IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2017-CP-00828

MICHAEL T. GERTY; and
THE STATE OF MISSISSIPPI *EX REL.*
JIM HOOD, ATTORNEY GENERAL **APPELLANTS**

VS.

JOESIE R. GERTY **APPELLEE**

On Appeal from the Chancery Court of Harrison County,
First Judicial District, Cause No. C2401:13-cv-2446-2

BRIEF OF APPELLANT THE STATE OF MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Michael T. Gerty, *pro se*, Appellant.

2. The State of Mississippi *ex rel*. Jim Hood, Attorney General, Appellant.

3. Joesie R. Gerty, Appellee.

4. Justin L. Matheny and the Office of the Mississippi Attorney General, counsel for Appellant the State of Mississippi *ex rel*. Jim Hood, Attorney General.

5. Michael Channing Powell, counsel for Appellee.

6. Thomas W. Teel, Anna Ward Sukmann, and the Perry, Murr, Teel & Koenenn law firm, former counsel for Michael T. Gerty in the Chancery Court below.

S/Justin L. Matheny
Justin L. Matheny
Counsel for Appellant the State of Mississippi ex rel. Jim Hood, Attorney General

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STATEMENT OF THE ISSUES

After the Gertys tried competing fault-based divorce claims, the Harrison County Chancery Court simultaneously: rejected their fault grounds; secretly invented its own constitutional claim; eliminated Mississippi Code Section 93-5-2's mutual consent provisions; and awarded the Gertys an irreconcilable differences divorce. The Chancery Court's unprecedented actions raise the following issues with respect to the State:

1. Did the Gertys sufficiently prove their fault-based divorce grounds and thereby render any constitutional issues moot?

2. If not, did the Chancery Court exceed its authority under controlling law, and the rules of civil procedure, by adjudicating Section 93-5-2's constitutionality *sua sponte*?

3. If the Chancery Court legitimately addressed Section 93-5-2's validity, did it erroneously hold the Fourteenth Amendment's Due Process Clause renders the statute's mutual consent provisions facially unconstitutional?

STATEMENT OF ASSIGNMENT

From the State's viewpoint, straightforward reasons warrant reversing the Chancery Court's judgment without reaching any constitutional issues' merits. Even if the State is somehow incorrect, and reviewing the merits of the trial court's constitutional ruling is necessary, this appeal meets Rule 16 criteria for Supreme Court retention. Given the appeal implicates a trial court's lack of authority to strike down legislative enactments *sua sponte*, and significant constitutional issues, the Supreme Court should retain this appeal.

STATEMENT OF THE CASE

Background

As far back as Hutchinson's Code of 1848, the Legislature prescribed the grounds for a Mississippi divorce. It revised the grounds numerous times over the next 125 years. Then, at its 1976 Regular Session, lawmakers added "irreconcilable differences" as a means to dissolve a marriage upon the parties' mutual consent. *See* Laws, 1976, ch. 451, § 1. The 1976 law required the parties' agreement on all divorce-related issues.

In 1990, the Legislature relaxed the consent requirement. The parties could agree to an irreconcilable differences divorce but reserve any remaining issues for a chancellor's resolution. *See* Laws, 1990, ch. 584, § 1. That mutual consent scheme endures today, codified as follows, in pertinent part:

> (1) Divorce from the bounds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.
>
> (2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.
>
> (3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any

> motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

Miss. Code Ann. § 93-5-2.

The Mississippi Supreme Court has never specifically held the Legislature's divorce grounds, or Section 93-5-2's provisions, unconstitutional. The United States Supreme Court, likewise, has never held any state's substantive divorce laws violate the federal constitution—and certainly has never held divorce constitutes a constitutionally-protected fundamental right. The Chancery Court below, in one fell swoop, raised those issues *sua sponte* post-trial, added the State as an involuntary party, and declared Section 93-5-2 facially unconstitutional.

The Gertys' Divorce Suit

Joesie R. Gerty and Michael T. Gerty married in Harrison County on May 7, 2005. [R. 9].[1] They filed a sworn "Joint Complaint for Divorce (Irreconcilable Differences)" on September 18, 2013 in the Harrison County Chancery Court. [R. 9-12]. The Joint Complaint included an executed "Separation and Child Custody and Property

[1] This brief cites to the Clerk's Papers in the 983-page record on appeal using this format: "R. (page #)." Cites to record pages included in the State's Record Excerpts use this parallel citation format: "R. (page #); State R.E. (excerpt #)."

Settlement Agreement" (the "PSA"). [R. 14-23].

The PSA, among other things, divided the Gertys' property, required Michael to pay Joesie alimony for five years, and established custody and child support arrangements for their then three-year-old son. [R. 14-23]. The PSA provided the Gertys would share "joint legal custody" of their son, with Michael responsible for physical custody during the school year and Joesie responsible in the summertime. [R. 14-15]. The PSA included monthly and holiday visitation periods. [R. 15-16]. It also established the parties "agreed and understood that this Agreement is not contingent upon a divorce being granted." [R. 19].

The Chancery Court never entered a final judgment on the Gertys' September 2013 Joint Complaint. Meanwhile, for nearly two years after executing the PSA, the Gertys reportedly abided by all its terms. [R. 379-81]. In Fall 2013, Michael, a Recruit Division Commander in the Navy, moved to Kenosha, Wisconsin and later to Haynesville, Illinois. [R. 252, 257-58, 268-69]. Joesie remained in the Mississippi Gulf Coast area. [R. 322]. Under the PSA, Michael had physical custody of their son in Wisconsin and Illinois during the 2013-2015 school years and Joesie had custody in Mississippi over the Summers in 2014 and 2015. [R. 377-78].

In June 2015, things changed. While the Gertys' son was in Joesie's physical custody in Mississippi, Joesie hired an attorney and filed a "Withdrawal of Consent to Divorce on Irreconcilable Differences." [R. 29-32]. She also filed a "Complaint for Divorce" that pled grounds of adultery, habitual cruel and inhuman treatment, desertion, and alternatively, irreconcilable differences. [R. 33-40]. Joesie quickly moved for temporary relief, including custody rights. [R. 41-44].

Michael opposed the motion for temporary relief, [R. 45-48], answered Joesie's complaint, and counterclaimed for divorce in July. [R. 51-57]. Michael's counterclaim asserted the PSA should be enforced, and, alternatively, sought a divorce on adultery and habitual cruel and inhuman treatment grounds. [R. 55-56].

Neither party pled Section 93-5-2, or any other Mississippi divorce laws, are unconstitutional. Joesie and Michael never subsequently amended their pleadings, or otherwise challenged Section 93-5-2 at any time.

On July 14, the Chancery Court heard Joesie's temporary relief motion. Both parties put on evidence ostensibly limited to the ***Albright*** factors. [R. 249-406]. The Chancery Court ruled from the bench and awarded Joesie temporary primary care and physical custody of the son as well as child support. [R. 399-403]. On August 6, the court memorialized its ruling in a temporary order. [R. 58-65].

On December 7 and 9, 2015, and May 2-4, 2016, the Gertys tried Joesie's divorce complaint and Michael's counterclaim. [R. 407-939]. Five witnesses testified and twenty-eight exhibits were accepted in evidence or marked for identification. [*See* R. 246-48]. Nobody argued any divorce laws, much less Section 93-5-2, are unconstitutional. The trial proof had no bearing on Section 93-5-2's constitutionality. Neither the parties nor the Chancery Court put the Attorney General on notice that Section 93-5-2's validity would be adjudicated. The State had no say in the case before final judgment.

The Chancery Court's Rulings

Six months after the trial, on November 15, 2016, the Chancery Court issued a surprising final judgment. [R. 79-124; State R.E. 2]. The judgment initially denied Joesie's divorce on desertion grounds, and both parties' divorce on competing adultery and habitual cruel and inhuman treatment grounds. [R. 81-86; State R.E. 2]. Then, the judgment simultaneously: asserted the issue of Section 93-5-2's constitutionality; found it violates a fundamental right to "unilateral no fault divorce" allegedly established in ***Obergefell v. Hodges***, 135 S.Ct. 2584 (2015), and other decisions; and held Section 93-5-2 is "unconstitutional to the extent it requires mutual consent" and "the Attorney General of the State of Mississippi is hereby joined and added as a necessary party hereto." [R. 88-102; State R.E. 2]. Based on striking down Section 93-5-2, the judgment granted the Gertys an irreconcilable differences divorce, and approved some of the PSA. [R. 102-04; State R.E. 2]. However, the judgment substantially modified the PSA's child custody provisions. For example, it awarded primary physical custody of the Gertys' son to Joesie, and nearly doubled Michael's monetary child support obligation going forward. [R. 104-10; State R.E. 2].

The November 2016 judgment did not fully satisfy anybody. On November 22, Michael moved for reconsideration. [R. 125-29]. Joesie moved for reconsideration the following day. [R. 130-33]. On December 6, the State also moved to alter or amend the judgment under Rules 59 and/or 60.[2] [R. 136-40].

On March 23, 2017, the Chancery Court heard the Gertys' and the State's

[2] The State filed its motion over ten days after the November 15 judgment because the Attorney General was not timely provided a copy. The Clerk's Office initially mailed the judgment to the wrong address. [R. 134-35]. The State timely sought Rule 60 relief in any event, and the Gertys' post-trial motions tolled its time to appeal. *See* Miss. R. App. P. 4(d).

motions. [R. 940-68]. The Gertys disputed the court's failure to grant their divorce on fault grounds, and each complained about aspects of the judgment's terms. [R. 941-57]. The litigants agreed, meanwhile, that no party ever questioned Section 93-5-2's constitutional validity, and the Chancery Court lacked authority to assert and adjudicate that issue by itself.

