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.	:	

INTERVENOR'S BRIEF IN SUPPORT OF MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Statutes and Constitutional Provisions*:**

***Other Authorities*:**

INTERVENOR'S BRIEF IN SUPPORT OF MOTION TO INTERVENE

Proposed Intervenor-Defendant, Theresa Santai-Gaffney, in her official capacity as Schuylkill County Clerk of the Orphans' Court and Register of Wills ("Clerk Gaffney"), by and through counsel, respectfully submits this Memorandum of Law in Support of Motion to Intervene.

PROCEDURAL HISTORY

Plaintiffs have sought, pursuant to 42 U.S.C. § 1983, a declaration that Pennsylvania Consolidated Statutes Annotated §§ 1102 and 1704, ("Pennsylvania's Marriage Laws") are unconstitutional. Plaintiffs claim that Pennsylvania's Marriage Laws, which define marriage as between one man and one woman, violate their rights to due process and equal protection under the United States Constitution. Consequently, Plaintiffs have requested statewide preliminary and permanent injunctions enjoining the enforcement of those laws.

Plaintiffs had originally named as defendants in their official capacities Governor Thomas Corbett, Attorney General Kathleen Kane, Register of Wills and Clerk of the Orphans Court of Washington County, Mary Jo Poknis, and Register of Wills and Clerk of the Orphans Court of Bucks County, Donald Petrille, Jr. By agreement, Plaintiffs dismissed Governor Thomas Corbett, Attorney General Kathleen Kane, and Register of Wills and Clerk of the Orphans Court of Washington County, Mary Jo Poknis, and added as defendants in their official

capacities Michael Wolf, Secretary of the Department of Health, and Dan Meuser, Secretary of the Department of Revenue. While the added defendants initially defended the challenged laws, Defendant Petrille took no position on the merits. Dckt. Nos. 101, 102.

The parties filed Motions for Summary Judgment, and on May 20, 2014, the Court issued its opinion granting Plaintiffs' Motion for Summary Judgment along with the declarative and injunctive relief sought (hereinafter referring to the Court's order as "Injunction"). Dckt. Nos. 133, 134. The named defendants have either publicly stated that they do not plan to appeal the case or have entered a stipulation agreeing to no further participation. Thus, none of the current defendants intend to appeal.

STATEMENT OF FACTS

The people of Pennsylvania, through the passage of Pennsylvania's Marriage Laws, have maintained marriage as a legal union between one man and one woman. *See*, *e.g.*, 23 Pa.C.S.A. §§ 1102 ("'Marriage.' A civil contract by which one man and one woman take each other for husband and wife.") and 1704 ("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.").

In Pennsylvania, Clerks of the Orphans Court and Registers of Wills (hereinafter "clerk" or "clerks") are responsible for ensuring compliance with Pennsylvania's Marriage Laws and for issuing marriage licenses pursuant to those laws. *See* 20 Pa.C.S.A. § 711(19) ("Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans' court division) and section 713 (relating to special provisions for Philadelphia County), the 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."); 72 Pa.C.S.A. § 612 ("Clerks of the orphans' courts shall continue to be the agents of the Commonwealth for the collection of the fees payable to the Commonwealth for the issuance of marriage licenses as provided by law, but they shall make their returns to the Department of Revenue, and pay the fees collected to the State Treasurer, through the Department of Revenue, as provided in this act.").

Even so, each Register of Wills and Clerk of the Orphans' Court is an independently elected official who operates independently of other government officials. *See* 16 Pa.C.S.A. § 4301 ("At the municipal election preceding the expiration of the term of office of any prothonotary, clerk of the court of quarter

