IN THE SUPREME COURT OF MISSOURI

No. SC94101

In Re the Marriage of M.S.,
Appellant,

and

D.S.,
Respondent.

On Appeal from Circuit Court for St. Louis County, Missouri
The Honorable John N. Borbonus, III, Associate Circuit Judge

Brief Amici Curiae of American Civil Liberties Union of Missouri Foundation; PROMO; KC LEGAL; Professor Annette R. Appell, Director of Washington University Law School Child & Family Advocacy Clinic; American Civil Liberties Union; and Lambda Legal Defense and Education Fund in Support Appellant and Reversal

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STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amici adopt the jurisdictional statement and statement of facts as set forth in Appellant's brief.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are interested in this case because this Court's decision will be important not only for the parties but also for other gay and lesbian residents of Missouri and their children.[1] Because Missouri is home to exceptional institutions of higher learning as well as nationwide employers, among other draws, same-sex couples married in other states will continue to move to Missouri. As more and

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[1] According to the Williams Institute's analysis of the 2010 U.S. Census data, an estimated 3.3% of the general population identify as LGBT in Missouri. *See* Gary J. Gates & Frank Newport, *Gallup Special Report: New Estimates of the LGBT Population in the United States*, Williams Institute (Feb. 2013), *available at* http://williamsinstitute[.]law[.]ucla[.]edu/research/census-lgbt-demographics-studies/gallup-lgbt-pop-feb-2013/ (last visited on Aug. 12, 2014). There are 10,557 same-sex couples residing in Missouri. *See* Gary J. Gates, *Missouri Census Snapshot: 2010*, Williams Institute, *available at* http://williamsinstitute[.]law[.]ucla.edu/wp-content/uploads/Census2010Snapshot_Missouri_v2.pdf (last visited on Aug. 12, 2014). Of these couples who identify as spouses, 32% of them are raising their own children, in addition to the 15% of unmarried same-sex partners who are raising their own children. *Id.* Additionally, there are twenty-two counties in Missouri that more than fifty same-sex couples call home, which constitutes 19.3% of Missouri counties. *Id.*

more states abandon their exclusion of gays and lesbians from marriage, the number of same-sex couples in Missouri who are married will only increase as couples married in other states move to Missouri for education and jobs related to Missouri's nationally recognized colleges and universities and robust, world-class medical, research, manufacturing, and entrepreneurial market. This will add to the ever-growing population of Missouri same-sex couples who have been legally married in other states. Inevitably, many of those couples will need to terminate their marriages. Affirming the trial court's decision, which closes the courthouse to such couples, would create a barrier to attracting and retaining top talent to our state.

Amici curiae American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Missouri is the Missouri affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Missouri has more than 4,500 members.

The ACLU and ACLU of Missouri have a long history of protecting and promoting civil liberties in Missouri's courts, both through direct representation

and participation as amicus curiae in cases including, *Barrier v. Vasterling*, No. 1416-CV03892 (Mo. Cir.) (recognition of marriage of same-sex couples); *Lawson v. Kelly*, 4:14-cv-00622-ODS (W.D. Mo.) (freedom to marry for same-sex couples); *Messer v. Nixon*, No. 14AC-CC00009 (Mo. Cir.) (intervenor-defendant in challenge to joint tax filing by same-sex couples); *Glossip v. Missouri Department of Transportation & Highway Patrol Employees' Retirement System*, 411 S.W.3d 796, 799 (Mo. banc 2013); *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III School District*, 853 F. Supp. 2d 888, 894 (W.D. Mo. 2012) (challenge to school's web-filtering software to prevent students from "accessing websites saying it's okay to be gay"); *Johnston v. Missouri Department of Social Services*, No. 0516-CV09517, 2006 WL 6903173 (Mo. Cir. Feb. 17, 2006), *appeal dismissed* SC87601 (Mo. June 7, 2006) (challenge to Missouri's refusal to allow gay men and lesbians to serve as foster parents); *In re C.T.P.*, WD77435 (Mo. App. W.D.) (amicus); *White v. White*, 293 S.W.3d 1 (Mo. App. W.D. 2009) (amicus); *State v. Walsh*, 713 S.W.2d 508 (Mo. banc 1986) (amicus).

