STATE OF RIGHTS POST-*OBERGEFELL*

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State Bar of Texas
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CUTTING-EDGE CONTROVERSIES
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CHAPTER 2

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EDUCATION:

The Chartered Institute of Arbitrators
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Texas Wesleyan University School of Law, Fort Worth, Texas
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Southern Methodist University, Dallas, Texas
- ABA Legal Assistant, Certificate in Business Law

University of Washington, Seattle, Washington
- B.A., *cum laude* (Economics)

University of Washington, Seattle, Washington
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PROFESSIONAL ASSOCIATIONS:

State Bar of Texas, licensed
- Alternative Dispute Resolution Section – Member
- Appellate Law Section – Member
- LGBT Law Section – Past Chair, Past Vice-Chair, Current Council Member
- Real Estate, Probate, and Trust Law Section - Member

Dallas Bar Association - Member
- Appellate Section - Member
- Probate, Wills, & Estates Section – Member

Dallas Diversity Task Force – Member

DGLA – PAC Member

DGLBA – President, Past Vice-President, Member

DAYL Foundation - Life Fellow and Sustaining Life Fellow

The College of the State Bar of Texas – Member

LGBT Aging Coalition – Board Member

The National Mediation Academy, Dallas, Texas
- Certificate as a Certified Mediator and Neutral

Attorney Ad Litem Certificate

The Chartered Institute of Arbitrators, London, England, Fellow, FCIArb

Arbitral Women, The International Network of Women in Dispute Resolution - Member

ADMITTED TO PRACTICE BEFORE:

The Supreme Court of the United States

The United States Court of Federal Claims

The Supreme Court of Texas

United States Courts of Appeals for the Fifth, Sixth Circuits, and Seventh Circuits

United States District Courts for the Northern, Eastern and Southern Districts of Texas

United States District Court, Eastern District of Michigan

SELECTED EMPLOYMENT EXPERIENCE:

Blume, Faulkner & Skeen, PLLC a/k/a BFS Law Group, Member
Commercial Litigation, Appellate Law, Arbitration, Estate Planning & Probate

Ecumenical Mediation Service, Inc., Member and Faculty

ITT Technical Institute, Adjunct Instructor
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City of Wylie, Texas, Assistant Prosecutor (current)

Shackelford, Melton & McKinley, Associate
Complex Commercial Litigation

Campbell & LeBoeuf, P.C., Associate
Legal Malpractice and Grievance Defense, Complex Commercial Litigation, and Appellate Law

The Sixth District Court of Appeals for the State of Texas, Briefing Attorney

SELECTED CASES, SPEECHES AND PUBLICATIONS:

Cause No. 13-0073-CV; *In re John Doe a/k/a Trooper*, before the Texas Supreme Court, Lead Counsel, Oral Argument, Nov. 7, 2013, opinion issued on August 29, 2014, in favor of Trooper, BFS Law Group's client.

Cause No. 13-30103; *Doug Welborn, in his official capacity as Clerk of Court of the Nineteenth Judicial District for the Parish of East Baton Rouge, Louisiana, et al. v. The Bank of New York Mellon, et al*. and Cause No. 13-50080; *El Paso County, Texas, et al. v. Bank of America Corporation, et al*.; In the United States Court of Appeals for the Fifth Circuit, Co-Counsel, Oral Argument, February 5, 2014.

Motions Practice In Arbitration – A Guide for Counsel, Mercy McBrayer, Shelly L. Skeen, & Richard D. Faulkner, Just Resolutions, Dispute Resolution Section, American Bar Association, Upcoming Issue.

LGBT Law: Obergefell Update and Working with Transgender Clients, Poverty Law Conference, State Bar of Texas CLE, Austin, Texas, April 27, 2016

Tying It Up without Tying the Knot, GALORE Dallas, Panel Discussion on Family & Estate Planning, Dallas, Texas, February 17, 2016.

Welcome to the Wild Wild West!, Defamation on the Internet, Dallas Area Paralegal Association Dallas Bar Association, Belo Mansion, January 28, 2016.

The Marriage Equality Decision & What It Means to You, The National Federation of Paralegal Professionals, Live National Webinar, December 9, 2015.

The Impact of Marriage Equality on Texas Law, State Bar of Texas, Full Day of CLE, Course Director and Speaker, *Obergefell v. Hodges, What It Is and What It Means* and *LGBT Estate Planning, Financial Planning, and Probate After Obergefell*, December 1, 2015.

Welcome to the Wild Wild West!, Defamation on the Internet, DGLBA, Dallas Bar Association, Dallas, Texas, November 19, 2015.

Welcome to the Wild Wild West!, Defamation on the Internet, Northeast Tarrant County Bar Association, Southlake, Texas, November 17, 2015.

The Road to Marriage Equality and What's Next? Tarrant County College, LGBT History Month, October 14, 2015.

Marriage Equality Is Here But What Does It Mean?, North Central Texas College, September 29, 2015.

Marriage Equality Is Here But What Does It Mean?, Park Cities MLS, Dallas, Texas, September 22, 2015.

Resolving Same Sex Issues in the Collaborative Process, 11th Annual Collaborative Law Conference, Global Collaborative Law Council, Dallas Bar Association Collaborative Law Section, State Bar of Texas Collaborative Law Section and Texas Center for Legal Ethics, Dallas, Texas, September 17, 2015.

Marriage Equality Is Here But What Does It Mean?, Legal Aid of NorthWest Texas, Dallas, Texas, August 21, 2015.

Marriage Equality Is Here But What Does It Mean, Dallas Association of Paralegals, Dallas Bar Association, Dallas, Texas, August 18, 2015.

Marriage Equality Is Here But What Does It Mean?, Oak Lawn MLS, Dallas, Texas, August 12, 2015.

Marriage Equality Is Here But What Does It Mean?, Collaborative Law Section, Dallas Bar Association, July 30, 2015.

Embrace the Power of Difference, Panel, State Bar of Texas Leaders Conference, Westin Galleria, Houston, Texas, July 25, 2015.

The Marriage Equality Decision and What it Means for Your Clients, TexasBarCLE, Live Webcast, Co-Course Director and Speaker, Texas Law Center, Austin, Texas, July 22, 2015.

JCPenney©, Pride Month 2015, Keynote Speaker, *The Supreme Court's Upcoming Ruling on Marriage Equality*, Pride Business Resource Team, Frisco, Texas, June 24, 2015.

Raising the Bar, Empowering Local LGBT Organizations, State Bar of Texas Annual Meeting, San Antonio, Texas, June 19, 2015.

Coming Out of the Litigation Closet: How Collaborative Law Can Minimize Damage in Same-Sex Breakups, Panel, State Bar of Texas Annual Meeting, San Antonio, Texas, June 18, 2015.

Is Marriage Equality Destined for Texas? PFLAG Dallas, Northhaven United Methodist Church, June 11, 2015.

Welcome to the Wild Wild West! Defamation on the Internet, 9th Annual State Bar Bill of Rights Litigating the Constitution Course, Shelly L. Skeen & Robert L. Tobey, Texas Law Center, Austin, Texas, Live and Live Webcast, May 29, 2015.

Diversity Conference, Texas A & M University School of Law, Diversity Student Conference, February 20, 2015.

Fair and Impartial Courts, A Judicial Panel, Hon. Mark S. Cady, Chief Justice Iowa Supreme Court, Hon. J. Woodfin Jones, Chief Justice Third District Court of Appeals for the State of Texas, and Hon. Tonya Parker, Presiding Judge, 116th Civil District Court, Moderator, State Bar of Texas Annual Meeting, Austin, Texas, June 27, 2014.

The Aftermath of the Fall of DOMA: A Survey of Same-Sex Marriage Cases and What it Means for Us, Texas Minority Attorney Program, Speakers: Shelly L. Skeen and John Trevino, Jr., El Paso, Texas, May 22, 2014.

Legal Ethics: Hot Topics and Current Events, Webcast, National Business Institute, Speakers, James D. Blume & Shelly L. Skeen: Attorney Speech, What Lawyers Can and Cannot Say; Multi-Jurisdictional Practice Ethics; Conflicts of Interest, Attorney's Fees; Handling Bar Grievances and other Disciplinary Actions; and Confidentiality, Loyalty, and the Attorney Client Privilege, December 31, 2012.

Disclosures: Practical Considerations for Ensuring Arbitrator Impartiality and Independence in Reinsurance Arbitrations, Advanced Forum on Reinsurance Disputes in Litigation and Arbitration, American Conference Institute, New York City, Shelly L. Skeen & Richard D. Faulkner, April 30-May, 1, 2012.

Navigating Arbitration under the FAA and the TAA, Collection Law Seminar, Dallas Bar Association, Shelly L. Skeen and Richard D. Faulkner, November 20, 2008.

Not So Concrete: "Whenever Feasible" and Error Preservation in Broad Form Submissions in the Wake of Casteel, Harris, and Romero, North Dallas Bar Association, 2007, Shelly L. Skeen and Nathan J. Schwartz.

The McMansions are Coming: Professional Liability for Real Estate Professionals in the Wake of New Laws Regulating the McMansions, Professional Liability Underwriting Society Journal, May 2006, pp. 3-4.

Know When to Sue Your Lawyer, Executive Legal Advisor, Jan/Feb 2006, pp. 22-23.

Due Process Denied, Special Report, Legal Malpractice & Grievance Defense, TEXAS LAWYER, Vol. 20, No. 50, Bruce A. Campbell & Shelly L. Skeen, February 14, 2005.

Dangers of Rule 11 Agreements, A Trap for the Unwary, Bruce A. Campbell & Shelly L. Skeen, November 2005.

Can I Lie to You? False Statements, Failures to Disclose and Other Sins Committed in Communicating with Tribunals, Bruce A. Campbell & Shelly L. Skeen, Spring 2005.

City of Sherman v. Henry: Is the Texas Constitutional Right of Privacy Still a Source of Protection for Texas Citizens? Texas Wesleyan Law Review - Fall 1997.

OTHER EDUCATION:

NITA ADVOCATE DESIGNATION, 2014

Seeking CERTIFIED FINANCIAL PLANNER (TM) Practitioner Certificate, Southern Methodist University, expected completion 2017

SELECTED VOLUNTEER WORK:

Attorneys Serving the Community, Member - Leadership Level
Past Co-Chair Publicity Committee, Individual Underwriting Committee, and Past Chair and Co-Chair Communications Committee

ITT Advisory Committee

CHURCH: St. Paul's United Church of Christ

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BIOGRAPHICAL INFORMATION

EDUCATION
B.S. in Industrial and Labor Relations, Cornell University
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PROFESSIONAL ACTIVITIES
Professor of Law, New York Law School, since 1982
Former Associate, Kelley Drye & Warren (NYC), Seyfarth Shaw Fairweather & Geraldson (NYC)
Contributing Writer, *Gay City News* (gaycitynews.com)
Editor & Chief Writer, *LGBT Law Notes*, published by the LGBT Law Foundation of Greater New York
Founder and Past President, LGBT Law Association of Great New York
Trustee, The Jewish Board of Family & Children's Services, New York City
Former Trustee, Society of American Law Teachers
Blogger, artleonardobservations.com
Frequent speaker at CLE programs offered by bar associations and law schools

PUBLICATIONS & HONORS
Sexuality & the Law: An Encyclopedia of Major Legal Cases (1993)
Sexuality Law (Law School Casebook), co-authored with Patricia Cain (2nd edition 2009)
AIDS Law and Policy: Cases and Materials (2nd edition 1995)
Numerous law review articles on LGBT Law, AIDS Law, and Workplace Law
Dan Bradley Lifetime Achievement Award, National LGBT Law Association

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STATE OF RIGHTS POST-*OBERGEFELL*

I. INTRODUCTION

This article is by no means meant to be a comprehensive overview of the State of Rights-Post *Obergefell*. However, it is meant to provide the practitioner with a brief history of *Obergefell*, this circuit's handling of *Obergefell* and the cases before it involving the Texas Same Sex Marriage Bans found in Article 1, Section 32 of the Texas Constitution and §§ 2.001, 2.401 and 6.204 of the Texas Family Code. Finally, it will provide examples and considerations necessary for determining whether courts should apply *Obergefell* retroactively. The short answer to that important question, based on U.S. Supreme Court case law and the examples provided below, is: Yes.

The path to that answer, however, is not straightforward. For example, Justice Kennedy, since the United States Supreme Court's opinion in *American Trucking Assoc., Inc. v. Smith*[1] -- the first in a series of Supreme Court cases in the 1990s addressing the limits of retroactivity that culminated in the Court's decision in *Harper v. Virginia Dep't. of Taxation*[2] -- seems reticent to consistently apply new rules and laws retroactively. Given the current makeup of the Court, if *Obergefell's* retroactivity question is squarely presented to it, the Court might find the *Chevron Oil* test still applies in support of prospectivity. Or, perhaps, because Justice Kennedy authored the majority opinion in *Obergefell* and did not address retroactivity, he felt the issue of retroactivity was so well settled after *Harper* that he did not need to address it. Because of the complexity and denseness of the jurisprudence on retroactivity, please do not take the author's word for it, but instead consult the latest relevant authorities.

II. ***OBERGEFELL V. HODGES*, NO. 14-556, 14-562, 14-571, 14-574, 2015 U.S. LEXIS 4250 (JUNE 26, 2015), AT *1.**

In *Obergefell v. Hodges*, the petitioners were 14 same-sex couples and two men whose same-sex partners were deceased. The respondents were state officials responsible for enforcing the laws in question. The petitioners claimed the respondents violated the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

These cases came from Michigan, Kentucky, Ohio, and Tennessee, all states that define marriage as a union between one man and one woman. *See, e.g.,* Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01(C)(1) (Lexis 2008); Tenn. Const., Art. XI, §18.

> The United States Supreme Court granted certiorari to hear two issues: The **first**, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex, and the **second**, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

Obergefell v. Hodges, No. 14-556, 14-562, 14-571, 14-574, 2015 U.S. LEXIS 4250 (June 26, 2015), at *12-13.

