IN THE SUPREME COURT OF MISSOURI

SC94101

In Re the Marriage of

M. S.,

Appellant,

and

D. S.,

Respondent.

BRIEF OF APPELLANT M. S.

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JURISDICTIONAL STATEMENT

Pursuant to Art. V, § 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction over matters concerning the validity of a statute or provision of the Constitution of the State of Missouri.

This is an appeal from the Judgment of the Circuit Court of St. Louis County dismissing *with prejudice*, for lack of subject matter jurisdiction and constitutional and statutory authority, Petitioner/Appellant's petition ("Petition") for the dissolution of his same-sex marriage, which was lawfully entered into and recognized under the laws of the State of Iowa. The Circuit Court entered its Judgment on February 3, 2014. Pursuant to Rule 81.05 of the Missouri Rules of Civil Procedure, the Judgment became final on March 5, 2014. Petitioner/Appellant timely filed his Notice of Appeal to this Court on March 13, 2014.

The Circuit Court dismissed the Petition, pursuant to Art. I, § 33 of the Missouri Constitution and § 451.022 of the Revised Statutes of Missouri, which collectively provide that Missouri will only recognize marriages between a man and a woman and will not recognize same-sex marriages valid under the laws of other jurisdictions. In its Judgment, the Circuit Court apparently believed that it must recognize Appellant's same-sex marriage in order to dissolve it. If the Circuit Court's interpretation of the law is correct, Art. I, § 33 of the Missouri

Constitution and § 451.022 of the Revised Statutes of Missouri implicate Appellant's right to dissolution in Missouri. Consequently, the Circuit Court's Judgment necessitates Appellant's challenge to the validity of a Missouri statute and a provision of the Missouri Constitution.

In addition to challenging the Circuit Court's conclusion concerning its subject matter jurisdiction and authority under Missouri's dissolution statute, Appellant contends in the instant appeal that both Art. I, § 33 of the Missouri Constitution and § 451.022 of the Revised Statutes of Missouri are violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Thus, pursuant to Art. V, § 3 of the Missouri Constitution, this case involves the validity of a statute and a provision of the constitution of Missouri and herein provides the requisite basis for this Court to exercise its exclusive appellate jurisdiction.

STATEMENT OF FACTS

M. S. and D. S. (the "Parties"), both males, were lawfully married on December 12, 2012, in Polk County, Iowa. (LF 3). The Parties received a Certificate of Marriage, which notes that their marriage is registered in Des Moines, Iowa. *Id.* Both Parties were and are residents of the State of Missouri. (LF 3, 18).

On or about August 26, 2013, the Parties separated due to irreconcilable differences. (LF 4). On January 8, 2014, M. S. filed in the Circuit Court of St. Louis County (Division 35) his Petition for Dissolution of Marriage, styled *In Re the Marriage of M. S. and D. S.*, 14SL-DR00033 (the "Petition"). (LF 3-5). At the time of filing, M. S. was a resident of St. Louis County, Missouri, and had been a resident of St. Louis County, Missouri for the preceding 90 days. (LF 3). At the time of filing, D. S. was incarcerated with the Missouri Department of Corrections, was a resident of St. Louis City and had been a resident of St. Louis City, Missouri for the preceding 90 days. *Id.* Together with his Petition, pursuant to St. Louis County Local Rule 68.2, M. S. filed his Statement of Property and Statement of Income and Expenses. (LF 9-16).

On February 3, 2014, the Circuit Court entered its Judgment, wherein it *sua sponte* dismissed with prejudice the Petition. (LF 17-19). The Circuit Court determined that it lacked subject matter jurisdiction and constitutional and

statutory authority to dissolve[1] the Parties' marriage based on Art. I, § 33 of the Missouri Constitution and § 451.022 of the Revised Statutes of Missouri. (LF 19).

In 1996 and 2001, the Missouri Legislature enacted its "defense of marriage" statutes, which together form Section 451.022 of the Revised Statutes of Missouri:

> 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.[2]

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[1] Throughout Appellant's Brief, the terms "dissolve," "dissolution of marriage," and "divorce" will be used interchangeably.

[2] On July 3, 1996, the Missouri Legislature enacted S.B. No 768, which became Sections (1.) through (3.) of Mo. Rev. Stat. § 451.022. On July 13, 2001, the Missouri Legislature adopted H.B. No. 157, which became Section (4.) of Mo. Rev. Stat. § 451.022.

In 2004, the Missouri Legislature placed before the voters of Missouri a constitutional amendment, which, upon passage, became Article I, § 33 of the Missouri Constitution: "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."[3] Together Article I, § 33 of the Missouri Constitution and Section 451.022 of the Revised Statutes of Missouri constitute, and shall hereinafter be referred to as, "Missouri DOMA."

On March 13, 2014, M. S. filed his Notice of Appeal to this Court together with his Basis of Jurisdiction for Appeal to Missouri Supreme Court. (LF 20-23).

[3] The ballot measure passed on August 3, 2004. *See* Alan Cooperman, *Gay Marriage Ban in Mo. May Resonate Nationwide*, WASH. POST, Aug. 5, 2004, http:// www . washingtonpost.com/wp-dyn/articles/A38861-2004Aug4.html.

POINTS RELIED ON

I. The trial court erred in determining that it lacked subject matter jurisdiction to dissolve the parties' marriage and dismissing the Petition, because the trial court had subject matter jurisdiction over the case, in that the Petition stated a claim for dissolution of marriage, a civil matter, and, under Article V, Section 14 of the Missouri Constitution, the trial court has jurisdiction over all civil matters.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

II. The trial court erred in determining it lacked constitutional and statutory authority to dissolve the parties' marriage and dismissing the Petition, because the trial court had constitutional and statutory authority, in that neither Article I, Section 33 of the Missouri Constitution nor Mo. Rev. Stat. Section 451.022 specifically removes the court's authority to hear and rule on the Petition for Dissolution of M. S. and D. S., a lawfully married same-sex couple.

Johnson v. Johnson's Adm'r, 30 Mo. 72 (Mo. 1860)

De Pass v. Harris Wool Co., 144 S.W.2d 146 (Mo. banc 1940)

State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 687 S.W.2d 162 (Mo. banc 1985)

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

III. The trial court erred in determining it lacked constitutional and statutory authority to dissolve the parties' marriage and dismissing the Petition, because, to the extent the Missouri Constitution and/or Revised Statues of Missouri would preclude the trial court from dissolving the marriage of M. S. and D. S., the Missouri Constitution and/or statutory provisions violate the Constitution of the United States in that they deny Appellant access to the courts to dissolve his lawful marriage, unlawfully infringe upon Appellant's fundamental right to dissolution, and unlawfully discriminate against same-sex couples seeking to dissolve their marriages in the State of Missouri.

Fourteenth Amendment to the United States Constitution

United States v. Windsor, 133 S. Ct. 2675 (2013)

Bostic v. Schaefer, No. 14-1167, 2014 WL 3702493 (4th Cir., July 28, 2014)

Boddie v. Connecticut, 401 U.S. 371 (1971)

ARGUMENT

I. The trial court erred in determining that it lacked subject matter jurisdiction to dissolve the parties' marriage and dismissing the Petition, because the trial court had subject matter jurisdiction over the case, in that the Petition stated a claim for dissolution of marriage, a civil matter, and, under Article V, Section 14 of the Missouri Constitution, the trial court has jurisdiction over all civil matters.

Standard of Review

"[W]here, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*." *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003); s*ee also Warlop v. Warlop*, 254 S.W.3d 262, 263 (Mo. Ct. App. 2008) (motion to enforce parenting plan); *Peoples Bank v. Carter*, 132 S.W.3d 302, 304 (Mo. Ct. App. 2004) (forum selection clause in note). *Cf. Looper v. Carroll*, 202 S.W.3d 59, 61-62 (Mo. Ct. App. 2006) (When a court's jurisdiction depends on a factual determination, the decision is left to the sound discretion of the trial judge and the appellate court reviews for an abuse of discretion.)

A circuit court has subject matter over a dissolution, a civil matter.

The seminal case explaining the subject matter jurisdiction of Missouri circuit courts is this Court's decision in *J.C.W. ex rel. Webb v. Wyciskalla*, where the Court determined that "the subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution." 275 S.W.3d 249, 253 (Mo. banc 2009). *Webb's* progeny, including *State v. Brown*, emphasized this point further, stating that a "court's authority to render judgment in a particular category of case, and thus its subject matter jurisdiction, is controlled by the Missouri Constitution, *and not by statute*." 406 S.W.3d 460, 464 (Mo. Ct. App. 2013) (internal citation omitted) (emphasis added). As such, subject matter jurisdiction "is not a concept susceptible of alteration by either the courts or the legislature." *AMG Franchises, Inc. v. Crack Team USA, Inc.*, 289 S.W.3d 655, 660 (Mo. Ct. App. 2009) (internal citation omitted).

The Missouri Constitution specifically prescribes the subject matter jurisdiction of Missouri circuit courts: "The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal." Mo. Const. art V, § 14; *see also* Mo. Rev. Stat. § 478.070. This Court in *Webb* "distill[ed] the analysis of whether subject matter jurisdiction exists to a simple question: Does the circuit court have subject matter jurisdiction to hear the case under Article V, Section 14?" *AMG*, 289 S.W.3d at 660 (internal citation omitted). The answer to the

Court's question for any civil or criminal matter is yes, Missouri circuit courts have subject matter jurisdiction. *See McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473 (Mo. banc 2009) (deciding that the circuit court inappropriately dismissed plaintiff's tort claim because subject matter jurisdiction existed over a civil matter, and noting that some courts have "confused the concept of a circuit court's jurisdiction – a matter determined under Missouri's constitution – with the separate issue of the circuit court's *statutory or common law authority* to grant relief in a particular case.") (emphasis in original); *AMG*, 289 S.W.3d at 660 ("While a circuit court's authority to render a 'particular' judgment in a 'particular' case may be limited by statute or otherwise, this limitation does not call into question the court's subject matter jurisdiction, but only the court's limited authority to act in the particular case at hand."); *K.H. v. State*, 403 S.W.3d 720, 723 (Mo. Ct. App. 2013) (noting where statute says juvenile court loses jurisdiction over a minor under certain circumstances pursuant to statute, including a statute where the term "jurisdiction" is used, "the legislature does not have the ability to expand or contract the contours of a circuit court's subject matter jurisdiction.").

