No. 14-3048

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DEB WHITEWOOD, *et al.*,
Plaintiffs-Appellees,

v.

MICHAEL WOLF, IN HIS OFFICIAL CAPACITY
AS SECRETARY, PENNSYLVANIA DEPARTMENT OF HEALTH, *et al.*,
Defendants,

and

THERESA SANTAI-GAFFNEY, IN HER OFFICIAL CAPACITY AS SCHUYLKILL COUNTY
CLERK OF THE ORPHANS' COURT AND REGISTER OF WILLS,
Proposed Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania (Case No. 1:13-cv-01861-JEJ)

APPELLANT THERESA SANTAI-GAFFNEY'S PETITION FOR REHEARING OR REHEARING EN BANC

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Pursuant to Federal Rules of Appellate Procedure 35 and 40 and Local Appellate Rules 35.0 and 40.0, Appellant Theresa Santai-Gaffney, in her official capacity as Schuylkill County Clerk of the Orphans' Court and Register of Wills ("Clerk Gaffney"), petitions for rehearing or rehearing en banc. Counsel believes, based on reasoned professional judgment, (1) that consideration by the full Court is necessary to maintain uniformity of decisions in this Court because the panel's decision is contrary to *Harris v. Pernsley*, 820 F.2d 592 (3d Cir. 1987), and *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346 (3d Cir. 1999), and (2) that this appeal involves a question of exceptional importance—whether the Fourteenth Amendment forbids Pennsylvania from defining marriage as a man-woman union.

BACKGROUND

Pennsylvania is one of many States that defines marriage as a man-woman union. 23 Pa. Cons. Stat. §§ 1102, 1704. Plaintiffs allege that this marital definition violates the Fourteenth Amendment of the U.S. Constitution. Plaintiffs have named as defendants (among others) Michael Wolf, Secretary of the Pennsylvania Department of Health ("Secretary Wolf"), and Donald Petrille, Jr., Clerk of the Orphans' Court and Register of Wills of Bucks County ("Clerk Petrille").

Plaintiffs named Clerk Petrille as a defendant because Clerks of the Orphans' Court and Registers of Wills ("Clerks") enforce Pennsylvania's man-

woman marriage laws. 20 Pa. Cons. Stat. § 711(19); *see also* Pls. First Am. Compl. ¶¶ 114-118 (ECF No. 64). They are charged with the statutory duty of issuing marriage licenses only to man-woman couples. *See* 20 Pa. Cons. Stat. § 711(19); 23 Pa. Cons. Stat. §§ 1102, 1704; Pls. First Am. Compl. ¶ 115 (ECF No. 64).

Unlike Clerks, Secretary Wolf—who functions as the state registrar of vital statistics and oversees the recording of completed marriage records, *see* 71 Pa. Cons. Stat. § 534(c)—has no authority to issue marriage licenses. Nor does he have power to supervise Clerks in their statutory duty to issue marriage licenses only to qualifying couples. Clerks are elected county officials who operate independently of other government officers, *see* 16 Pa. Cons. Stat. § 4301, and swear an oath to obey the law, *see* Pa. Const. art. VI, § 3. If a Clerk were to contravene her official duties, she would be subject to a fine and guilty of a misdemeanor, *see* 16 Pa. Cons. Stat. § 3411, and could possibly face a mandamus action, *see Commw., Dep't of Health v. Hanes*, 78 A.3d 676, 693-94 (Pa. Commw. Ct. 2013).

After Plaintiffs filed this suit, Pennsylvania Attorney General Kathleen Kane refused to defend the challenged laws, so Governor Tom Corbett, acting through his Office of General Counsel, initially defended the laws on behalf of Secretary Wolf. Meanwhile, Clerk Petrille filed a motion to dismiss (ECF No. 25), which was denied (ECF No. 67), and subsequently did not participate in the proceedings.

On May 20, 2014, the District Court issued an opinion concluding that Pennsylvania's man-woman marriage laws are unconstitutional. *See Whitewood v. Wolf*, --- F. Supp. 2d ---, No. 1:13-CV-1861, 2014 WL 2058105, at *15 (M.D. Pa. May 20, 2014). It also entered an order declaring those laws invalid and enjoining their enforcement. *See id.* at *16. Defendants did not appeal.

