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IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA  
CIVIL DIVISION – EQUITY

REP. ALLAN EGOLF, REP. GIBSON C. )  
ARMSTRONG, REP. MATTHEW E. )  
BAKER, REP. THOMAS C. CREIGHTON, )  
REP. GORDON DENLINGER, REP. )  
STEPHEN R. MAITLAND, REP. DARYL )  
METCALFE, REP. MERLE H. PHILLIPS, )  
REP. SAMUEL E. ROHRER, REP. JERRY )  
A. STERN, REP. KATIE TRUE, REP. ) NO. 2004-3160-38-5  
THOMAS F. YEWIC, and CREATIVE )  
PULTRUSIONS INC., )  
Plaintiffs, )  
v. ) ACTION FOR DECLARATORY  
JUDGMENT  
ROBERT SENECA and STEPHEN STAHL, )  
Defendants. )

**PLAINTIFFS' BRIEF IN OPPOSITION TO  
DEFENDANTS' PRELIMINARY OBJECTIONS**

**I. COUNTER HISTORY OF THE CASE**

Plaintiffs filed the instant action seeking a declaration under the Declaratory Judgments Act, 42 Pa. C.S.A. § 7531-41, that Pennsylvania's Defense of Marriage Act, 23 Pa. C.S.A. § 1704, and the rest of Pennsylvania's Marriage Law, specifically 23 Pa. C.S.A. § 1102, are constitutional under both the Federal and state constitutions. Plaintiff Allan Egolf is a Pennsylvania State Representative and the prime sponsor of Pennsylvania's Defense of Marriage Act and another portion of Pennsylvania's Marriage Law which clarify that marriage is a union

between one man and one woman. (Pls.' Compl. ¶ 1). Plaintiffs Armstrong, Baker, Creighton, Denlinger, Maitland, Metcalfe, Phillips, Rohrer, Stern, True and Yewcic are Pennsylvania Representatives who either voted<sup>1</sup> for or support the legislation. (Pls.' Compl. ¶ 2). Plaintiff Creative Pultrusions is a Pennsylvania Corporation. (Pls.' Complaint ¶ 3).

The present action was filed because Defendants, Stahl and Seneca, seek to change Pennsylvania's marriage law through legal action. (Pls.' Compl. ¶ 17). Stahl and Seneca are two men who wish to have a legally recognized marriage to each other. (Pls.' Compl. ¶ 11). Defendants applied for a marriage-license on March 15, 2004, (Pls.' Compl. ¶ 12), amid much fanfare, including TV cameras. They applied, not because they were unaware that they would be denied a license, but for the very reason of challenging the constitutionality of the marriage law, (Pls.' Compl. ¶¶ 17-18). Defendants have stated that they plan to challenge the denial of a marriage license. (Pls.' Compl. ¶ 17). They have made this assertion repeatedly, specifically even after this litigation was filed. Not only does the Complaint allege their plan to challenge the marriage law, (Pls.' Compl. ¶ 17), but they specifically told reporters that they had hired an attorney to do so.

## **II. HOW THE QUESTIONS ARE RAISED**

This matter comes before this Court for decision on Preliminary Objections of Defendant to Plaintiffs' Complaint, filed on June 17, 2004. On July 6, 2004, Plaintiffs filed an Answer to the Preliminary Objections of Defendants. Defendants filed their brief in support of their Preliminary Objections on July 30, 2004. Plaintiffs herewith file their brief in opposition of Defendants' Preliminary Objections.

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<sup>1</sup> Plaintiffs' Complaint mistakenly left out the word "voted" but it was intended for the word "voted" to be in paragraph 2.

### III. QUESTIONS INVOLVED

- A. Whether Plaintiffs' Complaint for a Declaratory Judgment is proper where there are antagonistic claims, where Defendants' actions indicate imminent and inevitable litigation and where the declaration sought will end the controversy?

Suggested Answer: YES

- B. Whether Plaintiffs have standing to bring the declaratory judgment action where Plaintiff Legislators have their personal time and reputation at stake, where the right of the Legislators to define marriage is at stake, where Plaintiff Creative Pultrusions has a financial interest and where there is no other person or entity better suited than Plaintiffs to bring this claim?

Suggested Answer: YES

- C. Whether averments in a complaint which are not derogatory, do not directly name Defendants and are relevant in that they support Plaintiffs' basis for relief requested should be permitted?

Suggested Answer: YES

### IV. ARGUMENT

The present action is properly brought under Pennsylvania's Declaratory Judgments Act because there are antagonistic claims, which indicate imminent and inevitable litigation, and the relief requested will end the present controversy. Plaintiffs and Defendants disagree on the constitutionality of Pennsylvania's Defense of Marriage Act and the rest of Pennsylvania's marriage law, which clarify that marriage is a union between one man and one woman. Based on their position, Defendants have taken steps to challenge these laws and have indicated that litigation will occur. The Court's decision in this matter will end the controversy as it will prevent Defendants from filing another suit challenging Pennsylvania's marriage laws.

Plaintiffs have standing to bring a Declaratory Judgment action because they have a substantial, direct and immediate interest in the outcome of this litigation and because they are the best party to advocate the constitutionality of Pennsylvania's Marriage Laws.

