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August 19, 2013

VIA HAND-DELIVERY

Office of the Chief Clerk
Pennsylvania Judicial Center
601 Commonwealth Avenue
Suite 2100
Harrisburg, PA 17106

Re: Commonwealth of Pennsylvania, Department of Health v. D. Bruce Hanes
379 M.D. 2013

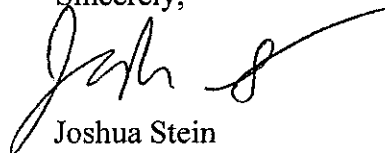
Dear Chief Clerk:

Enclosed please find an original and two (2) copies of the following three (3) documents for filing with the court in the above-captioned matter:

- 1) Respondent's Brief in Opposition to Petitioner's Amended Application for Summary Relief
- 2) Respondent's Preliminary Objections to Petitioner's Amended Petition for Review in the Nature of an Action in Mandamus
- 3) Response to Petitioner's Application for Summary Relief in the Nature of a Peremptory Judgment in Mandamus

Kindly file the original and two copies with the Court and return to us two (2) time-stamped copies.

Sincerely,



Joshua Stein

Alison Taylor, Chief Counsel, w/encls.
Audrey Feinman Miner, Sr. Counsel, w/encls.
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JMS/lh

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 379 M.D. 2013

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH,
Petitioner

v.

D. BRUCE HANES, in his capacity as
the Clerk of Orphans' Court of
Montgomery County,
Respondent

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S AMENDED
APPLICATION FOR SUMMARY RELIEF**

Brief in Response to a Petition for Review in the Nature of a Claim in Mandamus

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I. STATEMENT OF JURISDICTION

Petitioner, Pennsylvania Department of Health alleges that this Court has original jurisdiction over its Amended Petition for Review pursuant to Section 761(a) of the Judicial Code, 42 Pa.C.S. Section 761(a)(2).

Respondent, Montgomery County Register of Wills D. Bruce Hanes, in his capacity as the Clerk of the Orphans' Court of Montgomery County, contends that this Honorable Court does not have original jurisdiction over the Department's Petition for Review.

II. SCOPE AND STANDARD OF REVIEW

“[An] appellate court, in ruling on a motion for summary relief after the filing of a petition for review in an appellate or original jurisdiction matter, must view the evidence of record in the light most favorable to the non-moving party and may enter judgment only if: (1) there are no genuine issues as to any material facts, and (2) the right to relief is clear as a matter of law.” *Northwestern Youth Services, Inc. v. Com., Dept. of Public Welfare*, 1 A.3d 988 (Pa. Cmwlth. 2010). The Preliminary Objections filed by Respondent, which accompany this brief, should be granted “where it is clear and free from doubt that the facts pleaded are legally insufficient to establish a right of relief.” *Commonwealth ex rel. Smith v. Pennsylvania Dep't of Corrections*, 829 A.2d 788,792 (Pa. Cmwlth. 2003).

The legal standard for evaluating the Petition for Review is clear and straightforward. In considering a demurrer to a petition for review, this Court must accept as true all well pleaded facts and all inferences reasonably deducible from those facts. *Silo v. Ridge*, 728 A.2d 394, 397-98 (Pa. Cmwlth. 1999); *Africa v. Horn*, 701 A.2d 273, 274 (Pa. Cmwlth. 1997); *Pennsylvania State Lodge v. Commonwealth, Dep't of Labor*, 692 A.2d 609, 613 (Pa. Cmwlth. 1997), *aff'd without op.*, 550 Pa. 549, 707 A.2d 1129 (1998).

III. STATEMENT OF QUESTIONS INVOLVED

DOES THIS COURT PROPERLY HAVE JURISDICTION TO HEAR THE DEPARTMENT'S PETITION FOR REVIEW IN THAT THE CLERK OF THE ORPHANS' COURT IS A JUDICIAL OFFICER SUBJECT TO THE JURISDICTION OF THE PENNSYLVANIA SUPREME COURT?

(SUGGESTED ANSWER: NO)

DOES THIS COURT PROPERLY HAVE JURISDICTION TO HEAR THE DEPARTMENT'S PETITION FOR REVIEW IN THAT THERE IS NO APPELLATE MATTER PENDING BEFORE THIS COURT TO WHICH THE INSTANT MATTER IS ANCILLARY?

(SUGGESTED ANSWER: NO)

DOES THE DEPARTMENT HAVE PROPER STANDING TO BRING ITS AMENDED PETITION SEEKING AN ORDER OF MANDAMUS?

(SUGGESTED ANSWER: NO)

SHOULD THIS ACTION BE DISMISSED FOR FAILURE TO STATE A CLAIM IN MANDAMUS UPON WHICH RELIEF CAN BE GRANTED, WHERE THE DEPARTMENT SEEKS REVIEW OF RESPONDENT'S DISCRETIONARY POWERS AS A JUDICIAL OFFICER?

(SUGGESTED ANSWER: YES)

SHOULD THIS ACTION BE DISMISSED FOR FAILURE TO STATE A CLAIM IN MANDAMUS UPON WHICH RELIEF CAN BE GRANTED, WHERE THE DEPARTMENT FAILS TO DEMONSTRATE THE REQUISITE LEGAL OR FACTUAL SUFFICIENCY NECESSARY TO BE GRANTED THE RELIEF SOUGHT?

(SUGGESTED ANSWER: YES)

IV. STATEMENT OF THE CASE

Before the Court is the Brief of Respondent, Montgomery County Register of Wills D. Bruce Hanes (hereinafter referred to as “Hanes” or “Respondent”), in his capacity as the Clerk of the Orphans' Court of Montgomery County, to the Amended Petition for Review in the Nature of an Action in Mandamus (the “Petition”), filed by Petitioner Pennsylvania Department of Health (hereinafter referred to as “Department” or “Petitioner”). Petitioner seeks to have this Honorable Court issue a writ of mandamus ordering Respondent to cease and desist from issuing marriage licenses to same-sex couples.

In its Petition, the Department makes the following assertions: that the Department is an administrative department of the Commonwealth government, having powers and duties that are prescribed by law pursuant to 71 P.S. §531-555, 1404-14. That it has powers and duties related to the issuance of marriage licenses, e.g. the drafting of uniform forms and maintaining records and statistical information regarding marriage licenses issued throughout the Commonwealth. Petition, Exhibit “A”.

On July 23, 2013, Respondent, in response to an inquiry from individuals seeking a marriage license, made known to the public that he would issue a marriage license to same sex couples that submitted a proper

application, and were otherwise qualified to receive the same. The first such license was issued on July 24, 2013, and Respondent's office has issued a number of licenses to same-sex couples since that time. Importantly, Petitioners do not allege that Respondent has failed to use the appropriate forms or that Respondent has failed to collect all records and statistics, and provide the same to the Petitioner.

On July 30, 2013, the Department filed its initial Petition with this Honorable Court, seeking the issuance of a Writ of Mandamus enjoining the Respondent from issuing further marriage licenses which Department argues are in violation of Pennsylvania statutes regarding Marriage (hereinafter "The Marriage Laws" or DOMA). On August 2, 2013, Respondent filed Preliminary Objections to Department's Petition, and setting forth the legal and factual bases describing why the relief sought was inappropriate.

On August 5, 2013, in response to Respondent's Preliminary Objections, the Department filed its Amended Petition for Review in the Nature of an Action in Mandamus, which was substantially the same as the initial Petition. In its Amended Petition, the Department asserts that it has statutory authority to seek judicial enforcement of the Law through language in the Department's enabling legislation, specifically that it is charged with the enforcement of the Marriage Laws. The Department also claims that the

“unlawful actions of the Clerk in issuing marriage licenses in violation of the Marriage Law, directly and substantially [interferes] with the proper administration of the Law....” See, Exhibit “A”.

On August 6, 2013, this Court issued its Order, setting forth the briefing schedule for the parties, including the requirement that Respondent file this brief in opposition on or before August 19, 2013.

It is worth noting that, at no time did Petitioner contact Respondent or his office to express any concerns or request that Respondent cease issuing marriage licenses to any couples, and Hanes only learned of the Department's involvement on July 30, 2013, following the filing of the Petition.

V. SUMMARY OF ARGUMENT

For the reasons set forth below, the Department's Petition should be dismissed or transferred to the Pennsylvania Supreme Court. This Honorable Court lacks subject matter jurisdiction to decide this action. In addition, Petitioner lacks standing to seek the judicial remedy sought herein, as Respondent is not one of the enumerated entities cloaked with the power to seek such relief. Moreover, even if Petitioner had standing, which it does not, it has not met its burden for the issuance of a Writ of Mandamus.

VI. ARGUMENT

THE PETITION MUST BE DISMISSED OR TRANSFERRED, AS SUBJECT MATTER JURISDICTION FOR THIS MATTER VESTS IN THE PENNSYLVANIA SUPREME COURT; PETITIONER LACKS STANDING TO BRING THIS ACTION ON BEHALF OF THE COMMONWEALTH; AND PETITIONER FAILED TO MEET ITS BURDEN SHOWING THAT MANDAMUS IS THE APPROPRIATE REMEDY.

A. Subject Matter Jurisdiction for this Matter Lies with The Pennsylvania Supreme Court, and Therefore the Petition Must Be Transferred.

It is a well-settled principle that the Supreme Court of Pennsylvania has the responsibility of exercising general supervisory and administrative authority over all courts. Moreover, the Pennsylvania Supreme Court has the power to prescribe general rules governing the supervision of all officers of the judicial branch. Pa. Const. art. V § 10.

The Department asserts that the Respondent is a “commonwealth officer” and as such, this Court has original jurisdiction over an action in mandamus against him. In its Petition, the Department cites *In Re: Administrative Order No. 1-MD-2003*, 936 A2d 1 (Pa. 2007) in support of its claim that Respondent is a commonwealth officer, as opposed to a judicial officer in the Orphan’s Court of Montgomery County pursuant to 42 Pa.C.S.A. §2777. However, this argument is wholly without merit.

Even a cursory reading of *In Re: Administrative Order No. 1-MD-*

2003 clearly shows that it is distinguishable from the instant matter. In that case, this Court was faced with the question of whether a Clerk of a County Court's duty to follow an administrative order of the Supreme Court was ministerial in nature. As this Court is aware, the Clerk of a County Court and the Clerk of the Orphan's Court of a county are not the same position. This glaring difference is apparent from the fact that when rendering its decision *In Re: Administrative Order No. 1-MD-2003*, this Court took great care to align the responsibilities of the Clerk of a County Court with those of the Prothonotary and not the Clerk of the Orphan's Court.

Entering into a detailed analysis of the similarities of not just the language in the statutes authorizing the existence of the two offices of Prothonotary and Clerk of Courts, but of the actual duties of both offices, this Court held that those two positions were parallel to one another in their functions - those functions being ministerial in nature. However, conspicuously absent was any effort by the Court to include the Clerk of Orphan's Court in its analysis, despite the ease with which such an inclusion could have been made. Rather, the Court limited its discussion to the Clerk of Courts and the Prothonotary, and not the position of Clerk of the Orphans' Court, which is governed by separate statutory language. See, PA Const. Article V § 15. This distinction can be attributed to the fact that the position

of Clerk of the Orphans' Court is, in most counties, held ex-officio by the Register of Wills, a position that has been established to be a judicial office. *In re Laukhuff's Estate*, 32 Pa. Super. 538, 540 aff'd, 218 Pa. 585, 67 A. 874 (1907)

Even more persuasive is this Court's opinion in *Register of Wills and Clerk of the Orphan's Court Philadelphia License Marriage Bureau v. Office of Open Records*, 1671 CD 2009 (Pa. Cmwlth 2010). The facts of that case revolved around an individual who requested the Register of Wills, *in his capacity as Clerk of the Orphan's Court*, to provide him with copies of twenty-four marriage license applications and certifications. The Clerk of Orphan's Court refused the payment provided by the requestor, as it did not conform with the payment due a judicial office pursuant to 42 Pa. C.S. §1725.

This Court, in its jurisdictional analysis, agreed with the Petitioner that the Register of Wills, in his capacity as Clerk of the Orphan's Court, performs numerous judicial functions, both regarding marriage licenses and the issuance of certificates. This Court also found that the judicial nature of the office could be found in many statutes, including 65 P.S. §67.102 et seq. (the Right To Know Law), which defined a judicial agency as "a court of the Commonwealth or any other entity or office of the unified judicial system."

Finally, this Court held that the Register of Wills (who the Court acknowledged was acting in his capacity as the Clerk of the Orphan's Court) was a judicial agency. *Id* at 7. See also, *Bell v. Manspeaker*, 34 Fed Appx. 637 (10th Cir. 2002) ([a] federal clerk of court sometimes must exercise judgment that is functionally comparable to those of judges, because they too, exercise discretionary judgment as a part of their function).