A family court was created in St. Louis County as a division or divisions of its circuit court, by Mo. Rev. Stat. § 487.010.1(4). In St. Louis County, petitions for dissolution are heard in family court. Family court divisions, as authorized by the Missouri legislature, are vested with identical jurisdiction and authority as that

of any other division of the circuit court. *See State ex rel. M.D.K. v. Dolan*, 968 S.W.2d 740, 743-744 (Mo. Ct. App. 1998) (providing for the establishment of family courts as a division or divisions of the circuit court, which are specifically empowered to handle enumerated domestic relations matters, but with full authority "to hear and determine all cases with [that circuit court's] jurisdiction."); Mo. Rev. Stat. §§ 487.010, 487.080 (providing that "the family court shall have exclusive original jurisdiction to hear and determine the following matters: (1) All actions or proceedings governed by chapter 452, including, but not limited to, dissolution of marriage, legal separation, separate maintenance, child custody and modification actions.").

Circuit courts are presumed to have subject matter jurisdiction unless a contrary showing is made. *See, e.g. Gomez v. Gomez*, 336 S.W.2d 656, 660 (Mo. banc 1960) ("In the absence of proof to the contrary, there is always a presumption of jurisdiction and right action by a court of general jurisdiction.") (internal citation omitted); *Stockstrom v. Jacoby*, 775 S.W.2d 300, 302-03 (Mo. Ct. App. 1989) (*citing Beasley v. Beasley*, 553 S.W.2d 541, 545 (Mo. Ct. App. 1977) ("[E]very presumption is indulged in favor of the jurisdiction of the court over the subject matter and the parties, unless the record affirmatively shows the contrary.").

Harking back to the *Webb* opinion, here, too, "[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." *Webb*, 275 S.W.3d at 254. Because there is no constitutional provision abrogating the subject matter jurisdiction of Missouri circuit courts to dissolve same-sex marriages, this Court should hold that the Circuit Court had subject matter jurisdiction to hear and decide M. S.'s Petition.

II. The trial court erred in determining it lacked constitutional and statutory authority to dissolve the parties' marriage and dismissing the Petition, because the trial court had constitutional and statutory authority, in that neither Article I, Section 33 of the Missouri Constitution nor Mo. Rev. Stat. Section 451.022 specifically removes the court's authority to hear and rule on the Petition for Dissolution of M. S. and D. S., a lawfully married same-sex couple.

Standard of Review

The trial court determined that it lacked constitutional and statutory authority to dissolve the parties' marriage. The crux of that decision is the trial court's interpretation of Missouri DOMA as categorically preventing same-sex couples from dissolving their marriages in Missouri. The trial court's interpretation of Missouri DOMA is a matter of law to be reviewed by this Court

de novo. *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. banc 2013) ("Constitutional interpretation is a question of law and is reviewed de novo."); *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 705 (Mo. banc 2011) ("This case also involves the interpretation of an insurance contract and a statute. Such interpretations are questions of law that are reviewed *de novo*."); *Kiddie Am., Inc. v. Dir. of Rev.*, 242 S.W.3d 709, 711 (Mo. banc 2008).

Despite Missouri's statutory construct for dissolutions, some courts have used varied legal tools in cases of same-sex couples.

Some same-sex marriages are already being "terminated" in Missouri; however, the methods of doing so, if at all, vary widely from circuit to circuit, providing different remedies to couples based upon the county in which they reside. The three "terminations" of same-sex marriages that have occurred in Missouri, and of which Appellant has learned, were each accomplished through a different analysis.

On June 11, 2008, the Buchanan County Circuit Court granted a Judgment of Annulment in the matter of *Charisse Y. Sparks v. Janet Yolanda Peters Mauceri Sparks*, 07BU-CV04904 (Buchanan Co. Mo. Cir. Ct. June 11, 2008. In *Sparks*, the court determined the parties' marriage was void *ab initio* and annulled their marriage. The court restored to one party her maiden name, and allocated attorney's fees and costs.

On February 14, 2014, the Boone County Circuit Court granted a Declaratory Judgment in the matter of *In re the Marriage of Latimer v. Latimer*, 13BA-FC00363 (Boone Co. Mo. Cir. Ct. April 10, 2014). In *Latimer*, the Court determined it had "exclusive jurisdiction over the marital status of the parties," but Missouri DOMA "expressly prohibits the court from recognizing a same-sex marriage." "[T]he court recognize[d] that the marriage . . . is valid under the laws of Massachusetts" and "such a marriage may trigger an array of extra-territorial and federal ramifications." The court found it had "no authority to issue a Judgment of Annulment," and instead issued a declaratory judgment, which may have been limited "to status in Missouri only," declaring that the parties' marriage "is valid under the laws of Massachusetts [and that it is] dissolved or void, without finding that a valid marriage exists under the laws of Missouri." The court also set aside property to a party and allocated attorney's fees and costs.

The court pointed to the long history of Missouri courts entering "judgments with respect to marriages that were not legally recognized in Missouri." *Latimer, (citing State v. Eden*, 169 S.W.2d 342, 345 (Mo. 1943) (bigamy); *Nelson v. Marshall*, 869 S.W.2d 132, 134 (Mo. Ct. App. 1993) (non-licensed marriage); *Bellamy v. Whitsell*, 100 S.W. 514, 515-16 (Mo. Ct. App. 1907) (underage marriage)). The court recognized that "[g]ranting a declaratory judgment . . . does not require that Missouri affirm or recognize the marriage. Rather, as a matter of

comity, Missouri can utilize the law of the place where the marriage was formed for the limited purpose of granting equitable relief." The court also stated that "[b]y denying same-sex married couples residing in Missouri the ability to void or dissolve their marriage, the State runs afoul of its due process obligations under the Fourteenth [Amendment]."

On April 1, 2014, the Greene County Circuit Court granted a Judgment and Decree of Dissolution of Marriage in the matter of *In re the Marriage of Hilsabeck v. Meng*, Case No. 1431-DR00121 (Green Co. Mo. Cir. Ct. April 1, 2014). In *Hilsabeck*, the parties did not have any children, waived maintenance and entered into their own settlement agreement handling the division of the parties' property and debt. The court order dissolved the parties' marriage and incorporated their settlement agreement into the decree; it also ordered an equalizing payment from one party to the other, rejected payment of spousal maintenance to either party, directed the division of property and debt, and allocated attorney's fees and court costs between the parties. The court granted the dissolution of the parties' marriage, presumably as it would for a heterosexual couple.

Because such "terminations" are not necessarily being granted within the framework for dissolution provided in the Missouri statutes, they risk invalidation at a later date, leaving couples who thought themselves divorced with a myriad of obligations that they thought were long ago resolved.

Chapter 452 of the Missouri Revised Statutes vests circuit courts with the statutory authority to dissolve marriages. *See* Mo. Rev. Stat. §§ 452.300-452.415. In conjunction with the statutory requirements, a party must plead that: one of the parties has been a resident of Missouri for at least ninety days immediately preceding filing, § 452.305.1(1); the petition is verified, § 452.310.1; the marriage is irretrievably broken and that, therefore, there remains no reasonable likelihood that the marriage can be preserved, § 452.310.1; the residence of each party, including county and length of residence of each party in Missouri and in said county, § 452.310.2(1); the date of the marriage and where it is registered, § 452.310.2(2); the date of separation, § 452.310.2(3); the last four digits of each party's social security number, § 452.310.2(6); whether arrangements for maintenance of each party have been made, § 452.310.2(7); and the relief sought, § 452.310.2(8). Parties must also provide certain information for the confidential file, including: each party's current employment information, § 452.312.1; and each party's full social security number, § 452.312.4.

Pursuant to the Circuit Court's Judgment, M. S.'s Petition complies with the statutory requirements requisite for the Court's entry of a decree of dissolution of marriage, except for the fact that both M. S. and D. S. are male. *See* L.F. 3-5; 26 ("But for Petitioner's allegation that Petitioner and Respondent are both male, on its face, Petitioner's Petition otherwise validly states a claim for dissolution of

marriage in the State of Missouri."). M. S. also complied with the statutorily required confidential filing.

Circuit courts have not been stripped of authority to grant dissolutions of same sex marriages.

The Circuit Court's Judgment is seemingly based on an interpretation that Missouri DOMA denies the circuit court the authority to dissolve same sex marriages; however, there is no indication in the Missouri constitution or statutes of any intent to remove constitutional or statutory authority from the circuit courts to grant dissolutions of marriage to lawfully married same-sex couples. For purposes of examining the specifics of the conditions and prohibitions imposed by the Court's references, Missouri DOMA provides:

> Mo. Const. art. I, § 33:
>
> That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.
>
> Mo. Rev. Stat. § 451.022:
>
> 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.

Notably absent is any reference to any proceeding for "dissolution of marriage" or "divorce." Reviewing the plain text of Missouri DOMA, there is no direct indication of intent to strip circuit courts of constitutional or statutory authority to grant a dissolution of marriage to a same-sex couple. In fact, Missouri DOMA plays no part in the statutory framework for dissolution of marriage. Contrary to the prohibitions in Missouri DOMA, the spouses currently before this Court do not wish that a recorder issue a marriage license so they may enter a marriage. They do not seek a determination from the Court that their marriage is valid. Nor do they seek recognition of their Iowa marriage to live as a married couple within the State of Missouri and enjoy the continuing rights, privileges, obligations and protections that Missouri law bestows upon married couples. Rather, they wish to *exit* their marriage and restore their marital statuses to single.

The Missouri legislature is capable of putting forth constitutional amendments and passing legislation that explicitly expresses a desire to abrogate the authority of the circuit courts to grant dissolutions of marriage to same-sex

couples, as have other state legislatures. The Missouri legislature has taken at least three separate actions between 1996 and 2004 to create Missouri DOMA, but at no point did it include the topic of dissolution. In contrast to Missouri DOMA, the Defense of Marriage Act of Georgia ("Georgia DOMA"), in clear terms, provides that "[t]he courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any [same-sex] relationship 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); *see also* Ga. Code Ann. § 19-3-3.1(b)(West).[4] Putting aside constitutional infirmities such enactments may raise, the plain text of Georgia DOMA expressly states that it removed jurisdiction from the state courts with respect to divorce for married same-sex couples. Absent similarly clear language or "legislative history" pointing to the intent to strip Missouri circuit courts of authority, there is no reason to presume that the Missouri legislature intended to remove such authority from Missouri circuit courts. By reaching this conclusion, this Court would construe Missouri DOMA in a manner that avoids any constitutional questions.

[4] *See* Mary P. Byrn, *Same-Sex Divorce in a DOMA State*, 50 Fam. Ct. Rev. 214, 215-217 (2012).

