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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA (HARRISBURG)

DEB WHITEWOOD, et al.,

Plaintiffs,

vs.

THOMAS W. CORBETT, in his official capacity as Governor of Pennsylvania, et al.,

Defendants.

Case No. 13-cv-01861-JEJ

(Honorable John E. Jones, III)

DEFENDANT PETRILLE'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6), AND FAILURE TO JOIN PARTIES UNDER FED. R. CIV. P. 12(b)(7) AND 19.

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PROCEDURAL HISTORY & STATEMENT OF FACTS

Plaintiffs allege that Pennsylvania's marriage laws violate the 14th Amendment. Plaintiffs seek declaratory and injunctive relief against the Commonwealth's marriage laws.

All plaintiffs claim they are harmed by "the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman." 23 Pa. Cons. Stat. § 1704. Some plaintiffs—those who have marriage licenses from other jurisdictions—claim they are also harmed because "[a] marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth." *Id.*

Plaintiffs seek: (1) a declaratory judgment that the Commonwealth's marriage laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) to enjoin the defendants from complying with the marriage laws; and (3) the costs of suit, including reasonable attorneys' fees. Compl. at 50-51.

Defendant Petrille contends that plaintiffs' equal protection and due process allegations should be dismissed for want of a substantial

federal question. Pennsylvania possesses the authority to define the marital relation, and no particular genderless definition of marriage is mandated by the Constitution. Same-sex marriage is neither objectively nor deeply rooted in either Pennsylvania's or our Nation's history and tradition. The Commonwealth's marriage laws possess multiple rational bases and, thus, survive the scrutiny applicable to plaintiffs' claims. Plaintiffs also failed to join all necessary parties to this action.

QUESTIONS INVOLVED

I. Whether the Supreme Court's Precedent in *Baker v. Nelson* Forecloses Plaintiffs' Claims.

II. Whether Pennsylvania's Longstanding Definition of Marriage Comports with Equal Protection Because It Rationally Reflects the State's Unending Sovereign Interest in Supporting and Sustaining Biological Families.

III. Whether the Domestic Relations Law Is Rooted in Outmoded Gender Stereotypes, and Thus Sex Discrimination.

IV. Whether There Is a Substantive Due Process Fundamental Right to Marry a Person of One's Own Sex.

V. Whether Plaintiffs' Complaint Should Be Dismissed for Failure to Join Necessary Parties Under Rule 19.

INTRODUCTION

The Commonwealth of Pennsylvania does not violate the Constitution by retaining the traditional definition of marriage—the only one the Commonwealth has ever known. Thus, under Rule 12(b)(6), plaintiffs' entire suit must be dismissed for failure to state a claim upon which relief can be granted. As a matter of law, plaintiffs' claims conflict with settled Supreme Court precedent. In *Baker v. Nelson*, 409 U.S. 810 (1972), the Court rejected the exact same due process and equal protection claims, and lower courts must follow that binding precedent.

In addition to *Baker*, Pennsylvania does not violate equal protection by continuing to apply its centuries-old definition of marriage. The Commonwealth's marriage laws are subject to rational basis review, the same level of scrutiny applied by the Supreme Court in *Romer v. Evans*, 517 U.S. 620, 631-32 (1996), and *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). Those precedents focus on two particular signals that a law is motivated solely by animus and thus irrational: (1) one that creates a novel disability, and (2) one that intrudes into States' or localities' traditional sovereignty. Both factors

cut *in favor of* Pennsylvania's definition of marriage, which was first adopted long before modern controversies and is entirely consistent with federalism and the Commonwealth's traditional control of domestic relations. *Windsor*'s explicit deference strongly supports the Commonwealth's domestic relations laws.

The domestic relations laws are rationally related to immutable reproductive differences between opposite-sex and same-sex couples. Unplanned offspring are common to opposite-sex couples, and only they can rear children by both of their biological parents. And only they can give each child a parent of the child's own sex. Pennsylvania has thus rationally chosen to reserve *some* of its support and subsidies for traditional marriages. The marriage laws neither forbid nor penalize same-sex couples and leave them free to structure their lives, as plaintiffs have already done. And Pennsylvania law, as a whole, makes available to all couples a host of legal rights and protections to secure those relationships. From the ownership and passage of property, to medical care and hospital visitation, Pennsylvania law does not inhibit couples' ability to secure and order their lives.

Nor is Pennsylvania's definition of marriage subject to heightened scrutiny. The Supreme Court's cases relating to sexual orientation have repeatedly declined to apply heightened scrutiny, maintaining only a select few categories that trigger strict or intermediate scrutiny. Nor is the traditional definition of marriage a classification based on sex, as both sexes are equally free to marry the opposite sex.

Finally, the right to same-sex marriage asserted by plaintiffs is not a fundamental right as it is not deeply rooted in this Nation's history and tradition. And the Commonwealth's longstanding domestic relations laws cannot be reinterpreted as novel disabilities whose only possible explanation is animus against private sexual conduct. On the contrary, the longstanding structure of the marriage laws flows from the public's profound interest in supporting biological procreation and protecting unplanned offspring. Though plaintiffs impute an ill motive to a centuries-old benevolent policy, they cannot successfully construct a constitutional infirmity.

BACKGROUND

For countless centuries, marriage has required both sexes—uniting a man and a woman as husband and wife to be father and

mother to any children they produce. As David Hume explained, "[t]he long and helpless infancy of man requires the combination of parents for the subsistence of their young." David Hume, *An Enquiry Concerning the Principles of Morals*, in Essays and Treatises on Several Subjects 421 (London, Millar 1758). John Locke likewise understood marriage as "made by a voluntary Compact between Man and Woman; and tho' . . . its chief End, [is] Procreation; yet it draws with it mutual Support and Assistance, and a Communion of Interests too, as necessary not only to unite their Care and Affection, but also necessary to their common Off-spring, who have a Right to be nourished, and maintained by them, till they are able to provide for themselves." 2 John Locke, *Second Treatise of Government: Of Civil Government* § 78, *in The Works of John Locke Esq.* 180 (London, Churchill 1714). Noah Webster defined marriage as "[t]he act of uniting a man and woman for life; wedlock; the legal union of a man and woman for life," which is designed "for securing the maintenance and education of children." 2 Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828).

Marriage is synonymous with an opposite-sex pair who naturally forms a procreative union. As the Supreme Court noted long ago, marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). It is "an institution more basic in our civilization than any other." *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). And because it is structured for the procreation and protection of offspring, it is "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

The definition of marriage has been equally settled in this Commonwealth. "Marriage in Pennsylvania is a civil contract by which a man and a woman take each other for husband and wife." *In re Estate of Manfredi*, 159 A.2d 697, 700 (Pa. 1960). "The great end of matrimony is not the comfort and convenience of the immediate parties . . . [but] the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world." *Matchin v. Matchin*, 6 Pa. 332, 337 (1847).

In order to protect offspring and strengthen families, Pennsylvania has long regulated who can marry and on what terms.

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Bacchetta v. Bacchetta, 445 A.2d 1194, 1197 (Pa. 1982) (internal quotation marks and citation omitted). "The relation itself is founded in nature, and like other natural rights of persons, becomes a subject of regulation for the good of society. The social fabric is reared upon it, for without properly regulated marriage, the welfare, order and happiness of the state cannot be maintained." *Cronise v. Cronise*, 54 Pa. 255, 262 (1867).

Thus, the dozens of Pennsylvania marriage laws that the plaintiffs challenge, and cases interpreting them, refer to the married couple as a husband and a wife. *See* Exhibit A (non-exhaustive listing of many such statutes). For instance, the consanguinity law specifies: "A man may not marry his mother[,] . . . . the sister of his father[,] . . . .

the sister of his mother[,] . . . . his sister[,] . . . . his daughter[,] . . . . the daughter of his son or daughter[,] . . . [or] his first cousin." 23 Pa. Cons. Stat. § 1304 (e) (codifying 1990 Pa. Legis. Serv. 1990-206 (West), which superseded Act of June 24, 1901, P.L. 597). Likewise, "A woman may not marry her father[,] . . . . the brother of her father[,] . . . . her brother[,] . . . . her son[,] . . . . the son of her son or daughter[,] . . . . [or] her first cousin." *Id.*

Thus, when a man raised the novel claim of a same-sex common-law marriage to another man a mere few decades ago, the court in *De Santo v. Barnsley* reasoned that "the inference that marriage is so limited [to opposite-sex couples] is strong." 476 A.2d 952, 954 (Pa. Super. Ct. 1984). "The Marriage Law refers to the 'male and female applicant,' 48 P.S. § 1-3, and the cases assume persons of opposite sex." *Id.* It was beyond dispute that "common law marriage has been regarded as a relationship that can be established only between two persons of opposite sex." *Id.* The same was true of statutory marriages. "[W]e have no doubt that under [Pennsylvania's] Marriage Law it is impossible for two persons of the same sex to obtain a marriage license." *Id.* at 955-56.

Until very recently, the definition of marriage was entirely uncontroversial. And because the Commonwealth's purposes for marriage remain constant, Pennsylvania has not sought to transform its marriage laws, or adopt the policy premises of other jurisdictions. The redefinition of marriage never became a serious point of discussion until the Hawai'i Supreme Court suggested the possibility in 1993. *See Baehr v. Lewin*, 852 P.2d 44, 68 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). It has been a point of public discussion for less than a generation—yet plaintiffs insist this novelty is now embedded in our country's founding document.

Once Hawai'i raised the issue, Pennsylvania joined the national discussion on the meaning and definition of marriage. Unlike other States that elected to embed the traditional definition of marriage in their State constitutions, Pennsylvania chose to affirm its enduring purpose for its marriage laws only in its statutes, leaving future citizens and legislatures free to revisit the question, if they chose. The law re-codified Pennsylvania's longstanding approach to marriage as a "civil contract by which one man and one woman take each other for husband and wife." 23 Pa. Cons. Stat. § 1102.

The law also specified the comity Pennsylvania would extend to the licensing decisions of other States—hardly a novel concept. Like every other State, Pennsylvania routinely clarifies the extent to which it will recognize other States' licenses, ranging from licenses to carry weapons to professional licenses for doctors, lawyers, and others. As we know, for example, lawyers who are not members of the Pennsylvania Bar cannot use a foreign license to assert a right to practice law within the Commonwealth. But that is precisely what some plaintiffs are doing with marriage licenses, even though they are Pennsylvania domiciliaries. Compl. ¶¶ 39, 80, 87. To avoid the circumvention of its licensing efforts, the marriage laws identify the quarter that shall be given to certain licenses, as it does in so many other arenas. 23 Pa. Cons. Stat. § 1704.

ARGUMENT

I. The Supreme Court's Precedent in *Baker v. Nelson* Forecloses Plaintiffs' Claims.

A. *Baker* Rejected the Precise Claims Raised Here.

Binding Supreme Court precedent forecloses plaintiffs' due process and equal protection challenges. *Baker v. Nelson* dismissed a challenge to marriage laws as not presenting a substantial

constitutional question. In *Baker*, the Supreme Court held that neither the Due Process nor the Equal Protection Clauses of the Fourteenth Amendment forbade a State to maintain its marriage laws.

In *Baker*, a county clerk denied a marriage license to two men because their application did not satisfy Minnesota's opposite-sex requirement. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971) (en banc). The men challenged the denial, and the trial court rejected their claims. *Id.* at 185, 186.

The Minnesota Supreme Court affirmed. *Id.* It held that there is no fundamental right to marry someone of one's own sex; that the traditional definition of marriage works "no irrational or invidious discrimination"; and that it easily survives rational basis review. *Id.* at 186-87. The Court rejected plaintiffs' analogy to *Loving v. Virginia*, 388 U.S. 1, 12 (1967), noting a "clear distinction" between anti-miscegenation restrictions and the "fundamental difference in sex." 191 N.W.2d at 187.

The men's appeal to the Supreme Court presented three questions: (1) whether that denial "deprives appellants of their liberty to marry and of their property without due process of law under the

Fourteenth Amendment"; (2) whether it "violates their rights under the equal protection clause of the Fourteenth Amendment"; and (3) whether it "deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments." Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027) (attached as Exhibit B). Their brief analogized the traditional definition of marriage to the miscegenation statute in *Loving*. *Id.* at 13-16; *see also id.* at 11, 18 n.5, 19. And they asked the Court to apply heightened scrutiny. *Id.* at 14-18.

The Supreme Court dismissed the appeal. Its full ruling states: "The appeal is dismissed for want of a substantial federal question." *Baker*, 409 U.S. 810. Not one Justice recorded a dissent. This ruling on the merits establishes that neither the Due Process nor the Equal Protection Clause bars states from maintaining marriage as a man and a woman. It also dispels any argument that the result sought in this matter is compelled, in part or in whole, by *Loving*. For it cannot be contended that where plaintiffs' claims herein were dismissed by the Supreme Court only 5 years after the *Loving* case was decided, that *Loving* somehow now supports those same claims.

B. *Baker* Is Binding Precedent.

Baker binds this Court and is dispositive of this case. Summary dismissals for want of a substantial federal question are rulings on the merits, and lower courts are "not free to disregard th[ese] pronouncement[s]." *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). "[T]he lower courts are bound by summary decisions by this Court until such time as the Court informs (them) that (they) are not." *Id.* at 344-45 (internal quotation marks omitted; latter two alterations in original). While lower courts need not follow all the reasoning of the earlier lower court's opinion, summary dismissals "do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by" the dismissal. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Thus, this Court may not recognize a due process or equal protection right to same-sex marriage, because *Baker* rejected those very claims.

C. *Baker* Continues to Bind Lower Courts After *Windsor*.

Though plaintiffs rely upon *Windsor* to justify their claimed right, Compl. ¶ 143, *Windsor* expressly refused to question the continuing validity of the states' traditional marriage laws. "This opinion and its

holding are confined to those" "same-sex marriages made lawful by the State." 133 S. Ct. at 2695-96. Note the Court's careful wording: *both Windsor*'s holding *and* its opinion's reasoning apply only to the *federal government's* recognition of marriages that States *choose* to recognize.

The question presented in *Windsor* was only the validity of Section 3 of the federal Defense of Marriage Act (DOMA). The "unusual character" of Section 3 was its "unusual deviation from the usual tradition of [the federal government's] recognizing and accepting state definitions of marriage . . . ." *Windsor*, 133 S. Ct. at 2693. That question differs from the ones in *Baker*: *Baker* upheld a *state* law defining marriage, whereas *Windsor* struck down a *federal* law impinging the States' prerogative to define marriage. Thus, the overwhelming majority of courts found *Baker* inapplicable to DOMA. As Judge Boudin put it for the First Circuit: "*Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012); *see also, e.g.*, *Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012) ("The question [regarding . . .] Section 3 of DOMA is sufficiently distinct

from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*."), *aff'd*, 133 S. Ct. 2675 (2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 308 (D. Conn. 2012) (*Baker* is "clearly unrelated"); *Dragovich v. U.S. Dep't of Treasury*, 872 F. Supp. 2d 944, 952 (N.D. Cal. 2012) (similar); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012) (similar); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) (similar), *aff'd in part, vacated in part on other grounds, and remanded*, 447 F.3d 673 (9th Cir. 2006). Because the two cases addressed different questions, *Windsor* does not displace *Baker*.

