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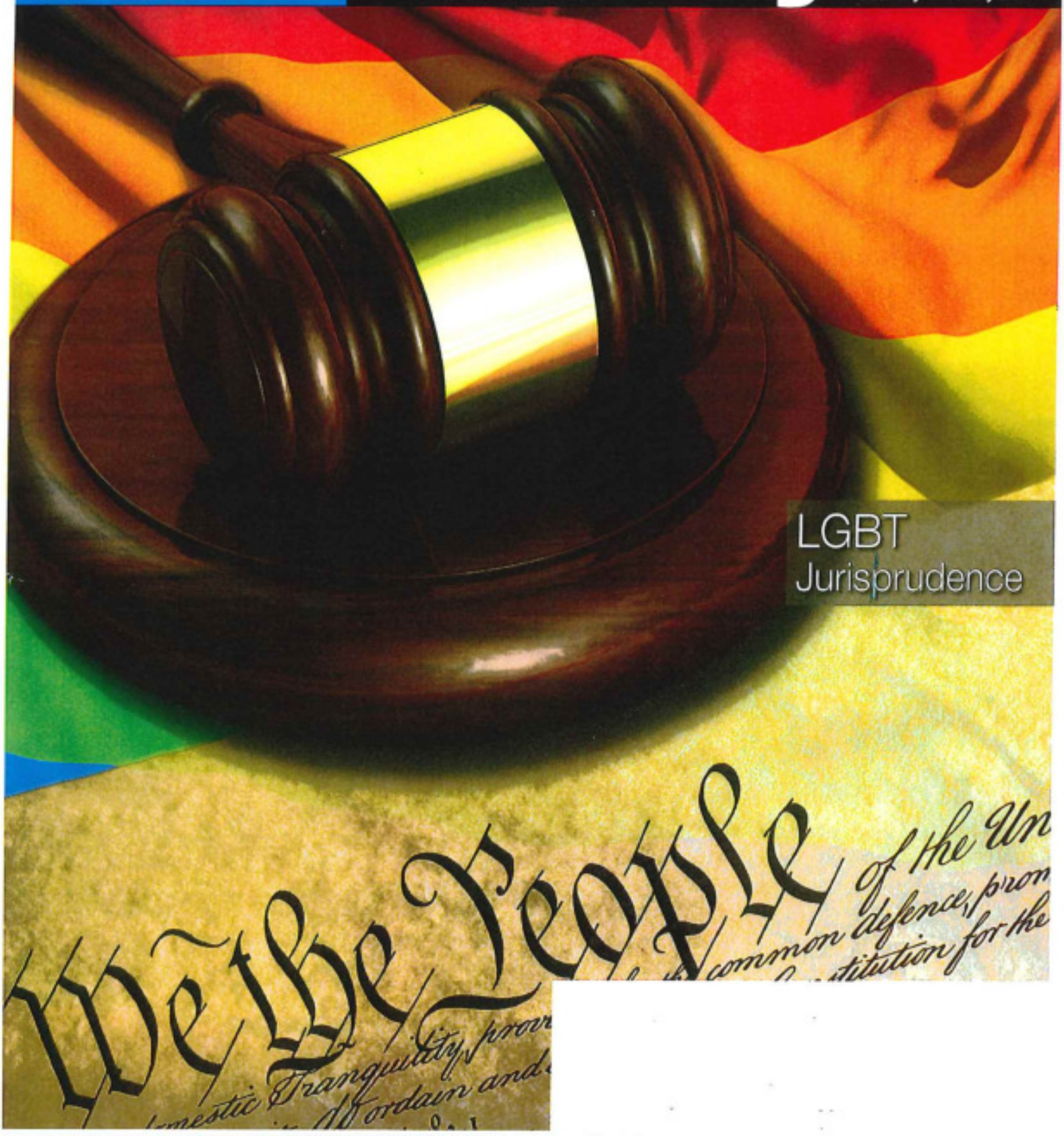

By TREY YATES and MIKE DAY

Arguments For and Against the Retroactive Application of *Obergefell* in Texas

Obergefell v. Hodges is rightly considered one of the most noteworthy U.S Supreme Court decisions in recent history, one that sparked passionate discussions on issues of equality and free exercise of religion throughout the nation. The *Obergefell* Court held that same-sex individuals have the right to legally marry, arising from their due process and equal protection rights. The purpose of this article is not to praise or assail the correctness of the *Obergefell* holding. Rather, this article endeavors to offer a dispassionate analysis of whether *Obergefell* should be applied retroactively by Texas courts.

