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 Writ of Certiorari to the Supreme Court of Texas**

## BRIEF FOR AMICI CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF PETITIONERS


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## INTEREST OF AMICI CURIAE[1]

GLBTQ Legal Advocates & Defenders ("GLAD"), a non-profit legal organization, engages in litigation, public policy advocacy and education, to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated cases representing same-sex couples seeking the freedom to marry and respect for their marriages from states and the federal government, including at this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). GLAD has also represented lesbian, gay, bisexual and transgender ("LGBT") persons and families seeking equal treatment and responsibilities in all manner of cases in state and federal courts.

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in protecting the fundamental constitutional freedom to marry, and represented the Tennessee petitioners in

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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. Pursuant to Rule 37.2(a), both parties received timely notice and consented to the filing of this Brief. Petitioners' and Respondents' consent has been filed with the Clerk with this brief.

*Obergefell v. Hodges*, 135 S. Ct. 3584 (2015), as well as the petitioners in *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

## SUMMARY OF THE ARGUMENT

In *Obergefell v. Hodges*, 135 S. Ct. 3584 (2015), this Court held that same-sex couples cannot be excluded from the institution of marriage or the "constellation of benefits that the States have linked to marriage." *Pavan v. Smith*, 137 S. Ct. 2075 (2017), confirmed that governmental protections linked to marriage must be accorded equally to married same-sex and opposite-sex couples.

Respondents argue that under Texas law, the State must deny spousal benefits provided to employees married to a person of the opposite sex to city employees married to a person of the same sex.

The Texas Supreme Court, ruling just four days after this Court's decision in *Pavan*, declined petitioners' request to apply this Court's clear holding in *Obergefell* that "the Constitution protects not only the right of same-sex couples to marry, but also to receive all of the 'benefits' of marriage." App. 25a. In its view, "*Obergefell* did not directly and expressly resolve th[e] issues" of whether "the Texas DOMAs are constitutional or . . . the City may constitutionally deny benefits to its employees' same-sex spouses." App. 27a (emphasis omitted). Claiming uncertainty about *Obergefell*'s scope, the Court concluded that respondents, "like many other litigants throughout the country, must now assist the courts in fully exploring *Obergefell*'s reach and ramifications, and are entitled to the opportunity to do so." App. 31a–32a. It sent the case back to the trial court and,

beyond instructing that *Obergefell* does not answer the specific issue involved and the parties could "litigate their positions on remand," it declined to "instruct the trial court [how] to construe *Obergefell*" on remand. App. 27a.

This Court should exercise its jurisdiction and grant certiorari, notwithstanding the interlocutory nature of the ruling below, because the Texas Supreme Court's departure from this Court's precedents threatens important federal policies and because this wrong may not be righted if the trial court decides the case on other grounds on remand.

## REASONS FOR GRANTING THE WRIT

Amici curiae agree with the reasons advanced by the City of Houston and Mayor Sylvester Turner for granting review. Amici write to explain why this Court's review is warranted notwithstanding the interlocutory character of the judgment below.

### I. THE SETTLED LAW OF *OBERGEFELL*, AS REITERATED BY *PAVAN*, CONTROLS HERE

*Obergefell* held that states may not "exclude same-sex couples from civil marriage *on the same terms and conditions* as opposite-sex couples" as a matter of Due Process and Equal Protection. *Obergefell*, 135 S. Ct. at 2604-05 (emphasis added). Same-sex couples must be afforded not only the right to marry itself, but also the full "constellation of benefits that the States have linked to marriage." *Id.* at 2601. The Court listed some of the most notable "governmental rights, benefits, and responsibilities" that states have chosen

to link to marriage and that are therefore included in that constellation:

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

*Id.* That extensive (though expressly non-exhaustive) list further demonstrates that the holding in *Obergefell* applies to the full panoply of state benefits tied to marriage. The Due Process and Equal Protection Clauses require that same-sex couples are afforded "*all* the benefits afforded to opposite-sex couples" in marriage. *Id.* at 2604 (emphasis added).

