IN THE SUPREME COURT OF TEXAS

NO. 15-0688

JACK PIDGEON AND LARRY HICKS, PETITIONERS,

v.

MAYOR SYLVESTER TURNER AND 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.

Without substantial discussion or analysis, the court of appeals assumed that because the United States Supreme Court declared couples of the same sex have a fundamental right to marry, the Equal Protection Clause of the Fourteenth Amendment requires cities to offer the same benefits to same-sex spouses of employees as to opposite-sex spouses. *See Parker v. Pidgeon*, 477 S.W.3d 353, 354–55 (Tex. App.—Houston [14th Dist.] 2015) (per curiam). I disagree. Marriage is a fundamental right. Spousal benefits are not. Thus, the two issues are distinct, with sharply contrasting standards for review. Because the court of appeals' decision blurs these distinctions and threatens constitutional standards long etched in our nation's jurisprudence, I would grant review.

I

A 2001 amendment to the Houston City Charter prohibits the City from "provid[ing] employment benefits, including health care, to persons other than employees, their legal spouses and

dependent children." Houston, Tex., Charter, art. II, § 22. Because Texas law defined marriage to exist only between persons of the opposite sex, same-sex partners were accordingly not entitled to receive such benefits. In November 2013, however, the City announced it would change course. It began offering benefits such as health insurance to same-sex partners of City employees if they married in a state that recognized same-sex marriage. It did so despite a Texas law expressly prohibiting it from giving effect to a "right or claim to any . . . benefit . . . asserted as a result of a marriage between persons of the same sex." TEX. FAM. CODE § 6.204(c)(2).

Two Houston taxpayers sued the City and its Mayor (collectively, the "City"), seeking temporary and permanent injunctions prohibiting the City from providing benefits to same-sex spouses of City employees married in other states. *See Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001) ("Taxpayers in Texas have standing to enjoin the illegal expenditure of public funds . . . ."). The City countered with a plea to the jurisdiction. After the trial court denied the City's plea and granted a temporary injunction, the City filed an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4), (8).

While the City's appeal was pending, the Supreme Court of the United States decided *Obergefell v. Hodges*, announcing that "same-sex couples may exercise the fundamental right to marry in all States," and "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the grounds of its same-sex character." 135 S. Ct. 2584, 2607–08 (2015). Citing *Obergefell*, the court of appeals reversed the trial court's temporary injunction and remanded for further proceedings. 477 S.W.3d at 354–55.

The taxpayers petitioned for review in this Court, urging that *Obergefell* does not require the City to offer employment benefits to same-sex spouses of City employees and Texas law prohibits the City from doing so. The City responded that this Court lacks jurisdiction over this interlocutory appeal and the Constitution requires the City to extend benefits to all spouses of City employees.

II

Obergefell concerned access to marriage, not an Equal Protection challenge to the allocation of employment benefits. The court of appeals apparently assumed that, if the Supreme Court concluded no government interest justifies recognizing marriage as only between couples of the opposite sex, then no interest justifies offering different benefits to same-sex and opposite-sex spouses of City employees. But, as discussed below, marriage—not spousal employment benefits—is a fundamental right, and laws limiting access to a fundamental right receive stricter scrutiny than laws distributing government benefits. As the majority in *Obergefell* recognized, "the Constitution contemplates that democracy is the appropriate process for change" when fundamental rights are not at stake. 135 S. Ct. at 2605.

By assuming the wrong level of scrutiny, the court of appeals removed an important policy decision from the democratic process, preventing the State from pursuing legitimate and important government interests. The court of appeals' error and the uncertainty it creates vests this Court with jurisdiction, *see Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 667 (Tex. 2008), and I believe we should grant review to correct it.

A

It is well settled that laws abridging a fundamental right or classifying persons according to "race, alienage, or national origin" receive stricter scrutiny than those that do not. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Strict scrutiny "is a searching examination," *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013), demanding that the law be "narrowly tailored to serve a compelling government interest," *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015); *Fisher*, 133 S. Ct. at 2419. Only compelling interests justify such restrictions, and even then there must be a close fit between the restrictions and their goal. *Cleburne*, 473 U.S. at 440.

Strict review gives way to substantial deference when fundamental rights or protected classes are not at stake. In such cases, "courts generally view constitutional challenges with the skepticism due respect for legislative choices demands." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) (footnote omitted); *see Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001). Legislation is generally "presumed to be valid" if the distinctions made by the statute are "rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.

These divergent levels of scrutiny serve a purpose: they balance the government's power to act in the public good against individual liberty and freedom. From the Founding to modern times, it has always been understood that legislatures, rather than courts, decide what policies are in the people's best interest. In Alexander Hamilton's words, "[t]he legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated," whereas the judiciary "may truly be said to have neither force nor will, but merely judgment." THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). These same principles emerge in the

"minimum 'rational-basis review'" applicable to general social and economic legislation. *See Garrett*, 531 U.S. at 366. When fundamental rights and protected classes are not at stake, the legislature may identify goals and take rational steps toward them.

