No. 15-0688

IN THE SUPREME COURT OF TEXAS

JACK PIDGEON AND LARRY HICKS,

Petitioners,

v.

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON,

Respondents.

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

BRIEF *AMICI CURIAE* OF GLBTQ ADVOCATES & DEFENDERS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL CENTER FOR LESBIAN RIGHTS, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Through litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works 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 on behalf of a Michigan couple 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 in all manner of cases in state and federal courts.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as co-counsel of record in some of the nation's most important cases regarding the rights of LGBT people, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal also was lead counsel in *Robicheaux v. Caldwell*, 791 F.3d 616 (5th Cir. 2015), a case heard in coordination with *DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), in which the court struck down Louisiana's and Texas' bans

on marriage for same-sex couples. Lambda Legal also was counsel in other cases that won marriage equality in Arizona, California, Illinois, Iowa, Nevada, New Jersey, North Dakota, Puerto Rico, Virginia, and West Virginia. Particularly pertinent to this matter, Lambda Legal represented Houston employees against the City of Houston in *Freeman v. Parker*, No. 4:13-cv-08755 (S.D. Tex., filed Dec. 26, 2013), to successfully enjoin the City from withdrawing benefits to same-sex spouses of employees until the constitutionality of Texas' marriage bans was finally determined by the courts in *Obergefell* and *DeLeon*.

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 plaintiffs in numerous challenges to state laws prohibiting marriage for same-sex couples, including representing the Tennessee petitioners in *Obergefell v. Hodges*.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to defending

the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Texas is the state affiliate of the national ACLU. For decades, the ACLU has advocated for the constitutional freedom to marry, including as counsel in *Loving v. Virginia*, 388 U.S. 1 (1967); *Baker v. Nelson*, 409 U.S. 810 (1972); *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The ACLU and its members have an interest in ensuring the proper interpretation of *Obergefell* in this case.

No party has paid a fee in connection with this brief.

SUMMARY OF ARGUMENT

This case concerns the validity of two provisions of Texas law: Article I Section 32 of the State Constitution, which defines marriage as between one man and one woman, and Family Code Section 6.204, which, as most relevant here, invalidates any "right or claim to any legal protection, benefit, or responsibility" by a same-sex couple by virtue of their marriage. Tex. Fam. Code § 6.204(c)(2). These provisions are unconstitutional under the Supreme Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Petitioners' attempt to evade *Obergefell* centers principally on the assertion that, while *Obergefell* precluded states from prohibiting same-sex couples from obtaining marriage as a legal status, the decision does not preclude states from differentiating between married same-sex and different-sex couples when it comes

to the benefits and responsibilities accompanying that status. But it unquestionably does. In fact, the square holdings of *Obergefell* are that states may not exclude same-sex couples from "civil marriage on the same terms and conditions as opposite-sex couples," *id.* at 2605, and that states may not preclude married couples (same-sex or different-sex) from enjoying the "governmental rights, benefits, and responsibilities" that follow marriage. *Id.* at 2601. That does not mean, as Petitioners misinterpret Houston's argument, that *Obergefell* requires states to *subsidize* marriage benefits for same-sex couples. A state is free to decide in the first instance what benefits flow from marriage. But once that question is decided, *Obergefell* holds that a state may not offer a different "constellation of benefits" to same-sex married couples. *Id.* That fundamental principle precludes Petitioners' position here.

Presumably understanding that they cannot escape *Obergefell*'s holding, Petitioners urge this Court to ignore it. This Court is bound to reject that invitation. Petitioners contend that, at least when a state court disagrees with a decision of the U.S. Supreme Court (or even its interpretive method), the state court can "narrow" that decision, whatever that means. But as centuries of U.S. Supreme Court precedent, and decades of *this Court's* precedent, make clear, this Court—along with all other courts—is bound by the U.S. Supreme Court's decisions, including its decisions construing the U.S. Constitution.

Petitioners also contend that this Court should not apply *Obergefell* "retroactively," but their argument misapplies blackletter law. A U.S. Supreme Court decision is binding in any case that has not yet reached final judgment when the decision was issued. The judgment in this case has not yet issued, so *Obergefell* applies.