Nor can *Windsor* or other cases be extended to avoid the Supreme Court's holding in *Baker*. "'If a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (quoting with approval *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). *Baker* resolves this case.

II. Pennsylvania's Longstanding Definition of Marriage Comports with Equal Protection Because It Rationally Reflects the State's Unending Sovereign Interest in Supporting and Sustaining Biological Families.

Even apart from *Baker*, Pennsylvania's domestic relations laws easily survive equal protection analysis. Plaintiffs ask this Court to apply at least intermediate scrutiny to this law and offer to introduce "evidence [that] will show that classifications based on sexual orientation demand heightened scrutiny." Compl. ¶ 145. The appropriate tier of equal protection review is not, however, subject to the vagaries of discovery and proof; it is already established as a matter of law. The Supreme Court has repeatedly applied only rational basis review to such classifications.

In deciding whether such classifications are motivated solely by animus and thus lack any rational basis, the Court focuses on whether they (1) create novel disabilities, or (2) intrude upon States' or localities' traditional spheres. Here, both factors strongly support Pennsylvania's definition of marriage: it has been followed for centuries since its founding and long before any modern controversy, and it is consistent with the Commonwealth's sovereignty over domestic relations.

Because the classification is longstanding and consistent with state control of domestic relations, rational basis review is easily satisfied here. Traditional marriage provides for the many couples whose offspring is unplanned, and supports all biological mothers and fathers in nurturing their progeny together. Same-sex marriage is unable to serve all of the social goals of marriage. For example, Locke, *supra*, establishes the marital components of mutual support and assistance as important to the marital parties' "common offspring" and the right of every child to be raised and nurtured by the man and woman responsible for their existence. And while not every child is blessed with the privilege of being reared by the mother and father that made their life possible, plaintiffs cannot reasonably argue that it is irrational for the government to use some resources to encourage or enhance that possibility or result for as many children as possible. For no argument is made herein, nor can the plaintiffs rationally assert such, that the government has a right, or even a duty, to deprive a child of access to the comfort of their creators. It is only in the most extreme circumstances, *e.g.*, termination of parental rights, where that occurs, and yet even there it is done in the best interests of the child and not

without regard to the interest of every child to know, as best as possible, who they are and from where they come. Thus, the domestic relations law rationally remains limited to its original scope.

A. Classifications Implicating Sexual Orientation Must Be Upheld For Any Rational Basis.

In addition to the Commonwealth's marriage laws not creating a classification based on sexual orientation, the multiple rational bases for the laws settle any equal protection question.

1. *Only Rational Basis Review Applies.*

Strict scrutiny is reserved for laws that classify based on "race, alienage, or national origin." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Classifications based on "sex or illegitimacy" are quasi-suspect and receive "intermediate scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). All other classifications trigger only rational basis review.

The Supreme Court has only applied rational basis review to sexual orientation classifications. In *Romer*, the Colorado Supreme Court applied strict scrutiny to Amendment 2, a referendum invalidating local antidiscrimination laws. 517 U.S. at 624-25. But the U.S. Supreme Court noted the law "neither burdens a fundamental

right nor targets a suspect class." *Id.* at 631. Under that test, legislation must be upheld "so long as it bears a rational relation to some legitimate end." *Id.* The Court held that Amendment 2 "fails, indeed defies, even this conventional inquiry." *Id.* at 632.

In *Windsor*, the Court rested its holding on the equal protection component of the Due Process Clause of the Fifth Amendment. Though the decision below had applied intermediate scrutiny, and the parties and the Solicitor General debated whether the classification deserved intermediate scrutiny, nowhere did the Court apply that level of review. Instead, *Windsor* relied upon *United States Department of Agriculture v. Moreno*, which held that "[u]nder traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." 413 U.S. 528, 533 (1973); *see Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*).

As Judge Boudin noted in rejecting intermediate scrutiny for sexual orientation, "[n]othing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a

demarche." *Massachusetts*, 682 F.3d at 9. The same can be said of *Windsor*. To quote Sherlock Holmes, "the curious incident of the dog in the night-time" is that the dog, heightened scrutiny, did not bark. 1 Sir Arthur Conan Doyle, *Silver Blaze*, *in The Complete Sherlock Holmes* 413 (2003). Heightened scrutiny does not apply here.

2. *Rational Basis Review Is Extremely Deferential.*

Rational basis review "is a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Cleburne*, 473 U.S. at 440. Thus, "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The judicial role is modest precisely because rational basis is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). The statute enjoys "a strong presumption of validity," and the challenger bears "the burden 'to negative every conceivable basis which might support it'" without regard to "whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach*,

508 U.S. at 314-15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080-81 (2012).

In formulating definitions, there is no requirement that a classification be narrowly or precisely tailored. A legislature "ha[s] to draw the line somewhere," *Beach*, 508 U.S. at 316, which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see Schweiker v. Wilson*, 450 U.S. 221, 238 (1981) (prescribing extra deference for statutory distinctions that "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle.") (footnote omitted).

The Court has applied this deferential approach not just to economic legislation, but even to governmental determinations of who or what constitutes a family. *See*, *e.g.*, *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (upholding on rational basis review a zoning regulation defining unmarried couples as "families" permitted to live together, but forbidding cohabitation by larger groups). A legislature's decision about where to draw the line is "virtually unreviewable." *Beach*, 508 U.S. at

316. So long as the chosen "grounds [are not] wholly irrelevant to the achievement of the State's objective," the law survives rational basis. *Heller v. Doe*, 509 U.S. 312, 324 (1993) (internal quotation marks omitted).

The question here is whether "the inclusion of [opposite-sex couples] promotes a legitimate governmental purpose, and the addition of [same-sex couples] would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Even if the two groups share some characteristics in common, *id.* at 378, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (internal quotation marks omitted).

3. *The Two Flags of Impermissible Animus: Novel Disabilities and Intrusions into States' Traditional Province.*

Pennsylvania's centuries-old definition of marriage neither springs from animus nor fails rational basis review. Novel classifications implicating sexual orientation have failed to satisfy rational basis review *only* when there is no rational explanation for

them apart from animus, that is, "a bare . . . desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534). In conducting this inquiry, the Supreme Court has focused on two red flags: (1) whether a law creates and imposes a novel disability upon the group, and (2) whether the law intrudes into States' or localities' traditional sovereign sphere.

In *Romer*, the Court stressed both factors as flagging impermissible animus. First, Amendment 2's novelty and breadth signaled its unconstitutional motive. The Court described Amendment 2 as "peculiar" and "exceptional" because it "impos[ed] a broad and undifferentiated disability on a single named group." 517 U.S. at 632. Thus, this "unprecedented" burden was telling, because "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Moreover, Amendment 2's "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward

the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632.

Second, Amendment 2 intruded upon the prerogative of local governments to address local matters. It nullified municipal ordinances and banned any like future measures. *Id.* at 623-24. The Court found it telling that the amendment intruded upon "every level of Colorado government" "no matter how local or discrete the harm." *Id.* at 629, 631. Thus, "the amendment impose[d] a special disability upon [homosexuals] alone," forbidding them to seek protection from discrimination except by amending the State constitution. *Id.* at 631.

This case is nothing like *Romer*, where Colorado imposed a "[s]weeping" and "unprecedented" political disability on all individuals identified "by a single trait," effectively deeming "a class of persons a stranger to its laws." *Id.* at 627, 633, 635. Nor is this a case like *Lawrence v. Texas*, where the State punished *as a crime* "the most private human conduct, sexual behavior, and in the most private of places, the home," and sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." 539

U.S. 558, 567 (2003). *Lawrence*, though decided on due process grounds, emphasized the *novelty* of Texas's anti-sodomy law, as there was "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Id.* at 568. And general "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Id.* at 569. "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so." *Id.* at 570.[1]

Similarly, *Windsor* relied heavily upon both DOMA's (a) novelty, and (b) its intrusion into the traditional domain of the States, as the necessary twin signs of animus. "By history and tradition the definition

[1] In 1980, the Pennsylvania Supreme Court found the Commonwealth's anti-sodomy law unconstitutional. *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980). On March 31, 1995, almost the identical legislature that enacted the 1996 marriage law voted overwhelmingly to repeal the Commonwealth's anti-sodomy statute. 18 Pa. Cons. Stat. § 3124, Repealed Mar. 31, 1995, P.L. 985, No. 10 (Spec. Sess. No. 1), § 7. Not a single state senator or representative voted against the repeal, and all but a handful in each chamber rationally voted both to repeal the anti-sodomy law and enact the marriage law. These state legislators evidently saw no inconsistency in protecting, even if only symbolically, private same-sex activity from criminal punishment while simultaneously preserving the enduring purposes behind its marriage laws. Under no circumstances can this sequence of events be read as evidence of unconstitutional animus.

and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689-90. DOMA was unconstitutional because it injected the federal government into the "virtually exclusive province of the States." *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). The Constitution gave the federal government no authority to intrude upon States' traditional power over domestic relations. *Id.* Thus, "[f]ederal courts will not hear divorce and custody cases even if they arise in diversity because of 'the virtually exclusive primacy . . . of the States in the regulation of domestic relations.'" *Id.* (ellipses in original) (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring in the judgment)).

Each State thus retains plenary "power in defining the marital relation." *Windsor*, 133 S. Ct. at 2692. States, and States alone, may choose to "vary in some respects" in what marriages they license by, for example, refusing certain licenses due to policy concerns associated with procreation between cousins or young teenagers. *Id.* at 2691-92.

That primacy of "[t]he State's power in defining the marital relation is of central relevance in this case." *Id.* at 2692. Some States

had chosen to "use[their] historic and essential authority to define the marital relation" to include same-sex couples, while others had not. *Id.* Nevertheless, "DOMA seeks to injure the very class New York seeks to protect." *Id.* at 2693. The federal government "unusual[ly] deviat[ed] from the usual tradition of" deferring to and recognizing "marriages made lawful by the unquestioned authority of the States . . . in the exercise of their sovereign power." *Id.* Undercutting the State's own definition and "consisten[cy] within each State," DOMA "creat[ed] two contradictory marriage regimes within the same State." *Id.* at 2692, 2694.

This innovative intrusion upon a State's longstanding, traditional authority flagged Congress's impermissible motive. *Windsor* reiterated *Romer*'s teaching that courts should scrutinize "[d]iscriminations of an unusual character . . . to determine whether they are obnoxious." 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). The *only* possible inference was that the Court believed Congress enacted DOMA "to influence or interfere with state sovereign choices about who may be married." *Windsor*, 133 S. Ct. at 2693. "[I]ts purpose is to discourage enactment of state same-sex marriage laws[,] . . . 'to put a thumb on the

scales and influence a state's decision as to how to shape its own marriage laws.'" *Id.* (quoting *Massachusetts*, 682 F.3d at 12-13). Thus, "if any State decides to recognize same-sex marriages," federal law may not "treat[those unions] as second-class marriages." *Id.* at 2693-94.

In short, *Windsor* confirms that States, *not* the federal government, enjoy the sovereign power to define marriage within their boundaries. It found impermissible discrimination *only* because the federal government reversed its traditional stance to intrude upon state sovereignty over domestic relations, treating marriages within each State inconsistently. Thus, just because some states have shifted the central policy focus of their marriage laws away from procreation between opposite-sex couples does not mean that all other states are required to do so. It was for this reason that the Court expressly limited "[t]his opinion and its holding . . . to those lawful marriages" deliberately recognized by the decision of a State. 133 S. Ct. at 2696. Far from undercutting Pennsylvania's ability to retain its consistent, traditional definition of marriage, *Windsor* protects that sovereign power from judicial interference.

B. Pennsylvania's Traditional Definition of Marriage Is Longstanding, Supported by State Sovereignty, and Rational.

1. *A Longstanding Institution, Not a Novel Disability.*

The two factors at the heart of *Romer*, *Lawrence*, and *Windsor* strongly support the Commonwealth's power to retain its traditional definition of marriage. First, the traditional definition of marriage is hardly a novel disability, but a centuries-old institution. Plaintiffs nowhere allege that Pennsylvania has ever authorized same-sex marriages or recognized same-sex marriages performed in other jurisdictions. Far from an aberrant, novel disability, Pennsylvania's definition of marriage, like so many other provisions of Pennsylvania law, is consistent.

2. *An Exercise of State Sovereignty to Preserve the Status Quo.*

Second, the domestic relations laws embody State sovereignty. They preserve the Commonwealth's legitimate governmental means of serving its goals of marriage in an era when many other jurisdictions are debating the pros and cons of "two competing views of marriage." *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). While this debate goes on in other states, Pennsylvania law rationally accounts for the

normal movements of citizens between states from "creating two contradictory marriage regimes within the same State." *Id.* at 2694 (majority opinion). Pennsylvania, like New York in *Windsor*, made a deliberate choice about the "two competing views of marriage" and which couples qualify for special support and benefits. Pennsylvania has "virtually exclusive primacy" in defining and regulating domestic relations. *Id.* at 2691 (majority opinion) (internal quotation marks omitted). As with so many other areas of law, the Constitution safeguards each State's freedom to experiment, or not, as it sees best, free from federal interference in either direction.

Pennsylvania law does not leave couples that are unable to marry as "stranger[s] to its laws." *Romer*, 517 U.S. at 635. It does not penalize, let alone criminalize them, and leaves them free to use a variety of tools to plan their lives together, *e.g.*, joint tenancies, wills, trusts, adoptions, insurance plans, beneficiary designations, advance health-care directives, and powers of attorney. Plaintiffs have successfully used many of these tools. *See, e.g.*, Compl. ¶¶ 18, 22, 32, 49, 55, 59, 65, 70, 79, 81, 89.

3. *Multiple Rational Bases for Pennsylvania's Traditional Definition of Marriage.*

Pennsylvania has multiple rational bases for providing marital benefits and recognition to a certain class of opposite-sex couples (but not all opposite-sex couples). For centuries now, these rational bases flow not from animus or invidious stereotypes, but from the facts of biology and reproduction. Opposite-sex relationships frequently do result in pregnancies and offspring, and the legal protections of marriage extend to these procreative unions to encourage their longevity, especially where the offspring was not planned. Same-sex relationships do not result in unintentional offspring.

