IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D., and DONNA DITRANI, JAMES E. PETERS and GARY A. MOHRMAN; CARRIE L. FOWLER and SARAH C. BRAUN; and DARCI JO BOHNENBLUST and JOLEEN M. HICKMAN, Plaintiffs, v. ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official Capacity as Clerk of the District Court for the 7th Judicial District (Douglas county), and BERNIE LUMBRERAS, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), NICK JORDAN, in his official capacity as Secretary of the Kansas Department of Revenue, LISA KASPAR, in her official capacity as Director of the Kansas Department of Revenue's Division of Vehicles, and MIKE MICHAEL, in his official capacity as Director of the State Employee Health Plan, Defendants.	)	Case No. 14-CV-2518-DDC-TJJ

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Defendants Douglas A. Hamilton and Bernie Lumbreras, Clerks of the District Court of the 7th and 18th Judicial District respectively, submit this Memorandum in support of their motion for an Order dismissing them from this action for lack of lack of subject matter jurisdiction, including Eleventh Amendment immunity, lack of an Article III case or controversy, lack of standing and mootness. As an

alternative, Plaintiffs have also failed to join indispensable, but immune parties, the Chief Judges of the Districts in question. The Clerks must be dismissed as defendants from this action.

NATURE OF THE MATTER BEFORE THE COURT

On November 26, 2014, Plaintiffs filed an Amended Complaint. (Doc. 52). The sole claims against the Clerks are by the original Plaintiffs, Marie, Brown, Wilks and DiTrani, who have made no effort since November 13, 2014, to obtain a marriage license, despite the entry of Administrative Orders by Chief Judges in both Districts allowing for issuance of same-sex marriage licenses. Any allegation that Marie, Brown, Wilks or DiTrani are being prevented from receiving a license Hamilton or Lumbreras is patently and demonstrably false in an apparent attempt to manufacture or maintain jurisdiction where no basis exists.[1]

QUESTIONS PRESENTED

1. Have Plaintiffs Marie, Brown, Wilks and DiTrani met their burden of showing a jurisdictional basis for their claims that they are currently being denied a marriage license by Clerks Hamilton and Lumbreras?
2. In the alternative, assuming jurisdiction, should this action be dismissed for failure to join necessary but indispensable parties?

STATEMENT OF FACTS

1. Douglas Hamilton and Bernie Lumbreras are Clerks of the District Court in Douglas and Sedgwick Counties respectively. Am. Complt. (Doc. 52), at ¶ ¶ 12-13.
2. As Clerks, Mr. Hamilton and Ms. Lumbreras are officers of the State of Kansas, appointed

[1] The Amended Complaint adds new Plaintiffs, Peters, Mohrman, Fowler, Braun, Bohnenblust and Hickman, none of whom assert any claims against Clerks Hamilton and Moser. The new Plaintiffs are not requesting marriage licenses, but rather demand recognition of licenses, including out-of-state licenses by the new Defendants, Nick Jordan, Secretary of Revenue, Lisa Kaspar, Director of Kansas Department of Revenue's Division of Vehicles and Mike Michael, Director of the State Employee Health Plan. In any event, as a matter of law, the Clerks are not proper defendants on a "non-recognition" claim. *Bishop v. Smith,* 760 F.3d 1070 (10th Cir. 2014).

by and subject to supervision by the Chief Judges of their respective judicial districts. K.S.A. 2014 Supp. 20-343.[2]

3. Appointed clerks, their deputies and assistants "have such powers, duties and functions as are prescribed by law, prescribed by rules of the supreme court or assigned by the chief judge." K.S.A. 20-343. The clerks of the district court "shall do and perform all duties that may be required of them by law or the rules and practice of the courts. . .." K.S.A. 20-3102.

4. Kansas is a unified court system. K.S.A. 20-101, Kan. Const. Art. 3, § 1 ("[t]he supreme court shall have general administrative authority over all courts in this state"); K.S.A. 2014 Supp. 20-318, K.S.A. 2014 Supp. 20-319. In Kansas, the district courts are organized into thirty-one (31) judicial districts. Kan. Const., Art. 3, § 6; K.S.A. 4-202, *et seq.* Chief Judges, including Judge Fairchild and Judge Fleetwood, are subject to appointment by and supervision of the Kansas Supreme Court. *See, e.g.*, K.S.A. 2014 Supp. 20-329. Clerks of the District Court Hamilton and Lumbreras, are Kansas Judicial Branch officers, appointed by their respective Chief Judges and are Judicial Branch employees. K.S.A. 2014 Supp. 20-343, K.S.A. 2014 Supp. 20-345. As of June 30, 2013, there were 246 district judges in Kansas. Annual Report of the Courts of Kansas, FY 2013, available at http://intranet.kscourts.org:7780/stats.[3]

5. The only claim in the Amended Complaint against Clerks Hamilton and Lumbreras is an official capacity claim by Plaintiffs Marie, Brown, DiTrani and Wilks. *See* Am. Complt. (Doc. 52), at ¶¶ 22, 75, 76.