The retroactive application of *Obergefell* is one of the most interesting legal issues being litigated today. Although primarily considered a family law matter, the existence of a legal marriage can impact a wide spectrum of litigation issues from wrongful death claims to chain-of-title disputes. In the absence of appellate guidance, there is substantial uncertainty among the trial courts when deciding the applicability of *Obergefell*.

Arguments Supporting Retroactive Application

That *Obergefell* should be applied retroactively is the conventional wisdom approach. In researching this issue, the first resource a practitioner should review is the very recent opinion issued by Judge Crone of the Eastern District of Texas in *Ranolls v. Dewling*.[1] Judge Crone provides some of the most lucid and fundamentally sound analyses found on this issue. In *Ranolls*, an automobile accident resulted in the death of Ranolls's daughter. The daughter's alleged common-law wife intervened, claiming that she, not the mother, should represent the decedent's estate as the surviving spouse. Defendants sought summary judgment on the issue of whether *Obergefell* applied retroactively and, if it did, summary judgment on the informal marriage issue.

Judge Crone began by citing *Obergefell*'s holding that the right to marry is a fundamental right of Due Process and Equal Protection.[2] She went on to note that unconstitutional laws are void from the inception, as if they never existed.[3] Judge Crone provided a brief history of the rather convoluted retroactivity jurisprudence.[4] She discussed how the U.S. Supreme Court adopted the *Chevron Oil* test (discussed further below) and then gradually retreated from this approach.[5] Judge Crone concluded her historical analysis by stating one of the central tenets of contemporary retroactivity jurisprudence, *i.e.* ,when the U.S. Supreme Court applies a new rule of law to the parties in a case, then all courts must apply the new rule with respect to all others similarly-situated if not barred by proce-

dural requirements or *res judicata*.[6]

Judge Crone then determined that *Obergefell* should apply retroactively to the parties in *Ranolls* because the U.S. Supreme Court applied the new rule of law to the parties in *Obergefell*.[7] Judge Crone then solidified her analysis by citing numerous recent decisions in which the overwhelming consensus was that courts should apply *Obergefell* retroactively.[8] She discussed a Fifth Circuit case that resulted in same-sex families having greater access to Bureau of Vital Statistics forms as well as an Eleventh Circuit case that possessed similar facts to *Ranolls*.[9]

Judge Crone further held that denying the alleged "wife" one of the benefits of marriage (e.g., asserting the wrongful death claim) would violate her Due Process and Equal Protection rights.[10] This is an implied rejection of the argument that there is a distinction between the right to marry and the right to receive benefits arising from that marriage (an argument addressed further below).

Not surprisingly in light of her approach to *Obergefell*, Judge Crone denied summary judgment on the basis of lack of existence of the informal marriage.[11] In the informal marriage context, *Ranolls* is illustrative of the principle that same-sex cases are just like heterosexual cases in that informal marriage claims are unique and fact-intensive and rarely conducive of summary judgment.

In short, the idea that *Obergefell* should apply retroactively is the easier argument. However, things become far more complicated in cases when recognizing a marriage that was not previously recognized could result in unintended consequences or, depending on the Texas Supreme Court decision in *Pidgeon* (discussed below), when a party is opposing a discrete benefit arising from marriage as opposed to only the validity of the marriage itself.

Arguments against a Retroactive Application

That *Obergefell* should not be applied retroactively is the harder position as it goes against much of the legal commentary on the subject. Nonetheless, there are two general substantive arguments, and one procedural one, for avoiding the retroactive application of *Obergefell*. In addition, there is a conceptual distinction between a spouse challenging the validity of a marriage and a third party seeking to avoid inequitable collateral consequences of a retroactive change in someone else's marital status.