> The Ohio plaintiffs sought recognition on death certificates and birth certificates, the Kentucky plaintiffs sought the issuance of marriage licenses and wanted their lawfully performed out of state marriages recognized for parentage, the Tennessee plaintiffs sought the recognition of their lawfully performed out of state marriages, and the Michigan plaintiffs sought to set aside a Michigan statute that restricted adoption to single persons and opposite sex married persons

Obergefell, 2015 U.S. LEXIS 4250, at *15-18.

Justice Kennedy, writing for the majority in a 5-4 decision, held:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and **the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage *on the same terms and conditions as opposite-sex couples.***

[1] 469 U.S. 167 (1990)

[2] 509 U.S. 86 (1993)

Obergefell, 2015 LEXIS 4250, at *42-43. (emphasis added).

> **PRACTITIONER'S TIP**: Justice Kennedy's language here is crystal clear: marriage and the concomitant rights, obligations and responsibilities that flow from it are available to all individuals on the **same terms and conditions** available to heterosexual couples. As the reader will see in Supreme Court case law below, because the Court's opinion was applied to the relief sought by the *Obergefell* parties, the Court's opinion should be applied retroactively to all litigants in current and future litigation, for events both prior to and after *Obergefell.*

III. JUDGE ORLANDO L. GARCIA, *DE LEON V. PERRY,* 975 F. SUPP. 2D 632 (W.D. TEX. FEB. 26, 2014).

The plaintiffs were two same-sex couples who sought to marry in Texas or to have their marriage in another state recognized in Texas. They sued the state defendants seeking a declaration that Texas's law denying same-sex couples the right to marry, set forth in Article I, § 32 of the Texas Constitution and, *inter alia*, Texas Family Code §§ 2.001 and 6.204, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. § 1983. They also sought a permanent injunction barring enforcement of Texas's laws prohibiting same-sex couples from marrying. *De Leon v. Perry,* 975 F. Supp. 2d 632, 639-40 (W.D. Tex. Feb. 26, 2014).

Judge Orlando L. Garcia stated:

> The issue before this Court is whether Texas' current definition of marriage is permissible under the United States Constitution. After careful consideration, and applying the law as it must, **this Court holds that Texas' prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process**. Texas' current marriage laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason. **Accordingly, the Court finds these laws are unconstitutional and hereby grants a preliminary injunction enjoining Defendants from enforcing Texas' ban on same-sex marriage**.

De Leon v. Perry, 975 F. Supp. 2d 632, 639-40 (W.D. Tex. Feb. 26, 2014). (emphasis added).

On February 26, 2014, Judge Garcia issued the preliminary injunction prohibiting the state from **enforcing any laws or regulations prohibiting same-sex couples from marrying or prohibiting the recognition of marriages between same-sex couples lawfully solemnized elsewhere**. Judge Garcia immediately stayed the injunction while the state appealed. *De Leon v. Perry*, 975 F. Supp. 2d 632, 639-40, 79-80 (W.D. Tex. Feb. 26, 2014). (emphasis added).

IV. 5TH CIRCUIT APPEAL OF *DE LEON--DE LEON V. ABBOTT,* 791 F.3D 619, 624 (5TH CIR. JULY 1, 2015).

The State of Texas appealed Judge Garcia's order. After full briefing, including participation by numerous amici curiae, the 5th Circuit heard expanded oral argument on January 9, 2015. *De Leon v. Abbott*, 791 F.3d 619, 624 (5th Cir. July 1, 2015).

The same day *Obergefell* was announced on June 26, 2015, Judge Garcia issued a one-paragraph order entitled "Order Granting Plaintiffs' Emergency Unopposed Motion To Lift the Stay of Injunction," stating that the Court:

> **"hereby LIFTS the stay of injunction issued on February 26, 2014 . . . and enjoins the state defendants from enforcing Article I, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage."**

(***See* Exhibit 1, Judge Garcia June 26, 2014, Order).** (emphasis added).

On Wednesday, July 1, 2015, Judge Jerry E. Smith, 791 F.3d 619 (5th Cir. July 1, 2015), writing for the 5th Circuit held:

> *Obergefell* . . . **is the law of the land and, consequently, the law of this circuit** and should not be taken lightly by actors within the jurisdiction of this court.

De Leon v. Abbott, 791 F.3d 619, 624 (5th Cir. July 1, 2015). (emphasis added). **(See also Exhibit 2, Fifth Circuit July 1, 2015, Order).**

> After *Obergefell*, the 5th Circuit sought and promptly received letter advisories from plaintiffs and the state, asking their respective positions on the proper specific disposition in light of *Obergefell*. **Because, as both**

> **sides now agree, the injunction appealed from is correct in light of *Obergefell*,** the preliminary injunction is AFFIRMED.

De Leon v. Abbott, 791 F.3d 619, 624 (5th Cir. July 1, 2015). (emphasis added). (**See Exhibit 2, Fifth Circuit July 1, 2015, Order).**

V. THE JULY 7TH, 2015, FINAL JUDGMENT IN *DE LEON V. PERRY*

On July 7, 2015, Judge Garcia entered a final judgment in the district court case:

> Any Texas law denying same sex-couples the right to marry, including Article 1, §32 of the Texas Constitution, **any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage**, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 . . . .

Final Judgment, *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Tex. July 7, 2015). (emphasis added). **(*See* Exhibit 3, District Court, July 7, 2015, Final Judgment**).

VI. WHY WE CARE: WHO AND WHAT RIGHTS ARE AFFECTED

A. Texas Citizens Whose Rights are Affected

- 600,000 adults in Texas identify as LGBT
- 93,000 of them report being in a same sex relationships, or 46,401 couples
- 11,000 same sex couples, raising 19,000 children, or more than 1 in 5 same sex couples
- Same sex couples are more than 7 times more likely to be raising an adopted child than opposite-sex couples

*Neel Lane, 5th Circuit Oral Argument, *De Leon v. Abbott*, Counsel for Plaintiffs/Appellees, Jan. 9, 2015, Source: Williams Institute, UCLA, Sept. 2014.

B. Texas State Rights Affected

- Intestacy
- Guardianship
- Homestead Protection and Tax Exemptions
- Wrongful Death and Survival Actions
- Community Property presumption
- Right to share in spouse's pension or retirement plans
- Spousal maintenance
- Automatic right to make health care decisions and burial decisions for spouse
- Spousal evidentiary privileges
- Birth Certificates and Death Certificates

The word "marriage" occurs 69 times in the Estates Code and the word "spouse" 414 times. The word "spouse" occurs 22 times in the Property Code, 48 times in the Health and Safety Code, and 22 times in the Tax Code. The words "marriage" and "spouse" occur too many times to mention in the Family Code.

C. United States Citizens Whose Rights are Affected

- 110,000 same sex couples, raising 170,000 children
- 4 times more likely to be raising an adopted child
- Between 5.4 and 8 million LGBT workers
- 700,000 transgendered individuals, 1/2 of 1% of the population, 4 times more likely to live below the poverty level, with murder rates of 1 per month in U.S.
- 87% of the Fortune 500 employers have LGB protections in place for employees

D. Federal Rights Affected

A 2004 General Accounting Office Report lists 1,138 federal rights affected by marital status, including:

- Federal income taxes
- Estate and gift taxes
- ERISA
- Social Security
- Veteran's Benefits
- Medicare
- Health Insurance
- FMLA
- Medicaid/Chip Programs
- Federal Employee Benefits
- Immigration
- Education and Student Loans
- Military Benefits
- Bankruptcy Laws
- Evidentiary Privileges and Criminal Laws

VII. RETROACTIVE?

PRACTITIONER'S TIP: The law of the land for both civil and criminal cases now is that unconstitutional laws and rules are *void ab initio*, or void from inception, as if they did not ever exist.[3] Therefore, the new law or rule is applied retroactively. However, the U.S. Supreme Court struggled in a series of fractured decisions, among them, *Chevron Oil v. Huson* in 1971, *Griffith v. Kentucky* in 1987, *American Trucking v. Smith* in 1990,[4] *James B. Beam Distilling Co. v. Georgia* in 1991, *Harper v. Virginia Dept. of Taxation* in 1993 and *Reynoldsville Casket v. Hyde* in 1995, before arriving at a clear consensus adopting retroactivity in civil actions.

A. History

1. Pure Prospectivity: *Chevron Oil v. Huson*, 404 U.S. 97 (1971).

Huson was injured in December 1965 while working on Chevron Oil's artificial island drilling rig, located on the Outer Continental Shelf of Louisiana's coast. Huson allegedly did not discover that his injuries were serious until many months later. In January 1968, Huson filed a suit for damages against Chevron Oil in federal district court. *Chevron Oil v. Huson,* 404 U.S. at 98. While Huson's case was pending, the United States Supreme Court issued its decision in *Rodrigue v. Aetna Casualty & Surety Co*., 395 U.S. 352 (1969), which held that state law and not admiralty law applied to fixed structures on the Outer Continental Shelf under the Outer Continental Shelf Lands Act ("Lands Act")..

The District Court, relying on *Rodrigue,* held that Louisiana's one-year limitation on personal injury actions applied to Huson rather than the admiralty laches doctrine, and granted Chevron's motion for summary judgment. The *Chevron* Court, however, found that the Lands Act made the Outer Continental Shelf exclusively subject to federal jurisdiction, but then extended to that area the laws of the adjacent State "to the extent that they are applicable and not inconsistent" with federal laws. *Chevron Oil v. Huson,* 404 U.S. at 100.

Huson had argued on appeal that in view of pre-*Rodrigue* jurisprudence making admiralty law (including the laches doctrine) applicable, it would be unfair to give the *Rodrigue* decision retrospective effect. *Chevron Oil v. Huson,* 404 U.S. at 99.

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[3] An unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is *void ab initio*. 19 AM. JUR. 2D, Constitutional Law Section §195. *See also Reyes v. State*, 735 S.W.2d 382 (Tex. Crim. App. 1988).

[4] In the interests of brevity, neither *Griffith* (criminal case) nor *American Trucking* (civil case) will be discussed here. However, the author encourages practitioners to read each case to further and better understand the Supreme Court's holdings in *Harper* and *Reynolds Casket*.

The United States Supreme Court said that "*Rodrigue* should not be invoked to require application of the Louisiana time limitation retroactively to this case." *Chevron Oil v. Huson,* 404 U.S. at 100. The Court then set forth a three part test now known as the "*Chevron Oil* test" to determine whether a law should be only prospective. It held:

> **First**, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. **Second**, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' **Finally**, we have weighed the inequity imposed by retroactive application. . . .

Chevron Oil Co. v. Huson, 404 U.S. at 106-107 (citations omitted).

> **PRACTITIONER'S TIP***: Chevron Oil* is best known for its protection of litigants' reliance interests: when substantial inequities or undue hardship will result from retroactive application of a new law or rule, that law or rule should be applied prospectively, not retroactively.

2. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

In *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991), the Court issued five separate opinions, with none receiving more than three votes.

The question presented was whether the Supreme Court's ruling in *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984), should apply retroactively to claims arising on facts antedating that decision.

In a shift from *Chevron Oil*, the Court said, "application of the rule in *Bacchus* requires its application retroactively in later cases." *Beam*, 501 U.S. at 532.

The *Beam* Court noted:

> Prior to its amendment in 1985, Georgia state law imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products (citation omitted). In 1984, a Hawaii statute that similarly distinguished between imported and local alcoholic products was held in *Bacchus* to violate the Commerce Clause. *Bacchus*, 468 U.S. at 273. **It proved no bar to our finding of unconstitutionality that the discriminatory tax involved intoxicating liquors, with respect to which the States have heightened regulatory powers under the Twenty-First Amendment.** *Id*. at 276.

Beam, 501 U.S. at 532-33. (emphasis added).

> **PRACTITIONER'S TIP**: Marriage laws, like regulations affecting alcohol, have traditionally been regulated by, and within the province of, the states. Therefore, arguments that *Obergefell* and *De Leon v. Abbott* do not apply to Texas marriage laws (whether ceremonial or informal) are unpersuasive and inapplicable.

In *Bacchus'* wake, James B. Beam Distilling Co., a Delaware corporation and Kentucky bourbon manufacturer, claimed Georgia's law likewise inconsistent with the Commerce Clause, and sought a refund of $2.4 million, representing not only the differential taxation but the full amount it had paid for the years 1982, 1983, and 1984. Georgia's Department of Revenue failed to respond to the request, and Beam thereafter brought a refund action against the State in the Superior Court of Fulton County.

On cross-motions for summary judgment, the trial court agreed that the tax could not withstand a *Bacchus* attack for the years in question, and that the tax had therefore been unconstitutional. However, using the analysis described in the Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971), the trial court nonetheless refused to apply its ruling retroactively. It therefore denied Beam's refund request. *Beam*, 501 U.S. at 533.

Justice Souter, in the opinion for the judgment of the Court, described retroactivity in terms of both "choice of law" and "remedy". He said there are three ways in which the choice-of-law problem may be resolved. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991).

> **First**, **a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm**, *see Kuhn v. Fairmont Coal Co*., 215 U.S. 349, 372, 54 L. Ed. 228, 30 S. Ct. 140 (1910) (Holmes, J., dissenting), and is in keeping

> with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. *See Mackey v. United States*, 401 U.S. 667, 679, 28 L. Ed. 2d 404, 91 S. Ct. 1160 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). It also reflects the declaratory theory of law, *see Smith, supra*, at 201 (SCALIA, J., concurring in judgment); *Linkletter v. Walker*, 381 U.S. 618, 622-623, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965), according to which the courts are understood only to find the law, not to make it. But in some circumstances retroactive application may prompt difficulties of a practical sort. However much it comports with our received notions of the judicial role, the practice has been attacked for its failure to take account of **reliance on cases subsequently abandoned**, a fact of life if not always one of jurisprudential recognition. *See, e. g., Mosser v. Darrow*, 341 U.S. 267, 276, 95 L. Ed. 927, 71 S. Ct. 680 (1951) (Black, J., dissenting).

Beam, 501 U.S. at 535-36. (emphasis added).

