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In the Supreme Court of Texas

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

J.B., *Petitioner*,

versus

THE STATE OF TEXAS, *Respondent*.

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

BRIEF *AMICI CURIAE* OF
AMERICAN CIVIL LIBERTIES UNION OF TEXAS AND
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF PETITIONER AND
URGING REVERSAL OF THE COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 5

ARGUMENT 13

I. The Texas Marriage Exclusions Do Not Prevent Courts from Hearing an Uncontested Petition of Divorce Involving the Marriage of a Same-Sex Couple. 13

II. If the Texas Marriage Exclusions Are Construed to Deny Married Same-Sex Couples the Right to Divorce, the Exclusions Violate the Due Process Clause of the Fourteenth Amendment. 28

- A. When Texas Holds the Only Key to Divorce, the State Violates Procedural Due Process by Locking Married Same-Sex Couples Out of the Courthouse. 28

- B. Denying Divorce to Same-Sex Couples Implicates an Array of Fundamental Rights that Require a Legitimate and Compelling Justification. 33

III. If the Texas Marriage Exclusions Are Construed to Preclude Married Same-Sex Couples Only from Seeking Divorce, the Exclusions, as Applied Here, Violate the Federal Equal Protection Clause, and Substituting the Inferior Remedy of a Voidance Cannot Save Them. 37

PRAYER 45

CERTIFICATE OF COMPLIANCE 47

CERTIFICATE OF SERVICE 48

TABLE OF AUTHORITIES

CASES

Boddie v. Connecticut, 401 U.S. 371 (1971) ..28, 29, 30, 32, 34

Braddock v. Taylor, 592 S.W.2d 40 (Tex. Civ. App.–Beaumont 1979, writ ref'd n.r.e.) 23

Chapman v. Walker, 289 P. 740 (Okla. 1930) 25

Christiansen v. Christiansen, 253 P.3d 153 (Wyo. 2011) 25

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)..40

City of DeSoto v. White, 228 S.W.3d 389 (Tex. 2009)...........14

Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71 (Tex. 2000).......17

Durr v. Newman, 537 S.W.2d 323 (Tex. Civ. App.–El Paso 1976, writ ref'd n.r.e.) 23

Etheridge v. Shaddock, 706 S.W.2d 395 (Ark. 1986)...........26

Gannon v. Payne, 706 S.W.2d 304 (Tex. 1986) 24

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) 20

Husband v. Pierce, 800 S.W.2d 661 (Tex. App.–Tyler 1990, no writ) 23

In re Marriage of J.B. & H.B., 326 S.W.3d 654 (Tex. App.–Dallas 2010, pet. filed) 7

In re Marriage of Laine, 120 P.3d 802 (Kan. Ct. App. 2005) 25

Kelderhaus v. Kelderhaus, 21 Va. App. 721 (Va. Ct. App. 1996) 26

Lawrence v. Texas, 539 U.S. 558 (2003) (O'Connor, J., concurring) 3, 44

Loving v. Virginia, 388 U.S. 1 (1967) 34, 36

McElreath v. McElreath, 345 S.W.2d 722 (Tex. 1961) 24

Moore v. City of East Cleveland 431 U.S. 494 (1977) 36

Nowell v. Nowell, 408 S.W.2d 550 (Tex. Civ. App.—Dallas 1966) 24

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 34

Plyler v. Doe, 457 U.S. 202 (1982) 38

Reno v. Florez, 507 U.S. 292 (1993) 35

Roberts v United States Jaycees, 468 U.S. 609 (1984) 36

Romer v. Evans, 517 U.S. 620 (1996) 3, 12, 39, 40, 41, 44

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

Sosna v. Iowa, 419 U.S. 393 (1975) 32

St. Luke's Medical Ctr. v. Rosengartner, 231 N.W.2d 601 (Iowa 1975) 20

State v. Naylor, 330 S.W.3d 434 (Tex. App.–Austin 2011, pet. filed) 7

Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212 (Tex. 2002) 14

Tex. Employers' Ins. Ass'n v. Borum, 834 S.W.2d 395 (Tex. App.–San Antonio 1992, writ denied)......................23

Thomas v. Long, 207 S.W.3d 334 (Tex. 2006).......................14

Trickey v. Trickey, 642 S.W.2d 47 (Tex. App.–Fort Worth 1982, writ dism'd w.o.j.)..35

United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)..40

United States v. Windsor, 570 U.S. ---, 133 S. Ct. 2675 (2013)...3, 6, 7, 12, 38, 41, 42, 44

VanDevender v. Woods, 222 S.W.3d 430 (Tex. 2007)...........27

Williams v. North Carolina, 325 U.S. 226 (1945)................34

Williams v. Texas State Board of Orthotics & Prosthetics, 150 S.W.3d 563 (Tex. App.–Austin, 2004, no pet.)...27

