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SPECIAL INTEREST OF AMICUS CURIAE

Robert M. McCord is the Treasurer of the Commonwealth of Pennsylvania, an independently elected, state constitutional office, whose powers and responsibilities are statutorily derived and set forth in the state Fiscal Code. In his capacity as the State Treasurer, Robert M. McCord (“Treasurer McCord”) seeks to provide this Court the viewpoint of a public official who is statutorily charged with the oversight and administration of state laws, programs, and public benefits that, without public policy justification, categorically deprive same-sex couples of equal treatment under state law.

By filing this Brief of *Amicus Curiae*, Treasurer McCord desires to ensure that this Court receives the balanced perspective of a state public official who is able to identify, with specificity, instances in the administration of state-sponsored benefits and programs that, as a consequence of Pennsylvania’s Marriage Law, create two distinct classes – those couples whose marriages are recognized by Pennsylvania and therefore are granted access to state-sponsored benefits and programs, and those same-sex couples whose out-of-state marriages are not recognized and therefore are denied access to state-sponsored benefits and programs.

Treasurer McCord, by virtue of his position is able to offer a unique perspective on the fiscal impact of Pennsylvania’s Marriage Law on same-sex couples whose out-of-state marriages are not recognized. The State Treasurer is a public employer. The State Treasurer is also responsible for the administration of myriad laws and programs within the scope of the Treasury Department that touch upon the lives of almost every Commonwealth resident and, in many circumstances, reach beyond Pennsylvania’s borders to impact the rights of residents of

other states.¹ For example, the State Treasurer is responsible for overseeing Pennsylvania's Disposition of Abandoned and Unclaimed Property Act, a program that seeks to identify, locate, and reunite abandoned and unclaimed property with lawful owners. 72 P.S. § 1301.1 *et seq.* The Treasurer also serves as Chairman of the Board of Finance and Revenue, an administrative appellate Board that considers and resolves appeals from the Department of Revenue involving state taxation. 72 P.S. § 9703.1. In addition, the Treasurer administers Pennsylvania's Tuition Account Program, intended to provide affordable savings and college tuition planning for families. 24 P.S. § 6901.304.

Of equal importance, the Treasurer is the only public official who serves as an *ex officio* member of each of Pennsylvania's state retirement boards – the Pennsylvania State Employees' Retirement Board (71 Pa.C.S.A. § 5901) and the Pennsylvania Public School Employees' Retirement Board (24 Pa.C.S.A. § 8501).

Pennsylvania's Marriage Law has a genuine fiscal impact on same-sex couples, like Plaintiffs Palladino and Barker, because it excludes them from access to these myriad state-sponsored programs and benefits that are overseen and administered by the Treasurer.

¹ In fact, the State Treasurer is the only non-judicial statewide public official specifically mentioned in on section of the Marriage Law (not Section 1704, the section that Plaintiffs challenge, which lists no particular official charged with enforcement). In particular, Section 1105 directs that 50 cents for each issuance of a marriage license shall be transmitted to the State Treasurer upon the tenth day of each month. 23 Pa.C.S.A. § 1105. The Pennsylvania Fiscal Code provides extensive oversight authority to the Treasurer to ensure the proper disbursement of all public funds, grants, and other public money within the custodial control of the Treasurer. 72 P.S. §§ 301-304. The role of custodian is not a mere perfunctory duty, but involves the responsibility of assuming immediate charge and control of ownership, implying the responsibility for the protection and preservation of the funds and assets under the custodial control of the Treasurer. *See Black's Law Dictionary* at 347 (5th ed. 1971). The mere fact that Pennsylvania's Marriage Law prohibits the issuance of a marriage license to same-sex couples deprives the Commonwealth's General Fund of this additional source of revenue.

As a consequence, same-sex married couples are neither treated in the same manner nor afforded the same legal rights and presumptions that opposite-sex spouses when: (1) seeking to recover unclaimed property; (2) accessing and receiving retirement benefits; (3) establishing and transferring college-tuition savings accounts; (4) appealing disparate tax treatment decisions of the Department of Revenue; and (5) obtaining employer provided benefits. In each case, Pennsylvania’s Marriage Law deprives same-sex couples of equal treatment and effectively places public officials – in particular the State Treasurer – in the untenable position of complying with a discriminatory law.²

As a result of Pennsylvania’s Marriage Law's impact on these state-sponsored programs and benefits overseen by the State Treasurer, Treasurer McCord has a special interest in ensuring that the administration of those programs and benefits are executed in a manner that ensures equal access and treatment of all individuals, without regard to sexual orientation.

