MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO.: KEN-14-456

ELIZABETH KINNEY,

Plaintiff-Appellee

v.

TANYA J. BUSCH,

Defendant-Appellant

ON REPORT FROM THE KENNEBEC DISTRICT COURT

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STATEMENT OF INTEREST OF AMICI[1]

The amici filing this brief are Maine citizens, primarily attorneys, concerned with ensuring the equal rights of same-sex couples in Maine.

Governor John E. Baldacci served two terms as Governor of Maine, from 2003-2011. On May 9, 2011, Governor Baldacci became the first governor in the United States to sign a law authorizing marriage equality where it was not previously court ordered.

The other Amici are leaders in Maine policy and lawyers practicing in various areas of the law affected by the answer to the reported question. Each of these lawyers, otherwise unaffiliated, have played a significant role in the practice or policy of family, probate, real estate and tax law in the State of Maine.

In sum, Amici seek an affirmative answer to the question presented, so that 19-A M.R.S. § 650-B achieves its desired intent of marriage equality and avoids the problematic and adverse consequences of Appellant Busch's suggested interpretation of the statute.

[1] As reflected in the enclosures to the cover letter submitting this brief, the brief is being filed with the consent of the parties per M.R. App. P. 9(a)(1).

STATEMENT OF THE ISSUE

The reported question is:

> May property acquired between October 14, 2008 and Dec. 29, 2012 by a same-sex couple married in the State of Massachusetts on Oct. 14, 2008 be treated as marital property for the purposes of equitable division of property in a divorce action filed on January 18, 2013?

As the District Court ruled, as explained in Kinney's Appellee Brief, and, as noted below, the answer to this question is yes.

SUMMARY OF ARGUMENT

The Court should accept the report. The question presented is one of importance because the impact of a ruling that would treat marriages as occurring on December 29, 2012 instead of earlier dates of actual solemnization could have myriad negative effects, cutting across many areas of the law, on potentially thousands of same-sex couples and their children.

The intent of section 650-B was to achieve marriage equality. When the Maine public voted to approve section 650-B, it did so in the context of seeking to achieve marriage equality for gay people and couples. A negative answer to the reported question would subvert this intent and perpetuate the disparate treatment of same-sex couples that the law was designed to stop.

The consequences of a negative answer to the question would be adverse and severe. The impact of Appellant's proposal that marriages of same-sex

couples celebrated in other states and valid in those jurisdictions on a date prior to December 29, 2012 should nevertheless all be treated as occurring potentially years later, would flow through multiple areas of family law, probate law, real estate law, tax law, benefits and other areas. It is a fiction not only contrary to legislative intent, but would cause grave consequences to these many families relating not just marital property questions in divorce, but in the many other areas of the law in which the duration of a marriage matters.

ARGUMENT

Introduction

In 1997, Maine enacted a discriminatory statute that forbade the state from recognizing marriages of same sex couples performed in other states and licensing such marriages in Maine.[2] The Supreme Court is now considering whether similar state laws are constitutional. But that is not necessary in Maine, because the voters decided to repeal that law and treat equally all of Maine's citizens' marriages, regardless of the gender of the married couple or where they celebrated their marriage. Appellant Busch, who recognizes that she was married to Appellee Kinney and, thus, has not objected to Appellee's filing for a divorce, argues that

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[2] 19-A M.R.S.A. § 650, enacted by PL 1997, c. 65 § 2. Supporters of "An Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages," L.D. 1017 (118th Legis. 1997), considered it a victory against "marauding of opportunistic gay activists." *See Maine Legislature Votes To Ban Gay Marriages*, N.Y. TIMES (Mar. 28, 1997), http://www.nytimes.com/1997/03/28/us/maine-legislature-votes-to-ban-gay-marriages.html.

Maine voters did not really intend to recognize marriages of same-sex couples that were validly performed outside of Maine "for all purposes," as the statute requires. Rather, according to Appellant, their marriage should be treated not as occurring on its actual date, but as if the couple were married on December 29, 2012, the effective date of the law extending recognition to same-sex couples validly married outside of Maine.

Although Appellant's creative interpretation serves to benefit her in the allocation of marital property, it would not serve to benefit Maine and its legal system. First, Appellant's interpretation is inconsistent with the clear statutory text of Maine's law recognizing same-sex couples' marriages "for all purposes," 19-A M.R.S. § 650-B, and the history of that law in which the voters decided to grant equal status to same-sex marriages. Second, adopting Appellant's interpretation would produce a two-tiered system in which marriages, and the appurtenant rights and privileges, do not apply, or apply in unintended ways, to same-sex couples' marriages celebrated before December 2012. The unintended application of the marital property statute appears to be exactly what Appellant wants in this case. Extrapolating that interpretation would be detrimental to other married same-sex couples and Maine's legal system and economy, not to mention the lawyers and judges who would be tasked with administering a discriminatory system.

I. This Court should accept the District Court's report.

The question presented is of importance to many families, both in and outside Maine. As noted *infra*, Section III, the length of a marriage can have many legal ramifications. The complications and confusion that would be caused by having a marriage of different durations for different jurisdictions would also impose many costs on ordinary families, encourage rampant forum shopping, affect decisions whether to move to Maine, and result in unfair and unconstitutional treatment for same-sex couples.