Furthermore, the Courts had already carved out a distinction between the responsibilities of the Clerk of Orphan's Court to issue marriage licenses and those administrative duties of either the Clerk of Courts of a County and the Prothonotary. *In Re: Miller's Estate*, 34 Pa. Super. 385 (1907), the Court established that the authority of the Clerks of the Orphan's Court to grant marriage licenses is a judicial act. "[T]he authority of the clerk of the orphans' court to grant or refuse to grant marriage licenses is a judicial, and not merely a ministerial, act..."*Id*.

The Department further relies on 16 P.S. §§ 3401(a)(8) and 4302 as authority on the issue of whether the Register of Wills, in his capacity as Clerk of the Orphan's Court, is a county officer. However, this Court has already determined that "[a] heterogeneous list [w]hich includes not only the register of wills, but also commissioners, controllers, district attorneys, treasurers, sheriffs, recorders of deeds, prothonotaries, and clerks of

court...in no way categorizes any of these various officials as members of judicial, local or any other type of agency.” See, *Register of Wills & Clerk of Orphan’s Court* at 7.

Additionally, the Superior Court’s decision *In Re: Coats*, 849 A.2d 254 (Pa. Super. 2004), is rife with examples as to how inter-related the acts of the Clerk of Orphan’s Court in the issuance of marriage licenses are with the Court itself. See, *In Re: Coats* (as a further limitation to the power of the Clerk of Orphans’ Court, indeed to the power of the trial court to provide staff, facilities and services deemed necessary, legislation clearly and specifically delineates the interrelationship and responsibility vis a vis the courts and local government financial responsibility as to expenditures for court facilities and services; Orphans’ court is solely responsible for obtaining the authenticated marriage license and fulfilling the legislation requirement or its equivalent of a personal interview with an applicant for a marriage license; If it is to be a court-mandated solution, the remedy must flow from the power of the Pennsylvania Supreme Court as monitor of the Unified Judiciary). In examining the issue of how to address the quandary of incarcerated individuals seeking a marriage license, the Court viewed the actions of the Clerk of Orphan’s Court as the acts of the Court itself, clearly demonstrating the judicial nature of this responsibility.

While Respondent does concede that many of his responsibilities may be ministerial in nature (e.g. the compiling of statistics, the filing of documents for Orphan's Court, or keeping of the dockets of Orphan's Court), the issuance of marriage licenses does not fall within that realm. Since 1885, the Clerk of the Orphan's Court has had the responsibility for the issuance of marriage licenses in this Commonwealth. See, Act of June 23, 1885, as amended by the Act of June 18, 1895, P.L. 202.

Inherent in the responsibility of a Register of Wills, acting in their capacity as Clerk of the Orphans' Court, is a requirement that the Clerk of Orphan's Court exercise the type of discretion and judgment necessary to carry out a task invested in an officer of the Court. See, *Greene v. Brandt*, 25 Luz. L. Reg. (Pa. Com. Pl. 1940) (where Court refused to void the marriage of a minor where a marriage license had been issued and there was no showing of a disregard for the solemn responsibility of the Clerk of Orphan's Court who issued the same).

Importantly, a plain reading of the procedure required prior to the issuance of a marriage license reveals the reality that the issuance is not merely ministerial. Prior to the issuance of a marriage license, Respondent conducts an oral examination of the applicants, uses his discretionary judgment and interpretation of the Marriage Laws to make an independent

determination as to whether any legal impediment exists to the marriage, and as the Department so aptly points out in its Petition, insures proper consideration of the application for the marriage license prior to issuance. See, 23 Pa. C.S.A §1302.

The Respondent is not merely a rubber stamp, handing out forms and issuing licenses as a matter of course. Instead, he must carefully weigh all of the evidence presented to him upon receipt of the application and only after "proper" consideration issue a marriage license, including determining issues such as competency of the applicants. See 23 Pa. C.S.A §1304. This is the essence of a judicial act and in the performance of a judicial act, the Respondent is a judicial officer of an inferior court; therefore jurisdiction lies with the Supreme Court of this Commonwealth.

This argument is further bolstered by the fact that the decisions of the Clerk of Orphans' Court regarding the issuance of marriage license are reviewable, by way of appeal, to the Orphans' Court itself, pursuant to 20 Pa.C.S.A. § 711:

"[T]he jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

...

(19) Marriage licenses. - Marriage licenses, as provided by law.

While no Court of this Commonwealth has yet had the opportunity to

review this particular issue, the position of Register of Wills, as the ex-officio Clerk of the Orphans' Court, is more akin to the position of the judicial officers of the magisterial courts of the Commonwealth. Such a corollary can be drawn as the Registers of Wills, like the magisterial courts "are of a subordinate nature and limited jurisdiction, but their importance in our system of jurisprudence, as well as the English system in which they had their origin, cannot be ignored. Within the sphere of their powers they have all the attributes of legally constituted courts of justice and are independent of any other tribunal except in so far as their action is reviewable on appeal.... In certain instances their decisions are reviewable on appeal, but otherwise they must be left free to exercise an independent judgment in the conduct of their office." *Petition of McNair*, 324 Pa. 48, 53, (1936).

The Court's description of the role of the magisterial courts from *McNair* further shows the parallel with the position of the Respondent:

"(i)t is his (the magistrate's) discretion, his judgment, which must be exercised, for he is the officer entrusted by the law with the function of rendering a preliminary decision. In its performance he must be free from all external influences and, so long as he renders judgment in good faith, he is accountable to no one." *Id.* at 54

Thus, where Petitioner requests the Commonwealth Court to issue a writ of mandamus or prohibition to a court of inferior jurisdiction (in the instant case a judicial officer of the Orphan's Court) and there is no appeal before it, it must transfer the matter to the Supreme Court, pursuant to 42 Pa. C.S.A. §5103 (a). Additionally, 42 Pa C.S.A. §761 provides that The Commonwealth Court shall have original jurisdiction in cases of mandamus and prohibition to courts of inferior jurisdiction and other government units

only where such relief is ancillary to matters within its appellate jurisdiction

(emphasis added).

Those provisions are identical to the provisions as laid out in 42 Pa C.S.A. §741, which this Court has held is controlling as it relates to its jurisdiction over petitions for mandamus to courts of inferior jurisdiction.

Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County, 489 A.2d 1286 (Pa. 1985).

In *Municipal Publications* this Court opined that, “where a petitioner requests [the Commonwealth] Court to issue a writ of mandamus or prohibition to a ‘court of inferior jurisdiction’ and there is no appeal pending before [it], [the Commonwealth Court has] held that [it] must transfer the matter to the Supreme Court pursuant to sections 721 and 5103(a) of the Judicial Code, 42 Pa.C.S. § 5103(a)”. See also, *Leiber v. County of Allegheny*, 654 A.2d 11 (Pa.Cmwlth.1994).

In a series of seminal cases, the Supreme Court collectively addressed the nature of this Court's jurisdiction and the matters such as the case sub judice. These cases include *Pennsylvania Department of Aging v. Lindberg*, 503 Pa. 423, 469 A.2d 1012 (1983) and *O'Brien v. State Employees' Retirement System*, 503 Pa. 414, 469 A.2d 1008 (1983). In *O'Brien* and *Lindberg*, the Supreme Court specifically addressed the need to preserve the

finite resources of both the Commonwealth Court and Supreme Court by requiring careful scrutiny as to the issue of appellate and ancillary appellate jurisdiction versus the invocation of original jurisdiction. In this regard, the Supreme Court stated “The original jurisdiction of the Commonwealth Court remains for addressing the increasingly limited class of cases in which the appellate review of agency actions is not provided by statute or as to which statutory review would be inadequate.” *Lindberg*, 469 A.2d at 1016.

Since there is no appellate matter pending before this Court to which the instant matter is ancillary, and since the mandamus order being sought by the Department is to a court of inferior jurisdiction, this Court does not have proper jurisdiction and the matter must be transferred to the Supreme Court.

Additionally, even if the Court were to agree with the Petitioner that Respondent is a commonwealth officer, *In Re: Administrative Order No. 1-MD-2003* held that original jurisdiction for such an action lay with the Court of Common Pleas, and not the Commonwealth Court. In fact, this Court found that its jurisdiction was limited to the appellate review of the action of the Court of Common Pleas and refused to expand its jurisdiction to that of original, given the facts before it.

B. Petitioner Lacks Standing to Bring a Mandamus Action Against Respondent

Pennsylvania Rule of Civil Procedure 1028(a)(2) provides that a defendant may move to strike any and all claims in a complaint for lack of conformity to a law or Rule of Court. Preliminary Objections may also be filed for the failure of a pleading to conform to law or Rule of Court. See, Pa.R.C.P.1028. Additionally, Pa.R.C.P. 1028(a)(5) provides that a Defendant may move to strike a complaint or petition when a Plaintiff lacks the capacity to sue the named adversarial litigant.

The doctrine of standing insures that the Court will have the benefit of truly adverse parties in resolving cases, and as such, it is a prerequisite that the parties have standing in order to obtain a judicial resolution of a dispute. See, *Nader v. Hughes*, 643 A.2d 747, 164 Pa.Cmwlth. 434 (1994). Simply stated, standing is a threshold requirement and, in order to prove it, the litigants must demonstrate that they are aggrieved in order to proceed with their action. See, *Howard v. Com.*, 957 A.2d 332, 335 (Pa.Cmwlth. 2008). Here, the Petitioner lacks the capacity to sue the named Respondent, as the Petitioner does not have the requisite standing.

The nature of mandamus has been described on innumerable occasions by the courts of this Commonwealth. "Mandamus is a remedy of great antiquity. It is extraordinary in character and is a high prerogative writ used rather as a last resort than as a common mode of redress." *Tanenbaum*

v. D'Ascenzo, 356 Pa. 260, 262, 51 A.2d 757, 758 (1947). "The primary requisites for an action of mandamus are that the plaintiff has a legal right to enforce which is specific, well-defined, and complete; a corresponding positive duty resting upon the defendant; and no other adequate, specific, or appropriate remedy." *Pittenger v. Union Area School Board*, 24 Pa.Cmwlth. 442, 445-46, 356 A.2d 866, 868 (1976).

Mandamus is appropriate only where the plaintiff has a clear legal right to compel the performance of a duty. *Haywood v. Pennsylvania State Police*. 541 Pa. 100, 660 A.2d 1324 (1995). In doing so, the plaintiff must show a specific or well-defined and complete legal right to the action demanded. *Equitable Gas Co. v. Pittsburgh*, 507 Pa. 53, 488 A.2d 270 (1985).

Mandamus is not proper to enforce a right which is doubtful, or to attempt to establish legal rights; Rather the writ is only appropriately used to enforce those rights which have already been clearly established. ("Mandamus can never be invoked in a doubtful case.") *Commonwealth ex rel. McLaughlin v. Erie County*, 375 Pa. 344, 100 A.2d 601 (1953); *Wassell v. Pennsylvania Board of Probation*. 658 A.2d 466 (Pa. Commw. 1995). "To succeed in an action of mandamus, the plaintiff must show an immediate, specific, well defined and complete legal right to the thing demanded." *Id.* at 273 (citing *Purcell v. City of Altoona*, 364 Pa. 396, 72 A.2d 92 (1950)).

Thus, in order for a plaintiff, such as the Petitioner in the instant matter, to be granted the relief of Mandamus, the burden is upon them to show definitively that: (1) it is among the enumerated parties that can bring such an action, (2) that it has a clear legal right in some ministerial act or mandatory duty which is not being fulfilled by the government actor clothed with the responsibility to perform this ministerial act or mandatory duty, (3) that the government actor they seek to compel has a clear legal obligation to perform this act or duty, and (4) that there is no other adequate remedy available. If, as in the instant matter, a petitioner fails to show that all four factors are present, the petition must fail.

1. **Only The Attorney General of Pennsylvania, The District Attorney, or a Private Citizen With Specific and Independent Legal Right or Interest Different than the Public At Large has Standing**

As described above, mandamus is an extraordinary remedy. See, *Nickson v. Com. Bd. of Probation and Parole*, 880 A.2d 21 (2005). It is designed to stimulate and not to restrain official activities. *School Directors of Bedford Borough v. Anderson*, 45 Pa. 388, 390 (1863). Because of its extraordinary nature, it may be used to compel the performance of a ministerial act or mandatory duty only when a clear legal right exists in the plaintiffs and in the corresponding duty in the defendants and there is no

other appropriate or adequate remedy. See, *Nader, supra*. (emphasis added).

In order for a writ of mandamus to be appropriately issued, the writ must be sought by application of a person beneficially interested. See, *Dorris v. Lloyd*, 375 Pa. 474 (1953). Pennsylvania courts have long held that “where the duty of an officer under a statute is a public one, it can be enforced only at the suit of the attorney general or the district attorney of the proper county or by a private citizen who has a specific and independent legal right or interest in himself different from that of the public at large or who has suffered an injury special and peculiar to himself.” *Lloyd* at 478 (emphasis added). See also, *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655 (2005) and *Dombroski v City of Philadelphia*, 245 A.2d 238 (Pa. 1968).

