

CENTER FOR LESBIAN AND GAY CIVIL RIGHTS
By: Cynthia J. Schneider (I.D. No. 77882)
Leonore F. Carpenter (I.D. No. 86767)

1211 Chestnut Street
Philadelphia, PA 19107
(215) 731-1447

*Attorneys for Defendants
Robert Seneca and Stephen Stahl*

**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. THOMAS F. YEWIC, and
CREATIVE PULTRUSIONS, INC.,

Plaintiffs,

v.

ROBERT SENECA and STEPHEN STAHL,

Defendants.

No. 2004-3160-28-5

ORAL ARGUMENT REQUESTED

**REPLY BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS
OF DEFENDANTS ROBERT SENECA AND STEPHEN STAHL
TO PLAINTIFFS' COMPLAINT**

INTRODUCTION

Plaintiffs cannot and do not provide any authority whatsoever to support what they attempt here: a declaratory judgment action to declare constitutional a statute that has not been subject to legal challenge. In fact, such an action is clearly not allowed under explicit

Pennsylvania law. See Whitehall Township v. Oswald, 161 A.2d 348, 349-50 (Pa. 1960); Yarmoski v. Lloyd, 531 A.2d 1169, 1171 (Pa. Commw. Ct. 1987). Instead, Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections ("Plaintiffs' Brief") attempts to confuse very clear issues that are resolved by controlling Pennsylvania precedents that require dismissal of this case. For example, Plaintiffs emphasize Defendants' supposed comments to the press, which are legally irrelevant and are not even part of the Complaint (and therefore not properly before the Court on Preliminary Objections).

Nor do Plaintiffs point to any authority under which legislators attain standing to ask a court to declare a statute unconstitutional merely because they voted in favor of the statute and -- presumably like any statute for which they voted -- are interested in its subject matter. Again, Pennsylvania law makes clear that these allegations do not afford standing. See Whitehall Township, 161 A.2d at 350; Wilt v. Beal, 363 A.2d 876, 881 (Pa. Commw. Ct. 1996). Likewise, Plaintiffs provide no authority to support Creative Pultrusions' standing based on the sheer speculation that if the statute at issue is at some future time struck down, the private party might incur additional costs in providing benefits or bear tax burdens that are no different from those of other citizens and taxpayers. See Wm. Penn Parking Garage v. Pittsburgh, 346 A.2d 269, 280-81 (Pa. 1975).

Finally, Plaintiffs completely fail to show that the Complaint's scandalous and impertinent allegations regarding Defendants and other same-sex couples could in any way be relevant; therefore, such allegations should be stricken.

As we discuss below, none of the arguments raised by Plaintiffs' Brief establishes that this case should be allowed to go forward, and therefore Plaintiffs' Complaint should be dismissed.

ARGUMENT

I. **PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THIS CASE IS RIPE OR JUSTICIABLE.**

In their response, Plaintiffs do not contest the basic legal principles established in Defendants' Brief In Support Of Preliminary Objections ("Defendants' Brief") that: (1) the Declaratory Judgments Act does not allow preemptive-strike litigation to establish the constitutionality of a statute that has not been legally challenged, Whitehall Township, 161 A.2d at 349-50; (2) it would be improper for this Court to issue an advisory opinion, Gulnac v. S. Butler County Sch. Dist., 587 A.2d 699, 701 (Pa. 1991); and (3) Pennsylvania's Defense of Marriage Act, 23 Pa. C.S.A. § 1704, and Pennsylvania's Marriage Law, 23 Pa. C.S.A. § 1102 ("Marriage Laws"), are presumed constitutional until a Court has held otherwise. Commonwealth v. McCafferty, 758 A.2d 1155, 1160 (Pa. 2000). Nonetheless, Plaintiffs urge this Court to issue a declaratory judgment on the constitutionality of the Marriage Laws despite the absence of the requisite legal controversy.¹