Prior to December 29, 2012, six states plus the District of Columbia allowed same-sex couples to marry, and approximately 180,000 same-sex couples had already married outside Maine. *See* Casey Miller and Randy Yeip, *Marriage Mosaic: Evolution of Gay Unions in the U.S.* (Jan. 14, 2015), http://graphics.wsj.com/gay-unions/ (last updated Feb. 9, 2015); U.S. Census Bureau, American Community Survey Data on Same Sex Couples, http://www.census.gov/hhes/samesex/data/acs.html (last visited Mar. 24, 2015); *see also* Hunter Schwarz, *Married same-sex couples make up less than one half of one percent of all married couples in the U.S.*, WASHINGTON POST (Sept. 22, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/22/married-same-sex-couples-make-up-less-than-one-half-of-one-percent-of-all-married-couples-in-the-u-s/. Section 650-B as read by Appellant Busch challenges the legitimacy of those

many thousands of marriages through that date. It treats those couples as not married until December 29, 2012, with any of their children born before then as non-marital, and perpetuates such second hand, disparate treatment for as long as they remain in the jurisdiction. Such a result is not only unfair to these many couples and their families; it discourages migration to Maine, creates costs in keeping track of different marriage dates for different legal purposes, and violates the will of the electorate in enacting marriage equality in 2012.

II. The intent of section 650-B was to achieve marriage equality "for all purposes."

The text of the statute recognizing marriages of same-sex couples performed outside Maine, 19-A M.R.S. § 650-B, entitled "Recognition of Marriage Licensed and Certified in Another Jurisdiction," could not be more clear: "A marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is ***recognized for all purposes*** under the laws of this State." (emphasis supplied). The history of section 650-B signals that "for all purposes" has a simple, plain meaning—the state should treat every marriage in which the couple is the same gender in the same way as it treats a marriage in which the couple is different genders.

When Maine voters decided to repeal Maine's discrimination against same-sex couples' marrying, a constant thread at each stage of the process was that Maine would recognize any such marriage valid in another state as valid in Maine.

First, the Secretary of State-vetted Summary of the Proposed Initiative on the circulated Petition stated that the law would specify that "a marriage between 2 persons of the same sex in another state that is valid in that state is valid and must be recognized in this State." (Addendum ("Add.") 1 at 3.) Second, after the Petition received 105,000 signatures in just 12 weeks (Add. 2 at 1), the Ballot Initiative entitled "An Act To Allow Marriage Licenses for Same Sex Couples and Protect Religious Freedom" went before Maine voters with the same substantive text in the Summary. (Add. 3 at 4.) Third, the Maine Citizen's Guide to the Referendum Election included a summary of the Intent and Content of the proposed law prepared by the Attorney General, which stated that "[t]he legislation also provides that the marriage of a same-sex couple that is licensed and certified under the laws of another state would be recognized as valid for all purposes under the laws of this state." Maine Citizen's Guide to the Referendum Election, Tuesday, November 6, 2012, at 7, *available at* http://www.maine.gov/sos/cec/elec/2012/CITIZENS%20GUIDE.pdf. Finally, on November 6, 2012, Maine voters enacted sections 650-A and 650-B allowing all Maine citizens to marry and have their valid out-of-state marriages recognized equally for all purposes. (*See* Add. 4.) In none of these materials was there any suggestion that a same-sex couple's marriage occurring outside Maine would be

treated any differently than a heterosexual marriage, or that all marriages of same-sex couples would be treated going forward as if they did not occur until 2012.

The 2012 initiative was about ensuring equality for all married couples, including recognizing any same-sex couple's marriage performed outside of Maine. The referendum was described at the time as "a matter of equality." *Maine should legalize gay marriage*, BANGOR DAILY NEWS (Oct. 30, 2012), http://bangordailynews.com/2012/10/30/opinion/maine-should-legalize-gay-marriage/. It was recognized as seeking to treat same-sex partners equally in terms of "mak[ing] medical decisions concerning children's welfare" and "benefit[ing] from [each] others' pension." *Id.* As one editorial put it, the question before the Maine voters was whether Maine would "continue to allow legal discrimination against others based on their gender, sexual orientation or marital status." *Vote Yes on 1*, BRUNSWICK TIMES RECORD (Oct. 30, 2012), http://www.timesrecord.com/news/2012-10-30/Editorial/Vote_Yes_on_1.html. The same editorial noted that passing the referendum would result in same-sex spouses having "the same legal recognition, rights and privileges as any committed couple when it comes to end-of-life-care, estate planning and income tax benefits." *Id.* The Portland Press Herald's editorial page described the 2012 initiative as "a simple question about whether the law should continue to discriminate against a minority of couples because of who they love. It is a question of whether we will

be a society where everyone is treated equally under the law, or one that lets the government continue to reward and punish families based on sexual orientation." *Our View: Marriage equality race faces a tough challenge*, PORTLAND PRESS HERALD (Sept. 12, 2012), http://www.pressherald.com/2012/09/12/marriage-equality-race-faces-a-tough-challenge_2012-09-12/.