As Justice Willett recently explained, "The core controversy—whether the Fourteenth Amendment forbids States from preferring traditional marriage—is decided." *In re State*, 489 S.W.3d 454, 454 (Tex. 2016) (Willett, J., concurring in the dismissal of the petition for writ of mandamus). This Court should give effect to that decision and affirm the judgment below.

ARGUMENT

I. *Obergefell v. Hodges* Requires The State To Grant Same-Sex Couples The Same Legal Rights, Benefits, And Responsibilities As Different-Sex Couples

Obergefell v. Hodges, 135 S. Ct. 2584 (2015), squarely holds that the Due Process and Equal Protection Clauses preclude state laws "to the extent they exclude same-sex couples from civil marriage *on the same terms and conditions* as opposite sex couples."[1] *Id.* at 2605 (emphasis added); *see id.* at 2593 ("The

[1] The holdings in *Obergefell* addressed not only the right to marry, but also the right to have an existing out-of-state marriage respected in the couple's home state. In the six consolidated cases from Michigan, Ohio, Kentucky, and Tennessee, four were brought by married same-sex couples seeking to have their marriages recognized where they lived or worked, in part to access state protections, responsibilities, and benefits. Indeed, Valeria Tanco and Sophy Jesty, the lead plaintiffs in the Tennessee litigation, sought coverage under the family

petitioners in these cases seek to . . . have[e] their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex."). Yet Petitioners urge this Court to enforce a law providing for marriage on *separate* terms and conditions: one for different-sex couples that includes employment benefits, and one for same-sex couples that excludes them. Petitioners' position cannot be reconciled with *Obergefell*, and must be rejected.

Petitioners' contrary contention fails to recognize that under *Obergefell*, marriage is not merely a legal status, but necessarily includes its attendant rights, benefits, and responsibilities. The Court analyzed state laws forbidding same-sex couples from marrying under both the Due Process and Equal Protection Clauses, although the Court made clear that those two clauses are "connected in a profound way." *Id.* at 2603. But whether considered under the Due Process Clause, the Equal Protection Clause, or the "interlocking nature of these constitutional safeguards" the Court recognized between the two, *id*. at 2604, the *Obergefell* decision makes clear that marriage encompasses not only a legal status but any marital benefits and responsibilities that states offer to give that status meaning. Indeed, this is something on which all nine Justices agreed. Petitioners' position is

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health plan offered by their State employer (the university) to married different-sex couples, but denied to them. *See Tanco v. Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014), *rev'd DeBoer v. Snyder*, 772 F.3d 388 (6th Cir.), *rev'd Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also* Br. for Pet. Valeria Tanco, et al., at 5, *Tanco v. Haslam*, 135 S. Ct. 2584 (Feb. 27, 2015), (No. 14-562). After *Obergefell*, they now can access the very employee benefits that Petitioners here seek to deny Houston's employees.

wrong, and their attempt to prevent Houston from offering employment benefits to married same-sex couples on the same terms as married different-sex couples cannot be reconciled with the U.S. Constitution's demands, as authoritatively construed by *Obergefell*.

A. *Obergefell* Held That The Due Process Clause Requires That Same-Sex Couples Have The Same Access To The Institution Of Marriage, Including The "Governmental Rights, Benefits, And Responsibilities" That Accompany It

The *Obergefell* Court held that the Due Process Clause protects the fundamental right to marry, and that this right "appl[ies] with equal force to same-sex couples." *Id.* at 2599. The Court expressly held that this fundamental right encompassed not only legal status but marriage benefits.

The Court explained that "marriage is a keystone of our social order" because states have chosen to make it "the basis for an expanding list of governmental rights, benefits, and responsibilities." *Id.* at 2601. The Court concluded that through marital benefits—including the employment benefits directly at issue here, and many others purportedly barred by Family Code Section 6.204(c)—society "pledge[s] to support the couple, offering symbolic recognition *and material benefit* to protect and nourish the union," increasing stability to both married couples and, as a result, society. *Id.* (emphasis added). And denying same-sex couples access to marriage deprives them of this "constellation of benefits that the States have linked to marriage," "lock[s] [gays and lesbians] out

of a central institution of the Nation's society," "consign[s] [them] to an instability many opposite-sex couples would deem intolerable in their own lives," and "material[ly] burdens" them. *Id.* at 2601–02. The Court's analysis, in other words, makes clear that a state or other governmental entity would violate due process by denying married same-sex couples the same "governmental rights, benefits, and responsibilities" as provided to different-sex married couples.[2]

The Court's holding that the fundamental right to marriage encompasses marriage benefits is reflected throughout the Court's analysis. For example, the Court explained that marriage is fundamental because it "safeguards children and families." *Obergefell*, 135 S. Ct. at 2600. And the Court offered marital benefits as one example of these "material" safeguards; children are able to receive benefits like health insurance and survivor's benefits, for example, from either of their parents. *Id.* If the right to marry did not include the benefits linked by states to that status, these material benefits described by the Court as part and parcel of the fundamental right to marry would not be protected.

