

VIA FEDERAL EXPRESS

August 24, 2015

Pedro J. Garcia
Miami-Dade Property Appraiser
Stephen P. Clark Center
111 N.W. 1st Street, Suite 710
Miami, Florida 33128-1984

Re: Demand to Refund Tax Payments Based on Unconstitutional Denial of Homestead
Protections to Hal F.B. Birchfield, Surviving Spouse of James Merrick Smith

Dear Mr. Garcia:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) and White & Case LLP write on behalf of our client, Hal F.B. Birchfield (“Hal”).¹ Hal and James Merrick Smith (“James”) met in 1970 and lived together in Florida for 42 years. In 2002, they purchased a family home at 1541 Brickell Avenue C1506, Miami, FL 33129-1213, Folio No. 01-4139-038-1860, on which James qualified for and received a homestead exemption. Hal and James were validly married in the state of New York, in 2012.² The next year, on September 13, 2013, James died, and his interest in the homestead property passed to Hal. That transfer to Hal as a

¹ Founded in 1973, Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender people, and those living with HIV. Lambda Legal has extensive experience representing the interests of lesbians and gay men in court, and has participated as party counsel or *amicus curiae* in every major case dealing with the rights of gay people at the Supreme Court. *See, e.g., Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571 and 14-574, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015) (party counsel); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (*amicus curiae*). Lambda Legal also has represented parties or *amicus curiae* in virtually every major case seeking marriage equality since its founding. *See, e.g., Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (counsel for intervenor class of 14,000 same-sex couples; securing marriage for same-sex couples in Virginia); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (party counsel; securing marriage for same-sex couples in Indiana); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (party counsel; securing marriage for same-sex couples in Nevada). Additionally, Lambda Legal represents individual and organizational plaintiffs in several suits to enforce full recognition of the valid marriages of same-sex widows and widowers. *See, e.g., Murphy v. Colvin*, No. 1:14-cv-01764-RC (D.D.C.) (seeking recognition of same-sex couples’ valid marriages for purposes of Social Security survivors’ benefits); *Williams v. Colvin*, No. 1:14-cv-08874 (N.D. Ill.) (same).

² A copy of Hal and James’ marriage certificate is attached as Exhibit A.

surviving spouse, however, was treated by your office as a change of ownership, and Hal was denied the benefit of James' homestead exemption and Save Our Homes ("SOH") cap on annual increases in taxable value. As a result, the 2014 taxable value of the homestead property—which would have increased only 1.7% if James had been alive—jumped 38.7%, from \$307,397 to \$426,340.

Under the United States Supreme Court's decision in *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571 and 14-574, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015), your office's refusal to recognize Hal and James' marriage was unconstitutional. *Obergefell* makes it clear that denying surviving-spouse homestead protections to Hal, simply because his deceased spouse was a man and not a woman, violates constitutional guarantees of due process and equal protection. Indeed, *Obergefell* held that the protection of marriage as a fundamental right "appl[ies] with equal force to same-sex couples," and that "[t]here is no difference between" same-sex and different sex couples with respect to marriage. *Id.* at *625, 628. The Supreme Court explicitly recognized that a key aspect of marriage is society's pledge to support a married couple, for example through "rights, benefits, and responsibilities" relating to "taxation, inheritance and property rights . . . [and] the rights and benefits of survivors." *Id.* at 627. Thus, *Obergefell* mandates that states cannot deny validly married same-sex couples spousal responsibilities and rights such as homestead protections. Your office should restore Hal to the homestead and SOH protections that belonged to James and should have passed to Hal upon James' death, and should refund to Hal the excess property tax that he was assessed as a result.

Florida Law Extends Homestead Protections to All Surviving Spouses.

