No. ___-_____

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator.

Original Proceeding from the
126th District Court, Travis County

CONDITIONAL PETITION FOR WRIT OF MANDAMUS OF THE STATE OF TEXAS

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General
for Civil Litigation

DAVID C. MATTAX
Director of Defense Litigation

JONATHAN F. MITCHELL
Solicitor General

JAMES D. BLACKLOCK
Assistant Solicitor General
State Bar No. 24050296

CLEVE W. DOTY
Assistant Attorney General
State Bar No. 24069627

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-059)
Austin, Texas 78711-2548
[Tel.] (512) 936-8160
[Fax] (512) 474-2697
jimmy.blacklock@oag.state.tx.us

COUNSEL FOR THE STATE OF TEXAS

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Relator:
State of Texas

Counsel for Relator:

JAMES D. BLACKLOCK
Assistant Solicitor General
State Bar No. 24050296
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
[Tel.] (512) 936-1700
[Fax] (512) 474-2697

CLEVE W. DOTY
Assistant Attorney General
State Bar No. 24069627

Respondent:
The Honorable Scott Jenkins
126th Judicial District Court
Travis County Courthouse
1000 Guadalupe St
Austin, Texas 78701

Real Parties in Interest:
Angelique Naylor (Petitioner) and Sabina Daly (Respondent)

Petitioner represented by:

James J. Scheske
Akin Gump Strauss Hauer Feld LLP
300 West 6th Street
Suite 2100
Austin, Texas 78701-3911

Respondent represented by:

Robert B. Luther
LAW OFFICES OF ROBERT B. LUTHER, P.C.
919 Congress
Suite 450
Austin, Texas 78701

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Statutes, Rules, and Constitutional Provisions:

Other Authorities:

STATEMENT OF THE CASE

Nature of the Case:	Angelique Naylor sued Sabrina Daly for divorce under Texas Family Code § 6.001. MR195-206.[1] Naylor and Daly are two women who obtained a marriage license under Massachusetts law. MR241. The State intervened after the district court announced its intention to grant a divorce. MR225-35.
Trial Court/Respondent:	The Honorable Scott Jenkins, 126th Judicial District Court, Travis County, Texas.
Trial Court Disposition:	The court granted the divorce and issued a final decree of divorce on March 31, 2010. App. Tab 1.
Action from which Relief Sought:	If this Court determines that the State's direct appeal cannot proceed because of the timing of the State's intervention below, the State seeks mandamus relief from the district court's rejection of the State's post-judgment arguments and from the district court's entry of judgment granting a divorce to two persons of the same sex. The State files this Conditional Petition for Writ of Mandamus so that the Court may remedy the clearly erroneous judgment below, in the event that the Court determines that the State is not entitled to appeal the judgment directly.

1. References to the Mandamus Record appear as MR[page number]

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue the requested writ of mandamus. *See* TEX. CONST. art. V, § 3; TEX. GOV'T CODE § 22.002.

This petition was not first presented to the court of appeals for two compelling reasons. *See* TEX. R. APP. P. 52.3(e). First, the State's position in the court of appeals was that the State properly intervened at the district court and was therefore entitled to a direct appeal of the same-sex divorce decree. The district court twice contemplated on the record that the State could seek an "appellate decision on the propriety of the Court's exercise of jurisdiction." MR99-100; *see also* MR104. Thus, there was no need to seek extraordinary relief until the court of appeals unexpectedly dismissed the State's appeal, potentially shielding the actions of the parties' and the district court from appellate scrutiny. Second, the court of appeals has already made clear that it does not consider the granting of a same-sex divorce to be clear error. Although the court of appeals declined to reach the merits of Naylor's divorce claim, the court went out of its way to state that Texas law can legitimately be interpreted "in a manner that would allow the trial court to grant a divorce in this case." *State v. Naylor*, 330 S.W.3d 434, 441-42 (Tex. App.—Austin 2011, pet. filed). Asking the court of appeals to rule that granting a same-sex divorce constitutes clear error would be futile in light of the court's recent statements on the issue. *See id.* ("[T]he fact remains that there are interpretations of section 6.204 that would allow the trial court to grant the divorce without finding the statute unconstitutional.").

