No. 11-0024

In The Supreme Court of Texas

In the Matter of the Marriage of J.B. and H.B.,

J.B.,

Petitioner,

v.

The State of Texas,

Respondent.

On Petition for Review from the Fifth Court of Appeals at Dallas, Texas
Case No. 05-09-01170-CV

PETITIONER'S BRIEF ON THE MERITS

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Statement of the Case

Nature of the Case:	This is a suit for divorce. The State of Texas intervened and filed a plea to the jurisdiction.
Trial Court:	The Honorable Tena Callahan, 302nd Family District Court, Dallas County.
Trial Court's Disposition:	The trial court entered an order striking the State's intervention and denying its plea to the jurisdiction. 1 CR 82. The trial court then entered findings of fact and conclusions of law and an amended order. 2 Supp. CR 27, 37.
Parties in the Court of Appeals:	The State of Texas (Appellant and Relator); J.B. (Appellee and Real Party in Interest).
Court of Appeals:	Fifth Court of Appeals; Justice FitzGerald, joined by Justices Bridges and Fillmore. *In the Matter of the Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed 2/17/2011) (hereinafter "Op.").
Court of Appeals' Disposition	The court of appeals granted mandamus regarding the striking of the State's intervention, reversed the denial of the State's plea to the jurisdiction, and remanded with instruction to dismiss for lack of subject-matter jurisdiction. The court then denied J.B.'s motion for *en banc* reconsideration. No motions for rehearing are pending in the court of appeals.

Statement of Jurisdiction

The Supreme Court has jurisdiction because this case involves the construction and validity of section 6.204 of the Texas Family Code. Tex. Gov't Code § 22.001(a)(3); *see also* Tex. R. App. P. 56.1(a)(3).

This Court also has jurisdiction because the court of appeals construed section 6.204 as denying trial courts jurisdiction, which conflicts with longstanding Texas family law regarding jurisdiction in petitions for divorce, and with this Court's prior decisions regarding statutory construction. *See* Tex. Gov't Code § 22.001(a)(2); *see also* Tex. R. App. P. 56.1(a)(2). In *City of DeSoto v. White*, for example, this Court held statutes are presumptively nonjurisdictional, and that this presumption can be overcome only by a showing of clear legislative intent—such as the inclusion of language explicitly identifying the statute as jurisdictional. 288 S.W.3d 389, 393–394 (Tex. 2009). Section 6.204 includes no language identifying it as jurisdictional. *See* Tex. Fam. Code § 6.204.

Finally, this Court has jurisdiction because the court of appeals erred regarding important questions of Texas state law "that should be, but [have] not been, resolved by the Supreme Court." Tex. Gov't Code § 22.001(a)(6); *see also* Tex. R. App. P. 56.1(a)(5)–(6).

Issues Presented

1. Does section 6.204 of the Texas Family Code strip Texas trial courts of jurisdiction to hear a petition for divorce involving a same-sex couple legally married in another state, where no language identifies the statute as jurisdictional, and where that construction would upend a century of Texas divorce procedure?

2. If construed as preventing a same-sex couple legally married in another state from obtaining a divorce in Texas, does section 6.204 violate the United States Constitution?

3. Did the court of appeals err by refusing to address all of J.B.'s constitutional challenges to the State's construction of section 6.204?

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Case No. 05-09-01170-CV

PETITIONER'S BRIEF ON THE MERITS

To The Honorable Supreme Court of Texas:

Petitioner J.B. submits this brief on the merits, and respectfully shows this Court as follows:

Statement of Facts

The court of appeals correctly stated the nature of the case. J.B. and H.B.—two men—were legally married in Massachusetts on September 22, 2006. 1 CR 8. The couple moved to Dallas County, Texas in 2008. 1 CR 5, 32. The couple stopped living together in November, and on January 21, 2009—having satisfied the six-month residency requirement—J.B. filed an uncontested petition for divorce in the 302nd District Court in Dallas County.[1] 1 CR 5–6. In his petition, J.B. alleged he and H.B. were legally married in Massachusetts. 1 CR 8.

The Office of the Attorney General (representing the State) intervened. 1 CR 13. The State conceded the validity of J.B.'s marriage under Massachusetts law, but argued section 6.204 of the Texas Family Code deprives the Texas trial court of jurisdiction to hear the petition for divorce. 1CR 22–24. J.B. and amicus opposed the State's plea, arguing the court had jurisdiction because section 6.204 applies to same-sex marriage, not to divorce—and that depriving J.B. of the ability to obtain a divorce would be unconstitutional. 1 CR 32–39; 3 Supp. CR 6–11.

The trial court entered an order denying the State's plea to the jurisdiction on October 1, 2009, finding the court had jurisdiction and concluding both section 6.204 and article I, section 32(a) of the Texas

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[1] H.B. did not contest the divorce, has not hired counsel, and has not been involved in any of these proceedings.

Constitution violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, to the extent they purported to deprive the court of the power "to divorce parties who have legally married in another jurisdiction and who otherwise meet the residency and other prerequisites required to file for a divorce in Dallas County, Texas." *See* 1 CR 82.[2] The State filed its notice of interlocutory appeal the next day. 1 CR 85.

J.B. requested findings of fact and conclusions of law on October 20, 2009. 2 Supp. CR 11–23. The State did not respond to J.B.'s proposed conclusions regarding the constitutionality of construing section 6.204 as preventing same-sex divorce; instead, the State contended only that the trial court could not enter findings of fact and conclusions of law because the State's notice of interlocutory appeal stayed all proceedings in the trial court. 2 Supp. CR 3–9. On December 7, 2009, the trial court signed and entered J.B.'s proposed findings of fact and conclusions of law. 2 Supp. CR 27–34.

The court then entered an amended order stating that section 6.204—to the extent it purported to deny J.B. access to divorce—violated other rights in addition to Equal Protection, under the U.S.

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[2] The trial court also *sua sponte* struck the State's intervention. 1 CR 82. The State petitioned for mandamus and the court of appeals consolidated the petition for mandamus regarding intervention with the interlocutory appeal of the denial of the State's plea to the jurisdiction. Op. at 660. The State lacked any legal basis to intervene in this private divorce action, but the issue of intervention is not before this Court in this case.

Constitution. 2 Supp. CR 37–38. The amended order also removed references to article I, section 32 of the Texas Constitution. *See id.*

After oral argument, the Fifth Court of Appeals vacated the amended order and disregarded the trial court's findings of fact and conclusions of law, holding they were entered in error because the State's notice of interlocutory appeal had stayed all proceedings in the trial court. Op. at 662, 681. The court of appeals then reversed the trial court's denial of the plea to the jurisdiction, construing section 6.204 as depriving the trial court of jurisdiction to hear J.B.'s petition for divorce. Op. at 665–667. Finally, the court of appeals held its construction of section 6.204 did not violate the Equal Protection Clause of the Fourteenth Amendment. Op. at 681.

The court of appeals denied J.B.'s motion for *en banc* reconsideration on December 8, 2010. Op. at 681. J.B. filed his petition for review on February 17, 2011.

Summary of the Argument

This case is about divorce. It is not about creating a marriage. It is not about legally recognizing a marriage. In fact, this case is not even about any of the "protections" or "benefits" that are sometimes associated with a divorce—such as a determination of contested property claims or the adjudication of child custody. Literally, as it pertains to J.B. and the State of Texas, this case is about nothing more than the trial court's power to say, "Divorce granted."

The unambiguous language of section 6.204 of the Texas Family Code refers only to marriage, and does not prevent a trial court from granting an uncontested divorce to a same-sex couple legally married in another state. But the court of appeals—at the State's urging—held section 6.204 of the Texas Family Code strips a trial court not only of the ability to grant J.B.'s petition for divorce, but of jurisdiction to even consider that petition in the first place. The court of appeals' decision misconstrues the plain words of the statute and upends a century of Texas law regarding divorce and subject-matter jurisdiction.