Thus, *Obergefell*'s direct holdings squarely preclude Petitioners' attempt to bifurcate marriage from its associated benefits. As the Supreme Court explained, its holding that "same-sex couples may exercise the fundamental right to marry"

[2] *Obergefell* is entirely consistent with other due process cases affirming the right to marry. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95–97 (1987) (appealing in part to the "attributes of marriage" including "receipt of government benefits…, property rights,…and other, less tangible benefits" when invalidating prison marriage ban).

includes access to the benefits and responsibilities that come with marriage. *Id.* at 2605.

B. *Obergefell*'s Equal Protection Holding Rejected States' Attempt To Differentiate Between Same-Sex And Different-Sex Couples With Regard To Distribution Of Marital Benefits

Obergefell's equal protection holding, like its due process holding, likewise compels the conclusion that same-sex couples cannot be deprived of marriage benefits. Indeed, the Court squarely ruled that one of the principal constitutional defects in the states' attempt to deprive same-sex couples of the right to marriage was that "same-sex couples are denied all the benefits afforded to opposite-sex couples." 135 S. Ct. at 2604. While the Court acknowledged that states could decide whether to extend benefits to married couples at all, *see id.* at 2601 ("[T]he States are in general free to vary the benefits they confer on all married couples . . . ."), it made clear that once a state decides to extend benefits to *any* married couples, it must treat same-sex couples with "equal dignity in the eyes of the law" and grant them equal benefits. *Id.* at 2605.

Obergefell also held that the marriage bans "abridge central precepts of equality" because denying marriage and its attendant benefits "works a grave and continuing harm" on same-sex couples that "disrespect[s] and subordinate[s] them." *Id*. at 2604. Petitioners' attempt to reinstate a regime of disrespect cannot be justified under both the Equal Protection and Due Process Clauses. *Id.*

The same result follows from the Supreme Court's recent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). There, the Court invalidated on equal protection grounds the federal Defense of Marriage Act ("DOMA"), which withheld all federal benefits from validly married same-sex couples. The Court was particularly troubled by the fact that DOMA "reject[ed] the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary . . . from one State to the next." *Id.* at 2692. The "creat[ion of] two contradictory marriage regimes within the same State" impermissibly "place[d] same-sex couples in an unstable position of being in a second-tier marriage" and "wr[o]te[] inequality into the entire United States Code." *Id.* at 2694. Petitioners' attempt to preclude same-sex couples from receiving marriage benefits to which different-sex couples are entitled would have exactly the same effect and is unconstitutional for the same reason.

C. The *Obergefell* Dissenters And The State Of Texas Itself Have Recognized That The Supreme Court's Holding Necessarily Encompasses Marriage Benefits

That *Obergefell* protects not only marriage as a legal status but also the benefits linked to it is plain enough from the decision itself. It is thus hardly surprising that both the *Obergefell* dissenters and the State recognized this fundamental point.

Just as the *Obergefell* majority understood the laws that it struck down had denied "all the benefits afforded to opposite-sex couples," 135 S. Ct. at 2604, Chief Justice Roberts's principal dissent (joined by Justices Scalia and Thomas) similarly recognized that "petitioners . . . seek public recognition of their relationships, along with corresponding government benefits." *Id.* at 2607 (Roberts, C.J., dissenting); *see also id.* at 2626 ("If you . . . favor expanding same-sex marriage, by all means celebrate today's decision. . . . *Celebrate the availability of new benefits*." (emphasis added)). And Justice Alito (also joined by Justices Scalia and Thomas) agreed, defining the phrase "recognize marriage" to include "issuing marriage licenses and *conferring those special benefits and obligations provided under state law for married persons*." *Id.* at 2640 n.1 (Alito, J., dissenting) (emphasis added).

