

**TESTIMONY OF  
JOSHUA PRINCE, ESQ.**

**Chief Counsel  
Firearms Industry Consulting Group  
a division of Prince Law Offices, P.C.**



**PUBLIC HEARING BEFORE  
THE PENNSYLVANIA HOUSE  
STATE GOVERNMENT COMMITTEE  
ON  
IMPEACHMENT OF ATTORNEY GENERAL KANE**

**MAY 6, 2014**

Mr. Chairman and Honorable Members of the Committee, I appreciate the opportunity to be here today and discuss these important issues.

I am a licensed member, in good standing, of the Pennsylvania Bar and am admitted to numerous courts, including: Pennsylvania Supreme Court, U.S. Supreme Court, U.S. Court of Appeals for the Third Circuit, District Courts for the Eastern, Middle and Western Districts of Pennsylvania and the District Court for the District of Colorado. As my curriculum vitae is beyond the scope of my testimony today, I am attaching it as Exhibit A.<sup>1</sup>

### **Summary of Testimony**

As explained more thoroughly below, the Attorney General of Pennsylvania lacks the power and authority to modify, amend, rescind, revoke or otherwise change or invalidate any firearm reciprocity agreement, as the sole-power of the Attorney General, as bestowed upon Attorney General by the Legislature, is “the power and duty to *enter*

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<sup>1</sup> Joshua Prince, Esq. is Chief Counsel of the Firearms Industry Consulting Group, a division of Prince Law Offices, P.C. and actively litigates all forms of firearms-related issues, at the state and federal level.

FICG represents numerous individuals, gun clubs and Federal Firearms Licensees in Pennsylvania with regards to state law issues. Furthermore, in relation to federal issues, FICG represents numerous Federal Firearms Licensees across the United States in all matters relating to firearms. FICG actively works to defend, preserve, and protect constitutional and statutory rights of firearm owners, including through Article 1, Section 21 of the Pennsylvania Constitution and the 2<sup>nd</sup> Amendment of the United States Constitution.

FICG’s purpose is to provide legal representation in the protection and defense of the Constitutions of Pennsylvania and the United States, especially with reference to the inalienable right of the individual citizen guaranteed by such Constitutions to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens.

*into* reciprocity agreements with other states.” Only the Legislature has the power and authority to modify, amend, rescind, revoke or otherwise change or invalidate an existing reciprocity agreement.

Further, while seemingly in direct violation of the statutory delegation and an attempt to usurp the Legislature’s power, Attorney General Kane’s action raise serious constitutional questions, as Pennsylvania provided no opportunity to be heard prior to these changes, no compensation to the aggrieved and is now discriminating against its own citizens, as a Florida, Virginia or Arizona resident may lawfully carry a concealed firearm based upon his/her respective Florida, Virginia or Arizona license or permit in Pennsylvania, but a Pennsylvania resident may not carry a concealed firearm in Pennsylvania based upon the same Florida, Virginia or Arizona license or permit.

Moreover, Attorney General Kane’s Notices have usurped the legislative authority in enacting 18 Pa.C.S. §§ 6106, 6108, as her blanket statements that Pennsylvania residents may not carry a loaded firearm, in any manner, solely pursuant to a valid Florida, Virginia, or Arizona concealed carry permit, is contrary to the law and will only seek to confuse law enforcement and violate civil liberties of Pennsylvania residents.

In turning to the Attorney General Kane’s obligations under Article IV, Section 4.1 of the Pennsylvania Constitution and the Commonwealth Attorneys Act, 71 Pa.C.S. § 732-101, et seq., she has failed “to uphold and defend the constitutionality of all statutes.”

**I. Modifications, Amendments, Rescissions, Revocations of License to Carry Firearm Reciprocity Agreements**

For the reasons set-forth below, the Attorney General of Pennsylvania lacks the power and authority to modify, amend, rescind, revoke or otherwise change or invalidate any firearm reciprocity agreement, as the sole-power of the Attorney General, as bestowed upon Attorney General by the Legislature, is “the power and duty to *enter into* reciprocity agreements with other states,” pursuant to 18 Pa.C.S. § 6109(k). Only the Legislature has the power and authority to modify, amend, rescind, revoke or otherwise change or invalidate an existing reciprocity agreement. Further, Attorney General Kane’s notices have attempted to usurp the Congressional enactment of 18 Pa.C.S. § 6106, as her blanket statements that Pennsylvania residents may not carry a loaded firearm, in any manner, solely pursuant to a valid Florida, Virginia, or Arizona concealed carry permit, is contrary to the law.

**Background**

In early 2013, shortly after taking office, Attorney General Kathleen Kane began “amend[ing]” existing firearm reciprocity agreements.

**Florida**

On February 1, 2013, the existing reciprocity agreement, which had been entered into on September 21, 2001, with Florida was amended.<sup>2</sup> The amended Reciprocity

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<sup>2</sup> A copy of the original Reciprocity Agreement, the amended Reciprocity Agreement, the Notice regarding the amended Reciprocity Agreement and the Notice an individual received from Florida are attached hereto as Exhibit B.

It must be noted that it is questionable as to the effective date, or even the validity of the amended Reciprocity Agreement, as, in addition to not having the authority to amend or otherwise change a reciprocity agreement as discussed *infra*, the Reciprocity

Agreement provides: “This Reciprocity Agreement is intended to *amend* and *supersede* the original agreement [sic] entered into between the State of Florida and the Commonwealth of Pennsylvania on September 21, 2001.” (emphasis added). On February 8, 2013, Attorney General Kane issued a Notice declaring that the “Attorney General of Pennsylvania has entered into a *modification* of the current firearm reciprocity agreement with the state of Florida.”<sup>3</sup> (emphasis added). The Notice received by an individual who had a valid and lawfully issued Florida license reflects that approximately 4,700 Pennsylvania residents have been affected.<sup>4</sup>

#### Virginia

On April 9, 2013, the existing reciprocity agreement, which had been entered into on January 3, 2007, with Virginia was amended.<sup>5</sup> The amended Reciprocity Agreement provides: “This Reciprocity Agreement is intended to *amend* and *supersede* the original agreement [sic] entered into between the Commonwealth of Virginia and the Commonwealth of Pennsylvania on January 3, 2007.” (emphasis added). On April 11, 2013, Attorney General Kane issued a Notice declaring that the “Attorney General of Pennsylvania has entered into a *modification* of the current firearm reciprocity agreement with the state [sic] of Virginia<sup>6</sup>.”<sup>7</sup> (emphasis added).

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Agreement effective date is listed as February 1, 2013, yet, Attorney General Kane’s signature is dated February 4, 2013.

<sup>3</sup> See, Exhibit B.

<sup>4</sup> Id.

<sup>5</sup> A copy of the original Reciprocity Agreement, the amended Reciprocity Agreement and the Notice regarding the amended Reciprocity Agreement are attached hereto as Exhibit C.

<sup>6</sup> See Hornbook of Virginia History, 4th ed., page 88, declaring that Virginia is a Commonwealth, not a state.

<sup>7</sup> See, Exhibit C.

## Arizona

On April 8, 2013, the existing reciprocity agreement, which had been entered into on February 19, 2008, with Arizona was amended.<sup>8</sup> The amended Reciprocity Agreement provides: “This Reciprocity Agreement is intended to *amend* and *supersede* the original agreement [sic] entered into between the State of Arizona and the Commonwealth of Pennsylvania in [sic] February 19, 2008.” (emphasis added). On April 11, 2013, Attorney General Kane issued a Notice declaring that the “Attorney General of Pennsylvania has entered into a *modification* of the current firearm reciprocity agreement with the state of Arizona.”<sup>9</sup> (emphasis added).

### Statutory Provisions

#### 18 Pa.C.S. § 6109

18 Pa.C.S. § 6109(k) provides:

**(k) Reciprocity.—**

- (1) The Attorney General shall have the power and duty to *enter into* reciprocity agreements with other states providing for the mutual recognition of a license to carry a firearm issued by the Commonwealth and a license or permit to carry a firearm issued by the other state. To carry out this duty, the Attorney General is authorized to negotiate reciprocity agreements and *grant recognition of a license or permit to carry a firearm issued by another state*.
- (2) The Attorney General shall report to the General Assembly within 180 days of the effective date of this paragraph and annually thereafter concerning the agreements which have been consummated under this subsection. (emphasis added).

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<sup>8</sup> A copy of the original Reciprocity Agreement, the amended Reciprocity Agreement and the Notice regarding the amended Reciprocity Agreement are attached hereto as Exhibit D.

<sup>9</sup> See, Exhibit D.

18 Pa.C.S. § 6106

18 Pa.C.S. § 6106(b), in part, provides:

**(b) Exceptions.**—The provisions of subsection (a) shall not apply to:

(11) Any person while carrying a firearm in any vehicle, which person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.

(15) Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:

- (i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.
- (ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.

**Legal Discussion**

**a. Attorney General Kane Lacks the Power and Authority to Modify, Amend, Rescind, Revoke or Otherwise Change or Invalidate any Firearm Reciprocity Agreement, pursuant to 18 Pa.C.S. § 6109(k).**

As specified above, 18 Pa.C.S. § 6109(k) only provides the Attorney General with the “power and duty to *enter into* reciprocity agreements.” (emphasis added). It continues on to emphasize this limited delegation of power that “[t]o carry out this duty, the Attorney General is authorized to negotiate reciprocity agreements and *grant recognition of a license or permit to carry a firearm issued by another state.*” (emphasis added).

It is important to note that in amending the existing reciprocity agreements, Attorney General Kane only cites to her authority pursuant to 18 Pa.C.S. § 6109(k);

thereby, acknowledging that the Attorney General's only power is that power conferred upon her by Section 6109(k).<sup>10</sup>

Notably absent from this delegation of power from the Legislature to the Attorney General in Section 6109(k) is the power to modify, amend, rescind, revoke or otherwise change or invalidate any firearm reciprocity agreement. Therefore, the Legislature has *only* delegated its power to *enter into* and *grant* reciprocity agreements but has *retained* its power to modify, amend, rescind, revoke or otherwise change or invalidate any firearm reciprocity agreement.

In turning to the Pennsylvania Statutory Construction Act, 1 Pa.C.S. § 1501, et seq., Section 1901 provides: “In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.” In determining the meaning of words, Section 1903, “Words and phrases shall be construed according to rules of grammar and according to their common and approved usage.”

The Legislature in enacting Section 6109(k) sought to limit the delegation of power to the Attorney General, as it utilized the words “enter into,” instead of conferring a general power to control, in all aspects, reciprocity agreements. Black’s Law Dictionary defines the word “enter” in pertinent part as “3. To *become* a party to.”<sup>11</sup> (emphasis added). Clearly, the common meaning of “enter into” means to become a party to something, which had not yet existed.

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<sup>10</sup> See, Exhibits B, C, and D.

<sup>11</sup> BLACK’S LAW DICTIONARY 572 (8<sup>th</sup> ed. 2007).



In this matter, former Attorneys General Mike Fisher and Tom Corbett entered into separate reciprocity agreements with Florida, Virginia and Arizona, all of which Attorney General Kane acknowledges in each of the amended Reciprocity Agreements.<sup>12</sup> The text of the modified Reciprocity Agreements provides that the existing reciprocity agreement is being *amended*. The Attorney General does not even contend that she is “entering into” a reciprocity agreement, but rather, acknowledges that she seeks “to amend and supersede the original agreement.”

In the Notices provided by Attorney General Kane, instead of stating that she is “amending” the original agreement, she states that she has “entered into a *modification*” of the current agreement.<sup>13</sup> (emphasis added). Once again, the statutory delegation of power to the Attorney General does not confer power to modify or otherwise change an existing reciprocity agreement.

In turning to the second part of Section 6109(k)(1), the Legislature again sought to clarify and limit the power being bestowed upon the Attorney General – “To carry out this duty, the Attorney General is authorized to negotiate reciprocity agreements and *grant recognition of a license or permit to carry a firearm issued by another state.*” (emphasis added). The Legislature’s use of the word “grant,” especially when viewed in light of the previous sentence’s use of the words “enter into,” clearly reflect the Legislature’s limited delegation of power.

Again turning to Black’s Law Dictionary, it defines the word “grant” in pertinent part as “3. To permit or agree to.”<sup>14</sup> Neither in relation to “enter” or “grant” is any

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<sup>12</sup> See, Exhibits B, C, and D.

<sup>13</sup> Id.

<sup>14</sup> BLACK’S LAW DICTIONARY 720 (8<sup>th</sup> ed. 2007).

definition, let alone a common and approved usage, found which includes the words modify, amend, rescind, revoke or otherwise change or invalidate.

Thus, based strictly on the statutory language of Section 6109(k) and the Statutory Construction Act, the Attorney General *only* has the power to “enter into” reciprocity agreements.

**b. The Grant of Recognition is Absolute and Cannot be Limited**

Pursuant to the second sentence of Section 6109(k)(1), the granting of recognition of another state’s license or permit to carry a firearm is absolute and cannot be limited, as, in addition to being in violation of the strict statutory language, it would likely violate the Due Process, Takings, Privileges and Immunities and Equal Protection Clauses, since citizens of Pennsylvania were provided no opportunity to be heard before or after a fundamental change was effected in their liberty and property interest in an issued license to carry firearms, were provided no compensation for the governmental taking, and are being treated differently than those of other states and similarly situated individuals.

In pertinent part, Section 6109(k) provides, “To carry out this duty, the Attorney General is authorized to negotiate reciprocity agreements and *grant recognition of a license or permit to carry a firearm issued by another state.*” (emphasis added).

This statutory delegation is extremely clear that the power is to grant recognition of another state’s license or permit and does not provide the Attorney General with the power to limit the grant of recognition based upon the state of residence of the license or permit holder. Either, the Attorney General can take no action or can grant recognition of the other state’s license or permit; however, as is the case in this matter, the Attorney

General cannot grant recognition to a resident of the issuing state but refuse recognition for a non-resident of the issuing state.

In amending the reciprocity agreements with Florida, Virginia and Arizona, Attorney General Kane modified the reciprocity agreements so that although Pennsylvania will recognize a resident of that state's license or permit, Pennsylvania will not recognize a non-resident of that state's license or permit, even though former Attorneys General Fisher and Corbett found and entered into previous reciprocity agreements that provided for recognition of license or permits issued by those states to non-residents of those states. While seemingly in direct violation of the statutory delegation, as the Attorney General only has the power to either grant or not grant recognition of another state's license or permit, and an attempt to usurp the Legislature's power, Attorney General Kane's actions raise serious constitutional questions, as Pennsylvania provided no opportunity to be heard prior to these changes, no compensation to the aggrieved and is now discriminating against its own citizens, as a Florida, Virginia or Arizona resident may lawfully carry a concealed firearm based upon his/her respective Florida, Virginia or Arizona license or permit in Pennsylvania, but a Pennsylvania resident may not carry a concealed firearm in Pennsylvania based upon the same Florida, Virginia or Arizona license or permit.

i. Due Process

One's due process protections are found in the Pennsylvania Constitution in Article 1, Sections 1, 9, and 11<sup>15</sup> and in the U.S. Constitution in the 5<sup>th</sup> and 14<sup>th</sup>

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<sup>15</sup> See, Stone & Edwards Ins. Agency v. Dep't of Ins., 636 A.2d 293, 297 (Pa. Cmwlth. Ct. 1994).

Amendments. The right to due process is triggered when the government seeks to deprive citizens of legally cognizable liberty or property interests. *See, Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1256 (3d Cir. 1994). The U.S. Supreme Court has made abundantly clear that a “license may not be revoked or suspended at the discretion of the . . . authorities,” where there exists a liberty or property interest. *Barry v. Barchi*, 443 U.S. 55, 64 n.11 (1979). The Commonwealth Court in *Caba v. Weaknecht* held that an individual has both a protected property and liberty interest in an issued license to carry firearms under the Pennsylvania and U.S. Constitutions, affording the individual due process protections.<sup>16</sup> Furthermore, Florida’s statute for a license to carry a firearm, F.S.A. 790.06(10)(a)-(h), sets out the basis for why a Florida resident may have his license revoked and there does not exist a discretionary basis, as Florida acknowledges that there exists a property and liberty interest in an issued firearm license.