Opposite-sex marriages also promote the raising of a child by both their biological mother and father. Biological parents are genetically invested in the welfare of their offspring. They help their offspring grapple with the same genetic traits and diseases with which the parents have lived all their lives, and can also celebrate the many wonderful aspects of their genetic lineages. It would be irrational to conclude that genetics and blood lines are wholly irrelevant and can have no moorings in public policy. In same-sex couples, at most one parent can be the biological parent of the child.

Third, even as to the minority of children who are adoptive, stepchildren, or conceived through assisted reproductive technologies, opposite-sex marriage still promotes the importance of both mothers and fathers as child rearers. Same-sex couples do not. Adoption is our society's best effort to provide children loving parents when the ties to the mother and father that brought them into the world have been unfortunately severed. To the extent that the Commonwealth, or its courts, have sanctioned adoptions by individuals or same-sex couples when the alternative has been foster care, institutions, etc., the focus is attempting to provide an adequate environment for a child in non-ideal circumstances, and not whether any particular adult relationship is necessarily ideal in and of itself.

Fourth, because marriage unites a man and a woman, one of the married parents will be of the same sex as any children they create. That pairing ensures that each child has a role model of the same sex, as well as one of the opposite sex. It thus assists a child as he or she matures through each sex's distinctive experience of puberty, for example. And though not every child will grow up with both a mother and a father,

> [t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.

Hernandez v. Robles, 855 N.E.2d 1, 4 (N.Y. 2006). Thus, it is irrational to conclude that having both a mother and a father in the home as role models is irrelevant and can have no moorings in public policy when it comes to domestic relations laws.

Finally, marriage is a known quantity ingrained in our laws and culture that has proven its enduring value, over thousands of years. Indeed, until the previous decade, no State or country altered its domestic relations laws in the fashion demanded by plaintiffs. The Netherlands became the first country to do so in 2000, and Massachusetts followed in 2004. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) (citations omitted). It has not existed for even a single generation, so there can be no significant, longitudinal social-science data regarding its large-scale, long-term effects upon children, families, governments, economies, and societies over generations. It remains a novel social experiment with unforeseeable but potentially profound

consequences, and the Commonwealth's cautious approach to this novelty, like any other, is inherently rational.

That the plaintiffs identify the undeniable existence of different forms and structures of families does nothing to assist this Court in assessing whether the law must expressly recognize and/or extend special privilege to those relationships. Set aside for now the many methodological flaws in the research alluded to by plaintiffs, Compl. ¶ 130, which defendants will explicate later if necessary. If one takes the research at face value, as plaintiffs ask this Court to do, the claimed research findings *undercut* a need for same-sex marriage—they suggest that children raised by same-sex couples are doing equally well without it, and are not harmed by its absence. The research on unmarried couples cannot tell us the pros and cons, for these and other children, of a marital innovation so novel that not even a single generation has grown up under it. Nonetheless, plaintiffs cannot claim, in one breath, that the absence of their access to a marriage license creates a real harm and then, in another breath, profess that the absence of their access to a marriage license has yielded no harm at all.

Given this uncertainty and the grave stakes, the Commonwealth rationally declines to leap wholesale into the unknown. Instead, in the face of legal changes elsewhere, and efforts to import those changes here, it has struck a reasonable compromise. The domestic relations laws preserve the Commonwealth's time-tested structure to support and nurture biological procreative unions, while simultaneously leaving other family structures the legal tools needed to plan their lives free of State interference.

Because rational basis review looks to any conceivable basis on which the legislature could have rested, discovery about actual motives or effects would be of nominal value. Moreover, plaintiffs cannot produce to this Court evidence of unconstitutional motives by the Commonwealth when its domestic relations laws were first adopted centuries ago. And because rational basis review requires only some justification that is plausibly served by a classification, it is irrelevant that plaintiffs invoke other *policy* reasons for extending marriage to same-sex couples. Reasonable legislatures and voters may disagree about such tradeoffs, and plaintiffs may advance those arguments at the statehouse and the ballot box.

Governments ration and manage benefits, and the bases listed above are not irrational ways of doing so through domestic relations law. *But see* Compl. ¶¶ 125, 127. As Judge Boudin put it, "broadening the definition of marriage will reduce tax revenues and increase social security payments. This is the converse of the very advantages that the . . . plaintiffs are seeking, and [a legislature] could rationally have believed that [restricting marriage to opposite-sex couples] would reduce costs, even if newer studies" suggest the contrary. *Massachusetts*, 682 F.3d at 9.

It is of no moment that the marital classification is not precisely tailored to the vagaries of eventual reproduction. Almost all classifications are underinclusive, overinclusive, or both, and rational basis review allows such necessary imperfections. For instance, some opposite-sex couples are infertile or choose not to reproduce. But as the Minnesota Supreme Court noted in *Baker v. Nelson*, equal protection demands neither perfection nor absolute symmetry. 191 N.W.2d at 187. Moreover, couples change their minds, accidentally conceive, or successfully treat infertility. The government could not constitutionally pry into such choices or fertility without violating the privacy of the

marital bedroom. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). Being of a certain age, outside a certain degree of consanguinity, and of the opposite sex is a reasonable, unintrusive proxy for likely procreation.

The domestic relations laws' traditional definition of marriage easily survives rational basis review.

III. The Domestic Relations Law Is Rooted in the Biology of Reproduction, Not Outmoded Gender Stereotypes, so It Is Not Sex Discrimination.

Unable to prove that the Commonwealth's domestic relations laws irrationally discriminate for purposes of Count II, plaintiffs claim in Count III that they discriminate based on sex. But the Supreme Court has never held that classifications involving sexual orientation amount to sex discrimination. The traditional definition of marriage treats both sexes equally, as men and women are equally free to marry members of the opposite sex.

The fundamental flaw with plaintiffs' sex discrimination claim is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v.*

State, 744 A.2d 864, 880 n.13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct." *Id.* Other courts reject the claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex." *Id.* (citing *Baker*, 191 N.W.2d at 186-87, and *Singer v Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974)); *see also In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality); *id.* at 20 (Graffeo, J., concurring); *Andersen v. King Cnty.*, 138 P.3d 963, 988 (Wash. 2006) (plurality); *id.* at 1010 (J.M. Johnson, J., concurring in judgment only); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363 n.2 (D.C. 1995) (op. of Steadman, J.) (same). Federal courts agree. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005) ("DOMA does not discriminate on the basis of sex because it treats women and men equally"); *Smelt*, 374 F. Supp. 2d at 877 (same); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2005) (same).[2]

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[2] The only contrary authority of which counsel is aware is *Baehr, supra.* (*Footnote continued on next page*…)

The Supreme Court has repeatedly upheld classifications that track biological differences between the sexes. Distinctions based on pregnancy, for instance, are rationally related to women's different reproductive biology. *Geduldig v. Aiello*, 417 U.S. 484, 495-96 (1974) (equal protection) (later superseded by 42 U.S.C.A. § 2000e(k) (West 2013) (Pregnancy Discrimination Amendment)). And immigration law may make it easier for out-of-wedlock children to claim citizenship from citizen mothers than from citizen fathers, for reasons beyond gender stereotypes. *Nguyen v. INS*, 533 U.S. 53, 62-65 (2001). Both sexes are equally free to marry, and Pennsylvania's marriage laws are rooted in reproductive biology, not stereotypes.

IV. There Is No Substantive Due Process Fundamental Right to Marry a Person of One's Own Sex.

Plaintiffs stretch the Supreme Court's cases recognizing a fundamental right to marry a person of the *opposite* sex into a right to marry a person of the *same* sex. In doing so, they invent an

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There, a two judge plurality expressed the view that marriage laws constituted sex discrimination under the *state* constitution. 852 P.2d at 59-63. That view did not command a majority of the court and was later superseded by an amendment to the Hawai'i Constitution. *See* Haw. Const. art. I, § 23.

unprecedented right, contrary to the Supreme Court's demanding test for substantive due process. Ironically, while relying heavily on *Windsor* for its condemnation of the federal government's novelty, the so-called right asserted by the plaintiffs breaks new ground.

Right-to-marry cases are rooted in the basic biological fact that opposite-sex couples reproduce. This implicates not just private sexual activity but the public's vital interest in rearing children. This does not encompass plaintiffs' purported right.

The Due Process Clause of the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted). The alleged right cannot be asserted in a broad, abstract manner, but requires "careful description" resting on "concrete examples" of how the right has been instantiated. *Id.* at 721-22. One cannot construct a new fundamental right by labeling same-sex unions as marriages, but must focus on how their details diverge from the marriages recognized in earlier cases.

The primary authority plaintiffs cite for a fundamental right is *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Compl. ¶ 11, 35. But the law struck down there targeted procreative interracial unions, and the Court emphasized that marriage is "fundamental to our very existence and survival." 388 U.S. at 12. It was because of procreation that the miscegenation laws even arose. *See generally* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. Davis L. Rev. 421 (1988).

"[A]t common law there was no ban on interracial marriage," Irving G. Tragen, *Statutory Prohibitions against Interracial Marriag*e, 32 Cal. L. Rev. 269, 269 (1944), and "[t]here was no rule at common law in England nor has any statute been passed in England banning interracial marriages." *Id.* n.2 (citing Alexander Wood Rinton and George Grenville Phillimore, *The Comparative Law of Marriage and Divorce* 142 (Sweet & Maxwell 1910). Miscegenation laws first appeared in the 1600's, following the inception of slavery on American soil, and marking a novel and unusual departure from the common law as it had existed for centuries. When the Supreme Court struck down the handful of remaining such laws in *Loving*, it merely returned

marriage to its natural, common law state—one man and one woman, without racial restrictions. And it is these very same real and enduring procreative purposes that have allowed age and consanguinity restrictions to remain as enduring pillars of marriage.

Likewise, *Zablocki v. Redhail* praised the due process right "to marry, establish a home and bring up children" as "fundamental to the very existence and survival of the race." 434 U.S. at 384 (cited at Compl. ¶ 108) (internal quotation marks omitted). And *Turner v. Safley* authorized prisoners to marry "in the expectation that [the marriages] ultimately will be fully consummated" upon release. 482 U.S. 78, 96 (1987) (cited at Compl. ¶ 108). Each of these cases anchored its holding in the reproductive capacity of opposite-sex couples.

Nor is *Lawrence v. Texas* a basis for recognizing a novel right to marry someone of the same sex. In grounding its right to privacy, *Lawrence* stressed the novelty of sodomy laws, the gravity of criminal penalties, and the private nature of the sexual conduct protected at home. 539 U.S. at 568-71, 575-76. It specifically declined to change which relationships the public may recognize or foster. *Id.* at 578.

Here, by contrast, plaintiffs do not allege that the government has intruded their bedrooms, or criminalized their behavior. Nor do they ask this Court to abrogate a novel disability, but rather a longstanding, bedrock institution. They seek not privacy for consenting adults behind closed doors, but public recognition, endorsements, and benefits. *See, e.g.*, Compl. ¶¶ 2, 13, 26, 73. *Lawrence* is thus inapposite. There is no basis for plaintiffs' alleged fundamental right.

V. Plaintiffs' Complaint Should Be Dismissed for Failure to Join Necessary Parties Under Rule 19.

Under Rule 19, all Clerks of the Orphans' Court are required parties to grant complete relief to plaintiffs' challenge to the Commonwealth's marriage laws. Failure to join parties under FRCP 19 constitutes grounds for dismissal under FRCP 12(b)(7).

The Third Circuit has defined necessary parties as "[p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1011 (3d Cir. 1987) (*quoting Shields v. Barrow,* 58 U.S. (17 How.)

130, 139, 15 L.Ed. 158 (1854)). Because issues of "joinder can be complex, and determinations are case specific," there is no set formula for this equitable determination. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 863 (2008); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968) ("Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation. There is a large category . . . of persons who, in the Rule's terminology, should be 'joined if feasible.'"). "The decision whether to dismiss (*i.e.*, the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 118-19.

Factors that the Third Circuit and Supreme Court have considered in the case-specific necessary-party-determination include: (1) consideration of "'the public['s interest] in avoiding repeated lawsuits on the same essential subject matter.'" *Gen. Refractories Co. v. First*

State Ins. Co., 500 F.3d 306, 315 (3d Cir. 2007); (2) "'the desirability of joining those persons in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court.'" *Id.* (quoting the advisory committee notes to the 1966 amendment to Rule 19); and (3) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111. Whether complete relief may be granted absent the unjoined parties is necessarily determined by the "relief sought." *Steel Valley Auth.*, 809 F.2d at 1012. Thus, following *Steel Valley Authority*, "we direct our attention to the relief sought by" the plaintiffs. *Id.*

A. Plaintiffs Request Relief on Behalf of Parties not before this Court, and that will Impact Unjoined Defendants.

Although plaintiffs have not moved to certify a class, plaintiffs seek a declaratory judgment and injunctive relief on behalf of "all other same-sex couples . . . in the Commonwealth of Pennsylvania" that are not parties to this case. Compl. at p. 51 (Prayer for Relief). Thus, plaintiffs are seeking the effect of a statewide class-action lawsuit without the formalities. *Cf.* Fed. R. Civ. P. 23.

Because all Clerks of Orphans' Court have not been joined, the relief sought may bind only the named defendants to this case, but would necessarily impact all non-party Clerks of Orphans' Court causing "repeated lawsuits on the same essential subject matter," *Gen. Refractories Co.*, 500 F.3d at 315, conflicting with "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies," *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111, and resulting in "hollow rather than complete relief," *Gen. Refractories Co.*, 500 F.3d at 315.

B. This Court Cannot Afford the Full Relief Sought by Plaintiffs Absent Joinder of all Clerks of Orphans' Court.

Apart from plaintiffs' lack of Article III standing to assert third-parties' interests, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) ("In the ordinary case, a party is denied standing to assert the rights of third persons."), such relief cannot be completely afforded absent joinder because only the named defendants would be bound if this Court afforded the relief sought. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 110 (non parties "cannot be bound by the judgment rendered.").

Pennsylvania law imposes a ministerial duty on the Clerks of Orphans' Court to enforce the marriage statutes, and grants them no discretion to depart from its requirements or determine whether the law is constitutional. *Commonwealth v. Hanes*, No. 379 M.D. 2013, slip op. at 25, 33 (Pa. Commw. Ct. Sept. 12, 2013) (attached as Exhibit C) (The Commonwealth's "statutory scheme, outlining the applicable requirements and procedure for the issuance of a marriage license, does not authorize [a Clerk] to exercise any discretion or judgment with respect to its provisions."). Thus, because 65 of Pennsylvania's 67 Clerks of Orphans' Court are not parties to this case, nor bound by any potential judgment of this Court, the unjoined Clerks shall continue to enforce the Commonwealth's laws—presumably as to other same-sex couples on whose behalf plaintiffs seek relief. *See e.g.*, *U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) (Holding that "because lower federal courts exercise no appellate jurisdiction over state tribunals, [and] decisions of lower federal courts are not conclusive on state courts," the supremacy clause did not require the state to cease enforcement of an ordinance declared unconstitutional by a federal district court in a different case.); *Ryan v. Specter*, 332 F. Supp. 26, 29

(E.D. Pa. 1971) (Three-judge district panel opinion by Biggs, Circuit Judge) (citations omitted) ("a decision by this court declaring the Pennsylvania . . . statutes unconstitutional would not be binding on the Supreme Court of Pennsylvania. If we were to hold these Pennsylvania statutes unconstitutional and the Supreme Court of Pennsylvania should . . . declare them to be constitutional, an awkward and probably unworkable situation would arise, whether in Philadelphia County alone or throughout Pennsylvania. Chaos might ensue.").