*Obergefell* squarely forecloses respondents' argument. The City not only *may* provide equal employment benefits to same-sex and opposite-sex married couples, it *must*.

Respondents contend that *Obergefell* "did not recognize a fundamental right 'to spousal employee benefits' or 'require States to give taxpayer subsidies to same-sex couples.'" App 24a. This is true, but irrelevant. *Obergefell* does not require states to give spousal benefits or "taxpayer subsidies" to anyone. But *Obergefell* does require that when a state chooses to provide such benefits to some married couples, it must provide those benefits equally to both same-sex and opposite-sex married couples. 135 S. Ct. at 2601, 2604 (noting that marriage laws are "unequal" where "same-sex couples are denied all the benefits afforded to opposite-sex couples"). And by affording same-sex

couples the exact same benefits already available to opposite-sex couples, the City—correctly—did just that.

*Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), confirmed that *Obergefell* conclusively answered the "question" presented here. In *Pavan*, the Arkansas Supreme Court upheld a state law that required a birth mother's opposite-sex spouse to be named on a child's birth certificate, but did not require a birth mother's same-sex spouse to be named. *Pavan*, 137 S. Ct. at 2077. The Arkansas court there, like the Texas court here, wrongly reasoned that *Obergefell* did not control because it purportedly did not specifically address the government policy at issue. *Smith v. Pavan*, 505 S.W.3d 169, 176 (Ark. 2016), *rev'd*, 137 S. Ct. 2075.

This Court disagreed and summarily reversed. "The Arkansas Supreme Court's decision," this Court concluded, "denied married same-sex couples 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) (alterations in original). "Having made that choice" to provide married opposite-sex couples "a form of legal recognition," Arkansas could not "deny married same-sex couples that recognition." *Id.* at 2078-79. The same applies here: having made the choice to provide married opposite-sex couples spousal benefits, the City must afford married same-sex couples those benefits. The City could not do otherwise, because "*Obergefell* proscribes such disparate treatment." *Id.* at 2078.

If *Obergefell* closed the door on the "question" presented here, *Pavan* bolted it shut. Summary reversal is usually reserved for cases where "lower

courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam). *Pavan* was such a case.

## II. JURISDICTION IS PROPER AND CERTIORARI IS WARRANTED BECAUSE THE TEXAS SUPREME COURT DISREGARDED CLEARLY SETTLED LAW ON AN ISSUE OF NATIONWIDE IMPORTANCE

This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a) (2012). Although the judgment below is interlocutory, this Court is "not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment,'" *Pope v. Atl. Coast Line R. Co.*, 345 U.S. 379, 382 (1953), and instead takes a "pragmatic approach," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975). In "situations[] where intermediate rulings may carry serious public consequences," "even so circumscribed a legal concept as appealable finality has a penumbral area." *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

"The considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system." *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948). At times, "immediate rather than delayed review [is] the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox Broad. Corp.*, 420 U.S. at 477-78 (quoting *Radio Station WOW*, 326 U.S. at 124).

Waiting can extract a heavy price. *See, e.g., Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (holding that "it serves the policy underlying the requirement of finality . . . to determine [the issue] now . . . rather than to subject [the parties] to long and complex litigation which may all be for naught"); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 683 (2003) (Breyer, J., dissenting from dismissal of writ of certiorari).

Applying these general principles in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the Court focused on the facts that: (1) a reversal of the underlying holding of the state supreme court "would preclude any further proceedings"; (2) the underlying holding could end up unreviewed and thus "seriously erode federal policy"; and (3) the decision "has important implications" as to a particular area of the law. *Id.* at 179–80. Although further proceedings were required under the state supreme court ruling, this Court held: "Following our 'pragmatic approach' to the question of finality, *Cox Broad. Corp. v. Cohn, supra, at* 486, . . . we therefore conclude that the Ohio decision on the federal issue is a final judgment for purposes of 28 U.S.C. § 1257(2)." *Id.* at 180; *see also Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963) (holding that § 1257 does not preclude treating a decision as final "when postponing review would seriously erode . . . national . . . policy").[2]

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[2] In *Goodyear Atomic*, the Court indicated it was applying the "fourth category" of cases recognized in *Cox Broadcasting* as satisfying finality even though further state proceedings were contemplated. 486 U.S. at 179.