Therefore, at a minimum, a post-deprivation hearing was necessary to be provided to those individual who were affected by the amendments.<sup>17</sup>

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<sup>16</sup> *Caba v. Weaknecht*, 64 A.3d 39, 60, 63 (Pa. Cmwlth. Ct. 2013), reconsideration denied (Mar. 27, 2013), appeal denied, 77 A.3d 1261 (Pa. 2013)

“Under *Board of Regents* and *Paul*, and recognizing that Article I, Sections 1 and 11 of the Pennsylvania Constitution expressly attach due process protections to a citizen's interest in his or her reputation, we hold that the Sheriff's revocation of Caba's license in this case implicated a liberty interest worthy of procedural due process protections.”

“When a regulatory scheme provides for a review of an adverse governmental decision, this ‘sheds light on the legislature's intention in conferring a property right on those’ with the appeal right.”

<sup>17</sup> It is questionable in this context as to why a pre-deprivation hearing was not legally required and could not be provided, since the Attorney General did not find any urgency in the enforcement of the amended reciprocity agreements, as she provided 120 days notice before enforcement. See, Exhibits B, C, and D stating “If you are currently a

As reflected in Exhibit B, the records of Florida's Department of Agriculture and Consumer Services, which is responsible for the issuance of non-resident licenses, reflect that approximately 4,700 individuals in Pennsylvania have been affected by this change, alone. It is unknown how many Pennsylvania residents were affected by the changes to the Virginia and Arizona reciprocity agreements. Clearly, the due process rights of those individuals have been violated by Attorney General Kane's actions, assuming, *arguendo*, that the amendments of the reciprocity agreements are valid.

ii. Taking Without Just Compensation

The 5<sup>th</sup> Amendment of the U.S. Constitution requires that just compensation be paid when the Government takes private property. In this matter, Pennsylvania residents paid fees to Florida, Virginia and Arizona for licenses or permits from the respective states. Florida's non-resident application fee is \$112.00 and the renewal fee is \$102.00.<sup>18</sup> Virginia's non-resident application and renewal fee is \$100.00.<sup>19</sup> And, Arizona's non-resident application fee is \$60.00 and the renewal fee is \$43.00.<sup>20</sup>

In relation to Florida alone, as we know approximately 4,700 Pennsylvania residents were affected,<sup>21</sup> this would result, based solely on the renewal rate, which is cheaper than the original application fee, in the deprivation of approximately \$479,400 to those residents of Pennsylvania. Unfortunately, we do not know the cost in relation to

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resident of Pennsylvania only and have a CCP from the state of [Florida, Virginia or Arizona], your [Florida, Virginia or Arizona] permit will no longer be recognized in Pennsylvania 120 days from the date of this Notice”

<sup>18</sup> See,

[http://www.freshfromflorida.com/content/download/7438/118429/License\\_Fees.pdf](http://www.freshfromflorida.com/content/download/7438/118429/License_Fees.pdf).

<sup>19</sup> See,

[http://www.vsp.state.va.us/Firearms\\_NonresidentConcealed.shtm#Replacement\\_Permits](http://www.vsp.state.va.us/Firearms_NonresidentConcealed.shtm#Replacement_Permits).

<sup>20</sup> See, [http://www.azdps.gov/Services/Concealed\\_Weapons/Fees](http://www.azdps.gov/Services/Concealed_Weapons/Fees).

<sup>21</sup> See, Exhibit B.

those Pennsylvania residents who were affected by the changes to the Virginia and Arizona reciprocity agreements. It is assumed that a similar number of Pennsylvania residents were affected by those changes as well, resulting in over \$1,000,000.00 being taken from Pennsylvania residents by the Attorney General's actions.

Accordingly, any Pennsylvania resident who obtained a Florida, Virginia or Arizona license for purposes of carrying in the Commonwealth, as a result of Attorney General Kane's actions, has been deprived of the fees paid, without any form of just compensation.

### iii. Equal Protection

In turning to the Equal Protection clause of the Pennsylvania Constitution found in Article 1, § 26 and 14<sup>th</sup> Amendment of the U.S. Constitution, the Pennsylvania Supreme Court has found that equal protection claims are analyzed under the Federal approach. Love v. Borough of Stroudsburg, 597 A.2d 1137, 1139 (Pa. 1991). "In order to state an equal protection claim . . . the party claiming such discrimination must show that 'persons similarly situated have not been treated the same and that 'the decisions were made on the basis of an unjustifiable standard such as race, religion, *or other arbitrary classification or to prevent the party's exercise of a fundamental right.*' *Correll*, 726 A.2d at 431 *quoting Knepp v. Lane*, 848 F.Supp. 1217, 1221-22 ((E.D.Pa. 1994).

It is undisputed that, even absent the U.S. Supreme Court's holding in District of Columbia v. Heller, 554 U.S. 570 (2008), Pennsylvania already acknowledges that there exists a fundamental right to keep and bear arms. The Legislature has declared, pursuant to 23 Pa.C.S. § 6101(2), "The Second Amendment to the Constitution of the United States and section 21 of Article I of the Constitution of Pennsylvania recognize a

fundamental right to keep and bear arms”<sup>22</sup> and the Pennsylvania Supreme Court has held, “[T]he right to bear arms enjoys constitutional protection...” Lehman v. Pennsylvania State Police, 839 A.2d 265, 273 (Pa. 2003).

As the Commonwealth Court has already held in Caba v. Weaknecht, *supra*, that a license to carry firearms holder has due process protections in an issued licensed and there additionally exists a fundamental right in the right to keep and bear arms, Attorney General Kane’s amendments to the existing reciprocity agreements, if valid, are an attempt to prevent the exercise of a fundamental right.

Furthermore, even setting aside Article 1, Section 21 and the 2<sup>nd</sup> Amendment, Attorney General Kane’s classification in this context is clearly arbitrary and capricious, as there exists no reasonable basis to permit Florida, Virginia or Arizona residents to carry concealed firearms within the Commonwealth on the respective state-of-residence’s license, while denying Pennsylvania residents the ability to carry on those states’ licenses.

Clearly, the equal protection rights of those Pennsylvania residents, who have had their licenses invalidated, have been violated by Attorney General Kane’s actions, assuming, *arguendo*, that the amendments of the reciprocity agreements are valid.

#### iv. Privileges and Immunities

Finally, in turning to the Privileges and Immunities Clause of the U.S. Constitution, Article IV, Section 2, Clause 1, it provides, “The Citizens of each State

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<sup>22</sup> This portion of the statute was amended by the General Assembly, in 2005, Nov. 10, P.L. 335, No. 66, effective in 180 days [May 9, 2006].

shall be entitled to all Privileges and Immunities of Citizens in the several States.” The U.S. Supreme Court in *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999) held:

[O]ur cases have not identified any acceptable reason for qualifying the protection afforded by the Clause for the citizen of State A who ventures into State B to settle there and establish a home. Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident’s exercise of the right to move into another State and become a resident of that State. What is at issue . . . then, is [the] third aspect of the right to travel – the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State.”

In this context, it is hard to fathom how a Pennsylvania resident may be denied the same right as a Florida, Virginia or Arizona resident *in Pennsylvania*, without violating the Privileges and Immunities Clause, as the Pennsylvania resident is being discriminated against based upon his/her residency. It would seem clear that the Privileges and Immunities rights have been violated of those Pennsylvania residents, who have had their licenses invalidated by Attorney General Kane’s actions, assuming, *arguendo*, that the amendments of the reciprocity agreements are valid.

**c. Attorney General Kane’s Notices of Modification Attempt to Usurp the Authority and Statutory Enactments of the Legislature and Confuse Law Enforcement.**

Attorney General Kane has issued Notices to Florida, Virginia and Arizona license holders<sup>23</sup> stating:

If you are currently a resident of Pennsylvania only and have a CCP from the state of [Florida, Virginia or Arizona], your [Florida, Virginia or Arizona] permit will no longer be recognized in Pennsylvania 120 days from the date of this Notice, or on June 8, 2013. In the proscribed time period you may apply for a CCP in the county of your residence.

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<sup>23</sup> See, Exhibits B, C, and D.



This declaration by Attorney General Kane is in direct contradiction to the legislative enactments found in 18 Pa.C.S. §§ 6106, 6108.

Section 6106(b) provides exceptions from the firearm licensing requirements in certain situations. Two of those exceptions, (11) and (15), are directly contrary to Attorney General Kane's declaration.

Section 6106(b)(11) provides:

*Any person while carrying a firearm in any vehicle, which person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.* (emphasis added)

Attorney General Kane's declaration would seemingly attempt to invalidate this statutory provision by stating that "[i]f you are currently a resident of Pennsylvania only and have a CCP from the state of [Florida, Virginia or Arizona], your [Florida, Virginia or Arizona] permit will no longer be recognized in Pennsylvania." Clearly, as "any person" may carry a loaded firearm in his/her vehicle, pursuant to a valid and lawfully issued license or permit from "any other state," Attorney General Kane's statement that a Pennsylvania resident's out-of-state license or permit will no longer be recognized in Pennsylvania is contrary to the law and will only seek to confuse law enforcement and violate civil liberties of those carrying a loaded firearm in their vehicles pursuant to another state's license or permit.

In turning to Section 6106(b)(15), it provides:

*Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:*

- (i) The state provides a reciprocal privilege for individuals

licensed to carry firearms under section 6109.

- (ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.

This provision is very unique as it specifies that it applies regardless of whether or not a reciprocity agreement exists. Attorney General Kane's declaration would seemingly attempt to invalidate this entire statutory provision by stating that "[i]f you are currently a resident of Pennsylvania only and have a CCP from the state of [Florida, Virginia or Arizona], your [Florida, Virginia or Arizona] permit will no longer be recognized in Pennsylvania." While Attorney General Kane may attempt to argue that subsections (i) and (ii) are not met, such an argument is unpersuasive, given the prior findings of former Attorneys General Fisher and Corbett and the amended reciprocity agreements with Florida, Virginia and Arizona.

It is undisputed based upon the prior reciprocity agreements and the amendments that Attorney General Kane has attempted to institute that Florida, Virginia and Arizona provide reciprocal privileges for individuals to carry firearms.<sup>24</sup> Therefore, the criteria of Section 6106(b)(15)(i) is met.

In relation to Section 6106(b)(15)(ii), former Attorneys General Fisher and Corbett, in enacting our prior reciprocity agreements with Florida, Virginia and Arizona found that the laws were similar to the laws of this Commonwealth. In fact, as part of the Attorneys General Fisher and Corbett Reciprocity Agreements, a provision was included requiring the respective states to notify one another of "any changes in their respective carrying of concealed weapons statutes that may affect the eligibility of recognition

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<sup>24</sup> Id.

granted by each state.” *See*, Exhibit B, Florida Agreement, para 4. *See also*, Exhibit C, Virginia Agreement, para 4. and Exhibit D, Arizona Agreement, para 4. Further, the Virginia and Arizona Attorney General Corbett Reciprocity Agreements provide, “WHEREAS, the Attorney General of the Commonwealth of Pennsylvania has determined that the state of [Virginia or Arizona] meets the requirements for reciprocity with the Commonwealth of Pennsylvania.” <sup>25</sup>

Furthermore, to the extent there exists an argument that the laws are no longer similar, Attorney Eric Friday, who is licensed by the Florida Bar and is general counsel for Florida Carry, Inc., provided an Affidavit stating that since September 21, 2001, there have been only three minor changes to Florida’s licensing provisions, none of which are substantial – 1. License is now valid for seven years as opposed to only be valid for five previously; 2. The reduction in fees for licenses; and 3. Providing licenses to military members and honorably discharged veterans.<sup>26</sup> Therefore, it would seem that there exists no basis to find that Florida’s firearms law have substantially changed since the enactment of the original reciprocity agreement, which found that the laws were similar.

Clearly, as “any person” may carry a loaded firearm in the Commonwealth, pursuant to a valid and lawfully issued license or permit “under the laws of another state,” Attorney General Kane’s statement that a Pennsylvania resident’s out-of-state license or permit will no longer be recognized in Pennsylvania is contrary to the law and will only seek to confuse law enforcement and violate civil liberties of those carrying a loaded firearm pursuant to Section 6106(b)(15).

Lastly, in turning to Section 6108, it provides:

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<sup>25</sup> *Id.*

<sup>26</sup> *See*, Exhibit E.

No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:

- (1) such person is licensed to carry a firearm; or
- (2) *such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license). (emphasis added).*

As I have reviewed the exemptions as provided for by Section 6106(b) above, it is clear that a Pennsylvania resident may lawfully carry a firearm, rifle or shotgun upon the public property in a city of the first class, pursuant to a Florida, Virginia or Arizona license, since, at a minimum, Section 6106(b)(11) exempts any person who has a valid and lawfully issued license from “any other state.” Once again, Attorney General Kane’s statement that a Pennsylvania resident’s out-of-state license or permit will no longer be recognized in Pennsylvania is contrary to the law and will only seek to confuse law enforcement and violate civil liberties of those carrying a firearm, rifle or shotgun in a city of the first class pursuant to another state’s license or permit.

\* \* \*

For all of the above reasons, the Attorney General of Pennsylvania lacks the power and authority to modify, amend, rescind, revoke or otherwise change or invalidate any firearm reciprocity agreement, as the sole-power of the Attorney General, as bestowed upon Attorney General by the Legislature, is “the power and duty to *enter into* reciprocity agreements with other states.” Only the Legislature has the power and authority to modify, amend, rescind, revoke or otherwise change or invalidate an existing reciprocity agreement.

Further, while seemingly in direct violation of the statutory delegation and an attempt to usurp the Legislature's power, Attorney General Kane's action raise serious constitutional questions, as Pennsylvania provided no opportunity to be heard prior to these changes, no compensation to the aggrieved and is now discriminating against its own citizens, as a Florida, Virginia or Arizona resident may lawfully carry a concealed firearm based upon his/her respective Florida, Virginia or Arizona license or permit in Pennsylvania, but a Pennsylvania resident may not carry a concealed firearm in Pennsylvania based upon the same Florida, Virginia or Arizona license or permit.

Lastly, Attorney General Kane's Notices have usurped the legislative authority in enacting 18 Pa.C.S. §§ 6106, 6108, as her blanket statements that Pennsylvania residents may not carry a loaded firearm, in any manner, solely pursuant to a valid Florida, Virginia, or Arizona concealed carry permit, is contrary to the law and will only seek to confuse law enforcement and violate civil liberties of Pennsylvania residents.

## **II. Commonwealth Attorneys Act**

For the reasons set-forth below, Attorney General Kane is in violation of Article IV, Section 4.1 of the Pennsylvania Constitution and the Commonwealth Attorneys Act, 71 Pa.C.S. § 732-101, et seq., as she has failed in her duty to uphold and defend the constitutionality of the congressionally-enacted definition of marriage as found in 23 Pa.C.S. § 1102.

Regardless of one's views of Pennsylvania's definition of marriage, it is undisputed that the Attorney General is obligated, pursuant to 71 Pa.C.S. § 732-204(a)(3), to "defend the constitutionality of all statutes" and, in this matter, has elected not to based on her own personal and/or political opinions.

## **Background**

On June 26, 2013, in United States v. Windsor, 133 S. Ct. 2675, 2691-93, 186 L. Ed. 2d 808 (2013), the United States Supreme Court struck down the Federal Defense of Marriage Act, which similar to Pennsylvania's definition defined a marriage as a contract between a man and a woman, on the grounds that the *Federal Government* improperly intruded upon the states' "historic and essential authority to define the marital relation," as "[S]tate laws defining and regulating marriage ... is an area that has long been regarded as virtually exclusive provision of the States" and that "[t]he responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people." The Court *did not hold* that a state violates the constitution when it defines marriage as a contract between a man and a woman. In fact, the Court spent a significant amount of the decision acknowledging that the determination is *best made* by the state.

