No. 11-0024

IN THE SUPREME COURT OF TEXAS

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

J.B.

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	This is a suit for divorce involving a same-sex couple that was legally married in Massachusetts before moving to Texas. The State of Texas intervened and filed a plea to the jurisdiction.
District Court:	The Honorable Tena Callahan, 302nd Family District Court, Dallas County.
District Court's Disposition:	The district court entered an order striking the State's intervention and denying its plea to the jurisdiction. (*See* Appendix at Tab A). After J.B. timely requested findings of fact and conclusions of law, the district court entered findings of fact and conclusions of law and an amended order. (*See* Appendix at Tabs B, C).
Parties in the Court of Appeals:	State (Appellant); J.B. (Appellee).
Court of Appeals:	Fifth Court of Appeals; Justice FitzGerald, joined by Justices Bridges and Fillmore. *In the Matter of the Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed 2/17/2011). (Opinion and judgment attached, Appendix at Tabs D, E).
Court of Appeals' Disposition:	The court of appeals granted mandamus regarding the striking of the State's intervention, reversed the denial of the State's plea to the jurisdiction, and remanded with instruction to dismiss for lack of subject-matter jurisdiction. The court then denied J.B.'s motion for *en banc* reconsideration. No motions for rehearing are pending in the court of appeals.

STATEMENT OF JURISDICTION

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

This Court also has jurisdiction because the court of appeals construed section 6.204 as stripping district courts of jurisdiction, which conflicts with longstanding Texas family law regarding jurisdiction in petitions for divorce, and with this Court's prior decisions regarding statutory construction. *See* Tex. Gov't Code § 22.001(a)(2); *see also* Tex. R. App. P. 56.1(a)(2). In *City of DeSoto v. White*, for example, this Court held statutes are presumptively nonjurisdictional, and that this presumption can be overcome only by a showing of clear legislative intent—such as the inclusion of language explicitly identifying the statute as jurisdictional. 288 S.W.3d 389, 393–94 (Tex. 2009). Section 6.204 includes no language identifying it as jurisdictional. *See* Tex. Fam. Code § 6.204, *attached at* Appendix, Tab F.

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

ISSUES PRESENTED

1. Is a statute such as section 6.204 of the Texas Family Code properly construed as stripping Texas district courts of jurisdiction, where there is no language explicitly identifying the statute as jurisdictional, and where the statute need not be jurisdictional to accomplish its objective?

    a. If not jurisdictional, is section 6.204 nevertheless properly construed as preventing same-sex couples residing in Texas, who were legally married in another state, from obtaining a divorce in Texas? (unbriefed subissue)

2. Whether jurisdictional or not, does section 6.204 of the Texas Family Code violate the U.S. Constitution if it is construed as preventing a same-sex couple that was legally married in another state from obtaining a divorce in Texas?

3. Texas Rule of Appellate Procedure 28.1(c) permits a district court to enter findings of fact and conclusions of law in an appeal from an interlocutory order, and Rule 29.5 permits the district court to amend the order complained of on appeal. Does the automatic stay triggered by an interlocutory appeal, under section 51.014(b) of the Civil Practice & Remedies Code, nullify Rule 28.1(c) and Rule 29.5? (unbriefed issue)

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THE STATE OF TEXAS,

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

PETITION FOR REVIEW

To The Honorable Supreme Court of Texas:

Petitioner J.B. submits this petition for review of the decision of the Fifth Court of Appeals at Dallas. The court of appeals erroneously construed section 6.204 of the Texas Family Code as depriving district courts of jurisdiction to hear certain petitions for divorce, then compounded its error by holding this application of the statute does not violate Equal Protection.

STATEMENT OF FACTS

The court of appeals correctly stated the nature of the case. J.B. and H.B.—two men—were legally married in Massachusetts on September 22, 2006. 1 CR 8. The couple moved to Dallas County, Texas, in 2008. 1 CR 5, 32. On January 21, 2009, J.B. filed an uncontested petition for divorce in the 302nd District Court in Dallas County.[1] 1 CR 5–6.

The Office of the Attorney General ("the State") intervened in the divorce purportedly "to defend the constitutionality of Texas and federal law," though neither J.B. nor H.B. had challenged the constitutionality of any Texas or federal law. 1 CR 13–20. The State did not dispute the validity of J.B.'s marriage under Massachusetts law, but filed a plea to the jurisdiction asserting section 6.204 of the Texas Family Code strips the district court of jurisdiction to hear the petition for divorce. 1 CR 22–24. J.B. and amicus opposed the State's plea, arguing the court had jurisdiction because section 6.204 applied to same-sex marriage, not to divorce. 1 CR 32–39; 3 Supp. CR 6–11.

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

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

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

J.B. timely requested findings of fact and conclusions of law on October 20, 2009, asserting in his proposed findings of fact and conclusions of law that to construe section 6.204 as preventing same-sex couples legally married in another state from obtaining a divorce in Texas would violate numerous provisions of the U.S. Constitution in addition to the Equal Protection Clause. 2 Supp. CR 11–23. The State did not respond to J.B.'s proposed conclusions regarding the constitutionality of construing section 6.204 as preventing same-sex divorce; instead, the State contended only that the district court could not enter findings of fact and conclusions of law because the State's notice of appeal stayed all proceedings in the district court. 2 Supp. CR 3–9. On December 7, 2009, the district court signed and

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[2] The district court also *sua sponte* struck the State's intervention. 1 CR 82. The State petitioned for mandamus and the court of appeals consolidated the petition for mandamus regarding intervention with the interlocutory appeal of the denial of the State's plea to the jurisdiction. Op. at 660. J.B. believes the State had no basis for intervening in this private divorce action, but does not challenge the court of appeals' ruling that the district court cannot strike the intervention *sua sponte*.

entered J.B.'s proposed findings of fact and conclusions of law. 2 Supp. CR 27–34, *attached at* Appendix, Tab B.

The court also entered an amended order to clarify that section 6.204—to the extent it purports to deny J.B. access to divorce—violates other rights in addition to the right to equal protection, under the U.S. Constitution. 2 Supp. CR 37–38, *attached at* Appendix, Tab C. The amended order also removed the language regarding Article I, section 32(a) of the Texas Constitution. *See id.*

After oral argument, the Fifth Court of Appeals vacated the amended order and disregarded the district court's findings of fact and conclusions of law, holding they were entered in error because the State's notice of interlocutory appeal had stayed proceedings in the district court. *In the Matter of the Marriage of J.B. and H.B.*, 326 S.W.3d 654, 662, 681 (Tex. App.—Dallas 2010, pet. filed 2/17/2011), *attached at* Appendix, Tab D (hereinafter "Op."). The court of appeals then reversed the district court's denial of the plea to the jurisdiction, construing section 6.204 as depriving the district court of jurisdiction to hear J.B.'s petition for divorce. Op. at 665–67. Finally, the court of appeals held its construction of section 6.204 did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Op. at 681.

The court of appeals denied J.B.'s motion for *en banc* reconsideration on December 8, 2010. It again refused to consider J.B.'s other constitutional challenges and disregarded the district court's findings of fact and conclusions of law, claiming J.B. had not presented those challenges to the district court and that the State had "had no opportunity to respond to them in that court." Op. at 681. By this timely petition, J.B. seeks this Court's review of the court of appeals' decision.

SUMMARY OF THE ARGUMENT

This Court should grant review because this case involves questions of great importance to Texas state law, which likely will recur with increasing frequency until this Court provides guidance. Over 28% of the U.S. population lives in a jurisdiction where same-sex marriage or its equivalent is permitted. Texas is one of the nation's fastest growing states—attracting thousands upon thousands of migrants each year, including couples from those states that permit same-sex marriage. Thus, there is an increasing likelihood that same-sex couples legally married in another state will move to Texas and eventually seek divorce in Texas. Whether Family Code section 6.204 prevents these same-sex couples who were legally married in another state from obtaining a divorce in Texas, and whether this violates the U.S. Constitution, are questions important to the state's jurisprudence, and should be, but have not yet been, resolved by this Court.

Here, the court of appeals erroneously construed section 6.204 as preventing a same-sex couple that was legally married in another state from obtaining a divorce in Texas. In fact, the court of appeals compounded its error by holding section 6.204 constitutes a "jurisdictional bar" to a divorce action involving a same-sex couple. This not only conflicts with longstanding Texas family law regarding subject-matter jurisdiction in petitions for divorce, it also conflicts with this Court's prior decisions regarding statutory construction. And the court of appeals then multiplied its error first by holding its construction of section 6.204 did not violate the Equal Protection Clause—and then again by refusing to consider J.B.'s other constitutional challenges or the district court's conclusions regarding those additional challenges.

Because the court of appeals' decision conflicts with longstanding Texas family law and with this Court's prior decisions regarding statutory construction; because this case involves the construction and validity of a Texas statute; because it involves numerous constitutional issues; and because the court of appeals has committed errors of law regarding important questions of state jurisprudence that should be, but have not been, decided by this Court, this Court should grant review and reverse the court of appeals' decision.

ARGUMENT

I. This Court should grant review to resolve whether section 6.204 of the Texas Family Code strips district courts of jurisdiction to hear a petition for divorce involving a same-sex couple that was legally married in another state.

This Court should grant review because the court of appeals' construction of section 6.204 conflicts with longstanding Texas family law regarding a district court's jurisdiction to hear a petition for divorce, and with this Court's prior decisions regarding statutory construction. *See* Tex. R. App. P. 56.1(a)(2)–(3); Tex. Gov't Code § 22.001(a)(2)–(3). This constitutes "an error of law of such importance to the state's jurisprudence that it should be corrected." *See* Tex. R. App. P. 56.1(a)(6).

Section 6.204 states, in relevant part: "the state may not give effect to" any "public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex," or to any "right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex." Tex. Fam. Code § 6.204(c), *attached at* Appendix, Tab F. Though section 6.204 says nothing about divorce, the court of appeals held that it not only prohibits same-sex divorce but strips district courts of jurisdiction to hear a petition for divorce involving a same-sex couple—even where that couple was legally married in another state. Op. at 665, 670. According to the court of appeals, Texas district courts lack jurisdiction "even if only to deny the petition" on grounds

that the marriage is void. Op. at 663–65. Same-sex couples legally married in another state must instead "plead for a declaration of voidness." *Id.*

This misguided exercise in statutory construction has implications reaching beyond Texas family law. By holding section 6.204 strips district courts of jurisdiction, the court of appeals' decision conflicts with this Court's decision in *City of DeSoto v. White*, wherein this Court held statutory provisions are presumptively **not** jurisdictional unless there is a showing of clear legislative intent to the contrary. *See* 288 S.W.3d 389, 393–94 (Tex. 2009). Where there is no explicit language indicating the statute is jurisdictional, "the text of the statute does not indicate that the Legislature intended the provision to be jurisdictional." *Id.* at 395–96. Yet here, despite the absence of any language explicitly indicating section 6.204 was intended to be jurisdictional, the court of appeals construed it that way. This conflicts with *City of DeSoto* and creates precedent for construing other statutory provisions as jurisdictional where there is no intent for them to be so.

Furthermore, Texas district courts have general jurisdiction, which necessarily includes jurisdiction to hear divorce actions. *See Aucutt v. Aucutt*, 62 S.W.2d 77, 79 (Tex. 1933). The court of appeals' opinion runs counter to over a century of family law, under which, to successfully plead an action for divorce, the pleader need only allege the existence of a valid marriage—and **the allegation alone is sufficient to invoke the district court's jurisdiction**. *See*

Cuneo v. De Cuneo, 24 Tex. Civ. App. 436, 59 S.W. 284 (1900). A marriage "duly shown to have been contracted" is presumed valid in the context of a divorce action. *Texas Emp. Ins. Ass'n v. Elder*, 282 S.W.2d 371, 373 (Tex. 1955) ("The presumption in favor of the validity of a marriage which, as in this case, has been duly shown to have been contracted is one of the strongest, if, indeed, not the strongest, known to law."). A challenge to the validity of the alleged marriage—i.e., an effort to have the marriage declared void—constitutes a defense on the merits. *See Gray v. Gray*, 354 S.W.2d 948, 949 (Tex. Civ. App.—Houston 1962, writ dism'd) (citing *Ex Parte Threet*, 333 S.W.2d 361 (Tex. 1960)); *see also Narvaez v. Maldonado*, 127 S.W.3d 313, 317 (Tex. App.—Austin 2004, no pet.) (voidness "is not a jurisdictional deficiency; rather it is a defense that should have been argued to the court during the trial on the merits").

Here, neither the State nor the court of appeals questions the validity of J.B.'s marriage under Massachusetts law, and neither the State nor the court of appeals disputes that J.B. properly alleged a valid marriage in his pleadings. Nor do they dispute that he duly showed his marriage had been contracted by presenting a copy of his Massachusetts marriage certificate. *See* 1 CR 8. Further still, neither the State nor the court of appeals suggests that the validity of J.B.'s marriage was ever challenged in the district court before the State intervened.

By holding section 6.204 constitutes a "jurisdictional bar" to J.B.'s petition for divorce, Op. at 665, the court of appeals' opinion rejects the sufficiency of alleging a valid marriage in the petition, discards the strong presumption of validity, and shifts the burden so that voidness constitutes a jurisdictional deficiency rather than a defense. The court of appeals' decision, in effect, requires the district court to inquire *sua sponte* into the validity of the marriage in every petition for divorce, to determine the court's jurisdiction to proceed. Not only does this ruin the court's ability to process uncontested divorces efficiently, it turns Texas family law on its head. Determining the validity of an alleged marriage and declaring the marriage void have always been determinations going to the merits of a divorce action. *See Narvaez*, 127 S.W.3d at 317; *Gray*, 354 S.W.2d at 949; *Ex Parte Threet*, 333 S.W.2d at 363–64. But the court of appeals would now require the district court to put the cart before the horse—to make these determinations before the court has decided whether it has jurisdiction to make them.

