No. 17-424

IN THE SUPREME COURT OF THE UNITED STATES

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON,

PETITIONERS,

v.

JACK PIDGEON AND LARRY HICKS,

RESPONDENTS.

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

REPLY BRIEF FOR PETITIONERS

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This Court has answered Pidgeon's restated question in the affirmative: governmental employers must provide publicly funded benefits on an equal basis to same-sex married couples and opposite-sex married couples. *Pavan* v. *Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam); *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2604–2605 (2015).

This Court concluded that DOMAs in two of the consolidated cases in *Obergefell*—*Tanco* and *Bourke*—were unconstitutional precisely because they prohibited same-sex married couples from obtaining publicly funded benefits made available to opposite-sex married couples. See Pet. 10 & n.3. This Court also listed "workers' compensation" and "health insurance" as among the "constellation of benefits that States have linked to marriage." *Obergefell*, 135 S. Ct. at 2601.

These precedents explain why Pidgeon reverts to technical contentions about the Court's purported powerlessness to decide the merits: finality, Article III standing, and that the City has not challenged the judgment of the Supreme Court of Texas. Pidgeon is wrong on all three counts.

I. There is no obstacle to review.

A. The Court has adopted a pragmatic approach to 28 U.S.C. 1257's finality requirement.

Pidgeon asserts the Court lacks jurisdiction to decide this case. Pidgeon reasons that, although the Texas court concluded that *Obergefell* does not compel

equality in benefits, its remand of the case for further consideration shields this ruling from review. See Opp. 16–28. But this Court has rejected a "mechanical" interpretation of finality under 28 U.S.C. 1257. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). It has consistently applied an "intensely 'practical' approach" to determine a judgment's finality. *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976).

"[A]s the cases have unfolded, the Court has recurringly encountered situations" in which it elected to treat decisions of the state courts as "final" even though "there [we]re further proceedings in the lower state courts to come." *Cox Broad.*, 420 U.S. at 477. The Court has granted review when, as here, "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice." *Id.* at 477–478 (quotations omitted).

This case meets *Cox Broadcasting*'s requirements, which permit review of interlocutory state-court rulings where:

> (1) "the federal issue has been finally decided";
>
> (2) the party seeking review "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court";
>
> (3) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and

> (4) refusal to review the ruling "might seriously erode federal policy."

Id. at 482–483.

Pidgeon does not challenge—because he cannot—the applicability of the first and fourth of these factors. Opp. 21–22. The Texas court's decision is final in its refusal to apply *Obergefell* and *Pavan*. And absent immediate review, the Texas decision will "seriously erode federal policy." *Cox Broad.*, 420 U.S. at 483; see also *Chapman* v. *California*, 405 U.S. 1020, 1021–1024 (1972) (Douglas, J., dissenting from denial of certiorari) (collecting cases finding a state-court decision final if the subsequent state proceedings would deny the federal right for which review is sought). If the Texas court's decision is left unaddressed, rights and benefits *Obergefell* and *Pavan* have secured will be thrown into question. Same-sex married couples will thus be forced to relitigate issues this Court has already laid to rest. See Pet. 11.

Pidgeon's effort to deny the remaining two factors falls short. First, Pidgeon asserts that there is "no conceivable" non-federal ground that would allow the City to prevail "on the merits" in further proceedings. Opp. 22. Pidgeon relies entirely on the "on the merits" phrase in the second factor. But the *Cox Broadcasting* Court's essential concern was that, without immediate review, the petitioner may prevail on non-federal grounds, insulating the lower court's resolution of the federal issue from review by this Court. An erroneous ruling on an important federal question would continue to corrupt that state's jurisprudence.

As it now exists, the City's governmental-immunity and standing defenses will be litigated in lower state courts. Pet. App. 28a–31a. Should the City prevail on either defense, the trial court will not reach the federal question. The erroneous Texas high court decision will continue to bind Texas courts and inspire needless litigation "throughout the country," beyond this Court's power to rectify. Pet. App. 32a.

To suggest that finality is lacking, Pidgeon contends that Texas's DOMA would survive—and this litigation would continue—even if this Court were to reverse the state court's decision. Opp. 22–24. But *Obergefell* and *Pavan* bar any State from distinguishing between same-sex and opposite-sex couples in the provision of benefits the State links to marriage. Recognition of this point will preclude all of Pidgeon's claims.