Plaintiff Egolf has a substantial, direct and immediate interest in this litigation, as he is the prime sponsor of the laws being challenged by Defendants. Plaintiff Egolf and the remaining Plaintiff Legislators have an interest in preserving their right and duty to define marriage, which is a legislative function. Additionally, Plaintiff Legislators have invested considerable time and effort in passing and or preserving Pennsylvania's Marriage Laws.

Plaintiff Creative Pultrusions has a substantial, direct and immediate interest in not paying money as a result of inevitable increase in benefits due to an expanded class of persons considered to be married. Additionally, Creative Pultrusions has standing as a taxpayer because they are uniquely positioned to advocate on behalf of Pennsylvania's Marriage Laws.

Lastly, paragraphs 27-31 of Plaintiffs' Complaint are not scandalous or impertinent. Paragraphs 27-31 are not derogatory nor are Defendants directly named. The averments made are supportive of Plaintiffs' basis for the declaration sought and thus are relevant to the present action. Therefore, paragraphs 27-31 of Plaintiffs' Complaint should not be stricken from Plaintiffs' Complaint.

**A. Means for Bringing This Claim**

The Pennsylvania Declaratory Judgments Act provides that "[a]ny person... whose rights, status, or other legal relations are affected by a statute... may have determined any question of construction or validity arising under the...statute... and obtain a declaration of rights, status, or other legal relations thereunder." 42 Pa. C.S.A. § 7533. The Declaratory

Judgments Act is remedial. *See* 42 Pa. C.S.A. § 7541. “Its purpose is to settle and to afford relief from **uncertainty and insecurity** with respect to rights, status, and other legal relations, and is to be **liberally construed and administered.**” 42 Pa. C.S.A. § 7533 (emphasis added).

Whether or not a court will take jurisdiction of a declaratory judgment action is purely a matter of judicial discretion. *Gulnac v. South Butler County School District*, 526 Pa. 483, 487, 587 A.2d 699, 701 (1991); *In re Lifter’s Estate*, 377 Pa. 227, 228, 103 A.2d 670, 672 (1954). A court should assume jurisdiction of a declaratory judgment action if there is the presence of antagonistic claims indicating imminent and inevitable litigation coupled with a clear manifestation that the declaration sought will be of practical help in ending the controversy. *In re Lifter’s Estate*, 377 Pa. at 228 (*citing* *Capital Bank & Trust Company’s Petition*, 336 Pa. 108, 111, 6 A.2d 790, 792) (1939)). *See also* *Gulnac v. South Butler County School District*, 526 Pa. at 487 (1991).

There is no doubt that this case involves antagonistic claims. Robert Seneca and Stephen Stahl claim that Pennsylvania’s Defense of Marriage Act and Pennsylvania’s Marriage Law are unconstitutional because they do not allow same-sex couples to marry. Plaintiffs claim that Pennsylvania’s Defense of Marriage Act and Pennsylvania’s Marriage Law (hereinafter “Marriage Laws”) are constitutional and that the denial of Seneca and Stahl’s application for a marriage license was proper. Therefore, the presence of antagonistic claims is clear in this case.

It is also very clear that these antagonistic claims indicate immediate and inevitable litigation. Defendants Seneca and Stahl have taken the first step in instituting litigation by requesting a marriage license application with the fanfare of reporters and TV cameras.<sup>2</sup> They

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<sup>2</sup> “The duo visited the borough council, which unanimously passed a resolution calling on Bucks County to grant them a marriage license. Great ceremony went into the preparations for the trip to the courthouse in nearby Doylestown.” Dennis Roddy, *Preventive Governance*, Pittsburgh Post-Gazette, May 23, 2004, at E-1.

knew full well that they would be denied an application, but making a request is the first step needed in order to appeal the denial of a license.<sup>3</sup> Seneca and Stahl stated in public that they view the Marriage laws as unconstitutional and that they will bring a lawsuit challenging the constitutionality of the statutes.<sup>4</sup> Even after this present case was filed, Seneca and Stahl continued to publicly declare their intent to challenge the marriage laws.<sup>5</sup> Although Seneca and Stahl have not yet filed a lawsuit challenging the validity of the acts, it appears that it is only the present lawsuit that is standing in their way. In fact, they stated to news reporters that they hired an attorney to challenge the marriage laws around the time this complaint was filed.<sup>6</sup> Should the present action be terminated, it is evident that Seneca and Stahl will challenge the Marriage Laws as plaintiffs. These facts show that litigation is immediate and inevitable.

Seneca and Stahl argue that they have not yet filed a lawsuit, litigation may never occur, and therefore this action is not ripe for adjudication. However, Seneca and Stahl have never denied their intent to initiate litigation. They have instead continually reaffirmed that intention publicly. Additionally, there is no requirement that a lawsuit must already have been filed to meet the requirement of immediate and inevitable litigation. "The subject matter of the dispute giving rise to a request for declaratory relief need not have erupted into a full-fledged battle."