Further, *Romer v. Evans*, 517 U.S. 620 (1996), established that a law is constitutionally suspect if it singles out gays and lesbians for disfavored treatment. If section 6.204 means what the court of appeals says it means, then it treats same-sex couples legally married in another state separately and unequally, denies them due process, and serves to penalize them for moving to Texas by denying them access to divorce. This Court should avoid statutory constructions that create such obvious constitutional infirmities.

On a grander scale, this case is about how we, as Americans, must legally reconcile the fact that we are a nation of sovereign states having conflicting marriage policies with the fact that we are also a nation of individual citizens who migrate freely from state to state.

This Court should reverse the court of appeals' judgment and remand to the trial court with instructions to consider J.B.'s uncontested petition for divorce.

Argument

I. The Court should apply section 6.204 of the Family Code as it is written—as pertaining to marriage, not divorce.

"The cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent." *Klein v. Hernandez*, 315 S.W.3d 1, 6 (Tex. 2010). For a statute that is unambiguous, the Court will "apply its words according to their common meaning without resort to rules of construction or extrinsic aids." *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007). It is presumed the statute is intended to effect a "just and reasonable result." Tex. Gov't Code § 311.021.

The statutory provision at issue here is section 6.204 of the Family Code—particularly section 6.204(c). Section 6.204(a) defines terms; section 6.204(b) declares same-sex marriage contrary to public policy and "void in this state"; and section 6.204(c) says, in relevant part:

> 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 … in this state or in 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 … in this state or in any other jurisdiction.

Tex. Fam. Code § 6.204(c).

A. Construing section 6.204 as jurisdictional conflicts with the plain language of the statute and produces unjust and unreasonable results.

1. The court of appeals' decision upends a century of Texas divorce procedure.

Texas trial courts are courts of general jurisdiction. TEX. CONST. art. V, § 8; *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). This general jurisdiction includes the jurisdiction to hear divorce actions—and this Court has even declared the Legislature lacks the power to take away that jurisdiction. *Aucutt v. Aucutt*, 62 S.W.2d 77, 79 (Tex. 1933) ("Since trial courts of this State are clothed by the Constitution with divorce jurisdiction it does not lie within the power of the Legislature to take such jurisdiction away from them.").

Further, subject-matter jurisdiction "is the power to decide, and not merely the power to decide correctly." *Martin v. Sheppard*, 201 S.W.2d 810, 812–813 (Tex. 1947). An appellate court reviewing a trial court's jurisdiction construes the pleadings in favor of the pleader and takes as true the facts pleaded. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). This means, in determining the trial court's jurisdiction over J.B.'s petition for divorce, the appellate court should take as true J.B.'s allegation of a valid marriage, and the trial court's jurisdiction should be based on the character of the case (a divorce action)—not on how the court should decide the matter.[3]

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[3] Incidentally, the same standard applies in determining a petitioner's standing; the pleadings, taken as true, determine standing regardless of whether they are subject to rebuttal on the merits. *Frost Nat. Bank v. Fernandez*, 315 S.W.3d

Indeed, for over a century in Texas family law, to successfully plead an action for divorce and thereby invoke the trial court's jurisdiction, the petitioner has needed only to allege the existence of a valid marriage—and *the allegation alone is sufficient*. *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S.W. 284 (1900). If the other party disputes the marriage's validity, then the assertion of voidness "is not a jurisdictional deficiency; rather it is a defense that should [be] argued to the court during a trial on the merits." *Narvaez v. Maldonado*, 127 S.W.3d 313, 317 (Tex. App.—Austin 2004, no pet.) (citing *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003)); *see also Gray v. Gray*, 354 S.W.2d 948, 949 (Tex. Civ. App.—Houston 1962, writ dism'd) (evidence of the invalidity of the marriage constitutes a defense on the merits) (citing *Ex Parte Threet*, 160 Tex. 482, 333 S.W.2d 361 (1960) (proof of the marriage's validity or invalidity must be made where the marriage is "denied" or "put in issue")). A petition for divorce has long been "held to embrace" not only the dissolution of "an existing legal marriage" but also the dissolution of a marriage that was "void or voidable from the beginning." *Schneider v. Rabb*, 100 Tex. Civ. App. 211, 212, 97 S.W. 463, 464 (1906). That is, a trial court hearing a petition for divorce has always been able, after considering the merits, to deny that petition and refuse to grant the divorce on the ground that the alleged marriage was void.

494, 503–504 (Tex. 2010). In its plea to the jurisdiction, the State initially argued J.B. lacked standing because his marriage was invalid. 1 CR 22–23. But the State abandoned its standing argument on appeal.

Contrary to this longstanding procedure, the State has argued the only proper way to dissolve a same-sex marriage is a suit to declare the marriage void.[4] 1 CR 41, 47; State's COA br. at 8–11. And the court of appeals agreed by construing section 6.204 as jurisdictional. Op. at 665, 681. Under this approach, a trial court must inquire into and determine the merits of a petition—despite the absence of any dispute between the parties—in order to decide whether it has jurisdiction to determine the merits. Then, rather than simply denying the divorce and declaring the marriage void, the court must dismiss the petition for lack of jurisdiction. Op. at 681. The petitioner must then file a separate suit to declare the marriage void.

In short, by injecting a jurisdictional bar into section 6.204, the court of appeals has upended bedrock family law and the law of subject-matter jurisdiction. This is unjust, unreasonable, and unsupported by the plain language of the statute.

2. The plain language of section 6.204 does not prevent the trial court from hearing and granting J.B.'s uncontested petition for divorce.

In interpreting a statute, the Court looks first to the "plain and ordinary meaning" of the statutory language. *City of Houston v. Clark*, 197 S.W.3d 314, 318 (Tex. 2006); *see also Klein*, 315 S.W.3d at 9

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[4] The State relies on section 6.307 of the Family Code. But section 6.307 says only that "[e]ither party to a marriage made void by this chapter *may* sue to have the marriage declared void." Tex. Fam. Code § 6.307 (emphasis added). By its plain terms, this provision is merely permissive and does not require the marriage to be dissolved this way.

(Willett, J., concurring) ("unambiguous text equals dispositive text") (collecting cases). Here, the common, ordinary meaning of "marriage" refers to the creation and ongoing (or going-forward) existence of a legal "union."[5] No one uses the word "marriage" to refer also to divorce; that would be nonsensical. Divorce is a disunion—the antithesis of marriage. A divorce does not create a marriage, nor does it "give effect" to a marriage; to the contrary, a divorce ends whatever effect that marriage might have had. By its own terms section 6.204 prevents giving effect to a same-sex *union*; it does nothing to prevent effecting a *disunion*. Accordingly, section 6.204 should be understood as (1) preventing the state from "giving effect" to the creation or recognition of an ongoing same-sex marriage, but (2) not precluding a trial court from dissolving a validly-created same-sex marriage through the granting of an uncontested petition for divorce.

Moreover, this Court has declared there is a "presumption that the Legislature did not intend to make [a statute] jurisdictional," which is "overcome only by clear legislative intent to the contrary." *City of DeSoto v. White*, 288 S.W.3d 389, 394–396 (Tex. 2009) (statute in question not jurisdictional because it contained no "explicit language" indicating the Legislature intended it to be jurisdictional, and because construing it as jurisdictional produced "troubling" consequences).

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[5] The Texas Constitution defines "marriage" as a "union" of a man and a woman. TEX. CONST. art. I, § 32. The court of appeals acknowledged the distinction between (1) the creation or "going-forward" recognition of a marriage and (2) divorce. Op. at 672.

Here, section 6.204 contains no "explicit language" indicating the intent to be jurisdictional. And notably, none of the other provisions in Chapter 6 of the Family Code are jurisdictional. Under *City of DeSoto* and plain meaning, this should have been enough for the court of appeals to reject the State's proposed construction of section 6.204 as jurisdictional. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–626, 632 (Tex. 2008) (a court risks crossing the line between judicial and legislative powers when it reads language into a statute that the Legislature did not put there); *Williams v. Texas State Board of Orthotics & Prosthetics*, 150 S.W.3d 563, 573 (Tex. 2004) ("we will not read into an act a provision that is not there"); *Lee v. City of Houston*, 807 S.W.2d 290, 294–295 (Tex. 1991) (the Legislature's failure to draw a bright line does not authorize the court to draw one by adding words that are not contained in the language of the statute).