A. *Reynoldsville Casket*

The first substantive and strongest argument relies on the holding of the U.S. Supreme Court in *Reynoldsville Casket*, the first case to address retroactivity issues after the Court decided a line of cases approving of general retroactive application of new rules of law (*i.e.*, the line of cases relied upon by Judge Crone in *Ranolls*).

Reynoldsville Casket involved an Ohio statute of limitations that treated out-of-state defendants differently from in-state defendants.[12] Prior to *Reynoldsville Casket*, the U.S. Supreme Court held that this same Ohio statute of limitations was unconstitutional.[13] Shortly thereafter, the Ohio Supreme Court declined to apply retroactively *Bendix* to plaintiffs who had relied on the statute declared unconstitutional.[14] The *Reynoldsville Casket* Court disagreed with the Ohio Supreme Court's reasoning that none of the conditions that may avoid the effect of a retroactive application of a new rule of law were present.[15]

The four conditions listed in *Reynoldsville Casket* are: (1) an alternative way of curing a constitutional violation; (2) a previously existing independent 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 a new rule of law, which general rule reflects both reliance interest and other significant policy justifications; or (4) a principle of law that limits the principle of retroactivity itself.[16] As will be discussed below, *Reynoldsville Casket* allows a creative practitioner to engage in a crucial strategy of legal argument. When the answer to the question at hand is unfavorable (e.g., *Obergefell* is retroactive), the advocate should insist that the court must answer a different question before reaching a legal conclusion, such as looking to a previously existing basis for denying relief that has nothing to do with the retroactivity issue.

B. *Chevron Oil*

The second approach in avoiding the retroactivity application is to rely on the *Chevron Oil* test, which some commentators have suggested is still viable. The elements of the *Chevron Oil* test are: (1) the decision to be applied non-retroactively 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; (2) to weigh the merits and demerits in each case by looking to the prior rule in question, its purpose and effect, and determining whether retrospective operation will further or retard the prior rule's operation; and (3) to weigh the inequity imposed by retroactive application.[17]

It is important to remember that the precedential value of *Chevron Oil* is extremely unclear. The U.S. Supreme Court alluded as much in *Reynoldsville Casket* when it noted that the plaintiff conceded *Harper* overruled *Chevron Oil*.[18] Chief Justice Wallace Jefferson also noted this allusion in a dissenting opinion.[19]

Nevertheless, the U.S. Supreme Court has not conspicuously stated that it has overruled *Chevron Oil*. In fact, Justice Kennedy relied on *Chevron Oil* in his concurrence in *Reynoldsville Casket* when he noted that, "We do not read today's opinion to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions. We cannot foresee the myriad circumstances in which the question might arise."[20]

Less than a month after *Reynoldsville Casket*, the U.S. Supreme Court held that a Coast Guard seaman was entitled to a retroactive application of a decision finding an appointments clause violation and remanded so that the accused could be judged by judges who were appointed in compliance with the appointments clause.[21] The Government invoked *Chevron Oil* arguing against retroactive application of the *Ryder* opinion. The Supreme Court declined to do so observing that, "...whatever the continuing validity of *Chevron Oil* (citation omitted) after *Harper* (citation omitted) and *Reynoldsville Casket* (citation omitted), there is not the sort of grave disruption or inequity involved in awarding retrospective relief to the petitioner that would bring that doctrine into play."[22] Indeed, what is the continuing validity of *Chevron Oil*? This is a question that the Court has refused to answer clearly.

Lower courts have noted this lack of clarity and are split on whatever continuing validity *Chevron Oil* might have. The Ninth Circuit continues to adhere to *Chevron Oil* as it has not been expressly overruled.[23] The Fourth Circuit has expressed reservations about *Chevron Oil* but observed "the notable absence in *Harper* of any statement that *Chevron* is overruled."[24] The Fifth Circuit believes that *Chevron Oil* is overruled except in extremely unusual and unforeseeable cases.[25] The Eleventh Circuit believes that the U.S. Supreme Court impliedly retained the *Chevron Oil* Test in some form.[26] And, the Third Circuit believes the issue is "unclear."[27] Suffice it to say, federal authority is conflicting on this issue.

