Cause No. 2014-61812

Jack Pidgeon and **Larry Hicks**, Plaintiffs, v. **Sylvester Turner**, in his official capacity as Mayor of the City of Houston, and **City of Houston**, Defendants	IN THE DISTRICT COURT HARRIS COUNTY, TEXAS 310th JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Jack Pidgeon and Larry Hicks respectfully move for summary judgment, as there are no genuine issues of material fact and the plaintiffs are entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a.

UNDISPUTED FACTS

Texas law forbids the state and its subunits to extend spousal employment benefits to same-sex couples. *See* Tex. Family Code § 6.204(c)(2) (forbidding the state and its subdivisions to "give effect" to any "benefit . . . asserted as a result of a marriage between persons of the same sex"). On November 19, 2013, then-Mayor Annise Parker defied this provision of state law and directed the city of Houston to extend spousal employment benefits to the same-sex partners of city employees who had obtained marriage licenses from other States. Parker took this action more than a year and a half before *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), held that states must recognize same-sex marriages performed in other jurisdictions. Parker claimed, however, that she could defy section 6.204(c)(2) because she thought the state's marriage

laws were unconstitutional—and she pointed to an opinion of the Houston City Attorney to buttress this assertion. But no court had declared section 6.204(c)(2) unconstitutional or enjoined the city from enforcing it at the time that Parker issued her edict.

The city's policy continues to this day—and it continues to violate section 6.204(c)(2) of the Texas Family Code. The only issues for this Court to resolve are pure questions of law: (1) Whether the city can defend its present-day defiance of section 6.204(c)(2) by relying on the Supreme Court's decisions in *Obergefell* and *Pavan v. Smith*, 137 S. Ct. 2075 (2017); and (2) Whether the city can defend its pre-*Obergefell* defiance of section 6.204(c)(2) by relying on then-mayor Parker's personal beliefs that the statute was unconstitutional.

ARGUMENT AND AUTHORITIES

The mayor and city's actions are *ultra vires* because they violate section 6.204(c)(2) of the Texas Family Code, and neither *Obergefell* nor *Pavan* can justify the defendants' past and present violations of state law. The plaintiffs are therefore entitled to an injunction that will: (1) enjoin Mayor Sylvester Turner and the City of Houston from spending public funds in violation of section 6.204(c)(2); and (2) compel the mayor and the city to claw back taxpayer money that former Mayor Annise Parker and other city officials unlawfully spent on spousal benefits for homosexual partners of city employees.

I. The Plaintiffs Are Entitled To An Injunction That Forbids The City To Spend Public Funds In Violation Of Section 6.204(c)(2)

Section 6.204(c)(2) of the Texas Family Code forbids the State and its subunits to spend taxpayer money on any "benefit . . . 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." The mayor and the city of Houston have been violating this statute since November 19,

2013, when then-Mayor Annise Parker directed the city to give spousal benefits to homosexual partners of city employees who had obtained marriage licenses in states or foreign countries that recognized same-sex marriage. And the city is continuing to violate section 6.204(c)(2) by enforcing the directive of November 19, 2013. The city appears to believe that the Supreme Court's pronouncements in *Obergefell* and *Pavan* prevent it from complying with section 6.204(c)(2), but it remains possible to comply with both the statute and the Supreme Court's pronouncements—even under the broadest possible interpretations of *Obergefell* and *Pavan*.

A. If *Obergefell* And *Pavan* Require Equal Spousal Benefits For Same-Sex And Opposite-Sex Married Couples, Then The Defendants Must Comply With 6.204(c)(2) By Withdrawing Spousal Benefits From All City Employees

Neither *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), nor *Pavan v. Smith*, 137 S. Ct. 2075 (2017), requires the city to extend benefits to same-sex spouses of city employees in defiance of section 6.204(c)(2). Even under the broadest possible interpretation of *Obergefell* and *Pavan*, those cases hold at most that states and their subdivisions must treat same-sex and opposite-sex couples *equally* with regard to spousal employee benefits. Neither case holds that state or city employees have a *substantive* constitutional entitlement to benefits for their spouse—or that they have a substantive constitutional entitlement to any particular package of employee spousal benefits. The City of Houston could withdraw spousal benefits from all city employees tomorrow without violating the Constitution, and without violating anything in *Obergefell* and *Pavan*. *See* Cass R. Sunstein, *The Right To Marry*, 26 Cardozo L. Rev. 2081, 2092 (2005) ("[E]xisting doctrine does not require economic benefits to be provided to married people as such."). Indeed, at oral argument in the state supreme court, the

defendants disclaimed any suggestion of a substantive constitutional right to employee spousal benefits—either for opposite-sex or same-sex married couples.[1]