On July 11, 2013, Attorney General Kane held a public press conference at the National Constitution Center in Philadelphia to announce that she would not defend a lawsuit challenging a lawfully enacted Pennsylvania statute.<sup>27</sup> Only two days earlier, in the U.S. District court for the Middle District of Pennsylvania, a civil action captioned as Whitewood v. Corbett was filed challenging the constitutionality of Act 124 of 1996, which defined "marriage" in this Commonwealth as "a civil contract by which one man and one woman take each other for husband and wife" and which denied recognition of same-sex marriages conducted in other states. During the press conference, Attorney

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<sup>27</sup> See, <https://www.youtube.com/watch?v=0HFVNBND2oE>. See also, <http://www.attorneygeneral.gov/press.aspx?id=7043>.

General Kane stated, “I cannot ethically defend the constitutionality of Pennsylvania’s version of DOMA, where *I believe it to be* wholly unconstitutional.” (emphasis added).

After Attorney General Kane's public announcement, the Montgomery County Register of Wills began to issue marriage licenses to same-sex couples, citing Attorney General Kane's announcement to support its lawful authority to do so.<sup>28</sup> Thereafter, in September, President Judge Dan Pellegrini of the Commonwealth Court of Pennsylvania would issue decision granting a peremptory judgment of mandamus against the Montgomery County Register of Wills from issuing same-sex licenses;<sup>29</sup> yet, Attorney General Kane continued to refuse to defend the constitutionality of the definition of marriage in the Commonwealth.<sup>30</sup>

### **Constitutional and Statutory Provisions**

Article IV, Section 4.1 of Pennsylvania’s Constitution provides, in part:

An Attorney General ... shall exercise such powers and *perform such duties as may be imposed by law*. (emphasis added).

Section 204(a)(3) of the Commonwealth Attorneys Act provides:

*It shall be the duty* of the Attorney General to *uphold and defend the constitutionality of all statutes* so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction. (emphasis added).

### **Attorney General Kane has Violated the Commonwealth Attorneys Act**

Article IV, Section 4.1 of Pennsylvania’s Constitution places an absolute obligation on the Attorney General to “*perform such duties as may be imposed by law*.” It

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<sup>28</sup> See, <http://abclocal.go.com/wpvi/story?section=news/local&id=9183134>

<sup>29</sup> See, Exhibit F.

<sup>30</sup> See, [http://articles.philly.com/2014-01-18/news/46304583\\_1\\_montgomery-county-register-bruce-hanes-marriage-licenses](http://articles.philly.com/2014-01-18/news/46304583_1_montgomery-county-register-bruce-hanes-marriage-licenses)

is undisputed that Section 4.1 does not provide for any exception. Further, Section 204(a)(3) of the Commonwealth Attorneys Act imposes a duty upon the Attorney General to “*uphold and defend the constitutionality of all statutes.*” Once again, it is undisputed that Section 204(a)(3) does not provide for any exception, especially one based upon the Attorney General’s beliefs or political agenda.

Whether the Pennsylvania definition of marriage should be amended is an issue for the citizens of Pennsylvania and their respective representatives, as the U.S. Supreme Court correctly held in Windsor. The Attorney General cannot elect what laws to uphold and defend and which laws to ignore. Pursuant to Section 204(a)(3), the Attorney General is obligated to defend *all statutes*, including those, which the Attorney General may despise or oppose morally and politically. To permit the Attorney General to decide what laws to uphold and defend and which laws to ignore would result in the destruction of the separation of powers and the fracturing of the foundation of our political system, including the erosion of state sovereignty. The political process of our Republic demands that the Executive branch uphold the laws, while the people’s voice can be heard by their respective representatives in the Legislature and the constitutionality of any enactment reviewed by the Judiciary.

In turning to Commonwealth v. Hanes, 379 MD 2013, the Commonwealth Court explicitly held, in relation to the Montgomery County Register of Wills, that “[u]ntil a court has decided that an act is unconstitutional, Hanes *must* enforce the law as written, and it is not a defense to a mandamus action that the law may be unconstitutional. *Only a court can arrive at that conclusion.*”<sup>31</sup> (emphasis added). The Commonwealth Court went

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<sup>31</sup> See, page 26 of Memorandum in Exhibit F.



on to review the Pennsylvania Constitution and declare, “Under our Constitution then, *only* the courts have the power to determine the constitutionality of a statute.”<sup>32</sup> Clearly, as only the courts, and not the Attorney General, have the power to determine the constitutionality of a statute, Attorney General Kane has attempted to usurp judicial power and ignored her obligations under the Commonwealth Attorneys Act.

Although Attorney General Kane has not raised issue with her oath, the Commonwealth Court addresses this issues in the Hanes matter, where Register of Wills Hanes contended that the Commonwealth could not “force him to abandon his oath of office and violate the United States and Pennsylvania Constitution [sic],” Article VI, Section 3. The court held:

[H]is oath of office requires him to follow the law until a court decides it is unconstitutional. See, e.g., *State ex rel. Atlantic Coast Line R.R. v. State Bd. Of Equalizers*, 84 Fla. 592, 595-96, 94, So. 681, 682-83 (1922) (“The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitution before he will obey it is, I think without merit. The fallacy in it is that every act of the Legislature is presumptively constitutional until judicially declared otherwise, and the oath of office ‘to obey the Constitution’ means to obey the Constitution, not as the officer decides, but as judicially determined. The doctrine that the oath of office of a public official requires him to decided for himself whether or not an act is constitutional before obeying it will lead to strange results, and set at naught other binding provisions of the Constitution.” (Pg. 28, fn. 29).

The court would then declare unequivocally:

Because *only* the General Assembly may suspend its own statutes, because *only* courts have the authority to determine the constitutionality of a statute, and because all statutes as presumptively constitutional, a public official “[i]s *without power or authority*, even though he is of the opinion that a statute is unconstitutional, to implement his opinion in such a manner as to effectively abrogate or suspend such statute which is

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<sup>32</sup> *Citing to the PA Supreme Court’s decision in In re Investigation by Dauphin County Grand Jury*, 332 Pa. 342, 352-53 (1938).

presumptively constitutional until declared otherwise *by the Judiciary*.”  
(emphasis added).


As Attorney General Kane is also a Commonwealth official, like Register of Wills Hanes, she lacks any authority to decide the constitutionality of statutes and has a binding obligation “to uphold and defend the constitutionality of all statutes.” In conformance with the Pennsylvania Supreme Court’s holding in *Faga v. Smith*, 615 Pa. 87, 90 (2012), in addition to considering impeachment, the Legislature should consider filing a writ of mandamus to compel Attorney General Kane’s performance of her mandatory duties.

For these reasons, Attorney General Kane is in violation of Article IV, Section 4.1 of the Pennsylvania Constitution and the Commonwealth Attorneys Act, 71 Pa.C.S. § 732-101, et seq., as she has failed in her duty to uphold and defend the constitutionality of the congressionally-enacted definition marriage as found in 23 Pa.C.S. § 1102.

\* \* \*

For the reasons specified above, it is clear that Attorney General Kane has unlawfully amended our reciprocity agreements, violated the constitutional rights of Pennsylvania residents and shirked her duties under the Pennsylvania Constitution and the Commonwealth Attorneys Act.

Thank you Mr. Chairman and honorable Committee Members for the opportunity to testify before you today.



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Joshua Prince, Esq.

Firearms Industry Consulting Group

division of Prince Law Offices, P.C.

646 Lenape Rd

Bechtelsville, PA 19505

610-845-3803 ext 81114

610-845-3903 (fax)

[Joshua@PrinceLaw.com](mailto:Joshua@PrinceLaw.com)

# **Exhibit A**

(Curriculum Vitae)

Joshua Prince, Esq.  
Firearms Industry Consulting Group  
a division of Prince Law Offices, P.C.  
646 Lenape Rd  
Bechtelsville, Pa 19505  
610-845-3803  
Joshua@PrinceLaw.com

## **BAR ADMISSIONS**

### **State Admissions**

**Pennsylvania Supreme Court** – October 13, 2009

### **Federal Admissions**

**U.S. Supreme Court** – January 22, 2013

U.S. Court of Appeals for the 3<sup>rd</sup> Circuit – April 11, 2012

U.S. District Court, Eastern District of Pennsylvania – March 19, 2010

U.S. District Court, District of Colorado – June 16, 2011

U.S. District Court, Middle District of Pennsylvania – February 10, 2012

U.S. District Court, Western District of Pennsylvania – December 20, 2012

## **LEGAL EDUCATION**

**Widener University of Law**, Harrisburg, PA

JD May 2009

- **Top 10% of class**
- **Member of the Widener Law Journal**

## **PUBLICATIONS**

- Joshua G. Prince and Allen Thompson, *The Inalienable Right to Stand Your Ground*, St. Thomas Law Journal, *to be published Fall of 2014*, Vol 27.
- Joshua G. Prince, *Grandpop's Machine Gun in the Chest: Part II of II* (PA BAR ASSOC. AT ISSUE, Spring 2013) *available at* <http://www.pabar.org/public/yld/pubs/atissue/AtIssueSpring13.pdf>
- Joshua G. Prince, *Grandpop's Machine Gun in the Chest: Part I of II* (PA BAR ASSOC. AT ISSUE, Fall 2012) *available at* <http://www.pabar.org/public/yld/pubs/atissue/AtIssue%20Fall%202012.pdf>
- Joshua G. Prince, *Firearms Law 101: Knowing When Your Client Loses His/Her Second Amendment Rights*, (PA BAR ASSOC. AT ISSUE, Spring 2012) *available at* <http://www.pabar.org/public/yld/pubs/atissue/AISpring2012.pdf>.
- Joshua G. Prince, *Fee Disputes in Workers' Compensation Cases: The Hendricks/Weidner Headache*, Widener Law Journal, Vol 18, No. 2 (2009)
- Joshua G. Prince, *I Bequeath My Machine Gun to...* (PA BAR ASSOC. NEWSLETTER, REAL PROPERTY, PROBATE AND TRUST LAW, Issue No. 64), Fall 2007 at 18-19.
- Joshua G. Prince, *Grandpop's Machine Gun in the Trunk*, *available at* <http://blog.princelaw.com/atf/firearms>.
- Joshua G. Prince, *Grandpop's Machine Gun in the Trunk, Part II* *available at* <http://blog.princelaw.com/atf/firearms>.
- Joshua G. Prince, *National Firearms Act Estate Planning 101*, *available at* <http://blog.princelaw.com/atf/firearms>.
- Joshua G. Prince, *Violating Due Process: Convictions Based on the National Firearms Registration and Transfer Record when its "Files are Missing"*, Article awaiting

publication in a Law Journal, *available at*  
[http://princelaw.files.wordpress.com/2011/09/violating\\_due\\_process.pdf](http://princelaw.files.wordpress.com/2011/09/violating_due_process.pdf)

#### **SEMINARS TAUGHT**

- **My Estate Has Firearms, Now What?** – 15<sup>th</sup> Annual Estate & Elder Law Symposium, PBI – Feb 12, 2014 and Feb. 20, 2014
- **My Estate Has Firearms, Now What?** – 20<sup>th</sup> Annual Estate Law Conference, PBI – November 14, 2013
- **Firearms and Real Estate in Estates** – Estate Planning Council of Lehigh Valley – February 13, 2013
- **2012 Firearms Law & The Second Amendment Symposium** – View from the Street: Firearms Law in Pennsylvania and New Jersey – NRA – October 13, 2012
- **Firearms Law for Every Practitioner** – Berks Bar Assc. – July 11, 2012
- **When the Primer Ignites No More** – 18<sup>th</sup> Annual Estate Law Conference, PBI – November 18, 2011
- **Pennsylvania Gun Crimes and Sentencing** – Montgomery Bar Assc. – Sept. 9, 2011
- **Firearms & Estates** – PBI – Apr. 7, 2011
- **Firearms Law 101 – What Every Practitioner Need to Know about Firearms Law** – Berks Bar Assc. – Aug. 18, 2011
- **Firearms in Estates and Trusts** – Berks, Cumberland, and Dauphin Bar Assc. 2008-2009.

#### **EXPERIENCE**

- **Prince Law Offices, P.C. handling State and Federal Firearms Law Matters – October 2009 - Present**  
*Attorney*

## **Exhibit B**

(The original Florida Reciprocity Agreement, the amended Florida Reciprocity Agreement, the Notice regarding the amended Florida Reciprocity Agreement and the Notice an individual received from Florida)

## **RECIPROCITY AGREEMENT**

This Reciprocity Agreement by and between the State of Florida by and through the Florida Department of State, Division of Licensing, and the Commonwealth of Pennsylvania by and through the Office of Attorney General.

WHEREAS, the purpose of this Reciprocity Agreement is to extend reciprocal concealed firearm carry permit/license privileges to the citizens of the Commonwealth of Pennsylvania and the State of Florida,

WHEREAS, the respective state offices are authorized by statute to enter into this Reciprocity Agreement,

WHEREAS, in consideration of the matters described herein, and of the mutual benefits and obligations set forth in this Reciprocity Agreement, the Parties hereby agree and covenant as follows:

1.

The State of Florida will recognize valid Pennsylvania permits to carry concealed firearms by valid Pennsylvania permit holders while said permit holders are present in the State of Florida.

2.

The Commonwealth of Pennsylvania will recognize valid Florida licenses to carry concealed firearms by valid Florida permit holders while said permit holders are present in the Commonwealth of Pennsylvania.

3.

This Reciprocity Agreement applies only to the carrying of firearms as defined and authorized by the applicable statutes of Pennsylvania by valid license/permit holders from the respective states and not to any other types of weapons.



4.

The Commonwealth of Pennsylvania and the State of Florida will inform each other of any changes in their respective carrying of concealed weapons statutes that may affect the eligibility of the recognition granted by each state.

5.

The Commonwealth of Pennsylvania and the State of Florida will each provide the other with copies of their current laws regarding concealed weapons and firearm carry licenses/permits.

6.

The State of Florida will provide twenty-four hour verification of the authenticity and status of Florida licenses. Instructions regarding the method of verification of a Florida concealed handgun permit/license will be provided as soon as the method is established.

7.

This Reciprocity Agreement is contingent upon and shall only remain effective as long as the respective statutory authority in each state authorizing the reciprocal privileges remains effective.


8.

This Reciprocity Agreement shall become effective upon the execution of the authorized Parties' signatures.


9.

This Agreement may be terminated by either Party or their successor upon thirty (30) days written notice.

WITNESSETH, each Party to this Reciprocity Agreement has caused it to be executed on the date indicated below.

  
John M. Russi  
Director

Division of Licensing  
State of Florida

  
David J. DeVries  
Chief Deputy Attorney General  
Office of Attorney General  
Commonwealth of Pennsylvania

# **MEMORANDUM OF AGREEMENT**

**between**

**The Commonwealth of Pennsylvania**

**and**

**The State of Florida**

## **Concerning Handgun License Reciprocity for Concealed Carry**

This Reciprocity Agreement is intended to amend and supersede the original agreement entered into between the State of Florida and the Commonwealth of Pennsylvania on September 21, 2001.