6. The sole claim asserted by Plaintiffs Marie, Brown, DiTrani and Wilks is that *as of October 9, 2014*, they were not issued marriage licenses at the Douglas County or Sedgwick County

[2] K.S.A. 20-343, along with other statutes concerning the Judicial Branch, was amended in 2014. 2014 Sess. Laws Ch. 82. A current version appears at http://ksrevisor.org/statutes.

[3] A court may take judicial notice under Fed. R. Evid. 201 of information on the Internet. *See O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007).

Clerks' Offices. *See Id.*, at ¶¶ 22-29.

7. On November 13, 2014, Administrative Orders were entered by the Chief Judges in the 7th and 18th Judicial Districts (Douglas and Sedgwick Counties), respectively, ordering the Clerks of those Courts to issue marriage licenses to same sex couples on the same terms as opposite sex couples. Certified copies of those Orders are attached as Exhibits to Affidavits of Douglas Hamilton and Bernie Lumbreras respectively.
8. The Amended Complaint was filed on November 26, 2014 (Doc. 52).
9. The Amended Complaint alleges no facts showing that Plaintiffs Marie, Brown, DiTrani or Wilks appeared in the respective Clerks' Offices on or after November 13, 2014, to request issuance of a license. *See Id.*
10. In fact, none of these Plaintiffs has appeared in the Clerks' Offices since November 13, 2014, to request issuance of a license. *See* Affidavit of Douglas A. Hamilton; Affidavit of Bernie Lumbreras.
11. The Clerks have nothing to do with recognition of marriage in Kansas for tax purposes or intestate succession. Affidavit of Douglas A. Hamilton signed October 30, 2014; Affidavit of Bernie Lumbreras signed October 29, 2014.

ARGUMENT AND AUTHORITIES

Clerks Hamilton and Lumbreras must be dismissed from this action as there is no factual basis for a claim against them and no basis for jurisdiction of this Court. Although the Clerks join in the Motion to Dismiss submitted by Defendant Moser (Doc. 57), as though wholly restated herein, the Clerks will for the Court's ease of reference repeat portions of that filing here.

The Legal Standard: Plaintiff Bears the Burden of Showing Jurisdiction

As stated by Defendant Moser, federal courts are courts of limited jurisdiction. Lack of jurisdiction is presumed. The burden of establishing federal court jurisdiction falls on the party asserting that jurisdiction exists.[4] As Judge Robinson of this District stated the well-established law, "Federal courts are of limited jurisdiction and, as such, must have a statutory or constitutional basis to exercise jurisdiction. A court lacking jurisdiction must dismiss the case, regardless of the stage of the proceeding, when it becomes apparent that jurisdiction is lacking. The party who seeks to invoke federal jurisdiction bears the burden of establishing that such jurisdiction is proper. Thus, plaintiff bears the burden of showing why the case should not be dismissed. Mere conclusory allegations of jurisdiction are not enough."[5]

In particular, "[a] plaintiff must maintain standing at all times throughout the litigation for a court to retain jurisdiction."[6] A plaintiff must show a personal stake in the outcome.[7] Since federal courts are courts of limited jurisdiction, jurisdiction is subject to continuing review and to satisfy constitutional case or controversy requirements, the controversy must be extant at all stages of the action.[8] Although counsel have a duty to advise the Court of pertinent facts, including changing facts, the federal courts have an independent duty given their limited jurisdiction not to allow parties to collusively create jurisdiction where none exists.[9] When the facts upon which subject matter jurisdiction depends are attacked, "the court must look beyond the complaint and has wide discretion to allow documentary and even testimonial evidence under Rule 12(b)(1)."[10] In the case of a factual

