IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEB WHITEWOOD and SUSAN WHITEWOOD, FREDIA HURDLE and LYNN HURDLE, EDWIN HILL and DAVID PALMER, HEATHER POEHLER and KATH POEHLER, FERNANDO CHANG-MUY and LEN RIESER, DAWN PLUMMER and DIANA POLSON, ANGELA GILLEM and GAIL LLOYD, HELENA MILLER and DARA RASPBERRY, RON GEBHARDTSBAUER and GREG WRIGHT, MARLA CATTERMOLE and JULIA LOBUR, MAUREEN HENNESSEY,
and A.W. and K.W., minor children, by and through their parents and next friends, DEB WHITEWOOD and SUSAN WHITEWOOD,

Plaintiffs,

v.

THOMAS W. CORBETT, in his official capacity as Governor of Pennsylvania; MICHAEL WOLF, in his official capacity as Secretary of the Pennsylvania Department of Health; KATHLEEN KANE, in her official capacity as Attorney General of Pennsylvania; MARY JO POKNIS, in her official capacity as Register of Wills of Washington County; and DONALD PETRILLE, JR., in his official capacity as Register of Wills and Clerk of Orphans' Court of Bucks County,

Defendants.

Civil Action No. 1:13-cv-01861 JEJ

Type of Pleading:

BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FRCP 12

Filed on behalf of Defendant:

Mary Jo Poknis, in her official capacity as Register of Wills of Washington County

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TABLE OF CONTENTS

Page

I. TABLE OF AUTHORITIES ii

II. PROCEDURAL HISTORY OF THE CASE 2

III. STATEMENT OF THE FACTS 3

IV. STATEMENT OF QUESTIONS IN VOLVED 4

V. ARGUMENT 6

- A. Standard of Review 6
- B. Plaintiffs Do Not Have Standing to Sue Ms. Poknis 7
- C. Venue is Most Proper in the Western District 9
- D. Plaintiffs Have Failed to Join Indispensable Parties 12
- E. Defendant Poknis is Entitled to Immunity 14
  - 1. Absolute Immunity 14
  - 2. Qualified Immunity 18
- F. Ms. Poknis has Immunity From the Civil Rights Claims for Injunctive Relief 24
- G. Claims For Attorney's Fees Must be Dismissed 24

VI. CONCLUSION 25

I. TABLE OF AUTHORITIES

Cases Cited | Page

A. Rocks v. City of Philadelphia, 868 F.2d 644, (3d Cir. 1989) 6

B. Bell Atl. Corp v. Twombly 550 U.S. 544, 127 S.Ct. 1955 (2007) 6

C. Ashcroft v. Iqbal, 556 U.S. 662 129 S. Ct. 1937 (2009) 6, 18

D. Personnel Administrator of Mass. v. Feeney, 443 U.S. 256, 99 S.Ct.2282 (1979) 6

E. Harris v. Corbett, 2012 WL 1565357 p.4 (M.D.Pa.), citing Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3d Cir. 2003). 7

F. Cottman Transmissions Systems, Inc. v. Martino, 36 F.3d 291, 294 (3d.Cir.Ct.App. 1994) 11

G. Wilson v. Pennsylvania State Police Department, 1995 W.L. 129202 (E.D. Pa. 1995) 11

H. Kalman v. Cortes, 646 F.Supp.2d 238 (E.D. Pa. 2009) 11

I. Kyle v. Days Inn of America, Inc., 550 F.Supp.368, 369-370 (M.D. Pa. 1982) 12

J. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947) 12

K. General Refractories Co. v. First State Insurance Co., 500 F.3d 306 (3d Cir. 2007) 13

L. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 110 (1968) 13, 14

M. Commonwealth v. Hanes, No. 379 MD (Sept. 12, 2013) 13, 22

N. Schiazza v. Zoning Hearing Board of Fairview Township, York County 168 F.Supp.2d 361 (2001) 16

O. Howlette v. Rose, 496 U.S. 356 (1990) 17

P. Antonie v. Byers and Anderson, Inc., 508 U.S. 429, 432 (1993) 17

Q. Burns v. Reed, 500 U.S. 478, 499-500 (1991) 17

R. McBride v. Cahoone, 820 F.Supp.2d 623, 637-638 (E.D. Pa. 2011) citing Breslin v. Brainard, No. 01-cv-7269, 2002 WL 31513425 at 6-7 (E.D. Pa. November 1, 2002) 17