Texas has agreed. In *Obergefell* itself, Texas, as an *amicus*, argued that marriage "ripple[s] across vital areas of law, including the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' One could add to that list laws regulating adoption, taxation, inheritance, insurance, health care, reproductive technology, and employment." *Amici Curiae* Brief of Louisiana et al., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015 WL 1608213, at *7 (Apr. 2, 2015), (No. 14-556) (second alteration in original) (internal citation omitted). And after *Obergefell* was decided, the State has maintained that it requires providing spousal benefits to married same-sex couples to the same extent

as married different-sex couples. For example, in *De Leon*, the State asked the U.S. Court of Appeals for the Fifth Circuit to affirm the district court's preliminary injunction, *see* Letter from Appellants, *De Leon v. Abbott*, No. 14-50196, Doc.00513100429 (5th Cir., June 30, 2015), which invalidated any laws that excluded same-sex couples from "civil marriage on the same terms and conditions as opposite-sex couples." *See* Clerk's Order, *De Leon v. Abbott*, No. 14-50196, Doc.00513097104 (5th Cir., June 29, 2015); *cf.* Advisory to the Court at 7, *De Leon v. Abbott*, No. 5:13-cv-00982 (W.D. Tex. Aug. 24, 2015), ECF No. 115 (Attorney General letter, in response to contempt motion, arguing that a statute that "does not address marriage as a predicate" is not implicated by *Obergefell*).

Petitioners' attempt to escape *Obergefell*'s holding that marriage includes marriage benefits—which no Justice disputed, and which the State itself well understood—should be rejected.

II. Petitioners' Attempts To Relitigate Arguments The Supreme Court Has Already Rejected Fail

Petitioners and their *amici* essentially make three arguments to distinguish *Obergefell* and defend the Texas laws. Each fails.

First, Petitioners contend that the Constitution grants no free-standing right to employee benefits for same-sex couples, and that *Obergefell* merely requires a state to "recognize[e] same-sex marriage," not "subsidize" it. Pet. Merits Br. at 13; *see also* Gov. *Amicus Curiae* Br. at 7. That argument misses the point of

Obergefell entirely. No one is asking the State to "subsidize" marriage. Rather, Respondents are seeking equal treatment with respect to benefits that the state has already chosen to provide to married couples. Indeed, *Obergefell* recognized that a state need not grant marriage benefits to anyone at all. 135 S. Ct. at 2601 ("[T]he States are in general free to vary the benefits they confer on all married couples . . . ."). But the square holding of *Obergefell* is that states must grant same-sex and different-sex couples *equal* access to marriage benefits—once a state decides to grant benefits as an incident of marriage, it must grant that benefit to all married couples. *See supra* at I.A & B.[3]

Second, Petitioners argue that if the Court rules for Houston, the State would be obligated to pay for abortions. *See* Pet. Merits Br. at 13–14. This argument suffers from the same defect. As the Supreme Court held in *Harris v. McRae*, 448 U.S. 297 (1980), "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of

[3] Similarly, appeals to *Califano v. Jobst*, 434 U.S. 47 (1977) and *Bowen v. Owens*, 476 U.S. 340 (1986) are inapt. There, Congress intended to condition benefits on the recipient's "status of dependency," a status which was often changed by marriage. Here, however, the benefits sought are not contingent on any status other than marriage itself. Moreover, here Petitioners try to exclude a particular group from an original *grant* of marital benefits, rather than a *termination* of benefits that pre-date marriage. And even if *Califano* and *Bowen* did allow legislators to draw certain lines, *Obergefell* and *Windsor* do not allow them to draw that line based on whether one marries a member of the same or different sex. *Compare, e.g., Windsor*, 133 S. Ct. at 2694 (placing same-sex couples in a "second-tier marriage" without federal benefits "demeans the couple, whose moral and sexual choices the Constitution protects") *with Califano*, 434 U.S. at 53 ("[T]he marriage rule cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group.").

choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 317–18. But as just explained, *Obergefell* does not require any state to confer any particular marriage benefit. It simply requires that when a state decides to do so, it must do so equally. Petitioners' abortion-funding argument is a red herring. This case concerns the equal treatment of all married couples; it has nothing to do with a state's power to decide whether to provide a particular marital benefit in the first instance.