sessions, clerk of the court of oyer and terminer, register of wills, clerk of the orphans' court or recorder of deeds of the county and quadrennially thereafter, the electors of the county shall elect a person to fill such office from the first Monday of January next succeeding such election, for a term of four years and until his successor is elected and qualified."). Thus, each clerk and register must, before taking office, swear an oath to obey and defend the laws of both the United States and the Commonwealth of Pennsylvania. *See* Pa. Const. art. 6, § 3 ("I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity."). The Register of Wills and Clerk of the Orphans' Court, therefore, must enforce Pennsylvania's Marriage Laws—indeed, if a clerk were to contravene his or her sworn duty in this regard, he or she would be subject to a fine and guilty of a misdemeanor. 16 Pa.C.S.A. § 3411 ("If any county officer neglects or refuses to perform any duty imposed on him by the provisions of this act or by the provisions of any other act ... , he shall, for each such neglect or refusal, be guilty of a misdemeanor, and, on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500)"). In addition, if a clerk fails to carry out the specific requirements concerning the issuance of marriage licenses, he or she may be subject to a mandamus action to enjoin him or her from issuing licenses contrary to law. *See Com., Dept. of Health*

v. Hanes, 78 A.3d 676 (Pa. Cmwlth. 2013) (defendant Hanes, a county Register of Wills, issued numerous same-sex marriage licenses contrary to Pennsylvania law and was enjoined from doing so via order of the Commonwealth Court).

STATEMENT OF THE QUESTION INVOLVED

Whether Clerk Gaffney should be permitted to intervene under Federal Rule of Civil Procedure 24(a) and/or 24(b)?

Suggested Answer: Yes.

ARGUMENT

Federal Rule of Civil Procedure 24(a)(2) provides 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.

In the Third Circuit this rule has been interpreted such that a person must be permitted to intervene if "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987) (citing *Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir. 1976)). While "these requirements are intertwined, each must be met to intervene as of right." *Harris*, 820 F.2d at 596 (citations omitted).

In addition to intervention of right, Federal Rule of Civil Procedure 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." In the exercise of its discretion under this permissive intervention rule, a court must consider whether permissive intervention "will unduly delay or prejudice the adjudication of the original parties' rights." Fed R. Civ. P. 24(b)(3). In this case, Clerk Gaffney satisfies all the requirements for both intervention as of right and permissive intervention.

I. CLERK GAFFNEY IS ENTITLED TO INTERVENE AS OF RIGHT

A. The Application is Timely

"The critical inquiry" when "permitting post-judgment intervention for the purpose of appeal" is "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977). In general, when a proposed intervenor "file[s] her motion within the time period in which the named [parties] could have taken an appeal," courts conclude that the "motion to intervene [i]s timely filed." *Id.* at 396. Because this motion has been filed within the time during which the named defendants could have pursued an appeal, the Court should conclude that the timeliness requirement is satisfied here.

More broadly, the Third Circuit considers the following three factors when determining whether the intervention motion is timely: "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Benjamin ex rel. Yock v. Depart. of Pub. Welfare of Pa.*, 701 F.3d 938, 949 (3d Cir. 2012) (citations omitted). Additionally, "[t]here is a general reluctance to dispose of a motion to intervene as of right on untimeliness grounds because the would-be intervenor actually may be seriously harmed if not allowed to intervene. The delay should be measured from the time the proposed intervenor knows or should have known of the alleged risks to his or her rights or the purported representative's shortcomings." *Id.* at 949-50 (citations omitted).

1. The stage of the proceeding favors granting intervention.

Courts have routinely permitted intervention *after* judgment has been entered. *See, e.g., United Airlines*, 432 U.S. at 395 (collecting cases permitting post-judgment intervention); *Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 387 (4th Cir. 1982) (vacating a district court order denying intervention and stating that "[t]o the extent any more stringent standard for intervention following judgment is warranted . . . it must be based upon heightened prejudice to the parties and more substantial interference with the orderly process of the court in that context," and further concluding that "[i]f neither of these results would occur the mere fact that judgment already has been entered should not by itself require an application for

intervention to be denied." (quotation marks and citations omitted)); *United States Cas. Co. v. Taylor*, 64 F.2d 521, 526 (4th Cir. 1933) (permitting intervention after judgment and noting that such intervention is proper "if the party applying for intervention has a direct legal interest in the pending litigation"); *United States v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (concluding that a post-judgment motion to intervene by a government party was timely); *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118 (D.C. Cir. 1972) (permitting intervention after judgment was rendered); *Pellegrino v. Nesbit*, 203 F.2d 463, 465-66 (9th Cir. 1953) ("Intervention should be allowed even after a final judgment where it is necessary to preserve some right . . . [such as] the right to appeal from the judgments entered on the merits by the District Court.").

