

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NICOLA M. CUCINOTTA,  
and TAMARA J. CUCINOTTA,  
formerly TAMARA J. DAVIS,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

No. 451 M.D. 2013

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**RESPONDENT'S PRELIMINARY OBJECTIONS TO THE  
PETITION FOR REVIEW**

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AND NOW comes Respondent, the Commonwealth of Pennsylvania (hereinafter "the Commonwealth"), by and through its undersigned counsel, to preliminarily object to the Petition for Review filed by Petitioners, Nicola M. Cucinotta and Tamara J. Cucinotta. In support of its preliminary objections, the Commonwealth states as follows:

## **BACKGROUND**

1. On September 6, 2013, Petitioners Nicola M. Cucinotta and Tamara J. Cucinotta filed with this Honorable Court a Petition for Review (“Petition”). A true and correct copy of the Petition is attached hereto as Exhibit “A”.

2. Petitioners purport to make constitutional challenges to two provisions of the Marriage Law – 23 Pa.C.S. §§ 1102 and 1704 – claiming that those sections violate Article I, Sections 1, 3, 26 and 28, of the Constitution of Pennsylvania.

3. These preliminary objections are timely filed in accordance with applicable Pennsylvania rules of court.

### **FIRST PRELIMINARY OBJECTION - SOVEREIGN IMMUNITY**

4. The Commonwealth is immune from suit under principles of sovereign immunity.

5. Petitioners have named the Commonwealth as the sole respondent in seeking a declaration that 23 Pa.C.S. §§ 1102 and 1704 are unconstitutional.

6. Petitioners have named in their Petition no Commonwealth official or agency allegedly responsible for enforcing the Marriage Law provisions that they challenge and seek to have declared unconstitutional.

7. Article I, Section 11, of the Pennsylvania Constitution permits suits against the Commonwealth only to the extent that the Legislature has specifically waived its immunity.

8. The General Assembly has not waived the Commonwealth's sovereign immunity to permit an action for declaratory judgment seeking to have a statute declared unconstitutional.

9. There is a clear distinction between suits against the Commonwealth (which are within the rule of immunity), and suits brought against responsible state officials to declare a statute to be unconstitutional or to restrain state officials from enforcing provisions of a statute claimed to be unconstitutional (which are not within the rule of immunity). *Wilksburg Police Officers Assoc. v. Commonwealth*, 564 A.2d 1015, 1018 (Pa. Cmwlth. 1989), *aff'd*, 636 A.2d 134 (Pa. 1993).

10. Because the Commonwealth government and its various agencies and officers are regarded as separate entities, "the Commonwealth of Pennsylvania[] itself, which is clearly **not** a Commonwealth agency, ... enjoys absolute immunity pursuant to 1 Pa.C.S. § 2310." *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010) (single judge opinion of Leadbetter, P.J.) (quoting *Bonsavage v. Borough of Warrior Run*, 676 A.2d 1330, 1331 (Pa. Cmwlth. 1996)) (emphasis in original); *see also Stackhouse v. Commonwealth*, 892 A.2d 54, 59 (Pa. Cmwlth.), *allocatur denied*, 903 A.2d 539 (Pa. 2006).

11. Because the Petition asserts no basis for waiver, this action against the Commonwealth of Pennsylvania is barred as a matter of law by the doctrine of sovereign immunity.<sup>1</sup>

WHEREFORE, Respondent Commonwealth of Pennsylvania respectfully requests that this Honorable Court sustain its preliminary objection based on sovereign immunity and dismiss the petition for review against the Commonwealth of Pennsylvania with prejudice.

### **SECOND PRELIMINARY OBJECTION - GENERAL DEMURRER**

12. Petitioners seek a judgment declaring unconstitutional provisions of the Marriage Law that limit marriage between one man and one woman.

13. Petitioners have set forth only that they are “adult women of full capacity” who “have chosen to be married to one another.” Petition at ¶ 6. They fail to plead facts demonstrating that they meet all requirements of the Marriage Law. *See* 23 Pa.C.S. §§ 1102, 1301-04.

WHEREFORE, Respondent Commonwealth of Pennsylvania respectfully requests that this Honorable Court sustain its preliminary objections in the nature of a general demurrer and dismiss the petition for review for legal insufficiency.

