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Supreme Court of Texas
In The Matter of the Marriage of J.B. and H.B consolidated with State of Texas
v.
Angelique Naylor and Sabina Daly
consolidated with
In re State of Texas
Nos. 11-0024, 11-0144, 11-0222
November 5, 2013

Oral Argument

Appearances:

James J. Scheske of James J. Scheske PLLC, Austin, TX, for Petitioners-Relators.

James D. Blacklock from the Office of the Attorney General, Austin, TX, for Respondent-Real Party In Interest.

Before:

Chief Justice Nathan L. Hecht, Justices Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, Jeffrey S. Boyd, John P. Devine and Jeffrey V. Brown.

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CHIEF JUSTICE NATHAN L. HECHT: The Court is ready to hear argument in the consolidated cases 11-0024, 11-0144 and 11-0222.

MARSHAL: May it please the Court, Mr. Scheske will present argument for the Petitioners/Relators. Petitioners/Relators have reserved five minutes for rebuttal.

ORAL ARGUMENT OF JAMES J. SCHESKE ON BEHALF OF THE PETITIONERS-RELATORS

ATTORNEY JAMES J. SCHESKE: May it please the Court, good morning. These cases are about divorce and quality. The Fifth Court of Appeals held that Texas residents may not petition for divorce if they were married out of state and both the Petitioner and the Respondents are of the same gender. This ruling forecloses my clients' constitutional right to petition for divorce in his state of residency and thereby violates his rights under the Fourteenth Amendment. There are three factors that are axiomatic in this case. The first is that my clients got married. There's no dispute that the Commonwealth of Massachusetts authorized persons of the same gender to be married at the time and place of their ceremonies.

The second thing that's axiomatic is that Texas residents may only petition for divorce in Texas. They don't have any other state available to seek a divorce and, third, although Texas bans same-sex marriage, it bans the recognition of those marriages, it bans the, uh, creation of those marriages, Texas cannot prevent its gay and lesbian citizens from getting married. They're getting married in New York and Massachusetts and California. You can even go to New Jersey should you want to and get married now and when those persons married out of state return to Texas, resume their Texas residency, some of those marriages will fail.

JUSTICE JEFFREY S. BOYD: Do they have to meet residency requirements in all of those other states?

ATTORNEY JAMES J. SCHESKE: I'm sorry, Your Honor?

JUSTICE JEFFREY S. BOYD: They have to meet residency requirements in all of those other states.

ATTORNEY JAMES J. SCHESKE: To be married--

JUSTICE JEFFREY S. BOYD: Yes.

ATTORNEY JAMES J. SCHESKE: Or divorced?

JUSTICE JEFFREY S. BOYD: To be married, if Texas residents decide they want to get married in Massachusetts, do they have to meet a particular residency requirement in Massachusetts and in each of the other states where they have that option?

ATTORNEY JAMES J. SCHESKE: No, Your Honor, they do have to wait a certain waiting period, uh, after receiving a marriage license, but there's not a residency requirement for marriage like there is for divorce.

JUSTICE DON R. WILLETT: To dissolve a marriage, would a court first necessarily have to recognize a marriage?

ATTORNEY JAMES J. SCHESKE: No, Your Honor, it does not. Um, a petition for divorce invokes the divorce laws. Marriage and divorce are separate and opposite from each other. Um, the way divorces work in our family courts is that a Petitioner files a lawsuit in which an allegation is made that says basically at some place, at some point in time in the past, the parties were married.

CHIEF JUSTICE NATHAN L. HECHT: So you do have to recognize it?

ATTORNEY JAMES J. SCHESKE: I'm sorry, Your Honor?

CHIEF JUSTICE NATHAN L. HECHT: So you do have to recognize it?

ATTORNEY JAMES J. SCHESKE: No, Your Honor, that's not recognizing the marriage. What I was, the point I was going to make is that's a pleading allegation that is necessary merely as a condition precedent to establishing the right--

CHIEF JUSTICE NATHAN L. HECHT: They were married, that they were married.

ATTORNEY JAMES J. SCHESKE: That they were married and we know that my client was married.

CHIEF JUSTICE NATHAN L. HECHT: But how can, the trial court has to take that as correct, right?

ATTORNEY JAMES J. SCHESKE: Yes, unless the--

CHIEF JUSTICE NATHAN L. HECHT: So how can be do that without recognizing? I'm not following it.

ATTORNEY JAMES J. SCHESKE: Well, because the validity of the marriage is never at issue in a, in a divorce, particularly an agreed divorce. Now there are situations where--

JUSTICE DON R. WILLETT: Well doesn't the court--

ATTORNEY JAMES J. SCHESKE: One part--

JUSTICE DON R. WILLETT: Doesn't the court have to presume that there's a in fact and in law a valid marriage that requires judicial action, not to be entered, but to be [inaudible]?

ATTORNEY JAMES J. SCHESKE: I don't think the court has to presume that. I don't think that trial courts even, uh, examine the validity of the marriage unless one of the parties challenges it and only a party to the marriage can challenge its validity.

JUSTICE EVA M. GUZMAN: Does Massachusetts have community property laws like Texas does?

ATTORNEY JAMES J. SCHESKE: I do not believe so. I don't believe any of the Northeast--

JUSTICE EVA M. GUZMAN: And so, are you not availing yourself to some extent of the laws that that, um, govern property acquired during marriage under section 7002 of the Family Code, which says if the property would have been community, then we, we, we're going to consider it community even though Massachusetts is not a community property state?

ATTORNEY JAMES J. SCHESKE: Not in these cases, Your Honor, because in both of the marriages before you today, the parties had agreed on their property division so the issue of community property is not at issue here.

JUSTICE EVA M. GUZMAN: Let's assume that it were an issue though because this rule has to operate in, in, in all of the cases.

ATTORNEY JAMES J. SCHESKE: Well, I, I don't know that there is a specific answer to that question, Your Honor, because it would depend on the facts of the case. For example, if the parties first lived in another state after being married, they would have acquired vested property rights under that state's laws, which may or may not be community in nature so it's, it's difficult to draw a hard line when it comes to property division even if a trial court feels that it may not, um, apply community property laws, of course, our district courts still have a general equity power to affect an equitable division of property.