Finally, the court of appeals' decision appears to conflict with this Court's decisions in *Reiss v. Reiss* and *Fillingim v. Fillingim*. In *Reiss*, this Court held a district court's "action contrary to a statute or statutory equivalent" did not constitute a jurisdictional defect that would render the decision subject to collateral attack. 118 S.W.3d 439, 443 (Tex. 2003). And in *Fillingim* this Court went further, holding a district court's

unconstitutional action did not constitute a jurisdictional defect subjecting the decision to collateral attack. --- S.W.3d ---, 2011 WL 117664, at *3 (Tex. Jan. 14, 2011). In short, *Reiss* and *Fillingim* suggest a district court can make determinations pursuant to its jurisdiction, even if its determinations are impermissible under Texas statute or the Texas Constitution. Such errors are appealable, but they are not subject to collateral attack. *See id.*

Here, the court of appeals construed section 6.204 as a "jurisdictional bar" based in part on the rationale that, should the district court have jurisdiction and then grant a divorce to a same-sex couple, this would create "greater uncertainty," because the divorce would be subject to future collateral attack as impermissible under section 6.204 and Article I, section 32(b) of the Texas Constitution. *See* Op. at 679. But this rationale conflicts with *Reiss* and *Fillingim* and thus cannot support the court of appeals' construction of section 6.204 as jurisdictional.

Because this case involves the construction of section 6.204, and because the court of appeals' decision conflicts with longstanding Texas family law and with prior decisions of this Court, review should be granted.

II. This Court should grant review to resolve whether section 6.204 violates the U.S. Constitution, if construed as preventing a same-sex couple that was legally married in another state from obtaining a divorce in Texas.

Even if the court of appeals is correct that 6.204 is jurisdictional, the Court should grant review because this construction raises constitutional

questions as to the validity of section 6.204. *See* Tex. R. App. P. 56.1(a)(3)–(4); Tex. Gov't Code § 22.001(a)(3). Review is warranted because the court of appeals has decided important questions "that should be, but [have] not been, resolved by the Supreme Court." *See* Tex. R. App. P. 56.1(a)(6).

The court of appeals concluded section 6.204 did not violate the Equal Protection Clause, even when construed as a "jurisdictional bar" to J.B.'s petition for divorce. Op. at 681. But this was error.[3]

First, there is a growing consensus that discrimination against gays and lesbians is unconstitutional. *See*, *e.g.*, *Florida Dept. of Children and Families v. Adoption of X.X.G.* ("*X.X.G.*"), 45 So.3d 79 (Fla. App.—3rd Dist. 2010) (holding Florida law banning adoption by gay parents violates Equal Protection); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (holding the military's "Don't Ask, Don't Tell" policy unconstitutional under Due Process and the First Amendment); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding California's prohibition against same-sex marriage unconstitutional under Due Process and Equal Protection); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) (holding the Defense of Marriage Act's definition of marriage unconstitutional because it denies lawfully-married same-sex

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[3] The court of appeals then multiplied this error by refusing to consider additional constitutional challenges raised by J.B. both in the district court and on appeal.

couples equal access to "federal marriage-based benefits"); *Massachusetts v. USDHHS*, 698 F. Supp. 2d 234 (D. Mass. 2010) (same).

Second, in this case, which involves a same-sex couple already legally married in another state, the distinction between the right to marry and the right to divorce is crucial. The right to divorce has been recognized as a distinct right. *See Boddie v. Connecticut*, 401 U.S. 371, 381 n.8 (1971) (recognizing "the special nature of the divorce action" and divorce as "a right of substantial magnitude"); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (divorce "affects personal rights of the deepest significance" and "touches basic interests of society"); *Ivy v. Ivy*, 177 S.W.2d 237, 239 (Tex. Civ. App.—Texarkana 1943) ("The right to prosecute a divorce suit is personal."). And the court of appeals itself recognized the legal distinction between (a) the creation or "going-forward" recognition of a marriage and (b) divorce. Op. at 671–72 (distinguishing *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *dism'd*, 409 U.S. 810, 34 L.Ed.2d 65 (1972), as noncontrolling because it concerned the creation and "going-forward" recognition of a same-sex marriage, as opposed to same-sex divorce).

Yet, after recognizing this distinction and acknowledging J.B. and H.B. were already legally married under Massachusetts law, the court of appeals inexplicably identified the right in question as "the right to marry a person of the same sex" rather than as the equal right to divorce. *See* Op. at 675–76,

678. In its Equal Protection analysis, the court of appeals then relied heavily on "the goal of promoting the raising of children in households headed by opposite-sex couples" as the rational basis for prohibiting same-sex marriage in Texas. *See* Op. at 676–78. But the court of appeals failed to explain how preventing a legally married same-sex couple from obtaining a divorce has any rational connection to this goal. Requiring a resident, legally married same-sex couple to either (a) nullify its marriage by voidance or (b) move out of Texas to obtain a divorce elsewhere impinges on numerous constitutional rights. If the objective of section 6.204 is simply to disallow same-sex marriage in Texas, there is no rational basis for preventing the uncontested dissolution of a same-sex marriage in Texas, via divorce.

Notably, the court of appeals' decision has far-reaching implications. Thirteen jurisdictions in the U.S. now allow same-sex marriage or its functional equivalent, and these thirteen jurisdictions represent more than 28% of the U.S. population.[4] Meanwhile, Texas is one of the fastest growing

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[4] Andrew Koppelman, *Twenty Eight Percent*, Balkinization, Dec. 2, 2010, http://bit.ly/ezD8Gr (last visited Feb. 17, 2011). Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and the District of Columbia allow same-sex marriage. D.C. ST § 46-401(a); N.H. REV. STAT. § 457:1-a; 15 V.S.A. § 8; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1004–05 (Mass. 2003). Hawaii, Illinois, Nevada, New Jersey, Oregon, and Washington allow civil unions or domestic partnerships. Lucy Madison, *Hawaii Passes Same-Sex Civil Union Law*, CBS News, Feb. 17, 2011, http://bit.ly/dHerSS (last visited Feb. 17, 2011) (not yet codified); Kris Alingod, *Illinois House Passes Gay Civil Unions Bill*, All Headline News, Dec. 1, 2010, http://bit.ly/ekzVRG (last visited Feb. 17, 2011) (not yet codified); N.R.S. 122A.010–.510; N.J.S.A. 26:8A-1 to -13; N.J.S.A. 37:1-28 to -36; O.R.S. § 106.990 n.6;

states in the Union.[5] From 2008 to 2009 alone, roughly 143,000 people moved to Texas from other states—including J.B. and H.B.[6] And like J.B. and H.B., many who move to Texas come from those jurisdictions that allow same-sex marriage or its equivalent.[7] Presumably, many coming to Texas are already legally married. And inevitably, some of those married couples have been—and will continue to be—same-sex couples like J.B. and H.B.

Texas's growing economy obviously depends on this influx of skilled workers. Thus questions as to whether section 6.204 prevents migrant, legally married same-sex couples from obtaining a divorce, and whether this violates their constitutional rights—and whether Texas law presents a disincentive or impediment to legally married same-sex couples that are considering whether to move to Texas—are questions that are only growing more and more important to the state's jurisprudence. They therefore should be resolved by this Court.

West's RCWA 26.60.10–.901. California allows domestic partnerships under statute; it issued same-sex marriage licenses for a while, then stopped; a federal court has held California must again permit same-sex marriages, but that decision is stayed pending appeal. West's ANN. CAL. FAM. CODE §§ 297–299.6; *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

[5] *List of U.S. states by population growth rate*, Wikipedia, http://bit.ly/giKax5 (last visited Feb. 17, 2011) (measuring growth by percentages); Matt Goodman, *Census: Texas fastest growing state*, Killeen Daily Herald, Dec. 30, 2009, http://bit.ly/fGT3lQ (last visited Feb. 17, 2011) (measuring growth in total numbers).

[6] *See* Steve Campbell, *Texas remains country's fastest growing state*, McClatchy, Dec. 24, 2009, http://bit.ly/e3xsob (last visited Feb. 17, 2011).

[7] *See Texas, here we come*, The Economist, June 16, 2010, http://econ.st/brbXYx (citing Jon Bruner, *Map: Where Americans Are Moving*, Forbes.com, http://bit.ly/agfgl4) (last visited Feb. 17, 2011).

PRAYER

For the foregoing reasons and in the interest of justice, this Court should grant review, reverse the court of appeals' judgment, and remand for further proceedings in the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Review was forwarded to counsel of record by email and certified mail, return receipt requested, on this 17th day of February 2011.

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No. 11-0024

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APPENDIX TO PETITION FOR REVIEW

Tab A – District Court's Oct. 1, 2009 Order (1 CR 82)

Tab B – Findings of Fact and Conclusions of Law (2 Supp. CR 27–34)

Tab C – District Court's Dec. 7, 2009 Amended Order (1 Supp. CR 19–20)

Tab D – Court of Appeals' Opinion and Supplemental Opinion

Tab E – Court of Appeals' Judgment

Tab F – Texas Family Code § 6.204

Tab G – Texas Constitution, Article I, § 32

TAB A

Cause No. DF-09-1074

IN THE MATTER OF	§	IN THE DISTRICT COURT
THE MARRIAGE OF	§	
	§	302ND JUDICIAL DISTRICT
J.B.	§	
AND	§	
H.B.	§	DALLAS COUNTY, TEXAS

ORDER ON INTERVENOR'S PLEA TO THE JURISDICTION

On the limited issue of whether this Court has jurisdiction to divorce parties who have legally married in another jurisdiction and who otherwise meet the residency and other prerequisites required to file for a divorce in Dallas County, Texas:

The Court FINDS that Article 1, Section 32(a) of the Texas Constitution violates the right to equal protection and therefore violates the 14th Amendment of the United States Constitution.

The Court FINDS that Texas Family Code Section 6.204 violates the right to equal protection and therefore violates the 14th Amendment of the United States Constitution.

Accordingly, the Court FINDS that it has jurisdiction to hear a suit for divorce filed by persons legally married in another jurisdiction and who meet the residency and other prerequisites required to file for divorce in Dallas County, Texas, and

IT IS THEREFORE ORDERED that Intervenor's Plea to the Jurisdiction is denied and that the Intervention filed by the Office of the Attorney General is hereby stricken.

SIGNED: October 1, 2009

JUDGE PRESIDING

TAB B

NO. DF-09-1074

IN THE MATTER OF THE MARRIAGE OF,	§	IN THE DISTRICT COURT OF
	§	
	§	302ND JUDICIAL DISTRICT
J.B.	§	
AND	§	
H.B.	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 1, 2009, this Court entered an Order denying the Plea to the Jurisdiction filed by the State of Texas (the "Court's Order"). The Court's Order also struck the State's Petition in Intervention. On October 2, 2009, the State of Texas appealed the Court's Order under Texas Rule of Appellate Procedure 28.1. Following this notice, on October 16, 2009, Petitioner J.B. requested that the Court enter Findings of Fact and Conclusions of Law on the State's jurisdictional plea.

The Court hereby GRANTS Petitioner's request and enters the following Findings of Fact and Conclusions of Law (the "Court's Findings") on the State's Plea to the Jurisdiction. In conformance with the Court's Findings, the Court will enter an Amended Order Denying Intervention (the "Amended Order"). To the extent of any inconsistency between the Court's Order and the Court's Findings and Amended Order, these Findings and the Amended Order control.

I. FINDINGS OF FACT

1. J.B., Petitioner in these proceedings, and H.B, Respondent, are both male.

2. Petitioner and Respondent were married on or about September 22, 2006, in the Commonwealth of Massachusetts.

3. Both Petitioner and Respondent resided in Massachusetts at the time of their union, and fulfilled all other statutory requirements to lawfully enter marriage there.

4. Subsequent to their marriage, Petitioner and Respondent moved to Texas.

5. There are no children of the marriage and none are expected.

6. Petitioner and Respondent cohabitated until their separation in November 28, 2008.

7. Petitioner filed for divorce on January 21, 2009, claiming discord or conflict of personalities as the reason for divorce.

8. Petitioner was a domiciliary of Texas for the six months preceding his petition for divorce.

9. Petitioner also resided in Dallas County for the 90 days preceding his petition for divorce.

10. The State of Texas filed a petition for intervention in this action claiming that this Court cannot grant Petitioner a divorce, because Texas law does not grant same-sex couples like J.B. and H.B. the right to seek a divorce, even if they have been lawfully married in other states.

II. CONCLUSIONS OF LAW

1. Marriage to a person of the same sex is currently legal in Massachusetts, and was legal at the time of the union of Petitioner and Respondent. Mass. Gen. Laws ch. 207, §§ 1-9 (2009).

2. Petitioner fulfills all of the enumerated statutory requirements to bring a suit for divorce in Texas. *See* Tex. Fam. Code § 6.302; *see also Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 52 Tex. Sup. Ct. J. 462, 465 (Tex. Mar. 27, 2009) (noting the rule that a party suing under a statute must establish the right to make a claim under that statute).

3. In 2003, the Texas Legislature passed Chapter 124 of Senate Bill Number 7, later codified in the Texas Family Code as Section 6.204, which states in relevant part:

> (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.
>
> (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.

Tex. Acts 2003, 78th Leg., ch. 124, § 1, eff. Sept. 1, 2003.

4. On November 8, 2005, the People of the State of Texas enacted the following amendment to the Texas Constitution by ballot initiative:

> (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.

5. Article I, Section 32 of the Texas Constitution is not implicated in this proceeding. In Texas, dissolution of a marriage entered in another state does not require that Texas affirm or approve of the marriage, or subjugate its own policies to those of another state. A suit for divorce does, indeed, presume a valid marriage. *Gray v. Gray*, 354 S.W.2d 948, 949 (Tex. Civ. App.---Houston 1962, writ dism'd). But in granting a divorce, Texas courts do not determine the validity of a marriage by reference to either Texas law or Texas public policy. Rather, Texas courts, as a matter of comity, consistently apply the "place of celebration" test, utilizing the law of the place where the marriage was celebrated or contracted to determine the

validity of a marriage. *Tex. Employers' Ins. Ass'n v. Borum*, 834 S.W.2d 395, 399 (Tex. App.—San Antonio 1992, writ denied); *Husband v. Pierce*, 800 S.W.2d 661, 663 (Tex. App. -Tyler 1990, no writ); *Braddock v. Taylor*, 592 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.); *Durr v. Newman*, 537 S.W.2d 323, 326 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971). Texas courts routinely apply another state's laws to determine the validity of a marriage. In doing so, the State of Texas is not "recognizing" the legal status of the marriage as a matter of Texas law. Instead, it is merely determining whether the marriage was valid under the laws in which the union was entered.