> **Second, there is the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision**. **The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision**. **This Court has, albeit infrequently, resorted to pure prospectivity, *see Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971);** *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 88, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-143, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964); *see also Smith, supra*, at 221, n. 11 (STEVENS, J., dissenting); *Linkletter*, *supra*, at 628, although in so doing it has never been required to distinguish the remedial from the choice-of-law aspect of its decision. *See Smith*, supra, at 210 (STEVENS, J., dissenting). This approach claims justification in its appreciation that "the past cannot always be erased by a new judicial declaration," *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 84 L. Ed. 329, 60 S. Ct. 317 (1940); *see also Lemon v. Kurtzman*, 411 U.S. 192, 199, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973) (plurality opinion), and that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness. But this equitable method has its own drawback: it tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures. *See United States v. Johnson*, 457 U.S. 537, 554-555, 73 L. Ed. 2d 202, 102 S. Ct. 2579 (1982); *James v. United States*, 366 U.S. 213, 225, 6 L. Ed. 2d 246, 81 S. Ct. 1052 (1961) (Black, J., dissenting).

Beam, 501 U.S. at 536-37.

> **Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call modified, or selective, prospectivity**, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused. *See, e. g., Johnson v. New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966); *Stovall v. Denno*, 388 U.S. 293, 297, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967); *Daniel v. Louisiana*, 420 U.S. 31, 42 L. Ed. 2d 790, 95 S. Ct. 704 (1975); *see also Smith, supra*, at 198 ("During the period in which much of our retroactivity doctrine evolved, most of the Court's new rules of criminal procedure had expanded the protections available to criminal defendants"). On the one hand, full retroactive application of holdings such as those announced in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964); and *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967), would have "seriously disrupted the administration of our criminal laws [,] . . . requiring the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson, supra*, at 731. On the other hand, **retroactive application could hardly have been denied the litigant in the law-changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether.**
>
> **But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally**. *See R. Wasserstrom, The Judicial Decision* 69-72 (1961). "We depart from this basic judicial tradition when we

> simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Desist v. United States*, 394 U.S. 244, 258-259, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969) (Harlan, J., dissenting); *see also Von Moschzisker*, Stare Decisis in Courts of Last Resort, 37 HARV. L. REV. 409, 425 (1924). **For this reason, we abandoned the possibility of selective prospectivity in the criminal context in *Griffith v. Kentucky***, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987), even where the new rule constituted a "clear break" with previous law, **in favor of completely retroactive application of all decisions to cases pending on direct review**. **Though *Griffith* was held not to dispose of the matter of civil retroactivity,** *see id*., at 322, n. 8, selective prospectivity appears never to have been endorsed in the civil context. *Smith*, 496 U.S. at 200 (plurality opinion). This case presents the issue.

Beam, 501 U.S. at 537-38. (emphasis added).

> Questions of remedy aside, *Bacchus* is fairly read to hold as a choice of law that **its rule should apply retroactively to the litigants then before the Court**. **Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it**, *cf. American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 297-298, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987) (remanding case to consider whether ruling "should be applied retroactively and to decide other remedial issues"), **it is properly understood to have followed the normal rule of retroactive application in civil cases.**

Beam, 501 U.S. at 539. (emphasis added).

> The grounds for our decision today are narrow. They are confined entirely to **an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata**. We do not speculate as to the bounds or propriety of pure prospectivity.
>
> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court.

Beam, 501 U.S. at 544. (emphasis added).

> **PRACTITIONER'S TIP**: Justice Kennedy's majority opinion in *Obergefell* did not reserve the question of whether its holding should be applied to the parties before it and, in fact, the Court's decision was applied to the parties before it. Therefore, under *Beam*, *Obergefell* should be applied retroactively to events that both predate and postdate the *Obergefell* decision.

3. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993).

In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 89-90 (1993), federal civil service and military retirees filed suit for a refund of income taxes assessed by Virginia in violation of the constitutional doctrine of intergovernmental tax immunity. *Id.*

Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891, 109 S. Ct. 1500 (1989) had established that a State violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement benefits paid by the Federal Government but exempts from taxation all retirement benefits paid by the State or its political subdivisions. Relying on the retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971), the Supreme Court of Virginia twice refused to apply *Davis* to taxes imposed before *Davis* was decided. *Id.*

In accord with *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991), the Supreme Court held that its application of a rule of federal law to the parties before the Court requires **every court to give retroactive effect to that decision.** *Id.* (emphasis added).

> Both the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson v. Neil*, 409 U.S. 505, 507, 35 L. Ed. 2d 29, 93 S. Ct. 876 (1973). **Nothing in the Constitution alters the fundamental rule of "retrospective operation" that has governed "judicial decisions . . . for near a thousand years."** *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 54 L. Ed. 228, 30 S. Ct. 140 (1910) (Holmes, J., dissenting). In *Linkletter v. Walker*, 381 U.S. 618, 14

> L. Ed. 2d 601, 85 S. Ct. 1731 (1965), however, we developed a doctrine under which we could deny retroactive effect to a newly announced rule of criminal law. Under *Linkletter*, a decision to confine a new rule to prospective application rested on the purpose of the new rule, the reliance placed upon the previous view of the law, and "the effect on the administration of justice of a retrospective application" of the new rule. *Id*., at 636 (limiting *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961)). **In the civil context, we similarly permitted the denial of retroactive effect to "a new principle of law" if such a limitation would avoid "'injustice or hardship'" without unduly undermining the "purpose and effect" of the new rule. *Chevron Oil Co. v. Huson*, 404 U.S. at 106-107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 23 L. Ed. 2d 647, 89 S. Ct. 1897 (1969)).**

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 94-95 (1993). (emphasis added).

The Court subsequently overruled *Linkletter* in *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987), **and eliminated limits on retroactivity in the criminal context by holding that all "newly declared . . . rule[s]" must be applied retroactively to all "criminal cases pending on direct review**." *Harper*, 509 U.S. at 95 (citing *Griffith*, 479 U.S. at 322). (emphasis added).

> "[Griffith's] holding rested on two "basic norms of constitutional adjudication." *Ibid.* **First**, we reasoned that "the nature of judicial review" strips us of the quintessentially "legislat[ive]" prerogative to make rules of law retroactive or prospective as we see fit. *Ibid.* **Second,** we concluded that "**selective application of new rules violates the principle of treating similarly situated [parties] the same**. Dicta in *Griffith*, however, stated that "civil retroactivity . . . . continued to be governed by the standard announced in *Chevron Oil*." *Id*., at 322, n. 8.

Harper, 509 U.S. at 95 (citing *Griffith*, 479 U.S. at 323).

The Court divided over the meaning of this dicta in *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (1990), a case decided before *Beam*:

> "The four Justices in the plurality used "the *Chevron Oil* test" to consider whether to confine "the application of [*American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987),] to taxation of highway use prior to June 23, 1987, the date we decided *Scheiner*." Id., at 179 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and WHITE and KENNEDY, JJ.). Four other Justices rejected the plurality's "anomalous approach" to retroactivity and **declined to hold that "the law applicable to a particular case is that law which the parties believe in good faith to be applicable to the case.**" *Id*., at 219 (STEVENS, J., dissenting, joined by Brennan, Marshall, and BLACKMUN, JJ.). Finally, despite concurring in the judgment, JUSTICE SCALIA "shared" the dissent's "perception that prospective decisionmaking is incompatible with the judicial role." *Id*., at 201."

Harper, 509 U.S. at 95-96. (emphasis added).

The Court noted that "*Griffith* and *American Trucking* thus left unresolved the precise extent to which the presumptively retroactive effect of this Court's decisions may be altered in civil cases." *Harper*, 509 U.S. at 96.

Justice Thomas, writing the majority opinion for the Court, then said:

> But we have since adopted a rule requiring the retroactive application of a civil decision such as *Davis*. Although *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991), did not produce a unified opinion for the Court, a majority of Justices agreed that **a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law.** In announcing the judgment of the Court, JUSTICE SOUTER laid down a rule for determining the retroactive effect of a civil decision: **After the case announcing any rule of federal law has "applied that rule with respect to the litigants" before the court, no court may "refuse to apply [that] rule . . . retroactively.**" *Id.*, at 540 (opinion of SOUTER, J., joined by STEVENS, J.). JUSTICE SOUTER's view of retroactivity **superseded** "**any claim based on a *Chevron Oil* analysis**." *Ibid.* JUSTICE WHITE likewise concluded that a decision "extending the benefit of the judgment" to the winning party "**is to be applied to other litigants whose cases were not final at the time of the [first] decision.**" *Id.*, at 544 (opinion concurring in judgment). Three other Justices agreed that "our judicial responsibility . . . requir[es] retroactive application of each . . . rule we announce." *Id*., at 548 (BLACKMUN, J., joined by Marshall and SCALIA, JJ., concurring in judgment). *See also id*., at 548-549 (SCALIA, J., joined by Marshall and BLACKMUN, JJ., concurring in judgment).

Harper, 509 U.S. at 96-97. (emphasis added).

PRACTIONER'S TIP: Justice Thomas here announced the rule governing retroactivity in civil cases and criminal cases that is still in effect today: *Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*:

> **When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule**. This rule extends *Griffith's* ban against "selective application of new rules." 479 U.S. at 323. Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, *id.*, at 322, **we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases**. **In both civil and criminal cases, we can scarcely permit** "**the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule**. *Beam, supra,* at 543 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law **or to treat similarly situated litigants differently."**

Harper v. Virginia Dept. of Taxation, 509 U.S. at 97. (emphasis added).

Justice Thomas also addressed Justice Souter's choice of law and remedy analysis, saying:

> We need not debate whether *Chevron Oil* represents a true "choice-of-law principle" or merely "a remedial principle for the exercise of equitable discretion by federal courts." *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 220, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (1990) (STEVENS, J., dissenting). *Compare id*., at 191-197 (plurality opin-ion) (treating *Chevron Oil* as a choice-of-law rule), with *id.*, at 218-224 (STEVENS, J., dissenting) (treating *Chevron Oil* as a remedial doctrine). Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that "the *Chevron Oil* test cannot determine the choice of law by relying on the **equities of the particular case**" and that the federal law applicable to a particular case does not turn on "**whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application" of a new one**. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991) (opinion of SOUTER, J.).

Harper v. Virginia Dept. of Taxation, 509 U.S. at 95, n. 9. (emphasis added).

PRACTITIONER'S TIP: The import of *Harper* is clear: in civil cases, retroactivity applies. *Harper* prohibits selective temporal barriers to the application of *Obergefell* regardless of "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule.

4. *Reynoldsville Casket v. Hyde*, 514 U.S. 749 (1995).

Hyde was in a motor vehicle accident in Ohio with a truck owned by a Pennsylvania company, Reynoldsville Casket. Hyde filed suit in an Ohio county court against the company and the truck's driver three years after the accident occurred. The suit would have been barred by a statute of limitations if the defendant had been an Ohio resident. However it was timely under an Ohio provision that tolls the running of the State's 2-year statute of limitations in lawsuits against out-of-state defendants.

In its opinion, the United States Supreme Court noted that a related case had already invalidated that Ohio law:

> In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc*., 486 U.S. 888 (1988), the United States Court held unconstitutional (as impermissibly burdening interstate commerce) the Ohio "tolling" provision that, in effect, gave Ohio tort plaintiffs unlimited time to sue out-of-state (but not in-state) defendants.

Reynoldsville Casket, 514 U.S. at 750.

> The Supreme Court of Ohio held that, despite *Bendix*, Ohio's tolling law continues to apply to tort claims that accrued before that decision. The United States Supreme Court said: **this holding, in our view, violates the Constitution's Supremacy Clause. We therefore reverse the Ohio Supreme Court's judgment**.

Reynoldsville Casket, 514 U.S. at 751. (emphasis added).

The plaintiff in this case did agree with the holding in *Bendix*:

> Hyde acknowledges that the Supreme Court, in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, (1993), held that, **when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve predecision events**. She thereby concedes that, the Ohio Supreme Court's syllabus to the contrary not-withstanding, *Bendix* applies to her case. And, she says, as "a result of *Harper*, there is no question that *Bendix* retroactively invalidated" the tolling provision that makes her suit timely.

Reynoldsville Casket, 514 U.S. at 752. (emphasis added).

But then she went back to try and argue that *Chevron Oil* allowed the Supreme Court to choose whether to apply *Bendix*:

> Hyde asked the United States Supreme Court to look at what the Ohio Supreme Court has done, not through the lens of "retroactivity," but through that of "remedy." States, she says, have a degree of legal leeway in fashioning remedies for constitutional ills. She points to *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in which this Court applied prospectively only its ruling that a 1-year statute of limitations governed certain tort cases -- primarily because that ruling had "effectively overruled a long line of decisions" applying a more generous limitations principle (that of laches), upon which plaintiffs had reasonably relied. *Id.*, at 107. **Hyde concedes that *Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law**. But, she notes the possibility of **recharacterizing *Chevron Oil* as a case in which the Court simply took reliance interests into account in tailoring an appropriate remedy for a violation of federal law.**

Reynoldsville Casket, 514 U.S. at 752. (emphasis added).

The Court stated:

> The upshot is that Hyde shows, through her examples, the unsurprising fact that, as courts apply "retroactively" a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case. Thus, a court may find:
>
> 1) an alternative way of curing the constitutional violation,
> 2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief,
> 3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy justifications, or
> 4) a principle of law, such as that of "finality" present in the *Teague* context, that limits the principle of retroactivity itself.
>
> But, this case involves no such instance; nor does it involve any other special circumstance that might somehow justify the result Hyde seeks. Rather, **Hyde offers no more than simple reliance (of the sort at issue in *Chevron Oil*) as a basis for creating an exception to *Harper's* rule of retroactivity** -- in other words, she claims that, for no special reason, *Harper* does not apply. We are back where we started. Hyde's necessary concession, that *Harper* governs this case, means that she cannot prevail.

Reynoldsville Casket, 514 U.S. at 758-59. (emphasis added).