JUSTICE EVA M. GUZMAN: But--

JUSTICE PAUL W. GREEN: Well to the extent that a Maryland marriage is recognized in this state upon get, uh, granting a divorce in the context of that, uh, wouldn't this the Texas court have to apply Texas law?

ATTORNEY JAMES J. SCHESKE: To the divorce?

JUSTICE PAUL W. GREEN: In, in dividing the property?

ATTORNEY JAMES J. SCHESKE: Yes, I believe that's right and, um, as I was--

JUSTICE PAUL W. GREEN: Though it, then it requires a recognition of a, of a marriage in another state, uh, in order to do that wouldn't it because if you're, otherwise, if, if there is no marriage, then you're just talking about dividing about tenants in common.

ATTORNEY JAMES J. SCHESKE: Well--

JUSTICE PAUL W. GREEN: But, but if they live in Texas for a period of time and, and acquire community property, what would be community property, what's, what is the trial court to do dividing that property?

ATTORNEY JAMES J. SCHESKE: If the trial court cannot use our community property laws, the trial court still has the ability to effectuate an equitable division of property and, uh, again, marriage and divorce are opposites of each other. Um, I, I pointed out on page 13 of my brief that this is the second state supreme court to have to deal with this issue. The first state that encountered it back in 2011 was Wyoming, um, and in that case, the Wyoming Supreme Court was faced with Wyoming residents who were married in Canada, uh, and, uh, Wyoming had a statute that we don't have, which requires Wyoming to recognize an out-of-country marriage so in that sense, the cases are a bit different, but what is important to take from what the Wyoming Supreme Court did is it recognized that when a party sues for divorce, divorce is not the same thing as marriage. It is not invoking the marriage laws or recognizing the marriage. It is invoking the divorce laws.

JUSTICE PHIL JOHNSON: Well let me--

JUSTICE EVA M. GUZMAN: Do the, do the, I'm sorry, Justice Johnson.

JUSTICE PHIL JOHNSON: Let me ask a question. If I file a lawsuit against Chief Justice Hecht and say I want a divorce, don't I have to, don't I have to say there's a marriage? Otherwise, how am I going to get a divorce?

ATTORNEY JAMES J. SCHESKE: Yes, to allege a petition for divorce, the Petitioner must allege, as I said, that at some point--

JUSTICE PHIL JOHNSON: If I file a lawsuit against Chief Justice Hecht and say I want a divorce and don't allege a marriage, does, can a trial court grant me a divorce?

ATTORNEY JAMES J. SCHESKE: No, you must have a marriage before you can have a divorce and, again, there is no dispute but that my clients were married and they were married in a place that allowed those marriages. Texas chooses not to recognize those marriages or give them any effect, but the treatment that Texas gives those marriages does not affect the existence of the marriage.

JUSTICE DON R. WILLETT: Do you believe the state's preference for traditional marriage is driven by irrational animus?

ATTORNEY JAMES J. SCHESKE: I believe, uh, that the state's, uh, segregation of gay and lesbian marriages that occurred out of state differently from opposite sex marriages that occur out of state is driven by animus towards gay and lesbians and I believe that because what the U. S. Supreme Court held in *Romer v. Evans* where the Colorado voters had passed an amendment, the will of the people, that took away equal rights specifically to gay and lesbian Colorado residents and the Supreme Court said the mere passage of that amendment was sufficient to show animus and the Supreme Court reaffirmed that in the *United States v. Winsor* this summer. *Winsor* is the game changer here because the Fifth Court of Appeals applied the Texas Defense of Marriage Act to divorce precisely like the federal government applied section 3 of the federal DOMA and that is to deny inequalities specifically to gay and lesbian marriages. In the federal case, it was marriages among the various states and to make those marriages second class.

JUSTICE JOHN P. DIVINE: How do you argue that a trial court or this court or any court in Texas has jurisdiction over this issue in light of the Family Code and the Texas Constitution?

ATTORNEY JAMES J. SCHESKE: Well, first of all, there's nothing in the Texas Defense of Marriage Act laws that mentions jurisdiction. Um, in Texas, family law jurisdiction resides exclusively in Texas district courts under, um, the Texas Constitution. The Texas Defense of Marriage Act does not contain the word jurisdiction. It's not a jurisdictional statute under the holdings of this Court so, um, [inaudible]--

JUSTICE DON R. WILLETT: Is it true, is it true that one of the parties in the Austin case, the *Naylor* case, um, argued initially that voidance and not divorce was the proper procedural vehicle under the Family Code?

ATTORNEY JAMES J. SCHESKE: Not exactly. The Respondents, Sabina Daly, argued as one of her defenses that, um, the marriage was void under Texas law. That is, in fact, in her answer to the case and, by the way, that's normally how voidance is raised in Texas Family Law in an answer. The Respondent raises his or her hand and says, excuse me, Your Honor, I'm actually not married to this person, but--

JUSTICE EVA M. GUZMAN: If a--

ATTORNEY JAMES J. SCHESKE: Uh, if I may just finish that one point, please, Justice Guzman, uh, importantly, um, neither the Respondent nor the Petitioner in the *Naylor* and *Daly* case actually challenged the constitutionality of Texas law. In the absence of that challenge is one of the reasons the state does not have standing to intervene in that case.

JUSTICE EVA M. GUZMAN: Well, on that point, there was certainly a concern by the trial court judge expressed at least at some stage of that litigation about the constitutional issues and actually asking the parties for full briefing on that and then after that, there was a settlement of some sort.

ATTORNEY JAMES J. SCHESKE: That's right, Your Honor, uh, the record is clear that Judge Scott Jenkins, who, of course, is a highly regarded district judge in the state, that Judge Jenkins did raise the issue of what is my jurisdiction and at some point, we know from the record, Judge Jenkins resolved that at least to the extent that he had the authority to grant an agreed divorce and he rendered that judgment and in the written final judgment, he found that he had adequate subject matter jurisdiction.

JUSTICE EVA M. GUZMAN: I wanted to go back to the issue of voidance that you were discussing. If, if you're not seeking the benefit of community property laws, which, which are an aspect of a marriage in Texas, why isn't a voidance then a, a proper vehicle for you in this instance?

ATTORNEY JAMES J. SCHESKE: There are several reasons, Your Honor. The first is that, um, if we haven't learned anything from U. S. Supreme Court cases in the last 60 years, we should have learned that forcing a targeted group of citizens into a separate and unequal court procedure is never constitutional and that's what happens here.

