No. _____

In the

Supreme Court of the United States

Theresa Santai-Gaffney, in her official capacity as Schuylkill County Clerk of the Orphans' Court and Register of Wills,

Petitioner,

v.

Deb Whitewood, et al.,

Respondents.

Application to Stay Judgment Pending Appeal

DIRECTED TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT

Randall L. Wenger
INDEPENDENCE LAW CENTER
23 North Front Street, 2nd Floor
Harrisburg, PA 17101
(717) 657-4990; (717) 545-8107 (Fax)

David Austin R. Nimocks
ALLIANCE DEFENDING FREEDOM
801 G Street N.W., Suite 509
Washington, D.C. 20001
(202) 393-8690; (480) 444-0028 (Fax)

Byron J. Babione
Counsel of Record
James A. Campbell
Kenneth J. Connelly
J. Caleb Dalton
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 (Fax)
bbabione@alliancedefendingfreedom.org

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Orders

Constitutional Provisions, Statutes, and Rules

Other Authorities

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Third Circuit:

Petitioner Theresa Santai-Gaffney, in her official capacity as Schuylkill County Clerk of the Orphans' Court and Register of Wills, ("Clerk Gaffney") respectfully applies for a stay pending appeal of a judgment and injunction entered by the United States District Court for the Middle District of Pennsylvania enjoining enforcement of Pennsylvania's statutes affirming marriage as a man-woman union. Both the District Court and the Third Circuit have declined to enter the requested stay. Yet as explained herein, Clerk Gaffney is entitled to a stay pending appeal.

INTRODUCTION

Approximately six months ago, this Court unanimously stayed a nearly identical district-court order in a materially indistinguishable case presenting the question whether the State of Utah may define marriage as the union of one man and one woman. *See Herbert v. Kitchen*, 134 S. Ct. 893 (2014). By doing this, the Court signaled to all lower federal courts that they must take similar steps to preserve the enforcement of man-woman marriage laws until this Court definitively settles whether States may maintain those laws consistent with the requirements of the Fourteenth Amendment to the United States Constitution. Any other approach would invite needless chaos and uncertainty rather than facilitate the orderly and dignified resolution of one of the most important constitutional questions of our day.

Most of the circuits, including the Sixth, Seventh, and Ninth, have appropriately heeded this Court's guidance and stayed district-court decisions invalidating man-woman marriage laws. *See, e.g.*, Order, *Baskin v. Bogan*, No. 14-2386 (7th Cir. June 27, 2014); Order, *Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014); Order, *Tanco v. Haslam*, No. 14-5297 (6th Cir. Apr. 25, 2014); Order, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014). But the Third Circuit parted ways with that consistent line of circuit-court stay orders. As a result, Clerk Gaffney has been forced to bring her stay request to this Court. For the same reasons that this Court unanimously stayed the Utah district-court decision in *Herbert*, it should stay the District Court's judgment here.

BACKGROUND

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

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). Accordingly, they serve as the gateway for individuals seeking to access civil marriage in the Commonwealth.

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 to applicants. Nor does he have authority to direct Clerks in their statutory duty to issue marriage licenses only to qualifying couples. Each Clerk is an elected county official who operates independently of other government officers, *see* 16 Pa. Cons. Stat. § 4301, and who swears an oath to obey the laws, *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 possibly face a mandamus action, *see Commw., Dep't of Health v. Hanes*, 78 A.3d 676, 693-94 (Pa. Commw. Ct. 2013).

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) (attached as Exhibit 1). It also entered an order declaring those laws invalid and enjoining their enforcement. *See id.* at *16. Even though this case raises an important constitutional question of interest to countless Pennsylvanians, the named Defendants indicated that they would not appeal.

While the District Court's injunction purports to bind only the named Defendants, *see id.* ("**ORDER[ING]** that the Defendants are **PERMANENTLY ENJOINED** from enforcing [Pennsylvania's man-woman marriage laws]"), the District Court previously

stated that "all Clerks . . . would be subject to [its] legal mandate." Mem. and Op. Denying Mot. to Dismiss at 8 (Nov. 15, 2013) (ECF No. 67) (attached as Exhibit 2). Secretary Wolf agrees that the District Court's order subjects all Clerks to its legal mandate, as demonstrated by his directive that Clerks must "perform [their] duties in accordance with the court's order" and must cease enforcing Pennsylvania's man-woman marriage laws. *See* Pa. Dep't of Health, General Notice to All Clerks of the Orphans' Court (Jun. 11, 2014) (attached as Exhibit 3). Thereafter, the District Court indicated that Secretary Wolf's directive correctly reflected "[t]he effect of [its] decision." Mem. and Order Denying Mot. to Intervene at 6 (Jun. 18, 2014) (ECF No. 150) (attached as Exhibit 4).