ISSUES PRESENTED

1. If the State cannot directly appeal the judgment below, does the district court's clear error of law in granting a divorce to a same-sex couple entitle the State to mandamus relief?

No. __-____

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator.

Original Proceeding from the
126th District Court, Travis County

CONDITIONAL PETITION FOR WRIT OF MANDAMUS OF THE STATE OF TEXAS

TO THE HONORABLE TEXAS SUPREME COURT:

This Conditional Petition for Writ of Mandamus is brought in conjunction with an appeal currently pending before this Court, *State of Texas v. Naylor and Daly*, No. 11-0114. This Conditional Petition incorporates the briefing submitted by all parties in that case as well as the record in that case. Thus, the Court may wish to consolidate (or at least consider) this original proceeding with No. 11-0114.

The State's direct appeal of the judgment below presents two questions for this Court to resolve: (1) Is the State entitled to bring a direct appeal by virtue of its intervention below?; and (2) Did the district court err in granting a divorce to two women married under Massachusetts law? The answer to both questions is "yes." *See* Petition for Review of the State of Texas, *State of Texas v. Naylor and Daly*, No. 11-0114, filed March 21, 2011. If, however, this Court determines that a defect in the State's intervention prohibits the State

from appealing the judgment directly, this Conditional Petition for Writ of Mandamus should be granted in order to correct the district court's clear error of law.

The State has a well-recognized justiciable interest in defending its laws against constitutional attack. The State attempted to effectuate that interest by intervening below and informing the district court of the clear error of its decision to grant a divorce. MR225-35. The court, however, refused to take up the issues raised by the State and proceeded to enter a judgment of divorce. App. Tab 1. If this Court decides the State is not a proper party to a direct appeal, then the district court's rejection of the State's post-judgment jurisdictional arguments entitles the State to mandamus relief. Well within the time in which the district court could have rescinded the divorce decree, the State informed the court of the provisions of the Texas Constitution and Family Code that prohibit courts from even exercising jurisdiction over same-sex divorce petitions, much less granting them. MR228-33; 241-47. But in a clear abuse of discretion, the court ignored the State's arguments, ignored its obligation to consider its jurisdiction, and entered a decree of divorce that lacks any basis in Texas law. App. Tab 1. If a direct appeal is unavailable, a writ of mandamus should issue to require the district court to do what it should have done when presented with the State's arguments: consider its jurisdiction, follow the law, and dismiss the divorce petition.

STATEMENT OF FACTS

Angelique Naylor and Sabrina Daly obtained a marriage license in Massachusetts in 2004. MR241. They moved to Texas, and in December 2009, Naylor filed a petition for divorce in Travis County District Court. MR195-206. The divorce suit was consolidated

with a pre-existing suit affecting the parent-child relationship (SAPCR) involving Naylor and Daly's adopted son. All issues in the SAPCR were resolved in an agreed order. MR144-94. The State never challenged the validity, content, or enforceability of that order.

Daly's answer to the divorce petition included a motion to dismiss and/or declare the marriage void. MR207-15. The motion argued that "the Court does not have subject matter jurisdiction over this matter because Petitioner is asking the Court to recognize and enforce a marriage between two persons of the same sex which is contrary to the law and public policy of the State of Texas." MR208. Daly also noted "the 'marriage' between Petitioner and Respondent is invalid . . . and the parties do not qualify for a divorce." MR209.

