

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NOEL FREEMAN,
YADIRA ESTRADA, and
RONALD REESER,

Plaintiffs,

versus

ANNISE D. PARKER, in her official capacity
as Mayor of the City of Houston;

and

THE CITY OF HOUSTON, a Texas
municipality,

Defendants.

CASE NO. 4:13-cv-3755

**PLAINTIFFS' ORIGINAL COMPLAINT FOR PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT**

This action seeks injunctive and declaratory relief against The City of Houston and its Mayor, Annise D. Parker, for denying equal employment benefits to Plaintiffs Noel Freeman, Yadira Estrada, and Ronald Reeser ("Plaintiffs") because of Plaintiffs' sexual orientation in violation of Plaintiffs' constitutional rights.

I. JURISDICTION AND VENUE

1. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation under color of state law of rights secured by the United States Constitution.

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction to grant the declaratory relief requested is provided under 28 U.S.C. § 2201.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because the defendants reside and have their offices within the district and a substantial portion of the events

giving rise to Plaintiffs' claims occurred in this district.

II. THE PARTIES

4. Plaintiffs NOEL FREEMAN, YADIRA ESTRADA, and RONALD REESER are citizens of Texas who are employees of the City of Houston.

5. Defendant ANNISE D. PARKER ("Mayor Parker") is sued in her official capacity as Mayor of the City of Houston. Upon information and belief, Mayor Parker is a citizen and resident of Harris County, Texas. In her official capacity as Mayor, she maintains an office at Houston City Hall, 901 Bagby Street, Houston, Texas 77002.

6. Defendant THE CITY OF HOUSTON ("the City") is a home rule city authorized by Article XI, § 5 of the Texas Constitution with the full power of local self-government pursuant to the charter provisions and ordinances adopted by its citizens in accordance with TEX. LOC. GOV'T CODE § 51.072. As a political subdivision, the City is a "person" subject to suit pursuant to 42 U.S.C. § 1983. The City may be served by delivering a copy of the Summons and Complaint to Anna Russell, the City Secretary of the City of Houston, at 900 Bagby, Public Level, Rm. 101, Houston, Texas 77002. *See* TEX. CIV. PRAC. & REM. CODE § 17.024(a).

7. This Complaint challenges the constitutionality of Section 6.204 of the Texas Family Code ("Texas DOMA Statute")¹ and Article I, Section 32 of the Texas Constitution

¹ RECOGNITION OF SAME-SEX MARRIAGE OR CIVIL UNION

(a) In this section, "civil union" means any relationship status other than marriage that:

- (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
- (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

(c) The state or an agency or political subdivision of the state may not give effect to a:

- (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or

—(continued)

(“Texas Marriage Amendment”)² as applied to the City of Houston, acting as a public employer, and the Mayor’s efforts to comply with provisions of Article II, Section 22 of the Houston Charter (“City Charter Amendment of 2001”)³ in order to provide equal compensation and benefits to all City employees who legally have married, consistent with federal constitutional law. Thus, pursuant to Fed. R. Civ. P. 5.1, Plaintiffs will file and serve notice of constitutional question on Greg Abbott, Attorney General of the State of Texas, by certified mail at 300 W. 15th Street, Austin, Texas 78701.

III. FACTUAL BACKGROUND

8. In 1996, Congress passed the Defense of Marriage Act (“Federal DOMA”), 28 U. S. C. § 1738C, which, among other things, singled out a class of same-sex couples who, although legally married in a state or other jurisdiction, imposed a disability on the class by refusing to acknowledge their marriages based on the sexual orientation of the couples. The federal government’s refusal to recognize those legal marriages, pursuant to the Federal DOMA, disqualified those who have legally a same-sex partner from a variety of federal benefits.

(continuation):

(2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

² MARRIAGE

(a) Marriage in this state shall consist only of the union of one man and one woman.

(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

³ DENIAL OF BENEFITS TO SAME SEX PARTNERS AND RELATED MATTERS

Except as required by State or Federal law, the City of Houston shall not provide employment benefits, including health care, to persons other than employees, their legal spouses and dependent children; nor shall the City provide any privilege in promotion, hiring, or contracting to a person or group on the basis of sexual preference, either by a vote of the city council or an executive order of the Mayor. Further, the City of Houston shall not require entities doing business with the City to have any of the above benefits or policies.