Second of all, the whole idea of voidance engages in what a friend of mine calls a complete fiction because a suit to void a marriage in Texas voids the marriage *ab initio* if it is granted and we know that's not true. These marriages were not void *ab initio*. They were valid *ab initio* because they were permitted in the Commonwealth of Massachusetts so the whole premise of a suit to void the marriage is untrue and, furthermore, unlike the other categories of marriages that are declared void in the Texas Family Code, only this purported void marriage targets specific classifications of citizens, that is gays and lesbians.

JUSTICE JEFFREY V. BROWN: For, for those other forms of marriage that are declared void under Chapter 6 of the Family Code, um, marriages where a minor, where someone under 16 is involved or people who are closely related, are you aware of, are you aware of any, uh, cases showing that divorce decrees have been granted to participants in marriages like that?

ATTORNEY JAMES J. SCHESKE: No and I'm not sure there ever would be because only the parties to those marriages would be able to appeal them and, therefore, uh, generate some sort of record where we would know whether that had occurred or not and, um, I, I do think, however, that assuming, um, I think the *Winsor* case mentioned either New Hampshire or, or Vermont had a very young age, um, for marriage. It was something like 13 or 14. Obviously, that's different than our law, right, so assuming that, um, a New Hampshire resident was married at that young age lawfully in that state, uh, let's assume further that, um, after age of 18, they moved to Texas and established residency here to go to college or something and they needed a divorce, there's no question but that a Texas district court seeing that petition for divorce would grant it.

CHIEF JUSTICE NATHAN L. HECHT: Well, I think there's some question. Uh, you don't think there's any kind of marriage, uh, no matter how young or, uh, if it involved the two close relationship or if it was polygamous or whatever, uh, that the, uh, state court would not refuse to acknowledge it nor grant a divorce?

ATTORNEY JAMES J. SCHESKE: It depends on whether one of the parties to the marriage raises the validity of the marriage as a defense.

CHIEF JUSTICE NATHAN L. HECHT: Well--

ATTORNEY JAMES J. SCHESKE: That's the way it actually operates in Texas Family Law.

CHIEF JUSTICE NATHAN L. HECHT: Well, the trial court would have jurisdiction. It would just be up to a party to raise it.

ATTORNEY JAMES J. SCHESKE: The trial court has to have jurisdiction because if you rule as the Fifth Court of Appeals did, you're not only denying my client his right to a divorce, a right that all other Texas residents have, you're denying him the opportunity to even be heard. That's the effect of the Fifth Court of Appeals' decision. It's not just the denial of the beremedy. It's the denial of the opportunity to be heard, that is a textbook procedural due process violation that cannot, cannot be constitutional under the Fourteenth Amendment.

JUSTICE DON R. WILLETT: I want to clarify your response to my earlier question when I asked whether the state's preference for traditional marriage is driven by irrational animus. I want to make sure I understand. Your assertion is your argument that the lawmakers of both parties who voted overwhelmingly for the Family Code provision and for the amendment to propose it to voters and then the voters themselves who, you know, the margin and all that stuff, but you're saying that their purpose in defending traditional marriage was to demean, was to humiliate, was to condemn those who prefer other arrangements and what in the record, um, supports that assertion?

ATTORNEY JAMES J. SCHESKE: Actually what I'm saying is none of that has anything to do with divorce because those laws that were passed, um, with the stated purpose of the goals that you just eloquently summarize all relate to marriage and this isn't a marriage case and so the, whether the state had a rational basis to enact laws prohibiting same-sex marriage is actually not at issue here, uh, because it is a divorce case.

JUSTICE JEFFREY S. BOYD: But it is, it is on your alternative argument. Your first argument is just as a matter of statutory construction. Granting divorce does not recognize or give effect to the marriage. Alternatively, if it does, then you're arguing a constitutional claim based on the animus that you've described.

ATTORNEY JAMES J. SCHESKE: But only as if those laws are applied to divorce and that's the distinction. Remember the class of person affected here--Texas resident, number one, married out of state, number two, three, same-sex marriage and, four, needing a divorce. It's that fourth characteristic that separates the Texas Defense of Marriage Act from the constitutional right to divorce. If we're only talking about the first three classifications, then the Texas Defense of Marriage Act certainly prohibit the creation or recognition of same-sex marriages.

JUSTICE DON R. WILLETT: I have a procedural question for you. I know this proceeding began pre-2011 and 2011, of course, HB4293 was passed, um, to give the AG the right to notice and the right to intervene if there's a perceived constitutional attack on a statute. Um, would a married same-sex couple filing for divorce today in Texas with HB4293 on the books, would a married same-sex couple filing for divorce today be required to give the AG notice an opportunity to be heard and to intervene?

ATTORNEY JAMES J. SCHESKE: No, Your Honor, unless one of those parties actually challenged the constitutionality of some Texas law.

JUSTICE DON R. WILLETT: And I guess that's the rub because as the AG sees it kind of baked into the proceeding is an implicit attack on the constitutionality of the Family Code.

ATTORNEY JAMES J. SCHESKE: Well, because the State doesn't have a right to intervene in these divorce cases where there's no child support or child protective services type issues, um, the State doesn't have standing to intervene in a private divorce case unless one of the parties does as you just suggested and challenges the constitutionality of Texas law. If that doesn't happen, the State can't intervene and that's why it has filed a conditional petition for writ of mandamus. It's asking you to award a carve-out so that the attorney general can go around the state and intervene in any same-sex divorce case and disrupt the proceedings and--

CHIEF JUSTICE NATHAN L. HECHT: If the, um, trial judge had said in an order, uh, in the decree, well, um, the-

se folks want a divorce, but the statute won't let me give it to them and I think the statute's unconstitutional. Would the attorney general have the authority to intervene at that point?

ATTORNEY JAMES J. SCHESKE: After final judgment?

CHIEF JUSTICE NATHAN L. HECHT: Well, it would have to be at that point. None of the parties have raised it, but the trial judge says the only way I can grant this divorce is if the statute's unconstitutional.