The State pointed out, in addition to the flaws in the merits of the judgment's constitutional analysis, well-settled Mississippi law prohibits trial courts from deciding constitutional questions litigants never raised. [R. 136-40, 957-58]. The State further established *sua sponte* constitutional rulings are likewise improper where, as here, nobody complied with Rule 24(d)(2). [R. 136-40, 958-60].

Michael's counsel objected to the trial court's *sua sponte* ruling:

> 2. The Court found the Irreconcilable Differences divorce statute unconstitutional, stating:
>
> > **ORDERED AND ADJUDGED** that pursuant to Mississippi Rules of Civil Procedure 57 and 15(c), **SECTION 93-5-2 OF MISSISSIPPI CODE OF 1972, AS AMENDED, IRRECONCILABLE DIFFERENCES DIVORCE,** is hereby declared unconstitutional to the extent that it requires mutual consent.
>
> 3. This issue was not pled by either Plaintiff or Defendant, nor noticed by the court, nor argued by either party. The attorney general was not noticed of this issue prior to the court addressing the issue in its judgment.
>
> 4. For these reasons, Michael Gerty asserts that the Court erred in this ruling.

[R. 125]. Joesie likewise objected. At the post-trial motions hearing, her counsel adopted the State's position:

> MR. POWELL: Your Honor, I do want to say something about the constitutionality issue, and that is that I read what the Attorney General wrote and the cases cited there, and I agree with the Attorney General in that issue, in that while some statutes may be unconstitutional, nobody asked this Court to determine that that was unconstitutional. So I would ask the Court to set aside that aspect of this judgment.

[R. 948].

On June 8, the Chancery Court entered an "Amended and Restated Judgment of Divorce" (the "amended judgment"). [R. 143-207; State R.E. 3]. Without addressing contrary and controlling Mississippi Supreme Court precedent, the amended judgment discarded any notion the court lacked authority to decide Section 93-5-2's constitutionality *sua sponte*. [R. 146-59; State R.E. 3]. Next, after again denying Joesie's and Michael's asserted grounds for a divorce, [R. 159-63; State R.E. 3], the amended judgment restated the argument that Section 93-5-2 violates the parties' constitutional rights under ***Obergefell*** and other decisions. [R. 163-79; State R.E. 3]. Then the Chancery Court revised the original judgment with respect to certain property division and custody issues, [R. 179-93; State R.E. 3], and again held Section 93-5-2 is unconstitutional. [R. 193; State R.E. 3].

On June 14, Michael appealed. [R. 208-10]. Seven days later, the State also timely appealed. [R. 225-26].

SUMMARY OF THE ARGUMENT

Nearly two years after Joesie and Michael Gerty agreed to a divorce and settled their custody and property issues, Joesie wanted better terms. She sued Michael on fault grounds. Michael counterclaimed with his own fault grounds. The Gertys tried their fault-based claims to the Harrison County Chancery Court. In November 2016, the trial court shocked everyone. It rejected all the Gertys' fault claims, struck down Code Section 93-5-2's mutual consent provisions *sua sponte* as facially invalid under the Fourteenth Amendment's Due Process Clause, and awarded an irreconcilable differences divorce on different terms from the Gertys' prior settlement agreement.

After entering its November 2016 final judgment, the Chancery Court eventually sent the Attorney General's Office notice of its *sua sponte* constitutional ruling. The State timely objected. The Gertys also objected, and asserted they never tried or specifically pled any constitutional issues prior to judgment. The litigants' post-judgment protest failed. The Chancery Court's June 2017 amended judgment swept aside the parties' objections, and re-affirmed its prior judgment invalidating Section 93-5-2 and modifying the Gertys' settlement agreement.

The first, and possibly only, question this appeal must resolve is whether the Gertys proved their competing fault grounds. The State takes no position on the merits of the Gertys' fault-based claims. But if their proof warrants a fault-based divorce, this Court can grant that relief here and, under the well-established constitutional avoidance doctrine, obviate any need to address any constitutional issues.

Even if the Gertys are not entitled to a fault-based divorce, the Chancery Court's amended judgment should be reversed. Decades of Mississippi Supreme Court

precedent prohibits, without exception, trial courts from raising and deciding constitutional issues *sua sponte*. With all due respect, the Chancery Court broke that law. When all the parties complained, the court overruled their objections and disregarded controlling authority. The amended judgment instead argued four "noteworthy exceptions" justified its *sua sponte* constitutional adjudication. Mississippi law supports none of them. Each so-called exception would effectively render the bar to *sua sponte* constitutional rulings in every case no bar in any case.

The Chancery Court also violated Rule 24(d)(2). Nobody put the Attorney General on notice of any constitutional challenge before the Chancery Court deemed Section 93-5-2 unconstitutional. Leaving post-judgment motions as the State's and the Gertys' only option to dispute the trial court's constitutional result prejudiced the parties. A belated and limited opportunity to challenge the judgment did not cure the due process problems in the Chancery Court's tainted *sua sponte* constitutional ruling.

If the constitutional issues' merits must be addressed, this Court should reverse and render. The Chancery Court incorrectly determined unilateral no fault divorce constitutes a fundamental right protected by the Fourteenth Amendment's Due Process Clause. No court has ever held such a fundamental right exists. No court has ever subjected a substantive state divorce regulation to heightened Fourteenth Amendment scrutiny. To the contrary, the United States Supreme Court's only opinion on point requires that states' substantive divorce regulations satisfy rational basis review.

The Chancery Court disregarded the Supreme Court's precedent and instead crafted is own, new, fundamental right to unilateral no fault divorce. It disregarded the fact that state courts cannot enlarge the Fourteenth Amendment's scope, as well as the

Supreme Court's careful process for determining whether an interest constitutes a constitutionally-protected fundamental right. It also incorrectly interpreted the Supreme Court's decisions concerning a right to marry, expressive association rights reserved for organizations exercising First Amendment freedoms, and privacy rights, to come up with its novel fundamental right to unilateral no fault divorce.

Since unilateral no fault divorce implicates no fundamental right, Section 93-5-2's mutual consent scheme must only satisfy rational basis review. The statute clearly passes that test which prohibits courts from judging the wisdom of legislative policy, and instead only requires that a statute rationally advance any legitimate governmental interest.

As examples, Mississippi, and all states, have legitimate interests in protecting and preserving marriages, mitigating the potential harm to spouses and children caused by divorce proceedings, and encouraging an orderly and efficient resolution of divorce actions when they become necessary. Studies show that, at most, mutual consent divorce versus pure unilateral no fault divorce is a debatable policy question. Rational Mississippi legislators could conclude, among numerous other things, that their mutual consent-based divorce scheme legitimately protects spouses and children, establishes equality in the divorce process, and prevents premature divorce actions. Section 93-5-2 easily satisfies rational basis review. The fact that reasonable arguments exist both for and against a policy approach does not prove it unconstitutional.

Finally, the Mississippi Coalition Against Domestic Violence's *amicus* brief fails to improve on the amended judgment's flawed arguments. The Coalition says next-to-nothing about Section 93-5-2s's constitutionality and instead focuses on why it believes

unilateral no fault divorce is a better policy than the Legislature's current mutual consent-based approach. The Coalition's policy arguments do not prove Section 93-5-2 is unconstitutional, and also fail to acknowledge recent Code changes which address many, if not all, of its concerns.

ARGUMENT

I. If the Gertys Proved Divorce Grounds, then the Chancery Court's *Sua Sponte* Constitutional Ruling Should be Vacated.

The initial, and potentially only, question this appeal must resolve is did Joesie and/or Michael prove their divorce grounds. Both Joesie and Michael pled fault grounds, and tried them over several days. [*See* R. 249-939]. The Chancery Court denied their competing claims. [R. 81-86, 159-63; State R.E. 2 & 3].

The State was not added as an involuntary party before the November 2016 judgment and was not a trial participant. It takes no position on the merits of the Gertys' divorce grounds now, except to point out that Mississippi appellate courts (and trial courts) are duty-bound to avoid constitutional questions "where the issues involved in a particular case are such that the case may be decided on other grounds." ***Warner-Lambert Co. v. Potts***, 909 So. 2d 1092, 1093 (¶3) (Miss. 2005).

If the Chancery Court erred in denying the Gertys' divorce on fault grounds, no reason to address Section 93-5-2's constitutional validity exists. In that event, under the constitutional avoidance doctrine, this Court should render a divorce judgment on grounds, address any necessary issues regarding custody and property, vacate the Chancery Court's holding regarding Section 93-5-2, and dismiss the State.

II. The Chancery Court Exceeded its Authority in Striking Down Section 93-5-2 *Sua Sponte*.

If the Gertys do not deserve a divorce on grounds, this Court must address the Chancery Court's unauthorized *sua sponte* invalidation of Section 93-5-2. The scope of a lower court's authority is a legal question. Appellate courts review legal questions *de novo*. ***Stratton v. McKey***, 204 So. 3d 1245, 1248 (¶8) (Miss. 2016).

A. The Chancery Court improperly raised and adjudicated its own constitutional claim.

Courts possess many powers. Their authority is not limitless, however, particularly when it comes to invalidating a legislative act. No court can invent a constitutional claim, gather its own extra-record evidence, try its claim in chambers against an empty chair, and declare its opinion of a statute the winner. The law protects litigants, and ultimately all Mississippians, from that judicial overreach—no matter how well-intentioned a court's actions.