ARGUMENT

I. Pennsylvania’s Marriage Law creates two distinct classes of marriage.

Pennsylvania was once a leader in removing laws that selectively afforded the right to marriage to only certain privileged classes of citizens. In 1780, Pennsylvania became the first state in the nation to repeal its anti-miscegenation law – removing any legal impediment to marriage between races. *See* 1780 Pa. Laws 492 § XIV (repealing Chapter 292 of the Act of 1725 of the General Assembly of Pennsylvania, which prohibited interracial marriages). It was

² Though Treasurer McCord has no pecuniary or personal interest in the outcome of this litigation, “there is no rule... that amici must be totally disinterested.” *Liberty Res., Inc. v. Phila. Hous. Auth.*, 395 F. Supp. 2d. 206, 209 (E.D. Pa. 2005) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)). Robert M. McCord has been married to his wife for over twenty-seven years, yet had his marriage taken place forty years earlier, it would have been explicitly prohibited in seventeen states. As both a husband and a public official, the belief that marriage is a fundamental right and inherently related to individual liberty is personal to Treasurer McCord.

not until 1967 when the United State Supreme Court, in *Loving v. Virginia*, declared prohibitions against inter-racial marriages to be unconstitutional and a violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823-24 (1967). Unfortunately, litigation before this Court revisits the issue of state laws that selectively recognize marital rights, replacing racially based barriers with a newly identified obstacle – sexual orientation.

Pennsylvania’s Marriage Law, 23 Pa.C.S.A. § 1101 *et seq.*, defines marriage in a manner that explicitly prohibits same-sex couples from obtaining a marriage license in the Commonwealth and excludes from legal recognition same-sex couples lawfully married in another state jurisdiction. Section 1102 of the Marriage Law defines a “marriage” as a civil contract, a formal legal relationship recognized under state law which provides the couple with various associated rights, protections, and presumptions. However, by its terms, Pennsylvania’s civil marriage contract explicitly excludes same-sex couples. 23 Pa.C.S.A. § 1102 (“A civil contract by which one man and one woman take each other for husband and wife.”). The effect of this exclusion is to prohibit any state legal acknowledgement of a same-sex couple’s relationship under the same terms and conditions as an opposite-sex relationship. 23 Pa.C.S.A. § 1301(a) (no marriage is recognized without a license).

Section 1704 of the Marriage Law—which is the particular section that Plaintiffs challenge—extends its exclusionary treatment to same-sex marriages legally entered into in other state jurisdictions. The Marriage Law formally states that it is the “public policy of this Commonwealth” that marriage is between one man and one woman and that same-sex marriages entered into in another state are “void” in the Commonwealth. 23 Pa.C.S.A. § 1704. In so doing, Pennsylvania’s Marriage Law intentionally establishes two distinct classes of couples:

opposite-sex couples, who are able to enter into the civil contract of marriage in any jurisdiction and have their marriage legally recognized in Pennsylvania, and same-sex couples, who are neither allowed to obtain a marriage license in Pennsylvania nor enjoy legal recognition by the Commonwealth of a marriage contract lawfully obtained in another jurisdiction.³ The effect of this division is to prohibit contractual legal status for same-sex marriages, and by implication, numerous derivative state legal rights, protections, and presumptions.

II. Pennsylvania’s Marriage Law compels the unequal treatment of same-sex couples in accessing state-sponsored programs and benefits administered by the State Treasurer.

Although the Treasurer does not directly enforce Section 1704 of the Pennsylvania Marriage Law, the statute impacts the state-sponsored benefits and programs that he does enforce. In particular, Section 1704 results in disparate treatment for same-sex married individuals who, because their marriage is not recognized as a result of Section 1704, are deprived of equal access to the various state-sponsored programs and benefits that are overseen and administered by the Treasurer.