ATTORNEY JAMES J. SCHESKE: Um, no I don't believe so. I think at that point, the State is left with arguing on appeal the El Paso automobile dealers case and whether or not the State is bound by the trial court order. In that case--

JUSTICE DON R. WILLETT: So your position is absolute that the State is procedurally powerless to defend Texas laws against constitutional attack once judgment has been granted.

ATTORNEY JAMES J. SCHESKE: I'm saying the State has a right to do that in the limited circumstances that already exist, which largely stems from that automobile dealer blue law case. Just because the executive branch does not like the application of Texas law by a district court, that does not confer standing on the executive branch to intervene in private lawsuits and yes, I believe that absolutely.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Scheske. The Court is ready to hear argument from the, uh, Respondents and, uh, Relator.

MARSHAL: May it please the Court, Mr. Blacklock will present arguments for the Respondents-Real Party in Interest.

ORAL ARGUMENT OF JAMES D. BLACKLOCK ON BEHALF OF THE RESPONDENT-REAL PARTY IN INTEREST

ATTORNEY JAMES D. BLACKLOCK: Good morning, may it please the Court. Under the Texas Constitution and the Texas Family Code, all same-sex marriages are void and unenforceable for any reason, including divorce regardless of where, where the marriage was created. The parties here admit that Texas law does not recognize their marriages, but nevertheless--

JUSTICE PHIL JOHNSON: Let me interrupt you just a moment. When you say it's void, you're talking not, as opposing Counsel said, if you're married in Massachusetts, it may not be void. Would you agree with that or disagree with that?

ATTORNEY JAMES D. BLACKLOCK: I agree that it's void in Texas for all purposes whether it's--

JUSTICE PHIL JOHNSON: In Texas.

ATTORNEY JAMES D. BLACKLOCK: Yes, sir. Whether it's void in Massachusetts is an issue of Massachusetts law that, honestly, has not come up in this case and I wouldn't think there'd be any reason to think it was void in Massachusetts.

CHIEF JUSTICE NATHAN L. HECHT: But you suggest that one remedy here is an action to declare the marriage void, but it wasn't void in where it was performed. How can the court grant that relief?

ATTORNEY JAMES D. BLACKLOCK: Because it's void in Texas and, and the question--

CHIEF JUSTICE NATHAN L. HECHT: Doesn't, doesn't it matter where it was performed? I mean you could go to another state and it's valid there and another state and it's void there, uh, surely, I mean that would seem like a wreck of full faith and credit that, uh, you have all these judgments from all these states depending on what their own law was said and a marriage that was valid at the time it was performed is invalid.

ATTORNEY JAMES D. BLACKLOCK: I think what a suit to create a marriage void does in terms of full faith and credit is establish that the marriage no longer exists, that the marital status of the parties is not married to one another and all 50 states and the federal government would have to recognize that and--

CHIEF JUSTICE NATHAN L. HECHT: So that's not void *ab initio*?

ATTORNEY JAMES D. BLACKLOCK: To be honest, Your Honor, I, I'm not sure whether if, if the decree of voidance includes a decree that the marriage was void *ab initio*, I don't know whether Massachusetts would have to honor that aspect of the decree.

JUSTICE DON R. WILLETT: But you do concede that states for a long time and as a matter of just fundamental comity have recognized marriages, you know, first cousins in some states, for example, or marriages of various ages that states have recognized marriages that they themselves would not have created or permitted.

ATTORNEY JAMES D. BLACKLOCK: I think that's generally right. Uh, it can be right when there's not a strong public policy expressed against recognition of the marriage so, for instance, Mr. Scheske mentioned the Wyoming case where the Wyoming Supreme Court concluded that despite the ban on creation of same-sex marriages in Wyoming, Wyoming courts can nevertheless grant a divorce. If you look at these cases where state courts have, have looked to whether they could grant a divorce of a same-sex couple married in another state, the question the court asks is does our state recognize the marriage and, in particular, does our state have positive law like section 6.204 that denies recognition to the marriage and that instructs the courts and the state not to provide any rights of marriage or any recognition to that marriage.

JUSTICE DON R. WILLETT: The Texas law does, it does declare same-sex marriage contrary to Texas public policy and it would strike some people as, as odd, um, that the State is advocating a view that would keep same-sex couples wedlocked instead of letting them split and it would seem to many that divorce would further the state's

public policy and not undermine the State's public policy. What's your response?

ATTORNEY JAMES D. BLACKLOCK: I've certainly heard that argument, Your Honor, and frankly I think it's, it's somewhat facetious. There, the policy is that marriages between same-sex couples will not be recognized and divorce unquestionably recognizes and gives effect to the marriage in violation of Texas' policy and on top of that, the State's policy is not going to force the parties to stay married because as I said, there is the availability of a suit to declare the marriage void and the only--

JUSTICE EVA M. GUZMAN: How does the suit to declare the marriage void impact, um, third-party creditors, for example, people in Massachusetts that extended or, not people, organizations, entities that extended credit based on a marriage, then, then they get to Texas and so how does that impact the, the liabilities if you will that run with the acquisition of assets in any number of states if we say they're void *ab initio*?

ATTORNEY JAMES D. BLACKLOCK: I think with respect to any, any claim from a creditor or another third-party that was premised on the validity of the marriage while the parties were resident in Texas, that claim would be of no effect and the marriage would be completely void with respect to that. There's a, a separate question that I think you're asking about how Massachusetts law would treat the voidance decree and whether it would have to consider the marriage void *ab initio* and--

JUSTICE EVA M. GUZMAN: Well, those are important considerations in, in marriages that have been traditionally recognized as the rights that, that accrue to the respective parties and that's what I'm asking about, um, in this case, if, if in Massachusetts certain rights accrue and they're married, but when they come here as the third parties, what is the impact?

ATTORNEY JAMES D. BLACKLOCK: I think that's a question of Massachusetts law, Your Honor, that the, the courts there would have to, to sort out.

JUSTICE PAUL W. GREEN: Well the other thing is you say that the divorce is void for all purposes, but, but now I think we know that that the federal government says that if you were a, a, um, live in Texas, you can still file a tax return married filing jointly even though that the, um, marriage may be void in this state, is that correct?

ATTORNEY JAMES D. BLACKLOCK: That's right.

JUSTICE PAUL W. GREEN: So it's not void for all purposes?

ATTORNEY JAMES D. BLACKLOCK: It's void for purposes of Texas law. It's not necessarily void for purposes of federal law, you're right.