In expressing his support for the 2012 initiative, Governor Baldacci noted that he had come to support marriage for same-sex couples because "it was a question of fairness and equal protection under the law." John E. Baldacci, *Maine Voices: In debate on same-sex marriage, civil unions fall short*, PORTLAND PRESS HERALD (Oct. 10, 2012), http://www.pressherald.com/2012/10/10/in-debate-on-same-sex-marriage-civil-unions-fall-short_2012-10-10/. President Obama also spoke out in favor of the 2012 initiative, and the White House's Northeast regional press secretary noted that he "believes same-sex couples should be treated equally and supports Question 1." Susan M. Cover, *Maine gay-marriage initiative supported by Obama*, PORTLAND PRESS HERALD (Oct. 25, 2012), http://www.pressherald.com/2012/10/25/obama-spokesman-president-supports-question-1/.

Campaign materials also indicate that the 2012 initiative was about marriage equality. For example, in one advertisement sponsored by Mainers United for Marriage, a Republican supporter of the initiative stated "Voting yes protects

religious freedom and it protects individual freedom. To me that's what our country's all about." *Yes on 1: Mainers United for Marriage - Stacey Fitts* (published Oct. 9, 2012), http://www.youtube.com/watch?v=LV8RogOJWDQ. In another advertisement featuring the Gardner family of Machias, Maine, the elder Harlan Gardner stated "This isn't about politics. It's about family and how we as people treat one another." *Yes on 1: Mainers United for Marriage - The Gardner Family of Machias* (published Oct. 25, 2012), http://www.youtube.com/watch?v=2dTdP-XLZzk. Another advertisement sponsored by Mainers United for Marriage featured the parents of twins, one gay and one straight, advocating that both of their sons should be treated equally when they decide to marry. *Yes on 1: Mainers United for Marriage - Pat & Dan Lawson of Monroe* (published Oct. 19, 2012), http://www.youtube.com/watch?v=FdUCLgjxanQ.

In sum, enactment of the initiative in 2012, including adoption of section 650-B, reflects an evolution in the beliefs and understanding of the Maine electorate. By 2012, that electorate in enacting the initiative chose to treat same-sex couples just like heterosexual couples, recognizing the legitimacy of their marriages equally. There is no suggestion in any legislative history, campaign literature or otherwise of any intent to treat the marriages of same-sex couples

differently from any other, as if they had only occurred on December 29, 2012, instead of their actual dates of solemnization.

III. Unintended and detrimental consequences will result if the Court creates a two-tiered marriage system.

The following are only a few examples that show how Appellant's argument produces not only unequal but also absurd results.

A. Divorce

1. disposition of marital assets

The first example is the one presented here. Once divorce proceedings begin, the court must determine the amount of "marital property" as, with specific exceptions, "all property acquired by either spouse subsequent to the marriage." 19-A M.R.S. § 953(2). Therefore, the time period that is "subsequent to the marriage" is critical to assessing each spouse's rights and interests at the time of divorce and "divid[ing] the marital property in proportions the court considers just after considering all relevant factors." 19-A M.R.S. § 953(1). Under Appellant's interpretation, if a couple married in Massachusetts in 2004, lived in Massachusetts for ten years, and then moved to Maine, Maine would only recognize property acquired in the last two years of their marriage as "marital property." This is not "recogniz[ing] for all purposes" and does not make sense.

2. spousal support

Length of marriage is a critical factor in determining spousal support, including a presumption of no alimony if the marriage lasted less than 10 years:

> There is a rebuttable presumption that general support may not be awarded if the parties were married for less than 10 years as of the date of the filing of the action for divorce. There is also a rebuttable presumption that general support may not be awarded for a term exceeding 1/2 the length of the marriage if the parties were married for at least 10 years but not more than 20 years as of the date of the filing of the action for divorce.

19-A M.R.S. § 951-A(2)(A)(1). Thus, the longer the marriage, the greater the support the spouse is entitled to upon divorce.

Appellant's position that a marriage entered into by a same-sex couple prior to 2012 should be treated as if it began on December 29, 2012 would thus result in the unequal treatment of same-sex spouses seeking support. The effect would be unfairly, arbitrarily and unjustifiably to shorten the length of the marriage solely for same-sex couples. In some cases, this may have a significant impact. For example, if a heterosexual couple is married in 2000 and divorces in 2015, spousal support will be awarded based on a 15-year marriage. By contrast, under Busch's interpretation, spousal support for a same-sex couple in the exact same position would be based on a three-year marriage, resulting in a presumption of no alimony even though the marriage actually lasted 15 years. So, in the example of the Massachusetts couple married in 2004 provided above, the spouse that gave up her

job to take care of the children through their school years would be deprived of any alimony recognizing that fact.

3. parental rights and obligations

In Maine, if same-sex parents raise a child together, but only one is considered the "legal" parent, the rights of the other parent are uncertain. When a child is born during a marriage, the child is presumed to be a child of the marriage. *Stitham v. Henderson*, 2001 ME 52, ¶ 14, 768 A.2d 598 (common law presumption); M.R. Evid. 302. As a result, if a child born to a married same-sex couple before December 2012 is considered a non-marital child, one spouse may not be considered to be a "legal parent" without judicial proceedings to establish parentage first. Moreover, the "non-legal parent" may not have standing to rebut the presumption in a legal proceeding to establish parentage. *See Pitts v. Moore*, 2014 ME 59, 90 A.3d 1169.