Amicus curiae PROMO is a statewide organization that advocates for lesbian, gay, bisexual, and transgender equality through legislative action, electoral politics, advocacy, grassroots organizing, and community education. A nonprofit, nonpartisan organization founded in 1986, PROMO is a member of the Equality Federation, a national network of statewide LGBT equality organizations. PROMO

represents the interests of thousands of families who are impacted by Missouri's marriage exclusion. Thus, its mission includes advocating for "[a] shift in the Missouri laws, from a system flawed with fundamental injustices to one that truly embraces the concept of equality for all citizens, regardless of sexual orientation or gender identity [that] will put us one step closer to a society where all voices are heard and people are free." PROMO has a long history of working to advance legal rights for LGBT Missourians through political organizing, lobbying, education, and, increasingly, legal advocacy. PROMO participated as amicus curiae in supplemental briefing to this Court in *Glossip*.

Amicus curiae Kansas City LEsbian, Gay, and Allied Lawyers ("KC LEGAL") is a nonprofit membership association of the lesbian, gay, bisexual, and transgender and allied legal community in the Kansas City metropolitan area. It mission includes educating the public and the court about legal issues facing LGBT individuals and working to gain equal rights for all people.

Amicus curiae Annette Appell is a law professor at Washington University in St. Louis, Missouri, with a courtesy faculty appointment at the George Warren Brown School of Social Work. She directs Washington University Law School's Children and Family Advocacy Clinic, which provides pro bono representation to Missourians in family law matters, including custody, guardianship, domestic violence, and child abuse and neglect. She has written twenty-seven law review

articles, seven book chapters, five bar journal articles, and twelve interdisciplinary articles in the area of families and children. She has taught law at Northwestern University, University of South Carolina School of Law, and University of Nevada, Las Vegas, Law Center.

Amicus curiae Lambda Legal Defense and Education Fund, Inc., is a nonprofit national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as counsel or amicus in numerous challenges to state laws banning same-sex couples from marriage, including *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (counsel in cases establishing the right of same-sex couples to marry in California and Iowa, respectively). Lambda Legal similarly has participated in cases involving same-sex couples who seek court intervention to dissolve their legal relationship to each other in jurisdictions that ban same-sex couples from marrying or otherwise deny formal respect to such relationships. *See Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858 (Iowa 2005). Lambda Legal also was party counsel in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), two of the Supreme Court's leading cases redressing sexual orientation discrimination. Lambda Legal accordingly has both an interest in protecting

lesbian and gay couples and their children in every state of the nation and extensive expertise in the issues before this Court.

SUMMARY OF ARGUMENT

Married same-sex couples are much like their counterparts in different-sex marriages. One of the commonalities is that sometimes their marriages do not work. The end of a marriage might, or might not, be amicable, but in any event, it is necessary to terminate the legal connection, divide property and debts, and guard the best interests of any children in an orderly and equitable fashion. In this case, however, the circuit court closed the courthouse doors to a married couple seeking to end to their marriage and separate their property and debts. The court erroneously concluded that it lacked jurisdiction and statutory authority to allow a married same-sex couple any relief.

The circuit court erred in dismissing the petition for lack of jurisdiction instead of determining whether the petition stated a claim upon which relief could be granted. Moreover, neither Article I, Section 33 of the Missouri Constitution nor section 451.022 of the Missouri Revised Statutes prevents courts from hearing an uncontested petition for dissolution involving the marriage of a same-sex couple. Furthermore, the circuit court had the power to grant relief even if that relief is not called a "divorce." In addition, because the due process right to obtain a divorce is distinct from the fundamental right to marry, Missouri's marriage bans cannot

constitutionally be applied to divorce proceedings even if they were otherwise constitutional. Missouri's laws should be interpreted in a manner that is not inconsistent with the Fourteenth Amendment.