[4] *See Devon Energy Production Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1201 (10th Cir. 2012); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).
[5] *See, e.g, Youssefi v. United States*, No. 13-2174-JAR, 2013 WL 3755791 (D. Kan. July 15, 2013). (citations omitted).
[6] *Phelps v. Hamilton*, 122 F.3d 1309, 13-15-16 (10th Cir. 1997) (quoting *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995)).
[7] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
[8] *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *Phelps v. Hamilton*, 122 F.3d at 1315-16.
[9] *Id.*, at 73 (citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986)); and n.23 ("It is the duty of counsel to bring to the federal tribunal's attention '*without delay,*' facts that may raise a question of mootness.") (citation omitted).
[10] *Paper, Allied-Industrial, Chemical and Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1293

attack upon subject matter jurisdiction, the Court is not required to assume the truth of the complaint's factual allegations.[11]

Eleventh Amendment Immunity Bars Plaintiffs' Claim Against the Clerks

The Eleventh Amendment bars federal court lawsuits against a state or its officials acting within their official capacities, with a narrow exception allowing for prospective injunctive relief against individual officials for their **ongoing** violations of federal rights, the rule of *Ex parte Young.*[12] Given the undisputable facts, there is no basis for prospective injunctive relief against Clerks Hamilton and Lumbreras as both Clerks are granting licenses to same-sex applicants as per Administrative Orders entered in those Districts. Eleventh Amendment immunity requires dismissal of Plaintiffs' claims against Hamilton and Lumbreras.[13]

For similar and related reasons, state officials sued in their official capacities are not "persons" subject to suit under 42 U.S.C. 1983.[14] As noted by Dr. Moser, any claim against these Clerks for past actions in their respective individual capacities is also barred by qualified immunity.[15]

The Claim Against the Clerks is Barred for Lack of Article III Jurisdiction

Plaintiffs Marie, Brown, DiTrani and Wilks have failed to show any basis for a continuing claim against Clerks Hamilton and Lumbreras, whether that is discussed in terms of no standing (no injury in fact, actual or imminent, concrete and particularized, traceable to actions of Defendants Hamilton and Lumbreras), no irreparable harm (for purposes of Rule 65 injunctive relief), no case or controversy for

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(10th Cir. 2005) (citation omitted); *see also, GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381 (10th Cir. 1997) (when a plaintiff does not attach a document central to plaintiff's claim, a defendant may submit the document on a motion to dismiss).

[11] *Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1272 (10th Cir. 2012).

[12] 209 U.S. 123 (1908).

[13] *See, e.g., Peterson v. Martinez*, 707 F.3d 1197, 1205-06 (10th Cir. 2013).

[14] *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *see also, Arizonans for Official English v. Arizona*, 520 U.S. 43, 69-70 (1997) (citing *Will*), and n.24.

[15] *Guttman v. Khalsa*, 669 F.3d 1101 (10th Cir. 2012).

purposes of declaratory relief or other relief, or related doctrines of mootness depriving this Court of subject matter jurisdiction under Article III, § 2 of the U.S. Constitution.

Although cases are legion for these generally accepted, black-letter propositions, *Arizonans for English* is an example of a case discussing these principles. There, the Plaintiff, a state employee, brought the federal court action challenging a state statute as an individual, not as a class representative, and voluntarily left state employment after filing her initial complaint.[16] In an opinion by Justice Ginsburg, the Court held that Plaintiff's resignation from state employment made her claim for prospective relief moot, "[t]he case had lost the essential elements of a justiciable controversy," and the action should have been dismissed.[17] After discussing the lengthy procedural history of the case, the Court noted that federal court jurisdiction is limited to cases or controversies as per the Constitution, Article III, § 2.[18] Standing is an aspect of that requirement.[19] "To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'"[20] The Plaintiff must possess a "direct stake in the outcome," at all times, even on appeal.[21] After Plaintiff Yniguez's resignation, the Court questioned where there was still a case to pursue, whether there was a live case or controversy or whether the case was moot, finding that the case was moot.[22]

In *Arizonans for English,* the Arizona Attorney General suggested that the case was moot when the state employee Plaintiff resigned but the district court rejected that suggestion.[23] The Supreme Court held that was wrong for a variety of reasons; in addition to the usual litigation question to be routinely asked, "Is this conflict really necessary?," the Court indicated the obligation to question jurisdiction is particularly important where anticipatory relief is sought in federal court against a state

[16] *Arizonans for Official English v. Arizona,* 520 U.S. at 48.
[17] *Id.*, at 48-49.
[18] *Id.*, at 64.
[19] *Id.* (citation omitted).
[20] *Id.*, at 64 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).
[21] *Id.* (citation omitted).
[22] *Id.*, at 66-72.
[23] *Id.*, at 74.