3. The court of appeals' textual analysis of the phrase "may not give effect to" misconstrues the actual text of section 6.204(c).

But the court of appeals did not follow *City of DeSoto*. Instead, the court of appeals seized on the phrase "may not give effect to" in section 6.204(c) and proceeded to explain the ways in which this phrase deprives the trial court of jurisdiction to consider J.B.'s petition for divorce. *See* Op. at 664–667. At every step, the court of appeals either misused or misconstrued the actual words of the statute.

First, the court of appeals claimed 6.204(c)(1) prevents the trial court from "giving effect" to J.B.'s marriage certificate, which J.B. had

appended to his petition. Op. at 665. But even if the court of appeals was right about this, it would have nothing to do with jurisdiction. And as shown above, the determination of the validity of an alleged marriage goes to the *merits* of the petition, not to the court's jurisdiction. *Narvaez*, 127 S.W.3d at 317 (voidness "is not a jurisdictional deficiency; rather it is a defense that should [be] argued to the court during a trial on the merits"); *Gray*, 354 S.W.2d at 949 (evidence of the invalidity of the marriage constitutes a defense on the merits). Thus, this aspect of the court of appeals' analysis cannot support construing section 6.204 as jurisdictional.

Next, the court of appeals cited 6.204(c)(2) as forbidding the court from "giving effect" to a "right or claim to any legal protection, benefit, or responsibility asserted as a result of a same-sex marriage." Op. at 665. Then the court defined J.B.'s petition for divorce as "a claim … to legal protections, benefits, or responsibilities asserted as a result of a marriage"—and pointed to community-property rights as "one example of such a benefit." Op. at 665 (internal quotations omitted). But this ignores the important fact that J.B.'s petition for divorce is uncontested; the State has acknowledged property division is not at issue here, and that "the only stated goal of this litigation [is] termination of the marriage." State's COA br. at 11; State's COA Reply br. at 7. Neither the court of appeals nor the State can explain how the mere declaration, "Divorce granted," constitutes a "legal protection, benefit, or responsibility" resulting from marriage. (No one considers

divorce a "benefit" of marriage.) Moreover, even if J.B. did seek "protections" or "benefits" such as an adjudication of community property—which he does not—this still would have no bearing on the court's *jurisdiction* to determine whether any effect could be given to those claims.

Next, the court of appeals construed section 6.204 as preventing the trial court from "giv[ing] any effect" to the divorce petition itself, "even if only to deny it." Op. at 665. But the court failed to explain how, by exercising jurisdiction to merely consider (and to possibly deny) J.B.'s petition—which merely *alleges* a valid marriage and *asks* for a divorce—would be transgressing the plain terms of section 6.204.

The text of section 6.204(c) is actually quite precise in its delineation of the things to which no effect may be given. To repeat: any "public act, record, or judicial proceeding that creates, recognizes, or validates a [same-sex] marriage," and any "right or claim to any legal protection, benefit, or responsibility" resulting from a same-sex marriage. Tex. Fam. Code § 6.204(c). A petition for divorce is none of these things. And a court's rendition of "divorce granted" constitutes none of these things.

The court of appeals attempted to shoehorn this case into the purview of section 6.204(c) by claiming "[a] same-sex divorce proceeding would … establish the validity of [the] marriage." Op. at 666. But this is simply not true. Again, J.B.'s petition merely *alleges* a valid marriage. Because the petition is uncontested, the trial court

merely presumes the marriage's validity—just as it would accept as true any other alleged and undisputed fact. The mere *presumption* of validity is not an *adjudication* of validity. *See Ex Parte Threet*, 333 S.W.2d at 361 (proof of the marriage's validity is made only where the marriage is "put in issue"). As the Wyoming Supreme Court recently put it:

> [R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role.

Christiansen v. Christiansen, 253 P.3d 153, 156 (Wyo. 2011).

The same holds true here. For the trial court to consider—and even grant—an uncontested petition for divorce involving a same-sex couple legally married in another state does nothing to lessen the law or policy in Texas against the creation or recognition of same-sex marriages. And the actual words of section 6.204 simply do not preclude the trial court from presuming the validity of J.B.'s out-of-state marriage for the sole purpose of dissolving it through divorce.

4. Construing section 6.204 as stripping trial courts of jurisdiction over an uncontested divorce produces unjust and unreasonable results.

The Court presumes the Legislature intended a "fair and reasonable result" in its enactment of a statute. *In the Interest of M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (citing TEX. GOV'T CODE § 311.021(3)). In other words, if the "plain meaning" of the statute points to an unreasonable result, the Court should not consider itself bound by this "plain meaning" in its determination of the statute's operative effect. *See City of Rockwall*, 246 S.W.3d at 625–626 (Court construes words according to their plain meaning unless it leads to absurd results); *accord Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 453–455 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

The State of Texas processes roughly 80,000 divorces every year.[6] The vast majority of these divorces are uncontested, and the presumption of the validity of the alleged marriage in an uncontested divorce is essential to judicial efficiency. The court of appeals' construction of section 6.204 as jurisdictional will require trial courts to police these tens of thousands of uncontested divorces—and where it cannot be determined from the face of the petition whether an opposite-sex or same-sex couple is involved, the court will have to inquire into and determine the validity of the alleged marriage

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[6] *Table 7 Marriages and Divorces Texas, 1970–2008*, Tex. Dept. of State Health Services, http://bit.ly/plNt4y.

(thereby undoing the concept of "uncontested"). As more and more states legalize same-sex marriage,[7] as more and more people move to Texas[8]—and as the popularity of unisex names remains high[9]—gone will be the days in which trial courts could efficiently grant an uncontested petition for divorce between "Cameron and Dana" or "Taylor and Robin," or "Jordan and Avery," or "Reese and Reagan"—or "J.B. and H.B."

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[7] Eight states now allow same-sex marriage—though California's allowance is presently on hold. *See* McKinney's DRL § 10-a and 10-b (2011) [New York]; N.H. Rev. Stat. §§ 457:1 et seq. (2010) [New Hampshire]; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *stayed by* 2010 WL 3212786 (9th Cir. Aug. 16, 2010) [California]; 2009 Vt. Acts & Resolves n. 3 [Vermont]; B18-482, 2009–2010 Council, 18th Period (D.C. 2009) [District of Columbia]; *Varnum v. Brien*, 763 N.W.2d 862, (Ia. 2009) [Iowa]; *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008) [Connecticut]; *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) [Massachusetts]. And other states allow civil unions—e.g., Delaware, Hawaii, Illinois, New Jersey, Oregon, Rhode Island. Moreover, nationwide public opinion has accelerated in favor of legalizing same-sex marriage. Nate Silver, *Gay Marriage Opponents Now in Minority*, The New York Times (April 20, 2011), http://bit.ly/g7Fwdf (discussing four recent polls showing outright majority favors recognizing same-sex marriage); Kyle Leighton, *Tolerance Wave? Multiple Polls in Red and Purple States Show Support for Gay Rights*, TPM (August 23, 2011), http://bit.ly/nZfzEx (noting a poll in Utah—"the most Republican state in the union"—showed 60% "supported either gay marriage or civil unions").

[8] Matt Goodman, *Census: Texas fastest growing state*, Killeen Daily Herald (Dec. 30, 2009), http://bit.ly/fGT3lQ (measuring growth in total numbers); Steve Campbell, *Texas remains country's fastest growing state*, McClatchy (Dec. 24, 2009), http://bit.ly/e3xsob; *Texas, here we come*, The Economist (June 16, 2010), http://econ.st/brbXYx (citing Jon Bruner, *Map: Where Americans Are Moving*, Forbes.com, http://bit.ly/agfgl4 (showing many migrants to Texas are coming from states that allow same-sex marriage or civil unions)).

[9] *Group of Names – Androgynous: Combined Popularity Chart*, NameTrends.net, http://bit.ly/nVw2rQ.