In their efforts to avoid binding Pennsylvania precedents and convince the Court that this case is legally ripe and justiciable, Plaintiffs assert that the case involves "antagonistic claims" that indicate that litigation over the constitutionality of the Marriage Laws is "immediate

¹ Plaintiffs do not address Defendants' argument that because Plaintiffs have not alleged that Defendants have secured an out-of-state marriage, their attempt to seek a declaratory judgment with respect to 23 Pa. C.S.A. § 1704, which regulates out-of-state marriages, is improper. See Defendants' Brief at 9, n.1.

and inevitable." Plaintiffs' Brief at 5, 6. However, the supposed "claims" at issue, as alleged by Plaintiffs, are not legal claims. Rather, they amount to nothing more than the fact that Defendants have publicly expressed personal views of the Marriage Laws that are different from Plaintiffs', a fact that as a matter of law does not make litigation either "immediate" or "inevitable." If persons' mere expressed disagreements over arguably controversial issues were sufficient to create a ripe case or controversy, courts would be flooded with litigation and spend all their time issuing advisory opinions.²

As Plaintiffs themselves state in their response, the only supposed "claims" Defendants have allegedly made consist of an application for a marriage license and second-hand accounts of supposed personal statements of their feelings and beliefs on the subject -- none of which is alleged in Plaintiffs' Complaint and some of which were not made until after Plaintiffs instituted this action. Plaintiffs' Brief at 5-6. None of Plaintiffs' allegations constitutes an "antagonistic claim" that is legally sufficient to support a declaratory judgment action.

The controlling point is: Plaintiffs here are not aggrieved and Defendants have not taken any action that has threatened imminent harm to Plaintiffs' legally protected rights. Defendants have been denied a marriage license and did not appeal.³ Had Defendants wished to do so, not only could they have instituted a challenge to the Marriage Laws before the present

² For example, if Plaintiffs' argument were accepted, then any time a newspaper editorial or letter to the editor opined that a law was unconstitutional, Plaintiffs could bring a suit against the newspaper or individuals expressing such opinions.

³ Applying for a license is not a necessary "first step" in bringing an alleged challenge to the Marriage Laws, as Plaintiffs suggest, since any aggrieved citizen has the potential to bring an action at any time challenging the constitutionality of the Marriage Laws on their face. If a party could be sued as soon as s/he took an initial step to find out what his or her rights might be, the courts would be flooded with hypothetical cases that they would be deciding in the abstract.

action was filed, they could have instituted a challenge at any time after this action was filed.⁴ They have not done so, have no present intent to do so, and no legal controversy is presented.

In the end, Plaintiffs' arguments only underscore that this case is not appropriate for declaratory judgment under the controlling precedents. It is well settled under Pennsylvania law that courts should not enter declaratory judgments in anticipation of events that may never occur, and that litigants should not seek advisory opinions under the Declaratory Judgments Act. Gulnac, 587 A.2d at 701; Yarmoski, 531 A.2d at 1171. Whitehall Township explicitly prohibits preemptive-strike litigation to uphold the constitutionality of a statute. Here, Plaintiffs' entire basis for entry of a declaratory judgment rests upon the speculative fear that at some future time Defendants may challenge Pennsylvania's Marriage Laws. Pennsylvania courts have already squarely rejected this type of speculation as insufficient to create a ripe and justiciable controversy. See Yarmoski, 531 A.2d at 1171-72 (granting preliminary objections and dismissing suit based on lack of ripeness and a justiciable controversy where plaintiff deputy constable sought a declaration that, pursuant to state statute, he and other constables have the power to arrest persons without a warrant and alleged that failure to grant relief may subject him to future lawsuits).