In fact, the Commonwealth, through its General Counsel, has conceded this point. In his letter of July 30, 2013 to the Attorney General’s Office, General Counsel James D. Schultz stated it that “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. That duty is...imposed exclusively on the Attorney General...” (quoting 71 P.S. 732-§204 (a) (3). (emphasis added). See Letter of July 30, 2013 from James

Schultz to Deputy Attorney General Adrian King, attached hereto as Exhibit “B”.

Importantly, the Petitioner in the instant matter is the Pennsylvania Department of Health, *not* the Commonwealth’s Attorney General, nor a District Attorney. Further, the Petitioner is not a private citizen, so it is unnecessary to determine if the Department has an independent legal right or interest different from that of the public at large.

In its Amended Petition, the Department states that it is represented in the instant matter by attorneys appointed by the General Counsel of the Commonwealth under the Commonwealth Attorneys Act, 71.P.S. § 732-301, and that this Act allows these appointed attorneys to bring its Petition, in place of the Attorney General. The Petition States:

16. The Department’s attorneys have authority under the Commonwealth Attorney’s Act to represent the Department in this matter because the Attorney General has refused – as she publicly stated at a news conference held in Philadelphia on July 11, 2013 – to represent the Department in defense or enforcement of the provisions of the Marriage Law prohibiting marriage between individuals of the same sex.”

Petition, paragraph 16, Exhibit “A” (emphasis added). See Also, Petitioner’s Brief, footnote 4.

This argument, however, does not accurately represent the statements of the Pennsylvania Attorney General. On July 11, 2013, in response to the

filing of a civil action in federal court, challenging Pennsylvania's Defense of Marriage Act ("DOMA"), the Attorney General stated that she would not defend the constitutionality of DOMA. See Press Releases of Pennsylvania Attorney General, dated July 11, 2013 and July 12, 2013, attached hereto as Exhibit "C," and The Department cannot point to any instance where the Attorney General has said she will not enforce the statutes at issue in this matter. Such a distinction is not without precedent, as United States Attorney General Eric Holder opined that his office would not defend the federal Defense of Marriage Act, but it would seek to enforce the law. See Press Release of the United States Department of Justice, dated February 23, 2011, attached hereto as Exhibit "D", related to the matter decided in *U.S. v. Windsor*, 133 S.Ct. 2675, 81 USLW 4633 (U.S. 2013)¹

¹ From the Supreme Court's decision in *Windsor*: "While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA's § 3. Noting that "the Department has previously defended DOMA against ... challenges involving legally married same-sex couples," App. 184, the Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." *Id.*, at 191. The Department of Justice has submitted many § 530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation... Although "the President ... instructed the Department not to defend the statute in *Windsor*," he also decided "that Section 3 will

In her July 11, 2013 release, the Attorney General specifically stated that the Office of General Counsel was authorized to defend the Commonwealth in the action brought against the Commonwealth and certain Registers of Wills in federal court. See Exhibit “C.” The Department cannot show that this authorization extends to all classes of litigation related to the issuance of marriage licenses, including the instant matter. Thus, without some evidence that the Attorney General’s office has affirmatively elected or refused not to enforce the Marriage Law, the Office of General Counsel lacks any authority to bring the Department’s Petition.

This argument is further bolstered by the Department’s cite to section 732-301(6) of the Commonwealth Attorneys Act, which states that the Office of General Counsel shall “[i]nitiate 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...” (emphasis added). See Exhibit “B”. Without such a necessary showing, the attorneys for the Department of Health have no more right to bring an action under the Commonwealth

continue to be enforced by the Executive Branch” and that the United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.” *Id.*, at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to “recogniz[e] the judiciary as the final arbiter of the constitutional claims raised.” *Id.*, at 192.

Attorneys Act than counsel for any Commonwealth department. And while General Counsel Schultz had an opportunity to officially refer the instant matter to the Attorney General in his July 30, 2013 letter, he chose not to do so, reserving his comments to the Attorney General's decision to not defend the Commonwealth in the federal suit. See Exhibit "B".

Thus, having failed to show that it is a proper party to bring such an action, the Department lacks standing to bring an action seeking a Writ of Mandamus.

2. Petitioner Has Failed to Show That It Has a Clear Legal Right in Respondent's Actions

Even assuming, arguendo, that Department was one of the enumerated parties that is permitted to bring a Mandamus action, Department's Petition must fail. In its initial Petition, the Petitioner could only refer to an "implicit" authority in the actions of the Respondent in issuing marriage licenses. In its Amended Petition, the Department asserts that the authority comes from the Administrative Code of 1929. Under the heading "Vital statistics," the provision pointed to by the Department states it has the power and duty to "see that the laws requiring the registration of births, deaths, marriages, and diseases, and to insure the faithful registration of the same in the townships, boroughs, cities, and counties, of the state, and in the department; 71 P.S. § 534(c).

What the Department fails to show is how Respondent's actions interfere with the Department's legal rights and obligations related to the collection of vital statistics. The Respondent continues to maintain all records required by the Department. Petitioner has not stated that the Respondent has failed to submit statistical information to the Department as required pursuant to 23 Pa. C.S. §1104 and 35 P.S. §450.601. Nor could it make such an assertion, as this information was submitted to the Department by the 15th of the month, as required by the Vital Statistics Law. This submission, in the form prescribed by the Department, along with Respondent's submission for the prior month, is attached hereto as Exhibit "E."

In an attempt to further its argument that it has standing on marriage license matters unrelated to the collection of statistical records, the Department relies heavily on the holding of *Commonwealth v. Beam*, 567 Pa.492 (2002). Pursuant to the reasoning in *Beam*, the Petitioner asserts that it has a clear right, enforceable through an action in mandamus, to insist that county officials comply with the Marriage Law. However, this argument fails as *Beam* can be readily distinguished from the matter sub judice. In *Beam*, the plaintiff departmental agency was not seeking relief in the form of mandamus, nor was the agency seeking relief against an inferior court.

Essentially, the facts in *Beam* make it wholly distinguishable from the facts in this case.

In *Beam*, the state Department of Transportation, who expressly had the authority to issue and suspend licenses to operate airports, filed a complaint in equity and sought an injunction to stop a person from operating an airport without a license. However, Mr. Beam argued that the Department of Transportation did not have standing to seek the judicial remedy of the preliminary injunction. The Court found that the Department of Transportation did have standing to seek the judicial remedy in the form of the preliminary injunction because it expressly possessed the statutory authority to issue licenses to operate airports and had not issued on to Mr. Beam. See, *Beam*, *supra*.

In the instant matter, the Petitioner is not seeking an injunction. Rather, the Petitioner seeks the extraordinary relief of a writ of mandamus, for whom relief has been limited by §4 of the Mandamus Act of 1893, Act of June 8, 1893, P.L. 345, 12 P.S. § 1914, repealed by section 2(a) of the Act of April 28, 1978, P.L. 202, effective June 27, 1978, and applicable case law including *Dombrowski*, *supra*, to three specific classes, the Attorney General, the District Attorney in the County where the harm is alleged, and finally, a private citizen or citizens who can show that they have suffered an

injury in fact that is “concrete and particularized” and “actual or imminent,” and not simply an interest common to all citizens; and that the injury is “fairly traceable” to the defendant's conduct; and it is likely that the injury will be redressed by a favorable decision.

Without such an express grant, the Department lacks that power to issue marriage licenses or enforce a statute detailing the manner in which they are issued. “[T]he power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist.” *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612, 622 (1993) [Internal citations omitted]. The Department has only been granted limited authority related to the forms used in the applications for that marriage licenses, and the manner in which marriage data is reported to its offices.

Thus, it becomes clear why Petitioner cannot show what injury it has suffered as a result of the Respondent's actions. While the Petition refers to the “untold harm” that will occur as a result of Hanes' issuance of marriage licenses to same-sex couples, it does not address what specific harms will befall the Department. While the Petition does address a hypothetical harm to the individuals to whom the licenses are issued, this issue is irrelevant for the purposes of a mandamus action. Since the harm must be specific and

particularized to the litigant, the Department has failed to meet its burden to show that it has a clear legal right to the relief it is seeking in its Petition.

3. Petitioner Has Failed to Show That Respondent is in Violation of a Ministerial Act or Mandatory Duty

The third prong of the analysis in determining whether a Writ of Mandamus should issue is the required showing that an agency or official has a legal obligation to perform a ministerial task or duty. Here, too, the Department's petition does not detail in what manner Respondent is in violation of such a task or duty. While the act of issuing marriage licenses is the duty of the Register of Wills, in his capacity as the Clerk of Orphans' Court of Montgomery County, this duty is discretionary in nature; Judicial, rather than ministerial. See *Miller Estate, supra*.

Where the action sought to be compelled is discretionary, mandamus will not lie to control that discretionary act. *Pennsylvania State Ass'n of County Commissioners v. Commonwealth of Pennsylvania*, 681 A.2d 699 (Pa. 1996). Mandamus is only available to compel the performance of a ministerial act and should not be granted in cases where the duty is not clear. *Kelly v. Pennsylvania Board of Probation and Parole*, 686 A.2d 883 (Pa. Cmwlth. 1996).

Importantly, a writ of mandamus cannot be used to control the

exercise of discretion or judgment by a public official or administrative or judicial tribunal or to review or compel the undoing of an action taken by such official or tribunal in good faith and in the exercise of legitimate jurisdiction. *Campbell v. Rosenberger*, 632 A.2d 1094 (Pa. Cmwlth. 1993). Mandamus lies only to compel the performance of a ministerial act or a mandatory duty. *Kester v. Pennsylvania Board of Probation and Parole*, 609 A.2d 622 (Pa. Cmwlth. 1992).

Petitioner attempts to draw parallels between the actions of the Respondent and those of the Mayor of San Francisco in 2004 that lead to the litigation in *Lockyer v. City and County of San Francisco*, 33 C.4th 1055 (2004). However, Petitioner ignores the stark differences in the two, which makes *Lockyer* clearly distinguishable from the instant matter.

Initially, as already discussed at length, Respondent is not a “commonwealth officer” like the County Executive whose actions were the subject of the litigation in *Lockyer*. The fact that the State of California, by way of statute and case law, has decided that the responsibilities of its County Executive and county clerk in the issuance of marriage licenses are ministerial in nature, holds no authority in this Commonwealth given the contravening finding of the Court in *Miller*. See, West Ann. Cal. Gov. Code §69840 (stripping the County clerk of its judicial responsibilities and creating

the office of Clerk of Court); See also, *Houston v. Williams* 13 Cal. 24, 73 Am. Dec 565 (1859) (holding that the Clerk of a Court was a constitutional officer subject to the orders of the Court).

Another insurmountable distinction is that in *Lockyer*, the action was brought by the Office of the Attorney General, who in the instant case is an individual who may have standing to bring an action in mandamus, not an administrative department without any particularized injury or cognizable harm. In *Lockyer*, the interest of the State in insuring uniformity in the forms provided for the purpose of obtaining a marriage license was completely usurped by the Mayor (an equivalent of a “commonwealth officer”). In the instant matter, the Respondent has continued to use the forms provided by the Petitioner without alteration.

Thus, Petitioner fails to meet its burden of showing that Respondent has violated any legally obligated task or duty.

C. Petitioner Lacks a Clear Right to Relief Under the Law

In the instant case, in order for mandamus to be granted, Petitioner must show that its legal rights are clear and free from doubt. The purpose of mandamus is not to establish legal rights, but to enforce those rights already established beyond peradventure. See *Hamm v. Bd. of Educ. for Sch. Dist. of Philadelphia*, 79 Pa. Cmwlth. 547, 549, 470 A.2d 189, 190 (1984) (citing to

a lower court case which uses the “clear and free from doubt” language). In addition to numerous issues discussed above, which alone cast enough doubt to make mandamus inappropriate, other factors present in the facts of this matter create an even murkier pall which obscures the purported legal right of the Department on this issue.

**1. Mandamus is Inappropriate in the Instant Matter, as
Petitioner has not exhausted all other remedies**

The requirements for the content of a Complaint in Mandamus are set forth in the Pennsylvania Rules of Civil Procedure, specifically Pa.R.Civ.Pro 1095. In relevant part, Rule 1095 requires the Petitioner to set forth the act or duty the defendant is required to perform and the refusal to perform it. The Court has interpreted this portion of the statute to require a demand and a refusal to perform acts plaintiffs sought court to require. See, *Bruhin v. Kassab*, 12 Pa. Cmwlth. 455, 317 A.2d 58 (1974).

Petitioner, in its reliance on *Lockyer* would be well served to recognize another distinguishable fact. In that matter, the Attorney General contacted the Mayor of San Francisco and requested him to cease and desist from the alteration of their forms and the issuance of marriage licenses to same sex couples.