If any portion of this proposed Charter amendment is declared unlawful, then such portion shall be removed and the remainder of the Charter amendment will remain in effect. Any ordinance in conflict with this section of the Charter is hereby repealed and declared invalid. Article II, Section 22.

9. A number of states, including Texas, passed similar statutes and constitutional amendments that mimicked the non-recognition effect of the Federal DOMA. The Texas DOMA Statute (enacted in 2003) and the Texas Marriage Amendment (passed in 2005) both mirror the design, purpose, and effect of the Federal DOMA in that one of the purposes of both the Texas DOMA Statute and the Texas Marriage Amendment is to identify a subset of state-sanctioned marriages and, by denying those marriages any recognition under Texas law, make those marriages, and the same-sex couples who have entered them, unequal to all other marriages and different-sex couples who have married.

10. In June 2013, the United States Supreme Court struck down the part of the Federal DOMA that denied federal recognition to same-sex couples legally married in a state that permitted it. The Supreme Court observed that when government relegates same-sex couples' relationships to a "second-tier" status, the government "demeans the couple," "humiliates . . . children now being raised by same-sex couples," deprives these families of equal dignity, and "degrade[s]" them in addition to causing them countless tangible harms, all in violation of "basic due process and equal protection principles." *Windsor v. United States*, 133 S. Ct. 2675, 2693-95 (2013).

11. Subsequently, Mayor Parker requested and received a legal opinion from the Houston City Attorney concerning whether, given the *Windsor* decision, the City could continue to deny benefits covering same-sex spouses of employees who have been legally married in jurisdictions outside of Texas.

12. The Houston City Attorney issued an opinion concluding that the City could not, consistent with the *Windsor* decision, continue to deny benefits covering same-sex spouses of City employees who legally married in another jurisdiction. In response to and in reliance on the

City Attorney's opinion, the Mayor directed Omar Reid, the City Human Resources Director, to afford the same benefits to City employees who legally married a same-sex partner in another jurisdiction as the City provides to City employees who legally have married a different-sex partner. (A true and correct copy of the Mayor's directive to Mr. Reid, along with the City Attorney's Opinion Letter dated November 19, 2013, are attached as Exhibit "A.")

13. Since the Mayor's announcement that the City's eligibility requirements would permit employees legally married to a same-sex spouse in another jurisdiction access to spousal benefits, including healthcare coverage, three employees have enrolled for those benefits.

Noel Freeman and Brad Pritchett

14. Plaintiff Noel Freeman ("Mr. Freeman") is an Administrative Coordinator for the Public Works and Engineering Department of the City. He has been employed by the City for approximately nine years.

15. On August 1, 2010, Mr. Freeman married Brad Pritchett ("Mr. Pritchett") in Washington, D.C. They had been in a committed relationship with one another for eight years when they married.

16. Although Mr. Pritchett is employed, health benefits are not available through his employer. Mr. Freeman enrolled Mr. Pritchett for spousal benefits, including healthcare coverage, within about 45 minutes of learning about the change in the City's eligibility policy.

17. Mr. Pritchett did not have health care for the entire twelve years the couple had been together—a fact that always loomed over them like a dark cloud. When Mayor Parker made her announcement, in many ways, it was like a heavy weight had been lifted off of their shoulders. They quickly started making plans. For example, Mr. Pritchett needed to update his eyeglasses' prescription for the past two years; he sometimes suffers from disorientation and

vertigo; and he has little-to-no hearing in his right ear. He finally made appointments to identify and treat these ailments.

Yadira Estrada and Jennifer Flores

18. Plaintiff Yadira Estrada (“Ms. Estrada”) is a police officer for the City. She has been employed by the City for almost six years.

19. On July 23, 2013, Ms. Estrada married Jennifer Flores (“Ms. Flores”) in Maine. They had been in a committed relationship with one another for seven and a half years when they married.

20. Ms. Flores is employed, but her employer does not provide healthcare coverage. Ms. Estrada enrolled Ms. Flores for spousal benefits, including healthcare coverage, about a week after learning about the change in the City’s eligibility policy.

21. In reliance on her new health insurance coverage, Mr. Flores already has scheduled and begun needed health-related treatment that will require future care and prescription coverage.

Ronald Reeser and Vince Olivier

22. Ronald Reeser (“Mr. Reeser”) is a Systems Administrator for the City. He has been employed by the City for approximately eight years.

23. Mr. Reeser married Vince Olivier (“Mr. Olivier”) on August 18, 2008 in Vancouver, British Columbia. They had been in a committed relationship with one another for three years at the time they married.