This Court will soon be faced with cases squarely addressing the constitutionality of Missouri's bans on recognition of the marriages of same-sex couples. In *Barrier v. Vasterling*, No. 1416-CV03892 (Mo. Cir.), same-sex couples who were lawfully married elsewhere challenge Missouri's refusal to recognize their marriages. In *Messer v. Nixon*, No. 14AC-CC00009 (Mo. Cir.), citizens challenge the Governor's executive order directing the Department of Revenue to accept combined state income tax returns from married couples of the same sex. In *Messer*, intervening defendants, a same-sex couple married in another state, question the validity of Missouri's marriage bans.

In addition, the Court will likely soon consider cases challenging Missouri's bans on marriage licenses for couples of the same sex. In *State v. Carpenter*, No. 1422-CC09027 (Mo. Cir.), the Attorney General challenges the authority of the Recorder of Deeds for the City of St. Louis to issue marriage licenses to same-sex couples; the Recorder has responded with a counterclaim that the marriage exclusion is unconstitutional. In *Lawson v. Kelly*, 4:14-cv-00622-ODS (W.D. Mo.),

same-sex couples challenged the denial of marriage licenses to them by the Jackson County Recorder of Deeds.[2]

This Court need not reach out to decide those constitutional issues in this case, where they were not considered or passed upon by the lower court and it is not necessary to decide those questions in order to reverse the circuit court's *sua sponte* pre-service dismissal. Should this Court disagree that reversal on the merits is required without addressing the constitutional issues, then remand is appropriate. Although the parties did not raise a constitutional challenge to the marriage bans in the trial court, they did not have a reasonable opportunity to do so. The case should be remanded so that those issues may be addressed by the trial court in the first instance.

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[2] *Lawson* was filed in state court (No. 1416-CV15024 (Mo. Cir.)); however, the State of Missouri intervened and filed a notice of removal from Missouri court to the federal court. As of the filing of this brief, it is unknown whether the case will proceed in federal court or be remanded to state court.

ARGUMENT

I. The circuit court erred in dismissing the petition *sua sponte* for lack of jurisdiction instead of analyzing, with the benefit of briefing, whether the petition had stated a claim on which relief could be granted.

The court dismissed the petition with prejudice *sua sponte*, based on its belief that it lacked subject matter jurisdiction as well as constitutional and statutory authority to grant a dissolution of marriage. In doing so, the court misunderstood the concept of subject matter jurisdiction. As this Court has explained, "[s]ubject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case." *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). "[T]he subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution." *Id*. The Missouri Constitution describes "the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that '[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court.'" *Id.* at 253-54 (quoting Mo. Const. art. V, § 14(a)). Here, the question of subject matter jurisdiction is not difficult. As in *Webb*,

"[t]he present case is a civil case. Therefore, the circuit court has subject matter jurisdiction and, thus, has the authority to hear this dispute." *Id.* at 254.

Dismissal *sua sponte* may be appropriate in cases where it is apparent from the pleadings that there is no subject matter jurisdiction or that relief is barred by res judicata. *See, e.g.*, *Ford Motor Credit Co. v. Updegraff*, 218 S.W.3d 617, 620-21 (Mo. App. W.D. 2007) ("The issue of whether a petition states a cause of action upon which relief can be granted … may be raised *sua sponte* by the [trial court] … 'because the failure to state a claim on which relief can be granted essentially deprives the trial court of subject matter jurisdiction[.]'"); *Patrick V. Koepke Const., Inc. v. Woodsage Const. Co.*, 119 S.W.3d 551, 555 (Mo. App. E.D. 2003) (res judicata)). Here, however, the court entered a judgment of dismissal with prejudice before the respondent was served, based not only on its incorrect perception that it lacked subject matter jurisdiction, but also upon the ascertainment that it lacked constitutional and statutory authority to render any relief in the case. Because the court had subject matter jurisdiction, its conclusion that it could not grant relief on that basis was incorrect.

Missouri has open courts. The Constitution provides "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Const. art. I, § 14. The court here closed the

courts to petitioner and respondent by summarily concluding that a statute and constitutional amendment addressing recognition of only certain marriages precluded it from affording any remedy to an individual married to a person of the same sex. Nothing in Article 1, Section 33 of the Missouri Constitution suggests that it closes the courts to any such person.