A demand is not some causal requirement precedent to a request for

mandamus in this Commonwealth. It is an integral step in the process showing that a Petitioner has availed itself of all legal options prior to burdening the limited resources of our judiciary. In the instant case there was no demand made of Respondent as required by statute. Having made no demand prior to the institution of this action, Petitioner cannot allege any failure to comply.

Petitioner, in its Amended Petition, attempts to deflect this failure to make any demand by claiming that its initial Petition acted as the required demand to Respondent.² It is disingenuous for Petitioner to now attempt to bootstrap its request for a demand prior to instigation of an action, with the action itself and claim that its requirement to make a demand and a subsequent refusal on behalf of the Respondent has been met. It therefore stands to reason that such an attempt speaks to the Department's failure to exhaust all administrative remedies prior to seeking judicial relief in the form of mandamus. See *Luke v. Cataldi* 932 A.2d 45, 47 (Pa.

2007)(“Mandamus is an extraordinary remedy that is appropriate only in cases where no adequate remedy at law exists.”); *St. Clair v. Pennsylvania*

² See Brief of Petitioner: “Despite the Department’s filing of this mandamus action – and through the Clerk’s continuing public statements to the media as well as his actions in continuing to issue marriage licenses to same-sex couples – the Clerk has adamantly refused to comply with the mandates of the Marriage Law and the Department’s expectation that he cease his illegal conduct.”

Board of Probation and Parole, 493 A.2d 146 (Pa. Cmwlth. 1985) (The exhaustion doctrine provides the agency with the opportunity to correct its own mistake and to moot judicial controversies).

2. Petitioner cannot have a clear legal right to force Respondent to adhere to a law that violates the United States and Pennsylvania Constitutions

In the instant case, the Petitioner must show that it has a clear legal right to compel Respondent to enforce a statute over which the Department has no standing to enforce and that violates both the Constitution of the United States as well as the Constitution of the Commonwealth of Pennsylvania, in that the law in question denies a class of individuals enjoyment of an inalienable civil right.

Thus, in order to prove that the Department's right to relief is clear, it must show that it has a likelihood of proving that Pennsylvania's definition of marriage, and Defense of Marriage Act as set forth at 23 Pa.C.S.A. 1301, et seq. are valid and enforceable under the Pennsylvania and United States Constitutions.

Ultimately, the determination of whether or not the Pennsylvania DOMA statute is unconstitutional is so inherently related to the claims against Respondent, that it must be addressed before a mandamus can be granted against Respondent. Our courts have long held that they will pass

upon deciding the constitutionality of a law if they can dispose of the action without having to do so. Altieri v. Allentown Officers' and Emp. Retirement Bd. 368 Pa. 176, 81 A.2d 884 (1951). However, the instant matter is one of the unique and special cases which requires the Court to make an underlying determination regarding the constitutionality of the Pennsylvania DOMA statute before potentially issuing a mandamus against Respondent.

Respondent has, as always, always acted to uphold his oath of office, and thus acted to faithfully uphold both the United States Constitution and Pennsylvania Constitution.

Further, Petitioner threatens multiple times in its brief that the Respondent can be charged with a misdemeanor offense pursuant to 16 P.S. §3411 entitled "Penalty for neglect or refusal to perform duties." As such, if this Honorable Court determines that the Petitioner has standing to bring this cause of action, it must determine whether the Pennsylvania DOMA statute is unconstitutional, because that is the key defense against Petitioner's allegations against him. See, *Commonwealth v. Cicci*, 2012 WL 8682077 (Pa. Cmwlth. 2012) (where this Honorable Court opined that the failure of the lower court to consider the defendant's defense that the law which he allegedly violated was unconstitutional was reversible error).

Article I, section 1 of the Pennsylvania Constitution (entitled

“Inherent Rights of Mankind”) 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.” Pa. Const. art. I, § 1. This section, like the due process clause in the Fourteenth Amendment of the United States Constitution, guarantees persons in this Commonwealth certain inalienable rights. Further along, in Section 26 of the Pennsylvania Constitution, the language reads, “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.” Pa. Const. art. I, § 26

Furthermore, Article 1 Section 28 of the Pennsylvania Constitution says, “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

Both the Pennsylvania and United States Constitution have recognized marriage as a basic civil right of man. See, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (the United States Supreme Court recognized marriage as “one of the basic civil rights of man...fundamental to the very existence and survival of the race.” See also, *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 1681, 14 L. Ed.2d 510, 514 (1965) (holding that the Bill of

Rights contains penumbras which include the common law right of privacy, which in turn encompasses the marital relationship; *Loving v Virginia*, 388 U.S. 1, 12 87S.Ct. 1817, 1824 (1967) (holding that the Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious... discriminations); *Stenger v. Lehigh Valley Hosp. Center*, 530 Pa. 426, 609 A.2d 796, 799-802 (1992) (holding that where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test).

Thus, any Writ of Mandamus issued by this Court would necessitate the Clerk of the Orphans' Court denying the alienable and basic civil right to marry, in direct violation of Respondent's oath to uphold the United States and Pennsylvania Constitutions.

3. The Conflict Between the Applicable Statute and Respondent's Oath to Uphold the U.S. and Pa. Constitutions

Upon his election to office, Respondent took the oath of office as prescribed by the Commonwealth in the Second-Class County Code, 16 P.S. §§ 3101 - 6302. In this oath Respondent swore to "support, obey and defend the Constitution of the United States, and the Constitution of this Commonwealth, and to discharge the duties of his office with fidelity". 16 Pa.C.S.A § 3403. This oath requires obedience to both the United States and

Pennsylvania Constitutions, as well as requiring that Respondent discharge his duties with fidelity.

Respondent's refusal to issue marriage licenses to same sex marriages would violate the 14th Amendment to the United States Constitution and Article I §§ 1, 26 and 28 of the Pennsylvania Constitution. Petitioner cannot possess a clear legal right to force Respondent to abandon his Oath and violate the United States and Pennsylvania Constitutions. Similarly, in order for Petitioner to establish a clear legal right to relief, it would need to establish that enforcement of this law does not violate the United States and Pennsylvania Constitutions, which it cannot do.

The Marriage Law seeks to treat similarly situated individuals different under the law in violation of the Equal Protection Clauses of the United States Constitution and the Pennsylvania Constitution. While it is true that the Commonwealth of Pennsylvania enjoys a constitutional separation of powers, this Court need not be constrained from performing its role within that framework by addressing the constitutionality of the Pennsylvania Marriage Law. The role of the judiciary is intertwined with the protection of individual rights so that those individuals may be secure in the fact that when those intrinsic rights are decided upon, they will be decided based on equity and the law and nothing less. It therefore flows that no determination

as to the Department's right to Mandamus can be addressed without first establishing that it has a clear legal right to enforce the statute in question.

The Supreme Court of Iowa faced a similar predicament in the matter of *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). In that case, a number of same sex couples asked the Court for a ruling on the constitutionality of the Iowa Marriage statute which defined marriage as a civil contract between one man and one woman.

Acknowledging, the importance of the separation of powers as a basic principle of government, the Court there would not be enjoined from protecting those individual rights upon which the government may not infringe. *Varnum* at 875 (Among other basic principles essential to our form of government, the constitution defines certain individual rights upon which the government may not infringe. *See*, Iowa Const. Art. 1); *See also*, Pa. Const. Art. 1 §26 (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.)

While not binding on this Court, the reasoning established by the Court in *Varnum* revolved around the proposition that any statute that was inconsistent with that state's constitution must be declared void, even though it may be supported by strong and deep seated traditional beliefs and popular

opinion. See, *Varnum* at 875. Respondent's now asserts that the same holds true in our Commonwealth. See *Miller v. City of Beaver Falls*, 82 A.2d 34 (Pa. 1951) (it must not be forgotten that all acts of the legislature and of any governmental agency are subordinate to the Constitution, which is the Supreme Law of the land; and therefore no matter how desirable the act may appear or how worthy the objective, it cannot be sustained if it is interdicted by the Constitution); See also, *King v. Com., State Employees' Retirement Bd.* 566 A.2d 323 (Pa. Cmwlth. 1989) ([I]t is not the Constitution which must be reconciled with the Code; rather, it is the Code, mere statutory law, which is subordinate to the Constitution and must be reconciled with the supreme law of the Commonwealth).

Lockyer, supra. also provides an additional lesson that is applicable to the instant case. Petitioner points to the *Lockyer* Court's refusal to address the constitutionality of the California Marriage Law as persuasive authority, by which this Court can rely in disregarding the constitutionality of the statute at issue here. Unfortunately, Petitioner ignores the fact that the Court in *Lockyer* faced another constitutional dilemma of its own. Pursuant to Article 3 §3.5 of the California Constitution, administrative agencies were expressly prohibited from making declarations as to the unconstitutionality of statutes.

Therefore, in order to adhere to its own constitutional mandates, the Court was compelled to forego ruling on the constitutionality of their Marriage Law. Instead, the Court issued an Order allowing for separate litigation to specifically address the constitutionality of the statute. See, *Lockyer* at 1074, 235.

There is no similar constitutional provision in this Commonwealth. Accordingly, this Court is not constrained to ignore the Constitutional issue which is at the heart of this dispute.

More importantly, the Court in *Lockyer* recognized that there were circumstances when it would be absurd to require compliance with a statute that was clearly unconstitutional. While the *Lockyer* Court may not have been able to make that determination in 2004, based on the totality of the circumstances that existed at the time, nearly a decade later this Court is in a better position to do just that.

Further, in challenges to statutes based on a violation of the Equal Protection Clause, if implicating a fundamental right (such as the right to marry), a statute must be strictly construed in light of the compelling governmental purpose. *Barge v. Pennsylvania Bd. of Probation and Parole*, 39 A.3d 530 (Pa. Cmwlth. 2012).

To survive this strict scrutiny analysis, a state must do more than

assert a compelling state interest, “it must demonstrate that its law is necessary to serve the asserted interest...A law rarely survives such scrutiny” (emphasis added). See, *Burson v. Freeman*, 504 U.S. 191, 199-200, 112 S.Ct. 1846, 1852 (1992).

It is well established that the right to marry is a basic civil right, protected by the United States Constitution. See, *In re Coats*, supra. (“We are beyond the underlying consideration as to whether prisoners have a fundamental constitutional right to marry-they do.”). And as such, any attempt to impinge upon that fundamental civil right must be reviewed by the Courts using the strict scrutiny standard.

The Pennsylvania DOMA statute affects a fundamental human right, and precludes an entire class of individuals from enjoyment of that right. As such, Pennsylvania’s DOMA statute does not stand up under strict scrutiny analysis.

The compelling state interest articulated in the statute itself is a “longstanding public policy”. 23 Pa.C.S. § 1704. While this may in fact be an “interest” as contemplated by the Courts in determining the constitutionality of statutes, given the resultant discrimination caused by this longstanding public policy, any potential benefit to society is substantially outweighed by the harm to individuals’ inalienable right to marry. As the

United States Supreme Court recently held in *Windsor*, “[t]he States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State” *Windsor* at 2693. (internal citations omitted)(emphasis added).

Pennsylvania’s DOMA statute is arbitrary and suspect, and is very similar to the statute which was struck down in *Windsor*, supra. *Id.* at 2683. The result of Pennsylvania’s DOMA statute is that parties of the same sex are unfairly precluded from attaining a judicially recognized fundamental civil right, the right to marry. This is a clear violation of 14th Amendment of the United States Constitution and Article I §§ 1, 26 and 28 of the Pennsylvania Constitution. In *Windsor*, supra the Court held “[i]n determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration. DOMA cannot survive under these principles.” *Id.* at 2693 (internal citations omitted).

The Pennsylvania DOMA statute is nothing more than an outgrowth of the federal statute at issue in *Windsor*, supra., which was just declared

unconstitutional. Thus, Petitioner cannot possess a clear legal right to force Respondent to adhere to a statute which violates the Equal Protection requirements of the United States Constitution and the Pennsylvania Constitution. Furthermore, even if a statute is not found to be violative of the U.S. Constitution, it must still be able to withstand a challenge under the Pennsylvania Constitution. "It is well established that a state may guarantee its citizens greater rights than those afforded under the United States Constitution. '[I]n the past, [the Courts of this Commonwealth] have not been shy of utilizing this freedom to afford the citizens of this Commonwealth greater liberties than they would otherwise enjoy.' Accordingly, any action authorized by a Pennsylvania statute must not run afoul of the Pennsylvania Constitution." *Bartholomew v. Foster*, 541 A.2d 393, 397 (Pa. Cmwlth. 1988) (citing *Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 125 (Pa. 1985)).

