

No. 11-0024

**In the
Supreme Court of Texas**

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

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

**RESPONSE OF THE STATE OF TEXAS
TO THE PETITION FOR REVIEW**

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ISSUES PRESENTED

1. Does a trial court have jurisdiction over a same-sex divorce suit premised on an out-of-state same-sex marriage?
2. Are Texas laws limiting the legal institution of marriage and the rights of marriage—including divorce—to the union of one man and one woman consistent with the U.S. Constitution?

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**RESPONSE OF THE STATE OF TEXAS
TO THE PETITION FOR REVIEW**

TO THE HONORABLE SUPREME COURT OF TEXAS:

The State of Texas agrees with Petitioner that this Court should grant the petition for review in order to resolve “an important question of state law that should be, but has not been, resolved by the Supreme Court.” *See* TEX. R. APP. P. 56.1(a)(6). That question is whether a same-sex couple married in another state may sue for divorce in a Texas court.

Multiple provisions of the Texas Constitution and Family Code prohibit a suit for same-sex divorce. *See* TEX. CONST. art. I, § 32; TEX. FAM. CODE §§ 6.001, 6.204(b), 6.204(c)(1), 6.204(c)(2), 6.307. To date, two district courts have either struck down or ignored those provisions of Texas law. *See In the Matter of the Marriage of J.B. & H.B.*, No. 09-01074-U3, Order (302nd Dist. Ct., Dallas County, Tex. Oct. 1, 2009) (declaring that Texas laws prohibiting same-sex divorce violate the Fourteenth Amendment to the U.S.

Constitution); *In the Matter of the Marriage of Naylor & Daly*, No. D-1-FM-09-000050, Hearing (126th Dist. Ct., Travis County, Tex. Feb. 10, 2010) (granting same-sex divorce without explanation despite recognizing one day earlier that a same-sex divorce petition creates “interesting constitutional issues” and “jurisdictional question[s]” that require extensive briefing and argument). In addition, one court of appeals has stated—in a published decision—that same-sex divorce may be permissible under Texas law. *See State v. Naylor*, 330 S.W.3d 434, 441-42 (Tex. App.—Austin 2011, pet. filed) (declining to reach the merits, but stating that Texas law can be interpreted “in a manner that would allow the trial court to grant a divorce in this case”).

As demonstrated below, Texas law could hardly be clearer that divorce is only available to dissolve validly married unions of one man and one woman. But these legally baseless judicial rulings have created needless uncertainty about the remedies available to same-sex couples who wish to dissolve their out-of-state marriages in Texas court. A decision from this Court affirming the court of appeals’ opinion would not only provide accurate legal guidance to same-sex couples residing in Texas, it would also reaffirm that Texas law means what it says: Marriage in Texas can only be between a man and a woman, and courts may not give effect to any legal claim asserted as a result of an out-of-state same-sex marriage. TEX. CONST. art. I, § 32; TEX. FAM. CODE § 6.204(c).

ARGUMENT

Petitioner sued his same-sex partner for divorce in Dallas County district court. Because no party to the case intended to defend the plain meaning and constitutionality of the Texas Constitution and Family Code, the State intervened. There is no challenge before this Court to the State’s participation in this case.¹

The district court apparently agreed with the State that Article I, section 32 of the Texas Constitution and section 6.204 of the Family Code prohibit suits for same-sex divorce. Because these provisions of Texas law stand in the way of a suit for same-sex divorce, they must be declared unconstitutional in order for a same-sex divorce to be granted. The district court did exactly that. *See In the Matter of the Marriage of J.B. & H.B.*, No. 09-01074-U3, Order (302nd Dist. Ct., Dallas County, Tex. Oct. 1, 2009) (finding that Article 1, section 32 of the Texas Constitution and section 6.204 of the Family Code “violate[] the right to equal protection and therefore violate[] the 14th Amendment of the United States Constitution”).

As the State explained below—and as the Fifth Court of Appeals’ decision reversing the district court correctly holds—Texas law prohibits suits for same-sex divorce in at least four independent ways. *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 664-67 (Tex. App.—Dallas 2010, pet. filed). First, only parties to a marriage may sue for divorce. TEX.

1. Petitioner challenged the State’s intervention at both the district court and the court of appeals. CR32-39; *Marriage of J.B.*, 326 S.W.3d 654, 660-62. The district court struck the State’s intervention, CR82, and the court of appeals granted mandamus relief clarifying that the State is a proper party to this case. *Marriage of J.B.*, 326 S.W.3d 654, 660-62. The petition for review does not ask this Court to review the propriety or the timing of the State’s intervention.