Florida's homestead laws grant to married couples the types of protections that, as *Obergefell* makes clear, are critical for all married couples, regardless of sexual orientation or sex. Under Florida law, when ownership of homestead property transfers from a deceased spouse to a surviving spouse, that transfer is *not* a change of ownership that destroys the protections of a homestead exemption and SOH cap. Any law to the contrary would betray the "homestead exemption's purpose of shielding Floridians from undue financial hardship related to a home after a person has experienced one of life's most stressful events, the death of a spouse." *Kelly v. Spain*, 160 So. 3d 78, 84-85 (Fla. 3d DCA 2015). Indeed, "[n]o matter the form, the goal of homestead has remained stable: to protect the family." *Id.* at 82. Homestead protections "promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law." *McKean v. Warburton*, 919 So. 2d 341, 344 (Fla. 2005) (internal quotation marks omitted).

Although the homestead statute provides that a property should be reassessed at just value when there is a "change of ownership," § 193.155(3)(a), Fla. Stat., the statute also provides that there is no change of ownership when "legal or equitable title is changed or transferred between husband and wife, including a change or transfer to a surviving spouse." § 193.155(3)(a)(2), Fla. Stat.; *see also* § 193.155(8), Fla. Stat. ("a husband and wife who owned and both permanently resided on a previous homestead shall each be considered to have received

the homestead exemption even though only the husband or the wife applied for the homestead exemption on the previous homestead”). In *Kelly v. Spain*, the court interpreted section 193.155(8) to mean that “a homestead application filed by one spouse inures to the other spouse, provided both spouses permanently resided at the homestead.” 160 So. 3d at 84.

Kelly v. Spain demonstrates why your office’s reassessment of Hal’s home after James’ death was improper. In *Kelly*, after the death of a married man with a homestead exemption, his surviving spouse, who had never applied for a homestead exemption either before or after the husband’s death,³ continued to take the benefit of the SOH cap on the property. When the property appraiser learned of the death, he sued to reassess the house at just value, claiming that the SOH cap was lost when the husband died, and therefore there was a “change of ownership.” The Fourth DCA disagreed, relying in part on section 193.155(3)(a), which provides that there is no “change of ownership” when “legal or equitable title is changed or transferred between husband and wife, including a change or transfer to a surviving spouse.” § 193.155(3)(a)(2), Fla. Stat.

Under *Obergefell*, those same principles apply to the transfer of James’ portion of the family home to Hal, who should have retained the benefit of the SOH cap when his husband died and James’ interest in the property transferred to him. It makes no difference that the terminology in the statute contemplates transfers between different-sex spouses because, also under *Obergefell*, the law must not be applied any differently to a transfer between *husband* and *husband*. See also § 1.01, Fla. Stat. (“In construing these statutes and each and every word, phrase, or part hereof, where the context will permit: . . . (2) Gender-specific language includes the other gender and neuter.”); *Gray v. Cent. Fla. Lumber Co.*, 140 So. 320, 323 (Fla. 1932) (statutes must be construed to avoid constitutional problems).

Obergefell Applies Retroactively to All Same-Sex Surviving Spouses.

Under *Obergefell*, every state in the country was obligated in the past, and is obligated now, to recognize the marriages of same-sex spouses as of the time those spouses entered into valid marriages. 2015 U.S. LEXIS 4250, at *634 (holding that the “substantial and continuing harm” inflicted by the refusal to recognize a same-sex couple’s prior valid marriage violates the Fourteenth Amendment). Indeed, there is no question that *Obergefell* applies retroactively. The Supreme Court has made clear that, once it has applied a new rule to the parties before it—as did *Obergefell*—retroactivity is the rule. See *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (clarifying that this is the rule developed by the Supreme Court’s foundational retroactivity decisions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) and *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86 (1993)). The Court left no doubt that, when it “applies a rule of federal law to the parties before it, that rule is the controlling interpretation of

³ Unlike the widow in *Kelly*, Hal applied for and received a homestead exemption after James’ death.