In other words, even if the plain language of section 6.204 could be read as jurisdictional, such a reading would be unreasonable—and unjust—insofar as it would upend a century of Texas divorce law and impede the ability of the trial courts to process tens of thousands of uncontested divorce actions. Moreover, because the court of appeals' construction of section 6.204 would require trial courts to review uncontested petitions looking for any that might involve a same-sex marriage—but does not require courts to police for all marriages deemed "void" under Chapter 6 of the Family Code—the result is unjust. Such overt targeting of a particular class of persons raises obvious constitutional concerns. (See Section II below.)

In sum, the court of appeals' construction of section 6.204 should be reversed because it conflicts with the plain words of the statute, conflicts with Texas Supreme Court precedent, turns the law of divorce and subject-matter jurisdiction on its head, and produces unreasonable and unjust consequences.

B. Construing section 6.204 as permitting a trial court to grant an uncontested same-sex divorce only furthers the intent and objective of the statute.

As noted, a statute's intent is determined first and foremost by the text. *Klein*, 315 S.W.3d at 9 (Willett, J., concurring). There is no disputing that section 6.204 declares same-sex marriage contrary to public policy, and that the intent or "object to be obtained," *see* Tex. Gov't Code § 311.023(1), is fewer (or no) same-sex marriages in Texas. The problem is that, when a same-sex couple is legally married in

another state and then moves to Texas, questions arise regarding the legal status of that marriage. No doubt, section 6.204 prevents Texas from "giving effect" to an ongoing marriage. TEX. FAM. CODE § 6.204(c). But that does not mean the marriage does not exist, because the marriage is not dependent only on the "effect" given to it by the State of Texas for its existence. At the very least, it remains legally valid according to the state in which it was created.[10]

In fact, even if a Texas court were to formally declare "void" a same-sex marriage that was lawfully created in Massachusetts, legal uncertainty would nevertheless remain. The State contends a declaration of voidance would be "effective in all 50 states." State's COA br. at 9. But in effect the State is saying Party A and Party B could be legally married in Massachusetts for a decade; the parties could amass a decade's fortune in marital property, as well as marital obligations and responsibilities (including those pertaining to children); then, for whatever reason, Party A could move to Texas and have this marriage declared void overnight.[11] And, according to the

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[10] Also, other states would acknowledge the marriage if the couple were to relocate. *See*, *e.g.*, *Christiansen*, 253 P.3d at 156. Moreover, the marriage is acknowledged for some purposes by the federal government. *See In re Balas*, 449 B.R. 567 (C.D. Cal. 2011) (DOMA unconstitutional to the extent it prevents legally-married same-sex couple from filing joint Chapter 13 petition in bankruptcy) (signed by 20 federal bankruptcy judges); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) (DOMA unconstitutional to the extent it denies legally-married same-sex couples equal access to "federal marriage-based benefits").

[11] There is no waiting period for a declaration of voidance—Party A need only be "domiciled in this state." TEX. FAM. CODE § 6.307(b).

State, that voidance decree would have to be honored by Massachusetts—despite the fact that Party B still resides there, where his marriage had been legally created and recognized for a decade. Can there be any doubt that the State's proposed voidance-regime will produce litigation over such obvious injustices? What would prevent Party B, for example, from obtaining a declaratory judgment in Massachusetts, affirming the validity of the parties' marriage and its attendant obligations and responsibilities, as against the Texas voidance—then bringing that judgment to Texas to be enforced?[12] In short, the State's preferred voidance remedy does little to reduce—and probably exacerbates—the legal uncertainty surrounding that same-sex marriage. *Cf. Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting) ("If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.").

The surest way to dissolve a same-sex marriage that was legally created in another state is the same way by which Texans dissolve an opposite-sex marriage that was legally created in another state: by granting a divorce. In other words, applying the plain language of

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[12] The State might contend section 6.204 would prevent "giving effect" to such a judgment, but this is dubious. Section 6.204 cannot survive constitutional scrutiny if interpreted as permitting Texas to refuse to give effect to a sister state's judgment. *See Adar v. Smith*, 639 F.3d 146, 152–161 (5th Cir. 2011) (noting the U.S. Supreme Court's description of "the full faith and credit obligation [regarding judgments] as 'exacting'") (citing *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998)).

section 6.204, so as to permit the trial court to merely presume the validity of an alleged marriage for the sole purpose of dissolving it by divorce, only furthers the intent and objective of the statute—because it means there will be one less same-sex marriage in Texas.

II. To the extent it is construed as preventing J.B. from obtaining a divorce, section 6.204 of the Texas Family Code violates J.B.'s rights under the U.S. Constitution.

As if the rules of statutory construction discussed above were not enough reason to reject the State's and the court of appeals' construction of section 6.204, yet another rule declares: "if a construction of the statute is fairly possible by which a serious doubt of constitutionality may be avoided, a court should adopt that construction." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) (internal citations omitted). This Court presumes a statute is intended to comply with the U.S. Constitution. Tex. Gov't Code § 311.021. And "[j]udicial restraint cautions that when a case may be decided on a non-constitutional ground, [the Court] should rest [its] decision on that ground and not wade into ancillary constitutional questions." *VanDevender v. Woods*, 222 S.W.3d 430, 432–433 (Tex. 2007); *see also City of Houston*, 197 S.W.3d at 320 (avoiding construction that "could well render" the statute "constitutionally suspect"); *Williams*, 150 S.W.3d at 571 ("We must, if possible, construe statutes to avoid constitutional infirmities."); *State v. Pioneer Oil & Refining Co.*, 292 S.W. 869, 872 (Tex. Comm'n App. 1927) (stating "words may be given a possible (though unusual) meaning" to avoid constitutional infirmity,

and construing the statute in question narrowly so as to preserve constitutional validity).

As demonstrated in the previous section, it is more than "fairly possible" to construe section 6.204 as (1) preventing the state from "giving effect" to the creation or recognition of an ongoing same-sex marriage in Texas, but (2) not precluding a trial court from merely presuming—without deciding—the validity of an out-of-state marriage for the sole purpose of acquiring jurisdiction to dissolve it through the granting of a divorce. The Court therefore should adopt this construction, so as to avoid wading unnecessarily into constitutional questions.[13]

Of course, it may be that even this proposed construction of section 6.204 raises its own constitutional concerns. *See*, *e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (finding California's prohibition against same-sex marriage unconstitutional under Due Process and Equal Protection). But those concerns pertain to *marriage*. Questions about the creation or ongoing recognition of same-sex marriage are not before the Court. This case is about *divorce*—and divorce is a right distinguishable from the right to marry. *See Boddie v. Connecticut*, 401 U.S. 371, 381 n.8 (1971) (recognizing "the special nature of the divorce action" and divorce as "a right of substantial magnitude"); *Williams v. North Carolina*, 325 U.S. 226,

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[13] This construction does not conflict with the Texas Constitution either. Article I, section 32 prohibits the creation or recognition of same-sex marriages, or unions—but again, this is distinguishable from divorce, which effects a disunion.

230 (1945) (divorce "affects personal rights of the deepest significance" and "touches basic interests of society"); *Ivy v. Ivy*, 177 S.W.2d 237, 239 (Tex. Civ. App.—Texarkana 1943) ("The right to prosecute a divorce suit is personal.").

The court of appeals' construction raises numerous, fatal constitutional concerns. There is a rapidly growing judicial consensus that all discrimination against gays and lesbians is unconstitutional. *See*, *e.g.*, *In re Balas*, 449 B.R. 567 (C.D. Cal. 2011) (Defense of Marriage Act (DOMA) unconstitutional to the extent it prevents legally-married same-sex couple from filing joint Chapter 13 petition in bankruptcy) (signed by 20 federal bankruptcy judges); *Dragovich v. U.S. Dept. of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011) (DOMA unconstitutional to the extent it denies legally-married same-sex couples access to state-maintained insurance plans); *Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (military's "Don't Ask, Don't Tell" policy unconstitutional); *Perry*, 704 F. Supp. 2d 921 (state law banning same-sex marriage unconstitutional); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) (DOMA unconstitutional to the extent it denies legally-married same-sex couples equal access to "federal marriage-based benefits"); *Massachusetts v. USDHHS*, 698 F. Supp. 2d 234 (D. Mass. 2010) (same); *Florida Dept. of Children and Families v. Adoption of X.X.G.* ("*X.X.G.*"), 45 So.3d 79 (Fla. App.—3rd Dist. 2010) (state law banning adoption by same-sex parents violated Equal Protection).