Comity principles support accepting existence of marriage for limited purpose of granting dissolution.

Despite the declaration in Section 451.022.4 that "[a] marriage between persons of the same sex will not be recognized for any purpose in this state," the combination of Missouri's strong common law tradition of *lex loci* – which utilizes the law of the place where the marriage was formed to determine the validity of the marriage; the principles of comity – the deference Missouri courts show to the laws of another state; and the Uniform Judicial Notice of Foreign Law Act, codified in Missouri at Section 490.080 – which provides 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," taken together militate strongly for the Court's accreditation of marriage, such that amounts to merely a "condition precedent" to granting a dissolution of marriage. *See Christiansen v. Christiansen*, 253 P.3d 153, 156-57 (Wyo. 2011) ("Respecting the law of [another jurisdiction], as allowed by [*lex loci*], for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage."). These principles allow Missouri courts to determine that a marriage was valid at the time and place it was entered, without Missouri itself recognizing the validity of an on-going marriage.

Granting a divorce to same-sex couples does not require that Missouri affirm or approve of the marriage. Rather, as a matter of comity, Missouri courts consistently utilize the law of the place where the marriage was formed, the *lex loci*, to determine the validity of the marriage. For example, where a mother sought enforcement and modification of child support based on an Israeli divorce decree, father opposed the suit, arguing Missouri courts lacked jurisdiction to modify a judgment from a foreign country. Father argued the Israeli judgment could not be recognized in Missouri courts. *Manor v. Manor*, 811 S.W.2d 497 (Mo. Ct. App. 1991). The appellate court found no support for father's argument despite the circuit court's grant of summary judgment for father. Under the doctrine of comity, Missouri courts may recognize an Israeli decree; if the decree could be modified in the foreign jurisdiction, it could be modified in Missouri. *Id.* at 498.

Missouri courts have long recognized that while marriage is a relation, it is also a matter of contract. In *State, to Use of Gentry v. Fry*, 4 Mo. 120, 180 (Mo. 1835), the Court gave some attention to the obligations and expectations of marriage, followed by a discussion of what behaviors (the law contained six

grounds for divorce) might end the contract.[5] Then, the contract would be "broken, and the injured party has a right by the law of nature and by the laws of most civilized countries, to consider the contract at an end, and has a right to apply to some public authority of the State to render a decree, by some public solemn act, that the contract is at an end." *Id*. at 181-82. The Court likened the situation to forfeiture of a contract that releases the parties from further execution of the contract. Either spouse was to make application to the circuit court, and if found against the party complained of, the court would dissolve the bonds of matrimony and give the injured party such other relief as the nature of the subject would permit and the laws of the land provided for. *Id*. at 182, 187. (General Assembly's act of decreeing a divorce was unconstitutional as impairing the obligation of contracts and an assumption of judicial power).

This Court should consider the strong Missouri public policy in favor of comity for the limited purpose of granting a dissolution to M. S. and D. S., a same-sex couple. Indeed, Missouri benefits from other states' according of comity to

[5] In 1973, the 77th General Assembly passed the Divorce Reform Act which, in the main, eliminated the "fault concept"; it is considered a modified no-fault dissolution law. *In re Marriage of Mitchell*, 545 S.W.2d 313, 318 (Mo. Ct. App. 1976).

Missouri laws.[6] Missouri courts have countenanced laws from many states (*e.g.*, Kansas, Delaware, Texas, New York) and entertained collateral actions and enforced consequences of laws considered, at the time, anathema to Missouri public policy (*e.g.*, usurious interest rates, prohibition on gambling).

Missouri has long held that comity is more than mere courtesy or goodwill, but is a doctrine under which contracts are made, rights are acquired, and obligations incurred in one state and enforced in another state. *Langston v. Hayden*, 886 S.W.2d 82, 85 (Mo. Ct. App. 1994). And, it has long been held that an obstacle to the enforcement of those rights of comity occurs when the law of the

[6] *See, e.g., Beard v. Viene*, 826 P.2d 990 (Okla. 1992) (under principle of comity, Oklahoma would recognize Missouri's limitation on municipal tort liability); *Matter of Est. of Mack*, 373 N.W.2d 97 (Iowa 1985) (Missouri dissolution decree adjudicating rights of parties to Iowa property would be given full effect pursuant to principles of comity); *Gen'l Motors Acceptance Corp. v. Nuss*, 196 So. 323 (La. 1940) (chattel mortgage covering automobile, executed and recorded in Missouri, would be given effect in Louisiana under rule of comity even as against innocent parties in Louisiana); *Missouri State Life Ins. Co. v. Lovelace*, 58 S.E. 93 (Ga. Ct. App. 1907) (Missouri as *lex loci contractus* controls as to nature, construction, and interpretation of insurance contract and its law would be enforced by comity, including penalty for a vexatious refusal).

other state violates some definite public policy of Missouri. *Id*. (*referencing Yellow Mfg. Acceptance Corp. v. Rogers*, 142 S.W.2d 888, 893 (Mo. Ct. App. 1940) (where employer's workers' compensation carrier brought action in Missouri in employee's name against third-party tort-feaser, statutory assignment of employee's third-party action under Kansas law did not violate public policy of Missouri). But, in truth, courts have proved reluctant to find a violation of public policy such as to discredit a sister state's legislative or judicial action.

In *Everett v. Barse Live Stock Comm'n Co.*, 88 S.W. 165 (Mo. Ct. App. 1905), a court acknowledged that the courts of one state will not enforce rights or contracts arising in another state, when it is against morality or the public policy of such state. In the *Everett* case, which involved lien priority and right to enforcement, the court reasoned that the Missouri courts enforce contracts for interest, good where made, but usurious in Missouri. "That the states do enforce rights existing under the laws of another state which would not be enforced in the state itself is a fundamental rule of comity." *Id*. at 166. The Missouri Supreme Court has reminded the lower courts that "comity is not a vague idea only which the courts may regard or disregard as they may see fit. They are as much bound to give it effect as they are to give effect to any other rule of the common law." *State ex rel. Standard Tank Car Co. v. Sullivan*, 221 S.W. 728, 736 (Mo. banc 1920)

(mandamus action for Secretary of State to issue license or certificate authorizing Delaware corporation to conduct business as a foreign corporation in Missouri).

Before giving effect to another state's law, Missouri courts typically express reluctance to enforce a foreign law when to do so would prejudice the state's own rights or when to give force and effect to a foreign law would be to contravene the positive policy of the law of the forum. *See, e.g.*, *Austin v. Hough*, 10 S.W.2d 655, 659 (Mo. Ct. App. 1928) ("doctrine of comity is permitted and accepted in all civilized states from mutual interest and convenience, and a sense of the inconvenience which would otherwise result, and from moral necessity, to do justice in order that justice may be done in return"; nothing in Missouri law or general policy to suggest court should not enforce Texas laws invoked in suit); *Thurston v. Rosenfield*, 42 Mo. 474 (Mo. 1868) (real estate located in Missouri, but parties and contract, including an assignment, were made in New York; policy of the law was to avoid effect of giving an advantage to non-resident creditors to the injury of Missouri's citizens; where denial of preferences was not at issue, comity required, and justice would be sub-served, by holding the assignment good according to the law of the place where it was executed, New York).

An appellate court was called upon to consider public policy in *Maxey v. Railey & Bros. Banking Co.* Plaintiff filed suit upon a draft of $2,500 issued by a banking company; plaintiff was an assignee of the draft. 57 S.W.2d 1091 (Mo. Ct.

App. 1933). The court stated the general rule that the validity of a contract is determined by the law of the state or country in which the contract was entered into; such contracts are enforced in another state or country only on the ground of comity and the court will not give countenance to them if they "offend the fixed public policy of the state where the action is brought." *Id*. at 1093. The court observed that statutes declaring gambling contracts and transactions illegal or void were viewed as embodying a distinctive public policy, requiring the courts to refuse to recognize or enforce any contract or transaction in violation of their terms, even though such contract or transaction arose in another state, by the laws of which it was valid. *Id*. Notwithstanding Missouri statutes that had been construed to mean that the intent of either one of the parties to gamble in a transaction, rendered the contract void and of no effect, courts had held that such contracts entered into in other jurisdictions, where the common law was or was presumed in force requiring that both parties intended to speculate on the rise and fall of the market in order to make the contract invalid, would be enforced in Missouri, even where one of the parties intended to gamble. *Id*. at 1093-94.

Under the doctrine of comity, a state may give a remedy which the full faith and credit clause does not compel. *Estate of Angevine v. Evig*, 675 S.W.2d 440, 443 (Mo. Ct. App. 1984) (while Missouri courts are not required to enforce an Illinois judgment which was not final, Missouri courts may choose to recognize the

Illinois judgment and use it as evidence to support a general claim in probate court). The *Estate of Angevine* case stands as an example of a Missouri court giving credence to a sister state's judicial pronouncement for a limited purpose, which is applicable to the matter before this Court, in that the Iowa marriage of M. S. and D. S. should be "recognized" to the extent it is a condition precedent for dissolution.

Missouri has a long history of recognition of marriage for limited purposes.

In a similar vein, marriages, without benefit of license or ceremony, and on occasion, with more than two individuals included in the bond, but sanctioned by other jurisdictions, have been "recognized" in Missouri under comity principles, at least for limited purposes. Missouri has considered it "well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere." ("*Lex loci*" rule). *Johnson v. Johnson's Adm'r*, 30 Mo. 72, 88 (Mo. 1860); *Hartman v. Valier & Spies Milling Co.*, 202 S.W.2d 1, 6 (Mo. 1947) (question of respondent's marriage *vel non* must be determined substantively under the law of the state in which the marriage was performed). Moreover, Missouri has applied this rule to recognize out-of-state/foreign marriages that would have been invalid if contracted or solemnized in Missouri.

In *Johnson*, the Court was called upon to determine whether the children of a union between a white man and an Indian woman while living in Indian country, were legitimate and, thus, rightful heirs. The Court held that a marriage had taken place according to the customs of the woman's country. The Court acknowledged the marriage did not include a license or a ceremony, and contemplated the power of divorce at the pleasure of the husband.

> Permanency is not to be regarded as an essential element of marriage by the law of nature; otherwise all such connections as have taken place among the various tribes of the North American Indians-- either between persons of pure Indian blood, or between half breeds, or between the white and Indian races-- must be regarded as illicit and the offspring illegitimate; for it is well established that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure.