Without legal recognition of their marital status, same-sex couples are without a myriad of derivative rights, protections, and presumptions, including, by way of example, the “spousal privilege” in criminal proceedings (42 Pa.C.S.A. § 5913), the right to inherit through intestate succession (20 Pa.C.S.A. § 2102), and the legal presumption to make medical decisions for an incapacitated spouse (20 Pa.C.S.A. § 5461(d)(1)(i)). This statutorily imposed disadvantage extends not just to Pennsylvania same-sex couples seeking to have their relationships

³ See, e.g., Pa. House Journal, Jun. 28, 1996, 2017 (Remarks of Rep. Egolf) (explaining the intention to exclude same-sex couples from state and employment benefits typically afforded to opposite-sex couples) and Pa. Senate Journal, October 1, 1996, 2452-53 (Remarks of Sen. Fumo) (opposing the amendment to the Marriage Law because of its discrimination against same-sex couples as a class).

acknowledged legally, but also to those couples whose marriages have been legally recognized outside of Pennsylvania, yet cannot obtain equal treatment under Pennsylvania law.

Though not immediately obvious, the various programs overseen and administered by the State Treasurer are illustrative of the legal divide between same-sex couples and opposite sex couples as it pertains to access to state benefits and programs.

A. Abandoned and Unclaimed Property

The State Treasurer is statutorily assigned the responsibility to administer Pennsylvania's Disposition of Abandoned and Unclaimed Property Act (DAUPA), an act that identifies abandoned property and provides the means by which such property may be reunited with its lawful owner. *See 72 P.S. 1301.1 et seq.* An early example of a consumer protection law, Pennsylvania's DAUPA establishes an extensive process in which the owners of abandoned and unclaimed property are located, contacted, and subsequently reunited with their property.

Pennsylvania's DAUPA has far-reaching public impact. Annually, Treasury receives and processes over 80,000 claims for the return of abandoned and unclaimed property. Approximately 1.2 million people, estates, or corporations are currently listed as having unclaimed property within the custodial control of the Commonwealth. From 2009 to 2013, BUP has received 3,979,840 individual unclaimed properties, the owners of which include out of state residents. In the last two fiscal years, the Treasury Department has received over \$500 million dollars in unclaimed property, of which over \$200 million was reunited with 140,946 lawful owners.

The Treasury Department makes available a searchable database on which individuals may look for unclaimed property in their names or the names of their relatives. If a person believes he or she is entitled to unclaimed property, he or she may file a claim and submit it to

Treasury's Bureau of Unclaimed Property ("BUP"). 72 P.S. § 1301.19. The Treasurer considers and resolves thousands of claims annually, and in so doing, may "receive evidence concerning" claims. 72 P.S. § 1301.20(a).

The DAUPA defines "owner" as a "person having a legal or equitable interest in the property." 72 P.S. § 1301.1. The Treasurer applies Pennsylvania law, including the Marriage Law, the Divorce Code, the Probate, Estates and Fiduciaries Code, and other relevant commercial or property laws, in order to determine entitlement to the property. Because unclaimed property is generally reported to the Commonwealth after a five year repose period (72 P.S. §§ 1301.3-1301.10), the person seeking the return of the property is frequently an heir or assignee of the original property owner. In many cases, the person making a claim for the property is an out-of-state resident seeking the return of family assets.

1. Intestate Succession

One way individuals may prove entitlement to unclaimed property is by establishing a legally recognized relationship with a deceased owner of the property. For example, in 2012 and 2013, BUP received 25,516 claims submitted by heirs of deceased owners of unclaimed property. When the decedent owner dies without a will, the Treasurer applies the law of intestate succession, 20 Pa.C.S.A. §§ 2101-2114.

In order to claim abandoned property on behalf of the estate of an owner who has died intestate, a claimant must present to the Treasurer, among other documents, letters of administration identifying the claimant as administrator of the estate. Under Pennsylvania law of intestate succession, the county Register of Wills is directed to grant letters of administration first to the surviving spouse, if there is no will. 20 Pa.C.S.A. § 3155(b)(2). Because Pennsylvania's Marriage Law prohibits the recognition of same-sex marriage, a surviving same-

sex spouse is often unable to obtain letters of administration in the estate of his or her deceased spouse. As a consequence, the Treasurer is forced to deny claims made by a surviving same-sex spouse who cannot obtain letters of administration.