C. Joinder of all Clerks of Orphans' Court is Necessary to Avoid Repeated Lawsuits.

When considering whether a party is necessary under Rule 19(a), courts "consider the interests of 'the public in avoiding repeated lawsuits on the same essential subject matter.'" *Gen. Refractories Co.*, 500 F.3d at 315. For example, in *Hoheb v. Muriel*, the court overturned a district court's denial of a motion to dismiss for failure to join parties under Rule 19 in part because "[i]f the relief sought by plaintiffs should be granted further litigation . . . appears inevitable. If all [parties in question] are joined now, complete relief can be given in a single lawsuit." 753 F.2d 24, 27 (3d Cir. 1985). The court noted that "Rule 19 was amended in 1966 to simplify and liberalize joinder under the

Federal Rules of Civil Procedure. The principal consideration is that 'persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.'" *Id.* at 26.

Were this Court to grant plaintiffs' requested relief, the non-party Clerks of Orphans' Court would not be bound, resulting in some clerks issuing licenses to same-sex couples while others remain obligated to follow Commonwealth laws. This would place the unjoined parties in an untenable position: whether to enforce the law, or whether to abdicate their ministerial duty to enforce the law because a court judgment they are not bound by has declared the law to be unconstitutional. Indeed, the Clerk of Montgomery County is currently bound by an order of the Commonwealth Court to comply with his ministerial duty to enforce the law. *Commonwealth v. Hanes*, No. 379 M.D. 2013, slip op. at 25, 33. An inconsistent state of affairs will lead to further litigation to compel those clerks that continue to enforce the Commonwealth's laws to comport with any potential judgment of this Court. In order to avoid such a state of "chaos," as the *Ryan* Court put it, plaintiffs must join all necessary parties—all Clerks of Orphans'

Court. Absent the unjoined Clerks of Orphans' Court, this Court cannot grant full relief. Indeed granting plaintiffs relief absent the unjoined Clerks would result in the "partial or 'hollow' rather than complete relief" that Rule 19 was designed to prevent. *Gen. Refractories Co.*, 500 F.3d at 315. Relief granted in the absence of the unjoined Clerks would "leave[] the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Steel Valley Auth.*, 809 F.2d at 1011.

Because all Clerks of Orphans' Court are necessary Rule 19-parties, under FRCP 12(b)(7) this Court should dismiss the Plaintiffs' complaint for failure to join necessary parties.

CONCLUSION

For the foregoing reasons, Defendant Petrille respectfully moves to dismiss plaintiffs' complaint.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify, pursuant to Local Rule 7.8(b)(2), and this Court's October 3, 2013order, issued under Local Rule 7.8(b)(3) and granting Defendant Petrille's Motion for Leave to Exceed Word Limitation, ECF No. 32, that the foregoing brief is 9,950 words as calculated by Microsoft Word, the word-processing system used to prepare the brief.

s/ *Nathan D. Fox*
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2013, I electronically filed the foregoing Defendant Petrille's Brief in Support of Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6) and Failure to Join Parties Under Fed. R. Civ. P. 12(b)(7) and 19, with the Clerk of Court using the ECF system, which will effectuate service of this filing on the following ECF-registered counsel by operation of the Court's electronic filing system:

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EXHIBITS – TABLE OF CONTENTS

EXHIBIT A

Exhibit A – Table of Contents

1. 1770, Feb. 24, 1 Sm.L. 307, § 1 *codified at* 21 Pa. Stat. Ann. § 254 (West 2013)

   a. ("No grant, bargain and sale, lease, release, feoffment, deed, conveyance or assurance whatsoever, heretofore bona fide made and executed by husband and wife in manner aforesaid . . . shall be deemed, held or adjudged invalid or defective in law . . . but that all . . . are hereby declared to be, good and valid in law for transferring and passing the estates, rights, titles and interests of such husband and wife. . .");

2. 1770, Feb. 24, 1 Sm.L. 307, § 3 *codified at* 21 Pa. Stat. Ann. § 49 (West 2013)

   a. ("All deeds and conveyances made and executed by husband and wife, not residing within this province, and brought hither to be recorded in the county where the lands lie . . .shall be as valid and effectual in law as if the same had been made and acknowledged in manner aforesaid . . .");

3. 1836, Jun. 16, P.L. 729, § 37 *codified at* 39 Pa. Stat. Ann. § 281 (West 2013)

   a. ("Personal property of the wife of any such insolvent, which shall not have been reduced by him into possession, previously to his assignment as aforesaid, shall not be deemed to vest in the said trustees, but the beneficial interest in the same shall remain to such wife. . .");

4. 1840, Apr. 16, P.L. 357, § 15 *codified at* 21 Pa. Stat. Ann. § 261 (West 2013)

   a. ("Any and every grant, bargain and sale, release, or other deed of conveyance or assurance of any lands, tenements or hereditaments in this commonwealth, heretofore bona fide made, executed and delivered by husband and wife, within any other of the United States, where the acknowledgment of the execution thereof has been taken and certified by any officer or officers in any of the states where made and executed . . . shall be deemed and adjudged to be as good, valid and effectual in law for transferring, passing and

conveying the estate, right, title and interest of such husband and wife . . .");

5. 1854, May 5, P.L. 572, § 1 *codified at* 21 Pa. Stat. Ann. § 265 (West 2013)

   a. ("Any and every deed of grant, bargain and sale, release, or other deed of conveyance or assurance of any lands, tenements or hereditaments in this commonwealth, heretofore bona fide made, executed and delivered by husband and wife . . . within any other of the United States . . . shall be deemed and adjudged to be as good, valid and effectual in law, for transferring, passing and conveying the estate, right, title and interest of such husband and wife . . .");

6. 1854, Dec. 14, P.L. 724, § 1 *codified at* 21 Pa. Stat. Ann. § 384 (West 2013)

   a. ("All letters of attorney authorizing contracts to be made, the adjustment of accounts, the sale of stocks and personal estate, the receipt of moneys, or the discharge and acquittance of legacies or distributive shares when executed,

proved or acknowledged in other states or foreign countries, by any person or husband and wife. . .");

7. 1859, Apr. 2, P.L. 352, § 1 *codified at* 21 Pa. Stat. Ann. § 222 (West 2013)

   a. ("All ambassadors, ministers plenipotentiary, charges d'affaires, or other persons exercising public ministerial functions, duly appointed by the United States of America, shall have full power and authority to take all acknowledgments and proofs of any deeds, conveyances, settlements, mortgages, agreements powers of attorney, or other instruments under seal relating to real or personal estate, made or executed in any foreign country or state, by any person or persons, or by husband and wife. . .");

8. 1868, May 1, P.L. 106, § 1 *codified at* 46 Pa. Stat. Ann. § 191 (West 2013)

   a. ("On every act for divorce from the bonds of matrimony passed on the application of the husband, the sum of one hundred dollars [shall be paid to the treasury of the

commonwealth]; if on the application of the wife, the sum of fifty dollars.");

9. 1877, Mar. 23, P.L. 29, § 1 *codified at* 21 Pa. Stat. Ann. § 224 (West 2013)

   a. ("In all cases of the sale, conveyance, mortgage or other instrument of writing, heretofore made or which may be hereafter made by any person, or husband and wife, concerning any lands, tenements or hereditaments, or any estate or interest therein, lying or being within this commonwealth . . . shall be valid to all intents and purposes . . .");

10. 1897, May 25, P.L. 83, No. 63, § 1 *codified at* 21 Pa. Stat. Ann. § 391 (West 2013)

   a. ("All releases, contracts, letters of attorney and other instruments of writing which a married woman is or shall be authorized by law to make and execute without the joinder of her husband . . . may be recorded in the office for recording deeds in the proper county if the same shall have been acknowledged by her without her husband joining. . .");

11. 1901, Apr. 4, P.L. 67, No. 35, § 1 *codified at* 21 Pa. Stat. Ann. § 82 (West 2013)

    a. ("Acknowledgments of any married woman of any deeds, mortgages or other instruments of writing, required by law to be acknowledged, shall be taken by any judge, justice of the peace, notary public, or other person authorized by law to take acknowledgments of deeds, et cetera, in same manner and form as though said married woman were feme-sole; said acknowledgment to have the same force and effect as if taken separate and apart from the husband of said married woman.");

12. 1903, Apr. 22, P.L. 248, § 8 *codified at* 52 Pa. Stat. Ann. § 1419 (West 2013)

    a. ("[T]he wives of all the men who are eligible to [the Miner's] home. . . and who have attained the age of fifty-five years are eligible to live in this home.").

13. 1913, Jun. 4, P.L. 405, § 2 *codified at* 43 Pa. Stat. Ann. § 274 (West 2013)

    a. ("No such assignment of, or order for, wages or salary to be earned in the future, to secure a loan, shall be valid, when made by a married man, unless the written consent of his wife to the making of such assignment or order is attached thereto. . .");

14. 1915, Jun. 2, P.L. 736, No. 338, § 307 *codified at* 77 Pa. Stat. Ann. § 562 (West 2013)

    a. ("No compensation shall be payable under this section to a widow, unless she was living with her deceased husband at the time of his death . . . [n]o compensation shall be payable under this section to a widower, unless he be incapable of self-support at the time of his wife's death and be at such time dependent upon her for support.");

15. 1919, Jul. 21, P.L. 1065, No. 432, § 1 *codified at* 25 Pa. Stat. Ann. § 321 (West 2013)

    a. ("Any person employed in the service of this State or in the service of the Federal Government, and required thereby to

be absent from the city wherein he resided when entering such employment, his wife or her husband, shall . . . be registered as of the district wherein he or she shall have resided prior to entering such service.");

16. 1923, March 28, P.L. 45, § 1 *codified at* 21 Pa. Stat. Ann. § 259 (West 2013)

    a. (declaring that pre-1923 deeds, mortgages, or other instrument of writing regarding land, estates, etc. that were properly acknowledged by husband and wife before the appropriate person authorized by law prior are valid for transferring, passing, and conveying the estate, right, title, and interest of the husband and wife) (validates 1770, Feb. 24, 1 Sm.L. 307 and subsequent laws that refer to deeds and conveyances made by husband and wife);

17. 1927, May 13, P.L. 984, § 1 *codified at* 69 Pa. Stat. Ann. § 541 (West 2013)

    a. (". . . a conveyance of an interest in real property [may be made] by either husband or wife without the joinder of his or her spouse to husband and wife as tenants by the entireties,

[or] by husband and wife as tenants by the entireties to either husband or wife alone. . .");

18. 1933, May 25, P.L. 1050, § 13 *codified at* 53 Pa. Stat. Ann. § 23618 (West)

    a. ("If any beneficiary of the [Firemen Relief and Pension] fund shall be awarded a pension and shall thereafter be convicted of felony, or shall become an habitual drunkard, or shall cease to care for and support his wife and family, then, and in any such case, the board shall have power, by a two-thirds vote, to revoke the pension, or to suspend the payment thereof, or to direct payment of the pension to the family of such beneficiary.");

19. 1935, Jul. 12, P.L. 970, No. 314, § 308 *codified at* 72 Pa. Stat. Ann. § 3402-308 (West 2013)

    a. ("A husband and wife living together shall receive but one personal deduction. If such husband and wife make separate returns, the personal deduction may be taken by either or divided between them.");

20. 1935, Jul. 12, P.L. 970, No. 314, § 401 *codified at* 72 Pa. Stat. Ann. § 3402-401 (West 2013)

    a. ("If a husband and wife living together have an aggregate net income of one thousand five hundred dollars ($1,500.00) or over . . . each shall make such a return, or the income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.");

21. 1936, Dec. 5, P.L. 2897, § 404 *codified at* 43 Pa. Stat. Ann. § 804 (West 2013)

    a. ("As used in this paragraph the term "dependent spouse" means any legally married wife or husband of the eligible employe [sic] in question who, at the beginning of such individual's current benefit year was living with and being wholly or chiefly supported by such individual.");

22. 1937, Jun. 24, P.L. 2017, § 501 *codified at* 62 Pa. Stat. Ann. § 2331 (West 2013)

    a. ("Before emancipation, the settlement of a legitimate minor is and remains that of the father, unless--(1) The father is dead and the mother acquires a new settlement, in which

case it follows that of the mother; or (2) The father deserts his family, in which case it follows that of the mother; or (3) The mother withdraws from cohabitation with the husband on account of his cruelty, inebriety or lack of support, in which case it follows that of the parent having the custody . . .");

23. 1937, Jun. 3, P.L. 1333, § 704 *codified at* 25 Pa. Stat. Ann. § 2814 (West 2013)

    a. ("In determining the residence of a person desiring to register or vote . . .[t]he place where the family of a married man or woman resides shall be considered and held to be his or her place of residence, except where the husband and wife have actually separated and live apart. . .");

24. 1939, Jun. 24, P.L. 872, § 731 *codified at* 18 Pa. Stat. Ann. § 4731 (West 2013)

    a. ("Whoever, being a husband or father, separates himself from his wife or from his children or from wife and children, without reasonable cause, or willfully neglects to maintain his wife or children, such wife or children being destitute, or

being dependent wholly or in part on their earnings for adequate support, is guilty of a misdemeanor. . .");

25. 1947, Jul. 7, P.L. 1368, § 308 *codified at* 72 Pa. Stat. Ann. § 5860.308 (West 2013)

    a. ("In the case of property owned by joint tenants, tenants in common, or husband and wife as tenants by the entireties, the bureau may give the notice required by this section by forwarding only one notice addressed to such joint tenants, tenants in common or husband and wife at the same post office address.");

26. 1959, Dec. 3, P.L. 1688, No. 621, § 405-C *codified at* 35 Pa. Stat. Ann. § 1680.405c (West 2013)

    a. ("In cases of joint mortgagors who are husband and wife, where only one spouse who is an occupant of the mortgaged premises makes application for and receives assistance under this article, the lien to secure repayment as aforesaid shall be a lien on the property of like force and effect as a mechanic's lien.");