Johnson, supra. at 86. The Court concluded that although by custom the power of divorce at pleasure may exist in one or both of the parties, it is, nevertheless, a valid marriage, which will be recognized. (Every reasonable presumption should be indulged in favor of children's legitimacy). *Id*. at 88.

In a case from the same era, the Court was confronted with a situation in which a white man died after residing for many years in Indian country. *Buchanan v. Harvey*, 35 Mo. 276 (Mo. 1864). For years before his death, and up to the time of his death, he had two wives, who were sisters, and of the Blackfeet tribe of Indians. They were both considered, and treated by him, as his lawful wives, and he had a daughter by each one of them. Polygamy was lawful as in conformity to the customs of the Blackfeet Indians. After the man's death, his estate was administered by the St. Louis Probate Court; it ordered the estate to be distributed to the two daughters. That ruling was appealed. The Supreme Court stated that based upon the principles stated in the *Johnson* case, "the validity of the marriages of [the decedent] with the two women could probably be maintained"; but, regardless, the issue of the marriages would be legitimate. *Id*. at 281.

Interestingly enough, in 1875, the Supreme Court of Missouri was grappling with the notion of "marriage recognition" (again, in a case about who were proper heirs), with appellants contending that the general rule, that a marriage, valid where celebrated, is valid everywhere is a matter of comity, but "when an alleged marriage does not contain the essential elements of a marriage as known to our laws, it ought not to be enforced. It is no marriage." *Boyer v. Dively*, 58 Mo. 510, 511 (Mo. 1875). Appellant challenged the validity of the marriage and argued that marriages which do not contain an essential element, as measured by Missouri

laws should be held no marriage at all. *Id*. Under the *Johnson* principles, the Court recognized the marriage and its related incidents where witnesses agreed that Indian marriage required no ceremony, religious or otherwise, and in which the main feature was the consent of the parents of the proposed wife, and their acceptance of the presents offered. *Id.* at 529.

On the basis of comity, courts have rejected challenges to the validity of a variety of out-of-state marriages. In a petition for divorce, wife alleged that she was lawfully married to husband in Oklahoma and continued to live with him as his wife until the date they separated. Husband challenged the validity of the marriage, claiming that he had been underage. The court held "that the validity of this marriage must be determined substantively (although not procedurally) by the *lex loci contractus, i.e.*, Oklahoma law. *Taylor v. Taylor*, 355 S.W.2d 383, 386-87 (Mo. Ct. App. 1962). Regardless of whether the marriage may have been voidable, wife had made a prima facie showing of the validity of her marriage, entitling her to temporary allowances despite husband's denial of the marriage.

In Missouri, "[c]ommon-law marriages shall be null and void." Mo. Rev. Stat. § 451.040.5. Yet, Missouri courts recognize common law marriages valid where contracted and further, that until a decree of dissolution is entered, the common law marriage impedes either spouse's ability to enter another marriage. *Cf. Whitley v. Whitley*, 778 S.W.2d 233, 238-39 (Mo. Ct. App. 1989) (ex-

husband's maintenance obligations ceased as a result of his ex-wife's common law marriage in Texas).

In a habeas corpus proceeding to determine the right to custody of a child, husband conceded that a valid decree of divorce was rendered in Oklahoma. *Green v. McDowell*, 242 S.W. 168 (Mo. Ct. App. 1922). Wife, however, had remarried in Tennessee within six months of the divorce decree, though Oklahoma would not have permitted the marriage. Husband challenged the general rule that a marriage, valid where contracted, is valid everywhere. The Missouri appellate court held that wife's Tennessee marriage was valid. (Statute prohibiting remarriage within a certain period after divorce is granted, had no extra-territorial effect. *Id*. at 172.)

Missouri courts extend comity to other countries in determining the existence of a marriage based on the principle of *lex loci*. Following a decree of dissolution by the circuit court, husband appealed, contending the trial court erred in finding the parties had entered into a valid marriage and therefore, the trial court had no jurisdiction to enter judgment. *James v. James*, 45 S.W.3d 458 (Mo. Ct. App. 2001). Wife's petition had alleged that the parties were married in Mexico. On appeal, husband contended the trial court erred in finding the parties were married (based on "simple declaration or promise of marriage at a place which performed marriages" in Mexico) because as a matter of law, no marriage existed

in Mexico and, therefore, could not exist in Missouri. *Id*. at 462. Husband asserted that the parties did not comply with the requirements of Mexican law requisite for a valid marriage. The appellate court reviewed the materials the parties filed with respect to the requirements for there to have been a valid Mexican marriage. The court stated that while Missouri had adopted "The Uniform Judicial Notice of Foreign Law Act" which requires the courts of Missouri "to take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States," that requirement did not extend to other nations. Recognition of the law of another country is a matter of comity, a rule of voluntary consent. *Id*. The appellate court affirmed the trial court's jurisdiction over the relationship of the parties based on its finding that the parties' Mexican marriage was valid. Presumably then, granting the dissolution was a matter of "deference, respect, and good will." *Id*.

As discussed above, Missouri has acknowledged relationships which would not be defined as "marriage" in Missouri and has accorded the unions the status of "married" to resolve matters which require judicial intervention. Certainly, the marriage which is the underlying issue in the case at bar merits acknowledgement, at the very least, as a condition precedent for the purposes of acting on a petition for dissolution.

Moreover, the consequences over the years of the effects of Missouri's restrictions on marriage and divorce in the name of public policy have taken a terrible human toll.

Consequences of public policy have been inimical to minority populations.

The effect of Missouri's public policy on who had the right to marry and the consequences of non-recognition played out in the infamous *Dred Scott* case, and were poignantly described in the Dissent. *See Dred Scott v. Sandford*, 60 U.S. 393, 599-604 (1856). In the *Dred Scott* case, a person claiming that Dred Scott's master had owed him money tried to assert a title to Dred Scott and his wife as slaves, and thus to destroy their marriage. While Dred Scott was residing in the Territory of Wisconsin, he was married (with the consent of his master) to Harriet (who also went to Wisconsin as a slave). Two children were born of the marriage. The Dissent observed that in Wisconsin, the spouses were free persons, having full capacity to enter into the civil contract of marriage. Justice Curtis, in dissent, reasoned that the "principle of international law, settled beyond controversy … that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere; and that no technical domicile at the place of the contract is necessary to make it so." *Id*. at 599. The Dissent indicated that were Missouri courts to hold that plaintiff Dred Scott were a slave,

the validity and operation of his contract of marriage would have to be denied. Dred Scott could have no legal rights, certainly not those of a husband and father. The same would be true as to Dred Scott's wife and children. The consequence would be analogous to that which M. S. and D. S. find themselves, *i.e.*, though lawfully married in a state (or Territory), when they left and entered Missouri, they were no longer recognized as spouses. *Id*. at 599-600.

It was the judgment of the *Dred Scott* Dissent that a Missouri law which would thus annul a marriage, lawfully contracted by the parties while resident in Wisconsin, not in fraud of any law of Missouri, would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. *Id*. at 601.

In the name of states' rights, the Missouri Supreme Court responded to a challenge to a Missouri statute criminalizing the intermarriage of "any person having one-eighth or more Negro blood with any white person." *State v. Jackson*, 80 Mo. 175 (Mo. 1883). The Court reasoned that if the State "desire[d] to preserve the purity of the African blood by prohibiting intermarriages between whites and blacks," it was "purely a domestic concern," as there was "no power on earth to prevent such legislation." *Id*. at 176 (dismissing notion that such action of the State would come within ambit of Fourteenth Amendment).

Presuming the public policy of Missouri is to disfavor same-sex couples living as married within the State, it may be nonsensical to dismiss a same-sex couple's petition for dissolution of marriage. Ironically, granting divorces to same-sex couples actually furthers the purported (albeit, Appellant submits, illegitimate) public policy behind Missouri DOMA, because divorces would result in fewer same-sex couples living as married in Missouri. The relationship of two people, as acknowledged and deemed worthy of dignity by Iowa, does not now, nor especially after being granted a dissolution, impede or erode the public policy of Missouri. *See Christiansen*, 253 P.3d at 156 ("[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 Wyoming against allowing the creation of same-sex marriages.").

The *Christiansen* Court also rejected arguments that the public policy exception to the *lex loci* statute should apply, pointing out that common law marriages, which are invalid when entered into in Wyoming, are recognized when entered into in foreign jurisdictions for limited purposes. *Id.* Rejecting the argument that a public policy exception should apply, the *Christiansen* Court analogized recognizing same-sex marriages for the limited purpose of divorce to Wyoming's recognition of common law marriages for limited purposes. *Id.* The court reasoned:

> [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 Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role.

Id. Just as the Christiansens were not seeking to live in Wyoming as married, but rather sought to dissolve their legal relationship entered into under Canadian law, M. S. and D. S. similarly seek to dissolve their marriage entered into under the laws of Iowa. *Id.*

Maryland's highest court discussed the issue of repugnancy to Maryland public policy when it recognized a same-sex marriage performed under the laws of another state, for the purposes of granting a divorce in Maryland at a time before Maryland recognized as legal such marriages entered in its own state. In conducting a comity analysis, the Court could not logically conclude that valid out-of-state same-sex marriages were "repugnant" to Maryland "public policy" as the

term is properly understood in applying the doctrine of comity in modern times. *Port v. Cowan*, 44 A.3d 970, 978 (Md. 2012). In a subsequent case, the Court took the occasion to reiterate that Maryland recognizes liberally marriages formed validly in foreign jurisdictions; although public policy is admittedly "an amorphous legal concept," prior decisions demonstrate that the bar in meeting repugnancy standard is set intentionally high; Court had recognized valid foreign marriages under the comity doctrine that would have been invalid if attempted to be formed in Maryland; and, that no decision by the Court had yet been made that deemed a valid foreign marriage to be "repugnant," despite being void or punishable as a misdemeanor or more serious crime were it performed in Maryland. *Tshiani v. Tshiani*, 81 A.3d 414, 426-27 (Md. 2013) (internal citations omitted) (marriage ceremony conducted in Congo, in which groom was not physically present, recognized under doctrine of comity). Likewise, acknowledgement of the marriage of M. S. and D. S. for purposes of granting a dissolution, should not be found "repugnant" to Missouri "public policy" in these times.

There are a myriad of consequences attendant to a lack of remedy in a petitioner's domicile.