On June 6, well within the time for appealing the District Court's May 20 Opinion and Order, Clerk Gaffney—acting in her official capacity as a public officer charged with enforcing the Commonwealth's man-woman marriage 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 District Court's May 20 Order pending appeal. *See id.* After expedited briefing, on June 18, the District Court denied both of Clerk Gaffney's motions. *See id.* at 9-10.

That same day, Clerk Gaffney timely appealed from the District Court's May 20 Opinion and Order resolving the merits of Plaintiffs' claims and the June 18 Order denying Clerk Gaffney's motion to intervene and motion to stay. Within hours after filing the notice of appeal on June 18, Clerk Gaffney commenced proceedings before the Third Circuit by filing her Motion for Stay of Injunction Pending Appeal with Request for

Expedited Consideration. The parties finished briefing that motion by June 27, yet the Third Circuit did not deny Clerk Gaffney's stay request until nearly a week later.

On July 3, the Third Circuit 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 5).

The foregoing discussion illustrates that the stay Clerk Gaffney seeks "is not available from any other court or judge." Supreme Court Rule 23(3). Indeed, she already sought a stay from the District Court and the Third Circuit, and both courts denied the requested relief. This Court, therefore, is the only remaining tribunal able to grant the stay that Clerk Gaffney requests.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Each of these factors weighs decisively in favor of issuing the requested stay.

As discussed above, in *Herbert v. Kitchen*—the current challenge to Utah's man-woman marriage laws—this Court already conducted this analysis and unanimously found that the factors weighed in favor of staying a nearly identical district-court order in a materially indistinguishable case. The plaintiffs in that case claim that Utah's man-woman marriage laws violate the Fourteenth Amendment. After the district court agreed with the plaintiffs and invalidated the challenged laws, both the district court and the Tenth Circuit denied the government defendants' request to stay the district court's ruling. Upon application to this Court, however, the stay was unanimously granted. *See Herbert v. Kitchen*, 134 S. Ct. 893 (2014).

Numerous circuit courts have read this Court's stay order in *Herbert* as compelling a stay pending appeal in cases where a public official appeals a decision invalidating a State's man-woman marriage laws. *See, e.g.*, Order, *Baskin v. Bogan*, No. 14-2386 (7th Cir. June 27, 2014) (granting the government's motion for a stay pending resolution of the appeal); Order, *Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (Hurwitz, J., concurring) ("I concur in the order granting the stay pending appeal . . . . because I believe that the Supreme Court, in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), has virtually instructed courts of appeals to grant stays in the circumstances before us today."); Order, *Tanco v. Haslam*, No. 14-5297 (6th Cir. Apr. 25, 2014) (granting a stay pending appeal and noting that "the public interest and the interests of the parties would be best served by this Court imposing a stay on the district court's order until this case is reviewed on appeal"); Order, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) (granting the government's motion to stay the district court's order pending appeal). This

recent precedent originating with this Court's order in *Herbert* thus confirms that a stay is warranted here.

I. It Is Probable That Four Justices Will Consider the Question Presented Sufficiently Meritorious to Grant Certiorari.

This Court will likely consider the question presented here worthy of certiorari. In fact, just a year and a half ago, in *Hollingsworth v. Perry*, this Court already granted certiorari to decide the substantive constitutional question raised here. *See* Petition for Certiorari, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2012 WL 3109489, at *i ("Question Presented: Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman."); *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). While a jurisdictional hurdle prevented this Court from deciding that constitutional question there, nothing suggests that this Court would be disinclined to review this important issue now. On the contrary, the *Herbert* stay order confirms that this vital question remains worthy of review by this Court.