WHEREAS, the purpose of this Reciprocity Agreement is to extend reciprocal concealed firearm carry permit/license privileges to the residents of the Commonwealth of Pennsylvania and the State of Florida; and

WHEREAS, the Commonwealth of Pennsylvania has the authority to issue a License to Carry a Firearm pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109; and

WHEREAS, the State of Florida has the authority to issue a Concealed Handgun License pursuant to Florida Statute § 790.01; and

WHEREAS, the Attorney General for the Commonwealth of Pennsylvania has made such affirmative determination with respect to the State of Florida; and

WHEREAS, the State of Florida is authorized, pursuant to Florida Statute § 790.015, to recognize the validity of a permit to carry a concealed handgun issued by another state; and

WHEREAS, the Attorney General of the Commonwealth of Pennsylvania is authorized, pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109(k), to enter into reciprocity agreements with other states providing for the mutual recognition of each state's license to carry a firearm; and

WHEREAS, the Attorney General of the Commonwealth of Pennsylvania has determined that the State of Florida meets the requirements for reciprocity with the Commonwealth of Pennsylvania; and

WHEREAS, Handgun License reciprocity between Florida and Pennsylvania is thus supported by the laws of both states;

**NOW, THEREFORE, the parties do hereby agree as follows:**

1. The Commonwealth of Pennsylvania shall give full faith and credit to a valid Concealed Handgun License issued by the State of Florida to legal residents of the State of Florida; and

2. The State of Florida shall consider holders of a valid Concealed Handgun License issued by the Commonwealth of Pennsylvania to be concealed handgun permittees in Florida as required by Florida Statute § 790.015; and
3. Persons carrying a concealed firearm pursuant to this Memorandum of Agreement shall comply with all applicable concealed carry laws, rules and regulations of the respective states, including, but not limited to, age requirements and restrictions regarding the type of firearms that may be carried; and
4. The State of Florida and the Commonwealth of Pennsylvania will inform each other of any changes to their respective weapons statutes that may affect the eligibility of the recognition granted by each state pursuant to this Memorandum of Agreement.
5. This Reciprocity Agreement shall become effective February 1, 2013.

This Memorandum of Agreement becomes effective on the date of the final signature and shall continue in effect unless modified by mutual written consent, or terminated by either state upon thirty (30) days' written notice. This document is not intended to limit or restrict the statutory authority or jurisdiction of either state.



\_\_\_\_\_  
GRETA BEVIS  
Director, Division of Licensing  
Florida Department of Agriculture and  
Consumer Services

DATE February 1, 2013



\_\_\_\_\_  
KATHLEEN G. KANE  
Attorney General  
Commonwealth of Pennsylvania

DATE Feb. 4, 2013

February 8, 2013

**NOTICE FROM ATTORNEY GENERAL KATHLEEN G. KANE**

The Attorney General of Pennsylvania has entered into a modification of the current firearm reciprocity agreement with the state of Florida. This reciprocity agreement previously permitted citizens of Pennsylvania who were not also Florida residents to obtain a Concealed Carry Permit (hereinafter "CCP") from the state of Florida. The CCP would then be honored in Pennsylvania without the need for a CCP granted by a Pennsylvania issuing authority. This agreement has been modified as follows pursuant to the authority of the Attorney General of Pennsylvania as found in 18 Pa.C.S. § 6109(k)(1):

1. If you are currently a resident of Pennsylvania *only* and have a CCP from the state of Florida, your Florida permit will no longer be recognized in Pennsylvania 120 days from the date of this Notice, or on June 8, 2013. In the proscribed time period you may apply for a CCP in the county of your residence. Please be aware that your local Sheriff or Police Department (in cities of the First Class) will have forty-five (45) days from the date of your application on which to grant or deny your application for a CCP.
2. If you are a dual resident of Pennsylvania and Florida you need not apply for a CCP in Pennsylvania if you currently hold a CCP from Florida. You must, however, carry with you proof of your Florida citizenry/residence along with your CCP identification when you are carrying a concealed firearm either on your person or in a vehicle.
3. If you are a resident of Florida only and have a CCP from Florida it will continue to be honored in Pennsylvania with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

**IMPORTANT**

This Notice does *not* impact the validity of Pennsylvania CCP's issued to residents of Pennsylvania. All valid and unexpired Pennsylvania CCP's remain in full force and effect. Further, if you are a resident of Pennsylvania only and have a CCP from Pennsylvania it will continue to be honored in Florida with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

DIVISION OF LICENSING  
(850) 245-5500  
(850) 245-5505 FAX



POST OFFICE BOX 3927  
TALLAHASSEE, FLORIDA 32315-3927

2520 NORTH MONROE STREET  
TALLAHASSEE, FLORIDA 32303-4052

**FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES**  
**COMMISSIONER ADAM H. PUTNAM**

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February 18, 2013

Dear Florida Concealed Weapon License Holder:

Our records indicate that you are one of approximately 4,700 resident Pennsylvanians who hold a valid Florida concealed weapon license. I am writing to you today to inform you about an important change in the reciprocity agreement between Florida and Pennsylvania that will affect the status of your Florida concealed weapon license in your home state. Please allow me to explain further.

**The concealed weapon license reciprocity agreement between Florida and Pennsylvania was recently revised at the request of the Pennsylvania Attorney General's Office. Under the terms of the revised Florida-Pennsylvania reciprocity agreement, Pennsylvania will honor a Florida concealed weapon license ONLY IF the license holder is a resident of the state of Florida. This provision will take effect on June 8, 2013.**

You will find enclosed with this memorandum a notice from Pennsylvania Attorney General Kathleen G. Kane that her office asked us to send to all Florida concealed weapon license holders whose residence of record was in the Commonwealth of Pennsylvania. This notice will provide detailed information concerning this change in the reciprocity agreement between our two states.

Sincerely,

A handwritten signature in black ink that reads "Grea Bevis".

Grea Bevis  
Director, Division of Licensing

GB/kw

Enclosure

February 8, 2013

**NOTICE FROM ATTORNEY GENERAL KATHLEEN G. KANE**

The Attorney General of Pennsylvania has entered into a modification of the current firearm reciprocity agreement with the state of Florida. This reciprocity agreement previously permitted citizens of Pennsylvania who were not also Florida residents to obtain a Concealed Carry Permit (hereinafter "CCP") from the state of Florida. The CCP would then be honored in Pennsylvania without the need for a CCP granted by a Pennsylvania issuing authority. This agreement has been modified as follows pursuant to the authority of the Attorney General of Pennsylvania as found in 18 Pa.C.S. § 6109(k)(1):

1. If you are currently a resident of Pennsylvania *only* and have a CCP from the state of Florida, your Florida permit will no longer be recognized in Pennsylvania 120 days from the date of this Notice, or on June 8, 2013. In the proscribed time period you may apply for a CCP in the county of your residence. Please be aware that your local Sheriff or Police Department (in cities of the First Class) will have forty-five (45) days from the date of your application on which to grant or deny your application for a CCP.
2. If you are a dual resident of Pennsylvania and Florida you need not apply for a CCP in Pennsylvania if you currently hold a CCP from Florida. You must, however, carry with you proof of your Florida citizenry/residence along with your CCP identification when you are carrying a concealed firearm either on your person or in a vehicle.
3. If you are a resident of Florida only and have a CCP from Florida it will continue to be honored in Pennsylvania with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

**IMPORTANT**

This Notice does *not* impact the validity of Pennsylvania CCP's issued to residents of Pennsylvania. All valid and unexpired Pennsylvania CCP's remain in full force and effect. Further, if you are a resident of Pennsylvania only and have a CCP from Pennsylvania it will continue to be honored in Florida with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

## **Exhibit C**

(The original Virginia Reciprocity Agreement, the amended Virginia Reciprocity Agreement and the Notice regarding the amended Virginia Reciprocity Agreement)

MEMORANDUM OF AGREEMENT

between

The Commonwealth of Pennsylvania

and

The Commonwealth of Virginia

Concerning Handgun License Reciprocity for Concealed Carry

**WHEREAS**, the Commonwealth of Pennsylvania has the authority to issue a License to Carry a Firearm pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109; and

**WHEREAS**, the Commonwealth of Virginia has the authority to issue a Concealed Handgun License pursuant to § 18.2-308 of the *Code of Virginia*; and

**WHEREAS**, the Commonwealth of Pennsylvania is authorized to recognize the validity of a Non-resident concealed handgun license if the Pennsylvania Attorney General determines that a background check of each applicant for a license issued by the other state is conducted by state or local authorities, or agent thereof, before the license is issued to determine the applicants' eligibility to possess a firearm under the Federal Gun Control Act (18 U.S.C. § 922); and

**WHEREAS**, the Attorney General for the Commonwealth of Pennsylvania has made such affirmative determination with respect to the Commonwealth of Virginia; and

**WHEREAS**, the Commonwealth of Virginia is authorized, pursuant to § 18.2-308(P) of the *Code of Virginia*, to recognize the validity of a permit to carry a concealed handgun issued by another state; and

**WHEREAS**, the Attorney General of the Commonwealth of Pennsylvania is authorized, pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109(k), to enter into reciprocity agreements with other states providing for the mutual recognition of each state's license to carry a firearm; and

**WHEREAS**, the Attorney General of the Commonwealth of Pennsylvania has determined that the Commonwealth of Virginia meets the requirements for reciprocity with the Commonwealth of Pennsylvania; and

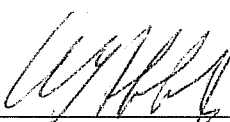
**WHEREAS**, Handgun License reciprocity between Virginia and Pennsylvania is thus supported by the laws of both states;

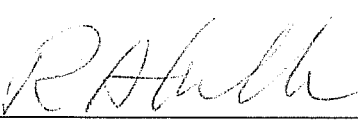
**NOW, THEREFORE**, the parties do hereby agree as follows:



1. The Commonwealth of Pennsylvania shall give full faith and credit to a valid Concealed Handgun License issued by the Commonwealth of Virginia; and
2. The Commonwealth of Virginia shall consider holders of a valid Concealed Handgun License issued by the Commonwealth of Pennsylvania to be concealed handgun permittees in Virginia as required by § 18.2-308; and
3. Persons carrying a concealed firearm pursuant to this Memorandum of Agreement shall comply with all applicable concealed carry laws, rules and regulations of the respective states, including, but not limited to, age requirements and restrictions regarding the type of firearms that may be carried; and
4. The Commonwealth of Virginia and the Commonwealth of Pennsylvania will inform each other of any changes to their respective weapons statutes that may affect the eligibility of the recognition granted by each state pursuant to this Memorandum of Agreement.

This Memorandum of Agreement becomes effective on the date of the final signature and shall continue in effect unless modified by mutual written consent, or terminated by either state upon thirty (30) days' written notice. This document is not intended to limit or restrict the statutory authority or jurisdiction of either state.

  
\_\_\_\_\_  
W. Steven Flaherty  
Superintendent  
Virginia State Police

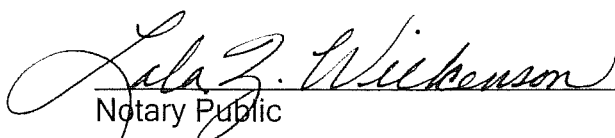
  
\_\_\_\_\_  
ROBERT A. MULLE  
Chief Deputy Attorney General  
for Attorney General of Pennsylvania

DATE 12/12/06

DATE 1-3-07

COMMONWEALTH OF VIRGINIA  
CITY/COUNTY OF Chesterfield, to-wit:

The foregoing Memorandum of Agreement was subscribed and acknowledged before me by W. Steven Flaherty, Superintendent, Virginia State Police, to be his true official act and deed this 12<sup>th</sup> day of December, 2006.

  
\_\_\_\_\_  
Notary Public

My commission expires: 12-31-10.

COMMONWEALTH OF PENNSYLVANIA

CITY/COUNTY OF Dauphin, to-wit:

The foregoing Memorandum of Agreement was subscribed and acknowledged before me by Robert A. Mulle, Chief Deputy Attorney General, Office of the Attorney General of Pennsylvania, to be his true official act and deed this 3rd day of

January, 2006.

Elaine S.M. Beck  
Notary Public

My commission expires:

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
ELAINE S.M. BECK, Notary Public  
City of Harrisburg, Dauphin County  
My Commission Expires Feb. 12, 2010

## **MEMORANDUM OF AGREEMENT**

**between**

**The Commonwealth of Pennsylvania**

**and**

**The Commonwealth of Virginia**

**Concerning Handgun License Reciprocity for Concealed Carry**

This Reciprocity Agreement is intended to amend and supersede the original agreement entered into between the Commonwealth of Virginia and the Commonwealth of Pennsylvania on January 3, 2007.

WHEREAS, the purpose of this Reciprocity Agreement is to extend reciprocal concealed firearm carry permit/license privileges to the residents of the Commonwealth of Pennsylvania and the Commonwealth of Virginia; and

WHEREAS, the Commonwealth of Pennsylvania has the authority to issue a License to Carry a Firearm pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109; and

WHEREAS, the Commonwealth of Virginia has the authority to issue a Concealed Handgun License pursuant to § 18.2-308 of the Code of Virginia; and

WHEREAS, the Attorney General for the Commonwealth of Pennsylvania has made such affirmative determination with respect to the Commonwealth of Virginia; and

WHEREAS, the Commonwealth of Virginia is authorized, pursuant to § 18.2-308(P) of the Code of Virginia, to recognize the validity of a permit to carry a concealed handgun issued by another state; and

WHEREAS, the Attorney General of the Commonwealth of Pennsylvania is authorized, pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109(k), to enter into reciprocity agreements with other states providing for the mutual recognition of each state's license to carry a firearm; and

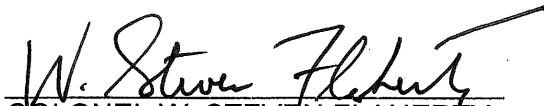
WHEREAS, the Attorney General of the Commonwealth of Pennsylvania has determined that the Commonwealth of Virginia meets the requirements for reciprocity with the Commonwealth of Pennsylvania; and


WHEREAS, Handgun License reciprocity between Virginia and Pennsylvania is thus supported by the laws of both states;

NOW, THEREFORE, the parties do hereby agree as follows:

1. The Commonwealth of Pennsylvania shall give full faith and credit to a valid Concealed Handgun License issued by the Commonwealth of Virginia to legal residents of the Commonwealth of Virginia; and
2. The Commonwealth of Virginia shall consider holders of a valid Concealed Handgun License issued by the Commonwealth of Pennsylvania to be concealed handgun permittees in Virginia as required by § 18.2-308 of the Code of Virginia; and
3. Persons carrying a concealed firearm pursuant to this Memorandum of Agreement shall comply with all applicable concealed carry laws, rules and regulations of the respective states, including, but not limited to, age requirements and restrictions regarding the type of firearms that may be carried; and
4. The Commonwealth of Virginia and the Commonwealth of Pennsylvania will inform each other of any changes to their respective weapons statutes that may affect the eligibility of the recognition granted by each state pursuant to this Memorandum of Agreement.
5. This Reciprocity Agreement shall become effective April 9, 2013.

This Memorandum of Agreement becomes effective on the date of the final signature and shall continue in effect unless modified by mutual written consent, or terminated by either state upon thirty (30) days' written notice. This document is not intended to limit or restrict the statutory authority or jurisdiction of either state.