As explained, *infra.*, the circuit court had statutory and constitutional authority to dissolve the petitioner and respondent's marriage. But even if such authority were in doubt, the question should have been analyzed with the benefit of briefing as a merits question, not as a basis for dismissing *sua sponte*.

II. Neither article 1, section 33, of the Missouri Constitution nor section 451.022 prevents trial courts from hearing an uncontested petition of dissolution involving the marriage of a same-sex couple.[3]

In the context of divorce, Missouri courts should recognize that a marriage of a same-sex couple was valid under the laws of the state in which it was entered into and allow such a marriage to be dissolved as it would other marriages validly entered into in another jurisdiction.

To the extent that Missouri's constitutional and statutory provisions provide that the state will recognize as valid only a marriage between a man and a woman, they do not preclude the granting of divorces to same-sex couples. "[R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in [a state that is] against allowing the creation of same-sex marriages." *Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011). Neither the plain language of the provisions nor any reasonable construction prevents courts from considering an uncontested petition for dissolution of a marriage to a same-sex spouse formed in another jurisdiction for the limited purpose of dissolving the marriage.

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[3] All statutory references are to the Missouri Revised Statutes 2000, as updated, unless otherwise noted.

As discussed, *supra*, in Point I, Missouri courts have subject matter jurisdiction over every civil dispute and are open to afford a remedy and administer justice for every person. Article I, section 33, of the Missouri Constitution provides, in its entirety, "[t]hat to be valid and recognized in this state, a marriage shall exist only between a man and a woman." The plain language of the provision includes no indication that it was intended to strip courts of their jurisdiction to dissolve the marriage of a same-sex couple. Indeed, no mention is made of jurisdiction or dissolution. In contrast, for example, the Georgia Constitution provides that "[t]he courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any [marriage between persons of the same sex] or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship." Ga. Const. art. I, § 4, para 1(b). If the proponents of Missouri's constitutional amendment intended to prevent same-sex couples married elsewhere from divorcing in Missouri, then they would have included the same text as their cohorts in Georgia did.[4] Similarly, section

[4] It is impossible to know if the voters of Missouri would have adopted the amendment if language prohibiting divorces had been included.

451.022 does not evidence any intent to foreclose a married couple of the same sex from securing an uncontested divorce. Section 451.022 has four provisions:

> 1. It is the public policy of this state to recognize marriage only between a man and a woman.
>
> 2. Any purported marriage not between a man and a woman is invalid.
>
> 3. No recorder shall issue a marriage license, except to a man and a woman.
>
> 4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.

As with the constitutional provision, the statute makes no mention of jurisdiction or divorce. *Compare* Ga. Code Ann. § 19-3-3.1 (providing specifically that "the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to [marriages between individuals of the same sex] or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage").

The Missouri legislature is aware that courts will encounter marriages formed in other jurisdictions and has empowered those courts to determine whether the marriages at issue were lawfully entered into under the laws of the other

jurisdiction. Missouri has adopted the Uniform Judicial Notice of Foreign Law Act, which provides, *inter alia*, that "[e]very court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States." § 490.080. The Act enables courts to determine that a marriage was valid at the time and place it was entered into without Missouri itself recognizing the validity of the marriage.[5]

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[5] The Act forecloses any possibility that marriages like the one at issue here could be annulled. "'The annulment of a marriage voids the marriage *ab initio.*'" *Blair v. Blair*, 147 S.W.3d 882, 885 (Mo. App. W.D. 2004) (quoting *Eyerman v. Thias*, 760 S.W.2d 187, 189 (Mo. App. E.D. 1988)). "'In the eyes of the law it is as if the marriage never existed.'" *Id.* (quoting *Eyerman*, 760 S.W.2d at 189). Here, petitioner and respondent were legally married in Iowa. And, in Iowa, the provisions of the Domestic Relations Code "must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage." *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009). Thus, a determination by a Missouri court that the marriage never existed would be contrary to laws of Iowa, the state in which the marriage was formed. This would require Missouri courts to ignore the laws of another state, in direct contradiction of the Act. It would also have serious implications for comity among the states because Missouri, as well as its citizens who move freely between states, expect that Missouri marriages with have extraterritorial effect. This expectation was likely the reason the