Same-sex couples residing in Missouri that are barred from dissolving their marriages may be forever trapped in marriages that are valid and legally

recognized by many other state and local governments, as well as the federal government, and remain saddled with the attendant consequences and obligations concomitant with that marriage. In contrast to marriage, dissolution is governed by *lex domicilii*. Thus, in order for a court to have authority to enter a dissolution of marriage, at least one party must meet the state's durational residency requirement. *See, e.g.*, Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 Wm. & Mary L. Rev. 1 (Oct. 1999). Missouri same-sex couples cannot simply drive across the border (or fly to any other state) to get a divorce, as state law residency and domicile requirements bar other state courts from granting their divorce.[7] Unlike marriage, for which most, if not all, states encourage visitors as a

[7] *See, e.g.*, **Ark. Code Ann. § 9-12-307(a)(1)(A)(West)**: To obtain a divorce, the plaintiff must prove, but need not allege, in addition to a legal cause of divorce: A residence in the state by either the plaintiff or defendant for sixty (60) days next before the commencement of the action. **750 Ill. Comp. Stat. 5/401(a)**: "The court shall enter a judgment of dissolution of marriage if at the time the action was commenced one of the spouses was a resident of this State or was stationed in this State while a member of the armed services, and the residence or military presence had been maintained for 90 days next preceding the commencement of the action or the making of the finding." **Iowa Code § 598.5.1(k)**: "Except where the respondent is a resident of this state and is served by personal service, state that the

source of economic benefit, divorce is not permitted in the same drive-thru-like manner. As a result, unless one spouse establishes residence in another jurisdiction, thereby allowing the couple access to its courts for dissolution proceedings, a same-sex couple seeking a divorce will continue living as married and will accrue rights and responsibilities *vis–à-vis* each other until one spouse dies, releasing the other from the bounds of an unwanted marriage.

Meeting the condition precedent of a marriage for dissolution purposes is far less recognition than that which Missouri already provides same-sex couples who remain married. For example, Executive Order 13-14, signed by Governor Jay Nixon on November 14, 2013, in the wake of *United States v. Windsor,* 133 S. Ct. 2675 (2013) and IRS Rev. Rul. 2013-17 (2013-38 I.R.B. 201(2013)) *requires* all

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petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided and the length of such residence in the state after deducting all absences from the state, and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a dissolution of marriage only." **Kan. Stat. Ann. § 23-2703(a)**: "The petitioner or respondent in an action for divorce must have been an actual resident of the state for 60 days immediately preceding the filing of the petition." *See also*, **43 Okl. St. Ann. § 102** (Oklahoma) (180 days); **T.C.A. § 36-4-104** (Tennessee) (180 days); **Neb. Rev. Stat. § 42-349** (Nebraska) (1 year); **Ky. Rev. Stat. Ann. § 403.140** (Kentucky) (180 days).

couples filing Missouri income tax returns, including same-sex couples, who filed a joint federal income tax return, to similarly file a joint Missouri return. Mo. Exec. Order. No. 13-14, 38 Mo. Reg. 2085 (2013). Governor Nixon's order resolved a discrepancy between Mo. Rev. Stat. § 143.031.1, which requires a "husband and wife who file a joint federal income tax return [to] file a combined [state] return," and the non-recognition language in Missouri DOMA, in favor of recognition of same-sex marriage for at least the limited purpose of paying state taxes. *See id*. The Governor utilized the requirement in Mo. Rev. Stat. § 143.091.1, that the Missouri Department of Revenue apply federal definitions for terms under state income tax law, to define "husband and wife" to include same-sex couples. *Id.* Refusing to grant a same-sex couple's dissolution of marriage may require them to continue filing joint federal and state returns when they would prefer to terminate their relationship.

Beyond income taxes, Missouri already faces expanded recognition of same-sex couples within its borders as a result of federal action to provide benefits to

same-sex spouses of members of the U.S. military[8] and veterans,[9] provide benefits to same-sex spouses and annuitants of Federal employees,[10] handle immigration visas equally for all spouses regardless of sex,[11] define the term "spouse" in

[8] Press Release, U.S. Department of Defense, DOD Announces Sam-Sex Spouse Benefits (August 14, 2013), http :// www . defense. gov/ releases/ release .aspx? releaseid= 16203; Memorandum from Secretary of Defense Chuck Hagel for Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness on Extending Benefits to the Same-Sex Spouses of Military Members (Aug. 13, 2013), http://www . defense.gov /home/ features/ 2013/ docs/ Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf.

[9] *Lesbian, Gay and Bi-Sexual (LGB) Servicemembers and Veterans*, U.S. DEPARTMENT OF VETERANS AFFAIRS (July 18, 2014), http://www .benefits. va.gov/persona/lgb.asp.

[10] U.S. Office of Personnel Management, Benefits Administration Letter No. 13-203 on Coverage of Same-Sex Spouses (July 17, 2013), https:// www . opm. Gov /retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf.

[11] Statement from Former Secretary of Homeland Security Janet Napolitano on Implementation of the Supreme Court Ruling on the Defense of Marriage Act (April 11, 2014), http://www . dhs. gov/topic/implementation-supreme-court-

employee benefit plans under ERISA to include same-sex spouses,[12] and provide some benefits to same-sex spouses under Medicare.[13] While the federal government provides affirmative recognition to the marriages of same-sex couples in Missouri through the marriage benefits it provides them, a decision by this Court granting access to Missouri circuit courts to same-sex couples for dissolution of marriage will not similarly grant marriage recognition.

Regardless of domicile, many married same-sex couples have continuing interests and obligations in states that recognize their marriage, including property interests, financial obligations, and decision-making authority if a spouse were to become ill or incapacitated during a visit to a state recognizing the marriage. *See,*

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ruling-defense-marriage-act.; Statement from Secretary of Homeland Security Janet Napolitano on July 1, 2013 on Same Sex Marriages (April 3, 2014), http://www .uscis. gov/family/same-sex-marriages.

[12] U.S. Department of Labor, Technical Release No. 2013-04 on Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in *United States v. Windsor* (September 18, 2013), http://www . dol.gov/ebsa/newsroom/tr13-04.html.

[13] *Important Information for Individuals in Same-Sex Marriages*, MEDICARE.GOV (July 18, 2014), http:// www . medicare.gov/sign-up-change-plans/same-sex-marriage.html.

e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (discussing non-exhaustive list of the "hundreds of statutes" related to the incidents of marriage). For example, often times same-sex couples may be accruing rights with respect to property they acquired during the relationship in other states (irrespective of any property located in Missouri). As married couples, debt accrued by either spouse would be considered a marital debt in many states, burdening both parties. *See, e.g., St. Luke's Med. Ctr. v. Rosengartner*, 231 N.W.2d 601, 602 (Iowa 1975) (holding a husband liable for spouse's medical expenses, even though the expenses were incurred after they began living apart by agreement, because there was no divorce or legal separation). In addition, without a valid divorce decree, the parties cannot remarry without risking violation of civil and criminal bigamy prohibitions. *See, e.g.* Iowa Code § 726.1.[14] Additional probate and other issues also remain when parties are unable to dissolve their marriage, or if the method used to terminate the marriage is later invalidated.

The varied forms of relief granted by Missouri circuit courts, as previously demonstrated, results in unequal application of the law to spouses in same-sex marriages, and in some cases, completely blocks them from access to the courts for

[14] *See* Missouri equivalent in Mo. Rev. Stat. § 451.030. *See also* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev 1669, 1688 (2011).

a judicial remedy, as was the case with M. S. and D. S. Further, using a judgment of annulment or declaratory judgment as the vehicle to dissolve a marriage denies parties important avenues for relief made generally available under Missouri law through a dissolution of marriage. For example, an annulment or voidance merely affirms non-recognition without any of the remedies provided for by dissolution. The Missouri Supreme Court owes all Missouri residents, especially those now in same-sex marriages, or who may be in the future, the certainty of a clear remedy should they exercise their freedom to exit their marriage.

Under Chapter 452 of the Missouri Revised Statutes, the Missouri legislature provides heterosexual married couples in Missouri the ability to seek the dissolution of their marriage; however, generally (the known exception being *In re the Marriage of Hilsabeck*, *supra.*), access to that avenue of relief is currently denied to Missouri same-sex couples. Chapter 452 affords couples in a divorce proceeding access to relief beyond simply the dissolution of their marriage, including: division of property and debt, § 452.330; legal and physical custody over any children, § 452.375; child support awards, § 452.340; and maintenance awards, § 452.335. Same-sex couples living in Missouri seeking to dissolve their marriages, in almost all cases, do not currently have access to such relief. Thus, unless the parties are lucky enough to have their case assigned to a willing circuit court judge, their marriage may remain intact against one or both parties' wishes.

And if an alternative form of relief is granted, as in *Latimer* and *Sparks*, issues attendant to "terminating" the parties' marriage may remain unresolved.

Under the reasoning that flows from the Circuit Court's Judgment, a circuit court would not be able to enter an order dividing property and debt and awarding maintenance. Even if the parties enter into a contract purporting to divide property and debt and handle other matters typically resolved in a dissolution proceeding, that agreement would not be incorporated in a decree and judgment of dissolution of marriage, as is the usual practice in Missouri, and thus would not be enforceable by contempt or other judicial action without a new petition for breach of contract. And, under the Circuit Court's Judgment, if children were involved, their custody and support issues might remain unresolved even though the circuit courts under Chapter 452 have the authority to resolve such issues, but, under this logic, would be unable to exercise that authority. *Cf. Dickerson v. Thompson*, 88 A.D.3d 121 (2011) (2011 N.Y. Slip. Op.06009) (Where plaintiff in civil union, valid where formed, lacked remedy at law for dissolution in domicile state, trial court had equity jurisdiction to dispose of all matters at issue and to grant complete relief, including dissolution).

The practical consequences for married same-sex couples prohibited from dissolution, also continue on the federal level. Since the decision in *Windsor*, several federal agencies have declared they recognize all marriages valid in the

place of celebration.[15] For example, the U.S. Department of Treasury and Internal Revenue Service recently determined that same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes. The decision also applies to married same-sex couples residing in jurisdictions, such as Missouri, that do not recognize their marriage.[16] As a result, both individuals are required to file their tax return as "married," incurring applicable tax consequences and obligations of their spouse, even if they have limited or no continuing contact with each other. As a further consequence, the individuals unable to divorce are precluded from extending federal benefits to a subsequent spouse because they cannot remarry. Thus, the couple seeking dissolution through divorce is placed in the untenable position of being bound by the valid out-of-state marriage.

Judicial restraint is requisite where a court can construe a statute as constitutional.

The Canon of Constitutional Avoidance counsels "that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (internal

[15] *See supra* notes 8-13 [re benefits].