24. Mr. Reeser enrolled Mr. Olivier for spousal benefits, including healthcare coverage, approximately one month after learning about the change in the City’s eligibility policy.

25. Mr. Reeser enrolled Mr. Olivier for spousal benefits, including healthcare coverage, within one month after learning about the change in the City's eligibility policy. Due to the advanced age of Mr. Olivier's parents, Mr. Reeser wanted to ensure his own access to the City's family bereavement leave if that became necessary. Additionally, Mr. Olivier was unemployed and did not have access to employer-provided health insurance.

Plaintiffs' Loss of Spousal Benefits

26. On December 17, 2013, two taxpayers challenged the City's decision to permit same-sex spouses of City employees to obtain benefits on the same basis as different-sex spouses of City employees. On that date, the District Court for Harris County, Texas issued a temporary restraining order enjoining Mayor Parker and the City "and any other person(s) with knowledge of [that court's] Order, to cease and desist providing benefits to same-sex spouses of employees that have married in jurisdictions that recognize same-sex marriage." (A true and correct copy of the Temporary Restraining Order is attached as Exhibit "B.") As a result, the City advised the Plaintiffs that the spousal benefits they had purchased and were relying upon were subject to being interrupted and terminated. (A true and correct copy of the letter from Human Resources Department is attached as Exhibit "C.")

27. The selective withdrawal of spousal coverage from lesbian and gay City employees—while leaving family coverage intact for non-gay City employees with a legally recognized spouse—will deny each Plaintiff equal compensation for equal work and discriminatorily inflict upon each Plaintiff and his or her spouse anxiety, stress, risk of untreated or inadequately treated health problems, and potentially ruinous financial burdens.

28. Plaintiffs will suffer these harms based on their sexual orientation solely because the State has enacted legislation and a constitutional amendment that single out and

purport to divest married same-sex couples of their already-existing legal marriages as well as the attendant ability to access spousal benefits and other compensation on the same basis as non-gay married employees.

**IV. CONSTITUTIONAL FACTS RELATING TO
WHY CLASSIFICATIONS BASED ON SEXUAL
ORIENTATION SHOULD BE SUBJECTED
TO HIGHTENED JUDICIAL SCRUTINY**

29. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully set forth here.

30. Based on the traditional considerations that determine the appropriate level of scrutiny for equal protection claims, classifications based upon sexual orientation warrant heightened scrutiny by the courts.

31. Lesbian and gay individuals have suffered a long and significant history of purposeful discrimination in a wide variety of settings. Federal, state, and local governments have all played a significant role in this history, including for years deeming lesbians and gay men unfit for positions in public employment and barring them from governmental jobs based on their sexual orientation. The federal government and many states and localities began aggressive campaigns to purge lesbian and gay employees from government service since, at least, the 1940s.

32. Sexual orientation is immutable in the sense that it is fundamental to one's identity, fixed at an early age, and highly resistant to change. Efforts to change an individual's sexual orientation are generally futile and potentially dangerous to an individual's well-being. Lesbian and gay individuals should neither be required to abandon their sexual identity to access fundamental rights nor to hide their identities to avoid discrimination.

33. Lesbians and gay men historically have lacked political power. Although they have achieved some advances against discrimination, these gains have been consistently met with strong political and public backlash, and lesbians and gay men continue, in many parts of the country, to be denied any remedy for the widespread discrimination they face in private employment, housing, and public accommodation and to be subject to express discrimination by the government regarding their relationships and parental rights. Still today, lesbians and gay men lack the consistent ability to attract the favorable attention of lawmakers.

34. Homosexuality, in and of itself, implies no impairment to judgment, stability, reliability, or general social or vocational capabilities. A person's sexual orientation bears no relation to a person's ability or capacity to contribute to society. Whether premised on pernicious stereotypes or simple moral disapproval, laws classifying based on sexual orientation rest on factors that generally provide no sensible or legitimate ground for differential treatment.

V. FIRST CLAIM FOR RELIEF
Declaratory and Injunctive Relief
Deprivation of Substantive Due Process
U.S. Const. Amend. XIV

35. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully set forth here.

36. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause has a substantive component that provides heightened protection against government interference with fundamental rights and liberty interests.

37. Although Texas does not permit same-sex couples to marry in the State, same-sex couples currently are able to marry in 18 other states and the District of Columbia as well as 17 countries outside the United States.