Plaintiffs rely on Wecht v. Roddey, 815 A.2d 1146 (Pa. Commw. Ct. 2002), inaccurately arguing that Wecht supports the proposition that whenever someone makes the "public contention" that a law is invalid, an actual legal controversy ensues. Plaintiffs' Brief at

⁴ Plaintiffs claim that "a declaratory judgment action is the only way the constitutionality of [the Marriage Laws] can be decided." Plaintiffs' Brief at 10. This assertion is absolutely incorrect. Although there is no actual controversy over the constitutionality of the Marriage Laws, if some day some party should decide to test the constitutionality of those laws, he or she could properly do so in a variety of ways, such as by filing an appeal from the denial of a license or by instituting a civil action.

7. Plaintiffs' argument obviously proves too much. Were it a valid statement of law, any individual who publicly asserted a view different from Plaintiffs (or anyone else) on the constitutionality of a statute would become a potential defendant and proper target for a declaratory judgment suit to uphold laws that have not been legally challenged.

Of course, Wecht stands for no such rule. In Wecht, it was the aggrieved party -- the Coroner of Allegheny County -- who filed suit to strike down the law at issue, claiming that an attempt by the County to exercise control over his office by the enactment of an Administrative Code was in violation of the Pennsylvania Constitution and Second Class County Charter law. Id. at 1148. Although the Coroner may not yet have been in violation of any specific provision of the Administrative Code, the mere exercise of power over his office was the act that gave rise to his grievance and was at issue in his suit.

In other words, the plaintiff-coroner in Wecht was being subjected to an alleged legal violation and brought suit to strike down the law at issue. Had the County done what Plaintiffs attempt here -- asked for a declaratory judgment to uphold the law where there was no legal challenge -- it would have been in precisely the same situation as the Plaintiff Township in Whitehall Township, and the Court would have been obligated by the precedent of our Supreme Court to dismiss the case.

No doubt understanding that Whitehall Township dooms this lawsuit, Plaintiffs make an unavailing attempt to distinguish it. Plaintiffs argue that the holding of Whitehall Township -- that the Declaratory Judgments Act does not allow preemptive-strike litigation, such as the present case, to establish the constitutionality of a statute -- does not apply because Defendants have "publicly questioned the validity of the Marriage laws" while the defendants in

Whitehall Township did not. Plaintiffs' Brief at 8. However, unlike Defendants in this case, the defendants in Whitehall Township did even more than "question" the validity of the ordinance at issue -- they actually violated it. If actual violation of a law was not enough to create a controversy sufficient to support a declaratory judgment action in Whitehall Township, a fortiori, Defendants' mere public comments are insufficient to create an actual controversy in this case.

Plaintiffs' effort to distinguish Pa. Dental Hygienists' Ass'n v. State Bd. of Dentistry, 672 A.2d 414 (Pa. Commw. Ct. 1996), because that case involved a pre-enforcement challenge to an agency regulation rather than a statute, Plaintiffs' Brief at 9, is equally unconvincing. A legally ripe, justiciable controversy is a requirement for any declaratory judgment action, whether it involves a statute or an administrative regulation, and Plaintiffs do not show otherwise.

Plaintiffs' argument that the declaration they seek "will be of practical help in ending the controversy between the parties," Plaintiffs' Brief at 7, is equally unavailing because, as Defendants have established, there simply is no legally cognizable "controversy" between the parties. Again, Plaintiffs confuse the requisite legal controversy with a mere public policy disagreement.

Plaintiffs also attempt to salvage this action by asserting that a "substantial public interest would be served by a determination of this issue." But while any issue of constitutionality is arguably "of public interest" and "importance," courts clearly cannot properly issue advisory opinions on constitutional issues merely because they may be perceived as "important" or because there might be public disagreement over them. If courts could, they would be inundated with requests for advisory opinions on constitutional matters.