In addition to the issue of marriage as a fundamental civil right, a prohibition on marriage based on the sex of the individuals involved is not permitted under the Pennsylvania Constitution. Article I, section 28, of the Pennsylvania Constitution provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. I, § 28. While the Courts have not

yet had the opportunity to address the proper level of scrutiny to be applied under this Equality provision, a review of relevant decisions indicates that an a review of any law restricting who may enter into a marriage, on the basis of the sex of those seeking to marry, is invalid in light of the protections afforded under the Pennsylvania Constitution.

In *Henderson v. Henderson*, 327 A.2d 60 (Pa. 1974), the Pennsylvania Supreme Court, relying upon article I, section 28, declared unconstitutional a statute that allowed the payment of temporary alimony, attorney fees and expenses to a wife in a divorce action, but not a husband. As stated by the Court:

[A]s it is appropriate for the law where necessary to force the man to provide for the needs of a dependent wife, it must also provide a remedy for the man where circumstances justify an entry of support against the wife. In short, the right of support depends not upon the sex of the petitioner but rather upon need in view of the relative financial circumstances of the parties.... [t]he sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities.” *Id.* See also *Commonwealth v. Butler*, 328 A.2d 851 (Pa. 1974), (the Supreme Court, in striking down discriminatory parole eligibility rules, said that “sex may no longer be accepted as an exclusive classifying

tool.”).

A stated by this Court in *Bartholomew*, “[t]he only types of sexual discrimination that have been permitted in this Commonwealth are those which are “reasonably and genuinely based on physical characteristics unique to one sex. All other types of sexual discrimination have been outlawed in this Commonwealth.” *Id.* at 397.

Any attempts to construe the exception for physical differences as applying to the ability to procreate would be forced to ignore the explicit language of the Pennsylvania Supreme Court: “[a] plain reading of [the Equality Provision of Pa. Const. art. I, § 28 reveals no exception in the area of domestic relations. Nor has this Court in the past shied away from applying the Equality Provisions to questions of the rights and duties of husbands and wives, even where the interests of children may be affected. *George v. George*, 487 Pa. 133, 135, 409 A.2d 1 (1979).

Indeed, to give effect to the statute in question in this matter, one must be forced to ignore the Pennsylvania Supreme Court's explanation of the purpose of the Commonwealth's Equality Provision. “The obvious purpose of the Amendment was to put a stop to the invalid discrimination which was based on the sex of the person. The Amendment gave legal recognition to what society had long recognized that men and women must have equal

status in today's world." *Hopkins v. Blanco*, 320 A.2d 139 (Pa. 1974). That same year, the Court also opined that "the purpose of this constitutional provision was to end discriminatory treatment on account of sex." *Butler*, at 855.

Moreover, because the right the Petitioner seeks to infringe upon is one that is so intimate in nature, so essential to the rights of mankind, this Court should look for guidance from other courts that have established the standard for equal protection jurisprudence. The central notion of that standard is that "[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.'" *Reed v. Reed*, 404 U.S. 71, 92 S.Ct.251 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S.Ct.560 (1920)).

In the instant case, the statute that the Department seeks to enforce in is wholly unconstitutional. With very little interest, other than a long standing public policy, the State continues to deprive same sex couples of the inherent right to marry³. As Justice Oliver Wendell Holmes poignantly

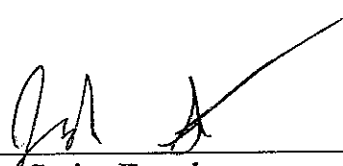
³ It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil

said, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, Justice, Supreme Judicial Court of Massachusetts, *The Path of the Law*, address dedicating new hall at Boston University School of Law (January 8, 1897).

marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. *Varnum, infra*.

CONCLUSION

For all of the reasons set forth above, Respondent respectfully requests that the Department of Health's Petition for Review be dismissed and all relief requested therein be denied.



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Dated: August 19, 2013

IN THE COMMONWEALTH COURT OF PENNSYLVANIA


COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF HEALTH,	:	Civil Action –
	:	In Mandamus
<i>Petitioner</i>	:	
	:	
vs.	:	No. 379 M.D. 2013
	:	
D. BRUCE HANES, in his capacity as	:	
the Clerk of Orphans' Court of	:	
Montgomery County,	:	
<i>Respondent</i>	:	

CERTIFICATION OF WORD COUNT PURSUANT TO RULE 2135(d)

I, Joshua Stein, Esquire, certify that the number of words in the Brief for Respondent, D. Bruce Hanes, pursuant to the word count feature of Microsoft Word, totals 11,507

Respectfully submitted,

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Civil Action – In Mandamus

No. 379 M.D. 2013

Joshua M. Stein

EXHIBIT "A"

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF HEALTH, :
Petitioner :

v. :

No. 379 M.D. 2013

D. BRUCE HANES, in his capacity as the :
Clerk of the Orphans' Court of :
Montgomery County :

TO: The Honorable D. Bruce Hanes
Raymond McGarry, Esquire
Montgomery County Solicitor's Office
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NOTICE TO PLEAD

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after the Amended Petition for Review and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any claim or relief that is requested by Petitioner. You may lose rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Dauphin County Bar Association
Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HEALTH,

Petitioner

v.

D. BRUCE HANES, in his capacity as the
Clerk of the Orphans' Court of
Montgomery County,

Respondent

No. 379 M.D. 2013

**AMENDED PETITION FOR REVIEW IN THE NATURE OF AN ACTION
IN MANDAMUS**

AND NOW, comes the Pennsylvania Department of Health ("Department"), by and through its undersigned counsel, to petition this Honorable Court to issue a writ of mandamus commanding the Clerk of the Orphans' Court of Montgomery County ("Clerk") (1) to perform his duties under the Pennsylvania Marriage Law, 23 Pa.C.S. Part II (the "Law"), in conformity with (a) the Law's definition of the term "marriage" as "[a] civil contract by which one man and one woman take each

other for husband and wife,” 23 Pa.C.S. § 1102, and (b) the Law’s declaration that it is “the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman,” 23 Pa.C.S. § 1704; and (2) to cease and desist immediately from issuing marriage licenses to individuals of the same gender in violation of the Law.

The Clerk is repeatedly and continuously acting in clear derogation of the Marriage Law inasmuch as he is issuing marriage licenses to applicants of the same gender and accepting marriage certificates of those to whom he has issued marriage licenses indicating falsely that marriages between individuals of the same gender have been lawfully performed by a person authorized under the Law to perform marriages. The Clerk’s actions are in direct defiance of the express policy of the Commonwealth that “marriage shall be between one man and one woman,” 23 Pa.C.S. § 1704, is undermining completely the uniformity in the administration of the Marriage Law intended by the General Assembly, and risks causing serious and limitless harm to the public throughout the Commonwealth and beyond.

The Department is charged by law with the power and duty “[t]o see that the laws requiring the registration of ... marriages ... are **uniformly and thoroughly enforced throughout the State.**” 71 P.S. § 534(c) (emphasis added). In repeatedly and continuously violating the Marriage Law, the Clerk is acting in direct contravention of the Marriage Law, and in so doing the Clerk is directly and

substantially interfering with the proper performance of the powers, duties and responsibilities that the law assigns to and imposes upon the Department.

Other than a writ of mandamus, there is no other remedy at law that the Department could pursue or secure that would be effective in stopping the Clerk from continuing to violate the Marriage Law, interfering with the proper administration of the Law (including the responsibilities of the Department), and causing untold harm to the public.

In support of its petition, the Department of Health avers as follows:

I. JURISDICTION

1. This Honorable Court has original jurisdiction of this action under section 761(a)(2) of the Judicial Code, which provides in relevant part as follows:

“The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings ... [b]y the Commonwealth government....” 42 Pa.C.S. § 761(a)(2).

2. Petitioner Department of Health is an administrative department of the Commonwealth government. *See* 71 P.S. § 61.

3. Because the Department is part of the Commonwealth government, this Honorable Court has original jurisdiction over the Department’s action in mandamus under 42 Pa.C.S. § 761(a)(2).

4. This Court also has jurisdiction over this action against the Clerk based on 42 Pa.C.S. § 761(a)(1), which provides that Commonwealth Court (with

exceptions not relevant here) “shall have original jurisdiction of all civil actions or proceedings ... [a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity.”

5. For purposes of section 761 of the Judicial Code, the Supreme Court has held that a clerk of courts “is considered to be the Commonwealth government as a Commonwealth officer,” *In re Administrative Order No. 1-MD-2003*, 936 A.2d 1, 7 (Pa. 2007), and that Commonwealth Court, therefore, has original jurisdiction to consider claims made against a clerk of courts. *Richardson v. Peters*, 319 A.3d 1047 (Pa. 2011); *see also Pridgen v. Wright*, No. 578 M.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 714, at *3 n.2 (Pa. Cmwlth. Sept. 20, 2012) (Commonwealth Court has original jurisdiction “in any civil action against an officer of the Commonwealth acting in his official capacity,” including a county clerk of court or prothonotary as a “Commonwealth officer.”).

6. This action in mandamus by the Department to compel a clerk of the orphans’ court (as a Commonwealth officer acting in his official capacity) to comply with clear statutory mandates in his administration of the Marriage Law is an action at law by the Commonwealth agency charged with enforcement of the Law that lies squarely within Commonwealth Court’s original jurisdiction under 42 Pa.C.S. § 761(a). Thus, this mandamus action is not, and need not be, ancillary to some other matter as described in 42 Pa.C.S. § 761(c).

II. PARTY SEEKING RELIEF

7. Petitioner Department of Health is an administrative department of the Commonwealth government, 71 P.S. § 61, having powers and duties that are prescribed by law. *See, e.g.*, 71 P.S. §§ 531-555, 1401-14.

8. Most relevant here, the Department has the power and duty under section 2104(c) of The Administrative Code of 1929 “[t]o see that the laws requiring the registration of ... marriages ... are **uniformly and thoroughly enforced throughout the State.**” 71 P.S. § 534(c) (emphasis added).

9. The Department itself has several powers and duties under the Marriage Law itself, *to wit*:

a. Relating to the marriage licensing process, section 1104 of the Law provides as follows:

Marriage license applications, consent certificates, marriage licenses and other necessary forms shall be supplied at the expense of the county and shall be uniform throughout this Commonwealth **as prescribed by the [D]epartment.** Statements of physicians and laboratories relative to examinations for syphilis shall be **prepared and furnished by the [D]epartment.**

23 Pa.C.S. § 1104 (emphasis added).

b. Relating to the Department’s responsibilities for recordkeeping and statistics, section 1106 of the Law provides; in relevant part, as follows:

(a) *Filing transcript or record.*—The county shall furnish **the [D]epartment**, not later than the 15th day of each month, with a transcript or record of each marriage license issued and each return of the celebration of a marriage received or filed during the preceding calendar month.

(b) *Forms.*—The transcripts or records required to be furnished shall be made on forms prepared and furnished **by the [D]epartment** and shall contain such information as **the [D]epartment** may require.

(d) *Statistics.*—**The [D]epartment** shall from time to time compile and publish statistics derived from records furnished under this section.

23 Pa.C.S. § 1106 (emphasis added).

10. The Department has similar responsibilities under section 601 of the

Vital Statistics Law of 1953, which provides in relevant part as follows:

The clerk of orphans' court of every county shall execute a statistical summary of the marriage license applications for marriages solemnized within this Commonwealth. **The [D]epartment** shall prescribe the forms of such summary and the forms of marriage license applications. On or before the fifteenth day of each calendar month, each clerk of orphans' court shall transmit to **the [D]epartment** the summary of all marriage license applications pertaining to the executed marriage license certificates filed with the clerk during the immediately preceding calendar month.... **The [D]epartment**, at its discretion, may prescribe the method by which the transmission of the statistical summaries to the [D]epartment is to occur under this section, including, but not limited to, transmission by paper copy by mail or other courier, facsimile transmission or electronic means.

35 P.S. § 450.601 (emphasis added).

11. Having the express statutory power and duty to “[t]o see that the laws requiring the registration of ... marriages ... are **uniformly and thoroughly enforced throughout the State**,” 71 P.S. § 534(c) (emphasis added), and itself having important administrative responsibilities under the Marriage Law and the Vital Statistics Law, it follows that the Department has the authority and standing where necessary to seek the aid of the judiciary to compel responsible county officers to comply with the Law. *See Commonwealth v. Beam*, 788 A.2d 357, 360 (Pa. 2002) (“[A]n administrative agency is invested with the implied authority necessary to the effectuation of its express mandates,” including the power to seek judicial relief to compel compliance with a law under which it has administrative responsibilities); *Belden & Blake Corp. v. Dep’t of Conservation & Natural Res.*, 969 A.2d 528, 533 (Pa. 2009) (Saylor, J., dissenting) (same); *see also Pittenger v. Union Area School Bd.*, 356 A.2d 866 (Pa. Cmwlth. 1976) (Department of Education, having the power to administer the laws of the Commonwealth regarding the establishment, maintenance, and conduct of the public schools, had authority to seek mandamus against a school board to compel compliance with a school law.).