S. Seeds of Peace Collective v. City of Pittsburgh,453 F.App'x 211, (3d Cir. 2011) 18

T. Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2478 (2001) 18, 19, 20

U. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985) 18, 21

V. Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534 (1991) 18, 19

W. Burke v. Twp. Of Cheltenham, 742 F.Supp. 2d 660, (E.D. Pa. 2010) ... 19

X. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 19

Y. Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808 (2009) 19, 20, 22

Z. Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987) 19, 21

AA. Burns v. Pa. Dept. of Corrections, 642 F.3d 163, (3d Cir.Ct. App. (2001) 21
BB. Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012 (1984). 21
CC. Wilson v. Lane, 526 U.S. 603, 615 (1999) 21
DD. United States v. Windsor, 570 U.S. _____ ,133 S.Ct. 2675 (2013) 23
EE. Sonsa v. Iowa, 419 U.S. 393, 404 (1975) 23
FF. Parry v. Westmoreland County, 2010 WL 5798101 (W.D.Pa.) 24
GG. Monter v. Travis, 171 F.3d 757, 761 (2d.Cir. 1999) 24

Statutes Cited

A. 23 Pa.C.S.A. § 1704 .... 8, 16
B. 28 U.S.C.A. §1391(b) 10
C. 28 U.S.C.A. §1391(b)(1) 10
D. 28 U.S.C.A. §1391(b)(2) 10
E. 28 U.S.C.A. § 1404(a) 11
F. 20 Pa. C.S. A. § 901 15
G. 42 Pa.S.C.A. § 2771(a) 15
H. 42 Pa.S.C.A. § 277(1-6) 15
I. 20 Pa.S.C.A. § 711(19) 15
J. 23 Pa.C.S.A. § 1306(a)(1) 16
K. 23 Pa.C.S.A. § 1307 16
L. 23 Pa.C.S.A. § 1102 16
M. 23 Pa.C.S.A. § 1304(b) 16
N. 23 Pa.C.S.A. § 1304(c) 16
O. 23 Pa.C.S.A. § 1304(d) 16
P. 23 Pa.C.S.A. § 1304(e) 16
Q. 42 U.S.C.A. § 1983 .... 16, 24
R. 42 U.S.C.A. § 1988 24
S. 42 U.S.C.A. §1988(b) 24

II. PROCEDURAL HISTORY OF THE CASE

On July 9, 2013, Plaintiffs, Fredia Hurdle, Lynn Hurdle, Edwin Hill, David Palmer, Heather Poehler, Kath Poehler, Fernando Chang-Muy, Len Rieser, Dawn Plummer, Diana Polson, Angela Gillem, Gail Lloyd, Helena Miller, Dara Raspberry, Ron Gebhardtsbauer, Greg Wright, Marla Cattermole, Julia Lobur, Maureen Hennessey, Deb Whitewood and Susan Whitewood ("Plaintiffs") filed a Complaint against several Defendants, including Mary Jo Poknis, in her official capacity as Register of Wills of Washington County ("Ms. Poknis" or "Defendant"). Minor children A.W. and K.W. (also referred to as "Child Plaintiffs") also raised claims against Ms. Poknis.

III. STATEMENT OF THE FACTS

Plaintiffs are either lesbian or gay couples who wish to marry, lesbian or gay couples who purport to have been married in other states, and a woman whose same sex partner passed away. Plaintiffs' Complaint at ¶¶ 2, 3 and 4. The Complaint also asserts that Child Plaintiffs are the biological children of Plaintiff Deb Whitewood, that Plaintiff Sue Whitewood has established a legal parent-child relationship with both Child Plaintiffs, and that the Whitewoods have jointly adopted a son in Allegheny County, Pennsylvania. Id. at ¶ 18.

The Complaint avers that Plaintiffs Deb Whitewood and Susan Whitewood (also referred to as "Whitewoods") live in Allegheny County, Pennsylvania, with Child Plaintiffs. The Whitewoods claim that on June 24, 2013, they applied for a marriage license at the Office of the Washington County, Pennsylvania Register of Wills. Id. at ¶¶ 17, 25. Deb Whitewood is the same sex as Susan Whitewood, therefore no marriage license was issued. Id. at ¶ 25. At that time Defendant, Mary Jo Poknis was the duly elected Register of Wills of Washington County, and served as the Clerk of the Orphans' Court.

Plaintiffs' Complaint asserts that they wish to be married in Pennsylvania to obtain certain legal protections and financial benefits. Id. at ¶ 22-23, 32-34, 41-42, 45, 55, 59, 63-64, 70, 75, 81-82 and 90. Child Plaintiffs have also raised claims against Ms. Poknis, alleging that they have been deprived of economic resources because the Whitewoods are not allowed to marry in Pennsylvania. Id. at ¶ 26.

Through this Complaint Plaintiffs challenge Pennsylvania's Marriage Law ("Marriage Law"), requesting injunctive and declaratory relief. 23 Pa.C.S.A. §§ 1102 and 1704.

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Whether this Court should dismiss Plaintiffs' claims against Ms. Poknis pursuant to F.R.C.P. 12(b)(1) on the grounds that they lack standing to sue her?