Decades of uncontradicted precedent bars Mississippi trial courts from raising and deciding constitutional issues *sua sponte*. *E.g.*, ***Martin v. Lowery***, 912 So. 2d 461, 464-66 (¶¶8-11) (Miss. 2005); ***Lawrence County Sch. Dist. v. Bowden***, 912 So. 2d 898, 900 (¶¶4-5) (Miss. 2005); ***City of Jackson v. Lakeland Lounge of Jackson***, 688 So. 2d 742, 749 (Miss. 1996); ***Smith v. Flour Corp.***, 514 So. 2d 1227, 1232 (Miss. 1987); ***Estate of Miller v. Miller***, 409 So. 2d 715, 718 (Miss. 1982). As a matter of law, "a statute's constitutionality will not be considered unless it has been specifically pleaded." ***Martin***, 912 So. 2d at 464 (¶8). "A specifically pleaded issue is one that has been raised in a proper motion before the court." ***Id.*** at 464-65 (¶8). Absent a party's specific pleading, "a trial court may not raise the constitutional issue

sua sponte." ***Id.*** at 465 (¶8). Accordingly, as in ***Martin***, and consistent with every prior case on point, although "a chancellor does have the power to hold a statute unconstitutional, **constitutionality must first be specifically pled before the power of review is vested in the trial court**." ***Id.*** at 466 (¶11) (emphasis added).

The Chancery Court violated ***Martin***'s controlling line of precedent. The Gertys filed a divorce complaint and counterclaim. [R. 33-40; 51-57]. They tried the case over several days. [*See* R. 407-939]. Neither Joesie nor Michael ever specifically pled, contended, tried, or even mentioned whether Section 93-5-2 is unconstitutional. In fact, even after the Chancery Court struck the statute ostensibly to their benefit, both conceded the issue was never properly before the court. [R. 125; 948]. The Chancery Court lacked any authority to consider Section 93-5-2's constitutionality. ***Martin***, 912 So. 2d at 466 (¶11); ***Lawrence County***, 912 So. 2d at 900 (¶¶4-5); ***Estate of Miller***, 409 So. 2d at 718.

In its *sua sponte* constitutional ruling's wake, the Chancery Court tried to justify its misstep once all the parties objected post-judgment. The amended judgment did not confront the ***Martin*** line of cases. Instead, it argued four "noteworthy exceptions" to the bar against *sua sponte* constitutional adjudication authorized its extraordinary action. Based on misconstruing an outdated version of *Corpus Juris Secundum* and non-Mississippi case law, the amended judgment posited that courts may spontaneously adjudicate constitutional questions "when a statute is patently unconstitutional on its face," "when a statute is void," "where the court's jurisdiction is affected," or "where the Court's plenary powers are affected." [R. 151; State R.E. 3].[3]

[3] Pages 22-23 of the amended judgment also argued the rules of civil procedure authorized its *sua sponte* maneuver. [R. 164-65; State R.E. 3]. But the Gertys admittedly never

With all due respect to the Chancery Court, controlling Mississippi authority trumps hornbook generalizations and other jurisdictions' case law. Mississippi law, for good reasons, does not recognize the amended judgment's so-called "noteworthy exceptions." Otherwise, it would always be open season for unlicensed *sua sponte* constitutional litigation in every trial court throughout the state.

The amended judgment's first proposed exception, "when a statute is patently unconstitutional on its face," is unworkable. As its label suggests, "patently unconstitutional" is entirely subjective. That standard would afford a trial court unfettered discretion to ignore the bar against *sua sponte* constitutional adjudication. The Mississippi Supreme Court has already rejected any such exception that would swallow the rule.

For example, entirely unlike the Gertys' case here, in ***Estate of Miller***, a prior United States Supreme Court decision spoke directly to the statute-in-question's constitutionality. 409 So. 2d at 717. That still did not authorize the trial court to challenge the "patently unconstitutional" statute on its own.

Miller's estate and Lena Bell Miller Watson sued Frank Miller to confirm Lena Bell as the estate's sole heir-at-law. ***Id.*** at 716. Former Code Section 91-1-15, which allowed illegitimate children to inherit from their mothers, but not their fathers, prohibited Frank, an illegitimate son of J.D. Miller, from inheriting through the estate. ***Id.*** at 717. The parties tried the case, and nobody ever questioned Section 91-1-15's

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asserted any claim that Section 93-5-2 is unconstitutional, put on no proof on that unpled claim at trial, and objected to the ruling post-trial. Rule 15(d), which allows pleading amendments for claims "tried by expressed or implied consent of the parties," does not apply here. ***Martin*** and its predecessors, moreover, span both pre-rules and post-rules Mississippi practice. The rules provide no vehicle to skirt the prohibition on adjudicating an unpled constitutional claim *sua sponte*.

validity. ***Id.***[4]

After the parties rested, the chancellor surreptitiously invalidated Section 91-1-5 and held both Frank and Lena Bell were the estate's heirs-at-law. ***Id.*** When Lena Bell's counsel questioned the trial court's *sua sponte* constitutional ruling, the chancellor explained "the Court holds that Section 91-1-15 is unconstitutional by virtue of the holding of the U.S. Supreme Court in ***Trimble v. Gordon***." ***Id.***

The United States Supreme Court's decision in ***Trimble v. Gordon*** held the Illinois Probate Act facially violated the equal protection rights of illegitimate children. 430 U.S. 762, 776 (1977). Nevertheless, even though the Illinois law was "similar to that of Mississippi," on appeal in ***Estate of Miller***, the Mississippi Supreme Court reversed the chancellor's *sua sponte* constitutional ruling. 409 So. 2d at 718. No matter how "patently" unconstitutional the chancery court thought former Section 91-1-15 was, the Supreme Court held "the constitutionality of the statute was not properly before the lower court," and therefore the chancery court "erred in declaring the statute unconstitutional of its own volition." ***Id.***

A trial court's singular conviction that a statute is patently unfair does not render it patently unconstitutional. As explained below in Section III, unlike former Section 91-1-15, current Section 93-5-2 is not "patently unconstitutional on its face," or otherwise unconstitutional. But even if it could be, just like ***Estate of Miller***, a subjective belief regarding the degree of Section 93-5-2's unconstitutionality did not authorize the Chancery Court to adjudicate the issue *sua sponte*.

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[4] Justice Roy Noble Lee colorfully observed that the "parties, in their pleadings, should have hit the issues of illegitimacy, unconstitutionality, and statute of limitations head on like two wild rams during the mating season. . . . [Instead,] they danced, bobbed and weaved like boxers in the ring, skirting those questions." ***Id.***

The amended judgment's second purported exception would allow a lower court to strike down a statute on its own accord "when the statute is void." That is a clumsy way to say a constitutional issue can be adjudicated *sua sponte* anywhere, at anytime.

"Unconstitutional" statutes are "void" statutes. *See* ***State v. Bd. of Sup'rs of Bolivar County***, 72 So. 700 (Miss. 1916) (if a statute conflicts with the Constitution, it "is therefore void"). If a trial court's subjective opinion that a statute is "void" triggers *sua sponte* constitutional review, mere belief a statute is "unconstitutional" would likewise authorize the challenge. The entire ***Martin*** line of cases would be meaningless. A so-called "voidness" exception does not legitimize the Chancery Court's *sua sponte* examination of Section 93-5-2's constitutionality.[5]

The amended judgment's third supposed exception would allow *sua sponte* constitutional adjudications "where the court's jurisdiction is affected." The broad concept of jurisdictional examination cannot be conflated with challenging a statute's constitutional validity *sua sponte*.

Nobody disputes that a court may, and should, examine its subject matter jurisdiction on its own accord. For instance, footnote two of the amended judgment cites ***Liberty Mutual Insurance Company v. Wetzel***, where the Supreme Court dismissed a Title VII appeal *sua sponte* after a district court failed to enter a Rule 54(b) judgment, and the federal interlocutory appeal statute was not otherwise satisfied. [R.

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[5] The amended judgment's "statute is void" theory might make sense when a court raises a non-constitutional issue *sua sponte*, such as, where subsequent repeal renders a statute "void." For example, ***United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.***, 508 U.S. 439, 445-47 (1993), cited at pages 14-15 of the amended judgment, [R. 156-57; State R.E. 3], did not involve a *sua sponte* constitutional adjudication. Rather, the Court examined the objective fact of whether Congress previously repealed a statute involved in the litigation. If repealed, the statute did not exist, and was thus "void." ***Bank of Oregon*** does not prove a court can assert a constitutional claim *sua sponte*.

151 (citing ***Wetzel***, 424 U.S. 337, 742-46 (1976)); State R.E. 3]. The Court examined its own jurisdiction *sua sponte*. But that had nothing to do with an unpled constitutional challenge. ***Wetzel*** furthermore did not invalidate any statute, or even consider doing so, in examining whether its statutory appellate jurisdiction existed.

The lower court here literally invented its own constitutional challenge to generate the power to grant otherwise unauthorized relief. Neither ***Wetzel***, nor the amended judgment's other cited cases (all from beyond Mississippi), establish that trial courts can use unpled constitutional claims to create or destroy their ability to issue whatever relief they want. The Mississippi Supreme Court, meanwhile, has rejected that precise maneuver.