Pidgeon also relies on a claim that funds expended on same-sex marriage benefits prior to the ruling in *Obergefell* should be "clawed back" from the City. Opp. 22, 24. As the Texas Supreme Court noted, Pidgeon never pleaded such a claim. Pet. App. 23a. A nonexistent claim cannot defeat finality. Moreover, Texas law disallows taxpayer standing for past expenditures of public funds. *Williams* v. *Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

Pidgeon's reliance, Opp. 23–25, on this Court's order dismissing the petition in *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 656 (2003) (per curiam), as improvidently granted does not undermine this analysis. *Nike* came to this Court after an early dismissal on the pleadings, when the scope and nature of the speech claimed to be

protected by the First Amendment was not yet defined. *Id*. at 664–65 (Stevens, J., concurring in dismissal). Here, the constitutional issue is clear. Its resolution should have been a foregone conclusion. Rather than requiring the "anticipat[ion]" of novel constitutional questions, *id*. at 663, this petition presents a federal question that this Court has fully answered.

The significance of the Texas court's ruling, and the widespread importance of the rights at issue, favor recognizing the decision as final so that this Court can act before further erosion of its decisions occurs. See Br. for Amici Curiae GLBTQ Legal Advocates & Defenders and Nat'l Ctr. for Lesbian Rights 6–12.

B. The City has Article III standing.

Pidgeon contends that this case involves a "difficult jurisdictional question." Opp. 31. He asserts that because he, as a municipal taxpayer, would be unable to demonstrate standing in the federal courts, this Court should deny the petition. But this Court's Article III jurisdiction does not depend on Pidgeon's standing:

> When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.

ASARCO Inc. v. *Kadish*, 490 U.S. 605, 623–624 (1989). The Texas court's decision harms the City; consequently, the City has standing. The City has Article III standing to defend the constitutionality of its municipal policy of extending spousal benefits to *all* of its married employees. Cf. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (noting that "a State has standing to defend the constitutionality of its statute" in federal court); see also *Raines* v. *Byrd*, 521 U.S. 811, 831 n.2 (1997) (Souter, J., concurring in the judgment) ("[A]n injury to official authority may support standing for a government itself or its duly authorized agents." (citations omitted)).

Pidgeon denies the City's injury-in-fact. See Opp. 28–31; see also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). He contends that the City has suffered no "direct injury" because the Texas court did not "reject the city's constitutional defenses." Opp. 30. To the contrary, that court forcefully rebuffed the City's constitutional argument—it held that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons." Pet. App. 27a.

The City satisfies the injury-in-fact prerequisite for Article III standing in multiple ways. First, upon the ordered remand to the trial court, the City faces the threat of an immediate halt to the benefits it extends to same-sex spouses of employees. See Opp. 6. Because the Texas court's decision instructs Texas courts, including the trial court, that *Obergefell* is merely a marriage-license ruling, the threat of injury to the City in the form of yet another injunction is both real and immediate. This same trial court has already enjoined

the City's benefits policy on two prior occasions. Opp. 7–8. In *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341, 2345 (2014), the Court clarified that an allegation of future injury is sufficient when there is a "substantial risk that the harm will occur" and deemed the threat of future enforcement substantial, in part, based on a history of past enforcement. See also, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101–102 (1983) (explaining that standing is shown when the party "*is immediately in danger of sustaining some direct injury* as the result of the challenged official conduct" and the "threat of injury [is] both real and immediate, not conjectural or hypothetical" (quotations and citation omitted; emphasis added)).

As an employer, the City also has a specific and substantial interest in developing, administering, and enforcing its employee-benefits program, as well as in attracting and retaining skilled employees. See, *e.g.*, *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 601–602 (1982) (noting in discussing standing that states sometimes have proprietary interests that may be pursued in court). By refusing to apply this Court's holding in *Obergefell*, the Texas Supreme Court's judgment damaged the City's competitiveness in the employment marketplace. See Amicus Curiae Br. of Int'l Municipal Lawyers Ass'n & Tex. Municipal League 9. Indeed, a main thrust of Pidgeon's argument is that the City must either discriminate against same-sex married couples or cease providing benefits to any married couples.

Finally, the City has been forced to expend public dollars defending its constitutionally mandated benefits

policy. Remand under the Texas court's erroneous decision guarantees the ongoing, involuntary devotion of additional City resources.* These expenditures of time and money are sufficiently "distinct and palpable" to confer Article III standing. *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

C. The Texas judgment instructs lower courts that *Obergefell* does not require equality of benefits.

Pidgeon asserts that "the City does not appear to challenge the state supreme court's judgment." Opp. 31. Pidgeon is mistaken.