ANSWER: Yes

2. Whether this Court should dismiss Plaintiffs' claims against Ms. Poknis pursuant to F.R.C.P. 12(b)(3) or in the alternative, transfer this case to the Western District of Pennsylvania because venue is most proper in the Western District?

ANSWER: Yes

3. Whether the Plaintiffs failed to name indispensable parties in their Complaint, such that Plaintiffs' claims against Ms. Poknis should be dismissed pursuant to F.R.C.P. 12(b)(7)?

ANSWER: Yes

4. Whether this Court should dismiss Plaintiff's claims against Ms. Poknis under F.R.C.P. 12(b)(6) since this Defendant is entitled to absolute and/or qualified immunity?

ANSWER: Yes

5. Whether Plaintiffs' claims for injunctive relief should be dismissed on the grounds the Ms. Poknis is immune from such claims?

ANSWER: Yes

6. Whether this Court should strike Plaintiffs' claims for attorneys' fees on the grounds that Ms. Poknis is immune from claims with attorneys' fees?

ANSWER: Yes

V. ARGUMENT

A. Standard of Review

It is well settled that in reviewing a Motion to Dismiss under Rule 12, "[t]he applicable standard of review requires the Court to accept as true all allegations in the Complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). In Bell Atlantic Corp. v. Twombly, the Supreme Court ruled that dismissal pursuant to Rule 12 is proper where the averments of the Complaint plausibly fail to raise directly or inferentially the material elements necessary to obtain relief under a viable legal theory of recovery. Bell Atl. Corp v. Twombly, 550 U.S. 544 (2007). The Rule calls for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Id. at 570. A claim has facial plausibility when the pleaded factual content allows the Court to draw the reasonable inference that the Defendant is liable for the misconduct alleged. Id. at 556.

In deciding a Motion to Dismiss, the District Court is required to identify factual allegations that amount to nothing more than "legal conclusions" or "naked assertions". Id. at 550 U.S. 544, at 555, 557. Such allegations must be disregarded for purposes of resolving a Rule 12 Motion to Dismiss, since they are "not entitled to the assumption of truth". Ashcroft v. Iqbal, 556 U.S. 662, 663-665 (2009).

B. Plaintiffs Do Not Have Standing to Sue Ms. Poknis

It is incumbent upon a federal court to ensure that the Plaintiffs have met the jurisdictional prerequisites of Article III of the United States Constitution before that court can address the merits of the suit. Harris v. Corbett, 2012 WL 1565357, p. 4 (M.D. Pa.), citing Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3d. Cir. 2003). The court must address and decide the justiciability question even if the issue has not been raised by the parties themselves. Id.

In order to establish that they have standing to sue:

(1) the plaintiff must have suffered a injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

(2) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of an independent action of some third party not before the court; and

(3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id.

In addition to the aforementioned constitutional requirements for standing, the court must also be assured that the following prudential concerns are also met.

(1) the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties;

(2) even when the plaintiff has alleged redressable injuries sufficient to meet the requirements of Article III, the federal courts will not adjudicate abstract questions of the wide public significance which amount to generalized grievances

pervasively shared and most appropriately addressed in the respective branches; and

(3) the plaintiff's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Id.

There is no legally protected interest for those of the same sex to obtain a marriage license in Pennsylvania. To the contrary, the Marriage Law states that marriage shall be between one man and one woman, and does not recognize same sex marriages entered into in other States. 23 Pa.C.S.A. § 1704. Notwithstanding the speculative and hypothetical injuries described throughout the Complaint, none of the Plaintiffs or Child Plaintiffs have suffered an injury in fact, of an interest that is legally protected in the Commonwealth. Because none of the Plaintiffs or Child Plaintiffs have standing to sue Ms. Poknis, all claims should be dismissed.

If this Court finds that the Plaintiffs and Child Plaintiffs have suffered an injury in fact of a legally protected interest that is concrete and actual, nearly all of the Plaintiffs lack a "causal connection between the injury and the conduct complained of", namely the denial of a marriage license by Ms. Poknis. Nineteen (19) Plaintiffs have sued Ms. Poknis without any injury that can be traceable to Defendant. As such, a finding that any of the Plaintiffs have standing should be limited to the Whitewoods, A.W. and K.W. The allegations in the Complaint fall short of describing how any other Plaintiffs have standing to sue this Defendant.

Therefore, if the Court finds that these any Plaintiffs suffered an injury in fact, only the Whitewoods, and A.W. and K.W. have alleged any violative conduct on behalf of Ms. Poknis.

C. Venue is Most Proper In the Western District of Pennsylvania

The only specific allegations in the Complaint that call into question the conduct of Ms. Poknis are contained in Paragraphs 17 and 25. It is alleged therein that on June 24, 2013, the Whitewoods, residents of Allegheny County, traveled to the office of the Washington County Register of Wills to obtain a marriage license. On that date, no marriage license was issued since the Marriage Law only allows marriage between one man and one woman.