27. 1965, Nov. 30, P.L. 847, No. 356, § 604 *codified at* 7 Pa. Stat. Ann. § 604 (West 2013)

    a. ("Any such deposit account and all interest thereon may be paid in whole or part upon the check, order or receipt of . . . [t]he survivor of a husband and wife in the case of an account in their joint names.");

28. 1965, Dec. 22, P.L. 1164, § 1 *codified at* 71 Pa. Stat. Ann. § 1770.1 (West 2013)

    a. ("The widow of any member of the Pennsylvania State Police, the State Highway Patrol or the Pennsylvania Motor Police whose husband died prior to January 1, 1938, as a direct and proximate result of injuries received in the course of his employment, shall . . . so long as she remains his widow and does not remarry, receive a monthly payment equal to fifty percent of the monthly salary of such member at the time of his death.");

29. 1965, Dec. 31, P.L. 1257, § 2 *codified at* 53 Pa. Stat. Ann. § 6924.301.1 (West 2013)

    a. ("Such local authorities shall not have authority by virtue of this act: (1) To levy, assess and collect or provide for the levying, assessment and collection of any tax . . . on a transfer between husband and wife, or on a transfer between persons who were previously husband and wife but who have since been divorced provided such transfer is made within three months of the date of the granting of the final decree in divorce, or the decree of equitable distribution of marital property, whichever is later, and the property or interest therein, subject to such transfer, was acquired by the husband and wife, or husband or wife, prior to the granting of the final decree in divorce, or on a transfer between parent and child or the spouse of such a child, or between parent and trustee for the benefit of a child or the spouse of such child. . .");

30. 1968 Jul. 18, P.L. 405, No. 183, § 5 *codified at* 51 Pa. Stat. Ann. § 20125 (West 2013)

    a. ("In the case of death or those missing in action, who have not been declared dead or captured, [payment shall be made by the Adjutant General] to the . . .surviving wife or unremarried widow if the wife or widow was living with the veteran at the time of his death or departure. . .");

31. 1971, Mar. 4, P.L. 6, No. 2, § 309 *codified at* 72 Pa. Stat. Ann. § 7309 (West 2013)

    a. ("If the income of husband or wife who are both nonresidents of this Commonwealth and are subject to tax under this article is determined on a separately filed return, their incomes from sources within this Commonwealth shall be separately determined. . . If either husband or wife is a nonresident and the other a resident, separate taxes shall be determined on their separate incomes on such forms as the department shall prescribe . . .");

32. 1971, Mar. 4, P.L. 6, No. 2, § 325 *codified at* 72 Pa. Stat. Ann. § 7325 (West 2013)

    a. ("A husband and wife may make a joint declaration of estimated tax hereunder as if they were one taxpayer, in which case the liability with respect to the estimated tax shall be joint and several. If a joint declaration is made but husband and wife elect to determine their taxes separately, the estimated tax for such year may be treated as the estimated tax of either husband or wife, or may be divided between them, as they may elect.");

33. 1971, Mar. 4, P.L. 6, No. 2, § 331 *codified at* 72 Pa. Stat. Ann. § 7331 (West 2013)

    a. ("If the income tax liabilities of husband and wife are determined on a joint return, their tax liabilities shall be joint and several.");

34. 1971, Mar. 4, P.L. 6, No. 2, § 1102-C.3 *codified at* 72 Pa. Stat. Ann. § 8102-C.3 (West 2013)

    a. ("The tax imposed by section 1102-C1 shall not be imposed upon: . . . (6) A transfer between husband and wife, between

persons who were previously husband and wife who have since been divorced, provided the property or interest therein subject to such transfer was acquired by the husband and wife or husband or wife prior to the granting of the final decree in divorce. . .");

35. 1971, Mar. 4, P.L. 6, No. 2, § 2111 *codified at* 72 Pa. Stat. Ann. § 9111 (West 2013)

    a. ("Property owned by husband and wife with right of survivorship is exempt from inheritance tax.");

36. 1972, Jun. 30, P.L. 508, No. 164, § 2 *codified at* 20 Pa. Cons. Stat. Ann. § 2104 (West 2013)

    a. ("When real or personal estate or shares therein shall pass to two or more persons, they shall take it as tenants in common, except that if it shall pass to a husband and wife they shall take it as tenants by the entireties.");

37. 1976, July 9, P.L. 586, No. 142, § 2 *codified at* 42 Pa. Cons. Stat. Ann. § 5914 (West 2013)

    a. (". . . neither husband nor wife shall be competent or permitted to testify to confidential communications made by

one to the other. . .") (substantially a reenactment of act of 1887, May 23, P.L. 158, No. 89, § 2(c));

38. 1976, Jul. 9, P.L. 586, No. 142, § 2 *codified at* 42 Pa. Cons. Stat. Ann. § 5926 (West 2013)

    a. (In all civil actions brought by either the husband or wife, either the husband or the wife shall be a competent witness in rebuttal, when his or her character or conduct is attacked upon the trial thereof, but only in regard to the matter of his or her character or conduct.") (reenactment of act of 1907, May 8, P.L. 184, No. 146, § 1);

39. 1976, Jul. 9, P.L. 586, No. 142, § 2 *codified at* 42 Pa. Cons. Stat. Ann. § 5927 (West 2013)

    a. ("In any action brought by either the husband or wife to protect and recover the separate property of either, both shall be fully competent witnesses. . .") (substantially a reenactment of 1893, Jun. 8, P.L. 344, No. 284, § 4);

40. 1976, Jul. 9, P.L. 586, No. 142, § 2.21 *codified at* 42 Pa. Stat. Ann. § 254 (West 2013)

    a. ("In a civil matter neither husband nor wife shall be competent or permitted to testify against each other") (substantially a reenactment of 1887, May 23, P.L. 158, No. 89, § 5(c));

41. 1980, Oct. 15 P.L. 934, No. 163, § 1 *codified at* 23 Pa. Cons. Stat. Ann. § 2711 (West 2013)

    a. ("The consent of the husband of the mother shall not be necessary [for adoption] if, after notice to the husband, it is proved to the satisfaction of the court by evidence, including testimony of the natural mother, that the husband of the natural mother is not the natural father of the child. Absent such proof, the consent of a former husband of the natural mother shall be required if he was the husband of the natural mother at any time within one year prior to the birth of the adoptee.");

42. 1989, Nov. 17, P.L. 592, No. 64, § 3 *codified at* 18 Pa. Cons. Stat. Ann. § 3209 (West 2013)

    a. ("In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement . . . from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion.");

43. 1990, Dec. 19, P.L. 1240, No. 206, § 2 *codified at* 23 Pa. Cons. Stat. Ann. § 1702 (West 2013)

    a. ("If a married person, during the lifetime of the other person with whom the marriage is in force, enters into a subsequent marriage pursuant to the requirements of this part and the parties to the marriage live together thereafter as husband and wife . . . they shall, after the impediment to their

marriage has been removed by the death of the other party to the former marriage or by annulment or divorce, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and immediately after the date of death or the date of the decree of annulment or divorce.");

44. 1990, Dec. 19, P.L. 1240, No. 206, § 2 *codified at* 23 Pa. Cons. Stat. Ann. § 4102 (West 2013)

    a. ("In all cases where debts are contracted for necessaries by either spouse for the support and maintenance of the family, it shall be lawful for the creditor in this case to institute suit against the husband and wife for the price of such necessaries. . .") (derived from 1848, Apr. 11, P.L. 536, § 8);

45. 1990, Dec. 19, P.L. 1240, No. 206, § 2 *codified at* 23 Pa. Cons. Stat. Ann. § 3706 (West 2013)

    a. ("No petitioner is entitled to receive an award of alimony where the petitioner, subsequent to the divorce pursuant to which alimony is being sought, has entered into cohabitation with a person of the opposite sex who is not a member of the

family of the petitioner within the degrees of consanguinity.") (Cohabitation "[r]equires that two persons of the opposite sex reside together in the manner of husband and wife, mutually assuming those rights and duties usually attendant upon the marriage relationship. Cohabitation may be shown by evidence of financial, social, and sexual interdependence, by a sharing of the same residence, and by other means." *Miller v. Miller,* 352 Pa. Super. 432, 439, 508 A.2d 550, 554 (1985));

46. 1990, Dec. 19, P.L. 1240, No. 206, § 2 *codified at* 23 Pa. Cons. Stat. Ann. § 6381 (West 2013)

    a. (". . .a privilege of confidential communication between husband and wife . . . shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse.");

47. 1990, Dec. 19, P.L. 834, No. 198, § 302 *codified at* 17 Pa. Cons. Stat. Ann. § 506 (West 2013)

    a. (declaring an exception for spousal accounts: "This section. . . shall not be construed to affect share accounts in the names

of a husband and his wife.") (reenactment of 1961, Sept. 20, P.L. 1548, No. 658, § 16).

EXHIBIT B

71-1027

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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No. .....

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

[2] Appellant McConnell is also petitioner before this Court in *McConnell* v. *Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently percipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[3]

[3] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homosexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

> "Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.[4] This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

[4] See, e.g., *Jones* v. *Hallihan*, W-152-70 (Ct. Apps. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Meyer* v. *Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protection component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra,* pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut*, *supra*.

"Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia*, *supra*; *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

> denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.[8]

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranted in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut*, 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel* v. *United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

[8] The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed*, *supra*; *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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EXHIBIT C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Health, Petitioner	:	
v.	:	
D. Bruce Hanes, in his official capacity as the Clerk of the Orphans' Court of Montgomery County, Respondent	:	No. 379 M.D. 2013
	:	Argued: September 4, 2013

BEFORE: HONORABLE DAN PELLEGRINI, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: September 12, 2013

Before the Court is the Department of Health's (Department) Amended Application for Summary Relief pursuant to Pa. R.A.P. 1532(b)[1] (Application) for

[1] Pa. R.A.P. 1532(b) states, in relevant part:

> **(b) Summary relief.** At any time after the filing of a petition for review in an … original jurisdiction matter the court may on application enter judgment if the right of the applicant … is clear.
>
> *Note:* [S]ubdivision (b) authorizes immediate disposition of a petition for review, similar to the type of relief envisioned by the Pennsylvania Rules of Civil Procedure regarding judgment on the pleadings and peremptory and summary judgment. However, such relief may be requested before the pleadings are closed where the right of the applicant is clear.

(Footnote continued on next page…)

peremptory judgment with respect to its Amended Petition for Review in the Nature of an Action in Mandamus (Petition). For the reasons that follow, we grant the Application and the mandamus relief sought in the Petition.

I.

A.

On June 26, 2013, in a case involving the marital exemption from the federal estate tax under Section 2056(a) of the Internal Revenue Code, 26 U.S.C. §2056(a), the United States Supreme Court held that the federal Defense of Marriage Act's definition of "marriage" as only as a legal union between a man and a woman, and "spouse" as only as a person of the opposite sex who was a husband or wife, 1 U.S.C. §7, was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment to the United States Constitution. *See Windsor v. United States*, ___ U.S. ___, ___, 133 S. Ct. 2675, 2693-2996 (2013). Nevertheless, as the Supreme Court explained:

> [S]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons; but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." … Consistent

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(continued…)

An application for summary relief filed under Pa. R.A.P. 1532(b) is generally the same as a motion for peremptory judgment filed in a mandamus action in the common pleas court. *Barge v. Pennsylvania Board of Probation and Parole*, 39 A.3d 530, 550 (Pa. Cmwlth. 2012). The application will be granted where the right to such relief is clear, but will be denied where there are material issues of fact in dispute or if it is not clear the applicant is entitled to judgment as a matter of law. *Id.*

> with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations…. The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States."

Id. at ___, 133 S. Ct. at 2691.[2] Because the regulation of marriage is a matter for the states, the Supreme Court found that a federal definition of marriage that creates "two

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[2] With respect to statutes regarding marriage in Pennsylvania, the Pennsylvania Supreme Court has explained:

> The law for certain purposes regards marriage as initiated by a civil contract, yet it is but a ceremonial ushering in a fundamental institution of the state. The relation itself is founded in nature, and like other natural rights of persons, becomes a subject of regulation for the good of society. The social fabric is reared upon it, for without properly regulated marriage, the welfare, order and happiness of the state cannot be maintained. Where the greater interests of the state demand it, marriage may be prohibited; for instance, within certain degrees of consanguinity, as deleterious to the offspring and to morals. For the same reason the law may dissolve it, and as a question of power, there is no difference whether this be done by a general or a special law.

Cronise v. Cronise, 54 Pa. 255, 262 (1867); s*ee also Bacchetta v. Bacchetta*, 498 Pa. 227, 232-33, 445 A.2d 1194, 1197 (1982) ("'Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.'") (citation omitted); *In re Stull's Estate*, 183 Pa. 625, 629-30, 39 A. 16, 17 (1898) (holding that the validity of a marriage is determined by the law of the place where it was celebrated and if it is invalid there, it is invalid everywhere).

contradictory marriage regimes within the same State" must fall. *Id.* at ___, 133 S. Ct. at 2694. Congress "interfered" with "state sovereign choices" about who may be married by creating its own definition, relegating one set of marriages – same-sex marriages – to the "second-tier," making them "unequal." *Id.*

B.

To declare the prohibition of same sex marriages in Pennsylvania unconstitutional, on July 9, 2013, the American Civil Liberties Union of Pennsylvania filed a federal civil rights lawsuit on behalf of a number of same-sex couples against several Commonwealth officials including the Governor; the Department's Secretary; the Attorney General; the Register of Wills of Washington County; and the Register of Wills and Clerk of Orphans' Court of Bucks County. *See Whitewood v. Corbett* (No. 13-1861) (M.D. Pa.). The lawsuit challenges the constitutionality of Section 1102 of the Marriage Law, 23 Pa. C.S. §1102, which defines "marriage" as "[a] civil contract by which one man and one woman take each other for husband and wife," and Section 1704, 23 Pa. C.S. §1704, which provides:

> It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

The complaint alleges that the foregoing provisions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[3]

On July 11, 2013, the Attorney General issued a press release announcing that her office would not defend the provisions of the Marriage Law in challenged *Whitewood* because she deemed them to be "wholly unconstitutional" and that it was her duty under the Commonwealth Attorneys Act[4] to authorize the Office

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[3] U.S. Const. amend. XIV, §1. Section 1 states, in pertinent part, "[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] Act of October 14, 1980, P.L. 950, *as amended*, 71 P.S. §§732-101 – 732-506. Article 4, Section 4.1 of the Pennsylvania Constitution states, in pertinent part:

> An Attorney General … shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.

Pa. Const. art. IV, §4.1.