38. It is the longstanding and strong public policy of the State that marriages legally performed in other jurisdictions are presumed valid in Texas. TEXAS FAMILY CODE § 1.101.⁴

39. Yet, by adopting the Texas Marriage Amendment, Texas has created a special exception for married same-sex couples as a class that withdraws from them this recognition as a matter of constitutional mandate.

40. Thus, same-sex couples can legally marry outside of Texas and then reside in Texas (and work for public employers such as the City). Yet, according to Texas law, the City is required to treat legally-married lesbian and gay employees for the purpose of employment compensation as if they are single.

41. The United States Supreme Court has established that existing marital, family, and intimate relationships are areas in which the government generally should not intrude without substantial justification.

42. The longstanding general rule in every state has historically been that a marriage that has legal force where it was celebrated also has legal force throughout the country. Indeed, the idea of being married in one state and unmarried in another is one of the most perplexing and distressing complications in the domestic relations of citizens.

⁴ EVERY MARRIAGE PRESUMED VALID. In order to promote the public health and welfare and to provide the necessary records, this code specifies detailed rules to be followed in establishing the marriage relationship. However, in order to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable. Therefore, every marriage entered into in this state is presumed to be valid unless expressly made void by Chapter 6 or unless expressly made voidable by Chapter 6 and annulled as provided by that chapter.

43. Therefore, the right to remain married is properly recognized as one that is a fundamental liberty interest appropriately protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A State's failure to respect this interest violates the couples' constitutional rights to liberty, dignity, autonomy, family integrity, association, and due process.

44. In the context of the City's inability to provide equality of compensation to its married employees, the marriage recognition ban contained in the Texas DOMA Statute and the Texas Marriage Amendment violates this fundamental right without any sufficient legitimate business justification on which the government, as a public employer, can rely.

45. Accordingly, Defendants' conduct should be declared to violate the Due Process Clause of the U.S. Constitution, and Defendants should be preliminarily and permanently enjoined from prohibiting legally married lesbian or gay employees from accessing spousal benefits for their same-sex spouses as part of their compensation on the same basis as their non-gay legally married co-workers.

**VI. SECOND CLAIM FOR RELIEF
Declaratory and Injunctive Relief
Deprivation of Equal Protection
U.S. Const. Amend. XIV**

46. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully set forth here.

47. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall deny any person the equal protection of the laws.

48. Public employees do not lose their constitutional rights when they accept public employment positions. While those rights may be balanced against the requirements the

government has in its role as an employer (as opposed to as sovereign), the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently. Public employers cannot take personnel actions or provide different pay scales that would violate the Constitution.

49. With respect to the workplace, Plaintiffs and their spouses are similarly situated in every relevant respect to the non-gay co-workers with different sex spouses who are allowed to obtain spousal coverage, including healthcare insurance, as part of their employment compensation.

50. Plaintiffs' employment is no less demanding, and their service to the public no less valuable, than that of their non-gay co-workers with the same jobs who, unlike Plaintiffs, are permitted access to spousal coverage as part of their compensation.

51. Same-sex couples make the same commitment to one another as different-sex couples. Like different-sex couples, same-sex couples fall in love, build their lives together, plan their futures together, and hope to grow old together. Like different-sex couples, same-sex couples support one another emotionally and financially and take care of one another physically when faced with injury or illness. Employment compensation provided by the City, including spousal benefits and healthcare coverage, is an important component contributing to same-sex employees' security and happiness.

52. By singling out and denying lesbian and gay employees who are legally married in another jurisdiction access to spousal benefits, Defendants, each acting under the color of state law, discriminate against Plaintiffs because of their sexual orientation. Defendants are depriving and will continue to deprive Plaintiffs of rights secured by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

53. A public employer's actions that treat a class of employees disparately based solely on the employees' sexual orientation are inherently suspect and must be analyzed under strict or, at least, intermediate scrutiny. Such employer conduct will be presumed to violate equal protection unless the government can demonstrate that the classification is necessary to meet a compelling government interest or, at a minimum, is substantially related to an important government objective. The classification used by the employer, as well as the resulting discriminatory conduct, can be defended only by its actual governmental purpose, not a different rationalization invented after the fact.