The Child Plaintiffs who have raised claims against Ms. Poknis assert that they are minor children of the Whitewoods and that they also reside in Allegheny County. The Whitewoods also state that an Allegheny County Children's Court granted them the adoption of a young boy, L.W. Furthermore, four other Plaintiffs, Fredia Hurdle, Lynn Hurdle, Dawn Plummer, and Diana Polson, live in Pittsburgh, Pennsylvania, which is also in Allegheny County. Overall, eight (8) of the twenty-three (23) Plaintiffs and Child Plaintiffs, as well as Ms. Poknis herself, reside in either Allegheny County or Washington County, both of which are in the Western District of Pennsylvania.

The Complaint alleges no such action, event or conduct on the part of Ms. Poknis, or any of the other Defendants, in the Middle District of Pennsylvania. In

fact, the Complaint does not assert that any of the Plaintiffs were denied, or continue to be denied, any rights that they sought in the Middle District of Pennsylvania. Instead, Plaintiffs and Child Plaintiffs generally state that venue is proper in the Middle District pursuant to 28 U.S.C.A § 1391(b) because three of the Defendants reside in the Middle District. A closer look at the applicable venue statute however, demonstrates that the Western District is the more appropriate venue for this case.

Plaintiffs rely on one subsection of 28 U.S.C.A. § 1391(b), specifically that an action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located". 28 U.S.C.A. § 1391(b)(1). Nevertheless, an action may also be brought in a district "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated". 28 U.S.C.A. § 1391(b)(2). Plaintiffs did not assert that any event or omission in the Middle District is a substantial or a significant part of the claim that is raised.

Unlike the Middle District (which satisfies just one provision of the venue statute), the Western District satisfies both applicable subsections of the venue statutes. Specifically the Western District is the proper venue in terms of both the residency requirement and the provision that the claim be brought in the district where a substantial part of events or omissions occurred. 28 U.S.C.A. §

1391(b)(1) and (2). The Courts have been clear that a plaintiff's choice of venue is subject to the substantiality provision of § 1391(b)(2). Cottman Transmissions Systems, Inc. v. Martino, 36 F.3d 291, 294 (3d.Cir.Ct.App. 1994). In fact, district courts have rejected the proposition that venue is most appropriate in a district where a statute was written, or governmental policy was implemented. Wilson v. Pennsylvania State Police Department, 1995 W.L. 129202 (E.D. Pa. 1995); Kalman v. Cortes, 646 F.Supp.2d 238 (E.D. Pa. 2009). Both the Wilson and Kalman courts held that venue was proper in the district where a substantial event, namely the alleged violation of freedom, occurred, as opposed to the district where the law or policy was adopted.

The most significant event that is alleged relative to Ms. Poknis occurred in the Western District when she followed the Marriage Law and did not issue a marriage license to the Whitewoods. A significant number of the parties to this case reside in the Western District. Despite the fact that venue is proper in the Middle District, the case should be transferred to the United States District Court for the Western District of Pennsylvania, where venue is most appropriate.

In consideration of the convenience of the parties, this court has the discretion to transfer this case to another district "where it may have been brought". 28 U.S.C.A.1404(a). Certain factors have been outlined by the United States Supreme Court when addressing a request under § 1404(a) including, "the relative ease of access to sources of proof", the availability and costs of obtaining

attendance of willing and unwilling witnesses, and " all other practical problems that make trial of a case easy, expeditious and inexpensive". Kyle v. Days Inn of America, Inc., 550 F. Supp. 368, 369-370 (M.D. Pa. 1982), citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947). Ms. Poknis maintains that these factors strongly favor the Western District, where the substantial events or omissions occurred, and where a number of the parties reside.

The allegedly violative conduct of this Defendant that is critical to Plaintiffs' claims occurred in the Western District. Ms. Poknis is already faced with the prospect that attorneys' fees may be awarded against her, and as of this date there are no less than ten (10) attorneys who have appeared for Plaintiffs. This Western District Defendant should not be forced to litigate this case in the Middle District. For these reasons, venue is most proper in the Western District and Ms. Poknis requests that the Plaintiffs' claims be transferred to the Western District of Pennsylvania.

D. Plaintiffs Have Failed to Join Indespensable Parties

Pursuant to Fed.R.C.P. 12(b)(7) and 19 Plaintiffs and Child Plaintiffs' Complaint should be dismissed for failure to join an indispensable party. Under Rule 19(a)(1) "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties."

In applying the standard for determining "whether complete relief may be accorded to those persons named as parties to the action in the absence of any unjoined parties," the court limits the "inquiry to whether the district court can grant complete relief to persons *already named* as parties to the action; what effect a decision may have on absent parties is immaterial." Gen. Refractories Co. v. First State Ins. Co., 500 F.3d 306, 313 (3d Cir. 2007) (emphasis in original). The court should also consider the interests of 'the public "in avoiding repeated lawsuits on the same essential subject matter." Id. at 315. In addition, the advisory committee notes "'stress[] 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).