FAM. CODE § 6.001. The Texas Constitution explicitly defines the word “marriage” for all legal purposes in Texas: “Marriage in this state shall consist only of the union of one man and one woman.” TEX. CONST. art. I, § 32(a). Petitioner and Respondent obtained a marriage license in Massachusetts, but because they are both men, they are not married—and cannot be married—as far as Texas law is concerned. Thus, Petitioner did not—and cannot—allege a valid marriage so as to trigger the court’s jurisdiction. To the contrary, he alleged a void marriage, and this facial deficiency in his pleading deprives the court of jurisdiction.² See *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993) (standing is a component of subject-matter jurisdiction).

Second, section 6.204(c)(1) of the Family Code prohibits same-sex divorce. Under section 6.204(c)(1), Texas courts may not “give effect” to an out-of-state same-sex marriage. *Id.* § 6.204(c)(1). Granting a divorce to a same-sex couple—indeed, even entertaining a suit for divorce premised on an out-of-state same-sex marriage—gives some legal effect to the out-of-state same-sex marriage, in violation of section 6.204(c)(1).

Third, perhaps Texas law’s clearest prohibition on same-sex divorce suits is section 6.204(c)(2), which prohibits courts from giving effect any “right or claim to any legal

2. The petition incorrectly states that “neither the State nor the court of appeals disputes that J.B. properly alleged a valid marriage in his pleadings.” Petition at 8. In the State’s view, J.B. alleged a void marriage in his pleadings, which is insufficient to trigger the court’s divorce jurisdiction. J.B.’s lack of familiarity with the State’s position is understandable, however. Until his motion for rehearing in the court of appeals, J.B. never challenged the State’s position that the legal defects in the divorce petition are *jurisdictional* defects. As a result, the State has never had the opportunity to respond in merits briefing to Petitioner’s jurisdictionally-focused arguments.

protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex . . . in any other jurisdiction.” *Id.* § 6.204(c)(2). Petitioner’s divorce suit is unquestionably a claim to a legal protection, benefit, or responsibility asserted as a result of an out-of-state same-sex marriage. It is therefore barred by section 6.204(c)(2).

Fourth, section 6.204(b) declares all out-of-state same-sex marriages void in Texas. *Id.* § 6.204(b). Under section 6.307, all marriages made void by Chapter 6 of the Family Code can only be dissolved by a suit to declare the marriage void. *Id.* § 6.307. Thus, a suit to declare the marriage void is the exclusive means available to Petitioner to seek judicial dissolution of his Massachusetts marriage in Texas court.

The court of appeals got all of this right. *In re J.B.*, 326 S.W.3d at 664-67. The court of appeals correctly held that the Texas Constitution and Family Code present a *jurisdictional* bar to suits for divorce premised on out-of-state same-sex marriages. *Id.* (“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).”). A pending suit for divorce, even if the requested relief is ultimately denied, entitles the parties to a variety of legal protections and benefits, both procedural and substantive.³ Thus, in order to ensure that no “claim to any legal protection, benefit, or

3. For instance, during the pendency of a divorce suit, a debt incurred by one spouse that intentionally subjects the other spouse to liability is void. TEX. FAM. CODE § 6.707. Property transactions undertaken during a divorce suit can also be voided. *Id.* Furthermore, a court may provide the parties to a divorce suit with court-ordered counseling to determine if reconciliation is possible. *Id.* § 6.505. And, a Respondent’s failure to answer a divorce suit does not constitute an admission of the petition’s allegations. *Id.* § 6.701. The availability of these legal benefits and protections is not premised on the legal validity of

responsibility” is given any legal effect—as section 6.204(c)(2) requires—courts may not exercise jurisdiction over suits for same-sex divorce.⁴

The court of appeals also correctly held that Texas’s prohibition on same-sex divorce does not violate the U.S. Constitution. In doing so, the court of appeals followed the great weight of judicial authority, under which state laws limiting marriage and the rights of marriage to the union of one man and one woman are constitutional. *See, e.g., Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandau*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Because the court of appeals decision properly disposes of this case, this Court could simply refuse the petition for review, thereby making the court of appeals decision the law of the State. *See* TEX. R. APP. P. 56.1(c). However, given the confusion created by recent judicial rulings, Texas law would benefit from a direct resolution of this issue by the highest Court in the state. Only this Court can clearly and unequivocally instruct all litigants and lower courts in the state that Texas laws prohibiting same-sex divorce suits mean what they say and do not violate the U.S. Constitution.

the marriage or the ultimate granting of the divorce. If Texas courts can exercise jurisdiction over same-sex divorce actions—even if only to deny them—these protections and benefits would be available to parties to out-of-state same-sex marriages, in violation of section 6.204(c).

4. *See also Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, at *2 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.) (voiding a same-sex divorce decree and holding that 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”). *But see Naylor*, 330 S.W.3d at 441-42 (stating that Texas law can be interpreted “in a manner that would allow the trial court to grant a divorce in this case”).

PRAYER

For the foregoing reasons, this Court should grant the petition for review.

Respectfully submitted,

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