The Texas court did not remand to the trial court "for proceedings consistent with *Obergefell*." See Pet. App. 14a–15a. It instead remanded "for further proceedings consistent with *our* judgment and *this* opinion." Pet. App. 32a (emphasis added). That opinion refused to honor *Obergefell* and *Pavan*. Rather than recognize that *Obergefell* and *Pavan* invalidated Texas's DOMA, the Texas court concluded that a lower state court may plausibly rule, in harmony with those decisions, that a state may discriminate against same-sex married couples in the provision of public benefits. Pet. App. 27a.

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* Accordingly, this case does not implicate the principle that a plaintiff cannot manufacture standing by incurring legal fees in filing a suit. See *Blunt* v. *Lower Merion Sch. Dist.*, 767 F.3d 247, 288–89 (3d Cir. 2014). Instead, the City was involuntarily required to devote resources to this lawsuit as a defendant.

The Texas high court could have remanded for proceedings "consistent with *Obergefell*" and "in light of *De Leon*." Pet. App. 14a–16a, 19a. But by ordering the trial court to instead proceed consistent with *its* opinion, the judgment instructs the trial court—and all other Texas courts—to accept its ruling that the question presented here has not been answered. The City challenges that judgment as contrary to this Court's precedent.

II. Pidgeon's other objections highlight the importance of the question presented.

A. The Texas court's decision directly conflicts with *Obergefell.*

Pidgeon asserts that the Texas court's decision is consistent with *Obergefell*. Opp. 34–37. Pidgeon is wrong. The decisions conflict.

Because discrimination between same-sex and opposite-sex couples in the provision of marital benefits is unconstitutional, it is *not* an open question "whether any parts or applications of [the Texas DOMA] survive *Obergefell*." Opp. 18. The Texas court created a conflict with *Obergefell* and *Pavan* by holding to the contrary.

And because Texas's DOMA mandates unconstitutional discrimination, Pidgeon's attempt to harmonize it with *Obergefell* fails. Pidgeon argues:

> If the Constitution forbids the city to treat same-sex married couples differently from opposite-sex couples, but [the Texas DOMA]

> forbids the city to award spousal employment benefits to same-sex couples, then the proper response is for the city to withdraw spousal benefits from *all* of its employees.

Opp. 6.

Pidgeon's argument assumes the continued validity of the Texas DOMA. But the DOMA's plain language, Pet. 3, requires the City to unconstitutionally discriminate between married couples; it does not empower courts to divest every married couple of marital benefits. The statute is a nullity, just like every other DOMA this Court has confronted. It cannot be reconciled with *Obergefell*, and the Texas court's holding was therefore erroneous.

B. This Court need not await further litigation before deciding the issue.

Pidgeon claims that the lack of a mature division of authority renders the petition deficient. Opp. 37–38. But the Court has frequently corrected similar departures from its controlling precedent—including on this very issue. See Pet. 12–13.

Pidgeon also speculates that the trial court might properly interpret and apply *Obergefell* on remand, asserting that the trial court is "free to hold" that "*Obergefell should be extended* to require equal benefits." Opp. 37 (emphasis added). But *Obergefell* already compels equal provision of benefits to both same-sex and opposite-sex married couples. The City, and indeed any litigant, should reasonably anticipate

that a court would honor the Supremacy Clause. See U.S. Const. art. VI, cl. 2. The danger is that a Texas Supreme Court decision must be "accepted as a binding precedent by * * * other courts of lower rank." *Swilley* v. *McCain*, 374 S.W.2d 871, 875 (Tex. 1964). The Texas high court has instructed the trial court that *Obergefell's* holding was only about the right to a marriage license and did not resolve the issue of equal benefits. This Court's intervention is imperative.

This Court recognized the importance of same-sex couples' rights under the Fourteenth Amendment when it granted the petitions in *Obergefell*, *Pavan*, *Windsor*, *Lawrence*, and *Romer*. The issue has been and, unfortunately, continues to be urgent. See, *e.g.*, *Obergefell*, 135 S. Ct. at 2605–2606, 2608–2612 & Apps. A & B (recognizing urgency of issue, cataloging state and federal-court litigation of issue, and noting the filing of more than 100 amicus briefs); see also Pet. 13–15; Br. for Amici Curiae GLBTQ Legal Advocates & Defenders and Nat'l Ctr. for Lesbian Rights; Br. of Amici Curiae LGBT Bar Ass'n & Equality Texas; Br. of Amici Curiae Professors of Constitutional & Family Law; Amicus Curiae Br. of Int'l Municipal Lawyers Ass'n & Tex. Municipal League; Br. for Mark Phariss & Victor Holmes as Amici Curiae.

The inconsistency in constitutional rights for same-sex married couples created by the Texas court is substantial and national. It is untenable for all affected.

> As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, "the laws, the

> treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable."

James v. *City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam) (quoting *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)).

CONCLUSION

The petition should be granted.

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