CONSTITUTIONAL PROVISIONS

GA. CONST. art. I, § 4, para. 1(b)..17

TEX. CONST. art. I, § 32...5, 16

U.S. CONST. amend. XIV, § 1..37

U.S. CONST. amend. XIV, § 1, cl. 3..28

STATUTES

GA. CODE § 19-3-3.1(b) 17

MASS. GEN. LAWS ch. 208, § 5 8

TEX. FAM. CODE § 6.204 5

TEX. FAM. CODE § 6.204 (b) 15

TEX. FAM. CODE § 6.204(c) 15

OTHER AUTHORITIES

12 Tex.Jur.2d, Conflict of Laws, § 2, p. 304 24

Courtney G. Joslin, Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts, 91 B.U. L. Rev 1669 (2011) 21

Mary Patricia Byrn and Morgan Holcomb, Wedlocked, 67 U. Miami L. Rev. 1, 33 (2012) 29

Memorandum by Secretary of Defense Chuck Hagel Regarding Extending Benefits to the Same-Sex Spouses of Military Members (Aug. 13, 2013) 21

Rev. Rul. 2013-17, 2013 IRB LEXIS 437 (I.R.S. Aug. 29, 2013) 22

S. Research Ctr., *Bill Analysis*, H.J.R. 6, 79th Leg., R.S. (Aug. 16, 2005) 13

Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013) 21

Susannah W. Pollvogt, Unconstitutional Animus, 81 Fordham L. Rev. 887, 926 (2012) 40

Tex. H. of Rep., H. Research Org., *Focus Report: Constitutional Amendments Proposed for November 2005 Ballot*, at 8 (Sept. 15, 2005) 13

Texas Legislative Council, *Analyses of Proposed Constitutional Amendments: November 8, 2005, 2005 Election*, at 18 (September 2005) 13

U.S. Office of Personnel Management, Benefits Administration Letter No. 13-203, at 1 (July 17, 2013) 21

STATEMENT OF INTEREST[1]

Founded in 1938, the **American Civil Liberties Union of Texas** is a nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Texas is a state affiliate of the American Civil Liberties Union. Throughout its history, the ACLU has been at the forefront of efforts to protect individual liberty and has appeared before the U.S. Supreme Court, federal courts, and Texas courts in a variety of cases aimed at ensuring equal treatment of LGBT people by the government; equal protections for LGBT couples and families; protection from discrimination in jobs, schools, housing, and public accommodations; and fair treatment of people living with

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

HIV.

The ACLU has been an advocate for the rights of LGBT people since bringing its first gay rights case in 1936. In 1970, the ACLU filed the first lawsuit seeking the freedom to marry for same-sex couples in the country, and has been actively involved in marriage-related litigation ever since. The ACLU, together with private co-counsel, litigated *United States v. Windsor*, 570 U.S. —, 133 S. Ct. 2675 (2013), and the ACLU was co-counsel with Lambda Legal in *Romer v. Evans*, 517 U.S. 620 (1996).

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), founded in 1973, is the nation's oldest and largest national legal organization whose mission is to safeguard and advance the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and those individuals living with HIV through impact litigation, education, and policy work. Lambda Legal has appeared

before the U.S. Supreme Court in numerous cases as counsel to parties and *amici*, including as counsel to the successful challengers of the anti-gay state initiative in *Romer v. Evans*, 517 U.S. 620 (1996), and Texas's sodomy law in *Lawrence v. Texas*, 539 U.S. 558 (2003), as well as *amicus* in support of the successful challenge to the federal Defense of Marriage Act in *United States v. Windsor*, 570 U.S. —, 133 S. Ct. 2675 (2013) — all landmark sexual orientation cases decided by the U.S. Supreme Court.

Lambda Legal has also participated in numerous challenges to LGBT discrimination in both state and federal courts across the country, including ensuring equality for same-sex couples in the dissolution of their relationships, both as party counsel, *see, e.g.*, *Port v. Cowan*, 44 A.3d 970 (Md. 2011) (affirming right of same-sex couple with out-of-state marriage to divorce in state that did not grant them right to marry), and as *amicus*, *see, e.g.*, *Dickerson v.

Thompson, 73 A.D.3d 52 (N.Y. App. Div. 3d Dep't 2010) (holding that state courts have subject matter jurisdiction to adjudicate action seeking dissolution of out-of-state civil union); *Dickerson v. Thompson*, 88 A.D.3d 121 (N.Y. App. Div. 3d Dep't 2011) (declaring New York court may dissolve Vermont civil union).

ACLU of Texas and Lambda Legal submit this brief to provide information relevant to the statutory construction of Section 6.204 of the Family Code, provide insight on the impact of *Windsor*, and outline several constitutional ramifications of precluding divorce from same-sex couples. For the reasons discussed herein, *amici* believe the framing adopted by the Attorney General raises serious doubts about whether the provisions of the Texas Family Code and Texas Constitution, as they are being applied here to legally-married couples who seek to dissolve their marriages, violate the U.S. Constitution.

SUMMARY OF ARGUMENT

Ignoring the doctrine of constitutional avoidance, the Attorney General frames this appeal as permitting, indeed *requiring*, this Court to determine the constitutionality of the Texas marriage amendment ("Marriage Amendment") and the Texas Defense of Marriage Act ("Texas DOMA")[2]

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[2] The Marriage Amendment, TEX. CONST. art. I, § 32, states that "Marriage in this state shall consist only of the union of one man and one woman." It further provides that "This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."