The court of appeals upset this balance between the judiciary and the legislature by inappropriately applying strict scrutiny. The Supreme Court's holding in *Obergefell* hinged on marriage's status as a fundamental right. *Obergefell*, 135 S. Ct. at 2604. This case, however, involves employment benefits, which the City obviously has no constitutional duty to offer to its employees, let alone their spouses. Though the laws in *Obergefell* denying access to marriage were subject to strict scrutiny, the laws in this case allocating benefits among married couples are not.

Indeed, criteria that cannot be used to restrict marriage may still be relevant when allocating benefits. Consider, for example, that the Supreme Court allowed the government to condition continued eligibility for child disability benefits on not marrying someone who did not also qualify for these benefits, even though the government obviously could not bar disabled persons from marriage for failing this requirement. *Califano v. Jobst*, 434 U.S. 47, 58 (1977). Similarly, the Supreme Court allowed Congress to grant continued social security survivor's benefits to widows who remarried after 60, but terminate the same benefits to divorced persons who remarried after 60. *Bowen v. Owens*, 476 U.S. 340, 341–42, 350 (1986). This condition was acceptable for allocating benefits, but could not have been used to prevent anyone from marrying. The same distinction applies here.

The City, however, emphasizes *Obergefell*'s holding that states may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell*,

135 S. Ct. at 2605. But *Obergefell* concerned same-sex couples' right to marry—i.e., to enter into marriage—and must be interpreted accordingly. In Texas, both same- and opposite-sex couples must obtain a marriage license from a county clerk. TEX. FAM. CODE § 2.001(a). They must generally be over 18 years of age, *id.* § 2.101, should provide proof of their age and identity, *id.* § 2.005(a), and should not be closely related to the intended spouse or be already married to someone else, *id.* §§ 2.004(b)(5)–(6), .009(a)(5). These are the types of "terms and conditions" that the Supreme Court held states must allow same-sex couples to enter into marriage on. *Obergefell* did not require that the same benefits be provided to all.

Thus, claims by same-sex spouses of City employees to employment benefits do not enjoy the benefit of strict scrutiny. Indeed, in *Romer v. Evans*, the Supreme Court considered whether a law denying special protections to homosexuals had "a rational relation to some legitimate end." 517 U.S. 620, 631 (1996). In *United States v. Windsor*, the Court examined whether federal law defining marriage as between a man and a woman had a "legitimate purpose." 133 S. Ct. 2675, 2696 (2013). And in *Obergefell*, when the majority conceded that democracy is normally "the appropriate process for change," it made an exception only for laws abridging fundamental rights, without suggesting that same-sex couples are a suspect class. 135 S. Ct. at 2605.

Admittedly, the *Obergefell* majority assumed same- and opposite-sex couples would receive the same benefits, reasoning that "[w]ere the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at 2606. The Court described the many benefits married couples enjoy, noting that no difference exists

"between same- and opposite-sex couples with respect to" how the states have "contributed to the fundamental character" of marriage by tying so many rights and responsibilities to it. *Id.* at 2601. Yet, the fact remains that, at most, the majority merely *described* the benefits that states confer on married couples and *assumed* states would extend them to all married couples. Generalized assumptions about state laws do not constitute a legal holding, much less sweep aside well-established standards of review.

Lest there be any doubt about *Obergefell*'s limited role when fundamental rights are not at stake, the Supreme Court has repeatedly (even more recently than *Obergefell*) admonished that

> [i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Hurst v. Florida, 136 S. Ct. 616, 623 (2016) (alteration in original) (quoting another source); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). To the extent *Obergefell*'s wording casts doubt on the traditional deference owed to the democratic process when neither fundamental rights nor suspect classes are involved, we must still follow the Supreme Court's well-established Equal Protection jurisprudence.

B

The "[i]nherent differences between men and women" are, as Justice Ginsburg once explained, "cause for celebration." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The "two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Id.* (alteration in original) (quoting *Ballard v. United States*, 329 U.S. 187, 193

(1946)). Surely the same is true in marriage, the closest and most intimate of communities in our nation. Yet, by applying strict scrutiny, the court of appeals foreclosed any argument that the State has a legitimate or important interest in celebrating these differences when they occur in marriage.

Consider the State's interest in encouraging procreation. The State may well have believed that offering certain benefits to opposite-sex couples would encourage procreation within marriage. After all, benefits such as health insurance provide financial security as couples decide whether to have a child. An opposite-sex marriage is the only marital relationship where children are raised by their biological parents. In any other relationship, the child must be removed from at least one natural parent, perhaps two, before being adopted by her new parent(s). This does not diminish any child's inherent dignity, a fact the City presumably recognizes by extending benefits to their employees' children regardless of the employees' marital status. But it does explain why the State might choose to direct resources to opposite-sex couples.