### A. A Reversal Of The Texas Supreme Court's Judgment Would Preclude Any Further Proceedings

The Texas Supreme Court held (incorrectly) that *Obergefell* did not resolve the central, and indeed only, question presented by this litigation, i.e., whether the City of Houston must, in accordance with the U.S. Constitution, provide the same publicly funded marital benefits equally to same-sex and opposite-sex spouses.

A reversal of the Texas Supreme Court's judgment would resolve this entire litigation and preclude any further proceedings as completely unnecessary.

For this straightforward reason, the first element to establish finality is satisfied.[3]

### B. The Decision Below, Left Unreviewed, Would Seriously Erode Federal Policy And An Important Constitutional Precedent By Suggesting That *Obergefell* Is Not Settled Law

*Obergefell* unequivocally held that same-sex and opposite-sex couples are equally entitled to civil marriage and to the full "constellation of benefits that the States have linked to marriage." *Obergefell,* 135 S. Ct. at 2601. But the Texas Supreme Court fundamentally misread that decision as not

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[3] Put another way, the "critical federal question" has "already been answered by the State Supreme Court and its judgment is therefore ripe for review." *Miss. Power & Light Co. v. Miss. Ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988); *see also New York v. Cathedral Academy*, 434 U.S. 125, 128 n.4 (1977) ("Since further proceedings cannot remove or otherwise affect this threshold federal issue, the [New York] Court of Appeals' decision[] is final for purposes of review in this Court").

definitively resolving whether "the City may constitutionally deny benefits to its employees' same-sex spouses." App. 27a. In so doing, it effectively declared that *Obergefell* is not settled law on matters it plainly addressed. That patently incorrect ruling will have serious public consequences and threatens to erode *Obergefell*'s status as the law of the land unless this Court intervenes.

When addressing the lawfulness of Houston's benefits for employees with spouses of the same sex, the Texas court agreed it would be "erroneous" not to consider *Obergefell*, but nonetheless claimed *Obergefell* did not address and resolve "th[e] specific issue" presented by this case. App. 26a. The Texas court conceded that *Obergefell* addressed licensing and recognition of marriages, but claimed "*Obergefell* did not directly and expressly resolve th[e] issues" of whether "the Texas DOMAs are constitutional or . . . the City may constitutionally deny benefits to its employees' same-sex spouses." App. 27a (emphasis omitted).

The Texas court's misreading was accompanied by its citation to irrelevant authorities that do not support its conclusion that *Obergefell* does not resolve whether equal benefits must be provided to the same-sex spouses of public employees whenever such benefits are provided to opposite-sex spouses. App. 26a & n.19. *Coker v. Whittington*, 858 F.3d 304 (5th Cir. 2017) involved two men cohabitating with each other's wives, concerned no same-sex relationships, and cited *Obergefell* only to explain that its holding did not apply to extramarital relations. *See id.* at 307. *Parella v. Johnson*, No. 1:15-cv-0863 (LEK/DJS), 2016 WL 3566861 (N.D.N.Y. June 27, 2016), is also inapt, involved no same-sex relationships, and cited

*Obergefell* only to explain that it does not afford a citizen-husband the right to obtain a visa for his "alien" wife. *Id.* at *9-10. *Solomon v. Guidry*, 155 A.3d 1218 (Vt. 2016) concerned not marriage but civil unions, and referenced *Obergefell* to explain it did not speak to that "legally distinct" state institution. *Id.* at 1221. And *In re P.L.L.-R.*, 876 N.W.2d 147 (Wis. Ct. App. 2015), mentioned *Obergefell*, but did not engage with it before dismissing the case on procedural grounds. *Id.* at 153-54. The rights of married same-sex couples were not addressed in *any* of these cases, and the Texas court's reliance on them betrays a misunderstanding of the rulings in *Obergefell* and *Pavan*.