The allocation of parental rights and responsibilities for individuals deemed to be parents is governed by 19-A M.R.S. § 1653. Section 1653(2)(B) provides that the court may grant reasonable rights of contact to a third person but may not grant parental rights and responsibilities to a third person unless awarding those rights to either parent would place the child in jeopardy. Thus, Appellant's interpretation of section 650-B could lead to myriad unjust results and potential

gaming of a system designed to ensure children's welfare when a same-sex couples' marriage is not deemed to have occurred until December 2012.

If only one parent is considered the "legal" parent, the other parent may lose the right to spend time with and visit the marital children. *See* 19-A M.R.S. §§ 1651 *et seq*. Losing the presumption of being the married parent of the child and all that goes with it can put that parent at a serious disadvantage. If a child is born prior to the marriage, the non-biological parent may be in a position of spending considerable time establishing her rights in the beginning of an action, whereas if the parties were married and the child was born during that time, the presumption of parentage would act to insure more immediate access to the child.

4. child support

Every final order under Maine law 19-A M.R.S. § 1653 must contain a provision for child support. The child support calculation is done on income shares between the parents of the child(ren). "The financial support of a child of divorced parents is the equal responsibility of each parent to be discharged in accordance with each parent's capacity and ability to support the child...." Jon D. Levy, *Maine Family Law*, § 6-37 (2013 ed.). Since children born during a marriage are presumed to be children of the marriage, not recognizing an out-of-state marriage can have the effect of depriving a child of access to additional support.

If only one parent is considered the "legal" parent, the other may be allowed to skirt his or her parental obligations, including child support. Without a determination of "parentage" there is no obligation.

B. Probate

1. elective share

When a Maine resident dies, the deceased's spouse has "a right of election to take an elective share of 1/3 of the augmented estate." 18-A M.R.S. § 2-201. The value of that augmented estate, however, may be affected by the date of marriage. For example, if transferred property is of the type enumerated by statute, the following is added to the augmented estate:

> The value of property transferred to anyone other than a bona fide purchaser by the decedent ***at any time during marriage***, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer.

18-A M.R.S. § 2-202 (emphasis supplied). Thus, depending on whether the property was transferred "during marriage," it may or may not be added to the value of the augmented estate. Assuming such property was transferred after a same-sex couple was married but before December 2012, Appellant's interpretation would under-value the augmented estate, undermining the policy behind the elective share statute. In addition, a diminished augmented estate may

have negative implications when older same-sex couples decide whether to reside in Maine.

2. omitted spouse share

Maine's omitted spouse statute provides that a surviving spouse is entitled to the same share of the estate as if the deceased spouse died intestate when a pre-marital will is not updated to provide for or exclude the surviving spouse:

> If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

18-A M.R.S. § 2-301. The statute is intended to protect individuals mistakenly excluded from their spouse's will because the will was entered into before the marriage. It is not meant to alter the testator's intent. Here, Busch's interpretation would do just that–but only if the testator were part of a same-sex union celebrated prior to December 2012.

Under the omitted spouse statute, the surviving spouse is not entitled to a share of the estate if the will was entered into after the couple was married and is silent as to the surviving spouse's share. In that case, the exclusion of the surviving spouse is deemed intentional. If Busch's interpretation applied, the same

might not be true for the surviving spouse of a same-sex union. For example, if the couple was married in 2005 and one spouse executed a will in 2008 silent as to the surviving spouse's share, the surviving spouse of a same-sex union would be entitled to a share of the estate based on the omitted spouse statute, contrary to the underlying purpose of the omitted spouse statute. Arbitrarily setting December 2012 as the date of the marriage undermines the purpose of the omitted spouse statute.

C. Public benefits

1. pensions

In Maine, pensions, including the Maine State Retirement System, are considered marital property and thus are affected by the date of the marriage. *See Stotler v. Wood*, 687 A.2d 636, 638 (Me. 1996). The date of the marriage is critical in this regard as the calculation of the marital portion is based on the number of years the party was a participant in the plan, divided by the number of years of the marriage. Accordingly, if a party was married in 2008 and divorced in 2014 and the participant had 20 years of marriage, 6/20ths of the pension would be marital. If we move the date of the marriage to delete 4 years, the pension would become $1/10^{th}$ marital.

2. social security and veterans benefits

Under federal law, a divorced spouse may be able to collect social security benefits on a former spouse's work record as long as the couple was married at least ten years. 42 U.S.C. § 402(b) (eligibility criteria for wife and divorced wife benefits) and (c) (same for husband and divorced husband benefits). Unlike most federal benefits statutes, the social security laws look to whether a marriage is valid in the state of domicile of the social security number holder at the time of the application for benefits or date of death, 42 U.S.C. § 416(h)(1)(A)(i), but not to the state of celebration of the marriage. Memorandum of the Attorney General of the United States dated June 20, 2014, at 13, *available at* http://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf.