Article 1, Section 33 of the Missouri Constitution and section 451.022 state that Missouri may not create or recognize a marriage between persons of the same-sex. The Missouri residents in this proceeding, however, do not wish to enter into a marriage or to seek Missouri's recognition of their Iowa marriage to live as other married couples within Missouri and enjoy the continuing rights, privileges, obligations, and protections that Missouri affords to different-sex married couples. Instead, they wish to exit a marriage formed in Iowa and restore their marital status to single. Given Missouri's expressed disapproval of married couples of the same-sex, it is contradictory to its own position on marriage that its laws be interpreted as preventing the exit from such a marriage.

In practice, married same-sex couples barred from divorce will be forever trapped in marriages that are valid and legally recognized by many other states and the federal government. As a result, unless one spouse relocates to establish residence in another jurisdiction, the same-sex couple that longs to divorce will, until one spouse dies, continue to accrue rights and responsibilities with regard to

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legislature chose *not* to include marriages between persons of the same sex among those that are presumptively void. *See* § 451.020 (listing types of marriages that are presumptively void).

one another.[6] For example, if a couple remains married, a child born to one spouse is presumed to be the child of the other spouse no matter how long the parties to a marriage have lived separately. *See Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013). Couples unable to dissolve their marriage may also accrue rights with respect to property either spouse acquires in another state during the marriage. And, in many states, the debt accrued by either spouse will be considered a marital debt burdening both parties. *See, e.g.*, *St. Luke's Med. Ctr. v. Rosengartner*, 231 N.W.2d 601, 602 (Iowa 1975) (holding that a husband is liable for his spouse's medical expenses, even though the expenses were incurred after they lived apart, because there was no divorce or legal separation). Without a dissolution of their current marriage, neither person can remarry without risking punishment for violation of bigamy prohibitions. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1688 (2011).

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[6] Legalities aside, requiring parties to remain married can also be dangerous. Although there is no record of abuse in the marriage at issue in this case, gay men and lesbians are not immune from domestic violence in their marriages. Depriving married couples of the state's mechanism for exiting a marriage by divorce will result in individuals remaining in marriages that they want or need to escape.

The consequences for married same-sex couples barred from divorce also amass on the federal level. Following the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), numerous federal agencies now recognize all marriages valid in the place of celebration. As one example, the United States Department of Treasury and Internal Revenue Service recognizes for federal tax purposes the marriages of those same-sex couples whose marriages are recognized at the place of celebration, regardless whether the jurisdiction where they currently reside recognizes their marriage. As a result, a married same-sex couple will be required to file their federal tax return as "married," and thereby incur tax consequences and obligations to their spouse, even if they separate and have no continuing contact with each other. The Department of Labor also recognizes marriages valid at the place of celebration, so benefits governed by Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*., cannot be accessed without complying with spousal consent requirements and, thus, estranged spouses continue to accrue an interest in one another's retirement benefits. Moreover, individuals who wish to remarry but are unable to divorce are precluded from extending federal benefits to a subsequent spouse.

Presuming that the policy of Missouri is to disfavor same-sex couples living as married within Missouri, denying such couples the opportunity to divorce is contrary to that public policy and, at a minimum, allowing them to divorce does

nothing to offend it. No doubt that *amici* and many others believe such a policy is illegitimate and unconstitutional. But, it is sufficient for resolution of the case at bar that "recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in [a state that is] against allowing the creation of same-sex marriages." *Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011). "A divorce proceeding does not involve recognition of a marriage as an ongoing relationship[; rather,] accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce." *Id.*

Finally, this Court has repeatedly held that any laws are "to be construed so as to render [them] constitutional, if this is possible." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985). This rule of interpretation furthers a core principle of judicial restraint: "A court will avoid the decision of a constitutional question if the case can be fully determined without reaching it." *Id.* "It is a well[-]accepted canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991). Should this Court determine that Article 1, Section 33 of the Missouri Constitution, section 451.022 RSMo, or both, deprive the lower

courts of this State the authority to consider an uncontested petition for dissolution, then, as explained, *infra*, those provisions, as applied to same-sex couples wishing only to divorce, violate the federal constitutional guarantees of due process and equal protection. This Court can avoid reaching that analysis in the present case by construing the provisions in a manner consistent with the federal Constitution.