Finally, Plaintiffs attempt to convince the Court to keep this action alive by arguing that, despite filing preliminary objections, Defendants supposedly want the present lawsuit to continue. Plaintiffs' Brief at 11. With all due respect, this contention borders on the nonsensical. Plaintiffs go so far as to cite Defendants' efforts to have this suit dismissed as proof that somehow it should not be dismissed, arguing that "Defendants do not have to defend this suit if they do not want to. The reason they are still in is because they want to challenge the marriage laws." See id. But Defendants are doing precisely the opposite of challenging the Marriage Laws -- they are asking that this case be dismissed because there is no ripe legal controversy regarding those statutes. And although Plaintiffs contend that "this case with the same issues will be back in court" if it is dismissed and Defendants simply "want to be the ones bringing the suit instead of Plaintiffs," id., they produce absolutely no evidence to support these assertions. Even if these contentions were true, they would not be enough to create a justiciable controversy at this time in the context of this action.⁵

II. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THEY HAVE STANDING TO BRING THIS ACTION.

Even assuming that this action could present a ripe, justiciable controversy, it still must be dismissed because no Plaintiff has standing to obtain a declaration or judgment from this Court.

⁵ Although Plaintiffs note that the American Civil Liberties Union ("ACLU") filed a suit in Maryland on behalf of other individuals challenging that state's marriage laws, the mere fact that other litigation has been filed by other parties in other states under different state laws and state constitutional provisions cannot convert this action into a ripe, justiciable controversy. No legal challenge has been instituted in Pennsylvania and the existence of challenges in other states does not make it proper for Plaintiffs to force Defendants to defend this action when they have done nothing more than express their personal views of the law.

The Legislator Plaintiffs contend that they obtain standing because they have an interest "in preserving the right and duty of the legislators to define marriage" and in preserving "their extensive work and dedication" and "reputations and integrity." Plaintiffs' Brief at 13, 14. But the same would be true for any statute. What the legislators point to is nothing more than a generic interest of the legislators in seeing their legislation upheld -- an interest that has already been determined to be no greater than that of the public and insufficient to support standing under Pennsylvania law. Whitehall Township, 161 A.2d at 349-50; Wilt, 363 A.2d at 881.

Plaintiffs do not even address the controlling decision in Whitehall Township and suggest that Wilt has been "called . . . into question" by Zemprelli v. Daniels, 436 A.2d 1165 (Pa. 1981) and Ritter v. Commonwealth, 548 A.2d 1317 (Pa. Commw. Ct. 1988). Plaintiffs' Brief at 13. In fact, neither Zemprelli nor Ritter comes close to suggesting that a legislator obtains standing to file an action to uphold a statute merely because he or she voted for it.

Both Zemprelli and Ritter involved legislators challenging alleged procedural infringements on their legislative functions. In Zemprelli, the legislators claimed that "the voting process" was legally defective. 436 A.2d at 1167. In Ritter, the claim was that legislators' "votes were in effect 'diluted.'" 548 A.2d at 1318. The present case in no sense resembles Zemprelli or Ritter. Here, Plaintiffs do not allege that proper procedures were not followed in enacting amendments to the Marriage Laws or that their legislative function was infringed upon. To the contrary, they are seeking to confirm that the Marriage Laws would survive a hypothetical

legal challenge. Yet, this type of proceeding is precisely what Whitehall Township and Wilt hold they lack standing to do.⁶

As for Creative Pultrusions, it offers nothing but the same factually unsupported conjecture contained in the Complaint that its benefits package somehow will be affected if the Marriage Laws are declared unconstitutional or that state spending and taxes will increase if same-sex partners can qualify for benefits. Creative Pultrusions fails to show precisely how it will be affected and, indeed, does not even assert that it has any employees who would enter into same-sex marriages and seek coverage under Creative Pultrusions' benefits package. And as far as "state spending" is concerned, it makes no attempt to show that its interest is any different than that of any other citizen-taxpayer. See Wm. Penn Parking Garage, 362 A.2d at 280-81. Therefore, it too lacks standing.