  
COLONEL W. STEVEN FLAHERTY  
Superintendent, Virginia State Police  
Commonwealth of Virginia

  
KATHLEEN G. KANE  
Attorney General  
Commonwealth of Pennsylvania

DATE March 15, 2013

DATE April 8, 2013

## NOTICE FROM ATTORNEY GENERAL KATHLEEN G. KANE

The Attorney General of Pennsylvania has entered into a modification of the current firearm reciprocity agreement with the state of Virginia. This reciprocity agreement previously permitted citizens of Pennsylvania who were not also Virginia residents to obtain a Concealed Carry Permit (hereinafter "CCP") from the state of Virginia. The CCP would then be honored in Pennsylvania without the need for a CCP granted by a Pennsylvania issuing authority. This agreement has been modified as follows pursuant to the authority of the Attorney General of Pennsylvania as found in 18 Pa.C.S. § 6109(k)(1):

1. If you are currently a resident of Pennsylvania only and have a CCP from the state of Virginia, your Virginia permit will no longer be recognized in Pennsylvania 120 days from the date of this Notice, or on August 9, 2013. In the prescribed time period you may apply for a CCP in the county of your residence. Please be aware that your local Sheriff or Police Department (in cities of the First Class) will have forty-five (45) days from the date of your application in which to grant or deny your application for a CCP.
2. If you are a dual resident of Pennsylvania and Virginia, you need not apply for a CCP in Pennsylvania if you currently hold a CCP from Virginia. You must, however, carry with you proof of your Virginia citizenry/residence along with your CCP identification when you are carrying a concealed firearm either on your person or in a vehicle.
3. If you are a resident of Virginia only and have a CCP from Virginia, it will continue to be honored in Pennsylvania with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

## IMPORTANT

This Notice does not impact the validity of Pennsylvania CCP's issued to residents of Pennsylvania. All valid and unexpired Pennsylvania CCP's remain in full force and effect. Further, if you are a resident of Pennsylvania only and have a CCP from Pennsylvania it will continue to be honored in Virginia with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

## **Exhibit D**

(The original Arizona Reciprocity Agreement, the amended Arizona Reciprocity Agreement and the Notice regarding the amended Arizona Reciprocity Agreement)

MEMORANDUM OF AGREEMENT

between

The Commonwealth of Pennsylvania

and

The State of Arizona

Concerning Handgun License Reciprocity for Concealed Carry

WHEREAS, the Commonwealth of Pennsylvania has the authority to issue a License to Carry a Firearm pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109; and

WHEREAS, the State of Arizona has the authority to issue a Concealed Handgun License pursuant to Arizona Revised Statutes § 13-3112; and

WHEREAS, the Commonwealth of Pennsylvania is authorized to recognize the validity of a nonresident concealed handgun license if the Pennsylvania Attorney General determines that a background check of each applicant for a license issued by the other state is conducted by state or local authorities, or agent thereof, before the license is issued to determine the applicants' eligibility to possess a firearm under the Federal Gun Control Act (18 U.S.C. § 922); and

WHEREAS, the Attorney General for the Commonwealth of Pennsylvania has made such affirmative determination with respect to the State of Arizona; and

WHEREAS, the State of Arizona is authorized, pursuant to Arizona Revised Statutes § 13-3112, to recognize the validity of a permit to carry a concealed handgun issued by another state; and

WHEREAS, the Attorney General of the Commonwealth of Pennsylvania is authorized, pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109(k), to enter into reciprocity agreements with other states providing for the mutual recognition of each state's license to carry a firearm; and

WHEREAS, the Attorney General of the Commonwealth of Pennsylvania has determined that the State of Arizona meets the requirements for reciprocity with the Commonwealth of Pennsylvania; and

WHEREAS, Handgun License reciprocity between Arizona and Pennsylvania is thus supported by the laws of both states;

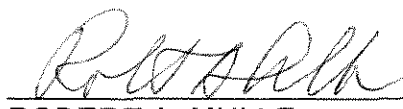
NOW, THEREFORE, the parties do hereby agree as follows:



1. The Commonwealth of Pennsylvania shall give full faith and credit to a valid Concealed Handgun License issued by the State of Arizona; and
2. The State of Arizona shall consider holders of a valid Concealed Handgun License issued by the Commonwealth of Pennsylvania to be concealed handgun permittees in Arizona as required by Arizona Revised Statutes § 13-3112; and
3. Persons carrying a concealed firearm pursuant to this Memorandum of Agreement shall comply with all applicable concealed carry laws, rules and regulations of the respective states, including, but not limited to, age requirements and restrictions regarding the type of firearms that may be carried; and
4. The State of Arizona and the Commonwealth of Pennsylvania will inform each other of any changes to their respective weapons statutes that may affect the eligibility of the recognition granted by each state pursuant to this Memorandum of Agreement.


This Memorandum of Agreement becomes effective on the date of the final signature and shall continue in effect unless modified by mutual written consent, or terminated by either state upon thirty (30) days' written notice. This document is not intended to limit or restrict the statutory authority or jurisdiction of either state.

  
\_\_\_\_\_  
ROGER VANDERPOOL  
Director  
Arizona Department of Public Safety

  
\_\_\_\_\_  
ROBERT A. MULLE  
Chief Deputy Attorney General  
for Attorney General of Pennsylvania

DATE 2-3-08

DATE 2/19/08

  
\_\_\_\_\_  
Assistant Attorney General  
Approved as to Form

MEMORANDUM OF AGREEMENT

between

The Commonwealth of Pennsylvania

and

The State of Arizona

Concerning Handgun License Reciprocity for Concealed Carry

This Reciprocity Agreement is intended to amend and supersede the original agreement entered into between the State of Arizona and the Commonwealth of Pennsylvania in February 19, 2008.

WHEREAS, the purpose of this Reciprocity Agreement is to extend reciprocal concealed firearm carry permit/license privileges to the residents of the Commonwealth of Pennsylvania and the State of Arizona; and

WHEREAS, the Commonwealth of Pennsylvania has the authority to issue a License to Carry a Firearm pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109; and

WHEREAS, the State of Arizona has the authority to issue a Concealed Handgun License pursuant to Arizona Revised Statutes § 13-3112; and

WHEREAS, the Attorney General for the Commonwealth of Pennsylvania has made such affirmative determination with respect to the State of Arizona; and

WHEREAS, the State of Arizona is authorized, pursuant to Arizona Revised Statutes § 13-3112, to recognize the validity of a permit to carry a concealed handgun issued by another state; and

WHEREAS, the Attorney General of the Commonwealth of Pennsylvania is authorized, pursuant to 18 Pennsylvania Consolidated Statutes Annotated § 6109(k), to enter into reciprocity agreements with other states providing for the mutual recognition of each state's license to carry a firearm; and

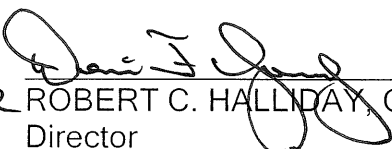
WHEREAS, the Attorney General of the Commonwealth of Pennsylvania has determined that the State of Arizona meets the requirements for reciprocity with the Commonwealth of Pennsylvania; and

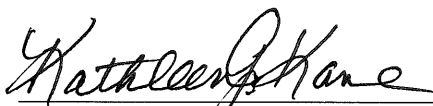
WHEREAS, Handgun License reciprocity between Arizona and Pennsylvania is thus supported by the laws of both states;

NOW, THEREFORE, the parties do hereby agree as follows:

1. The Commonwealth of Pennsylvania shall give full faith and credit to a valid Concealed Handgun License issued by the State of Arizona to legal residents of the State of Arizona; and
2. The State of Arizona shall consider holders of a valid Concealed Handgun License issued by the Commonwealth of Pennsylvania to be concealed handgun permittees in Arizona as required by Arizona Revised Statutes § 13-3112; and
3. Persons carrying a concealed firearm pursuant to this Memorandum of Agreement shall comply with all applicable concealed carry laws, rules and regulations of the respective states, including, but not limited to, age requirements and restrictions regarding the type of firearms that may be carried; and
4. The State of Arizona and the Commonwealth of Pennsylvania will inform each other of any changes to their respective weapons statutes that may affect the eligibility of the recognition granted by each state pursuant to this Memorandum of Agreement.


This Memorandum of Agreement becomes effective on the date of the final signature and shall continue in effect unless modified by mutual written consent, or terminated by either state upon thirty (30) days' written notice. This document is not intended to limit or restrict the statutory authority or jurisdiction of either state.

  
FOR ROBERT C. HALLIDAY, Colonel  
Director  
Arizona Department of Public Safety

  
KATHLEEN D. KANE  
Attorney General  
Commonwealth of Pennsylvania

DATE 4/1/13

DATE April 8, 2013

  
**Assistant Attorney General**  
**Approved as to Form**

## NOTICE FROM ATTORNEY GENERAL KATHLEEN G. KANE

The Attorney General of Pennsylvania has entered into a modification of the current firearm reciprocity agreement with the state of Arizona. This reciprocity agreement previously permitted citizens of Pennsylvania who were not also Arizona residents to obtain a Concealed Carry Permit (hereinafter "CCP") from the state of Arizona. The CCP would then be honored in Pennsylvania without the need for a CCP granted by a Pennsylvania issuing authority. This agreement has been modified as follows pursuant to the authority of the Attorney General of Pennsylvania as found in 18 Pa.C.S. § 6109(k)(1):

1. If you are currently a resident of Pennsylvania only and have a CCP from the state of Arizona, your Arizona permit will no longer be recognized in Pennsylvania 120 days from the date of this Notice, or on August 9, 2013. In the prescribed time period you may apply for a CCP in the county of your residence. Please be aware that your local Sheriff or Police Department (in cities of the First Class) will have forty-five (45) days from the date of your application in which to grant or deny your application for a CCP.
2. If you are a dual resident of Pennsylvania and Arizona, you need not apply for a CCP in Pennsylvania if you currently hold a CCP from Arizona. You must, however, carry with you proof of your Arizona citizenry/residence along with your CCP identification when you are carrying a concealed firearm either on your person or in a vehicle.

3. If you are a resident of Arizona only and have a CCP from Arizona, it will continue to be honored in Pennsylvania with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

#### IMPORTANT

This Notice does not impact the validity of Pennsylvania CCP's issued to residents of Pennsylvania. All valid and unexpired Pennsylvania CCP's remain in full force and effect. Further, if you are a resident of Pennsylvania only and have a CCP from Pennsylvania it will continue to be honored in Arizona with all the same rights and recognition as contained in the Reciprocity Agreement between said States.

# **Exhibit E**

(Affidavit of Eric Friday, Esq.)

**AFFIDAVIT**

STATE OF FLORIDA       )  
                                      )  
COUNTY OF DUVAL       )

Comes now the undersigned affiant, Eric J. Friday, Esq. and states:

1. This Affidavit is based on the personal and professional knowledge of the undersigned affiant.
2. Affiant is an attorney licensed to practice in the states of Florida and Alabama.
3. Affiant is general Counsel for Florida Carry, Inc., and its registered lobbyist.
4. Affiant spends a specific portion of his practice lobbying and litigating firearms rights cases throughout Florida.
5. Florida Statute 790.06, regulates the qualifications and issuance of Concealed Weapons Firearms Licenses (CWFL) by the State of Florida.
6. Since 21 September 2001 there have been only three substantive changes to Florida law in regards to the issuance and qualifications for a Florida CWFL:
  - a. Extending the term of a CWFL from five years to seven years;
  - b. A reduction in the fee which may be charged for issuance of a CWFL; &
  - c. Allowing the issuance of licenses to persons regardless of age, if they are currently a service member or an honorably discharged veteran.
7. No other substantial changes regarding the requirements for issuance or the qualifying process have been made since 21 September 2001.

Further Affiant sayeth not.

  
Eric J. Friday

STATE OF FLORIDA  
COUNTY OF DUVAL

Sworn to (or affirmed) and subscribed before me this 2nd day of MAY 2014, by ERIC FRIDAY.



(Name of Notary: Kristin Fields)

Personally Known X OR Produced Identification \_\_\_\_\_

## **Exhibit F**

(Order and Memorandum Opinion in Commonwealth v. Hanes,  
379 M.D. 2013 (Cmwlth. Ct. 2013))



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
Department of Health,	:	
Petitioner	:	
	:	
v.	:	No. 379 M.D. 2013
	:	
D. Bruce Hanes, in his capacity as the	:	
Clerk of the Orphans' Court of	:	
Montgomery County,	:	
Respondent	:	

**ORDER**

**AND NOW**, this 23<sup>rd</sup> day of September, 2013, the opinion in support of this Court's Order of September 12, 2013 is amended as shown in the attached.

  
\_\_\_\_\_  
DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :  
Department of Health, :  
Petitioner :  
 :  
v. :  
 :  
D. Bruce Hanes, in his capacity as the :  
Clerk of the Orphans' Court of :  
Montgomery County, : No. 379 M.D. 2013  
Respondent : Argued: September 4, 2013

BEFORE: HONORABLE DAN PELLEGRINI, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
PRESIDENT JUDGE PELLEGRINI

FILED: September 12, 2013

Before the Court is the Department of Health's (Department) Amended Application for Summary Relief pursuant to Pa. R.A.P. 1532(b)<sup>1</sup> (Application) for

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<sup>1</sup> Pa. R.A.P. 1532(b) states, in relevant part:

**(b) Summary relief.** At any time after the filing of a petition for review in an ... original jurisdiction matter the court may on application enter judgment if the right of the applicant ... is clear.

*Note:* [S]ubdivision (b) authorizes immediate disposition of a petition for review, similar to the type of relief envisioned by the Pennsylvania Rules of Civil Procedure regarding judgment on the pleadings and peremptory and summary judgment. However, such relief may be requested before the pleadings are closed where the right of the applicant is clear.

**(Footnote continued on next page...)**

peremptory judgment with respect to its Amended Petition for Review in the Nature of an Action in Mandamus (Petition). For the reasons that follow, we grant the Application and the mandamus relief sought in the Petition.

I.

A.

On June 26, 2013, in a case involving the marital exemption from the federal estate tax under Section 2056(a) of the Internal Revenue Code, 26 U.S.C. §2056(a), the United States Supreme Court held that the federal Defense of Marriage Act's definition of "marriage" as only a legal union between a man and a woman, and the definition of "spouse" as only a person of the opposite sex who was a husband or wife found in 1 U.S.C. §7, were unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment to the United States Constitution. *See Windsor v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2693-2996 (2013). Nevertheless, as the Supreme Court explained:

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**(continued...)**

An application for summary relief filed under Pa. R.A.P. 1532(b) is generally the same as a motion for peremptory judgment filed in a mandamus action in the common pleas court. *Barge v. Pennsylvania Board of Probation and Parole*, 39 A.3d 530, 550 (Pa. Cmwlth. 2012). The application will be granted where the right to such relief is clear, but will be denied where there are material issues of fact in dispute or if it is not clear the applicant is entitled to judgment as a matter of law. *Id.*

[S]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons; but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” ... Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations ... The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.”

*Id.* at \_\_\_, 133 S. Ct. at 2691.<sup>2</sup> Because the regulation of marriage is a matter for the states, the Supreme Court found that a federal definition of marriage that creates “two

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<sup>2</sup> With respect to statutes regarding marriage in Pennsylvania, the Pennsylvania Supreme Court has explained:

The law for certain purposes regards marriage as initiated by a civil contract, yet it is but a ceremonial ushering in a fundamental institution of the state. The relation itself is founded in nature, and like other natural rights of persons, becomes a subject of regulation for the good of society. The social fabric is reared upon it, for without properly regulated marriage, the welfare, order and happiness of the state cannot be maintained. Where the greater interests of the state demand it, marriage may be prohibited; for instance, within certain degrees of consanguinity, as deleterious to the offspring and to morals. For the same reason the law may dissolve it, and as a question of power, there is no difference whether this be done by a general or a special law.