6. While the Article 1, Section 32 of the Texas Constitution might prohibit same-sex couples from receiving public benefits on the basis of their relationship status, or recognize the same-sex spousal relationship as having the ability to supplant otherwise-applicable state law (such as the spousal privilege against admission of evidence), it does not prohibit consideration of a valid marriage entered in Massachusetts for the sole purposes of granting a divorce.

A. **Equal Protection**

7. The freedom to marry a person of one's choosing is a fundamental liberty interest protected under the United States Constitution. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 314 (Tex. 1993); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage" are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."). This fundamental liberty interest protecting autonomy in personal decisions like marriage applies equally to the decision to dissolve that union through divorce. Such decisions involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," and for that reason are central to the liberty protected by the Fourteenth

Amendment. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883, 887 (1992); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (divorce is "adjustment of a fundamental human relationship" and thus a fundamental liberty interest). Also, divorce involves, affects, and affords a number of other fundamental rights and important benefits like adjudication of property rights and the exercise of one's freedom of association. *See Sosna v. Iowa*, 419 U.S. 393, 406-07 (1975).

8. Prohibiting Texas's same-sex residents who meet the statutory requirements for obtaining a divorce in Texas, and who were legally married in another jurisdiction, from obtaining a divorce would impose substantial restrictions on those residents to exercise rights and benefits they could reasonably expect to enjoy in dissolving a lawful union; rights that heterosexual couples enjoy under Texas law.

9. The procedure offered by the State of Texas as a supposed substitute for divorce for same-sex couples does not even remotely provide the rights that those couples could reasonably expect in a divorce. It therefore fails to afford same-sex couples access to divorce proceedings on the same terms as persons in heterosexual marriages. Under any level of scrutiny, this unjustified deprivation of rights constitutes a violation of the right to Equal Protection afforded under the Fourteenth Amendment. *See Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (holding that laws that seek to "classif[y] homosexuals not to further a proper legislative end but to make them unequal to everyone else" fail to satisfy rational basis review.). Therefore, Section 6.204 is unenforceable against Petitioners and cannot deprive this Court of jurisdiction.

B. <u>Due Process</u>

10. As noted above, the institutions of marriage and divorce, and the bundle of personal relationships, property interests, and other burdens and benefits that go with them, are a

fundamental aspect of liberty protected under the United States Constitution. For that reason, they are also protected under the Fourteenth Amendment Due Process Clause and subject to strict scrutiny. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving*, 388 U.S. at 12.

11. Section 6.204 cannot pass scrutiny under the Due Process Clause. The State of Texas cannot articulate any compelling reason why it *must* substantially impair the rights of same-sex couples to obtain a divorce, much less explain how this discrimination is tailored as narrowly as possible to avoid excessive burden on homosexuals and their right to obtain divorces.

C. **Freedom of Association**

12. The freedom of individuals to associate intimately with others in furtherance of their personal beliefs is not only a fundamental liberty interest protected under the Due Process Clause of the Fourteenth Amendment, it has also "long been held to be implicit in the freedoms of speech, assembly, and petition" outlined in the First Amendment. *Healy v. James*, 408 U.S. 169, 181 (1972) (holding that "denial by state college of official recognition to a group of students who decided to form" a political organization implicated First Amendment association concerns). The freedom of association also "plainly presupposes a freedom *not* to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added).

13. Just as Texas Family Code Section 6.204 cannot survive strict scrutiny in the Due Process context, it fails similar review under the First Amendment. The State of Texas's refusal to provide lawfully married same-sex couples with access to divorce proceedings constitutes an undue burden on both the right to intimate association and the right to be free from forced

association. This infirmity provides a second and independent reason why Section 6.204 should not be enforced to deprive this Court of jurisdiction to hear this matter.

D. The Right to Travel

14. It is a fundamental aspect of citizens' concepts of personal liberty, not to mention the very nature of the federal union of states, that all citizens should be free to travel "'throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.'" *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)). This right to migrate protects the right of travelers, as citizens of the United States, to elect to become permanent residents in any state and enjoy the "same privileges and immunities enjoyed by other citizens of the same State." *Saenz v. Roe*, 526 U.S. at 502.

15. In addition to its other constitutional infirmities, Texas Family Code Section 6.204 severely and permanently infringes upon the right of lawfully married same-sex couples to migrate to and set up residence in Texas.

16. The State of Texas has asserted no compelling interest why it must discriminate against migrant same-sex married couples in this manner. It has also failed to demonstrate how Section 6.204 is drawn narrowly to avoid undue infringement on the fundamental right to travel under Article IV and the Fourteenth Amendment. Thus, for this additional reason, the State of Texas has failed to carry its burden to demonstrate the constitutionality of this provision, and it will not be enforced.

E. Conclusion and Order Denying Intervention

17. Because the provisions of the Family Code denying same-sex couples access to divorce proceedings violates the Petitioner's constitutional rights, the Court therefore concludes that the State's plea to the jurisdiction must be denied. In determining that this Court has

jurisdiction, this Court's holding is expressly limited to a narrow determination that the provisions of Texas law refusing to grant same-sex couples who are lawfully married in another state access to divorce proceedings cannot pass muster under the United States Constitution. The Court finds that these provisions violate Petitioner's rights protected under the United States Constitution, including Petitioner's rights to freedom of association under the First Amendment, and equal protection and due process under the Fourteenth Amendment.

18. Because J.B. and H.B. were married before they became Texas residents, this Court does not have occasion to determine whether the Texas Constitution's provisions or the Texas Family Code's provisions involving same-sex marriage comply with the protections of the United States Constitution.

19. The State of Texas does not have the constitutional or statutory authority to intervene in this divorce case. This is not a suit affecting the parent-child relationship and the Court concludes that there is no other basis for intervention by the State in this proceeding.

Signed this 7 day of December 2009.

Judge Presiding

TAB C

Order

NO. DF-09-1074

IN THE MATTER OF THE MARRIAGE OF,	§	IN THE DISTRICT COURT OF
	§	
	§	302ND JUDICIAL DISTRICT
J.B.	§	
AND	§	
H.B.	§	DALLAS COUNTY, TEXAS

AMENDED ORDER ON INTERVENOR'S PLEA TO THE JURISDICTION

On the limited issue of whether this Court has jurisdiction to divorce the Petitioner J.B., who has legally married in another jurisdiction and who otherwise meets the residency and other prerequisites required to file for a divorce in Dallas County, Texas:

The Court FINDS that Texas Family Code Section 6.204 violates the following Constitutional rights of the Petitioner J.B.: (i) the right to travel under the Privileges and Immunities Clause of Article IV, Section 2 to the United States Constitution; (ii) the freedom of association under the First Amendment to the United States Constitution; (iii) the right to travel under the Privileges or Immunities Clause under Section 2 to the Fourteenth Amendment to the United States Constitution; (iv) the Due Process Clause under Section 2 to the Fourteenth Amendment to the United States Constitution; (v) the Equal Protection Clause under Section 2 to the Fourteenth Amendment to the United States Constitution.

Accordingly, the Court FINDS that it has jurisdiction to hear Petitioner J.B.'s suit for divorce, as he is a person legally married in another jurisdiction who meets the residency and other prerequisites required to file for a divorce in Dallas County, Texas.

The Court FINDS that the State of Texas does not have the Constitutional or statutory authority to intervene in this divorce case. This is not a suit affecting the parent-child

relationship and the Court concludes that there is no other basis for intervention by the State in this proceeding. Therefore, the State's Plea to the Jurisdiction is denied and the Intervention filed by the Office of the Attorney General is hereby stricken.

Signed this 7 day of December 2009.

Judge Presiding

TAB D

326 S.W.3d 654
(Cite as: 326 S.W.3d 654)

H

Court of Appeals of Texas,
Dallas.
In the Matter of the MARRIAGE OF J.B. AND H.B.
In re State of Texas, Relator.

No. 05-09-01170-CV.
Aug. 31, 2010.
Supplemental Opinion on Denial of En Banc Reconsideration Dec. 8, 2010.

Background: Action was brought by individual to dissolve his same-sex marriage from another state. The State filed petition to intervene as a party respondent, and sought dismissal of the action. The 302nd Judicial District Court, Dallas County, Tena Callahan, J., entered order finding that it had subject matter jurisdiction and striking State's petition for intervention. State appealed and filed petition for writ of mandamus to correct allegedly erroneous denial of petition.

Holdings: The Court of Appeals, FitzGerald, J., held that:
(1) State courts have no subject-matter jurisdiction to adjudicate divorce petitions in the context of same-sex marriage;
(2) sexual orientation was not a suspect classification;
(3) right to legal recognition of same-sex marriage was not a fundamental right; and
(4) statute prohibiting same-sex marriage did not violate Equal Protection Clause.

Reversed and remanded; writ granted; motion for en banc reconsideration denied.

West Headnotes

[1] Divorce 134 73

134 Divorce
134IV Proceedings
134IV(D) Parties
134k73 k. Intervention. Most Cited Cases

Mandamus 250 33

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k33 k. Intervention or substitution of parties. Most Cited Cases

Without a motion to strike by any party, the trial court abused its discretion in striking, sua sponte, State's petition to intervene as party respondent in divorce action involving same-sex couple who had been married in another state, as required for grant of writ of mandamus to correct denial of State's petition. Vernon's Ann.Texas Rules Civ.Proc., Rule 60.

[2] Mandamus 250 4(1)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(1) k. In general. Most Cited Cases

Mandamus 250 28

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k28 k. Matters of discretion. Most Cited Cases

To obtain mandamus relief from an order, the petitioner for relief must meet two requirements: it must show that the trial court clearly abused its discretion and that the petitioner has no adequate remedy by appeal.

[3] Parties 287 44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and proceedings thereon. Most Cited Cases

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Parties 287 93(2)

287 Parties
287VI Defects, Objections, and Amendment
287k93 Improper Intervention, Addition, or Substitution of Parties
287k93(2) k. Necessity, mode, and time of objection. Most Cited Cases

Lack of a justiciable interest to intervene must be raised by a motion to strike or the defense is waived.

[4] Mandamus 250 4(4)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(4) k. Modification or vacation of judgment or order. Most Cited Cases

Mandamus 250 33

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k33 k. Intervention or substitution of parties. Most Cited Cases

State lacked adequate remedy by appeal, with regard to striking of its petition to intervene as party respondent in divorce action involving same-sex couple who had been married in another state, as required for grant of writ of mandamus to correct denial of State's petition; case was exceptional and involved not only basic principles of subject-matter jurisdiction but also constitutionality of State's laws concerning marriage, such that denial of petition would interfere with State's right to be heard on issues.

[5] Mandamus 250 4(1)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(1) k. In general. Most Cited Cases

An appellate remedy is “adequate” when any benefits to mandamus review are outweighed by the detriments.

[6] Mandamus 250 4(1)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(1) k. In general. Most Cited Cases

The detriments of mandamus review, for the purpose of determining if an appellate remedy is adequate, can include undue interference with trial-court proceedings, diversion of appellate-court attention to issues that are not important to the litigation or the development of the law, and increase in expense to the parties.

[7] Mandamus 250 4(1)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(1) k. In general. Most Cited Cases

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

[8] Mandamus 250 32

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in civil actions in general. Most Cited Cases

When the right to participate in litigation is wrongfully denied, mandamus relief is likely to be appropriate.

[9] Divorce 134 182

134 Divorce
134IV Proceedings
134IV(O) Appeal
134k182 k. Effect of appeal. Most Cited Cases

Trial court's amended order denying State's plea to the jurisdiction in divorce action involving same-sex couple who had been married in another state was legal nullity, where amended order was entered during automatic stay of trial court proceedings following State's filing of its notice of appeal of original order denying plea. V.T.C.A., Civil Practice & Remedies Code § 51.014(b).

[10] Action 13 68

13 Action
13IV Commencement, Prosecution, and Termination
13k67 Stay of Proceedings
13k68 k. In general. Most Cited Cases

A trial court's order signed during a stay is a legal nullity.

[11] Courts 106 2

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k2 k. Grounds and essentials of jurisdiction. Most Cited Cases

"Jurisdiction" refers to the power of a court, under the constitution and laws, to determine the merits of an action between the parties and render judgment.

[12] Courts 106 11

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k11 k. In general. Most Cited Cases

"Personal jurisdiction" refers to a court's power to render a binding judgment against a particular person or entity, typically a nonresident.

[13] Courts 106 4

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k3 Jurisdiction of Cause of Action
106k4 k. In general. Most Cited Cases

"Subject-matter jurisdiction" refers to the court's power to hear a particular type of suit.

[14] Courts 106 4

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k3 Jurisdiction of Cause of Action
106k4 k. In general. Most Cited Cases

Courts 106 35

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k34 Presumptions and Burden of Proof as to Jurisdiction
106k35 k. In general. Most Cited Cases

Courts 106 37(1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k37 Waiver of Objections
106k37(1) k. In general. Most Cited Cases

Subject-matter jurisdiction is essential for a court to have authority to decide a case; it is never presumed and cannot be waived.

[15] Courts 106 155

106 Courts
106III Courts of General Original Jurisdiction
106III(B) Courts of Particular States
106k155 k. Texas. Most Cited Cases

Courts of general jurisdiction presumably have subject-matter jurisdiction unless a contrary showing is made.

[16] Statutes 361 212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other matters. Most Cited Cases

When the legislature adopts a rule that imposes a mandatory requirement on a claimant but does not specify whether failure to satisfy that requirement defeats the court's jurisdiction or merely means the claim fails on the merits, the Court of Appeals presumes that the legislature did not intend to make the requirement jurisdictional unless application of statutory-interpretation principles reveals a clear legislative intent to the contrary.

[17] States 360 5(1)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) k. In general. Most Cited Cases

"Comity" is a principle under which the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign not as a rule of law, but rather out of deference or respect.