Similarly, the Texas DOMA, TEX. FAM. CODE § 6.204, provides:

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

continued —

(collectively, "Texas Marriage Exclusions"), which deny same-sex couples the right to marry in Texas, as well as deny benefits and protections under state law for couples who legally married out of state and now reside in Texas and wish to remain married. Mischaracterizing *United States v. Windsor*, 570 U.S. ---, 133 S. Ct. 2675 (2013), as decided based on "principles of federalism," the Attorney General broadly asserts that the Texas Marriage Exclusions that discriminate against and exclude same-sex couples in a variety of settings "are a valid exercise of the State's well-recognized authority to define marriage and to decline recognition to out-of-state marriages that violate the Texas's

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— *continuation*

> 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.

public policy." [Respondent's] Supplemental Response Brief Addressing Recent U.S. Supreme Court Decisions ("Resp. Supp."), *In the Matter of the Marriage of J.B. and H.B.*, No. 11-0024, at p. 2.

Yet the case the Attorney General would advance is ***not*** this case. The same-sex couples here and in the related case already are legally married under Massachusetts law, *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.–Dallas 2010, pet. filed); *State v. Naylor*, 330 S.W.3d 434 (Tex. App.–Austin 2011, pet. filed), and their marriages are recognized under federal law, *Windsor*. They are seeking to change their marital status from "married" to "divorced." They do not ask Texas to issue them a license uniting them in marriage, nor do they seek to remain married to gain the ongoing benefits the State offers other legally married couples.

Thus, the legal question before this Court is much

narrower than the one the Attorney General is pressing: Must a Texas district court – a court of general jurisdiction – dissolve a same-sex couple's marriage on the same basis as available to other married couples when that court enjoys exclusive jurisdiction over the parties' marital status?[3]

In short, this case does not require this Court to determine whether any legitimate and sufficient governmental interest exists that justifies denying same-sex couples the legal status and all the privileges, benefits, obligations, and protections of marriage. It simply asks what legitimate and sufficient justification the State can identify for denying a same-sex couple, over whose marital status Texas enjoys exclusive jurisdiction, the right to dissolve their

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[3] The couple seeking divorce married in the Commonwealth of Massachusetts. Because they are currently residents of Texas, both individuals are precluded from seeking divorce in Massachusetts because of the one-year residency requirement for divorce. MASS. GEN. LAWS ch. 208, § 5. Thus, this case involves a couple whose ability to dissolve their marital status is subject ***exclusively*** to the jurisdiction of the State of Texas.

marriage – trapping them in a marriage that undeniably triggers an array of extra-territorial and federal ramifications or relegating them to the remedy of "voidance," which leaves them as if they were never married in the first instance.

In this narrow context, divorce and marriage should be seen as distinct from each other. Married same-sex couples' relationships are legally recognized in some form in nearly half of the states and the District of Columbia, as well as recognized by the federal government. It is particularly ironic that Texas insists married same-sex couples remain married while simultaneously professing to disapprove of their marriages. The State's reasoning, simply put, is incoherent.

The language of the Texas Marriage Exclusions does not suggest any intent to withhold divorce from married same-sex couples. In fact, a thorough review of the

legislative record fails to establish that members of the Texas Legislature ever contemplated precluding same-sex couples from divorcing when they were drafting these laws. And why would they? The divorce of married same-sex couples ***furthers*** the purported public policy of Texas that same-sex couples not live as "married" in the State – a result consistent with Texas's avowed disapproval of the relationships the couples here seek to dissolve. Therefore, it would be astonishing for this Court to construe the Texas Marriage Exclusions to withhold subject matter jurisdiction from state district courts under these circumstances.

For these reasons, the Attorney General's broad framing should be rejected and the Court should simply construe the Texas Marriage Exclusions to hold they do not prohibit Texas district courts from providing a divorce to same-sex couples legally married in another jurisdiction but who now reside in Texas and wish to divorce. In so doing,

this Court construes Texas law in a way that avoids any constitutional problem.

If, on the other hand, this Court finds that the Texas Marriage Exclusions are jurisdictional and preclude same-sex couples from divorcing, these laws, ***as applied to couples wishing to divorce***, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Due process requires that Texas, at a bare minimum, afford married same-sex couples access to the courts when they petition for divorce, which is a constitutionally-protected liberty. Yet, Texas has failed to identify ***any*** specific, legitimate interest for withholding access to the courts sufficient to satisfy constitutional scrutiny and save the Texas Marriage Exclusions as applied here.

Finally, the Texas Marriage Exclusions as applied to same-sex couples wishing to divorce also deprive them of the

Constitution's guarantee of equal protection, which is all the more evident in light of *Windsor*. In *Windsor*, the U.S. Supreme Court reinforced the core principle that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . . ." *Windsor*, 133 S. Ct. at 2691. *Windsor* expressly pointed out two long-established precepts: First, "the incidents, benefits, and obligations of marriage [must be] uniform for all married couples within each State," and, second, variations in treatment from one State to the next are "subject to constitutional guarantees." *Id.* at 2692. "[D]iscriminations of an unusual character," as embodied in the Texas Marriage Exclusions, "especially suggest careful consideration to determine whether they are obnoxious" to constitutional guarantees. *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)). And under this approach, careful consideration points to unconstitutional animus as the sole motivation for

applying the Texas Marriage Exclusions to block same-sex couples from divorcing.

