Received 12/02/2013 Supreme Court Middle District

Filed 12/02/2013 Supreme Court Middle District
77 MAP 2013

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 77 MAP 2013

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HEALTH,
Appellee,

v.

D. BRUCE HANES, in his official capacity as
Clerk of the Orphans' Court of Montgomery County,
Appellant.

BRIEF OF *AMICUS CURIAE* SAME-SEX COUPLES

Appeal from the order of the Commonwealth Court at No. 379 MD 2013 dated September 12, 2013.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae are twenty-three same-sex couples ("*Amicus* Couples") who received marriage licenses from Appellant D. Bruce Hanes, Clerk of the Orphans' Court of Montgomery County.[1] Each couple is directly affected by the unconstitutional enforcement of the Marriage Law, 23 Pa. C.S. §§ 1101, *et seq.*, which has cast a shadow over the validity of their marriage licenses. The *Amicus* Couples moved to intervene in the case below and their petition was denied as moot. A number of the *Amicus* Couples have brought a separate declaratory action against the Governor and other state officials in the Commonwealth Court at 481 MD 2013, which seeks to strike down Pennsylvania's Marriage Law as unconstitutional.

[1] The *Amicus* Couples include: Sasha Ballen and Diana Spagnuolo; Jennifer L. Anderson and Lisa A. Fraser; Gabriela Assagioli and Lynn Zeitlin; Youval Balistra and Dr. Glen Loev; Mark Baumann-Erb and Ronald Baumann-Erb; Jeffrey Becker and Kevin Taylor; Joan L. Bennett and Joanne B. Glusman; Joseph Billips and Andrew Pruessner; Loreen Bloodgood and Alicia Terrizzi; Leigh Taylor Braden and Sophie Forge; Joan Brown and Jill Galper; Dr. Marta Dabezies and Patricia Rose; Dr. Mary Margaret DeSouza and Kimberly A. Lane; Mary Beth Flynn and Elaine Spangler; Joann Hyle and Kathryn Kolbert; Charlene Kurland and Ellen Toplin; Christine Lindgren and Andrea Myers; Ethelda A. Makoid and Wendy L. Sheppard; Marcia Martinez-Helfman and Sarah Martinez-Helfman; Ruth Parks and Michelle Schaeffer; Robert Polay and Nicholas Vlaisavljevic; Domenick Scudera and Brian Strachan; Richard Strahm and Ken Robinson.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa. C.S. § 723(a) and Pa. R.A.P. 311(a)(5).

ORDER IN QUESTION

On September 12, 2013, the Commonwealth Court of Pennsylvania (Pellegrini, P.J.) entered the following Order in Case No. 379 M.D. 2013:

> **AND NOW**, this 12th day of September, 2013, the Department of Health's Amended Application for Summary Relief for peremptory judgment in mandamus is granted. D. Bruce Hanes, in his official capacity as the Clerk of the Orphan's Court of Montgomery County, is directed to comply with all provisions of the Marriage Law, 23 Pa. C.S. §§ 1101-1905, while discharging the duties of his office, including the provisions of Sections 1102, 1303(a) and 1704, 23 Pa. C.S. §§ 1102, 1303(a), and 1704, and he shall cease and desist from accepting the marriage certificates of same-sex couples, and from waiving the mandatory three-day waiting period in violation of the Marriage Law. The Preliminary Objections of D. Bruce Hanes and the Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1521 filed by Putative Intervenors are dismissed as moot.
>
> */s/ Dan Pellegrini*
> DAN PELLEGRINI, President Judge

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Amicus Couples accept Appellant's statement of the scope and standard of review.

STATEMENT OF QUESTION INVOLVED

Amicus Couples accept Appellant's statement of questions involved.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On July 30, 2013, the Commonwealth of Pennsylvania's Department of Health (the "Department") filed for a writ of mandamus commanding Appellant Hanes to enforce Pennsylvania's Marriage Law, 23 Pa. C.S. §§ 1101, *et seq.*

On August 19, 2013, *Amicus* Couples moved to intervene as respondents pursuant to Pa. R.A.P. 1531. (See R. 69-82a). *Amicus* Couples alleged that Hanes granted them marriage licenses, that they had married or intended to be married in the Commonwealth, and that the Commonwealth Court's consideration of Hanes' authority to issue the licenses may impact their rights and the validity of their marriages and marriage licenses.