federal law and must be given full retroactive effect . . . regardless of whether such events predate or postdate our announcement of the rule.” *Harper*, 509 U.S. at 97; *see also Glazner v. Glazner*, 347 F.3d 1212, 1218 (11th Cir. 2003) (same). Thus, state and local agencies are obligated to give retroactive effect to a Supreme Court decision holding that a category of state law is unconstitutional and applying that ruling to the parties before it—which is precisely what the Court did in *Obergefell*. The lead plaintiff in that case, widower James Obergefell, asked the question whether Ohio could erase his marriage to his same-sex spouse “for all time,” and the Supreme Court answered with a resounding “no.” 2015 U.S. LEXIS 4250, at *634. As a result, Mr. Obergefell was entitled to an accurate death certificate identifying him as the surviving spouse, even though, at the time of his husband’s death, Ohio did not recognize their marriage. Under the Supreme Court’s well-established retroactivity principles, Hal is entitled to the same treatment, and your office must recognize the validity of his marriage to James as of 2012, the year they were married.⁴

We hope that this matter can be resolved without the need for litigation, and that you will promptly rectify your office’s discriminatory treatment of Hal. If your office is not willing to rectify that discriminatory treatment, however, Hal is prepared to file a lawsuit.⁵ Please respond to this letter no later than September 7, 2015, and do not hesitate to contact me with any questions at 470-225-5341 or tborelli@lambdalegal.org. Thank you for your cooperation.

Sincerely,



Tara L. Borelli*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 1070
Atlanta, GA 30308-1210

Karen L. Loewy**
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005

⁴ *See also* Tara Siegel Bernard, “Gay Couples Are Eligible for Social Security Benefits, U.S. Decides,” *New York Times* (Aug. 20, 2015), www.nytimes.com/2015/08/21/business/gay-couples-are-eligible-for-benefits-us-decides.html?_r=1 (describing the U.S. Social Security Administration’s recognition that *Obergefell* applies retroactively).

⁵ On September 10, 2014, Hal filed a petition with the Value Adjustment Board, and he is waiting for a hearing date. Hal’s federal constitutional claims, however, do not depend on exhaustion of administrative remedies.

David P. Draigh, Fla. Bar No. 624268
WHITE & CASE LLP
Southeast Financial Center
200 South Biscayne Blvd., Ste. 4900
Miami, FL 33131-2352

* Admitted in Georgia, California, and Washington only

** Admitted in Massachusetts and New York only

cc: Mr. Hal F.B. Birchfield

Exhibit A



L4978688

New York State Department of Health

Certificate of Marriage Registration

District Name City of RyeDistrict No. 5908Local Register No. 65

This is to certify that the persons identified below were married on the date and at the place specified as shown by the duly registered license and certificate of marriage on file in this office

Bride/Groom/Spouse

Name Hal Fred Broadus Birchfield
First Middle Premarriage Surname Birth Name
(If different from premarriage surname)
☒ Check box if same as premarriage surname
New Surname (if applicable)

Residing at Miami, Dade County, Florida, 33129

Date of Birth 10/12/1945 Place of Birth Mayo, Florida
Month Day Year City, Town or Village/State or Country

Bride/Groom/Spouse

Name James Merrick Smith
First Middle Premarriage Surname Birth Name
(If different from premarriage surname)
☒ Check box if same as premarriage surname
New Surname (if applicable)

Residing at Miami, Dade County, Florida, 33129

Date of Birth 03/21/1919 Place of Birth St. Joseph, Louisiana
Month Day Year City, Town or Village/State or Country

Date of Marriage 10/11/2012 Place of Marriage City Of Rye , NEW YORK
Month Day Year City, Town or Village

(SEAL)

Town or City Clerk Dawn J. Nodouse 10/12/2012
Month Day Year

☐ If checked, this marriage was a second or subsequent ceremony.

Do not accept this transcript unless the raised seal of the issuing locality is affixed thereon.

Any Alteration Invalidates This Certificate

See Reverse Side For A List of Security Features Used In This Form