In ***Lawrence County***, for instance, a guidance counselor administratively protested a school district's non-renewal of her contract before the county school board. 912 So. 2d at 899 (¶2). The board affirmed, and she appealed to chancery court under the Education Employment Procedures Law of 2001. ***Id.*** The chancery court "held sua sponte that the Education Employment Procedures Law unconstitutionally confers jurisdiction on the chancery court." ***Id.***

On appeal, whether the education statutes "affected" the chancery court's jurisdiction was irrelevant. The Supreme Court automatically reversed, holding that "[i]n light of the fact that neither of the parties raised the constitutionality of Mississippi's Education Employment Procedures Law, the chancellor exceeded his powers in raising the issue *sua sponte*." ***Id.*** at 900 (¶6).[6]

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[6] The Mississippi Coalition Against Domestic Violence's *amicus* brief mentions ***Lawrence County*** examined the Education Employment Procedures Law's constitutionality after reversing the chancery court for its *sua sponte* adjudication violation. Coalition Br. at p. 14. The Court obviously took that step in ***Lawrence County*** because a simple analysis of the

A court's examination of its own subject matter jurisdiction is a recognized practice. Forging a *sua sponte* constitutional challenge to modify existing law, and thereby award unauthorized relief, is not. The amended judgment's fusion of those two concepts does not create an exception to the bar against *sua sponte* constitutional challenges.

The amended judgment's fourth, and most imaginative, alleged exception would allow *sua sponte* constitutional adjudication "where the Court's plenary powers are affected." Pages 10-11 of the amended judgment assumes Section 159 of the Constitution's assignment of "full jurisdiction" over "divorce and alimony" to chancery courts[7] equates to a "plenary power," and implicitly authorizes chancery courts to adjudicate any *sua sponte* constitutional claim related to divorce. [R. 152-53; State R.E. 3]. Its revolutionary empowerment theory is off-base for several reasons.

"Plenary" means "absolute" and "unqualified."[8] If a "plenary power" exception based on Section 159 existed, there would be no bar against *sua sponte* constitutional challenges in any chancery court whenever a lawsuit involves one of Section 159's listed

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procedures law demonstrated the enactment was constitutional. Here, as explained in Section III, just like in ***Lawrence County***, the statute at issue is constitutional. If any doubt about Section 93-5-2's constitutionality exists, however, the Chancery Court's *sua sponte* adjudication must be reversed and the State given a full opportunity to litigate the issue (only if a party, as opposed to a trial court, ever properly raises the issue in the future). Otherwise, the Coalition's interpretation of ***Lawrence County*** would always render the bar to *sua sponte* constitutional adjudication superfluous.

[7] Section 159 specifically grants chancery courts "full jurisdiction" in "all matters in equity," "divorce and alimony," "matters testamentary and of administration," "minor's business," "cases of idiocy, lunacy, and persons of unsound mind," and "all cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation." Miss. Const., art. 6 § 159.

[8] "Plenary." Merriam-Webster.com, Merriam-Webster, n.d. Web. 28 Dec. 2017., available on-line at: <http://www.merriam-webster.com/dictionary/plenary> (last accessed December 28, 2017).

subjects. The exception would swallow the rule.

A "plenary power" exception is also obviously misplaced here. Section 159 does not grant chancery courts absolute authority over divorce actions, or any other cases involving a Section 159 subject. Divorce causes of action are purely a creature of statute, and chancery courts lack authority to ignore a substantive statute to reach a desired result. *See, e.g.*, ***In re Estate of Smith***, 891 So. 2d 811, 813 (¶5) (Miss. 2005) (chancellor erred by disregarding statute governing estate's tax liability); ***Mississippi Div. of Medicaid v. Pittman ex rel. Pittman***, 171 So. 3d 583, 587 (¶19) (Miss. Ct. App. 2015) (chancery court could not ignore a statute just because it possessed subject matter jurisdiction over cases involving minors under Section 159).[9] A substantive statute is not merely advisory. It cannot be stricken *sua sponte*, just because a chancery court sees it as an obstacle "to equity" in any given case.

Moreover, Supreme Court precedents applying the bar to *sua sponte* constitutional adjudication negate any "plenary power" exception. ***Martin***, for example, involved an implied easement by necessity—*i.e.*, a pure "matter in equity" under Section 159. 912 So. 2d at 463 (¶3). After the chancery court struck down a code provision *sua sponte*, the fact that the case involved a "matter in equity" gave the Supreme Court no pause in reversing the judgment. ***Id.*** at 464-66 (¶¶8-11); *see also* ***Estate of Miller***, 409 So. 2d at 717-18 (chancellor erred by raising and deciding its own constitutional claim in an heirship dispute—a "matter testamentary and of

[9] These authorities also refute page 11 of the amended judgment's various suggestions that chancery courts possess unfettered constitutional authority "to do equity," and a legislative enactment relating to divorce (or other Section 159 matters) violates the separation of powers doctrine if the statute inhibits a chancery court's subjective ability to "dispose fully" of a matter as the court sees fit. [*See* R. 153; State R.E. 3].

administration" under Section 159). ***Martin***, ***Estate of Miller***, and every other reversal of a chancery court's *sua sponte* violation would not be on the books if Section 159 affords chancery courts "plenary power" to strike down statutes surreptitiously.

Lawsuits exist to resolve parties' disputes. But a Mississippi trial court cannot raise and resolve a constitutional dispute on its own. There are no "noteworthy exceptions." The Chancery Court below erred in examining Section 93-5-2's constitutionally validity *sua sponte*.

B. The Chancery Court also violated Rule 24(d)(2).

Mississippi Rule of Civil Procedure 24(d)(2) promotes basic due process and fairness principles, protects the public, and effectively outlaws trying constitutional claims against a strawman without advance notice. The Chancery Court compounded its *sua sponte* adjudication error by disregarding Rule 24(d)(2).

In any action for injunctive or declaratory relief targeting a statute's constitutionality, Rule 24(d)(2) requires that

> the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an opportunity to intervene and argue the question of constitutionality.

Miss. R. Civ. P. 24(d)(2). A trial court cannot adjudicate a statute's constitutionality without satisfying the rule. ***In re D.O.***, 798 So. 2d 417, 423 (¶22) (Miss. 2001). The error is further exacerbated, and dictates reversal, when coupled with a *sua sponte* constitutional ruling. *See* ***Martin***, 912 So. 2d at 466 (¶11) (holding "because neither party raised [the constitutional issue], nor was notice provided in advance to the Attorney General, and the chancellor sua sponte declared the statute unconstitutional, the chancellor exceeded his authority in holding [the statute] unconstitutional").

The Gertys never challenged Section 93-5-2's validity. The Attorney General's first notice of any dispute about it occurred only after the Chancery Court decided the issue on its own. [*See* R. 79-124; State R.E. 2]. Although Rule 24(d)(2) provides no specific time frame for notice, it is required "within such time as to afford [the Attorney General] an opportunity to intervene and argue the question of constitutionality." Miss. R. Civ. P. 24(d)(2). Notification wrapped in a final judgment cannot satisfy the rule.

Absent any notice, much less Rule 24(d)(2)-compliant notice, the November 2016 final judgment added the Attorney General as a party and simultaneously ordered relief against the State that nobody requested. Those actions violated the rule and basic due process principles. The violation was not, as the amended judgment reasoned, excusable as a "procedural irregularity" or "harmless error," or because post-trial procedures afforded the parties "ample time" to respond after the Chancery Court struck down Section 93-5-2. [*See* R. 158-59; State R.E. 3].

With respect to the amended judgment's post-trial proceedings argument, the facts that post-judgment procedures exist, and the State and Gertys exercised them, do not excuse any error. When a court adds a party and simultaneously awards judgment against it, the maneuver implicates due process concerns. ***Nelson v. Adams USA, Inc.***, 529 U.S. 460, 466 (2000). Entering judgment against a litigant without proper notice and an opportunity to be heard is a *per se* due process violation. ***Porter v. Porter***, 23 So. 3d 438, 449-50 (¶¶29-31) (Miss. 2009); *see also* ***First Jackson Securities Corp. v. B.F. Goodrich Co.***, 176 So. 2d 272, 275-76 (Miss. 1965) ("It is universally recognized that no judgment, order or decree is binding upon a party who has had no notice of the proceeding against him."); ***Hyde Constr. Co. v. Elton***

Murphy-Walter Travis, Inc., 86 So. 2d 455, 458 (Miss. 1956) (a party "'must, by service of process, by publication of notice, or in some equivalent way, be brought into court, and if judgment be rendered against him before that is done, the proceedings will be utterly void as though the court had undertaken to act where the subject matter was not within its cognizance'") (quoting *Griffith's Mississippi Chancery Practice* § 223 (2d ed. 1950)). And a post-trial mechanism imposing burdens on a party that it would not have had at trial does not cure the violation. ***Armstrong v. Manzo***, 380 U.S. 545, 551 (1965).

If properly noticed before trial, the State would have had no obligation to plead or prove anything. A legitimate challenge to Section 93-5-2 instead required one of the Gertys to specifically plead and prove the claim "beyond all reasonable doubt." ***Tunica County v. Town of Tunica***, 227 So. 3d 1007, 1015 (¶12) (Miss. 2017). Everyone would also have had an opportunity to present evidence at trial.

As things turned out below, none of that took place. The trial court rendered its November 2016 judgment, and only then simultaneously added the State as a defendant and gave the Attorney General *post hoc* notice. Then the burden shifted to the State to meet Rules 59's or 60's heightened standards, and ultimately disprove the judgment's validity absent any basic civil processes, such as discovery or a trial on the merits.

The Chancery Court effectively altered the State's (and Gertys') burden of proof and cut-off any evidence or debate on a preordained decision. The error tainted both its "final" and "amended final" judgments. The only way to resolve the State's post-trial motion was to "wipe[] the slate clean" and "restore [the State and the Gertys] to the position [they] would have occupied had due process of law been accorded to [them] in

the first place." ***Armstrong***, 380 U.S. at 552. The Chancery Court had to reverse the November 2016 judgment after the State objected, and then could only proceed to adjudicate Section 93-5-2's constitutionality if the parties properly pled the claim.

