon* does not bind the state trial court on remand; (2) reinstate the temporary injunction, including its requirement that the mayor and the city undo expenditures made before *Obergefell*; and (3) instruct the trial court to narrowly construe *Obergefell* on remand.[1]

Statement of Facts

The Texas Constitution defines marriage as the union of one man and one woman, and prohibits the State and its subdivisions from recognizing same-sex marriages. *See* Tex. Const. art. I, § 32 ("(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."). The Texas Family Code further declares that any form of "marriage" other than a union of one man and one woman violates the State's public policy and is void, and forbids the State and its subdivisions to give to effect to a "right or claim to any legal protection, benefit, or responsibility asserted as a result of" such a union. *See* Tex. Fam. Code § 6.204(b), (c)(2). Finally, the city of Houston's charter bars the city

[1] After Pidgeon and Hicks filed their petition for review in this Court, Parker finished her term as mayor of Houston and was succeeded by Sylvester Turner. We have substituted Turner's name in the caption of this case.

from providing employment benefits to anyone other than city employees and their legal spouses and dependent children, except to the extent required by federal or state law.

In November 2013, long before the Supreme Court's ruling in *Obergefell*, Annise Parker, then-Mayor of Houston, defied these provisions of state and city law by extending spousal employment benefits to the partners of homosexual employees who had obtained marriage licenses in other States. Parker took this step based on her personal belief that the State's marriages laws violated the federal Constitution. CR 14, 58–60.

Petitioners Jack Pidgeon and Larry Hicks sued Parker and the city in December 2013, seeking a TRO and temporary injunction against Parker's actions. CR 14. The trial court issued the TRO. CR 61–63. But Parker and the city removed the case to federal court before the trial court could rule on the temporary injunction. Pidgeon and Hicks promptly moved to remand. Nine months later, the federal district court remanded, but at that point, the state trial court had already dismissed the case for want of prosecution. CR 86. Pidgeon and Hicks then filed a new lawsuit against Parker and the city. CR 4–14. Parker and city filed a plea challenging the trial court's jurisdiction. CR 20–26, 161–66. The trial court overruled the plea and temporarily enjoined Parker and the city from extending benefits to the homosexual partners of city employees. CR 170, 171–73. Parker and the city appealed the temporary injunction and the denial of their plea to the jurisdiction.

While the appeal was pending, the Supreme Court held in *Obergefell* that the fourteenth amendment requires States to license and recognize marriages between persons of the same sex. Later that day, a federal district court lifted a stay on a preliminary injunction that had enjoined the governor, the Attorney General, the Commissioner of the Texas Department of State Health Services, and the clerk of Bexar County from enforcing "any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage." Order Granting Motion for Preliminary Injunction, *De Leon v. Abbott*, No. 5:13-cv-00982 (W.D. Tex. Feb. 26, 2014), ECF No. 73. The U.S. Court of Appeals for the Fifth Circuit affirmed that preliminary injunction in light of *Obergefell*, and remanded for entry of a final judgment. *See De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).

In response to these developments, the fourteenth court of appeals reversed the trial court's temporary injunction and remanded "for proceedings consistent with *Obergefell* and *De Leon*." App. C.

Summary of Argument

The court of appeals was wrong to insist that the proceedings on remand comply with the federal district court's injunction in *De Leon*. Rulings from lower federal courts do not bind state judges—even on questions of federal law. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11, 66 n.21 (1997). And a federal court has no power to enjoin the state judiciary. *See Ex parte Young*, 209 U.S. 123, 162 (1908) ("An injunction against a state court would be a violation of the whole scheme of our government."). The court

should grant the petition and hold that *De Leon* does not bind the trial judge on remand. No court of this State is bound to follow a federal district or circuit court's interpretation of a Supreme Court ruling.

The court of appeals was also too quick to reverse the temporary injunction. *Obergefell* cannot shield Parker and the city for expenditures made *before* the Supreme Court's ruling. When Parker issued her directive in November 2013, *Baker v. Nelson*, 409 U.S. 810 (1972), was the controlling precedent, and remained so until *Obergefell* was announced on June 26, 2015. *See* 135 S. Ct. at 2605. It is undisputed that Parker and the city were violating state law during that time, and temporary injunction should have been preserved to the extent it requires the mayor and the city to undo the illegal expenditures made before *Obergefell*.