Underscoring the likelihood that this Court will grant certiorari is the existence of a circuit split on the question whether a State may define marriage as a man-woman union. The Eighth Circuit has unanimously upheld the constitutionality of Nebraska's law defining marriage as the union of a man and a woman. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006) (holding that "there is no constitutional right to same-sex marriage"). In contrast, the Tenth Circuit, in a 2-to-1 decision, struck down Utah's laws preserving man-woman marriage. *See Kitchen v. Herbert*, No. 13-

4178, 2014 WL 2868044, at *32 (10th Cir. Jun. 25, 2014) (holding that the Fourteenth Amendment requires that "those who wish to marry a person of the same sex" be permitted to do so). This circuit split increases the chances that this Court will grant review.

That the lower courts have, without basis, rejected Clerk Gaffney's interest in this case does *not* detract from the probability that the Court will grant certiorari to resolve the important constitutional issue raised here. Indeed, when this Court granted certiorari in *Hollingsworth*, it also reviewed "[w]hether petitioners have standing under Article III, § 2 of the Constitution . . . ." 133 S. Ct. at 786. This Court is likely to follow the same course here.

II. There Is a Fair Prospect That this Court Will Reverse the Judgment Below.

A. This Court Will Reverse the Denial of Clerk Gaffney's Intervention.

This Court is likely to reverse the District Court's decision denying Clerk Gaffney's motion to intervene. Federal Rule of Civil Procedure 24(a)(2) permits an applicant to intervene as of right so long as, among other uncontested factors, she has a sufficient interest in the outcome of the case.[1] The District Court rejected Clerk Gaffney's

[1] The other requirements for intervention as of right are (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. Fed. R. Civ. P. 24(a)(2). Those factors 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 interest in enforcing Pennsylvania's man-woman marriage laws would undoubtedly be impaired if she were not able to intervene. Third,

request to intervene because, it believed, she lacked a sufficient interest supporting her request to intervene in her official capacity. *See* Mem. and Order Denying Mot. to Intervene at 4-7 (Exhibit 4). That decision was in error.

Rule 24(a)(2) requires the applicant to assert "a significantly protectable interest" in the outcome of the litigation. *Donaldson v. United States*, 400 U.S. 517, 531 (1971), *superseded on other grounds by statute as recognized in Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 316 (1985). Applying that nondescript standard, the federal courts of appeals, including the Third Circuit, have widely held 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." *Harris v. Pernsley*, 820 F.2d 592, 602 (3d Cir. 1987); *see, e.g.*, *id.* at 597 (a public official "has a sufficient interest to intervene as of right" if his "duties . . . may be affected directly by the disposition of this litigation"); *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) (a public official was "allowed 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").

---

the named Defendants did not appeal the District Court's order and thus cannot be said to adequately represent Clerk Gaffney's interests.

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. Specifically, Plaintiffs seek to prevent Clerk Gaffney from carrying out her duty as prescribed by state law. There is thus no doubt that the subject of the suit falls within the scope of Clerk Gaffney's official duties and that she has a sufficient interest to intervene here.

Nor is there any doubt that the District Court's decision purports to abrogate Clerk Gaffney's duty to issue marriage licenses only to man-woman couples. Indeed, the District Court, Plaintiffs, and Secretary Wolf have all expressed their belief that the ruling has that effect. *See* Mem. and Op. Denying Mot. to Dismiss at 8 (Exhibit 2) (stating that "all Clerks . . . would be subject to [the court's] legal mandate"); Pa. Dep't of Health, General Notice to All Clerks of the Orphans' Court (Exhibit 3) (directing all Clerks to "perform [their] duties in accordance with the court's order"); Mem. and Order Denying Mot. to Intervene at 6-7 (Exhibit 4) (stating that Secretary Wolf's directive correctly reflected "[t]he effect of [the court's] decision").

Plaintiffs' own actions, moreover, show that Clerk Gaffney has a significant interest in the outcome of this litigation. In particular, Plaintiffs named another Clerk (Clerk Petrille) as a defendant in this action. They did so because Clerks are the only government officials in the Commonwealth with authority to issue marriage licenses and thus are the only officials with power to 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). Naming another Clerk as a defendant thus implicitly concedes that Clerk Gaffney has a sufficient interest to intervene in this case.