[18] Courts 106 511

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(C) Courts of Different States or Countries
106k511 k. Comity between courts of different states. Most Cited Cases

States 360 5(1)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) k. In general. Most Cited Cases

The State should extend comity by recognizing the laws and judicial decisions of other states unless: (1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances, or (2) the foreign statute produces a result in violation of this state's own legitimate public policy.

[19] Divorce 134 59

134 Divorce
134IV Proceedings
134IV(A) Jurisdiction
134k58 Jurisdiction of Cause of Action
134k59 k. In general. Most Cited Cases

Marriage 253 17.5(2)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(2) k. Effect of foreign union. Most Cited Cases

Texas courts have no subject-matter jurisdiction to adjudicate a divorce petition in the context of a same-sex marriage, under the statute limiting marriage to opposite-sex couples and prohibiting the State from giving effect to a right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex, even if the marriage was entered in another state that recognized the validity of same-sex marriages. V.T.C.A., Family Code § 6.204.

[20] Constitutional Law 92 3043

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3043 k. Statutes and other written

regulations and rules. Most Cited Cases

The 14th Amendment's promise that no person shall be denied equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. U.S.C.A. Const.Amend. 14.

[21] Constitutional Law 92 3041

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3041 k. Similarly situated persons; like circumstances. Most Cited Cases

Disparate treatment of different but similarly situated groups does not automatically violate the Equal Protection Clause of the 14th Amendment. U.S.C.A. Const.Amend. 14.

[22] Courts 106 107

106 Courts
106II Establishment, Organization, and Procedure
106II(K) Opinions
106k107 k. Operation and effect in general. Most Cited Cases

A summary disposition by the United States Supreme Court has very narrow precedential effect; specifically, that precedential effect can extend no farther than the precise issues presented and necessarily decided by the Court's action.

[23] Appeal and Error 30 712

30 Appeal and Error
30X Record
30X(N) Matters Not Apparent of Record
30k712 k. Matters not included or shown in general. Most Cited Cases

Ordinarily, the Court of Appeals does not consider matters outside the record.

[24] Constitutional Law 92 3051

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3051 k. Differing levels set forth or compared. Most Cited Cases

An equal-protection challenge is examined under one of two tests: the strict-scrutiny test or the rational-basis test. U.S.C.A. Const.Amend. 14.

[25] Constitutional Law 92 3051

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3051 k. Differing levels set forth or compared. Most Cited Cases

Strict scrutiny applies, in the equal protection context, if a law discriminates against a suspect class or interferes with a fundamental right: if a law neither burdens a fundamental right nor targets a suspect class, the Court of Appeals will uphold the legislative classification so long as it bears a rational relation to some legitimate end. U.S.C.A. Const.Amend. 14.

[26] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and civil unions. Most Cited Cases

Sexual orientation was not a suspect classification, and thus the statute prohibiting same-sex marriage was subject to rational basis review rather than strict scrutiny when challenged as violating the Equal Protection Clause in a proceeding concerning petition for divorce of out-of-state same-sex marriage; nothing indicated that State generally excluded homosexuals from protection of its law, nor did individual seeking divorce establish that homosexuals bore obvious,

immutable, or distinguishing characteristics that define them as discrete group, and persons favored by statute had distinguishing and relevant characteristic of natural ability to procreate. U.S.C.A. Const.Amend. 14; V.T.C.A., Family Code § 6.204.

[27] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and civil unions. Most Cited Cases

Marriage 253 2

253 Marriage
253k2 k. Power to regulate and control. Most Cited Cases

Marriage 253 17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In general. Most Cited Cases

The right to legal recognition of a same-sex marriage was not a fundamental right, for purposes of determining whether a statute prohibiting same-sex marriage violated the Equal Protection Clause; right was not deeply rooted in nation's history and tradition, in that no states had previously recognized same-sex marriages until recently, and Congress and most states had adopted legislation or constitutional amendments explicitly limiting institution of marriage to opposite-sex unions. U.S.C.A. Const.Amend. 14; V.T.C.A., Family Code § 6.204.

[28] Constitutional Law 92 3062

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3059 Heightened Levels of Scrutiny
92k3062 k. Strict scrutiny and compelling interest in general. Most Cited Cases

"Fundamental rights" that require strict scrutiny analysis in the context of an equal protection challenge are rights that are deeply rooted in the nation's history and tradition and are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. U.S.C.A. Const.Amend. 14.

[29] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and civil unions. Most Cited Cases

Marriage 253 2

253 Marriage
253k2 k. Power to regulate and control. Most Cited Cases

Marriage 253 17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In general. Most Cited Cases

Statute prohibiting same-sex marriage was rationally related to legitimate government interest in promoting raising of children in household headed by opposite-sex couple, and thus statute did not violate Equal Protection Clause; only relationships between opposite-sex couples could naturally produce children. U.S.C.A. Const.Amend. 14; V.T.C.A., Family Code § 6.204.

[30] Constitutional Law 92 3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

A law will be sustained under the rational basis test, in the context of an equal protection challenge, if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. U.S.C.A. Const.Amend. 14.

[31] Constitutional Law 92 3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

Under the rational-basis test, a statute enjoys a strong presumption of validity in an equal protection challenge, and the statute must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. U.S.C.A. Const.Amend. 14.

[32] Constitutional Law 92 2489

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2489 k. Wisdom. Most Cited Cases

Constitutional Law 92 2492

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2492 k. Desirability. Most Cited Cases

The judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.

[33] Constitutional Law 92 1040

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1040 k. Equal protection. Most Cited Cases

The party attacking the rationality of the legislative classification, in an equal protection challenge, bears the burden of negating every conceivable basis that might support it. U.S.C.A. Const.Amend. 14.

[34] Constitutional Law 92 3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

Under the rational basis test, the classification adopted by the legislature need not be perfectly tailored to its purpose in order to pass constitutional muster, in the context of an equal protection challenge. U.S.C.A. Const.Amend. 14.

[35] Divorce 134 179

134 Divorce
134IV Proceedings
134IV(O) Appeal
134k179 k. Presentation and reservation in lower court of grounds of review. Most Cited Cases

On State's appeal from trial court order finding that it had subject matter jurisdiction over divorce case arising from a same-sex marriage from another state, the Court of Appeals would not consider as grounds for affirmance the appellee spouse's arguments that

Texas constitutional and statutory provisions limiting marriage to opposite-sex couples violated due process and constitutional rights to free association and travel, where appellee did not present these constitutional challenges to the trial court, and State had no opportunity to respond to them in court. U.S.C.A. Const.Amends. 1, 14; Vernon's Ann.Texas Const. Art. 1, § 32; V.T.C.A., Family Code § 6.204.

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Before Justices BRIDGES, FITZGERALD, and FILLMORE.

OPINION

Opinion By JusticeFITZGERALD.

Does a Texas district court have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred***659** in Massachusetts? The trial court held that it had jurisdiction and that article I, section 32(a) of the Texas Constitution and section 6.204 of the Texas Family Code, which limit marriage to opposite-sex couples, violate the Equal Protection Clause of the Fourteenth Amendment. We hold that Texas district courts do not have subject-matter jurisdiction to hear a same-sex divorce case. Texas's laws compelling this result do not violate the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, we reverse the trial court's order and remand with instructions to dismiss the case for lack of subject-matter jurisdiction. We also conditionally grant the State's petition for writ of mandamus to correct the trial court's erroneous striking of the State's petition in intervention.

I. BACKGROUND

Appellee filed a petition for divorce in Dallas County in which he sought a divorce from H.B., whom appellee alleged to be his husband. Appellee alleged that he and H.B. were lawfully married in Massachusetts in September 2006 and moved to Texas in 2008. Appellee further alleged that he and H.B. "ceased to live together as husband and husband" in November 2008.

Appellee alleged in his divorce petition that there are no children of the marriage, born or adopted, and he requested a division of community property if a property-division agreement could not be reached. He prayed for a divorce, that his last name be changed back to his original last name, and "for general relief." The record contains no answer by H.B.

A few days after appellee filed suit, the State intervened in the action "as a party respondent to oppose the Petition for Divorce and defend the constitutionality of Texas and federal law." The Texas laws in question arearticle I, section 32(a) of the Texas Constitution and section 6.204 of the Texas Family Code. The federal law in question is the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C.[FN1] The State alleged that appellee is not a party to a "marriage" under Texas law, that he is therefore not eligible for the remedy of divorce, and that the trial court cannot grant a divorce without violating Texas law. At the end of its petition in intervention, the State prayed for dismissal of the petition for divorce.

> FN1. "No State, territory, or possession of the United States, or Indian tribe, shall be required to give any 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.A. § 1738C (West 2006).

Several weeks later, the State filed a plea to the jurisdiction in which it asserted, inter alia, that the trial court lacked subject-matter jurisdiction because appellee's petition demonstrated on its face that he and H.B. were not "married" as a matter of Texas law. The State asserted that section 6.204(c) of the family code "strips courts of jurisdiction" to confer the legal status of marriage upon any relationship besides the union of one man and one woman-even if only for the purpose

of granting a divorce.

The trial court denied the State's plea to the jurisdiction without a hearing. In its order, the court concluded that article I, section 32(a) of the Texas Constitution and section 6.204 of the family code violate the Equal Protection Clause of the Fourteenth Amendment. It further concluded that it ***660** had jurisdiction "to hear a suit for divorce filed by persons legally married in another jurisdiction and who meet the residency and other prerequisites required to file for divorce in Dallas County, Texas." It ordered "that Intervenor's Plea to the Jurisdiction is denied and that the Intervention filed by the Office of the Attorney General is hereby stricken." The State filed its notice of interlocutory appeal the day after the trial court signed the order. A few days later, the State filed its Conditional Petition for Writ of Mandamus in this Court seeking relief from the part of the trial court's order striking its petition in intervention.

Within twenty days after the court signed the order, appellee filed a request for findings of fact and conclusions of law. The State opposed the request. A few weeks later, the trial court signed both a set of findings of fact and conclusions of law and an amended order denying the State's plea to the jurisdiction. In the amended order, the court made no reference to article I, section 32 of the Texas Constitution, concluded that section 6.204 of the family code violated several provisions of the federal Constitution in addition to the Equal Protection Clause, and concluded that the State lacked both constitutional and statutory authority to intervene. The amended order concluded, "Therefore, the State's Plea to the Jurisdiction is denied and the Intervention filed by the Office of the Attorney General is hereby stricken."

We have consolidated the State's mandamus proceeding with its interlocutory appeal.

II. MANDAMUS RELIEF FROM ORDER STRIKING INTERVENTION

[1][2] To obtain mandamus relief from the order striking its intervention, the State must meet two requirements. It must show that the trial court clearly abused its discretion and that the State has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex.2004) (orig.proceeding); see also *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex.1992) (orig.proceeding). In its mandamus petition, the State contends that the trial court clearly abused its discretion by striking the State's intervention sua sponte and without sufficient cause. The State further contends that its remedy by appeal is inadequate.

We agree with the State that the trial court clearly abused its discretion by striking the State's intervention sua sponte. Texas Rule of Civil Procedure 60 provides, "Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause *on the motion of any party*." TEX.R. CIV. P. 60 (emphasis added). The court abuses its discretion by striking an intervention in the absence of a motion to strike. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex.1990); *Prototype Mach. Co. v. Boulware*, 292 S.W.3d 169, 172 (Tex.App.-San Antonio 2009, no pet.); *Ghidoni v. Stone Oak, Inc.*, 966 S.W.2d 573, 586 (Tex.App.-San Antonio 1998, pet. denied) (en banc); *Flores v. Melo-Palacios*, 921 S.W.2d 399, 404 (Tex.App.-Corpus Christi 1996, writ denied). Because appellee did not file a motion to strike the State's intervention, the trial court clearly abused its discretion.

[3] The foregoing analysis also disposes of appellee's argument that the trial court did not abuse its discretion by striking the State's intervention because the office of the attorney general has no justiciable interest in the case. Lack of a justiciable interest to intervene must be raised by a motion to strike or the defense is waived. ***661** *Bryant v. United Shortline Inc. Assur. Servs., N.A.*, 972 S.W.2d 26, 31 (Tex.1998); *see also Guar. Fed. Sav. Bank*, 793 S.W.2d at 657. Thus, appellee cannot defend the trial court's action by arguing that the State (which is the actual intervenor, not the office of the attorney general) lacks a justiciable interest in the case.

[4][5][6][7] We also agree with the State that it has no adequate remedy by appeal. This second prong of the test for mandamus relief has no comprehensive definition but calls for "the careful balance of jurisprudential considerations." *In re Prudential Ins. Co.*, 148 S.W.3d at 136. "When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id.* The detriments of mandamus review can include undue interference with trial-court proceedings, diversion of appellate-court attention to issues that are not important to the litigation or the development of the law, and increase in

expense to the parties. *Id.* But mandamus review may yield benefits as well:

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

Id. The balancing of detriments and benefits is practical and prudential. *Id.*

[8] In this case, the benefits of mandamus review outweigh the detriments. This is an exceptional case that involves not only basic principles of subject-matter jurisdiction but also the constitutionality of Texas's laws concerning marriage. The trial court's order striking the State's petition in intervention potentially interferes with the State's important right to be heard on the constitutionality of its statutes and its statutory right to pursue an interlocutory appeal of the denial of its plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 37.006(b) (Vernon 2008) (requiring attorney general to be given notice of any proceeding in which a statute is alleged to be unconstitutional); *id.* § 51.014(a)(8) (authorizing interlocutory appeal from denial of plea to the jurisdiction by a governmental unit); *see also Wilson v. Andrews*, 10 S.W.3d 663, 666 (Tex.1999) (attorney general intervened to defend statute, moved for summary judgment, and pursued appeal to Texas Supreme Court); *Kern v. Taney*, 11 Pa. D. & C.5th 558, 559 (Ct.Com.Pl.2010) (Pennsylvania attorney general intervened and participated in hearing regarding court's subject-matter jurisdiction to hear same-sex divorce case). When the right to participate in litigation is wrongfully denied, mandamus relief is likely to be appropriate. *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex.2006) (orig.proceeding) (granting mandamus and ordering court of appeals to allow insurer to participate in appeal so that insurer, which had superseded judgment, could defend its own interests). Mandamus relief will also yield the benefit of sparing the parties and the public the time and expense of divorce proceedings in a court that might lack subject-matter jurisdiction to proceed. *Cf. In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 627 (Tex.2007) (orig.proceeding) (granting mandamus relief from denial of Southwestern Bell's plea to the jurisdiction); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 776 (Tex.1995) (orig.proceeding) (granting mandamus relief to correct erroneous assertion of personal jurisdiction over nonresident defendant). Because this is an issue that is likely to arise in other cases, prompt ***662** appellate resolution of the subject-matter-jurisdiction question will have broad public benefits.