So if the defendants believe that *Obergefell* and *Pavan* forbid the disparate treatment of same-sex and opposite-sex married couples, then they must comply with Texas Family Code § 6.204(c)(2) by withdrawing spousal benefits from *all* city employees. That would comply with the broadest possible understanding of *Obergefell* by ensuring equal treatment of same-sex and opposite-sex spouses. And it would comply with Texas Family Code § 6.204(c)(2), which prohibits the payment of "benefit[s]" asserted as the result of a same-sex marriage. Under no circumstance may the city comply with *Obergefell* and *Pavan* by violating section 6.204(c) when it has a means of complying with *both* state law and the Supreme Court's rulings.

B. *Obergefell* and *Pavan* Need Not Be Construed To Require States Or Their Subdivisions To Extend Equal Taxpayer Subsidies To Same-Sex And Opposite-Sex Couples, And They Do Not Require Equal Spousal Benefits For All City Employees

Because the defendants have recognized (as they must) that there is no substantive constitutional entitlement to spousal employment benefits, the issue of spousal employment benefits is entirely different from the licensing and recognition of marriage. The latter is a "fundamental right" that cannot be withdrawn even if a State withholds the right from everyone, while the former is a taxpayer-funded gratuity that the State is under no constitutional obligation to provide.

1. *See* Oral Argument at 29:41 (JUSTICE GUZMAN: "But how are spousal benefits a fundamental right or deeply rooted in this nation's history and tradition? If so, I understand your point about marriage, I'm just trying to get to spousal benefits in that same category." MR. ALEXANDER: ". . . We are not arguing that there is some sort of fundamental right to spousal benefits. What we are saying is . . . that if you extend spousal benefits to opposite-sex couples, then under *Obergefell* you also have to extend it to same sex, not because there's a fundamental right to employment benefits or spousal benefits, but because there's a fundamental right that both of those marriages be treated equally."), available at http://www.texasbarcle.com/CLE/SCPLAYER.ASP?sCaseNo=15-0688 (last visited on July 2, 2018).

The city appears to believe that *Obergefell* compels a State to offer the same taxpayer-funded subsidies to same-sex and opposite-sex couples, but *Obergefell* did not resolve this question. *See Pidgeon v. Turner*, 538 S.W.3d 73, 86 (Tex. 2017) ("[W]e agree with Pidgeon that the Supreme Court did not address and resolve [the] specific issue in *Obergefell*" of "whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples"). Neither did *Pavan*, which involved only whether the same-sex spouse of a lesbian mother had the same right to be listed on a birth certificate as an opposite-sex spouse would have. Neither *Obergefell* nor *Pavan* resolves the unique questions surrounding taxpayer subsidies for homosexual couples, which presents a different issue from the right to have one's marriage licensed and recognized by the State.

Obergefell merely forbids a State to "exclude same-sex couples *from civil marriage* on the same terms and conditions as opposite-sex couples," 135 S. Ct. at 2605. But a denial of spousal employment benefits is not an exclusion from civil marriage. A State employer who refuses to offer spousal employment benefits has not excluded its employees from civil marriage; it has simply failed to provide a taxpayer-funded subsidy or a benefit to married couples.

Suppose that a city decides to withhold spousal health benefits from employees whose spouses have reached the age of 65, on the rationale that those spouses are eligible for Medicare and therefore do not need health care provided at the expense of city taxpayers. A policy of this sort is entirely constitutional; it does not infringe the "fundamental right" to marry and it does not "exclude" the couple "from civil marriage." It simply withholds a taxpayer subsidy from a married couple that other married couples happen to receive.