12. The unlawful actions of the Clerk in issuing marriage licenses in violation of the Marriage Law as described herein are directly and substantially

interfering with the proper and uniform administration of the Law, including the proper performance of the powers and duties of the Department of Health.

13. Because the Clerk's continuing unlawful actions are interfering with the proper and uniform administration of the Law, including the effectuation of the Department's express statutory mandate to see that the Marriage Law is uniformly and thoroughly enforced throughout the State, the Department has authority and standing to seek judicial relief against the Clerk.

14. The Department has a clear legal right, enforceable through an action in mandamus, to insist that county officials comply with the Marriage Law.

15. The Department is represented in this matter by attorneys appointed by the General Counsel of the Commonwealth under section 301(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-301(1).

16. The Department's attorneys have authority under the Commonwealth Attorneys Act to represent the Department in this matter because the Attorney General has refused -- as she publicly stated at a news conference held in Philadelphia on July 11, 2013 -- to represent the Department in defense or enforcement of the provisions of the Marriage Law prohibiting marriage between individuals of the same sex. *See* 71 P.S. § 732-301(6) (attorneys appointed by the General Counsel may represent executive agencies in matters where the Attorney General will not); *see also* 71 P.S. § 732-204(c) ("The Attorney General may, upon

determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel ... to initiate, conduct or defend any particular litigation or category of litigation in his stead.”).

III. GOVERNMENT UNIT WHOSE ACTION IS IN ISSUE

17. The Clerk of the Orphans’ Court of Montgomery County is the government unit whose actions are at issue in this mandamus action.

18. The Clerk (who also serves as the Register of Wills of Montgomery County) is a county officer under the Second Class County Code. *See* 16 P.S. §§ 3401(a)(8), 4302.

19. Specifically, the Department seeks review by this Honorable Court of – and mandamus relief for – the continuing illegal actions of the Clerk in issuing marriage licenses to individuals of the same gender in direct contravention of the Marriage Law.

20. Under Pennsylvania law, the clerks of the orphans’ courts of the Commonwealth have the power and duty to issue marriage licenses and to perform other responsibilities under the Marriage Law and the Vital Statistics Law. *See* 35 P.S. § 450.601; *In re: Coats*, 849 A.2d 254, 259 (Pa. Super. 2004) (the clerks of the orphans’ courts are responsible under Pennsylvania law to issue marriage licenses and perform related duties).

21. In performing his powers and duties, the Clerk must act in conformity with the requirements of the law. *See* 42 Pa.C.S. § 2774 (The clerk of the orphans' court division shall "exercise the powers, and perform the duties by law vested in and imposed upon the clerk of the orphans' court division or the office of the clerk of the orphans' court division."); § 2777(6) (The clerk of the orphans' court is required to "[e]xercise such ... powers and perform such ... duties as may ... be vested in or imposed upon the office by law."); *see also In re: Coats*, 849 A.2d at 258 ("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.").

22. In the administration of his responsibilities under the Marriage Law, the Clerk has a solemn duty to perform in compliance with the dictates of the statute as written by the General Assembly; he has no authority to deviate.

23. In fact, under the Second Class County Code, a county officer who "neglects or refuses to perform any duty imposed on him ... by the provisions of any ... act of Assembly," such as the Marriage Law, may be guilty of a misdemeanor for each act of neglect or refusal. *See* 16 P.S. § 3411.

IV. THE MARRIAGE LAW (23 Pa.C.S. Part II)

A. The Procedure

24. A license to marry has been required by the law of the Commonwealth of Pennsylvania since 1885.

25. In 1990, the Pennsylvania General Assembly enacted the Marriage Law (23 Pa.C.S. Part II) – which replaced the Marriage Law of 1953 – as part of a new comprehensive and consolidated Domestic Relations Code (Title 23 of the Pa. Consolidated Statutes).

26. Section 1301(a) of the Marriage Law provides that “[n]o person shall be joined in marriage in this Commonwealth until a marriage license has been obtained.” 23 Pa.C.S. § 1301(a).

27. The Law also provides that “[n]o marriage license shall be issued except upon written and verified application made by both of the parties intending to marry.” 23 Pa.C.S. § 1302(a).

28. A marriage license application must include, among other information, “the full name of the applicants,” 23 Pa.C.S. § 1302(b)(1), and “[a]ny ... facts necessary to determine **whether a legal impediment to the proposed marriage exists.**” *Id.* at § 1302(b)(6) (emphasis added).

29. To facilitate proper consideration of the application for marriage license, a marriage license may not be issued “prior to the third day following the making of application,” 23 Pa.C.S. § 1303(a), except “[i]n case of emergency or extraordinary circumstances,” *id.* at § 1303(b)(1), or to accommodate certain military service duties. *Id.* at § 1303(b)(2).

30. The Law also requires an "oral examination," *to wit*: "Each of the applicants for a marriage license shall appear in person and shall be examined under oath or affirmation **as to [t]he legality of the contemplated marriage,**" 23 Pa.C.S. § 1306(a)(1) (emphasis added), among other subjects.

31. When the substantive and procedural requirements are satisfied, the Law directs that 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. § 1307 (emphasis added). When the substantive and procedural requirements are satisfied, the Clerk has no discretion to withhold a marriage license; his duty to issue the marriage license is purely ministerial.

32. Under section 1310 of the Law, the marriage license is to appear substantially in the following form:

Commonwealth of Pennsylvania

ss: No.

County of (name)

To any person authorized by law to solemnize marriage:

You are hereby authorized to join together in holy state of matrimony, **according to the laws of the Commonwealth of Pennsylvania,** (name) and (name).

Given under my hand and seal of the Court of Common Pleas of (name), at (city, borough or town), on (date).

Signed
(Official Title)

23 Pa.C.S. § 1310 (emphasis added).

33. Under the Law, the forms that the clerks of the orphans' courts use in their administration of the Marriage Law must have been approved by the Department of Health. *See* 23 Pa.C.S. § 1104; *see also* 35 P.S. § 450.601.

34. The county is required monthly to provide to the Department "[a] record of each marriage license issued and each return of the celebration of a marriage received or filed during the preceding calendar month ... on forms prepared and furnished by the [D]epartment," containing "such information as the [D]epartment may require." 23 Pa.C.S. § 1106(a), (b); *see also* 35 P.S. § 450.601. The Department, in turn, compiles and publishes statistics derived from the records furnished to it by the counties. *Id.* at § 1106(d).

35. The Department is responsible, *inter alia*, to see that the Law is "uniformly and thoroughly enforced throughout the State." *See* 71 P.S. § 534(c).

B. The 1996 Amendments

36. On October 16, 1996, Governor Thomas J. Ridge signed into law Act 124, which made amendments to the Marriage Law.

37. As relevant here, Act 1996-124 added to the Law a definition of "marriage" as "a civil contract by which one man and one woman take each other for husband and wife." 23 Pa. C.S. § 1102.

38. Act 124 also added a new section 1704 addressing specifically “marriage between persons of the same sex.” That section provides as follows:

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.

23 Pa.C.S. § 1704 (emphasis added).

39. The 1996 amendments added to restrictions and prohibitions that were already part of the Law relating to minors, 23 Pa.C.S. § 1304(b); incompetent persons, 23 Pa.C.S. § 1304(c); persons under the influence of alcohol or drugs, 23 Pa.C.S. § 1304(d); and persons within certain degrees of consanguinity, 23 Pa.C.S. § 1304(e).

40. No court has declared section 1102 or section 1704 of the Law to be unconstitutional or unenforceable.

41. In fact, Pennsylvania courts have enforced the Law. *See, e.g., Himmelberger v. Dep’t of Revenue*, 47 A.3d 160 (Pa. Cmwlth. 2012) (affirming on the basis of the opinion in *In re Estate of Warnock*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 565 (CCP Berks Co. 2011)); *Kern v. Taney*, 11 Pa. D. & C. 5th 558 (CCP Berks Co. 2010).

V. MATERIAL FACTS

42. On July 23, 2013, the Clerk of the Orphans' Court of Montgomery County publicly announced that his office would begin issuing marriage licenses to same-sex couples in defiance of the Marriage Law. In a press release forecasting his intended defiance of the law, the Clerk stated: "Based upon the advice of [the county solicitor], my own analysis of the law and mindful of the Attorney General's belief that Pennsylvania's marriage laws are unconstitutional, I decided to come down on the right side of history and the law...."

43. The Clerk's reference to "the Attorney General's belief that Pennsylvania's marriage laws are unconstitutional" apparently is an allusion to the public pronouncement made by the Attorney General on July 11, 2013, at the National Constitution Center in Philadelphia that the provisions of the Marriage Law that define marriage exclusively to be between one man and one woman and prohibit marriages between those of the same gender are, in her opinion, "wholly unconstitutional."

44. The context of the Attorney General's public pronouncement about the Law's constitutionality was the announcement she made at the same time that she would not perform her duty under Pennsylvania law to defend the constitutionality of the Marriage Law in a federal civil rights action filed on July 9, 2013 (*Whitewood, et al. v. Corbett, et al.*, No. 13-01861 (M.D. Pa.)), challenging

under the 14th Amendment to the U.S. Constitution the constitutionality of the Marriage Law's prohibition against same-gender marriage. As part of that announcement, the Attorney General announced that she would not represent the Governor and the Secretary of Health in that matter.

45. The Clerk cited to the Attorney General's public pronouncement notwithstanding that the Attorney General has issued no official opinion requested by a Commonwealth official or agency under the Commonwealth Attorneys Act; see 71 P.S. § 732-204(a)(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 the performance of the official duties of the Governor or agency"), and notwithstanding that the Attorney General has no authority to render legal opinions or advice – official or otherwise – to local public officials, such as the Clerk. In other words, the Attorney General's individual opinion respecting the constitutionality of the Marriage Law is of no legal consequence to the Clerk or any other public official or agency.

46. Moreover, the Attorney General's public declaration that the Marriage Law is unconstitutional is not based on the holding of any court that has binding effect in Pennsylvania. The case cited by the Attorney General in her announcement – *United States v. Windsor*, 133 S. Ct. 2884 (2013) – in no way

holds that a state law resembling Pennsylvania's Marriage Law violates the Constitution.

47. Absent a controlling judicial decision of a court of competent jurisdiction, neither the Attorney General, *see* 71 P.S. § 732-204(a)(1), nor any other public official has license under Pennsylvania law to act in defiance of a controlling statute enacted by the General Assembly.

48. There is no controlling judicial decision of a court of competent jurisdiction that would justify the Attorney General or the Clerk not to defend and enforce the Marriage Law as written.

49. Based on media reports, it is averred that the Clerk (as of August 2, 2013) had issued 62 marriage licenses to couples of the same sex in direct violation of the Marriage Law.

50. To highlight the impact of the Clerk's unlawful performance of his sworn duty and the consequent public harm in allowing his illegal actions to persist, the media has reported that the availability of unlawful marriage licenses has attracted to the Montgomery County seat of government individuals from other Pennsylvania counties whose orphans' court clerks will not violate the Law by issuing marriage licenses to same-sex couples.

51. In one such instance, it has been reported, two women – Loreen Bloodgood and Alicia Terrizzi of Schuylkill County – traveled to Montgomery

County on the strength of the Clerk's announced intention to defy the Marriage Law; and they obtained a license to marry on July 24, 2013.

52. In further defiance of the Marriage Law, the Clerk in that instance reportedly waived, presumably based on some "extraordinary" reason, the three-day waiting period mandated by the Law. *See* 23 Pa.C.S. § 1303.

53. As a result of the Clerk's violation of the Law, it has been reported, Ms. Bloodgood and Ms. Terrizzi immediately appeared before a minister who, upon presentation of the illegal marriage license they had received from the Clerk and the waiver of the waiting period granted by the Clerk, purported to perform a marriage between the two women in defiance of Pennsylvania law.

54. As a result of the illegal issuance of marriage licenses by the Clerk, it is alleged based on media reports that same-sex couples are proceeding with marriage ceremonies that are not permitted by Pennsylvania law, improper marriage certificates are being filed with the Clerk, and the same-sex couples are left to believe erroneously that they have entered into a valid marriage under the Pennsylvania law.

55. One consequence of the Clerk's illegal conduct in issuing invalid marriage licenses is likely to be this: Same-sex couples who falsely believe (or merely contend erroneously) that they are married will apply for or claim benefits

or other treatment (both public and private) that is reserved for those who are lawfully married under Pennsylvania law.

56. There is no limit to the administrative and legal chaos that is likely to flow from the Clerk's unlawful practice of issuing marriage licenses to those who are not permitted under Pennsylvania law to marry.

57. After the Department commenced the above-captioned action on July 30, 2013, and filed with the Court an application for summary relief on July 31, 2013, the Clerk responded with preliminary objections and an answer indicating his intention to continue issuing licenses in violation of the Marriage Law – a committed course of lawlessness that was emphasized in public statements by the Clerk and his legal counsel.

