Supreme Court of Texas

No. 21-0510

Jack Pidgeon and Larry Hicks,

Petitioners,

v.

Sylvester Turner, in His Official Capacity as Mayor of the City of Houston, and the City of Houston,

Respondents

On Petition for Review from the
Court of Appeals for the Fourteenth District of Texas

JUSTICE DEVINE, dissenting to the denial of the petition for review.

Five years ago, we deemed this case sufficiently important to the jurisprudence of the state to grant review.[1] This iteration of the case involves the same parties, same facts, same causes of action,[2] and much of the same requested relief. The ultimate outcome hinges on the resolution of the same underlying questions, including "the reach and ramifications" of the United States Supreme Court's opinion in

[1] *See* TEX. GOV'T CODE § 22.001(a); *Pidgeon v. Turner*, 538 S.W.3d 73, 80 (Tex. 2017) (*Pidgeon II*).

[2] *See Pidgeon II*, 538 S.W.3d at 78-79.

Obergefell v. Hodges.[3] If the case was important enough to grant review five years ago, it is just as important now. What's more, the issues undergirding this particular case have never been decided by either this Court or the Supreme Court, so the outcome is not preordained. Denying review will leave significant constitutional issues undetermined and subject to assumption. Because we have a clear and compelling duty to say what the law is in light of Supreme Court opinions that are distinguishable from this one, I would grant the petition for review to determine the extent to which those cases, including *Obergefell* and *United States v. Windsor*,[4] govern the outcome here.

I

In this case, Houston taxpayers allege the City of Houston and its current and former mayors have violated clear and express state and local laws by extending tax-funded benefits to same-sex partners of public employees. The Houston City Charter provides that, "[e]xcept as required by State or Federal law, the City of Houston shall not provide employment benefits, including health care, to persons other than employees, their legal spouses[,] and dependent children."[5] While not "expressly refer[ring] to same-sex relationships, the voters' intent to deny tax-funded employment benefits to same-sex partners was undisputed" and expressed with clarity by its title: "Denial of Benefits to Same-Sex Partners and Related Matters."[6] Augmenting this local

---

[3] *Id.* at 89.

[4] 570 U.S. 744 (2013).

[5] HOUS., TEX., CHARTER ART. II, § 22 (2001).

[6] *Pidgeon II*, 538 S.W.3d at 79; HOUS., TEX., CHARTER ART. II, § 22.

prohibition, the Texas Constitution elucidates on who "legal spouses" are:

> (a) Marriage in this state shall consist only of the union of one man and one woman.
> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.[7]

Similarly, Section 6.204(c)(2) of the Texas Family Code prohibits "[t]he state or an agency or political subdivision of the state" from "giv[ing] effect to a . . . right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction."[8] The actions petitioners challenge are directly contrary to these laws, which neither this Court nor the Supreme Court has ever invalidated. The question my colleagues decline to answer is whether and to what extent the Supreme Court's subsequently issued opinions in *Windsor* and *Obergefell*, and their progeny, invalidate these laws.

In 2013, the Supreme Court decided *Windsor*, decreeing unconstitutional a section of the federal Defense of Marriage Act (DOMA) that defined marriage as a legal union between spouses of the opposite sex and "spouse" as referring only to a person of the opposite

---

[7] TEX CONST. art. I, § 32.

[8] TEX. FAM. CODE § 6.204(c)(2).

sex who is a husband or wife.[9] After that decision issued, Houston's city attorney advised then-Mayor of Houston Annise Parker that the City of Houston "'may extend benefits' to City employees' same-sex spouses who were legally married in other states 'on the same terms it extends benefits to heterosexual spouses.'"[10] In November 2013, Mayor Parker directed "that same-sex spouses of employees who have been legally married in another jurisdiction [will] be afforded the same benefits as spouses of a heterosexual marriage." This was a direct violation of Texas law.[11]

A month later, Jack Pidgeon and Larry Hicks (collectively, Pidgeon) sued the City and the Mayor (collectively, the Mayor) in state court (*Pidgeon I*), challenging the Mayor's directive and the concomitant provision of benefits.[12] The court issued a temporary restraining order, requiring the Mayor "and any other person(s) with knowledge of [the court's] Order, to cease and desist providing benefits to same-sex spouses of employees that have married in jurisdictions that recognize same-sex marriage."[13] Pursuant to that order, the Mayor informed City employees that spousal benefits for same-sex employees "may be interrupted, may not be available . . . , or . . . may be terminated at some

---

[9] *United States v. Windsor*, 570 U.S. 744, 752 (2013) (quoting and invalidating 1 U.S.C. § 7).

[10] *Pidgeon II*, 538 S.W.3d at 78.