ARGUMENT

I. The Texas Marriage Exclusions Do Not Prevent Courts from Hearing an Uncontested Petition of Divorce Involving the Marriage of a Same-Sex Couple.

The Texas Marriage Exclusions do not preclude Texas district courts from granting divorces to same-sex couples.[4] Neither the plain language of the Texas Marriage Exclusions, nor any reasonable statutory construction, prevents Texas courts from hearing an uncontested petition for divorce by an individual in a marriage to a same-sex

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[4] In 2003, the Texas Legislature enacted the Texas DOMA in "response to court cases and legislative actions in a number of states on the issue of same-sex marriage and civil unions." Texas Legislative Council, *Analyses of Proposed Constitutional Amendments: November 8, 2005, 2005 Election*, at 18 (September 2005). In 2005, the Texas Legislature proposed the Marriage Amendment to "prevent a possible [court] challenge." Tex. H. of Rep., H. Research Org., *Focus Report: Constitutional Amendments Proposed for November 2005 Ballot*, at 8 (Sept. 15, 2005); *see also* S. Research Ctr., *Bill Analysis*, H.J.R. 6, 79th Leg., R.S. (Aug. 16, 2005).

spouse formed in another jurisdiction, for the limited purpose of dissolving the relationship.

"Texas district courts are courts of general jurisdiction with the power to hear and determine any cause that is cognizable by the 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). District courts are presumed to have subject matter jurisdiction unless a contrary showing is made. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002). When the statute imposes a mandatory requirement but does not express whether that requirement strips jurisdiction, courts "begin with the presumption that the [l]egislature did not intend to make the [statutory requirement] jurisdictional." *City of DeSoto v. White*, 228 S.W.3d 389, 394 (Tex. 2009). That presumption is "overcome only by clear legislative intent to the contrary." *Id.*

Here, there is not "clear" indication the Texas Legislature intended to remove jurisdiction from the district court to hear an uncontested petition for divorce involving a married same-sex couple – and the Attorney General has not pointed to any. In relevant part, Texas DOMA provides that "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." TEX. FAM. CODE § 6.204 (b).

It further states that:

> 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 . . . 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 marriage between persons of the same sex . . . in this state or in any other jurisdiction.

TEX. FAM. CODE § 6.204(c) (emphasis supplied). Notably absent is a reference to a proceeding that "dissolves" a

marriage.

In 2005, the Texas Legislature passed the Marriage Amendment, which provides that "[m]arriage in this state shall consist only of the union of one man and one woman; and, [t]his 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. Reviewing the plain text of the Texas Marriage Exclusions, there is no direct indication the legislature intended to strip district courts of jurisdiction to dissolve the marriage of a same-sex couple. Certainly, no clear showing exists of such intent, and a reasonable construction of these laws that upholds the district courts' jurisdiction is consistent with this conclusion.

Most apparent, the Texas Marriage Exclusions do not mention the words "jurisdiction" or "divorce." Consistent with Texas's strong presumption that courts are vested with jurisdiction, the general rule is that when state legislatures

intend to abrogate the jurisdiction of state courts, they do so clearly and explicitly. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). The Texas legislature certainly is capable of explicitly expressing such a desire, as have other state legislatures. For example, in stark contrast to the Texas Marriage Exclusions, the Defense of Marriage Act of Georgia ("Georgia DOMA"), in very plain and clear terms, provides that "[t]he courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any [same-sex] relationship . . . ." GA. CONST. art. I, § 4, para 1(b); *see also* GA. CODE § 19-3-3.1(b). Putting aside obvious constitutional infirmities such enactments raise, as more fully addressed in Sections II and III, *infra*, the plain text of the Georgia DOMA ***expressly states*** that it removed jurisdiction from the state courts with respect to divorce for married same-sex couples. Absent similarly clear language or any legislative history pointing to the intent to

strip the district courts of jurisdiction, there is no reason to presume that the Texas Legislature likewise intended to remove jurisdiction from Texas district courts. By reaching this conclusion, this Court would construe the Texas Marriage Exclusions in a manner that avoids any constitutional questions.

The State is concerned that merely granting an uncontested divorce to these same-sex couples violates the Texas Marriage Exclusions. *See* Brief on the Merits of Respondent the State of Texas ("Resp. Br."), *In the Matter of the Marriage of J.B. and H.B.*, No. 11-0024 at 4-10. In fact, the Marriage Amendment plays no part in divorce proceedings and is outside the narrow scope of the question presented. The Marriage Amendment says that Texas may not "create or recognize" a marriage of same-sex partners. The Texas residents currently before this Court, however, do not wish to *enter* a marriage. Nor do these couples seek

recognition of their Massachusetts marriages to live as married couples within the State and enjoy the continuing rights, privileges, obligations, and protections Texas law bestows upon married couples. Rather, they wish to *exit* a marriage formed in the Commonwealth of Massachusetts and restore their marital statuses from married to single (a result Texas should not disfavor given its disapproval of same-sex couples marrying).