The Commonwealth Court heard oral argument on September 4, 2013. (*See* R. 392a). On September 12, 2013, the court granted the Department's application for a writ of mandamus against Hanes and dismissed *Amicus* Couples' petition to intervene as moot. (R. 433a). President Judge Pellegrini added, in his Opinion, that the "proper method for those aggrieved is to bring a separate action in the proper forum raising their challenges to the Marriage Law." (Op. at 33). *Amicus* Couples have not appealed the ruling denying their petition to intervene.

II. FACTUAL BACKGROUND

Under Pennsylvania law, a couple must obtain a marriage license before legally joining in marriage. *See* 23 Pa. C.S. § 1301(a). Pennsylvania's Marriage Law defines "marriage" as a "civil contract by which one man and one woman take each other for husband and wife." *Id.* § 1102. Pennsylvania's Marriage Law further states that it is the "policy of the Commonwealth that marriage shall be between one man and one woman." *Id.* § 1704.

In its landmark decision on June 26, 2013, the United States Supreme Court struck down as unconstitutional a portion of the federal equivalent to Pennsylvania's Marriage Law, the Defense of Marriage Act ("DOMA"), as unconstitutional. *See United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013). Following *Windsor*, on July 9, 2013, the American Civil Liberties Union of Pennsylvania filed a federal lawsuit against several Pennsylvania officials challenging the constitutionality of the Marriage Law on behalf of same-sex couples who wish to marry in Pennsylvania, same-sex couples who wish to have their out-of-state marriages recognized by Pennsylvania, two children of a same-sex couple, and a widow. *See Whitewood v. Corbett*, No. 13-1861 (M.D. Pa.).

On July 11, 2013, Pennsylvania Attorney General Kathleen G. Kane announced that the Office of Attorney General would not defend the Marriage Law

in the federal lawsuit. The Attorney General explained that she could not defend Pennsylvania's Marriage Law because the law is "wholly unconstitutional."[2] Following Attorney General Kane's pronouncement, on July 23, 2013, Appellant Hanes announced that his office would begin issuing marriage licenses to same-sex couples. The *Amicus* Couples received marriage licenses from Appellant Hanes.

Following the Honorable Dan Pellegrini's September 12, 2013 Order granting mandamus against Hanes and denying *Amicus* Couples' petition to intervene, twenty-one of the *Amicus* Couples filed a separate lawsuit against the Governor and certain other state officials in the Commonwealth Court. The lawsuit seeks to strike down Pennsylvania's Marriage Law as unconstitutional under the Pennsylvania and United States Constitutions.[3] *See* 481 MD 2013.

SUMMARY OF ARGUMENT

Because the Commonwealth Court did not address the validity of the *Amicus* Couples' marriage licenses, the court denied the *Amicus* Couples' Petition to

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[2] *See* Jason Nark, *Kane says state's ban on gay marriage 'wholly unconstitutional,'* Phila. Daily News (July 12, 2013), *available at* http://articles.philly.com/2013-07-12/news/40538475_1_kathleen-kane-attorney-general-kane-pennsylvania-republicans (last visited December 2, 2013).

[3] On November 8, 2013, the plaintiffs in that suit filed an amended complaint that added seven additional same-sex couples as plaintiffs.

Intervene. *Amicus* Couples do not now appeal that decision; however, they file this brief to urge this Court not to rule in a way that adversely affects their interests.

First, *Amicus* Couples submit this brief to emphasize that the validity of their marriage licenses is not properly before this Court. The Commonwealth Court did not address their validity; therefore, this Court should not either. The validity of many of *Amicus* Couples' marriage licenses currently is being litigated before the Commonwealth Court, and the constitutionality of the Marriage Law is being litigated before the Commonwealth Court and the federal courts. *Amicus* Couples therefore respectfully urge the Court not to address the validity of their licenses in this case.

