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)

PROPOSED INTERVENOR-DEFENDANT-APPELLANT THERESA SANTAI-GAFFNEY'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL WITH REQUEST FOR EXPEDITED CONSIDERATION

Proposed Intervenor-Defendant-Appellant, 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 moves this Court for a stay pending appeal of the order issued by District Judge John E. Jones III, of the Middle District of Pennsylvania, on May 20, 2014, enjoining enforcement of Pennsylvania's Marriage Laws. Expedited consideration is requested under 3d Cir. L.A.R. 27.7 (2011).[1]

PROCEDURAL HISTORY

Plaintiffs brought this action, pursuant to 42 U.S.C. § 1983, challenging the constitutionality of 23 Pennsylvania Consolidated Statutes Annotated §§ 1102 and 1704, defining marriage as the union of one man and one woman ("Pennsylvania's Marriage Laws"). Plaintiffs claim that the Due Process and Equal Protection Clauses of the United States Constitution prohibit the Commonwealth from defining marriage as the union of one man and one woman and requested statewide preliminary and permanent injunctions enjoining the enforcement of those laws.

Plaintiffs 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

[1] Pursuant to Fed. R. App. P. 8(a)(2), on June 18, 2014, less than two hours after the docketing of the District Court's Opinion and Order ruling on Clerk Gaffney's motions for intervention and stay, Counsel for Clerk Gaffney notified all parties of her intent to file this Motion.

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. Attorney General Kane refused to defend the laws. Governor Corbett's Office of General Counsel initially defended the challenged laws on behalf of Defendants Wolf and Meuser. After an initial motion to dismiss (Dckt. Nos. 25, 41) was denied (Dckt. No. 67), 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, ordering the declaratory relief sought, enjoining the named parties from enforcing the challenged laws, (hereinafter referring to the Court's order as "Injunction") (Dckt. Nos. 133 and 134, attached as Exhibits 1-2), and purporting to bind all Clerks including Clerk Gaffney. *See also* Memorandum and Order, *Whitewood v. Wolf*, 1:13cv-1861 at 6 (June 18, 2014) (Dckt. No. 150 attached as Exhibit 4) (noting the "effect . . . of our decision on Santai-Gaffney's 'rights and duties' in her role as Clerk of the Orphans' Court"). The named Defendants have either

publicly stated that they do not plan to appeal the Injunction or have entered a stipulation agreeing to no further participation.

On June 6, 2014, Clerk Gaffney moved to intervene (Dckt. Nos. 139, 140) in the District Court for the purpose of appealing the Injunction, and simultaneously filed a motion for stay of the Injunction (Dckt. Nos. 141, 142). On June 18, the district court denied Clerk Gaffney's motion to intervene and denied her motion for a stay of the Injunction (Dckt. No. 150, attached as Exhibit 4). On the same day, June 18, 2014, Clerk Gaffney filed a notice of appeal from the Injunction and from the denial of her motion to intervene (Dckt. No. 152).

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. Cons. Stat. Ann. §§ 1102, 1704. Clerk Gaffney is a Pennsylvania Clerk of the Orphans' Court and Register of Wills (hereinafter "clerk" or "clerks") and is responsible for ensuring compliance with Pennsylvania's Marriage Laws and for issuing marriage licenses pursuant to those laws. *See* 20 Pa. Cons. Stat. Ann. § 711(19); 72 Pa. Cons. Stat. Ann. § 612.

Each Register of Wills and Clerk of the Orphans' Court is an elected county official who operates independently of other government officers. *See* 16 Pa. Cons. Stat. Ann. § 4301. 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. VI, § 3. The clerks, therefore, must enforce Pennsylvania's Marriage Laws—indeed, if a clerk were to contravene her sworn duty in this regard, she would be subject to a fine and guilty of a misdemeanor. 16 Pa. Cons. Stat. Ann. § 3411. In addition, if a clerk fails to carry out the specific requirements concerning the issuance of marriage licenses, she may be subject to a mandamus action to enjoin her from issuing licenses contrary to law. *See Commw, Dep't of Health v. Hanes*, 78 A.3d 676, 693-94 (Pa. Commw. Ct. 2013) (defendant Hanes, a county register and clerk, was enjoined from issuing same-sex marriage licenses contrary to Pennsylvania law).