Part V of the Texas court's opinion converted its erroneous interpretation of *Obergefell* into a veritable call to action for more litigation nationwide. Acknowledging *Obergefell*'s conclusion that the history of traditional marriage "is the beginning of these [marriage equality] cases," but not "the end as well," 135 S. Ct. at 2594, the Texas court countered that "*Obergefell* is not the end either." App. 31a. But when it comes to "disparate treatment" of married same-sex and opposite-sex spouses or couples for purposes of state-conferred benefits linked to marriage, *Obergefell* is the end. *Pavan*, 137 S. Ct. at 2078.

The Texas Supreme Court's opinion concludes with a nationwide appeal to "many other litigants throughout the country, [who] must now assist the courts in fully exploring *Obergefell*'s reach and ramifications." App 32a. It enlists *Pavan* in support of this need for more litigation, mischaracterizing that case as an instance of the Court's "address[ing] *Obergefell*'s impact on an issue it did not address in

*Obergefell*." App. 31a. But that is simply not so. *Pavan* rejected the disparate treatment regarding birth certificates for children born to married couples as "infring[ing] *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that states have linked to marriage.'" 137 S. Ct. at 2077 (quoting 135 S. Ct. at 2601). Nor is the Texas court's decision supported by its reference to the matter before it as one "tangential" to *Obergefell*'s holding. App. 32a n.21. And its reliance on the Court's grant of certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 137 S. Ct. 2290 (2017), is similarly misplaced, because that case involves claimed First Amendment exemptions to a state's public accommodations law for a private business, not the benefits that the government provides married couples.

The "smooth functioning of our judicial system," *Republic Nat. Gas Co.*, 334 U.S. at 69, and the rule of law itself are severely impeded when state courts interpret this Court's decisions in ways that contravene the very essence of those precedents.

Finally, there is a significant possibility, as noted by the Texas court, that the petitioners could prevail on the ordered remand on nonfederal grounds—standing and governmental immunity in particular. App. 28a-31a. It is precisely in these circumstances where decisions on federal questions are particularly appropriate for review as effectively final. *See Goodyear Atomic*, 486 U.S. at 179; *Cox Broad. Corp.,* 420 U.S. at 482-87 (noting "there should be no trial at all" if the state high court ruled in error); *see also Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (holding that "it would be intolerable to leave unanswered . . . an important question" of

constitutional rights where "an uneasy and unsettled constitutional posture" would "harm the operation of a free press").

For these reasons, the second element to establish finality making this Court's review proper is satisfied.

### C. The Decision Here Has Important Implications For The Future Of Marriage Equality For Same-Sex Couples

Certiorari is also proper in this case because the Texas court's misunderstanding of this Court's authority threatens to erode the important constitutional policy expounded in *Obergefell*. This Court's review of the Texas Supreme Court's erroneous reading of *Obergefell* will—like this Court's decision in *Pavan*—instruct lower courts in the states and in the federal system that failure to faithfully apply the clear decision and import of *Obergefell* will not be countenanced. Without this Court's clear and decisive action, the implications for the rule of law and for the status and legal rights of married same-sex couples will be grave.

In calling for "other litigants throughout the country" to "assist the courts in fully exploring *Obergefell*'s reach and ramifications," the Texas court undermines the important constitutional policy established in *Obergefell*. App. 32a. Moreover, the Texas court called for exactly the "slower, case-by-case determination of the required availability of specific public benefits to same-sex couples" this Court rejected in *Obergefell*. 135 S. Ct. at 2606. Allowing a remand to proceed would "deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* And allowing the Texas court's ruling to stand will encourage other state courts to similarly

misinterpret *Obergefell* and continue to chip away at its weight as the law of the land.

For this reason, the third element to establish finality is satisfied.

* * *

This Court may properly exercise jurisdiction when "there is nothing more to be decided." *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 73-74 (1946). As *Pavan* instructs, there is nothing more to be decided about the "question" presented here: *Obergefell* already decided it.

## CONCLUSION

For the foregoing reasons, amici respectfully request that the Court grant the petition for certiorari and reverse the decision of the Texas Supreme Court.

Respectfully submitted,

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