PRACTITIONER'S TIP: *Reynoldsville Casket* solidifies the Court's ruling in *Harper* by emphasizing two main points:

1) when the Court decides a case and applies the (new) legal rule of that case to the parties before it, then it and other courts must treat that same (new) legal rule as "retroactive," applying it, to all pending cases, whether or not those cases involve predecision events and

2) reliance interests take a back seat to *Harper's* rule of retroactivity in favor of treating those who are similarly situated similarly.

ADDITIONAL PRACTITIONER'S TIP: While *Reynoldsville Casket* appears to further solidify the Court's holding in *Harper*, it does allow a creative practitioner to argue that retroactivity should not apply to the facts of the case on the basis of:

1) an alternative way of curing the constitutional violation, or
2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or
3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy justifications, or
4) a principle of law, such as that of "finality" present in the *Teague* context, that limits the principle of retroactivity itself.

B. Justice Kennedy – Dissents and Concurrences: Hesitance to Jettison the *Chevron Oil* Test.

In *Beam*, Justice O'Connor, writing in dissent and joined by Chief Justice Rehnquist and Justice Kennedy, decries the Court's abandonment of the analysis of *Chevron Oil*. O'Connor agrees that the Court in *Bacchus* applied its rule "retroactively" to the parties before it, but erred in doing so by not employing the *Chevron Oil* analysis. Principles of *stare decisis*, O'Connor argues, dictate the result she reaches. "At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them." Therefore, when, under the principles of *Chevron Oil*, a court decides not to apply a new rule retroactively, it is protecting those "settled expectations that have built up around the old law." [*Beam* at 551-552.] Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1548-49 (1998). (citations omitted).

In *Harper*, Justice Kennedy concurred separately, joined by Justice White, **to reiterate his support for the notion that it may be appropriate in some civil cases to give only prospective application to a rule in order to protect reliance interests**. **In addition, Justice Kennedy would still find retroactivity in civil cases to be governed by the analysis in *Chevron Oil***. However, Justice Kennedy concurs in the judgment of the Court because under that analysis he would find that *Davis* did not announce a new rule in that it neither "overrules clear past precedent on which litigants may have relied" nor "decides an issue of first impression whose resolution was not clearly foreshadowed."

Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1553-54 (1998). (citations omitted). (emphasis added).

In *Reynoldsville Casket*, Justice Kennedy, joined by Justice O'Connor, concurs in the judgment, but refuses to concede the:

> "authority to decide that in some **exceptional cases, courts may shape relief in light of disruption of important interests or the unfairness caused by unexpected judicial decisions**."

Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1557-58 (1998). (citations omitted). (emphasis added).

PRACTITIONER'S TIP: Because Justice Kennedy wrote the majority decision in *Obergefell*, and intended to apply the decision to the parties before the Court, a reasonable take away is that Justice Kennedy and the Court intended for *Obergefell* to apply retroactively.

VIII. CURRENT CASES, CONSIDERATIONS AND EXAMPLES

A. Informal Marriage

Texas is one of approximately nine (9) states that still has common-law marriage. §2.401 of the Texas Family Code, under Subchapter E, "*Marriage without Formalities*," entitled "*Proof of Informal Marriage*," states:

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

TEX. FAM. CODE §2.401.

PRACTITIONER'S TIP: Because informal marriage was available to Texas residents prior to *Obergefell* and because *Obergefell* applies retroactively under *Harper*, informal marriage should be available to Texas residents on the same terms and conditions as opposite-sex couples. Under *Obergefell*, the Texas same sex marriage bans are "now held invalid to the extent they exclude same-sex couples from civil marriage," regardless of whether that marriage was a ceremonial or informal marriage and regardless of when the informal marriage accrued under *Harper*.

See Obergefell, 2015 LEXIS 4250, at *43. (emphasis added).

B. Tarrant County District Clerk

Under §2.402 of the Texas Family Code, parties to an informal or common law marriage can file a "Declaration of Registration of Informal Marriage" with the county clerk. To be eligible for an informal license, both participants must be over 18. Applicants for informal marriages are asked to sign the following declaration and oath:

"I solemnly swear (or affirm) that we, the undersigned, are married to each other by virtue of the following facts: on or about (date) we agreed to be married, and after that date we lived together as husband and wife and in this state we represented to others that we were married. Since the date of marriage to the other party I have not been married to any other person. This declaration is true and the information in it which I have given is correct."

TEX. FAM. CODE §2.402.

In the fall of 2015, after *Obergefell*, a Tarrant County Clerk refused to register the Declaration of Informal Marriage two men attempted to file stating they had been in a common law marriage for 23 years. The clerk told the men to change the date of the informal marriage to the date of the *Obergefell* decision, June 26, 2015.

The couple's attorney, Mr. Jon Nelson, stated:

"This is an affidavit." "What the state of Texas is asking my clients to do is file a false affidavit and subject themselves to criminal penalties."

https://dailyqueernews.wordpress.com/2015/09/27/updated-tarrant-county-clerk-reverses-stance-on-same-sex-couples-common-law-marriage.

On Friday, September 25, 2015, Tarrant County Clerk Mary Louise Garcia released a statement saying that her office will accept common-law marriage affidavits from same-sex couples seeking to file such affidavits **dated prior to the June 26, 2015 U.S. Supreme Court ruling affirming marriage equality**. Garcia's statement said:

"Today, my office reached out to DSHS to reconfirm their position on the above. However, they indicated there had been a miscommunication regarding the issue; and that applicants, regardless of gender, may apply for an informal marriage license **using any date applicable to their relationship**.

"Additionally, we sought an opinion from the Tarrant County Criminal District Attorney on this same issue. They agree with the position of the Department of State Health Services."

http://www.dallasvoice.com/update-tarrant-county-clerk-office-accept-common-law-marriage-affidavit-10205158.html.

PRACTITIONER'S TIP: *Obergefell* is being applied retroactively in the context of informal marriage by the Department of State Health Services and Tarrant County. This is consistent with *Harper* and the fact that *Obergefell's* holding was applied to the 14 same sex couples before the Court. Accordingly, under *Obergefell* and the 5th Circuit's opinion in *De Leon v. Abbott*, the state of Texas and all Texas agencies, counties and municipalities should treat Texas' same sex marriage bans as *void ab initio*.

C. *Stella Powell,* No. C-1-PB-14-001695*, Estate of Stella Marie Powell, Deceased,* Probate Court No. 1, Travis County, Texas.

Stella Powell died on June 21, 2014 without a will. Ms. Powell's brother and sister filed an application for determination of heirship and for issuance of letters testamentary asking Travis County Probate Court No. 1 to determine that they, Ms. Powell's mother and other sibling, Bryan Powell, were the rightful heirs of Ms. Powell's and to determine their interests in Ms. Powell's estate. Ms. Powell's brother and sister alleged that Ms. Powell had never been married and that they were the only heirs of Ms. Powell's estate.

Ms. Powell's partner, Sonemaly Phrasavath, contested the application. Ms. Phrasavath claimed she and Ms. Powell were in a committed same sex relationship, that they were married by a Zen priest before friends and family after Ms. Phrasavath proposed to Ms. Powell on the peak of Mount Haleakala in Hawaii, that they lived openly as spouses and that they had been married for six years prior to Ms. Powell's death. Ms. Phrasavath challenged the Texas same sex marriage bans, Article 1, Section 32 of the Texas Constitution and of Texas Family Code Sections §2.401 (limiting informal marriage to a man and woman) and §6.204 (stating a marriage is void between two persons of the same sex in Texas). Ms. Phrasavath argued the Texas same sex marriage bans violated the Due Process Clause and Equal Protection Clauses of the14th Amendment.

On February 17, 2015, Judge Guy Herman ruled Article 1, Section 32 of the Texas Constitution and §2.401 and §6.204 of the Texas Family Code unconstitutional "because such restrictions and prohibitions violate the Due Process and Equal Protection Clauses of the United States Constitution." **(See Exhibit 7, February 17, 2015, Judge Guy Herman Order on Special Exceptions and Motion to Dismiss).**

PRACTITIONER'S TIP: Judge Herman treated the Texas same sex marriage bans as *void ab initio*, as if they never existed, when he found that Ms. Phrasavath was Ms. Powell's heir.

D. *Suzanne Bryant and Sarah Goodfriend,* No. D-1-GN-000632*, Sarah Goodfriend and Suzanne Bryant v. Dana Debeauvoir, Travis County Clerk* and *In Re State of Texas, Relator*, No. 15-0139 (Tex. Apr. 15, 2016) (orig. proceeding).

In a span of less than three hours on February 19, 2015, two (2) days after Judge Herman issued his decision in the *Powell* estate case, Suzanne Bryant and Sarah Goodfriend were married in Austin, Texas. The Travis County Clerk waived the 72 hour waiting period and issued a marriage license to Ms. Bryant and Ms. Goodfriend after they filed a request for a temporary restraining order, preliminary injunction and permanent injunction to declare Article 1, Section 32 of the Texas Constitution and §2.001, §2.012, and §6.204 of the Texas Family Code unconstitutional. Ms. Bryant and Ms. Goodfriend asked the court to prohibit the county clerk from complying with the Texas same sex marriage bans because of Ms. Goodfriend's poor health. Ms. Bryant and Ms. Goodfriend failed to notify the Attorney General that they were challenging the constitutionality of the Texas same sex marriage bans.

Travis County Judge David Wahlberg granted the TRO, holding the Texas same sex marriage bans unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amendment. A rabbi married Ms. Bryant and Ms. Goodfriend on the courthouse steps. Mr. Chuck Herring, Ms. Bryant and Ms. Goodfriend's, attorney and the author of Texas Legal Malpractice and Lawyer Discipline since 1990, nonsuited the case after the marriage.

Ken Paxton, the Texas Attorney General, filed a Petition for Writ of Mandamus with the Texas Supreme Court claiming in part that the trial court had abused its discretion by holding the Texas same sex marriage bans unconstitutional without first requiring notice to the attorney general.

On April 15, 2016, the Texas Supreme Court dismissed the Attorney General's mandamus petition as moot but not without issuing two concurring opinions criticizing the nonsuit and Mr. Herring's handling of the case. *See In re State of Texas, Relator,* No. 15-0139 (orig. proceeding) (J.J., Willett & Devine, concurrence, p. 1). (J.J., Brown & Devine, concurrence, p. 2).

PRACTITIONER'S TIP: In the concurrences, the Texas Supreme Court acknowledges the *Obergefell* decision and dismissed the mandamus as moot. Therefore, a reasonable interpretation of the Court's decision is that *Obergefell* applied retroactively to validate Ms. Bryant's and Ms. Goodfriend's February 2015 marriage. Justices Willett and Devine in their concurrence state: "For all practical purposes, [*Obergefell*], disposes of the state procedural case." *See In re State of Texas, Relator,* No. 15-0139 (orig. proceeding) (J.J., Willett & Devine, concurrence, p. 1). Justices Brown and Justice Devine said: "Today, this Court dismisses that mandamus petition as moot. In light of *Obergefell,* I cannot dispute this disposition." (J.J., Brown & Devine, concurrence, p. 2).

E. *Shirley Ranolls, Individually and as a Representative of the Estate of April Dawn Ranolls v. Adam Dewling,* No. 1:15:-cv-00111, (E.D. Tex 2015) -- Informal Marriage

In *Shirley Raynolls v. Adam Dewling*, No. 1:15-cv-00111 (E.D. Tex. 2015), Rhonda Hogan filed a petition in intervention against Adam Dewling, Tankstar USA, Rogers Cartage, Co., and Bulk Logistics, Inc. ("defendants") for the wrongful death of April Raynolls as a result of a motor vehicle accident involving Raynolls and defendants on March 9, 2015. Hogan claimed she was informally married to Raynolls: that they had agreed to be married, that after such agreement they lived together in the State of Texas as spouses and they represented to others that they were married. The court granted the petition in intervention. **(See Exhibit 4, Hogan Petition in Intervention).**

PRACTITIONER'S TIP: A Texas federal court has allowed a party to intervene in a wrongful death and survival action on the basis of an alleged informal marriage that took place prior to the *Obergefell* decision on June 26, 2015..

F. *Alberts v. Richardson* – Informal Marriage

On March 18, 2016, a Dallas District Court, in determining whether the Respondent's Motion to Dismiss, Special Exceptions and Plea to the Jurisdiction based on the Petitioner's claims of an informal marriage, stated:

> "[t]here is no question that prior to June 26, 2015, marriages between same sex couples were void under Texas law. The facts that Petitioner uses to establish her claim for an informal marriage all existed at a time that such a marriage was void. To arbitrarily recognize such facts as establishing a marriage would potentially place thousands of Texans in a legal, financial, emotional and relationship minefield."

The court then went on the find that, although they had done so prior to June 26, 2015, the parties did not meet the elements of an informal marriage after that date. The court dismissed the petition for divorce with prejudice.

PRACTITIONER'S TIP: The issue of retroactivity is likely to be a hot bed of litigation after *Obergefell* in Texas and especially in the context of informal marriage and property rights. The Dallas District Court's ruling focuses on reliance interests and inequities which *Harper* rejected as a ground for refusing to apply a law retroactively.

G. Birth Certificates and Death Certificates – Intervention by John Stone-Hoskins in *De Leon v. Perry* District Court Case After *Obergefell*

On Wednesday, August 5, 2015, nearly six weeks after *Obergefell*, John Allen Stone-Hoskins intervened in the *De Leon v. Perry* case to enforce the permanent injunction Judge Garcia entered in the federal district court barring Ken Paxton, Texas Attorney General, and Kirk Cole, Interim Commissioner of the Texas Department of State Health Services, from enforcing Texas laws restricting recognition of same-sex marriages.

Stone-Hoskins claimed that Cole had refused to comply with the permanent injunction by refusing his request to amend the death certificate of his late husband James to reflect that John Stone-Hoskins was his surviving spouse. Stone-Hoskins stated that "[b]y denying John relief that is routinely afforded surviving spouses in opposite sex marriages, both Paxton and Cole are in contempt of this Court's permanent injunction." *See* John Allen Stone-Hoskins Emergency Motion To Intervene and For Contempt, p. 2, available on Pacer.