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<sup>1</sup> Under the Pennsylvania Rules of Civil Procedure, immunity from suit is an affirmative defense properly raised as a new matter in a responsive pleading. *Smolsky v. Pennsylvania General Assembly*, 34 A.2d 316, 317 n.7 (Pa. Cmwlth. 2011). The courts have permitted limited exception to this rule and have allowed parties to raise the affirmative defense of immunity as a preliminary objection. *Sweeney v. Merrymeade Farm, Inc.*, 799 A.2d 972 (Pa. Cmwlth. 2002). The immunity defense must be clearly applicable on the face of the complaint. *Id.*

**THIRD PRELIMINARY OBJECTION - DEMURRER**  
**Article I, Section 3**

14. Petitioners claim that the Marriage Law provisions violate Article I, § 3, of the Pennsylvania Constitution by “interfering with their rights of conscience.”

15. Petitioners do not plead any facts identifying how the Marriage Law provisions impose a burden on their religious liberty by interfering with their rights of conscience; they make only a single, legally conclusive statement that Pennsylvania’s limitation on marriage “interferes with their rights of conscience.”  
Petition ¶ 12.

16. Pennsylvania courts have usually interpreted Article I, §3, in cases alleging that the religious liberties of a person have been infringed upon. *See Gibbons v. Kugle*, 908 A.2d 916 (Pa. Super. 2006); *Knapp v. Knapp*, 758 A.2d 1205 (Pa. Super. 2000); *Wikoski v. Wikoski*, 513 A.2d 986 (Pa. Super. 1986).

17. Petitioners fail to identify any actual or imminent infringement on their religious rights under Article I, § 3, of the Pennsylvania Constitution.

WHEREFORE, Respondent Commonwealth of Pennsylvania respectfully requests that this Honorable Court sustain its preliminary objections in the nature of a demurrer as to Pa. Const. art. I, § 3, and accordingly dismiss the petition for review for legal insufficiency.

**FOURTH PRELIMINARY OBJECTION - DEMURRER**  
**Article I, Section 28**

18. Petitioners claim that the Marriage Law provisions violate Article I, § 28, of the Pennsylvania Constitution because there is no impediment to Petitioners being married to one another other than their sex, which impediment Petitioners contend denies them equality of rights under the law based on their gender.

19. Petitioners do not plead facts that would demonstrate that the only impediment to their being married to one another is their sex, nor do Petitioners plead facts that would demonstrate that the Marriage Law provisions actually infringe on their right to equality based on their sex.

20. A statute is presumed to be constitutional and will not be adjudged unconstitutional “unless it clearly, palpably and plainly violates the Constitution.” *Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005) (“PAGE”). All doubts and inferences are to be resolved in favor of finding a statute to be constitutional. *PAGE*, 877 A.2d 393.

21. Under Article I, § 28, of the Pennsylvania Constitution, equality of rights under the law shall not be denied or abridged because of an individual’s sex. This provision of the Constitution is intended to equalize the benefits and the burdens between the sexes, so that gender alone is not an exclusive method of classification. *DiFlorido v. DiFlorido*, 459 Pa. 641, 331 A.2d 174 (1975).

22. The Marriage Law does not deny individuals equality under the law based on sex. Rather, the Marriage Law treats men and women equally, allowing

both a man and a woman to enter into the contract of marriage with someone of the opposite sex.

23. Men and women also are treated equally under the law with respect to the benefits and burdens received that one receives after marriage. There is no distinction under the law respecting the benefits accorded to and burdens imposed upon a married man and a married woman. They are treated identically.

WHEREFORE, Respondent Commonwealth of Pennsylvania respectfully requests that this Honorable Court sustain its preliminary objections in the nature of a demurrer as to Pa. Const. art. I, § 28, and accordingly dismiss the petition for review with prejudice for legal insufficiency.

**FIFTH PRELIMINARY OBJECTION - DEMURRER**  
**Article I, Section 25**

24. Petitioners claim that the Marriage Law provisions violate Article I, § 25, of the Pennsylvania Constitution because the limitation on marriage transgresses Petitioners' inherent right to pursue their own happiness.

25. Petitioners plead no facts to support a claim that the Marriage Law transgresses any inherent right reserved to the people, let alone Petitioners' inherent right to pursue their own happiness.

WHEREFORE, Respondent Commonwealth of Pennsylvania respectfully requests that this Honorable Court sustain its preliminary objections in the nature

of a demurrer as to Pa. Const. art. I, § 25, and accordingly dismiss the petition for review with prejudice for legal insufficiency.

**SIXTH PRELIMINARY OBJECTION - DEMURRER**  
**Article I, Section 26**

26. Petitioners claim that the Marriage Law provisions violate Article I, § 26, of the Pennsylvania Constitution because Pennsylvania's limitation on marriage denies them the enjoyment of the civil rights of marriage and discriminates against them in the exercise of their civil rights.