58. Through his response to the Department's actions in this Court, the Clerk has refused the Department's demand that the Clerk cease his illegal conduct.

59. The Clerk is likely to continue to defy the Marriage Law unless and until a court should order him to cease and desist.

60. A writ of mandamus would be well-suited to cause the Clerk to stop violating the Law.

VI. THE MANDATORY DUTY OF THE CLERK

61. The Clerk has a mandatory and ministerial duty to comply with the Law as written by the General Assembly.

62. When a duly enacted statute imposes a ministerial duty upon a public official to follow the dictates of the statute in performing a mandated act, the official has no authority to disregard the statutory mandate based on the official's own determination that the statute is unconstitutional.

63. Like any public official, the Clerk is relieved of his mandatory duty to comply with the Law only if a court of competent jurisdiction has declared the law in question to be unconstitutional or otherwise unenforceable, or a court has rendered a precedential decision binding on public officials in the Commonwealth that establishes definitively and indistinguishably that the law is unconstitutional or unenforceable.

64. No public pronouncement of an executive official – even the Attorney General of Pennsylvania – declaring his or her individual legal opinion that a law is unconstitutional relieves a public official such as the Clerk from his mandatory duty to comply with the law.

65. Absent a controlling opinion of a court of competent jurisdiction, an administrative official such as the Clerk lacks the power or discretion under the

law or our system of government not to perform his duties in accordance with applicable statutes enacted by the General Assembly.

66. An administrative official who refuses to comply with the law that applies to the performance of his public duties is properly the subject of a writ of mandamus to compel his adherence to the law and to ensure the uniform statewide administration of the Marriage Law, including the proper performance of the powers and duties of the Department of Health.

67. The Marriage Law is the law of Pennsylvania.

68. The Clerk has a clear legal duty to comply with the Law and should be ordered to perform his duty accordingly.

69. Under principles applied nearly uniformly across the county, a public official cannot refuse to comply with a duly enacted statute, or avoid a court ordering him to comply with the statute, by claiming that the statute at issue is unconstitutional.

70. In a case having strong parallels to this one – where the Mayor of San Francisco ordered licensing authorities in San Francisco to issue marriage licenses to same sex couples in defiance of state law based on his determination that the law was unconstitutional – the Supreme Court of California refused to consider whether the law was unconstitutional and ordered local officials to comply with the

law as written by the legislature. See *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004).

71. The Court in *Lockyer* explained – compellingly and at great length – why courts across the country are nearly unanimous in holding that an administrative official must follow the law until a court having jurisdiction over the official determines that the law is unconstitutional. *Id.* at 488-94.

72. Though not binding on Pennsylvania courts, the powerful concluding words of the court in *Lockyer* should be heeded in this case for their universal and enduring wisdom in the preservation of fundamental separation of powers:

An executive official ... is free to criticize existing statutes, to advocate their amendment or repeal, and to voice an opinion as to their constitutionality or unconstitutionality.... [H]owever, an executive official who is charged with the ministerial duty of enforcing a statute generally has an obligation to execute that duty in the absence of a judicial determination that the statute is unconstitutional, **regardless of the official's personal view of the constitutionality of the statute.**

... [T]he city has suggested that a contrary rule—one under which a public official charged with a ministerial duty would be free to make up his or her own mind whether a statute is constitutional and whether it must be obeyed—is necessary to protect the rights of minorities. But history demonstrates that members of minority groups, as well as individuals who are unpopular or powerless, have the most to lose when the rule of law is abandoned—even for what appears, to the person departing from the law, to be a just end. ... **[G]ranting every public official the authority to disregard a ministerial statutory duty on the basis of the official's opinion that the statute is unconstitutional would be fundamentally inconsistent with our political system's commitment to John Adams's vision of a government where official action is**

determined not by the opinion of an individual officeholder —but by the rule of law.

Id. at 499 (emphasis added) (footnote omitted).

VII. STATEMENT OF THE RELIEF BEING SOUGHT

73. The Department of Health seeks a writ of mandamus to compel the Clerk of the Orphans' Court of Montgomery County to comply with the Marriage Law (including sections 1102 and 1704 of the Law) and to immediately cease and desist from issuing marriage licenses to individuals of the same gender.

74. Pennsylvania's Marriage Law prohibits same-sex marriage. The Law unequivocally defines marriage as a civil contract between one man and one woman, 23 Pa.C.S. § 1102, and explicitly renders void any marriage between persons of the same sex. 23 Pa.C.S. § 1704.

75. Compliance with Pennsylvania law by its public officials is a mandatory obligation.

76. Ours is a government of laws, not one of public officials exercising their will as they believe the law should be or will be.

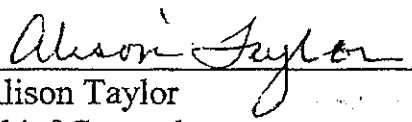
77. Under our constitutional system, public officials — including the Governor, the Attorney General, and the clerks of our courts — administer and enforce the laws that are enacted by the Legislature. Only the courts in a proper case brought before them have the power to declare that a law is unconstitutional and to suspend its effects.

78. Until a court of competent jurisdiction has declared a law to be unconstitutional, the oath taken by all elected and appointed officials requires compliance with the duly enacted laws of the Commonwealth as they are written.

79. To avoid the disorder and confusion that would otherwise result, mandamus to compel compliance with the Pennsylvania Marriage Law as written is necessary and appropriate in this case.

80. No other remedy at law is available to curtail the continuing unlawful acts of the Clerk of the Orphans' Court of Montgomery County.

WHEREFORE, the Pennsylvania Department of Health respectfully requests that this Honorable Court issue a writ of mandamus to the Clerk of the Orphans' Court of Montgomery County ordering him to comply fully with the Marriage Law (23 Pa.C.S. Part II), and to direct the Clerk immediately to cease and desist from issuing marriage licenses to same-sex couples.


Alison Taylor
Chief Counsel

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Senior Counsel

Pennsylvania Department of Health
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825 Health and Welfare Building
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(717) 783-2500

*Counsel for Petitioner Department of
Health*

August 5, 2013

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF HEALTH, :
Petitioner :

v. :

No. 379 M.D. 2013

D. BRUCE HANES, in his capacity as the :
Clerk of the Orphans' Court of :
Montgomery County :

VERIFICATION

Marina O'Reilly Matthew, RHIA, State Registrar and Director of the Bureau of Health Statistics & Research, Department of Health, hereby verify that the factual averments made in the Amended Petition for Review in the Nature of an Action in Mandamus filed by the Department of Health in the above-captioned matter are true and correct to the best of my knowledge, information and belief. I make this verification subject to the provisions and penalties prescribed by 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).



Marina O'Reilly Matthew, RHIA
State Registrar and Director of the
Bureau of Health Statistics &
Research
Pennsylvania Department of Health

DATE: August 5, 2013

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF HEALTH, :

Petitioner :

v. :

No. 379 M.D. 2013

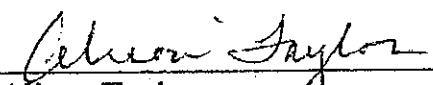
D. BRUCE HANES, in his capacity as the :
Clerk of the Orphans' Court of :
Montgomery County, :

Respondent :

CERTIFICATE OF SERVICE

I, Alison Taylor, Chief Counsel, Pennsylvania Department of Health, Office of Legal Counsel, hereby certifies that on August 5, 2013, I served true and correct copies of the foregoing, Commonwealth of Pennsylvania, Department of Health's Amended Petition for Review in the Nature of an Action in Mandamus by causing same to be deposited in the United States Mail, postage prepaid and UPS overnight mail, to the following:

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*Counsel for Petitioner Department of
Health*

EXHIBIT "B"



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 30, 2013

Adrian R. King, Jr.
First Deputy Attorney General
Office of Attorney General
16th Floor Strawberry Square
Harrisburg, PA 17120

Re: *Whitewood, et al. v. Corbett, et al.*, No. 13-1861 (M.D. Pa.)

Dear Mr. King:

This responds to your July 12 letter and Attorney General Kane's purported delegation of her legal duty to defend the constitutionality of a lawfully enacted Pennsylvania statute. The Attorney General's unprecedented public adjudication of the statute's alleged unconstitutionality was an improper usurpation of the role of the courts, which at a minimum, causes confusion among those charged with administering the law and places any lawyer defending the case at a disadvantage from the outset.

Section 204(a)(3) of the Commonwealth Attorneys Act ("Act") states: "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." 71 P.S. § 732-204(a)(3). That duty is mandatory, not discretionary; and it is imposed exclusively on the Attorney General, who under Article IV, § 4.1, of the Constitution of Pennsylvania is required to "exercise such powers and perform such duties as may be imposed by law."

The Attorney General's constitutional and statutory duty is clear. Exception is made only when a court of competent jurisdiction has issued a controlling decision that the law (or a materially indistinguishable law) is unconstitutional. No court, expressly or implicitly, has declared the provisions of Pennsylvania's Marriage Law (23 Pa. C.S. Part II) that are challenged in *Whitewood, et al. v. Corbett, et al.*, No. 13-01861 (M.D. Pa.), to be unconstitutional. Accordingly, nothing excuses the Attorney General from undertaking her legal duty to defend the statute challenged in *Whitewood*; her personal opinion that the law is unconstitutional is not a valid basis for her refusal to do her job.

Your letter and the Attorney General's public comments indicate that she has decided to "delegate" her responsibility to the Office of General Counsel ("OGC") under a separate provision of the Act, namely section 204(c). That provision allows the Attorney General, "upon determining that it is *more efficient* or otherwise is *in the best interest of the Commonwealth*, to authorize the General Counsel ... to ... conduct or defend any particular litigation ... *in [her] stead*." 71 P.S. § 732-204(c) (emphasis added). It is neither more efficient nor in the best interest of the Commonwealth for the Attorney General to refuse to undertake her responsibilities in this case.

Determinations of efficiency under section 204(e) are typically made where the litigation at issue involves complex regulatory matters in which the expertise of an agency and its lawyers make representation by OGC a more effective and prudent use of Commonwealth resources. The Marriage Law is not a complicated regulatory regime, nor are any Commonwealth agencies or OGC lawyers involved substantially in the administration of the Marriage Law so as to implicate their specialized knowledge or experience. Moreover, there is certainly no reasonable basis to determine that it would be in the best interest of the Commonwealth for OGC to defend the Marriage Law when no court of competent jurisdiction has decided that the Pennsylvania Marriage Law (or a substantially similar state law) is unconstitutional. For decades, the career attorneys in the Office of Attorney General have been successfully defending the laws of this Commonwealth.

More importantly, Section 204(a)(3) does not permit the Attorney General to unilaterally delegate to OGC actions challenging the constitutionality of statutes. To assert otherwise is to disregard the specific and uncompromising duty that the General Assembly has imposed upon the Attorney General through section 204(a)(3). Thus, the Attorney General should do her duty under section 204(a)(3) of the Act, irrespective of her personal legal opinion or prediction of how a court will decide the issue.

In 1996, then-Attorney General Corbett, rendering an official opinion to the Secretary of Public Welfare regarding the constitutionality of several Pennsylvania statutes, elaborated on the duties of the Attorney General under section 204(a)(3) and, more specifically, what constitutes a "controlling decision" of a court of competent jurisdiction:

[T]he Attorney General is required by Section 204(a)(3) of the Commonwealth Attorneys Act "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." Since each of the [statutory provisions in question] implicates a decision of the United States Supreme Court relevant to its constitutionality, it is incumbent upon me to determine whether the Supreme Court decision is "controlling" so as to compel the advice that the provision to which it relates is unenforceable.

As a threshold matter, it must be emphasized that the concept of a "controlling decision by a court of competent jurisdiction" is not susceptible to precise definition. Clearly, it cannot be construed so narrowly as to require a decision by a court of last resort holding unconstitutional the very provision on which the Attorney General's advice is sought, since that construction would render the Attorney General's advice a meaningless gesture. On the other hand, the decision said to be "controlling" must be more than merely predictive of the constitutionality of the statutory provision on which the Attorney General's advice is sought; it must adjudicate the constitutionality of a statutory provision materially indistinguishable from the statutory provision on which the advice is sought, and it must be rendered by a court that has jurisdiction over the entirety of Pennsylvania.

Adrian R. King, Jr.
July 30, 2013
Page Four

The Court in *Windsor* enforced the principles of federalism that are embedded in the U.S. Constitution, declaring that only the States have the authority to define marriage. The Court in no way adjudicated the question of whether a *state* law defining marriage as exclusively between a man and a woman violates due process or equal protection. To the contrary, *Windsor* clearly leaves for another day the limits that the U.S. Constitution might impose on the States in their regulation of the marital relationship.