Furthermore, the court of appeals' construction—stripping the trial court of jurisdiction to even consider a petition for divorce involving a same-sex couple legally married in another state—waves a constitutional red flag in two directions. First, it treats a same-sex couple legally married in another state with disfavor: the opposite-sex couple with the out-of-state marriage can obtain a divorce but the same-sex couple cannot. The constitutional concerns arising out of such blatantly unequal treatment should be obvious. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (a law is constitutionally suspect if it singles out gays and lesbians for disfavored treatment).

But less obviously and more invidiously, the court of appeals' construction treats the same-sex couple unfavorably even compared to couples in marriages declared "void" under Chapter 6 of the Family Code, insomuch as the trial court retains jurisdiction to consider a petition for divorce involving a couple in a consanguineous marriage (section 6.201), a bigamous marriage (section 6.202), an underage marriage (section 6.205), or a stepchild marriage (section 6.206). And under longstanding Texas family law, the trial court has no cause to inquire into the validity of those alleged marriages, if no party challenges that validity. *See Ex Parte Threet*, 333 S.W.2d at 361 (proof of the marriage's validity is made where the marriage is "put in issue"). Meanwhile, under the court of appeals' construction of section 6.204—and in the State's enforcement of that construction, through its

intervention in same-sex divorces—petitions for divorce involving same-sex couples are specially targeted and denied equal treatment.

Given these obvious constitutional concerns, the Court should reverse the court of appeals and construe section 6.204 as permitting the trial court to consider J.B.'s petition for divorce. To the extent section 6.204 is construed as preventing a same-sex couple legally married in another state from obtaining a divorce in Texas, it runs afoul of (A) the Equal Protection Clause of the Fourteenth Amendment; (B) the fundamental right to travel; (C) the Due Process Clause of the Fourteenth Amendment; and (D) the Full Faith and Credit Clause.

A. Because it targets a particular class of persons for discrimination and because the State can provide no rational basis for it, the court of appeals' construction of section 6.204 violates Equal Protection.

On its face, the Equal Protection Clause of the Fourteenth Amendment provides: "No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In other words, the Fourteenth Amendment requires that "all persons similarly situated shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *accord City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In *Bonds v. Foster*, 36 Tex. 68 (1871), this Court held the State's discriminatory marriage laws were abrogated by the plain terms of the Fourteenth Amendment.

In *Bonds*, the Louisiana owner of a female slave took her and her children to Ohio in 1847, where he emancipated them by deed. *Id.* Over a period of four years, the couple established the basis for a common-law or "presumptive" marriage. *Id.* The man then brought his family to Texas—and because the marriage was legal in Ohio, this Court noted "their coming to the State of Texas, where the law prohibited marriage between the white and black races, did not, *per se*, operate a dissolution of the marriage, although, at the time, none of the marital rights of the parties could have been enforced by the laws of Texas." *Id.* The man then died in 1867, and the woman sued the man's executor claiming she was entitled to the homestead and other property as the decedent's widow. *Id.* This Court affirmed the trial court's recognition of the interracial marriage legally created in Ohio because the Texas law "prohibiting such a marriage had been abrogated by the 14th Amendment to the Constitution of the United States." *Id.*

Thus, under *Bonds*, Texas laws pertaining to marriage that purport to deny equal protection to a marriage legally created in another state are abrogated by the plain terms of the Fourteenth Amendment. Adhering to the precedent established by *Bonds*, this Court should hold the court of appeals' construction of section 6.204, as denying J.B. equal access to divorce, is likewise abrogated by the plain terms of the Fourteenth Amendment.

To reconcile the equal-protection principle with practical necessity, differing levels of judicial scrutiny determine whether a given law violates the constitutional prohibition against unequal treatment. *See Mauldin v. Texas State Bd. of Plumbing Examiners*, 94 S.W.3d 867, 871 (Tex. App.—Austin 2002, no pet.) (identifying strict and rational-basis levels of scrutiny). A law is constitutionally suspect if it singles out gays and lesbians for disfavored treatment, or if it withdraws specific legal protection from homosexuals but from no others. *See Romer*, 517 U.S. at 631; *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004). The only question is which level of scrutiny applies, to determine whether the law is in fact unconstitutional.[14]

1. Even under the rational-basis standard, the denial of equal access to divorce is unconstitutional.

Under rational-basis scrutiny, there must be some rational connection between the discriminating law in question and a legitimate government interest. *See Perry*, 704 F. Supp. 2d at 995 (citing *Romer*, 517 U.S. at 632) ("the court must 'insist on knowing the relation between the classification adopted and the object to be obtained'"); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 506 (5th Cir. 2001) (typically the State has the "minimal burden of

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[14] The State has relied heavily on *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *dism'd* 409 U.S. 810 (1972), as controlling on the Equal Protection question. *See* State's COA br. at 12–16, 20–21. But the court of appeals rejected this argument, properly identifying *Baker* as concerning the creation and recognition of a same-sex marriage "on a going-forward basis"; *Baker* is therefore distinguishable from this case involving a petition for divorce. Op. at 671–672.

showing that the law has a rational basis"). Put simply: "Under the rational basis test, similarly situated individuals must be treated equally unless there is a rational basis for not doing so." *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985).

The court of appeals first and foremost relied on the State's "legitimate interest in promoting the raising of children in the optimal familial setting … [which] is the household headed by an opposite-sex couple." Op. at 677. According to the court of appeals, "[b]ecause only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to … opposite-sex *marriage*." Op. at 677 (emphasis added). Notably, in advancing this interest the court of appeals makes no distinction between marriage and divorce. Consequently, the court of appeals never connects the dots: How does denying same-sex couples access to *divorce* promote procreation and the raising of children in opposite-sex households? This Court must insist on knowing: What is the rational relation between allowing only opposite-sex couples to divorce and promoting "stable family environments for procreation"? Perhaps the rational connection would be clear if the statute denied divorce to all couples with children—or prohibited divorce altogether. But the State's interest in procreation or child-rearing, no matter how legitimate and worthy of protection, simply cannot provide a rational basis for allowing legally-married opposite-sex couples to divorce, while denying similarly situated same-sex couples the same right.

Recently, courts in California and Florida have found no rational basis to support restrictions against same-sex marriage or adoption by same-sex parents—two scenarios that clearly have procreative or child-rearing implications. *Perry* found California's law restricting marriage to opposite-sex couples failed to pass constitutional muster, even under rational-basis scrutiny. 704 F. Supp. 2d at 994–1002. And a Florida appeals court has held that a Florida law banning adoption by gay parents also lacked any rational basis. *X.X.G.*, 45 So. 3d at 85–92. If a state's interests in procreation and child-rearing cannot support restrictions on marriage or adoption, they cannot rationally support a restriction on divorce.

Further still, forcing J.B. into a voidance action, rather than providing him equal access to a divorce, does nothing to promote the raising of children in heterosexual households—nor will it incentivize heterosexual couples to marry and have children. It also will not dissuade homosexual couples in other states from marrying.[15]

In fact, the State's constitutional arguments are contradictory. On the one hand, the State intimates a same-sex couple is not denied equal protection because it can obtain the same protections through voidance as through divorce. *See* State's COA br. at 10–11. Even if this were true, this argument reduces to "separate but equal"—and

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[15] Denying access to divorce might dissuade same-sex couples legally married in other states from moving to Texas—and perhaps this is one of the State's unstated objectives. But this violates the constitutional right to travel. (See Section II.B. below.)

therefore should be rejected under the principle that separate is inherently unequal. *See Brown v. Board of Ed.*, 347 U.S. 483, 495 (1954); *see also Igartua-De La Rosa v. U.S.*, 417 F.3d 145, 169 (1st Cir. 2005) ("separate but equal" concept "belongs to the Dark Ages of American constitutional law"); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 313 (4th Cir. 2001) ("separate but equal" is an "untenable proposition"). Here, separate treatment carries the stigma of voidness—putting same-sex marriages on par with consanguineous marriages, bigamous marriages, and underage marriages.[16] And this imposed inequality of status is exacerbated by the fact that the marriage at issue was perfectly legal and enjoyed equal treatment in its place of celebration. To the extent the State advocates "separate but equal," the argument should be rejected.