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<sup>3</sup> "The issue went to court after two men, Robert Seneca and Stephen Stahl of New Hope, Pa., filed for a marriage license in Bucks County, Pa. When their application was rejected, the men said they would test the constitutionality of the Keystone State's Defense of Marriage Act and Marriage Law. The 1996 law forbids gay marriages." Angie DeRosa, *Executive joins suit against gay marriage*, Crain Communications, Inc., *Plastics News*, May 31, 2004, at 4.

<sup>4</sup> "It is my duty to do what I have got to do and open that door a little bit wider," said Stahl, who along with Seneca discussed their decision Tuesday night at a marriage, equality and civil rights forum. "We are going to go forward," Stahl said in an interview. "It was clear what we needed to do. Our rights are not being honored by this country." Pervaiz Shallwani, *Gay men vow marriage fight; Bucks pair say state law permits an appeal and they plan to pursue one*, *Morning Call* (Allentown, Pa), April 14, 2004, at A1. See also FN3.

<sup>5</sup> "Stephen Stahl was furious. 'I'm coming out with both fists in front of my face,' Stahl said yesterday. 'I'm ready to fight hard.' On the day Massachusetts began issuing marriage licenses to same-sex couples, Stahl said he and his partner, Robert Seneca, had hired a lawyer to challenge Pennsylvania law forbidding them to marry." Walter Naedele, *Bucks men vow to sue to be wed*, *Philadelphia Inquirer*, May 18, 2004, at B04.

<sup>6</sup> *Id.* at B04.

Clark v. Hamilton, 128 Pa. Cmwlth. 31, 36, 562 A.2d 965, 968 (1989). See also Pennsylvania Gamefowl Breeders Assc. v. Commonwealth, 533 A.2d 838, 840 (Commw. Ct. 1987) (indicating that “threatened” prosecution could be an event which could give rise to a case or controversy ripe for review.) The Declaratory Judgments Act simply requires that litigation be **imminent and inevitable**.

Public contention regarding the constitutionality of a law is sufficient to show imminent<sup>7</sup> and inevitable litigation and therefore justify a court’s jurisdiction over a declaratory judgment action. See Wecht v. Roddey, 815 A.2d 1146 (Commw. Ct. 2002). In Wecht v. Roddey, the Commonwealth Court found no error in a Court of Common Pleas’ decision to review a petition for declaratory judgment brought by a county coroner. Wecht v. Roddey, 815 A.2d 1146, 1150 (Commw. Ct. 2002). The county coroner brought an action seeking a declaration that exercise of power and control over him by the county through an administrative code was constitutionally impermissible. Id. The Commonwealth Court held that although there was no evidence that the coroner was about to violate the administrative code, the fact of the coroner’s “forceful public contention” that the county government was not authorized to administer his office represented the “ripening seeds of a controversy sufficient to support judicial review.” Id. Like the coroner in Wecht, Seneca and Stahl have publicly contended that the laws at issue are invalid. That public contention is sufficient to create a controversy justifying jurisdiction over a declaratory judgment action.” See Wecht, 815 A.2d at 1150.

Plaintiffs meet the last criteria for a declaratory judgment action because the declaration sought by Plaintiffs will be of practical help in ending the controversy between the parties.

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<sup>7</sup> “They picked on the wrong two queers,” Stahl, 55, said. “All it did was light me up. They thought if I saw the names of 12 state reps it would intimidate me to the point of not moving forward.” 365gay.com, “Lawyer Asks For Anti-Gay Marriage Suit To Be Thrown Out,” [www.365gay.com/newscon04/06/062104pasuit.htm](http://www.365gay.com/newscon04/06/062104pasuit.htm) (June 21, 2004) (visited June 22, 2004).

Plaintiffs seek a declaration that the Pennsylvania Defense of Marriage Act and Pennsylvania's Marriage Law are constitutional under both the Federal and state constitutions. As Defendants seek to challenge the validity of the Acts under both the Federal and state constitutions, this Court's ruling on the declaration sought by Plaintiffs will end the controversy between the parties and prevent Defendants from filing another suit challenging the Marriage Laws.

Defendants cite Township of Whitehall v. Oswald, 400 Pa. 65, 161 A.2d 348 (1960) as supportive of their position that Plaintiffs do not have standing to bring a Declaratory Judgment action. However, Township of Whitehall is easily distinguishable from the present action. In Township of Whitehall, the township brought an action seeking a declaration that a town ordinance was constitutional. Township of Whitehall v. Oswald, 400 Pa. 65, 161 A.2d 348 (1960). The Defendants in Township of Whitehall had violated the ordinance at issue. Id. The key distinguishing fact, the fact upon which the Pennsylvania Supreme Court based its decision, was that the Defendants had **never questioned the constitutional validity of the ordinance.** See Whitehall Township, 400 Pa. at 69, 161 A.2d at 349-350. The township in Township of Whitehall simply filed the action in court without any indication of an antagonistic claim from Defendants. "So long as an ordinance is unquestioned, its constitutional validity remains established." Id. at 349-350. Because the ordinance was unquestioned, the court in Whitehall held that the plaintiff township was without standing to have the constitutionality of its ordinance adjudicated.