Third, Petitioners argue that the State can refuse to provide married same-sex couples the same benefits as different-sex married couples based on its interest in furthering procreation and child-rearing. Pet. Merits Br. at 14. *Obergefell* expressly considered and rejected that argument. The principal justification for refusing to recognize same-sex couples' marriage offered in that case was the states' interest in procreation and child-rearing, yet the Court rejected that rationale and precluded such discrimination, including with respect to marriage benefits. *See* 135 S. Ct. at 2606–07. *See also* Br. for Resp. Michigan at 31–45, *DeBoer v. Snydar*, 135 S. Ct. 2584 (Mar. 27, 2015), (No. 14-571) (State's brief in case consolidated with *Obergefell*) (seeking to justify Michigan's marriage ban based on the State's asserted interest in procreation by different-sex couples). Far from accepting that asserted state interest as legitimate, *Obergefell* concluded that

excluding same-sex couples from the protections of marriage would *hinder* a state's interest in childrearing, procreation, and education. *See* 135 S. Ct. at 2600–01 ("Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. . . . The marriage laws at issue here thus harm and humiliate the children of same-sex couples."); *see also Windsor*, 133 S. Ct. at 2695 ("DOMA also brings financial harm to children of same-sex couples.").

Petitioners' arguments, in short, are nothing more than an effort to relitigate *Obergefell*. Because this Court is bound by the Supreme Court's decisions, that effort must necessarily fail.

III. Petitioners' Nullification And Non-Retroactivity Theories Are Similarly Foreclosed By U.S. Supreme Court Precedent

Presumably because Petitioners understand that the actual holdings in *Obergefell* preclude their merits arguments, they fall back on technical arguments that have long been discredited. They argue that this Court need not follow the holdings of the U.S. Supreme Court if it disagrees with that Court's mode of interpretation, a nullification theory that was rejected two centuries ago. And they argue that U.S. Supreme Court decisions with which state courts disagree should not apply retroactively, which is just another way of arguing that the U.S. Supreme Court's federal-law holdings do not fully bind this Court.

A. This Court's Obligation To Follow U.S. Supreme Court Precedent Does Not Depend On The Supreme Court's Mode Of Interpretation

For the reasons explained, there is no faithful reading of *Obergefell* that would support Petitioners' attempt to deny married same-sex couples the same state marriage benefits provided to other married couples. Petitioners and their *amici* thus argue that the decision recognizes a "constitutional right with no basis in text or history," Pet. Merits Br. at 13, and that, under these circumstances this Court should "narrow[] . . . precedent from below," Gov. *Amicus Curiae* Br. at 11. *Amici* disagree with Petitioners' characterization of the *Obergefell* opinion, but even if Petitioners were right, it would not matter—*Obergefell*'s holding binds this and every other court as a definitive construction of the federal Constitution.

Petitioners' position is an invitation to nullify U.S. Supreme Court precedent, an invitation that the U.S. Supreme Court precluded state courts from accepting 200 years ago. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 352 (1816) ("[N]o state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion."). It is thus well established that state high courts are "foreclosed from re-examining the grounds of [the Supreme Court's] disposition."[4] *NAACP v. Alabama ex rel.*

[4] Judge Learned Hand argued that it is a lower court's "duty to divine, as best it can, what would be the event of an appeal in the case before us." *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting) *vacated sub nom. Spector Motor Serv. v.*

Patterson, 360 U.S. 240, 244–45 (1959) (per curiam). Petitioners may of course ask the U.S. Supreme Court to take their case and overrule *Obergefell*. But that decision may "neither be nullified openly and directly by . . . judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted ingeniously or ingenuously." *Cooper v. Aaron*, 358 U.S. 1, 17–18 (1958) (internal quotation marks and citations omitted).

This Court has repeatedly recognized this obligation. *See, e.g.*, *Hoff v. Nueces Cty.*, 153 S.W.3d 45, 49 (Tex. 2004) (recognizing Texas Supreme Court "bound by the decisions of the U.S. Supreme Court" on issues of federal constitutional law); *CMMC v. Salinas*, 929 S.W.2d 435, 439–40 (Tex. 1996); *see also Gulf, Colo. & Santa Fe Ry. Co. v. Deen*, 317 S.W.2d 913, 239–40 (Tex. 1958) (recognizing this Court's "duty" to conform to a U.S. Supreme Court's opinion despite the Supreme Court's decision to decline to formally issue mandamus writ or writ of certiorari).