After Daly filed her answer, the State became aware of the case through media coverage.[2] Because Daly had already presented the court with the proper arguments, the State chose not to intervene at that time. Instead, the State monitored the case, which proceeded in an adversarial fashion. In December 2009, the court granted a continuance to allow Naylor to hire counsel to answer Daly's jurisdictional challenge. MR219-21. In January 2010, Daly filed a motion to compel and for sanctions. MR216-18. On February 2, 2010, Naylor filed an amended petition and other motions. MR225-41. Daly responded on February 4. MR222-24. Daly never exhibited any intention of abandoning her jurisdictional defense and agreeing to a divorce until the final hours of the litigation. *See* MR56.

At a hearing on February 9, 2010, the district court recognized that Naylor's petition suffered from potential jurisdictional defects, MR13, and recognized that the primary issue

2. *See, e.g.*, Jenny Hoff, *Austin gay couple fighting over divorce*, KXAN.COM, Dec. 18, 2009, available at http://www.kxan.com/dpp/news/politics/Austin-Gay-couple-fighting-over-divorce.

in the case was constitutional in nature, MR14. The court and Naylor's counsel discussed Naylor's desire to make constitutional arguments in favor of her claimed right to divorce. MR3-12. The court stated that, with respect to the constitutional and jurisdictional issues, "What I don't want to do is some precipitous shooting from the hip based on less than full briefing . . . That's a fairly illogical way for us to approach this very important issue." MR10. Accordingly, the court set a 30-day briefing schedule and contemplated that he would spend another 30 days reading the briefing, wrestling with the issues, and "reading every scrap of law I can read before [hearing] arguments." MR10-14. Thus, as of February 9, Daly continued to press her jurisdictional arguments, and the parties and the court agreed that the validity of the divorce petition would not be resolved for at least 60 days.

The court and the parties again discussed the potential jurisdictional defects in Naylor's petition when the hearing continued the morning of the following day, February 10. MR20-29. The court declined to make any rulings in the divorce action, worrying that "if I have no jurisdiction in the divorce action . . . then any orders the Court issues with respect to the divorce action it seems to me are void orders." MR24. The Court stated it would "have to go back and think about this . . . legal mess . . . created by the states of Massachusetts and Texas having, you know, clashing statutes . . . none of which has been fully briefed." MR27. The court concluded that "until I decide the jurisdictional question, I'm not likely to issue any orders in the divorce action." MR28.

But things changed abruptly only a few hours later. The hearing recessed for lunch, MR54-56, and during the recess, the parties learned that a representative of the Attorney

General's office had arrived to observe portions of the hearing. *See* MR93 (recalling presence of Attorney General's representative at February 10 hearing). The parties and the court immediately conducted an off-record conference in chambers, and on their return, Daly's counsel announced that the parties had settled "all issues pending in this case today." MR56. He read a rough outline of a property division agreement into the record, MR57-65, asked the court to "render a judgment today," MR115, and the court responded, "All right," *id*. The court then stated, "The divorce is granted." *Id*. No mention was made by the parties or the court of resolving the glaring jurisdictional and constitutional issues that had so concerned them just hours earlier. MR20-29.

The State intervened the next day, February 11. MR225-35. Daly objected to the intervention, arguing that the State's ability to intervene was cut off by the alleged rendition of judgment at the February 10 hearing. MR236-40. The State filed a plea to the jurisdiction on February 23, 2010, MR241-49, to which Naylor responded, MR250-64.

At a hearing on March 31, 2010, the district court declined to hear the State's plea to the jurisdiction or Naylor's motion to strike the State's intervention. According to the court, a jurisdictional ruling was unnecessary because "we all agree [that jurisdictional issues] can be heard for the first time on appeal should that be something anyone really desires." MR104. The court advised the State that the court did not want to prolong matters in the district court, so the State should get "an appellate decision on the propriety of the Court's exercise of jurisdiction." MR99-100. The court then approved the parties' written settlement agreement and signed an order granting the divorce. MR142; App. Tab 1.

The Third Court of Appeals affirmed, holding that the State's intervention was untimely. *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. filed); App. Tab 2. The court further stated that Texas law can be interpreted "in a manner that would allow the trial court to grant a divorce in this case." *Id*. at 441-42.