The "harmless error" doctrine likewise does not validate the Chancery Court's notice failure. A Rule 24(d)(2) violation is not "harmless" when the trial court strikes a statute down. It is automatic reversible error. *See* ***Pickens v. Donaldson***, 748 So. 2d 684, 692 (¶31) (Miss. 1999) (failure to notify the Attorney General of a constitutional challenge in the trial court "results in a procedural bar" rendering a "constitutional attack . . . without merit"); ***McDonald v. McDonald***, 850 So. 2d 1182, 1186 (¶11) (Miss. Ct. App. 2002) ("It is reversible error for a court to declare a statute unconstitutional without the Rule 24(d) notice.").

Nevertheless, assuming "harmless error" analysis could apply here, an "error" is only "harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the final outcome of the case." ***Bay Point Properties, Inc. v. Mississippi Transp. Comm'n***, 201 So. 3d 1046, 1056 (¶22) (Miss. 2016) (quotations and citation omitted). No notice that Section 93-5-2's validity would be questioned—before the November 15 judgment struck it down—prejudiced the State and the Gertys.

Invalidating a statute without following the rules, and without telling anyone until after-the-fact, is not a "trivial," "formal," "merely academic," or non-prejudicial error. If properly noticed before the Gertys' trial, the Attorney General could have appeared, challenged the extra-record evidence gathered by the trial court, conducted discovery, cross-examined witnesses, produced its own witnesses, and/or taken other

measures allowed under the rules. If the Gertys knew the trial involved an unpled constitutional issue, they would have approached their trial differently, or changed their litigation strategy altogether. Respectfully, the Chancery Court's mistake was anything but "harmless."

The amended judgment's constitutional holding should be reversed because its *sua sponte* constitutional adjudication was error, and litigating the constitutional issues without notice to the Attorney General compounded the error. If reversed on those grounds, the State should be dismissed and the case remanded for a new trial, with explicit instructions that the Chancery Court may only address any constitutional issues if the Gertys specifically plead them and meet the requirements of Rule 24(d)(2).

III. Section 93-5-2 is Constitutional.

Assuming the Chancery Court properly raised Section 93-5-2's validity on its own, and the merits of its constitutional argument must be examined, then this Court should reverse and render judgment for the State. The statute's mutual consent provisions comport with the Fourteenth Amendment.

The amended judgment's findings are not entitled to any deference. Section 93-5-2's constitutionality is a legal question, and "a trial court's rulings concerning the constitutionality of a statute are reviewed de novo." ***Tunica County***, 227 So. 3d at 1015 (¶11).

This Court's *de novo* review of Section 93-5-2's constitutionality implicates two interrelated standards. First, in any constitutional litigation, the party attacking a statute must "overcome the strong presumption" of the law's validity. ***Id.*** at 1015 (¶12) (internal quotations and citation omitted). "[C]ourts are without the right to substitute

their judgment for that of the Legislature as to the wisdom and policy" of a statute, "and must enforce it, unless it appears **beyond all reasonable doubt** to violate the Constitution." ***Id.*** (emphasis in original) (internal quotations and citation omitted).

Second, the amended judgment incorrectly distilled an implicit fundamental right to "unilateral no fault divorce" from the Constitution, and applied "strict scrutiny" to Section 93-5-2 under the federal Due Process Clause.[10] Under a federal substantive due process analysis, a statute generally must satisfy strict scrutiny only if it implicates a fundamental right. ***Harris v. Mississippi Valley State Univ.***, 873 So. 2d 970, 984 (¶36) (Miss. 2004) (a governmental infringement upon a fundamental right "either explicitly or implicitly guaranteed by the constitution" does not comply with the Due Process Clause unless the law "is narrowly tailored to serve a compelling state purpose") (citing ***Reno v. Flores***, 507 U.S. 292, 302 (1993); ***San Antonio Indep. Sch. Dist. v. Rodriguez***, 411 U.S. 1, 33-34 (1973)). However, where no fundamental right is implicated, a statute must only satisfy rational basis review. ***Id.*** ("If the right infringed upon is not fundamental, yet a substantive due process is lodged, the statute (or rule) will be upheld so long as it is reasonably related to a legitimate state purpose.") (citing ***Exxon Corp. v. Governor of Maryland***, 437 U.S. 117, 124-25 (1978)).

As explained below, only the latter rational basis standard applies here. Section 93-5-2's mutual consent provisions involve no fundamental right. Multiple rational bases support the statute. The Chancery Court erred in determining otherwise.

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[10] The amended judgment mentioned Section 14 of the Mississippi Constitution's due process provisions but relied solely on the federal Due Process Clause. Its argument only drew upon federal Fourteenth Amendment cases, and ultimately, if the amended judgment relied on both the Fourteenth Amendment and Section 14, the point is immaterial. The rights they protect are "essentially identical." *See* ***Tunica County***, 227 So. 3d at 1016 (¶17) (internal quotations and citation omitted).

A. "Unilateral no fault divorce" is not a constitutionally-protected fundamental right.

When the problem unfortunately arises, as the Gertys' case demonstrates, a couple's interests in dissolving their marriage are significant. Mississippi, and all states, also have important interests at stake in their citizens' domestic relations and afford various judicial procedures to everyone for obtaining a divorce. However, like countless other types of relief only available from a court, our state and federal Constitutions do not expressly provide a fundamental right to divorce.

The United States Supreme Court does not recognize a generic fundamental right to obtain a divorce. It has never held a specific right to obtain a "unilateral no fault divorce," or any particular means of achieving a divorce, qualifies as an implied fundamental right. Likewise, neither the Mississippi Supreme Court, nor any other American appellate courts, have ever put "unilateral no fault divorce," or any other particular method to achieve a divorce, on the fundamental rights pedestal. The amended judgment erred in taking that unprecedented step.

1. The Supreme Court has never elevated "unilateral no fault divorce," or even "divorce" itself, to fundamental right status.

Only a few implicit fundamental rights exist, beyond those the Constitution expressly protects:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" protected by the Due Process Clause includes the right to marry,. . . to have children,. . . to direct the education and upbringing of one's children,. . . to marital privacy,. . . to use contraception,. . . to bodily integrity,. . . and to abortion.

Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (internal citations omitted). No substantive fundamental rights to "unilateral no fault divorce" divorce, any

particular means for obtaining a divorce, or even divorce generally, are on the list. But the United States Supreme Court has addressed state divorce regulations and declined to make that sweeping proclamation.

Nearly fifty years ago, in the wake of ***Griswold v. Connecticut***, 381 U.S. 479 (1965) and ***Loving v. Virginia***, 388 U.S. 1 (1967), the Supreme Court examined the constitutionality of divorce filing fees which, distinct from the state's substantive enumerated causes for divorce, allegedly impeded indigent litigants' procedural right to court access. In ***Boddie v. Connecticut***, a class of women receiving state welfare assistance challenged Connecticut's fee scheme under the Due Process and Equal Protection Clauses. 402 U.S. 371, 372 (1971). ***Boddie*** invalidated the fee statute using a procedural due process analysis. ***Id.*** at 382-83. Although ***Boddie*** mentioned the fee statute imposed an "exclusive precondition to the adjustment of a fundamental human relationship," the Court held "only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." ***Id.*** at 383.

Boddie established that states cannot effectively prohibit indigent individuals from invoking the state-created judicial mechanism for obtaining a divorce through filing fees. But the Court stopped short of establishing a fundamental right which bars states from enacting substantive divorce conditions unless proven narrowly tailored to serve a compelling state interest. ***Id.***; *see also*, *e.g.*, ***Murillo v. Bambrick***, 681 F.2d 898, 903 n. 9 (3rd Cir. 1982) ("Although ***Boddie*** recognized that marriage was an important relationship, the Court, in holding that a state violated due process by

denying court access to indigents unable to pay divorce filing fees, did not explicitly recognize a fundamental right to marry, much less a fundamental right to divorce."), *cert. denied*, 459 U.S. 1017 (1982).

Soon after ***Boddie***, in ***Sosna v. Iowa***, the Court actually examined a challenge to a state's substantive divorce regulation. 419 U.S. 393, 395-96 (1975). The ***Sosna*** plaintiff married her husband in 1964, subsequently separated and moved from New York to Iowa with her children, and sought a divorce. ***Id.*** at 395. Mrs. Sosna alleged Iowa's residency requirement barred her divorce action and thereby violated her Fourteenth Amendment rights. ***Id.*** at 405.

Sosna noted Iowa's divorce scheme, like many others, "sets forth in considerable detail the grounds upon which a marriage may be dissolved and the circumstances in which a divorce may be obtained." ***Id.*** at 404. The Court also recognized the residency requirement was part of the state's "comprehensive regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States." ***Id.***

In rejecting Mrs. Sosna's challenge, the Court declined to elevate her asserted unfettered right to obtain a divorce to fundamental right status. Instead, the majority contrasted the interest in court access examined in ***Boddie*** with the Court's "right to marry" precedents in light of Iowa's regulatory scheme and explained a divorce

> is not a matter in which the only interested parties are the State as a sort of "grantor," and a divorce petitioner such as appellant in the role of "grantee." Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights. Where a married couple has minor children, a decree of divorce would usually include provisions for their custody and support. With consequences of such moment riding on a divorce decree issued by its courts, Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here.

> Such a requirement additionally furthers the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack. A State such as Iowa may quite reasonably decide it does not want to become a divorce mill for unhappy spouses who have lived there as short a time as appellant had when she commenced her action in the state court after having long resided elsewhere.

Sosna, 419 U.S. at 406-07.