The District Court, however, did not mention the many circuit decisions (discussed above) allowing intervention by public officials charged with enforcing a challenged state law. Instead, the District Court disregarded the sufficiency of Clerk Gaffney's interest because it concluded that her duty to issue marriage licenses only to man-woman couples is "purely ministerial[.]'" Mem. and Order Denying Mot. to Intervene at 5 (Exhibit 4). But the District Court did not cite, and Clerk Gaffney has not found, any precedent suggesting that a public official whose statutory duties will be directly affected by the disposition of litigation lacks a significant interest if her duties are ministerial rather than discretionary. On the contrary, a number of federal courts have concluded that officials whose ministerial duties would be affected by the outcome of a lawsuit have a significant interest supporting their 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 [a county official] can and cannot do as a county clerk is the direct and substantial effect that is recognized as a legally protected interest."); *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 the plaintiffs sought an injunction that might change the clerks' obligations). The District Court thus erred in ignoring widespread precedent and resting its decision on a novel and unsupported consideration like the ministerial nature of Clerk Gaffney's duties.

The District Court's unprecedented rule regarding ministerial duties and intervention would forbid intervention by public officials similarly situated to the named defendants. If, for example, Clerks were the only defendants named here, the District Court'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 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. Furthermore, had Plaintiffs filed suit only against 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 in the Commonwealth authorized to provide the relief (a marriage license) sought by Plaintiffs who want to enter into a marriage in Pennsylvania.

The District Court also discounted Clerk Gaffney's interest because, it believed, her duty is merely "to comply with the current state of the law." Mem. and Order Denying Mot. to Intervene at 5 (Exhibit 4). This line of reasoning exhibits at least two flaws. First, it characterizes Clerk Gaffney's duty at a level of abstraction that blurs her direct interest in the outcome of this case. Precisely stated, Clerk Gaffney's duty is to issue marriage licenses only to man-woman couples. The District Court's generic description obscures, rather than informs, the analysis. Second, a nonspecific duty "to comply with the current state of the law" is a duty of *every* public officer litigating in

their official capacity, including all of the named Defendants. So if this were a disqualifying factor, government officials could *never* intervene to defend the laws that they enforce.

At bottom, the District Court's dismissive treatment of Clerk Gaffney's interest in this case ignores that she intervened *not* in her personal capacity, but in her official capacity as a public officer charged with enforcing the challenged man-woman 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 personal interests (or lack thereof) are thus irrelevant when assessing the sufficiency of her official interest in this case.

Clerk Gaffney raised another significant interest supporting her intervention: her interest in clarifying the effect of the District Court's order on her statutory duty to issue marriage licenses only to man-woman couples.[2] The District Court rejected that interest, stating that Clerk Gaffney "can claim no confusion." Mem. and Order Denying Mot. to Intervene at 7 (Exhibit 4). But none of the items that the District Court considered—(1) its declaration, (2) its injunction, or (3) Secretary Wolf's order—provides Clerk Gaffney with authoritative guidance. *See id.* at 6-7.

---

[2] During the pendency of this litigation (or until a stay is issued), Clerk Gaffney has decided to issue marriage licenses to same-sex couples because she reasonably fears that she might be subject to prosecution or mandamus action for failing to do so.

First, the District Court's declaration states that the man-woman marriage laws are invalid, but a trial-court declaration "is not binding precedent" on nonparties or other courts. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011); *see also Young Women's Christian Ass'n of Princeton, N. J. v. Kugler*, 463 F.2d 203, 204 (3d Cir. 1972) (per curiam) ("In the absence of a class action determination the declaratory judgment is binding only between [the] individual" parties). Second, the injunction provides that the challenged laws should not be enforced, yet on its face, it applies only to the named Defendants. *See Whitewood*, 2014 WL 2058105 at *16. Third, although Secretary Wolf's order, which was not issued until after Clerk Gaffney filed her motion to intervene, states that Clerks should not enforce the challenged laws, *see* Pa. Dep't of Health, General Notice to All Clerks of the Orphans' Court (Exhibit 3), he does not have authority to direct Clerks in how to carry out their duty of issuing marriage licenses. While Secretary Wolf has statewide authority over "the registration of . . . marriages," 71 Pa. Cons. Stat. § 534(c), that power applies only to the "act of recording" completed marriage records. *See* Black's Law Dictionary 1310 (8th ed. 2004) (defining "registration"); *see, 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. Secretary Wolf thus lacks authority to require Clerk Gaffney to disregard her statutory duty to issue marriage licenses only to man-woman couples. His directive, therefore, did not provide the clarity that Clerk Gaffney seeks.