[16] IRS Rev. Rul. 2013-17 (2013-38 I.R.B. 201(2013)), available at http:// www .irs .gov/pub/irs-drop/rr-13-17.pdf.

citation omitted). The Canon of Constitutional Avoidance is utilized when, after the application of ordinary textual analysis, the statute is found susceptible of more than one construction; the canon operates as a means of choosing between them. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). Here, where Section 451.022.4 may be read to prohibit marriage recognition only for an on-going relationship with its attendant benefits, or to be applicable to the necessary acknowledgement that a marriage took place in another jurisdiction as a condition precedent to hearing a dissolution case, the former construction avoids serious constitutional questions which would be raised by total preclusion of a judicial forum. *Id.*

The overriding rule of statutory construction to be applied in this case is the rule which requires the Court "to construe legislative enactments so as to render them constitutional and avoid the effect of unconstitutionality, if it is reasonably possible to do so." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State*, 399 S.W.3d 467, 481-82 (Mo. Ct. App. 2013) (internal citation omitted). As the Court could determine that Missouri DOMA does not prohibit the grant of a dissolution to same-sex couples who meet the statutory requirements of Chapter 452, Missouri DOMA should not be construed to prohibit Missouri circuit courts from such action, as fundamental constitutional guarantees would be thereby implicated. *See State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985).

The *Windsor* ruling striking provision that permitted Federal differences in treatment between state-sanctioned same sex marriages and state-sanctioned heterosexual marriages, supports Missouri courts affording parties in a same-sex marriage a judicial forum for dissolution.

To the extent that the Circuit Court may have thought that acting upon a petition for dissolution would require recognition of the same sex marriage of M.S. and D.S., and that Missouri DOMA prohibited same, the eradication of the Federal Defense of Marriage Act in *Windsor*, should serve to support jurisdiction over M.S.'s Petition. *Cf. De Pass v. Harris Wool Co.*, 144 S.W.2d 146 (Mo. banc 1940).

> …this court is under no compulsion to enforce, against the public policy of Missouri, a contract made in another state although valid where made and valid at the place of performance. That is not the question here. We are now considering the effect of a law of the United States the force of which does not stop at the boundary of Missouri. The constitution of the United States (Art. VI) provides: "This Constitution, and the Laws of the United States

> which shall be made in Pursuance thereof *** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Id. at 148. In *De Pass*, the defendant contended that the state "may make paramount its own view of public policy by refusing to enforce contracts it regards as in violation of it." *Id*. The Court responded to this contention, stating that the laws of Missouri do not, and cannot, declare a policy contrary to law which is binding and valid in Missouri; and the court's refusal to enforce a contract, "made legal by Federal law, would interfere, to some extent, with the exercise of a Federal function, and if all the states should pursue the same course, such contracts would be practically nullified." *Id*. at 149. (internal quotation marks omitted).

III. The trial court erred in determining it lacked constitutional and statutory authority to dissolve the parties' marriage and dismissing the Petition, because, to the extent the Missouri Constitution and/or Revised Statues of Missouri would preclude the trial court from dissolving the marriage of M. S. and D. S., the Missouri Constitution and/or statutory provisions violate the Constitution of the United States in that they deny Appellant access to the courts to dissolve his lawful marriage, unlawfully infringe upon Appellant's fundamental right to dissolution, and unlawfully discriminate against same-sex couples seeking to dissolve their marriages in the State of Missouri.

Standard of Review

While Appellant did not raise a constitutional issue in his Petition before the trial court, the record in this case affirmatively shows that the trial court's ruling, in large measure, interpreted the Missouri Constitution in holding that constitutional and statutory authority prohibited the court's further action. Under such circumstances, the Supreme Court has exclusive jurisdiction. *See Eder v. Painters' Dist. Council No. 3*, 199 S.W.2d 648, 649 (Mo. Ct. App. 1947); *cf. Haley v. Horjul, Inc.*, 281 S.W.2d 832, 833 (Mo. 1955) (Supreme Court had jurisdiction of appeal upon which appellant sought construction of constitutional provision relating to jurisdiction of probate court, and retained jurisdiction even though, in

final disposition, it was unnecessary to decide this question). In effect, the trial court, in addressing its jurisdiction to dissolve Appellant's marriage, *sua sponte*, invoked constitutional issues. This Court has exclusive appellate jurisdiction in cases involving the validity of a statute or provision of the constitution of this state. *See Missouri Prosecuting Attorneys and Circuit Attorneys Ret. Sys. v. Pemiscot Cnty.*, 217 S.W.3d 393, 399-400 (Mo. Ct. App. 2007).

This Court's jurisdiction rests upon the constitutional issues involved. Once having jurisdiction, the Court determines the whole case, irrespective of the issue upon which the case may turn. *Taylor v. Dimmitt*, 78 S.W.2d 841, 842 (Mo. 1934). *See also State ex inf. v. Heffernan*, 148 S.W. 90, 92 (Mo. 1912) (Supreme Court has jurisdiction of an appeal involving constitutional questions, though the cause be disposed of on other grounds.)

Introduction

The trial court apparently believed that it must recognize Appellant's same-sex marriage in order to dissolve it. If the trial court's interpretation of the law is correct, Missouri's DOMA implicates Appellant's right to divorce in Missouri. Consequently, an examination of the constitutional propriety of Missouri's same-sex marriage recognition ban becomes necessary, because the trial court's decision below is expressly conditioned upon the permissibility of the same.

In 1993, Hawaii's Supreme Court was the first state to open its door to same-sex marriage. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The reaction was immediate and visceral. Over the next few years, 27 states, including Missouri, passed anti-same sex marriage legislation, and Congress passed the Federal DOMA. Several years later, Massachusetts followed in Hawaii's footsteps, *Goodridge v. Dep't of Pub. Health*, *supra*, and began permitting the marriage of same-sex couples. In response, numerous states, including Missouri, enacted constitutional amendments banning same-sex marriage.

Between 2010 and 2013, a handful of additional states, following Hawaii and Massachusetts, also began legalizing same-sex marriages. In 2013, the Supreme Court, in *United States v. Windsor*, *supra.*, struck down a provision of the Federal DOMA and held that the federal government cannot refuse to recognize valid marriages licensed in states that recognize same-sex marriage. Since *Windsor*, numerous federal and state courts have addressed the impact of *Windsor* on state laws relating to same-sex couples and recognition of same-sex marriages. These courts have uniformly and repeatedly rejected a narrow reading of *Windsor—e.g.*,

that the basis of *Windsor* was decided strictly on federalism grounds[17]—and found that *Windsor* protects the rights of same-sex couples in a variety of contexts. [18]

[17] *See e.g., Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493, *11 (4th Cir., July 28, 2014) (*citing Windsor,* 133 S. Ct. at 2692) ("The State's power in defining the marital relation is *quite apart from* principles of federalism . . . *Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving* 's [388 U.S. 1 (1967)] admonition that the states must exercise their authority without trampling constitutional guarantees.) (emphasis in original); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, *10 (10th Cir. June 25, 2014) (*citing Windsor*, 133 S. Ct. at 2692) ("Rather than relying on federalism principles, the Court framed the question presented as whether the 'injury and indignity' caused by DOMA 'is a deprivation of an essential part of the liberty protected by the Fifth Amendment.' And the Court answered that question in the affirmative.").

[18] In reaching their decisions, Courts have consistently rejected any notion that *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissed matter for want of federal jurisdiction) is controlling. *See e.g.*, *Bostic*, No. 14-1167, 2014 WL 3702493 at *6-8 ("Every federal court to consider this issue since the Supreme Court decided [*Windsor*] has reached the same conclusion [--that *Baker* is not controlling]"); *Kitchen*, No. 13-4178, 2014 WL 2868044 at *7-10.

These cases include decisions finding state anti-recognition laws, substantively identical to Missouri's DOMA, unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as decisions finding that same-sex marriage bans are unconstitutional on their face.[19]

[19] Appellant is cognizant of this Court's rule that "[l]ong quotations from cases and long lists of citations should not be included." Mo. Sup. Ct. R. 84.04(e). However, given the number of timely, categorical rejections of state DOMA laws across the country by federal and state courts, Appellant believes the citation list below is relevant, compelling and appropriate.

See e.g., *Bostic*, No. 14-1167, 2014 WL 3702493; *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014); *Kitchen*, No. 13-4178, 2014 WL 2868044; *Burns v. Hickenlooper*, No. 14-CV-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014); *Baskin v. Bogan*, No. 1:14-CV-00355-RLY, 2014 WL 2884868 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (D. Wis. 2014); *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, No. 6:13-CV-01834-MC, 2014 WL 2054264 (D. Or. May 19, 2014); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395 (S.D. Ohio April 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525 (M.D.

In these cases, the courts held that bans on same-sex marriage and anti-recognition laws violate both the Fourteenth Amendment's Due Process and Equal Protection Clauses, regardless of what level scrutiny was applied. And, in each of these cases, the opposition routinely offered the same pretextual defenses for their respective

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Tenn. March 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Wright v. Arkansas*, No. 60CV-13-2662 (Ark Cir. Ct. May 9, 2014); *Brinkman v. Long*, No. 13-CV-32572 (Colo. Dist. Ct. July 9, 2014); *Huntsman v. Heavilin*, No. 2014-CA-305-K (Fla. Cir. Ct. July 17, 2014).

state's DOMA laws, all of which were categorically rejected under even the least demanding level of constitutional review.[20] Missouri's DOMA is *no* different.

Substantive and Procedural Due Process

The Fourteenth Amendment provides that, "[n]o State shall. . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3. The purpose of the Due Process Clause is to protect "vital personal rights essential to the orderly pursuit of happiness by free men [and women], more commonly referred to as 'fundamental rights.'" *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395, *7 (S.D. Ohio, April 14, 2014) (*quoting Loving v. Virginia*, 388 U.S. 1, 12 (1967)). It provides two distinct guarantees: substantive and procedural due process. *DeKalb Stone, Inc. v. Cnty. of DeKalb, Ga.*, 106 F.3d 956, 959 (11th Cir. 1997). The right to both is "absolute." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

[20] The litany of purported—yet pretextual—justifications offered for state DOMA laws include incentivizing procreation, evading the province of the legislature or the will of the people, childrearing, supporting gradual—rather than swift—social change, protecting traditional marriage, protecting the institution of marriage, preventing a slippery slope (e.g., permitting bigamy or polygamy), avoiding civic strife, and encouraging stable homes. All of these have been rejected. *See, supra*, fn. 19.