Unlike the Defendants in Township of Whitehall, Defendants Seneca and Stahl have repeatedly and publicly questioned the constitutional validity of the Marriage laws. Because the Marriage laws were and continue to be questioned, their constitutional validity is not established. Indeed, courts in many other states have been called on to make a determination of the

constitutionality of similar marriage laws based on similar constitutional considerations. See Anderson v. King County, Wash. Superior Ct., Case No. 04-2-04964-4 SEA, Slip op. (Aug. 4, 2004) (holding Washington DOMA unconstitutional); Wilson v. Ake, Case No. 8:04-CV-1680-T-30 TBM (E.D. Fla., July 23, 2004) (challenging Federal and state DOMA); Deane v. Conaway, No. 24-C-045390 (Balt. Cir. Ct., filed July 7, 2004) (challenging Maryland statutory code which does not permit marriages of same-sex couples).<sup>8</sup> The question as to the constitutionality of the marriage laws is not hypothetical but has called the constitutionality of the statutes into question in a real way. Therefore, unlike the township in Whitehall, a declaratory judgment action is appropriate since the validity of the marriage law has been called into question by both the pattern of marriage law challenges and by the specific intentions of Defendants.

Defendants also cite Pa. Dental Hygienists' Assoc. v. State Bd. of Dentistry, 672 A.2d 414 (Commw. Ct. 1996) as supportive of their position. However, Pa. Dental Hygienists is clearly distinguishable from this case. Pa. Dental Hygienists involved a pre-enforcement challenge to an **agency regulation**. See Pa. Dental Hygienists, 672 A.2d 414 (1996). The Commonwealth Court stated that it was reluctant to grant declaratory judgments in that context in order to keep from "entangling themselves in abstract disagreements over **administrative policies**" especially since a "statutory review process of an **agency**" presents an "adequate statutory remedy." Pa. Dental Hygienists, 672 A.2d at 416. Pa. Dental Hygienist addresses administrative policies and there was an adequate statutory remedy. See Pa. Dental Hygienist, 672 A.2d at 414. The present case does not address administrative policies and does not have an adequate statutory remedy, therefore Pa. Dental Hygienists is not relevant to the present controversy.

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<sup>8</sup> It is interesting to note that the ACLU filed the action in Maryland challenging the marriage laws yet are arguing to dismiss in the present action on the basis that there is no present controversy over the issue of same-sex marriages.

A substantial public interest would be served by a determination of this issue. The court has in the past, accepted jurisdiction in a declaratory judgment proceeding even where it seemed questionable in order to address an issue of public interest. See McCandless Township v. Wylie, 375 Pa. 378, 382, 100 A.2d 590 (1953) (*stating* “under the circumstances, and especially since this case is one of public interest and state-wide importance, we will entertain and fully dispose of the proceeding”). This issue is one of statewide importance that will have a significant impact on the institution of marriage. The public has an interest in having the important issue of same-sex marriages decided in an orderly fashion. Unfortunately, in other states, this issue has not always been decided in an orderly fashion. For example, in California, the issue of the validity of same-sex marriages was not resolved in time for the state officials who had to administer the scheme to know what they were supposed to do.<sup>9</sup> In addition, other states have experienced the situation where officials acted on their own because there was no judicial determination.<sup>10</sup> Therefore, it would be in the best interest of the public to have this issue decided now in an orderly fashion.

It is well settled that constitutional challenges to a statute’s validity may be decided by a declaratory judgment action. See Larry Pitt & Assocs. P.C. v. Butler, 785 A.2d 1092 (Pa. Commw. 2001). In fact, a declaratory judgment action is the only way the constitutional validity of these statutes can be decided. Had the defendants brought the instant suit as they intended, they too would have naturally filed an action for declaratory judgment. An action for declaratory judgment would be appropriate for Seneca and Stahl because there is an actual controversy.

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<sup>9</sup> See Proposition 22 Legal Defense & Educ. Fund v. City & County of San Francisco, No. CPF-04-503943 (San Francisco, Ca. Super. Ct.).

<sup>10</sup> See Hebel v. West, No. 04-1915 (Ulster County, N.Y. Sup. Ct. June 7, 2004) (injunction against mayor of New Paltz).

Therefore, the same action is equally justiciable for Plaintiffs. Defendants desire for the issue of same-sex marriages to be decided, but are simply aggravated that Plaintiffs filed suit and are involved in the action. If this Court dismisses the present action, this same case with the same issues will be back in court.

It is disingenuous for Defendants to argue that there is no actual controversy over the issue of same-sex marriages, yet at the same time publicly contend that the statutes are unconstitutional, and voice their intention of filing suit. In fact, the same entity defending Seneca and Stahl, the American Civil Liberties Union, filed an action less than 30 days ago across our boarder in Maryland, challenging Maryland's marriage laws.<sup>11</sup> Defendants are speaking out of both sides of their mouths. Defendants are not challenging the present action because, as they claim, they are being picked on and brought into a suit, being forced to spend money to defend an action which they do not wish to defend. Defendants do not have to defend the suit if they do not want to. The reason they are still in is because they do want to challenge the Marriage Laws. As Defendant Stahl stated, "[t]hey picked on the wrong two queers." See footnote 7. In reality, Defendants want the present controversy resolved; they just want to be the ones bringing the suit instead of Plaintiffs. That is not a legitimate basis for dismissing the present action.