A State may also require married couples who engage in high-risk behaviors to pay higher premiums for health benefits provided by the State. Under Texas law, for example, every person enrolled in the Texas Employees Group Benefits Program

(GBP) health insurance plans must certify whether they or their spouse or any of their dependents use tobacco. If any state employee or his spouse or dependents used any tobacco products five or more times within the past three consecutive months, then the employee must pay an additional $30 per month for health insurance for each of these tobacco users in his household (up to $90 per month per household). *See* https://www.ers.state.tx.us/Customer_Support/FAQ/Tobacco_Policy (last visited on July 2, 2018). A policy of this sort is perfectly constitutional, even though it classifies and distinguishes among married couples based on their behavior. Nothing in the Constitution or in *Obergefell* requires the States to provide the same taxpayer subsidies to all married couples. States may use taxpayer subsidies to encourage behaviors that the State wishes to promote (such as smoking cessation)—and States may withhold taxpayer subsidies from those who are less likely to need them (such as married couples who qualify for Medicare).

A State is likewise entitled to confer taxpayer subsidies on behaviors that advance the State's interest in encouraging childbirth and childrearing, while withholding those taxpayer subsidies from constitutionally protected activities that do not advance this interest. For example, the government may award tax credits to taxpayers who have dependent children at home, and withhold those tax credits from childless taxpayers, even though the Supreme Court has said that the Constitution protects the decision to choose *not* to have children. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). The government may also subsidize the costs of childbirth while refusing to subsidize abortion, even though the Supreme Court has recognized a constitutional right to abort an unborn child. *See Harris v. McRae*, 448 U.S. 297 (1980). A State may not punish or fine individuals who refrain from procreating or who abort their unborn

children, but it need not give taxpayer subsidies to those who exercise these purported constitutional rights.

For the same reasons, a State may withhold taxpayer subsidies from married couples of the same sex, even though *Obergefell* held that States must license and recognize same-sex marriages. Opposite-sex marriages advance the State's interests in procreation to a greater extent than same-sex marriages do. First, opposite-sex unions are the only relationships that can produce offspring, which are needed to ensure economic growth and the survival of the human race. Same-sex unions are biologically incapable of producing children, and every child adopted by a homosexual parent is the product of some type of opposite-sex union. No child enters the world without a biological mother and a biological father. Second, opposite-sex marriages promote childrearing by reducing out-of-wedlock births and channeling procreative heterosexual intercourse into committed relationships. The sexual practices of homosexuals do not result in pregnancy, so same-sex marriage does not further this goal. Opposite-sex marriages therefore do more to advance the State's interests in promoting childbirth and childrearing than same-sex marriages do. *Obergefell* does not require taxpayer subsidies for same-sex marriages—any more than *Roe v. Wade* requires taxpayer subsidies for abortions.

II. The Plaintiffs Are Entitled To An Injunction Requiring The Defendants To Claw Back Public Funds That They Previously Spent In Violation Of Section 6.204(c)(2)

The plaintiffs also request an injunction requiring the defendants to claw back public funds that they previously spent in violation of section 6.204(c)(2). The plaintiffs have standing to seek this remedy, and the Court should order the defendants to recoup the public funds that they unlawfully spent in enforcing Mayor Parker's edict of November 19, 2013.

A. The Plaintiffs Have Standing To Pursue A Clawback Remedy

The plaintiffs undoubtedly have standing as taxpayers to seek an injunction to prevent *future* payments that violate section 6.204(c)(2), but a taxpayer's desire to recover *past* illegal expenditures of public funds is not, by itself, sufficient to confer standing. *See, e.g.*, *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). Instead, a taxpayer who seeks a clawback remedy must show a "particularized injury distinct from that suffered by the general public." *Bland Indep. School Dist.*, 34 S.W.3d at 555–56; *see also Williams*, 52 S.W.3d at 178–79. Pidgeon and Hicks have suffered a "particularized injury" from the mayor and city's illegal expenditures of taxpayer money.