Finally, the court of appeals should have instructed the trial court to narrowly construe *Obergefell* on remand. *Obergefell* may require States to license and recognize same-sex marriages, but that does not require States to give taxpayer subsidies to same-sex couples—any more than *Roe v. Wade*, 410 U.S. 113 (1973), requires States to subsidize abortions or abortion providers. *See Harris v. McRae*, 448 U.S. 297 (1980). There is no "fundamental right" to spousal employee benefits, and a State could abolish all spousal employee benefits without violating the Constitution or the Supreme Court's "substantive due process" doctrine. *See* Cass R. Sunstein, *The Right To Marry*, 26 Cardozo L. Rev. 2081 (2005). Finally, the ruling in *Obergefell* also has no basis in the text or history of the Constitution, and should therefore be interpreted

narrowly. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

Argument

I. The Court Of Appeals Erred By Instructing The Trial Court To Follow *De Leon* On Remand

After reversing the temporary injunction, the court of appeals remanded "for proceedings consistent with *Obergefell* and *De Leon*." App. C. The court of appeals erred by instructing the trial court to follow *De Leon*'s interpretation of *Obergefell*. Only decisions from the Supreme Court of the United States are binding on the state judiciary; federal district and circuit courts have no power over the state-court system.

An inferior federal court's interpretation of federal law is not binding precedent in a state-court proceeding. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.21 (1997); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[S]tate courts . . .

possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law"); *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring). The state trial court must therefore interpret the Constitution and *Obergefell* as it sees fit; it is not obligated to follow the injunction or opinions from the *De Leon* proceedings.

A lower federal court also lacks authority to enjoin a state court. *See Ex parte Young*, 209 U.S. 123, 162 (1908) ("An injunction against a state court would be a violation of the whole scheme of our government."). Nor does it have any means to review or reverse the rulings of a state court. It is untenable to think that a state court can be "bound" by an inferior federal court that has no ability to induce compliance.

The mayor and city appear to agree (as they must) that the Fifth Circuit's decision in *De Leon* is not binding on the state judiciary. *See* Response at 14; *see also* PFR at 7–8 (collecting authorities). And they do not contest the Supreme Court's holding that the federal judiciary lacks authority to enjoin a state court. *See Ex parte Young*, 209 U.S. 123, 162 (1908) ("An injunction against a state court would be a violation of the whole scheme of our government."). That confesses that *De Leon* is not binding authority in the state courts, and that the court of appeals erred by instructing the district court to comply with it.

The mayor and city try to defend the court of appeals by noting (correctly) that state courts may consider the lower-court rulings in *De Leon* when

deciding how broadly or narrowly to construe *Obergefell*. *See* Response at 14. And they suggest that the court of appeals demanded compliance with *De Leon* because it believed that *De Leon* correctly interpreted the Supreme Court's ruling in *Obergefell*. That is not, however, what the court of appeals did. Its opinion relies on the brute fact of the *De Leon* injunction and the Fifth Circuit's affirmance of that injunction—and it demands that the trial court comply with these non-binding federal-court rulings without even asserting that they correctly interpreted the Constitution or *Obergefell*. It is clear from the court of appeals' opinion that it regarded *De Leon* as binding authority on the state courts. That was error, and was error to instruct the trial court to comply with it on remand.

The court of appeals should not have instructed the trial court to follow *De Leon* on remand. This court should grant the petition and hold that state courts cannot be bound by rulings from a federal district or circuit court. The state courts are welcome to consider these rulings to the extent they find them persuasive, but they cannot regard those rulings as binding authority.

II. The Court Of Appeals Should Have Preserved The Temporary Injunction To The Extent It Requires The Mayor And City To Undo Expenditures Made Before *Obergefell*

The court of appeals reversed the temporary injunction in its entirety, but that was unwarranted. Parker and the city were violating state law before *Obergefell*, and they have no defense for the unlawful expenditures they made

before the Supreme Court's ruling. Pidgeon and Hicks are entitled to a remedy that claws back the taxpayer money that Parker and the city illegally spent between November 2013 and June 26, 2015. And the court of appeals should have preserved at least that much of the temporary injunction before remanding.