While the District Court's injunction purports to bind only Defendants, *see id.* ("**ORDER[ING]** that the Defendants are **PERMANENTLY ENJOINED** from enforcing [the challenged marriage laws]"), the District Court, consistent with its prior representation, has indicated that "all Clerks" are "subject to [its] legal mandate." Mem. Denying Mot. to Dismiss at 8 (ECF No. 67). Secretary Wolf agrees, as evidenced by his letter directing all Clerks to "perform [their] duties in accordance with the court's order." *See* Mem. Denying Mot. to Intervene at 7 (ECF No. 150) (attached as Exhibit 2) (quoting Pa. Dep't of Health, General Notice to All Clerks of the Orphans' Court (Jun. 11, 2014)). The District Court thereafter indicated that Secretary Wolf's letter correctly reflected "[t]he effect of [its] decision." *Id.* at 6.

On June 6, within the time for appealing the District Court's judgment, Clerk Gaffney—acting in her official capacity as a public officer charged with enforcing the challenged laws—moved to intervene in the District Court for the purpose of appealing. *See id.* at 2 & n.1. She also moved to stay the judgment

pending appeal. *See id.* On June 18, the District Court denied both of Clerk Gaffney's motions, *see id.* at 9-10, holding that Clerk Gaffney lacks a legal interest in this case because her duty to issue marriage licenses only to man-woman couples is "purely ministerial," *id.* at 5 (quotation marks omitted).

That day, Clerk Gaffney timely appealed from the District Court's judgment resolving the merits of Plaintiffs' claims and the order denying Clerk Gaffney's motion to intervene and motion to stay. She also asked this Court for a stay pending appeal. This Court requested that the parties address whether the appeal should be resolved through summary action. *See* L.A.R. 27.4. After the parties filed 15-page submissions discussing that issue, on July 3, the panel issued a two-sentence order stating: "For essentially the reasons set forth in the Opinion of the District Court, the order denying the motion to intervene is summarily affirmed and the appeal is dismissed. Appellant's motion for stay pending appeal is dismissed as moot." Order Dismissing Appeal at 2 (3d Cir. Jul. 3, 2014) (attached as Exhibit 1).[1] The panel thus adopted the District Court's analysis.[2]

[1] The panel summarily affirmed the District Court's denial of Clerk Gaffney's motion to intervene even though the Ninth Circuit, in a nearly identical case, acknowledged that the arguments raised by Clerk Gaffney "might have merit." *Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011); *see also id.* at 908 (Reinhardt, J., concurring).

[2] On July 3, Clerk Gaffney filed an application with Circuit Justice Samuel A. Alito, Jr., asking him to stay the District Court's judgment. Acting alone, he denied that request without analysis on July 9. *See* Order, *Santai-Gaffney v. Whitewood*, No. 14A19 (U.S. Jul. 9, 2014) (Alito, J.).

ARGUMENT

I. The Panel's Decision Conflicts with this Court's Decision in *Harris*.

In *Harris*, this Court explored the right of a public official to intervene in federal-court litigation. In its analysis, the *Harris* Court acknowledged that a government officer's interest in executing her "duties as a public official" constitutes "a *legal interest* in support of . . . interven[tion]." 820 F.2d at 597 (emphasis added). This Court then established the rule that a public "official ha[s] a sufficient interest to intervene in cases in which the subject of the suit [falls] within the scope of h[er] official duties," *id.* at 602, and similarly stated that a public official "has a sufficient interest to intervene as of right" if her official "duties . . . may be affected directly by the disposition of th[e] litigation," *id.* at 597. That has been the law in this Circuit until the panel's decision in this case.[3]

Here, Clerk Gaffney has the statutory duty to issue marriage licenses only to man-woman couples. *See* 20 Pa. Cons. Stat. § 711(19); 23 Pa. Cons. Stat. §§ 1102, 1704. That duty is directly implicated by Plaintiffs' claim that Clerks must issue marriage licenses to same-sex couples. Indeed, Plaintiffs seek to prevent Clerks

[3] *Harris* reflects not only the law in this Circuit, but also the prevailing rule among the circuits. *See, e.g.*, *Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir. 1977) ("A [public] official has a sufficient interest in adjudications which will directly affect his own duties and powers under the state laws."); *Hines v. D'Artois*, 531 F.2d 726, 738 (5th Cir. 1976) (allowing a public official "to intervene as of right" "[o]n the basis of the relation between [his] statutory duties and the claims for relief made by plaintiffs"); *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967) (permitting intervention by "the official charged with administering the state's . . . laws").