The District Court ruled that Clerk Gaffney is bound by its Injunction, yet has denied her request to intervene for the purposes of appeal and to stay the enforcement of the Injunction pending appeal (Dckt. No. 150 attached as Exhibit 4); *see also*, Memorandum and Order, *Whitewood v. Wolf*, 1:13cv-1861 at 8 (Nov. 15, 2013) (Dckt. No. 67 attached as Exhibit 3).

ARGUMENT

The United States Supreme Court's recent stay of an injunction granted by a district court in Utah, in a substantively similar case challenging that state's marriage laws, confirms the necessity of staying the Injunction pending appellate review. *See* Order, *Herbert v. Kitchen*, No. 13A687 (U.S. Jan. 6, 2014) (granting

stay of injunction pending appeal)[2]; *see also Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (granting the defendants' "motions to stay the district court's . . . order pending appeal"); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) (same). The situation here is virtually identical to the situation in *Herbert*, and the Supreme Court's unanimous decision there makes it clear that in the limited context of an injunction prohibiting the enforcement of state man-woman marriage laws, a stay pending appeal should be issued upon the request of a government official tasked with enforcing the state's marriage laws.

A four-prong test is generally used to determine the appropriateness of a stay pending appeal. These four prongs are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

I. Defendants are Likely to Succeed on the Merits.

The Supreme Court's stay in *Kitchen* supports the likelihood of success on appeal here, because the standard for grant of a stay by the Supreme Court is

[2] The text of the Supreme Court's order reads as follows: "The application for stay presented to Justice Sotomayor and by her referred to the Court is granted. The permanent injunction issued by the United States District Court for the District of Utah, No. 2:13-cv-217, on December 20, 2013, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit." Order, *Herbert v. Kitchen*, No. 13A687 (U.S. Jan. 6, 2014), attached as Exhibit 5.

substantially similar to the standard governing this Court. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (noting that a stay is appropriate if there is "a fair prospect that a majority of the Court will vote to reverse the judgment below."). Although the Supreme Court or a Circuit Justice "rarely grants" a "stay application," they will do so if they "predict" that a majority of "the Court would . . . set the [district court] order aside." *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302-03 (2006) (Kennedy, J., in chambers). On January 6, 2014, after Justice Sotomayor referred the stay application to all the Justices, the Court unanimously stayed the *Kitchen* district court's injunction, thereby signaling the Court's belief that it will ultimately set that order aside. *See* Order, *Herbert v. Kitchen*, No. 13A687 (U.S. Jan. 6, 2014). Thus, Clerk Gaffney is likely to succeed on the merits.

Furthermore, Defendants are likely to succeed on appeal for at least five reasons: (1) same-sex marriage is not a fundamental right; (2) sexual orientation is not a suspect or quasi-suspect classification; (3) *United States v. Windsor*, 133 S. Ct. 2675 (2013), supports the constitutionality of Pennsylvania's Marriage Laws; (4) Plaintiffs' claims are foreclosed by *Baker v. Nelson*, 409 U.S. 810 (1972); and (5) the attempted analogy to *Loving v. Virginia*, 388 U.S. 1 (1967), is inapposite.