Clerk Gaffney thus is in a difficult and uncertain position. And if she chooses the wrong course, she risks facing misdemeanor charges, fines, or a mandamus action. *See* 16

Pa. Cons. Stat. § 3411; *Hanes*, 78 A.3d at 693-94. But by allowing her to intervene, she would obtain clarity in two ways. First, adding her as a party would make her unequivocally bound by the injunction, and her duties would be clear. Second, allowing her to appeal would enable this Court to rule on the merits of Plaintiffs' claims and establish binding judicial precedent for all public officials to follow. Consequently, Clerk Gaffney's interest in clarifying the effect of the District Court's order on her statutory duty to issue marriage licenses only to man-woman couples amply supports her request to intervene.

B. This Court Will Conclude That Clerk Gaffney Has Standing to Appeal.

Throughout this litigation, Plaintiffs have baselessly argued that even if Clerk Gaffney has a sufficient interest to intervene, she would not have standing to appeal the District Court's order invalidating Pennsylvania's man-woman marriage laws. This argument is unavailing.

A government official "has standing to defend the constitutionality of [the] statute[s]" she enforces. *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *see also Maine v. Taylor*, 477 U.S. 131, 137 (1986); *Yniguez v. Arizona*, 939 F.2d 727, 733 n.4 (9th Cir. 1991). To have standing, an appellant "must possess a 'direct stake in the outcome' of the case." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (citation omitted). According to the District Court below, its substantive ruling has abolished Clerk Gaffney's statutory duty to issue marriage licenses only to man-woman couples. This judicial nullification of her statutory duty to enforce the Commonwealth's man-woman marriage laws inflicts an injury that affords Clerk Gaffney, in her official capacity, a

direct stake in the outcome of this appeal. *See Zablocki v. Redhail*, 434 U.S. 374, 381-82 (1978) (entertaining without question an appeal by a county clerk from a lower-court decision striking down a challenged marriage law); *Cobb v. Aytch*, 539 F.2d 297, 299-300 (3d Cir. 1976) (concluding that a county official who was not formally bound by a district-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.").

This Court's recent analysis in *Hollingsworth* reinforces Clerk Gaffney's standing to appeal. 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. This 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 forbids Clerk Gaffney from effectuating her statutory duty to issue marriage licenses only to man-woman couples. *See* Mem. and Order Denying Mot. to Intervene at 6-7 (Exhibit 4). 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 the enforcement of

Pennsylvania's man-woman marriage laws. Therefore, she, unlike the private-citizen appellants in *Hollingsworth*, has standing to defend those laws' enforcement.[3]

C. This Court Will Reverse the Ruling Invalidating Pennsylvania's Man-Woman Marriage Laws.

In issuing the stay order in *Herbert*, this Court necessarily found "a fair prospect that a majority of the Court will vote to reverse" a district-court decision striking down a state law that defines marriage as the union of one man and one woman. *See Hollingsworth*, 558 U.S. at 190 (outlining the factors for issuing a stay pending appeal). That conclusion firmly supports Clerk Gaffney's stay request.

At least five considerations demonstrate that this Court is likely to reverse the District Court's invalidation of Pennsylvania's man-woman marriage laws.

First, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court stressed that in our federalist system the various States have the authority to define marriage for their respective communities. *See, e.g., id.* at 2689-90 ("the definition and regulation of marriage" is "within the authority and realm of the separate States"); *id.* at 2691 ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations"); *id.* at 2692 (discussing the State's "essential authority to

---

[3] This Court's recent order in *National Organization for Marriage v. Geiger*, No. 13A1173, 2014 WL 2514491 (U.S. Jun. 4, 2014), does not undermine Clerk Gaffney's stay request. In *Geiger*, a private organization and its anonymous members tried to appeal a federal district court's decision declaring Oregon's man-woman marriage laws to be unconstitutional. No public officer acting in her official capacity filed an appeal there. Here, unlike in *Geiger*, an elected official acting in her official capacity as a government officer charged with enforcing the challenged man-woman marriage laws has appealed an order whose effect purports to prohibit her from carrying out her duties. *Geiger*, therefore, does not govern here.

define the marital relation"). *Windsor* stated, in no uncertain terms, that the Constitution permits States to define marriage through the political process, extolling the importance of "allow[ing] the formation of consensus" when States decide critical questions like the definition of marriage:

> In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

Id. (quotation marks, alterations, and citation omitted); *see also id.* at 2693 (mentioning "same-sex marriages made lawful by the unquestioned authority of the States").