Similarly, the Veterans Administration determines a spouse's eligibility for certain benefits based on the length of the marriage. For example, to be eligible for Veterans Administration death pension, death compensation or dependency and indemnity compensation benefits, a surviving spouse must have been married to the veteran for at least one year. 38 C.F.R. § 3.54 (a) (1) (death pension); 38 C.F.R. § 3.54 (b)(2) (death compensation) and 38 C.F.R. § 3.54 (c)(2) (dependency and indemnity compensation.) And a divorced spouse must have been married for at least ten years to a veteran who served for at least ten years in order to be eligible for direct payment of the portion of the veteran's retirement benefits

awarded to the spouse at the time of divorce. 10 C.F.R. §1408(d)(2). Like Social Security, the Veterans Administration looks to the state of domicile to determine if the spouse was validly married to the veteran. 38 U.S.C. § 103(c).

Thus, if Appellant's interpretation of Maine's statute recognizing out-of-state marriage of same-sex couples holds, currently married same-sex couples or divorced spouses may view Maine's truncating the length of their marriage as an impediment to relocating here because it could result in the denial of crucial benefits for older persons. In addition, current Maine residents whose retirement benefits would be affected will have an incentive to move out-of-state in their later years.

D. Taxes

1. income taxes

For more than two years, Maine Revenue Service has been applying section 650-B according to its plain meaning and recognizing that pre-2012 marriages of same-sex couples are valid in Maine as of the date they were celebrated. The Court should not adopt Appellant's inconsistent interpretation of section 650-B and contradict several years of rulings by Maine Revenue Service.

In December 2012, Maine Revenue Services issued a Maine Tax Alert regarding the new law, *i.e.*, section 650-B, stating: "[T]he new law extends legal recognition to same-sex marriages validly licensed and performed in other states.

For Maine income tax purposes, same-sex couples who are legally married on the last day of the tax year must file their Maine individual income tax return using the filing status of either 'Married filing Jointly' or 'Married filing Separate' even if they filed a federal return using a filing status of 'Single' or 'Head-of-Household.'" 22 Maine Tax Alert 11, *2012 Maine Individual Income Tax Returns Filed by Married Same-sex Couples* (Dec. 2012), *available at* http://www.maine.gov/revenue/publications/alerts/2012/TADecember2012_Vol22_Iss11.html; *see also* 23 Maine Tax Alert 3, *Maine Income Tax Issues Related to Same-Sex Marriages* (Jan. 2013), *available at* http://www.maine.gov/revenue/publications/alerts/2013/TAJanuary2013_Vol23_Iss3.html.

Subsequently, the Supreme Court ruled unconstitutional section 3 of the federal Defense of Marriage Act, which had defined "marriage" for federal purposes as limited to heterosexual couples. *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013). As a result, the Internal Revenue Service stated that it would treat same-sex couples who are validly married under state law as married for federal tax purposes, and allow same-sex couples to file amended returns for three previous years when they had been validly married under state law but had to file separately for federal tax purposes. Rev. Rul. 2013-17, 2013-38 I.R.B. 201

(Sept. 16, 2013).[3] Maine Revenue Service followed suit and has been processing retroactive amended returns for several years.[4]

For example, a married same-sex couple that was forced to file separately would have been taxed on the value of the domestic partner benefits provided from one spouse to the other, but there would be no tax if the couple filed jointly. Similarly, as was the case in *Windsor*, the surviving spouse of a married same-sex couple would have had to pay estate taxes on an inheritance if the other spouse died before 2012, but the surviving spouse would not owe estate taxes if Maine Revenue Service recognized their marriage.

The Court should follow Maine Revenue Service and find that section 650-B actually means what it plainly says, that same-sex couples' marriages are treated the same as heterosexual marriages "for all purposes." If the Court adopts Appellant's interpretation, the Revenue Service, and the lawyers and accountants who practice before it, will be burdened with administering an inefficient, two-tiered system in which pre-2012 marriages of same-sex couples are treated differently.

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[3] The limitation period for making the election is three years. 26 U.S.C. § 6013(b)(2).
[4] The starting point for taxable income in Maine is "federal adjusted gross income." 36 M.R.S. § 5121.

2. estate taxes

Maine imposes an estate tax on the estates of deceased Maine residents. 36 M.R.S. § 4063. The estate tax also applies to real property and tangible personal property situated in Maine that was owned by a non-resident decedent. 36 M.R.S. § 4064. The estates of residents and non-residents may claim a deduction for assets that pass to a surviving spouse. In determining whether particular property is eligible for the marital deduction, Maine incorporates federal law. 36 M.R.S. § 4062(1-B). Certain property as to which a marital deduction election is not made for federal purposes may still be treated as marital deduction property for Maine purposes if a Maine election is made. 36 M.R.S. § 4062(2-B). The "taxable estate" of an individual is the value of the assets subject to estate tax net of any available deductions, including the marital deduction. Because the Maine estate tax statute incorporates federal law to determine the amount of the "taxable estate," Maine in effect has incorporated the decision of the United States Supreme Court in *Windsor*, 133 S. Ct. 2675.

Assume a couple that married in Massachusetts in 2008 who became Maine domiciliaries, or who owned real property in Maine, and one spouse died before December 29, 2012. Assume the deceased spouse devised his or her entire estate outright to the surviving spouse. Maine Revenue Services would recognize a valid

marital deduction and the taxable estate would be zero. Under *Windsor*, the Maine Revenue Services approach appears to be constitutionally obligatory.