The only way that the mayor and city can avoid this result is to make *Obergefell* retroactive to the moment that the fourteenth amendment was enacted. And the mayor and city argue that *Obergefell* is fully retroactive and vindicates their pre-*Obergefell* defiance of state law. *See* Response at 11–13. But that stance is untenable. *Baker v. Nelson*, 409 U.S. 810 (1972), had rejected the idea of a constitutional right to same-sex marriage, and that remained the controlling precedent until *Obergefell*. And if *Obergefell* is retroactive, then every same-sex couple that lived together in jurisdictions that recognize common-law marriage would be retroactively hitched—and those who have moved on to other "spouses" could be exposed to retroactive alimony obligations or bigamy prosecutions. It would also mean that the city of Houston (along with every other municipality in the United States) is liable for money damages under 42 U.S.C. § 1983 to every same-sex couple that was denied marriage licenses or recognition before *Obergefell*. *See Owen v. City of Independence,* 445 U.S. 622 (1980) (municipalities cannot claim qualified immunity under 42 U.S.C. § 1983). The mayor and city's response to the petition for review did not deny that this follows from their claim that *Obergefell* is retro-

active. *See* Response at 13 ("Petitioners may be correct that there will be other legal issues raised regarding the effect of *Obergefell*.").

The mayor and city claim that Supreme Court interpretations of federal law are always retroactive, but that is mistaken. *See* Response at 11–12 (citing *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993)). In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court refused to apply *Miranda v. Arizona*, 384 U.S. 436 (1966), retroactively to cases pending on direct review; instead the Court applied the ruling only to persons whose trials began after the dates of the decision. And in *Desist v. United States*, 394 U.S. 244 (1969), the Court held that *Katz v. United States*, 389 U.S. 347 (1967), which redefined the meaning of search and seizure under the fourth amendment, would apply only when the prosecution introduces evidence obtained after the Court's ruling in *Katz*. Finally, new rules of criminal procedure announced by the Supreme Court do not apply retroactively to litigants who exhausted their direct appeals before the Supreme Court's ruling. *See Teague v. Lane*, 489 U.S. 288 (1989).

Of course, Supreme Court rulings *should* apply retroactively when the Court is purporting to enforce the original meaning of a constitutional provision. When the Court announces what the law *is*—and *always has been*—the ruling has full retroactive effect, controlling all cases open on direct review and governing all conduct that occurred before the Court's ruling. *See Harper*, 509 U.S. at 107 (Scalia, J., concurring). But that was not the situation in *Miranda* or *Katz*—and it was not the situation in *Obergefell*. All of these deci-

sions changed the meaning of the Constitution going forward and made no pretense of enforcing what the Constitution had always meant. *Obergefell* did not even attempt to argue that same-sex marriage became a constitutional right when the fourteenth amendment was ratified. It rested entirely on a living-constitution philosophy that empowers judges to change the meaning of constitutional provisions in accordance with "new insights and societal understandings." *Obergefell v. Hodges,* 135 S. Ct. 2584, 2603 (2015). Decisions of this sort cannot have retroactive effect, because they are explicitly premised on the idea that the Constitution's meaning has changed and evolved over time.

Finally, the court will be inviting anarchy if it allows Parker and the city to get away with their pre-*Obergefell* defiance of state law. Local officials cannot disobey state law based on their personal belief that a law violates the Constitution—especially when the Supreme Court had *rejected* a constitutional challenge to traditional marriage laws in *Baker v. Nelson* and had not overruled that decision when Parker and the city decided to take matters into their own hands. If a local official believes a state law is unconstitutional, then she must seek redress in the state or federal judiciary, not resort to self-help based on one's own theory of what the Constitution should mean. There is also no stopping point to the prerogative that Parker has asserted. *Any* local official can concoct a constitutional objection to *any* state law, and Parker's stance would subordinate every decision of the state legislature to the subjective and idiosyncratic constitutional theories of individual local of-

ficials. The Court should grant the petition and soundly reject the self-help tactics that Parker employed before the Supreme Court's ruling in *Obergefell*.

III. The Trial Court Should Be Instructed To Narrowly Construe *Obergefell* On Remand

The Supreme Court's decision in *Obergefell* is poorly reasoned and has no basis in constitutional text or history. The opinion repeatedly invokes a right to "liberty," but the Constitution provides no such right. *See* U.S. Const. amend. XIV (forbidding States to "deprive any person of life, liberty, or property *without due process of law*.") (emphasis added). And the fourteenth amendment would never have been ratified if it stripped the States of their authority to define marriage as the union of one man and one woman, or if it delegated to the federal judiciary the power to impose same-sex marriage on the States at a future moment of its choosing. *Obergefell* reflects a living-constitution mindset that allows judges to create new constitutional rights that have no basis in the text and could never attain the supermajoritarian backing that Article V requires before a new constitutional rule can be entrenched. *See Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.").

Decisions such as *Obergefell* must therefore be interpreted narrowly. A state court's ultimate obligation is to the Constitution, not to the doctrinal jargon concocted by Supreme Court justices. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate

touchstone of constitutionality is the Constitution itself and not what we have said about it."). And an opinion that recognizes a constitutional right with no basis in text or history should be construed as narrowly as possible.

