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In the Supreme Court of Texas

IN THE MATTER OF THE MARRIAGE OF J.B. AND H.B.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas

BRIEF ON THE MERITS OF RESPONDENT THE STATE OF TEXAS

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TABLE OF CONTENTS

Index of Authorities iii

Issues Presented xi

Summary of Argument 3

Argument 4

I. Texas Law Bars Divorce Suits Involving Same-Sex Couples, and That Bar Is Jurisdictional 4

A. The Texas Constitution and Family Code Prohibit Same-Sex Divorces in Five, Independent Ways; Collectively, These Provisions of Texas Law Leave No Doubt that Divorce Is Unavailable to Same-Sex Couples 4

B. Texas Courts Lack Jurisdiction Over Suits for Divorce Involving Same-Sex Couples 10

1. The clear intent of section 6.204 of the Family Code is that courts not exercise jurisdiction over divorce suits involving same-sex couples 11

2. The district court lacked jurisdiction because J.B.'s divorce petition affirmatively demonstrates a lack of standing 16

C. A Suit to Declare the Marriage Void Is the Proper Legal Mechanism for Dissolving an Out-of-State Same-Sex Marriage in Texas Court 19

1. A judgment in a suit to declare the marriage void would be enforceable in all fifty states 20

2. A suit to declare the marriage void provides for property division and other rights 23

II. Texas's Traditional Marriage Laws Are Consistent with the U.S. Constitution 24

A. *Baker v. Nelson* Forecloses Any Claim of a Constitutional Entitlement to Same-Sex Divorce 25

B. Texas's Provision of the Rights of Marriage—Including Divorce—Only to the Union of One Man and One Woman Does Not Violate the Fourteenth Amendment 27

1. Texas's marriage laws do not violate the Equal Protection Clause 27

2. There is no fundamental right under the Due Process Clause to a same-sex divorce 32

3. The constitutional right to travel is not implicated here . . . 35

4. The Full Faith and Credit Clause does not require Texas to grant same-sex divorces 38

III. In This Appeal of the District Court's Denial of the State's Plea to the Jurisdiction, All Jurisdictional Arguments Should Be Considered By the Court of Appeals and This Court 40

Prayer 42

Certificate of Service 44

INDEX OF AUTHORITIES

Cases

Adams v. Howerton,
486 F. Supp. 1119 (C.D. Cal. 1980) 14

Andersen v. King County,
138 P.3d 963 (Wash. 2006) (en banc) 27

Attorney Gen. of N.Y. v. Soto-Lopez,
476 U.S. 898 (1986) 36

Aucutt v. Aucutt,
62 S.W.2d 77 (Tex. 1933) 16

Baker v. Gen. Motors Corp.,
522 U.S. 222 (1998) 21-23, 39

Baker v. Nelson,
409 U.S. 810 (1972) 25, 27, 32, 33

Beth R. v. Donna M.,
853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008) 7, 9

Boddie v. Connecticut,
401 U.S. 371 (1971) 32, 33

Bonds v. Foster,
36 Tex. 68 (1871) 32

C.M. v. C.C.,
867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008) 9

Chambers v. Ormiston,
935 A.2d 956 (R.I. 2007) 7

Christiansen v. Christiansen,
253 P.3d 153 (Wyo. 2011) 7

Citizens for Equal Prot. v. Bruning,
455 F.3d 859 (8th Cir. 2006) 26, 29, 30, 33

City of DeSoto v. White,
288 S.W.3d 389 (Tex. 2009) 11, 14, 16

Dean v. Goldwire,
480 S.W.2d 494 (Tex. App.—Waco 1972, writ ref'd n.r.e.) 23, 24

Doe v. Hodgson,
478 F.2d 537 (2d Cir. 1973) 26

Engquist v. Oregon Dep't of Agric.,
553 U.S. 591 (2008) (emphasis added) 27

Esparza v. Esparza,
382 S.W.2d 162 (Tex. Civ. App.— Corpus Christi 1964, no writ) 24

Faglie v. Williams,
569 S.W.2d 557 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) 24

FCC v. Beach Commcn's, Inc.,
508 U.S. 307 (1993) 29

Gill v. Office of Pers. Mgmt.,
699 F. Supp. 2d 374 (D. Mass. 2010) (mem. op.) 27

Helena Chem. Co. v. Wilkins,
47 S.W.3d 486 (2001) 14

Heller v. Doe,
509 U.S. 312 (1993) (citation omitted) 29

Hernandez v. Robles,
26 A.D.3d 98 (N.Y. App. Div. 2005) 26

Hicks v. Miranda,
422 U.S. 332 (1975) 26

High Tech Gays v. Defense Indus. Sec'y Clearance Office,
895 F.2d 563 (9th Cir. 1990) 28

Hovious v. Hovious,
No. 02-04-169-CV, 2005 WL 555219
(Tex. App.—Fort Worth Mar. 10, 2005, pet. denied) (mem. op.) 20, 23

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004) 27, 33

In re Marriage of J.B. & H.B.,
326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed) . . . . . *passim*

Isbill v. Stovall,
92 S.W.2d 1067 (Tex. Civ. App.—Eastland 1936, no writ.) 6

Johnson v. Johnson,
385 F.3d 503 (5th Cir. 2004) 28

Johnson v. Robison,
415 U.S. 361 (1974) 31

K.D.F. v. Rex,
878 S.W.2d 589 (Tex.1994) 39

Kern v. Taney,
2010 WL 2510988, 11 Pa. D. & C. 5th 558 (Pa. Com. Pl. 2010) 7

Langan v. St. Vincent's Hosp. of N.Y.,
25 A.D.3d 90 (N.Y. App. Div. 2005) 26

Lawrence v. Texas,
539 U.S. 558 (2003) 28, 30

LeClerc v. Webb,
419 F.3d 405 (5th Cir. 2005) 27, 28

Littleton v. Prange,
9 S.W.3d 223 (Tex. App—San Antonio 1999, pet. denied) 26

Lofton v. Sec'y of Dep't of Children & Family Servs.,
358 F.3d 804 (11th Cir. 2004) 28

Loughran v. Loughran,
292 U.S. 216 (1934) 39

Loving v. Virginia,
388 U.S. 1 (1967) 29-30, 32

Mandel v. Bradley,
432 U.S. 173 (1977) (per curiam) 25-26

Massachuetts v. USDHHS,
698 F. Supp. 2d 234 (D. Mass. 2010) 38

McConnell v. Nooner,
547 F.2d 54 (8th Cir. 1976) 26

Mem'l Hosp. v. Maricopa County,
415 U.S. 250 (1974) 37

Mireles v. Mireles,
No. 01-08-00499-CV, 2009 WL 884815
(Tex. App.—Houston [1 Dist.] Apr. 2, 2009) 4, 19

Morrison v. Sadler,
821 N.E.2d 15 (Ind. Ct. App. 2005) 26, 30, 31

Narvaez v. Maldonado,
127 S.W.3d 313 (Tex. App—Austin 2004, no pet.) 17

Nevada v. Hall,
440 U.S. 410 (1979) 40

Pacific Ins. Co. v. Indus. Accident Comm'n,
306 U.S. 493 (1939) 40

Perry v. Schwarzenegger,
704 F. Supp. 2d. 921 (N.D. Cal. 2010) 33

Peters v. Peters,
214 N.W.2d 151 (Iowa 1974) 21

Romer v. Evans,
517 U.S. 620 (1996) 27, 28

Ross v. Goldstein,
203 S.W.3d 508 (Tex. App.—Houston [14th Dist.] 2006, no pet.) 6

Saenz v. Roe,
526 U.S. 489 (1999) 36, 37

Skinner v. Oklahoma ex rel. Williamson,
316 U.S. 535 (1942) 29, 31

Smelt v. County of Orange,
374 F. Supp. 2d 861 (C.D. Cal. 2005) *aff'd in part,*
vacated in part on other grounds by
Smith v. County of Orange, 447 F.3d 673 (9th Cir. 2006) 27, 33

Sosna v. Iowa,
419 U.S. 393 (1975) 29, 33

State v. Naylor,
330 S.W. 3d 434 (Tex. App.—Austin 2011, no pet. h.)ç 2, 9

Subaru of Am., Inc. v. David McDavid Nissan, Inc.,
84 S.W.3d 212 (Tex. 2002) 11

Sutton v. Leib,
342 U.S. 402 (1952) 21

Tex. Ass'n of Bus. v. Tex. Air Control Bd.,
852 S.W.2d 440 (Tex. 1993) 16, 18

Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser,
140 S.W.3d 351 (Tex. 2004) 41

Waco Indep. Sch. Dist. v. Gibson,
22 S.W.3d 849 (Tex. 2000) 41

Washington v. Glucksberg,
521 U.S. 702 (1997) 34, 35

Williams v. North Carolina,
317 U.S. 287 (1942) 40

Williams v. North Carolina,
325 U.S. 226 (1945) 32

Wilson v. Ake,
354 F. Supp. 2d 1298 (M.D. Fla. 2005) 26, 30, 33, 38

Constitutional Provisions, Statutes and Rules

U.S. CONST. art. IV, § 1 38

TEX. CONST. art I, § 32 . . . . . 1, 2, 5, 16, 26

TEX. CONST. art V, §58 16

28 U.S.C. § 1738C 23, 38

28 U.S.C. § 1257 25

TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) 40

TEX. CIV. PRAC. & REM. CODE § 51.014(b) 41

TEX. FAM. CODE § 1.003 . . . . . 22, 23

TEX. FAM. CODE § 1.101 8

TEX. FAM. CODE § 3.404(b) 23

TEX. FAM. CODE § 6.001 . . . . . 1, 5, 6, 16, 18

TEX. FAM. CODE §§ 6.001-.008 20

TEX. FAM. CODE §§ 6.001-6.802 19

TEX. FAM. CODE §§ 6.102-6.111 20

TEX. FAM. CODE § 6.201 20

TEX. FAM. CODE §§ 6.201-6.206 20

TEX. FAM. CODE § 6.202 20

TEX. FAM. CODE § 6.204 7

TEX. FAM. CODE § 6.204(b) 1, 5, 6, 20, 40

TEX. FAM. CODE § 6.204(c) 2, 9

TEX. FAM. CODE § 6.204(c)(1) 1, 6, 13, 15

TEX. FAM. CODE § 6.204(c)(2) 1, 7, 9, 11

TEX. FAM. CODE § 6.205 20

TEX. FAM. CODE § 6.206 20

TEX. FAM. CODE § 6.305(a) 22

TEX. FAM. CODE § 6.307 . . . . . 1, 7, 20

TEX. FAM. CODE § 6.501(a) 23

TEX. FAM. CODE §§ 7.001-7.009 24

TEX. FAM. CODE § 45.105 23

TEX. R. APP. P. 56.1(a)(6) 1

Other Authorities

16 TEX. JUR. 3d *Courts* § 1 (2010) 6

Baker v. Nelson,
Jurisdictional Statement, No. 71-1027 (Oct. Term 1972) 25

C. Wright,
LAW OF FEDERAL COURTS 495 (2d ed. 1970) 26

ISSUES PRESENTED

1. Does a Texas court have jurisdiction over a divorce suit involving a same-sex couple who obtained a marriage license in another state?