Defendants additionally argue that Plaintiffs have effectively denied Defendants their choice of forum, citing the case of Osram v. Sylvania Prods., Inc. v. Comsup Commodities, Inc., 845 A.2d 846 (Pa. Super 2004). First, this argument supports the fact that Defendants do intend to bring a lawsuit challenging the Marriage Laws. Secondly, the present action is distinguishable from Osram in that in Osram, the Plaintiffs brought suit in Pennsylvania after the Defendants had already initiated a lawsuit in California, in the hopes of depriving the Defendants of their choice

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<sup>11</sup> See FN 8.

of forum. Osram, 845 A.2d at 848. In the present action, Defendants have not filed suit elsewhere, nor are Plaintiffs depriving Defendants of a choice of forum.

**B. Plaintiffs have standing to bring the present declaratory judgment action.**

In order to have standing, a Plaintiff must have a substantial, direct and immediate interest in the subject-matter of the particular litigation. Wm. Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 191, 346 A.2d 269, 280 (1975). The requirement of a 'substantial,' or pecuniary interest simply means that the interest must have substance; there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. Id at 195, 346 A.2d at 282. For there to be a direct interest means that there must be causation of the harm to the interest claimed. Id. The requirement of immediate interest has to do with the causal connection between the harm to the plaintiff and what is complained of. Id at 197, 346 A.2d at 283. Specifically, "immediate" informs whether the harm is imminent rather than remote. Id at 208, 346 A.2d at 289.

**1. Plaintiff Legislators have a substantial, direct and immediate interest in the outcome of this litigation.**

Legislators have been found to have substantial, direct and immediate interests that support standing for declaratory judgment actions. In Zemprelli v. Daniels, 496 Pa. 247, 436 A.2d 1165 (1981), the Pennsylvania Supreme Court found legislative standing upon the argument that the legislators' power and effectiveness was impaired when fewer votes were needed to confirm a gubernatorial appointment. *See* Zemprelli, 496 Pa. at 252-53, 436 A.2d at 1167-68. Legislators are granted standing to challenge certain actions "when specific powers

unique to their functions under the Constitution are diminished or interfered with.” Wilt v. Beal, 26 Pa. Cmwlth. 298, 305, 363 A.2d 876, 881 (1976). In fact, interference with the performance of a legislative duty is a sufficient injury to give each legislator standing. Id. at 306 A.2d at 881.

Defendants cite to the statement of the Commonwealth Court in Wilt that once the votes that legislators “are entitled to make have been cast and duly counted, their interest as legislators ceases” as grounds for their position that Plaintiff Legislators do not have standing. *See* Wilt, 26 Pa. Commw. at 305, 363 A.2d at 881. However, the Pennsylvania Supreme Court in Zemprelli called that proposition into question. *See* Zemprelli, 496 Pa. at 252, 436 A.2d at 1167 (*citing* Wilt and stating this proposition “might” be persuasive). In fact, the Commonwealth Court itself, in a case subsequent to Wilt, cited Zemprelli as controlling on the question of a legislator’s standing and found that certain voting procedures interfered with the duty of the legislators therefore giving the legislators standing. *See* Ritter v. Commonwealth, 120 Pa. Commw. 374, 378, 548 A.2d 1317, 1319 (1988).

Like the legislators in Zemprelli and Ritter, Plaintiff Legislators have an interest in preserving their legislative function. In the present action, the legislative interest is in preserving the right and duty of the legislators to define marriage. This official right and duty is distinct from those of all other citizens. Defendants seek to undermine this legislative interest and instead have the court redefine marriage. Plaintiffs filed the present action to make sure that when the court looks at this issue that the court does not merely substitute its judgment as to what would be a good marriage law for the legislators’ own ability to make that determination. Indeed, even those legislators who did not vote for the present marriage laws have a stake in their ability to craft future marriage law amendments which could be undermined if the court unilaterally redefines marriage.

In addition to the Plaintiff Legislators' interest in preserving their legislative function, Plaintiff Legislators have a personal stake in the fate of the marriage law that is substantial, direct and immediate. Unlike the public in general, the sponsors of this public policy legislation have a unique interest in the outcome. Plaintiff Legislators will suffer a substantial harm if their extensive work and dedication in enacting and supporting the Marriage Laws are completely undermined by a Court granting the relief that Defendants have publicly stated that they will request. Plaintiffs' own personal and professional reputations and integrity are on the line. Plaintiff Egolf was the prime sponsor of Pennsylvania's Defense of Marriage Act and another portion of Pennsylvania's Marriage Law that clarify that marriage is a union between one man and one woman. Plaintiff Egolf spent countless hours working on these Marriage Laws. Even after passage of the Marriage Laws, Plaintiff Egolf as well as the remaining Plaintiffs have spent time and effort actively supporting the Laws and have vowed to uphold and defend these Laws. Plaintiff Legislators have a substantial interest that surpasses the interest of citizens generally in upholding and preserving the law because of their active involvement and support of the Marriage Laws.<sup>12</sup> Plaintiff Legislators therefore have a direct and immediate interest in the outcome of this litigation which is sufficient to support standing.