If a surviving same-sex spouse were able to obtain letters of administration as “other fit persons” under Section 3155(b)(5) of the Probate, Estates and Fiduciaries Code, the Treasurer may pay the estate of the decedent-owner. However, the claimant-spouse personally will not be entitled to the funds under the laws of intestate succession. 20 Pa.C.S.A. §§ 2102-2103.

Pennsylvania’s intestate succession laws, together with the Marriage Law, effectively treat spouses in a same-sex marriage as strangers, without any legal rights or presumptions normally granted to opposite-sex spouses. Under circumstances in which there are no living heirs, the estate is escheated to the Commonwealth of Pennsylvania, rather than inherited by a surviving spouse. 20 Pa.C.S.A. § 2103(6).

If a decedent-owner died while residing in the Commonwealth, the Treasurer is permitted to distribute unclaimed property owned by the decedent directly to an entitled claimant only if the following conditions apply:

- (i) The amount of the funds or the value of the property is \$ 11,000 or less.
- (ii) The person claiming the property or the funds is the surviving spouse, child, mother or father, or sister or brother of the decedent, with preference given in that order.
- (iii) A personal representative of the decedent has not been appointed or five years have lapsed since the appointment of a personal representative of the decedent.

20 Pa.C.S.A. § 3101(e)(1)(i)-(iii) (emphasis added).

This provision provides a convenient way for family members to claim the property of a deceased relative. In fact, 16,470 of the claims submitted by heirs of decedent property owners in 2012 and 2013 utilized this section in order to claim the property of their deceased relatives.

However, pursuant to the Marriage Law, the Treasurer is required to deny such claims made by surviving spouses of a same-sex marriage because Pennsylvania affords no legal acknowledgment of their relationship or out-of-state marriage.

Unfortunately, unless same-sex couples engage in careful estate planning, the Pennsylvania Marriage Law precludes a surviving same-sex spouse from enjoying the same inheritance rights or presumptions typically provided to opposite-sex couples seeking to claim abandoned or unclaimed property.

2. Tenancy by the Entireties

Though real property is not remitted to the Treasurer as unclaimed property, the proceeds from the sale of real estate, such as from sheriffs' sales, is subject to the custody and control of the Commonwealth. 72 P.S. § 1301.9(1). In 2011 and 2012, the Treasurer received \$23.4 million in proceeds from the sheriff's sale of 2,771 properties from Philadelphia County alone. If the underlying real property was owned by more than one person, the proceeds are reported in the names of all owners. In situations where a claim for the proceeds of jointly owned real estate sold at sheriff's sale is submitted to the Treasury Department, and one of the owners is deceased, the Treasurer looks at the type of tenancy created by the conveyance of the property in order to determine entitlement.

Pennsylvania law no longer contains a presumption that favors rights of survivorship between joint owners. *See* 68 P.S. § 101. Accordingly, where a deed conveys property as a Tenancy in Common or a Joint Tenancy with no survivorship language, the property will pass pursuant to the decedent's will or through intestate succession. *Id.* If owners intend to create a Joint Tenancy with Right of Survivorship, "the intent to do so must be expres[s]ed with sufficient clarity to overcome the statutory presumption that survivorship is not intended."

Zomisky v. Zamiska, 449 Pa. 239, 242, 296 A.2d 722, 723 (1972) (citing *Isherwood v. Springs First Nat'l Bank*, 365 Pa. 225, 74 A. 2d 89 (1950) and *Mardis v. Steen*, 293 Pa. 13, 141 A. 629 (1928)).

However, Pennsylvania common law provides for a unique form of ownership known as Tenancy by the Entireties, a legal right available only to married couples. See *Wylie v. Zimmer*, 98 F. Supp. 298, 299 (E.D. Pa. 1951), *Clingerman v. Sadowski*, 513 Pa. 179, 183, 519 A.2d 378, 380 (1986), and *Gilliland v. Gilliland*, 751 A.2d 1169, 1172 (Pa. Super. Ct. 2000). Tenancy by the Entireties is characterized by a right of survivorship, whereby upon the death of one spouse, the surviving spouse is presumed to become the sole owner of the property. *Id.*

As a consequence, if a couple in a same-sex marriage were to purchase real property as joint tenants, but not include sufficiently clear language to create a right of survivorship, the Treasurer will be required to deny the claim for the proceeds of a subsequent sale of the property, if the claim were submitted by the surviving spouse of that relationship. Alternatively, if the couple were married under Pennsylvania law, and were able to purchase the property as husband and wife, upon the death of one spouse, the surviving spouse would be presumed under Pennsylvania law to be the sole property owner. Under such circumstances, the Treasurer would be able to approve the claim and distribute the proceeds to the surviving spouse.

