

No. 14-0404

IN THE SUPREME COURT OF TEXAS

**HEATHER DELGADO, in her capacity a/n/f XXXXXX XXXXXX
and XXXXX XXXXXX, and SIMONA LONGORIA,**

Petitioners,

v.

NIKKI ARAGUZ,

Respondent.

**PETITIONERS' RESPONSE TO RESPONDENT'S SUPPLEMENTAL
BRIEF ON THE MERITS**

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Petitioners Heather Delgado, in her capacity as next friend for minors XXXXXX XXXXXX and XXXXX XXXXXX, and Simona Longoria file this their Response to Respondent's Supplemental Brief on the Merits and would show the Court as follows:

BACKGROUND

This case involves the validity of a marriage between Nikki Perdue ("Nikki") and Thomas Araguz. Nikki was born male as Justin Perdue on Xxxx x, xxxx. 1 CR 56. She presented herself as a woman in her application for a marriage license on August 19, 2008. 2 CR 380. After a wedding ceremony on August 23, 2008, she claimed to be married to Thomas Araguz until he died on July 3, 2010. 6 CR 1757-63. After Thomas' death his parents and his minor sons

by a previous marriage challenged the validity of his marriage to Nikki. 1 CR 10, 36.

The case is before this Court on the issue of whether Texas law permitted the marriage between a man and a transgendered woman. Nikki has filed a Supplemental Brief asserting that the United States Supreme Court's recent decision in *Obergefell v. Hodges*, 14-456, 2015 WL 2473451, *19 (U.S., June 26, 2015) requires a judgment in her favor.

ARGUMENT

In *Obergefell*, the Supreme Court recognized for the first time “that same-sex couples may exercise the fundamental right to marry.” Citing *Obergefell* and *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), Nikki argues that this Court should apply *Obergefell* to legalize a marriage which ended five years before the *Obergefell* decision. But this case presents different issues from those presented in *Obergefell*. *Obergefell* principally involved the rights of same-sex couples to get married in the future if that is their desire. This case involves the validity of a purported marriage between two people who never sought a same-sex marriage and whose claimed marriage ended five years before *Obergefell* was decided. Since *Obergefell* addressed different issues, it is not controlling here.

There were two questions before the Court in *Obergefell*: First, whether the Fourteenth Amendment requires a State to license a marriage between two people

of the same-sex, and second, whether the Fourteenth Amendment requires States to recognize a same-sex marriage performed in another state which grants the right of same-sex marriage. *Obergefell*, 2015 WL 247345 at *6. The *Obergefell* court answered those questions affirmatively, but those answers do not compel a decision for Nikki here because Nikki is not seeking to enter a same-sex marriage or to have a lawfully performed same-sex marriage recognized. Instead, she sought in the court below a declaration that her marriage to Thomas, which had already ended, was a valid opposite-sex marriage. 1 CR 249-258. Then, after summary judgment was granted against her on the opposite-sex marriage issue, she filed a motion for new trial, asserting that her marriage to Thomas was a constitutionally protected same-sex marriage. 7 CR 1880. *Obergefell* does not apply to Nikki's case because *Obergefell* does not purport to reach back in time to validate purported marriages, which were invalid under the law in effect at the time they were entered into.

Indeed, the Court in *Obergefell* deliberately recognized that same-sex marriages were historically recognized as not valid and stated that its holding was based on "changed understandings" and "new insight." *Obergefell*, 2015 WL 2473451 at *9, 11. Thus, the Court stated:

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810 , 93

S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972 holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Id. at 12. In *Obergefell*, the Court rejected the law’s historical position that same-sex marriages were invalid and announced a new rule based on what it perceived to be changed societal views. That the Court knew that it was moving the law away from its historical position is obvious from the language of its opinion. The Court’s majority wrote:

Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

...

When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

...

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new judicial insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.

Id. at *9, 11, 18. Recognizing that the rule announced in *Obergefell* was based on “new understandings,” the Court likewise recognized that the rule itself was a new rule governing the future rights of same-sex couples in the United States:

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is *now manifest*.

...

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of 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 case 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 *16, 19 (emphasis added).

Obergefell announced a new constitutional right for same-sex couples to marry. While it sets out new parameters for constitutionally protected marriage in the future, it does not purport to create marriages where they did not legally exist before. In this case, Texas law prevented Nikki from having a valid same-sex marriage during the entire time of her claimed marriage between 2008 and 2010. Nothing in *Obergefell* supports the notion that Nikki's purported marriage which ended five years before *Obergefell* was decided should now be validated. Since the first aspect of the Court's holding in *Obergefell* purports to address only the right to marry in the future, it does not compel a decision for Nikki in this case.