27. Petitioners plead no facts demonstrating any discrimination against them in the exercise of their civil rights; they offer only a legal conclusion, stated in a single sentence, that the Marriage Law provisions discriminate against them in the exercise of their civil rights. *See* Petition at ¶ 12.

28. A statute is presumed to be constitutional and will be found unconstitutional only "if *the party challenging the law can prove* that it clearly, palpably and plainly violates the Constitution." *Nixon v. Dep't of Pub. Welfare*, 576 A.2d 385, 398 (Pa. 2003) (emphasis added). There is a very heavy burden of persuasion upon one who attacks the constitutionality of the statute to demonstrate that the statute in question plainly violates the Constitution. *Commonwealth v. Barud*, 681 A.2d 162, 165 (Pa. 1996). All doubts and inferences are to be resolved in favor of finding a statute to be constitutional. *Commonwealth v. Hendrickson*, 724 A.2d 315, 317 (Pa. 1999).



29. Article I, Section 26, of the Pennsylvania Constitution is analyzed “under the same standards used . . . when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991). To properly state an equal protection claim, “a plaintiff must allege that he is receiving different treatment from that received by other similarly situated individuals.” *Myers v. Ridge*, 712 A.2d 791, 799 (Pa. Cmwlth. 1998).

30. Petitioners fail to set forth any facts that meet their burden or demonstrate they are receiving different treatment from other similarly situated individuals; rather, Petitioners set forth only conclusions of law in an attempt to prove that the Marriage Law provisions violate the Article I, Section 26, of the Pennsylvania Constitution.

WHEREFORE, Respondent Commonwealth of Pennsylvania respectfully requests that this Honorable Court sustain its preliminary objections in the nature of a demurrer as to Pa. Const. art. I, § 26, and accordingly dismiss the petition for review with prejudice for legal insufficiency.

**SEVENTH PRELIMINARY OBJECTION - DEMURRER**  
**Article I, Section 1**

31. Petitioners claim that the Marriage Law provisions violate Article I, § 1, of the Pennsylvania Constitution because Pennsylvania’s limitation on marriage “denies them the inherent rights of *pursuing their own happiness*.” Petitioners’

single averment in regard to a denial of their Article I, Section 1, rights is based solely on a stated conclusion that the Marriage Law denies them the right to pursue their own happiness. Petition at ¶ 12.

32. Petitioners do not allege any facts to demonstrate that the Marriage Law in any way denies them the inherent right of pursuing their own happiness.

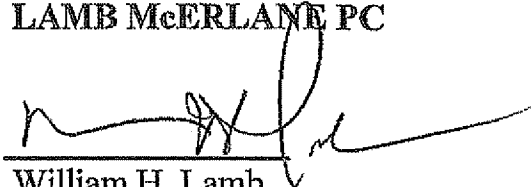
33. Petitioners do not state any other right under Article I, Section 1, that has been denied or infringed. Petitioners do not state any classification that has been created or standard of review that has not been met under Article I, Section 1.

WHEREFORE, Respondent Commonwealth of Pennsylvania respectfully requests that this Honorable Court sustain its preliminary objections in the nature of a demurrer and dismiss the petition for review with prejudice for legal insufficiency.

Respectfully submitted,

LAMB McERLANE PC

By:



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(610) 430-8000

Dated: October 7, 2013

*Counsel for Respondent  
Commonwealth of Pennsylvania*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NICOLA M. CUCINOTTA,  
and TAMARA J. CUCINOTTA,  
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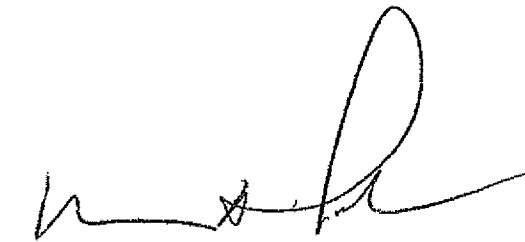
**CERTIFICATE OF SERVICE**

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I, William H. Lamb, hereby certify that, on this date, I served the foregoing Respondent's Preliminary Objections to the Petition for Review by causing a copy of the same to be deposited in the United States mail, first-class, postage prepaid, at Harrisburg, Pennsylvania addressed to the following:

Cletus P. Lyman, Esquire  
Michael S. Fetter, Esquire  
Michael T. Sweeney, Esquire  
LYMAN & ASH  
1612 Latimer Street  
Philadelphia, PA 19103  
Tel: (215) 732-7040