54. By incorporating the non-recognition requirements of the Texas DOMA Statute and the Texas Marriage Amendment to determine which employees are deemed to have a "legal spouse," Defendants enforce the City Charter Amendment of 2001 in a way that creates a discriminatory employment compensation system that violates the federal Constitution's equal protection guarantee under any heightened scrutiny standard because the Defendants' conduct neither advances substantially any important governmental business interest as a public employer nor is necessary to further a compelling governmental business interest as a public employer in an adequately tailored fashion.

55. Even without application of heightened scrutiny analysis, Defendants' conduct still fails the Constitution's equal protection guarantee under the most deferential level of scrutiny because it bears no rational relationship to any legitimate governmental business interest of the City acting as a public employer.

56. In the absence of an independent legitimate governmental business interest of the City acting as a public employer, a classification that compensates lesbian and gay employees differently and worse than other employees because of their sexual orientation solely for the

purpose of expressing moral disapproval of their same-sex relationships constitutes a classification for its own sake motivated by animus and, therefore, is constitutionally impermissible.

57. The Equal Protection Clause of the Fourteenth Amendment also guarantees minorities the right to full participation in the political life of the community. The Clause even prohibits a political structure that treats all individuals as equals yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

58. The provisions of the Texas Marriage Amendment and the Texas Statutory DOMA that prevent recognition of the marriages same-sex couples have legally entered into in other jurisdictions do not simply violate the equal protection guarantee of the Fourteenth Amendment as applied to Plaintiffs in the conventional sense. By enshrining discrimination in the form of a constitutional amendment, the Texas Marriage Amendment deprives lesbian and gay Texans of equal protection of the laws by locking them out of the political process and making it uniquely more difficult to secure legislation on their behalf. The conduct of Mayor Parker and the City in enforcing these laws violates the right of Plaintiffs to equal protection by discriminating impermissibly on the basis of sexual orientation.

59. Furthermore, the provisions of the Texas Marriage Amendment and the Texas Statutory DOMA that prevent recognition of the marriages same-sex couples have legally entered into in other jurisdictions discriminates against Plaintiffs based on their sexual orientation with respect to the exercise of their right to remain married, which is properly recognized as one that is a fundamental liberty interest appropriately protected by the Due Process Clause of the Fourteenth Amendment (*see* Section V, Second Claim for Relief, *supra*),

as well as their liberty interests in dignity, autonomy, and family integrity and association. Differential treatment with respect to Plaintiffs' exercise of fundamental rights and liberty interests, based on their sexual orientation, subjects Defendants' conduct to strict or at least heightened scrutiny, which Defendants' conduct cannot withstand.

60. Defendants' refusal to recognize the legal marriages of same-sex couples for the purpose of employment compensation denies same-sex couples equal dignity and respect and deprives their families of a critical safety net of rights and responsibilities. Defendants' actions brand lesbians and gay men, as well as their children, as second-class citizens through a message of government-imposed stigma. It fosters private bias and discrimination by instructing all persons with whom same-sex couples interact, including their own children, that their relationships are less worthy than others. Defendants' actions reflect the State's moral disapproval and antipathy toward lesbians and gay men.

61. Accordingly, Defendants' conduct should be declared to violate the Equal Protection Clause of the United States Constitution, and Defendants should be preliminarily and permanently enjoined from prohibiting legally married lesbian or gay employees from accessing spousal benefits for their same-sex spouses as part of their compensation on the same basis as their non-gay legally married co-workers.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court enter judgment:

- A) Issuing a preliminary injunction pursuant to Fed. R. Civ. P. 65 enjoining Mayor Parker and the City of Houston from withdrawing or denying spousal benefits for same-sex spouses of lesbian and gay employees until such time as the Court can make a final determination on the merits;
- B) Declaring, pursuant to Fed. R. Civ. P. 57, that Defendants' conduct violates Plaintiffs' equal protection and due process rights under the United States Constitution;

- C) Declaring unconstitutional the provisions of the Texas Marriage Amendment and the Texas DOMA Statute insofar as they prohibit the City of Houston and other governmental employers in the State of Texas from recognizing the legal marriages of same-sex couples performed in other jurisdictions for the purpose of qualifying employees for spousal benefits;
- D) Issuing a permanent injunction enjoining Mayor Parker and the City of Houston from withdrawing or denying spousal benefits for same-sex spouses of lesbian and gay employees;
- E) Awarding statutory costs pursuant to 28 U.S.C. § 1920;
- F) Granting reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- G) Granting such other and further relief to which Plaintiffs are entitled.

Respectfully submitted this 26th day of December, 2013.