Even if *Chevron Oil* is still viable and the equitable ground prong is met, a party would still have to show that *Obergefell* is somehow new law or not foreseeable. As time goes on, arguing the newness of *Obergefell* does not get any easier. Similarly, foreseeability is difficult to argue in light of *Windsor*.[28]

C. Practical Application

The better approach is to focus on *Reyondsville Casket*. If a claim meets the equitable standard for *Chevron Oil*, then it should satisfy some other independent rule that should prevail despite *Obergefell*'s retroactive application and without having to answer the law school final exam question on *Chevron Oil*'s viability. For example, suppose a hitherto unrecognized spouse seeks to set aside a deed conveying a marital homestead because the deed did not contain her signature as required by Texas Family Code Section 5.001. If the non-signing spouse has moved out of the property and the buyers have moved in, then the buyers can assert an independent basis for defeating the non-signing spouse's claim that is well grounded in the law: the deed was merely inoperative but became operative upon the non-signing spouse's abandonment of the homestead.[29]

Another example might be where a hitherto unrecognized spouse claims

that a contractor's lien on a homestead is invalid because the unrecognized spouse never signed the contract for improvements with the contractor. The contractor could still have a viable defense. If the spouses misled the contractor about their marital status (e.g., "this is Frank, he's my boyfriend"), the spouses could be subject to fraud and estoppel claims preventing them from asserting the homestead defense or the requirement for both spouses to sign the contract before a lien can attach regardless of the validity of the marriage.[30]

These examples demonstrate the distinction between one's marital status and third parties avoiding inequitable collateral consequences of that marital status. The policy behind *Chevron Oil* is to avoid such inequitable consequences. *Reynoldsville Casket* addresses this concern by emphasizing that the retroactivity of the law does not mean that equity is read out of the law.[31] Rather, equity can be ascertained from some other legal principle as long as that principle falls under one of the four factors that can prevail regardless of retroactivity. Unclean hands, estoppel, and other principles are exactly the sorts of claims that a creative practitioner should pursue.

A spouse seeking to avoid *Obergefell*'s retroactive effect regarding marital status is much more problematic than a third party seeking to avoid collateral consequences. A party seeking to avoid a formal marriage is, again, likely limited to the *Reynoldsville Casket* factors. Even if *Chevron Oil* is still good law, it seems impossible that a party who consented to a marriage could satisfy all three of its factors.

On the other hand, *Reynoldsville Casket* appears to offer some limited relief. For example, a spouse (or someone on their behalf) could still seek annulment of the marriage under any of the admittedly rare grounds for annulment set out in Chapter 6 of the Texas Family Code.

More importantly, an advocate could claim that Judge Crone was wrong in rejecting the distinction between the right to marry and the right to benefits arising from that marriage. On January 19, 2017, the Texas Supreme Court finally ruled on the petition for rehearing in *Pidgeon v. Turner*.[32] By agreeing to hear this case, the Texas Supreme Court will give an audience to the claim that there is such a distinction between the right to marry and the right to benefits arising from said marriage.

Pidgeon involved a suit asserted by taxpayers against the City of Houston regarding the City's policy on employee benefits for same-sex couples; the taxpayers claimed that providing such benefits was void as a matter of public policy and an illegal use of public funds.[33] The Fourteenth Court of Appeals invalidated the injunction obtained by the taxpayers in the trial court on the basis that *Obergefell* presented a new and substantial change in the law.[34] The Texas Supreme Court at first blush declined to hear the case in

September 2016.[35]

In his dissent in the denial of the petition of review in *Pidgeon v. Turner*, Justice Devine argued that *Obergefell* does not foreclose a distinction between the right to marry and the right to benefits arising from marriage by citing United States Supreme Court precedent in which claimants for governmental benefits were treated differently according to the claimants' marital history.[36] The *Pidgeon* petition for rehearing was filed in October 2016 (Governor Abbott, Lieutenant Governor Patrick, and Attorney General Paxton joined by Amicus briefing). As mentioned above, the petition for rehearing was granted on January 19, 2017.[37] Oral argument is set for March 1, 2017.[38]