Appellant's approach would suggest that if the deceased spouse died before December 29, 2012, even if the marriage is recognized under the law of another state and under federal law, Maine should nonetheless deem that the marriage occurred on December 29, 2012. That would make hash of the Maine estate tax system. An estate could have a valid marital deduction for federal law purposes, for Massachusetts estate tax purposes (or the estate tax laws of another state), and yet not for Maine purposes. It is an outcome that is inconsistent with the explicit terms of the current Maine estate tax statute, and inconsistent with the administration of the Maine estate tax by Maine Revenue Services.

3. real estate taxes

Appellant's interpretation of section 650-B would also create a two-tiered system of real estate transfer taxes. Section 4641-C(4) of Title 36 provides that deeds between certain family members are exempt from the real estate taxes imposed under Chapter 711-A, particularly section 4641-A. The exemption applies to "[d]eeds between husband and wife . . . and deeds between spouses in divorce proceedings." Therefore, an interspousal transfer between a same-sex couple that occurred before 2012 would be taxed differently from a post-2012 transfer, and for that matter, different from any transfer between a heterosexual

couple. This discriminatory approach to real estate transfers was not the intended effect of section 650-B.

E. Marital Privilege

It is a basic rule of evidence that a spouse cannot be compelled to disclose confidential information communicated between spouses during the marriage. M.R. Evid. 504(a) ("A communication is confidential if it is made privately by any person to his or her spouse . . ."). Because the privilege only applies to information communicated during the marriage, the date of the marriage is critical for determining whether the privilege applies. Busch's position would undermine a primary purpose of law, which is to encourage marital openness and harmony, and lead to unequal treatment of same-sex couples married prior to December 2012.

CONCLUSION

Before 2012, same-sex couples and their lawyers were forced to navigate a discriminatory two-tiered system in Maine. That system was inefficient, costly and unfair. When Maine voters decided to grant same-sex couples' marriages equal recognition "for all purposes," Maine purposefully abolished that two-tiered system in order to treat all married couples the same. To do otherwise now, as Busch argues, would go against the clear intent of the law and revert back to an unjust and unequal system that discriminates and will continue to discriminate

against same-sex couples married before December 2012 to the detriment of Maine's legal system and economy.

DATED: April 3, 2015

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CERTIFICATE OF SERVICE

I, Diane Dusini, Esq., hereby certify that two copies of this Amici Brief of Concerned Maine Leaders & Attorneys was served upon counsel at the address set forth below by first class mail, postage-prepaid on April 3, 2015.

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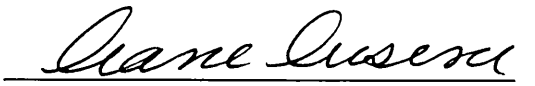

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ADDENDUM

TAB

Bureau of Corporations, Elections and Commissions

Department of the Secretary of State

Charles E. Summers, Jr.
Secretary of State

Julie L. Flynn
Deputy Secretary of State

August 5, 2011

Michael J. Gray
62 Cedar Avenue
Old Orchard Beach, ME 04064

Dear Mr. Gray:

I am providing a second draft of the legislation, prepared with the assistance of the Office of the Revisor of Statutes, to address changes that you requested to the initiative entitled "An Act To Allow Marriage Licenses for Same-sex Couples and Protect Religious Freedom". The changes are as follows:

1. In section 650-A, the final sentence has been removed.
2. In the last sentence of section 655, subsection 3, the words "may not" have been replaced with the word "cannot". The same change also has been made to the final sentence of the summary. Although the drafting conventions for the Maine Revised Statutes describe the words "may not" as the proper form for indicating lack of authority, the word "cannot" is not expressly prohibited. Additionally, upon a cursory search of the statutes, we found the word "cannot" used in a similar context to this proposal (*see 14 M.R.S. section 6002(2) (B)*).

Please review the enclosed new draft legislation and advise me in writing as to your acceptance or of any changes you wish to make. We must receive your written acceptance of the final language of the proposed law before a petition form will be provided. You may reach me by telephone at 624-7650 or by fax at 287-5428 or by email at melissa.packard@maine.gov.

Sincerely,

Melissa K. Packard
Director of Elections

Enclosure

Cc: P. James Nicholson, Rita W. Clifford, Matthew W. McTighe, Dallas G. Denery II, Nicole Y. Jedrey-Irvin, Patricia A. Peard, Esq., Mary Banauto, Esq.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 19-A MRSA §650-A is enacted to read:

§650-A. Codification of marriage

Marriage is the legally recognized union of 2 people. Gender-specific terms relating to the marital relationship or familial relationships must be construed to be gender-neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law or any other source of civil law.

Sec. 2. 19-A MRSA §650-B is enacted to read:

§650-B. Recognition of marriage licensed and certified in another jurisdiction

A marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is recognized for all purposes under the laws of this State.

Sec. 3. 19-A MRSA §651, sub-§2, as amended by PL 1997, c. 537, §12 and affected by §62, is further amended to read:

2. Application. The parties wishing to record notice of their intentions of marriage shall submit an application for recording notice of their intentions of marriage. The application may be issued to any 2 persons otherwise qualified under this chapter regardless of the sex of each person. The application must include a signed certification that the information recorded on the application is correct and that the applicant is free to marry according to the laws of this State. The applicant's signature must be acknowledged before an official authorized to take oaths. Applications recording notice of intentions to marry must be open for public inspection in the office of the clerk. When the application is submitted, the applicant shall provide the clerk with the social security numbers of the parties. The application must include a statement that the social security numbers of the parties have been provided to the clerk. The clerk shall record the social security numbers provided by each applicant. The record of the social security numbers is confidential and is not open for public inspection.