Second, on the merits of this case, *Amicus* Couples respectfully submit that the Commonwealth Court erred in determining that Appellant Hanes could not assert the unconstitutionality of the Marriage Law as a defense to the mandamus action. Contrary to the Commonwealth Court's holding, Appellant Hanes is directed by statute to examine the constitutionality of the Marriage Law, and a long line of cases permits the constitutionality of a law to be raised in defense to a mandamus action.

Finally, if this Court reaches the underlying constitutional issue, *Amicus* Couples agree with Appellant Hanes that the Commonwealth Court erred in

granting mandamus because the Marriage Law patently violates same-sex couples' rights under both the United States Constitution and the Pennsylvania Constitution.

ARGUMENT

I. THE COURT SHOULD NOT ADDRESS THE VALIDITY OF *AMICUS* COUPLES' MARRIAGE LICENSES.

The validity of the marriage licenses issued to same-sex couples by Appellant Hanes is not properly the subject of this appeal and is not before this Court. The Commonwealth Court did not address the validity of the marriage licenses issued to same-sex couples. Accordingly, the Commonwealth Court denied *Amicus* Couples' Petition to Intervene as moot. Because the Commonwealth Court did not reach the issue of the validity of the Putative Intervenors' marriage licenses, they are not properly the subject of this appeal. *See Altman v. Ryan*, 257 A.2d 583, 585 (Pa. 1969) (the Supreme Court of Pennsylvania "will not consider . . . an issue unless it has been raised or considered by the court below") (citing *Montgomery Cnty. Bar Ass'n v. Rinalducci*, 197 A. 924, 925 (Pa. 1938); *Brunswick Corp. v. Key Enters., Inc.*, 244 A.2d 658 (Pa. 1968); *Schofield v. Donato*, 240 A.2d 541 (Pa. 1968)).

The Department of Health argued and the Commonwealth Court found that the marriage licenses issued by Appellant Hanes to the *Amicus* Couples would not be invalidated by the Commonwealth Court's decision. In opposing the *Amicus*

Couples' Petition to Intervene, the Department of Health argued that the *Amicus* Couples did not have a legally enforceable interest because the Department was seeking only to prevent Appellant Hanes' "behavior *in the future*" and that the Department was not seeking to invalidate Putative Intervenors' marriage licenses. (Pet'rs Br. in Opp. to Pet. for Leave to Intervene at 6, 10 (emphasis in original)). The Commonwealth Court held that "the legality of Hanes' actions and any purported rights obtained thereby are not at issue and may not be established in the instant mandamus actions." (Op. at 32).

In the wake of the Commonwealth Court's decision, several state and federal court actions have been filed, which directly address both the validity of the marriage licenses issued by Appellant Hanes and the constitutionality of the Marriage Law in general. *See Ballen v. Corbett*, No. 481 M.D. 2013 (Cmwlth. Ct. 2013); *Cucinotta v. Commonwealth*, No. 451 M.D. 2013 (Cmwlth. Ct. 2013); *Estate of Burgi-Rios*, No. 1310 of 2012, (O.C. Northampton Cnty. 2013); *Palladino v. Corbett*, Civ. No. 13-5641 (E.D. Pa. 2013); *see also Whitewood v. Corbett*, Civ. No. 13-1861-JEJ (M.D. Pa. 2013).

Because the Commonwealth Court did not determine the validity of any marriage licenses issued by Appellant Hanes and denied intervention on that basis, that issue is not properly before this Court on appeal. *See, e.g.*, *Altman*, 257 A.2d

at 585. Accordingly, *Amicus* Couples respectfully request that the Court refrain from addressing the validity of the marriage licenses Appellant Hanes issued to *Amicus* Couples.

II. APPELLANT HANES MAY RAISE THE CONSTITUTIONALITY OF THE MARRIAGE LAW AS A DEFENSE TO A MANDAMUS ACTION.

The Commonwealth Court erred in determining that Appellant Hanes could not assert the unconstitutionality of the Marriage Law as a defense to the mandamus action. Contrary to the Commonwealth Court's holding, Appellant Hanes is directed by statute to examine the constitutionality of the Marriage Law, and it is a long-standing principle of Pennsylvania law that government officials such as Appellant Hanes may raise the constitutionality of the relevant law as a defense to a mandamus action.