On the other hand, the State also concedes that the unequal treatment of same-sex marriages is "precisely the point" of section 6.204. State's COA Reply br. at 7. In effect, the State admits the goal is to marginalize or disenfranchise gays and lesbians. And it is precisely this open, facially discriminatory treatment that fails to hold up even under the most deferential level of constitutional scrutiny. *See Romer*, 517 U.S. at 634–635 (the desire "to harm a politically unpopular group cannot constitute a legitimate government interest").

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[16] None of the other "void marriage" provisions in Chapter 6 of the Family Code target an identifiable class of persons. They merely proscribe particular marriages.

Lastly, the State has relied heavily on the "traditional institution" or "traditional definition of marriage" as a putatively legitimate interest advanced by the State's construction of section 6.204. State's COA br. at 17–19. But this presents a mere tautology: i.e., "We have a reasonable basis for doing what we are doing because it is what we have always done." Doing something cannot itself be justification for doing it. And "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Williams*, 399 U.S. at 239.

The court of appeals erred in its rational basis analysis; its construction of section 6.204 violates the Equal Protection Clause and should be reversed.

2. Because section 6.204 implicates fundamental rights and targets a particular class of persons for discrimination, strict scrutiny should apply.

A law is evaluated under strict scrutiny if it implicates a fundamental right or discriminates against a suspect class. *Romer*, 517 U.S. at 631. Choices related to marriage constitute fundamental rights. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage" are "sheltered by the Fourteenth Amendment"); *Zablocki v. Redhail*, 434 U.S. 374, 383–384 (1978) (right to marry is fundamental); *Boddie*, 401 U.S. at 381 n.8 (recognizing divorce as "a right of substantial magnitude"); *Loving v. Virginia*, 388 U.S. 1, 13 (1967) (right to marry is fundamental); *Williams*, 325 U.S. at 230 (divorce "affects personal rights of the deepest significance"); *Richards*

v. League of United Latin Am. Citizens, 868 S.W.2d 306, 314 (Tex. 1993) (recognizing marriage and "certain aspects of personal privacy" as fundamental rights); *Ivy*, 177 S.W.2d at 239 ("The right to prosecute a divorce suit is personal."). And the federal court in *Perry*—after extensive evidentiary inquiry—held the fundamental right to marry includes the right to marry someone of the same sex. 704 F. Supp. 2d at 991–994 (holding strict scrutiny applies to a law restricting marriage to opposite-sex couples). Again, whether same-sex *marriage* is a fundamental right is not at issue here—but for any legally-married couple, divorce is undeniably a "choice about marriage." The right to divorce therefore is recognized as fundamental and sheltered by the Fourteenth Amendment. *See M.L.B.*, 519 U.S. at 116; *Boddie*, 401 U.S. at 383 (divorce is an "adjustment of fundamental human relationships" and thus a fundamental liberty interest).[17]

But even if the right is not considered "fundamental," strict scrutiny should nevertheless apply because section 6.204 discriminates against a suspect class. Suspect classes include gender, race, alienage, and national origin. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

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[17] The State has argued there is "no fundamental right to same-sex divorce." State's COA Reply br. at 10. But this characterization of the right in question echoes *Bowers v. Hardwick*, which characterized the right in question as the right "to engage in sodomy." 478 U.S. 186, 190 (1986). The U.S. Supreme Court rejected this in *Lawrence v. Texas*, and recharacterized the right in question as the right to privacy in one's sexual conduct. 539 U.S. 558, 579 (2003). This Court should avoid the State's desire to follow *Bowers* by construing the right in question too narrowly. We are not arguing about a right "to same-sex divorce." We are asserting an equal right "to divorce."

But according to the U.S. Supreme Court, this list is not exhaustive; a suspect class is one that includes individuals who possess an "immutable characteristic determined solely by the accident of birth," *id.* at 686, or persons who have been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Mass. Bd. of Ret. v. Murgia* ("*Murgia*"), 427 U.S. 307, 313 (1976) (per curiam); *San Antonio ISD v. Rodriguez*, 411 U.S. 1, 28 (1973).

Regarding gays and lesbians as a class, studies show homosexuality has a genetic component.[18] And studies show homosexuality is biological and determined largely at birth.[19] After hearing extensive evidence on this question from both sides, the *Perry* court found that sexual orientation "is fundamental to a person's

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[18] See Stefan Anitei, *Homosexual by Birth*, Softpedia (Dec. 8, 2006), http://bit.ly/Y5NX5 ("homosexuality may be determined by a polymorphic gene"); Andrea Camperio-Ciani, Francesca Corna, and Claudio Capiluppi, *Evidence for maternally inherited factors favouring male homosexuality and promoting female fecundity*, Proc. Biol. Sci. (Oct. 18, 2004), http://1.usa.gov/pTy5cw ("two lines of evidence point to genetic factors being partially associated with human male homosexuality").

[19] See E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. Haw. L. Rev. 571, 576–584 (1996) (discussing biological influences on sexual orientation); Sandi Doughton, *Born gay? How biology may drive orientation*, Seattle Times (June 19, 2005), http://bit.ly/tggXM ("It's pretty definitive that biological factors play a role in determining a person's sexual orientation."); American Psychological Association, *What causes a person to have a particular sexual orientation?*, http://bit.ly/b3Iy4Q ("most people experience little or no sense of choice about their sexual orientation").

identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group." 704 F. Supp. 2d at 964.

Further, the history of "purposeful unequal treatment" of gays and lesbians is undeniable.[20] "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral." *Lawrence v. Texas*, 539 U.S. 558, 559 (2003). And the State has touted the large political majority that supported the passage of laws banning same-sex marriage in Texas—but this only demonstrates that gays and lesbians have been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *See Murgia*, 427 U.S. at 313. For all these reasons, classifications based on sexual orientation should be viewed as suspect.

Because section 6.204, when construed to deny legally-married same-sex couples equal access to divorce, implicates fundamental rights and relies on a suspect classification for a discriminatory purpose, it should be subjected to strict scrutiny. And under strict scrutiny, the burden is on the State show the classification and the

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[20] See *Perry*, 704 F. Supp. 2d at 940–941; Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 175 (2000) ("Although most sodomy statutes are facially neutral, they are selectively enforced against gay men and interpreted by courts and citizens as proscribing only same-sex conduct."); Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 Colum. J. Gender & L. 1, 49 n.166 (2008) (pointing to evidence that law enforcement officials target gay men for unequal enforcement of solicitation and public lewdness laws); Susan Ferriss, *History of discrimination against gays cited in Prop 8 trial*, McClatchy (January 13, 2010), http://bit.ly/oi3NT0.

restriction are necessary and narrowly tailored to advance a compelling state interest. *Perry*, 704 F. Supp.2d at 995 (citing *Carey v. Population Services International*, 431 U.S. 678, 686 (1977)). So far the State has made no effort to carry this burden—having simply presumed rational-basis scrutiny applies.

The State cannot meet its burden under strict scrutiny—and even if rational-basis scrutiny applies, the State still cannot explain the rational connection between its defined interests and the denial of equal access to *divorce*. Thus, to the extent section 6.204 is construed as preventing the trial court from hearing or granting an uncontested petition for divorce, the provision is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

B. Because it serves to penalize legally-married same-sex couples who migrate to Texas by denying them equal access to divorce, section 6.204 violates the right to travel.

Closely related to equal protection, the freedom to travel "has long been recognized as a basic right under the Constitution," and this freedom "includes the freedom to enter and abide in any State in the Union." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901–902 (1986) (internal quotations omitted); *see also Richards v. LULAC*, 868 S.W.2d 306, 314 (Tex. 1993) (acknowledging the right to travel as "fundamental"). This "principle of free interstate migration" has "unquestioned historic acceptance" and is "firmly established."