Sec. 4. 19-A MRSA §655, sub-§3 is enacted to read:

3. Religious exemption. This chapter does not require any member of the clergy to perform or any church, religious denomination or other religious institution to host any marriage in violation of the religious beliefs of that member of the clergy, church, religious denomination or other religious institution. The refusal to perform or host a marriage under this subsection cannot be the basis for a lawsuit or liability and does not affect the tax-exempt status of the church, religious denomination or other religious institution.

Sec. 5. 19-A MRSA §701, as amended by PL 2007, c. 695, Pt. C, §4, is further amended to read:

§701. Prohibited marriages; exceptions

1. Marriage out of State to evade law. When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State.

1-A. Certain marriages performed in another state not recognized in this State. Any marriage performed in another state that would violate any provisions of subsections 2 to ~~5~~ 4 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.

2. Prohibitions based on degrees of consanguinity; exceptions. This subsection governs marriage between relatives.

A. A man may not marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister, mother's sister, the daughter of his father's brother or sister or the daughter of his mother's brother or sister. A woman may not marry her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother, mother's brother, the son of her father's brother or sister or the son of her mother's brother or sister. A person may not marry that person's parent, grandparent, child, grandchild, sibling, nephew, niece, aunt or uncle.

B. Notwithstanding paragraph A, a man may marry the daughter of his father's brother or sister or the daughter of his mother's brother or sister, and a woman may marry the son of her father's brother or sister or the son of her mother's brother or sister as long as, pursuant to sections 651 and 652, the man or woman provides the physician's certificate of genetic counseling.

3. Persons under disability. A person who is impaired by reason of mental illness or mental retardation to the extent that that person lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning that person's property or person is not capable of contracting marriage. For the purposes of this section:

A. "Mental illness" means a psychiatric or other disease that substantially impairs a person's mental health; and

B. "Mental retardation" means a condition of significantly subaverage intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period.

4. Polygamy. A marriage contracted while either party has a living wife or husband from whom the party is not divorced is void.

~~**5. Same-sex marriage prohibited.** Persons of the same sex may not contract marriage.~~

SUMMARY

This initiated bill repeals the provision that limits marriage to one man and one woman and replaces it with the authorization for marriage between any 2 persons that meet the other requirements of Maine law. It also specifies that a marriage between 2 persons of the same sex in another state that is valid in that state is valid and must be recognized in this State. It also provides that a member of the clergy is not required to perform and a church, religious denomination or other religious institution is not required to host a marriage in violation of the religious beliefs of that member of the clergy, church, religious denomination or other religious institution and that any such refusal cannot be the basis for a lawsuit or liability and does not affect the tax-exempt status of the church, religious denomination or other religious institution.

PRESS RELEASE
Maine Freedom to Marry Coalition

CONTACT: David Farmer, 557-5968
Davidwfarmermaine@gmail.com

FOR IMMEDIATE RELEASE
March 14, 2012

Freedom to Marry Legislation Clears Procedural Hurdle on Way to the Ballot

AUGUSTA – The Maine Legislature today took the final procedural vote that moves legislation allowing same-sex couples to obtain a marriage license one step closer to the ballot in November.

The vote to indefinitely postpone LD 1860, "An Act to Allow Marriage Licenses for Same-sex Couples and Protect Religious Freedom," was a necessary step to place the question on November's ballot without further legislative activity.

"More than 105,000 Mainers signed petitions to put a question on the ballot in November. With today's vote, the Legislature has moved us one step closer to that outcome," said Shenna Bellows, executive director of the American Civil Liberties Union of Maine. "Our goal has been to allow Mainers to decide this question, and today's action moves us closer."

When presented with a citizen's initiative, the Legislature can either adopt the language of the legislation without change or send the question to voters.

"Public support for allowing same-sex couples to receive a marriage license is growing," said Matt McTighe, public education director for Gay & Lesbian Advocates & Defenders. "In a poll released last week by Public Policy Polling, 54 percent of Mainers said they support marriage for same-sex couples. People are changing their minds and are willing to support same-sex couples who are ready to make the commitment and accept the responsibility of marriage."

The Maine Freedom to Marry Coalition supports the votes to indefinitely postpone LD 1860.

"While today's vote was procedural, we want to thank the Legislature for its actions in advancing freedom to marry legislation to the ballot in November," said Betsy Smith, executive director of EqualityMaine.

"Lawmakers honored the will of the voters. By expediting the bill's legislative process, we can continue to discuss this issue with friends, family and neighbors directly," said Laura Harper, director of public policy at the Maine Women's Lobby.

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Proposed Citizens Initiative:

An Act To Allow Marriage Licenses for Same Sex Couples and Protect Religious Freedom

Submitted June 30, 2011

by Michael J. Gray, et al

Proposed Ballot Initiative Question

"Do you favor a law allowing marriage licenses for same-sex couples that protects religious freedom by ensuring no religion or clergy be required to perform such a marriage in violation of their religious beliefs?"