In practice, the same-sex couples barred from divorce will be forever trapped in a marriage that is valid and legally recognized by many other state and local governments, as well as the federal government. As a result, unless one of them establishes residence in another jurisdiction that will allow them to marry, the same-sex couple who long to divorce will, until one dies, continue to accrue rights and

responsibilities *vis–à-vis* each other.[5] For example, the parties may be accruing rights with respect to property they acquired during the relationship in other states (irrespective of any property located in Texas). As married spouses, debt would be considered a marital debt in many states burdening both parties. *See, e.g.*, *St. Luke's Medical Ctr. v. Rosengartner*, 231 N.W.2d 601, 602 (Iowa 1975) (holding a husband liable for spouse's medical expenses, even though the expenses were incurred after they began living apart by agreement). In addition, without a valid divorce decree, the parties cannot remarry without risking violation of civil and criminal bigamy prohibitions.[6]

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[5] Regardless of domicile, many married same-sex couples have continuing interests and obligations in states that recognize their marriage, including property interests, financial obligations, and decision-making authority if a spouse were to become ill or incapacitated during a visit to the state recognizing the marriage. *See, e.g., Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (discussing non-exhaustive list of the "hundreds of statutes" related to marital benefits).

[6]Courtney G. Joslin, Modernizing Divorce Jurisdiction: Same-Sex

continued —

The practical consequences for married same-sex couples prohibited from divorce also continue on the federal level. Since the decision in *Windsor*, several federal agencies have declared they recognize all marriages valid in the place of celebration.[7] For example, the U.S. Department of Treasury and Internal Revenue Service (IRS) recently determined that same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes. The decision further applies to married same-sex couples residing in jurisdictions,

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Couples and Minimum Contacts, 91 B.U. L. Rev 1669, 1688 (2011).

[7] *See, e.g.,* U.S. Office of Personnel Management, Benefits Administration Letter No. 13-203, at 1 (July 17, 2013), available at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf; Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), available at https://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act; Memorandum by Secretary of Defense Chuck Hagel Regarding Extending Benefits to the Same-Sex Spouses of Military Members (Aug. 13, 2013), available at http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf.

such as Texas, that do not recognize their marriage.[8] As a result, both individuals are required to file their tax return as "married," incurring applicable tax consequences and obligations of their spouse, even if they have limited or no continuing contact with each other. With many more federal agencies expected to recognize the marriage regardless of domicile, the ability to divorce becomes even more urgent. As a further consequence, the individuals unable to divorce are precluded from extending federal benefits to a subsequent spouse because they cannot remarry. Thus, the couple seeking dissolution through divorce is placed in the untenable position of being bound by the valid out-of-state marriage.

The State also fears that granting an uncontested petition for divorce would "give effect" to the marriage. Resp.

[8] Rev. Rul. 2013-17, 2013 IRB LEXIS 437 (I.R.S. Aug. 29, 2013), available at http://www.irs.gov/pub/irs-drop/rr-13-17.pdf.

Br. at 6. However, granting a divorce to same-sex couples does not require that Texas affirm or approve of the marriage. Rather, as a matter of comity, Texas courts consistently utilize the law of the place where the marriage was formed to determine the validity of the marriage. *See 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.).

Comity, grounded in cooperation and mutuality, has frequently been defined as "the recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to the rights of its own citizens." *Nowell v. Nowell*,

408 S.W.2d 550, 553 (Tex. Civ. App.—Dallas 1966). "The rationale of the doctrine is founded on mutual interest, conscience and moral necessity to do justice in order that justice may be done in return." *Id.* 12 Tex.Jur.2d, Conflict of Laws, § 2, p. 304. Under this "principle of mutual convenience," Texas will recognize the legal statuses conferred under the laws of other states, expecting that those states will extend Texas the same consideration. *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986). Texas will extend comity to the law of a cooperative jurisdiction so long as that law does not violate Texas public policy. *McElreath v. McElreath*, 345 S.W.2d 722, 724 (Tex. 1961).

Presuming the policy of Texas is to disfavor same-sex couples living as married within the State, it is nonsensical for the State to then claim that permitting them to divorce somehow offends that public policy. Ironically, granting divorces to same-sex couples actually furthers the purported

(albeit illegitimate) public policy behind the Texas Marriage Exclusions because divorces would result in fewer couples living as married. The relationship of two people, as acknowledged and deemed worthy of dignity by Massachusetts, does not now, nor especially after being granted divorce, impede or erode the public policy of Texas. *See Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011) ("Recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages.").