Finally, Plaintiffs argue that they "are uniquely positioned to advocate on behalf of Pennsylvania's marriage laws" (even more so than the Attorney General's Office, which Plaintiffs claim "is not a specialist in this area of law" and is affected by "bias and personal beliefs" hampering its ability to litigate this action effectively). Plaintiffs' Brief at 17. Not only is this argument unconvincing, it is completely irrelevant. Whether or not Plaintiffs and their attorneys are better-trained and more experienced in this sort of litigation has nothing to do with whether or not Plaintiffs have the substantial, direct, and immediate interest in the subject matter

⁶ Plaintiffs cite several federal intervention cases, Plaintiffs' Brief at 14-15, while conceding that these cases "are not binding on this Court," *id.* at 14, and that "the interest required to intervene pursuant to Fed. R. Civ. P. 24 (a) is not identical to the interest required for standing." *Id.* at 15. In fact, these cases are completely irrelevant in the face of explicit Pennsylvania law that Plaintiffs have no standing here.

of the litigation required to confer standing, Wm. Penn Parking Garage, Inc. v. Pittsburgh, 346 A.2d 269, 281-82 (Pa. 1975). Plaintiffs cite no authority holding otherwise.

III. PLAINTIFFS HAVE FAILED TO SHOW THAT PARAGRAPHS 27 THROUGH 31 OF THEIR COMPLAINT SHOULD NOT BE STRICKEN.

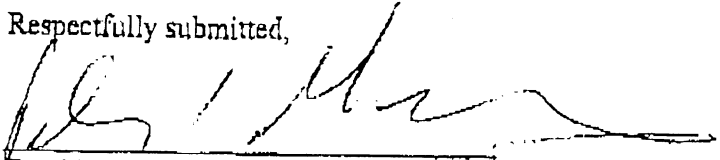
Finally, Plaintiffs' weak attempts to defend paragraphs 27 through 31 of their Complaint only serve to establish that they should be stricken as scandalous and impertinent matter. Plaintiffs do not in any way attempt to defend the relevance of these inflammatory and derisive allegations, which Defendants have shown to be immaterial. Instead, Plaintiffs make the peculiar argument that because Defendants contend that these paragraphs are irrelevant and should be stricken, then they must be relevant. Obviously, it does not follow that challenging the relevance of an allegation somehow makes that allegation relevant.

Moreover, the mere fact that the paragraphs at issue "do not name Defendants specifically," Plaintiffs' Brief at 20, does not make them any less derogatory but only underscores their irrelevance. These paragraphs were clearly designed to attack and disparage same-sex couples and, by association, Defendants. Because Plaintiffs have failed to show how the allegations at issue serve some purpose other than to defame Defendants and same-sex couples generally, paragraphs 27 through 31 should be stricken.

CONCLUSION

For the foregoing reasons, Defendants' Preliminary Objections to Plaintiffs' Complaint should be granted, Plaintiffs' Complaint should be dismissed in its entirety, and paragraphs 27 through 31 of Plaintiffs' Complaint should be stricken.

Respectfully submitted,



Cynthia J. Schneider (I.D. No. 77882)
Leonore F. Carpenter (I.D. No. 86767)
Center for Lesbian and Gay Civil Rights
1211 Chestnut Street
Philadelphia, PA 19107
(215) 731-1447

Peter S. Greenberg (I.D. No. 12562)
Mark A. Momjian (I.D. No. 48216)
Jennifer A. Diamantis (I.D. No. 84486)
Lauren L. Sorrentino (I.D. No. 89598)
Linda Alle-Murphy (I.D. No. 91543)
Schnader Harrison Segal & Lewis LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2000

Malia Brink (I.D. No. 86749)
ACLU Foundation of Pennsylvania
P.O. Box 1161
Philadelphia, PA 19105
(215) 592-1513, ext. 119

Susan Frietsche (I.D. No. 65240)
Women's Law Project
Western Pennsylvania Office
345 Fourth Avenue, Suite 904
Pittsburgh, PA 15222
(412) 227-0301

David S. Cohen (I.D. No. 88811)
Women's Law Project
125 South Ninth Street, Suite 300
Philadelphia, PA 19107
(215) 928-9801

*Attorneys for Defendants
Robert Seneca and Stephen Stahl*

Dated: October 1, 2004