In turn, Section 204 of the Commonwealth Attorneys Act provides, in pertinent part:

> **(a) Legal advice.—**
>
> (1) Upon the request of the Governor or the head of any Commonwealth agency, the Attorney General shall furnish legal advice concerning any matter or issue arising in connection with the exercise of the official powers or performance of the official duties of the Governor or agency. The Governor may request the advice of the Attorney General concerning the constitutionality of legislation presented to him for approval in order to aid him in the exercise of his approval and veto powers and the advice, if given, shall not be binding on the Governor….

(Footnote continued on next page…)

of General Counsel[5] to defend the State in the litigation. *See* Press Release, Office of Attorney General, Attorney General Kane will not defend DOMA (July 11, 2013),

(continued…)

* * *

> (3) It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.

* * *

> **(c) Civil litigation; collection of debts.—**The Attorney General … may, upon determining that it is more efficient or otherwise in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead….

71 P.S. §732-204(a)(1), (3), (c).

[5] Section 301 of the Commonwealth Attorneys Act states, in pertinent part:

> There is hereby established the Office of General Counsel which shall be headed by a General Counsel appointed by the Governor to serve at his pleasure who shall be the legal advisor to the Governor and who shall:
>
> (1) [A]ppoint for the operation of each executive agency such chief counsel and assistant counsel as are necessary for the operation of each executive agency.
>
> (2) Supervise, coordinate and administer the legal services provided by … the chief counsel and assistant counsel for each executive agency.

* * *

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http://www.attorneygeneral.gov/press.aspx?id=7043. On July 23, 2013, D. Bruce Hanes (Hanes), Clerk of the Orphans' Court of Montgomery County, issued a press release announcing that he had "decided to come down on the right side of history and the law" and was prepared to issue a marriage license to a same-sex couple based upon the advice of his solicitor, his analysis of the law, and the Attorney General's belief that the Marriage Law is unconstitutional. *See* http://mainlinemedianews.com/articles/2013/07/23/main_line_times/news/doc51eecae35360b015385105.txt.

C.

On August 5, 2013, the Department filed the instant Petition and Application, seeking a writ of mandamus to compel Hanes, in his official capacity as Clerk of the Orphans' Court of Montgomery County, to perform his duties as established by Section 2774(a) of the Judicial Code, 42 Pa. C.S. §§2774(a)[6] and

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(continued…)

> (6) Initiate appropriate proceedings or defend the Commonwealth or any executive agency when an action or matter has been referred to the Attorney General and the Attorney General refuses or fails to initiate appropriate proceedings or defend the Commonwealth or executive agency.

71 P.S. §732-301(1), (2), (6). In turn, Section 102 defines "executive agency," in pertinent part, as "[t]he departments … of the Commonwealth government…." 71 P.S. §732-102.

[6] Section 2774(a) states, in pertinent part:

> **(a) General rule.—**There shall be an office of the clerk of the orphans' court division in each county of this Commonwealth, which shall be supervised by the clerk of the orphans' court division of the county who shall … exercise the powers, and perform the duties by

(Footnote continued on next page…)

accordingly comply with all provisions of the apply the Marriage Law. The Department contends that this Court has jurisdiction over the action pursuant to Section 761(a) (1) and (2) of the Judicial Code, 42 Pa. C.S. §761(a)(1), (2),[7] because Hanes is a "commonwealth officer."

The Department alleges that it is entitled to mandamus relief because Hanes is repeatedly and continuously acting in derogation of the Marriage Law because, as of August 2, 2013, he has been issuing marriage licenses to same-sex applicants and accepting the marriage certificates of same-sex couples stating that their marriages have been lawfully performed under the Marriage Law. The Department asserts that Hanes' actions violate Sections 1102 and 1704 of the Marriage Law, which limits marriage to opposite-sex couples, and Hanes' duty to perform ministerial duties and that Hanes may not issue marriage licenses to same-

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(continued…)

> law vested in and imposed upon the clerk of the orphans' court division or the office of the clerk of the orphans' court division.

See also Section 15 of the Schedule to Article 5 of the Pennsylvania Constitution, Pa. Const. art. V Sched., §15 ("Until otherwise provided by law, the offices of prothonotary and clerk of courts shall become the office of prothonotary and clerk of courts of the court of common pleas of the judicial district, … and the clerk of the orphans' court shall become the clerk of the orphans' court division of the court of common pleas, and these officers shall continue to perform the duties of the office and to maintain and be responsible for the records, books and dockets as heretofore….")

[7] Section 761(a)(1) and (2) states that "[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings … [a]gainst the Commonwealth government, including any officer thereof acting in his official capacity… [and b]y the Commonwealth government…."

sex applicants based on his personal opinion that the law is unconstitutional.[8] It also contends that Hanes may be committing a misdemeanor under Section 411 of the Second Class County Code[9] for each violation thereof for refusing to carry out his public duty in accordance with the law.

Hanes filed a Response to the Department's Application in which he raised in New Matter that the Application for mandamus should be denied for the reasons set forth in his Preliminary Objections filed that same day. First, Hanes alleges that he is a "judicial officer" under Section 2777 of the Judicial Code, 42 Pa. C.S. §2777, and that his issuance of a marriage license is a "judicial act," so that exclusive jurisdiction over the instant mandamus action lies with the Supreme Court under Section 721(2) of the Judicial Code, 42 Pa. C.S. §721(2), as he is a "court[] of inferior jurisdiction,"[10] and this Court does not have jurisdiction to issue a writ of mandamus to a "court of inferior jurisdiction" under Section 761(c), 42 Pa. C.S. §761(c),[11] in the absence of a pending appeal.[12]

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[8] The Petition also alleged that Hanes had improperly waived the mandatory three-day waiting period for the issuance of a license under Section 1303(a) of the Marriage Law. 23 Pa. C.S. §1303(a).

[9] Act of July 28, 1953, P.L. 723, 16 P.S. §3411. Section 411 states, in pertinent part:

> If any county officer neglects or refuses to perform any duty imposed on him by the provisions of this act or by the provisions of any other act …, he shall, for each such neglect or refusal, be guilty of a misdemeanor, and, on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500).

[10] Section 721(2) states that "[t]he Supreme Court shall have original but not exclusive jurisdiction of all cases of … [m]andamus or prohibition to courts of inferior jurisdiction."

[11] Section 761(c) states, in relevant part:

(Footnote continued on next page…)

Second, Hanes asserts that the Department does not have standing to seek mandamus relief because only the Attorney General, the Montgomery County District Attorney, or a private citizen who has suffered a special injury may seek to enforce an officer's public duty[13] and the Attorney General did not authorize the Department to bring suit under Section 204(c) of the Commonwealth Attorneys Act.

(continued…)

> **(c) Ancillary matters.—**The Commonwealth Court shall have original jurisdiction in cases of mandamus … to courts of inferior jurisdiction … where such relief is ancillary to matters within its appellate jurisdiction….

[12] Hanes also argues that we should transfer the case to the Supreme Court pursuant to Section 5103(a) of the Judicial Code which states, in pertinent part:

> **(a) General rule.—**If a[] … matter is taken to or brought in a court … of this Commonwealth which does not have jurisdiction of the … matter, the court … shall not … dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the … matter shall be treated as if originally filed in the transferee tribunal on the date when the … matter was first filed in a court … of this Commonwealth….

42 Pa. C.S. §5103(a). *See also* Pa. R.A.P. 751(a) (same); Pa. R.A.P. 751(b) ("[A]n appeal or other matter may be transferred from a court to another court under this rule by order of court or by order of the prothonotary of any appellate court affected.").

[13] *See Dorris v. Lloyd*, 375 Pa. 474, 476-77, 100 A.2d 924, 926 (1953) ("The Mandamus Act of June 8, 1893, P.L. 345, … Section 4, 12 P.S. §1914, provides that 'When the writ is sought to procure the enforcement of a public duty, the proceeding shall be prosecuted in the name of the commonwealth on the relation of the attorney general: *Provided however*, That said proceeding, in proper cases, shall be on the relation of the district attorney of the proper county: * * *.") (emphasis in original). *But cf.* Section 2(a)[794] of the Judiciary Act Repealer Act (JARA), Act of April 28, 1978, P.L. 202, 42 P.S. §20002(a)[794] ("[E]xcept as otherwise expressly provided in this subsection, the following acts and parts of acts are hereby repealed absolutely … [A]ct of June 8. 1893 (P.L. 345, No. 285), referred to as the 'Mandamus Act of 1893' and entitled 'An act relating to Mandamus….'"); Section 3(b) of the JARA, 42 P.S. §20003(b) ("[G]eneral rules promulgated

(Footnote continued on next page…)

Finally, Hanes contends that the Department fails to state a claim for which mandamus relief may be granted, because the Department fails to state a claim for which mandamus relief may be granted because the Department failed to show that a Clerk of the Orphans Court does not have a discretion to determine the constitutionality of the Marriage Act. Hanes argues that the Department must show that Sections 1102 and 1704 of the Marriage Law are constitutional in order to establish a clear right to relief, and furthermore, that the Department cannot do so because the Marriage Law's exclusion of same-sex marriages violates the inalienable right to marry solely based on gender in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Sections 1, 26 and 28 of the Pennsylvania Constitution.[14]

(continued…)

pursuant to the Constitution of Pennsylvania and the Judicial Code in effect on the effective date of the repeal of a statute, shall prescribe and provide the practice and procedure with respect to the enforcement of any right, remedy or immunity where the practice and procedure had been governed by the repealed statute on the date of its repeal. If no such general rules are in effect with respect to the repealed statute on the effective date of its repeal, the practice and procedure provided in the repealed statute shall continue in full force and effect, as part of the common law of the Commonwealth, until such general rules are promulgated….").

[14] Pa. Const. art. I, §§1, 26, 28. Article 1, Section 1 provides:

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

In turn, Article 1, Section 26 provides, "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Finally, Article 1, Section 28 states, "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

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D.

By order dated August 22, 2013, argument was limited to the following issues encompassing the claims raised by Hanes in opposition to the Department's Application:[15]

> - Whether this Court lacks subject matter jurisdiction because Hanes is a Judicial Officer and his issuance of a marriage license is a judicial act;
>
> - Whether the Department has standing and, if not, what is the effect of the Pennsylvania Attorney General's delegation of the duty to defend the constitutionality of Sections 1102 and 1704 of the Marriage Law; and
>
> - Whether the constitutionality of the act sought to be enforced can be raised as a defense to a mandamus action.

On September 4, 2013, argument was heard on the foregoing issues. We will now consider these issues seriately.[16]

(continued…)

[15] We consolidate the issues argued before the Court in the interest of clarity.

[16] On August 19, 2013, a group of 32 same-sex couples, designated as Putative Intervenors, filed a Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1531 seeking to intervene as Respondents in this case. Putative Intervenors allege that Hanes has granted them marriage licenses and that they have married in the Commonwealth or intend to be married and that this Court's judgment on Hanes' authority to issue the licenses may substantially impact their rights and the validity of their marriages and marriage licenses.

II.

Relying on several cases, Hanes first argues that this Court cannot decide this case because jurisdiction properly lies with the Supreme Court under Section 721(2) of the Judicial Code, 42 Pa. C.S. §721(2), which provides that "[t]he Supreme Court shall have original but not exclusive jurisdiction of all cases of … Mandamus or prohibition to *courts* of inferior jurisdiction." (Emphasis added). He argues that because he is a "judicial officer," and his issuance of a marriage license under the Marriage Law is a "judicial act" because he is issuing a marriage license on behalf of the Orphans' Court division of the Court of Common Pleas of Montgomery County, that makes this mandamus action one directed to a "court of inferior jurisdiction" conferring jurisdiction to the Supreme Court.

Hanes is clearly a county officer, because he serves as Register of Wills and Clerk of Orphans' Court, and as such performs only ministerial duties. Article 9, Section 4 of the Pennsylvania Constitution provides that "County officers shall consist of commissioners, controllers or auditors, district attorneys, public defenders, treasurers, sheriffs, registers of wills, recorders of deeds, prothonotaries, clerks of the courts, and such others as may from time to time be provided by law." Pa. Const. art. IX, §4. In counties of the second class such as Berks County or second class A, one person holds the offices of both Register of Wills and Clerk of Orphans' Court pursuant to Section 1302 of the Second Class County Code, 16 P.S. § 4302. Under Section 711(9) of the Probate, Estates and Fiduciaries Code (Probate Code), 20 Pa. C.S. §711(9), "[t]he jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division: … Marriage licenses, as provided by law." Marriage licenses are issued by the Clerk of Orphans' Court.

However, Section 901 of the Probate Code, 20 Pa. C.S. §901, gives to the Register of Wills "[j]urisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law."

Courts of the Commonwealth have held that the Register of Wills, when accepting a will for probate, is acting in judicial capacity. *See Commonwealth ex rel. Winpenny v. Bunn*, 71 Pa. 405, 412 (1872) ("In nothing said herein do we mean to say that the acts of the register are in no case judicial. They are always so[.]"); *In re Sebik's Estate*, 300 Pa. 45, 47, 150 A. 101, 102 (1930) ("[A] register is a judge, and the admission of a will to probate is a judicial decision, which can only be set aside on appeal, and is unimpeachable in any other proceeding." (citing *Holliday v. Ward*, 19 Pa. 485, 489 (1852))); *Walsh v. Tate*, 444 Pa. 229, 236, 282 A.2d. 284, 288 (1971). Cole *v. Wells*, 406 Pa. 81, 90-91, 177 A.2d 77, 81 (1962) ("The decree of probate by the Register of Wills constitutes a judicial decree in rem[.]"); *Mangold v. Neuman*, 371 Pa. 496, 500, 91 A.2d 904, 906 (1952) ("judicial decree of the register of wills"); ("[T]he Register of Wills performs a judicial function and is closely integrated into the judicial branch of government").

However, the courts have not held that the Clerk of Orphans' Court acts in a judicial capacity when keeping records. For example, in *Miller's Estate*, 34 Pa. Super. 385 (1907), the appellant's contention that the authority of an Orphans' Court clerk to grant or refuse a marriage license is a judicial and not a ministerial act was rejected by the Superior Court. Another case that Hanes cites to us is the unpublished single-judge opinion in *Register of Wills & Clerk of the Orphans' Court of Philadelphia License Marriage Bureau v. Office of Open Records* (No. 1671 C.D.