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

By: s/ Kenneth D. Upton, Jr.
Kenneth D. Upton, Jr.
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is the Original Complaint. Plaintiffs' Counsel will cause Summons to be served on each Defendant as required by Fed. R. Civ. P. 4(j)(2). Additionally, Plaintiffs' Counsel will serve a Notice of Constitutional Question on the Attorney General of the State of Texas in accordance with Fed. R. Civ. P. 5.1(a)(2).

s/ *Kenneth D. Upton, Jr.*

Kenneth D. Upton, Jr.



CITY OF HOUSTON

Legal Department

Interoffice

Correspondence

To: Omar Reid

From: Mayor Annise Parker

Date: November 19, 2013

cc: David M. Feldman
City Attorney

Subject: Same-Sex Spousal Benefits

Attached is a legal opinion from the City Attorney concluding that the City's prohibition against the provision of benefits to same-sex spouses of city employees may no longer be considered constitutionally valid. As a result, I am hereby directing that same-sex spouses of employees who have been legally married in another jurisdiction be afforded the same benefits as spouses of a heterosexual marriage.

FREEMAN v PARKER
EXHIBIT "A"



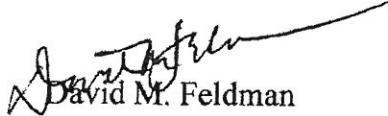
CITY OF HOUSTON

Legal Department

Interoffice

Correspondence

To: Mayor Annise D. Parker

From: 
David M. Feldman
City Attorney

Date: November 19, 2013

Subject: Legal Opinion Regarding Same-Sex
Spousal Benefits

ATTORNEY-CLIENT COMMUNICATION PRIVILEGED AND CONFIDENTIAL

A growing number of states have recognized same-sex marriage, causing the courts to give increasing attention to whether laws that do the opposite, and further discrimination based on sexual orientation, are unconstitutional. In light of this trend, and the requests by employees seeking benefits for same-sex spouses, you have asked me to review the City of Houston's authority to continue to deny benefits to same-sex spouses of employees that have been legally married in other jurisdictions, with a particular focus on the City Charter amendment of 2001, which has heretofore been relied on to prohibit the granting of such benefits.

The relevant City Charter provision, which was initiated by voter petition, reads as follows:

Except as required by State or Federal law, the City of Houston shall not provide employment benefits, including health care, to persons other than employees, *their legal spouses* and dependent children; nor shall the City provide any privilege in promotion, hiring, or contracting to a person or group on the basis of sexual preference, either by a vote of the city council or an executive order of the Mayor. Further, the City of Houston shall not require entities doing business with the City to have any of the above benefits or policies.

If any portion of this proposed Charter amendment is declared unlawful, then such portion shall be removed and the remainder of the Charter amendment will remain in effect. Any ordinance in conflict with this section of the Charter is hereby repealed and declared invalid. Article II, Section 22. (emphasis added.)

After reviewing relevant case law around the country and from the U.S. Supreme Court, I believe a court would now find that the continued application of Article II, Section 22 of the Houston City Charter to deny benefits to legally married same-sex spouses to be unconstitutional, primarily because it denies the employees of such spouses equal protection of the laws.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution provides that: "No State shall.....deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, §1. This prohibition applies with equal force to all governmental entities within the State of Texas, including the City of Houston, meaning that all persons similarly situated should, generally, be treated alike under the law. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982). In order to pass constitutional muster, the current application of the City Charter provision would have to survive rational basis review, at a minimum. In other words, there must be some rational connection between the discriminating law or policy in question and a legitimate governmental interest. See *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 1003 (N.D. Cal. 2010), *aff'd sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated by*, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (holding initiative's proponents had no standing to appeal the district court's judgment for the same-sex couple plaintiffs, and therefore effectively reinstating the district court's holding finding California's prohibition against same-sex marriage unconstitutional under due process and equal protection analyses).

In 1996, the U. S. Supreme Court considered the constitutionality of an amendment to the Colorado Constitution; the amendment prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships." *Romer v. Evans*, 517 U.S. 620, 624 (1996). The Court held that the constitutional amendment failed for lack of a rational basis, finding that it could not be explained by "anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer* at 632. Applying a similar test to the current application of Article II, section 22 of the City of Houston's charter yields a similar result: it seems not to further any governmental end, but simply makes homosexuals unequal to all other city employees. Application of the City of Houston's charter to deny benefits to legally married same-sex spouses arguably violates the Equal Protection Clause by treating employees differently on the basis of sexual orientation or sexual identity; that is, a female city employee may secure employment benefits for the husband she married in California, but a female city employee may not obtain the same benefits for a wife she married in California. The weight of recent court decisions would dictate that such a distinction does not serve a legitimate governmental interest.