A. Plaintiffs' Claims Do Not Implicate a Fundamental Right.

Fundamental rights are those that "are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks and citation omitted), and in assessing a fundamental-rights claim, the Supreme Court has commanded that the right ostensibly at stake must be "'careful[ly] descri[bed].'" *Id*. at 721. The carefully described right asserted here—to redefine marriage to include same-sex unions—is not deeply rooted in, but instead is belied by, this Nation's history and tradition. The District Court thus erred when it concluded that the alleged right to marry a person of the same sex is a fundamental right. The court ignored *Glucksberg*'s careful-description command, opting instead to summarily conclude that same-sex marriage is a "right that [individuals seeking to marry a person of the same sex] have always been guaranteed by the United States Constitution." *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105, at *8 (M.D. Pa. May 20, 2014). But the court was only able to reach that conclusion by circumventing *Glucksberg*'s "history and tradition requirement." The Court asserted that the fundamental right to marriage traditionally recognized by the Supreme Court "reside[s] with the individual and cannot be infringed by the State," *id*. at *7 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)), apparently thinking the personal nature of the right a sufficient predicate to qualify it as fundamental. But the fact that a right

"resides with the individual" is completely irrelevant to the task of determining whether it is fundamental—indeed, if that were the calculus all rights would be fundamental.

In the end, the District Court's conclusion that same-sex marriage is subsumed within the established fundamental right to marry upheld by the Supreme Court is unavailing, for that deeply rooted right is the right to enter the relationship of husband and wife. Marriage, after all, is a term that, throughout Supreme Court precedent developing the fundamental right to marry, has always meant "the union . . . of one man and one woman." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Indeed, *every* case vindicating the fundamental right to marry has involved a man marrying a woman. And the Supreme Court's repeated references to the vital link between marriage and "our very existence and survival" confirm that the Court has understood marriage as a gendered relationship with an intrinsic connection to procreation. *See, e.g.*, *Loving*, 388 U.S. at 12. *Windsor* itself acknowledged that same-sex marriage is of recent vintage and not deeply rooted:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to . . . lawful marriage. For marriage between a man and a woman no doubt had 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 limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental[.]

133 S. Ct. at 2689.

B. Sexual Orientation is Not a Suspect Classification.

The District Court concluded that sexual orientation is a quasi-suspect classification subject to heightened scrutiny. *Whitewood*, 2014 WL 2058105, at *14. That decision is wrong because the class of persons seeking to redefine marriage to include same-sex couples are not politically powerless and sexual orientation is not immutable.

As to political power, a significant factor in the judicial analysis is whether the "political processes ordinarily to be relied upon to protect" the group seeking a suspect or quasi-suspect designation has been "curtail[ed]." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In assessing that factor, the relevant question is whether the class at issue is "politically powerless in the sense that [its members] have no ability to attract the attention of the lawmakers." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985). Here, however, it cannot be seriously questioned that gays and lesbians possess abundant political power and undoubtedly attract lawmakers' attention.

Indeed, individuals who identify as gay have achieved a disproportionate level of political power and success, particularly on the issue of marriage.[3] For example:

[3] Individuals who identify as gay comprise less than 4% of the population, *see* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, The Williams Institute (Apr. 2011), *available at*

- The Democratic Party has included redefining marriage in its official party platform. *See* Platform Standing Comm., 2012 Democratic Nat'l Convention Comm., *Moving America Forward* 17, 18 (2012), *available at* http://www.democrats.org/democratic-national-platform.
- The President and his administration support same-sex marriage. *See* Josh Earnest, *President Obama Supports Same-Sex Marriage*, The White House Blog (May 10, 2012, 7:31 PM), http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage.
- During the last five years, legislatures in seven United States jurisdictions—New Hampshire, Vermont, New York, the District of Columbia, Minnesota, Delaware, and Rhode Island—have voted to redefine marriage. *See Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, National Conference of State Legislatures (May 20, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx.
- In 2012, the citizens in three States—Maine, Maryland, and Washington—decided to redefine marriage through a direct vote of the people. *See* Richard Socarides, *Obama and Gay Marriage: One Year Later*, The New Yorker (May 6, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/05/obama-and-gay-marriage-one-year-later.html.