Pidgeon and Hicks have suffered more than the mere pecuniary injury of having their money taken and spent in violation of state law. Pidgeon and Hicks have suffered a "particularized" injury because they are devout Christians who have been compelled by the mayor's unlawful edict to subsidize homosexual relationships that they regard as immoral and sinful, in violation of their sincere religious beliefs. Their injury is as particularized as the injury suffered by Hobby Lobby when the Obama Administration tried to compel it to subsidize abortifacients. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (holding that Hobby Lobby had suffered a "substantial burden" on its religious beliefs). And their injury is as particularized as the injury suffered by Edwin Lee, an Amish employer who was compelled to pay social-security taxes in violation of his sincere religious beliefs. *See United States v. Lee*, 455 U.S. 252 (1982) (rejecting Lee's free-exercise challenge to social-security taxes on the merits without questioning Lee's standing to bring the claim).

Of course, there are other devout Christian taxpayers who share this injury with Pidgeon and Hicks, but that was equally true in *Hobby Lobby*: Other Christian-owned businesses were injured by the contraception mandate, but that did not make Hobby Lobby's injury into a generalized grievance shared with all members of the public.

And there were Old Order Amish employers in addition to Edwin Lee who were injured by the compelled payment of social-security taxes, but that did not make Lee's claim into a generalized grievance either. This injury that Pidgeon and Hicks have suffered is particularized—unlike the mere financial grievance that they share with every other taxpayer in Houston—and they need not limit their claims to purely prospective relief.

B. The Court Should Order The Defendants To Undo Previous Payments Of Spousal Benefits For Same-Sex Couples

For the same reasons that the Court should enjoin the defendants from violating section 6.204(c)(2) in the future, it should also order the defendants to undo their past unlawful expenditures of public funds on spousal benefits for same-sex couples. *Obergefell* provides no excuse for the defendants' previous violations of section 6.204(c)(2). If the defendants believe that *Obergefell* requires equal treatment of same-sex and opposite-sex married couples, then they should have complied with section 6.204(c)(2) by withholding spousal benefits from *all* city employees. *See* Section I.A, *supra*. The Court should order the City to claw back all public funds that it spent on spousal benefits for same-sex couples, and if the City believes that *Obergefell* forbids disparate treatment of same-sex and opposite-sex married couples, then it must also claw back the money it spent on spousal benefits for opposite-sex couples.

C. At The Very Least, The Court Should Order The Defendants To Undo The Payments Of Spousal Benefits For Same-Sex Couples That Occurred Before June 26, 2015

Even if *Obergefell* could somehow shield the city's defiance of section 6.204(c)(2), it cannot support the city's pre-*Obergefell* disregard of the State's marriage laws. When former Mayor Annise Parker began extending spousal employment benefits to same-sex partners in November 2013, same-sex marriage was illegal in Texas, and the Supreme Court had not yet issued its ruling in *Obergefell*. So the mayor and the city have no defense for the pre-*Obergefell* expenditures that they made in

violation of state law, as all city employees affected by Parker's order were unmarried for purposes of state law between November 2013 and June 26, 2015.

Obergefell required the State to begin recognizing same-sex couples who obtained marriage licenses in other jurisdictions as "married" as of June 26, 2015. But it does not require the State to retroactively change the marital status of these couples during the pre-*Obergefell* era. Indeed, if *Obergefell* compels the States to regard same-sex couples as "married" from the moment they obtained an out-of-state marriage license, then all sorts of absurdities will follow. First, the City of Houston—and every state employer in America—would be constitutionally obligated to retroactively provide spousal employment benefits to *every* same-sex couple that obtained a marriage license before *Obergefell*, and they must retroactively provide the benefits that were unconstitutionally withheld between the time that they secured a marriage license and the time of the ruling in *Obergefell*. Mayor Parker's order of November 2013 does not come anywhere close to fulfilling *this* supposed constitutional obligation; it merely recognizes out-of-state same-sex marriages going forward and makes no attempt to correct the city's *past* withholding of spousal employment benefits. But if the city wants to assert that *Obergefell* retroactively changes the marital status of same-sex couples, then Mayor Parker's order barely scratches the surface of the city's constitutional obligations. And *every* state and local government in America would be constitutionally required to retroactively provide the spousal employment benefits that were denied to same-sex couples before the ruling in *Obergefell*.