CHIEF JUSTICE NATHAN L. HECHT: I don't--

JUSTICE JEFFREY V. BROWN: Why, why is voidance of jurisdictional, uh, a jurisdictional pro, problem instead

of just a defense.

ATTORNEY JAMES D. BLACKLOCK: Because of the way section 6.204 is written and I the, the Fifth Court got this exactly right that section 6.204 cannot be fully effectuated if a court is exercising jurisdiction over a same-sex divorce case because merely exercising jurisdiction gives some effect to the claim of divorce in violation of the statute by resulting in a final judgment, resulting in res judicata and collateral stopple effects on the parties even if divorce is ultimately granted, simply exercising jurisdiction has given the claim of divorce some effect.

CHIEF JUSTICE NATHAN L. HECHT: But I'm, I'm just inquiring about your arguments that the parties have an alternative, which is to sue for voidance of the marriage, that's your argument right?

ATTORNEY JAMES D. BLACKLOCK: Yes, Your Honor.

CHIEF JUSTICE NATHAN L. HECHT: And, uh, so if you make, if you file that suit in Texas and you get a decree that, a judgment that, yes, the marriage is void even though it was valid in Massachusetts, that binds, that's the all states are required to honor that judgment, right?

ATTORNEY JAMES D. BLACKLOCK: Absolutely.

CHIEF JUSTICE NATHAN L. HECHT: Including Massachusetts.

ATTORNEY JAMES D. BLACKLOCK: Absolutely.

CHIEF JUSTICE NATHAN L. HECHT: Even though the marriage was valid there.

ATTORNEY JAMES D. BLACKLOCK: Yes.

CHIEF JUSTICE NATHAN L. HECHT: And if you had made the mistake of suing in another state that like Massachusetts raised same-sex marriage, you'd get a judgment that said, no, it wasn't valid. It wasn't void.

ATTORNEY JAMES D. BLACKLOCK: That's right.

CHIEF JUSTICE NATHAN L. HECHT: So each state's going to apply its own law and where you file a lawsuit depend, uh, you're going to get a judgment that the marriage was or was not void.

ATTORNEY JAMES D. BLACKLOCK: That's right and the one thing that, that either a divorce judgment in Massachusetts or a voidance judgment here in Texas would do is establish nationwide as a matter of full faith and credit that the parties are no longer married to one another and the Supreme Court's decision in *Sutton v.Leib* I think is right on point.

JUSTICE DON R. WILLETT: Well voidance means not only not, no longer married, but never married.

CHIEF JUSTICE NATHAN L. HECHT: Right.

ATTORNEY JAMES D. BLACKLOCK: That, that's right, that's right.

JUSTICE DON R. WILLETT: And I just wonder to what degree would, would check in the never married box as opposed to the divorced box to what degree that would invite, um, disarray, would it invalidate, discredit, disrupt thousands of decisions. They might have had children. They might have, uh, bought property, taken on debt together and I just wonder to what degree it would sort of inject disarray if you declare these marriages invalid, not simply divorced, but never married to begin with.

ATTORNEY JAMES D. BLACKLOCK: Well, certainly a court hearing as suit to declare the marriage void has the authority to divide the property to arrange the, the, the, um, parties' affairs to legally disentangle the parties so to speak using equitable principles and, and the court could not apply community property principles or other, uh, property rights that accrue only to married couples, but the court can through equitable principles do what it needs to do to as I said legally disentangle the parties. Um, and you mentioned children and I want to be real clear that none of, none of the arguments we're making, uh, affect the availability of a suit affecting the parent-child relationship. Uh, a SAPCR as it's called is available in a divorce case. It's available in a suit to declare the marriage void. It's available on its own. It does not have to brought with a suit for dissolution of the marriage and a same-sex couple that where both, uh, both parties have parental rights has just as much right as any other parent in the state to bring that kind of a suit to make sure that any issues related to the child are properly sorted out.

JUSTICE JEFFREY S. BOYD: Mr. Blacklock, what, what specific law gives the attorney general the authority to intervene in a case like these?

ATTORNEY JAMES D. BLACKLOCK: Rule 60 of the federal, of the Texas Rules of, of Civil Procedure, Your Honor, uh, gives us the right to intervene because of our justiciable interest in defending, uh, Texas laws against constitutional [inaudible].

JUSTICE DON R. WILLETT: But Mr. Scheske says they're not attacking the constitutionality of Texas law.

ATTORNEY JAMES D. BLACKLOCK: I, I just don't think that's a tenable position, Your Honor. I think from, from the very beginning, there was at least an implicit constitutional attacking of these cases and then it moved beyond just being implicit when at every stage of the litigation when the parties were asked to provide a legal explanation for their claimed right to relief, they attacked the constitutionality of Texas law.

JUSTICE JEFFREY S. BOYD: Well let me, let me back up a little bit. You say Rule 60 is based on the attorney general having a justiciable interest. What law gives the attorney general a justiciable interest in these cases?

ATTORNEY JAMES D. BLACKLOCK: The justiciable interest is not established by statute although it has been, I

think, recognized by, uh, Chapter 402 of the Government Code, the, the, uh, provision that Justice Willett referenced that was recently enacted that gives the State the opportunity to receive notice of constitutional challenges and assumes that the State has the inherent right to intervene. That, that statute Chapter 4 or in Chapter 402 does not purport to give the State a statutory right to intervene in those cases. It simply requires that the State be notified of the cases.

JUSTICE EVA M. GUZMAN: If the State makes a strategic choice not to intervene, for example, in this case, I guess you all knew for awhile it says in your brief through media coverage that the issue was percolating in that trial court. Was the choice not to intervene sooner a strategic choice?

ATTORNEY JAMES D. BLACKLOCK: I, I think it, it was, Your Honor.

JUSTICE EVA M. GUZMAN: And so don't those strategic choices carry some risk and that is the risk of the issue being resolved or settled before you intervened so you sort of had to weigh that out didn't you?

ATTORNEY JAMES D. BLACKLOCK: They do carry some risk, Your Honor, and I think that's one thing the Court would have to, to take into consideration in weighing the equities here and this, this rule against post-judgment intervention is an equitable role that's not in the rules of procedure and, and considerations like that have to be weighed.