Plaintiff Legislators' situation is analogous to that of public interest groups and sponsors of ballot initiatives and propositions that are granted the right to intervene in a case. While the Federal cases for intervention are not binding on this Court, the analysis used to grant the right of intervention to an individual or party is similar to the analysis of legislative standing. "A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a

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<sup>12</sup> Plaintiffs' Complaint contained a typo in paragraph 9 in that it did not include the names of all of the Plaintiff Legislators. It was pled in paragraph 2 of Plaintiffs' Complaint that all legislators support the legislation. It was intended in paragraph 9 of Plaintiffs' Complaint for the pleading to list the names of all Plaintiff Legislators because they all have an interest in the will of the legislature being upheld.

measure it has supported.” Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1397 (9<sup>th</sup> Cir. 1995) (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9<sup>th</sup> Cir. 1983)).<sup>13</sup> In Idaho Farm Bureau, the 9<sup>th</sup> Circuit Court of Appeals held that a conservation group had sufficient interest in litigation challenging the listing of a snail under the Endangered Species Act, where they were active in getting the snail listed. See Idaho Farm Bureau, 58 F.3d 1392 (9<sup>th</sup> Cir. 1995). In Sagebrush Rebellion, the 9<sup>th</sup> Circuit Court found that the Audubon Society’s interest in the protection of birds and other animals and its active participation in the proceedings to establish a wildlife sanctuary entitled it to intervene as of right in a case challenging the validity of that sanctuary. See Sagebrush Rebellion, 713 F.2d 525 (9<sup>th</sup> Cir. 1983).

Sponsors of ballot initiatives have also been found to have sufficient interest to intervene as of right in cases where the constitutionality of the sponsor’s initiative has been challenged. See Yniguez v. Arizona, 939 F.2d 727 (9<sup>th</sup> Cir. 1991). In Yniguez, the 9<sup>th</sup> Circuit Court of Appeals argued that the principal sponsor of the initiative at issue stood in an analogous position to a state legislature in that they had a strong interest in the vitality of the initiative which they proposed and for which they vigorously campaigned. Yniguez, 939 F.2d at 733. While the interest required to intervene pursuant to Fed. R.Civ. P. 24(a) is not identical to the interest required for standing, there are substantial similarities between the two, which support standing for Plaintiff Legislators in the present action.

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<sup>13</sup> See also Washington State Bldg. And Constr. Trades Council v. Spellman, 684 F.2d 627 (9<sup>th</sup> Cir. 1982) cert. denied by Don't Waste Washington Legal Defense Found. v. Washington, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983) (allowing intervention of public interest group in a lawsuit challenging a measure the group has supported); Idaho v. Freeman, 625 F.2d 886 (9<sup>th</sup> Cir. 1980) (permitting National Organization for Women to intervene in a suit challenging the validity of ratification procedures surrounding the Equal Rights Amendment, where the organization had actively supported the amendment); Herdman v. Town of Angelica, 163 F.R.D. 180 (W.D. NY 1995) (allowing an environmental group to intervene in a lawsuit challenging the validity of a town law, where the group had taken an active role in encouraging the town to draft and adopt the law, and the group had an interest in the continuing constitutional viability of the law).

In the present action, the imminent challenge by Defendants of the Marriage Laws is an attempt to interfere with a unique power of the legislature, the power to define marriage, and to improperly subject the definition of marriage to judicial determination. The legislature has the “right to legislate upon the subject of marriage.” Sciafe v. McKee, 298 Pa. 33, 38, 148 A. 37, 38 (1929). By threatening to challenge the Marriage laws and taking steps to do so, Defendants are interfering with the right of the legislature to legislate upon marriage, and instead seeking to have the court invalidate the law. The Plaintiff Legislators therefore have standing to defend their right to define marriage.

Defendants’ reliance on cases in other jurisdictions are of no help to them here. The Indiana Court of Appeals case of City of Mishawaka v. Mohney, 156 Ind. App. 668, 297 N.E.2d 858 (1973) is similar to Whitehall Township, which was discussed earlier, in which the local ordinance which the city sought to be validated, was never questioned. Again, “so long as an ordinance is **unquestioned**, its constitutional validity remains established.” See Whitehall Township, 161 A.2d at 349-350 (emphasis added). The present action is much different because unlike the ordinance in City of Mishawaka, the Marriage Laws have been questioned by Defendant in public on numerous occasions and Defendants have taken steps to challenge the Marriage Laws by filing for a license and hiring an attorney. Therefore, the constitutional validity of the Laws does not remain established and Plaintiffs do have standing.