2. Does the U.S. Constitution permit Texas to define the legal institution of marriage as the union of one man and one woman, and to provide the rights of marriage—which include divorce—only to those legally recognized relationships?

No. 11-0024

In the Supreme Court of Texas

IN THE MATTER OF THE MARRIAGE OF J.B. AND H.B.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas

BRIEF ON THE MERITS OF RESPONDENT THE STATE OF TEXAS

TO THE HONORABLE SUPREME COURT OF TEXAS:

The court of appeals correctly resolved this case. Texas law prohibits courts from exercising jurisdiction over suits for divorce involving same-sex couples, and that prohibition does not violate the U.S. Constitution. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed). Although the court of appeals correctly disposed of J.B.'s divorce petition, this Court should grant the petition for review and affirm the court of appeals' holding regarding jurisdiction in order to resolve "an important question of state law that should be, but has not been, resolved by the Supreme Court." *See* TEX. R. APP. P. 56.1(a)(6).

Texas law bars same-sex divorce in at least five, independent ways. *See* TEX. CONST. art. I, § 32; TEX. FAM. CODE §§ 6.001, 6.204(b), 6.204(c)(1), 6.204(c)(2), 6.307. Texas law also bars district courts from exercising jurisdiction over suits for same-sex divorce. *See*,

e.g., *id*. § 6.204(c). To date, however, two district courts—including the district court in this case—have either struck down or ignored those provisions of Texas law. *See In the Matter of the Marriage of J.B. & H.B.*, No. DF-09-01074, Order (302nd Dist. Ct., Dallas County, Tex. Oct. 1, 2009) (declaring that Texas laws prohibiting same-sex divorce violate the Fourteenth Amendment to the U.S. Constitution), CR82; *In the Matter of the Marriage of Naylor & Daly*, No. D-1-FM-09-000050, Hearing (126th Dist. Ct., Travis County, Tex. Feb. 10, 2010) (granting same-sex divorce without explanation despite recognizing one day earlier that a same-sex divorce petition creates "interesting constitutional issues" and "jurisdictional question[s]"). In addition, one court of appeals has stated—in a published decision—that same-sex divorce may be permissible under Texas law. *See State v. Naylor*, 330 S.W.3d 434, 441-42 (Tex. App.—Austin 2011, pet. filed & mand. pending) (speculating Texas law can be interpreted "in a manner that would allow the trial court to grant a divorce in this case").

These legally baseless judicial rulings violate the Texas Constitution and create needless uncertainty about the remedies available to same-sex couples who wish to dissolve their out-of-state marriages in Texas court. A decision from this Court affirming the court of appeals' analysis of the jurisdictional issue would not only provide accurate legal guidance to same-sex couples residing in Texas, it would reaffirm that Texas law means what it says: Marriage in Texas can only be between a man and a woman, and courts may not give effect to any legal claim asserted as a result of an out-of-state same-sex marriage. TEX. CONST. art. I, § 32; TEX. FAM. CODE § 6.204(c).

SUMMARY OF ARGUMENT

Under article I, section 32 of the Texas Constitution and section 6.204(b) of the Family Code, J.B. and H.B. are not married in this state because they are both men. As a result, they cannot get a divorce in this state. Texas law not only prohibits courts from divorcing same-sex couples, it prohibits them from exercising jurisdiction over a divorce suit involving a same-sex couple. Even if divorce is ultimately denied, entertaining a suit for divorce that is premised on a same-sex marriage license would give legal effect to the marriage license, in violation of 6.204(c)(1) of the Family Code. It would also give effect to a claim of access to the courts asserted as a result of a same-sex marriage and to a claim to the many legal rights, protections, and benefits that are available during the pendency of a divorce suit. This would violate section 6.204(c)(2) of the Family Code. The only way to satisfy section 6.204(c)'s requirement that out-of-state same-sex marriages be given no legal effect at all is to decline to exercise jurisdiction over divorce suits involving same-sex couples. Moreover, because J.B.'s facially defective divorce petition affirmatively demonstrates a lack of standing, the district court lacked jurisdiction for that reason as well.

These provisions of Texas law do not violate the U.S. Constitution. Whether under the Supreme Court's ruling in *Baker v. Nelson* or under a thorough equal protection and due process analysis, Texas laws prohibiting same-sex couples from suing for divorce on the basis of their out-of-state marriage licenses easily withstand constitutional scrutiny. Furthermore, Texas's marriage laws do not violate the Fourteenth Amendment right to travel

or the Full Faith and Credit Clause. This Court should affirm the court of appeals' ruling that a same-sex divorce petition in a Texas court must be dismissed for lack of jurisdiction.

ARGUMENT

I. TEXAS LAW BARS DIVORCE SUITS INVOLVING SAME-SEX COUPLES, AND THAT BAR IS JURISDICTIONAL.

Section 6.204 of the Family Code not only prohibits courts from granting divorces to same-sex couples, it prohibits them from exercising jurisdiction over divorce suits premised on same-sex marriages. *See Marriage of J.B.*, 326 S.W.3d at 670 ("We hold that Texas courts lack subject-matter jurisdiction to entertain a suit for divorce that is brought by a party to a same-sex marriage, even if the marriage was entered in another state that recognizes the validity of same-sex marriages."); *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, at *2 (Tex. App.—Houston [1 Dist.] Apr. 2, 2009) ("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."). Here, the district court lacked jurisdiction both because of section 6.204 and because of facial defects in J.B.'s divorce petition.

A. The Texas Constitution and Family Code Prohibit Same-Sex Divorces in Five, Independent Ways; Collectively, These Provisions of Texas Law Leave No Doubt that Divorce Is Unavailable to Same-Sex Couples.

Setting the jurisdictional aspect of the argument aside for a moment, Texas law plainly bars courts from granting divorces to same-sex couples. Thus, even if this Court found that the district court had jurisdiction, J.B. could obtain no relief on the basis of his divorce claim.

First and foremost, the Texas Constitution's clear definition of marriage prohibits Texas courts from granting a divorce to a same-sex couple. According to the Constitution:

> (a) Marriage in this state shall consist only of the union of one man and one woman
> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

TEX. CONST. art. I, § 32. Under the Family Code, a divorce is available only "[o]n the petition of either party to a marriage." TEX. FAM. CODE § 6.001. Because J.B. and H.B. are both men, they are not parties to a marriage as a matter of Texas constitutional law. As a result, J.B. cannot get a divorce from H.B.[1]

Second, under section 6.204(b) of the Family Code, "[a] marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state." *Id*. § 6.204(b).[2] This clear statement of legislative policy reinforces the Texas

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1. Despite J.B.'s attempt to confuse a very simple issue, no further analysis is needed to conclude that a same-sex couple cannot get divorced in a Texas court. According to J.B., "[t]he 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." Pet. Br. at 16-17. Indeed, that was potentially a problem prior to the Legislature's enactment in 2003 of section 6.204 of the Family Code and the ratification of article I, section 32 of the Texas Constitution in 2005. It is no longer a problem, however, because article I, section 32 and section 6.204 resolve all questions about the status of same-sex marriages in this State—they are void and cannot serve as the basis for any legal right or claim, including a claim for divorce.

2. Section 6.204 of the Texas Family Code, Texas's Defense of Marriage Act, provides:

> (a) In this section, "civil union" means any relationship status other than marriage that:
> (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
> (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
>
> (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

Constitution's ban on same-sex marriage and further clarifies that J.B. and H.B. are not—and cannot be—married in Texas. Unmarried parties cannot get divorced. *Id*. § 6.001.

Third, under section 6.204(c)(1) of the Family Code, no "agency or political subdivision of the state"[3] may "give effect to a . . . public act . . . that creates, recognizes, or validates a marriage between persons of the same sex . . . in this state *or in any other jurisdiction*." *Id*. § 6.204(c)(1) (emphasis added); s*ee Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (explaining that under section 6.204 and article I, section 32 of the Texas Constitution, "it is contrary to the State's public policy to recognize or give effect to a same-sex marriage or civil union"). As the court of appeals observed, "section 6.204(c)(1) amplifies section 6.204(b) by providing explicitly that the rule of voidness applies *even to same-sex marriages that have been recognized by another jurisdiction*." *Marriage of J.B.*, 326 S.W.3d at 665 (emphasis added). Any divorce decree in this case would necessarily "give effect to" and "recognize" a same-sex marriage created in another jurisdiction, in violation of section 6.204(c)(1).