Joining additional parties, specifically other Registers of Wills in Pennsylvania, will avoid "repeated lawsuits on the same essential subject matter." Id. Such repetitive claims are bound to result because unjoined registers of wills and clerks of orphans' court "cannot be bound by the judgment rendered." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968). In fact, as of this date of filing there are multiple lawsuits filed by same sex couples wishing to marry in Pennsylvania, including a claim that directly address the enforcement of the Marriage Law by another Register of Wills. See Commonwealth v. Hanes, No. 379 MD (Sept 12, 2013). The unjoined parties,

bound by state law to enforce state law, will be subject to further lawsuits "on the same essential subject matter" by other same-sex couples seeking marriage licenses.

Granting the relief requested, absent the joined parties, may result in inconsistent application of the law throughout the commonwealth. Since unjoined registers of wills and clerks of orphans' court "cannot be bound by the judgment rendered." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968). Thus, if the Plaintiffs' relief is granted, some clerks may issue licenses to same-sex couples, while others may not and continue to enforce Pennsylvania law. This will leave the unjoined parties uncertain as to whether to enforce the law, or whether to abdicate their duty to enforce the law because a court judgment they are not bound by has declared the law to be unconstitutional. Joinder would best meet "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968) (discussing factors regarding Rule 19(a) analysis).

E. Ms. Poknis is Immune from Suit and Should be Dismissed

1. Absolute Immunity

Plaintiffs and Child Plaintiffs have named Ms. Poknis as a Defendant in this matter "in her official capacity as Register of Wills of Washington County". See Complaint, ¶ 99. The Complaint asserts that this Defendant's "office is responsible for issuing marriage licenses" in Washington County. Id. at ¶ 99. Pursuant to 20

Pa.C.S.A. § 901, the Register of Wills has jurisdiction of the probate of wills, the granting of letters to a personal representative and other matters provided by law. 20 Pa.C.S.A. § 901.

In each county in Pennsylvania "there shall be one clerk of the Orphans' Court Division, who shall be known as the "Clerk of the Orphans' Court Division of the Court of Common Pleas" of that county. 42 Pa.C.S.A. 2771(a). In fact, at all times relative hereto, Ms. Poknis was not only the Register of Wills, but also the Clerk of Orphans' Court in Washington County. Among the powers and duties of the Clerk of the Orphans' Court Division is the administration of oaths and affirmations, certifications and exemplifications of documents and records, and the entering of Orders of Court, Judgments by Confession and Satisfactions of Judgments. The Clerk of the Orphans' Court is also responsible for exercising the authority of the position as an officer of the court, and to "[e]xercise such other powers and perform such other duties as may now or hereafter be vested in or imposed upon the office by law". 42 Pa.C.S.A. § 277(1)-(6).

The jurisdiction of the Court of Common Pleas "shall be exercised through its Orphans' Court division" over a number of matters, including the issuance of marriage licenses. 20 Pa.C.S.A. § 711(19). The Marriage Law requires that each applicant "for a marriage license shall appear in person and shall be examined under oath or affirmation as to the legality of the contemplated marriage." 23 Pa.C.S.A. § 1306(a)(1). The 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.A. § 1307.

Pursuant to the Marriage Law in Pennsylvania, "marriage shall be between one man and one woman". 23 Pa.C.S.A. § 1704. Marriage in Pennsylvania is a marriage defined as "a civil contract by which one man and one woman take each other for husband and wife". 23 Pa.C.S.A. § 1102. This is just one requirement that must be satisfied before an official, such as Ms. Poknis, is authorized to issue a license. Ms. Poknis has neither the authority nor the discretion to issue a marriage license to minors (23 Pa.C.S.A. § 1304(b)), incompetent persons (23 Pa.C.S.A. § 1304(c)), persons under the influence of alcohol or drugs (23 Pa.C.S.A. § 1304(d)), nor male and female couples/applicants who are deemed to be within the prohibited degrees of consanguinity under Pennsylvania Law (23 Pa.C.S.A. § 1304(e)).

On June 24, 2013 Ms. Poknis, consistent with her duties and obligations as the Clerk of the Orphans' Court, determined that a marriage license would not be issued to the Whitewoods. This Defendant concluded that there was a "legal objection" to the contemplated marriage, specifically, that the Whitewoods are the same sex.

It is well settled that in cases brought under 42 U.S.C.A. § 1983, immunity defenses are determined under federal law. Schiazza v. Zoning Hearing Board of Fairview Township, York County, 168 F.Supp.2d 361 (2001), citing Howlette v.