from performing their duty as prescribed by state law. The subject of this suit thus undoubtedly falls within Clerk Gaffney's official duties. And the District Court's decision unquestionably purports to abrogate Clerk Gaffney's duty to issue marriage licenses only to man-woman couples. Thus, under the principles set forth in *Harris*, Clerk Gaffney has a sufficient interest to intervene as of right.[4]

The panel, however, ignored the rule that this Court adopted in *Harris*. Instead, the panel disregarded Clerk Gaffney's legal interest because her duty to issue marriage licenses to man-woman couples is "purely ministerial." Mem. Denying Mot. to Intervene at 5 (Ex. 2) (quotation marks omitted). But neither the panel nor the District Court cited any precedent suggesting that an official whose statutory duties will be directly affected by the disposition of litigation lacks a significant interest simply because those duties are ministerial. On the contrary, a number of federal courts have concluded that officials whose ministerial duties would be affected by a lawsuit have a significant interest supporting intervention as of right. *See, e.g., Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 256 (D.N.M. 2008) ("This direct effect on what [Clerk] Coakley can . . . do as

[4] Plaintiffs' own actions in naming another Clerk as a defendant show that Clerk Gaffney has a significant interest in this litigation. Plaintiffs named a Clerk as a defendant because Clerks are the only government officials with authority to issue marriage licenses and thus are the only officials who can remedy the injury alleged by the couples who seek to enter into marriages in Pennsylvania. *See* Pls. First Am. Compl. ¶¶ 114-118 (ECF No. 64). Plaintiffs have thus implicitly conceded that Clerk Gaffney has a sufficient interest to intervene here.

a county clerk is the direct and substantial effect that is recognized as a legally protected interest under [R]ule 24(a)."); *Bogaert v. Land*, No. 1:08-CV-687, 2008 WL 2952006, at *2-3 (W.D. Mich. July 29, 2008) (permitting county officials to intervene where plaintiffs sought an injunction that might change those officials' obligations). The panel thus erred in disregarding the rule established in *Harris* and in resting its decision on a novel consideration like the ministerial nature of Clerk Gaffney's duty to issue marriage licenses only to qualifying couples.[5]

The panel apparently believed that the ministerial nature of Clerk Gaffney's duty renders her legal interest insignificant because her job is simply to "comply with the current state of the law" and "ensure that she applies the correct current [legal] requirements." Mem. Denying Mot. to Intervene at 5 (Ex. 2).[6] Yet a nonspecific duty "to comply with the current state of the law" and "the correct current [legal] requirements" is a duty of *all* public officers litigating in their official capacities. So if this were a disqualifying factor, government officials

[5] Just as this Court, sitting en banc, has concluded that a county official is a proper defendant even though her "duties . . . are entirely ministerial," *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (en banc), so too a public official is a proper intervenor-defendant even though her duties are ministerial. This Court has never suggested otherwise.

[6] This reasoning begs the question of what "the current state of the law" is. It assumes that the District Court's constitutional interpretation is correct and that a lone district-court judge can definitively resolve the important constitutional question raised in this case. In contrast, Clerk Gaffney's appeal attempts to move beyond begging this question about the current state of the law and decisively settle it.

could *never* intervene to defend the laws that they enforce. The analysis adopted by the panel, then, would effectively prohibit intervention by all public officials. That, however, directly conflicts with the rule that this Court established in *Harris*.

The panel also discounted Clerk Gaffney's duty because its ministerial nature means that she does not exercise or implement her "opinion concerning the propriety or impropriety of the act to be performed." Mem. Denying Mot. to Intervene at 5 (Ex. 2) (quotation marks omitted). The panel, in other words, faulted Clerk Gaffney because she does not implement her personal or private beliefs about the challenged marriage laws. This reasoning overlooks that Clerk Gaffney intervened *not* in her capacity as a private citizen, but in her official capacity as a public officer charged with enforcing the challenged marriage laws. A public official litigating in her "official capacity" is acting *not* on her own behalf, but on behalf of her "office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). State law charges Clerk Gaffney's office with the duty to issue marriage licenses only to man-woman couples. Her official interest is in effectuating that duty. Her private interests (or lack thereof) are thus irrelevant when assessing the sufficiency of her official interest in this case.