Sosna did not subject Iowa's divorce regulation to heightened scrutiny. The Court simply looked for a rational basis supporting it, and found Iowa could "quite reasonably" set the conditions for a divorce action. ***Id.*** at 407-08. ***Sosna*** otherwise confirmed an individual's interest in obtaining a divorce is not a constitutionally-protected fundamental right requiring the state's divorce scheme to satisfy strict scrutiny.[11] Following ***Sosna***, and unless the Supreme Court ever says otherwise, substantive state divorce regulation of the methods for obtaining a divorce do not implicate fundamental rights and need only satisfy rational basis review.

2. The Chancery Court inappropriately manufactured a fundamental right to "unilateral no fault divorce."

Sosna is the Supreme Court's only and last word on whether substantive state divorce regulations implicate any fundamental rights. Instead of applying ***Sosna***, or even citing or discussing it, the amended judgment attempted to boost an interest in obtaining a unilateral no fault divorce to the fundamental right level. Its rationale is off-

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[11] That point is clear. Justice Marshall's ***Sosna*** dissent argued ***Boddie*** and the Court's marriage cases, such as ***Loving***, justified holding a "right to seek dissolution of the martial relationship" constitutes a fundamental right "closely related to the right to marry, as both involve the voluntary adjustment of the same fundamental human relationship." ***Sosna***, 419 U.S. at 419-20 (Marshall, J., dissenting). Justice Marshall's argument garnered only one other vote, and since ***Sosna***, a majority of the Court has never adopted his viewpoint. *See also* ***Lynk v. Superior Court No. 2***, 789 F.2d 554, 566 (7th Cir. 1986) (noting a conclusion that a fundamental right to obtain a divorce exists is "hard to square with ***Sosna v. Iowa***").

base, with all due respect, and its ultimate conclusion should be abdicated.

As a threshold matter, the Chancery Court relied exclusively upon its interpretation of United States Supreme Court precedents and the federal Constitution to create a new fundamental right. State trial courts, as an elementary matter, lack authority to do that.

Without doubt, state courts, including Mississippi trial and appellate courts, must "follow the decisions of the United States Supreme Court in interpreting federal constitutional rights." ***Gilliard v. State***, 614 So. 2d 370, 374 (Miss. 1992); *see also* ***State v. Smith***, 278 So. 2d 411, 415 (Miss. 1973) (Mississippi courts must adhere to United States Supreme Court decisions regarding federal constitutional questions and "apply the law announced, *if applicable to the case under consideration*") (emphasis added). By the same token, however, Mississippi courts cannot expand the scope of federal rights protected by the Fourteenth Amendment. Their obligation is precisely the opposite. Only the United States Supreme Court may extend the Fourteenth Amendment's application when it comes to a clash with state laws. As the Supreme Court has ordered, "when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal law than [the United States Supreme] Court has imposed." ***Minnesota v. Clover Leaf Creamery Co.***, 449 U.S. 456, 461 n. 6 (1981).

The Chancery Court exceeded its powers by extending the Fourteenth Amendment well-beyond the United States Supreme Court's precedents. That, in and of itself, negates its conclusion that a previously unrecognized fundamental right to unilateral no fault divorce exists.

Even if the Chancery Court below could assume the Supreme Court's role in the fundamental rights arena, it erred on the merits in fashioning a new right to unilateral no fault divorce. The Supreme Court has "always been reluctant to expand the concept of substantive due process because guide posts in this uncharted area are scarce and open-ended." ***Glucksberg***, 521 U.S. at 720 (internal quotations and citation omitted). Classifying an interest as fundamental also to a "great extent, place[s a] matter outside the arena of public debate and legislative action." ***Id.*** For those reasons, the Court requires "the utmost care" in identifying implicit fundament rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." ***Id.***

Only a carefully described and fundamental liberty interest that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed" rises to the level of a fundamental right. ***Id.*** at 721-22. An unfettered right to no fault divorce does not meet that standard. No court has ever held any particular method of dissolving a marriage is a fundamental right. Meanwhile, as the Supreme Court has recognized on numerous occasions throughout our country's history, "regulation of domestic relations . . . has long been regarded as a virtually exclusive province of the States." ***Sosna***, 419 U.S. at 404 (citing ***Simms v. Simms***, 175 U.S. 162, 167 (1899); ***Pennoyer v. Neff***, 95 U.S. 714, 734-35 (1878); ***Barber v. Barber***, 21 How. 582, 584 (1859)).

The Chancery Court turned a blind eye to ***Glucksberg***'s admonitions, and instead crafted a fundamental right to obtain a unilateral no fault divorce from the Supreme Court's marriage, expressive association, and privacy decisions. Carefully

examining those categorical precedents proves none support the amended judgment's leap to treat unilateral no fault divorce as a fundamental right.

With respect to the marriage cases, it is true the Supreme Court recently announced the "right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty." ***Obergefell***, 135 S.Ct. at 2598. ***Obergefell***'s recognition of a fundamental right to form a same-sex marriage, or a "right to marry" generally, does not establish an unqualified fundamental right to a unilateral divorce simply because divorce relates to marriage.

A federally-protected fundamental right does not exist merely since the Court has declared another closely-related right fundamental. For instance, in ***Glucksberg***, the Supreme Court rejected the contention that a right to physician-assisted suicide is fundamental because ***Cruzan v. Director, Missouri Department of Health*** held a dying person had the right to direct physicians to remove her from life support equipment. ***Glucksberg***, 531 U.S. at 725 (discussing ***Cruzan***, 497 U.S. 261 (1990)). Despite their virtually reciprocal relationship, the Court held a "decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection." ***Id.***

Similarly, the importance of two related interests does not render them both fundamental in the constitutional sense. The Court has established a fundamental right to have children, *see* ***Skinner v. Oklahoma ex rel. Williamson***, 316 U.S. 535, 541

(1942), and to direct children's education. *See* ***Meyer v. Nebraska***, 262 U.S. 390, 399 (1923). The Court has recognized "education is perhaps the most important function of state and local governments," and firmly held the government's provision of public education must comport with equal protection. ***Brown v. Bd. of Education***, 347 U.S. 483, 493 (1954). The Court has also confirmed, however, it does not follow that education is a fundamental right protected under the Fourteenth Amendment.

Both the interest in a child's education, and the right to direct that child's education and upbringing, are significant and related to the important interest of education generally. But relative importance to a recognized constitutional right does not render a related interest fundamental:

> the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative social significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
>
> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.

Rodriguez, 411 U.S. at 33-35 (internal citations omitted). As with an interest in assisted-suicide and education, a fundamental right to unilateral no fault divorce does not flow merely from the fact that marriage and divorce both involve marital relationships.

Beyond the surface-level problems with "if this, then that" logic founded on a right to marry, the amended judgment's fundamental right advocacy suffers from other defects. Its reasoning starkly fails to account for (or even mention) the Supreme Court's

Sosna decision. As discussed above, ***Sosna*** examined a substantive state divorce regulation and declined to recognize a fundamental right to divorce or apply heightened scrutiny. ***Sosna***, 419 U.S. at 407-08. The Court had already issued prominent "right to marriage" decisions when ***Sosna*** was decided in the mid-1970s, between its opinions in ***Loving*** and ***Zablocki v. Redhail***, 434 U.S. 374 (1978), and in the aftermath of its privacy rights cases stemming from ***Griswold***. That confirms an interest in attaining a divorce, while it may be important, is not fundamental. If such a right could be considered an outgrowth of the marriage cases, ***Sosna*** would have explicitly said so, or the Court would have at least subjected Iowa's substantive divorce restrictions to something more than rational basis review.

The amended judgment's rationale also ignores the material component of ***Obergefell***, and the other marriage cases, which is irrelevant when judging Section 93-5-2 or Mississippi's other divorce laws. ***Obergefell***, and its predecessors, dealt with state laws which excluded discreet classes of citizens from the institution of state-recognized marriage. The ***Obergefell*** majority crafted its holding upon the "synergy" between the Due Process and Equal Protection Clauses and reasoned the marriage prohibitions at issue burdened "the liberty of same-sex couples" as well as "central precepts of equality." 135 S.Ct. at 2603-04. The same is true for the Court's other preeminent marriage cases, such as ***Zablocki*** and ***Loving***, where it invalidated state laws restricting definitive classes of individuals from marrying. ***Zablocki***, 434 U.S. at 387-88; ***Loving***, 388 U.S. at 11.

Entirely different from the state laws at issue in ***Obergefell***, ***Zablocki***, and ***Loving***, Section 93-5-2 presents no equal protection problem. The statute applies to

anyone seeking an irreconcilable difference divorce regardless of race, sex, religion, national origin, or other identifiable characteristic. ***Obergefell***'s "synergy" rationale is ill-suited support for creating a stand-alone fundamental right to divorce, striking down Section 93-5-2, or subjecting the statute to anything more than minimal constitutional scrutiny.

Utilizing ***Obergefell***'s, and its predecessors', right to marry to create a new fundamental right to unilateral no fault divorce is also conceptually misplaced. Every legally-recognized marriage involves two consenting persons. Obtaining a marriage license involves an essentially ministerial act of confirming the parties' eligibility. ***Obergefell***'s right to marry protects a couple's joint interest in a legally-recognized marriage against arbitrary state eligibility regulation.

In contrast, dissolving a marriage involves different governmental interests and an entirely different process altogether. Often divergent interests of the parties themselves, as well as third-parties, are at stake in the judicial outcome. Divorce always requires a judicial determination to award relief, if any, and contested divorces always present a scenario where both parties do not agree on something, and often many things. In cases involving fault or where both parties do not consent to an irreconcilable differences divorce, moreover, the couple lacks a joint interest in the result.