Under the stage-of-the-proceeding factor, Clerk Gaffney's motion is timely because it will not result in any delay or prejudice to the parties or the Court. Although the Injunction has been issued, Intervenor is merely seeking what Defendants could have sought (*i.e.*, an appeal and a stay during appeal) if they had not abandoned the defense of this action. Thus, Clerk Gaffney should be allowed to intervene.

2. There is no chance of prejudice to parties by delay.

Due to the fact that intervention is for the limited purpose of appeal and not to relitigate anything before this Court, there is no possibility that the litigation will

be delayed. Because granting this motion will not delay the litigation, no party can credibly claim that delay is likely to harm its interests.

3. There is no delay in the intervention.

As stated above, it is well settled that the delay, if any, should be measured from the time the proposed intervenor knew or should have known of the alleged risks to his or her rights or the purported representative's shortcomings. In this case, the shortcomings of the existing defendants' ability to represent Clerk Gaffney's interests were not known until a few weeks ago (May 21, 2014) when the Governor declared his intention not to appeal. Thus, this request for intervention—filed well within the time for appeal—has not been delayed in the slightest.

Furthermore, in this exact context of marriage litigation, where the representative government defendant suddenly decides to stop defending the constitutionality of the state's marriage laws, the District Court for the Eastern District of Virginia has permitted intervention by a government official in charge of issuing marriage licenses even at a late stage in the district court litigation. *See Bostic v. Rainey*, No. 2:13-cv-395, Dckt. 91 (E.D. Va. Jan 17, 2014) (permitting intervention of government official responsible for issuing marriage licenses just before summary-judgment oral argument).

Consequently, because each of the three factors are squarely in Clerk Gaffney's favor, the request for intervention satisfies the timeliness element.

B. Clerk Gaffney Has Significantly Protectable Interests in the Subject Matter of this Action

Clerk Gaffney has myriad significantly protectable interests in the subject matter of this litigation. *See U.S. ex rel. Frank M. Sheesley Co. v. St. Paul Fire and Marine Ins. Co.*, 239 R.R.D. 404, 409 (W.D. Pa. 2006) ("The interest at stake must be 'significantly protectable,' which binding precedent interprets to mean 'a legal interest as distinguished from interests of a general and indefinite character.' *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir.1987)").

Plaintiffs themselves implicitly concede, by naming Register of Wills of Washington County, Mary Jo Poknis, and Register of Wills and Clerk of Orphans' Court of Bucks County, Donald Petrille, Jr., in this action that the county registers responsible for issuing marriage licenses in the Commonwealth of Pennsylvania each have a significantly protectable interest in litigation challenging the constitutionality of Pennsylvania's Marriage Laws. Indeed, Plaintiffs recognize in their Amended Complaint that "[i]n each county in the Commonwealth, either the county Register of Wills or the county Clerk of Orphans' Court issues marriage

licenses." First Am. Compl. ¶ 15 (Dckt. No. 64).[1] That is true of Clerk Gaffney with respect to Schuylkill County.

As the public official in Schuylkill County charged with enforcing Pennsylvania's Marriage Laws, Clerk Gaffney has a significantly protectable interest in discharging her marriage-related duties and enforcing Pennsylvania's Marriage Laws. As detailed above, county registers are independently elected officers in Pennsylvania, duty-sworn to ensure, among other things, that Pennsylvania's Marriage Laws are properly enforced and administered. *See* 16 Pa.C.S.A. § 4301; Pa. Const. art. 6, § 3. Clerk Gaffney may not issue marriage licenses without first ensuring that all statutory requirements have been met, and any failure on this score could subject her to conviction of a misdemeanor and fines. *See* 16 Pa.C.S.A. § 3411.