Rose, 496 U.S. 356 (1990). The party that claims absolute immunity bears the burden of establishing the justification for said immunity. Antoine v. Byers and Anderson, Inc., 508 U.S. 429, 432 (1993). This Defendant is aware that the Pennsylvania Commonwealth Court has recently ruled on a related issue (See Commonwealth v. Hanes, No. 379 MD (Sept. 12, 2013))(Attached as Exhibit "A"), however that action is pending and not dispositive of this Court's analysis.

Judicial immunity has been extended beyond public officials, but also to private citizens such as jurors or arbitrators. "The touchstone for its applicability was performance of the function of resolving disputes between parties or authoritatively adjudicating private rights". Burns v. Reed, 500 U.S. 478, 499-500 (1991)(Scalia, J., concurring in judgment in part and dissenting in part). The Third Circuit has found that, in the case of a parole officer, "absolute immunity attaches when the officer (1) hears evidence; (2) makes recommendations as to whether to parole a prisoner; or (3) makes decisions as to whether grant, revoke or deny parole" McBride v. Cahoone, 820 F.Supp.2d 623, 637-638 (E.D.Pa. 2011) citing Breslin v. Brainard, No. 01-cv-7269, 2002 WL 31513425, at 6-7(E.D.Pa. November 1, 2002). The critical factor is whether the parole officer exercised discretion in his or her "adjudicatory" decision. McBride, 820 F.Supp.2d at 628.

The Complaint asserts that the decision made by Ms. Poknis, to refuse a marriage license to the Whitewoods, operated to deny rights to those Plaintiffs and Child Plaintiffs. Ms. Poknis is entitled to absolute immunity from liability based

on her acts or conduct on June 24, 2013. Specifically, Ms. Poknis cannot be held liable as Clerk of the Orphans' Court for her finding of a legal impediment, thus resulting in her refusal to issue a marriage license to The Whitewoods.

2. Qualified Immunity

Qualified Immunity is a permissible basis for seeking dismissal under Rule 12(b)(6). See Seeds of Peace Collective v. City of Pittsburgh, 453 F.App'x 211, 214 (3d Cir. 2011). When a Defendant seeks qualified immunity, the Supreme Court has directed that the issue be decided early in the proceedings as to avoid unnecessary costs and expenses of trial, where the defense is dispositive. Saucier v. Katz, 533 U.S. 194, 200 (2001).

> Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Id. citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The privilege is "an immunity from suit rather than a mere defense of liability; and like an absolute immunity, it is effectively lost if the case is erroneously permitted to go to trial" Ibid. As a result, "we have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation". Hunter v. Bryant, 502 U.S. 224, 227 (1991) *(per curaim).*

In this suit, Plaintiffs must plead that each government-official Defendant, including Ms. Poknis, violated the Constitution through her own actions. Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009). Government officials are generally shielded from liability for civil damages when their conduct is not a violation of a clearly established statutory or conditional right of which a reasonable person would have known. Burke v. Twp. Of Cheltenham, 743 F.Supp. 2d 660, 676, citing Harlow v.

Fitzgerald, 457 U.S. 800, 818 (1982). When plaintiffs' allegations fail to state a claim for a violation of a clearly established law, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Burke, citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

> "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government officials error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law in fact." Pearson v. Callahan, 555 U.S. 223, 231 (2009).

The Supreme Court made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "insubstantial claims" against government officials [will] be resolved prior to discovery." Pearson at 231-232, quoting Anderson v. Creighton, 483 U.S. 635, 640, n.2, 107 S. Ct. 3034, 97 L.Ed. 2(d) 523 (1987). Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Pearson, 555 U.S. at 232, quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)(*per curiam*).

In the case of Saucier v. Katz, the United States Supreme Court developed a two-step inquiry to determine whether government officials were entitled to qualified immunity. Saucier v.Katz, 533 U.S. 194 (2001). The first inquiry is whether the facts that are alleged show that the officer's conduct violated a

Constitutional right. Id. 533 U.S. at 201. The second inquiry directs that if a violation can be made out, the next step is to determine whether that right was clearly established. Id. The Supreme Court subsequently analyzed the test laid out in Saucier and in doing so, relieved Courts of the sequential analysis. In Pearson v. Callahan, the Court clarified that the sequential analysis laid out in Saucier is not obligatory.

> The judges of the district courts and Courts of Appeals should be permitted to exercise their sound discretion in deciding which of the two-prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. Pearson v. Callahan, 555 U.S. 223 (2009).

As set forth below Ms. Poknis is entitled to qualified immunity since Plaintiffs have not made out a claim to satisfy either of the standards laid out in Saucier.

The Whitewoods, as well as Child Plaintiffs, claim that Ms. Poknis violated their Constitutional rights when the Register of Wills of Washington County refused to issue the Whitewoods a marriage license. These Plaintiffs are essentially asking the Court to rule against Ms. Poknis because she *did not* intentionally violate the laws of this Commonwealth, her official duties, and her oath. The Whitewoods have no Constitutional right to obtain a marriage license in the Commonwealth of Pennsylvania, nor do they have a Constitutional right to force Ms. Poknis to ignore and violate the law.