With respect to substantive due process, the Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted). In *Lawrence v. Texas*, 539 U.S. 558, 578-89 (2003), the Supreme Court reemphasized both the broad scope of these rights and the generational malleability of the Clause:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

In short, the Due Process Clause protects "substantive aspects of an individual's liberty from impermissible government restrictions." *Hawkins v. Holloway*, 316 F.3d 777, 780 (8th Cir. 2003).

Additionally, the guarantee of procedural due process protects against "the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property," without constitutionally required process. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). By denying same-sex married couples residing in Missouri the ability to divorce, Missouri and its courts run afoul of their substantive and procedural due process obligations under the Fourteenth Amendment.

Substantive Due Process

The right to divorce is a fundamental right.

Choices relating to marriage and family life, including the decision to marry and, likewise, the decision to dissolve that marriage, are fundamental rights protected by the United States Constitution. The constitutional right of due process "affords . . . protections to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," because these decisions "involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.*

Decisions relating to marriage, such as the decision to dissolve a marriage, are "central to personal dignity and autonomy" and are "central to the liberty protected by the Fourteenth Amendment." *Id.* These choices are deeply personal and of basic importance under the Constitution. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (*citing Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."); *Hodgson v. Minn.*, 497 U.S. 417, 435 (1990) (plurality opinion) ("[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); *Moore v. City of E. Cleveland* 431 U.S. 494, 499 (1977); *Carey v. Population Services, Intern.*, 431 U.S. 678, 684-85 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

The Supreme Court has routinely reaffirmed the principle that decisions affecting marriage and the personal dignity of individuals are fundamental. *See*

Lawrence, 539 U.S. at 578 (state may not "control th[e] destiny" of its citizens by criminalizing certain intimate conduct); *M.L.B., 519 U.S. at 116; Cleveland Bd. of Educ.*, 414 U.S. at 639-40; *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (state may not impede one's right to travel through laws treating individuals as "unfriendly alien" rather than "welcome visitors."); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (Constitution protects right "to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person."). In addition, as noted above, state and federal courts across this Country have categorically affirmed the fundamental right to marriage in their universal rejections of same-sex marriage and same-sex marriage recognition bans. *See, supra*, fn. 19.

Dissolution is one of those choices affecting marriage and family that is a fundamental right under the Constitution. Indeed, the right to appear before a judge to seek divorce "is the exclusive precondition to the adjustment of a fundamental human relationship." *Boddie*, 401 U.S. at 383. The right to choose to be unmarried is just as fundamental as the right to choose to be married. *Id.*; *York v. York*, 98 A.D.3d 1038, 1041 (N.Y. Sup. Ct. 2012) ("Certain matters relating to the family have been determined to be fundamental rights, such as marriage and divorce."), aff'd 22 N.Y.3d 1051.

Dissolution, in particular, "affects personal rights of the deepest significance." *Williams v. N.C.*, 325 U.S. 226, 230 (1945). In fact, the right to

choose one's family relationships are fundamental liberties guarded by the Constitution. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . . ."); *id*. at 623 (fundamental right "not to associate."); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1000 (W.D. Wis. 2014) (*citing Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977) ("The liberty protected by the due process clause includes the right to choose your own family."). The "choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, No. 14-1167, 2014 WL 3702493 at *10.

Importantly, the right to a dissolution is fundamental, notwithstanding who seeks to assert it. "Fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them." *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, *18 (10th Cir., June 25, 2014) (internal citation omitted). "States may not 'experiment' with different social policies by violating constitutional rights . . . There is no asterisk next to the Fourteen [sic] Amendment that excludes gay persons from its protections" *Wolf*, 986 F. Supp. 2d at 994-96 (*citing Romer v. Evans*, 517 U.S. 620, 635 (1996)).

It is the judiciary's "obligation is to define the liberty of all." *Casey*, 505 U.S. at 850. Although courts may be tempted "to suppose that the Due Process

Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified . . . . such a view would be inconsistent with our law." *Id.* at 847 (citation omitted). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

In short, courts have routinely prohibited attempts to classify rights based upon the class-membership of the individual exercising rights related to same-sex relationships. *See e.g.*, *Bostic*, No. 14-1167, 2014 WL 3702493 at *8-10 ("*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships . . . Accordingly, we decline the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry."); *Kitchen*, No. 13-4178, 2014 WL 2868044 at *18-19.

Laws affecting or implicating fundamental rights, including the right to divorce, are subject to strict scrutiny.

Missouri's DOMA affects Appellant's fundamental right to dissolution. When a law affects or implicates fundamental rights, such as the right to get

married or, likewise, to dissolve a marriage, it is subject to strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493, *8 (4th Cir., July 28, 2014) (" Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny"); *Kitchen*, No. 13-4178, 2014 WL 2868044 at *19.

Under strict scrutiny, laws and regulations pass constitutional muster *only* if they are narrowly tailored to serve a compelling state interest. *Zablocki*, 434 U.S. at 388; *Bostic*, No. 14-1167, 2014 WL 3702493 at *10. The burden is upon the State to defend the constitutionality of its laws. *Zablocki*, 434 U.S. at 388. With respect to whether the law serves a compelling interest, the party defending the law may not "rest upon a generalized assertion as to . . . [its] relevance to its goals." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Indeed, the focus must be upon the "purpose" of the law—not "hypothetical justifications." *Bostic*, No. 14-1167, 2014 WL 3702493 at *10.

Likewise, "[t]he purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). "Only 'the most exact connection between

justification and classification' survives." *Kitchen*, No. 13-4178, 2014 WL 2868044 at *21 (*citing Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

Missouri's DOMA does not survive strict scrutiny, and violates the Substantive Due Process Clause.

There is no conceivable compelling interest that would justify Missouri's DOMA. Time and time again, courts across this country have universally rejected purported "compelling interests" by States for their own respective DOMA regulations. *See Supra* fn. 19. Nor is Missouri's DOMA narrowly tailored to any purported compelling interest offered by the State.

Missouri does not have written legislative history, but the purpose of Missouri's DOMA is no mystery, as noted by the historical context of Missouri's DOMA and the political climate within which it was enacted. Discrimination of an "unusual character" especially suggests improper animus or purpose for a law. *Windsor*, 133 S. Ct. at 2692 (*citing Romer*, 517 U.S. at 633). Here, as the Supreme Court found in *Windsor*, "the avowed purpose and practical effect of [Missouri's DOMA is] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of [other] States." *Id.* at 2693. Much like the invalidated Federal DOMA, Missouri DOMA's overt purpose is to tell "couples, and all the world, that their otherwise valid marriages are unworthy of [Missouri] recognition. This places

same-sex couples in an unstable position of being in a second-tier marriage." *Id.* at 2694.

Procedural Due Process

A claim of procedural due process requires proof of (1) a deprivation of property or liberty interest protected by the Constitution; and (2) a lack of required process. *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011); *Krentz v. Robertson*, 228 F.3d 897, 902 (8th Cir. 2000). The right to appear before a judge to seek divorce "is the exclusive precondition to the adjustment of a fundamental human relationship." *Boddie,* 401 U.S. at 383. The State violates the Due Process Clause when it "pre-empt[s] the right to dissolve this legal relationship without affording ***all citizens*** access to the means it has prescribed for doing so." *Id.* (emphasis added). As the State has a monopoly upon the dissolution of marital unions, Missouri cannot constitutionally preclude married same-sex couples from divorce by barring their access to its courts for purposes of dissolution.

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

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

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

married same-sex couples. No matter how Missourians may regard a marriage of a same-sex couple originating in another state, it does not follow that a Missouri court may wholly disregard the Fourteenth Amendment and bar married same-sex couples from their day in court. Any individual seeking divorce must, at a minimum, "be given meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377. Appellant was not given any opportunity to be heard in the instant matter.

Moreover, the State may not deny procedural due process regarding a particular liberty interest by offering access to the court for a substantively different interest. In closing the doors to the only available judicial forum where these married same-sex couples can get a dissolution, the State commits the classic textbook example of a procedural due process violation.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Such clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Equal protection jurisprudence also mandates strict scrutiny, or, alternatively, heightened scrutiny of Missouri's DOMA.

Strict scrutiny is reserved for laws that either infringe upon a fundamental right or engender suspect classifications, such as race, alienage or national origin. *Id.* at 40. If a classification impinges upon the exercise of a fundamental right, the Equal Protection Clause requires the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Bostic*, No. 14-1167, 2014 WL 3702493 at *8 (strict scrutiny applied to equal protection challenge to Virginia's DOMA); *Kitchen*, No. 13-4178, 2014 WL 2868044 at *21.

Intermediate or heightened scrutiny (used interchangeably) is applied to classifications deemed quasi-suspect, such as sex or illegitimacy. *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). To survive heightened scrutiny, a statutory classification must be substantially related to an important governmental objective, with the party defending the statute, similar to strict scrutiny, carrying the burden to demonstrate the rationale. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). The standard requires an "exceedingly persuasive justification" for the classification. *Miss Univ. for Women*, 458 U.S. at 724. Quasi-suspect classifications are subject to heightened

review because the preeminent characteristic of the group "generally provides no sensible ground for differential treatment." *Cleburne*, 473 U.S. at 440.

Finally, for classifications not targeting a suspect or quasi-suspect class, courts apply the rational basis test, which requires that state laws be rationally related to a legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993). While rational basis review is a deferential standard, it "is not a toothless one." *Matthews v. Lucas*, 427 U.S. 495, 510 (1976). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446-47. The rational basis test, unlike heightened scrutiny, does not require an investigation of a law's purpose or its discriminatory effect.

As noted above, the classification imposed by Missouri's DOMA infringes upon a fundamental right. Consequently, the same standard (strict scrutiny) applied for purposes of Substantive Due Process analysis (along with the same result) should be equally applicable to Appellant's Equal Protection challenge.

Nonetheless, even if this Court were to declare that dissolution is not a fundamental right, classifications based upon sexual orientation are still subject to, at a minimum, heightened scrutiny. While the Supreme Court has never explicitly held that gay and lesbians are a "quasi-suspect class," *Windsor* certainly insinuates the same. *Whitewood*, No. 1:13-CV-1861, 2014 WL 2058105 at *10 (M.D. Pa.

May 20, 2014). ("[I]n the tea leaves of *Windsor* and its forebears we apprehend the application of scrutiny more exacting than deferential . . .The Court did not evaluate hypothetical justifications for the law but rather focused upon the harm resulting from DOMA, which is inharmonious with deferential review.").