Furthermore, the panel's unprecedented rule regarding ministerial duties and intervention would bring about absurd results, like forbidding intervention by public officials similarly situated to Defendants. If, for example, Clerks were the

only defendants named here, the panel's logic would preclude Secretary Wolf from intervening because his marriage-related duties (no less than Clerk Gaffney's) are ministerial. His duties—to furnish record forms, *see* 23 Pa. Cons. Stat. § 1106(b), and to oversee the registration of completed marriage records, *see* 71 Pa. Cons. Stat. § 534(c)—are performed in a prescribed manner and executed without discretion. Yet these characteristics of his duties do not disqualify his interest in this case. Alternatively, had Plaintiffs sued only Secretary Wolf, Plaintiffs' arguments would prohibit intervention by any Clerk, even though Plaintiffs, by naming Clerk Petrille, admit that Clerks are proper defendants to this lawsuit, and even though Clerks are the *only* public officials authorized to provide the relief (a marriage license) sought by Plaintiffs who want to marry in the Commonwealth.

The direct conflict between the intervention rule that this Court adopted in *Harris* and the panel's decision here is not diminished by the *Harris* Court's decision to deny the intervention request at issue there. In *Harris*, the Philadelphia District Attorney sought "to intervene to litigate whether the conditions in [local] prison[s] [were] unconstitutional." 820 F.2d at 599-600. This Court rejected that request because "[t]he District Attorney . . . ha[d] no legal duties or powers with regard to . . . the administration of the prisons." *Id.* at 600. Here, however, Clerk Gaffney's legal duties—specifically, the duty to issue marriage licenses only to man-woman couples—include administering the marriage laws. She, then, unlike

the District Attorney in *Harris*, has the right to intervene here.[7] Thus, the intervention rule established in *Harris* (not the denial of the District Attorney's intervention request) controls here, and the panel's decision conflicts with it.

The panel also appeared to discredit Clerk Gaffney's interest based on its suggestion that she is supervised by Secretary Wolf when she issues marriage licenses. *See* Mem. Denying Mot. to Intervene at 6-7 (Ex. 2). This inflated view of Secretary Wolf's authority is mistaken. While Secretary Wolf has statewide authority over "the registration of . . . marriages," 71 Pa. Cons. Stat. § 534(c), that supervisory power applies only to the "act of recording" completed marriage records, *see* Black's Law Dictionary 1310 (8th ed. 2004) (defining "registration"); *e.g.*, 23 Pa. Cons. Stat. § 1106. It does not authorize Secretary Wolf to supervise Clerks when they issue licenses that permit couples to marry. More importantly, though, even if Secretary Wolf had such supervisory authority over Clerk Gaffney,

[7] In addition, the interests that the District Attorney asserted in *Harris*—his interests in prosecuting crime—were only indirectly affected by an order altering prison conditions. He claimed, for example, that the trial court's "decree may result in some people not appearing for their scheduled trial dates," but such indirect "by-product[s]," this Court concluded, were "not sufficient to give the District Attorney the right to become a party." *Harris*, 820 U.S. at 602. Yet here, the District Court has indicated that its judgment has the effect of requiring Clerk Gaffney to violate her statutory duty to issue marriage licenses only to man-woman couples. *See* Mem. Denying Mot. to Intervene at 6-7 (Exhibit 2). The District Court's judgment thus directly affects Clerk Gaffney's duty. This "direct" (as opposed to "remote") effect on Clerk Gaffney's interest—not the ministerial nature of that interest—is "always" "the polestar for evaluating a claim for intervention." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998).

that would not eliminate Clerk Gaffney's legal interest here. In fact, a public official with specific statutory authority to remedy Plaintiffs' alleged injury (the inability to obtain a marriage license) has a *stronger* interest in appearing as a party-defendant than that official's supervisor does. *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) ("[G]eneral supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit."); *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993) ("General authority to enforce the laws . . . is not sufficient to make government officials the proper parties to litigation challenging [a] law."). Because only Clerks can provide the relief requested by Plaintiffs who want to marry in Pennsylvania, Clerk Gaffney's interest is *more* substantial than any interest of Secretary Wolf.

For these reasons, the panel erred in concluding that Clerk Gaffney lacks a sufficient interest to intervene in this case, and its decision conflicts with *Harris*.[8]

[8] Other than a sufficient interest, the remaining requirements for intervention as of right—(1) timeliness, (2) practical impairment of the applicant's ability to protect her interest, and (3) inadequate representation of the applicant's interests by existing parties, *see* Fed. R. Civ. P. 24(a)(2)—are plainly satisfied here. First, "post-judgment intervention for the purpose of appeal" is timely when a proposed intervenor "file[s] her motion within the time period in which the named [parties] could have taken an appeal." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977). Because Clerk Gaffney filed her intervention motion within that period, the timeliness requirement is satisfied. Second, Clerk Gaffney's ability to protect her legal interest in enforcing Pennsylvania's man-woman marriage laws would undoubtedly be impaired if she were not able to intervene. Third,

