No. 15-0688

In the Supreme Court of Texas

JACK PIDGEON AND LARRY HICKS,
Petitioners,

v.

MAYOR SYLVESTER TURNER AND THE 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

AMICUS CURIAE BRIEF OF GOVERNOR GREG ABBOTT, LIEUTENANT GOVERNOR DAN PATRICK, AND ATTORNEY GENERAL KEN PAXTON IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Governor is the Chief Executive Officer of the State, and the Constitution charges him with the obligation to "cause the laws to be faithfully executed." TEX. CONST. art. 4, §§ 1, 10. The Constitution establishes the Lieutenant Governor as the President of the Senate. *Id.* art. 4, § 16(b). And the Attorney General is constitutionally charged with representing the State in this Court. *Id.* art. 4, § 22. These state officials each have an acute interest in understanding with precision how federal court decisions impact the state laws they enforce, enact, and defend. They have a concomitant interest in encouraging state courts to carefully and correctly construe the effect of federal court decisions on Texas law. This case raises important questions of federal jurisdiction and of the relationship between federal courts and state law. For these reasons, we respectfully submit this *amicus curiae* brief.[1]

STATEMENT OF FACTS

The Texas Constitution provides that "[m]arriage in this state shall consist only of the union of one man and one woman," and it prohibits the State or any political subdivision from "creat[ing] or recogniz[ing] any legal status identical or similar to marriage." TEX. CONST. art. I, § 32. Texas law further prohibits the State or any political subdivision from giving effect to a "right or claim to any legal protection, benefit, or responsibility asserted as a result of" any same-sex union. TEX. FAM. CODE § 6.204(b), (c)(2).

[1] No fee was paid for the preparation of this brief. *See* TEX. R. APP. P. 11(c).

In 2013, and in contravention of the Texas Constitution, former Houston Mayor Annise Parker recognized same-sex marriages performed for city employees in other States. Then, in violation of the Family Code, the former mayor extended spousal employment benefits to same-sex couples who got married in other States. Her only basis for doing so was her personal belief that the Texas Constitution and Family Code violated the United States Constitution. *See* CR 14, 58-60. Parker's personal belief violated long-settled U.S. Supreme Court precedent, under which any federal constitutional claim for same-sex marriage was not only baseless but did not even raise a substantial federal question. *See Baker v. Nelson*, 409 U.S. 810 (1972).

Given that state law prohibited Parker's actions in 2013, and given that her personal interpretation of the federal constitution was incorrect under U.S. Supreme Court precedent at the time, the trial court appropriately entered a temporary injunction against her. After Parker appealed the temporary injunction, however, the Supreme Court switched course. On June 26, 2015, that Court held the federal constitution's Fourteenth Amendment requires every state in the nation to recognize same-sex marriages. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). On the same day *Obergefell* was announced, a federal district court in San Antonio lifted the stay of a preliminary injunction against execution of Texas's constitutional and statutory prohibitions on same-sex marriage. *See* Order, *De Leon v. Perry*, No. 13-cv-982, ECF No. 96 (W.D. Tex. June 26,

2015), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). The Fifth Circuit upheld the district court's preliminary injunction and issued an opinion, in which it noted that the outcome of *De Leon* does not necessarily dictate the outcome of future cases involving conflicts between the right to same-sex marriage and other interests. *See De Leon*, 791 F.3d at 625 ("We express no view on how controversies involving the intersection of these rights should be resolved but instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them."). The district court then issued a final judgment ordering that the defendants in that case "are permanently enjoined from enforcing Texas's laws prohibiting same-sex marriage." Final Judgment, *De Leon v. Perry*, No. 13-cv-982, ECF No. 98, at 1 (W. D. Tex. July 7, 2015). Shortly thereafter, the Fourteenth Court of Appeals in this case dissolved the temporary injunction against Parker and remanded for proceedings "consistent with *Obergefell* and *De Leon*." *Parker v. Pidgeon*, 477 S.W.3d 353, 355 (Tex. App.—Houston [14th Dist.] 2015), *review denied sub nom. Pidgeon v. Turner*, No. 15-0688, 2016 WL 4938006 (Tex. Sept. 2, 2016).