SUMMARY OF THE ARGUMENT

The Texas Constitution and Family Code plainly prohibit same-sex divorce, and granting a same-sex divorce—as the district court purported to do—was a clear abuse of discretion. Moreover, the divorce decree is void because the court lacked jurisdiction over a same-sex divorce suit. The district court's decision to ignore the State's jurisdictional arguments and grant a same-sex divorce is precisely the kind of clear error this Court should remedy through mandamus relief.

If this Court determines that the State is not a proper party to a direct appeal, the State lacks an adequate remedy on appeal. The State has a justiciable interest in defending its laws against constitutional attack. But the court of appeals dismissed the State's appeal and refused to correct the district court's clear error. Even if this Court concludes that the State cannot proceed with a direct appeal, the State nonetheless has a justiciable interest that should be vindicated through mandamus relief.

STANDARD OF REVIEW

A writ of mandamus may issue upon a showing of a clear abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). "A trial court clearly abuses its discretion if 'it reaches a decision so arbitrary and unreasonable as to amount to a clear

and prejudicial error of law.'" *Id.* (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)). Moreover, "[a] trial court has no discretion in determining what the law is or applying the law to the facts even when the law is unsettled." *In re Prudential Ins. Co. of Amer.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (internal quotations and citations omitted).

Mandamus relief is improper, however, if the law provides another plain, adequate, and complete remedy. *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958). As in any other proceeding, a party invoking the court's mandamus jurisdiction must demonstrate some justiciable interest in the matter brought before the court. *Terrazas v. Ramirez*, 829 S.W.2d 712, 723 (Tex. 1991). But it is no bar to mandamus relief that the relator was not a party in the underlying litigation that gives rise to the mandamus action. This Court has held that "[a] person need not be a party to the underlying litigation in order to seek mandamus relief." *Id.* at 723. Rather, "[t]o be entitled to mandamus, relators must have a justiciable interest in the underlying controversy." *Id.*; s*ee also Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984).

ARGUMENT

I. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION WHEN IT ENTERED A SAME-SEX DIVORCE DECREE.

The district court clearly abused its discretion in at least two ways. First, as this court has held, "[a] trial court has no discretion in determining what the law is or applying the law to the facts even when the law is unsettled." *In re Prudential Ins. Co. of Amer.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (internal quotations and citations omitted). Here, the statutory and constitutional text could hardly be clearer: Texas courts lack jurisdiction to

grant a divorce to a same-sex couple. *See* TEX. FAM. CODE § 6.204, App. Tab 3; TEX. CONST. art. I, § 32; App. Tab 5; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 662-670 (Tex. App—Dallas 2010, pet. filed) (discussing overlapping reasons why this is so); *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, *2 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.) ("A Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person."); Petition for Review of the State of Texas, *State of Texas v. Naylor and Daly*, No. 11-0114, filed Mar. 21, 2011 (discussing myriad reasons why a Texas court lacks jurisdiction over a same-sex divorce petition).

Second, and equally important, the district court had an obligation to consider its jurisdiction. *See Matthews v. Cohen*, 807 S.W.2d 605, 606 (Tex. App.—Houston [14th Dist.] 1991, no pet.) ("A court must notice, even *sua sponte*, the matter of its own jurisdiction, since jurisdiction is fundamental in nature and may not be ignored."); *K & S Interests v. Texas American Bank/Dallas*, 749 S.W.2d 887, 890 (Tex. App.—Dallas 1988, writ denied) (same). Thus, the district court was not entitled to ignore the State's jurisdictional arguments merely because of the timing of the State's intervention. The district court reasoned that the State could pursue "an appellate decision on the propriety of the court's exercise of jurisdiction" "for the first time on appeal should that be something anyone really desires." MR99-100; 104. But the district court was obligated to consider its jurisdiction and could not simply punt the issue to the court of appeals. Indeed, the district court explicitly recognized the glaring legal issues raised by Naylor's petition and anticipated extensive briefing, research,

and argument on the issue. MR10-14; 20-29. But just one day after making these statements, the court purported to grant a divorce without any mention of the extensive jurisdictional and constitutional problems that had so troubled the court just hours earlier. MR115. The court was well aware of the potential jurisdictional defects in its divorce decree, and its failure to even address the issue was a clear abuse of discretion that entitles the State to mandamus relief. *See*, *e.g.*, *Terrazas*, 829 S.W. 2d at 712 (granting mandamus relief to non-parties who challenged final judgment of a district court).