B. Tuition Account Program

The State Treasurer administers the Tuition Account Program (“TAP”). TAP contains two programs—a Guaranteed Savings Program and an Investment Program—in which account owners can take advantage of a low-cost, tax-deferred contribution program in order to save money for a designated beneficiary’s college education. 24 P.S. § 6901.101 *et seq.* TAP is a state-sponsored program intended to provide affordable access to higher education and to

encourage attendance at institutions of higher education. 24 P.S. § 6901.301(5). There are currently 104,318 accounts within the Guaranteed Savings Program, and 82,774 accounts within the Investment Program. Participation in either program is open to residents of all states; it is not limited to Pennsylvania residents. In fact, approximately 2,888 of Guaranteed Savings Program account holders and 3,599 Investment Program account holders are out-of-state residents.

Both programs in TAP require the account owner to complete a contract, in which he or she is given the opportunity to select a successor owner to become the owner of the TAP account upon the original owner's death or incapacity. If a successor owner is not designated, upon the death of the account owner, successor ownership is determined by the account owner's will. If there is no will, and the beneficiary is a minor, ownership passes to the original owner's surviving spouse. However, if there is no surviving spouse, successor ownership is determined by state intestate laws. *See* Investment Program Disclosure Statement, Part 2(A)(2)(c), attached hereto as Exhibit 1.

Since Pennsylvania law does not recognize same-sex marriages, the same-sex spouse of an account owner will not become the successor owner upon the death of the account owner who died intestate without a designated successor. By way of comparison, because opposite-sex marriages are formally recognized, Pennsylvania provides inheritance rights that would permit successor ownership of the account to the surviving spouse. Without the legal right to marriage, there is no presumption of the right to inherit or control the handling of a Pennsylvania TAP account.

C. Public Employee Retirement Benefits

The State Treasurer is the only public official who is a member of both major state public retirement systems – the State Employees' Retirement System ("SERS"), 71 Pa.C.S.A. § 5901,

and the Public School Employees' Retirement System ("PSERS"), 24 Pa.C.S.A. § 8501. SERS and PSERS are the two largest pension funds in the Commonwealth, with over 832,000 active members, combined. SERS currently has 107,002 active members who are still employed with the Commonwealth, 120,052 retirees or annuitants, and 4,951 vested members who no longer work for the Commonwealth. PSERS has 267,428 active members, 209,204 annuitants, and 128,650 vested members who have left employment with the public school system. Though primarily Pennsylvania residents while employed, at the time of retirement, many SERS and PSERS members move and establish residency in other states, including those states that acknowledge the legal status of same-sex marriages.

As a member of each retirement system board, Treasurer McCord oversees the management and investment of each fund, the administration of each system's benefits, and consideration and resolution of payment requests.

One of the responsibilities of the system administrators is to pay death benefits to designated beneficiaries upon notification of the death of a member. If the member fails to designate a beneficiary and the Board has not been notified to pay the estate, "the board is authorized to pay such benefits to the executor, administrator, surviving spouse or next of kin of the deceased member" 24 Pa.C.S.A. § 8505(h) (PSERS) and 71 Pa.C.S.A. § 5905(g) (SERS). Under Pennsylvania law, a same-sex spouse would not be entitled to receive the death benefits of his or her spouse if the member-spouse did not designate a beneficiary. However, because Pennsylvania Marriage Law affords opposite-sex married couples legal recognition of their relationship, an opposite-sex spouse would be presumed to be entitled to those benefits even if there were no beneficiary designation. Furthermore, it is questionable that a surviving same-sex spouse would even possess legal standing to appeal or challenge a decision of either

system, because there is no legal recognition in Pennsylvania of their relationship, and therefore no established property right in the benefit. Because Pennsylvania's Marriage Law does not recognize same-sex marriages of other state jurisdictions, out-of-state residents are also excluded from accessing state benefits under similar circumstances.