III. The circuit court had power to grant relief even if that relief is not called a "divorce."

Even assuming, *arguendo*, that the trial court did not have authority to grant a divorce, dismissal with prejudice was incorrect because the court had authority to afford at least some of the relief sought by the petition. The petition that initiated this case not only sought a Judgment and Decree of Dissolution of Marriage, but also requested that the court divide the parties' property and debts as well as provide "such other and further orders as to the Court deems just and proper." LF 4.

Nothing in Article 1, Section 33, of the Missouri Constitution prevents an associate circuit court from dividing property and debts. In addition to the subject matter jurisdiction afforded by Missouri Constitution, article 5, section 14(a), and the open courts provisions of article 1, section 14, Missouri statutes provide for the determination of such rights. *See* § 527.010 (providing that "[t]he circuit courts of this state … shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed"); *see also* § 528.010 (partition suits).

Because the circuit court had subject matter jurisdiction as well as constitutional and statutory authority to afford relief to petitioner, it erred in its

dismissal of the petition with prejudice. Accordingly, the judgment should be reversed and vacated and this matter remanded for further proceedings.

IV. Because the due process right to obtain a divorce is distinct from the fundamental right to marry, Missouri's marriage bans cannot constitutionally be applied to divorce proceedings even if they were otherwise constitutional.

Whether or not the Constitution requires Missouri to allow same-sex couples to marry or to recognize their legal marriages from other jurisdictions, the Fourteenth Amendment independently protects same-sex couples' due process rights to obtain a divorce. Because Missouri holds the only key to divorce for its residents, it violates procedural due process when it locks married same-sex couples out of the courthouse.

"[A]n opportunity to go into court to obtain a divorce … is the exclusive precondition to the adjustment of a fundamental human relationship." *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971). Where a state "pre-empt[s] the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so," it violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 383. In this case, it appears that both petitioner and respondent are Missouri residents and, therefore, Missouri courts are the only source by which they can obtain a divorce. Missouri cannot bar such a couple from divorce by prohibiting them access to the courts.

In *Boddie*, the Supreme Court of the United States held that a requirement that court costs be prepaid before divorce proceedings could commence was a de

facto bar to indigent persons attempting to file for divorce. The Court noted that it was the state itself that created the requirement that married couples turn to the state courts to dissolve their marriage. "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, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery." *Id.* at 376. The Court concluded 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," the state cannot deny access to the courts for the purpose of seeking a divorce to those who cannot pay. *Id*.

Here, the circuit court erroneously concluded that the courthouse doors must be forever closed to married couples of the same sex. Just as courts cannot foreclose an entire group from access to divorce because of economics, they are similarly prohibited from denying the same liberty interest to all married couples of the same sex. Thus, as applied to categorically foreclose married couples of the same sex the opportunity to obtain an uncontested divorce, Article 1, Section 33 of the Missouri Constitution and section 451.022 violate the Due Process Clause of the Fourteenth Amendment.

V. Because of the trial court's sua sponte dismissal, the parties have not had the opportunity to challenge the constitutionality of the marriage bans in the circuit court and the circuit court has not had an opportunity to analyze their constitutionality in the first instance.