Moreover, mandamus is especially appropriate where, as here, the district court oversteps its jurisdictional bounds and in so doing interferes with this Court's ability to exercise judicial review. *See In re State Bar of Texas*, 113 S.W.3d 730, 732 (Tex. 2003) (orig. proceeding) (granting mandamus relief where a district court issued an order where it had no jurisdiction to do so, and where that judgment interfered with the jurisdiction of the Board of Disciplinary Appeals).

If this Court rules that the State is not a proper party to a direct appeal because of the timing of its intervention, these clear errors of law should be remedied by mandamus relief. In such a scenario, this mandamus petition is the only avenue by which the legal merits of Naylor's groundbreaking divorce claim may be tested through the adversarial process. Naylor and Daly have strived to avoid any judicial scrutiny of their novel divorce claim, and the court of appeals' decision further shields this case from review. But such an outcome would be inconsistent with basic principles underlying our adversarial system. Our very system of justice, according to the U.S. Supreme Court, "is premised on the well-tested

principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal citation omitted). This basic tenet of our legal system can only be honored in this case by allowing the State to present a defense of the plain meaning and constitutionality of Texas's traditional marriage laws. As this Court has observed, "the supreme objective of the courts is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants *under established principles of substantive law*." *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002) (emphasis added). Naylor and Daly's effort to side-step the adversarial process and change Texas law by default must be rejected.

II. THE STATE HAS A JUSTICIABLE INTEREST IN THIS CASE AND IS ENTITLED TO MANDAMUS RELIEF.

To be entitled to mandamus relief, a relator need not be a party, but "must have a justiciable interest in the underlying controversy." *Terrazas*, 829 S.W.2d at 723; *see also Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). The State of Texas has a well-recognized justiciable interest in defending state law against constitutional attack on behalf of the people of Texas. *See* TEX. CIV. PRAC. & REM. CODE § 37.006(b) (requiring attorney general to be given notice of any proceeding in which a statute is alleged to be unconstitutional); *id.* § 51.014(a)(8) (authorizing interlocutory appeal from denial of plea to the jurisdiction by a governmental unit). Accordingly, in case after case, Texas courts routinely recognize the State's right to intervene under these circumstances.[3] The Dallas Court of Appeals

3. *See, e.g.*, *State v. Hodges*, 92 S.W.3d 489, 493 (Tex. 2002) ("The State of Texas intervened, arguing for [Texas Election Code § 162.015]'s constitutionality."); *Wilson v. Andrews*, 10 S.W.3d 663, 666 (Tex. 1999) ("The Attorney General intervened to defend [Texas Local Government Code 143.057(d)]'s

recognized the State's "important right" to be heard on the very issues at stake here:

> This is an exceptional case that involves not only basic principles of subject-matter jurisdiction but also the constitutionality of Texas's laws concerning marriage. The trial court's order striking the State's petition in intervention potentially interferes with the State's important right to be heard on the constitutionality of its statutes and its statutory right to pursue an interlocutory appeal of the denial of its plea to the jurisdiction.

Marriage of J.B., 326 S.W.3d at 661.