2009, filed March 26, 2010). Because it is an unpublished single-judge opinion, it is not precedential, Internal Operating procedure §414, but it is illustrative of how the definitions in the applicable act determine whether the Clerk of Orphans' Court and/or Register of Wills can be considered a "judicial officer" in some circumstances and not others. In that case, we were considering whether the Register of Wills was a "judicial agency" for the purpose of determining whether the Office of Open Records had jurisdiction over records withheld by the Register of Wills Office under the Right-to-Know Law (RTKL).[17] We noted that Section 102 of the RTKL, 65 P.S. §67.102, defines "judicial agency" as "[a] court of the Commonwealth or any other entity or office of the unified judicial system," and that Section 102 of the Judicial Code, 42 Pa. C.S. §102, includes "administrative staff" within the definition of "personnel of the system," which includes clerks of court and prothonotaries. Based on the definitions in the RTKL, we held that the Office of Open Records could not order the release of judicial records held by the Register of Wills and Clerk of the Orphans' Court of Philadelphia. Moreover, while "personnel of the system" are deemed to be part of a "judicial agency" for purposes of the RTKL, we made an explicit distinction between the "judicial function" of the Register of Wills with respect to the probate of wills and the non-judicial function of the Clerk of Orphans' Court with respect to the issuance of marriage licenses. *Id.*[18]

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[17] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

[18] *See also Retail Clerks International Association, Local 1357 v. Leonard*, 450 F.Supp. 663, 666 (E.D. Pa. 1978) ("The powers and duties of the Register of Wills are set forth in [Section 901 of the Probate, Estates and Fiduciaries Code, 20 Pa. C.S.] §901: (t)he register shall have jurisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law. It is apparent that the Register's judicial duties are confined to matters relative to the probate of wills. *Sebik's Estate*[.] Thus, we find that the hiring and firing of employees is

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As we looked to the definitions contained in the RTKL in *Register of Wills & Clerk of the Orphans' Court of Philadelphia License Marriage Bureau,* we look to the definitions in the Judicial Code in deciding whether the Supreme Court has exclusive jurisdiction of this matter under Section 721 as a mandamus action to a "court of inferior jurisdiction." 42 Pa. C.S. §721(2). Section 102 of the Judicial Code defines "court" as "[i]nclud[ing] any one or more of the judges of the court who are authorized by general rule or rule of court, or by law or usage, to exercise the powers of the court in the name of the court." 42 Pa. C.S. §102. Section 102 also defines "judicial officers" as "[j]udges, district justices and appointive judicial officers." In contrast, "county staff" is defined as "[s]ystem and related personnel elected by the electorate of a county…The term does not include judicial officers." *Id.* In turn, "system and related personnel" is defined as including Registers of Wills and Clerks of the Orphans' Court division. *Id.* Thus, Hanes, as the Clerk of Orphans' Court and Register of Wills, is "county staff" and is not a judge or judicial officer. Accordingly, he is not within the definition of "court" within the meaning of Section 721(2) of the Judicial Code, and the Supreme Court does not have jurisdiction of this mandamus action against him.

Finally, this is an action by the Department of Health, part of the Executive Branch of the Commonwealth government. As such, the Department, with counsel designated by the Office of General Counsel, may bring this action in the

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functionally not within the purview of his judicial duties and therefore not within the ambit of those acts which entitle him to judicial immunity….").

Commonwealth Court pursuant to Section 761(a)(2) of the Judicial Code, which grants the Commonwealth Court "original jurisdiction of all civil actions or proceedings:…(2) By the Commonwealth government …." 42 Pa. C.S. § 761(a)(2).

In the alternative, Section 761(a)(1) of the Judicial Code provides that the Commonwealth Court has original jurisdiction of all civil actions or proceedings "[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity…." 42 Pa. C.S. §761(a)(1). Section 102 of the Judicial Code also defines "Commonwealth government," in pertinent part, as "[t]he courts and other officers and agencies of the unified judicial system…." 42 Pa. C.S. §102. Although Hanes is not a "judicial officer," he is named in his official capacity as Clerk of the Orphans' Court of Montgomery County. He is, therefore, an officer of the Commonwealth government under Section 102 of the Judicial Code, and this Court has original jurisdiction under Section 761(a)(1). *Richardson v. Peters*, 610 Pa. 365, 366-67, 19 A.3d 1047-48 (2011); *Werner v. Zazyczny*, 545 Pa. 570, 577 n.5, 681 A.2d 1331, 1335 n.5 (1996).[19]

III.

[19] *See also Humphrey v. Dep't of Corrections*, 939 A.2d 987, 991 (Pa. Cmwlth. 2007), *aff'd in part, appeal denied in part*, 598 Pa. 191, 955 A.2d 348 (2008) ("When the petitioner seeks the official performance of a ministerial act or mandatory duty, the petitioner properly sounds in mandamus. Here Humphrey requests this Court to order [the Department] to return confiscated UCC items and vacate DC-ADM 803-3. Therefore, we agree that Humphreys Petition requests mandamus relief and will consider the Petition in this Court's original jurisdiction pursuant to Section 761(a)(1) or the Judicial Code….").

Hanes next argues that the Department does not have standing[20] under the former Mandamus Act of 1893 and the related cases[21] to initiate the instant mandamus proceedings seeking to compel him to perform his public duty because only the Attorney General, the Montgomery County District Attorney or a private citizen with an interest independent of the public at large has such standing. Because the Department is not the Attorney General or a private citizen, he contends that it does not have standing to maintain this action.

While this action was not brought in the name of the Commonwealth, the Attorney General, by letter dated August 30, 2013, authorized the Department of Health to bring this action on her behalf pursuant to Section 204(c) of the Commonwealth Attorneys Act, which allows the Office of General Counsel, who is the counsel for all state agencies, to do so under Section 301(6) of that statute. When authorizing the General Counsel to bring an action, as the Attorney General did here, Section 204(c) of the Commonwealth Attorneys Act provides that the Office of General Counsel or the counsel for the agency shall act "in [her] stead." 71 P.S.

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[20] The concept of "standing," in its accurate legal sense, is concerned only with the question of who is entitled to make a legal challenge to the matter involved. *Pennsylvania Game Commission v. Department of Environmental Resources*, 521 Pa. 121, 127, 555 A.2d 812, 815 (1989). Standing may be conferred by statute or by having an interest deserving of legal protection. *Id.* at 128, 555 A.2d at 815. As a general matter, the core concept of standing is that a person who is not adversely affected by the matter he seeks to challenge is not aggrieved thereby and has no right to obtain a judicial resolution of his challenge. *Id.*

[21] *See Dombroski v. City of Philadelphia*, 431 Pa. 199, 245 A.2d 238 (1968); *Dorris*. Hanes also cites *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655 (2005). However, that case was not a mandamus action seeking to compel the performance of a public duty; the relief sought therein was for declaratory and injunctive relief from the purportedly unconstitutional Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §§1101-1904.

§732-204(c). The net effect is that the Office of General Counsel has all the rights and duties of the Attorney General, and since Hanes admits that the Attorney General has standing, the Department of Health, through the Office of General Counsel, can maintain this action to enforce a public duty.

Moreover, the Department of the Health has standing in its own right to bring this action. As the Supreme Court has explained:

> [W]hen the legislature statutorily invests an agency with certain functions, duties, and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances the legislature has implicitly ordained that such an agency is a proper party litigant, *i.e.*, that it has "standing"….

Pennsylvania Game Commission, 521 Pa. at 128, 555 A.2d at 815. *See also Commonwealth v. Beam*, 567 Pa. 492, 497-500, 788 A.2d 357, 361-62 (2005) (holding that the Department of Transportation had the implicit authority under the Aviation Code, 74 Pa. C.S. §§5101-6505, to initiate an action in equity to enjoin the operation of an unlicensed airport where the injunctive relief sought was a restrained and supervised form of administrative action and the operation of the unlicensed airport was injurious to the public interest).

Section 2104(c) of the Administrative Code of 1929 (Administrative Code)[22] empowers the Department "[t]o see that laws requiring the registration of …

[22] Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §534(c).

marriages … are uniformly and thoroughly enforced throughout the State, and prompt returns of such registrations made to the department." Thus, the General Assembly has specifically conferred upon the Department the duty to ensure the uniform and thorough enforcement of all provisions of the Marriage Law, including Section 1102, defining marriage as "[a] civil contract by which one man and one woman take each other for husband and wife," and Section 1704 which makes same-sex marriages entered into in foreign jurisdictions void within the Commonwealth. 23 Pa. C.S. §§1102, 1704. In addition, the General Assembly has empowered the Department to enforce Section 1301(a), which prohibits persons from being joined in marriage until a license is obtained, and Section 1302, which requires a written and verified application by both parties before a license is issued requiring the disclosure "[a]ny other facts necessary to determine whether legal impediment to the proposed marriage exists." 23 Pa. C.S. §§1301(a), 1302(a) (b) (6). Further, Section 1104 requires that "[m]arriage licenses … shall be uniform throughout this Commonwealth as prescribed by the department…," in a form that states, under Section 1310, that "[y]ou are hereby authorized to join together in holy state of matrimony, according to the laws of the Commonwealth of Pennsylvania, (name) and (name)…." 23 Pa. C.S. §1104, 1310. Finally, the Department has the duty to uniformly enforce the provisions of Section 1307 which states that "[t]he marriage license shall be issued if it appears from properly completed applications on behalf of each of the parties to the proposed marriage that there is no legal objection to the marriage…." 23 Pa. C.S. §1307.[23]

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[23] *See, e.g., In re Adoption of R.B.F.*, 569 Pa. 269, 277, 803 A.2d 1195, 1199-1200 (2002) ("[A]s noted, 23 Pa. C.S. §1704 provides that the Commonwealth only recognizes marriages 'between one man and one woman.' Thus, a same-sex partner cannot be the 'spouse' of the legal parent and therefore cannot attain the benefits of the spousal exception to relinquishment of parental

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Based on the foregoing, it is clear that the Department is the proper party with standing to initiate the instant mandamus proceeding to compel Hanes to discharge his duties in compliance with the Marriage Law because the Department possesses a substantial, direct and immediate interest in the subject matter of this litigation pursuant to its authority under the Administrative Code and the Marriage Law.

IV.

Hanes also contends that because he must determine whether to issue marriage licenses, "as provided by law," he has the discretion to determine whether the Marriage Law is constitutional and that it would be unconstitutional as applied to same-sex couples. With respect to whether Hanes' duties as Clerk of the Orphans' Court of Montgomery County give him discretion to determine whether an act is constitutional, our Supreme Court, *albeit* in relation to prothonotaries and clerks of courts, has noted:

> It is "well settled" in the intermediate appellate courts of this Commonwealth that the role of the prothonotary of the court of common pleas, while vitally important, is purely ministerial. As a purely ministerial office, any authority exercised by the prothonotary must derive from either statute or rule of court. Further, as "[t]he prothonotary is merely the clerk of the court of Common

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rights [under Section 2903 of the Adoption Act, 23 Pa. C.S. §2903,] necessary for a valid consent to adoption.").

> Pleas[,] [h]e has no judicial powers, nor does he have power to act as attorney for others by virtue of his office." Consistent therewith, "[t]he prothonotary is not 'an administrative officer who has discretion to interpret statutes.'" Thus, while playing an essential role in our court system, the prothonotary's powers do not include the judicial role of statutory interpretation.
>
> As the prothonotary and the clerk of courts are created by the same constitutional provision and have substantially identical statutory grants of authority, we conclude that the well-accepted limitations that the courts of this Commonwealth have recognized in the prothonotary's role are equally applicable to the clerk of courts….

In re Administrative Order No. 1-MD-2003, 594 Pa. 346, 360, 936 A.2d 1, 9 (2007).

The same applies to the clerks of the Orphans' Court division of the courts of common pleas, because they are also created and vested with the same powers by the same constitutional provision, Section 15 of the Schedule to Article 5 of the Constitution.[24] Likewise, the statutory powers conferred upon the clerk of the Orphans' Court division under Section 2777 of the Judicial Code[25] are identical to

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[24] The Schedule to Article 5 of the Pennsylvania Constitution is given the same force and effect as the provisions contained in the main body of the Constitution. *Commonwealth ex rel. Brown v. Heck*, 251 Pa. 39, 41, 95 A. 929, 930 (1915).

[25] Section 2777 states, in pertinent part:

> The office of the clerk of the orphans' court division shall have the power and duty to:
>
> (1) Administer oaths and affirmations and take acknowledgments … , but shall not be compelled to do so in any matter not pertaining to the proper business of the office.

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those conferred upon the prothonotary under Section 2737, 42 Pa. C.S. §2737, and the clerk of courts under Section 2757, 42 Pa. C.S. §2757. Thus, the powers granted under Section 2777 to Hanes as the Clerk of the Orphans' Court:

> [a]re clearly ministerial in nature. Nothing in this grant of authority suggests the power to interpret statutes and to challenge actions of the court that the clerk perceives to be in opposition to a certain law. Thus, the clerk of courts, as a purely ministerial office, has no discretion to interpret rules and statutes….

In re Administrative Order No. 1-MD-2003, 594 Pa. at 361, 936 A.2d at 9; s*ee also Council of the City of Philadelphia v. Street*, 856 A.2d 893, 896 (Pa. Cmwlth. 2004), *appeal denied*, 583 Pa. 675, 876 A.2d 397 (2005) ("A ministerial act is defined as 'one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard

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> (2) Affix and attest the seal of the court to all the process thereof and to the certifications and exemplifications of all documents and records pertaining to the office of the clerk of the orphans' court division and the business of that division.
>
> (3) Enter all orders of the court determined in the division.
>
> (4) Enter all satisfactions of judgments entered in the office.
>
> (5) Exercise the authority of the clerk of the orphans' court division as an officer of the court.
>
> (6) Exercise such other powers and perform such other duties as may now or hereafter be vested in or imposed upon the office by law, … [or] order or rule of court.

to his own judgment or opinion concerning the propriety or impropriety of the act performed.'") (citations omitted).

Nor was any discretion given to the clerk when issuing the license under the Marriage Law, which requires the clerk to issue a marriage license only if certain criteria are met. Section 1302(a) provides that "[n]o marriage license shall be issued except upon written and verified application made by both of the parties intending to marry," and §1302(b) outlines the contents thereof. 23 Pa. C.S. §1302(a) (b).[26] Section 1303(a) provides that no marriage license shall be issued prior to the third day after application unless the Orphans' Court authorizes a waiver of the time period pursuant to subsection (b). 23 Pa. C.S. §1303(a) (b).[27] Section 1304(b) prohibits the issuance of a license if either of the applicants is under 16 years of age unless the Orphans' Court determines that it is in the best interest of the applicant, and prohibits issuance of a license if either of the applicants is under 18 years of age unless consented to by the custodial parent. 23 Pa. C.S. §1304(b) (1), (2). Section 1304 further prohibits issuing a marriage license to incompetent persons unless the Orphans' Court decides that it is in the best interest of the applicant or society, to applicants under the influence of alcohol or drugs, or to applicants within the

[26] As noted above, under Section 1104, the Department prescribes the form of the application. 23 Pa. C.S. §1104.