Unsurprisingly, neither Petitioners nor their *amici* can point to any authority for their contrary rule. *Williams v. State*, 10 A.3d 1167 (Md. 2011), is inapposite. That case simply read the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), to not apply to public possession of a handgun in public when "prohibition

McLaughlin, 323 U.S. 101. *Cf.* Pet. Merits Br. at 12 (asking for this Court to "instruct[]" lower courts to "narrowly construe *Obergefell*").

of firearms in the home was the gravamen of the certiorari questions . . . and their answers." *Williams*, 10 A.3d at 1177. The Maryland court did *not* conclude that the Supreme Court's holdings reached public possession but then decline to follow those holdings, which is what Petitioners ask this Court to do here. Their *amici* also rely on the Montana Supreme Court's attempt to evade *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), but that is an odd example for them to cite, because the U.S. Supreme Court summarily reversed that decision without argument on the ground that the Montana court's positions "were already rejected." *See* Gov. *Amicus Curiae* Br. at 10–11; *Am. Trad. P'ship Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam); *see also Am. Trad. P'ship Inc. v. Bullock*, 565 U.S. 1187, 1188 (2012) (Ginsburg, J., respecting grant of stay application) ("[L]ower courts are bound to follow this Court's decision until they are withdrawn or modified.").

B. This Court's Obligation To Apply U.S. Supreme Court Precedent To Cases Pending On Appeal Does Not Depend On The Supreme Court's Mode Of Interpretation

Petitioners second argument—that *Obergefell* cannot have retroactive effect because it "rested entirely on a living-constitutional philosophy"—is equally unsupported and contrary to well-settled law. *See* Pet. Merits Br. at 11. The issue is not, as certain *amici* put it, whether *Obergefell* allows "state or local officials to violate state laws prior to" the date it was rendered. Gov. *Amicus Curiae* Br. at 7.

Rather, the question is what law this Court applies when evaluating Houston's actions *now*. And the answer is obvious—*Obergefell* binds this and every other court under fundamental principles of retroactivity.

That result follows directly from *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), as Houston ably explains. Resp. Merits Br. at 22–26. "[A] decision extending the benefit of the judgment to the winning party is to be applied to other litigants whose cases were not final at the time of the first decision." *Harper*, 509 U.S. at 96–97 (quotation and alteration omitted); *accord Danforth v. Minnesota*, 552 U.S. 264, 271 (2008); *see also Ranolls v. Dewling*, __ F. Supp. 3d __, 2016 WL 7726597, at *6–9 (E.D. Tex. Sept. 22, 2016) (applying *Obergefell* retroactively under Texas' informal marriage laws to surviving spouse's wrongful death claim). This case is not final—and obviously was not final when *Obergefell* was decided—so *Obergefell* applies. Petitioners' inapposite cases involve retroactivity rules in *criminal* cases and upon *habeas corpus* review, and even then only when (unlike here) the governing U.S. Supreme Court decision was rendered *after* the party seeking retroactive application suffered an adverse final judgment. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 295 (1989) (plurality) (refusing to apply criminal procedure rule on collateral review to overturn conviction). In contrast to *habeas corpus* proceedings or other cases involving collateral review of

final judgments, *Harper* make clear that U.S. Supreme Court precedent applies "retroactively" to all cases in which final judgment has not been entered.

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995), is instructive. There, the Supreme Court had invalidated a particular Ohio tolling statute, but the Ohio Supreme Court continued to let litigants use it because of their reliance on the provision prior to its invalidation. The U.S. Supreme Court held that this violated the Supremacy Clause. *Id.* at 753–54. As Justice Scalia explained in his concurrence, "what a court does with regard to an unconstitutional law is simply to ignore it. It decides the case disregarding the unconstitutional law, because a law repugnant to the Constitution is void, and is as no law." *Id.* at 760 (internal citation, quotation marks, and alterations omitted).

As explained above, the laws on which Petitioners rely to preclude same-sex couples from obtaining marriage benefits are unconstitutional. This Court must therefore disregard them when deciding this case, and, as a result, reject Petitioners' position.

CONCLUSION

For the foregoing reasons, and those provided by Respondents, the decision below should be affirmed.

Respectfully submitted,

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