Naylor and Daly have characterized this case as a purely private matter that involves no attack on Texas law. But at both the district court level and on appeal, the parties have both implicitly and explicitly questioned the constitutionality of Texas's marriage laws, giving rise to the State's justiciable interest in this case. Naylor's court of appeals brief raised several constitutional claims. *See* Brief of Appellee Angelique Naylor, *State of Texas v. Naylor and Daly*, No. 03-10-00237-CV (Tex. App.—Austin), filed Sept. 30, 2010 (raising equal protection, due process, and right to travel challenges to Texas's traditional marriage laws). In addition, when the State questioned the legal basis for Naylor's divorce claim at the district court, Naylor responded by arguing that Texas laws denying her a divorce are unconstitutional. MR250-64 (raising due process and full faith and credit challenges). The

---

constitutionality."); *Corpus Christi People's Baptist Church, Inc. v. Nueces County Appraisal Dist.*, 904 S.W.2d 621, 624 (Tex. 1995) ("The Attorney General intervened for the limited purpose of defending the constitutionality of section 11.433 [of the Texas Tax Code]."). Indeed, the State's interest in defending its own statutes is so compelling that both federal and state courts alike—including the U.S. Supreme Court, this Court, and the U.S. Court of Appeals for the Fifth Circuit—have on various occasions affirmatively *invited* the State of Texas to participate in litigation where one of the parties has called into question the constitutionality of a Texas law. *See, e.g.*, *Rhine v. Deaton*, No. 08-1596, 2009 WL 3161890 (U.S. Oct. 5, 2009) (inviting Texas "to file a brief in this case expressing the views of the State"); *In re J.O.A.*, 283 S.W.3d 336, 347 (Tex. 2009) (Willett, J., concurring) (noting that Texas filed "an amicus curiae brief . . . at the Court's invitation"); *Rothgery v. Gillespie County*, 491 F.3d 293, 296 n.3 (5th Cir. 2007) (noting that Texas "filed an amicus curiae brief in this appeal at our request"), *vacated*, 128 S. Ct. 2578 (2008).

parties' decision to frame their constitutional attack on Texas law as an argument in the alternative does not change the fact that in every pleading they have filed defending Naylor's divorce claim, they make constitutional arguments against Texas's marriage laws.

Even if the constitutional argument were merely one of many live arguments in favor of a same-sex divorce claim in Texas court, the State would have a justiciable interest in this case. But this case is even simpler. The only colorable legal issue here is whether the Constitution prohibits Texas courts from applying unambiguous provisions of the Texas Constitution and Family Code to the facts of this case. Unless Texas law is unconstitutional, the parties cannot escape two dispositive facts: they are not married in Texas, and their divorce suit seeks legal benefits, protections, and responsibilities asserted as a result of a same-sex marriage, in violation of section 6.204 of the Family Code. App. Tabs 3 & 5.

The district court recognized as much mere hours before granting a divorce. MR27 ("THE COURT: So we'll have to go back and think about all this. But one thing this little colloquy has made apparent, it is quite a legal mess, and in part created by the states of Massachusetts and Texas having, you know, conflicting statutes . . . *which can only be resolved by constitutional analysis*, none of which has been fully briefed, and all of which we find interesting." (emphasis added)). Given the court's recognition of the constitutional nature of the case mere hours before granting the divorce, the divorce decree appears to be a ruling that the U.S. Constitution requires a divorce to be granted despite the "mess" created by "conflicting statutes." In any event, because this case plainly involves a constitutional attack on Texas law, the State's justiciable interest could hardly be clearer.

In sum, the State has a justiciable interest in defending Texas's marriage laws against both the implicit constitutional attack presented by Naylor's divorce claim and the explicit constitutional attacks raised in the parties' subsequent pleadings. That interest entitles the State to mandamus relief, assuming the Court determines that the State is not a proper party to the direct appeal. *See*, *e.g.*, *Terrazas*, 829 S.W. 3d at 723.