The PSERS board is also authorized to "sponsor a participant-funded group health insurance program for annuitants, spouses of annuitants, survivor annuitants and their dependents." 24 Pa.C.S.A. § 8502.2(a) (emphasis added). Because Pennsylvania's Marriage Law bars from legal recognition same-sex marriages, it is likely that same-sex spouses of annuitants would be denied access to health benefits under this program. *See id.*

D. Administrative Appeals of Department of Revenue Decisions

The State Treasurer is statutorily identified as the Chairman of the Board of Finance and Revenue. 72 P.S. § 9703.1(i). The Board of Finance and Revenue is a quasi-judicial administrative board charged with the consideration and resolution of appeals of final tax decisions from the Department of Revenue. 72 P.S. § 9703.4. In 2013, the Board received over 4,000 individual tax appeals involving a broad range of state tax matters, including personal income taxes, corporate net income taxes, state sales taxes, and realty transfer taxes.

Pennsylvania's Marriage Law has a significant impact on the assessment and calculation of state tax liability, and by consequence, the application of state tax law in considering appeals concerning the Department of Revenue tax determinations. For example, Pennsylvania law imposes a tax on the transfer of real property, such as residential homes. 72 P.S. § 8102-C. Individuals who record a document transferring real estate within Pennsylvania must pay a state tax at the rate of one percent of the value of the real estate. *Id.* However, certain transactions are excluded from the realty transfer tax, including:

transfer between husband and wife . . . between parent and child or the spouse of such child, between a stepparent and a stepchild or the spouse of the stepchild, between brother or sister or spouse of a brother or sister and brother or sister or the spouse of a brother or sister and between a grandparent and grandchild or the spouse of such grandchild”

72 P.S. § 8102-C.3(6) (emphasis added).

For example, if a grandparent transferred realty to the opposite-sex spouse of a grandchild, that conveyance would not be subject to a realty transfer tax; however, if the tax was mistakenly paid and it was appealed to the Board of Finance and Revenue, the Board would be permitted to issue a refund. Conversely, if the facts in the previous situation were exactly the same, except the transfer was to the same-sex spouse of a grandchild, the Board would be forced to deny the refund because Pennsylvania’s Marriage Law affords no legal recognition to their relationship.

Likewise, Pennsylvania assesses a sales tax on the transfer of the registration of a vehicle. 61 Pa. Code § 31.42. Tax is not imposed, however, on transfers “between a husband to his wife or from a wife to her husband,” from the couple as joint owners to one spouse, or from one spouse to the couple as joint owners. 61 Pa. Code § 31.48(4) and (5). Since the Board of Finance and Revenue also considers appeals for refunds of sales taxes, Treasurer McCord would be required to deny a refund of a sales tax to a same-sex spouse, where the vehicle upon which the tax was assessed was transferred from the other spouse.

Though the Board of Finance and Revenue does not consider appeals regarding the imposition of inheritance taxes, the Board does examine appeals for the refund of inheritance taxes. Pursuant to Pennsylvania’s Inheritance and Estate Tax Act, 72 P.S. §§ 9101 *et seq.*, the transfer of property between husband and wife is taxed at a rate of zero percent. 72 P.S. § 9116(a)(1.1)(ii). By comparison, the transfer of property between unrelated persons is taxed at a

rate of fifteen percent. 72 P.S. § 9116(a)(2) (emphasis added). Unfortunately, as a consequence of Pennsylvania’s Marriage Law, same-sex couples (even those same-sex couples lawfully married in another state) are taxed as if they had no relationship—mere acquaintances.

If a same-sex spouse paid more than the amount of inheritance tax owed under Pennsylvania law, he or she would have little chance of a successful appeal to the Board of Finance and Revenue if the Department of Revenue refused their request. Whereas, a similarly situated opposite-sex spouse would not have to undertake any appeals, as he or she would never have been required to pay the inheritance tax in the first place.

E. State Treasury Employee Benefit Access

As the chief executive of the Treasury Department, the State Treasurer oversees approximately 376 public workers who are employed by the Treasury Department. Pennsylvania’s Marriage Law precludes Treasurer McCord from offering certain benefits and protections to same-sex spouses, when those same benefits and protections are available to opposite-sex spouses. For example, following the death of an employee who died a resident of Pennsylvania, an employer is permitted to pay any wages, salary, or other employee benefits “due the deceased in an amount not exceeding \$5,000 to the spouse, any child, the father or mother, or any sister or brother (preference being given in the order named) of the deceased employee.” 20 Pa.C.S.A. § 3101(a) (emphasis added). Pursuant to Pennsylvania’s definition of marriage and explicit exclusion of same-sex couples, Treasurer McCord is forced to deny a same-sex spouse of a deceased employee the preferential treatment provided for in Section 3101.