We disagree with Defendants that the United Supreme Court Case of Raines v. Byrd, 521 U.S. 811, 117 S. Ct. 2312, 138 L. Ed.2d 849 (1997) should be analyzed in this action. In Raines v. Byrd, the United States Supreme Court held that individual members of Congress did not have standing to challenge the constitutionality of the Line Item Veto Act. See Raines v. Byrd, 521 U.S. 811 (1997). This case is ultimately governed by state principles of standing, rather than the

Federal principles created by Article III of the United States Constitution and addressed in Raines v. Byrd. State courts are not bound to adhere to the federal definition of standing. In re Hickson, 573 Pa. 127, 136, 821 A.2d 1238, 1243 (2003) (citing ASARCO inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037, 2043, 104 L.Ed.2d 696 (1989)). Furthermore, the Pennsylvania Constitution has no counterpart to Article III's "case or controversy" requirement." Hickson, 573 Pa. at 136, 821 A.2d at 1243. The Pennsylvania cases of Zemprelli, 496 Pa. 247 (1981) and Ritter, 120 Pa. Commw. 374 (1988), as discussed earlier, reflect a more expansive view of standing under Pennsylvania law than that expressed under Federal law in Raines.

Plaintiffs are uniquely positioned to advocate on behalf of Pennsylvania's marriage laws. In addition to their interest in defending the Marriage Laws, they are represented by counsel with expertise in litigating these issues. Defendants likewise have attorneys and other special interest groups who are trained and experienced in this area of the law. If Defendants file suit, as they intend, it would be left to the Attorney General to come in and defend the constitutionality of the Marriage Laws. The Attorney General's Office, while highly respected and well trained, is not a specialist in this area of the law. Additionally, individual bias and personal beliefs of the staff at the Attorney General's Office naturally affects the arguments made and the effectiveness of any defense to the marriage laws.<sup>14</sup> In some states where marriage laws have been challenged, Attorney Generals have defended less than vigorously or have even been on record as supporting same-sex marriages.<sup>15</sup> Plaintiffs, on the other hand, have a substantial interest in upholding and

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<sup>14</sup> In fact, the current Democratic candidate for Attorney General, Jim Eisenhower, when asked his "position on aggressively defending state law refusing to recognize same-sex 'marriages'," replied "I am in favor of civil rights for all people." *Candidates Answer PA Catholic Conference Questionnaire*, Viewpoint (PA Catholic Conference, Harrisburg, PA), Volume 19, Issue 2, at 3.

<sup>15</sup> See, e.g., Robert Tanner, *Associated Press Newswires*, "State AGs Come Down Against Gay Marriages," 3/5/04 APWIREs 15:11:41 (March 5, 2004) (citing New York AG Elliot Spitzer and California AG Bill Lockyer as having their hearts with those seeking same-sex "marriage"); Yvonne Abraham, *Boston Globe*, "Gay Union Foes Doubt if

defending the Marriage Laws, are in favor of the Marriage Laws being upheld and are therefore uniquely situated to zealously defend the Marriage Laws.

**2. Creative Pultrusions has a substantial, direct and immediate interest in the outcome of this litigation and has standing as a taxpayer.**

“Standing is not to be denied simply because many people suffer the same injury.” Wm. Penn Parking Garage, 464 Pa. at 204, 346 A.2d at 289. Creative Pultrusions has standing as both a business with a substantial, direct and immediate interest and as a taxpayer because it is, like the Plaintiff Legislators, in a unique position to defend the Marriage Laws.

Creative Pultrusions has an interest in not paying money as a result of the inevitable increase in benefits due to an expanded class of persons considered to be married.<sup>16</sup> If more persons are considered married, the state will pay more state benefits, thus affecting state spending and taxes. Indeed, many state benefits are directly tied to marital status. The business’ benefits package itself would be affected since more persons considered to be “married” would result in increased benefit costs. Creative Pultrusions’ interest is also direct and immediate. It is direct in that a determination by the court eliminating the constitutional doubt raised by Defendants will prevent Plaintiff from suffering the harm complained of. See Wm. Penn at 208, 346 A.2d at 289. Creative Pultrusions’ interest is also immediate since Defendants have promised to challenge the marriage law and have already taken steps to do so.

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Reilly Should Try Case," 4/19/01 BOSTONG B.1 (Apr. 19, 2001) (noting that Massachusetts AG Tom Reilly "has backed efforts to grant recognition to same-sex relationships, and other gay and lesbian causes").

<sup>16</sup> Cf. *LifeSite Daily News*, "Queen to Announce British Gay Partnership Plan," [www.lifesite.net/ldn/2003/nov/03111105.html](http://www.lifesite.net/ldn/2003/nov/03111105.html) (Nov. 11, 2003) (last visited Aug. 6, 2004) (estimating cost of domestic partner benefits to private sector employers of up to 20 million pounds per year, and up to 240 million pounds per year to the government by 2050); *Associated Press Newswires*, "Canadian Government to Appeal Landmark Ruling on Same-sex Pension Benefits," 1/19/04 APWIREs 22:04:28 (Jan. 19, 2004) (estimating cost of back survival benefits to 1,500 homosexuals would be about \$300 million dollars).

Defendants cite to Pa. Dental Hygienists, 672 A.2d 414 to try to analogize the alleged harms there to the harms Creative Pultrusions will suffer. However, as discussed earlier, Pa. Dental Hygienists is clearly distinguishable from this case because it dealt with administrative policies and contained an “adequate statutory remedy.” It therefore is not relevant to the present controversy.