**Dated: October 7, 2013**



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(610) 430-8000

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NICOLA M. CUCINOTTA, and :  
TAMARA J. CUCINOTTA, :  
formerly TAMARA J. DAVIS, :  
 :  
Plaintiffs, :  
v. :  
COMMONWEALTH OF PENNSYLVANIA, :  
 :  
Defendant. :

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Office of Attorney General  
Litigation Section

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LITIGATION SECTION

NOTICE TO DEFEND

TO: COMMONWEALTH OF PENNSYLVANIA

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

DAUPHIN COUNTY LAWYER REFERRAL SERVICE  
213 North Front Street  
Harrisburg, PA 17101  
(717) 232-7536

RECEIVED  
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OFFICE OF GENERAL COUNSEL  
REFERRED \_\_\_\_\_

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NICOLA M. CUCINOTTA, and :  
TAMARA J. CUCINOTTA, :  
formerly TAMARA J. DAVIS, :  
 :  
Plaintiffs, :  
v. :  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
 :  
Defendant. :

COMPLAINT FOR DECLARATORY JUDGMENT

1. Nicola M. Cucinotta is an individual with an address at 551 Foxwood Lane, Paoli, PA 19301.

2. Tamara J. Cucinotta, formerly Tamara J. Davis, is an individual with an address at 551 Foxwood Lane, Paoli, PA 19301.

3. Commonwealth of Pennsylvania is properly addressed for this action at the office of the Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120.

4. Plaintiffs bring this action for judgment pursuant to 42 Pa.C.S. §§ 7531-7541, declaring they have the right to be married to one another under Article I, §§ 1, 3, 25, 26, and 28 of the Pennsylvania Constitution, notwithstanding any purported traditional or statutory definition of marriage limited to one man and one woman.

5. This court has original jurisdiction over this action pursuant to 42 Pa.C.S. § 761(a), whereby the Commonwealth Court shall have original jurisdiction of all civil actions against the Commonwealth government.

6. Plaintiffs are adult women of full capacity., Plaintiffs have chosen to be married to one another.

7. There is no impediment to plaintiffs being married to one another other than their sex, which raises a question of the definition of marriage in Pennsylvania case law, such as De Santo v. Barnsley, 476 A.2d 952 (Pa.Super. 1984), and in the Pennsylvania Marriage Law, 23 Pa.C.S. §§ 1101 et seq.

8. De Santo held that a marriage was between a man and a woman and that any change would be properly legislative. De Santo expressly declined to consider the Pennsylvania Constitution because the parties had not raised the Pennsylvania Constitution in the Court of Common Pleas.

9. The Marriage Law was amended in 1996 to provide that a marriage is "a civil contract by which one man and one woman take each other for husband and wife." 23 Pa.C.S. § 1102.

10. Pennsylvania Constitution, Article I, § 25, nullifies governmental acts that transgress Article I, as ultra vires:

"§ 25. To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."

11. Purported denial of the rights, benefits, and mutual obligations of marriage violates Article I, §§ 1, 3, 26, and 28, which say:

"§ 1. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

"§ 3. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship."

"§ 26. Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

"§ 28. Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

12. The limitation on marriage in Pennsylvania case law and the Marriage Law transgresses plaintiffs' inherent rights of pursuing their own happiness, interferes with their rights of conscience, denies them the enjoyment of the civil rights of marriage, discriminates against them in the exercise of their civil rights, and denies them equality of rights under the law because of their sex.



WHEREFORE, plaintiffs Nicola M. Cucinotta and Tamara J. Cucinotta demand judgment in their favor against the Commonwealth of Pennsylvania, declaring that they have the right to be married to one another with all the benefits and obligations pertaining, pursuant to Pennsylvania Constitution, Article I, §§ 1, 3, 25, 26, and 28, notwithstanding any purported traditional or statutory definition of marriage limited to one man and one woman.



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Counsel for Plaintiffs

VERIFICATION

NICOLA M. CUCINOTTA says the following:

I am a plaintiff in this matter and the facts contained in the foregoing complaint are true and correct to the best of my knowledge, information, and belief.

I understand that these statements are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Dated: September 5, 2013.

  
Nicola M. Cucinotta

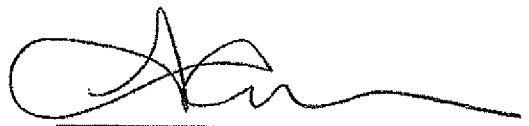
VERIFICATION

TAMARA J. CUCINOTTA says the following:

I am a plaintiff in this matter and the facts contained in the foregoing complaint are true and correct to the best of my knowledge, information, and belief.

I understand that these statements are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Dated: September 5, 2013.



Tamara J. Cucinotta