As compared to these benefits, the detriments of mandamus review in this case are not substantial. Mandamus review of the order in question does not require this Court to dedicate its resources to a routine or unimportant matter. Rather, in the absence of mandamus review, our consideration of issues that are important both to this litigation and to the law of this state would be impeded. Moreover, any additional expense that mandamus review imposes on the parties is offset by the savings of time and expense that will be gained by prompt appellate consideration of the State's jurisdictional challenge.

We hold that the trial court clearly abused its discretion by striking the State's intervention and that the State lacks an adequate remedy by appeal. Accordingly, we conditionally grant mandamus relief with respect to the order striking the State's intervention.

III. INTERLOCUTORY APPEAL

A plea to the jurisdiction contests a trial court's subject-matter jurisdiction. *Dallas Fort Worth Int'l Airport Bd. v. Cox*, 261 S.W.3d 378, 386 (Tex.App.-Dallas 2008, no pet.). We review an order on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex.2004). When a plea to the jurisdiction challenges the pleadings, as in this case, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Id.* at 226. If the pleadings do not affirmatively demonstrate the trial court's jurisdiction but also do not affirmatively demonstrate incurable defects in jurisdiction, the plaintiff should be afforded the opportunity to amend. *Id.* at 226-27. But if the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227; *see also* Rebecca Simmons & Suzette K. Patton, *Plea to the*

Jurisdiction: Defining the Undefined, 40 ST. MARY'S L.J. 627, 648-54 (2009) (discussing *Miranda*).

Determinations of questions of law are reviewed de novo. *Hoff v. Nueces Cnty.*, 153 S.W.3d 45, 48 (Tex.2004) (per curiam). This includes "questions raising constitutional concerns." *State v. Hodges*, 92 S.W.3d 489, 494 (Tex.2002).

[9][10] The State asserts that we should disregard the trial court's amended order denying the State's plea to the jurisdiction because it was signed during the automatic stay under section 51.014(b) of the civil practice and remedies code. We agree. When the State commenced this interlocutory appeal by filing its notice of appeal, "all other proceedings in the trial court" were stayed pending resolution of the appeal. TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(b). An order signed during a stay is a "legal nullity." *Amrhein v. La Madeleine, Inc.*, 206 S.W.3d 173, 174-75 (Tex.App.-Dallas 2006, no pet.). Accordingly, the trial court erred by signing the amended order. We vacate the amended order and analyze the State's appeal in light of the grounds stated in the trial court's original order. We also disregard the trial court's findings of fact and conclusions of law signed after the stay went into effect.

IV. TEXAS COURTS LACK SUBJECT-MATTER JURISDICTION OVER SAME-SEX DIVORCE CASES

A. The Texas Constitution and Texas Family Code

The Texas Constitution was amended in 2005 to provide as follows:

> ***663** (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 Texas Family Code, the term "suit for dissolution of marriage" encompasses three distinct kinds of suits: suits for divorce, suits for annulment, and suits to declare a marriage void. TEX. FAM.CODE ANN § 1.003 (Vernon 2006); *see also id.* §§ 6.001-.206 (Vernon 2006 & Supp.2009). In 2003, the legislature declared that same-sex marriages are void by adopting section 6.204, which provides in pertinent part as follows:

> (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.
>
> (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.

Id. § 6.204(b)-(c) (Vernon 2006). Even before the adoption of section 6.204, the family code provided, "A [marriage] license may not be issued for the marriage of persons of the same sex." *Id.* § 2.001(b). The statute governing informal marriage also characterizes the relationship as a "marriage of a man and woman." *Id.* § 2.401(a).

Appellee did not plead for a declaration of voidness. Rather, he sought a divorce on the ground of insupportability. His petition tracks the language of section 6.001, which provides:

> On the petition of either party to a marriage, the court may grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.

Id. § 6.001. A divorce based on this provision is commonly known as a "no-fault divorce." *See, e.g.*, *Waite v. Waite*, 64 S.W.3d 217, 220 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (plurality op.); *Clay v. Clay*, 550 S.W.2d 730, 733-34 (Tex.Civ.App.-Houston [1st Dist.] 1977, no writ).

B. The Law of Subject-Matter Jurisdiction

[11][12][13][14] "Jurisdiction refers to the power of a court, under the constitution and laws, to determine the merits of an action between the parties and render judgment." *Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858, 864 (Tex.App.-Dallas 2009, pet. denied); *see also Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex.2004) ("The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law."). "Personal jurisdiction" refers to a court's power to render a binding judgment against a particular person or entity, typically a nonresident. *See, e.g., CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex.1996). "Subject-matter jurisdiction," by contrast, refers to the court's power to hear a particular type of suit. *Id.* "Subject matter jurisdiction is essential for a court to have authority to ***664** decide a case; it is never presumed and cannot be waived." *Combs v. Kaufman Cnty.*, 274 S.W.3d 922, 925 (Tex.App.-Dallas 2008, pet. denied).

[15] The trial court in this case is a district court, so the starting presumption is that it possesses subject-matter jurisdiction over the case. This is because "Texas district courts are courts of general jurisdiction with the power to hear and determine any cause that is cognizable by courts of law or equity and to grant any relief that could be granted by either courts of law or equity." *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex.2006) (internal quotations and citations omitted). "Courts of general jurisdiction presumably 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); *accord Liebbe v. Rios*, No. 05-07-00381-CV, 2008 WL 1735448, at *3 (Tex.App.-Dallas Apr. 16, 2008, no pet.) (mem.op.); *see also* TEX. CONST. art. V, § 8 ("District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.").

[16] A Texas trial court may lack subject-matter jurisdiction over a particular case or claim for a variety of reasons, such as immunity from suit, *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex.2004), exclusive federal jurisdiction, *see, e.g.*, 28 U.S.C.A. § 1338(a) (West 2006) (giving federal district courts jurisdiction "exclusive of the courts of the states in patent, plant variety protection and copyright cases"), and the effect of an automatic bankruptcy stay, *Brashear v. Victoria Gardens of McKinney, L.L.C.*, 302 S.W.3d 542, 550-52 (Tex.App.-Dallas 2009, no pet.). Difficulties occasionally arise when the legislature adopts a rule that imposes a mandatory requirement on a claimant but does not specify whether failure to satisfy that requirement defeats the court's jurisdiction or merely means the claim fails on the merits. In such cases, we presume that the legislature did not intend to make the requirement jurisdictional unless application of statutory-interpretation principles reveals a clear legislative intent to the contrary. *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex.2009).

C. The Parties' Contentions

The State argues that section 6.204(c) of the family code and section 32(b) of article I of the Texas Constitution strip Texas trial courts of jurisdiction in same-sex-divorce cases because adjudicating the merits of such a case would recognize or "give effect to a ... right or claim" based on a same-sex marriage. Under the Texas Constitution, the state cannot "create or recognize" marriages other than between one man and one woman. TEX. CONST. art. I, § 32(b). Under section 6.204(c) of the Texas Family Code, the state cannot "give effect to a ... right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex." TEX. FAM.CODE ANN. § 6.204(c)(2). Appellee's principal response is that the trial court does not adjudicate or establish the validity of a marriage in a divorce case, and thus a divorce case does not recognize or give effect to a same-sex marriage formed in another jurisdiction. Appellee also urges us to apply the "place-of-celebration test" and conclude that he and H.B. are validly married for the limited purpose of adjudicating his divorce petition.

D. Application of Texas Law

In construing a statute, our objective is to ascertain and effectuate the legislature's ***665** intent. Our starting point is the plain and ordinary meaning of the words of the statute. If a statute's meaning is unambiguous, we generally enforce it according to its plain meaning. We read the statute as a whole and interpret it so as to give effect to every part. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex.2003).

Section 6.204(b) declares same-sex marriages

void and against Texas public policy. TEX. FAM.CODE ANN. § 6.204(b). "Void" means having no legal effect. *In re Calderon,* 96 S.W.3d 711, 719-20 (Tex.App.-Tyler 2003, orig. proceeding [mand. denied]); *see also Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.,* 283 S.W.3d 838, 850 (Tex.2009) ("A law that is declared void has no legal effect."). Thus, section 6.204(b) means that same-sex marriages have no legal effect in Texas. *See also* TEX. CONST. art. I, § 32.

Next, section 6.204(c)(1) provides that Texas and its agencies and subdivisions may not give any effect to any public act, record, or judicial proceeding that creates, recognizes, or validates a same-sex marriage "in this state or in any other jurisdiction." Thus, 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. Further, section 6.204(c)(1) mandates that Texas courts may not give any legal effect whatsoever to a public act, record, or judicial proceeding that validates a same-sex marriage. *See also* TEX. CONST. art. I, § 32. In the case before us, appellee attached his Massachusetts marriage certificate to his divorce petition. Section 6.204(c)(1), which addresses "any public act, record, or judicial proceeding" that "creates, recognizes, or validates a same-sex marriage" in another jurisdiction, in this case, Massachusetts, provides the trial court may not give any legal effect to this document. Thus, section 6.204(c)(1) precludes any use of the marriage certificate in this case.

Section 6.204(c)(2) forbids the state and its subdivisions from giving any effect to a "right or claim to any legal protection, benefit, or responsibility asserted as a result of a" same-sex marriage. Thus, the State may not give any legal effect even to a claim to a protection or benefit predicated on a same-sex marriage. 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. 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). 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. *See Ysasaga,* 279 S.W.3d at 864 ("Jurisdiction refers to the power of a court, under the constitution and laws, to determine the merits of an action between the parties and render judgment.").

Thus, in the instant case, section 6.204(c) precludes a trial court from giving any legal effect to appellee's petition for divorce and all supporting documentation, and it deprives the trial court of subject-matter jurisdiction.

Our holding that section 6.204(c) is a jurisdictional bar is consistent with *Mireles v. Mireles,* wherein Jennifer Jack ***666** married and divorced Andrew Mireles. No. 01-08-00499-CV, 2009 WL 884815, at *1 (Tex.App.-Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.). She then filed a "petition for bill of review" seeking to vacate the divorce decree on the ground that Mireles was actually born female, making their marriage a void same-sex marriage. *Id.* The trial court granted Jack's petition and set aside the divorce decree. *Id.* The court of appeals affirmed. It concluded that Jack's action was actually a collateral attack rather than a bill of review, but held that the collateral attack was proper because a void judgment "may be attacked collaterally with extrinsic evidence when the court 'has not, under the very law of its creation, any possible power' to decide the case." *Id.* at *2 (quoting *Templeton v. Ferguson,* 89 Tex. 47, 54, 33 S.W. 329, 332 (Tex.1895)). "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." *Id.* By holding that the original trial court had no "power" to issue the divorce decree, the court of appeals held, in effect, that the trial court lacked the subject-matter jurisdiction to grant a divorce. *See Tellez v. City of Socorro,* 226 S.W.3d 413, 413 (Tex.2007) (per curiam) ("Subject-matter jurisdiction 'involves a court's power to hear a case.' ") (quoting *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). Appellee argues that *Mireles* is factually distinguishable because the parties in that case were married in Texas, but we see nothing in the opinion indicating where the

marriage ceremony took place. Moreover, such a factual distinction would be immaterial because the Texas Constitution and section 6.204 apply equally whether a same-sex marriage is contracted in Texas or in some other jurisdiction. TEX. CONST. art. I, § 32; TEX. FAM.CODE ANN. § 6.204(c).

Appellee contends that adjudicating a same-sex divorce does not "give effect" to a same-sex marriage because a divorce decree does not establish the validity of the marriage as against third parties. The Texas Constitution and section 6.204 of the Texas Family Code, however, forbid the State and its agencies from giving *any effect whatsoever* to a same-sex marriage. Thus, in order to prevail, appellee must show that a same-sex divorce gives no effect at all to the purported same-sex marriage. He cannot do so. 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. *See Gray v. Gray*, 354 S.W.2d 948, 949 (Tex.Civ.App.-Houston 1962, writ dism'd) ("A suit for divorce presumes a valid marriage. At the trial on the merits the plaintiff must prove by a preponderance of the evidence that she was married to the defendant.") (citations omitted); *cf. Mossler v. Shields*, 818 S.W.2d 752, 753-54 (Tex.1991) (per curiam) (dismissal of divorce action with prejudice was res judicata as to plaintiff's claim of the existence of a common-law marriage). Moreover, in this very case appellee seeks to "give effect" to his marriage under Texas law by seeking a division of the parties' community property in the event they are unable to agree on a property division. Community property is a paradigmatic legal benefit that is associated intimately and solely with marriage. *See* TEX. FAM.CODE ANN. § 3.002 ("Community property consists of the property, other than separate property, acquired by either spouse during marriage.").

Furthermore, a divorce proceeding would "give effect" to a same-sex marriage. The inherent nature of a divorce proceeding requires both a respondent ***667** whom the petitioner seeks to divorce and a legally recognized relationship between the parties that the petitioner seeks to alter. An obvious purpose and function of the divorce proceeding is to determine and resolve legal obligations of the parties arising from or affected by their marriage. A person does not and cannot seek a divorce without simultaneously asserting the existence and validity of a lawful marriage. Texas law, as embodied in our constitution and statutes, requires that a valid marriage must be a union of one man and one woman, and only when a union comprises one man and one woman can there be a divorce under Texas law.