II. The Panel's Decision Conflicts with this Court's Decision in *Northview Motors*.

The panel incorrectly assumed that if Clerk Gaffney lacks a sufficient interest to intervene, this Court cannot decide the important substantive question raised in this appeal: whether the Fourteenth Amendment forbids Pennsylvania from defining marriage as a man-woman union. "[T]his Court has recognized that a nonparty may bring an appeal when three conditions are met: (1) the nonparty has a stake in the outcome of the proceedings . . . ; (2) the nonparty has participated in the proceedings before the district court; and (3) the equities favor the appeal." *Northview Motors*, 186 F.3d at 349; *accord Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 836 (3d Cir. 1995). All three of these conditions are satisfied here.

First, Clerk Gaffney (litigating in her official capacity) has a direct stake in the outcome of these proceedings—that is, she has standing to pursue this appeal. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (stating that litigants have standing to appeal where they "possess a 'direct stake in the outcome' of the

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Defendants did not appeal the District Court's order and thus do not adequately represent Clerk Gaffney's interests. *See Associated Builders & Contractors v. Perry*, 115 F.3d 386, 391 (6th Cir. 1997). When analyzing that final consideration—the inadequate-representation requirement—the panel concluded that Clerk Gaffney cannot "claim that her rights and interests were not represented by the Defendants" "because [she] has no protectable interest." Mem. Denying Mot. to Intervene at 7 (Exhibit 2). Yet that conclusion sidesteps the required analysis and contravenes this Court's clear directive "not to blur the interest and representation factors together." *Kleissler*, 157 F.3d at 972.

case"). A government official like Clerk Gaffney "has standing to defend the constitutionality of [the] statute[s]" that she enforces. *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *see also Maine v. Taylor*, 477 U.S. 131, 137 (1986). Here, the District Court has indicated that the effect of its decision is to forbid Clerk Gaffney from executing her statutory duty to issue marriage licenses only to man-woman couples. *See* Mem. Denying Mot. to Intervene at 6-7 (Ex. 2). This judicial nullification of her statutory duty affords Clerk Gaffney (in her official capacity) a direct stake in the outcome of this appeal. *See Cobb v. Aytch*, 539 F.2d 297, 299-300 (3d Cir. 1976) (concluding that a county official who was not formally bound by a court order had standing to appeal because that order hindered his ability to carry out his statutory duties); *see also In re Piper Funds, Inc., Institutional Gov't Income Portfolio Litig.*, 71 F.3d 298, 301 (8th Cir. 1995) ("A nonparty normally has standing to appeal when it is adversely affected by an injunction.").

The Supreme Court's recent analysis in *Hollingsworth* confirms Clerk Gaffney's standing. The *Hollingsworth* Court held that a private nonprofit group and individual proponents of California's man-woman marriage law lacked standing to appeal a decision invalidating that law. 133 S. Ct. at 2668. The Court reasoned that the appellants there did not "possess a 'direct stake in the outcome' . . . of their appeal" because "the District Court had not ordered them to do or refrain from doing anything." *Id.* at 2662. Here, however, the District Court has

indicated that the effect of its order is to forbid Clerk Gaffney from effectuating her statutory duty to issue marriage licenses only to man-woman couples. *See* Mem. Denying Mot. to Intervene at 6-7 (Ex. 2). Hence, Clerk Gaffney has a direct stake in this appeal. In addition, the *Hollingsworth* Court observed that an appellant who has "no role—special or otherwise—in the enforcement of [the challenged law]" has "no 'personal stake' in defending its enforcement." *Hollingsworth*, 133 S. Ct. at 2663. But here, Clerk Gaffney has an undeniable role in enforcing Pennsylvania's man-woman marriage laws. Therefore, she, unlike the private citizens in *Hollingsworth*, has standing to defend those laws' enforcement.

Second, Clerk Gaffney participated in the proceedings before the district court. Throughout most of those proceedings, at least one of Defendants was actively defending Pennsylvania's man-woman marriage laws, so the need for Clerk Gaffney to intervene did not arise until she found out that no Defendant would appeal the District Court's judgment. Promptly after learning that (and well within the period for filing an appeal), she moved to intervene in order to protect her interests, which were no longer represented by Defendants. This prompt intervention effort—particularly when combined with her motion to stay the judgment (which opposed the legal basis for Plaintiffs' claims)—satisfies the requirement that Clerk Gaffney must have participated "in some way" in the district-court proceedings. *See Caplan*, 68 F.3d at 836 (requiring that "the non-

party has participated *in some way* in the proceedings before the district court" (emphasis added)); *Northview Motors*, 186 F.3d at 349 ("[N]onparty's filing of brief [in the district court] . . . satisfied participation requirement . . . .").