The Supreme Court's DOMA ruling and its effect thus far

Significantly, after the U.S. Supreme Court struck down the federal Defense of Marriage Act (DOMA) in *U.S. v. Windsor*, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 (June 26, 2013), a number of federal agencies have announced that they will recognize same-sex marriages that were valid in the place of celebration, regardless where those couples now live. These agencies include the Office of Personnel Management, the U.S. Citizenship and Immigration Services, the Department of Defense, and the Federal Election Commission. In addition, the Internal Revenue Service issued an announcement on August 29th, stating that all legally married same-sex couples will be recognized as married for federal tax purposes, even if those couples reside in states that do not recognize same-sex marriage.

Texas DOMA

Although the U.S. Supreme Court struck down the federal Defense of Marriage Act's definition of marriage as a union between a man and a woman, the Court did not deprive individual states of the right to maintain their own definitions of marriage. Texas has done so in its contribution (Tex. Const. Art. I, Sec. 32), and has its own version of DOMA—a statute that prohibits political subdivisions of the state from giving effect to:

1. A public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or any other jurisdiction; or
2. Right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or any jurisdiction.

Tex. Fam. Code § 6.204.

This law has been challenged as unconstitutional, and while some courts have found it to be constitutional, others have found it to be constitutionally infirm. The Texas Supreme Court has an opportunity to rule on this law this term, but it may choose to decide the two pending cases on much narrower grounds. *In re Marriage of J.B. and H.B.*, (Tex. App. – Dallas 2010, pet. granted) 326 S.W. 3d 645; *State v. Naylor* 330 S.W.3d 434, (Tex. App. – Austin 2011, pet. granted). (Both cases involve same-sex couples who were married in other states and wish to be divorced in Texas.) While state law is significant authority for the City of Houston, the City could still face liability for complying with a law that is unconstitutional, or would cause it to apply its own laws in an unconstitutional manner.

Conclusion and Recommendation

In conclusion, it is my legal opinion that the City of Houston may extend benefits to legally married same-sex spouses on the same terms it extends benefits to heterosexual spouses. To apply Article II, section 22 of the City Charter differently would, based on my review of all relevant federal authority, be unconstitutional. Therefore, I recommend you give serious consideration to directing the Human Resources Department to offer benefits to same-sex spouses of city employees who were lawfully married in a state that recognizes same-sex marriage.

CAUSE NO. 2013-75301

P-3
JMKX

JACK PIDGEON AND
LARRY HICKS,
PLAINTIFFS,

v.

MAYOR ANNISE PARKER AND
CITY OF HOUSTON,
DEFENDANTS.

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

310 JUDICIAL DISTRICT

**ORDER ON PLAINTIFFS'
APPLICATION FOR TEMPORARY RESTRAINING ORDER**

CAME ON FOR CONSIDERATION Jack Pidgeon and Larry Hicks ("Plaintiffs") application for a Temporary Order, presented to the Court today. The Court examined the pleadings of Plaintiffs, the evidence presented, and the argument of counsel, and after due consideration finds that:

- 1) a cause of action against the Defendants exists;
- 2) Plaintiffs have a probable right to the relief sought; and
- 3) Plaintiffs will suffer a probable, imminent, and irreparable injury in the interim.

Therefore, Plaintiffs are entitled to a temporary injunction.

It is therefore ORDERED that the clerk of this Court issue a temporary injunction enjoining Defendants, Mayor Annise Parker and the City of Houston ("Defendants") and any other person(s) with knowledge of this Order, to cease and desist providing benefits to same-sex spouses of employees that have been married in jurisdictions that recognize same-sex marriage providing benefits to same sex couples. This order shall stand until further Order of this Court.

Plaintiffs have shown a probable injury because the harm is imminent; if the temporary restraining order does not issue, the injury would be irreparable; and the applicant has not other adequate legal remedy.

FREEMAN v PARKER
EXHIBIT "B"

FILED

Chris Daniel
District Clerk

DEC 17 2013

Time:

Harris County, Texas

By

Deputy

If the temporary injunction is not issued, the Defendants' unlawful policy providing benefits to same-sex spouses of employees that have been married in jurisdictions that recognize same-sex marriage providing benefits to same sex couples will remain in place; therefore, the harm to Plaintiffs' constitutional and statutory rights is imminent.