JUSTICE EVA M. GUZMAN: So should equitable rules come into play when lawyers across our state makes strategic decisions all the time about when to intervene, whether they intervene, should equity, um, I guess provide some sort of benefit to someone who's made a strategic decision not to do something?

ATTORNEY JAMES D. BLACKLOCK: In this case, Your Honor, the way things played out in the district court, I think the, the, the details of what that reporter's record looks like has to be taken into account. The, the courts, the state was in the process of deciding whether to get involved in the case. The State was certainly aware of the case. One of the parties was arguing that the Texas Constitution prohibits a divorce and that the proper mechanism for dissolving the marriage was a suit to declare the marriage void and typically it's our policy not to get involved in a lawsuit when one of the parties is making the arguments that we would make.

Uh, the district court recognized the important jurisdictional issues, constitutional issues in the case, asked the parties to brief those issues over a period of 60 days and then the very next day suddenly granted a divorce without explaining why or what legal basis or what had happened to the jurisdictionally constitutional issues that the court was so worried about just the day before and so the State, I think, we relied on the court's statement that this was going to be litigated over a period of time and over that period of time, we would have either with the parties or against the parties joined into that litigation, but because of the way things played out so suddenly, we were deprived of the ability to do that.

JUSTICE EVA M. GUZMAN: And now that you're required to, to receive notice under section you alluded to 402, would, um, courts, should courts look at differently at your decision to intervene or should they still deem it equitable for you to intervene after judgment?

ATTORNEY JAMES D. BLACKLOCK: I don't believe that the enactment of, of that provision in the Government Code restricts or changes the states' justiciable interest in, um, in, in cases where the law is, uh, challenges unconstitutional. It, it simply authorizes or requires the State to be notified and it assumes that the State has an inherent right to intervene in those cases once it is notified because as I said, the statute doesn't [inaudible].

JUSTICE JEFFREY S. BOYD: I just need you to flush that out a little bit because Rule 60, justiciable interest and then that's based on the new 402, which assumes an inherent right. Is it the State's position that that inherent right is, derives from the constitutional role of the attorney general or does it derive from common law recognition of the State's interest. Where is that inherent right, where's the basis of that inherent right?

ATTORNEY JAMES D. BLACKLOCK: It, it derives, I think, Your Honor, from the, from the state constitution, from the attorney general's role as you said as the representative of the state's interest in court.

JUSTICE JEFFREY S. BOYD: And so is that interest, inherent right and interest, um, limited to constitutional issues? In other words, does that interest exist only when there is a question of constitutionality of state law or conduct?

ATTORNEY JAMES D. BLACKLOCK: It certainly exists in those cases. I don't want to say it can't exist in a case that doesn't involve constitutional questions, but these cases do.

JUSTICE JEFFREY S. BOYD: But, okay, so we resolve this case and a year from now let's say we hold everything the way you want us to hold in this case, a year from now another same-sex couple files for divorce. They go in with an agreed decree of divorce and the trial judge says I'm going to grant this and signs it. Nobody ever raises constitutionality. Maybe on the record, the trial judge says I just simply construe the statute in the way Mr. Scheske wants, which is that granting a divorce does not give effect to or recognize validity of marriage. There is no constitutional issue. In that case, how does the attorney general have any authority to intervene?

ATTORNEY JAMES D. BLACKLOCK: Given the, given the nationwide debate on the same-sex marriage issue and given the, the obvious constitutional implications of the kind of situation that you're talking about, I don't know that it would be accurate to describe any such situation as not involving some level of constitutional attack on Texas law, but even assuming that, that it were possible for that kind of a, for a case to be litigated that way, I, I suppose that would be a different case if and if these parties had through the course of this litigation completely disclaimed any desire to ask any court to make a ruling on the constitutionality of Texas law, this would be a different case in terms of the State's ability to intervene, but that's not what they did. From the very beginning at every point when they were defending their entitlement to the relief that they seek, they attacked the constitutionality of state law and that triggers the State's justiciable interest in the case.

JUSTICE JOHN P. DEVINE: If there were children involved in this case, how would your argument be different today if any difference?

ATTORNEY JAMES D. BLACKLOCK: There was a child, Your Honor, in the Naylor case. There is a child in the, in the Naylor case I should say and, um, that--

JUSTICE JOHN P. DEVINE: You, you mentioned SAPCR and so I was interested in knowing how, what, what you thought it was?

ATTORNEY JAMES D. BLACKLOCK: The enforceability, the availability of a SAPCR is completely unaffected by these arguments that we're making.

JUSTICE DON R. WILLETT: We said in *Dubai* and elsewhere that Texas has a very strong presumption that jurisdiction exists, that courts are vested with jurisdiction and if lawmakers want to abrogate that jurisdiction, they got to do so clearly. They got to do so explicitly and the Texas laws, as Mr. Scheske points out, nowhere mentions jurisdiction, does it mention divorce unlike the DOMA law I guess in Georgia, which does allow courts there to recognize marriage for the purpose of granting a divorce, the Texas law doesn't do that. Um, but other states like Georgia seem to have a law that unambiguously kind of strips the court of jurisdiction to hear a divorce action. Um, I just wonder what your response would be and we've got the strong presumption that Texas courts are vested with jurisdiction and lawmakers have to abrogate that in very clear language and here it seems, things seem very inferential.

ATTORNEY JAMES D. BLACKLOCK: I think there's a few responses to that, Your Honor. The, the first is that there really is no way to comply fully with section 6.204 while exercising jurisdiction over a, a same-sex divorce case and that's not only because of what the Fifth Court said that just exercising jurisdiction results in a final judgment that, that can bind the parties, etc., but also because there are rights that accrue two parties in a divorce case regardless of whether divorce is ultimately granted and one of those rights is that certain property transactions or debts incurred are void during the pendency of a divorce case and that is a right that is given effect just by the court's exercise of jurisdiction over the case, which means that the court is violating section 6.204 by exercising jurisdiction and that we think is sufficient basis for this Court to hold that the, that the general presumption of jurisdiction is overcome.

CHIEF JUSTICE NATHAN L. HECHT: But Mr. Scheske argues in this case that, uh, you, that you do not have to hold the statute in violation of the U. S. Constitution in order to grant this divorce and that's one of the reasons why we're here and if the trial judge thought that was right and said, I'm not reaching constitutionality any what in this case. The parties aren't arguing it. I think you can do it without getting into constitutional issues, then can the attorney general intervene in that case or not?