Third, the equities favor hearing this appeal. Because Clerk Gaffney timely appealed both the denial of intervention and the order invalidating Pennsylvania's man-woman marriage laws, this case presents one of the most important constitutional questions of our time—whether States like Pennsylvania may maintain man-woman marriage—a question that (in the context of another State) the Supreme Court has already deemed worthy of certiorari review. *See Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). It would be unjust to insulate from appellate review a trial-court decision resolving that important issue.

III. This Appeal Involves a Question of Exceptional Importance.

As explained in the prior paragraph, this appeal presents a constitutional question of exceptional importance regarding the right of States like Pennsylvania to define marriage as they always have—as the union of one man and one woman. That pressing issue warrants full review by this Court.

CONCLUSION

For the foregoing reasons, Clerk Gaffney respectfully requests that the panel rehear this appeal or that the full Court rehear this appeal en banc.

Respectfully submitted this 17th day of July, 2014.

s/ Byron J. Babione

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Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I electronically filed the foregoing document and attached exhibits with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: July 17, 2014

s/ Byron J. Babione
Byron J. Babione
Counsel for Appellant

Index of Exhibits

Title	Exhibit #
Order Dismissing Appeal, *Whitewood v. Wolf*, No. 14-3048 (3d Cir. Jul. 3, 2014)	1
Memorandum and Order Denying Motion to Intervene, *Whitewood v. Wolf*, No. 1:13-CV-1861 (M.D. Pa. June 18, 2014)	2

Exhibit 1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 26, 2014
CCO-096E

No. 14-3048

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

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF HEALTH; DONALD PETRILLE, JR., in his official capacity as Register of Wills and Clerk of Orphans' Court of Bucks County; DAN MEUSER

*Theresa Santai-Gaffney,
Appellant

(*Pursuant to Fed. R. App. P. 12(a))

(M.D. Pa. No. 1-13-cv-01861)

Present: FUENTES, JORDAN and SHWARTZ, Circuit Judges

1. Clerk Order Dated 6/18/14 for a Determination of Summary Action.

2. Motion by Appellant Theresa Santai-Gaffney for Stay Pending Appeal.

3. Response by Appellees Dan Meuser and Secretary Department of Health to the 6/18/14 Clerk Order Listing Case for Possible Summary Action.

4. Response by Appellee Deb Whitewood to the 6/18/14 Clerk Order Listing Case for Possible Summary Action.

5. Response by Appellee Deb Whitewood to Appellant's Motion for Stay Pending Appeal.

6. Appellant Theresa Santai-Gaffney's Opposition to Summary Action.

7. Appellant Theresa Santai-Gaffney's Reply in Support of Motion for Stay Pending Appeal.

Respectfully,
Clerk/tmk

ORDER

For essentially the reasons set forth in the Opinion of the District Court, the order denying the motion to intervene is summarily affirmed and the appeal is dismissed. Appellant's motion for stay pending appeal is dismissed as moot.

By the Court,

s/ Patty Shwartz
Circuit Judge

Dated: July 3, 2014
tmk/cc: all counsel of record

Exhibit 2

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

DEB WHITEWOOD, *et al.*,	:	1:13-cv-1861
Plaintiffs,	:	
	:	Hon. John E. Jones III
v.	:	
MICHAEL WOLF, *in his official capacity as Secretary, Pennsylvania Department of Health, et al.*,	:	
Defendants.	:	

MEMORANDUM AND ORDER

June 18, 2014

Presently pending before the Court is the post-judgment Motion for Intervention of Proposed Intervenor-Defendant, Theresa Santai-Gaffney, Schuylkill County Clerk of the Orphans' Court and Register of Wills (hereinafter "Santai-Gaffney"). (Doc. 139). For the reasons that follow, the Motion shall be denied.