SUMMARY OF ARGUMENT

Major constitutional rulings by the United States Supreme Court routinely give rise to waves of litigation exploring the contours and limits of the Court's pronouncement. This case is one of many cases that will require state courts to examine the scope of the right to same-sex marriage announced by

the Supreme Court in *Obergefell v. Hodges*. By issuing its judgment in *Obergefell*, the Supreme Court effectively has required all States to grant same-sex marriages and recognize same-sex marriages from other states, and the purpose of this brief is not to contest or circumvent that requirement. But the existence of a federal court judgment obligating States to grant and recognize same-sex marriages does not automatically dictate the outcome of a case like this one, which raises a related but different constitutional question involving municipal employee benefits. State courts tasked with applying *Obergefell* should bear in mind foundational concepts of federal jurisdiction that are often ignored in the regrettably sloppy public discussion of U.S. Supreme Court rulings. When a federal court, including the Supreme Court, exercises its constitutional authority to decide a case or controversy, it does so through a *judgment*. A federal court may or may not choose to write an *opinion* to explain the basis for its judgment, but every word of that judicial opinion does not thereby become constitutional law that binds other branches of the state and federal governments. While the *judgment* in *Obergefell* is authoritative, Justice Kennedy's lengthy *opinion* explaining that judgment is not an addendum to the federal constitution and should not be treated by state courts as if every word of it is the preemptive law of the United States.

Unlike the judgment in *Obergefell*, the judgment in *De Leon* is of limited relevance to this Court or any other state court asked to decide a case like this

one. To begin with, state courts are coordinate with—not subservient to—federal district courts and federal courts of appeals when it comes to interpreting the federal constitution. In addition, *De Leon* resulted in a federal district court's final judgment pursuant to *Ex Parte Young* ordering Texas executive branch officials not to enforce state laws prohibiting same-sex marriage. We do not question the authority of that order to tie the hands of executive branch officials. But a federal district court judgment against state officials does not amend the Texas Constitution or the Texas Family Code. And it most certainly does not require state courts to act as if those provisions of Texas law no longer exist. Federal courts lack the power to issue injunctions against state courts, and a federal district court order against the Governor and other executive branch officers does not bind Texas courts in any way.

Whether or not this Court chooses to reinstate the temporary injunction, it should issue remand instructions directing lower Texas courts to carefully examine claims, such as the claims in this case, that implicate the scope of the right announced in *Obergefell*. Regrettably, many lawyers and judges do not devote careful thought to the complicated questions of federal jurisdiction raised by decisions like *Obergefell*, instead assuming without adequate reflection that the U.S. Supreme Court has decided once and for all any constitutional questions about state laws on same-sex marriage. The Fourteenth Court's remand for further proceedings "consistent with *Obergefell* and *De Leon*" risks conflating

the constitutional questions in this case with what five Justices of the U.S. Supreme Court said in explaining a different judgment about different constitutional questions in a different case. It is not the duty of the state courts to divine broad principles from Supreme Court opinions and to extrapolate them to new contexts. Rather, state courts must be meticulous in examining each new claimed right and determining whether and to what extent it must be expanded in new ways. Principles of comity, federalism, and the rule of law should make state courts particularly wary of using the federal constitution to expand upon newly created substantive due process rights that have the effect of undoing the work of state lawmakers.

ARGUMENT

I. A PROPER UNDERSTANDING OF FEDERAL JURISDICTION REQUIRES STATE COURTS TO CAREFULLY EXAMINE THE EFFECT ON STATE LAW OF THE SUPREME COURT'S JUDGMENT IN *OBERGEFELL V. HODGES*.

Determining with precision the current state of Texas law in light of a Supreme Court decision like *Obergefell* is a complicated endeavor. Commentators in the media and lawyers with a vested interest in doing so may act as if the answer is straightforward. The Supreme Court has spoken, they claim, and with the stroke of Justice Kennedy's pen, all state laws to the contrary have been swept away as if they never existed. The truth is much more complex, as most serious students of federal jurisdiction would admit. Indeed, if *Obergefell*

had been a case about the constitutionality of a provision of the tax code instead of a case about a contentious social policy question, few would deny that in future cases careful consideration must be given to the precise status of state law in light of the Supreme Court's decision.