Obergefell holds only that States must license and recognize same-sex marriages. But *Obergefell* does not require States to confer taxpayer subsidies on same-sex couples—any more than *Roe v. Wade* requires States to subsidize abortions or abortion providers. *See Harris v. McRae*, 448 U.S. 297 (1980). There is no "fundamental right" to spousal employee benefits; indeed, a State could abolish all spousal employee benefits without violating the Constitution or the court-created "substantive due process" doctrine. *See* Cass R. Sunstein, *The Right To Marry*, 26 Cardozo L. Rev. 2081, 2092 (2005) ("[E]xisting doctrine does not require economic benefits to be provided to married people as such."). The "right to marry" does not entail any particular package of tax benefits, employee fringe benefits, or testimonial privileges. *Id.*; *see also* Response at 9 (acknowledging that there is no constitutional right to spousal employee benefits, and that the institution of civil marriage does not require spousal employee benefits).

A State may also decide to confer taxpayer subsidies on behaviors that advance the State's interest in encouraging childbirth and childrearing, while withholding those taxpayer subsidies from constitutionally protected activities that do not advance this interest. For example, the government may award tax credits to taxpayers who have dependent children at home, and withhold those tax credits from childless taxpayers, even though the Su-

preme Court has said that the Constitution protects the decision to choose *not* to have children. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). The government may also subsidize the costs of childbirth while refusing to subsidize abortion, even though the Supreme Court has recognized a constitutional right to abort a nonviable fetus. *See Harris v. McRae*, 448 U.S. 297 (1980). A State may not punish or fine individuals who refrain from procreating or who abort their unborn children, but it need not give taxpayer subsidies to those who exercise these purported constitutional rights.

For the same reasons, a State may withhold taxpayer subsidies from married couples of the same sex, even though *Obergefell* held that States must license and recognize same-sex marriages. It is undisputed that opposite-sex marriages advance the State's interests in procreation to a greater extent than same-sex marriages do. First, opposite-sex unions are the only relationships that can produce offspring, which are needed to ensure economic growth and the survival of the human race. Same-sex unions are biologically incapable of producing children, and every child adopted by a homosexual parent is the product of some type of opposite-sex union. No child enters the world without a biological mother and a biological father. Second, opposite-sex marriages promote childrearing by reducing out-of-wedlock births and channeling procreative heterosexual intercourse into committed relationships. The sexu-

al practices of homosexuals do not result in pregnancy, so same-sex marriage does not further this goal. Even those who support same-sex marriage cannot deny that opposite-sex marriages do more to advance the State's interests in promoting childbirth and childrearing than same-sex marriages do.

Obergefell does not require taxpayer subsidies for same-sex marriages—any more than *Roe v. Wade* requires taxpayer subsidies for abortions. The Court should instruct the trial court to construe *Obergefell* narrowly and consider on remand which applications of Texas Family Code § 6.204 can be preserved to the extent they prohibit taxpayer subsidies for same-sex marriages.

Conclusion

The petition for review should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

Jared R. Woodfill
State Bar No. 00788715
Woodfill Law Firm, P.C.
River Oaks Green
3131 Eastside, Suite 450
Houston, Texas 77098
(713) 751-3080
jwoodfill@woodfilllaw.com

Jonathan M. Saenz
Texas Values
State Bar No. 24041845
900 Congress Avenue, Suite 220
Austin, Texas 78701
jsaenz@txvalues.org

Counsel for Petitioners

Certificate of Service

I certify that this document was served by certified U.S. mail and e-mail May 9, 2016, upon:

Judith L. Ramsey
Chief, General Litigation Section
Texas Bar No. 16519550
judith.ramsey@houstontx.gov

John B. Wallace
Senior Assistant City Attorney
Texas Bar No. 20769750
john.wallace@houstontx.gov

Kathleen Hopkins Alsina
Texas Bar No. 09977050
kate.alsina@houstontx.gov

Darah Eckert
Texas Bar No. 24007141
darah.eckert@houstontx.gov

David L. Red
Texas Bar No. 16656900
david.red@houstontx.gov

City of Houston Legal Department
900 Bagby, 4th Floor
Houston, Texas 77002
(832) 393-6491

Counsel for Respondents

/s/ Jared R. Woodfill
Jared R. Woodfill
Counsel for Petitioners

Certificate of Compliance

I certify that this document contains 3,656 words, excluding the portions described in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Jared R. Woodfill
Jared R. Woodfill
Counsel for Petitioners