[11] *Id.*

[12] *Id.*

[13] Original Complaint at 7, *Freeman v. Parker* (S.D. Tex. Dec. 26, 2013) (No. 4:13-cv-3755).

point during the litigation."[14] The Mayor removed *Pidgeon I* to federal court. The federal district court ultimately remanded the case back to state court, but by then, the state court had dismissed the suit for want of prosecution.[15]

In the interim, three City employees filed a friendly suit against the Mayor in federal court (*Freeman v. Parker*), requesting, among other things, that the Mayor "be preliminarily and permanently enjoined from prohibiting legally married lesbian or gay employees from accessing spousal benefits for their same-sex spouses as part of their compensation on the same basis as their non-gay legally married co-workers."[16] In August 2014, the federal district court in *Freeman* issued a preliminary injunction prohibiting the Mayor "from discontinuing spousal employment benefits to same-sex spouses of City employees."[17]

In October 2014, Pidgeon again sued the Mayor (*Pidgeon II*).[18] In that case, from which this appeal derives, the trial court denied the Mayor's jurisdictional pleas and temporarily enjoined her from extending benefits contrary to Texas law.[19]

---

[14] *Id.* at Ex. C.

[15] *Pidgeon II*, 538 S.W.3d at 78.

[16] Original Complaint at 11, *Freeman v. Parker* (S.D. Tex. Dec. 26, 2013) (No. 4:13-cv-3755).

[17] *See Freeman v. Parker*, No. 4:13-cv-3755 (S.D. Tex. Aug. 29, 2014) (Lake, J.). This injunction was to last "until such time as final judgment is entered in this case or it is dismissed[.]"

[18] *Pidgeon II*, 538 S.W.3d at 78.

[19] *Id.* at 79-80.

While the Mayor's subsequent interlocutory appeal was pending in the court of appeals,[20] the legal landscape changed dramatically when the Supreme Court handed down its sharply divided opinion in *Obergefell*, which holds that "same-sex couples may now exercise the fundamental right to marry in all [s]tates," and "there is no lawful basis for a [s]tate to refuse to recognize a lawful same-sex marriage performed in another [s]tate on the ground of its same-sex character."[21] The result was that "every [s]tate" must now "license and recognize same-sex marriage."[22]

With *Obergefell* in view, the Texas appeals court vacated the trial court's temporary injunction against the Mayor.[23] We unanimously reversed the court of appeals' judgment and remanded, holding that (1) the Fifth Circuit's decision in *De Leon v. Abbott*[24] did not bind the trial court on remand, and the trial court was "not required to conduct its proceedings 'consistent with' [*De Leon*]"; (2) Pidgeon could seek all appropriate relief on remand; and (3) the court of appeals "did not err by failing to affirm the temporary injunction 'to the extent' it required the

---

[20] *Id.* at 80.

[21] 576 U.S. 644, 681 (2015).

[22] *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting). After both *Obergefell* and *DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), were decided and a court of appeals had reversed and dissolved the temporary injunction imposed by the first trial court, the federal district court lifted the *Freeman* injunction against the Mayor. *See Parker v. Pidgeon*, 477 S.W.3d 353, 355 (Tex. App.—Houston [14th Dist.] 2015), *rev'd sub nom. Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. 2017) (*Pidgeon II*).

[23] *Parker*, 477 S.W.3d at 354.

[24] 791 F.3d 619 (5th Cir. 2015).

City to claw back payments made prior to *Obergefell*"[25] because Pidgeon had never requested, and the trial court had never granted, such an injunction.[26] We "decline[d] to instruct the trial court how to construe *Obergefell* on remand."[27] To the contrary, we expressly recognized that *Obergefell* was "not the end" and that the full extent of its "reach and ramifications" on issues not addressed in that case remain to be explored by the courts.[28]

Back in the trial court, Pidgeon filed an amended petition, seeking to "enjoin the mayor's *ultra vires* expenditures of public funds." He also pursued temporary and permanent injunctions requiring city officials to "claw back public funds that were spent in violation of" state law and the City's charter and that the Mayor "comply with section 6.204(c)(2) of the Texas Family Code." He further asked the trial court to declare that (1) the Mayor's directive to provide same-sex spousal benefits and continued enforcement of that directive violate the Texas Constitution, Section 6.204(c) of the Family Code, and the Houston City Charter; and (2) "the mayor and city officials have no authority to disregard state law merely because it conflicts with their personal beliefs of what the U.S. Constitution or federal law requires."

On motion for summary judgment, Pidgeon argued that *Obergefell* cannot "justify the defendants' past and present violations of state law." The Mayor filed a plea to the jurisdiction and a cross-motion

---

[25] *Pidgeon II*, 538 S.W.3d at 89.

[26] *Id.* at 85.

[27] *Id.* at 89.

[28] *Id.*

for summary judgment, both of which the trial court granted.[29] The court of appeals affirmed,[30] and Pidgeon now petitions for review.

We should grant the petition because the underlying issues have never been resolved, by either this Court or the Supreme Court. Past Supreme Court opinions do not inexorably dictate the outcome of this case because none of them address its central question: whether the same-sex spouses of City employees are constitutionally entitled to receive tax-funded spousal benefits under state law.