ATTORNEY JAMES D. BLACKLOCK: I think the attorney general can intervene in that case.

CHIEF JUSTICE NATHAN L. HECHT: And so the Mr. Scheske argues, um, that really this gives the attorney general a license to just kind of roam around through the state courthouses and look for cases to intervene in and you say in your reply brief, no, that's not true. This is an extraordinary case. It's not going to happen all, we could do it all those times, but we're not going to try to do it in those cases. We're just going to do it in extraordinary cases. Is that a fair summary of your argument?

ATTORNEY JAMES D. BLACKLOCK: I think that's a fair summary, Your Honor.

CHIEF JUSTICE NATHAN L. HECHT: What makes the case extraordinary that the national debate, the fact that a lot of people are paying attention to the issue, is that, what else?

ATTORNEY JAMES D. BLACKLOCK: Well, that, that certainly makes it extraordinary. This is a unique issue that inherently raises constitutional issues and, and as I've said, this is not just an implicit constitutional attack. I do think and just an implicit constitutional attack would be sufficient to support our intervention, but these parties have continuously argued that Texas law is unconstitutional and that at least in the alternative that unconstitutionality entitles them to a divorce. That is one of their lead theories of this case.

JUSTICE DON R. WILLETT: But did you tell Justice Boyd earlier that it would be a different case if a same-sex couple wanting a divorce who in no manner, way, shape or form were going to raise a constitutional issue, if they were to walk in to a Texas district court with an agreed, um, divorce decree and the judge signs off on it. Nobody whispers. There's not a hint of a shadow of a smidgen of anything about the constitution, are you saying that a, a Texas court could or could not grant that divorce?

ATTORNEY JAMES D. BLACKLOCK: Certainly, a Texas court could not grant that divorce.

JUSTICE DON R. WILLETT: It would--

ATTORNEY JAMES D. BLACKLOCK: It could not exercise jurisdiction over that case.

JUSTICE DON R. WILLETT: So you say there is an unavoidable constitutional attack [inaudible] to that proceeding whether or not the parties and the judge think there is or not.

ATTORNEY JAMES D. BLACKLOCK: I think that's right, Your Honor. I think we have to separate out the question of whether the court could grant that divorce and the answer's absolutely no under the Texas Constitution and the Texas Family Code and whether the State could intervene, which is the second question.

JUSTICE JEFFREY S. BOYD: Isn't that the complete opposite though of the prevailing rule of this Court and the United States Supreme Court that if it possible to construe a statute to be constitutional and avoid a constitutional issue, then we are charged to pursue that course where it sounds like you're telling us that we have to assume that we must confront a constitutional issue every time this kind of case is filed.

ATTORNEY JAMES D. BLACKLOCK: Your Honor, the Court's only entitled to interpret the law to avoid a constitutional question when there is a plausible interpretation of the law that avoids the constitutional question and here there simply is not. There is no way to grant the divorce without recognizing a marriage. There is no way to comport with the Texas Constitution. The Texas Constitution defines marriage as solely the union of one man and one woman so there are no marriages here and therefore there can be no divorces.

JUSTICE PAUL W. GREEN: But here's the problem, one of the problems seems to me is somebody can brig in a petition for divorce and I don't recall the forms saying that anywhere in the statute says you have to declare when you're filing your petition for divorce that you have the Petitioner is, is male and the Respondent is a female. It is just, uh, initials or names that, that are ambiguous with respect to whether they're male or female and the trial court looks at that and it's an agreed situation and so 10 years later, somebody comes along and says, well, you know what? Those turned out to be, that was a void divorce. It's all the consequences of that divorce now undone? Is that, is that, uh, where we're headed with this?

ATTORNEY JAMES D. BLACKLOCK: They are, Your Honor. The consequences would be undone and I think the situation you're describing is one in which if this Court were to make clear that same-sex divorces are unavailable, you're talking about a situation where parties ignore that and attempts to go around what this Court has said and nevertheless attain a same-sex divorce and that the consequences of those actions would be that the divorce could be undone 10 years down the road I don't think is an unfair consequence.

JUSTICE JEFFREY V. BROWN: Is divorce a fundamental right?

ATTORNEY JAMES D. BLACKLOCK: The Supreme Court held in *Boddie v. Connecticut* that there is a fundamental right of access to the courts, uh, related to the dissolution of marriages and if you read *Boddie*, the court talks about divorce and dissolution of the marriages in interchangeable ideas and it's clear that the court is not talking about community property rights or other rights that may be reserved for valid marriages. It's talking about the ability to go to the court to dissolve a marriage.

JUSTICE DON R. WILLETT: You may view this--

ATTORNEY JAMES D. BLACKLOCK: In Texas, that right is available to these parties through a suit to declare the marriage void.

JUSTICE DON R. WILLETT: And you may view this as a distinction without a difference, but is it possible that what we're grappling with here today isn't whether a Texas court has or lacks jurisdiction, but whether the court lacks the authority to grant the requested relief or whether parties lack standing and people may view that as a distinction without a difference and I just wanted your two cents worth.

ATTORNEY JAMES D. BLACKLOCK: I don't think that's a distinction without a difference and I'm so glad you asked that question because my time was expiring and I really wanted to get to that. Uh, redressability is a real problem here because this, this Court has said that there's two, there's two requirements for a standing. There must be a real controversy that can be resolved by the relief requested. The relief requested here is a divorce which a divorce inherently recognizes the marriage and, therefore, can never be enforced because of section 6.204(c)(1) of the Family Code, but because section 6.024(c)(1) bars the enforcement of any divorce decree that might be granted, no effectual relief can be granted here by the courts. The courts cannot resolve these parties' dis, dispute with a divorce decree because of section 6.204(1). Therefore is no redressability, no standing, no jurisdiction.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Blacklock. Mr. Scheske, I think you

have five minutes.