As a result, or perhaps because, of this tremendous political influence, a recent poll suggests that support for same sex marriage now stands at 55%, whereas in 1996 68% of those polled opposed same-sex marriage. *See* Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%: Nearly eight in 10 young adults favor gay marriage*, Gallup Politics (May 21, 2014), http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx. Put simply, citizens advocating to redefine marriage are among the most influential groups in modern politics; they have attained more legislative victories, political

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http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

power, and popular favor in less time than virtually any other group in American history. Characterizing this group as in need of "extraordinary protection from the majoritarian political process," *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), is therefore an untenable conclusion.

As to immutability, Supreme Court case law has established that an immutable characteristic is one "determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *see also Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (Ginsburg, J.). But "there are no replicated scientific studies supporting any specific biological etiology for homosexuality." American Psychiatric Association, *LGBT-Sexual Orientation*, http://psychiatry.org/mental-health/people/lgbt-sexual-orientation (last visited June 18, 2014). Absent such, sexual orientation cannot be declared immutable.

Because neither a fundamental right nor a suspect class is implicated, heightened scrutiny is not warranted, and rational-basis review is appropriate. And as established below by the then-existing Defendants, under that deferential standard, Pennsylvania's Marriage Laws easily pass constitutional muster.

C. *Windsor* Supports the Constitutionality of Pennsylvania's Marriage Laws.

The District Court's reliance on *Windsor* to strike down the challenged marriage laws constitutes legal error. To begin with, *Windsor* did not prohibit States from continuing to define marriage as the union of one man and one woman.

On the contrary, the Court's opinion is replete with assurances that the States retain their traditional right to define marriage. *See*, *e.g.*, *Windsor*, 133 S. Ct. at 2691 (noting that the "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States," and that the "definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations") (quotation marks and citation omitted).

Moreover, the *Windsor* Court reviewed a Second Circuit decision that adopted heightened scrutiny. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). And although the parties urging affirmance in that case pressed the Court to embrace that standard, *see* Brief on the Merits for Respondent at 17-32, *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), nowhere did the Court adopt it. Instead, *Windsor* made it patently clear that it is "[d]iscrimination[] of an unusual character," not any law that might disparately impact same-sex couples, that "require[s] careful consideration." *Id.* at 2693 (quotations omitted). The *Windsor* Court discerned unusualness there because the federal government "depart[ed] from [its] history and tradition of reliance on state law to define marriage." *Id.* at 2692. Here, however, Pennsylvania's Marriage Laws do not depart from settled legal tradition or the Commonwealth's history; those laws

merely reaffirm the understanding of marriage that has always prevailed there. By its own terms, then, *Windsor* does not call for heightened scrutiny here. And although Pennsylvania's Marriage Laws would satisfy such heightened scrutiny, the Court should have reviewed them under rational-basis review, where the myriad rational bases for the laws mean that they easily pass constitutional muster.

D. Plaintiffs' Claims Are Foreclosed by *Baker v. Nelson*.

The Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), of an essentially identical challenge to Plaintiffs' in this case, forecloses Plaintiffs' claims. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("[L]ower courts are bound by summary decisions by this Court until such time as the Court informs (them) that (they) are not") (quotation marks omitted). Perceived "doctrinal developments" discussed by the District Court, *see Whitewood*, 2014 WL 2058105 at 4-6, do not authorize lower courts to stray from *Baker*'s force as directly on-point precedent. Indeed, if Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quotation marks omitted). Therefore, because the Supreme Court has not directed otherwise, *Baker* remains controlling and precludes Plaintiffs' claims.