In addition, this Court should consider the strong Texas public policy in favor of comity for the limited purpose of granting divorce to the same-sex couple. Indeed, Texas benefits from other states' according of comity to Texas laws. *See Chapman v. Walker*, 289 P. 740 (Okla. 1930); *In re Marriage of Laine*, 120 P.3d 802 (Kan. Ct. App. 2005);

Kelderhaus v. Kelderhaus, 21 Va. App. 721 (Va. Ct. App. 1996). In particular, other states extend comity to recognize marriages available in Texas but not available elsewhere. For example, states have applied the principle of comity to deny modification of a divorce decree based upon a first cousin marriage formed in Texas even though the marriage was against the other state's public policy. *Etheridge v. Shaddock*, 706 S.W.2d 395, 396 (Ark. 1986). So while other states grant Texas the mutual respect and reciprocity that Texas law purports to favor, Texas refuses to provide the limited respect to another state's marriages to permit orderly dissolution by divorce. The State's offer of the clearly inferior option to void, by judicial decree, the marriage as if it never occurred only adds insult to injury and affronts the policy of comity. So while opposing divorce to same-sex couples married elsewhere, it undermines the well-established public policy of comity.

Importantly, "[j]udicial restraint cautions that when a case may be decided on a non-constitutional ground, [the court] should rest [its] decision on that ground and not wade into ancillary constitutional questions." *VanDevender v. Woods*, 222 S.W.3d 430, 432-33 (Tex. 2007); *see also Williams v. Texas State Board of Orthotics & Prosthetics*, 150 S.W.3d 563, 571 (Tex. App.–Austin, 2004, no pet.) ("We must, if possible, construe the statute to avoid constitutional infirmities."). Accordingly, the Marriage Exclusions should be construed to permit Texas courts to grant divorces to same-sex couples terminating their marriages. Should this Court determine that district courts lack jurisdiction to entertain the petition of divorce, then, as explained below, the Texas Marriage Exclusions, as applied to same-sex couples wishing only to divorce, would violate the federal guarantees of due process and equal protection – an analysis this Court need not and should not reach here.

II. If the Texas Marriage Exclusions Are Construed to Deny Married Same-Sex Couples the Right to Divorce, the Exclusions Violate the Due Process Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides that, "No State shall. . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3. By denying same-sex married couples residing in Texas the ability to divorce, the State runs afoul of its due process obligations under the Fourteenth Amendment.

A. When Texas Holds the Only Key to Divorce, the State Violates Procedural Due Process by Locking Married Same-Sex Couples Out of the Courthouse.

The right to appear before a judge to seek divorce "is the exclusive precondition to the adjustment of a fundamental human relationship." *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971). The State violates the Due Process Clause when it "pre-empt[s] the right to dissolve this legal relationship without affording ***all citizens*** access to the

means it has prescribed for doing so." *Id.*[9] In those instances where the State has a monopoly upon the dissolution of marital unions, Texas cannot constitutionally preclude married same-sex couples from divorce by barring access to its courts.

In *Boddie*, the U.S. Supreme Court heard an as-applied challenge to a Connecticut statute that imposed a mandatory fee for instituting divorce proceedings. The case was brought by welfare recipients whose income "barely suffice[d] to meet the costs of the daily essentials of life," preventing them from being able to pay the required court costs. *Id.* at 372-73. In effect, the court fee acted as a *de facto* bar to indigent persons filing for divorce.

In analyzing the constitutionality of the law, the

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[9] *See also* Mary Patricia Byrn and Morgan Holcomb, Wedlocked, 67 U. Miami L. Rev. 1, 33 (2012) (denying same-sex divorce implicates the "due process trinity:" the right to access the courts, the right to divorce, and the right to remarry).

Boddie Court pointed out that "the requirement that these appellants resort to judicial process is entirely a state created matter." *Id.* at 383. "Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the State's judicial machinery." *Id.* at 376. "Our conclusion is that, given the basic position of the marriage relation in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit this State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriage." *Id.* at 376. The Court held the burden imposed by the filing fee upon indigent individuals was an unconstitutional deprivation of due process because *all*

citizens who seek divorce must be guaranteed a meaningful opportunity to be heard.

Construing the Texas Marriage Exclusions as precluding access to Texas district courts for same-sex couples seeking divorce directly contravenes the U.S. Supreme Court's holding in *Boddie.* It leaves J.B. and H.B., and other similarly-situated couples, no other reasonable means of dissolving a marriage legally entered in Massachusetts. Just as a state cannot foreclose an entire group from access to divorce based on economics, it is similarly prohibited from denying the same liberty interest to married same-sex couples.

The State claims that it can deny access to the courthouse *for divorce* because same-sex couples have access to the courthouse *for voidance*. Resp. Br. at 35. Prior to making this argument, the State wrongly argues that "Texas has no obligation to provide same-sex couples with any

process” because, inasmuch as the state does not acknowledge the out-of-state marriage, “there is nothing for [J.B.] to ‘be heard’ about.” *Id.* But whatever Texas believes about the significance in Texas of a marriage of a same-sex couple originating in another state, it does not follow that a Texas court may wholly disregard the Fourteenth Amendment and bar married same-sex couples from their day in court. Any individual seeking divorce must, at a minimum, “be given meaningful opportunity to be heard.” *Boddie*, 401 U.S. at 377; *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding a durational residency requirement of one year because appellant was not “irretrievably foreclosed” from obtaining divorce and she would “eventually qualify” for access to the courts).

Moreover, the State may not deny procedural due process regarding a particular liberty interest by offering access to the court for a substantively different interest.