First, the Commonwealth Court failed to engage in a close reading of the Pennsylvania Code relating to marriage. If it had done so, the Commonwealth Court would have recognized that the Pennsylvania legislature has mandated that Appellant Hanes examine the constitutionality of the Marriage Law. Under Pennsylvania law, Appellant Hanes shall issue a marriage license "if it appears from properly completed applications on behalf of each of the parties to the proposed marriage that there is *no legal objection* to the marriage." 23 Pa. C.S.

§ 1307 (emphasis added). Furthermore, Appellant Hanes must examine each applicant for a marriage license under oath as to "the *legality* of the contemplated marriage." 23 Pa. C.S. § 1306 (emphasis added). Therefore, pursuant to their plain language, sections 1306 and 1307 are statutory directives that require Appellant Hanes to consider the state of the law and determine the "legality" of the contemplated marriage.

Pursuant to these provisions, Appellant Hanes must review the laws of the Commonwealth and the United States and determine whether such laws pose a *legal* impediment to the marriage. *See Commonwealth v. State Treasurer*, 29 Pa. C.C. 545, 1904 WL 2600, at *6 (Pa. Com. Pl. 1904) (discussing whether "established by law" means "established by a (valid) law"). As it has long been settled law that the Constitutions of the United States and Pennsylvania are law and not merely aspirational documents, determining the legality of the contemplated marriage includes consideration of the constitutionality of any prohibition on a marriage.

Following the United States Supreme Court's decision in *United States v. Windsor*, 133 S.Ct 2675, and as discussed in further detail below, it has become clear that the Marriage Law's definition of marriage offends the United States and Pennsylvania constitutions. Because the sections of the Marriage Law defining

marriage as only between one man and one woman are unconstitutional, they cannot form the basis of a "legal objection to the marriage." Accordingly, when presented with marriage applications from same-sex couples, Appellant Hanes performed his statutorily-directed duty, examined the law, and determined there was no legal objection to the marriages. Because Appellant Hanes was performing his duty by determining whether the Marriage Law was a legal and constitutional objection to the marriages of same-sex couples, he necessarily can raise the constitutionality of the Marriage Law in defending against the Department of Health's mandamus action to force him to comply with the Marriage Law.

Second, this Court has a long history of permitting certain governmental officers like Appellant Hanes to raise the constitutionality of a statute as a defense in a mandamus action. Appellant Hanes has collected several examples of this history in his brief filed with this Court. *Amicus* Couples add the following analysis to Appellant Hanes' detailed coverage of this issue.

In *Commonwealth v. Mathues*, 59 A. 961 (Pa. 1904), the Commonwealth brought a mandamus action against the State Treasurer based on his refusal to comply with a law setting the salaries of judges. *Id.* at 962. In opposing the mandamus action, the Treasurer argued that the law was unconstitutional, and the primary question discussed by the lower court was "whether or not the State

Treasurer, being a ministerial officer, had a right in his answer to raise the constitutional question as a defense to his refusal to honor [the law]." *Id*. at 964. The trial court determined that "the weight of authority appears to be in favor of the cases which hold to the right, and in some instances the duty, of certain administrative officers to refuse to act under what they honestly believe to be an unconstitutional act." *Id.* at 968. On appeal, this Court expressly considered whether the statute at issue was constitutional, and held that the legislature had the power to increase the salaries of sitting judges. *Id*. at 980-82.

In *Commonwealth v. Brown*, 95 A. 929 (Pa. 1915), this Court again addressed the constitutionality of a statute when raised as a defense to a mandamus action. *Id.* at 930. In *Brown*, a judge refused "to act on the petition or to perform any of the duties of law judge of Clinton county" because he believed that the act assigning counties to certain districts was unconstitutional. *Id*. at 930. The Court's analysis began with a discussion of the Pennsylvania Constitution and held that, "by reason of its contravention of the fourteenth section of the Schedule of the Constitution," the act sought to be enforced was void. *Id*. at 930-31.