[27] While Section 1303 merely refers to the "court," Section 102 of the Domestic Relations Code, 23 Pa. C.S. §102, defines "court," in pertinent part, as "[t]he court … having jurisdiction over the matter under Title 42 … or as otherwise provided or prescribed by law." In turn, as noted above, Section 711(19) of the Probate, Estates, and Fiduciaries Code provides that "[j]urisdiction of the court of common pleas over the following shall be exercised through its orphans' court division: … [m]arriage licenses, as provided by law." 20 Pa. C.S. §711(19).

prohibited degrees of consanguinity. 23 Pa. C.S. §1304(c), (d), (e). Under Section 1306, Hanes is required to examine each applicant in person as to: (1) the legality of the contemplated marriage; (2) any prior marriages and their dissolution; (3) any of the Section 1304 restrictions; and (4) all information that must be furnished on the application as prepared and approved by the Department. 23 Pa. C.S. §1306(a). Finally, under Section 1307, Hanes is required to issue the marriage license subject to the Section 1303(a) three-day waiting period, "[i]f it appears from properly completed applications on behalf of each of the parties to the proposed marriage that there is no legal objection to the marriage." 23 Pa. C.S. §1307. Under Section 1308(a), 23 Pa. C.S. §1308(a), an applicant can appeal Hanes' refusal to issue a marriage license to the Orphans' Court.

The foregoing statutory scheme, outlining the applicable requirements and procedure for the issuance of a marriage license, does not authorize Hanes to exercise any discretion or judgment with respect to its provisions. Rather, the Marriage Law specifically requires Hanes to furnish and use the appropriate forms and to issue the license if the statutory requirements have been met, subject to the applicable exceptions and review by the Orphans' Court. Such is not a discretionary "judicial act" performed by the "judicial officer" of an inferior court. *See In re Administrative Order No. 1-MD-2003*, 594 Pa. at 361, 936 A.2d at 9; *In re Coats*, 849 A.2d 254, 258 (Pa. Super. 2004) ("[T]he orphans' court clerk simply performs its ministerial duty in accordance with the statutory mandate that requires applicants to

appear in person…. The office of the clerk of the orphans' court is not *sui juris* but is dependent on county and legislative provisions to implement its function….").[28]

V.

Hanes also argues that the Application should not be granted because the Department has to establish a clear right to relief, and to do that, the Department must show that the provisions in the Marriage Law limiting marriage to a man and a woman are constitutional. The Department asserts that this is the same as raising a counterclaim which is prohibited under the rules governing mandamus actions. *See* Pa. R.C.P. No. 1096 ("No counterclaim may be asserted."). Until a court has decided that an act is unconstitutional, Hanes must enforce the law as written, and it is not a defense to a mandamus action the law may be unconstitutional. A court can arrive at the conclusion.

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[28] *See also Rose Tree Media School District v. Department of Public Instruction*, 431 Pa. 233, 237, 244 A.2d 754, 755-56 (1968) ("[O]nce the Department has approved the amount of reimbursable transportation costs there is no discretion left to the Department in arriving at the actual amount which must be paid to the school district. After approval, the Department is mandated by statute to remit an amount which is to be determined by applying the mechanical formula of multiplying the cost of the approved reimbursable pupil transportation incurred during the school year by the district's aid ratio. The application of that formula does not involve any discretion but merely involves the ministerial duty of making proper computations in accordance with the directives of the statute…."); *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1081-82, 95 P.3d 459, 472-73 (2004) ("[U]nder the statutes reviewed above, the duties of the county clerk and the county recorder at issue in this case properly are characterized as *ministerial* rather than discretionary. When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same token, when the statutory requirements are not met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage….") (emphasis in original).

A.

All that a democratic form of government means is that we will be governed democratically - is a process does not guarantee any particular outcome. The citizens of the Commonwealth have consented to be governed under the terms of our Constitution and the it provides how the Pennsylvania democracy works. Under Article 2, Section 1, the legislative power of the Commonwealth, is vested in the General Assembly. Pa. Const. art. II, §1. The legislative power is the power "to make, alter and repeal laws…." *Jubelirer v. Rendell*, 598 Pa. 16, 41, 953 A.2d 514, 529 (2008). When the legislature enacts a law, under Article 4, Section 2, it is up to the Governor "to take care that the laws be faithfully executed." Pa. Const. art. IV, § 2. In addition, Article 5, Section 1 of the Constitution states:

> The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Pa. Const. art. V, §§1, 2(a). Under our Constitution then, only the courts have the power to determine the constitutionality of a statute. *In re Investigation by Dauphin County Grand Jury*, 332 Pa. 342, 352-53, 2 A.2d 804, 807 (1938); *Hetherington v. McHale*, 311 A.2d 162, 167 (Pa. Cmwlth. 1973), *rev'd on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974).[29]

[29] As a corollary to this claim, Hanes contends that the Department cannot possess a clear legal right to force him to abandon his oath of office and violate the United States and Pennsylvania
(Footnote continued on next page…)

Governmental officials carry out the functions assigned to the office and no more because when decision are reached that follow these and other constitutional procedures, it fosters acceptance of a statute or decision even by those who even strongly disagree. When public official don't perform their assigned tasks, it creates the type of "complication" caused by the United States Attorney General decision not to defend DOMA, which led the Supreme Court of the United States in *Windsor* to spend as much time addressing that "complication" as it did on the merits of the case. In this case, a clerk of courts has not been given the discretion to decide that a law whether the statute he or she is charged to enforce is a good idea or bad one, constitutional or not. Only courts have the power to make that decision.

B

(continued…)

Constitutions while discharging the duties of his office. *See* Article 6, Section 3 of the Pennsylvania Constitution, Pa. Const. art. IV, §3 ("[A]ll county officers shall, before entering on the duties of their respective offices, take and subscribe the following oath or affirmation before a person authorized to administer oaths. 'I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity.'…."). However, his oath of office requires him to follow the law until a court decides it is unconstitutional. *See, e.g., State ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers*, 84 Fla. 592, 595-96, 94 So. 681, 683-84 (1922) ("The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is, I think without merit. The fallacy in it is that every act of the Legislature is presumptively constitutional until judicially declared otherwise, and the oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined. The doctrine that the oath of office of a public official requires him to decide for himself whether or not an act is constitutional before obeying it will lead to strange results, and set at naught other binding provisions of the Constitution.").

While it is clear that Hanes did not have the power to decide on his own that the law is unconstitutional and to issue marriage licenses to same-sex couples, the question now is whether he can take advantage of his improper action in doing so and challenge the constitutionality of the Marriage Law as a defense in a mandamus action to compel him to follow its provisions. To allow him to raise such a defense would be the functional equivalent of a counterclaim, which is not permitted by Pa. R.C.P. No. 1096.

Moreover, *Commonwealth ex rel. Third School Dist. of the City of Wilkes Barre v. James*, 135 Pa. 480, 19 A. 950 (1890), an old case, like other cases discussed here that were decided before the mandamus rules, analyzed what was allowed in a mandamus action. In that case, the clerk of the former Court of Quarter Sessions refused to receive and record the resolutions of school boards contrary to statute. In defense of an application for mandamus seeking to compel him to comply with the law and to perform his ministerial duty, the clerk argued that the applicable statute was unconstitutional. In rejecting this defense, the Supreme Court explained:

> It is too plain for argument that the appellant, who is the clerk of the court of quarter sessions of Luzerne county, had no right to decline to receive and record the resolutions of the school boards of the third school-district, accepting of the provisions of the act of 23d May, 1889. P. L. 274. The act referred to requires him to receive and record these papers. His duties were purely ministerial, and the court below properly awarded the peremptory mandamus.
>
> It is but just to say that his act in refusing does not appear to have been one of insubordination, but was intended to test the constitutionality of the said act of 1889. We are of the opinion that the constitutional question cannot be raised in

> this way. We really have no case before us, beyond the mere refusal of the clerk to file the papers. This does not require discussion. The order of the court below awarding the peremptory mandamus is affirmed.

Id. at 482-83, 19 A. 950.[30]

We note that in two other cases involving public officers with discretionary powers, our Supreme Court addressed challenges to the constitutionality of a statute as a defense in a mandamus action. In *Commonwealth ex rel. Brown v. Heck*, 251 Pa. 39, 95 A. 929 (1915), our Supreme Court considered the constitutionality of a statute altering the counties of a judicial district that was raised as a defense in a mandamus action seeking to compel a common pleas court judge to perform his judicial duties to administer an estate, without addressing or distinguishing *James*. In *Commonwealth ex rel. Carson v. Mathues*, 210 Pa. 372, 59 A. 961 (1904), the Supreme Court affirmed a common pleas order granting mandamus to compel the state treasurer to pay warrants for judicial salaries. The Supreme Court did not address the trial court's analysis of *James* or the trial court's

[30] *See also The Crossings at Fleming Island Community Development District v. Echeverri*, 991 So. 2d 793, 799 (Fla. 2008) (holding that there is no "defensive posture" exception to the historical rule that a public official acting in his or her official capacity does not have standing to challenge the validity of a statute); *Li v. State*, 338 Or. 376, 396-98, 110 P.3d 91, 101-02 (2005) (holding that while executing his or her official duties, a governmental official must take care to consider the meaning of the state and federal constitutions, but that does not grant official powers to take actions and fashion remedies that would constitute *ultra vires* acts); *Lockyer*, 33 Cal.4th at 1082, 95 P.3d at 473 (holding that a local public official charged with the ministerial duty of enforcing a statute does not have the authority to refuse to enforce the statute on the basis of the official's view that it is unconstitutional in the absence of a judicial determination of unconstitutionality).

holding that the treasurer's standing as "a high constitutional officer of the Commonwealth" who exercises "discretion" permitted him to defend on the purported unconstitutionality of the statute setting the salaries. *James*, is nonetheless, controlling because the instant case also involves a mandamus action to compel a court clerk with no discretionary authority to perform his mandatory ministerial duty, whereas the foregoing cases involved constitutional officers with discretionary authority.

Because only the General Assembly may suspend its own statutes and because only courts have the authority to determine the constitutionality of a statute, and because all statutes are presumptively constitutional, a public official "[i]s without power or authority, even though he is of the opinion that a statute is unconstitutional, to implement his opinion in such a manner as to effectively abrogate or suspend such statute which is presumptively constitutional until declared otherwise by the Judiciary." *Hetherington*, 311 A.2d at 168. Based on the foregoing, it is clear that Hanes does not have standing to assert the purported unconstitutionality of the Marriage Law as a defense to the instant Petition.

VI.

With respect to the Putative Intervenors' Petition for Leave to Intervene,[31] as outlined above, the constitutionality of the Marriage Law may not be

[31] Pa. R.A.P. 1531(b) provides:

> **(b) Original jurisdiction petition for review proceedings.** A person not named as a respondent in an original jurisdiction petition for review, who desires to intervene in a proceeding under this chapter, may seek leave to intervene by filing an application for leave to

(Footnote continued on next page…)

raised as a defense in the instant mandamus proceedings and will not be considered by this Court. In addition, the legality of Hanes' actions and any purported rights obtained thereby are not at issue and may not be established in the instant mandamus action. *See, e.g., Barge*, 39 A.3d at 545 ("The purpose of mandamus is not to establish legal rights, but to enforce those rights already established beyond peradventure.") (citation omitted).[32] Moreover, there are no obstacles preventing those adversely affected by the provisions of the Marriage Law or putatively possessing rights based on Hanes' actions, such as the Putative Intervenors, from asserting their own rights in an appropriate forum. *See Whitewood v. Corbett* (No. 13-1861) (M.D. Pa.).

VII.

Based on the foregoing, we believe that the Department is entitled to the requested summary relief in mandamus. As the Pennsylvania Supreme Court has recently explained:

> The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty. *See Delaware River Port Auth. v. Thornburgh*, 508 Pa. 11, [20,] 493 A.2d 1351, 1355 (1985). Mandamus cannot issue "to compel performance of a discretionary act or to govern the

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(continued…)

> intervene…. The application shall contain a concise statement of the interest of the applicant and the grounds upon which intervention is sought.

[32] *See also* Pa. R.C.P. No. 2329(1) ("[A]n application for intervention may be refused, if … the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action….").

> manner of performing [the] required act." *Volunteer Firemen's Relief Ass'n of City of Reading v. Minehart*, 415 Pa. 305, [311,] 203 A.2d 476, 479 (1964). This Court may issue a writ of mandamus where the petitioners have a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists. *Id.*; *see Board of Revision of Taxes v. City of Philadelphia*, 607 Pa. 104, [133,] 4 A.3d 610, 627 (2010). Moreover, mandamus is proper to compel the performance of official duties whose scope is defined as a result of the mandamus action litigation. *Thornburgh*, [508 Pa. at 20,] 493 A.2d at 1355. Thus, "we have held that mandamus will lie to compel action by an official where his refusal to act in the requested way stems from his erroneous interpretation of the law." *Minehart*, [415 Pa. at 311,] 203 A.2d at 479-80.

Fagan v. Smith, 615 Pa. 87, 90, 41 A.3d 816, 818 (2012).

As outlined above, Hanes has admittedly failed to comply with his mandatory ministerial public duty under the Marriage Law by issuing marriage licenses to same-sex couples, by accepting the marriage certificates of same-sex couples, and by waiving the mandatory three-day waiting period, in violation of the express provisions of the Marriage Law. Even if Hanes is correct in his view that portions of the Marriage Law are unconstitutional, as noted above, the instant mandamus action is not the proper forum in which such a determination may be made. *Barge*. The proper method for those aggrieved is to bring a separate action in the proper forum raising their challenges to the Marriage Law. Unless and until either the General Assembly repeals or suspends the Marriage Law provisions or a court of competent jurisdiction orders that the law is not to be obeyed or enforced, the Marriage Law in its entirety is to be obeyed and enforced by all Commonwealth public officials.

Accordingly, the Department's Amended Application for Summary Relief for peremptory judgment in mandamus is granted; Hanes' Preliminary Objections and Putative Intervenors' Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1531 are dismissed as moot.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Health, Petitioner	:	
v.	:	
D. Bruce Hanes, in his official capacity as the Clerk of the Orphans' Court of Montgomery County, Respondent	:	No. 379 M.D. 2013

O R D E R

AND NOW, this 12th day of September, 2013, the Department of Health's Amended Application for Summary Relief for peremptory judgment in mandamus is granted. D. Bruce Hanes, in his official capacity as the Clerk of the Orphans' Court of Montgomery County, is directed to comply with all provisions of the Marriage Law, 23 Pa. C.S. §§1101-1905, while discharging the duties of his office, including the provisions of Sections 1102, 1303(a) and 1704, 23 Pa. C.S. §§1102, 1303(a) and 1704, and he shall cease and desist from issuing marriage licenses to same-sex applicants, from accepting the marriage certificates of same-sex couples, and from waiving the mandatory three-day waiting period in violation of the Marriage Law. The Preliminary Objections of D. Bruce Hanes and the Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1531 filed by Putative Intervenors are dismissed as moot.

DAN PELLEGRINI, President Judge