Resp. Br. at 24 (comparing "robust protections of divorce" with the "limited remedies to void marriages"). Indeed, according to the State, the voidance procedure merely memorializes what supposedly has already occurred by operation of law. *Id.* at 20, fn. 12 (Same-sex couples' "marriages are void whether they sue for such a declaration or not."). In closing the doors to the only available judicial forum where these married same-sex couples can divorce, the State commits the classic textbook example of a procedural due process violation.

B. The State's Denial of Divorce to Same-Sex Couples Impinges on Fundamental Rights, Without a Legitimate and Compelling Justification.

Time and again, the U.S. Supreme Court protects the fundamental nature of intimate and personal decisions. The constitutional right of due process "affords . . . protections to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and

education" because these decisions "involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). Divorce, which stands separate and distinct from marriage, is among those private family affairs protected by the constitution. *See Boddie*, 401 U.S. at 376. (divorce is "adjustment of a fundamental human relationship" and thus a fundamental liberty interest); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (discussing the "freedom to marry, or not to marry" a person); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (divorce "affects personal rights of the deepest significance").

There is no question that prohibiting divorce to same-sex couples is a form of intrusive regulation of the family

that disrupts lives and relationships in countless ways.[10] Indeed, a Texas appellate court made this very point: "We think that such a law or policy [denying divorce] . . . would constitute cruel and unusual punishment and actually place one of the spouses, in effect, in a prison from which there was no parole." *Trickey v. Trickey*, 642 S.W.2d 47, 50 (Tex. App.–Fort Worth 1982, writ dism'd w.o.j.). Categorically refusing to grant divorce to married same-sex couples is a restriction on liberty of a magnitude that demands strict scrutiny. *See Reno v. Florez*, 507 U.S. 292, 301-302 (1993) ("[C]ertain 'fundamental' liberty interests" cannot be interfered with at all, "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling interest.").

Even assuming for the sake of argument that no

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[10] *See* Section I., *supra*, regarding practical effects of prohibiting divorce for same-sex couples.

fundamental right to divorce itself existed, denying same-sex couples the ability to change their marital status nonetheless implicates an array of other rights clearly deemed fundamental, including the right to remarry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the right to travel, *Saenz v. Roe*, 526 U.S. 489, 499 (1999), and the freedom of association, *Roberts v United States Jaycees*, 468 U.S. 609, 623 (1984) ("freedom not to associate"). At minimum, the preclusion of same-sex couples from divorce constitutes an intrusion on family that warrants heightened scrutiny. *See Moore v. City of East Cleveland* 431 U.S. 494, 499 (1977) ("[W]hen the government intrudes on choices containing family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."). Whatever broad justifications the State seeks to proffer for refusing to "create, recognize or

validate" a marriage between same-sex couples, it is not divorce, not marriage that is at issue here. The State must identify some specific legitimate and sufficient governmental interest that is advanced by refusing to permit same-sex couples to dissolve their marriages through the orderly process of divorce available to every other married couple, instead keeping them locked in a legal status against their will, which justifies the level of intrusion into the lives of these couples and their constitutionally-protected relationships. This the State has not done.

III. If the Texas Marriage Exclusions Are Construed to Preclude Only Married Same-Sex Couples from Seeking Divorce, the Exclusions, as Applied Here, Violate the Federal Equal Protection Clause, and Substituting the Inferior Remedy of a Voidance Cannot Save Them.

The Fourteenth Amendment provides that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Specifically, the guarantee of equal protection directs that

"all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). But to keep married same-sex couples from obtaining an uncontested divorce in Texas, purportedly based on State laws that do not even mention the word "divorce," while providing them only the clearly inferior substitute of "voidance," is nothing other than class-based treatment rooted entirely in animus. *See* Resp. Br. at 24 (comparing "robust protections of divorce" with the "limited remedies to void marriages"). As a result, the Texas Marriage Exclusions, as applied to withhold divorce from same-sex couples, cannot withstand constitutional scrutiny under any level of review.[11]

[11] *Amici Curiae* submit that a higher level of scrutiny than rational review applies to the exclusion of same-sex couples from divorce, both because the Texas Marriage Exclusions burden an array of fundamental rights, discussed *supra*, and because classifications based on sex and sexual orientation are entitled to heightened scrutiny. In any event, laws born out of animus that have the purpose and effect of disparaging and injuring a class of people simply to make them inferior further no legitimate interest and thus cannot survive any level of equal protection scrutiny. *See Windsor*, 133 S. Ct. 2696; *Romer*, 517 U.S. at 635.

The remedy of “voidance” is an affront to the dignity of two people who have made the commitment of marriage to each other under state law and who have lived significant portions of their lives fulfilling those commitments. Like other married couples, their lives are inextricably intertwined financially, legally, and emotionally. If forced simply to walk away without any access to orderly dissolution, they would suffer great harm, both emotionally and financially. The State’s attempt to “erase” their lived history is demeaning and demonstrates nothing more than a desire to express public disapproval of their constitutionally-protected intimate relationship. The action furthers no purpose other than to punish them.