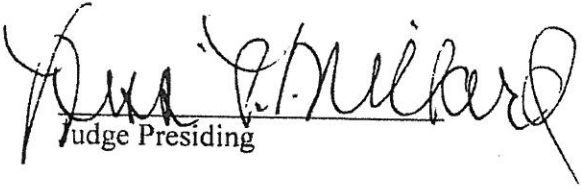
Plaintiffs' claims of statutory and constitutional injury and violation of the City of Houston's Charter, present a substantial threat that irreparable injury would result if the temporary restraining order does not issue.

Finally, Plaintiffs have no other adequate remedy at law because no amount of money can compensate Plaintiffs for the loss of their constitutional and statutory rights. However, Plaintiffs are not required to prove that they have no adequate remedy at law when they have a statutory right to an temporary restraining order, as provided by sections 106.002(a) and 110.005(a)(2) of the Texas Civil Practice and Remedies Code.

This temporary injunction is effective immediately and shall continue in force and effect until further order of this Court. This order shall be binding on Defendants, and any other person(s) who receive actual notice of this order by personal service or otherwise.

IT IS FURTHER ORDERED that this temporary injunction be effective immediately and the bond paid by Plaintiffs in the amount of \$250.00 for each Defendant, \$500.00 total payable to Defendants will extend to this temporary injunction. The Clerk of this Court is hereby ORDERED to issue citation and notice to Defendants, Mayor Annise Parker and the City of Houston.

This cause is set for ^{hearing} ~~trial~~ on January 6, 2014 at 9:00am
SIGNED on DEC 17 2013, 2013 at _____ m.


Judge Presiding



CITY OF HOUSTON

Annise D. Parker

Mayor

Human Resources Department

Omar C. Reid
Human Resources Director
P.O. Box 1562
Houston, Texas 77251-1562

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IMPORTANT MESSAGE CONCERNING INSURANCE COVERAGE AND BENEFITS PURCHASED FOR A SAME-SEX SPOUSE

You are receiving this letter because you are legally married and have applied for medical, dental and/or vision insurance coverage under one or more of the City's insurance plans. While you may already be aware, on December 17, a lawsuit* was filed seeking to prevent the City from continuing to provide you with the insurance coverage you have applied for and are paying for through bi-weekly payroll deductions. As an employee or an employee's spouse with insurance coverage under a City plan, you need to know that the lawsuit has significant and very real implications for your family and we want you to be prepared in the event a Court suddenly takes your insurance coverage away.

The City's Charter explicitly permits extension of benefits to "legal spouses" of employees and the City's decision to offer benefits to same-sex couples, married in a state where same-sex marriage is legal, was consistent with the City's Charter and the US Constitution in accordance with recent U.S. Supreme Court decisions and relevant case law from around the country. The City continues to believe that extending coverage to your family is the right, just and fair thing to do and that you are entitled to equal protection under the United States Constitution. However, on December 17, 2013, without notice to the City or an opportunity for the City to be heard, a Harris County District Court entered an order purporting to require Mayor Annise Parker and the City of Houston to temporarily cease and desist providing benefits to the same-sex spouses of employees married in jurisdictions recognizing same-sex marriage. The City is zealously defending the case, but there is now uncertainty surrounding your insurance benefits.

The City believes it will ultimately prevail in court, but such a result cannot be guaranteed and litigation can be a lengthy process. Your critical benefits may be interrupted, may not be available to you or they may be terminated at some point during the litigation. We encourage you to explore your insurance options and to have some form of contingency plan in place to help you minimize the impact of such events on your health and financial status.

If you have questions, please do not hesitate to contact Gerri Walker at (832) 393-6058.

**Jack Pidgeon and Larry Hicks v. Mayor Annise Parker and City of Houston, Cause No. 2013-75301, In the 310th Judicial District Court of Harris County, Texas*

**FREEMAN v PARKER
EXHIBIT "C"**

Council Members: Helena Brown Jerry Davis Ellen R. Cohen Wanda Adams Dave Martin Al Hoang Oliver Pennington Edward Gonzalez
James G. Rodriguez Mike Laster Larry V. Green Stephen C. Costello Andrew C. Burks, Jr. Melissa Noriega C.O. "Brad" Bradford Jack Christie
Controller: Ronald C. Green