If nothing else, these material distinctions justify affording the State greater authority to regulate divorce actions—as it always has had historically—as opposed to its somewhat more limited authority to regulate marriage eligibility given a couple's jointly-held right to marry under ***Obergefell***, and its predecessors. In other words, the Constitution necessarily gives states more room to regulate the complicated matters

often implicated in divorce actions than in the marriage eligibility context. That precludes the conclusion a fundamental right to marry, or otherwise, inhibits states' policy-making authority in the divorce area.

Beyond the marriage cases, the amended judgment also cites the Supreme Court's expressive association decisions as support for a fundamental right to unilateral no fault divorce. The Court has, on occasion, grappled with the limits of state regulation regarding large private groups' First Amendment freedoms to engage in political, social, economic, and ideological activities. *See* ***Boy Scouts of America v. Dale***, 530 U.S. 640 (2000) (exclusion of homosexuals from leadership); ***Roberts v. United States Jaycees***, 468 U.S. 609 (1984) (exclusion of women and older men from leadership). In those cases, the Court concluded states' interests in eradicating discrimination in public accommodations may, ***Roberts***, 468 U.S. at 628-29, or may not, ***Boy Scouts***, 530 U.S. at 656-69, justify mandating large groups engaged in expressive conduct to associate or treat certain individuals similarly. Those cases' holdings and rationale do not support the proposition that an individual has a fundamental right to unilaterally compel dissolution of his or her marriage rooted in the First Amendment.

As ***Roberts*** and ***Boy Scouts*** make clear, a group's expressive association rights protect collective speech-related interests. Thus, to warrant heightened constitutional protection against some governmental policy under an expressive association theory, some inhibition on speech-related interests must be implicated. *See* ***Boy Scouts***, 530 U.S. at 648 (explaining "to come within [the] ambit" of the First Amendment's protection of expressive association, "a group must engage in some form of expression"). An interest in unilaterally terminating one's marriage does not fit that mold. Because no

palpable connection exists between an individual's ability to obtain a divorce and an organization's ability to exercise its First Amendment rights to speech, assembly, petition the government, and religious exercise, the Supreme Court's recognition of constitutional protections for expressive association by no means renders unilateral no fault divorce a fundamental constitutional right.

Finally, like its other attempts to elevate unilateral no fault divorce to fundamental right status, the amended judgment's attempted linkage between unilateral divorce and ***Griswold***'s right to privacy is off-base. In ***Griswold***, the Court famously espoused constitutional privacy rights flow from its cases suggesting "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. Those privacy rights, more narrowly defined through ***Griswold*** and later cases, principally include heightened protections against criminal liability for engaging in particular activities constituting, or related to, intimate sexual conduct. *E.g.*, ***id.*** at 485 (married couples' use of contraception); ***Eisenstadt v. Baird***, 405 U.S. 438, 453 (1972) (unmarried couples' use of contraception); ***Roe v. Wade***, 410 U.S. 113, 153 (1973) (woman's decision to opt for abortion). None of those privacy cases make obtaining a unilateral no fault divorce a fundamental right.

For one thing, concluding ***Griswold*** established a fundamental right to unilateral no fault divorce defies logic. As mentioned above and here again, ***Sosna*** rejected a fundamental rights approach to divorce ten years after ***Griswold***—during the era when the Court decided many of its privacy rights cases.

Moreover, after ***Griswold***, the Court has pulled back the reins on the notion that

new fundamental rights can be "simply deduced from abstract concepts of personal autonomy," and since recognized that "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." ***Glucksberg***, 521 U.S. at 727 (citing ***Rodriguez***, 411 U.S. at 33-35). Personal decisions in divorce involve intimacy-related issues and the decision-maker's autonomy, just like certain intimacy-related decisions to use contraceptives or seek an abortion constituting privacy rights in ***Griswold***, and its progeny. But unlike those latter settings, divorce always involves two persons' (and oftentimes more) interests in the process, and those interests are divergent in nearly every case. Consistent with ***Sosna***, rather than ***Griswold*** or its successors, the State has greater room under the Constitution to regulate divorce, as it has throughout the country's history.

The Supreme Court has never held substantive state divorce regulations implicate fundamental rights. Unilateral no fault divorce does not qualify as a new fundamental right under the Supreme Court's marriage, expressive association, or privacy cases. The Chancery Court's amended judgment erred in holding otherwise.

B. Section 93-5-2 satisfies rational basis review.

Given Section 93-5-2's mutual consent requirements impair no fundamental right to unilateral no fault divorce, rational basis review is the appropriate means to evaluate the statute's constitutionality. To confirm its validity, this Court need only examine the rational reasons legislators could believe the statute advances any legitimate state interest. The enactment passes the test.

Important overarching principles govern rational basis review of legislative

decision-making. A strong presumption of Section 93-5-2's constitutional validity exists because rational basis review does not permit the judiciary to question "the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." ***New Orleans v. Dukes***, 427 U.S. 297, 303 (1975). Thus, consistent with the judiciary's obligation to safeguard the legislative branch's "independence and ability to function," under rational basis review

> those attacking the rationality of the [statute] have the burden to negative every conceivable basis which might support it. Moreover, because [courts] never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature. . .. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313-315 (1993) (internal citations and quotations omitted). The issue here boils down to whether Section 93-5-2 provides a "rational means of advancing a legitimate governmental purpose." ***Delahoussaye v. City of New Iberia***, 937 F.2d 144, 149 (5th Cir. 1991); *see also* ***Westbrook v. City of Jackson***, 665 So. 2d 833, 840 (Miss. 1995); ***Sharpe v. Standard Oil Co.***, 322 So. 2d 457, 460 (Miss. 1975), *appeal dismissed*, 425 U.S. 947 (1976).

Whether or not anyone disagrees with Section 93-5-2's mutual consent provisions as a policy matter, or doubts the statutory scheme's utility, the statute plainly advances legitimate governmental interests through rational means. The State has a paramount stake in regulating divorce, as shown through several interests, such as, protecting and preserving marriages, mitigating the potential harm to spouses and children caused by divorce proceedings, and encouraging an orderly and efficient

resolution of divorce actions when they become necessary. Documented support shows reasonable legislators could discern that mutual consent requirements rationally promote those goals. For example, in 2008, a policy analysis supported by detailed authorities concluded mutual consent provisions:

• protect children by making divorce more thoughtful on the part of spouses;

• protect economically dependent spouses by enhancing their bargaining power;

• protect spouses with children who lack a desire for a divorce from being left with solely the judicial process as a means to resolve custody determinations;

• establish equality in the divorce process;

• encourage amicability and settlement of issues involved in divorce actions, and alleviate problems attributable to unilateral no fault divorce where arguments regarding fault may be shifted to matters involving finances and custody;

• reduce the divorce rate;

• prevent premature divorce actions;

• alleviate the flaws attendant to unilateral no fault divorce, such as impairment of the economic interests of persons involved in dissolution proceedings; and

• have a minimal effect on divorce of incompatible spouses and increase the value of marriage.

Lynn Marie Kohm, *On Mutual Consent to Divorce: A Debate with Two Sides to the Story*, 8 APPALACHIAN J.L. 35, 44-51 (Winter 2008).[12]

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[12] Numerous other articles lend credence to these and other benefits associated with mutual consent divorce policies. *See*, *e.g.*, Allen M. Parkman, *The Contractual Alternatives to Marriage*, 32 N. KY. L. REV. 125, 135-41 (2005) (examining costs and effects of unilateral divorce as opposed to a mutual consent-based regime); Allen M. Parkman, *Reforming Divorce Reform*, 41 Santa Clara L. Rev. 379, 424-28 (2000) (contrasting benefits of mutual consent and unilateral divorce); Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 532-50 (1995) (economic theory analysis of benefits and burdens associated with mutual consent requirements); Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POL'Y 241, 258-62 (Winter 1993) (analyzing public policy considerations in the differences between fault/consent-based and no fault divorce schemes).

Counter-arguments to mutual consent policies exist. Detractors, as acknowledged in Professor Kohm's article, insist that mutual consent may cause delay, could promote marital disharmony, might stymie divorce between incompatible spouses, may disincentives marriage, and could trap innocent spouses in unwanted relationships. Kohm, *supra,* at 51-55. Along those lines, as the amended judgment points out, courts and commentators have criticized the Legislature's divorce scheme.[13] Mississippi law could be considered out-of-step with other jurisdictions in some respects.[14] And cherry-picked statistical snapshots can be interpreted to suggest Section 93-5-2 is cost-burdensome, and ineffective in promoting marriage.[15]

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[13] [*See* R. 166-68, 178 (citing and quoting ***Tackett v. Tackett***, 967 So. 2d 1264 (Miss. Ct. App. 2007); Deborah H. Bell, *The Cost of Fault-Based Divorce*, 82 MISS. L.J. SUPRA 131 (2013)); State R.E. 3]. While critical of Mississippi's divorce laws, neither Judge Irving's specially concurring opinion in ***Tackett***, nor Dean Bell's law review article, argue the Legislature's scheme is unconstitutional or unilateral divorce constitutes a fundamental right. In Judge Irving's words, ***Tackett*** merely demonstrated "the need for the legislature to take a fresh look at the grounds for allowing a divorce in this state." 967 So. 2d at 1268 (¶17) (Irving, J., specially concurring). Dean Bell's article similarly urges the Legislature to address her concerns by adopting a unilateral divorce option combined with restrictions, such as a waiting period. Bell, *supra*, at 144.

[14] [*See* R. 168 ("Mississippi and South Dakota are the only two states in the union which lack true unilateral no-fault divorce.") (citing Bell, *supra*, at 141); State R.E. 3]. The amended judgment's characterization may be technically correct, depending on "true" unilateral no fault divorce's definition. Although all have some form of "no fault divorce," essentially no two states' laws are identical in terms of various fault grounds, separation periods, types of available relief, and other issues implicated in a divorce action. *See* FAMILY LAW QUARTERLY, Vol. 46, No. 4, 530-533 (Winter 2013).