Qualified immunity is intended to give government officials the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." Burns v. Pa. Dept. of Corrections, 642 F.3d 163, 176 (3d Cir.Ct. App. (2001), citing Anderson v. Creighton, 483 U.S. 635, 645 (1987)(quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)). In order for an official's actions to violate a person's rights, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). In light of preexisting law, the unlawfulness must be apparent. Wilson v. Lane, 526 U.S. 603, 615 (1999).

No one can deny or dispute the clear language, the requirements and restrictions attendant to the Marriage Law on June 24, 2013 when the Whitewoods traveled to Washington County to request a marriage license. Nor can anyone deny the duties and obligations of the Orphans' Court Clerk, an officer of the Court who is charged with following the process established for issuing a license. Here, it could be argued that Ms. Poknis did not need to exercise discretion, given the clear directive of the Marriage Law. The Whitewoods simply had no Constitutional right of which Ms. Poknis reasonably should have known on June 24, 2013. Since Plaintiffs and Child Plaintiffs do not state a claim for a violation of a clearly established law, dismissal before commencement of discovery on the basis of qualified immunity is appropriate. Burke, 742 F. Supp. 2d at 676, citing Mitchell v. Forsythe, 472 U.S. 511, 526 (1985).

Regardless of whether the Court determines that Ms. Poknis violated a Constitutional right of either the Plaintiffs of Child Plaintiffs, the Court must find there was never a violation of clearly established right. The Supreme Court of the United States has found that this prong of the Saucier test, in and of itself, is sufficient to afford protection of qualified immunity. Pearson v. Callahan, 555 U.S. 223, 228, 129 S. Ct. 808 (2009). Under any sequence and under any analysis, it is undeniable that the law of the Commonwealth on June 24, 2013 did not permit the Whitewoods to marry. The "contours" of the Pennsylvania Marriage law were sufficiently clear, and Ms. Poknis stayed within those contours on June 24, 2013. There is simply non unlawfulness apparent in Ms. Poknis' conduct.

Since Plaintiffs filed suit against Ms. Poknis, the Commonwealth Court of Pennsylvania has addressed the issue of whether a Register of Wills in the Commonwealth should be compelled to comply with the provisions of the Marriage Law. In Commonwealth v. Hanes, 379 M.D. (Cmwlth Ct. 2013), Montgomery County Clerk of the Orphans' Court D. Bruce Hanes refused to comply with the Marriage Law and instead began issuing same sex marriage licenses. See Hanes at p. 7. Ruling on an Amended Petition for Review in the Nature of an Action in Mandamus, the Commonwealth Court granted the Application and the Mandamus relief sought. Id. at p. 1 & 2. The Memorandum Opinion by President Judge Pellegrini acknowledged the instant matter as well as other possible scenarios for same sex couples to challenge the Marriage Law.

Ultimately, Judge Pellegrini found that Register Hanes did not have the discretion to issue marriage licenses in contravention of the law. Ms. Poknis maintains that this recent decision of the Commonwealth Court provides further support for the propriety and lawfulness of her conduct, as well as her claims of immunity.

Plaintiffs reference the recent case of United States v. Windsor in support of their arguments and legal conclusions set forth in the Complaint. United States v. Windsor, 570 U.S. (2013). Any reliance on Windsor is misguided, because the limitations of Windsor were carefully set out by the United States Supreme Court. In the majority opinion of June 26, 2013 the Court struck down the federal statute known as the Defense of Marriage Act ("DOMA"). In doing so however, the majority conceded, and the remainder of the Court acknowledged, that they were only addressing the federal statute, finding that DOMA violated of the Fifth Amendment. In fact, the Court directly addressed the sovereignty of the states when it acknowledged that "[b]y history and tradition the definition and regulation of marriage... has been treated as being within the authority and realm of the separate states." Windsor at p. 14. Subject to the Constitutional guarantees, "regulation of domestic relations" is "an area that has been regarded as a virtually exclusive province of the States." Winsdor at p. 16, citing Sosna v. Iowa, 419 U.S. 393, 404 (1975).

F. Ms. Poknis has Immunity From the Civil Rights Claims for Injunctive Relief

Plaintiffs and Child Plaintiffs seek injunctive relief against Ms. Poknis, based on their claimed deprivation of Constitutional rights and privileges pursuant to 42 U.S.C.A. § 1983. However,

> [i]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.A. § 1983

As set forth above, Ms. Poknis acted in the capacity of a judicial officer, within her authority and jurisdiction in following Pennsylvania law governing the issuance of marriage licenses. Plaintiffs have not alleged the requisite violation of a declaratory decree, nor have they asserted the unavailability of declaratory relief. Parry v. Westmoreland County, 2010 WL 5798101 (W.D.Pa.), citing Montero v. Travis, 171 F.3d 757,761 (2d Cir. 1999). As such, Plaintiffs and Child Plaintiffs claims for injunctive relief must be denied.