*Cronise v. Cronise*, 54 Pa. 255, 262 (1867); see also *Bacchetta v. Bacchetta*, 498 Pa. 227, 232-33, 445 A.2d 1194, 1197 (1982) (“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, **(Footnote continued on next page...)**”)

contradictory marriage regimes within the same State” must fall. *Id.* at \_\_\_, 133 S. Ct. at 2694. Congress “interfered” with “state sovereign choices” about who may be married by creating its own definition, relegating one set of marriages – same-sex marriages – to the “second-tier,” making them “unequal.” *Id.*

## B.

Seeking a declaration that the prohibition of same sex marriages in Pennsylvania was unconstitutional, on July 9, 2013, the American Civil Liberties Union of Pennsylvania filed a federal civil rights lawsuit on behalf of a number of same-sex couples against several Commonwealth officials including the Governor; the Department’s Secretary; the Attorney General; the Register of Wills of Washington County; and the Register of Wills and Clerk of Orphans’ Court of Bucks County. *See Whitewood v. Corbett* (No. 13-1861) (M.D. Pa.). The lawsuit challenges the constitutionality of Section 1102 of the Marriage Law, 23 Pa. C.S. §1102, which defines “marriage” as “[a] civil contract by which one man and one woman take each other for husband and wife,” and Section 1704, 23 Pa. C.S. §1704, which provides:

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

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**(continued...)**

its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.””) (citation omitted); *In re Stull’s Estate*, 183 Pa. 625, 629-30, 39 A. 16, 17 (1898) (holding that the validity of a marriage is determined by the law of the place where it was celebrated and if it is invalid there, it is invalid everywhere).

state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

The complaint alleges that the foregoing provisions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.<sup>3</sup>

On July 11, 2013, the Attorney General issued a press release announcing that her office would not defend the provisions of the Marriage Law challenged in *Whitewood* because she deemed them to be “wholly unconstitutional” and that it was her duty under the Commonwealth Attorneys Act<sup>4</sup> to authorize the

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<sup>3</sup> U.S. Const. amend. XIV, §1. Section 1 states, in pertinent part, “[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>4</sup> Act of October 14, 1980, P.L. 950, *as amended*, 71 P.S. §§732-101 – 732-506. Article 4, Section 4.1 of the Pennsylvania Constitution states, in pertinent part:

An Attorney General ... shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.

Pa. Const. art. IV, §4.1.

In turn, Section 204 of the Commonwealth Attorneys Act provides, in pertinent part:

**(a) Legal advice.—**

(1) Upon the request of the Governor or the head of any Commonwealth agency, the Attorney General shall furnish legal advice concerning any matter or issue arising in connection with the exercise of the official powers or performance of the official duties of the Governor or agency. The Governor may request the advice of the Attorney General concerning the constitutionality of legislation

**(Footnote continued on next page...)**

Office of General Counsel<sup>5</sup> to defend the State in the litigation. *See* Press Release, Office of Attorney General, Attorney General Kane will not defend DOMA (July 11,

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**(continued...)**

presented to him for approval in order to aid him in the exercise of his approval and veto powers and the advice, if given, shall not be binding on the Governor....

\* \* \*

(3) It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.

\* \* \*

**(c) Civil litigation; collection of debts.**—The Attorney General ... may, upon determining that it is more efficient or otherwise in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead....

71 P.S. §732-204(a)(1), (3), (c).

<sup>5</sup> Section 301 of the Commonwealth Attorneys Act states, in pertinent part:

There is hereby established the Office of General Counsel which shall be headed by a General Counsel appointed by the Governor to serve at his pleasure who shall be the legal advisor to the Governor and who shall:

(1) [A]ppoint for the operation of each executive agency such chief counsel and assistant counsel as are necessary for the operation of each executive agency.

(2) Supervise, coordinate and administer the legal services provided by ... the chief counsel and assistant counsel for each executive agency.

**(Footnote continued on next page...)**

2013), <http://www.attorneygeneral.gov/press.aspx?id=7043>. On July 23, 2013, D. Bruce Hanes (Hanes), Clerk of the Orphans' Court of Montgomery County, issued a press release announcing that he had "decided to come down on the right side of history and the law" and was prepared to issue a marriage license to a same-sex couple based upon the advice of his solicitor, his analysis of the law, and the Attorney General's belief that the Marriage Law is unconstitutional. See [http://mainlinemedianews.com/articles/2013/07/23/main\\_line\\_times/news/doc51eeca\\_e35360b015385105.txt](http://mainlinemedianews.com/articles/2013/07/23/main_line_times/news/doc51eeca_e35360b015385105.txt).

### C.

On August 5, 2013, the Department filed the instant Petition and Application, seeking a writ of mandamus to compel Hanes, in his official capacity as Clerk of the Orphans' Court of Montgomery County, to perform his duties as established by Section 2774(a) of the Judicial Code, 42 Pa. C.S. 2774(a)<sup>6</sup> and

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**(continued...)**

\* \* \*

(6) Initiate appropriate proceedings or defend the Commonwealth or any executive agency when an action or matter has been referred to the Attorney General and the Attorney General refuses or fails to initiate appropriate proceedings or defend the Commonwealth or executive agency.

71 P.S. §732-301(1), (2), (6). In turn, Section 102 defines "executive agency," in pertinent part, as "[t]he departments ... of the Commonwealth government...." 71 P.S. §732-102.

<sup>6</sup> Section 2774(a) states, in pertinent part:

**(Footnote continued on next page...)**



accordingly comply with all provisions of the Marriage Law. The Department contends that this Court has jurisdiction over the action pursuant to Section 761(a) (1) and (2) of the Judicial Code, 42 Pa. C.S. §761(a)(1), (2),<sup>7</sup> because Hanes is a “commonwealth officer.”

The Department alleges that it is entitled to mandamus relief because Hanes is repeatedly and continuously acting in derogation of the Marriage Law because, as of August 2, 2013, he has been issuing marriage licenses to same-sex applicants and accepting the marriage certificates of same-sex couples stating that their marriages have been lawfully performed under the Marriage Law. The Department asserts that Hanes’ actions violate Sections 1102 and 1704 of the Marriage Law, which limit marriage to opposite-sex couples, and Hanes’ duty to

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**(continued...)**

**(a) General rule.**—There shall be an office of the clerk of the orphans’ court division in each county of this Commonwealth, which shall be supervised by the clerk of the orphans’ court division of the county who shall ... exercise the powers, and perform the duties by law vested in and imposed upon the clerk of the orphans’ court division or the office of the clerk of the orphans’ court division.

*See also* Section 15 of the Schedule to Article 5 of the Pennsylvania Constitution, Pa. Const. art. V Sched., §15 (“Until otherwise provided by law, the offices of prothonotary and clerk of courts shall become the office of prothonotary and clerk of courts of the court of common pleas of the judicial district, ... and the clerk of the orphans’ court shall become the clerk of the orphans’ court division of the court of common pleas, and these officers shall continue to perform the duties of the office and to maintain and be responsible for the records, books and dockets as heretofore....”).

<sup>7</sup> Section 761(a)(1) and (2) states that “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings ... [a]gainst the Commonwealth government, including any officer thereof acting in his official capacity... [and b]y the Commonwealth government....”

perform ministerial duties and that Hanes may not issue marriage licenses to same-sex applicants based on his personal opinion that the law is unconstitutional.<sup>8</sup> It also contends that Hanes may be committing a misdemeanor under Section 411 of the Second Class County Code<sup>9</sup> for each violation thereof for refusing to carry out his public duty in accordance with the law.

Hanes filed a Response to the Department's Application in which he raised in New Matter that the Application should be denied for the reasons set forth in his Preliminary Objections filed that same day. First, Hanes alleges that he is a "judicial officer" under Section 2777 of the Judicial Code, 42 Pa. C.S. §2777, and that his issuance of a marriage license is a "judicial act," so that exclusive jurisdiction over the instant mandamus action lies with the Supreme Court under Section 721(2) of the Judicial Code, 42 Pa. C.S. §721(2), as he is a "court[]" of inferior jurisdiction,"<sup>10</sup> and this Court does not have jurisdiction to issue a writ of mandamus to a "court of

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<sup>8</sup> The Petition also alleged that Hanes had improperly waived the mandatory three-day waiting period for the issuance of a license under Section 1303(a) of the Marriage Law. 23 Pa. C.S. §1303(a).

<sup>9</sup> Act of July 28, 1953, P.L. 723, *as amended*, 16 P.S. §3411. Section 411 states, in pertinent part:

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).

<sup>10</sup> Section 721(2) states that "[t]he Supreme Court shall have original but not exclusive jurisdiction of all cases of ... [m]andamus or prohibition to courts of inferior jurisdiction."

inferior jurisdiction” under Section 761(c), 42 Pa. C.S. §761(c),<sup>11</sup> in the absence of a pending appeal.<sup>12</sup>

Second, Hanes asserts that the Department does not have standing to seek mandamus relief, because only the Attorney General, the Montgomery County District Attorney, or a private citizen who has suffered a special injury may seek to enforce an officer’s public duty,<sup>13</sup> and the Attorney General did not authorize the Department to bring suit under Section 204(c) of the Commonwealth Attorneys Act.

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<sup>11</sup> Section 761(c) states, in relevant part:

**(c) Ancillary matters.**—The Commonwealth Court shall have original jurisdiction in cases of mandamus ... to courts of inferior jurisdiction ... where such relief is ancillary to matters within its appellate jurisdiction....

<sup>12</sup> Hanes also argues that we should transfer the case to the Supreme Court pursuant to Section 5103(a) of the Judicial Code, which states, in pertinent part:

**(a) General rule.**—If a] ... matter is taken to or brought in a court ... of this Commonwealth which does not have jurisdiction of the ... matter, the court ... shall not ... dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the ... matter shall be treated as if originally filed in the transferee tribunal on the date when the ... matter was first filed in a court ... of this Commonwealth....

42 Pa. C.S. §5103(a). *See also* Pa. R.A.P. 751(a) (same); Pa. R.A.P. 751(b) (“[A]n appeal or other matter may be transferred from a court to another court under this rule by order of court or by order of the prothonotary of any appellate court affected.”).

<sup>13</sup> *See Dorris v. Lloyd*, 375 Pa. 474, 476-77, 100 A.2d 924, 926 (1953) (“The Mandamus Act of June 8, 1893, P.L. 345, ... Section 4, 12 P.S. §1914, provides that ‘When the writ is sought to procure the enforcement of a public duty, the proceeding shall be prosecuted in the name of the commonwealth on the relation of the attorney general: *Provided however*, That said proceeding, in proper cases, shall be on the relation of the district attorney of the proper county: \* \* \*.”) (emphasis in original). *But cf.* Section 2(a)[794] of the Judiciary Act Repealer Act (JARA), Act of (Footnote continued on next page...)

Finally, Hanes contends that the Department fails to state a claim for which mandamus relief may be granted, because the Department failed to show that a Clerk of the Orphans' Court does not have the discretion to determine the constitutionality of the Marriage Act. Hanes argues that the Department must show that Sections 1102 and 1704 of the Marriage Law are constitutional in order to establish a clear right to relief, and furthermore, that the Department cannot do so because the Marriage Law's exclusion of same-sex marriages violates the inalienable right to marry solely based on gender in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Sections 1, 26 and 28 of the Pennsylvania Constitution.<sup>14</sup>

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**(continued...)**

April 28, 1978, P.L. 202, 42 P.S. §20002(a)[794] (“[E]xcept as otherwise expressly provided in this subsection, the following acts and parts of acts are hereby repealed absolutely ... [A]ct of June 8, 1893 (P.L. 345, No. 285), referred to as the ‘Mandamus Act of 1893’ and entitled ‘An act relating to Mandamus....’”); Section 3(b) of the JARA, 42 P.S. §20003(b) (“[G]eneral rules promulgated pursuant to the Constitution of Pennsylvania and the Judicial Code in effect on the effective date of the repeal of a statute, shall prescribe and provide the practice and procedure with respect to the enforcement of any right, remedy or immunity where the practice and procedure had been governed by the repealed statute on the date of its repeal. If no such general rules are in effect with respect to the repealed statute on the effective date of its repeal, the practice and procedure provided in the repealed statute shall continue in full force and effect, as part of the common law of the Commonwealth, until such general rules are promulgated....”).

<sup>14</sup> Pa. Const. art. I, §§1, 26, 28. Article 1, Section 1 provides:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

In turn, Article 1, Section 26 provides, “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Finally, Article 1, Section 28 states, “Equality  
**(Footnote continued on next page...)**

**D.**

By order dated August 22, 2013, argument was limited to the following issues encompassing the claims raised by Hanes in opposition to the Department's Application:<sup>15</sup>

- Whether this Court lacks subject matter jurisdiction because Hanes is a Judicial Officer and his issuance of a marriage license is a judicial act;
- Whether the Department has standing and, if not, what is the effect of the Pennsylvania Attorney General's delegation of the duty to defend the constitutionality of Sections 1102 and 1704 of the Marriage Law; and
- Whether the constitutionality of the act sought to be enforced can be raised as a defense to a mandamus action.

On September 4, 2013, argument was heard on the foregoing issues. We will now consider these issues seriatim.<sup>16</sup>

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**(continued...)**

of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”

<sup>15</sup> We consolidate the issues argued before the Court in the interest of clarity.

<sup>16</sup> On August 19, 2013, a group of 32 same-sex couples, designated as Putative Intervenors, filed a Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1531 seeking to intervene as Respondents in this case. Putative Intervenors allege that Hanes has granted them marriage licenses and that they have married in the Commonwealth or intend to be married and that this Court's judgment on Hanes' authority to issue the licenses may substantially impact their rights and the validity of their marriages and marriage licenses.

## II.

Relying on several cases, Hanes first argues that this Court cannot decide this case because jurisdiction properly lies with the Supreme Court under Section 721(2) of the Judicial Code, 42 Pa. C.S. §721(2), which provides that “[t]he Supreme Court shall have original but not exclusive jurisdiction of all cases of ... (2) Mandamus or prohibition to *courts* of inferior jurisdiction.” (Emphasis added). He argues that he is a “judicial officer” and his issuance of a marriage license under the Marriage Law is a “judicial act” because he is issuing a marriage license on behalf of the Orphans’ Court division of the Court of Common Pleas of Montgomery County, and, therefore, this mandamus action is one directed to a “court of inferior jurisdiction” conferring jurisdiction to the Supreme Court.

Hanes is clearly a county officer, because he serves as Register of Wills and Clerk of Orphans’ Court, and as such performs only ministerial duties. Article 9, Section 4 of the Pennsylvania Constitution provides that “County officers shall consist of commissioners, controllers or auditors, district attorneys, public defenders, treasurers, sheriffs, registers of wills, recorders of deeds, prothonotaries, clerks of the courts, and such others as may from time to time be provided by law.” Pa. Const. art. IX, §4. In counties of the second class (such as Montgomery County) or second class A, one person holds the offices of both Register of Wills and Clerk of Orphans’ Court pursuant to Section 1302 of the Second Class County Code, 16 P.S. §4302. Under Section 711(9) of the Probate, Estates and Fiduciaries Code (Probate Code), 20 Pa. C.S. §711(9), “[t]he jurisdiction of the court of common pleas over the following

shall be exercised through its orphans' court division: ... Marriage licenses, as provided by law." Thus, marriage licenses are issued by the Clerk of Orphans' Court. However, Section 901 of the Probate Code, 20 Pa. C.S. §901, gives to the Register of Wills "[j]urisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law."

Courts of the Commonwealth have held that the Register of Wills, when accepting a will for probate, is acting in judicial capacity. See *Commonwealth ex rel. Winpenny v. Bunn*, 71 Pa. 405, 412 (1872) ("In nothing said herein do we mean to say that the acts of the register are in no case judicial. They are always so[.]"); *In re Sebik's Estate*, 300 Pa. 45, 47, 150 A. 101, 102 (1930) ("[A] register is a judge, and the admission of a will to probate is a judicial decision, which can only be set aside on appeal, and is unimpeachable in any other proceeding." (citing *Holliday v. Ward*, 19 Pa. 485, 489 (1852))); *Walsh v. Tate*, 444 Pa. 229, 236, 282 A.2d 284, 288 (1971) ("[T]he Register of Wills performs a judicial function and is closely integrated into the judicial branch of government...."); *Cole v. Wells*, 406 Pa. 81, 90-91, 177 A.2d 77, 81 (1962) ("The decree of probate by the Register of Wills constitutes a judicial decree in rem[.]"); *Mangold v. Neuman*, 371 Pa. 496, 500, 91 A.2d 904, 906 (1952) ("judicial decree of the register of wills").