Appellee argues in the alternative that if the adjudication of his divorce action "gives effect" to a same-sex marriage, then the adjudication of a suit to declare his marriage void under section 6.307 of the family code would as well. Appellee points out that the family code authorizes the trial court to grant various forms of relief, such as temporary restraining orders and name changes, in any kind of suit for dissolution of marriage, whether the ultimate relief sought is a divorce, an annulment, or a declaration of voidness. *See* TEX. FAM.CODE ANN. §§ 6.501, 45.105(a) (Vernon 2006 & 2008). There is also some authority that courts may order property divisions in voidness suits. *See Hovious v. Hovious*, No. 2-04-169-CV, 2005 WL 555219, at *6 (Tex.App.-Fort Worth Mar. 10, 2005, pet. denied) (mem.op.). According to appellee, the State is trying to have it both ways by arguing that these remedies impermissibly "give effect" to a same-sex marriage if they are pursued in a suit for divorce but do not "give effect" to a same-sex marriage if they are sought in a suit to declare a marriage void. We disagree. A decree of voidness does not "give effect" to the void marriage but, just the opposite, establishes that the parties to the ostensible but void marriage were never married for purposes of Texas law. Also, orders granting ancillary relief, such as restraining orders and name changes, do not amount to "giving effect" to the void marriage. In the context of a voidness proceeding, such orders do not recognize or effectuate a marriage between the parties, or even a claim to marital benefits. They merely facilitate the disentanglement of the parties' affairs when (1) they were never validly married in the eyes of Texas law and (2) at least one of the parties desires a judicial declaration to that effect.

We conclude that Texas courts have no subject-matter jurisdiction to adjudicate a divorce petition in the context of a same-sex marriage.[FN2] Thus, the trial court had no subject-matter jurisdiction to adjudicate appellee's petition for divorce.

FN2. We also note the decision in *Littleton v. Prange*, 9 S.W.3d 223 (Tex.App.-San Anto-

nio 1999, pet. denied) (plurality op.). In *Littleton*, the San Antonio Court of Appeals held that a person who was born male, underwent a sex-change operation, and then ceremonially married another man was not validly married for purposes of standing to sue as a spouse under Texas's wrongful-death and survival statutes. *Id.* at 229-31. *Littleton* was decided before the adoption of section 6.204 of the family code and article I, section 32 of the Texas Constitution, but the court still concluded that "Texas statutes do not allow same-sex marriages." *Id.* at 231. And in *Ross v. Goldstein*, the Houston Fourteenth Court of Appeals refused to recognize the "marriage-like relationship" doctrine in the same-sex context, relying on the Texas Constitution and family code for support. 203 S.W.3d 508, 514 (Tex.App.-Houston [14th Dist.] 2006, no pet.).

E. Comity

Appellee argues that the trial court possesses subject-matter jurisdiction based on principles of comity because he was legally married in Massachusetts. Appellee further contends that Texas courts have long ***668** employed the comity-based "place-of-celebration rule" to determine whether a foreign marriage is valid for purposes of hearing a divorce, and that we should continue to apply that rule. He also cites cases from New York in which courts have entertained same-sex-divorce cases even though New York does not recognize same-sex marriages.

[17][18] "Comity is a principle under which the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign not as a rule of law, but rather out of deference or respect." *Hawsey v. La. Dep't of Soc. Servs.*, 934 S.W.2d 723, 726 (Tex.App.-Houston [1st Dist.] 1996, writ denied); *accord* BLACK'S LAW DICTIONARY 284 (8th ed. 2004) (defining comity as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts"). "Because comity is grounded in cooperation and mutuality, Texas should extend comity by recognizing the laws and judicial decisions of other states unless: (1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances; or (2) the foreign statute produces a result in violation of this state's own legitimate public policy." *Hawsey*, 934 S.W.2d at 726.

Appellee misconstrues the solidity of the place-of-celebration rule in Texas jurisprudence. In one of the more recent cases on point, the court rejected the place-of-celebration rule in favor of the most-substantial-relationship test and, based largely on Texas public policy, applied Texas law to ascertain the validity of marriages and divorces that took place in other countries. *Seth v. Seth*, 694 S.W.2d 459, 462-64 (Tex.App.-Fort Worth 1985, no writ). In neither of the two cases cited by appellee did a Texas court actually use the place-of-celebration rule to give effect to a marriage that was valid in the place of celebration but void in Texas. In one, the court enforced California's law refusing recognition of common-law marriages, thus rejecting the plaintiff's claim of common-law marriage to the extent it was based on conduct that took place in California. *See Braddock v. Taylor*, 592 S.W.2d 40, 42 (Tex.Civ.App.-Beaumont 1979, writ ref'd n.r.e.).[FN3] In the other, the question presented was whether a decedent had entered a valid common-law marriage with appellee Shelley Newman. *Durr v. Newman*, 537 S.W.2d 323, 325 (Tex.Civ.App.-El Paso 1976, writ ref'd n.r.e.). The appellant argued that the marriage was not valid under the place-of-celebration test because the only place Newman and decedent held themselves out as married was Nevada, which does not recognize common-law marriages. *Id.* at 326. The appellate court rejected the argument because the appellant had failed to prove the content of Nevada law properly in the trial court under the rules of procedure. *Id.* Thus, the court presumed that Nevada law was the same as Texas law, and the place-of-celebration rule was not essential to the case's disposition. *Id.* Moreover, we note ***669** that the place-of-celebration rule seems contrary to the family code's general choice-of-law provision: "The law of this state applies to persons married elsewhere who are domiciled in this state." TEX. FAM.CODE ANN. § 1.103.

FN3. In Braddock, the question was whether decedent David Taylor was married to appellee Janice Taylor at the time of his death, as the trial court held. Id. at 41. The evidence showed that decedent was previously married to someone else and not divorced when he and Janice began holding themselves out as husband and wife in Texas. Id. at 42. Dece-

> dent and Janice then moved to California, which does not recognize common-law marriages, and continued their relationship. *Id.* Decedent divorced his prior wife, and then he died. *Id.* "Since no marriage between the deceased and appellee was ever contracted or celebrated in California, nor contracted in Texas after the impediment was removed," the trial court erred by holding that Janice was decedent's wife and heir. *Id.*

Moreover, Texas has repudiated the place-of-celebration rule with respect to same-sex unions on public-policy grounds. The Texas Constitution provides that "[m]arriage in this state shall consist only of the union of one man and one woman." TEX. CONST. art. I, § 32(a). The rule contains no exceptions for marriages performed in other jurisdictions, nor is its application limited to marriages performed in this state. Any common-law principle recognizing same-sex marriages performed in other jurisdictions must yield to the constitution. Moreover, the legislature has declared that same-sex marriages are contrary to Texas public policy. TEX. FAM.CODE ANN. § 6.204(b). We do not extend comity to the laws of other states if doing so would result in a violation of Texas public policy. *K.D.F. v. Rex*, 878 S.W.2d 589, 595 (Tex.1994); *Hawsey*, 934 S.W.2d at 726; see also *Larchmont Farms, Inc. v. Parra*, 941 S.W.2d 93, 95 (Tex.1997) (per curiam) ("The basic rule is that a court need not enforce a foreign law if enforcement would be contrary to Texas public policy."). The Supreme Court has also indicated that a state may invoke statutory voidness to deny comity to a marriage performed in another state. *Loughran v. Loughran,* 292 U.S. 216, 223, 54 S.Ct. 684, 78 L.Ed. 1219 (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) (footnote omitted). Accordingly, we conclude that neither comity nor the place-of-celebration rule overcome the jurisdictional bar of section 6.204(c)(2).

Appellee has referred us to several recent New York cases that reach a different result, but Texas's specific constitutional and statutory provisions addressing same-sex marriage make those cases inapposite. New York has no legislation or constitutional amendment specifically declaring that same-sex marriages are against the public policy of the state. *See C.M. v. C.C.*, 21 Misc.3d 926, 867 N.Y.S.2d 884, 886 (Sup.Ct.2008) ("[T]he New York State legislature has not enacted any statute that would prohibit recognition of a same sex marriage from another jurisdiction, nor is there any constitutional amendment barring recognition of such marriages."). Rather, its highest court has inferred that New York's general marriage statutes, adopted in 1909, limit marriage to opposite-sex couples. *Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1, 6 (2006). Because New York has no clear declaration of a public policy forbidding same-sex marriages, some New York courts have relied on comity to extend recognition to same-sex marriages performed in other jurisdictions for the purpose of entertaining divorce actions. *See, e.g., Beth R. v. Donna M.*, 19 Misc.3d 724, 853 N.Y.S.2d 501, 504, 506 (Sup.Ct.2008) (relying on comity to deny defendant's motion to dismiss same-sex-divorce action); *accord C.M.*, 867 N.Y.S.2d at 889; *see also Dickerson v. Thompson*, 73 A.D.3d 52, 897 N.Y.S.2d 298, 299 (2010) (holding that New York courts have subject-matter jurisdiction to entertain suits to dissolve same-sex civil unions entered in another jurisdiction). But, as the court noted in *Beth R.*, comity governs the recognition of out-of-state marriages only in the absence of "overriding legislation." 853 N.Y.S.2d at 504. We have just such overriding legislation in Texas, where the constitution expressly limits "marriage" to opposite-sex couples, section 6.204(b) of the family code ***670** declares same-sex marriages to be contrary to public policy, and section 6.204(c) denies legal effect to same-sex marriages even if contracted in another jurisdiction. Thus, the New York cases relied on by appellee are inapposite.[FN4]

> FN4. In contrast to the New York cases, courts in other jurisdictions have held that they lack jurisdiction to dissolve same-sex marriages or civil unions despite the validity of those unions in the jurisdictions where they were celebrated. *See Rosengarten v. Downes*, 71 Conn.App. 372, 802 A.2d 170, 184 (Conn.App.Ct.), *appeal dism'd as moot*, 261 Conn. 936, 806 A.2d 1066 (2002); *Kern*, 11 Pa. D. & C.5th at 576; *Chambers v. Ormiston*, 935 A.2d 956, 958, 967 (R.I.2007). Like the New York cases, these cases are of limited usefulness because Texas's marriage laws differ from those at issue in those cases.

F. Conclusion

[19] 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. We must therefore proceed to consider whether the Texas laws compelling this result offend the Constitution.

V. TEXAS LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

The question presented is whether Texas law proscribing the adjudication of a petition for divorce by a party to a same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment.

A. The Equal Protection Clause of the Fourteenth Amendment

[20][21] The Equal Protection Clause provides, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). On the other hand, "the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Consequently, disparate treatment of different but similarly situated groups does not automatically violate equal protection. *Dallas Transit Sys. v. Mann*, 750 S.W.2d 287, 291 (Tex.App.-Dallas 1988, no writ). To reconcile the equal-protection principle with practical necessity, the Court has developed differing levels of judicial scrutiny depending on the kind of classification at issue, which we analyze below. First, however, we address the State's contention that the equal-protection issue has already been squarely decided by the United States Supreme Court in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). Ultimately, we conclude that Texas law does not violate equal protection.

B. *Baker v. Nelson*

The State contends that appellee's equal-protection challenge is completely foreclosed by the United States Supreme Court's 1972 decision in *Baker v. Nelson*. That case began as a suit in Minnesota state court in which two men sued for the right to obtain a marriage license. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 185 (1971), *dism'd*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). The petitioners argued that they were entitled to a marriage license under Minnesota law and, alternatively, that a law permitting only opposite-sex marriages denied them due ***671** process and equal protection. *Id.* at 185-86. The trial court denied relief, and the Minnesota Supreme Court affirmed. That court held that Minnesota law prohibited same-sex marriages and that this prohibition did not violate petitioners' due-process and equal-protection rights. *Id.* at 185-87. On further appeal to the United States Supreme Court, the Court dismissed the appeal "for want of a substantial federal question." 409 U.S. at 810, 93 S.Ct. 37. The State argues that this dismissal constituted a rejection of the petitioners' equal-protection claim on the merits. Because there is no Supreme Court precedent overruling *Baker*, the State concludes, we must reject appellee's equal-protection claim. Appellee makes several arguments in response. He distinguishes *Baker* because it involved an application for a marriage license, while his claim involves a request for a divorce. And he contends that *Baker* has been "fatally undermined" by subsequent cases. [FN5]

> FN5. Appellee also asserts that "neither the parties nor the Court in *Baker* had even conceived of Equal Protection or Due Process claims on the basis of sexual orientation." This statement is at odds with appellee's assertion two pages earlier in his brief that the *Baker* petitioner argued "that a state could not constitutionally refuse to marry same-sex couples under either the Due Process or Equal Protection clauses of the Fourteenth Amendment."

[22] A summary disposition by the Supreme Court has very narrow precedential effect. Specifically, that precedential effect "can extend no farther than the precise issues presented and necessarily decided by" the Court's action. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (internal quotations omitted); *see also Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (per curiam) (stating that summary dismissals "prevent lower courts from coming to opposite conclusions on the

precise issues presented and necessarily decided" by the Court). Thus, a summary disposition has "considerably less precedential value than an opinion on the merits." *Ill. State Bd. of Elections*, 440 U.S. at 180-81, 99 S.Ct. 983.

[23] The issue presented in this case is distinguishable from the precise issues presented to and decided by the Supreme Court in *Baker*. The jurisdictional statement in *Baker* posed three questions to the Court:

> 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. [FN6]
>
> FN6. The State attached a copy of the appellants' jurisdictional statement in *Baker* to its brief in this appeal. Ordinarily we do not consider matters outside the record. *In re Estate of Bendtsen*, 230 S.W.3d 823, 830 (Tex.App.-Dallas 2007, pet. denied). But appellee has not objected, and other courts have quoted the jurisdictional statement in *Baker* to similar effect. *See, e.g., In re Kandu*, 315 B.R. 123, 137 (Bankr.W.D.Wash.2004).

In all three issues, the *Baker* appellants argued that the Constitution compelled Minnesota to grant them a marriage license***672** and treat them as a married couple from then on. In the instant case, by contrast, appellee does not complain of Texas's refusal to recognize his marriage to H.B. on a going-forward basis. His complaint is that Texas law relegates him to a declaration of voidness, when a party to an opposite-sex marriage in otherwise similar circumstances would be entitled to a divorce.