II

The Supreme Court's opinions about same-sex marriage are distinguishable on several counts. Start with *Windsor*, which adjudicated provisions of *federal* DOMA unconstitutional[31] but said absolutely nothing about the Texas laws defining marriage. Any resemblance between the two statutes is of no moment. To state the obvious, federal statutes aren't state statutes, and to decide that a federal statute is unconstitutional is not to say that a state statute is, too, however similar the laws may be. Beyond that, the principles animating the *Windsor* decision are not in play here. The Court deemed federal DOMA unconstitutional because it "deviat[ed]" from "the usual tradition of recognizing and accepting state definitions of marriage" and invaded the arena of domestic relations—long "regarded as a virtually

---

[29] *Pidgeon v. Turner*, 625 S.W.3d 583, 593 (Tex. App.—Houston [14th Dist.] 2021).

[30] *Id.* at 590, 609.

[31] 570 U.S. at 769-75.

exclusive province of the [s]tates."[32] The Texas laws, by which the state regulates its own "exclusive province," do not implicate the same considerations. This case presents the inverse of *Windsor*.

Next, *Obergefell*, which holds that "same-sex couples may exercise the fundamental right to marry in all [s]tates"[33] and states must now "license and recognize same-sex marriage."[34] That's all. That holding "hinged on marriage's status as a fundamental right."[35] Alleged infringement of fundamental rights is subject to review under the strict-scrutiny standard, but such "[s]trict review gives way to substantial deference when fundamental rights or protected classes are not at stake."[36] Where no fundamental rights are involved, the laws at issue are "presumed to be valid"[37] if "the distinctions made by the statute are 'rationally related to a legitimate state interest.'"[38]

This case involves no fundamental rights—the central question is about entitlement to employment benefits, which the City has no

---

[32] *Id.* at 766 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)); *see id.* at 775.

[33] *Obergefell*, 576 U.S. at 681.

[34] *Id.* at 687 (Roberts, C.J., dissenting).

[35] *See Pidgeon v. Turner*, 549 S.W.3d 130, 132 (Tex. 2016) (Devine, J., dissenting to the denial of the petition for review) (citing *Obergefell*, 576 U.S. at 675).

[36] *Id.* at 131 (citing *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 426 (2010); and then citing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001)).

[37] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

[38] *See Pidgeon*, 549 S.W.3d at 132 (Devine, J., dissenting to the denial of the petition for review) (quoting *Cleburne*, 473 U.S. at 440).

constitutional duty to offer to its employees or their spouses.[39] Thus, any analysis of that question would employ a standard far more deferential to state law than the strict scrutiny by which the Court decided *Obergefell*. As a result, that case's enumeration of "governmental rights, benefits, and responsibilities" states *may* confer on married couples if they choose, including workers' compensation benefits, does not prejudge the outcome of Pidgeon's case.[40]

Even if *Windsor* plus *Obergefell* equals an outcome in the Mayor's favor, we won't know that until the issues have been fully litigated, which includes consideration by the highest courts. In short, no previous case commands a certain outcome in *this* case because none has involved the issues and laws presented here. In my view, the outcome is far from inevitable.

Finally, the existence of the federal district court's preliminary injunction when Pidgeon filed this lawsuit should not inhibit us from granting his petition. Pidgeon argues that the Mayor acted without legal authority, or *ultra vires*. Though the injunction was lifted in the wake of *Obergefell* and *De Leon*, the Mayor asserts that she was required to comply with it when it was extant. She argues that because the injunction was in full force when Pidgeon filed his lawsuit, she could not have acted without legal authority by continuing to provide benefits to same-sex spouses of City employees as the injunction required. And she further maintains that, before this suit was filed, other laws changed that validated or required her actions. These arguments should not

---

[39] *See id.* (citing *Obergefell*, 576 U.S. at 675).

[40] *Obergefell*, 576 U.S. at 669-70; *see also id.* (explaining that "the States are in general free to vary the benefits they confer on all married couples").

discourage us from granting review. Five years ago, we deemed the case important enough to the state's jurisprudence to merit our review despite the existence of the injunction.[41] It has not become less important with the passage of time. If it warranted our review then, it warrants it now.

III

Many may assume that we know the final answer to the questions at the core of this litigation. We do not. *Obergefell* and related cases may have sweeping consequences, but we do not yet know what the consequences are for this litigation because no case compels the resolution of the underlying issues *here*. When a case is important to the jurisprudence of the state, we abdicate our role as judges if we simply sit back and refuse to decide based on an assumption about what law will be declared down the road. We have a responsibility to say what it is *now*.[42] We should say it.

For all these reasons, I would grant the petition for review. Because the Court does not, I respectfully dissent.

John P. Devine
Justice

OPINION DELIVERED: May 27, 2022

[41] *See* TEX. GOV'T CODE § 22.001(a).

[42] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).