Pennsylvania lower courts are in accord with this Court's decisions in *Mathues* and *Brown*. *See In re Donnelly's Estate*, 173 A. 876 (Pa. Super. 1934) (holding that the petitioner's argument that the defendant county commissioners

could not raise the constitutionality of the act at issue was "without merit"); *Commonwealth v. Sloan*, 1970 no. 9, 1971 WL 14163, at *12 (Pa. Com. Pl. Mar. 17, 1971) ("We can hardly subscribe to the doctrine to which the attorney general seeks to support . . . that the mere fact that the governor . . . has signed a bill deprives the state treasurer of any and all right to question its constitutionality."). These cases permit government officials who exercise discretion to raise the constitutionality of a statute as a defense to a mandamus action and are a limited exception to the general rule. Appellant Hanes is statutorily directed to exercise discretion in determining whether there is an objection to a contemplated marriage, whether that objection is legal or valid, and whether the contemplated marriage is legal by looking at the state of the law. *See* 23 Pa. C.S. §§ 1306-07. In order to follow the dictates of sections 1306 and 1307, Appellant Hanes *must* consider the state of the law and determine the legality of the contemplated marriage and any objection thereto.

Accordingly, Appellant Hanes had every right to raise the constitutionality of the Marriage Law as a defense in this mandamus action, but the Commonwealth Court erroneously discounted *Mathues* and its progeny. (*See* Op. at 29-30) (citing *Com. ex rel. Third School Dist. of the City of Wilkes Barre v. James*, 19 A. 950 (1890)). The Commonwealth Court's reliance on *James* is misplaced because the

issue before the court in that case was a "mere refusal of the clerk to file the papers." (Op. at 30) (citing *James*, 135 Pa. at 482-483). Here, the duties performed by Appellant Hanes go far beyond receiving and recording documents.

The Commonwealth Court's reliance on *James* failed to adequately consider the impact of *Mathues* and subsequent case law, which firmly establishes that Pennsylvania officers may raise the constitutionality of a statute as a defense to a mandamus action.[4] For this reason, the Commonwealth Court erred in determining that Appellant Hanes could not assert the unconstitutionality of the Marriage Law as a defense to the mandamus action.

III. THE MARRIAGE LAW IS UNCONSTITUTIONAL.

If the Commonwealth Court had addressed the constitutionality of the Marriage Law in defense to the Department of Health's mandamus action, as it

[4] The Commonwealth Court also erred in determining that Appellant Hanes is a ministerial officer. *See* Op. at 25. Appellant Hanes' powers go beyond those of a prothonotory or other clerical officer because the Marriage Law directs him to determine whether there are legal objections to and the legality of the contemplated marriage. *See* 23 Pa. C.S. §§ 1306-07. When reviewing whether there is a legal impediment to a marriage, Appellant Hanes must determine whether the legal impediment is a valid. *See Commonwealth v. State Treasurer*, 29 Pa. C.C. 545, 1904 WL 2600, at *6 (Pa. Com. Pl. 1904) (discussing whether "established by law" means "established by a (valid) law"). These statutory directives require Appellant Hanes to exercise discretion beyond that typically exercised by a prothonotary and establish that, for purposes of the *Mathues* line of cases, Hanes is not a ministerial officer.

should have, there is only one possible conclusion: the Marriage Law violates both the federal and Pennsylvania constitutions.

A. The Marriage Law Violates Same-Sex Couples' Right to Equal Protection.

The Marriage Law violates same-sex couples' rights to equal protection under both the federal and Pennsylvania constitutions because it impermissibly discriminates based on sex when it prohibits a man from marrying a man or a woman from marrying a woman, solely based on the sex of his or her partner. As the United States Supreme Court has explained, "[t]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). When a law draws classifications between people and treats people differently based on those classifications, the level of scrutiny applied by the Court to determine whether the law is constitutional depends on the type of classifications drawn by the law and nature of the rights impacted by the law. *See id*. at 439-40.