For a taxpayer to be granted standing, the taxpayer must “allege and prove an interest in the outcome of the suit which surpasses ‘the common interest of all citizens in procuring obedience to the law’.” In re Biester, 487 Pa. 438, 442, 409 A.2d 848, 851 (1979) (quoting Wm. Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 192, 346 A.2d 269, 281 (1975)). This standard as articulated in Beister, may be relaxed to grant standing where there are no other persons better suited to assert a claim. C.O. Falter Constr. Corp. v. Towanda Mun. Auth., 149 Pa. Cmwlth. 74, 79, 614 A.2d 328, 331 (1992).

Plaintiff Creative Pultrusions should be granted standing to defend the Marriage Laws as there are no other persons or entities better suited to do so. Taxpayers should be permitted to come in and defend a statute affecting spending that has been questioned in a large number of other states and is now being questioned in their own state. Creative Pultrusions is, like the Plaintiff Legislators, uniquely situated to defend the Marriage Laws since the Attorney General’s Office is not specialized in this area of the law and since political and ideological considerations can affect the zeal of the representation. Therefore, Creative Pultrusions has standing both as a business and as a taxpayer.

**C. Paragraphs 27-31 of Plaintiffs Complaint are not scandalous and support Plaintiffs' request to preserve marriage.**

Pa. R.C.P. 1028(a)(2) provides that preliminary objections may be filed for "inclusion of scandalous and impertinent matter." To be scandalous and impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action. Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 115 (1998) (citing Dep't of Env'tl. Resources v. Pess Run Coal Co., 55 Pa. Cmwlth. 312, 423 A.2d 765 (1980)). The right of a court to strike impertinent matter should be **sparingly exercised** and only when a party can affirmatively show prejudice. Commonwealth v. Hartford Accident and Indemnity Co., 40 Pa. Cmwlth. 133, 138, 396 A.2d 885, 888 (1979)(emphasis added).

The paragraphs 27 – 31 of Plaintiffs' Complaint do not name Defendants specifically, nor were they intended to cast derogatory light on the Defendants. These paragraphs are not derogatory but rather state factual basis to support Plaintiffs' requested relief, the rational basis for supporting the Marriage Laws. Paragraphs 27 – 31 of Plaintiffs' Complaint are directly supportive of Plaintiffs' position that the Marriage Laws should be upheld and therefore are proof of Plaintiffs' cause of action. "Matter which is relevant can never be scandalous." Goodman's Estate, 28 Pa. D. 127, 1918 WL 3638 (Pa. Orph. 1918). Striking impertinent matter is a practice not to be encouraged because the rights of the parties can be fully guarded at the trial. Id. (citing Astrich v. Insurance Co., 13 Dist. R. 350). Furthermore, an averment which may appear irrelevant at one stage of the proceedings may subsequently be shown at the trial to be relevant, thus necessitating an amendment to the pleadings with the attendant delay. Id.

Additionally, the fact that Defendants have taken the time and effort in their own brief to directly argue and defend against the specific averments made by Plaintiffs in paragraphs 27-31, indicate that these points are in fact relevant to the present controversy. Therefore, paragraphs

27-31 of Plaintiffs' Complaint are not scandalous or impertinent and should not be stricken from Plaintiffs' Complaint.

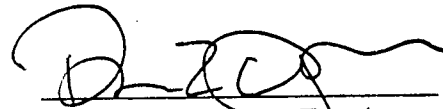
**V. CONCLUSION**

Wherefore, Plaintiffs request this Honorable Court to dismiss Defendants' Preliminary Objections and Order Defendants to submit their Answer to Plaintiffs' Complaint within twenty days. In the alternative, Plaintiffs request leave to amend their Complaint.

Respectfully Submitted  
CLYMER & MUSSER, P.C.

Date: August 9, 2004

By:



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Sworn and subscribed before me this  
9<sup>th</sup> day of August, 2004

  
Notary Public

My Commission Expires:



IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

REP. ALLAN EGOLF,	:	No. 2004-03160-28-5
REP. GIBSON C. ARMSTRONG,	:	
REP. MATTHEW E. BAKER,	:	
REP. THOMAS C. CREIGHTON,	:	
REP. GORDON DENLINGER,	:	
REP. STEPHEN R. MAITLAND,	:	
REP. DARYL METCALFE,	:	
REP. MERLE H. PHILLIPS,	:	
REP. SAMUEL E. ROHRER,	:	
REP. JERRY A. STERN,	:	
REP. KATIE TRUE,	:	
REP. THOMAS F. YEWICIC, and	:	
CREATIVE PULTRUSIONS, INC.	:	
	:	
	:	
vs.	:	
	:	
	:	
ROBERT SENECA and	:	
STEPHEN STAHL	:	

**ORDER**

AND NOW, this 19<sup>th</sup> day of August, 2004, upon consideration of the Preliminary Objections of Defendants Robert Seneca and Stephen Stahl to Plaintiffs' Complaint, it is **ORDERED** that Oral Argument is hereby scheduled for **Thursday, October 7, 2004, at 9:30 a.m., in Courtroom #7, Bucks County Courthouse, Doylestown, Pennsylvania.**

BY THE COURT:

  
\_\_\_\_\_  
MITCHELL S. GOLDBERG, J.

**N. B. It is your responsibility to notify all interested parties of the above action.**