John argued that the need for relief is urgent because he is terminally ill, doctors estimating he has no more than 45-60 days to live. John had legally married James Stone-Hoskins in New Mexico. James died intestate in January 2015. When James died, Texas issued a death certificate listing James as single. At the time of James' death, Paxton and Cole refused to list John as James' spouse.

After the federal district court lifted the stay of the preliminary injunction, John repeatedly asked the State to amend the death certificate. The State refused.

On Monday, August 3, 2015, DSHS told Stone-Hoskins that it would refuse to amend James' death certificate absent a court order compelling it to do so. John Allen Stone-Hoskins Emergency Motion To Intervene and For Contempt, p. 2, available on Pacer.

John urged the Court to act before he dies, so that he can make his final arrangements and enjoy the dignity of being listed on his late husband's death certificate. **"No less is required under the United States Constitution and this Court's order of permanent injunction."** Stone-Hoskins also filed a Motion for Contempt against Mr. Paxton and Mr. Cole.

The same day, Judge Garcia ruled that Paxton and Cole had to recognize the New Mexico marriage. Judge Garcia also ordered Paxton and Cole to appear in Court on April 12, 2015, to show why they should not be held in contempt for failing to amend the death certificate. The death certificate was amended the very next day.

On August 12, 2015, DSHS filed a Declaration from a Deputy General Counsel for DSHS. The Declaration attached an "Action Memorandum" implementing changes to vital records, including birth certificates, death certificates, and gestational agreements. **The Action Memorandum references parents and same sex couples who were "legally and formally married in Texas or another state." It did not reference informal marriages.** (**See Exhibit 5, Declaration of Barbara Klein).**

On or about August 24, 2015, DSHS filed its Revised Policies and Procedures for Vital Records Requests for Married Same Sex Couples. Specific provisions are made for informal marriages and **the "legally and formally married" language has been deleted.** (**See Exhibit 6, August 24, Advisory to the Court and attachment).**

For birth certificates, the Revised Policies and Procedures specifically state:

> "An informal marriage may be documented for purposes of amending a vital record by a properly filed informal marriage declaration or a court order establishing an informal marriage."

(**See Exhibit 6, August 24, Advisory to the Court and attachment).**

For death certificates:

> "[f]or decedents who died prior to June 26, 2015, an amendment to the death certificate, as requested will be processed recognizing any legal, same sex marriage at the time of death, for same sex marriages that occurred in another state prior to June 26, 2015, to list the surviving spouse and the decedent's status as married."

An informal marriage may be documented for the purposes of amending a vital record by a properly filed informal marriage declaration or a court order adjudicating an informal marriage has been established. (**See Exhibit 6, August 24, Advisory to the Court and attachment).**

> **PRACTITIONER'S TIP**: Texas is applying *Obergefell* retroactively for the purposes of birth certificates and death certificates regardless of whether the marriage was a ceremonial or an informal marriage.

H. Parentage and Adoption

Birth certificates will list the non-biological parent as the "mother," "father," or "parent" of a same sex couple to whom a child is born in Texas when one spouse is the birth mother, if the parents were legally married in Texas or another state at the time of the child's birth. However, practitioners need to understand that simply having the non-biological parent's name on the birth certificate is not sufficient to entitle that parent to make decisions about the child's health, welfare, safety, education, religious training and well-being. Non-biological parents still need to obtain a court order adjudicating that parent as the child's conservator.

I. Separate and Community Property

§ 3.001 of the Texas Family Code, entitled "*Separate Property*," states:

> "A spouse's separate property consists of:
>
> (1) the property owned or claimed by the spouse before marriage;
> (2) the property acquired by the spouse during marriage by gift, devise, or descent; and
> (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage."

TEX. FAM. CODE § 3.001.

§ 3.002 of the Texas Family Code, entitled "*Community Property*," consists of

> "the property, other than separate property, acquired by either spouse during marriage."

TEX. FAM. CODE § 3.002.

§ 3.003 of the Texas Family Code, entitled "*Presumption of Community Property*," states:

(a) Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.
(b) The degree of proof necessary to establish that property is separate property is clear and convincing evidence."

§ 3.006, entitled "*Proportional Ownership Interest of Property by Marital Estates*," states:

> "If the community estate of the spouses and the separate estate of a spouse have an ownership interest in property, the respective ownership interests of the marital estates are determined by the rule of inception of title."

PRACTITIONER'S TIP: If Texas courts apply *Obergefell* retroactively, it will affect the characterization of separate and community property under the inception to title rule.

J. Divorce

A number of courts are allowing same sex couples to divorce whether they were legally or informally married even though their divorce petitions were pending when *Obergefell* was decided. *See, e.g*., *Swicegood v. Swicegood*, No. 2016-UP-013, 2016 S.C. App. Unpub. LEXIS 12 (S. Carolina Ct. App. Jan. 13, 2016) (informal marriage); *Borman v. Borman*, No. E2014-01794-COA-R3-CV (Tenn. Ct. App. Aug. 4, 2015); *In the Matter of A.L.F.L. and K.L.L*., No. 04-14-00364-CV (Tex. App.--San Antonio, Jul. 29, 2015).

PRACTITIONER'S TIP: Texas courts are applying *Obergefell* retroactively in the context of divorce instead of finding the marriages void under the now unconstitutional Texas same sex marriage bans.

K. ERISA Benefits

1. *Cozen O'Connor, P.C. v. Tobits*, No. 11-0045, 2013 U.S. Dist. LEXIS 105507 (E.D. Penn. July 29, 2013), at *1.

The narrow issue presented in *Tobits* was whether the United States Supreme Court's decision in *United States v. Windsor*, declaring Section 3 of the Defense of Marriage Act unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment, requires recognition of a valid Canadian same-sex marriage for purposes of benefits distribution pursuant to ERISA, a federal statute. *See Cozen*, 2013 U.S. Dist. LEXIS 105507, at *3.

Sarah Ellyn Farley began working at the Cozen O'Connor law firm in 2004, and subsequently became eligible to participate in the Firm's Profit Sharing Plan (the "Plan"). In February of 2006, Ms. Farley married Jean Tobits in Toronto, Canada, as authorized under Canadian law. Shortly after her wedding, Ms. Farley was diagnosed with cancer and passed away on September 13, 2010.*See Cozen*, 2013 U.S. Dist. LEXIS 105507, at *3.

At the heart of the case is whether Jean Tobits is Ms. Farley's "Spouse" pursuant to the Plan language. This court answers the question in the affirmative. *See Cozen*, 2013 U.S. Dist. LEXIS 105507, at *8. The *Tobits* Court stated:

> In *United States v. Windsor*, the United States Supreme Court considered whether Edith Windsor, a New York resident who married her late-wife, Thea Spyer in 2006 in Canada, qualified for a federal estate tax exemption as a "surviving spouse," in light of Section 3 of DOMA. The *Windsor* Court held that because the state of New York recognized same-sex marriages as valid--and, to wit, the Canadian marriage of Edith Windsor and Thea Spyer-- DOMA unlawfully deprived those couples of the equal liberty of persons that is protected by the Fifth Amendment. . . ."

See Cozen, 2013 U.S. Dist. LEXIS 105507, at *19.

In applying the law to the facts, the Court held:

> There can be no doubt that Ms. Tobits is Ms. Farley's "surviving Spouse" under the Plan in light of the Supreme Court's decision in *Windsor*. Ms. Tobits and Ms. Farley were married in Toronto, Canada in 2006, just a year before Edith Windsor and Thea Spyer wed in Ontario. Ms. Tobits possesses uncontroverted evidence of a valid Canadian Marriage Certificate solemnizing that marriage. Ms. Tobits and Ms. Farley celebrated that marriage with another ceremony in Illinois, where the couple lived together until Ms. Farley's untimely death in 2010. Post-*Windsor*, where a state recognizes a party as a "Surviving Spouse," the federal government must do the same with respect to ERISA benefits--at least pursuant to the express language of the ERISA-qualified Plan at issue here. There can be no doubt that Illinois, the couple's place of domicile,

> would consider Ms. Tobits Ms. Farley's "surviving Spouse"--indeed it already has made that specific finding under state law. *Windsor* makes clear that where a state has recognized a marriage as valid, the United States Constitution requires that the federal laws and regulations of this country acknowledge that marriage. In light of that, this Court finds that Ms. Tobits is Ms. Farley's "Spouse" pursuant to the terms of the Plan. This finding alone is dispositive of the issue of the proper recipient of Ms. Farley's death benefits.

See Cozen, 2013 U.S. Dist. LEXIS 105507, at *20.

> **PRACTITIONER'S TIP**: Justice Kennedy wrote the majority opinion in *Windsor* on June 26, 2013. Immediately after the decision, the federal government and courts across the country applied *Windsor* retroactively. See June 20, 2014, Memorandum to the President from Eric Holder on the Implementation of *United States v. Windsor*. See https://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf. Because Justice Kennedy also wrote the majority opinion in *Obergefell*, a reasonable take away is that he and the Court intended for *Obergefell* to apply retroactively.

2. *Schuett v. FedEx Corp*., 119 F. Supp. 3d 1155 (N.D. Ca. Jan. 4, 2016).

Plaintiff Stacey Schuett, who resides in Sebastopol, California, was married to Lesly Taboada-Hall on June 19, 2013, in Sonoma County, California. Prior to their marriage, they had lived together in a committed relationship for 27 years, and had two children. They entered into a California Registered Domestic Partnership in November 2001. Plaintiff alleges that Ms. Taboada-Hall worked for FedEx Corporation for 26 years and was a fully-vested participant in defendant FedEx Corporation's Employees' Pension Plan, a defined Traditional Pension Benefit Plan ("the Plan"), governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). *Schuett*, 119 F. Supp. 3d at 1157.

In February 2010, Ms. Taboada-Hall was diagnosed with cancer that had metastasized to her lungs. *Id.* at 1157. On June 3, 2013, Ms. Taboada-Hall's doctor advised her that her cancer was terminal. *Id*. at 1158.

On June 19, 2013, plaintiff and Ms. Taboada-Hall were married in a civil ceremony at their home. The officiant was a Sonoma County Supervisor, and the ceremony was witnessed by a number of friends and family members. Ms. Taboada-Hall died on June 20, 2013. As of that date, licenses for marriages of same-sex couples were not available in California. *Id*. at 1158.

Six days later, on June 26, 2013, the United States Supreme Court declared § 3 of DOMA unconstitutional. *See United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013). Also on June 26, 2013, the Court issued a decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013), finding that the backers of Proposition 8, California's voter-enacted ban on same-sex marriage, lacked standing to pursue a defense of the measure after it had been held unconstitutional by the U.S. District Court for the Northern District of California, in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010). Two days later, on June 28, 2013, the Ninth Circuit lifted the stay it had previously imposed on the *Perry* court's order directing California officials to stop enforcing Proposition 8. *Perry v. Brown*, 725 F.3d 968 (2013). *Id*. at 1158.

On August 6, 2013, Ms. Schuett filed a Petition to Establish the Fact, Date, and Place of Marriage, pursuant to California Health & Safety Code § 103450, in the Superior Court of California, County of Sonoma. *Id*. at 1158. The Petition was served on the defendants and notice of the September 18, 2013, hearing was given to defendants. Defendants failed to appear. *Id*. at 1158.

On September 18, 2013, following the noticed hearing, the Sonoma County Superior Court issued an Order Establishing the Fact of Marriage, declaring that the marriage of Ms. Schuett and Ms. Taboada-Hall had occurred on June 19, 2013. The court then issued a delayed certificate of marriage showing the date of the marriage as June 19, 2013. *Id*. at 1158.

On November 26, 2013, Ms. Schuett submitted a claim for a qualified preretirement survivor annuity ("QPSA") under the Plan, as Ms. Taboada-Hall's surviving spouse. *Id*. at 1158.

By letter dated April 30, 2014, FedEx Corporation denied the claim, asserting that at the time of Ms. Taboada-Hall's death, the Plan defined "spouse" by explicitly incorporating the DOMA definition of marriage ("a union between one man and one woman") and thus did not provide survivor benefits to same-sex spouses. *Id.* at 1159.

In her second cause of action, Ms. Schuett asserts a claim of breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), against FedEx Corporation and FedEx RAC, for failure to administer the Plan in accordance with applicable law. *Id.* at 1162.

Ms. Schuett asserted that FedEx is required to interpret the Plan under controlling federal law, and that where an ERISA plan conflicts with federal law, the Plan must be interpreted in accordance with federal law (and that the Plan itself so provides). *Id.* at 1162.

Ms. Schuett argued there is no bar to retroactive application of the rule in *Windsor*. **She asserts that when the Supreme Court announces a new rule of federal law and applies that rule to the parties before it, the**

presumption is that the rule applies retroactively. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 90-97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) (holding that *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989) applied retroactively). (emphasis added). Ms. Schuett argues that the Supreme Court itself applied this principle in *Windsor*, when it held that DOMA § 3 was unconstitutional, and affirmed the lower court's judgment requiring the United States to refund the estate taxes Ms. Windsor had paid to the IRS following the death of her wife in 2009, even though at the time Ms. Windsor's wife died, DOMA precluded the IRS from recognizing Ms. Windsor as the surviving spouse. *See Windsor*, 133 S. Ct. at 2682-84. *Id.* at 1165.

Under § 3 of DOMA, the term "spouse" in ERISA and the Internal Revenue Code (and all federal statutes) had to be interpreted to mean a spouse of the opposite sex, in a marriage recognized under applicable state law. *Windsor* involved a claim that the DOMA definition was unconstitutional as applied to U.S. tax laws. The Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment (incorporated into the Due Process Clause of the Fifth Amendment) prevented the federal government from refusing to recognize same-sex marriages that have been entered into under the law of a state. **The claim accrued prior to the filing of the lawsuit, and the decision appears to invalidate § 3 of DOMA retroactive to 1996, the date of enactment. Notably, the decision in *Windsor* applied retroactively**. *Id.* at 1166. (emphasis added).