Laws that classify on the basis of sex are subject to intermediate scrutiny. Furthermore, although the United States Supreme Court has not squarely addressed

the issue, laws that classify based on sexual orientation should also be subject to intermediate scrutiny. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013); *see also* Brief of the United States on the Merits Question, *United States v. Windsor*, 133 S. Ct. 2675 (2013), 2013 WL 683048, at *13. To pass intermediate scrutiny, a law must be substantially related to the achievement of an important government objective. *See United States v. Virginia (VMI)*, 518 U.S. 515, 524 (1996).

The Marriage Law discriminates both on the basis of sex and on the basis of sexual orientation, and accordingly it should be subjected to intermediate scrutiny. *See Virginia*, 518 U.S. at 532-33; *Windsor v. United States*, 699 F.3d at 185. As explained below, the Marriage Law does not meet that standard. But even under a more lenient "rational basis" standard of review - which requires that the law rationally relate to a legitimate state interest - the law fails.

The purported objectives of the law include the "defense" of "traditional marriage," an interest in preserving state funds, and the protection of children. *See* 1996 Pa. Legis. J. (House), at 2019 ("[T]he large majority [of Pennsylvanians] do not want our traditional marriage institution and our state of morals to be changed."); s*ee also id*. at 2018 ("[I]f we are forced to recognize same-sex marriages, this would put an unfunded mandate on our businesses, another burden

on our taxpayers, and so on."). But these purported objectives do not excuse the law's discriminatory treatment of same-sex couples.

First, the Marriage Law is based on notions of "tradition." The law states that it is the "strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman." 23 Pa. C.S. § 1704. But tradition alone does not provide a rational or substantial basis for a discriminatory law. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .").

Second, the Marriage Law cannot be justified by reference to preservation of funds that would be spent to provide marital benefits to same-sex couples, absent an independent and valid rationale for why same-sex couples ought to bear that burden.

Third, the Marriage Law is not substantially or rationally related to an interest in protecting children. *See United States v. Windsor*, 133 S. Ct. at 2694 (noting that denying marriage rights to same-sex couples "humiliates" their children and makes it harder for those children to "understand the integrity and closeness of their own family"); *see also Perry v. Schwarzenegger*, 704 F. Supp.

2d 921, 980 (N.D. Cal. 2010) ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted."), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated for lack of standing sub nom. Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

Furthermore, the Marriage Law is unconstitutional under either intermediate scrutiny or rational basis review because it is motivated by animus. If a law's "principal purpose is to impose inequality" and it "demeans the couple, whose moral and sexual choices the Constitution protects," the law is unconstitutional. *United States v. Windsor*, 133 S. Ct. at 2694 (internal quotations omitted). Pennsylvania's Marriage Law is nothing more than a "mini-DOMA" - an outgrowth of the federal law struck down in *Windsor*. In *Windsor*, the Supreme Court found that the "essence" of DOMA was "interference with the equal dignity of same-sex marriages." *Id.* at 2693. The same is true of Pennsylvania's Marriage Law. It was enacted months after the federal DOMA, in the same wave of anti-same-sex marriage legislative activity that followed developments on the issue in Hawaii. Moreover, it was enacted for the same reasons as DOMA - animus towards homosexuals and same-sex couples. Therefore, the definitional language

of the Pennsylvania Marriage Law, like the definitional language of DOMA, is also unconstitutional.

Accordingly, the Court should hold that the Marriage Law is invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. For similar reasons, the Marriage Law also violates same-sex couples' rights to equal protection under the Pennsylvania Constitution. *See* Pa. Const. art. I §§ 1, 26; *DeFazio v. Civil Serv. Comm'n of Allegheny Cnty.*, 756 A.2d 1103, 1106 (Pa. 2000) ("The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly.").