Second, in *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), a plurality of this Court recently confirmed the right of citizens throughout the various States to "shap[e] the destiny of their own times" on sensitive policy matters. *Id.* at 1636. "[F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[.]" *Id.* at 1636-37. That a particular question of public policy is "sensitive," "complex," "delicate," "arcane," "difficult," "divisive," or "profound" does not disable the People from "prudently" addressing it. *Id.* at 1637-38. Concluding otherwise would "demean[] . . . the democratic process" and impermissibly restrict "the exercise of a fundamental right held not just by one person but by all in common"—namely, "the right to speak and debate and learn and then, as a

matter of political will, to act through a lawful electoral process." *Id.* at 1637. Pennsylvanians exercised this collective right when they enacted the marriage laws challenged here. The Fourteenth Amendment does not prohibit them from doing that.

Third, this Court in *Windsor* recognized that federalism provides ample room for variation between States' domestic-relations policies concerning which couples may marry. *See* 133 S. Ct. at 2691 ("Marriage laws vary in some respects from State to State."); *id.* (acknowledging that state-by-state marital variation includes the "permissible degree of consanguinity" and the "minimum age" of couples seeking to marry). This observation would make no sense if all States must adopt a genderless definition of marriage as the District Court's decision would in effect require. For this additional reason, *Windsor* indicates that this Court is likely to reverse the District Court's ruling.

Fourth, the District Court's due-process analysis (*see Whitewood*, 2014 WL 2058105 at *7-9) ignores the analytical principles that this Court outlined in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In *Glucksberg*, this Court required "a careful description of the asserted fundamental liberty interest," *id.* at 721 (quotation marks omitted), and reaffirmed that the carefully described right must be "objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21 (quotation marks omitted). Yet as this Court implicitly acknowledged in *Windsor*, the carefully described right asserted here—the right to marry a person of the same sex—is not deeply rooted in, but instead is belied by, this Nation's history and tradition. *See Windsor*, 133 S. Ct. at 2689 ("[M]arriage between a man and a woman no doubt [has] been thought of by most people as essential to the very definition of that term and to its role and function throughout the

history of civilization."). The District Court's contrary conclusion conflicts with the conclusions of most appellate courts that have faced this due-process question under a state constitution or the Federal Constitution.[4] This Court, therefore, will likely overturn the District Court's due-process analysis.

Fifth, the District Court's equal-protection analysis—particularly its holding that sexual orientation is a quasi-suspect classification entitled to heightened scrutiny (*see Whitewood*, 2014 WL 2058105 at *9-14)—also conflicts with this Court's jurisprudence. This Court applies the rational-basis standard to laws that classify based on sexual orientation. *See Romer v. Evans*, 517 U.S. 620, 631-32 (1996).[5] And in *Windsor*, this Court did not establish sexual orientation as a quasi-suspect classification, even though it reviewed a circuit-court decision that reached that conclusion, *see Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), and even though the parties defending that decision urged this Court to follow suit, *see* Brief on the Merits for Respondent at 17-32,

---

[4] *See, e.g., In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675-76 (Tex. Ct. App. 2010); *Conaway v. Deane*, 932 A.2d 571, 624-29 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 9-10 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 976-79 (Wash. 2006) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15, 32-34 (Ind. Ct. App. 2005); *Standhardt v. Superior Court*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

[5] So does nearly every circuit (10 out of 12) that has addressed this issue. *See Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684-85 (D.C. Cir. 1994) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for the United States on the Merits Question at 18-36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

For all these reasons, it is likely that this Court will reverse the judgment below.

III. Irreparable Harm Will Likely Result from Denying the Stay, and the Balance of the Equities Weighs Decisively in Clerk Gaffney's Favor.

In *Herbert*, this Court necessarily concluded that irreparable harm results from disregarding—and that the balance of the equities weighs in favor of maintaining—man-woman marriage laws *before this Court definitively resolves the important constitutional questions presented by these legal challenges*. That conclusion squarely supports Clerk Gaffney's stay application.