Moreover, as a Commonwealth agency and participant in the health benefit program, the Pennsylvania Employees Benefit Trust Fund (PEBTF), Treasury provides domestic partnership health care benefits to all Treasury employees, including domestic partners (opposite-sex or

same-sex couples). Domestic partners are provided the same medical, dental, and vision benefits as the Commonwealth employee.⁴ However, domestic partner health benefits are subject to federal income, social security, and Medicare taxes. Employers with retired employees must issue a W-2 form to report income to the IRS. Both employee and employer have a responsibility to pay the appropriate share of social security and Medicare taxes. The employer rates are 6.2% and 1.45% respectively on the imputed value of the benefits. The result is the added expense and burden on employers who must maintain two separate systems for calculating employee benefits: one system, which automatically applies the appropriate calculations for legally married couples, and one in which payroll employees must manually calculate the information for domestic partnerships, including same-sex couples.

Employees who have a same-sex relationship may not be able access other employee-related benefits that are available to legally recognized opposite-sex couples, such as Social Security benefits, Medicare, Medicaid, and protections under the Family and Medical Leave Act. Research has shown that granting to employees in a same-sex relationship the same employment rights and benefits accessible to opposite-sex married couples produces an economic benefit to employers. See Brad Sears *et al.*, *Economic Motives for Adopting LGBT-Related Workplace Policies*, The Williams Institute (October 1, 2011), <https://escholarship.org/uc/item/2nr871sf> (hereinafter “Sears *et al.*”). Employers who adopt policies advancing the equal treatment of all married couples—same-sex and opposite-sex—cite as one example of economic benefit the recruitment and retention of top-quality employees and talent, which facilitates employers to be more competitive. *Id.* at 5. See also Renee M. Scire & Christopher A. Raimondi, *Note: Employment Benefits: Will Your Significant Other Be Covered?*, 17 Hofstra Lab. & Emp. L.J.

⁴ Benefits differ among state employees depending on the insurance plan the employee chooses.

357, 375-376 (2000). Other economic benefits, such as an increase in ideas and innovation, productivity, and customer service are attributable to the improvement in diversity that is fostered by acceptance and equality for same-sex couples. *Sears et al.* at 5-8. By gaining a more diverse workforce, employers can take advantage of the unique and differing perspectives each employee has to offer, customers and clients are more likely to connect with employees from different backgrounds, and employees feel valued and respected at work. *Id.*

CONCLUSION

The state programs and benefits administered and overseen by the State Treasurer comprise a small fraction of Pennsylvania's \$30 billion annual government operations. Yet, it is not difficult to extrapolate from Treasury's example in order to understand the profound and far-reaching social impact of Pennsylvania's Marriage Law on the daily lives of same-sex couples, including those married in other state jurisdictions. It is well established that domestic relation status, in particular the civil contract of marriage, has a profound impact on society, including the manner in which persons are able to access state programs and benefits. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

There can be no doubt that Pennsylvania's Marriage Law acts to disadvantage, as a separate class, same-sex couples by purposefully refusing them state recognition of their relationship and thus the derivative rights, presumptions and protections normally associated with the legal status of marriage. From a time in which states once enacted anti-miscegenation laws, imposing similar discriminatory effects, such laws have been deemed unconstitutional as depriving individual of equal treatment under federal law. *Loving*, 388 U.S. at 12, 87 S. Ct. at 1823-24. Pennsylvania's law is equally demeaning; its professed purpose is to remove the dignity and legal acknowledgement of marriage from a newly identified disfavored class – same-

sex couples. The examples described herein are illustrative of the pervasive and routine discriminatory impact of this Law.

WHEREFORE, for the forgoing reasons, Pennsylvania Treasurer Robert M. McCord respectfully requests this Court to consider the perspective of *Amicus Curiae* and grant Cara Palladino's and Isabelle Barker's Motion for Summary Judgment, declaring, as a matter of law, that Pennsylvania's Marriage Law deprives them of equal protection under the law.

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