The U.S. Supreme Court has repeatedly held that governmental actions driven by animus lack a legitimate purpose and will not survive even rational basis review. *See, e.g.*, *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528,

534 (1973); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985).[12]

In *Romer v. Evans*, 517 U.S. 620, 634 (1996), the U.S. Supreme Court reasserted its disdain for laws "born of animosity" by striking down a discriminatory law targeting lesbians and gay men. The Court observed that when the "sheer breadth [of the law] is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests." *Id.* at 632-33. Thus, a law is deemed rooted in animosity when it imposes a special disability upon the targeted group so far removed from its justifications that it is impossible to credit them. *Id.* at 631, 635.

The U.S. Supreme Court recently reaffirmed the

[12] *See also* Susannah W. Pollvogt, Unconstitutional Animus, 81 Fordham L. Rev. 887, 926 (2012).

precept that laws of "unusual character," singling out a class of citizens, such as lesbians and gay men, for disfavored legal status or general hardship require careful consideration of their justifications. *Windsor*, 133 S. Ct. at 2692. The *Windsor* Court examined the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), which prohibited federal recognition of marriages to same-sex couples, observed that the law revealed an exceptional form of legislation targeting only lesbians and gay men. *Id.* at 2693. The purpose of DOMA (to "defend the institution of traditional heterosexual marriage") "demonstrate[d] that interference with equal dignity of same-sex marriages . . . was more than just an incidental effect of the federal statute. It was its essence." *Id.* As a result, DOMA levied inequality that permeated many aspects of federal law, affecting over 1,000 federal statutes and numerous regulations and burdening married same-sex couples in "visible and public ways… from the mundane to

the profound." *Id.* at 2694.

In depriving lesbians and gay men, but not others, the rights and responsibilities of marriage, the government created "two contradictory marriage regimes" which relegated married same-sex couples to a "second class status." *Id.* at 2694. "The avowed purpose and practical effect" of DOMA was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the State." *Id.* at 2693. Thus, the Court held that Section 3 of DOMA violated the Due Process and Equal Protection guarantees of the Fifth Amendment to the Constitution. *Id.* at 2696. Utilizing *Romer*'s equal protection analysis, the *Windsor* Court concluded that the sheer breadth of DOMA is so discontinuous with the reasons offered that the law seems inexplicable by anything but animus.

Notwithstanding a similar sweep and lack of any

apparent legitimate justification for the Texas Marriage Exclusions, this Court need not go so far here. The broad question, which the Attorney General would have the Court reach, of whether *Romer* and *Windsor* preclude the type of sweeping exclusion Texas seeks to impose on the creation or recognition of marriages for same-sex couples should wait for another day. What is apparent (and dispositive) here is that relegating same-sex couples to "voidance" for the purpose of changing their marital status, when other married couples may access the full range of divorce law remedies, imposes a disadvantage and second-class status on same-sex couples for no other purpose than to single out their relationships as inferior and to make them unequal. The State may not apply the Texas Marriage Exclusions to deprive same-sex couples, as a disfavored class, ***and no others,*** access to the State's divorce laws simply to express displeasure with their marriages. *Lawrence v. Texas*, 539 U.S. 558, 584 (2003)

(O'Connor, J., concurring); *Romer*, 517 U.S. at 633.

In light of these controlling cases, the State's position that the Texas Marriage Exclusions may be construed and applied in a way that precludes same-sex couples legally married in other states from divorcing in Texas would be unconstitutional.[13]

[13] Contrary to the State's assertions, *Windsor* was ***not*** decided on federalism grounds. *Windsor*, 133 S. Ct. at 2692 ("[I]t is *unnecessary to decide* whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is *quite apart from* principles of federalism.") (emphasis added). Federalism did factor into the Court's analysis of *how* Congress's intrusion in the domestic relations law historically reserved to the states was of an "unusual character" and a signal that required "careful consideration" of DOMA and the justifications for it. *Id.* at 2693. But federalism was merely a factor illustrative of the unusual nature of the legislation. In all other respects, the Court's equal protection analysis employed the same search for some legitimacy justifying the status-based exclusion that guided the Court in *Romer*. Nothing in *Windsor* justifies the Texas Marriage Exclusions and their application here to deny lawfully-married same-sex couples residing in Texas the ability to seek a divorce in the name of unbridled federalism.

PRAYER

The decision of the Fifth District Court of Appeals should be reversed and the cause remanded to the trial court for further proceedings that permit *J.B. and H.B.* to obtain a lawful divorce.

Dated: September 3, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because this brief contains 6,928 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

This brief complies with the typeface and type style requirements of Texas Rule of Appellate Procedure 9.4(e) because this brief has been prepared in a proportionally spaced, conventional typeface using Microsoft® Office Word 2007 (12.0.6668.5000) SPB MSO (12.0.6662.5000) in New Century Schoolbook 14-point font (12-point for footnotes).

Dated: September 3, 2013.

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CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 9.5 and local Rule 4(d), I certify that on September 3, 2013, I have served the above and foregoing Brief *Amici Curiae* of American Civil Liberties Union of Texas and Lambda Legal Defense and Education Fund, Inc., on the following parties through their counsel of record by serving it through the Court's Electronic Filing Service Provider:

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