E. The Analogy to *Loving v. Virginia* is Inapposite.

In *Loving*, the Supreme Court determined that Virginia's miscegenation statute constituted invidious discrimination because racial classifications could not be a predicate for restricting marriage. But race is irrelevant to the State's interest in marriage, whereas the sex of the two individuals marrying is central. The District Court's attempt to predicate a right to same-sex marriage upon *Loving* is belied by history, biology, and *Loving* itself, which was premised on the understanding of marriage as a union of one man and one woman. 388 U.S. at 12 (recognizing that marriage is "fundamental to our very existence and survival"). Furthermore, the Supreme Court already rejected the *Loving* analogy in *Baker*: even though the petitioners in *Baker* cited *Loving* nine times in their jurisdictional statement, *see* Br. of Pet'r, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027), the Supreme Court still summarily dismissed their case.

II. The Threat of Irreparable Harm in the Absence of a Stay is Real.

If the Injunction is not stayed pending appeal, the Commonwealth and individuals will suffer irreparable harm. "[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("It also seems to me that any time a State is enjoined by a court from effectuating

statutes enacted by representatives of its people, it suffers a form of irreparable injury.")); *see also O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002) (granting a stay of an injunction because the state suffers irreparable harm when its statutes are enjoined). *Windsor* reaffirmed the state's unique interests in its marital statutes, noting that "'[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders'" and "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Windsor*, 133 S. Ct. at 2691. Forcing Pennsylvania to violate its "rightful and legitimate concerns in the marital status of persons" constitutes irreparable harm to the Commonwealth's sovereignty.

The recent case in Utah serves as an example of the practical harms that may occur to the Commonwealth and to individuals absent a stay. In that case, the District Court and Circuit Court declined to issue a stay. Order on Motion to Stay, *Kitchen v. Herbert*, No. 2:13-cv-00217-RJS (D. Utah Dec. 23, 2013); Order Denying Emergency Motion for Stay and Temporary Motion for Stay, *Kitchen v. Herbert*, 12-4178 (10th Cir. Dec. 24, 2013). As a result, many same-sex couples flocked to clerks' offices to obtain marriage licenses that were issued to them in accord with the district court's injunction. Associated Press, *Supreme Court*

Complicates Gay Marriages in Utah, (Jan. 8, 2014), http://universe.byu.edu/2014/01/08/supreme-court-complicates-gay-marriages-in-utah/. Days later, however, the Supreme Court granted a stay of the injunction, and Utah's laws that recognize marriage as a man-woman union went back into effect—thus, the state did not recognize the licenses that were issued prior to the Supreme Court's grant of the stay. Press Release, Office of the Utah Governor, *Governor's Office Gives Direction to State Agencies on Same-Sex Marriages* (Jan. 8, 2014), http://www.utah.gov/governor/news_media/article.html?article=9617. In addition to those whose licenses were no longer considered valid, individuals who planned ceremonies were unable to complete them, and financial and family planning decisions made upon the assumption that the state would recognize same-sex marriage licenses became a nullity. *See* Associated Press, *supra*.

Failure to stay the District Court's Injunction pending appeal is likely to result in similar injuries and the exacerbation of uncertainty. But a stay preserving the status quo of man-woman marriage will mitigate that uncertainty, and prevent state officials and myriad administrative agencies from having to revise regulations to accommodate the Injunction, only to have to revise them back if this Court, or the Supreme Court, ultimately upholds the Commonwealth's laws. The State's interest in enforcing its own laws and in ensuring administrative clarity, as well as

individual and corporate interests in certainty regarding marriage plans, demonstrate the irreparable injury that is likely in the absence of a stay.

III. Maintaining the Status Quo by Granting a Stay Will Not Cause Irreparable Harm to the Parties.

A stay would for now maintain the status quo that has prevailed since the inception of the Commonwealth and would pose no irreparable harm on the parties. *Ashcroft*, 314 F.3d at 467 ("Although we do not minimize the imposition on the Plaintiffs' [alleged constitutional right in question], a stay will merely reinstate the status quo."). Furthermore, while the violation of an established constitutional right may inflict irreparable harm, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976), that doctrine does not apply here, where Plaintiffs seek to establish a novel constitutional right through litigation. Plaintiffs suffer no constitutional injury from awaiting a final judicial determination of their claims before receiving the marriage licenses they seek. *Cf. Rostker v. Goldberg*, 448 U.S. 1306, 1310 (1980) (reasoning that the inconvenience of compelling respondents to register for the draft while their constitutional challenge was finally determined did not "outweigh[] the gravity of the harm" to the government "should the stay requested be refused").