By issuing its judgment in *Obergefell*, the Supreme Court has forced the states to effectuate the Court's vision of the "fundamental right to marry" by issuing and recognizing same-sex marriage licenses. *See Obergefell*, 135 S. Ct. at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person."). But this case does not involve the issuance or recognition of marriage licenses. *Obergefell*'s judgment does not include a command that public employers like the City of Houston take steps beyond recognizing same-sex marriage—steps like subsidizing same-sex marriages (through the allocation of employee benefits) on the same terms as traditional marriages. Nor does *Obergefell*'s judgment retroactively authorize state or local officials to violate state laws prior to June 26, 2015. Because none of the questions before the trial court are completely resolved by *Obergefell*'s judgment, the trial court on remand must do more than simply tip its hat in *Obergefell*'s direction and enter judgment for the defendants.

To be sure, language in the majority *opinion* from *Obergefell* may suggest potential answers to some of the questions before the trial court. But language in a Supreme Court opinion is not part of the Constitution. Remand orders

like the one issued by the Court of Appeals in this case rest on a common but nonetheless erroneous understanding of the nature of federal courts and their opinions. The United States Constitution vests federal courts with "[t]he judicial power" to decide certain "cases" and "controversies." U.S. CONST. art. III, § 2. And federal courts decide those "cases" and "controversies" through judgments, not opinions. As one legal scholar explained:

> The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment. As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that settles authoritatively what is to be done—and the only thing that the judgment settles authoritatively is what is to be done about the particular case or controversy for which the judgment was made.[2]

Indeed, Founding-era evidence forecloses any suggestion that judicial opinions—as opposed to judgments—carry inherent legal effect. For example, during the first ten years of the U.S. Supreme Court's existence, there was no such thing as a majority opinion; instead, justices sometimes (but not always) wrote short personal statements to explain their votes for or against the Court's judgments. *See, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall*, *in* SERIATIM: THE

[2] Edward A. Hartnett, *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126-27 (1999) (footnotes and internal alterations and quotation marks omitted).

SUPREME COURT BEFORE JOHN MARSHALL 1, 20 (Scott Douglas Gerber ed., 1998). In fact, for much of the U.S. Supreme Court's early history, justices sometimes explained their votes in written opinions, sometimes explained their votes orally, and rarely did anything to ensure that the records of their opinions were accurate: "Indeed, it was not until 1834 that the Court provided for the filing of its own written opinions with its own clerk, and even then oral opinions were not invariably reduced to writing." Hartnett, 74 N.Y.U. L. REV. at 130 (internal quotation marks omitted). That majority opinions did not even exist at the Founding strongly suggests that such opinions implicate no part of "[t]he judicial power" created by Article III of the federal Constitution. *Cf., e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 767-70 (2010) (relying on Founding-era practice as probative of the Constitution's original meaning).

Nor does language in a Supreme Court opinion, on its own, amount to preemptive law of the United States. *See* U.S. CONST. art. IV, § 2 (specifying that States are bound only by "[t]his Constitution, and the Laws of the United States . . . and all Treaties . . . [which] shall be the supreme Law of the Land"). This by no means is a revolutionary or even unconventional view of Supreme Court opinions. It is the view of many legal scholars that "[t]he opinion of an appellate court is the explanation of what the court is deciding; it is not a legally operative instrument. The court's formal action is embodied in its 'judgment,'

a separate document directing the disposition of the case."[3] *See also* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did.").

Inattention to the difference between opinions and judgments prevents important disputes from receiving the thoughtful attention they deserve in the lower courts and thereby undermines the judicial system's ability to reach correct results. Vigorous litigation over the contours of a newly created right to same-sex marriage neither disrespects the United States Supreme Court nor disparages those who have entered into same-sex marriages. It is the way our legal system sorts out the reach of a major decision recognizing a new constitutional right. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

During this sorting-out process, neither side's ideological commitments are spared. For example, after *District of Columbia v. Heller*, 554 U.S. 570 (2008), reaffirmed that individuals have "the right to keep and bear arms," U.S. CONST. amdt. II, lower courts narrowed the precedent from below. *See, e.g.*, *Williams v.*

[3] DANIEL J. MEADOR & JORDANA S. BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 75-76 (1994).