Second, if *Obergefell* retroactively changes the marital status of same-sex couples under Texas law, then the City of Houston (and every state and employer in Texas) must retroactively recognize—and retroactively extend spousal employment benefits to—every same-sex couple in Texas who qualified for common-law marriage under the standards applied to opposite-sex couples. *See* Texas Family Code § 2.401. Mayor Parker's order did nothing to extend spousal employment benefits to *this* subset of

same-sex couples. But if the city wants to contend that *Obergefell* is retroactive, then the city must retroactively provide spousal employment benefits to these couples, and it must extend those benefits backward in time to the date on which they first met the standards for common-law marriage.

Finally, if *Obergefell* is retroactive, then the city of Houston (and all other municipalities in Texas) will be liable for damages under 42 U.S.C. § 1983 for every incident in which they denied recognition to or refused to license any same-sex marriage prior to *Obergefell*. *See Owen v. City of Independence*, 445 U.S. 622 (1980) (municipalities cannot claim qualified immunity under 42 U.S.C. § 1983).

So the Court should hold that *Obergefell* does not retroactively make same-sex couples married under Texas law before June 26, 2015. That means *Obergefell* cannot compel or excuse the city's decision to violate section 6.204(c)(2) before the *Obergefell* ruling issued, and the defendants must recoup all public funds spent on spousal benefits for same-sex couples prior to June 26, 2015.

III. The Court Should Declare That The Mayor And City Officials Have No Right To Violate State Law Merely On Account Of Their Personal Beliefs That State Law Is Unconstitutional

When Mayor Annise Parker issued her directive on November 19, 2013, she attempted to justify her defiance of state law by announcing that the state's marriage laws contradicted her personal interpretation of the U.S. Constitution—even though the binding Supreme Court precedent at the time had *rejected* a constitutional challenge to laws that limited marriage to opposite-sex couples. *See Baker v. Nelson*, 409 U.S. 810 (1972). The mayor's resort to these self-help tactics was unlawful, and this Court should enjoin the mayor and city officials from deploying this maneuver in the future.

Local officials cannot disobey state law based on their personal belief that a law violates the Constitution—especially at a time when the existing precedent of the

Supreme Court rejects the local officials' constitutional objections. *See Baker*, 409 U.S. 810. If a local official believes a state law is unconstitutional, then he or she must seek redress in the state or federal judiciary, not resort to self-help based on one's own theory of what the Constitution should mean. The court will be inviting anarchy if it allows Parker and the city to get away with their pre-*Obergefell* defiance of state law. *Any* local official can concoct a constitutional objection to *any* state law, and Parker's behavior would subordinate every decision of the state legislature to the subjective and idiosyncratic constitutional theories of individual local officials. The Court should enjoin the mayor and the city from using these tactics against other state laws that they dislike.

CONCLUSION

The motion for summary judgment should be granted, and the Court should enter judgment for the plaintiffs.

Respectfully submitted.

/s/ Jared R. Woodfill
JARED R. WOODFILL
State Bar No. 00788715
Woodfill Law Firm, P.C.
3 Riverway, Suite 750
Houston, Texas 77056
(713) 751-3080 (phone)
(713) 751-3058 (fax)
jwoodfill@woodfilllaw.com

Dated: July 2, 2018

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on July 2, 2018, this document was served in accordance with Rule 21a of the Texas Rules of Civil Procedure, electronically through the electronic filing manager or by certified registered U.S. mail, upon all counsel of record and unrepresented parties, including:

Judith L. Ramsey
Chief, General Litigation Section
Texas Bar No. 16519550
judith.ramsey@houstontx.gov

John B. Wallace
Senior Assistant City Attorney
Texas Bar No. 20769750
john.wallace@houstontx.gov

Kathleen Hopkins Alsina
Texas Bar No. 09977050
kate.alsina@houstontx.gov

Darah Eckert
Texas Bar No. 24007141
darah.eckert@houstontx.gov

David L. Red
Texas Bar No. 16656900
david.red@houstontx.gov

City of Houston Legal Department
900 Bagby, 4th Floor
Houston, Texas 77002
(832) 393-6491

Counsel for Defendants

/s/ Jared R. Woodfill
JARED R. WOODFILL
Counsel for Plaintiffs

I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this August 14, 2018

Certified Document Number: 80647056 Total Pages: 13

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com