However, the courts have not held that the Clerk of Orphans' Court acts in a judicial capacity when keeping records. For example, in *Miller's Estate*, 34 Pa. Super. 385 (1907), the appellant's contention that the authority of an Orphans' Court clerk to grant or refuse a marriage license is a judicial and not a ministerial act was rejected by the Superior Court. Another case that Hanes cites is the unpublished

single-judge opinion in *Register of Wills & Clerk of the Orphans' Court of Philadelphia License Marriage Bureau v. Office of Open Records* (Pa. Cmwlth., No. 1671 C.D. 2009, filed March 26, 2010). Because it is an unpublished single-judge opinion, it is not precedential, Internal Operating Procedure §414, but it is illustrative of how the definitions in the applicable act determine whether the Clerk of Orphans' Court and/or Register of Wills can be considered a "judicial officer" in some circumstances and not others. In that case, we were considering whether the Register of Wills was a "judicial agency" for the purpose of determining whether the Office of Open Records had jurisdiction over records withheld by the Register of Wills Office under the Right-to-Know Law (RTKL).<sup>17</sup> We noted that Section 102 of the RTKL, 65 P.S. §67.102, defines "judicial agency" as "[a] court of the Commonwealth or any other entity or office of the unified judicial system," and that Section 102 of the Judicial Code, 42 Pa. C.S. §102, includes "administrative staff" within the definition of "personnel of the system," which also includes clerks of court and prothonotaries. Based on the definitions in the RTKL, we held that the Office of Open Records could not order the release of judicial records held by the Register of Wills and Clerk of the Orphans' Court of Philadelphia. Moreover, while "personnel of the system" are deemed to be part of a "judicial agency" for purposes of the RTKL, we made an explicit distinction between the "judicial function" of the Register of Wills with respect to the probate of wills and the non-judicial function of the Clerk of Orphans' Court with respect to the issuance of marriage licenses. *Id.*<sup>18</sup>

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<sup>17</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

<sup>18</sup> See also *Retail Clerks Int'l Ass'n, Local 1357 v. Leonard*, 450 F.Supp. 663, 666 (E.D. Pa. 1978) ("The powers and duties of the Register of Wills are set forth in [Section 901 of the Probate, Estates and Fiduciaries Code, 20 Pa. C.S.] §901: (t)he register shall have jurisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law. It  
**(Footnote continued on next page...)**



As we looked to the definitions contained in the RTKL in *Register of Wills & Clerk of the Orphans' Court of Philadelphia License Marriage Bureau*, we look to the definitions in the Judicial Code in deciding whether the Supreme Court has exclusive jurisdiction of this matter under Section 721(2) as a mandamus action to a "court of inferior jurisdiction." 42 Pa. C.S. §721(2). Section 102 of the Judicial Code defines "court" as "[i]nclud[ing] any one or more of the judges of the court who are authorized by general rule or rule of court, or by law or usage, to exercise the powers of the court in the name of the court." 42 Pa. C.S. §102. Section 102 also defines "judicial officers" as "[j]udges, district justices and appointive judicial officers." In contrast, "county staff" is defined as "[s]ystem and related personnel elected by the electorate of a county...The term does not include judicial officers." *Id.* In turn, "system and related personnel" is defined as including Registers of Wills and Clerks of the Orphans' Court division. *Id.* Thus, Hanes, as the Clerk of the Orphans' Court and Register of Wills, is "county staff" and is not a judge or judicial officer. Accordingly, he is not within the definition of "court" within the meaning of Section 721(2) of the Judicial Code, and the Supreme Court does not have jurisdiction of this mandamus action against him.

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**(continued...)**

is apparent that the Register's judicial duties are confined to matters relative to the probate of wills. *Sebik's Estate*[.] Thus, we find that the hiring and firing of employees is functionally not within the purview of his judicial duties and therefore not within the ambit of those acts which entitle him to judicial immunity....").

Moreover, this is an action by the Department, part of the Executive Branch of the Commonwealth government. As such, the Department, with counsel designated by the Office of General Counsel, may bring this action in the Commonwealth Court pursuant to Section 761(a)(2) of the Judicial Code, which grants the Commonwealth Court “original jurisdiction of all civil actions or proceedings:...(2) By the Commonwealth government ....” 42 Pa. C.S. § 761(a)(2).

In the alternative, Section 761(a)(1) of the Judicial Code provides that the Commonwealth Court has original jurisdiction of all civil actions or proceedings “[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity....” 42 Pa. C.S. §761(a)(1). Section 102 of the Judicial Code also defines “Commonwealth government,” in pertinent part, as “[t]he courts and other officers and agencies of the unified judicial system....” 42 Pa. C.S. §102. Although Hanes is not a “judicial officer,” he is named in his official capacity as Clerk of the Orphans’ Court of Montgomery County. He is, therefore, an officer of the Commonwealth government under Section 102 of the Judicial Code, and this Court has original jurisdiction under Section 761(a)(1). *Richardson v. Peters*, 610 Pa. 365, 366-67, 19 A.3d 1047-48 (2011); *Werner v. Zazyczny*, 545 Pa. 570, 577 n.5, 681 A.2d 1331, 1335 n.5 (1996).<sup>19</sup>

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<sup>19</sup> See also *Humphrey v. Dep’t of Corrections*, 939 A.2d 987, 991 (Pa. Cmwlth. 2007), *aff’d in part, appeal denied in part*, 598 Pa. 191, 955 A.2d 348 (2008) (“When the petitioner seeks the official performance of a ministerial act or mandatory duty, the petitioner properly sounds in mandamus. Here Humphrey requests this Court to order [the Department] to return confiscated UCC items and vacate DC-ADM 803-3. Therefore, we agree that Humphrey’s Petition requests mandamus relief and will consider the Petition in this Court’s original jurisdiction pursuant to Section 761(a)(1) or the Judicial Code....”).

### III.

Hanes next argues that the Department does not have standing<sup>20</sup> under the former Mandamus Act of 1893 and the related cases<sup>21</sup> to initiate the instant mandamus proceedings seeking to compel him to perform his public duty, because only the Attorney General, the Montgomery County District Attorney or a private citizen with an interest independent of the public at large has such standing. Because the Department is not the Attorney General or a private citizen, he contends that it does not have standing to maintain this action.

While this action was not brought in the name of the Commonwealth, the Attorney General, by letter dated August 30, 2013, authorized the Department of Health to bring this action on her behalf pursuant to Section 204(c) of the Commonwealth Attorneys Act, which allows the Office of General Counsel, who is the counsel for all state agencies, to do so under Section 301(6) of that statute. When authorizing the General Counsel to bring an action, as the Attorney General did here,

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<sup>20</sup> The concept of “standing,” in its accurate legal sense, is concerned only with the question of who is entitled to make a legal challenge to the matter involved. *Pa. Game Comm’n v. Dep’t of Env’tl. Res.*, 521 Pa. 121, 127, 555 A.2d 812, 815 (1989). Standing may be conferred by statute or by having an interest deserving of legal protection. *Id.* at 128, 555 A.2d at 815. As a general matter, the core concept of standing is that a person who is not adversely affected by the matter he seeks to challenge is not aggrieved thereby and has no right to obtain a judicial resolution of his challenge. *Id.*

<sup>21</sup> See *Dombroski v. City of Philadelphia*, 431 Pa. 199, 245 A.2d 238 (1968); *Dorris*. Hanes also cites *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655 (2005). However, that case was not a mandamus action seeking to compel the performance of a public duty; the relief sought therein was for declaratory and injunctive relief from the purportedly unconstitutional Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §§1101-1904.

Section 204(c) of the Commonwealth Attorneys Act provides that the Office of General Counsel or the counsel for the agency shall act “in [her] stead.” 71 P.S. §732-204(c). The net effect is that the Office of General Counsel has all the rights and duties of the Attorney General, and since Hanes admits that the Attorney General has standing, the Department of Health, through the Office of General Counsel, can maintain this action to enforce a public duty.

Moreover, the Department has standing in its own right to bring this action. As the Supreme Court has explained:

[W]hen the legislature statutorily invests an agency with certain functions, duties, and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances the legislature has implicitly ordained that such an agency is a proper party litigant, *i.e.*, that it has “standing”....

*Pennsylvania Game Commission*, 521 Pa. at 128, 555 A.2d at 815; *see also Commonwealth v. Beam*, 567 Pa. 492, 497-500, 788 A.2d 357, 361-62 (2005) (holding that the Department of Transportation had the implicit authority under the Aviation Code, 74 Pa. C.S. §§5101-6505, to initiate an action in equity to enjoin the operation of an unlicensed airport where the injunctive relief sought was a restrained and supervised form of administrative action and the operation of the unlicensed airport was injurious to the public interest).

Section 2104(c) of the Administrative Code of 1929 (Administrative Code)<sup>22</sup> empowers the Department “[t]o see that laws requiring the registration of ... marriages ... are uniformly and thoroughly enforced throughout the State, and prompt returns of such registrations made to the department.” Thus, the General Assembly has specifically conferred upon the Department the duty to ensure the uniform and thorough enforcement of all provisions of the Marriage Law, including Section 1102, defining marriage as “[a] civil contract by which one man and one woman take each other for husband and wife,” and Section 1704, which makes same-sex marriages entered into in foreign jurisdictions void within the Commonwealth. 23 Pa. C.S. §§1102, 1704. In addition, the General Assembly has empowered the Department to enforce Section 1301(a), which prohibits persons from being joined in marriage until a license is obtained, and Section 1302, which requires a written and verified application by both parties before a license is issued requiring the disclosure “[a]ny other facts necessary to determine whether legal impediment to the proposed marriage exists.” 23 Pa. C.S. §§1301(a), 1302(a), (b) (6). Further, Section 1104 requires that “[m]arriage licenses ... shall be uniform throughout this Commonwealth as prescribed by the department...,” in a form that states, under Section 1310, that “[y]ou are hereby authorized to join together in holy state of matrimony, according to the laws of the Commonwealth of Pennsylvania, (name) and (name)....” 23 Pa. C.S. §§1104, 1310. Finally, the Department has the duty to uniformly enforce the provisions of Section 1307, which state that “[t]he marriage license shall be issued if it appears from properly completed applications on behalf of each of the parties to the

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<sup>22</sup> Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §534(c).

proposed marriage that there is no legal objection to the marriage....” 23 Pa. C.S. §1307.<sup>23</sup>

Based on the foregoing, it is clear that the Department is the proper party with standing to initiate the instant mandamus proceeding to compel Hanes to discharge his duties in compliance with the Marriage Law, because the Department possesses a substantial, direct, and immediate interest in the subject matter of this litigation pursuant to its authority under the Administrative Code and the Marriage Law.

#### IV.

Hanes also contends that because he must determine whether to issue marriage licenses, “as provided by law,” he has the discretion to determine whether the Marriage Law is constitutional and that it would be unconstitutional as applied to same-sex couples. With respect to whether Hanes’ duties as Clerk of the Orphans’ Court of Montgomery County give him discretion to determine whether an act is constitutional, our Supreme Court, *albeit* in relation to prothonotaries and clerks of courts, has noted:

It is “well settled” in the intermediate appellate courts  
of this Commonwealth that the role of the prothonotary of

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<sup>23</sup> See, e.g., *In re Adoption of R.B.F.*, 569 Pa. 269, 277, 803 A.2d 1195, 1199-1200 (2002) (“[A]s noted, 23 Pa. C.S. §1704 provides that the Commonwealth only recognizes marriages ‘between one man and one woman.’ Thus, a same-sex partner cannot be the ‘spouse’ of the legal parent and therefore cannot attain the benefits of the spousal exception to relinquishment of parental rights [under Section 2903 of the Adoption Act, 23 Pa. C.S. §2903,] necessary for a valid consent to adoption.”).

the court of common pleas, while vitally important, is purely ministerial. As a purely ministerial office, any authority exercised by the prothonotary must derive from either statute or rule of court. Further, as “[t]he prothonotary is merely the clerk of the court of Common Pleas[,] [h]e has no judicial powers, nor does he have power to act as attorney for others by virtue of his office.” Consistent therewith, “[t]he prothonotary is not ‘an administrative officer who has discretion to interpret statutes.’” Thus, while playing an essential role in our court system, the prothonotary’s powers do not include the judicial role of statutory interpretation.

As the prothonotary and the clerk of courts are created by the same constitutional provision and have substantially identical statutory grants of authority, we conclude that the well-accepted limitations that the courts of this Commonwealth have recognized in the prothonotary’s role are equally applicable to the clerk of courts....

*In re Administrative Order No. 1-MD-2003*, 594 Pa. 346, 360, 936 A.2d 1, 9 (2007).

The same applies to the clerks of the orphans’ court division of the courts of common pleas, because they are also created and vested with the same powers by the same constitutional provision, Section 15 of the Schedule to Article 5 of the Constitution.<sup>24</sup> Likewise, the statutory powers conferred upon the clerk of the orphans’ court division under Section 2777 of the Judicial Code<sup>25</sup> are identical to

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<sup>24</sup> The Schedule to Article 5 of the Pennsylvania Constitution is given the same force and effect as the provisions contained in the main body of the Constitution. *Commonwealth ex rel. Brown v. Heck*, 251 Pa. 39, 41, 95 A. 929, 930 (1915).

<sup>25</sup> Section 2777 states, in pertinent part:

The office of the clerk of the orphans’ court division shall have the power and duty to:

**(Footnote continued on next page...)**

those conferred upon the prothonotary under Section 2737, 42 Pa. C.S. §2737, and the clerk of courts under Section 2757, 42 Pa. C.S. §2757. Thus, the powers granted under Section 2777 to Hanes as the Clerk of the Orphans' Court:

[a]re clearly ministerial in nature. Nothing in this grant of authority suggests the power to interpret statutes and to challenge actions of the court that the clerk perceives to be in opposition to a certain law. Thus, the clerk of courts, as a purely ministerial office, has no discretion to interpret rules and statutes....

*In re Administrative Order No. 1-MD-2003*, 594 Pa. at 361, 936 A.2d at 9; *see also Council of the City of Philadelphia v. Street*, 856 A.2d 893, 896 (Pa. Cmwlth. 2004),

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**(continued...)**

- (1) Administer oaths and affirmations and take acknowledgments ... , but shall not be compelled to do so in any matter not pertaining to the proper business of the office.
- (2) Affix and attest the seal of the court to all the process thereof and to the certifications and exemplifications of all documents and records pertaining to the office of the clerk of the orphans' court division and the business of that division.
- (3) Enter all orders of the court determined in the division.
- (4) Enter all satisfactions of judgments entered in the office.
- (5) Exercise the authority of the clerk of the orphans' court division as an officer of the court.
- (6) Exercise such other powers and perform such other duties as may now or hereafter be vested in or imposed upon the office by law, ... [or] order or rule of court.



*appeal denied*, 583 Pa. 675, 876 A.2d 397 (2005) (“A ministerial act is defined as ‘one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act performed.’”) (citations omitted).

Nor is any discretion given to the clerk when issuing the license under the Marriage Law, which requires the clerk to issue a marriage license only if certain criteria are met. Section 1302(a) provides that “[n]o marriage license shall be issued except upon written and verified application made by both of the parties intending to marry,” and Section 1302(b) outlines the contents thereof. 23 Pa. C.S. §1302(a), (b).<sup>26</sup> Section 1303(a) provides that no marriage license shall be issued prior to the third day after application unless the Orphans’ Court authorizes a waiver of the time period pursuant to subsection (b). 23 Pa. C.S. §1303(a), (b).<sup>27</sup> Section 1304(b) prohibits the issuance of a license if either of the applicants is under 16 years of age unless the Orphans’ Court determines that it is in the best interest of the applicant, and it prohibits issuance of a license if either of the applicants is under 18 years of age unless consented to by the custodial parent. 23 Pa. C.S. §1304(b) (1), (2).

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<sup>26</sup> As noted above, under Section 1104, the Department prescribes the form of the application. 23 Pa. C.S. §1104.