For the foregoing reasons, the Attorney General cannot, in the manner she has done, invoke section 204(c) to evade her duty under section 204(a)(3). Accordingly, the legal position she has taken must be interpreted by OGC as a refusal to defend the Governor and the Secretary of Health in this litigation. Therefore, as required by section 301(6) of the Act, 71 P.S. § 732-301(6), OGC will defend those officials. In so doing, OGC and its public official clients have decided to defend the constitutionality of the Marriage Law, as this Governor's Administration would do where it is a party to the challenge of any duly enacted law the Attorney General has refused her obligation to defend.

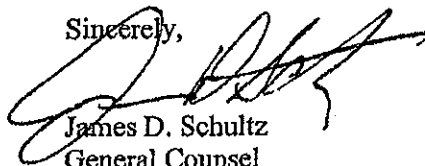
Notwithstanding our decision to defend a statute that the Attorney General without legal cause has refused to do, her refusal to defend the Marriage Law establishes a very troubling precedent. Any Attorney General faced with a statute with which he or she personally disagrees can simply declare, with no reasoned explanation necessary, that the law is "unconstitutional" and then refuse to defend it. This has the very real potential to compromise, among other things, the functions of the legislative and judicial branches of our government and the defense of our laws.

The members of the General Assembly, of either party, will not know whether the Attorney General will defend their work. And administrators and law enforcement will not know which laws are valid and which laws are not. This will create chaos and uncertainty – not unlike what we are seeing in the unlawful actions of the Clerk of the Orphans' Court of Montgomery County, who has cited the Attorney General's public declarations as justification for his own refusal to enforce the law.

Moreover, those who are left to assume the Attorney General's job will have the unenviable task of defending the constitutionality of a law that the Commonwealth's chief legal and law enforcement officer has already publicly declared to be unconstitutional. In cases where OGC declines to do the Attorney General's job, statutes would be left undefended.

Finally, future Attorneys General and other public officials will be able to cite this precedent to ignore their duty when it is inconvenient or uncomfortable for them to perform it. In deciding to do the job of the Attorney General, we are certainly not sanctioning her conduct or assuming any responsibility for the problems, which will inevitably arise as a result of it.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. Schultz", is written over the typed name and title.

James D. Schultz
General Counsel

EXHIBIT "C"



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July 11, 2013

Attorney General Kane will not defend DOMA

HARRISBURG - Attorney General Kathleen G. Kane today announced that the Office of Attorney General will not defend Pennsylvania's Defense of Marriage Act in a recently filed lawsuit (Whitewood, et al vs Corbett, et al). The lawsuit challenges Pennsylvania's Defense of Marriage Act, based on the Equal Protection and Due Process Clauses of the United States Constitution.

The law, commonly referred to as DOMA, prohibits marriage between people of the same sex. In addition, under DOMA, same-sex marriages that are legally made in other states are void in Pennsylvania.

"I cannot ethically defend the constitutionality of Pennsylvania's version of DOMA where I believe it to be wholly unconstitutional," Kane said.

"It is my duty under the Commonwealth Attorneys Act whenever I determine it is in the best interest of the Commonwealth to authorize the Office of General Counsel to defend the state in litigation."

"Additionally, it is a lawyer's ethical obligation under Pennsylvania's Rules of Professional Conduct to withdraw from a case in which the lawyer has a fundamental disagreement with the client," said Kane.

Kane made the following points about DOMA:

- Pennsylvania's DOMA, like the federal DOMA, imposes a disadvantage, a separate status, and a stigma on those who enter into same-sex marriages.
- Pennsylvania's DOMA wrongly denies same-sex couples the fundamental right to marry in Pennsylvania; and for those same-sex couples who legally marry outside Pennsylvania, it denies them the fundamental right to have their lawful marriage recognized in our state.
- Pennsylvania's DOMA has no legitimate purpose other than to disparage and injure same-sex couples by placing them in a less respected position than others.
- The discriminatory treatment explicitly authorized by DOMA violates both the US and Pennsylvania Constitution.

"I know that in this state there are people who don't believe in what we are doing, and I'm not asking them to believe in it. I'm asking them to believe in the constitution," Kane said.

The issue of same-sex marriage is squarely in the tradition of the struggle for civil rights in the U.S.

"We have always stood strong in the face of discrimination, which in its various forms has never withstood the test of time," Kane said.

"It is our duty, each and every one of us, to protect the constitutionality, to protect the rights and dignity of others, and to protect the equality of all men and women in this Commonwealth."

#

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State worker charged with theft




08/15/2013 -
Philadelphia man charged in \$150,000 identity theft scheme

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Berwick police officers aided by Attorney General agents discover apparent meth lab in Berwick



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July 12, 2013

Statement from Attorney General Kathleen G. Kane

In the past 24 hours, the OAG Press Office has received dozens of inquiries regarding my announcement that this Office would not defend DOMA in a recently filed lawsuit. I'm grateful that there has been a lot of interest, and grateful too that most of the reporting has been accurate and fair. Yesterday was a good day for human rights.

There have been far too many questions posed for me to reply to them individually. I offer the following statements so that the news media, and all Pennsylvanians, can have a better understanding of my reasons for taking this important step.

I swore an oath that I would defend and obey the constitution. What I did yesterday was simply that. I was obeying the constitution.

Doesn't the Commonwealth Attorneys Act require you to defend Pennsylvania statutes?

The Commonwealth Attorneys Act has a specific, plainly written provision that enables me to refer cases at my sole discretion. The OAG refers cases to the OGC hundreds of times each year, for many different reasons.

Here is the relevant language from the Commonwealth Attorneys Act:
The Attorney General may, upon determining that it is more efficient or otherwise is 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.

If you are not defending DOMA, why are you defending Voter ID in the trial that starts Monday?

There is a key difference between the two. The Pennsylvania Voter ID law is, on its face, constitutional. My concern with the Voter ID law has always been its implementation.

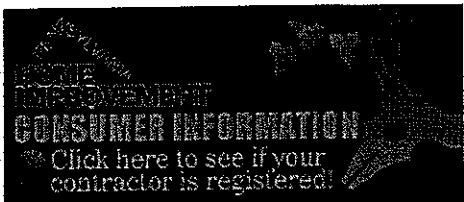
DOMA is different. DOMA is wholly unconstitutional. It cannot be fixed.

###

08/16/2013 -
State worker charged with theft

08/15/2013 -
Philadelphia man charged in \$150,000
identity theft scheme

08/15/2013 -
Berwick police officers aided by
Attorney General agents discover
apparent meth lab in Berwick



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EXHIBIT "D"



THE COMMON LAW IS THE WILL OF *Mankind* ISSUING FROM THE *Life* OF THE *People*

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JUSTICE NEWS

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FOR IMMEDIATE RELEASE

Wednesday, February 23, 2011

Statement of the Attorney General on Litigation Involving the Defense of Marriage Act

WASHINGTON – The Attorney General made the following statement today about the Department's course of action in two lawsuits, *Pedersen v. OPM* and *Windsor v. United States*, challenging Section 3 of the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as only between a man and a woman:

In the two years since this Administration took office, the Department of Justice has defended Section 3 of the Defense of Marriage Act on several occasions in federal court. Each of those cases evaluating Section 3 was considered in jurisdictions in which binding circuit court precedents hold that laws singling out people based on sexual orientation, as DOMA does, are constitutional if there is a rational basis for their enactment. While the President opposes DOMA and believes it should be repealed, the Department has defended it in court because we were able to advance reasonable arguments under that rational basis standard.

Section 3 of DOMA has now been challenged in the Second Circuit, however, which has no established or binding standard for how laws concerning sexual orientation should be treated. In these cases, the Administration faces for the first time the question of whether laws regarding sexual orientation are subject to the more permissive standard of review or whether a more rigorous standard, under which laws targeting minority groups with a history of discrimination are viewed with suspicion by the courts, should apply.

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination.

Consequently, the Department will not defend the constitutionality of Section 3 of DOMA as applied to same-sex married couples in the two cases filed in the Second Circuit. We will, however, remain parties to the cases and continue to represent the interests of the United States throughout the litigation. I have informed Members of Congress of this decision, so Members who wish to defend the statute may pursue that option. The Department will also work closely with the courts to ensure that Congress has a full and fair opportunity to participate in pending litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

The Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense. At the same time, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because – as here – the Department does not consider every such argument to be a "reasonable" one. Moreover, the Department has declined to defend a statute in cases, like this one, where the President has concluded that the statute is unconstitutional.

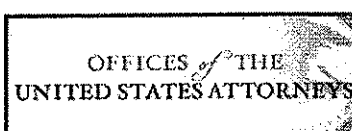
Much of the legal landscape has changed in the 15 years since Congress passed DOMA. The Supreme Court has ruled that laws criminalizing homosexual conduct are unconstitutional. Congress has repealed the military's Don't Ask, Don't Tell policy. Several lower courts have ruled DOMA itself to be unconstitutional. Section 3 of DOMA will continue to remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down, and the President has informed me that the Executive Branch will continue to enforce the law. But while both the wisdom and the legality of

JUSTICE.GOV en ESPAÑOL



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Section 3 of DOMA will continue to be the subject of both extensive litigation and public debate, this Administration will no longer assert its constitutionality in court.

11-222

Attorney General

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EXHIBIT "E"

Register of Wills and Clerk of Orphans' Court Division of Montgomery County, Pennsylvania

Number of Marriage Licenses Issued by Age of Bride and Groom

From 7/1/2013 to 7/31/2013

Age In Years	Bride	Groom
< 20	4	1
20 - 24	64	41
25 - 29	168	143
30 - 34	66	92
35 - 39	45	39
40 - 44	36	27
45 - 49	26	30
50 +	47	51
Unknown		
Total	456	424

Total Licenses Issued - 440

Issued to female couples – 25

Issued to male couples – 17

Issued to male/female couples - 398

Register of Wills and Clerk of Orphans' Court Division of Montgomery County, Pennsylvania

Number of Marriage Licenses Issued by Age of Bride and Groom
From 6/1/2013 to 6/30/2013

Age In Years	Bride	Groom
< 20	1	
20 - 24	47	28
25 - 29	152	121
30 - 34	78	99
35 - 39	17	42
40 - 44	22	21
45 - 49	21	14
50 +	38	51
Unknown		
Total	376	376

Register of Wills and Clerk of Orphans' Court Division of Montgomery County, Pennsylvania

Number of Marriage Licenses Issued by Age of Bride and Groom

From 7/1/2013 to 7/31/2013

Age In Years	Bride	Groom
< 20	4	1
20 - 24	64	41
25 - 29	168	143
30 - 34	66	92
35 - 39	45	39
40 - 44	36	27
45 - 49	26	30
50 +	47	51
Unknown		
Total	456	424

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 *** ACTIVITY REPORT ***

ST. TIME	CONNECTION TEL	CONNECTION ID	NO.	MODE	PGS.	RESULT
07/12 16:27	96102773538		3968	TRANSMIT ECM	1	OK 00'24
07/15 14:25	917179853234		3969	TRANSMIT ECM	1	OK 00'29
07/15 15:38	917177723258		3970	TRANSMIT ECM	2	OK 00'22
07/15 15:52	96102700503		3971	TRANSMIT ECM	1	OK 00'18
07/15 15:52	96102700503		3972	TRANSMIT ECM	1	OK 00'20
07/15 15:59	912155171423		3973	TRANSMIT ECM	1	OK 00'16
07/16 11:23	92773538		3974	TRANSMIT	0	NG 00'00 0 #018
07/16 11:23	92773538		3975	TRANSMIT	0	NG 00'00 0 #018
07/29 09:01	92156863019		3976	TRANSMIT ECM	1	OK 00'39
07/29 14:44	917177834820		3977	TRANSMIT	0	NG 00'04 0 STOP
07/29 14:44	917177834820		3978	TRANSMIT ECM	2	OK 00'30
08/02 13:04	916172228525		3979	TRANSMIT	0	NG 00'00 0 STOP
08/02 13:06	916172228525		3980	TRANSMIT ECM	3	OK 00'55
08/06 12:22	96102783240		3981	TRANSMIT ECM	1	OK 00'12
08/08 11:16			8565	AUTO RX ECM	1	OK 00'22
08/08 15:08	6102656167		8566	AUTO RX ECM	2	OK 01'34
08/15 16:53	917177723258		3982	TRANSMIT	0	NG 00'00 0 STOP
08/15 16:54	917177723258		3983	TRANSMIT	0	NG 00'00 0 STOP
08/15 16:54	917177723258		3984	TRANSMIT	0	NG 00'00 0 STOP
08/15 16:55	917177723258		3985	TRANSMIT ECM	2	OK 00'33



COUNTY OF MONTGOMERY

REGISTER OF WILLS
CLERK OF ORPHANS' COURT
D. BRUCE HANES, ESQ.

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JOAN H. NAGEL, ESQ.

SOLICITOR
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**REGISTER OF WILLS
AND CLERK OF ORPHANS' COURT**

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FAX: 717-772-3258 PAGES: 2
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