Unlike Mississippi, some states require divorce applicants to prove irreconcilable differences just as any other fault ground or require long waiting periods (both of which do not eliminate the possibility of no divorce being awarded, and do not necessarily reduce the delay, cost, and expense of divorce actions), and may even preempt no fault divorce altogether in cases involving child custody like the Gertys'. *See* Tenn. Code Ann. § 36-4-101 *et seq*. Under the Chancery Court's view that unilateral no fault divorce is a fundamental right, every state's various divorce policies would only be valid if they meet exacting scrutiny.

[15] [*See* R. 175-77 (comparing selected Mississippi marriage and divorce statistics); State R.E. 3]. Some flaws, among others, in the amended judgment's contentions founded on selected internet statistics include: (1) no accounting for the many conceivable reasons apart from

Additionally, the Gertys' proceedings below anecdotally demonstrate Section 93-5-2's potential shortcoming where both spouses apparently desire a divorce but one tactically withholds consent, and no complete settlement, or at least an agreement to litigate all contested custody and property issues, can be reached. If a chancery court rejects the parties' fault grounds for divorce (based on its view of the then-current facts elicited at trial), the net result may be that neither party receives a divorce at that time, leaving one or both spouses unfairly disappointed and frustrated.

A unilateral no fault divorce option, however, does not guarantee one or both spouses will not be ultimately disappointed and frustrated in the same scenario. Unilateral divorce does not eliminate gamesmanship—it merely changes the game. Instead of bargaining based on mutual consent where at least partial agreement must be reached, the parties must negotiate from the standpoint that either could force a unilateral divorce. That may oftentimes discourage one party from negotiating sincerely, or at all, particularly where random external factors exist, such as a party's belief that the court that will resolve the disputed custody and property issues favors him or her. Unilateral divorce will not cure the perceived unfairness, or potential disappointment and frustration, in the process.

In the end, the fallacy in the arguments against Section 93-5-2's mutual consent scheme is that, under rational basis review, the challenger must "negative every

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divorce laws which influence the marriage rate; (2) no attempt to square the proposition that Mississippi's divorce rate is relatively "high" (it is less than several other states, and relatively differs from all other states by a few percentage points, according to the internet page cited in the amended judgment) with its suggestions elsewhere that Section 93-5-2 unduly prevents many couples from obtaining a divorce; and (3) no objective comparative data showing that litigating contested issues in a Mississippi divorce action is more expensive than similarly-situated contested litigation under other states' nuanced no fault schemes.

conceivable basis which might support" the statute. ***Beach Communications***, 508 U.S. at 315 (internal quotations and citation omitted); ***Harris v. Hahn***, 827 F.3d 359, 365 (5th Cir. 2016) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it whether or not the basis has a foundation in the record.") (internal quotations and citations omitted). Pointing to some evidence that a law's utility is debatable does not meet that burden. It must be conclusively proven there can be no debate.

Courts have no license "to judge the wisdom, fairness or logic of legislative choices" under rational basis review. ***Beach Communications***, 508 U.S. at 313. Simply identifying facts, data, or other information on the internet suggesting that a law may not provide the best solution to a complex policy problem fails to prove a statute is unconstitutional. To the contrary, rational basis review compels courts "to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality." ***Heller v. Doe***, 509 U.S. 312, 321 (1993) (internal quotations and citations omitted).

The one and only constitutional question before the Chancery Court—assuming it could be raised *sua sponte*—was whether any conceivable rational basis supports Section 93-5-2's mutual consent provisions. Any reasonable legislator could conclude, for a number of reasons, the statute rationally advances legitimate state interests. The Chancery Court erred in holding otherwise, and subjecting the statute to any other form of review. If this Court must address Section 93-5-2's constitutionality, it should reverse the amended judgment, and render judgment in the State's favor here.

IV. The Coalition's *Amicus* Policy Arguments do not Improve the Case Against Section 93-5-2's Constitutional Validity.

On a final note, the Gertys' divorce proceedings did not involve any domestic abuse allegations whatsoever. Nevertheless, after the State took its appeal but before this brief became due, the Mississippi Coalition Against Domestic Violence filed an *amicus* brief supporting the amended judgment's constitutional holding. The Coalition, as explained in its brief, advocates against domestic violence through a variety of means throughout Mississippi, and sees this as a judicial opportunity to enact an unlimited form of no fault divorce as a statewide policy.

Notwithstanding its laudable interests, the Coalition asserts little, if any, legal support for the Chancery Court's amended judgment. Its entire argument regarding Section 93-5-2's constitutionality, as opposed to allegations why the Legislature's current divorce scheme constitutes bad policy, consists of two sentences in its fifteen page brief. The Coalition tersely proclaims Section 93-5-2 deprives domestic abuse victims of "their right to marry" under ***Obergefell***. Coalition Br. at p. 13. It further posits that "without a unilateral divorce statute" Mississippi law deprives abuse victims of their constitutional rights "to protect their children to be free from their abuser" and "to not be married to an abusive spouse." *Id.*

As explained above in Section III, the amended judgment mistakenly relied on ***Obergefell*** to manufacture a new fundamental right to obtain a unilateral no fault divorce. The Coalition's one-line invocation of ***Obergefell*** fails to improve the amended judgment's misplaced contentions and merits no further discussion here.

With respect to the importance of protecting children and affording domestic abuse victims adequate divorce remedies, those are certainly policy concerns and value

judgments reasonable lawmakers should consider at every legislative session. That does not mean those delicate policy matters involve fundamental rights. The Coalition cites no authority for the proposition that a right to protect children or automatic divorce rises to the fundamental constitutional level. *See* ***In re Smith***, 926 So. 2d 878, 886 (¶11) (Miss. 2006); Miss. R. App. P. 28(a)(7). Merely identifying important policy concerns, without more, is no support for the amended judgment's conclusions.

Apart from its thin constitutional analysis, the bulk of the Coalition's brief offers several good reasons legislators should always consider improvements to the State's divorce laws—particularly as relates to domestic violence victims. However, the Coalition fails to discuss, or even acknowledge, the Legislature's recent enactment that squarely addresses many, if not all, of the Coalition's stated concerns.

Several months before the Coalition filed its *amicus* brief, the Legislature passed significant amendments to Code Section 93-5-1. Spousal domestic abuse is now a ground for divorce and the new law reduces an affected spouse's proof burden in attaining a divorce.[16] Legislators heard, considered, and addressed the Coalition's

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[16] The Legislature's recent amendments to Section 93-5-1 provide:

> Divorces from the bonds of matrimony may be decreed to the injured party for any one or more of the following twelve (12) causes:
>
> ***
>
> *Seventh*. Habitual cruel and inhuman treatment, including spousal domestic abuse.
>
> Spousal domestic abuse may be established through the reliable testimony of a single credible witness, who may be injured party, and includes, but is not limited to:
>
> That the injured party's spouse attempted to cause, or purposely, knowingly or recklessly caused bodily injury to the injured party, or that the injured party's spouse attempted by physical menace to put the injured party in fear of

concerns. That only further proves why the Legislature is the proper forum to address divorce policy, the democratic process works, and its policies are only subject to rational basis scrutiny under the Constitution.

Everyone agrees domestic abuse is despicable. Everyone agrees with the Coalition that abuse is a policy issue of immense concern. And some might argue that beyond recent changes to Section 93-5-1, legislators should further tailor the Code to address domestic abuse, and other policy issues. None of that proves unfettered no fault divorce is the only constitutionally-acceptable means to solve domestic abuse problems, or that the amended judgment legitimately invalidated Section 93-5-2.

CONCLUSION

The Chancery Court below, no matter how well-intentioned, violated the prohibition against *sua sponte* constitutional adjudication, as well as the rules of civil procedure, and mistook an interest in unilateral no fault divorce as a fundamental right protected by the Fourteenth Amendment. This Court should examine the Gertys' fault grounds, and if it finds they deserved a fault-based divorce, vacate the Chancery Court's constitutional holding and dismiss the State.

Alternatively, if it finds a fault-based divorce is unwarranted on this record, this Court should reverse the Chancery Court's constitutional holding, dismiss the State, and

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> imminent serious bodily harm; or
>
> That the injured party's spouse engaged in a pattern of behavior against the injured party of threats or intimidation, emotional or verbal abuse, forced isolation, sexual extortion or sexual abuse, or stalking or aggravated stalking as defined in Section 97-3-107, if the pattern of behavior rises above the level of unkindness or rudeness or incompatibility or want of affection.

Miss. Code Ann. § 93-5-1.

remand the case for a new trial, with explicit instructions that the Chancery Court may only adjudicate any constitutional issues if the Gertys specifically plead them, and comply with Rule 24(d)(2)'s requirements.

In the further alternative, if this Court finds it must examine the merits of the Chancery Court's constitutional rulings, it should hold Section 93-5-2 comports with the Fourteenth Amendment, reverse the amended judgment's conclusions in that regard, and render judgment in the State's favor.

THIS the 28th day of December, 2017.

Respectfully submitted,

THE STATE OF MISSISSIPPI *EX REL.*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been filed with the Clerk of Court utilizing the Court's MEC system and thereby served on all counsel who have entered their appearance in this appeal. A true and correct copy of the foregoing brief has also been served on the following persons via US Mail, properly addressed and postage prepaid:

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Hon. Jennifer Schloegel
Chancery Court Judge
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Michael Channing Powell
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THIS the 28th day of December, 2017.

S/Justin L. Matheny
Justin L. Matheny