<sup>27</sup> While Section 1303 merely refers to the “court,” Section 102 of the Domestic Relations Code, 23 Pa. C.S. §102, defines “court,” in pertinent part, as “[t]he court ... having jurisdiction over the matter under Title 42 ... or as otherwise provided or prescribed by law.” In turn, as noted above, Section 711(19) of the Probate, Estates, and Fiduciaries Code provides that “[j]urisdiction of the court of common pleas over the following shall be exercised through its orphans’ court division: ... [m]arriage licenses, as provided by law.” 20 Pa. C.S. §711(19).

Section 1304 further prohibits issuing a marriage license to incompetent persons unless the Orphans' Court decides that it is in the best interest of the applicant or society, to applicants under the influence of alcohol or drugs, or to applicants within the prohibited degrees of consanguinity. 23 Pa. C.S. §1304(c), (d), (e). Under Section 1306, Hanes is required to examine each applicant in person as to: (1) the legality of the contemplated marriage; (2) any prior marriages and their dissolution; (3) any of the Section 1304 restrictions; and (4) all information that must be furnished on the application as prepared and approved by the Department. 23 Pa. C.S. §1306(a). Finally, under Section 1307, Hanes is required to issue the marriage license subject to the Section 1303(a) three-day waiting period, "[i]f it appears from properly completed applications on behalf of each of the parties to the proposed marriage that there is no legal objection to the marriage." 23 Pa. C.S. §1307. Under Section 1308(a), 23 Pa. C.S. §1308(a), an applicant can appeal Hanes' refusal to issue a marriage license to the Orphans' Court.

The foregoing statutory scheme, outlining the applicable requirements and procedure for the issuance of a marriage license, does not authorize Hanes to exercise any discretion or judgment with respect to its provisions. Rather, the Marriage Law specifically requires Hanes to furnish and use the appropriate forms and to issue the license if the statutory requirements have been met, subject to the applicable exceptions and review by the Orphans' Court. Such is not a discretionary "judicial act" performed by the "judicial officer" of an inferior court. *See In re Administrative Order No. 1-MD-2003*, 594 Pa. at 361, 936 A.2d at 9; *In re Coats*, 849 A.2d 254, 258 (Pa. Super. 2004) ("[T]he orphans' court clerk simply performs its ministerial duty in accordance with the statutory mandate that requires applicants to

appear in person.... The office of the clerk of the orphans' court is not *sui juris* but is dependent on county and legislative provisions to implement its function....").<sup>28</sup>

## V.

Hanes also argues that the Application should not be granted because the Department has to establish a clear right to relief, and to do that, the Department must show that the provisions in the Marriage Law limiting marriage to a man and a woman are constitutional. The Department asserts that this is the same as raising a counterclaim, which is prohibited under the rules governing mandamus actions. *See* Pa. R.C.P. No. 1096 ("No counterclaim may be asserted."). Until a court has decided that an act is unconstitutional, Hanes must enforce the law as written, and it is not a defense to a mandamus action that the law may be unconstitutional. Only a court can arrive at that conclusion.

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<sup>28</sup> *See also Rose Tree Media Sch. Dist. v. Dep't of Pub. Inst.*, 431 Pa. 233, 237, 244 A.2d 754, 755-56 (1968) ("[O]nce the Department has approved the amount of reimbursable transportation costs there is no discretion left to the Department in arriving at the actual amount which must be paid to the school district. After approval, the Department is mandated by statute to remit an amount which is to be determined by applying the mechanical formula of multiplying the cost of the approved reimbursable pupil transportation incurred during the school year by the district's aid ratio. The application of that formula does not involve any discretion but merely involves the ministerial duty of making proper computations in accordance with the directives of the statute...."); *Lockyer v. City and County of San Francisco*, 33 Cal. 4<sup>th</sup> 1055, 1081-82, 95 P.3d 459, 472-73 (2004) ("[U]nder the statutes reviewed above, the duties of the county clerk and the county recorder at issue in this case properly are characterized as *ministerial* rather than discretionary. When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same token, when the statutory requirements are not met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage....") (emphasis in original).

A.

All that a democratic form of government means is that we will be governed democratically – the process does not guarantee any particular outcome. The citizens of the Commonwealth have consented to be governed under the terms of our Constitution, and it provides how the Pennsylvania democracy works. Under Article 2, Section 1, the legislative power of the Commonwealth is vested in the General Assembly. Pa. Const. art. II, §1. The legislative power is the power “to make, alter and repeal laws...” *Jubelirer v. Rendell*, 598 Pa. 16, 41, 953 A.2d 514, 529 (2008). When the legislature enacts a law, under Article 4, Section 2 it is up to the Governor “to take care that the laws be faithfully executed.” Pa. Const. art. IV, §2. In addition, Article 5, Section 1 of the Constitution states:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Pa. Const. art. V, §1. Under our Constitution then, only the courts have the power to determine the constitutionality of a statute. *In re Investigation by Dauphin County Grand Jury*, 332 Pa. 342, 352-53, 2 A.2d 804, 807 (1938); *Hetherington v. McHale*,

311 A.2d 162, 167 (Pa. Cmwlth. 1973), *rev'd on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974).<sup>29</sup>

Governmental officials carry out the functions assigned to the office and no more because when decisions are reached that follow these and other constitutional procedures, it fosters acceptance of a statute or decision even by those who strongly disagree. When public officials do not perform their assigned tasks, it creates the type of “complication” caused by the United States Attorney General’s decision not to defend DOMA, which led the Supreme Court of the United States in *Windsor* to spend as much time addressing that “complication” as it did on the merits of the case. In this case, a clerk of courts has not been given the discretion to decide whether the statute he or she is charged to enforce is a good idea or bad one, constitutional or not. Only courts have the power to make that decision.

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<sup>29</sup> As a corollary to this claim, Hanes contends that the Department cannot possess a clear legal right to force him to abandon his oath of office and violate the United States and Pennsylvania Constitutions while discharging the duties of his office. See Article 6, Section 3 of the Pennsylvania Constitution, Pa. Const. art. VI, §3 (“[A]ll ... county officers shall, before entering on the duties of their respective offices, take and subscribe the following oath or affirmation before a person authorized to administer oaths. ‘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.’ ...”). However, his oath of office requires him to follow the law until a court decides it is unconstitutional. See, e.g., *State ex rel. Atlantic Coast Line R.R. v. State Bd. of Equalizers*, 84 Fla. 592, 595-96, 94 So. 681, 682-83 (1922) (“The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is, I think without merit. The fallacy in it is that every act of the Legislature is presumptively constitutional until judicially declared otherwise, and the oath of office ‘to obey the Constitution’ means to obey the Constitution, not as the officer decides, but as judicially determined. The doctrine that the oath of office of a public official requires him to decide for himself whether or not an act is constitutional before obeying it will lead to strange results, and set at naught other binding provisions of the Constitution.”).

## B.

While it is clear that Hanes did not have the power to decide on his own that the law is unconstitutional and to issue marriage licenses to same-sex couples, the question now is whether he can take advantage of his improper action in doing so and challenge the constitutionality of the Marriage Law as a defense in a mandamus action to compel him to follow its provisions. To allow him to raise such a defense would be the functional equivalent of a counterclaim, which is not permitted by Pa. R.C.P. No. 1096.

Moreover, *Commonwealth ex rel. Third School Dist. of the City of Wilkes Barre v. James*, 135 Pa. 480, 19 A. 950 (1890), an old case, like other cases discussed here that were decided before the mandamus rules, analyzed what was allowed in a mandamus action. In that case, the clerk of the former Court of Quarter Sessions refused to receive and record the resolutions of school boards contrary to statute. In defense of an application for mandamus seeking to compel him to comply with the law and to perform his ministerial duty, the clerk argued that the applicable statute was unconstitutional. In rejecting this defense, the Supreme Court explained:

It is too plain for argument that the appellant, who is the clerk of the court of quarter sessions of Luzerne county, had no right to decline to receive and record the resolutions of the school boards of the third school-district, accepting of the provisions of the act of 23d May, 1889. P. L. 274. The act referred to requires him to receive and record these papers. His duties were purely ministerial, and the court below properly awarded the peremptory mandamus.

It is but just to say that his act in refusing does not appear to have been one of insubordination, but was intended to test the constitutionality of the said act of 1889. We are of the opinion that the constitutional question cannot be raised in this way. We really have no case before us, beyond the mere refusal of the clerk to file the papers. This does not require discussion. The order of the court below awarding the peremptory mandamus is affirmed.

*Id.* at 482-83, 19 A. 950.<sup>30</sup>

We note that in two other cases involving public officers with discretionary powers, our Supreme Court addressed challenges to the constitutionality of a statute as a defense in a mandamus action. In *Commonwealth ex rel. Brown v. Heck*, 251 Pa. 39, 95 A. 929 (1915), our Supreme Court considered the constitutionality of a statute altering the counties of a judicial district, an issue that was raised as a defense in a mandamus action seeking to compel a common pleas court judge to perform his judicial duties to administer an estate. The Supreme Court did not address or distinguish *James*. In *Commonwealth ex rel. Carson v. Mathues*, 210 Pa. 372, 59 A. 961 (1904), the Supreme Court affirmed a common pleas order granting mandamus to compel the state treasurer to pay warrants for judicial salaries.

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<sup>30</sup> See also *The Crossings at Fleming Island Community Dev. Dist. v. Echeverri*, 991 So. 2d 793, 799 (Fla. 2008) (holding that there is no “defensive posture” exception to the historical rule that a public official acting in his or her official capacity does not have standing to challenge the validity of a statute); *Li v. State*, 338 Or. 376, 396-98, 110 P.3d 91, 101-02 (2005) (holding that while executing his or her official duties, a governmental official must take care to consider the meaning of the state and federal constitutions, but that does not grant official powers to take actions and fashion remedies that would constitute *ultra vires* acts); *Lockyer*, 33 Cal. 4<sup>th</sup> at 1082, 95 P.3d at 473 (holding that a local public official charged with the ministerial duty of enforcing a statute does not have the authority to refuse to enforce the statute on the basis of the official’s view that it is unconstitutional in the absence of a judicial determination of unconstitutionality).

The Supreme Court did not address the trial court's analysis of *James* or the trial court's holding that the treasurer's standing as "a high constitutional officer of the Commonwealth" who exercises "discretion" permitted him to defend on the purported unconstitutionality of the statute setting the salaries. *James* is, nonetheless, controlling because the instant case also involves a mandamus action to compel a court clerk with no discretionary authority to perform his mandatory ministerial duty, whereas the foregoing cases involved constitutional officers with discretionary authority.

Because only the General Assembly may suspend its own statutes, because only courts have the authority to determine the constitutionality of a statute, and because all statutes are presumptively constitutional, a public official "[i]s without power or authority, even though he is of the opinion that a statute is unconstitutional, to implement his opinion in such a manner as to effectively abrogate or suspend such statute which is presumptively constitutional until declared otherwise by the Judiciary." *Hetherington*, 311 A.2d at 168. Based on the foregoing, it is clear that Hanes does not have standing to assert the purported unconstitutionality of the Marriage Law as a defense to the instant Petition.

## VI.

With respect to the Putative Intervenors' Petition for Leave to Intervene,<sup>31</sup> as outlined above, the constitutionality of the Marriage Law may not be

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<sup>31</sup> Pa. R.A.P. 1531(b) provides:

**(b) Original jurisdiction petition for review proceedings.** A person not named as a respondent in an original jurisdiction petition for  
**(Footnote continued on next page...)**



raised as a defense in the instant mandamus proceedings and will not be considered by this Court. In addition, the legality of Hanes' actions and any purported rights obtained thereby are not at issue and may not be established in the instant mandamus action. *See, e.g., Barge*, 39 A.3d at 545 ("The purpose of mandamus is not to establish legal rights, but to enforce those rights already established beyond peradventure.") (citation omitted).<sup>32</sup> Moreover, there are no obstacles preventing those adversely affected by the provisions of the Marriage Law or putatively possessing rights based on Hanes' actions, such as the Putative Intervenors, from asserting their own rights in an appropriate forum. *See Whitewood v. Corbett* (No. 13-1861) (M.D. Pa.).

## VII.

Based on the foregoing, we believe that the Department is entitled to the requested summary relief in mandamus. As the Pennsylvania Supreme Court has recently explained:

The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty. *See Delaware River Port Auth. v. Thornburgh*, 508 Pa. 11, [20,]

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**(continued...)**

review, who desires to intervene in a proceeding under this chapter, may seek leave to intervene by filing an application for leave to intervene.... The application shall contain a concise statement of the interest of the applicant and the grounds upon which intervention is sought.

<sup>32</sup> *See also* Pa. R.C.P. No. 2329(1) ("[A]n application for intervention may be refused, if ... the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action....").

493 A.2d 1351, 1355 (1985). Mandamus cannot issue “to compel performance of a discretionary act or to govern the manner of performing [the] required act.” *Volunteer Firemen's Relief Ass'n of City of Reading v. Minehart*, 415 Pa. 305, [311,] 203 A.2d 476, 479 (1964). This Court may issue a writ of mandamus where the petitioners have a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists. *Id.*; see *Board of Revision of Taxes v. City of Philadelphia*, 607 Pa. 104, [133,] 4 A.3d 610, 627 (2010). Moreover, mandamus is proper to compel the performance of official duties whose scope is defined as a result of the mandamus action litigation. *Thornburgh*, [508 Pa. at 20,] 493 A.2d at 1355. Thus, “we have held that mandamus will lie to compel action by an official where his refusal to act in the requested way stems from his erroneous interpretation of the law.” *Minehart*, [415 Pa. at 311,] 203 A.2d at 479-80.

*Fagan v. Smith*, 615 Pa. 87, 90, 41 A.3d 816, 818 (2012).

As outlined above, Hanes has admittedly failed to comply with his mandatory ministerial public duty under the Marriage Law by issuing marriage licenses to same-sex couples, by accepting the marriage certificates of same-sex couples, and by waiving the mandatory three-day waiting period, all in violation of the express provisions of the Marriage Law. Even if Hanes is correct in his view that portions of the Marriage Law are unconstitutional, as noted above, the instant mandamus action is not the proper forum in which such a determination may be made. *Barge*. The proper method for those aggrieved is to bring a separate action in the proper forum raising their challenges to the Marriage Law. Unless and until either the General Assembly repeals or suspends the Marriage Law provisions or a court of competent jurisdiction orders that the law is not to be obeyed or enforced, the

Marriage Law in its entirety is to be obeyed and enforced by all Commonwealth public officials.

Accordingly, the Department's Amended Application for Summary Relief seeking peremptory judgment in mandamus is granted; Hanes' Preliminary Objections and Putative Intervenors' Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1531 are dismissed as moot.

  
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DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:
Department of Health,	:
Petitioner	:
	:
v.	:
	:
D. Bruce Hanes, in his capacity as the	:
Clerk of the Orphans' Court of	:
Montgomery County,	:
Respondent	: No. 379 M.D. 2013

**ORDER**

AND NOW, this 12<sup>th</sup> day of September, 2013, the Department of Health's Amended Application for Summary Relief for peremptory judgment in mandamus is granted. D. Bruce Hanes, in his official capacity as the Clerk of the Orphans' Court of Montgomery County, is directed to comply with all provisions of the Marriage Law, 23 Pa. C.S. §§1101-1905, while discharging the duties of his office, including the provisions of Sections 1102, 1303(a) and 1704, 23 Pa. C.S. §§1102, 1303(a) and 1704, and he shall cease and desist from issuing marriage licenses to same-sex applicants, from accepting the marriage certificates of same-sex couples, and from waiving the mandatory three-day waiting period in violation of the Marriage Law. The Preliminary Objections of D. Bruce Hanes and the Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1531 filed by Putative Intervenors are dismissed as moot.

  
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DAN PELLEGRINI, President Judge