Baker is certainly relevant because it reaffirms the states' preeminent role in the area of family law, and we accord *Baker* appropriate weight in our analysis of the equal-protection issue. But because *Baker* is distinguishable, we conclude that it does not control the disposition of the equal-protection issue presented in this case. *Cf. Smelt v. Cnty. of Orange*, 374 F.Supp.2d 861, 872-74 (C.D.Cal.2005) (concluding *Baker v. Nelson* did not control outcome of constitutional challenge to federal DOMA), *aff'd in part and vacated in part on other grounds*, 447 F.3d 673 (9th Cir.2006); *In re Kandu*, 315 B.R. 123, 138 (Bankr.W.D.Wash.2004) (same). *But see Wilson v. Ake*, 354 F.Supp.2d 1298, 1304-05 (M.D.Fla.2005) (concluding that *Baker* was binding in challenge to constitutionality of Florida statute prohibiting same-sex marriage).

C. The Standard: Strict Scrutiny or Rational Basis

[24][25] An equal-protection challenge is examined under one of two tests: the strict-scrutiny test or the rational-basis test. *City of Cleburne*, 473 U.S. at 439-40, 105 S.Ct. 3249; *Cannady v. State*, 11 S.W.3d 205, 215 (Tex.Crim.App.2000); *Kiss v. State*, 316 S.W.3d 665, 668-69 (Tex.App.-Dallas 2009, pet. ref'd). Appellee urges the former. Strict scrutiny applies if a law discriminates against a suspect class or interferes with a fundamental right. *Kiss*, 316 S.W.3d at 668-69; *Dill v. Fowler*, 255 S.W.3d 681, 683 (Tex.App.-Eastland 2008, no pet.). "[I]f 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." *Romer*, 517 U.S. at 631, 116 S.Ct. 1620; *accord Kiss*, 316 S.W.3d at 668-69.

The Supreme Court has described a "suspect class" as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (per curiam) (internal quotations omitted) (holding that rational-basis test applied to mandatory police retirement age). Examples of recognized suspect classes are classes defined by race, alienage, and ancestry. *Hookie v. State*, 136 S.W.3d 671, 679 n. 9 (Tex.App.-Texarkana 2004, no pet.).

"[T]he Supreme Court has never ruled that sexual

orientation is a suspect classification for equal protection purposes." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir.2006); *see also Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir.2004) ("Neither the Supreme Court nor this court has recognized sexual orientation as a suspect classification...."). The parties cite no authority from Texas's two highest courts on point, and we have found none. Many courts in other jurisdictions have addressed the issue and held that homosexuals are not a suspect class for equal-protection purposes. *See, e.g., Citizens for Equal Prot.*, 455 F.3d at 866-67; *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir.2004); *Smelt*, 374 F.Supp.2d at 875; *see also* ***673***Conaway v. Deane*, 401 Md. 219, 932 A.2d 571, 606 (2007) (analyzing claims under Maryland Constitution).

[26] Appellee poses several arguments in support of his position that homosexuals should be designated a suspect class. Appellee, citing *Bowen v. Gilliard*, 483 U.S. 587, 107 S.Ct. 3008, 97 L.Ed.2d 485 (1987), asserts that homosexuals "have long been persecuted." In *Bowen*, the Court, applying the rational-basis test, held that AFDC child support attribution requirements did not violate due process or equal protection. *Id.* at 598-603, 107 S.Ct. 3008. *Bowen* is significantly removed from, and does not support, the proposition for which it is cited. Next, appellee, citing *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), asserts that "for centuries there have been powerful voices to condemn homosexual conduct as immoral." *See id.* at 571, 123 S.Ct. 2472. In *Lawrence*, the Court held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 578-79, 123 S.Ct. 2472. According to the Court, "there is *no* longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Id.* at 568, 123 S.Ct. 2472 (emphasis added). *Lawrence* does not support appellee's position that homosexuals should be designated a suspect class.

Appellee has not shown that Texas generally excludes homosexuals from the protections of its laws. In fact, appellee pointed out in the trial court that persons in same-sex relationships appear to be eligible to seek protective orders from domestic violence, thus undermining his own position. *See* TEX. FAM.CODE ANN. § 82.002(b) (Vernon 2008) (permitting an adult member of a "dating relationship" to seek a protective order against violence, without regard to the sex of the members of the relationship).

Appellee argues that homosexuals are a politically powerless minority. This contention is presented without relevant authority or analysis, and we therefore reject it. We are aware of significant authority to the contrary. *See Romer*, 517 U.S. at 652, 116 S.Ct. 1620 (Scalia, J., dissenting) (noting that forty-six percent of voters opposed Colorado's Amendment 2, even though homosexuals composed no more than four percent of the population); *Strauss v. Horton*, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, 59, 68 (2009) (noting that over forty-seven percent of voters opposed referendum limiting marriage to opposite-sex couples). Like the Maryland court in *Conaway*, "we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to extraordinary protection from the majoritarian political process." 932 A.2d at 611 (internal quotations omitted).

Appellee also argues that homosexuals are a suspect class because they bear "obvious, immutable, or distinguishing characteristics that define them as a discrete group." However, appellee does not identify or attempt to suggest the exact nature of such characteristics. Again, this contention is presented without relevant authority or analysis, and we therefore reject it.

Citing *City of Cleburne*, appellee asserts that strict scrutiny is justified because sexual orientation has no bearing on a person's ability to "perform or contribute to society." In *City of Cleburne*, the Supreme Court explained that legal classifications based on gender and illegitimacy call for heightened scrutiny because those attributes generally do not affect a person's ability to contribute to society, thus making such classifications inherently suspect.***674** 473 U.S. at 440-41, 105 S.Ct. 3249. In the same opinion, however, the Court observed that rational-basis scrutiny is generally appropriate when the "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement." *Id.* at 441, 105 S.Ct. 3249. The persons singled out and favored by Texas's marriage laws, namely opposite-sex couples, have such a distinguishing and relevant characteristic: the natural ability to procreate. The state's interest in "fostering

relationships that will serve children best" is a legitimate interest within the state's authority to regulate. *Hernandez*, 855 N.E.2d at 11; *see also Conaway*, 932 A.2d at 630 ("[S]afeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest."). Thus, although a person's sexual orientation does not affect his or her ability to contribute to society in general, it does bear on whether he or she will enter a relationship that is naturally open to procreation and thus trigger the state's legitimate interest in child-rearing. *See Hernandez*, 855 N.E.2d at 11 (concluding that rational-basis scrutiny was appropriate in part because same-sex relationships "cannot lead to the birth of children"). Accordingly, *City of Cleburne* does not support appellee's contention that homosexuals are a suspect class.[FN7]

> FN7. In *City of Cleburne*, the Court held that mentally retarded persons are not a suspect class, and that a zoning ordinance requiring a special use permit for homes for the mentally retarded failed the rational-basis test. 473 U.S. at 442-50, 105 S.Ct. 3249.

We conclude that homosexuals are not a suspect class, that persons who choose to marry persons of the same sex are not a suspect class, and that the Texas law at issue in this case does not discriminate against a suspect class.

[27][28] Fundamental rights are rights that are "deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotations omitted).[FN8] In order to ascertain whether a claimed right is indeed fundamental, we must engage in a "careful description of the asserted fundamental liberty interest." *Id.* at 721, 117 S.Ct. 2258 (internal quotations omitted). We do not accept uncritically the description of the right proffered by the party asserting the right. In *Glucksberg*, for instance, the respondents described the claimed right as the "liberty to choose how to die" and the right to "control of one's final days," but the Supreme Court examined the statute under challenge and concluded that the asserted right was more precisely described as "a right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 722, 723, 117 S.Ct. 2258. Accordingly, we must first define the right asserted by appellee.

> FN8. Although *Glucksberg* is a due-process case rather than an equal-protection case, the test for ascertaining whether a claimed right is a "fundamental" right that triggers strict scrutiny is the same under both clauses. *See Lofton*, 358 F.3d at 811-18 (performing single fundamental-right analysis to dispose of both due-process and equal-protection challenges); *see also* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 15.4(a), 15.7 (4th ed. 2007) (discussing law of fundamental rights).

Appellee characterizes the rights in question as the "freedom to marry a person of one's own choosing" and the concomitant right to end such a marriage with a divorce. He points out that the Supreme ***675** Court has indicated that the right to marry is a fundamental right. *See Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (describing marriage as a "fundamental freedom" that may "not be restricted by invidious racial discriminations"); *accord Glucksberg*, 521 U.S. at 719, 117 S.Ct. 2258 (citing *Loving* as establishing fundamental right to marry); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."). But *Loving* involved a marriage between a man and woman. The *Loving* opinion's discussion of the right to marry does not embrace the broad formulation proposed by appellee. *See Evans v. Romer*, 854 P.2d 1270, 1301 (Colo.1993) (Erickson, J., dissenting) ("[R]ather than expressing a willingness to extrapolate new fundamental rights based on selective language from prior Supreme Court decisions, we should exercise caution in identifying and embracing previously unrecognized fundamental rights."). Many courts in other jurisdictions have confronted similar challenges to the federal DOMA and similar state laws, and they have generally concluded that the right being claimed should be defined and analyzed precisely as the right to marry a person of the same sex, not as the right to marry whomever one chooses. *See, e.g., Smelt*, 374 F.Supp.2d at 877-79; *In re Kandu*, 315 B.R. at 138-41; *Conaway*, 932 A.2d at 616-24; *Hernandez*, 855 N.E.2d at 9-10; *Andersen v. King Cnty.*, 158 Wash.2d

1, 138 P.3d 963, 976-79 (2006) (plurality op.). The *Conaway* court's thorough discussion of the question demonstrates that the Supreme Court's right-to-marry jurisprudence has always involved opposite-sex couples and that the Court has always justified the fundamental nature of the right to marry, at least in part, by reference to procreation. *Conaway*, 932 A.2d at 619-21. We agree with that analysis and conclude that the precise rights claimed by appellee are the right to marry a person of the same sex and the concomitant right to divorce.

"[T]he limitation of marriage to one man and one woman preserves both its structure and its historic purposes." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941, 992 n. 13 (2003) (Cordy, J., dissenting). Accurately identifying and analyzing appellee's claimed right-the purported "right to marry a person of the same sex"-exposes the serious consequences such a position portends: the redefinition of the fundamental institution of marriage. And, of course, only by asserting that marriage includes the union of two persons of the same sex can appellee advance his claim of discrimination. A fatal flaw in this position is that it assumes the truth of the proposition to be proved.[FN9]

> FN9. In legal analysis, as in mathematics, it is fundamentally erroneous to assume the truth of the very thing to be proved. *Goodridge*, 798 N.E.2d at 984 n. 2 (Cordy, J., dissenting).

Having concluded that the claimed right in question is properly defined as the right to marry a person of the same sex, we consider whether that right is " 'deeply rooted in this Nation's history and tradition.' " *Glucksberg*, 521 U.S. at 721, 117 S.Ct. 2258 (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality op.)). Plainly, it is not. Until 2003, no state recognized same-sex marriages. *Smelt*, 374 F.Supp.2d at 878. Congress and most states have adopted legislation or constitutional amendments explicitly limiting the institution of marriage to opposite-sex unions. *Conaway*, 932 A.2d at 627. We agree with the numerous courts that have held that the right to legal recognition of a same-sex marriage is not a fundamental ***676** right for equal-protection purposes. *See, e.g., Smelt*, 374 F.Supp.2d at 879; *Wilson*, 354 F.Supp.2d at 1307; *In re Kandu*, 315 B.R. at 140-41; *Standhardt v. Superior Court*, 206 Ariz. 276, 77 P.3d 451, 458-60 (Ariz.Ct.App.2003); *see also Conaway*, 932 A.2d at 629 (analyzing claims under Maryland Constitution); *Hernandez*, 855 N.E.2d at 10 (analyzing claims under New York Constitution); *Andersen*, 138 P.3d at 979 (analyzing claims under Washington Constitution and noting that "*no* appellate court applying a federal constitutional analysis" has found a fundamental right to marry a person of the same sex); *see also Goodridge*, 798 N.E.2d at 987 (Cordy, J., dissenting) ("While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not."). *But see Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 993-94 (N.D.Cal.2010) (holding that same-sex couples were seeking to exercise the fundamental right to marry), *appeal docketed*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 5, 2010). We conclude that the legislation in question does not interfere with a fundamental right.

Because Texas's laws stripping the courts of jurisdiction to adjudicate claims for same-sex divorce do not discriminate against a suspect class or burden a fundamental right, we evaluate the law under the rational-basis test.

D. Application of Rational-Basis Standard

[29][30] The link between the classification adopted and the object to be attained affords substance to the Equal Protection Clause. *Romer*, 517 U.S. at 632, 116 S.Ct. 1620. As emphasized by the Supreme Court, "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* The link-or rational relationship-ensures that the classification is not drawn with the express purpose of disadvantaging any group burdened by the law. *Id.* at 633, 116 S.Ct. 1620. In short, "a law must bear a rational relationship to a legitimate governmental purpose." *Id.* at 635, 116 S.Ct. 1620.

[31][32][33][34] Under the rational-basis test, a statute enjoys a strong presumption of validity, and the statute must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); *In re* G.C., 66 S.W.3d 517, 524

(Tex.App.-Fort Worth 2002, no pet.). "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam). The party attacking the rationality of the legislative classification bears the burden of negating every conceivable basis that might support it. Fed. *Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Moreover, the classification adopted by the legislature need not be perfectly tailored to its purpose in order to pass constitutional muster:

> [A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in ***677** some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Kiss, 316 S.W.3d at 668 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)). Finally, states have traditionally enjoyed wide latitude in prescribing "the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Citizens for Equal Prot.*, 455 F.3d at 867 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35, 24 L.Ed. 565 (1878)). "In this constitutional environment, rational-basis review must be particularly deferential." *Id.*

Several courts have concluded that laws limiting the benefits of marriage to opposite-sex couples do not offend equal protection. *Id.* at 868-69; *Smelt*, 374 F.Supp.2d at 879-80; *Wilson*, 354 F.Supp.2d at 1308-09; *Standhardt*, 77 P.3d at 465; *see also Morrison v. Sadler*, 821 N.E.2d 15, 21-31 (Ind.Ct.App.2005) (plurality op.) (analyzing equal-protection claim under Indiana Constitution); *Conaway*, 932 A.2d at 634 (analyzing equal-protection claim under Maryland Constitution); *Hernandez*, 855 N.E.2d at 12 (analyzing equal-protection claim under New York Constitution); *Andersen*, 138 P.3d at 985 (analyzing equal-protection claim under Washington Constitution). *But see Perry*, 704 F.Supp.2d at 1003-04 (reaching opposite result). We agree with those courts that have found no equal-protection violation. The state has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple. *Andersen*, 138 P.3d at 983; *see also Goodridge*, 798 N.E.2d at 999-1000 (Cordy, J., dissenting) ("[T]he Legislature could rationally conclude that a family environment with married, opposite-sex parents remains the optimal social structure in which to bear children...."). [FN10]

> FN10. Supporters of the amendment that became article I, section 32 of the Texas Constitution argued, "A traditional marriage consisting of a man and a 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." House Comm. on State Affairs, Bill Analysis, Tex. H.J.R. 6, 79th Leg., R.S. (2005).