Neither Justice Devine nor the Amici cited *Reynoldsville Casket*. Instead, they chose to argue that only *Obergefell*'s judgment is binding but not the reasoning of the opinion nor the "assumptions" made by the Supreme Court in support of its holding.[39] These seem to be rather unconventional arguments for an advocate to make to a lower court. A prudent advocate should argue that Justice Devine's dissent and the Supreme Court cases he relies upon satisfy the second factor of *Reynoldsville Casket* (i.e., a previously existing ground for denying relief) because the Supreme Court, through precedent it has yet to overrule (a questionable proposition given *Obergefell*'s language), continues to recognize a distinction between the right to marry and the right to benefits arising from the marriage. Simply put, the marriage is still valid but there is no right to whatever benefit the complaining spouse seeks to avoid providing (e.g., community property, spousal maintenance, etc.).

Time will tell if Texas courts adopt Justice Devine's approach and find that there is a distinction between the right to marry and the right to receive benefits arising from the marriage, or adopt Judge Crone's approach (and virtually every judge that has ruled on this issue) and find that such a distinction is foreclosed by the express language of *Obergefell*. Again, Justice Devine's approach cuts against legal conventional wisdom but that is not to say that a Texas court would find it unpersuasive.

D. Procedural Argument

Lastly, it seems that asserting any relief under *Obergefell* necessarily entails claiming the Texas statute making same sex marriage illegal is unconstitutional via the Supremacy Clause. This sort of claim is one that a party must generally raise as an affirmative defense under Rule 94 of the Texas Rules of Civil Procedure.[40] The failure to plead the Supremacy Clause as an affirmative defense results in waiver.[41] Therefore, it appears that *Obergefell*'s retroactive application can be waived under the ordinary rules of state court pleading as indicated by *Beam*.[42]

Of course, per *Obergefell*, the other side could claim that the Texas statute should be void from its inception so there should be no need to provide notice. It could be further argued that there is a difference between asserting an original challenge to a statute's constitutionality under Rule 94 and relying on one of the most significant U.S. Supreme Court cases in recent years holding the statute unconstitutional. In light of this latter consideration, a trial court could *sua sponte* consider the constitutionality issue or at least allow a trial amendment.[43]

On the other hand, surely the burden of pleading and disclosing *Obergefell* is slight and the U.S. Supreme Court has indicated that state law procedural requirements (e.g., statute of limitations) can be an exception to a retroactive application.[44] The Court has further indicated that as long as the constitutional right is recognized then it is up to the States to craft a system of remedies that satisfies Due Process considerations.[45] Surely, Texas state courts and their procedures afford sufficient due process.

Perhaps this approach is too clever by half. Then again, there are limited options when a party seeks to challenge a retroactive application of *Obergefell* to her own marriage and this is an opportunity to see an opponent's best poker face when that opponent has not disclosed or expressly pleaded the Supremacy Clause.[46]

In short, conventional wisdom is that *Obergefell* should apply retroactively. Nonetheless, a case set to be heard by the Texas Supreme Court in March 2017 could call that wisdom into question. Moreover, there is strong precedent for a party who innocently suffers inequity because of a retroactive application. For the not- so-innocent party, there is a non-frivolous procedural argument coupled with the uncertainty arising from *Pidgeon*.