I. BACKGROUND

By Memorandum Opinion and Order dated May 20, 2014, we declared as unconstitutional two Pennsylvania statutes that prohibited and refused to recognize same-sex marriages (collectively "the Marriage Laws") and permanently enjoined their enforcement. (Docs. 133 and 134). On the following day, the

Governor of the Commonwealth announced that the state Defendants would not appeal the decision. In excess of two weeks following that announcement, Santai-Gaffney filed the instant Motion seeking to intervene in this matter for purposes of filing an appeal of our decision to the United States Court of Appeals for the Third Circuit.[1]

II. DISCUSSION

Santai-Gaffney seeks to intervene pursuant to Federal Rule of Civil Procedure 24(a), providing for intervention of right, and 24(b), outlining permissive intervention. Neither path is successful for Santai-Gaffney, for the reasons set forth hereinafter.

A. Intervention of Right

For intervention of right, the Federal Rules of Civil Procedure relevantly provide that,

> [o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

[1] Santai-Gaffney also filed a Motion to Stay our decision pending her proposed appeal. (Doc. 141). Because we shall deny Santai-Gaffney's intervention request, we need not address the Motion to Stay.

FED. R. CIV. P. 24(a)(2). The Third Circuit has interpreted that a movant must demonstrate four elements to meet this standard: (1) a timely filing seeking leave to intervene; (2) a sufficient interest in the proceeding; (3) danger that the interest will be impaired or affected, for practical purposes, by the disposition of the underlying matter; and (4) that existing parties to the suit do not adequately represent the movant's interest. *See, e.g.*, *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005) (citing *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998)).

Since the motion is not technically untimely, we begin by assessing the sufficiency of the interest asserted by Santai-Gaffney.[2] Although courts have struggled to explicitly define the nature of the interest required for intervention of right, *see Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995), the Third Circuit has issued some general guidance. To meet this prong of the test, a prospective intervenor must fundamentally demonstrate that her interest relates to the subject of the underlying proceeding, *i.e.*, that it is "significantly protectable." *Kleissler*, 157 F.3d at 969 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)) (internal quotation marks

[2] We do, however, reiterate that Santai-Gaffney waited until the appeal period was halfway expired to file the instant Motion for the purpose of filing an appeal to the Third Circuit.

omitted). The asserted interest must be "a cognizable legal interest, and not simply an interest 'of a general and indefinite character.'" *Brody By and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1116 (3d Cir. 1992) (quoting *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987)) (internal quotation marks omitted); *see Treesdale, Inc.*, 419 F.3d at 220-21; *Mountain Top Condo. Ass'n*, 72 F.3d at 366. *But see Benjamin ex rel. Yock v. DPW of Pa.*, 701 F.3d 938, 951 (3d Cir. 2012) ("A proposed intervenor's interest need not be a legal interest, provided that he or she 'will be practically disadvantaged by the disposition of the action.'" (quoting, indirectly, 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1908 (2d ed. 1986)). Furthermore, the interest must be direct. As the Court in *Kleissler* stated,

> the polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote. Due regard for efficient conduct of the litigation requires that intervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated.

Kleissler, 157 F.3d at 972.

Santai-Gaffney contends that she has a significantly protectable interest in discharging her marriage-related duties and enforcing the Marriage Laws. She

specifically argues that because her "rights and duties" are affected by our declaration that the Marriage Law are unconstitutional that she must be permitted to intervene. These arguments fall far short of the mark.

Santai-Gaffney is the Clerk of the Orphan's Court and Register of Wills for Schuylkill County. Santai-Gaffney, who is elected to serve the Commonwealth in this capacity, issues marriage licenses to couples seeking to celebrate their civil marriage in the Commonwealth. As clarified by the Commonwealth Court, this duty is "purely ministerial," *Department of Health v. Hanes*, 78 A.3d 676, 686-88 (Pa. Commw. Ct. 2013) meaning that Santai-Gaffney must perform her duties "in a prescribed manner in obedience to the mandate of legal authority and without regard to [her] own judgment or opinion concerning the propriety or impropriety of the act to be performed." *Council of City of Phila. v. Street*, 856 A. 2d 893, 896 (Pa. Commw. Ct. 2014). Simply stated, Santai-Gaffney's "rights and duties" are to comply with the current state of the law, and she may not exercise any independent judgment when issuing marriage licenses. Thus, Santai-Gaffney's only interest in the outcome action is that she must ensure that she applies the correct current requirements when issuing marriage licenses in the performance of her official duties.

Santai-Gaffney next argues that she must intervene because, in the wake of our decision and the Governor's decision not to appeal, the state of the Marriage Laws and the scope of her duties have become unclear. Nothing could be further from the truth.