G. Ms. Poknis has Immunity From Plaintiffs' and Child Plaintiffs' Claims for Attorneys' Fees.

Pursuant to the provisions of 42 U.S.C.A. § 1988, the twenty-three (23) Plaintiff's raised claims against Ms. Poknis for the recovery of attorneys' fees. Ms. Poknis cannot be held liable for attorneys' fees. In accordance with 42 U.S.C.A. § 1988(b):

> ... in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorneys' fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C.A § 1988(b)

As set forth above, Ms. Poknis acted within her authority and jurisdiction on June 24, 2013. In fact, the Defendant exercised the authority and power directly conveyed to her from the Court of Common Pleas.

The conduct of Ms. Poknis that was called into question on June 24, 2013 was conduct undertaken in her judicial capacity, and clearly within the confines of her jurisdiction. In fact, Plaintiffs do not allege that Ms. Poknis abused her discretion or authority. Therefore, Ms. Poknis respectfully requests that this Court strike any and all claims for attorneys' fees against this Defendant, to the extent any claims are not moot.

IV. CONCLUSION

WHEREFORE, the Defendant, Mary Jo Poknis, in her official capacity as Register of Wills of Washington County, respectfully requests that this Honorable Court dismiss the Complaint filed by the Plaintiffs, Deb Whitewood and Susan Whitewood, Fredia Hurdle and Lynn Hurdle, Edwin Hill and David Palmer, Heather Poehler and Kath Poehler, Fernando Chang-Muy and Len Rieser, Dawn Plummer and Diana Polson, Angela Gillem and Gail Lloyd, Helena Miller and Dara Raspberry, Ron Gebhardtsbauer and Greg Wright, Marla Cattermole and

Julia Lobur, Maureen Hennessey, and A.W. and K.W, minor children, by and through their parents and next friends, Deb Whitewood and Susan Whitewood. All of the Plaintiffs' claims as against the Defendant should be dismissed in their entirety and with prejudice.

Respectfully submitted:

BY: /s/ Robert J. Grimm
Robert J. Grimm, Esquire

Attorney for Defendant
Mary Jo Poknis, in her official capacity of Register of Wills of Washington County

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEB WHITEWOOD and SUSAN WHITEWOOD, FREDIA HURDLE and LYNN HURDLE, EDWIN HILL and DAVID PALMER, HEATHER POEHLER and KATH POEHLER, FERNANDO CHANG-MUY and LEN RIESER, DAWN PLUMMER and DIANA POLSON, ANGELA GILLEM and GAIL LLOYD, HELENA MILLER and DARA RASPBERRY, RON GEBHARDTSBAUER and GREG WRIGHT, MARLA CATTERMOLE and JULIA LOBUR, MAUREEN HENNESSEY, and A.W. and K.W., minor children, by and through their parents and next friends, DEB WHITEWOOD and SUSAN WHITEWOOD,

No. 1:13-cv-01861-JEJ

Plaintiffs,

v.

THOMAS W. CORBETT, in his official capacity as Governor of Pennsylvania; MICHAEL WOLF, in his official capacity as Secretary of the Pennsylvania Department of Health; KATHLEEN KANE, in her official capacity as Attorney General of Pennsylvania; MARY JO POKNIS, in her official capacity as Register of Wills of Washington County; and DONALD PETRILLE, JR., in his official capacity as Register of Wills and Clerk of Orphans' Court of Bucks County,

Defendants.

CERTIFICATE OF CONCURRANCE

Pursuant to LR 7.1, this Defendant's counsel sought concurrence in this Motion from all parties and it was denied by Plaintiffs. Defendant Petrille concurs in this Motion. Defendant Kane takes no position on this Motion. Defendants Corbett and Wolfe concur in the substantive Motion of Ms. Poknis but do not concur in the venue request.

Respectfully submitted:

BY: /s/ Robert J. Grimm
Robert J. Grimm, Esquire

Attorney for Defendant
Mary Jo Poknis, in her official
capacity of Register of Wills of
Washington County

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 1:13-cv-01861-JEJ

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Defendants.

CERTIFICATE OF WORD COUNT

Pursuant to LR 7.8(b)(1), the undersigned hereby certifies that this Brief contains 6,852 words, exclusive to the Table of Contents, Table of Authorities, Certificates and Exhibits.

Respectfully submitted:

BY: /s/ Robert J. Grimm
Robert J. Grimm, Esquire

Attorney for Defendant
Mary Jo Poknis, in her official capacity of Register of Wills of Washington County

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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Defendants.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the within **Brief in Support of Motion to Dismiss Pursuant to FRCP 12** was served electronically on the following counsel on the 7TH day of October, 2013:

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