Soto-Lopez, 476 U.S. at 902–903.[21] "A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Id.* at 903 (internal quotations omitted). For example, a state law classifying migrants according to the time they established residency, so as to treat them differently from other state citizens in the distribution of rights and benefits, is unconstitutional. *Id.* at 903–904.

The difference between the equal-protection analysis and the right-to-travel analysis is in the nature of the comparison. By treating same-sex couples legally married in another state differently from similarly situated opposite-sex couples legally married in another state, the court of appeals' construction of section 6.204 violates equal protection, as discussed above. But by treating migrants who have a legal marriage differently from Texas citizens who have a legal marriage, the court of appeals' construction of section 6.204 also violates the right to travel.

The question is whether the state law "would deter migration." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257–258 (1974). A law enacted with the purpose of deterring migration "would

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[21] The right to travel has been identified as rooted in both the Fourteenth Amendment's Privileges or Immunities Clause and Article IV, section 2's Privileges and Immunities Clause. *Saenz v. Roe*, 526 U.S. 489, 501–503 (1999). But the U.S. Supreme Court has declared: "Whatever its origin, the right … is firmly established." *Soto-Lopez*, 476 U.S. at 902.

be unequivocally impermissible." *Saenz v. Roe*, 526 U.S. 489, 506 (1999). Evidence of actual deterrence is unnecessary; where a classification "operates to penalize those persons who have exercised their constitutional right of interstate migration, [that classification] must be justified by a compelling state interest." *Memorial Hospital*, 415 U.S. at 258 (internal quotations omitted).

The court of appeals' construction of section 6.204 deters legally-married same-sex couples from migrating to Texas, and it certainly serves to penalize legally-married same-sex couples who do migrate to Texas, by irretrievably foreclosing their ability to get a divorce. *See Sosna v. Iowa*, 419 U.S. 393, 406 (1975) (durational residency requirement for divorce was permissible because "Appellant was not irretrievably foreclosed from obtaining … what she sought"; "She would eventually qualify for the [divorce] she demanded virtually upon her arrival in the State.").

For these reasons, to the extent section 6.204 is construed as preventing a legally-married migrant couple from obtaining a divorce in Texas, it violates the fundamental right to travel and should be ruled unconstitutional.

C. Because it deprives J.B. of his substantive right to a divorce and of his procedural right to be heard, the court of appeals' construction of section 6.204 violates Due Process.

On its face, the Due Process Clause of the Fourteenth Amendment protects against a State's attempts to "deprive any person of life, liberty, or property, without due process of law." U.S. CONST.

amend. XIV, § 1, cl. 3. A state law that deprives an individual of a fundamental liberty interest violates Due Process unless it survives strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301–302 (1993) ("[C]ertain 'fundamental' liberty interests" cannot be interfered with at all, "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); *Boddie*, 401 U.S. at 382–383. In *Lawrence v. Texas*, the Supreme Court recognized that "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing" are protected from unwarranted intrusion by the state, and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574. In short, a person's marriage constitutes a fundamental liberty interest protected by the Due Process Clause.

But this case is about divorce, not marriage—and as discussed above divorce, too, constitutes a fundamental liberty interest as a "personal decision[] relating to marriage." *See Lawrence*, 539 U.S. at 574; *Boddie*, 401 U.S. at 380–381; *Perry*, 704 F. Supp. 2d at 991–995; *Loving*, 388 U.S. at 12; U.S. CONST. amend. XIV, § 1, cl. 3).

Yet section 6.204, as construed by the court of appeals, deprives J.B. of his right to divorce the minute he crosses the Texas border. Further, according to the court of appeals, section 6.204 forces J.B. into a voidance procedure that purports to reach back in time and across state lines to render his marriage a nullity from the beginning.

Thus, to the extent section 6.204 is construed as depriving J.B. of his substantive right to a divorce, it violates Due Process.

Further still, the right to due process under the Fourteenth Amendment protects "the right to a meaningful opportunity to be heard … against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie*, 401 U.S. at 379–380. The State of Texas "owes each individual"—including parties to a same-sex marriage legally entered into in another state—"that process which, in light of the values of a free society, can be characterized as due." *See id.* at 380. In *Boddie*, an indigent couple that met all the requirements for a divorce sought a divorce, but was denied access to the court because they could not afford the filing fee; the U.S. Supreme Court held this was a denial of due process because the couple was denied access to justice from the only legal forum available to them. *Id.*

As construed by the court of appeals, section 6.204 operates like the filing fee in *Boddie*, by denying J.B., who otherwise meets all the requirements for a divorce, access to justice from the only forum available to him. By denying J.B. the opportunity even to be heard, the court of appeals' construction is the epitome of denying procedural due process. *Cf. id.* at 380–382 ("the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce").

To the extent section 6.204 is construed to prevent the trial court from hearing or granting a divorce to a same-sex couple legally

married in another state, it violates—both substantively and procedurally—the Due Process Clause of the Fourteenth Amendment.

D. By denying J.B. divorce and forcing him into voidance, the court of appeals' construction of section 6.204 discriminates against the laws of another state and violates Full Faith and Credit.

Article IV, section 1 of the U.S. Constitution reads: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of ever other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." And section 2 provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. CONST. art. IV, §§ 1–2.

The "animating purpose of the full faith and credit command," was "to make [the several states] integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998); *see also Estin*, 334 U.S. at 546 (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns"). In effect, the Full Faith and Credit Clause imposes a constitutional "rule of decision" on state courts; that is, "a rule by which courts … are to be guided when a question arises in the progress of a pending suit as to the faith and

credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting." *Thompson v. Thompson*, 484 U.S. 174, 182–183 (1988). The "rule of decision" is that the forum state shall give *full* faith and credit to those acts, records, and proceedings of the sister state.

In other words, by purporting to direct Texas trial courts to give no effect whatsoever to J.B.'s Massachusetts marriage, section 6.204 violates Full Faith and Credit. Moreover, insofar as section 6.204 is construed as denying J.B. access to a Texas trial court in which to bring his petition for divorce in the first place, it violates the Privileges and Immunities Clause.

The Full Faith and Credit Clause is attended by what has been called the "enforcement provision,"[22] which provides: "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. And on this hook hangs the Defense of Marriage Act (DOMA), 28 U.S.C. §1738C, which purports to enable states to escape their obligations under Full Faith and Credit when it comes to same-sex marriage. But DOMA must be read narrowly—based on the plain text of the Constitution and on the principle that a statute cannot undo, overrule, or repeal a constitutional provision.

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[22] See L. Lynn Hogue, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Prolegomenon to a Brief*, 41 Cal. Western Intn'l L. J. 229, 246–247 (Fall 2010).

The plain text of the enforcement provision states simply that Congress can prescribe (a) "the manner in which" the acts, records, and proceedings of other states "shall be proved," which plainly refers to evidentiary matters, and (b) "the effect thereof." DOMA appears to have nothing to say about (a) and instead focuses on (b), purporting to relieve the states of any obligation "to give effect" to an act, record, or proceeding that creates or recognizes a same-sex marriage. *See* 28 U.S.C. § 1738C.

On its face, DOMA appears to undo Full Faith and Credit altogether when it comes to same-sex marriage—and this is the ground on which the court of appeals' construction of section 6.204 implicitly stands. But to read DOMA this broadly is to misread the text of the Constitution, which says "*full* faith and credit *shall* be given" to the acts of another state, and Congress can "prescribe" the "effect" of those acts. U.S. CONST. art. IV, § 1 (emphasis added). In plain terms, this means DOMA's declaration that states do not have to "give effect" to a same-sex marriage refers only to micro-level matters of enforcement; DOMA cannot undo Full Faith and Credit altogether.[23]

For example, DOMA might relieve Texas of the obligation to "give effect" to an ongoing same-sex marriage from Massachusetts when it comes to enforcement of marriage-based claims to insurance coverage, state tax benefits, hospital visitation rights, and so forth. But DOMA

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[23] See Hogue, *supra* note 4, at 246–247; David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 Yale L. J. 1584 (2009).

cannot abrogate altogether the Full Faith and Credit Clause, or something so fundamental as the right to divorce. Put another way, given the purpose of Full Faith and Credit—to reduce interstate conflict and foster friendly cooperation among the states[24]—DOMA must be read as permitting one state to ignore or reject the acts of another state only insofar as it does not create serious conflict.[25] Relieving one state of the obligation to "give effect" to an ongoing same-sex marriage from another state, so as to allow the denial of marriage-based claims to state tax benefits, for example, creates no serious conflict between the states. But refusing access to divorce and forcing legally-married couples into voidance procedures creates conflict and confusion between the states, as described above, and violates Full Faith and Credit by discriminating against the laws of other states "under the guise of merely affecting the remedy." *See Broderick v. Rosner*, 294 U.S. 629, 642–643 (1935).[26]

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[24] *See Baker by Thomas*, 522 U.S. at 232; *Estin*, 334 U.S. at 546.