statute for reasons of federalism and respect for States.[24] As noted above under Eleventh Amendment immunity, the Arizonans Court also pointed out that relief in that case against state officials was barred by the lack of a basis for prospective injunctive relief, a conclusion equally applicable here.[25]

The doctrine of mootness has been applied to bar claims for injunctive relief where there has been a change of policy, as here, the Administrative Orders entered by the Chief Judges of their respective districts. In such cases, public officials, including the Chief Judges who entered the orders in question as well as the Clerks, are entitled to a presumption of good faith.[26]

As noted by Defendant Moser, declaratory relief is not available either given Plaintiffs' claims that the outcome is already controlled by Tenth Circuit precedents: "As a general rule, where a law has been declared unconstitutional by a controlling court, pending requests for identical declaratory relief become moot."[27]

Here, the relief Plaintiffs initially sought from these Clerks, a license, is readily available; the Clerks (because of Orders of their respective Chief Judges), have made licenses available to Plaintiffs for the mere asking; there is no further relief to get or that this Court can give. Plaintiffs' claim against the Clerks for a license is moot.[28] Although there are many decisions dismissing similar claims based upon mootness, the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Smith*[29] is an example on point. There, an environmental organization sued federal agency defendants (Bureau of Land Management ("BLM") and the Secretary of Interior), for violation of the Endangered Species Act for failing to consult the Fish and Wildlife Service ("FWS") regarding the impact BLM's actions might have on a threatened species of milkweed. After the case was filed, the complained of consultation

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[24] *Id.*, at 74-75 (citations omitted).
[25] *Arizonans for English*, 520 U.S. at 69-70 (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989)), and n.24.
[26] *See generally,* 13C C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.7, p. 333, n.16 (3d ed. 2008) (noting that federal courts tend to trust public officials as opposed to private defendants, annotating cases).
[27] *Bishop v. United States ex rel. Holder,* 962 F. Supp. 2d 1252, 1269 (N.D. Okla.), *aff'd sub nom. Bishop v. Smith,* 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014).
[28] *See generally, 13C* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.7, n.12 (3d ed. 2008) (annotating cases).
[29] 110 F.3d 724 (10th Cir. 1997).

with FWS occurred. The district court entered summary judgment for defendants, but also found the claim moot, as did the Circuit on appeal, which held that the case should have been dismissed.

The Circuit noted there are two different mootness doctrines, Article III mootness and prudential mootness. "Article III mootness is 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[30] The doctrine of prudential mootness relates to the Court's remedial discretion and has "particular applicability in cases, such as this one, where the relief sought is an injunction against the government."[31] Under both doctrines, "the central inquiry is essentially the same: have circumstances changed since the beginning of the litigation that forestall any occasion for meaningful relief."[32] The Circuit found that since the requested consultation had already occurred, an injunction would redress no injury and a declaratory judgment was also unavailable as it would serve no purpose.[33] The Court found that even if the suit were not moot in the Article III sense, it would be moot on considerations of prudential mootness.[34]

Closer to home, Judge Richard Rogers of this District faced this very situation in a case seeking injunctive relief against the state lottery when the plaintiff moved out of state after the action was instituted. In that case, *Tyler v. Kansas Lottery*, the plaintiff was in a wheelchair and wanted a statewide permanent injunction forcing all retail lottery outlets in Kansas to conform with certain requirements of the Americans with Disabilities Act.[35] The matter was teed up for summary judgment when it became clear that Tyler had moved to Wisconsin.[36] In assessing Tyler's request for a permanent injunction, Judge Rogers noted that "an injunction is appropriate only where future conduct is at issue. 'The moving party must satisfy the court that relief is needed. The necessary determination

[30] 110 F.3d at 727 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)).
[31] *Id.* (citations omitted).
[32] *Id.*
[33] *Id.*, at 729-30.
[34] *Id.*, at 730.
[35] 14 F. Supp. 2d 1220, 1222 (D. Kan. 1998).
[36] *Id.*, at 1221.

is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."[37]