> The court finds that Ms. Schuett has adequately alleged that FedEx has violated Title I of ERISA by acting contrary to applicable federal law and failing to provide plaintiff with a benefit mandated by ERISA, and that she is entitled to pursue equitable relief to remedy that violation. The court is not persuaded at this stage of the case and under the facts alleged in the complaint that there is any basis for denying retroactive application of *Windsor*.

Id. at 1166.

> **PRACTITIONER'S TIP**: *Obergefell* is being applied retroactively under ERISA with respect to claims that Plans must be administered in accordance with applicable laws.[5]

L. Tax Returns

For tax year 2013 and going forward, same-sex spouses generally must file using a married filing separately or jointly filing status. For tax year 2012 and all prior years, same-sex spouses who file an original tax return on or after Sept. 16, 2013 (the effective date of Rev. Rul. 2013-17), generally must file using a married filing separately or jointly filing status. For tax year 2012, same-sex spouses who filed their tax return before Sept. 16, 2013, may choose (but are not required) to amend their federal tax returns to file using married filing separately or jointly filing status. For tax years 2011 and earlier, same-sex spouses who filed their tax returns timely may choose (but are not required) to amend their federal tax returns to file using married filing separately or jointly filing status provided the period of limitations for amending the return has not expired. A taxpayer generally may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later.

See https://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples. *See also* IRS Revenue Ruling 2013-17, https://www.irs.gov/pub/irs-drop/rr-13-17.pdf.

For information on filing an amended return, go to Tax Topic 308, Amended Returns, at http://www.irs.gov/taxtopics/tc308.html.

> **PRACTITIONER'S TIP**: *Windsor* is being applied retroactively for the purposes of federal income taxes regardless of whether you lived in a recognition or non-recognition state at the time the decision was issued.

M. Health Care Coverage

If an employer provided health coverage for an employee's same-sex spouse and included the value of that coverage in the employee's gross income, can the employee file an amended Form 1040 reflecting the employee's status as a married individual to recover federal income tax paid on the value of the health coverage of the employee's spouse?

> Answer: Yes, for all years for which the period of limitations for filing a claim for refund is open. Generally, a taxpayer may file a claim for refund for three years from the date the return was filed or two years from the

[5] Important Caveat: Please read the district court's decision in Schuett. The Court ruled against Ms. Schuett on two of her ERISA claims.

> date the tax was paid, whichever is later. If an employer provided health coverage for an employee's same-sex spouse, the employee may claim a refund of income taxes paid on the value of coverage that would have been excluded from income had the employee's spouse been recognized as the employee's legal spouse for tax purposes. This claim for a refund generally would be made through the filing of an amended Form 1040. For information on filing an amended return, go to Tax Topic 308, Amended Returns, at http://www.irs.gov/taxtopics/tc308.html. For a discussion regarding refunds of Social Security and Medicare taxes, see Q&A #12 and Q&A #13.

See https://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples.

> **PRACTITIONER'S TIP**: *Windsor* is being applied retroactively for the purposes of health care coverage regardless of whether you lived in a recognition or non-recognition state at the time the decision was issued.

IX. *LIFE PARTNERS V. STATE OF TEXAS*, 464 S.W.3D 660 (TEX. MAY 8, 2015).

In *Life Partners*, the primary issue before the Court in these two separate cases is whether a "life settlement agreement" or "viatical settlement agreement" is an "investment contract" and thus a "security" under the Texas Securities Act. *Life Partners*, 464 S.W.3d at 662. The Court held on this record that Life Partners' life settlement agreements are investment contracts, and thus securities, under the Texas Security Act. *Life Partners*, 464 S.W.3d at 685. It also declined to give its holding only prospective application and it declined to consider the merits of the "relief defendants'" evidentiary arguments. *Life Partners*, 464 S.W.3d at 662.

Life Partners asked the Court to give its holding only prospective effect, and thus alleviate Life Partners from any liability to the Arnolds or the State in the cases based on its prior conduct. *Life Partners*, 464 S.W.3d at 684. (Tex. May 8, 2015).

In support of its request, Life Partners relied on the Supreme Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), and the Texas Supreme Court's decision in *Carrollton--Farmers Branch Independent School District v. Edgewood Independent School District*, 826 S.W.2d 489, 492, 515 (Tex. 1992) ("Edgewood III"), to apply the holdings in those cases prospectively only.

Justice Jeffrey Boyd, writing for the Court, stated:

> We adopted the *Chevron* test in *Edgewood III* and elected to apply our decision in that case declaring the State's public school finance system unconstitutional prospectively only.

Life Partners, 464 S.W.3d at 684-85 (citing 826 *Edgewood III* S.W.2d at 521).

Justice Boyd held:

> we believe that retroactive application of our holding furthers the operation and enforcement of the Securities Act, and in light of the decades of precedent on which we rely, the results impose no inequities on Life Partners. *See, e.g., Bowen v. Aetna Cas. & Sur. Co.*, 837 S.W.2d 99, 100 (Tex. 1992) (per curiam) (holding that a prior decision should be given retroactive effect, even though it had overruled five different courts of appeals on a matter of statutory interpretation). And finally, in response to Life Partners' constitutional concerns, we need only note that our decision merely interprets and applies a very old law, consistent with the manner in which other courts have interpreted and applied it for decades; it does not create a new one. We therefore decline to limit today's holding to prospective application.

Life Partners, 464 S.W.3d at 685.

> **PRACTITIONER'S TIP**: The Texas Supreme Court is continuing to look to the *Chevron Oil* test in determining whether to apply Texas laws and rules retroactively even though it found that *Chevron Oil* did not apply in *Life Partners*. However, Texas Supreme Court's continuing reliance on its adoption of the *Chevron Oil* test in *Edgewood III* should be scrutinized because *Edgewood III* was decided before *Harper*. An argument can be made that because *Harper* rejected the *Chevron Oil* test, that the Texas Supreme Court's adoption of the *Chevron Oil* test in *Edgewood III* is no longer viable.

X. CONCLUSION

Neither the United States Supreme Court nor the Texas Supreme Court has squarely addressed retroactivity in light of *Obergefell*, however, U.S. Supreme Court precedent, the U.S. Government, courts across the county, and the State of Texas are applying *Windsor* and *Obergefell* retroactively. Nevertheless, because of the complexity and

denseness of the issues in retroactivity jurisprudence, a careful practitioner should consult relevant case law and authorities before determining that *Obergefell* applies retroactively in every instance.

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, et al. Plaintiffs,	§	
v.	§	Cause No. SA-13-CA-00982-OLG
RICK PERRY, in his official capacity as Governor of the State of Texas, et al., Defendants.	§	

ORDER GRANTING PLAINTIFFS' EMERGENCY UNOPPOSED MOTION TO LIFT THE STAY OF INJUNCTION

On this day the Court considered Plaintiffs' Emergency Unopposed Motion to Lift the Stay of Injunction (docket no. 95). Based on the opinion issued today by the United States Supreme Court in *Obergefell v. Hodges*, No. 14-556, ___ U.S. ___ (2015), the Court finds Plaintiffs' motion should be GRANTED. Accordingly, the Court hereby LIFTS the stay of injunction issued on February 26, 2014 (*see* docket no. 73), and enjoins Defendants from enforcing Article I, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage.

It is so ORDERED.

SIGNED this 26 day of June, 2015.

United States District Judge Orlando L. Garcia

EXHIBIT 2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-50196

United States Court of Appeals
Fifth Circuit
FILED
July 1, 2015
Lyle W. Cayce
Clerk

CLEOPATRA DE LEON; NICOLE DIMETMAN; VICTOR HOLMES; MARK PHARISS,

Plaintiffs–Appellees,

versus

GREG ABBOTT, in His Official Capacity as Governor of the State of Texas; KEN PAXTON, in His Official Capacity as Texas Attorney General; KIRK COLE, in His Official Capacity as Commissioner of the Texas Department of State Health Services,

Defendants–Appellants.

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, SMITH, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The plaintiffs are two same-sex couples who seek to marry in Texas or to have their marriage in another state recognized in Texas. They sued the state defendants seeking (1) a declaration that Texas's law denying same-sex couples the right to marry, set forth in Article I, § 32 of the Texas Constitution and, *inter alia*, Texas Family Code §§ 2.001 and 6.204, violates the Due Process and

No. 14-50196

Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. § 1983 and also seeking (2) a permanent injunction barring enforcement of Texas's laws prohibiting same-sex couples from marrying. On February 26, 2014, the district court issued a preliminary injunction prohibiting the state from enforcing any laws or regulations prohibiting same-sex couples from marrying or prohibiting the recognition of marriages between same-sex couples lawfully solemnized elsewhere. The court immediately stayed its injunction while the state appealed. After full briefing, including participation by numerous *amici curiae*, this court heard expanded oral argument on January 9, 2015.

While this appeal was under submission, the Supreme Court decided *Obergefell v. Hodges*, No. 14-556, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015). In summary, the Court declared that

> the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* [, 409 U.S. 810 (1972),] must be and now is overruled, and the State laws challenged by petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Id. at *41–42. "It follows that the Court must also hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at *50.

Having addressed fundamental rights under the Fourteenth Amendment, the Court, importantly, invoked the First Amendment, as well:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be

> condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Id. at *48–49.

Obergefell, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit[1] and should not be taken lightly by actors within the jurisdiction of this court. 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.

In response to *Obergefell*, the same day it was announced, the district court *a quo* issued a one-paragraph order entitled "Order Granting Plaintiffs' Emergency Unopposed Motion To Lift the Stay of Injunction," stating that it "hereby LIFTS the stay of injunction issued on February 26, 2014 . . . and enjoins Defendants from enforcing Article I, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage." This court sought and promptly received

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[1] If it were suggested that any part of the quoted passages is o*biter dictum*, we need only recall that although "[w]e are not bound by dicta, even of our own court [,] [d]icta of the Supreme Court are, of course, another matter." *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980). "[W]e give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court." *Geralds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013) (Reavley, J.).

letter advisories from plaintiffs and the state, asking their respective positions on the proper specific disposition in light of *Obergefell*. Because, as both sides now agree, the injunction appealed from is correct in light of *Obergefell*, the preliminary injunction is AFFIRMED. This matter is REMANDED for entry of judgment in favor of the plaintiffs. The court must act expeditiously on remand and should enter final judgment on the merits (exclusive of any collateral matters such as costs and attorney fees) by July 17, 2015, and earlier if reasonably possible.[2]

The mandate shall issue forthwith.

---

[2] Any pending motions are denied as moot.

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, et al.
Plaintiffs,

v.

RICK PERRY, in his official capacity as Governor of the State of Texas, et al.,
Defendants.

Cause No. SA-13-CA-00982-OLG

FINAL JUDGMENT

On July 1, 2015, the Fifth Circuit affirmed this Court's grant of a preliminary injunction and issued a mandate for this Court to enter judgment in favor of Plaintiffs in this case. *See De Leon v. Abbott*, No. 14-50196, 2015 WL 4032161, ___ F.3d ___ (5th Cir. 2015). In light of the United States Supreme Court's decision in *Obergefell v. Hodges*, No. 14-556, 2015 WL 2473451, ___ U.S. ___ (2015), and pursuant to the Fifth Circuit's mandate, the Court hereby enters judgment in this case.

It is hereby ORDERED, ADJUDGED, and DECREED that:

1) Any Texas law denying same-sex couples the right to marry, including Article I, §32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983;
2) Defendants are permanently enjoined from enforcing Texas's laws prohibiting same-sex marriage; and
3) Any taxable costs in this case are assessed against the Defendants.

It is so ORDERED.

SIGNED this 7 day of July, 2015.

United States District Judge Orlando L. Garcia

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

SHIRLEY RANOLLS, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE ESTATE OF APRIL DAWN RANOLLS, DECEASED	§	
VS.	§	Civil Action No. 1:15-cv-00111
ADAM DEWLING, ET AL.	§	Jury Trial Requested

PETITION IN INTERVENTION

COMES NOW RHONDA RENEE HOGAN, hereinafter called Intervenor-Plaintiff, and pursuant to Fed.R.Civ.P. 24, files this Petition in Intervention, and asserts her causes of action against Adam Dewling; Tankstar USA, Inc.; Rogers Cartage, Co.; and Bulk Logistics, Inc. ("Defendants"), would respectfully show the Court and Jury as follows:

PARTIES

1. Intervenor-Plaintiff appears herein as a proper plaintiff pursuant to the wrongful death and survival actions created by Tex. Civ. Prac. & Rem. Code Chapter 71, based upon her informal marriage to April Dawn Ranolls ("Decedent"), which existed at the time of the death of Decedent.

2. Defendants Adam Dewling; Tankstar USA, Inc.; Rogers Cartage, Co.; and Bulk Logistics, Inc., are all before the Court, as is Shirley Ranolls, who has appeared herein as a Plaintiff. A true and correct copy of this Petition is being served on counsel for each said party, in accordance with the Federal Rules of Civil Procedure.

3. Defendant Adam Dewling ("Defendant Dewling") is an individual who resides in the State of Florida who, at all times material to this lawsuit, was doing business in the State of Texas.

4. Defendant Tankstar USA, Inc. ("Defendant Tankstar"), is a Wisconsin corporation which, at all times material to this lawsuit, was doing business in the State of Texas.

5. Defendant Rogers Cartage, Co. ("Defendant Rogers"), is an Illinois corporation which, at all times material to this lawsuit, was doing business in the State of Texas.

6. Defendant Bulk Logistics, Inc. ("Defendant BLI"), is a Wisconsin corporation which, at all times material to this lawsuit, was doing business in the State of Texas.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction based on diversity of citizenship, as all the Plaintiffs, as well as Intervenor-Plaintiff, are citizens of the State of Texas, and all Defendants are natural persons who are citizens of, or corporations which are domiciled in states other than the State of Texas.

8. Venue is proper in the Eastern District of Texas, Beaumont Division, because the incident made the basis of this lawsuit occurred in Orange County, Texas, which lies within said District and Division, and this lawsuit was timely removed from the 136th Judicial District Court of Orange County, Texas.