[25] *See generally* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L. J. 1965, 1983 (May, 1997), and specifically at 2003 (the words of the Full Faith and Credit Clause lose meaning "if Congress can simply legislate the requirement away").

[26] J.B. challenged the constitutionality of the State's construction of section 6.204, under Full Faith and Credit, in the trial court. 1 CR 36. Although the Full Faith and Credit issue was not briefed to the court of appeals, this Court can address the issue under *de novo* review and because it goes to the question of subject-matter jurisdiction. See Section III below.

III. The court of appeals erred by failing to address all of J.B.'s constitutional challenges to the State's construction of section 6.204.

The court of appeals addressed the constitutionality of section 6.204 under the Equal Protection Clause, but it refused to consider J.B.'s arguments on appeal that the State's construction of section 6.204 also violates Due Process rights, the First Amendment right to free association, and J.B.'s constitutional right to travel—on the ground that J.B. failed to present those challenges in the trial court and the State thus had no opportunity to respond. Op. at 681 (citing *Guar. Cnty. Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986) (per curiam); *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986); *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 289–290 (Tex. App.—Dallas 2008, pet. denied)).[27] The court of appeals' rationale for ignoring these other constitutional arguments is erroneous.

First, appellate courts (including this Court) can always review subject-matter jurisdiction, even if it was not preserved or argued below. Likewise, because the court of appeals reviews the denial of a plea to the jurisdiction *de novo*, its review is not constrained by the trial court's reasoning and analysis. Moreover, J.B. did present his additional constitutional challenges to section 6.204 in the trial court,

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[27] These cases do not address the rules at issue or the appellate court's duty to address subject-matter jurisdiction even if raised for the first time on appeal. Rather, the cases state general error preservation principles, which are inapposite.

and the automatic stay created by the State's interlocutory appeal did not preclude the trial court from addressing them.

A. Subject-matter jurisdiction can be addressed for the first time on appeal and under *de novo* review.

A plea to the jurisdiction concerns whether the pleadings state a cause of action that confers subject-matter jurisdiction on the trial court. *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). But subject-matter jurisdiction also may be addressed for the first time on appeal. *See, e.g.*, *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000); *Harris Cnty. Mun. Utility Dist. No. 156 v. United Somerset Corp.*, 274 S.W.3d 133, 138 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *City of Houston v. Northwood Mun. Util. Dist. No. 1*, 73 S.W.3d 304, 313 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). This is "because subject matter jurisdiction is essential to the authority of a court to decide a case." *Gibson*, 22 S.W.3d at 851. Thus, an appellate court must address all arguments pertaining to subject-matter jurisdiction.

In *Gibson*, this Court held that the court of appeals should have addressed additional jurisdictional arguments raised on appeal but not presented to the trial court. *Id.* at 851. And citing *Gibson*, the First Court of Appeals held that it had jurisdiction in an interlocutory appeal to address an issue that was not presented to the trial court in a plea to the jurisdiction. *United Somerset*, 274 S.W.3d at 138; *accord Northwood*, 73 S.W.3d at 313 (reaching merits of sovereign immunity

challenge even though it was not raised in plea to the jurisdiction before trial court).[28]

Further still, the appellate court reviews an order on a plea to the jurisdiction *de novo*. Op. at 662 (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004)). Under *de novo* review, the court gives no deference to the trial court's ruling, and can affirm the ruling on any legal ground. *E.g.*, *In re A.A.G.*, 303 S.W.3d 739, 740 (Tex. App.—Waco 2009, no pet.) ("this case involves a determination of statutory construction, which we decide without giving weight to the trial court's determination, generally referred to as a *de novo* review."); *Mickens v. Longhorn DFW Moving, Inc.*, 264 S.W.3d 875, 879 (Tex. App.—Dallas 2008, pet. denied) ("When reviewing error under a *de novo* standard, we conduct an independent analysis of the record to arrive at our own legal conclusion."). Thus, the appellate court's review is not constrained by the trial court's reasoning and analysis or—in the context of subject-matter jurisdiction—limited to the arguments raised in the trial court.

At the court of appeals, J.B. challenged the constitutionality of section 6.204 under the Equal Protection Clause, Due Process Clause,

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[28] As it did in this case, the Dallas Court of Appeals takes a contrary (and erroneous) approach and generally confines its review of a ruling on a plea to the jurisdiction to the grounds argued below. Op. at 681; *see also*, *e.g.*, *City of Dallas v. First Trade Union Sav. Bank*, 133 S.W.3d 680, 687 (Tex. App.—Dallas 2003, pet. denied) ("in an interlocutory appeal under section 51.014(a)(8), our jurisdiction is only to review the trial court's ruling on the plea to the jurisdiction filed below.").

the First Amendment right to free association, and the constitutional right to travel. J.B. COA br. at 39–43. But the court of appeals refused to address all but the Equal Protection argument. *See* Op. at 662. And in denying J.B.'s motion for rehearing, the court of appeals again refused to address these arguments, because they were purportedly not raised in the trial court. Op. at 681. But addressing and deciding all arguments pertaining to the trial court's subject-matter jurisdiction was necessary to the appeal. The court of appeals had the power to decide J.B.'s other constitutional arguments for establishing the trial court's subject-matter jurisdiction under *de novo* review, and erred in refusing to address them. *See* Tex. R. App. P. 47.1; s*ee also Texas Disp. Sys, Inc. v. Perez*, 80 S.W.3d 593, 594 (Tex. 2002) (per curiam) (failure to consider petitioner's alternative argument for attorney's fees was erroneous and required summary remand for court of appeals to follow Tex. R. App. P. 47.1).

B. The stay triggered by an interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.014(b) does not nullify Tex. R. App. P. 28.1(c).

The trial court properly issued findings of fact and conclusions of law, and it did not violate the stay in effect upon the State's notice of interlocutory appeal per section 51.014(b) of the Civil Practice & Remedies Code. Rule 26.1(b) states that a notice of interlocutory appeal must be filed within 20 days after the order is signed, while Rule 28.1(c) gives the trial court 30 days to file findings of fact and conclusions of law—which necessarily may fall after a notice of

interlocutory appeal is filed. Tex. R. App. P. 26.1(b), 28.1(c). Further, Texas Rule of Civil Procedure 297 mandates that the trial court enter findings of fact and conclusions of law when requested and provides for no exception under section 51.014(b). And the trial court may enter findings of fact and conclusions of law after the 30-day deadline if it chooses. *See Davey v. Shaw*, 225 S.W.3d 843, 852 (Tex. App.—Dallas 2007, no pet.); *Morrison v. Morrison*, 713 S.W.2d 377, 380 (Tex. App.—Dallas 1986, writ dism'd).

For these additional reasons, the court of appeals erred in failing to address all of J.B.'s constitutional challenges to the State's construction of section 6.204.

Prayer

For the above reasons, and in the interests of reason and justice, J.B. asks this Court to rule section 6.204 does not prevent the trial court from hearing his petition for divorce; to reverse the judgment of the court of appeals; and to remand to the trial court for further proceedings—or, in the alternative, to remand to the court of appeals to address all of J.B.'s constitutional challenges to section 6.204; and to grant J.B. any such other and further relief deemed just and proper.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief on the Merits was forwarded to counsel of record by email and certified mail, return receipt requested, on this 6th day of September 2011.

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