After noting the Plaintiff's continuing obligation to show standing in general and the particular requirements for standing for injunctive relief (Plaintiff will suffer an injury in fact which is concrete and particularized and actual or imminent, not conjectural or hypothetical, that the conduct complained of will cause the injury alleged and that it is likely, not speculative, that the injury will be presented by a favorable decision), Judge Rogers noted that Tyler may have wanted to help other disabled persons, but the relief requested was for him as an individual.[38] The Court found that although Tyler may have had standing at the beginning, after moving to Wisconsin he lacked standing for injunctive relief or a case or controversy; nor could he demonstrate the imminent threat of irreparable harm needed for injunctive relief.[39] "The doctrine of standing bars this court from considering generalized grievances or claims raising another person's legal rights.[40] Plaintiff must demonstrate that he is immediately in danger of sustaining some direct injury as a result of defendant's alleged illegal conduct."[41]

Similarly here, assuming Plaintiffs Marie, Brown, DiTrani and Wilks were honest with the Court when the initial Complaint was filed about wanting to get a marriage license, the only barrier now is of their own making (*i.e.*, their failure to go to the office to request issuance of a license, a self-inflicted injury).[42] No other barrier, or basis for standing, case or controversy or prospective injunctive relief exists. Although those coming before this Court to seek equitable relief bear burdens of demonstrating good faith, clean hands, and that they are not 'slumbering on' their rights, [43] a Plaintiff

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[37] *Id.*, at 1223 (citations omitted).
[38] *Id.*, at 1224 (citing *State of Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998) (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).
[39] *Id.*, at 1225-28 (citations omitted).
[40] *Id.*, at 1228 (citing *State of Utah*, 137 F.3d at 1203 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).
[41] *Id.*, at 1228 (citing *Phelps*, 122 F.3d at 1316 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)).
[42] *See, e.g., Fiba Leasing Co., Inc. v. Airdyne Indus., Inc.*, 826 F. Supp. 38, 39 (D. Mass. 1993) ("Injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted.") (citing *San Francisco Real Estate v. Real Estate Invest. Trust of America*, 692 F.2d 814, 818 (1st Cir. 1982)).
[43] *See, e.g,* 11A C Wright, A. Miller, M. Kane, R. Marcus, A. Steinman, *Federal Practice and Procedure* § (3d ed.) (citing cases including *United States v. Any and All Assets of that Certain Business Known as Shane Co.*, 816 F. Supp. 389, 400

who fails to try to get the license or permit lacks standing as there is no injury, and certainly no injury resulting from defendants' actions.[44] "Manufactured" standing, as is the case here, is disfavored.[45]

Plaintiffs Have Failed to Join Indispensable Parties

Since this is the Clerks' first response to the Amended Complaint, the Clerks reassert what has been obvious all along – any decisions made regarding who is legally entitled to a marriage license are made by judges, not clerks and in particular in this case, the past decisions complained of were made by Chief Judges, not Clerks. The present Administrative Orders regarding licensing were entered by the Chief Judges. Since the judges are the supervisory and appointing authority over these Clerks as per K.S.A. 20-343, the Clerks are subject to that authority. Any injunction against the Clerks is only effective to the degree that the Chief Judges, the real parties in interest, choose to honor it. No attempt was made to join the judges in this action, and indeed, the attempt would have been futile given the judges' immunity even from injunctive relief under 42 U.S.C. § 1983 and under general principles of judicial immunity,[46] in addition to all of the other reasons stated herein (*e.g.*, given the current state of affairs as evidenced by the judges' Administrative Orders, there is no basis for prospective injunctive relief as well as Eleventh Amendment immunity). Given this, it is clear that if this moot claim were allowed to proceed, the action as to the Clerks fails under Fed. R. Civ. P. 19 for failure to join a

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(M.D.N.C. 1991) ("The court applies the clean hands doctrine, 'not for the protection of the parties, but for its own protection.'") (quoting *Mas v. Coca-Cola Co.*, 163 F.2d 505, 507 (4th Cir. 1947)).

[44] *See Davis v. Tarrant County, Tex.*, 565 F.3d 214, 220-21 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009) (attorney had no standing to challenge policy where he had previously been denied but did not reapply after change of policy); *Humanitarian Law Project v. U.S. Treasury Dept.*, 578 F.3d 1133, 1151 (9th Cir. 2009) (plaintiff organization lacked standing where it had not been denied a license and had not applied); *see, e.g., Gilles v. Davis*, 427 F.3d 197, 208 (3d Cir. 2005) (protestors lacked standing for First Amendment challenge where they never applied for nor were they denied a permit); *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (no standing to challenge Florida licensing plates where plaintiffs never applied for or were denied a pro-choice license plate); *Madsen v. Boise State Univ.*, 976 F.2d 1219 (9th Cir. 1992) (no standing to complain of failure to get free parking permit where plaintiff never formally applied for one and did not show that such an application would be futile); *Williams v. Taylor*, 677 F.2d 510, 517 (5th Cir. 1982) (felon who never applied for a pardon had no standing to complain that the state procedure as invalid).