REBUTTAL ARGUMENT OF JAMES J. SCHESKE ON BEHALF OF PETITIONERS-RELATORS

ATTORNEY JAMES J. SCHESKE: For this Court to affirm the Fifth Court of Appeals, you must find that the Texas Defense of Marriage Act laws are jurisdictional and remove district court jurisdiction. You must find that those Texas DOMA laws apply to divorce when by their plain terms they do not. You must conflate marriage and divorce, which is illogical because those things are the opposite of each other and you must find that even though the Fifth Court placed opposite sex, out-of-state marriages in a different classification than out-of-state same-sex marriages, in other words, that disparate treatment is a given here, that the state has offered a rational basis to justify that disparity.

JUSTICE JEFFREY S. BOYD: Mr. Scheske, I want to get to the AG standing issue, which we really didn't ask you much about in your opening. Let's assume we do find all of those five things you just listed. You lose, State wins completely in this case, just hypothetically assume that and a month after we issue our opinion in that, in this case, um, a same-sex couple married in another state goes down to see Judge Jenkins, has a divorce decree that is agreed, goes to Judge Jenkins and says would you grant this divorce and he says, yeah I do because I don't think, uh, the Supreme Court was correct and to me, it's not a constitutional issue at all. I think Mr. Scheske's correct that by granting a divorce, I am not recognizing the validity of the marriage, um, or giving effect to it and so he signs the decree. Is there anything that anybody can do to prevent or appeal from that judgment?

ATTORNEY JAMES J. SCHESKE: No because only the parties to a divorce may appeal that final judgment assuming again we don't have child support, child protective services type issues and that's goes to the question Justice, the last question Justice Green asked, uh, Mr. Blacklock. Only the parties to a divorce may challenge its validity. The reason the State doesn't have standing under Rule 60 is because the State is not bound by the divorce decree. The State could not bring a divorce decree in its own name.

JUSTICE JEFFREY S. BOYD: Doesn't that just simply completely undermine the rule of law in our state?

ATTORNEY JAMES J. SCHESKE: No because we have, uh, specific methods for our executive branch to intervene in private-party lawsuits when the state is not a party and those are in existence. Just because an executive disagrees with the application of Texas law doesn't give that executive standing to intervene in the case absent some direct challenge to constitutionality. Uh, the law is that a divorce decree should be attacked and brought up for, for review by the parties that have standing to do so.

JUSTICE DON R. WILLETT: Is it true that--

JUSTICE EVA M. GUZMAN: If the effect of the judgment though is to infringe on the state's constitutional, constitutional, uh, requirements in a case like this, isn't, I mean, isn't that enough to trigger a justiciable interest, the effect of that judgment is, in fact, to infringe on the decision of about 76% of voters, uh, who voted?

ATTORNEY JAMES J. SCHESKE: No, that, that is not correct, Your Honor, uh, because district courts although they work very hard, they sometimes get the law wrong and that does not give the state of Texas, that does not affect the state of Texas and it doesn't give the state of Texas standing to attack that judgment.

JUSTICE EVA M. GUZMAN: But the touchstone, the touchstone is the justiciable interest and so you have private parties and the rule, general rules can they bring the lawsuit for them, for themselves, but when there's the touchstone being a justiciable interest, I'm not sure I'm following your argument.

ATTORNEY JAMES J. SCHESKE: Well justiciable interest in the mandamus context is equivalent to standing and when the state is not bound by in a divorce decree, I mean the only parties bound by a divorce decree are the parties to the divorce so the state is unaffected. What your question boils down to, Justice Guzman, is simply the state doesn't like the way the court applied law, but that doesn't mean the court doesn't have the jurisdiction to apply the law incorrectly.

JUSTICE DON R. WILLETT: It is true right that the mini DOMA's in some states do allow courts there to recognize same-sex marriage for the limited purpose of dissolving a marriage or granting a divorce, is that true?

ATTORNEY JAMES J. SCHESKE: Uh, I think the Georgia example is the opposite [inaudible].

JUSTICE DON R. WILLETT: Exactly, that one, exactly.

ATTORNEY JAMES J. SCHESKE: I think it's the inverse of what you said.

JUSTICE DON R. WILLETT: Yeah, that one kind of strips course unambiguously jurisdiction, you're right.

ATTORNEY JAMES J. SCHESKE: And that's the only state that did that in its DOMA. I also want to emphasize in my last few seconds that if you grant the relief that the State requests in either its appeal from the Third Court of Appeals or its mandamus, this Court will be remarrying Ms. Naylor and Ms. Daly, some almost four years after their divorce was granted because the relief the State wants causes them to be remarried, undoes their agreements incident to their divorce, including issues relating to their child and that will be the effect of your ruling.

JUSTICE DON R. WILLETT: I just have one more question.

CHIEF JUSTICE NATHAN L. HECHT: Yes, Justice Willett.

JUSTICE DON R. WILLETT: As you read, uh, *Winsor*, the DOMA decision, um, there are the words of that decision and then there is the music of that decision and often it seems a little inherently discorded to me and there's something, it has a Rorschach test kind of quality to it. There seems to be something for everybody to pull out and hang their hat on and on the one hand, there's this federalism rationale underlying the decision and Justice Kennedy for the court seems very solicitous of the prerogative of states to define for itself who is married and who is not. Um, on the other hand, there's the equal protection rationale and, um, that variations in treatment from one state to anoth-

er are subject to constitutional guarantees and so just sort of embedded in that decision, there just seems to be, um, it's a little opaque and, um, like I say, there's, there are the words of it, but there's the music of it and to me, it, it seems a little disharmonious.

ATTORNEY JAMES J. SCHESKE: Your Honor, may I respond? My time is expired.

CHIEF JUSTICE NATHAN L. HECHT: Yes, you may.

ATTORNEY JAMES J. SCHESKE: Um, first of all, *Winsor* is clearly not a federalism decision and Justice Kennedy says that, um, and, um, the dissent by Chief Justice Roberts, uh, to which no other justice joined, did say it was a federalism decision.

JUSTICE DON R. WILLETT: With gusto.

ATTORNEY JAMES J. SCHESKE: But the majority says it's not.

JUSTICE DON R. WILLETT: Yeah.

ATTORNEY JAMES J. SCHESKE: Um, and second of all, one thing that is not murky about *Winsor* is that when state laws or in that case federal laws target gays and lesbians for second-class status, those laws do not survive constitutional scrutiny. There's no Rorschach test in that regard.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Scheske. The case is submitted. I should have noted that, uh, Justice Lehrmann is not sitting in the case. The Court will take a brief recess.

MARSHAL: All rise.

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