On May 20, 2014, we issued an Order declaring that the Marriage Laws are unconstitutional because they violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. We thus permanently enjoined the Defendants, including the Secretary of Health, from enforcing the laws. We did not stay our mandate. The state Defendants, through an announcement made by the Governor of the Commonwealth of Pennsylvania, decided almost immediately to forgo an appeal of both the decision and the permanent injunction. As a result, same-sex couples in the Commonwealth of Pennsylvania may marry, and their existing marriages performed in other jurisdictions must be recognized by the Commonwealth. Our decision was entirely unequivocal, as was the Governor's decision not to appeal.

The effect of our decision on Santai-Gaffney's "rights and duties" in her role as Clerk of the Orphans' Court was further clarified by a Notice issued on June 11, 2014 by the Department of Health to all Clerks of the Orphans' Courts:

> The decision in *Whitewood* requires every government official who administers the Marriage Law - ***including every clerk of the orphans' court*** - to perform his or her duties in accordance with the court's order. That means that a clerk of the orphans' court must consider applications for the issuance of a marriage license ***without regard to the gender of the applicants***.

See Pa. Dep't of Health, General Notice to All Clerks of the Orphans' Court (June 11, 2014) (Doc. 146, Ex. C) (emphasis in original; footnote omitted). There is simply no unclarity in the current status of the laws governing the issuance of marriage licenses in Pennsylvania, and Santai-Gaffney can claim no confusion. This specious argument is rejected.

Finally, because Santai-Gaffney has no protectable interest in the constitutionality of the Marriage Laws, she cannot successfully claim that her rights and interests were not represented by the Defendants to the action. Indeed and as aforestated, in her capacity as Clerk of the Orphans' Court and Register of Wills, Santai-Gaffney has no interest in the merits of the outcome of the case. To reiterate, Santai-Gaffney serves a ministerial role in which she may exercise no independent judgment relative to issuing marriage licenses. Thus Santai-Gaffney fails to carry the final intervention factor.[3]

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[3] Santai-Gaffney tries to bootstrap her proposed intervention on the fact that Donald Petrille, Jr., Register of Wills of Bucks County, was named as a defendant in this case. Notably however, Petrille was treated as only a nominal defendant throughout the case. By virtue of a stipulation among the parties, he did not participate in any meaningful way following the disposition of the motion to dismiss precisely because he had no interest in the outcome.

B. Permissive Intervention

Turning to permissive intervention, a court may allow anyone to intervene who files a timely motion and, *inter alia*, "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). In making this determination, a court is required to consider whether intervention will "unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3); *see also* 6 MOORE'S FEDERAL PRACTICE - CIVIL § 24.10 ("In essence, considerations of trial convenience dominate the question of whether to allow permissive intervention."). "[A]s the doctrine's name suggests, [it] is within the discretion of the district court" whether to grant permissive intervention. *Brody*, 957 F.2d at 1124.

It is in the context of permissive intervention that Santai-Gaffney's true motives are revealed, for she seeks permissive intervention on the basis that "a comprehensive defense of Pennsylvania's Marriage Laws before the appellate courts is desirable to ensure that the important constitutional question raised in this case is properly refined by the crucible of appellate review." (Doc. 140, p. 26). Here, Santai-Gaffney is clearly speaking as a private citizen, and not in her capacity as Register of Wills. In this sense Santai-Gaffney evinces personal

disagreement with our ruling. But this does not confer license to intervene and to appeal the same, given the fact that the Governor of the Commonwealth, who also personally disagrees with our decision, has after obviously careful consideration decided not to appeal. If the highest elected official in the Commonwealth chooses to abide by our decision, it defies credulity that we would permit a single citizen to stand in for him to perfect an appeal.

This Court respects Santai-Gaffney's evidently deep personal disagreement with our decision to strike down the Marriage Laws. That said, we lament that she has used her office as a platform to file the Motion we dispose of today. To repeat – there is nothing remotely ambiguous about how Santai-Gaffney must perform her duties relative to issuing marriage licenses. For her to represent otherwise is wholly disingenuous. At bottom, we have before us a contrived legal argument by a private citizen who seeks to accomplish what the chief executive of the Commonwealth, in his wisdom, has declined to do.

Accordingly, the Court will deny Santai-Gaffney's Motion, both as to intervention of right and permissive intervention.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT

1. Motion for Intervention of Proposed Intervenor-Defendant, Theresa Santai-Gaffney, Schuylkill County Clerk of the Orphans' Court and Register of Wills (Doc. 139) is **DENIED**.

2. Proposed Intervenor's Motion to Stay (Doc. 141) is **DISMISSED AS MOOT**.

John E. Jones III
United States District Judge