[1] County clerks in many sister states perform analogous marriage functions to Pennsylvania Register of Wills/Clerk of Orphans' Court, and are thus frequently defendants in same-sex marriage litigation. *See, e.g.*, *Smelt v. County of Orange*,447 F.3d 673 (9th Cir. 2006) (lawsuit against Orange County clerk for injunction and declaratory relief establishing that California law prohibiting same-sex marriage was unconstitutional); *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. 2014) (Circuit Clerk of Norfolk named as initial defendant and another Circuit Clerk subsequently intervened to defend the constitutionality of Virginia's marriage laws); *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004) (county clerks sued for unlawfully issuing marriage licenses to same-sex couples); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (same-sex couples sue county clerks for refusing to issue marriage licenses); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (same).

Given these responsibilities borne by Clerk Gaffney with respect to marriage in Pennsylvania, she easily meets the interest test here. *See Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (in a suit "brought to require compliance with federal statutes regulating governmental projects," noting that the "governmental bodies charged with compliance can be the only defendants"). More specifically, where a government official's "rights and duties" as defined by state law "may be affected directly by the disposition of [the] litigation," that official has a "sufficient interest to intervene as of right in [the] action." *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987); *see also Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir. 1977) (citing *Hines v. D'Artois*, 531 F.2d 726, 738 (5th Cir. 1976) (holding that a government "official has a sufficient interest in adjudications which will directly affect his own duties and powers under the state laws"); *Teague v. Baker*, 931 F.2d 259, 261 (4th Cir. 1991) (holding that where a proposed intervenor may be affected "by the direct legal operation of the district court's judgment," he or she will be found to have a "significantly protectable interest")).

It is beyond cavil that this Court's adjudication of this case may affect Clerk Gaffney's "rights and duties" under Pennsylvania's Marriage Laws. This is especially so given the broad scope of the relief ordered by the Injunction—namely, a far-reaching injunction prohibiting government officials from enforcing Pennsylvania's Marriage Laws—and the blanket declaration that Pennsylvania's

Marriage Laws are unconstitutional. Dckt. No. 134. Clerk Gaffney's significantly protectable interest in this case is therefore undeniable. *See Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 256 (D.N.M. 2008) ("This direct effect on what [a county official] can and cannot do as a county clerk is the direct and substantial effect that is recognized as a legally protectable interest."); *Bogaert v. Land*, No. 1:08-CV-687, 2008 WL 2952006, at *2-3 (W.D. Mich. July 29, 2009) (permitting county officials to intervene where the plaintiffs sought an injunction that might change the clerks' legal obligations).[2]

Perhaps less obvious, but no less important, is Clerk Gaffney's interest in knowing definitively the nature of her marriage-related duties going forward. Because this Court's Injunction could potentially impact what she must and must not do, Clerk Gaffney has an interest in clarity as to the precise contours of her post-judgment responsibilities. That clarity can be attained only by her inclusion as an intervenor. This is so because "'[a] decision of a federal district court judge is not binding precedent in . . . a different judicial district, the same judicial district, or even upon the same judge in a different case.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1][d], at 134-26 (3d ed. 2011)); *see also Gasperini v. Ctr. for Humanities,*

[2] In addition, Clerk Gaffney has a sworn duty to discharge her duties, including abiding by the marriage provision challenged in this case. *See* Pa. Const. art. 6, § 3. This forms part of her significantly protectable interest in this litigation.

Inc., 518 U.S. 415, 430 n.10 (1996) (stating that every federal district court judge "sits alone and renders decisions not binding on the others.").

Because this Court's decision will not serve as binding precedent on Clerk Gaffney, it is only by intervening as a party defendant that she can be sure she is bound by the Injunction or any other final judgment. This uncertainty is particularly troubling for Clerk Gaffney, who, as explained above, faces potential fines and conviction of a misdemeanor for missteps in her official duties. Thus, she has a significantly protectable interest in intervening so that she will be bound by this Court's ruling and will know with certainty her marriage-related duties in the wake of this Court's decision.