(c) The state or an agency or political subdivision of the state may not give effect to a:
(1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
(2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

3. Texas courts are created by statute and are agencies of the State. *See* 16 TEX. JUR. 3d *Courts* § 1 (2010) (citing *Isbill v. Stovall*, 92 S.W.2d 1067, 1070 (Tex. Civ. App.—Eastland 1936, no writ.)) (defining Texas courts as "an agency of the sovereign . . ."). As an agency or political subdivision of the State, a Texas court must follow section 6.204.

Fourth, section 6.204(c)(2) of the Family Code prohibits Texas courts from "giv[ing] effect to a . . . . 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)(2) (emphasis added). J.B.'s divorce suit is just such a claim. It seeks legal protections, benefits, and responsibilities and is asserted as a result of a marriage. It is therefore barred by section 6.204(c)(2) because it is asserted as a result of a same-sex marriage in another jurisdiction.[4]

Finally, under section 6.307 of the Family Code, "[e]ither party to a marriage made void by this chapter may sue to have the marriage declared void." *Id.* § 6.307. All same-sex marriages are made void in Texas by section 6.204(b). Thus, the way to dissolve a same-sex marriage in a Texas court is a suit to declare the marriage void, not a suit for divorce. *See Marriage of J.B.*, 326 S.W.3d at 678-79. Not only is the statutory text straightforward, the Legislature made its intentions doubly clear by placing section 6.204 of the Family Code,

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4. State courts across the country generally agree that state law bans on recognition of out-of-state same-sex marriage preclude the granting of a divorce to a same-sex couple. *See, e.g.*, *Chambers v. Ormiston*, 935 A.2d 956, 960-63 (R.I. 2007) (divorce unavailable to same-sex couple married in Massachusetts because marriage not recognized in Rhode Island); *Kern v. Taney*, 2010 WL 2510988, 11 Pa. D. & C. 5th 558 (Pa. Com. Pl. 2010) (statute declaring same-sex marriages void barred same-sex divorce); *accord. Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008) (allowing same-sex divorce only because New York has no positive law banning recognition of out-of-state same-sex marriages). In the Wyoming case J.B. cites, the court relied on a Wyoming statute under which any marriage valid in the *foreign country* where it was created is valid in Wyoming. *See Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011). The court followed that statute by treating a *Canadian* same-sex marriage as valid for the purpose of granting a divorce. Thus, *Christiansen* does not stand for the proposition that Wyoming would allow divorce of a Massachusetts same-sex marriage. In any event, Texas law and Wyoming law are much different in this area. Not only does Texas law lack any provision recognizing the validity of all foreign marriages, the Texas Family Code—unlike Wyoming law—contains specific provisions declaring out-of-state same-sex marriages void and barring all claims asserted as a result of them. TEX. FAM. CODE § 6.204.

Texas's Defense of Marriage Act, in the sub-chapter of the Code entitled "Declaring a Marriage Void."

Each of these provisions of Texas law independently prohibits courts from granting a same-sex divorce. Taken together, they leave no doubt about the will of the people of Texas and their elected representatives: Out-of-state same-sex marriages are legal nullities in this state, and Texas courts must not treat them like valid marriages for any purpose, including in a divorce suit.

In spite of Texas law's clarity, J.B. urges this Court to "presume" that his marriage is valid "for the sole purpose of dissolving it by divorce." *See, e.g.*, Pet. Br. at 13, 19. He does not explain how a court can "presume" something that it knows to be false and that is demonstrated to be false on the face of the pleadings. *See* CR6 (J.B.'s divorce petition identifying the parties as "husband and husband"). The Family Code speaks very clearly on when marriages should be "presumed" valid, though J.B. fails to mention this. Under section 1.101, "every marriage entered into in this state is presumed to be valid *unless expressly made void by Chapter 6* or unless expressly made voidable by Chapter 6 and annulled as provided by that chapter." TEX. FAM. CODE § 1.101 (emphasis added). J.B.'s purported marriage is expressly made void by Family Code section 6.204(b), so under Texas law it can never be "presumed" valid, for divorce or any other purpose.

J.B. also argues, without any support in the statutory text, that section 6.204's strictures only apply to marriages "going-forward" and are therefore inapplicable when

parties seek to end their marriages. Pet. Br. at 9; *see also Naylor*, 330 S.W.3d at 441-42 (speculating that section 6.204 could "be interpreted to apply only to same-sex marriages on a 'going-forward' basis") . But the words "going-forward," or anything resembling them, are nowhere to be found in the text of section 6.204(c), which is an absolute bar to any actions that "give effect to a . . . public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex . . . [or to a] right or claim to any legal protection, benefit, or responsibility asserted as a result of a" same-sex marriage. TEX. FAM. CODE § 6.204(c). The text of section 6.204 was carefully crafted—not to prohibit any particular type of legal claim—but to bar *all* legal rights and claims that might be asserted on the basis of an out-of-state same-sex marriage.[5] J.B. cannot escape the fact that all divorce suits are claims to the legal protections or benefits associated with a binding

5. J.B. characterizes the "law or policy in Texas" as "against the creation or recognition of same-sex marriages." Pet. Br. at 13. That is true, but it is not the whole story. Section 6.204(c) is very carefully worded to prohibit not only the creation or recognition of same-sex marriages, but any legal right or claim asserted as a result of a same-sex marriage. TEX. FAM. CODE § 6.204(c)(2). And divorce is perhaps the quintessential legal claim asserted as a result of a marriage. J.B's repeated assertion that a divorce decree is not a "'legal protection, benefit or responsibility' resulting from marriage" defies common sense and lacks any support in the law. *See, e.g.*, Pet. Br. at 11. A divorce decree is a binding judgment dividing marital property and legally separating the parties. When granted with jurisdiction, it can be enforced against the former spouse or against third parties, and it conclusively establishes the parties' marital status going forward. These important legal protections and benefits can only arise as a result of a marriage. To construe section 6.204(c)(2) in a way that does not prohibit same-sex divorce would rob it of all meaning and reduce section 6.204's carefully crafted language to—as J.B. would have it—a simple prohibition on the creation or recognition of same-sex marriages. Even so, J.B.'s incorrect reading of the statute would still prohibit same-sex divorce, as a divorce cannot be granted without "recognizing" that a marriage existed. *See Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008) (allowing same-sex divorce only because New York law allows courts to "recognize" out-of-state same-sex marriages); *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008) (same).

divorce decree.[6] And in J.B.'s case, his divorce claim is asserted as a result of a same-sex marriage, so it is barred by section 6.204(c). Whether J.B.'s claim has to do with a "going-forward" marriage or the termination of a marriage is irrelevant under the statute. Nothing in the text of section 6.204(c) supports J.B.'s desired addition to the statute of this fabricated "going-forward" standard.

B. Texas Courts Lack Jurisdiction Over Suits for Divorce Involving Same-Sex Couples.

The district court apparently agreed with the State that article I, section 32 of the Texas Constitution and section 6.204 of the Family Code prohibit courts from exercising jurisdiction over suits for same-sex divorce. Because these provisions of Texas law prevent courts from exercising jurisdiction over a suit for same-sex divorce, they had to be declared unconstitutional in order for the State's plea to the jurisdiction to be denied. The district court did exactly that. *See In the Matter of the Marriage of J.B. & H.B.*, No. DF-09-01074, Order (302nd Dist. Ct., Dallas County, Tex. Oct. 1, 2009) (finding that Article 1, section 32 of the Texas Constitution and section 6.204 of the Family Code "violate[] the right to equal

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6. As the court of appeals explained:

> A petition for divorce is a claim—that is, "a demand of a right or supposed right," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 414 (1981)—to legal protections, benefits, or responsibilities "asserted as a result of a marriage," TEX. FAM. CODE ANN. § 6.204(c)(2), one example of such a benefit being community-property rights. Under section 6.204(c)(2), the State cannot give any effect to such a petition when it is predicated on a same-sex marriage.

Marriage of J.B., 326 S.W.3d at 665.

protection and therefore violate[] the 14th Amendment of the United States Constitution"). As the court of appeals' decision reversing the district court correctly holds, multiple provisions of Texas law prohibit courts from exercising jurisdiction over suits for same-sex divorce. *See Marriage of J.B.*, 326 S.W.3d at 664-67.

1. The clear intent of section 6.204 of the Family Code is that courts not exercise jurisdiction over divorce suits involving same-sex couples.

Although courts of general jurisdiction are presumed to have subject-matter jurisdiction unless a contrary showing is made, *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002), mandatory statutory requirements are jurisdictional when the application of statutory-interpretation principles reveals a clear legislative intent that they be so. *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009); *Marriage of J.B.*, 326 S.W.3d at 663-64 (explaining the law of subject-matter jurisdiction in context of same-sex divorce).

Section 6.204 evinces a clear legislative intent that Texas courts not exercise jurisdiction over same-sex divorce claims. To begin with, section 6.204(c)(2) prohibits giving any legal effect to a "right or claim to any legal protection, benefit, or responsibility asserted as a result of a" same-sex marriage. TEX. FAM. CODE § 6.204(c)(2). The right of access to divorce proceedings—even though the divorce remedy may be eventually denied—is a legal right asserted as a result of a marriage. When the right to invoke the court's jurisdiction and enjoy the procedural protections of a divorce suit is asserted as a

result of a same-sex marriage, courts are prohibited by section 6.204(c)(2) from giving effect to that right by exercising jurisdiction over the claim. *See Marriage of J.B.*, 326 S.W.3d at 665 ("If a trial court were to exercise subject-matter jurisdiction over a same-sex divorce petition, even if only to deny the petition, it would give that petition some legal effect in violation of section 6.204(c)(2).").

J.B. fails to acknowledge that a divorce suit entails much more than an eventual judgment granting or denying divorce. A suit for divorce entitles the parties to procedural and substantive protections that apply *while the suit is pending*, regardless of whether the court ultimately grants a divorce. For instance, during the pendency of a divorce suit, a debt incurred by one spouse that intentionally subjects the other spouse to liability is void. TEX. FAM. CODE § 6.707. Property transactions undertaken during a divorce suit can also be voided. *Id*. A court may provide the parties to a divorce suit with court-ordered counseling to determine if reconciliation is possible. *Id*. § 6.505. And a respondent's failure to answer a divorce suit does not constitute an admission of the petition's allegations. *Id*. § 6.701.[7] Thus, not only does a same-sex divorce petition ask the court to give effect to a claim of access to divorce proceedings, the proceedings themselves provide unique protections to the parties during the pendency of the suit.

Most notably, just by filing a divorce petition, the petitioner limits the respondent's ability to incur debt or transfer property. *Id*. § 6.707. These substantive legal

7. None of these protections is available in a suit to declare a marriage void.

protections—which affect the rights of third-party creditors and transferees as well as affecting the parties to the divorce suit—are not premised on the legal validity of the marriage or the ultimate granting of the divorce. Rather, they extend to all divorce litigants the moment the divorce petition is filed. If Texas courts can exercise jurisdiction over same-sex divorce actions—even if only to deny them—such protections and benefits would be available to parties to out-of-state same-sex marriages, in violation of section 6.204(c)(2). As a result, the only way a court can fully comply with section 6.204(c)(2) when confronted with a same-sex divorce petition is to dismiss for lack of jurisdiction. *Marriage of J.B.*, 326 S.W.3d at 665. ("In order to comply with this statutory provision and accord appellee's same-sex divorce petition no legal effect at all, the trial court must not address the merits. In other words, the court must dismiss for lack of subject-matter jurisdiction.").[8]

Section 6.204(c)(1) also requires that courts decline to exercise jurisdiction over same-sex divorce suits. TEX. FAM. CODE § 6.204(c)(1) (courts may not "give effect" to a "public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction"). The statute does not simply prohibit creating same-sex marriages or providing rights associated with

8. J.B. argues that he has not yet laid claim to any of the ancillary legal rights associated with a divorce proceeding, so exercising jurisdiction over *his* suit would not violate section 6.204(c)(2). Pet. Br. at 11-12. But while he is litigating a divorce petition, J.B. automatically enjoys the legal "protections" mentioned above, whether he makes use of them or not. Allowing him access to these protections by exercising jurisdiction over his divorce petition would violate section 6.204(c)(2). And if this Court were to find that jurisdiction exists over same-sex divorce petitions, future same-sex couples could claim these benefits and protections in violation of the statute.

them. Rather, it prohibits giving "any legal effect whatsoever" to an out-of-state record creating a same-sex marriage. *Marriage of J.B.*, 326 S.W.3d at 665. To find that J.B. has alleged a valid marriage and triggered the court's jurisdiction by citing his Massachusetts marriage license would be to give effect to that act or record, in violation of section 6.204(c)(1). *Id.* at 665-66 ("A same-sex divorce proceeding would give effect to the purported same-sex marriage in several ways. For one, it would establish the validity of that marriage as to the parties involved under principles of res judicata and collateral estoppel."). In other words, under section 6.204(c)(1), the marriage license attached to J.B.'s petition is a legal nullity that is insufficient to trigger the court's jurisdiction.

In determining whether statutory provisions present jurisdictional bars, this Court looks to the statutory text first, but it also considers "the consequences that result from each possible interpretation." *City of DeSoto*, 288 S.W.3d at 396 (citing *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (2001)). Under this analysis as well, section 6.204 should be construed as jurisdictional. The Family Code provisions at issue here are particularly vulnerable to manufactured judgments involving same-sex couples and sympathetic district courts. As has already happened at least twice in Texas,[9] parties to out-of-state same-sex marriages have an obvious incentive, particularly in divorce cases, to agree to violate Texas law by treating their relationships as legally valid. If they draw a like-minded district judge,

9. *In the Matter of the Marriage of R.S. and J.A.*, No. F-185,063 (279th Dist. Ct., Jefferson Co., Tex. Mar. 3, 2003); *In the Matter of the Marriage of Naylor & Daly*, No. D-1-FM-09-000050, Hearing (126th Dist. Ct., Travis County, Tex. Feb. 10, 2010)

they can agree that the Texas Constitution and Family Code are unconstitutional—or they can simply ignore the law—and concoct a judgment that violates the State's constitution and thwarts the will of Texas voters. An incorrect judgment is nonetheless a final, enforceable judgment if the court had jurisdiction over the parties and the subject matter. Thus, holding that district courts can exercise jurisdiction over same-sex divorce actions would encourage same-sex couples to seek out district courts that are willing to provide them with divorce decrees that violate the state constitution but have the appearance of a binding final judgment.

Moreover, allowing courts to exercise jurisdiction over same-sex divorce cases would create practical problems for the enforcement of judgments. If this Court holds that jurisdiction exists over same-sex divorce petitions, same-sex couples who are able to obtain divorce decrees—such as the parties in *State v. Naylor*, No. 11-0114—may attempt to enforce their decrees in the future against each other or against third parties. But they will be barred from doing so by section 6.204(c)(1), which prohibits courts or any other government entity from "giv[ing] effect to a . . . public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex." TEX. FAM. CODE § 6.204(c)(1). A same-sex divorce decree is certainly a "public act, record, or judicial proceeding" that "recognizes" a same-sex marriage. Thus, even if the decree was issued with jurisdiction, no governmental entity could give it any force or effect in the future, and the parties to the decree could never enforce it.

The text of section 6.204 provides no reason to think the Legislature intended the bizarre scenario in which a judgment issued with jurisdiction is nonetheless a legal nullity. Instead, the simplest reading of the statutory text is that the Legislature intended for district courts to lack jurisdiction over suits for same-sex divorce. This outcome is consistent with the overall intent of the statute and is also the simplest way to ensure that no conflict arises between the enforceability of final judgments and the dictates of section 6.204.

In sum, under the plain terms of section 6.204, an out-of-state, same-sex marriage is a legal nullity that can give rise to nothing of legal consequence, including a judgment denying a claim for same-sex divorce.[10]

2. The district court lacked jurisdiction because J.B.'s divorce petition affirmatively demonstrates a lack of standing.

Standing is an essential component of subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993)). Only a "party to a marriage" may sue for divorce under the Family Code. TEX. FAM. CODE § 6.001. Generally, courts have

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10. J.B. cites *Aucutt v. Aucutt*, 62 S.W.2d 77, 79 (Tex. 1933), for the proposition that "this Court has even declared the Legislature lacks the power to take away [divorce] jurisdiction." Pet. Br. at 6. But *Aucutt* is based on the proposition—true in 1933 but no longer the case—that "trial courts of this State are clothed by the Constitution with divorce jurisdiction." *Aucutt*, 62 S.W.2d at 79. The Texas Constitution has changed since 1933, and it no longer expressly gives district courts jurisdiction over "all cases of divorce," *id.* Instead, it generally grants district courts "original jurisdiction of all actions, proceedings, and remedies." TEX. CONST. art. V, § 8. But this general grant of jurisdiction does not prohibit the Legislature from placing reasonable restrictions on the courts' jurisdiction over statutory causes of action, such as J.B.'s action for divorce under the Family Code. *See City of DeSoto*, 288 S.W.3d at 394 (statutory requirements are jurisdictional where it is clear the legislature intended them to be so). In addition, the Texas Constitution speaks specifically to this issue by defining marriage to exclude same-sex unions. TEX. CONST. art. I, § 32(a). Any general constitutional jurisdiction over divorce actions, even if it existed, would have to yield to the Constitution's specific prohibition on recognition of same-sex marriages.

held that a dispute as to the validity of a marriage goes to the merits of a divorce claim, not to the court's jurisdiction. *See, e.g.*, *Narvaez v. Maldonado*, 127 S.W.3d 313, 317 (Tex. App—Austin 2004, no pet.). Thus, an allegation of the "existence of a *valid* marriage" is generally thought to be sufficient to establish standing in a divorce action. *See* Pet. Br. at 7 (emphasis added). But even taking as true the facts pleaded in J.B.'s petition, the petition does not allege a valid marriage. To the contrary, it affirmatively alleges a void, same-sex marriage. J.B.'s divorce petition calls J.B. and H.B. "husband and husband," CR6, and attaches a marriage license, CR8, that identifies both parties as male. Thus, there is nothing for the court to adjudicate on the "merits," because the pleadings in the case—even if taken as true—allege that no valid marriage exists and therefore affirmatively demonstrate a lack of standing to sue for divorce. J.B.'s petition may as well have alleged, "I am not married in Texas, and I have no standing to sue for divorce under the Family Code." If a lack of standing on the face of the pleadings is ever a sufficient basis for a jurisdictional dismissal, J.B.'s facially defective divorce petition must be dismissed.[11]

J.B. claims that, if the defects in his petition are held to be jurisdictional, this will "upend a century of Texas divorce procedure" by requiring district courts to "inquire into and determine the merits of a petition . . . in order to decide whether it has jurisdiction." Pet. Br. at 6, 8. Setting aside the irony of a litigant in J.B.'s position complaining about centuries of

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11. Even if the same-sex nature of the marriage was not apparent from the pleadings, the court would be required to dismiss the case for lack of jurisdiction once it discovered the defect, in light of section 6.204 of the Family Code. *See supra* at 10-16.

settled law being upended, there is nothing revolutionary—or even controversial—about the State's position. When the allegations in a petition, taken as true, demonstrate a lack of standing, courts lack jurisdiction and the petition must be dismissed. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (petitioner must "allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause . . . Failing that, the suit is dismissed."). It is clear from the face of J.B.'s petition that he is not a party to a marriage and is therefore not entitled to sue for divorce. TEX. FAM. CODE § 6.001 (only a party to a marriage may sue for divorce). In such a case, there are no "merits" for the court to determine, because the petition itself alleges facts that defeat standing.

The State's position would not force courts to inquire *sua sponte* into the validity of marriages before hearing divorce cases. Instead, the State's position is simply that where the petition *itself* demonstrates a lack of standing, the case should be dismissed for lack of jurisdiction. And on top of that, any divorce suit involving a same-sex couple must be dismissed for lack of jurisdiction under section 6.204(c), whether the petition is facially defective or not.

In response, J.B. claims that adoption of the State's position would force courts to conduct fact-finding at the jurisdictional stage to ensure that divorce litigants with unisex names are not actually same-sex couples. Pet. Br. at 15 (worrying that "gone will be the days in which trial courts could efficiently grant an uncontested petition for divorce between 'Cameron and Dana' . . ."). But this concern is entirely misplaced. For one thing, it assumes

that lawyers licensed by this Court and sworn to duties of candor and professionalism would conceal from the court that their client is seeking a divorce from a person of the same sex. No lawyer in this case, or in the other same-sex divorce case pending before this Court, has attempted to conceal the sex of his or her client in order to avoid dealing with the legal issues implicated by a same-sex divorce petition. And no lawyer with any ethical standards would do so. Courts are entitled to rely on the representations of counsel when determining their jurisdiction. J.B.'s claim that courts will not know whether divorce litigants are of the same sex is more an aspersion on the family law bar than it is an argument against the State's legal position.

Moreover, the State's position is that this Court should clarify for all courts and litigants statewide that same-sex divorces are unavailable in Texas. Once that happens, one would hope that even the most irresponsible of advocates and litigants would not dare try to trick a court into divorcing a same-sex couple by concealing the sex of the parties. And in the event a court were to be misled in such a way, the void divorce decree could later be dissolved by collateral attack (and disciplinary sanctions brought against any lawyer who participated in such a charade). *See Mireles*, 2009 WL 884815, at *2 (granting collateral attack against same-sex divorce decree mistakenly granted four years prior).

C. A Suit to Declare the Marriage Void Is the Proper Legal Mechanism for Dissolving an Out-of-State Same-Sex Marriage in Texas Court.

The Texas Family Code provides three mechanisms for dissolving a marriage: divorce, annulment, and a suit to declare the marriage void. *See* TEX. FAM. CODE §§ 6.001-

6.802. Divorce dissolves legally valid marriages. *Id*. §§ 6.001-6.008. Annulment dissolves voidable marriages, which suffer legal defects but are valid unless annulled. *Id*. §§ 6.102-6.111. And suits to declare a marriage void provide for the dissolution of void marriages, which never have the force of law.[12] *Id.* § 6.307 (establishing an action for voidance); *id.* §§ 6.201-6.206 (grounds for voidance).[13]

1. A judgment in a suit to declare the marriage void would be enforceable in all fifty states.

"A suit to have a marriage declared void is a suit in rem, affecting the status of the parties to the purported marriage." *Id*. § 6.307(c). A declaration that a marriage is void thus legally dissolves the relationship and forecloses any claim that the parties remain married. *See, e.g.*, *Hovious*, 2005 WL 555219, at *6-7.

The U.S. Supreme Court has recognized that a state-court judgment declaring an out-of-state marriage "null and void" is entitled to full faith and credit and is conclusive

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12. Section 6.307 states: "Either party to a marriage made void by this chapter may sue to have the marriage declared void." *Id*. § 6.307. J.B. claims that the word "may" gives parties the option of dissolving their void marriages by some other means. But the Family Code does not provide a menu of options for dissolution of marriages. Valid marriages end in divorce, voidable marriages end in annulment, and void marriages never have the force of law but can be judicially dissolved through a suit to declare the marriage void. The word "may" in the statute only indicates that parties to void marriages are not *required* to sue for a declaration of voidness unless they wish to do so. Their marriages are void whether they sue for such a declaration or not, and they need only come into court under section 6.307 if they desire a judicial decree to that effect and a judicial sorting-out of their affairs.

13. A suit to declare the marriage void is the only proper dissolution mechanism in a variety of situations. For example, it is the only dissolution remedy when people marry with the mistaken belief that they properly terminated a previous marriage. *See id*. § 6.202; *Hovious v. Hovious*, No. 02-04-169-CV, 2005 WL 555219, at *6-7 (Tex. App.—Fort Worth Mar. 10, 2005, pet. denied) (mem. op.) (declaring marriage void due to unintentional bigamy). It is also the only proper dissolution remedy when the parties are underage or too closely related to one another to marry under Texas law. TEX. FAM. CODE §§ 6.201, 6.205, 6.206. And it is the only proper dissolution remedy when the parties are of the same sex. *Id*. § 6.204(b).

throughout the nation as to the marital status of the parties. *Sutton v. Leib*, 342 U.S. 402, 408 (1952). In *Sutton*, an Illinois woman married in Nevada, but the marriage was declared void on grounds of bigamy by a New York court. Some time later, an issue arose in an Illinois lawsuit as to whether the woman remained married to her second husband. *Id*. at 405-06. The Supreme Court held that the Full Faith and Credit Clause required Illinois—and indeed all fifty states—to recognize that New York's annulment of the marriage cut off any claim that the woman remained married.[14] *Id*. at 408. Because the parties "subjected themselves to the jurisdiction of the New York court and its decree annulling their Nevada marriage was entered with jurisdiction . . . [the] decree of annulment of their Nevada marriage ceremony is effective to determine that the marriage relationship . . . did not exist at the time of filing the present complaint." *Id*.[15] Thus, if J.B. and H.B. obtain a voidance decree from a Texas court, they will be protected against any claim that they remain married. *See also Peters v. Peters*, 214 N.W.2d 151, 155 (Iowa 1974) ("[W]e give full faith and credit to the Texas annulment decree.").

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14. Although the New York proceeding was called "annulment," according to the Court "[t]he New York annulment held the Nevada marriage void." *Sutton*, 342 U.S. at 409. New York, at the time, called the action to dissolve this void marriage "annulment," but Texas today calls the identical action a "suit to declare the marriage void." Regardless of how the action is titled, *Sutton* makes clear that a judgment dissolving a void, out-of-state marriage is entitled to full faith and credit in all fifty states and shields the parties from a claim in another state that they remain married.

15. By contrast, a Texas court's decree of divorce involving a same-sex couple would not be entitled to full faith and credit because it would be entered without subject-matter jurisdiction. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 239 (1998).

Furthermore, there is "no roving 'public policy exception' to the full faith and credit due *judgments*." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (citation omitted). "[C]redit must be given to the judgment of another state although the forum [state] would not be required to entertain the suit on which the judgment was founded." *Id*. at 232. Thus, no matter what a court in another state thought of a Texas voidance decree on policy grounds, it would be required by the Full Faith and Credit Clause to recognize the decree as conclusively establishing that the parties are not married.

J.B. claims that dissolving an out-of-state same-sex marriages using suite to declare the marriage void would lead to absurd results. He worries that "Party A and Party B could be legally married in Massachusetts for a decade . . .[and] Party A could move to Texas and have his marriage declared void overnight." Pet Br. at 18. This is false. The same personal jurisdiction rules that apply in divorce actions apply in suits to declare a marriage void. Both are "suit[s] for dissolution of a marriage" under the Family Code.[16] In any suit for dissolution, jurisdiction over a non-resident party exists if the couple lived together in Texas in the previous two years or if "there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction." TEX. FAM. CODE § 6.305(a). Thus, if "Party A" has no contacts with Texas that would otherwise support personal jurisdiction over him, he has no need to fear the abusive voidance suit J.B. envisions. And any suit to declare the marriage void that decree issued in Texas without

16. "'Suit for dissolution of a marriage' includes a suit for divorce or annulment or to declare a marriage void." TEX. FAM. CODE § 1.003.

personal jurisdiction over both parties would not be enforceable in Massachusetts, or anywhere else. *See Baker v. Gen. Motors*, 522 U.S. at 239.[17]

2. A suit to declare the marriage void provides for property division and other rights.

A suit to declare a marriage void does not simply dissolve the parties' relationship. Parties to a suit to declare a marriage void can request and obtain many additional elements of relief. *See* TEX. FAM. CODE § 1.003 (defining "suit for dissolution of marriage," as used throughout the Family Code, to include suits to declare a marriage void).

For example, temporary restraining orders may be requested during voidance proceedings. *Id*. § 6.501(a). Name changes are available, *id*. § 45.105, as are claims for economic contribution, in which one party requests payment for his share of property owned by the other party, *id*. § 3.404(b). A suit to declare a marriage void also allows for property division, though not based on community property principles. While the Family Code "does not expressly provide any guidance as to the disposition of property remaining after a marriage has been declared void, case law recognizes that, in one way or another, some disposition is required." *Hovious*, 2005 WL 555219, at *6 (citing *Dean v. Goldwire*, 480

17. J.B. also asks, "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?" Pet Br. at 18. Setting aside the question whether such an advisory declaration is available in Massachusetts courts, the simplest answer to J.B.'s question is the Defense of Marriage Act. Under DOMA, Texas need not give effect to any "public act, record, or judicial proceeding" respecting a same-sex marriage that comes from a state that recognizes same-sex marriages. 28 U.S.C. § 1738C; *see infra* at 38-40. Massachusetts, on the other hand, has no valid basis on which to refuse recognition to a valid Texas judgment declaring a marriage void.

S.W.2d 494, 496 (Tex. App.—Waco 1972, writ ref'd n.r.e.) (dividing property acquired during void marriage "in proportion to the value [each party's] labor contributed to the acquisition of it")). Courts employ a variety of equitable means to divide property acquired during a void marriage.[18]

To be sure, a suit to declare a marriage void does not provide the same property division rights that divorce does, such as community property rights or claims for spousal maintenance. *See* TEX. FAM. CODE §§ 7.001-7.009 (providing the property division rules applicable "[i]n a decree of divorce or annulment"). But this distinction is precisely the point of Texas law, which limits the robust protections of divorce to valid marriages, while providing more limited remedies to void marriages.

Thus, J.B. can get his void marriage dissolved in Texas court under section 6.307 of the Family Code. What he cannot get from a Texas court, however, is recognition of his same-sex marriage or any of the legal protections that Texas law reserves for validly married parties.

II. TEXAS'S TRADITIONAL MARRIAGE LAWS ARE CONSISTENT WITH THE U.S. CONSTITUTION.

The district court held, and J.B. contends in this Court, that Texas laws prohibiting same-sex divorce violate the U.S. Constitution. CR82. The court of appeals' reversal of the

18. *See, e.g.*, *Faglie v. Williams*, 569 S.W.2d 557 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (using equitable theories of trust law to divide property acquired during a legally invalid marriage); *Esparza v. Esparza*, 382 S.W.2d 162, 168 (Tex. Civ. App.— Corpus Christi 1964, no writ) (property jointly acquired during legally invalid marriage should be divided based on each party's contribution to the property).

district court's constitutional ruling should be affirmed, and J.B.'s constitutional arguments against Texas's marriage laws should be rejected.

A. *Baker v. Nelson* Forecloses Any Claim of a Constitutional Entitlement to Same-Sex Divorce.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court rejected the claim that same-sex couples have a Fourteenth Amendment right to marriage or to the legal rights associated with marriage. The plaintiffs in *Baker* presented two distinct theories. *See Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Oct. Term 1972); *see* Appendix. First, they maintained that "[t]he right to marry is itself a fundamental interest, fully protected by . . . the Fourteenth Amendment." *Id.* at 11. They also presented a second, distinct theory of relief—that "[i]n addition" to the "right to marry . . . itself," there are "significant property interests [that] flow from the legally ratified marital relationship," and that those property interests are "also protected by the due process clause." *Id*. at 11. The plaintiffs urged that "marriage comprises a bundle of rights and interests." *Id*. at 12. They went on to detail several examples, including inheritance and property benefits, tax benefits, and marital privileges against testifying in court. *Id*. at 11-12.

The U.S. Supreme Court unanimously rejected these arguments and ordered that the "appeal [be] dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810. This was a common Supreme Court ruling when, prior to 1988, the Supreme Court was required to hear all appeals from state supreme court rulings presenting federal constitutional questions. *See* 28 U.S.C. § 1257 (1988).

A summary dismissal for want of a substantial federal question is a precedential ruling on the merits that binds all state and lower federal courts. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting C. Wright, LAW OF FEDERAL COURTS 495 (2d ed. 1970)) ("Summary disposition of an appeal, . . . either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits"). Summary dispositions bind lower courts not only in later cases involving identical claims, but also in later cases involving the same questions of constitutional law. *See, e.g.*, *Doe v. Hodgson*, 478 F.2d 537, 538-40 (2d Cir. 1973) (summary affirmance upholding federal statute bound Second Circuit when other statutes were challenged using the same constitutional theory).

Baker remains binding precedent on all state and federal courts.[19] As a result, many courts in Texas and across the nation have recognized that *Baker* requires rejection of constitutional challenges to the traditional definition of marriage, including claims for various legal rights associated with marriage.[20] This Court should do the same.

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19. Some state courts have used their respective *state* constitutions to impose a requirement that same-sex couples and male-female couples receive equal marriage rights, a result that Texas voters have precluded by amending the Texas Constitution. *See* TEX. CONST. art. I, § 32.

20. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006) (citing *Baker* in rejecting constitutional claim to same-sex marriage); *Littleton v. Prange*, 9 S.W.3d 223, 225-26 (Tex. App—San Antonio 1999, pet. denied) (citing *Baker*, noting that courts have "soundly reject[ed] the concept of same-sex marriages"); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) (denying claim for spousal veterans benefits to same-sex couple because *Baker* already decided the issue); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (finding *Baker* dispositive on the question of whether same-sex couple with a Colorado marriage license was entitled to spousal immigration benefits); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005) (dismissing claim that Florida must recognize a Massachusetts marriage because *Baker* "is binding precedent upon this Court"); *Langan v. St. Vincent's Hosp. of N.Y.*, 25 A.D.3d 90, 94 (N.Y. App. Div. 2005) ("Based on . . . *Baker* . . . we agree . . . that 'purported homosexual marriages do

B. Texas's Provision of the Rights of Marriage—Including Divorce—Only to the Union of One Man and One Woman Does Not Violate the Fourteenth Amendment.

The court of appeals declined to recognize *Baker* as binding on the same-sex divorce question and instead upheld Texas laws prohibiting same-sex divorce based on a thorough Fourteenth Amendment analysis. *Marriage of J.B.*, 326 S.W.3d at 671-72 (according *Baker* weight in its equal protection analysis but declining to find it directly binding). Under this analysis as well, Texas law must be upheld.

1. Texas's marriage laws do not violate the Equal Protection Clause.

"When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008). Accordingly, a "state law classification that neither burdens a fundamental right nor targets a suspect class will be upheld so long as it bears a rational relation to some legitimate end." *LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005); *see also Romer v. Evans*, 517 U.S. 620, 631 (1996).

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not give rise to any rights [of survivorship] and that no constitutional rights have been abrogated or violated in so holding.'") (citations omitted); *Morrison v. Sadler*, 821 N.E.2d 15, 19-20 (Ind. Ct. App. 2005) (describing *Baker* as "binding United States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution"); *Hernandez v. Robles*, 26 A.D.3d 98, 115 (N.Y. App. Div. 2005) ("Plaintiffs' equal protection claim is foreclosed by the Supreme Court's summary disposition in *Baker v. Nelson*."); *Andersen v. King County*, 138 P.3d 963, 999 (Wash. 2006) (en banc) ("[In *Baker*,] the same-sex union as a constitutional right argument was so frivolous as to merit dismissal without further argument by the Supreme Court") (Alexander, C.J., concurring).

But see, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) *aff'd in part, vacated in part on other grounds by* 447 F.3d 673 (9th Cir. 2006) (rejecting same-sex marriage claim on the merits); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (mem. op.) (holding portion of federal Defense of Marriage Act that restricts federal marriage benefits to male-female couples unconstitutional).

Every federal court of appeals to address the issue has held that homosexuals are not a politically powerless suspect or quasi-suspect class entitled to greater than rational basis scrutiny.[21] Without mentioning these precedents, J.B. asks this Court to reach a different conclusion. Pet. Br. at 30-32. He claims that "gays and lesbians have been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id*. at 32. But his only evidence for this groundbreaking conclusion is Texas voters' decision to uphold the traditional definition of marriage. *Id*. His reasoning appears to be that because some parts of the country have not fully embraced every aspect of the gay rights political project, homosexuals must be "politically powerless." But he argues elsewhere that developments in the law are trending rapidly toward advancement of the gay rights agenda. *Id*. at 21. And he is right about this. Whether one considers the many recent lower-court rulings finding a right to same-sex marriage, *see id*., or the recent repeal of the U.S. military's "Don't Ask, Don't Tell" policy, the remarkable rate at which the gay rights movement has recently succeeded in advancing its agenda belies any attempt to claim that gays and lesbians are "politically powerless."

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21. *See, e.g.*, *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) ("Neither the Supreme Court nor [the Fifth Circuit] has recognized sexual orientation as a suspect classification or protected group."); *High Tech Gays v. Defense Indus. Sec'y Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (holding that homosexuals are "not . . . a suspect or quasi-suspect class entitled to greater than rational basis scrutiny"); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (same). Furthermore, the Supreme Court has applied rational basis review when reviewing state laws alleged to discriminate against homosexuals. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996) (applying rational basis scrutiny to Colorado law affecting homosexuals and noting that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); *see also Lawrence v. Texas*, 539 U.S. 558 (2003) (applying rational basis scrutiny to Texas sodomy law).

Because there is no suspect class involved and no fundamental right at stake, *see infra* at 32-35, rational basis review is appropriate. *LeClerc*, 419 F.3d at 421. Rational basis review is "a paradigm of judicial restraint," under which courts must apply "a strong presumption of validity" to the challenged statute. *FCC v. Beach Commcn's, Inc.*, 508 U.S. 307, 314 (1993). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation omitted). Rational basis scrutiny is especially deferential when applied to state laws governing marriage. "Statutory regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States. *Sosna v. Iowa*, 419 U.S. 393, 395. Because "the institution of marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential." *Bruning*, 455 F.3d at 867 (applying rational basis review to claim for same-sex marriage).

Texans' decision to allow no exceptions to the traditional definition of legal marriage easily satisfies these highly deferential standards. To begin with, no other kind of relationship is similarly situated to the naturally procreative relationship between one man and one woman. The primary reason governments provide unique support for and enforcement of the special union of one man and one woman is to encourage stable family environments for procreation and the rearing of children by a mother and a father. This is more than merely "rational." It is "fundamental to the very existence and survival of the

race." *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is . . . *fundamental* to our very existence and survival.") (emphasis added); s*ee also Bruning*, 455 F.3d at 867-68; *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308-09 (M.D. Fla. 2005); *Morrison v. Sadler*, 821 N.E. 2d 15, 24-26 (Ind. Ct. App. 2005); *Lawrence*, 539 U.S. at 585 (2003) (O'Connor, J., concurring) (recognizing a "legitimate state interest" in "preserving the traditional institution of marriage").

Simply put, marriage between a man and a woman is a special relationship. Throughout centuries of human history in civilizations all over the world, societies have recognized—and their governments have given legal effect and enforcement to—the institution of marriage as exclusively the union of one man and one woman. And the reason is neither complicated nor controversial: The naturally procreative relationship between a man and a woman is uniquely deserving of special societal support and protection, both to encourage responsible procreation and to increase the likelihood that children will be raised by a mother and a father in the context of stable, long-term relationships. These legitimate state interests are uniquely promoted through governmental recognition and enforcement of marriage as the union of one man and one woman.

J.B.'s equal protection argument boils down to the contention that denying the rights of marriage to same-sex couples does not promote the State's interests in marriage; or put another way, that allowing same-sex couples to divorce would not harm the State's interests

in marriage. *See* Pet. Br. at 26-28. But these formulations turn the highly deferential rational basis inquiry on its head. *See Bruning*, 455 F.3d at 868 (rejecting argument that "'prohibiting protection for gay people's relationships' does not steer procreation into marriage"). A classification has a rational basis where "the inclusion of one group promotes a legitimate government purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Thus, the pertinent question is whether there is a rational basis on which to favor male-female couples over same-sex couples when allocating legal rights intended to promote stable environments for procreation and the rearing of children by a mother and a father. Providing the legal benefits of marriage to the union of one man and one woman—including the protections of divorce, such as community property rights and the right to spousal maintenance—uniquely promotes these legitimate state interests in a way that providing the same benefits to same-sex couples simply does not. *See Morrison*, 821 N.E.2d at 35 ("Regardless of whether recognizing same-sex marriage would harm th[e state's] interest . . . in encouraging opposite-sex couples to procreate responsibly and have and raise children within a stable environment . . . neither does it further it.").

Put another way, Texas law does not "single out gays and lesbians for disfavored treatment." *See* Pet. Br. at 22. Instead, Texas law singles out validly married unions of one man and one woman as uniquely deserving of the special legal protection and societal support associated with the legal institution of marriage. And it does this because encouraging and supporting the union of one man and one woman provides "fundamental"

benefits to society that no other relationship can provide. *Skinner*, 316 U.S at 541. Particularly under rational basis review—and indeed, under any standard of judicial scrutiny—Texans' decision to maintain the traditional definition of marriage in this State comports with the Fourteenth Amendment and must be upheld by this Court.[22]

2. There is no fundamental right under the Due Process Clause to a same-sex divorce.

None of the cases J.B. cites support the counter-intuitive notion that divorce is a fundamental right that exists independently of the fundamental right to marriage. In *Boddie v. Connecticut*, the Supreme Court held that divorce can implicate fundamental due process rights, but only because of the "basic importance in our society" of the traditional institution of marriage. 401 U.S. 371, 376 (1971); *see also Loving*, 388 U.S. at 12 (recognizing "the freedom to marry or not marry" because marriage is "fundamental to our very existence and survival"). Any right to divorce that may exist is derivative of, and contingent upon, the existence of a right to marriage. In other words, the "personal rights of the deepest significance" that divorce affects are the rights of traditional marriage. *Williams v. North Carolina*, 325 U.S. 226, 230 (1945).[23]

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22. J.B.'s citation of *Bonds v. Foster*, 36 Tex. 68 (1871), only begs the equal protection question. Pet. Br. at 23-24. In that case, this Court held that a ban on interracial marriage violated the Fourteenth Amendment. *Bonds* is only relevant if this Court agrees with J.B. that Texas's prohibition on same-sex marriages also violates the Fourteenth Amendment.

23. J.B. cites *Loving* (1967), *Boddie* (1971), and *Williams* (1945) for the proposition that "[c]hoices related to marriage constitute fundamental rights." Pet. Br. at 29. But no matter how expansively these cases are interpreted, their holdings about the fundamental nature of marriage and its associated rights cannot be stretched so far as to include same-sex marriages, because these cases pre-date *Baker v. Nelson* (1972). If *Baker* stands for anything, it is that the Supreme Court in 1972—essentially the same court that had already

Virtually every court to address the issue, including the U.S. Supreme Court, has held that there is no fundamental right to same-sex marriage under the U.S. Constitution. *See, e.g.*, *Baker*, 409 U.S. at 810; *Bruning*, 455 F.3d at 866-67; *Wilson*, 354 F. Supp.2d at 1307-08; *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005); *In re Kandu*, 315 B.R. 123, 144 (Bankr. W.D. Wash. 2004); *but see Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921 (N.D. Cal. 2010). And because there is no fundamental right to marry a person of the same sex, a same-sex divorce is not, from a constitutional perspective, "the adjustment of a fundamental human relationship" to which "all citizens [must be afforded] access." *Boddie*, 401 U.S. at 376; *see also Sosna v. Iowa*, 419 U.S. 393, 406-07 (1975).

J.B. essentially claims that the validity of his same-sex marriage in Massachusetts gives him a fundamental right to get divorced in any state of his choosing. Pet. Br. at 30. But Massachusetts cannot impose on all other states an obligation to recognize new fundamental rights simply by choosing to grant same-sex marriages. If Massachusetts could do so, then the federal Defense of Marriage Act, which gives the force of federal law to Texas's refusal to recognize out-of-state same-sex marriages, would be invalid. In other words, if the Constitution requires Texas to treat J.B. as if he is married simply because his marriage is valid in Massachusetts, then DOMA is unconstitutional. But every court to address this aspect of DOMA has upheld it as consistent with the Fourteenth Amendment. *See, e.g.*, *Wilson*, 354 F. Supp. 2d at 1303, 1307-09.

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decided *Boddie* and *Loving*—unanimously agreed that the fundamental rights of marriage long recognized by the Supreme Court do not extend to same-sex marriages.

The U.S. Supreme Court, not Massachusetts, determines which rights are deemed fundamental under the Due Process Clause. And J.B. does not even mention the exacting standards that apply when courts are urged to declare new fundamental due process rights, such as J.B.'s claimed right to same-sex divorce. The Supreme Court has mandated the "exercise of utmost care whenever we are asked to break new ground" in declaring fundamental rights. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). "A 'careful description' of the asserted fundamental liberty interest" is required. *Id*. And the carefully described right will only be deemed fundamental if it is (1) "deeply rooted in this Nation's history and tradition," and (2) "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Id*. at 721.

J.B.'s claim of a "right to divorce," Pet. Br. at 30, is stated much too broadly and, contrary to the Supreme Court's instruction in *Glucksberg*, does not carefully describe the right he is asking this Court to find. The specific right he seeks is the right to dissolve a same-sex marriage by divorce in a state that does not recognize the marriage. Such a right is not deeply rooted in our Nation's history and tradition or implicit in the concept of ordered liberty. In fact, no same-sex marriage rights meet those exacting criteria. No same-sex marriage rights existed in American tradition until a few years ago, and even today, only six out of fifty states permit same-sex marriages. At least thirty-nine states have statutes or constitutional amendments outlawing same-sex marriage and limiting the rights of marriage to male-female couples. To paraphrase *Glucksberg*, "the history of the law's treatment of

[same-sex marriage rights] in this country has been and continues to be one of the rejection of nearly all efforts to permit [them]." *Id*. at 728. "That being the case . . . the asserted 'right' . . . is not a fundamental liberty interest protected by the Due Process Clause." *Id*. J.B.'s attempt to fabricate a due process right to same-sex divorce must be rejected.

Finally, even if same-sex couples did have a constitutional right to have their out-of-state marriages terminated by the state in which they reside (and they do not), Texas's provision of suits to declare the marriage void achieves that result. *See* Pet. Br. at 37-38 (claiming that lack of access to divorce proceedings interferes with J.B.'s "right to be heard" under *Boddie*). J.B. has no marriage in Texas, and in that sense there is nothing for him to "be heard" about. Although Texas has no obligation to provide same-sex couples with any process respecting their out-of-state marriages, Texas law nonetheless allows J.B. to sue to have the voidness of his marriage declared by a court. That proceeding would legally dissolve the relationship, provide for property division, allow for enforcement of property-division agreements, and must be recognized in all fifty states. *See supra* at 19-22. If this case is truly about the parties' desire to move on with their lives—and not about same-sex marriage rights more broadly—there is no reason for the parties to defy Texas law by seeking divorce rather than pursuing a suit to declare the marriage void.

3. The constitutional right to travel is not implicated here.

The "right to travel" has been described by the Supreme Court in three ways: "[1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated

as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

Texas's marriage laws do not interfere with J.B.'s right to travel. Only the third element of that right is conceivably implicated here, and there is no dispute that Texas law treats J.B. and H.B. just like any other same-sex couple in Texas. The right-to-travel analysis should end there.

J.B.'s claim appears to be that he should be treated like Texans who are legally married (i.e., male-female couples), rather than like Texan same-sex couples. Pet. Br. at 34. But this is merely a restatement of his equal protection argument, repackaged as a right-to-travel claim in an attempt to raise up the level of scrutiny. The real question is whether Texas law's distinction between same-sex couples and male-female couples violates the Equal Protection Clause. As explained above, rational basis scrutiny applies to that question, and Texas law easily satisfies that deferential standard. *Supra* at 27-32.

J.B. can point to no evidence that section 6.204 of the Family Code or article I, section 32 of the Texas Constitution were enacted with the goal of discouraging anyone from moving to Texas. In all the cases J.B. cites, the state laws the Supreme Court abrogated as violations of the right to travel purposefully disadvantaged new residents as compared to long-term residents, thereby discouraging migration. *See Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) (invalidating law restricting civil service preferences to veterans who were New

York citizens before they joined the military); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (invalidating law restricting access to county hospital to those who had resided in Arizona longer than one year); *Saenz*, 526 U.S. at 511 (1999) (invalidating California law limiting welfare benefits available to newly arrived residents). Texas's marriage laws bear no resemblance to these measures, which either discriminate against new residents or favor long-term residents.

Whatever the scope of the right to travel, there is certainly no constitutional right to be treated by the laws of one's new state of residence just the way one was treated by the laws of a previous state of residence. This is essentially the right J.B. is claiming when he complains that Texas's marriage laws "deter migration." Pet. Br. at 34. Of course, Texans are deterred from moving to California or New York because taxes are higher there, but that does not implicate the right to travel. A professional in one state may be deterred from moving to a state that more strictly regulates his profession. But again, that gives rise to no right to travel claim. Likewise, same-sex couples who get married in a state that allows such marriages may be deterred from moving to states that do not recognize same-sex marriage. But that does not mean that all states are bound by the "right to travel" to treat those couples as if they are validly married.

At bottom, the right to travel prohibits states from *penalizing* new residents *because* they are new residents. *See Maricopa County*, 415 U.S. at 258. It does not prohibit states

from treating all similarly situated citizens alike no matter how long they have resided in the state, which is what Texas's marriage laws do.

4. The Full Faith and Credit Clause does not require Texas to grant same-sex divorces.

The U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause also expressly gives Congress the power to "prescribe . . . the Effect" of a state's acts and records in another state. *Id.* Congress did exactly that when it passed the Defense of Marriage Act (DOMA), which provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C; *see Wilson*, 354 F. Supp. 2d at 1303 ("Congress' actions in adopting DOMA are exactly what the Framers envisioned when they created the Full Faith and Credit Clause."). DOMA clarifies that Texas has no constitutional obligation to recognize or give effect to an out-of-state same-sex marriage. By adopting section 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution, Texas exercised the right that DOMA guarantees to all states, a right to refuse recognition to out-of-state same-sex marriages.[24]

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24. In *Massachuetts v. USDHHS*, the district court declared unconstitutional only the part of DOMA that restricts the federal benefits of marriage to opposite-sex couples. 698 F. Supp. 2d 234 (D. Mass. 2010). That

Furthermore, even apart from DOMA, Texas is under no obligation to recognize out-of-state marriages that run afoul of Texas's clearly stated public policy on marriage. "The Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Baker v. Gen. Motors*, 522 U.S. at 233 (distinguishing between the "exacting" full faith and credit due judgments and the lesser obligations due other out-of-state acts and laws, which are subject to a "public policy exception"). The U.S. Supreme Court has specifically noted that a public-policy exception applies to the recognition of out-of-state marriages. *See Loughran v. Loughran*, 292 U.S. 216, 223 (1934) ("Marriages not polygamous or incestuous, *or otherwise declared void by statute*, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction.") (emphasis added). Thus, Texas has no obligation to deviate from its public policy regarding marriage just because six other states have chosen to grant same-sex marriages. S*ee also K.D.F. v. Rex*, 878 S.W.2d 589, 595 (Tex.1994) ("We do not extend comity to the laws of other states if doing so would result in a violation of Texas public policy.").

Without citing any case law to support it, J.B. proffers a novel interpretation of the Full Faith and Credit Clause, under which not even Congress can make exceptions to a rigid rule requiring all states to give recognition to same-sex marriages created in other states. Pet. Br. at 39-41. Though he cites a handful of law review articles in support of this theory, J.B.

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case is on appeal in the First Circuit. The other part of DOMA, which permits states to deny effect to out-of-state same-sex marriages, was not at issue in that case and has never been held unconstitutional.

fails to mention that the Supreme Court has roundly rejected this view of the Clause. The Court has long held that "Full Faith and Credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Nevada v. Hall*, 440 U.S. 410, 423-24 (1979) (quoting *Pacific Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 504-05 (1939)). "Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state." *Williams v. North Carolina*, 317 U.S. 287, 296 (1942). In sum, under well-established Supreme Court precedent, "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Hall*, 440 U.S. at 422. Thus, Texas has no obligation, constitutional or otherwise, to recognize an out-of-state same-sex marriage for any reason, because such a marriage "is contrary to the public policy of this state and is void in this state." TEX. FAM. CODE § 6.204(b).

III. IN THIS APPEAL OF THE DISTRICT COURT'S DENIAL OF THE STATE'S PLEA TO THE JURISDICTION, ALL JURISDICTIONAL ARGUMENTS SHOULD BE CONSIDERED BY THE COURT OF APPEALS AND THIS COURT.

The district court's order denying the State's plea to the jurisdiction declared that section 6.204 of the Family Code and article I, section 32 of the Texas Constitution violate the Equal Protection Clause. CR82. The State immediately appealed that order as of right, under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). CR85. After the State filed its notice

of appeal, J.B. proposed findings of fact and conclusions of law to the district court in an effort to replace the district court's initial order with something that reflected all the arguments J.B. intended to make on appeal. 2 Supp. CR11-23. The district court signed J.B.'s proposed findings and conclusions without amendment. 2 Supp. CR27-35. The State did not respond to J.B.'s proposed findings and conclusions, and did not include them in the clerk's record on appeal, because the State's notice of appeal "stay[ed] all other proceedings in the trial court pending resolution of that appeal." TEX. CIV. PRAC. & REM. CODE § 51.014(b).

None of this procedural history need concern this Court. The issue in this appeal is whether the district court has jurisdiction over a suit for divorce involving a same-sex couple. This Court has previously instructed that issues of subject-matter jurisdiction may be addressed at any time, including for the first time on interlocutory appeal. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000) (reversing a court of appeals' determination that it could not review jurisdictional issues on interlocutory appeal that were not addressed by the trial court); *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004) (following *Gibson* in the context of an interlocutory appeal). Thus, because the issue in this appeal is subject matter jurisdiction, all arguments are on the table, whether they were raised below or addressed by courts below.[25]

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25. As J.B. correctly notes, a split exists in the courts of appeals on the scope of appellate review when the State appeals the denial of a plea to the jurisdiction under section 51.014(a)(8). *See* Pet. Br. at 44. This Court has granted the State's petition for review in *Rusk State Hosp. v. Black*, No. 10-0548, which raises that issue and is set for oral argument on October 6, 2011. The State's position on the scope of appellate review

Because jurisdictional issues can be raised at any time, including in an interlocutory appeal, it does not matter whether the district court's findings of fact and conclusions of law are a part of the record (they are not). And it does not matter whether the court of appeals considered all of J.B.'s constitutional arguments (it did not, but should have). On *de novo* review of a jurisdictional issue, this Court has the authority to reject all arguments J.B. makes in this appeal, and it should do so.

PRAYER

The Court should grant the petition for review and affirm the court of appeals' decision that a same-sex divorce petition must be dismissed for want of jurisdiction.

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on appeals under section 51.014(a)(8) is fully explained in the State's briefing in *Rusk*.

Respectfully submitted,

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Appendix

Supreme Court, U.S.
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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD JOHN BAKER, *et al.*, *Appellants*,

—v.—

GERALD R. NELSON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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INDEX

PAGE

JURISDICTIONAL STATEMENT

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Questions Presented 3

Statement of the Case 3

How the Federal Questions Were Raised 6

The Questions Are Substantial 6

I. Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses 11

II. Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments 18

CONCLUSION 19

APPENDIX

Statutes Involved
Chapter 517, Minnesota Statutes 1a

Alternative Writ of Mandamus 10a

PAGE

Order Quashing the Writ 12a

Amended Order, Findings and Conclusions 14a

Opinion of the Minnesota Supreme Court, Hennepin County 18a

TABLE OF AUTHORITIES

Cases:

Bates v. City of Little Rock, 361 U.S. 516 (1960) 12

Boddie v. Connecticut, 401 U.S. 371 (1971) 11, 12, 13, 19

Cohen v. California, 403 U.S. 15 (1971) 14

Griswold v. Connecticut, 381 U.S. 479 (1965) 11, 12, 13, 14, 18, 19

Jones v. Hallihan, W-152-70 (Ct. Apps. Ky. 1971) 10

Loving v. Virginia, 388 U.S. 1 (1967) 11, 12, 13, 14, 15, 16, 18, 19

McLaughlin v. Florida, 379 U.S. 184 (1964) 13, 16, 18

Meyer v. Nebraska, 262 U.S. 535 (1923) 11, 12, 13

Mindel v. United States Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970) 18

Reed v. Reed, 92 S. Ct. 251, 30 L. ed.2d 225 (1971) 13, 16, 17, 18

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 17

Shapiro v. Thompson, 394 U.S. 618 (1969) 16

Shelton v. Tucker, 364 U.S. 479 (1960) 14

Skinner v. Oklahoma, 316 U.S. 535 (1942) 11, 12, 13

Street v. New York, 394 U.S. 576 (1969) 14

PAGE

Constitutional Provisions:

United States Constitution

First Amendment 5, 6

Eighth Amendment 5, 6

Ninth Amendment 3, 5, 6, 13, 19

Fourteenth Amendment 3, 5, 6, 11, 13, 17, 18, 19

Rule:

Minn. R. Civ. P. 52.01 5

Federal Statute:

28 U.S.C. §1257(2) 2

State Statute:

Minnesota Statutes Chapter 517 ..... 2, 4, 6, 13

Other Authorities:

Abrahamsen, Crime and the Human Mind 117 (1944) 9

Churchill, Homosexual Behavior Among Males 19 (1969) 8

Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969 9

Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947) 7

Freud, 107 Am. J. of Psychiatry 786 (1951) (reprinted) 10

PAGE

Hart, Law, Liberty and Morality 50 (1963) 9

James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902) 8

KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) 7

Westermarck, 2 Origin and Development of the Moral Idea 484 (1926) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

[2] Appellant McConnell is also petitioner before this Court in *McConnell* v. *Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently percipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[8]

[8] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. Kinsey, Sexual Behavior in the Human Male (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. Abnormal and Social Psych. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homosexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

"Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.[4] This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

[4] See, e.g., *Jones* v. *Hallihan*, W-152-70 (Ct. Apps. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Meyer* v. *Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protection component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra,* pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut*, *supra*.

"Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia*, *supra*; *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

> denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.[8]

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranted in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut*, 381 U.S. 470, 491-492 (Goldberg, J., concurring); see also, *Mindel* v. *United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

[8] The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed*, *supra*; *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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