Conversely, at least five justices of the Supreme Court have reasoned that the government has a compelling interest in ensuring access to contraception. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785–86 (2014) (Kennedy, J., concurring); *id.* at 2787, 2799 (Ginsburg, J., dissenting, joined by Justices Breyer, Kagan, and Sotomayor). Obviously, any government interest in providing access to contraceptives is linked to opposite-sex couples: they must plan *not* to get pregnant, whereas same-sex couples must undergo extensive planning and preparation before adopting or using in-vitro fertilization. Again, differences exist between same- and opposite-sex couples, and such differences may explain the State's allocation of benefits.

Admittedly, the State's policy is not perfect. Not all opposite-sex couples want, or are even capable of, procreation. But if rational-basis review instead of strict scrutiny applies, then the imperfections are not fatal. "The rationality commanded by the Equal Protection Clause does not require States to match [class] distinctions and the legitimate interests they serve with razorlike precision." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83–84 (2000) (discussing age discrimination). At times, the State may rely on one characteristic—such as the opposite-sex nature of a marriage—as a proxy for other abilities—such as procreation within marriage—that relate to the State's interests. *See id.* at 84 (discussing age as a proxy for other traits). It is enough that there is "a rational reason for the difference" in treatment. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008).

The State's policy is viable even under intermediate scrutiny, which is traditionally reserved for gender-based discrimination. *See, e.g.*, *Virginia*, 518 U.S. at 532–33 (discussing gender discrimination). Such discrimination "violates equal protection unless it serves important governmental objectives and [] the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Morrison*, 529 U.S. 598, 620 (2000) (internal quotation marks omitted). Although sex-based distinctions must rest on more than "overbroad generalizations about the different talents, capacities, or preferences of males and females," government may still recognize physical and inherent differences between men and women. *Virginia*, 518 U.S. at 533.

Chief among the "biological difference[s]" recognized by the Court is the capacity for childbirth. *See Nguyen v. INS*, 533 U.S. 53, 64 (2001). For example, that the mother but not the father must be physically present at their child's birth justifies different naturalization requirements

for children born abroad to an American father as opposed to an American mother. *Id.* at 64, 66–67. That "[o]nly women may become pregnant" justifies criminalizing a man's act of having sexual intercourse with an underage female without similarly penalizing women for having intercourse with an underage male. *See Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 471–73 (1981) (plurality opinion). And that only opposite-sex couples may procreate justifies limiting government incentives and security for childbearing to spouses of the opposite sex from the City's employees.

Some may argue that animus motivated Texas' law. When the legislature acts only out of "animus toward the class it affects," the law lacks a legitimate basis and is facially invalid. *Romer*, 517 U.S. at 632, 635–36 (striking down provision of Colorado Constitution); *see also Windsor*, 133 S. Ct. at 2693. Yet, for the provision to be facially unconstitutional, there must be "no set of circumstances under which [it] would be valid," or it must lack any "plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472–73 (2010) (quoting other sources); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

Here, insofar as the Texas law allocates benefits that were granted to encourage procreation within a family, the law clearly has a legitimate sweep. The constitutionality of the Defense of Marriage Act, struck down in *United States v. Windsor*, is irrelevant. The Court in *Windsor* held Congress had no legitimate purpose in withholding federal marital rights and responsibilities from same-sex couples validly married under state law. *Windsor*, 133 S. Ct. at 2693–94. But the Court's reasoning emphasized that Congress could not defy the classification already made by state law, and it did not prohibit states from deciding on their own how to allocate marital benefits. *See id.*

If the government may extend benefits to some disabled persons but disqualify others based on who they marry, *Jobst*, 434 U.S. at 57–58, or provide survivors' benefits to some widows who remarry but deny them to others, *Bowen*, 476 U.S. at 350, then surely the State may limit spousal employment benefits to spouses of the opposite sex. Only these spouses are capable of procreation within their marriage, and the State has an interest in encouraging such procreation. The State's policy "seeks to foster the opportunity for meaningful parent-child bonds to develop," and therefore "has a close and substantial bearing on the governmental interest in the actual formation of that bond." *See Nguyen*, 533 U.S. at 70. By misapplying *Obergefell*, the court of appeals overlooked this legitimate and important interest.

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Texas, as it allocates benefits to employees' spouses, may recognize the differences between same- and opposite-sex spouses. To withhold this decision from the people is to undermine precedent, democracy, and the limited role of courts in our nation. It bears repeating that the Supreme Court in *Obergefell* embraced "democracy [as] the appropriate process for change, so long as that process does not abridge fundamental rights." 135 S. Ct. at 2605. I would take the Court at its word. Because the court of appeals did not, I respectfully dissent to the denial of the petition for review.

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John P. Devine
Justice

Opinion delivered: September 2, 2016