B. The Marriage Law Violates Same-Sex Couples' Due Process Rights.

The Marriage Law also violates due process as it deprives same-sex couples of the fundamental right to marry. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from depriving its citizens of fundamental rights without due process of law. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (denying the fundamental freedom of marriage to some "is surely to deprive all the State's citizens of liberty without due process of law"). The right to marry is a fundamental right, and laws that infringe on that right are subject to strict scrutiny. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)

(analyzing "past decisions [which] make clear that the right to marry is of fundamental importance"). "To survive strict scrutiny, a state must do more than assert a compelling state interest—it must demonstrate that the law is necessary to serve the asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

The Commonwealth has no compelling state interest in defining marriage as between one man and one woman. The policy articulated in sections 1102 and 1704 of the Marriage Law is "longstanding public policy." As discussed above, however, "[a]ncient lineage of a legal concept does not give a [law] immunity from attack," let alone satisfy any level of scrutiny. *See Heller v. Doe*, 509 U.S. 312, 326 (1993). Morality is also subject to the same limitation and cannot satisfy rational basis review alone. *See Lawrence*, 539 U.S. at 577-78. Both the traditions and the "morals" purporting to support the Marriage Law find their root in animus against a group that has long been discriminated against and treated as other. Such motivations cannot and do not satisfy due process requirements.

Because "tradition" and purported morality cannot withstand the rigors of strict scrutiny, sections 1102 and 1704 of the Marriage Law are unconstitutional violations of due process under the Fourteenth Amendment to the United States Constitution.

Similarly, Article I of the Pennsylvania Constitution also recognizes a right to marry that is as fundamental as the right to life and liberty. *See In re Coats*, 849 A.2d 254, 263 (Pa. Super. 2004) ("Pursuant to the due process guarantees in the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Pennsylvania Constitution, strict scrutiny applies to the denial of the fundamental right to marry.") When reviewing whether a state action unconstitutionally deprives a person of a protected interest under the Pennsylvania Constitution, a court will engage in a substantive due process inquiry, balancing "the rights of the parties involved subject to the public interests sought to be protected." *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 20 (Pa. Cmwlth. 2012). Because appeals to tradition and morality alone cannot counterbalance interference with a fundamental right, the Marriage Law also is an unconstitutional violation of due process under the Pennsylvania Constitution.

C. The Marriage Law Violates Pennsylvania's Equal Rights Amendment

The Marriage Law also is unconstitutional under the Equal Rights Amendment to the Pennsylvania Constitution because it discriminates on the basis of sex. *See* Pa. Const. art. I § 28.

The Equal Rights Amendment provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of

the sex of the individual." Pa. Const. art. I, § 28. As this Court has recognized: "In this Commonwealth, sex may no longer be accepted as an exclusive classifying tool." *Commonwealth v. Butler*, 328 A.2d 851, 855 (Pa. 1974). The underlying principle behind the Equal Rights Amendment embodied in Article I, Section 28 is that one's sex should not define one's rights.

The Marriage Law defines "marriage" as a "civil contract by which one man and one woman take each other for husband and wife." 23 Pa. C.S. § 1102. The law states further that "marriage shall be between one man and one woman." 23 Pa. C.S. § 1704. The ability to marry within the state of Pennsylvania therefore depends exclusively on the sex of the participants.

For instance, under the Marriage Law, Bob is allowed to marry Sally, but Cindy may not do so. This is true even if Bob and Cindy are alike in every respect other than sex. The only reason that Bob may marry Sally, but Cindy may not, is because Bob is a man and Cindy is a woman. Cindy, then, is denied the legal right to marry Sally solely by virtue of her sex. This is a paradigmatic example of a sex classification.

Accordingly, as "sex may no longer be accepted as an exclusive classifying tool" in Pennsylvania, *Butler*, 328 A.2d at 855, the Court should hold that the Marriage Law violates the Equal Rights Amendment.

CONCLUSION

For the foregoing reasons, *Amicus* Couples respectfully request that this Court reverse the Commonwealth Court's September 12, 2013 Order and permit Appellant Hanes to raise the unconstitutionality of the Marriage Law as a defense to the mandamus action or strike down the Marriage Law as unconstitutional.

Respectfully submitted,

Dated: December 2, 2013

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WORD COUNT

I hereby certify, pursuant to Pa. R.A.P. 2135(d), that the Brief of *Amicus Curiae* Same-Sex Couples conforms with the 14,000 word limit of Pa. R.A.P. 2135(a). This certification is based on the word processing system used to prepare the Brief, which indicated a word count of 5,042 words.

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