OTHER FACTS RELATING TO PARTIES

9. The Texas Informal Marriage statute, Tex. Fam. Code §2.401, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, in that

it limits its application to a "man and woman," and fails to recognize informal marriages between same sex couples such as Intervenor-Plaintiff and Decedent.[1]

10. In conforming Tex. Fam. Code §2.401 to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and applying such modified statute to the facts of the relationship between Intervenor-Plaintiff and Decedent as it existed prior to the death of Decedent, Intervenor-Plaintiff and Decedent had an Informal Marriage, as during such period of time, Intervenor-Plaintiff and Decedent had agreed to be married, and after such agreement they lived together in the State of Texas as spouses and there represented to others that they were married.

11. Subsequent to the formation of the Informal Marriage between Intervenor-Plaintiff and Decedent, Decedent was killed in the motor vehicle collision which forms the basis of the underlying lawsuit.

12. As the surviving spouse of Decedent, Intervenor-Plaintiff is a proper plaintiff to assert a wrongful death action under Tex. Civ. Prac. & rem. Code Chapter 71.[2]

13. Further, as the spouse of Decedent, Intervenor-Plaintiff is a proper plaintiff to assert a survival action under Tex. Civ. Prac. & Rem. Code Chapter 71, as she is an heir to the Estate of April Dawn Ranolls.[3]

14. Intervenor-Plaintiff states that she is the sole heir of the Estate of April Dawn Ranolls pursuant to a Will duly executed by Decedent prior to her death.

15. Based on the foregoing allegations, Intervenor-Plaintiff states that she is the proper Representative of the Estate of April Dawn Ranolls.

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[1] Tex. Fam. Code §2.401.
[2] Tex. Civ. Prac. & Rem. Code §§71.001, et seq.
[3] Tex. Civ. Prac. & Rem. Code §§71.021, et seq.

ALLEGATIONS OF FACT – THE INCIDENT

16. On or about March 9, 2015, at approximately 6:00 a.m., Decedent was driving her vehicle southbound on State Highway 62, approaching the Pilot Truck Stop, when Defendant Dewling drove a tractor-trailer out of the Pilot Truck Stop exit, directly into the path of Decedent's vehicle.

17. Decedent did not have time to stop, and her vehicle collided with the tractor-trailer being operated by Defendant Dewling. This event is referred to hereinafter as "the Incident."

18. The Incident caused injuries to and death of Decedent.

ALLEGATIONS – VICARIOUS LIABILITY

19. At the time of the Incident, Defendant Dewling was an agent, servant, borrowed servant or employee, acting in the course and scope of agency or employment for one or more of the other Defendants, Defendant Tankstar, Defendant Rogers and/or Defendant BLI. Said Defendants, Defendant Tankstar, Defendant Rogers and/or Defendant BLI are therefore vicariously liable for the tortious conduct of Defendant Dewling under the doctrine of *Respondeat Superior.*

20. In the alternative, Defendants, Tankstar, Rogers and/or BLI are vicariously liable for the conduct of Defendant Dewling as an independent operator of their tractor-trailer, pursuant to federal law, and specifically the Federal Motor Carrier Safety Act and its relevant regulations.

ALLEGATIONS – NEGLIGENCE OF DEFENDANTS

21. At the time of the event, Defendant Dewling, and therefore under the doctrine of *Respondeat Superior,* or as otherwise provided under federal law, Defendants Tankstar, Rogers, and/or BLI, were guilty of the following acts, wrongs and/or omissions, each of which constituted negligence and/or negligence per se, and each of which, individually and collectively,

proximately caused the incident, the injuries to and death of Decedent, and the damages suffered by Intervenor-Plaintiff:

a. Failure to keep a proper lookout;

b. Failure to properly control his vehicle;

c. Failure to yield right of way;

d. Entering a roadway from a private driveway when it as unsafe to do so;

e. Driving recklessly; and

f. Driving while distracted (on information and belief).

22. Further, at the time of the event, Defendants Tankstar, Rogers and/or BLI were guilty of the following acts or omissions, each of which constituted negligence and/or negligence per se, and each of which, individually and collectively, proximately caused the incident, the injuries to and death of Decedent, and the damages suffered by Intervenor-Plaintiff:

a. Failure to properly train Defendant Dewling;

b. Failure to properly supervise Defendant Dewling;

c. Failure to exercise ordinary care in hiring Defendant Dewling.

DAMAGES

23. Intervenor-Plaintiff is the surviving spouse of Decedent, and as such, brings a claim for wrongful death of Decedent, and in that regard, makes a claim for the following elements of wrongful death damages:

a. Loss of spousal consortium, including the love, companionship, support, advice, counsel and society which she would have reasonably expected from their relationship in the future;

b. Grief and bereavement for the shocking and untimely death of her spouse.

Intervenor-Plaintiff sues the Defendants, jointly and severally, for the full amount of her damages, in the past and future, as determined by a jury.

24. Intervenor-Plaintiff is the proper Representative of the Estate of April Dawn Ranolls. Thankfully, it appears that Decedent did not survive beyond the moment of impact. However, for whatever period of conscious pain or mental anguish Decedent was aware of her impending death, or any physical pain that it is proved she suffered due to the negligence of the Defendants, even for one second, Intervenor-Plaintiff seeks a recovery on behalf of the Estate of April Dawn Ranolls. Intervenor-Plaintiff also seeks recovery of the funeral and burial expenses, to be reimbursed by the Estate of April Dawn Ranolls to those persons who paid for the cost of same.

GROSS NEGLIGENCE – PUNITIVE DAMAGES

25. Intervenor-Plaintiff states, on information and belief, that the conduct of Defendants, all set out above, when viewed objectively from the standpoint of Defendants at the time of their commission, involved an extreme degree of risk, considering the probability and magnitude of potential harm to other drivers on the roadway, such as Decedent. Further, such conduct was committed with actual, subjective awareness that their conduct exposed others on the roadway, such as Decedent, to an extreme degree of risk of death or serious injury, but Defendants nevertheless acted with conscious indifference to the rights, safety and welfare of others such as Decedent. Such conduct merits a finding of "gross negligence" as that term is defined and applied under the Texas Civil Practice and Remedies Code and upheld under the Constitutions of the State of Texas and the United States.

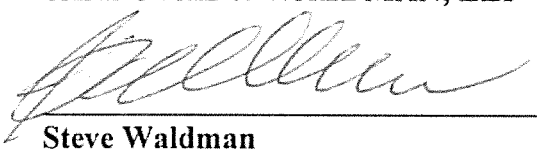
26. Intervenor-Plaintiff states that, as a result of the gross negligence of Defendants, each of said Defendants is individually liable for exemplary or punitive damages, in an amount deemed just and fair by the Court and jury.

PRAYER

27. For these reasons, Intervenor-Plaintiff asks for judgment against Defendants for actual damages, exemplary damages, prejudgment and post-judgment interest to the fullest extent of the law, costs of suit and all other relief the Court deems appropriate.

Respectfully submitted,

SANDOVAL & WALDMAN, LLP



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ATTORNEYS FOR PETITIONER AND/OR INTERVENOR-PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

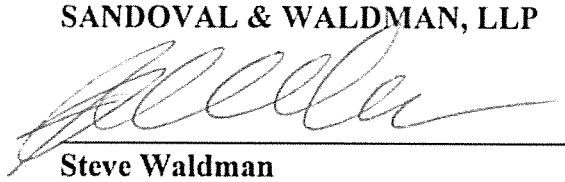
SHIRLEY RANOLLS, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE ESTATE OF APRIL DAWN RANOLLS, DECEASED	§	
VS.	§	Civil Action No. 1:15-cv-00111
ADAM DEWLING, ET AL.	§	Jury Trial Requested

INTERVENOR-PLAINTIFF'S DEMAND FOR JURY TRIAL

Intervenor-Plaintiff RHONDA RENEE HOGAN, asserts her rights under the Seventh Amendment to the U.S. Constitution and demands, in accordance with Federal Rule of Civil Procedure 38, a trial by jury on all issues.

Respectfully submitted,

SANDOVAL & WALDMAN, LLP



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ATTORNEYS FOR PETITIONER AND/OR INTERVENOR-PLAINTIFF

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS, *Plaintiffs*,	§	
v.	§	CIVIL ACTION NO. 5:13-CV-982-OLG
GREG ABBOTT, in his official capacity as Governor of the State of Texas, KEN PAXTON, in his official capacity as Texas Attorney General, GERARD RICKHOFF, in his official capacity as Bexar County Clerk, and KIRK COLE, in his official capacity as Interim Commissioner of the Texas Department of State Health Services *Defendants*.	§	

DECLARATION OF BARBARA LAUREL KLEIN

My name is Barbara Laurel Klein and I am over the age of 18 and fully competent to make this declaration and state the following:

1. I am a Deputy General Counsel for the Department of State Health Services.
2. On August 12, 2015, the Department of State Health Services issued an Action Memorandum implementing changes to vital records for vital events in compliance with the U.S. Supreme Court ruling in *Obergefell v. Hodges* and the U.S. District Court ruling in *DeLeon v. Abbott*, regarding recognition of same-sex couples.

3. Attached as Exhibit A is a true and correct copy of the Action Memorandum.
4. The Court has ordered Defendants to also submit an advisory by August 24, 2015 regarding pending applications. (Dkt. #113.) With the adoption of the attached Action Memorandum, the Department has begun issuing death certificate amendments.
5. The processing of software modifications by the third-party vendor that hosts the platform for vital records will take additional time, which will impact the issuance of birth certificates. Until that change is made, those requesting a birth certificate listing parents of the same sex may choose either to (1) obtain the standard birth certificate listing "mother" and "father" as well as an amendment to the birth certificate once the software modification is complete; or (2) obtain an original birth certificate allowing for the parents to be identified as "mother," "father" or "parent" once the software modification is complete. The Department has investigated other options, none of which appear viable other than the modifications described above, but will continue to explore other alternatives.
6. The Department has had multiple telephone conferences with the vendor so far, regarding the required changes. The vendor is working toward developing an expected timeline to complete the software modification.

7. For pending requests of which the Department is currently aware, the Department will begin issuing qualifying death records and contact requestors of qualifying birth records, to advise them of their available options to obtain their records.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of August, 2015.

Barbara Laurel Klein

TEXAS DEPARTMENT OF STATE HEALTH SERVICES

KIRK S. COLE
INTERIM COMMISSIONER

August 12, 2015

ACTION

MEMORANDUM FOR THE COMMISSIONER

FROM: Lisa Hernandez, General Counsel

SUBJECT: Recommendation for Implementation of procedures regarding issuance of same sex married couples' related vital records in response to the U.S. Supreme Court Ruling in *Obergefell* and U.S. District Court ruling in *DeLeon v. Abbott*

Purpose

To request approval of the implementation of recommendations regarding the issuance of vital records for vital events that occurred in Texas, in compliance with the U.S. Supreme Court ruling in *Obergefell v. Hodges*, No. 14-566 (U.S. 2015) (*Obergefell),* and the U.S. District Court ruling in *DeLeon v. Abbott,* No. SA-13-CA-00982-OLG (W.D. Tex. July 7, 2015) (*DeLeon),* regarding recognition of same-sex marriage.

Background/Summary

DSHS' Office of General Counsel has been working with the Vital Statistics Unit (VSU) and the Office of the Attorney General (OAG) since the day of the ruling in *Obergefell,* specifically, June 26, 2015, to implement changes to forms and practices that enable DSHS to comply with the ruling. On Friday, June 26, 2015, DSHS modified its formal marriage application and informal marriage application for use by local registrars and distributed the form to local registrars for immediate use on that same day. DSHS also accepted hand-modified marriage applications received for filing even after it submitted the revised marriage application to local officials. Since that time, DSHS has received and filed 963 same-sex marriage license applications to date.

With the issuance of *Obergefell*, DSHS also immediately began reviewing vital events forms, identified all vital event areas and records that may be impacted by the ruling, began to assess costs and effort to amend forms, and continued its review with the OAG of the ruling to

determine the impact on other vital events and records. The other vital events and/or forms that DSHS had identified as potentially impacted by the ruling were birth certificates, death certificates, adoptions and supplementary birth certificates, gestational agreements, burial permits, disinterment, and divorce forms. On July 7, 2015, the U.S. District Court for the Western District of Texas, San Antonio Division, issued a decision in *DeLeon,* consistent with the U.S. Supreme Court's decision in *Obergefell.*

This recommendation is a result of the advice provided by the OAG along with DSHS' evaluation of its forms and processes to enable it to implement the rulings.

Discussion

In consultation with the OAG, DSHS OGC is recommending that DSHS address the issuance of vital event records for the following vital events in response to the *Obergefell* and *DeLeon* rulings as follows:

Birth Certificates: Birth certificates are to be issued/amended for same sex-couples to whom a child was born in Texas when one spouse is the birth mother, if the parents were legally and formally married in Texas or another state at the time of the child's birth and provide documentation to this effect, along with other standard documentation required for birth certificate issuance/amendment. This does not include adoptions or gestational agreements (surrogate birth), which are referenced below.

Death Certificates: Death certificates will be processed and issued/amended to include the name of a decedent's same-sex surviving spouse, when the death occurred in Texas on or after June 26, 2015 for same-sex couples that were formally and legally married in Texas or another state, at the time of the decedent's death. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of a death certificate. For decedents who died in Texas prior to June 26, 2015, an amendment to the death certificate, as requested, will be processed recognizing any legal, formal same-sex marriage at the time of death, for same-sex marriages that occurred in another state prior to June 26, 2015, to list the surviving spouse and the decedent's status as "married". Documentation must be provided to this effect, along with other standard documentation required for an amendment to a death certificate.

Adoptions: For any adoption ordered on or after June 26, 2015, supplementary birth certificates for children born in Texas, will be issued/amended for the adopted child to include same-sex couples whose names are listed on the court order or formal certificate of adoption as the adoptive parents. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of a supplementary birth certificate for an adoption. For adoptions ordered prior to June 26, 2015, amendments to supplementary birth certificates previously issued, will be processed and issued, as requested, to list the names of

both persons of the same-sex couple if both are named as parents in the court ordered adoption. Documentation must be provided to this effect, along with other standard documentation required for issuance of an amendment to a supplementary birth certificate for an adoption.