Finally, Clerk Gaffney has a significantly protectable interest in appealing the Injunction. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (endorsing the practice of "interven[ing] for purposes of appeal"); *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1412 n.8 (9th Cir. 1996) ("[A party's] right to intervene for the purpose of appealing is well established."); *Pellegrino*, 203 F.2d at 465-66 ("Intervention should be allowed ... to preserve ... the right to appeal from judgments entered on the merits by the District Court."); *see also Richardson v. Ramirez*, 418 U.S. 24, 34-40 (1974) (concluding that "a live case or controversy" existed when a county official appealed to the Supreme Court a ruling invalidating a law that the clerk administered); *Bd. of Educ. of Cent. Sch.*

Dist. No. 1 v. Allen, 392 U.S. 236, 241 n.5 (1968) (concluding that "[t]here can be no doubt" that local officials charged with official duties under state and local laws "have a 'personal stake in the outcome' of ... litigation" involving the constitutionality of those laws).

In light of this, Clerk Gaffney undoubtedly has significantly protectable interests that entitle her to intervene in this litigation.

C. Absent Clerk Gaffney's Intervention as a Party, the Court's Ruling Will Impair Her Significantly Protectable Interests

As a practical matter, the outcome of this action has the potential to adversely affect Clerk Gaffney's significantly protectable interests in this litigation. On the one hand, this Court has declared Pennsylvania's Marriage Laws to be unconstitutional. Dckt. No. 134. But on the other hand, because the Court's Injunction enjoins "Defendants" from enforcing Pennsylvania's Marriage Laws, and because Clerk Gaffney is not a party, she arguably is not directly bound by this Court's Injunction. Dckt. No. 134. This leaves her in an unenviable position: her duties are uncertain, and she is exposed to the possibility of financial penalties or conviction if she chooses the wrong course.[3] This prospect alone satisfies the impairment-of-interest requirement.

[3] The exceedingly protracted California same-sex marriage litigation is instructive as to the difficult legal issues posed by an unappealable federal district court decision that purports to invalidate a state marriage law. *See* Vikram Amar, *If the Supreme Court Decides the Proposition 8 Sponsors Lack Standing, What Will*

That scenario poses additional roadblocks to the orderly resolution of this constitutional question throughout the Commonwealth. If this Court's Injunction is not appealed to the Third Circuit for a uniform binding decision, this will likely necessitate additional litigation, before this Court or others, regarding the effect and scope of the Injunction. Yet by granting intervention to Clerk Gaffney, this Court will guarantee appropriate appellate review and will remove Clerk Gaffney's uncertainty regarding her constitutional duties.

D. The Existing Parties Will Not Adequately Represent Clerk Gaffney's Interests

Regarding adequate representation of interests, the Middle District of Pennsylvania has held that

> [u]nder this element, "[t]he burden, however minimal, ... is on the applicant for intervention to show that his interests are not adequately represented by the existing parties." *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982). Representation is inadequate on any of the following grounds: "(1) that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently

---

Happen to Same-Sex Marriage in California?, Verdict (Apr. 26, 2013), http://verdict.justia.com/2013/04/26/if-the-supreme-court-decides-the-proposition-8-sponsors-lack-standing (explaining that a district-court injunction purporting to bind nonparty county officials might lead to those officials "proactively[] going into court to ask for a clear ruling that [they are] not bound by [the] injunction or, if [they are], to ask that the injunction be reopened because [they] didn't have a chance to participate in the proceedings"). The obvious solution to these difficulties is to permit Clerk Gaffney to intervene now so that this issue can be decided by the Third Circuit and ultimately by the Supreme Court.

> prosecuting the suit." *Brody*, 957 F.2d at 1122–23 (citing *Hoots*, 672 F.2d at 1135).