We next consider whether Texas's marriage laws are rationally related to the goal of promoting the raising of children in households headed by opposite-sex couples. We conclude that they are. Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage. *See Standhardt*, 77 P.3d at 462-63 ("The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children."); *Andersen*, 138 P.3d at 982 ("[N]o other relationship has the potential to create, without third party involvement, a child biologically related to both parents, and the legislature rationally could decide to limit legal rights and obligations of marriage to opposite-sex couples."). The legislature could reasonably conclude that the institu-

tion of civil ***678** marriage as it has existed in this country from the beginning has successfully provided this desirable social structure and should be preserved. *See Goodridge,* 798 N.E.2d at 998 (Cordy, J., dissenting). The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship. *See Hernandez,* 855 N.E.2d at 7 ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."); Lynn D. Wardle, Essay, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation,* 24 HARV. J.L. & PUB. POL'YY 771, 780 (2001) ("Heterosexual marriage reasonably may be assumed to provide the most advantageous environment in which children can be reared, providing profound benefits of dual gender parenting to model intergender relations and show children how to relate to persons of their own and the opposite gender.").

The Texas Constitution and the Texas Family Code single out one particular social unit for purposes of defining a legally valid marriage in Texas: opposite-sex couples. Appellee asserts that because Texas law thus both defines and restricts formal recognition of the institution of marriage to opposite-sex couples, it thereby discriminates against and denigrates same-sex couples. We disagree. Texas law recognizes that only opposite-sex couples are naturally capable of producing children, and it gives participants in that kind of relationship the option of legal formalization, with the legitimate legislative goal of encouraging such formalization and thereby promoting the well-being of children. The state has decided that the general welfare does not require extending the same option to the members of other social units. Texas law does not recognize same-sex relationships as valid marriages. Texas law also does not recognize relationships that involve more than one man and one woman, such as bigamous and polygamous relationships (both of which involve at least one person of the opposite sex), as valid marriages. *See* TEX. FAM.CODE ANN. § 6.202 (voiding marriage during existence of prior marriage); TEX. PENAL CODE ANN. § 25.01 (Vernon Supp.2009) (criminalizing bigamy). Appellee has not shown that the legislative history of the 2005 constitutional amendment defining marriage in Texas as limited to opposite-sex couples reflects any animus against same-sex couples. We cannot conclude that the State's justification for its marriage laws lacks a rational relationship to legitimate state interests.

Appellee asserts there is a sharp distinction between the right to marriage and the right to divorce. While each is different, the difference does not advance appellee's position. The laws specific to proceedings for divorce in Texas are an integral part of the State's overall scheme to give special protections and benefits to married couples. Divorce is a mechanism for determining and resolving the legal obligations of the parties arising from or affected by their marriage. The State may reasonably conclude that provisions must be made for the peaceable resolution of irreconcilable disputes and the legal dissolution of the marital bond when its continuance would hinder rather than promote the goals of the marriage laws.

Appellee argues that a voidance action is not an adequate substitute for a divorce action in his case. He contends that he might not be able to pursue an action to declare his marriage void under ***679** section 6.307 because the State contends that he is not a party to a "marriage" at all. He purports to fear that the State would intervene in a suit for voidness and claim that the trial court lacks jurisdiction of that action as well. This argument is without merit. Section 6.307 provides, "Either party to a marriage made void by this chapter may sue to have the marriage declared void[.]" TEX. FAM.CODE ANN. § 6.307(a). Same-sex marriages are made void by "this chapter," i.e., by section 6.204(b) of chapter 6 of the family code. Thus, appellee could bring a suit to declare his marriage to H.B. void.

Appellee argues that certain forms of relief, such as spousal maintenance, are available in divorce actions and not in voidance actions. He also argues that other benefits, like the spousal-communication privilege and the community-property laws, will not be available to him if he pursues a voidance action. These arguments are merely policy arguments that it would be better if the state gave same-sex couples the same marriage-related rights as opposite-sex couples. We have already concluded that the state may constitutionally treat opposite-sex couples differently from all other social units for purposes of marriage and divorce

laws. Appellee's arguments that he should be afforded rights such as the spousal-communications privilege and community-property rights must be addressed to the Texas Legislature.

Appellee argues that a declaration of voidness is not an adequate substitute for a divorce decree because other jurisdictions might not recognize a declaration of voidness as terminating his marriage to H.B. He points out that there is a lack of precedent showing that a declaration of voidness would be given full faith and credit by other states. He also argues that the wording of section 6.204(b) implies that a Texas declaration of voidness would have no effect outside of Texas because section 6.204(b) provides that a same-sex marriage is "void in this state." *Id.* § 6.204(b). The other statutes in the void-marriage subchapter of the family code provide that the defined marriages are simply "void." *See, e.g., id.* § 6.201 ("A marriage is void if one party to the marriage is related to the other [by specified blood or adoptive relationships]."). We disagree with appellee's contention. Section 6.307 is the provision that confers jurisdiction on the courts to declare any marriage void, and it does not contain the words "in this state" that appellee finds problematic in section 6.204(b). Under section 6.307, "[e]ither party to a marriage made void by this chapter may sue to have the marriage declared void"-not "void in this state." *See id.* § 6.307(a). We reject appellee's contention that a declaration of voidness in his case would not be effective in other jurisdictions as well. We also note, as the State points out, that in this case a decree of divorce would actually create greater uncertainty than a declaration of voidness, in light of existing Texas authority that a divorce decree would be void and subject to collateral attack. *See Mireles,* 2009 WL 884815, at *2 (affirming trial court's judgment that sustained collateral attack on same-sex divorce decree).

Citing a number of other sections of the family code relating to void marriages, appellee contends that Texas law treating "same-sex marriages" as void stigmatizes him. He argues that by declaring same-sex marriages void, Texas has placed them in the "odious company" of unions that have traditionally been deemed "criminal almost by their very nature," such as incestuous and bigamous marriages. The "guilt by association" caused by this juxtaposition, appellee contends, stigmatizes same-sex couples.

***680** Section 6.204 regarding same-sex marriages constitutes a separate and independent provision within the family code. It does not act in concert with the other provisions enumerated by appellee dealing with void marriages, all of which involve significantly different situations.[FN11] Appellee's criticism thus attacks the location of this provision amid other provisions in the code that address other void marriages. Appellee's strained comparison based upon the placement of section 6.204 within the family code not only misconstrues the meaning of section 6.204 but also suggests an effort by appellee to transform his social situation into one of self-imposed ignominy.

> FN11. Appellee mistakenly refers to section 6.302 as voiding consanguineous marriages; we presume he intended to refer to section 6.201. He also erroneously refers to section 6.205 as voiding "quasi-incestuous" marriages. Section 6.205 addresses marriage to minors younger than 16; we presume he intended to refer to section 6.206, which voids marriage to a stepchild or stepparent.

Appellee relies on *Romer* and *Lawrence.* In *Lawrence,* the Supreme Court held that statutes criminalizing homosexual sodomy violate the Due Process Clause. 539 U.S. at 578-79, 123 S.Ct. 2472. In *Romer,* the Court held that equal protection was violated by a state constitutional amendment forbidding the state or any of its subdivisions from giving protected status to any group defined by homosexual or bisexual orientation or activity. 517 U.S. at 635-36, 116 S.Ct. 1620.

The Court struck down the constitutional amendment at issue in *Romer* because it was "inexplicable by anything but animus toward the class it affects" and the Court could not conceive of a single proper legislative end advanced by the amendment. *Id.* at 632, 635, 116 S.Ct. 1620. Texas's laws governing marriage and divorce, by contrast, are rationally related to the legitimate state interest in fostering the best possible environment for procreation and child-raising. Appellee has not demonstrated that the laws at issue are explicable only by class-based animus. *Lawrence* decided that criminal laws against homosexual sodomy served no legitimate state interest that could justify the state's "intrusion into the personal and private life of the individual." 539 U.S. at 578, 123 S.Ct. 2472. But the *Lawrence* Court ex-

pressly recognized that the case did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* Texas's marriage and divorce laws serve legitimate state interests. *See id.* at 585, 123 S.Ct. 2472 (O'Connor, J., concurring) (identifying "preserving the traditional institution of marriage" as a legitimate state interest). In sum, *Romer* and *Lawrence* are distinguishable and offer appellee's position no support. Moreover, other courts have rejected similar arguments that statutes limiting marriage to opposite-sex couples are animus-based. *See, e.g., Citizens for Equal Prot.,* 455 F.3d at 868 (concluding that Nebraska's law limiting marriage to opposite-sex couples was not "inexplicable by anything but animus towards same-sex couples") (internal quotations omitted); *Standhardt,* 77 P.3d at 465 (rejecting contention that Arizona's similar law was "inexplicable by anything but animus") (internal quotations omitted); *Andersen,* 138 P.3d at 980-81 (rejecting contention that Washington's similar law was adopted solely because of anti-homosexual sentiment).

Appellee's bald assertion regarding section 6.204's supposed "guilt by association," without any legal analysis or precedent supporting it, is without merit. We conclude that the Texas laws in question ***681** do not unconstitutionally stigmatize appellee.

E. Conclusion

The trial court erred by ruling that article I, section 32(a) of the Texas Constitution and section 6.204 of the Texas Family Code violate the Equal Protection Clause of the Fourteenth Amendment. Texas's laws providing that its courts have no subject-matter jurisdiction to adjudicate a petition for divorce by a party to a same-sex marriage do not violate the Equal Protection Clause of the Fourteenth Amendment, a provision never before construed as a charter for restructuring the traditional institution of marriage by judicial legislation. [FN12]

> FN12. *Cf. Baker,* 191 N.W.2d at 186 ("The due process clause of the Fourteenth Amendment is not a charter for restructuring [the historic institution of marriage] by judicial legislation.").

VI. DISPOSITION

We conditionally grant the State's petition for writ of mandamus and direct the trial court to vacate its order to the extent it strikes the State's petition in intervention. The writ will issue only if the trial court fails to immediately comply.

We vacate the trial court's second order denying the State's plea to the jurisdiction. We reverse the trial court's first order to the extent it denies the State's plea to the jurisdiction, and we remand the case to the trial court with instructions to dismiss for lack of subject-matter jurisdiction.

SUPPLEMENTAL OPINION ON MOTION FOR EN BANC RECONSIDERATION

Appellee J.B. has filed a motion for en banc reconsideration. The motion is denied.

[35] In his motion, Appellee asserts that we erred by ignoring his arguments on appeal that article I, section 32(a) of the Texas Constitution and section 6.204 of the Texas Family Code violate the Due Process Clause, the First Amendment right to free association, and the constitutional right to travel. In its amended order denying the State's plea to the jurisdiction, the trial court ruled that section 6.204 of the family code violates all of those rights. But, as noted in our original opinion, that order was a legal nullity because it was signed during the automatic stay imposed by section 51.014(b) of the civil practice and remedies code.

Appellee did not present his constitutional challenges based on due process, the right to free association, and the right to travel to the trial court, and the State had no opportunity to respond to them in that court. We will not consider grounds for affirmance that were not presented to the trial court and to which the other side had no opportunity to respond. *Victoria Gardens of Frisco v. Walrath,* 257 S.W.3d 284, 289-90 (Tex.App.-Dallas 2008, pet. denied); *see also Guar. Cnty. Mut. Ins. Co. v. Reyna,* 709 S.W.2d 647, 648 (Tex.1986) (per curiam); *cf. City of San Antonio v. Schautteet,* 706 S.W.2d 103, 104 (Tex.1986) (court of appeals should not have addressed appellant's constitutional challenge that was never presented to the trial court).

Appellee's motion for en banc reconsideration is denied.

Tex.App.-Dallas,2010.
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TAB E

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

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

No. 05-09-01170-CV

Appeal from the 302nd Judicial District Court of Dallas County, Texas. (Tr.Ct.No. DF-09-1074).
Opinion delivered by Justice FitzGerald, Justices Bridges and Fillmore participating.

In accordance with this Court's opinion of this date, the trial court's December 7, 2009 Amended Order on Intervenor's Plea to the Jurisdiction is **VACATED**. The trial court's October 1, 2009 Order on Intervenor's Plea to the Jurisdiction is **REVERSED** and this cause is **REMANDED** to the trial court with instructions to dismiss the case for lack of subject-matter jurisdiction.

It is **ORDERED** that appellant the State of Texas recover its costs of this appeal from appellee Jeffrey Buck.

Judgment entered August 31, 2010.

KERRY P. FITZGERALD
JUSTICE

TAB F

Effective: September 1, 2003

Vernon's Texas Statutes and Codes Annotated Currentness
Family Code (Refs & Annos)
Title 1. The Marriage Relationship (Refs & Annos)
Subtitle C. Dissolution of Marriage
Chapter 6. Suit for Dissolution of Marriage
Subchapter C. Declaring a Marriage Void
➡ **§ 6.204. Recognition of Same-Sex Marriage or Civil Union**

(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.

(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.

TAB F

Effective: September 1, 2003

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(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.

TAB G

Effective: November 8, 2005

Vernon's Texas Statutes and Codes Annotated Currentness
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)
➡ § 32. Marriage; union of one man and one woman

Sec. 32. (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.

CREDIT(S)

Adopted Nov. 8, 2005.