[45] *Puckett v. Hot Springs School Dist No. 23-2*, 526 F.3d 1151, 1160-63 (8th Cir. 2008) (plaintiffs had no standing where they deliberately failed to request that the school district reinstate busing after a policy change "in an attempt to create a case or controversy.").

[46] *See* Stump *v. Sparkman*, 435 U.S. 349 (1978).

necessary and indispensable party under the analysis set forth in *Citizen Potawatomi Nation v. Norton:*

> The question of whether an absent party is necessary and/or indispensable is resolved by applying Rule 19 of the Federal Rules of Civil Procedure. *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) (quoting *Davis*, 192 F.3d at 957). Rule 19 provides a three-step process for determining whether an action should be dismissed for failure to join a purportedly indispensable party. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). First, the court must determine whether the absent party is "necessary." A person is necessary if:
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> > (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
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> Fed. R. Civ. P. 19(a); *Bowen,* 172 F.3d at 688. If the absent person is necessary, the court must then determine whether joinder is "feasible." *See* Fed. R. Civ. P. 19(a)-(b).[47]

In *Citizen Potawatomi Nation,* the Circuit affirmed the district court's dismissal of the action or failure to join necessary and indispensable parties, the Indian tribes, who enjoyed immunity. The Chief Judges here enjoy similar immunity. In telling the Wichita Plaintiffs that they were not legally entitled to a marriage license under Kansas law, the Plaintiffs dealt with Judge Fleetwood in his judicial capacity and in making a determination as to whether same-sex applicants were entitled to a license under Kansas law performed a function normally performed by a judge – making legal determinations as to matters within the judge's jurisdiction, performing a judicial function.[48] Judge Fairchild was performing a similar function when he issued the initial Administrative Order in this case.[49] Since this Court considered the matter in connection with the request for preliminary injunction, the Kansas Supreme Court held in the mandamus case regarding Johnson County Judge Kevin Moriarty as per the attached Order that Judge Moriarty was performing a judicial function in entering the Administrative

[47] 248 F.3d 993, 997 (10th Cir. 2001).
[48] *Stump,* 435 U.S. at 362; *State of Kansas ex rel. Schmidt v. Moriarty,* No. 112,590 (Kan. Nov. 18, 2014), attached as an Exhibit hereto.
[49] *Id.*

Order in that case.[50] Although the subsequent Orders are entitled "Administrative," the function, not the label controls and here, the Judges were making legal determinations as to what the law required, applying law to facts and to particular cases, which is the essence of the judicial function as the Kansas Supreme Court recognized in *Moriarty.*[51] To state the obvious, the Clerks are mere straw persons, pawns in Plaintiffs' game, sued as the easiest and most convenient target. If Plaintiffs' claims against the Clerks are allowed to proceed notwithstanding all of the jurisdictional problems stated above herein, the case must nonetheless be dismissed for failure to join indispensable parties as required by Fed. R. Civ. P. 19.

CONCLUSION

As there is no basis for jurisdiction or a claim against them, Douglas A. Hamilton, Clerk of the District Court for the 7th Judicial District, and Bernie Lumbreras, Clerk of the District Court for the 18th Judicial District, move this Court for an Order dismissing them from this action.

Respectfully Submitted,

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[50] *State of Kansas ex rel. Schmidt v. Moriarty,* No. 112,590 (Kan. Nov. 18, 2014), attached as an Exhibit hereto.
[51] *Id.*

CERTIFICATE OF SERVICE

This is to certify that on this 10th day of December, 2014, a true and correct copy of the above and foregoing was filed by electronic means via the Court's electronic filing system which serves a copy upon Plaintiffs' counsel of record, Stephen Douglas Bonney, ACLU Foundation of Kansas, 3601 Main Street, Kansas City, MO 64111 and Mark P. Johnson, Dentons US, LLP, 4520 Main Street, Suite 1100, Kansas City, MO 64111, dbonney@aclukansas.org and Mark.johnson@dentons. com with a courtesy copy served by email upon Joshua A. Block, American Civil Liberties Foundation, 125 Broad Street, 18th Floor, New York, NY 100004, jblock@aclu.org and Steve R. Fabert, Assistant Attorney General, Attorney for Defendant Robert Moser.

/s M.J. Willoughby
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