Any time the government "is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). Again, in this litigation, Clerk Gaffney appears in her official capacity, and as such, she represents the government and people she serves. The District Court indicated that the effect of its order disables Clerk Gaffney from enforcing Pennsylvania's man-woman marriage laws. Thus, she and, by extension, the government and people she represents already suffer, and continue to suffer, irreparable harm—in the same way Utah officials experienced irreparable harm in *Herbert*.

Although this abrogation of the challenged laws' enforcement is more than a sufficient injury to satisfy the irreparable-harm component of this analysis, there is more: as explained in Section (II)(A) above, Clerk Gaffney now faces uncertainty concerning the effect of the District Court's order on her statutory duty to issue marriage licenses only to man-woman couples. Such ambiguity inflicts irreparable harm, particularly because Clerk Gaffney risks incurring a misdemeanor conviction or fines or enduring mandamus proceedings if she improperly carries out her official duties. *See* 16 Pa. Cons. Stat. § 3411; *Hanes*, 78 A.3d at 693-94.

In addition, a stay preserving Pennsylvania's man-woman marriage laws would prevent government officials (including but not limited to Clerk Gaffney) and myriad administrative agencies (including but not limited to Clerk Gaffney's office) from revising forms, rules, and procedures to accommodate the District Court's order only to revise them back if the challenged marriage laws are ultimately upheld. Clerk Gaffney has an interest in avoiding this inefficiency and waste of governmental resources.

Furthermore, if this Court (in this case or another) affirms the right of States to maintain marriage as a man-woman union, the District Court's order would be immediately suspect, *see* Fed. R. Civ. P. 60(b)(5), and the validity of same-sex marriages formed under that order would be in doubt and require additional litigation to resolve. That, in turn, would harm not only Plaintiffs and other same-sex couples whose legal unions become suspect, but also many third parties (such as financial institutions and employers) who rely on or otherwise recognize those unions.

On the other side of the equities scale, the only interim harm that Plaintiffs and other same-sex couples can claim (assuming that this Court ultimately strikes down man-woman marriage laws) is a modest delay in obtaining the Commonwealth's official sanction of their relationship. Notably, even though the District Court's order has yet to be stayed, some of Plaintiffs still have not married their same-sex partners. *See* Plaintiffs' Mem. of Law in Opp'n to Clerk Gaffney's Motion to Stay at 15 (3d Cir. Jun. 25, 2014) (discussing "unmarried Plaintiffs . . . who are planning to marry"). This tangibly illustrates the lack of immediate, irreparable harm to Plaintiffs if this Court were to issue a stay pending appeal.

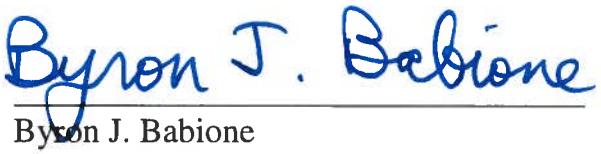
In short, the irreparable harm inflicted on Clerk Gaffney and the overall balance of the equities demonstrate that this Court should issue a stay pending appeal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests an immediate stay of the District Court's judgment and injunction pending appeal.

Dated: July 3, 2014

Respectfully Submitted,



Byron J. Babione
Counsel of Record
James A. Campbell
Kenneth J. Connelly
J. Caleb Dalton
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 (Fax)
bbabione@alliancedefendingfreedom.org

David Austin R. Nimocks
ALLIANCE DEFENDING FREEDOM
801 G Street N.W., Suite 509
Washington, D.C. 20001
(202) 393-8690; (480) 444-0028 (Fax)

Randall L. Wenger
INDEPENDENCE LAW CENTER
23 North Front Street, 2nd Floor
Harrisburg, PA 17101
(717) 657-4990; (717) 545-8107 (Fax)

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2014, I caused to be served the foregoing Application to Stay Judgment Pending Appeal on the following counsel via electronic mail and First-class United States mail postage prepaid:

Mark A. Aronchick
Hangley Aronckick Segal Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103
maronchick@hangley.com

Witold J. Walczak
ACLU Foundation of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
vwalczak@aclupa.org

Counsel for Plaintiffs-Respondents

Byron J. Babione

Byron J. Babione