III. THE EXCEPTIONAL NATURE OF THIS CASE MAKES MANDAMUS RELIEF PARTICULARLY APPROPRIATE.

Mandamus relief is particularly appropriate here due to the "significance of the issue." *In re Columbia Med. Ctr. of Las Colinas Subsidiary, L.P.*, 290 S.W.3d 204, 209 (Tex. 2009) (orig. proceeding) (citing *In re Prudential Ins. Co. of Amer.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)). In *In re Columbia Med. Ctr.*, this Court granted mandamus relief where district court judgments were essentially unreviewable because the district courts refused to give reasons for granting new trials. Similarly, in this case, a judgment involving a significant issue may become unreviewable if this court does not act.

As this Court has noted:

> Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.

Prudential, 148 S.W.3d at 136. Even if this Court determines that the State may not bring a direct appeal of this case, there is no reason to delay review of the important jurisdictional and constitutional issues raised here. These issues will doubtless arise again, especially given

the unnecessary legal confusion created by the rulings of the district court and the court of appeals. And given the incentive same-sex couples have to shield their family court proceedings from legal scrutiny—as was done here—future appeals from final judgments in same-sex divorce cases are likely to "prove elusive." *Accord. Marriage of J.B.*, 326 S.W.3d 654, 661-62 ("Because this is an issue that is likely to arise in other cases, prompt appellate resolution of the subject-matter-jurisdiction question will have broad public benefits.").

As in previous cases in which this court has granted mandamus relief, there is a "complete lack of authority for the trial court's order" that, if it is not remedied, will "put[] the civil justice system itself to the trouble of grinding through proceedings that [a]re certain to be 'little more than a fiction.'" *In re Prudential*, 148 S.W.3d at 137 (citing *In re Masonite Corp.*, 997 S.W.2d 194 (Tex.1999) (orig. proceeding)). That is even more the case here, as the district court's divorce decree is void for want of jurisdiction and therefore subject to collateral attack at any time. *See, e.g., Mireles*, 2009 WL 884815, at *2 (voiding divorce decree previously granted by a Texas court to two women). As in *In re Masonite* and *In re Prudential*, "the error [is] clear enough, and correction simple enough, that mandamus review [is] appropriate." *In re Prudential*, 148 S.W.3d at 137.

*** * ***

This Court should not permit this case to be decided by default. Instead, the merits of Naylor's divorce claim should be decided on the State's direct appeal. If the State cannot appeal the judgment directly, however, it has no other adequate remedy to vindicate its

interest in defending Texas law, and mandamus relief is necessary to correct the district court's clear error in granting a divorce to a same-sex couple.

PRAYER

For these reasons, if the Court determines that the State's direct appeal in case No. 11-0114 is improper, the Court should grant this petition and require the district court to reverse its judgment and dismiss the suit for want of jurisdiction.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

JONATHAN F. MITCHELL
Solicitor General

/s/ James D. Blacklock
JAMES D. BLACKLOCK
Assistant Solicitor General
State Bar No. 24050296

CLEVE W. DOTY
Assistant Attorney General
State Bar No. 24069627

Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
[Tel.] (512) 936-8160
[Fax] (512) 474-2697

COUNSEL FOR RELATORS

CERTIFICATE OF COUNSEL

I certify that I have reviewed the petition and to the best of my knowledge every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ James D. Blacklock
JAMES D. BLACKLOCK

CERTIFICATE OF SERVICE

I certify that on March 25, 2011 a true and correct copy of the above Conditional Petition for Writ of Mandamus was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

James J. Scheske
AKIN GUMP STRAUSS HAUER FELD LLP
300 West 6th Street
Suite 2100
Austin, Texas 78701-3911

Counsel for Petitioner

Robert B. Luther
LAW OFFICES OF ROBERT B. LUTHER, P.C.
919 Congress
Suite 450
Austin, Texas 78701
Ph: (512) 477-2323

Counsel for Respondent Sabina Daly

Jennifer R. Cochran
THE LAW OFFICE OF JENNIFER R. COCHRAN
13062 Hwy 290 West
Suite 201
Austin, Texas 78737
Ph: (512) 685-3584

Counsel for Respondent

/s/ James D. Blacklock
JAMES D. BLACKLOCK