Also illustrative is *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014), which involved a constitutional challenge to a preemptory strike of a prospective juror during jury selection, who was the only self-identified gay member of the jury pool. *Id.* at 474. Immediately after a peremptory strike was used on that juror, the opposing party raised a *Batson* challenge that the trial judge subsequently denied. *Id.* The Ninth Circuit concluded that the challenge amounted to purposeful sexual orientation discrimination before answering whether the classification was subject to heightened scrutiny. *Id.* In determining whether heightened scrutiny was applicable, the court noted that, while *Windsor* does not expressly announce any level of scrutiny, what the Court "actually did" exhibited none of the hallmark signs of rational basis review. *Id.* at 481. In concluding that classifications based upon sexual orientation are subject to heightened scrutiny, the Court determined that "*Windsor* requires that when state action discriminates on the basis of sexual orientation, [a court] must examine [the classification's] actual purpose and carefully consider the resulting inequality to

ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. *Id.* at 483.

Moreover, the Supreme Court has established criteria for evaluating whether a class qualifies as quasi-suspect. Instead of analyzing what the Court "actually did" in *Windsor*, several federal courts have chosen to independently apply that test to evaluate whether heightened scrutiny is appropriate for sexual orientation based classifications. Under the test, in order to qualify for heightened scrutiny, a class must (1) have been subjected to a history of purposeful treatment; (2) possess a characteristic that frequently bears no relation to the ability to perform or contribute to society; (3) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (4) is a minority or politically powerless. *See, e.g.*, *Whitewood*, No. 1:13-CV-1861, 2014 WL 2058105 at *11-14; *Henry*, No. 1:14-CV-129, 2014 WL 1418395 at *14. When the criteria are analyzed, federal courts have routinely concluded that sexual orientation based classifications are indeed subject to heightened scrutiny.[21]

[21] *See e.g., Whitewood*, No. 1:13-CV-1861, 2014 WL 2058105 at *14-15; *Henry*, No. 1:14-CV-129, 2014 WL 1418395 at *14; *Wolf*, 986 F. Supp. 2d at 1011-14; *Latta*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 at *17-18; *De Leon*, 975 F. Supp. 2d at 650-52.

In *Glossip v. Mo. Dept. of Trans. and Highway Patrol Emp. Ret. Sys.*—a case perhaps most well-known for the questions it left for another day, rather than what it did decide—the plaintiff, following the death of his same-sex partner, sued after he was denied survivor benefits. 411 S.W.3d 796, 799 (Mo. banc. 2013). Specifically, the plaintiff challenged the constitutionality of a Missouri statute limiting certain survival benefits to a surviving *spouse*, which was defined in the same statute as referring "only to a marriage between a man and a woman." *Id.* The Court, in holding that plaintiff presented no constitutional violation, expressly noted that the "case [was] decided on very narrow grounds:"

> This case does not involve a challenge to the Missouri Constitution's ban on same-sex marriage. That is an issue for another day . . . [The plaintiff] is not eligible for survivor benefits because he was not married to the patrolman . . . If [the plaintiff] and the deceased patrolman had been married in another state (or country), [the plaintiff] could have challenged the statute that prohibits recognizing same-sex marriages for purposes of Missouri benefits. But they were not. [The plaintiff] could have challenged Missouri's constitutional provision

> that precluded him and the patrolman from marrying here. But he did not.

Id. Indeed, the Court explicitly noted that "[t]his case would require a different analysis if, as in the recent case of *United States v. Windsor*, [the parties] had been married under the law of another state or jurisdiction." *Id.* at 804. Unlike the parties in *Glossip*, M.S. and D.S. were lawfully married under the law of another state and are expressly challenging Missouri's DOMA herein, based on the trial court's application of the same.

Because the challenge in *Glossip* concerned a classification based simply upon marital status—not sexual orientation—the Court applied rational basis review. *Id.* at 800. Although the Court noted that *Windsor* "left open the question of what level of scrutiny should apply to sexual orientation discrimination," it concluded that it "need not reach that issue here because the survivor benefits statute does not discriminate on the basis of sexual orientation." *Id.* at 805-06.

As noted above, since *Glossip*, a number of federal and state courts alike have determined that sexual orientation discrimination is subject to, at the very least, heightened scrutiny—not only based upon an analysis of what the Court "actually did" in *Windsor*, but also independently upon an application of the Supreme Court's aforementioned quasi-suspect criteria

test. Consequently, strict scrutiny or, alternatively, heightened scrutiny should be applied in the instant matter.

Regardless of the level of scrutiny, Missouri's DOMA violates the Equal Protection Clause, even under the most deferential of standards.

To prevent married same-sex couples from obtaining a divorce in Missouri, purportedly based on State laws that do not even mention the word "divorce" or "dissolution," is nothing other than class-based treatment rooted entirely in animus. As a result, Missouri's DOMA, as applied to withhold divorce from same-sex couples, cannot withstand constitutional scrutiny under any level of review.

Preventing validly married same-sex couples from seeking the remedies of dissolution, is an affront to the dignity of two people who have made the commitment of marriage to each other under state law and who have lived portions of their lives fulfilling those commitments. As with other married couples, their lives are inextricably intertwined financially, legally, and emotionally. If forced simply to walk away without any access to orderly dissolution, they will suffer great harm, both emotionally and financially. Preventing dissolution of a same-sex marriage is demeaning and demonstrates nothing more than a desire to express public disapproval of their constitutionally-protected intimate relationship. The action furthers no purpose other than to punish same-sex couples.

The U.S. Supreme Court has repeatedly held that governmental actions driven by animus lack a legitimate purpose and will not survive even rational basis review. *See, e.g., U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Cleburne*, 473 U.S. at 448. Laws born out of animus that have the purpose and effect of disparaging and injuring a class of people simply to make them inferior furthers no legitimate interest and thus cannot survive any level of equal protection scrutiny. *See Windsor*, 133 S. Ct. at 2696; *Romer*, 517 U.S. at 635. Indeed, in many of the post-*Windsor* cases, courts—including those applying some form of heightened scrutiny—have gone out of their way to declare that state DOMA's are unconstitutional even under the rational basis test.[22]

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[22] *See e.g., Baskin*, No. 1:14-CV-00355-RLY, 2014 WL 2884868 at *11-14; *Wolf*, 986 F. Supp. 2d at 1018-28 ("Even if I assume that Wisconsin's ban on same-sex marriage is not 'unusual' in the same sense as the laws at issue in *Romer* and *Windsor*, I conclude that defendants have failed to show that the ban furthers a legitimate state interest."); *Geiger*, No. 6:13-CV-01834-MC, 2014 WL 2054264 at *9-15; *Henry*, No. 1:14-CV-129, 2014 WL 1418395 at *15-16 ("even if no heightened level of scrutiny is applied to Ohio's marriage recognition bans, they still fail to pass constitutional muster."); *DeBoer*, 973 F. Supp. 2d at 769-75 ("the Court need not decide the issue because the MMA does not survive even the most deferential level of scrutiny, *i.e.*, rational basis review."); *Tanco*, No. 3:13-CV-

In *Romer,* 517 U.S. at 634, the U.S. Supreme Court reasserted its disdain for laws "born of animosity" by striking down a discriminatory law targeting same sex individuals. When the "sheer breadth [of the law] is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests." *Id.* at 632-33.

Much like in *Windsor*, by depriving same-sex couples, but not opposite-sex couples, of the recognition of marriage, Missouri creates "two contradictory marriage regimes" which relegate married same-sex couples to a "second class status." *Windsor*, 133 S. Ct. at 2694. Regardless of the level of scrutiny, the *Windsor* Court concluded that the sheer breadth of Federal DOMA is so discontinuous with the reasons offered that the law seems inexplicable by anything but animus. *Id.* Missouri may not apply DOMA to deprive same-sex couples, as a disfavored class, access to its divorce laws simply to express displeasure with their marriages. *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (O'Connor, J., concurring); *Romer,* 517 U.S. at 633.

Appellant was legally married in Iowa. His effort to obtain a dissolution in Missouri has openly imposed upon him a disadvantage and a separate status.

01159, 2014 WL 997525 at *5; *De Leon*, 975 F. Supp. 2d at 662-63; *Wright*, No. 60CV-13-2662; *Brinkman*, No. 13-CV-32572; *Huntsman*, No. 2014-CA-305-K.

Without question, Missouri's actions conflict with the constitutional principles articulated in *Windsor* and its progeny. While recognizing and protecting the choices that individuals make in same-sex relationships may cause some great concern, "inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws." *Bostic*, No. 14-1167, 2014 WL 3702493 at *17.

CONCLUSION

This case need only be about dissolution. It is not about creating a marriage. It is not about legally recognizing a marriage. In fact, this case is not even about any of the "protections" or "remedies" that are sometimes associated with a divorce – such as a determination of property distribution or the adjudication of child custody. Literally, as it pertains to M. S. and D. S. and the State of Missouri, this case is about nothing more than the Circuit Court's authority to say, "Dissolution of Marriage granted." Simply put, Missouri DOMA does not preclude Missouri circuit courts from granting dissolutions to same-sex couples.

Thus, for the reasons stated above, Appellant asks this Court to reverse and vacate the Judgment of the Circuit Court and remand with instructions that it has subject matter jurisdiction and that neither Missouri constitutional nor statutory authority preclude it from considering Appellant's Petition for Dissolution of Marriage or issuing Appellant's requested Judgment and Decree of Dissolution of Marriage.

Should this Court decide that Missouri constitutional and/or statutory authority precludes the trial court from considering Appellant's Petition for Dissolution of Marriage or granting a dissolution, for the reasons stated above, Appellant asks this Court to declare the constitutional and/or statutory provision unconstitutional pursuant to the Fourteenth Amendment to the Constitution of the

United States; to reverse and vacate the Judgment of the Circuit Court; and, to remand with instructions that the Circuit Court consider Appellant's Petition for Dissolution of Marriage in light of its authority to issue Appellant a judgment and decree of dissolution; and for such other relief as the Court deems proper in the circumstances.

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 19,549 words, excluding the cover, this certification and the signature block, and the certificate of service, as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that the electronic copy of this Brief was scanned for viruses and found to be virus free; and that notice of the filing of this Brief and accompanying Appendix, along with a copy of this Brief and Appendix were sent through the Missouri eFiling System on this 18th day of August, 2014, and a copy of said Brief and Appendix were mailed to Respondent D. S., via Regular U.S. Mail and Certified Mail, and via Personal Service, at:

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