Gestational Agreements (Surrogacy): Birth certificates will be processed and issued/amended for any births occurring in Texas, for which persons that are a same-sex couple are legally authorized to be the intended parents of the child as authorized by Texas Family Code, ch. 160, subchapter I. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of records for these vital events.

Burial Permits, Disinterment, Divorce and other Vital Events/Records not listed above: Any additional requests that are received that are not listed above and involve the recording of vital events through vital records will be reviewed and processed to ensure compliance with *Obergefell* and *DeLeon.*

With your approval, OGC will work with VSU to amend existing forms to ensure the proper reflection of terms and status of persons that are listed on vital records as a result of the implementation of these recommendations. While we will work to implement all aspects immediately and process and issue all requests as soon as possible, DSHS has identified some forms that require software modification to properly reflect terminology consistent with the Courts rulings.

All modified forms and instructions will be communicated to local registrars or other entities that may file vital information such as hospitals and funeral homes. Additional information will be provided on DSHS' website and other areas where the public may seek vital records information from DSHS, regarding required documentation or other necessary instructions regarding the issuance of records for the events described above specific to the changes required by the courts' rulings.

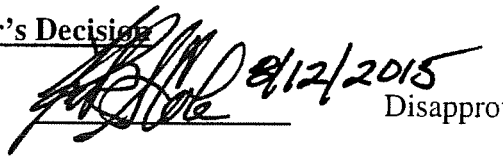
For any pending requests, DSHS will reach out to the requestor regarding the status of the request, any need for additional documentation and the anticipated time frame by which the request may be processed.

Recommendation

That you approve the processing and issuance of vital records regarding the vital events described above in compliance with *Obergefell* and *DeLeon.*

Action Memorandum for the Commissioner
August 12, 2015
Page 4

Commissioner's Decision

Approve  Disapprove _____

Modify _____ Needs More Discussion _____

Pend for Future Consideration _____

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS, *Plaintiffs*,	§	
v.	§	CIVIL ACTION NO. 5:13-CV-982-OLG
GREG ABBOTT, in his official capacity as Governor of the State of Texas, KEN PAXTON, in his official capacity as Texas Attorney General, GERARD RICKHOFF, in his official capacity as Bexar County Clerk, and KIRK COLE, in his official capacity as interim Commissioner of the Texas Department of State Health Services *Defendants*.	§	

ADVISORY TO THE COURT

On August 11, 2015, the Court requested notification by August 24, 2015 that the Department of State Health Services (Department) has: (1) created, issued, and implemented policy guidelines recognizing same-sex marriage in death and birth certificates, and (2) granted pending applications for birth and death certificates involving same-sex couples that are otherwise complete and qualify for approval. (Doc. #113 at 2.) As explained herein, the Department has exercised its authority to adapt its policies in light of *Obergefell v. Hodges*, No. 14-556 (U.S. 2015). As the Department's attorney, the Office of the Attorney General files this advisory to explain the Department's efforts to the Court. In short, the Department has created and implemented policy

guidelines that comply with *Obergefell* and this Court's injunction and has granted complete applications that qualify for approval. Additionally, the Department has contacted persons with pending applications that require additional information or payment to complete.

The State Defendants renew their objection to the intervention of a new party raising new issues in this matter after final judgment was entered. The State Defendants also continue to object to the unprecedented threat of contempt regarding the Department's processing of death and birth certificates by virtue of an attenuated link to this Court's injunction related to marriage, especially when that agency is diligently working to comply with a court ruling that unsettled what Justice Kennedy characterized at oral argument as a "millennia"-old definition of marriage. And the Office of the Attorney General continues to object to the threat of contempt for discharging a constitutional duty to represent a client agency. Because the Department is in full compliance with *Obergefell* and this Court's injunction and has granted the relief the intervenor sought, the State Defendant's believe there is no need for the Court's scheduled September 10, 2015 contempt hearing or any continued Court supervision of the Department.

I. POLICY GUIDELINES RECOGNIZING SAME-SEX MARRIAGE IN DEATH AND BIRTH CERTIFICATES

On August 12, 2015, the Department revised its policies regarding birth and certificates as well as surrogacy agreements.

A. Birth Certificates and Amendments

> The Department adopted a birth certificate policy that provides:
>
> Birth certificates will be processed, to same sex-couples to whom a child was born in Texas when one spouse is the birth mother, if the parents were legally married in Texas or another state at the time of the child's birth, and provide standard documentation required for birth certificate issuance.
>
> Birth certificate amendments will be processed, upon request, for same-sex couples to whom a child was born in Texas when one spouse is the birth mother, if the parents were legally married prior to the birth of their child. Standard documentation, including verification of marriage, will be required. An informal marriage may be documented for purposes of amending a vital record by a properly filed informal marriage declaration or a court order establishing an informal marriage.

Department of State Health Services, Revised Policies: Vital Records Requests from Married Same-Sex Couples, *at* http://www.dshs.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590000378 (Aug. 24, 2015). This policy is predicated on Texas statutes regarding assisted reproduction that deem a child born to a marriage by means of a sperm or egg donor to be a child of the marriage. *See* TEX. FAM. CODE §§ 160.701-.707.

B. Death Certificates and Amendments

> The Department adopted a death certificate policy that provides:
>
> Death certificates will be processed and issued/amended to include the name of a decedent's same-sex surviving spouse, when the death occurred in Texas on or after June 26, 2015 for same-sex couples that were legally married in Texas or another state, at the time of the decedent's death. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of a death certificate.

> For decedents who died in Texas prior to June 26, 2015, an amendment to the death certificate, as requested, will be processed recognizing any legal, same-sex marriage at the time of death, for same-sex marriages that occurred in another state prior to June 26, 2015, to list the surviving spouse and the decedent's status as "married". Documentation must be provided to this effect, along with other standard documentation required for an amendment to a death certificate.
>
> An informal marriage may be documented for purposes of amending a vital record by a properly filed informal marriage declaration or a court order adjudicating an informal marriage has been established.

Department of State Health Services, Revised Policies: Vital Records Requests from Married Same-Sex Couples, *at* http://www.dshs.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590000378 (Aug. 24, 2015).

C. Gestational Agreements (Surrogacy)

Tthe Department adopted a surrogacy policy that provides:

> Birth certificates will be processed and issued/amended for any births occurring in Texas, for which persons that are a same-sex couple are legally authorized to be the intended parents of the child as authorized by Texas Family Code, ch. 160, subchapter I. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of records for these vital events.

Id.; (Doc. # 114-1 at 6). The Texas surrogacy statutes deem a child born to a marriage under a gestational agreement to be a child of the marriage rather than a child of the gestational birth mother. TEX. FAM. CODE §§ 160.751-.763.

II. GRANTING OF PENDING APPLICATIONS FOR BIRTH AND DEATH CERTIFICATES FOR SAME-SEX COUPLES

A. Birth Certificates and Amendments

On August 19, 2015, the electronic platform that hospitals and birthing centers use to create entries for birth records was updated to allow spouses to select "Mother," "Father," or "Parent" in accordance with the above-addressed statutes and policies. Applications on file before that change occurred were given the option of: (1) obtaining at that time a birth certificate listing preexisting titles with the ability to obtain a subsequent amendment to reflect new titles after the software change occurs, or (2) waiting to obtain a revised birth certificate once the software change occurs. All such applicants the Department is aware of have now been contacted regarding their ability to obtain an amendment or a revised certificate. That Department has processed requests for birth certificates and amendments that met the Department's revised policy. Its employees have also returned phone calls on a daily basis involving what documentation is needed to obtain a birth certificate or amendment.

B. Death Certificates and Amendments

The Department has been accepting death certificates that list a surviving same-sex spouse. Also, the Department has issued death certificate amendments to list a surviving same-sex spouse in conformance with its policy (including an amendment for the intervenor in this proceeding) to those who have requested it. The Department has notified several requestors that additional documentation is needed to process their request to amend a death certificate to add a same-same surviving spouse.

C. Gestational Agreements (Surrogacy)

As of the date of this filing, the Department has not received any requests for birth certificates to list same-sex spouses resulting from surrogacy agreements. If the Department receives such a request, it will issue any requested certificate in compliance with its policy.

III. Other Matters Related to Marriage

The Department's August 12, 2015 policy states that matters such as burial permits, disinterment, divorce, and other vital events or records will be reviewed to ensure compliance with *Obergefell* and *DeLeon*. The Department has concluded that: 1) the disinterment application and consent forms need no change because they have no gender-specific fields, and 2) the form for county clerks reporting a divorce to the Department will be modified to accommodate same-sex spouses. It has revised its policy accordingly and will issue vital records and document vital events in conformance with its policy. *See* Department of State Health Services, Revised Policies: Vital Records Requests from Married Same-Sex Couples, *at* http://www.dshs.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590000378 (Aug. 24, 2015).

IV. Matters Unrelated to Marriage

The Department's August 12, 2015 policy also addressed supplemental birth certificates, which are issued to adoptive parents under Texas law. (Doc. # 114-1 at 5-6). The policy provides that supplemental birth certificates will

be issued or amended to reflect same-sex adoptive parents. *Id.* The supplemental birth certificate statute does not address marriage as a predicate to being listed on a supplemental birth certificate. *See* TEX. HEALTH & SAFETY CODE § 192.008(a). As such, Texas supplemental birth certificates are not addressed by *Obergefell* or *DeLeon*.

V. CONCLUSION

The Department is complying with the Court's injunction as well as *Obergefell*'s requirement that States provide for marriage on the same terms to same-sex couples as opposite sex couples. The State Defendant's believe there is no need for the Court's scheduled September 10, 2015 contempt hearing or any continued Court supervision of the Department.

Respectfully submitted,

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ATTORNEYS FOR STATE DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on August 24, 2015, I served all parties a copy of the foregoing document via the Court's ECF service.

s/ Michael P. Murphy
MICHAEL P. MURPHY

Birth Certificates:
Birth certificates will be processed, to same sex-couples to whom a child was born in Texas when one spouse is the birth mother, if the parents were legally married in Texas or another state at the time of the child's birth, and provide standard documentation required for birth certificate issuance.

Birth certificate amendments will be processed, upon request, for same-sex couples to whom a child was born in Texas when one spouse is the birth mother, if the parents were legally married prior to the birth of their child. Standard documentation, including verification of marriage, will be required. An informal marriage may be documented for purposes of amending a vital record by a properly filed informal marriage declaration or a court order establishing an informal marriage.

This does not include adoptions or gestational agreements (surrogate birth), which are referenced below.

Death Certificates:
Death certificates will be processed and issued/amended to include the name of a decedent's same-sex surviving spouse, when the death occurred in Texas on or after June 26, 2015 for same-sex couples that were legally married in Texas or another state, at the time of the decedent's death. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of a death certificate.

For decedents who died in Texas prior to June 26, 2015, an amendment to the death certificate, as requested, will be processed recognizing any legal, same-sex marriage at the time of death, for same-sex marriages that occurred in another state prior to June 26, 2015, to list the surviving spouse and the decedent's status as "married." Documentation must be provided to this effect, along with other standard documentation required for an amendment to a death certificate.

An informal marriage may be documented for purposes of amending a vital record by a properly filed informal marriage declaration or a court order adjudicating an informal marriage has been established.

Adoptions:
For any adoption ordered on or after June 26, 2015, supplementary birth certificates for children born in Texas will be issued/amended for the adopted child to include same-sex couples whose names are listed on the court order or formal certificate of adoption as the adoptive parents. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of a supplementary birth certificate for an adoption.

For adoptions ordered prior to June 26, 2015, amendments to supplementary birth certificates previously issued, will be processed and issued, as requested, to list the names of both persons of the same-sex couple if both are named as parents in the court ordered adoption. Documentation must be provided to this effect, along with other standard documentation required for issuance of an amendment to a supplementary birth certificate for an adoption.

Gestational Agreements (Surrogacy):
Birth certificates will be processed and issued/amended for any births occurring in Texas, for which persons that are a same-sex couple are legally authorized to be the intended parents of the child as

authorized by Texas Family Code, ch. 160, subchapter I. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of records for these vital events.

Burial Permits and Disinterment:
These forms remain unchanged and will continue to be processed as received.

Divorce and other Vital Events/Records not listed above:
Any additional requests that are received that are not listed above and involve the recording of vital events through vital records will be reviewed and processed to ensure compliance with *Obergefell* and *DeLeon*.

EXHIBIT 7

No. C-1-PB-14-001695

ESTATE OF	§	**IN THE PROBATE COURT**
	§	
STELLA MARIE POWELL,	§	**NUMBER 1**
	§	
DECEASED	§	**TRAVIS COUNTY, TEXAS**

ORDER ON SPECIAL EXCEPTIONS AND MOTION TO DISMISS

On this day, the Court considered Applicants James Powell and Alice Huseman's Special Exceptions to, and Motion to Dismiss, Sonemaly Phrasavath's (1) Contest to Applicants' Application for Determination of Heirship and Issuance of Letters of Independent Administration and (2) Counter-application to Determine Heirship, for Appointment of Dependent Administrator and Issuance of Letters of Administration (collectively, the "Special Exceptions and Motion to Dismiss"). Having considered the Special Exceptions and Motion to Dismiss, the response and supplemental response filed by Sonemaly Phrasavath, the arguments of counsel, and all other papers on file in this matter, the Court hereby DENIES the Special Exceptions in their entirety.

In denying the Special Exceptions, the Court finds that Texas Family Code § 2.401, Texas Family Code § 6.204(b), and Article I, § 32 of the Texas Constitution are unconstitutional insofar as they restrict marriage in the State of Texas to a union of a man and woman and prohibit the creation or recognition of marriage to same-sex couples, because such restrictions and prohibitions violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Unites States Constitution.

Signed on February 17, 2015.

HONORABLE JUDGE GUY HERMAN

Approved as to form: