

No. 11-0114

**In the
Supreme Court of Texas**

STATE OF TEXAS,
Petitioner,

v.

ANGELIQUE S. NAYLOR AND SABINA DALY,
Respondents.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

**PETITIONER'S SUPPLEMENTAL BRIEF ADDRESSING
RECENT U.S. SUPREME COURT DECISIONS**

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STATEMENT OF THE CASE

Nature of the Case:

Angelique Naylor sued Sabina Daly for divorce. CR91-102. Daly moved to dismiss for lack of jurisdiction and asked the court to declare the marriage void. CR104-06. When the State learned that Daly had abandoned her arguments and that the court intended to grant a divorce, the State immediately intervened. CR240-50. Daly moved to strike the State's intervention. CR251-55. The State filed a plea to the jurisdiction. CR270-78. Naylor responded, arguing that the Family Code permits same-sex divorce and that the U.S. Constitution requires that same-sex divorces be granted. CR364-78.

Trial Court:

The Honorable Scott Jenkins
126th District Court, Travis County,
Texas

Trial Court Disposition:

The trial court declined to rule on the State's plea to the jurisdiction or on Daly's motion to strike the State's intervention. RR4:10-16. The court granted the divorce without explanation and issued a final decree of divorce on March 31, 2010. CR404-26.

Parties in Court of Appeals:

Petitioner: State of Texas
Respondents: Angelique Naylor and
Sabina Daly

Court of Appeals:

Third Court of Appeals, Austin,
Texas

Court of Appeals's Disposition:

The court of appeals (Henson, J.) held that the State's intervention was untimely and dismissed the appeal for want of jurisdiction. *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. filed & mand. pending). The court also stated that Texas law may allow district courts to grant same-sex divorces. *Id.* at 441-42.

STATEMENT OF JURISDICTION

This Court has jurisdiction for at least three reasons. First, this case involves the construction and validity of section 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution. *See* TEX. GOV'T CODE § 22.001(a)(3); TEX. R. APP. P. 56.1(a)(3). Second, this case creates a split among courts of appeals on the question of whether a trial court has subject-matter jurisdiction over a petition for a same-sex divorce. TEX. GOV'T CODE § 22.001(a)(2); TEX. R. APP. P. 56.1(a)(2). *Compare In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App.—Dallas 2010, pet. filed) (“We hold that Texas district courts do not have subject-matter jurisdiction to hear a same-sex divorce case.”), and *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, at *2 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.) (“A Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person.”), with *State v. Naylor*, 330 S.W.3d 434, 441-42 (Tex. App.—Austin 2011, pet. filed & mand. pending) (stating that Texas law can be interpreted “in a manner that would allow the trial court to grant a divorce in this case”). Third, the court of appeals’ error is important to the jurisprudence of

the State. TEX. GOV'T CODE § 22.001(a)(6); TEX. R. APP. P. 56.1(a)(5)-(6).

As the Dallas Court of Appeals has recognized: “Because this is an issue that is likely to arise in other cases, prompt appellate resolution of the subject-matter-jurisdiction question will have broad public benefits.”

Marriage of J.B., 326 S.W.3d at 661-62.

ISSUES PRESENTED

1. Did the State properly intervene in this divorce suit by filing a petition in intervention in the district court immediately after Daly abandoned her arguments in defense of Texas law?
2. Does a district court have jurisdiction over a divorce suit involving a same-sex couple who obtained a marriage license in another state?
3. 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?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

On June 26, 2013, the United States Supreme Court decided *United States v. Windsor*, 133 S.Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013). This Court requested supplemental briefing addressing what legal impact, if any, these decisions have on the issues raised in this case. The State respectfully submits this brief in response to that request.

STATEMENT OF FACTS

The State incorporates by reference the Statement of Facts in its Brief on the Merits. *See* State’s Br. at 3-8.

SUMMARY OF ARGUMENT

The U.S. Supreme Court’s decision in *United States v. Windsor* reaffirms the sovereign authority of each State to define marriage and make laws concerning the marital status of its residents. While the Court’s *holding* invalidates Congress’s decision to use the traditional definition of marriage for all federal-law purposes, the Court’s *reasoning* relies in large part on Section 3’s interference with the States’ ability to define and regulate marriage within their borders. Any attempt to use *Windsor*’s holding to attack state laws that limit marriage and its attendant rights—such as divorce—to the union of one man and one woman would contravene the principles of federalism enunciated in the *Windsor* decision.

Respondents may argue that *Windsor* prohibits the States, no less than the federal government, from refusing to recognize other States’ same-sex marriages. That is not a tenable reading of *Windsor*. Unlike the federal government, the States have long had the prerogative to

deny recognition to out-of-state marriages that violate the State's public policy. *Windsor* does not empower one State to force every other State to recognize the marriage licenses it chooses to issue. Only by ignoring *Windsor's* extensive reliance on the States' primary authority over marriage could *Windsor* be employed to attack Texas's longstanding marriage policy.

In *Hollingsworth v. Perry*, the U.S. Supreme Court vacated the Ninth Circuit's decision and remanded for dismissal of the appeal for lack of jurisdiction. The Court did not address the constitutionality of the traditional definition of marriage chosen by the people of California. *Hollingsworth* has no impact on this case.

ARGUMENT

I. **WINDSOR'S HOLDING IS LIMITED TO SECTION 3 OF THE FEDERAL DEFENSE OF MARRIAGE ACT, WHICH IS NOT AT ISSUE IN THIS CASE.**

The five-Justice majority in *Windsor* concluded that Section 3 of the federal Defense of Marriage Act (DOMA) violates the Fifth Amendment. 133 S.Ct. at 2695-2696. Section 3 defines marriage, for purposes of federal law, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. Section 3 has played no

role in Texas's defense of its marriage laws in this litigation, so the Court's holding regarding Section 3 has no direct impact on this case.

Section 2 of federal DOMA, which codifies the longstanding principle that States may refuse to recognize same-sex marriages performed in other States, was not at issue in *Windsor*. See 28 U.S.C. § 1738c. Section 2 remains the “supreme Law of the Land,” U.S. CONST. art. VI, and it explicitly authorizes states to decline to give effect to out-of-state same-sex marriages. *Id.* Even without Section 2, Texas has a longstanding right to deny recognition to out-of-state marriages that contravene the State's public policy. 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); *K.D.F. v. Rex*, 878 S.W.2d 589, 595 (Tex. 1994) (“Texas will extend comity to the law of a cooperative jurisdiction so long as that law does not violate Texas public policy.”). The people of Texas have exercised their sovereign prerogative to recognize and give effect only to marriages in the time-honored understanding of that institution, that is, a legal union of one man and one woman. That

valid decision prevents a same-sex couple from obtaining a decree of divorce in this State. *See* State’s Br. at 26-28.

II. **WINDSOR REAFFIRMS THE SOVEREIGN RIGHT OF STATES TO DEFINE AND REGULATE MARRIAGE WITHIN THEIR BORDERS.**

Windsor casts no doubt on Texas’s marriage laws. To the contrary, *Windsor* reinforces the well-established rule that “regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.” 133 S.Ct. at 2691 (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). According to the majority opinion, “[t]he definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations,” *id.*, and “[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens,” *id.* (citing *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). These principles lead the Court to view Section 3’s federal definition of marriage as an “unusual deviation” from the federal government’s “usual tradition of recognizing and accepting state definitions of marriage.” *Id.* at 2693. This “unusual character” of Section 3 caused the majority to use “careful consideration” in examining its constitutionality. *Id.* at 2692. Though the Court does not say so explicitly, these passages suggest that Section

3's interference with the States' traditional role in defining the marriage relationship subjected the statute to heightened judicial scrutiny.

Whatever the nature or level of that scrutiny, it does not apply to Texas's marriage laws. In contrast to Section 3's "unusual deviation" from the federal government's traditional reliance on state marriage laws, Texas's formal adoption of the traditional definition of marriage and Texas's codification of its refusal to recognize out-of-state same-sex marriages were a normal exercise of the State's well-recognized sovereign authority over domestic relations. Like New York's decision to recognize same-sex marriage, Texas's codification of its traditional marriage policy occurred "after a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage." 133 S.Ct. at 2689. The *Windsor* majority appears to approve of a State's decision to engage in a "statewide deliberative process" to develop state policy on the subject of same-sex marriage. *Id.* Nothing in the majority opinion suggests that the Court considers a State's deliberative political process invalid—and in need of judicial correction—if it does not result in a decision to recognize same-sex

marriage. Indeed, a court-imposed federal constitutional definition of marriage would short-circuit what the Court held up as an important political process within the States, trampling on core values of federalism undergirding the *Windsor* decision. The Court's characterization of the sentiments of traditional-marriage proponents further implies that, in the Court's view, theirs is a perspective that should remain part of an ongoing political conversation within the States:

For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged.

Id. at 2689. These are not the words of a Court that thinks advocates of the traditional definition of marriage within the States seek to impose invidious, constitutionally suspect discrimination on their fellow citizens.

While the Court recognized the validity of a political resolution within the States concerning same-sex marriage, it took issue with the federal government's attempt to "put a thumb on the scales" in favor of one side in the debate. *Id.* at 2693-2694. In the majority's view, *federal*

involvement in the definition of marriage by way of Section 3 was uniquely onerous from a constitutional perspective. *Id.* It was Section 3’s departure from the traditional mechanisms through which marriage policy is created—not the substance of its definition of marriage—that singled out Section 3 for constitutional scrutiny. The Court criticizes Section 3 for its lack of an “identified connection to any particular area of federal law.” *Id.* at 2694. Unlike federal law, however, Texas law has always been concerned with the regulation of domestic relations, including the definition of marriage and the extent to which the State will recognize marriages performed in other States. And unlike the federal government, Texas has always been empowered to define and regulate marriage under our Constitutional system. Article I, section 32 of the Texas Constitution and section 6.204 of the Texas Family Code exercise that sovereign power in a way that simply codifies the traditional understanding of marriage that has always been the law in this State. *See, e.g., Littleton v. Prange*, 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied) (recognizing the invalidity of same-sex marriage in Texas prior to the 2003 enactment of section 6.204 of the Family Code).

Unlike the federal government’s selection of a federal definition of marriage, a State’s choice of the traditional definition of marriage is no “unusual deviation from the usual tradition.” *Windsor*, 133 S.Ct. at 2693. The “usual tradition” is for States to define marriage as a union of one man and one woman and to refuse recognition to out-of-state marriages that violate this strong public policy. *See* State’s Br. at 48-50. The Texas marriage laws challenged by Respondents in this case are exactly the kind of marriage regulations that, under *Windsor*, are emphatically the province of the States. As a result, the searching constitutional examination applied in *Windsor* to Section 3 of federal DOMA has no place in this case.

III. RESPONDENTS’ EQUAL-PROTECTION AND DUE-PROCESS CLAIMS FIND NO SUPPORT IN *WINDSOR*.

Respondents have levied both an equal-protection and a due-process challenge against the Texas laws that deny them access to divorce proceedings. Neither of those claims finds support in *Windsor*. Whether couched in equal-protection or due-process terms, the *Windsor* majority objects to Section 3 of federal DOMA because of its alleged purpose “to injure the very class New York seeks to protect.” *Id.* No such purpose underlies Texas’s marriage laws. Those laws are directed

toward Texas residents, not toward residents of other States. As *Windsor* recognizes, the people of Texas have a sovereign right to define marriage for themselves within their State. They did so by affirming the traditional definition of marriage that had always existed in this State. The purpose of that definition is to support and recognize the unique bond between husband and wife, the fundamental building block of human civilization that provides a stable environment for procreation and promotes the rearing of children by their mother and their father. See State's Br. at 44-46. Unlike Section 3, which the Court found was designed to "demean those persons who are in a lawful same-sex marriage," 133 S.Ct. at 2995, Texas marriage laws applied to residents of Texas cannot possibly "demean" a "lawful same-sex marriage," because there are no lawful same-sex marriages in Texas, and there never have been. In other words, article I, Section 32 of the Texas Constitution and section 6.204 of the Family Code made no one worse off, because same-sex marriages were never entitled to any recognition in Texas. Even if one thinks of Texas's marriage laws as "injuring" same-sex couples, Respondents have offered no evidence that imposing injury or expressing "animus" against same-sex couples—as opposed to

preserving and promoting the traditional institution of marriage—was *the purpose* of those laws.

In voting to send Texas’s constitutional definition of marriage to the voters, the Legislature made abundantly clear that the purpose of the State’s marriage laws is to preserve and promote the special legal status that has always been afforded to traditional marriage, not to express irrational “animus” against same-sex couples:

A traditional marriage consisting of one man and one woman is the basis for a healthy, successful, stable environment for children. It is the surest way for a family to enjoy good health, avoid poverty, and contribute to their community. The sanctity of marriage is fundamental to the strength of Texas’ families, and the state should ensure that no court decision could undermine this fundamental value.

HOUSE RESEARCH ORGANIZATION, H.J.R. 6 Bill Analysis, 79th Leg., R.S., April 25, 2005. The Legislature’s statement of intent reflects former Justice O’Connor’s observations that “preserving the traditional institution of marriage” is a “legitimate state interest” and “other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (O’Connor, J., concurring). Any claim that Texas’s marriage laws were motivated by something other than a desire to preserve and

promote the traditional institution of marriage is a bare assertion that is contradicted by the record.

In equal-protection terms, the rule announced in *Windsor* is that once a state has decided to recognize the same-sex marriages of its residents, the federal government may not treat those same-sex marriages differently from male-female marriages. For two reasons, this rule provides no support for Respondents in this case. First, it requires only the federal government—not the States—to recognize same-sex marriages that are valid in the State of residence. Any other result would allow one state to project its marriage laws into all other States as its residents emigrate across the country, making a mockery of the principle, recognized in *Windsor*, that each State has authority to define and regulate marriage within its borders. This improper projection of one State’s laws into another would be further complicated by the absence of a residence requirement for marriage in States such as Massachusetts. *See* Mass. Gen. Laws ch. 207, § 11-13 (repealed 2008) (former residence requirement now repealed). Residents of Texas or any other State need spend only three days in Massachusetts to obtain a same-sex marriage in that state. Mass. Gen. Laws ch. 207, §

19. If Texas were forced to recognize Massachusetts same-sex marriages, then as a practical matter Texas's definition of marriage would be eviscerated.

Second, under *Windsor*, the federal government must recognize same-sex marriages due to the “recognition, dignity, and protection” afforded those marriages *by the couple's State of residence*. Windsor was married in Canada. Under the majority's reasoning, it was not Windsor's Canadian marriage license that entitled her marriage to federal recognition. Rather, the decision of New York—Windsor's State of residence—to recognize her marriage gave rise to constitutional protections. Twice the majority criticizes Section 3 as depriving Windsor and her partner of equal standing “in their community”—the political community of New York, which has elected to recognize their marriage as the equivalent of a traditional marriage. 133 S.Ct. at 2691-2692, 2694. Nowhere does the Court's opinion indicate that same-sex couples have a constitutional right to be treated like male-female couples even in communities that have elected to preserve the traditional definition of marriage.

Like Windsor, Respondents were married in a jurisdiction that recognizes same-sex marriages. But under the Supreme Court’s reasoning, the place of celebration is not what bestows constitutional protection on same-sex relationships. Certainly nothing in the majority opinion indicates that Windsor’s Canadian marriage would have been entitled to federal recognition had she moved to Alabama immediately after obtaining it. Throughout its opinion, the Court emphasizes New York’s decision to recognize same-sex marriages as the triggering event that entitled Windsor’s relationship to federal recognition. *E.g., id.* at 2689, 2694, 2695-96. Yet unlike Windsor, Respondents reside in Texas, where their marriage is not recognized. Unlike Windsor, their claim is not that the law of their state of residence entitles their Massachusetts marriage to constitutional recognition. Their claim is that the law of the State where their marriage was created, Massachusetts, follows them wherever they go and requires any State in which they reside to recognize their marriage regardless of that State’s marriage policies. There is no legal support—in *Windsor* or elsewhere—for this staggering proposition. *See Nevada v. Hall*, 440 U.S. 410, 423-24 (1979) (“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 with it.”).

* * *

In sum, Respondents’ attempt to project Massachusetts’ marriage law into Texas finds no support in *Windsor*. Indeed, it flies in the face of *Windsor*’s repeated affirmation of the States’ primary authority to define and regulate marriage within their borders. One passage in particular illuminates this point:

In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who [sought] a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

133 S.Ct. at 2692 (citations and quotations omitted). The very same could be said of the decision of the people of Texas and their elected representatives, who voted overwhelmingly to affirm the traditional understanding of marriage and to recognize only marriages between one man and one woman. The people of Texas have the same right as the people of Massachusetts or New York to have a voice in shaping

their State's destiny. And Texans have spoken clearly. Their voice commands that only the union of one man and one woman will be recognized as a marriage in Texas. This Court should reject the invitation to substitute the rule of judges for the will of the people. The Supreme Court's decision in *Windsor* does not require otherwise.

IV. *HOLLINGSWORTH V. PERRY* DOES NOT IMPACT THIS CASE.

In *Hollingsworth v. Perry*, 133 S.Ct. 2652, the Supreme Court vacated the Ninth Circuit's decision and remanded with instructions to dismiss the appeal of supporters of California's Proposition 8, a ballot initiative that defined marriage in California as the union of one man and one woman. The Court ruled that the initiative supporters lacked standing to appeal the district court ruling enjoining Proposition 8 even though the state government refused to support the law. The Supreme Court's ruling does not address the merits of the challenge to Proposition 8. It has no impact on this case.

PRAYER

The State respectfully requests that the Court grant the petition for review, reverse the judgment of the court of appeals, permit the State's intervention, and render judgment dismissing the divorce petition for want of jurisdiction.

Respectfully submitted,

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On July 18, 2013, this Petitioner's Supplemental Brief Addressing Recent U.S. Supreme Court Decisions was served via CaseFileXpress on:

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In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 3,062 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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