An Act To Allow Marriage Licenses for Same Sex Couples and Protect Religious Freedom

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 19-A MRSA §650-A is enacted to read:

§ 650-A. Codification of marriage

Marriage is the legally recognized union of 2 people. Gender-specific terms relating to the marital relationship or familial relationships must be construed to be gender-neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law or any other source of civil law. All such spouses must be treated by the laws of this State as if federal law recognized their marriages in the same manner as the laws of this State.

Sec. 2. 19-A MRSA §650-B is enacted to read:

§ 650-B. Recognition of marriage licensed and certified in another jurisdiction

A marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is recognized for all purposes under the laws of this State.

Sec. 3. 19-A MRSA §651, sub-§2, as amended by PL 1997, c. 537, §12 and affected by §62, is further amended to read:

2. Application. The parties wishing to record notice of their intentions of marriage shall submit an application for recording notice of their intentions of marriage. The application may be issued to any 2 persons otherwise qualified under this chapter regardless of the sex of each person. The application must include a signed certification that the information recorded on the application is correct and that the applicant is free to marry according to the laws of this State. The applicant's signature must be acknowledged before an official authorized to take oaths. Applications recording notice of intentions to marry must be open for public inspection in the office of the clerk. When the application is submitted, the applicant shall provide the clerk with the social security numbers of the parties. The application must include a statement that the social security numbers of the parties have been provided to the clerk. The clerk shall record the social security numbers provided by each applicant. The record of the social security numbers is confidential and is not open for public inspection.

Sec. 4. 19-A MRSA §655, sub-§3 is enacted to read:

3. Religious Exemption. This measure does not require any clergy person to perform or place of worship to host any marriage in violation of their religious beliefs. The refusal to perform or host a marriage under this provision shall not be the basis for a lawsuit or liability, and shall not affect the tax exempt status of any church, religious denomination, or other religious institution.

Sec. 5. 19-A MRSA §701, as amended by PL 2007, c. 695, Pt. C, §4, is further amended to read:

§ 701. Prohibited marriages; exceptions

1. Marriage out of State to evade law. When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State.

1-A. Certain marriages performed in another state not recognized in this State. Any marriage performed in another state that would violate any provisions of subsections 2 to ~~5~~4 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.

2. Prohibitions based on degrees of consanguinity; exceptions. This subsection governs marriage between relatives.

A. A man may not marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister, mother's sister, the daughter of his father's brother or sister or the daughter of his mother's brother or sister. A woman may not marry her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother, mother's brother, the son of her father's brother or sister or the son of her mother's brother or sister. No person may marry that person's parent, grandparent, child, grandchild, sibling, nephew, niece, aunt, or uncle.

B. Notwithstanding paragraph A, a man may marry the daughter of his father's brother or sister or the daughter of his mother's brother or sister, and a woman may marry the son of her father's brother or sister or the son of her mother's brother or sister, as long as, pursuant to sections 651 and 652, the man or woman provides the physician's certificate of genetic counseling.

3. Persons under disability. A person who is impaired by reason of mental illness or mental retardation to the extent that that person lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning that person's property or person is not capable of contracting marriage. For the purposes of this section:

A. "Mental illness" means a psychiatric or other disease that substantially impairs a person's mental health; and

B. "Mental retardation" means a condition of significantly subaverage intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period.

4. Polygamy. A marriage contracted while either party has a living wife or husband from whom the party is not divorced is void.

~~5.~~ Same sex marriage prohibited. ~~Persons of the same sex may not contract marriage.~~

An Act To Allow Marriage Licenses for Same Sex Couples and Protect Religious Freedom

SUMMARY

This bill repeals the provision that limits marriage to one man and one woman and replaces it with the authorization for marriage between any 2 persons that meet the other requirements of Maine law. It also specifies that a marriage between 2 people of the same sex in another state that is valid in that state is valid and must be recognized in this State. This bill also provides that no clergy person or religious institution is required to perform or to host a marriage against his or her religious beliefs, and that any such refusal is no basis for legal liability and shall not affect the tax exempt status of a religious denomination, church or religious institution.

PUBLIC APPROVAL
NOVEMBER 6, 2012

EFFECTIVE DATE
DECEMBER 29, 2012

CHAPTER

1

INITIATED BILL

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND AND TWELVE

I.B. 3 - L.D. 1860

An Act To Allow Marriage Licenses for Same-sex Couples and Protect Religious Freedom

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 19-A MRSA §650-A is enacted to read:

§650-A. Codification of marriage

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§650-B. Recognition of marriage licensed and certified in another jurisdiction

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Sec. 4. 19-A MRSA §655, sub-§3 is enacted to read:

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1-A. Certain marriages performed in another state not recognized in this State. Any marriage performed in another state that would violate any provisions of subsections 2 to ~~5~~ 4 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.

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B. Notwithstanding paragraph A, a man may marry the daughter of his father's brother or sister or the daughter of his mother's brother or sister, and a woman may marry the son of her father's brother or sister or the son of her mother's brother or sister as long as, pursuant to sections 651 and 652, the man or woman provides the physician's certificate of genetic counseling.

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~~**5. Same sex marriage prohibited.** Persons of the same sex may not contract marriage.~~