On the other hand, if a stay is not granted and Commonwealth officials are enjoined from enforcing state law pending appeal, irreparable harm will occur to the Commonwealth, individuals and businesses that rely on the Injunction.

IV. The Public Interest is Served by Maintaining the Status Quo.

Pennsylvanians have an interest in deciding, through the democratic process, public policy issues of monumental societal importance such as the definition of marriage. Removing that decision from the people is a harm to the public interest. Moreover, the public also has an interest in certainty and in avoiding unnecessary expenditures. As outlined above, should a stay *not* be granted, marriages would be entered into under a cloud of uncertainty and the State would face administrative burdens associated with issuing licenses under that uncertainty. And, actions taken in reliance on marriages that ultimately prove invalid would pervasively impact the Commonwealth, harming myriad businesses, government agencies, and individual citizens. A stay, in contrast, would serve the public interest by preserving the status quo and allowing the appeals process to proceed on an issue of substantial state and national importance while *preventing* irreparable injury to the state and its citizens.

V. Additional Reasons Demonstrate the Court Should Grant a Stay Pending Appeal.

The only non-vacated Circuit court opinion to address the constitutional issues raised by Plaintiffs' claims has found a similar state law to be constitutionally sound, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (affirming the constitutionality of Nebraska's marriage laws) and in *Kitchen*, the Supreme Court has already stayed enforcement of an injunction

against a state's marriage laws. The Court should also follow the lead of the Ninth Circuit when it granted a stay of a similar injunction just last month. In *Latta v. Otter*, the Ninth Circuit was asked to stay a similar injunction after the district court refused. The three-judge circuit panel issued the stay (without dissent). Judge Hurwitz concurred in the Order and provided the following rationale: "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." *Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (Hurwitz, J., concurring).

VI. Clerk Gaffney has Standing to Appeal and is Affected by the Judgment.

Clerk Gaffney's official duty to issue marriage licenses provides a concrete, significant, and undeniable interest in the outcome of this case. 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). That is exactly the situation here. The District Court's ruling threatens to change Clerk Gaffney's duties by requiring her to issue marriage licenses to same-sex couples. It is thus beyond question that Clerk Gaffney has a significantly protectable interest in this litigation because her official rights and duties "may be affected directly by the disposition of [this] litigation." *Id.* The ministerial nature of

Clerk Gaffney's duties do not undercut her "interest in the constitutionality" of the challenged statutes. *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (en banc).

VII. The Court Should Expedite Consideration of This Motion.

The matters presented by this motion for stay involve issues of utmost importance to the democratic process and the rule of law. As noted above, enjoining the enforcement of Pennsylvania's laws constitutes irreparable injury to the Commonwealth, and irreparably injures businesses and individuals who are forced to plan and operate in uncertainty. Expedited consideration is thus appropriate.

CONCLUSION

Wherefore, counsel respectfully requests that, after expedited consideration of this Motion, the Court grant a stay pending appeal of the district court's May 20, 2014 Injunction. Appellant further requests that the Court schedule the opposition and reply as follows: Opposition due June 20, 2014; Reply due June 23, 2014.

Respectfully submitted this 18th day of June, 2014.

s/ J. Caleb Dalton

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**Application for Admission to the Third Circuit Pending*

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2014, I electronically filed the foregoing 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: June 18, 2014

s/ J. Caleb Dalton
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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d) and 46.1(e), the undersigned counsel certifies that he is a member of the bar of this Court.

s/ J. Caleb Dalton
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