Nevertheless, Nikki argues that the new rights recognized in *Obergefell* apply in her case because the *Obergefell* Court applied them to a marriage that had been ended by one spouse's death. (Supplemental Brief at 3.) But Nikki's situation differs markedly from the surviving spouse in *Obergefell* and that

difference makes the “surviving spouse” holding in *Obergefell* inapplicable to Nikki. In *Obergefell*, James Obergefell and his deceased spouse were lawfully married in Maryland. They then returned to Ohio where same-sex marriages were not legal. Mr. Obergefell’s partner died in Ohio, but Ohio, since it did not recognize the marriage as valid, refused to list Mr. Obergefell as his deceased partner’s spouse on the death certificate. *Obergefell*, 2015 WL 2473451 at *8. These facts placed Mr. Obergefell within the second aspect of the Court’s holding regarding the States’ obligation to recognize same-sex marriages validly performed in other states. The Court characterized the issue as “whether the Constitution requires States to recognize same-sex marriage validly performed out of state,” *Id.* at 22, and resolved it by stating 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 *23.

Under this rule, Mr. Obergefell’s marriage was recognized as valid, but the rule does not apply here because Nikki and Thomas Araguz have never been in a same-sex marriage validly performed in any state. Whether the marriage was a valid opposite-sex marriage is an issue still to be resolved by this Court, but it is undisputed that the marriage could not have been a valid same-sex marriage under Texas law since Texas law did not allow same-sex marriages during the time Nikki claims to have been married to Thomas. TEX. CONST. art. I, §32, TEX. FAM. CODE

§§ 2.001 and 6.204. And Nikki and Thomas never attempted a same-sex marriage in any other state. Since Nikki has not participated in a lawfully performed same-sex marriage, she cannot claim the benefit of *Obergefell's* holding that lawful same-sex marriages performed in other states be recognized.

While *Harper* requires the retroactive application of the Supreme Court's constitutional decisions, it does not require those decisions to be applied where they are legally or factually inapposite. See *United States v. Neifert-White Co.*, 390 U.S. 228, 231 (1968)(noting that language from a supreme court opinion “cannot be taken as a decision upon a point which the facts of the case did not present.”), *State v. J.M. Huber Corp.*, 193 S.W.2d 882, 885 (Tex. Civ. App.—Austin) *aff'd*, 145 Tex. 501 (1947)(holding that a “former holding or decision is binding only to the extent of the precise question passed upon...”) *Obergefell* does not have a controlling effect here because, by its own language it applies only to the future rights of same-sex couples desiring to marry or whose lawful marriage has not been recognized. Since Nikki does not fit into either of those categories, *Obergefell* does not compel a decision in Nikki's favor, and this Court must still determine whether her claimed marriage to Thomas Araguz was valid under Texas state law at the time it was performed.

CONCLUSION AND PRAYER

In her conclusion and prayer, Nikki states that she no longer opposes a grant of review by this Court for the limited purpose of remanding the case to the court of appeals for the rendition of judgment in her favor. (Supplemental Brief at 4.) But Nikki cannot seek this relief since she has not filed a Petition for Review of the Court of Appeals judgment. *See Caballero v. Central Power & Light Co.*, 858 S.W.2d 359, 362 (Tex. 1993). The Court should instead grant the Petition and reverse the court of appeals judgment holding that a fact issue existed as to Nikki's gender at the time of her marriage. Since as a matter of law Nikki was male throughout her marriage (thus precluding the existence of an opposite-sex marriage), the Court should determine whether Nikki had a constitutional right to a same-sex marriage with Thomas during the 2008-2010 time period that the purported marriage existed. And since Nikki did not have such a constitutional right during that time period, the Court should reverse the court of appeals judgment and reinstate the judgment of the trial court.

For these reasons, Petitioners Heather Delgado, in her capacity as next friend of XXXXXX XXXXXX and XXXXX XXXXXX, and Simona Longoria respectfully request that the Court reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

This brief complies with the type-volume limitation of TEX. R. APP. P 9.4(i)(2)(B) because this brief contains 1,849 words, excluding the parts of the brief exempted by TEX. R. APP. P 9.4(i)(1).

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