State, 10 A.3d 1167, 1177 (Md. 2011) ("If the Supreme Court, in [*Heller*'s] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly."); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (holding that where *Heller*'s judgment does not yield a "definitive constitutional rule" matters will be "left to the legislative process"). Likewise, after *Citizens United v. FEC*, 558 U.S. 310 (2010), held that nonprofit corporations have First Amendment rights to political speech, lower courts again narrowed the precedent from below. *See, e.g.*, *Western Tradition Partnership, Inc. v. Montana*, 363 Mont. 220, 274 (2011) (calling *Citizens United* "utter nonsense" and refusing to apply it to a Montana statute that reflected the State's "unique history and unique qualities which make Montana uniquely susceptible to the corrupting influence of unlimited corporate expenditures"); *American Tradition Partnership Inc. v. Bullock*, 132 S. Ct. 1307 (Feb. 17, 2012) (mem.) (Ginsburg, J., respecting grant of stay application) ("Montana's experience . . . since this Court's decision in *Citizens United* . . . will give the Court an opportunity to consider whether . . . *Citizens United* should continue to hold sway."). Whether these lower courts ultimately are vindicated or rebuked, their efforts to examine the contours of a newly recognized (or newly rediscovered) constitutional right ensures "the robust operation of our system of laws." *De Leon*, 791 F.3d at 625; *see also* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

Obergefell does not, on its own, resolve this case. As a unanimous panel of the Fifth Circuit did in *De Leon*, this Court should take this opportunity to remind the lower courts that all disputes involving the right to same-sex marriage have not been resolved, and lower courts have an obligation to carefully consider future claims related to the right announced in *Obergefell*. *See De Leon*, 791 F.3d at 625 (reminding federal district courts after *Obergefell* that "[w]e express no view on how controversies involving the intersection of these rights should be resolved but instead leave that to the robust operation of our system of laws . . .").

II. STATE COURTS ARE NOT BOUND BY THE FEDERAL DISTRICT COURT INJUNCTION IN *DE LEON*.

The Court of Appeals also remanded for proceedings "consistent with . . . *De Leon*." *Parker*, 477 S.W.3d at 355. This instruction was misleading, if not erroneous. The *De Leon* judgment is binding on the state officials who were defendants in that case and on their successors. *See Ex parte Young*, 209 U.S. 123 (1908) (holding that federal courts may enjoin state officials from violating the federal constitution). But state courts are not enjoined by—and cannot be enjoined by—federal court orders. As the Supreme Court held in *Ex parte Young*: "An injunction against a state court would be a violation of the whole scheme of our government." *Id.* at 162. While state courts should generally follow the U.S. Supreme Court's judgments regarding the federal consti-

tution, state courts are not bound by the judgment or the reasoning of the Fifth Circuit or the federal district court in *De Leon*. "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." *Lockhart v. Fretwell*, 506 U.S. 364, 375 (1993) (Thomas, J., concurring), cited by *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997). As one prominent law professor has explained: "Decisions of lower federal courts on issues of federal law are not binding precedents for a state court, which may properly view such precedents as no more persuasive than the views of the state courts of a different jurisdiction." Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1231 n.495 (1986); *see also* David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 771 (1979) ("[Lower] federal courts are no more than coordinate with the state courts on issues of federal law.").

Finally, state courts should be especially reluctant to rely on federal court opinions to extend substantive due process rights. Both state and federal courts applying *Obergefell* to new situations must heed the Supreme Court's warning that judges who create new substantive due process rights must provide "a *careful description* of the asserted fundamental liberty interest" that is historically rooted in our nation's past. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (emphasis added). This "careful description" requirement exists be-

cause the doctrine of substantive due process becomes particularly pernicious when courts elevate their policy preferences above those of legislatures. That is even truer where a state court erroneously thinks itself bound to follow—or even worse to expand—a lower federal court's opinion.

CONCLUSION

Whether or not this Court reinstates the temporary injunction, it should not send this case back to the lower courts without providing a clarifying instruction that (1) While *Obergefell* obligates the State to grant and recognize same-sex marriages, it does not bind state courts to resolve all other claims in favor of the right to same-sex marriage; and (2) *De Leon* binds executive branch officials but does not affect the authority of Texas courts to apply any provision of the Texas Constitution and Family Code to the extent doing so is not inconsistent with the Supreme Court's judgment in *Obergefell*.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 3,428 words, according to the word count of the word-processing software used to prepare this brief.

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CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served electronically on October 27, 2016, on all parties:

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