National Collegiate Athletic Ass'n v. Corbett, 296 F.R.D. 342, 348 (E.D. Pa. 2013). A proposed intervenor "should be treated [by this Court] as the best judge of whether the existing parties adequately represent ... her interests, and ... any doubt regarding adequacy of representation should be resolved in [her] favor." 6 Edward J. Brunet, *Moore's Federal Practice* § 24.03[4][a] (3d ed. 1997). As demonstrated below, both the first and third conjunctive elements are present, proving that Clerk Gaffney's interests are not adequately represented.

1. The existing parties do not to adequately represent Clerk Gaffney's interests.

The mere presence of Register Petrille and the former presence of Register Poknis as defendants in this matter are insufficient to adequately represent Clerk Gaffney's interest. Even if they had provided the staunchest substantive defense of Pennsylvania's Marriage Laws—and they have not, as Petrille has not taken a position on the merits, Dckt. Nos. 101, 102, and as Poknis was dismissed voluntarily, Dckt. No. 57—neither represent Clerk Gaffney's interest in obtaining clarity regarding her official duties. Thus, those defendants do not adequately represent Clerk Gaffney's interests.

2. The existing parties are not defending the suit on appeal and thus do not represent Clerk Gaffney's interest in appealing this Court's decision.

As cited above, representation is inadequate where an existing party is not diligently litigating the case. Here, it is certain that the named defendants will not pursue an appeal from the Injunction and have thus ceased defending Pennsylvania's Marriage Laws. *See*, The Guardian, *Pennsylvania Governor: I won't appeal court's gay marriage ruling*, Associated Press (May 21, 2014), http://www.theguardian.com/world/2014/may/21/pennsylvania-governor-no-appeal-gay-marriage-ruling. "[A] decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest." *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 305 (6th Cir 1990) (agreeing with the District of Columbia Circuit); *see also Pellegrino v. Nesbit*, 203 F.2d 463, 468 (9th Cir. 1953); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 101 F.3d 503, 508-09 (7th Cir. 1996) (collecting cases from the Sixth, Eighth, and Eleventh Circuits). Thus, as Register Petrille has taken no position on the merits of the litigation and as the Governor has declared his decision not to appeal, Clerk Gaffney's interest in appeal is completely unrepresented.

II. CLERK GAFFNEY IS ENTITLED TO PERMISSIVE INTERVENTION

Not only is Clerk Gaffney entitled to intervention as of right, she is also entitled to permissive intervention. "On timely motion, the court may permit a . . . governmental officer or agency to intervene if a party's claim or defense is based on a statute . . . administered by the officer or agency." Fed. R. Civ. P. 24(b)(2)(A). In this case, it is undeniable that Clerk Gaffney is charged with administering Pennsylvania's Marriage Laws, and it is also undeniable that Plaintiffs' claims challenge those laws. Therefore, this Court should permit Clerk Gaffney to intervene in this litigation in order to seek a stay and appeal of this Court's Memorandum Decision and Injunction.

Additionally, a court may grant permissive intervention upon a timely motion, provided that a proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact," and that the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). First, Clerk Gaffney established above that her motion is timely, and the same argument applies with equal force here. Second, Clerk Gaffney's defense shares a common question of law with Plaintiffs' claims—namely, whether Pennsylvania's Marriage Laws violate the United States Constitution. Third, the litigation will not be delayed, nor will the existing parties be unduly prejudiced by Clerk Gaffney's intervention in this case because she does

not seek to relitigate matters before the district court but only to pursue an appeal. Thus permissive intervention is proper here.

Moreover, concerns for fairness and judicial economy directly counsel *for* intervention. As explained above, permitting Clerk Gaffney to intervene for purposes of appealing the Injunction will help avoid likely future litigation before this Court or others concerning Clerk Gaffney's prospective marriage-related duties. *See Diagnostic Devices, Inc. v. Taidoc Tech. Corp.*, 257 F.R.D. 96, 100 (W.D.N.C. 2009) (noting that permissive intervention "is appropriate to promote judicial efficiency," and permitting it in part because it would "help avoid inconsistent results and promote judicial economy") (quotation marks and citations omitted). Clerk Gaffney's presence as a defendant will prevent that otherwise inevitable scenario from coming to pass.