The parties did not have a reasonable opportunity to raise constitutional claims in the trial court. *See Unverferth v. City of Florissant*, 419 S.W.3d 76, 88 (Mo. App. E.D. 2013).[7] The constitutional issue was raised for the first time by the trial court and then only in a judgment deciding the merits *sua sponte*. This is not a turn of events Petitioner was required to anticipate. And certainly Respondent, who

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[7] "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons[.]" *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Loving v. Virginia,* 388 U.S. 1 (1967)). The "'virtually exclusive province'" of the states to regulate domestic affairs is always "subject to those guarantees." *Id.* (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). As the Tenth Circuit concluded, "the experimental value of federalism cannot overcome plaintiffs' rights to due process and equal protection." *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *31 (10th Cir. June 25, 2014). Indeed, "[o]ur federalist structure is designed to 'secure[ ] to citizens the liberties that derive from the diffusion of sovereign power' rather than to limit fundamental freedoms." *Id.* (quoting *New York v. United States,* 505 U.S. 144, 181 (1992) (quotation omitted)).

was not even served when the Petition was dismissed with prejudice, did not have any opportunity to challenge the marriage bans before his rights were determined by the trial court.

"[A] constitutional argument cannot be considered if it is raised for the first time on appeal." *Duncan v. Reorganized Sch. Dist. No. R–1,* 617 S.W.2d 571, 573 n.5 (Mo. App. W.D. 1981). This Court's role is to review trial court's decisions on legal questions, not address the questions in the first instance. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not first view."). Nevertheless, there is a significant constitutional violation caused by the trial court's judgment that the parties have not been afforded an opportunity to address and that violation cannot escape review.

Assuming that Article 1, Section 33 of the Missouri Constitution, section 451.022, or both, preclude divorce, they could pass constitutional muster, as-applied to same-sex couples, only insofar as they advance a legitimate and sufficient governmental interest. Here the State has not yet advanced any interest to justify keeping married couples of the same sex locked into a legal status against their will.[8] In the unusual posture of this case, because of the circuit court's *sua*

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[8] Any interest the State might advance is unlikely to be sufficient to exclude married couples from divorce. On the broader issues of whether states must recognize lawful

sponte dismissal, the State has not yet had an opportunity to advance any government interest. Moreover, were the State to advance any interests in this Court, those purported interests would not be subjected to the scrutiny and careful consideration ordinarily provided, in the first instance, by a lower court. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430-31 (2012) (noting that remand is appropriate for resolution of claims a lower court's error prevented it from addressing); *see also Windsor*, 133 S. Ct. at 2695 (holding that non-recognition of marriage is deprivation of constitutionally protected liberty where "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage"); *id*. at 2710 (Scalia, J., dissenting)

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marriages of same-sex couples or issue marriage licenses to couples of the same sex, to date, the overwhelming majority of state and federal courts addressing the issue since *Windsor* have held that proffered and imagined government interests are insufficient to meet rational-basis scrutiny. *See, e.g.*, *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014); *Bishop v. Smith,* Nos. 14–5003, 14–5006, 2014 WL 3537847 (10th Cir. July 18, 2014); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *31 (10th Cir. June 25, 2014).

(suggesting that majority's reasoning could be applied to the state-law context to require recognition of marriages lawfully entered in another state).[9]

If Missouri statutory and constitutional provisions preclude divorce, and state officials wish to suggest interests that support such an exclusion, then this Court must reverse and remand for consideration of whether the Missouri statutory and constitutional provisions are themselves constitutional under the Due Process Clause of the Fourteenth Amendment.

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[9] The Supreme Court was explicit that the federal Defense of Marriage Act violated basic due process and equal protection principles and that federalism was not the basis for its holding in *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)). While federalism factored 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 Section 3 of the federal Defense of Marriage Act and the justifications for it, federalism was merely a factor illustrative of the unusual nature of the legislation. *Id.* at 2693. 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 v. Evans*, 517 U.S. 620 (1996).

Conclusion

Based on the foregoing, amicus curiae urge this Court to reverse and vacate the judgment of the circuit court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 5,579 words, as determined using the word-count feature of Microsoft Office Word. The undersigned further certifies that the accompanying disk has been scanned and was found to be virus-free.

/s/ Anthony E. Rothert

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 14, 2014, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties and send by First Class mail to Respondent.

/s/ Anthony E. Rothert