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Endnotes

1. *Ranolls v. Dewling*, Texas Eastern District Court, Case # 1:15-cv-00111, Memorandum and Order dated November 3, 2016.
2. *Id.* at 8.
3. *Id.*
4. *Id.* 8-12.
5. *Id.*
6. *Id.*, citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) and *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993).
7. *Id.* at 13.
8. *Id.* at 13-17.
9. *Id.*, citing *De Leon v. Perry*, 975 F. Supp. 2d 632, 639-40 (W.D. Tex. 2014), *aff'd*, 791 F.3d 619 (5th Cir. 2015); *Hand v. Attorney Gen.*, No. 15-13836, 2016 WL 1579015, at *1-3 (11th Cir. Apr. 20, 2016).
10. *Ranolls* at 17.
11. *Ranolls*, 17-19.
12. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995).
13. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).
14. *Hyde v. Reynoldsville Casket Co.*, 1994-Ohio-67, 68 Ohio St. 3d 240, 626 N.E.2d 75, rev'd, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995) and rev'd, 72 Ohio St. 3d 1544, 650 N.E.2d 904 (1995).
15. *Reynoldsville Casket Co.*, 514 U.S. at 759.
16. *Id.* at 759.
17. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).
18. *Reynoldsville Casket*, 514 U.S. 749, 752.
19. *Southwestern Bell Telephone Co., L.P. v. Mitchell*, 276 S.W.3d 443, 451 (Tex. 2008).
20. *Chevron Oil Co.*, 404 U.S. 97, 761-62.
21. *Ryder v. United States*, 515 U.S. 177 (1995).
22. *Ryder*, 515 U.S. at 184-85.
23. *Nunez Reyes v. Holder*, 646 F.3d 684, 691 (9th Cir. 2011) (en banc).
24. *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 710 (4th Cir. 1994).
25. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 333 (5th Cir. 1999).
26. *Glazner v. Glazner*, 347 F.3d 1212, 1216-17 (11th Cir. 2003) (en banc).
27. *Kolbevich v. Att'y Gen. of U.S.*, 501 F.3d 323, 337 n.9 (3d Cir. 2007).

28. *United States v. Windsor*, 133 S. Ct. 2675 (2013).
29. *Wilcox v. Marriott*, 103 S.W.3d 469, 474 n.3 (Tex.App.-San Antonio 2003, pet. denied).
30. *See Cadle Co. v. Ortiz*, 227 S.W.3d 831, 836 (Tex.App.-Corpus Christi 2007, pet. denied).
31. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, (1995).
32. *Parker v. Pidgeon*, 477 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2015), review denied sub nom. Pidgeon v. Turner, 15-0688, 2016 WL 4938006 (Tex. Sept. 2, 2016), rehearing granted, opinion withdrawn (Jan. 19, 2017).
33. *Parker v. Pidgeon*, 477 S.W.3d at 353-55.
34. *Id.*
35. Ward, Mike. "High Court Takes Houston Same-Sex Benefits Case After Prodded by GOP Leaders." *Houston Chronicle*. Houston Chronicle 20 Jan. 2017. Web. 26 Jan. 2017.
36. *Pidgeon*, 2016 WL 4938006 at *1-6.
37. Ward, Mike. "High Court Takes Houston Same-Sex Benefits Case After Prodded by GOP Leaders." *Houston Chronicle*. Houston Chronicle 20 Jan. 2017. Web. 26 Jan. 2017.
38. Ward, Mike. "High Court Takes Houston Same-Sex Benefits Case After Prodded by GOP Leaders." *Houston Chronicle*. Houston Chronicle 20 Jan. 2017. Web. 26 Jan. 2017.
39. *Pidgeon*, 2016 WL 4938006 at *1-6; See Amicus Curiae Brief of Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Attorney General Ken Paxton, filed October 27, 2016.
40. *Hyder-Ingram Chevrolet, Inc. v. Kutach*, 612 S.W.2d 687 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).
41. *Id.*
42. *James B. Beam Distilling Co.*, 501 U.S. at 544.
43. *Houston Chronicle Pub. Co. v. City of Houston*, 531 S.W.2d 177, 182 (Tex.App.-Houston [14th Dist.] 1975, writ ref'd n.r.e.); In re C.M.D., 287 S.W.3d 510, 515 (Tex.App.-Houston [14th Dist.] 2009, orig. proceeding).
44. *James B. Beam Distilling Co.*, 501 U.S. at 544.
45. *Harper*, 509 U.S. at 95-96.
46. Tex. R. Civ. Proc. 193.6(a).