Further, 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. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting) (noting that failure to appeal left "the District Court's judgment, and its accompanying statewide injunction, effectively immune from appellate review").

Finally, the "the magnitude of this case" warrants permissive intervention. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002)

(upholding the district court's grant of permissive intervention because it "gave a good and substantial reason for exercising its discretion to permit ... permissive intervention" when it concluded that intervention would "contribute to the equitable resolution of [a] case" of great importance (internal quotations omitted)), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). It is difficult to conceive of an issue of greater social import to the people of Pennsylvania than the constitutionality of the marriage definition that was passed with overwhelming support, and Clerk Gaffney's participation as a party defendant is the only way to permit review by the appellate courts. The Court should thus grant Clerk Gaffney's request for permissive intervention.

CONCLUSION

For the foregoing reasons, this Court should grant Clerk Gaffney's request to intervene as a defendant in this case.

DATED: June 6, 2014

By: /s/ *Jeffrey A. Conrad*

Jeffrey A. Conrad, Esquire
PA Bar No. 85156
CLYMER MUSSER & CONRAD, P.C.
408 w. Chestnut Street
Lancaster, PA 17903
Telephone: (717) 299-7101
Facsimile: (717) 299-5115
jeff.conrad@clymerlaw.com

James M. Smith, Esquire
PA Bar No. 82124
SMITH LAW GROUP, LLC
14133 Kutztown Road
P.O. Box 626
Fleetwood, PA 19522
Telephone: (610) 944-8406
Facsimile: (610) 944-9408
jsmith@smithlawgrp.com

David W. Crossett, Esquire
PA Bar No. 313031
(Application to Admission to U.S. District Court for the Middle District of PA pending)
SMITH LAW GROUP, LLC
14133 Kutztown Road
P.O. Box 626
Fleetwood, PA 19522
Telephone: (610) 944-8406
Facsimile: (610) 944-9408
dcrossett@smithlawgrp.com

Counsel for Intervenor-Defendant

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(2)

I hereby certify that the foregoing document does not exceed 5,000 words as it contains 4,542 words in compliance with this Middle District's Local Rule 7.8(b)(2).

By: /s/ *James M. Smith*

James M. Smith, Esquire
PA Bar No. 82124
SMITH LAW GROUP, LLC
14133 Kutztown Road
P.O. Box 626
Fleetwood, PA 19522
Telephone: (610) 944-8406
Facsimile: (610) 944-9408
jsmith@smithlawgrp.com

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.	:	

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2014, I electronically filed the foregoing Intervenor's Brief in support of Motion to Intervene with the Clerk of Court using the ECF system, which will effectuate service of this filing on the following ECF-registered counsel by operation of the Court's electronic filing system:

James D. Esseks
Email: jesseks@aclu.org

Leslie Cooper
Email: lcooper@aclu.org

Mary Catherine Roper
Email: mroper@aclupa.org

Rebecca S. Melley
Email: rsantoro@hangley.com

Witold J. Walczak
Email: vwalczak@aclupa.org

John S. Stapleton
Email: jstapleton@hangley.com

Mark A. Aronchick
Email: maronchick@hangley.com

Molly M. Tack-Hooper
Email: mtack-hooper@aclupa.org

Seth F. Kreimer
Email: skreimer@law.upenn.edu

Attorneys for Plaintiffs

William H. Lamb
Joel Frank
Maureen McBride
Email: wlamb@lambmcerlane.com
jfrank@lambmcerlane.com
mmcbride@lambmcerlane.com

Attorney for Defendants Sec. Wolf and Sec. Mueser

Frank Chernak
Ballard Spahr, LLP
Email: chernakf@ballardspahr.com

Attorney for Donald Petrille, Jr., Register of Wills and Clerk of Orphans' Court of Bucks County

Respectfully Submitted:

Clymer Musser & Conrad, P.C.

/s/ *Jeffrey A. Conrad* _
Jeffrey A. Conrad, Esquire