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

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT

The simple ineluctable fact of the matter is that if Kail Marie and Michelle Brown wanted to be married, they would be. Marie and Brown have chosen not to return to the Douglas County Clerk's Office to pick up a license. Or for that matter, since the Kansas Supreme Court lifted its stay on issuance of same-sex licenses in Johnson County, Marie and Brown could have applied and received a

license there or in any one of the other counties in the State where marriage licenses are currently being issued to same-sex couples. Similarly, if Kerry Wilks and Donna DiTrani wanted to obtain a Kansas marriage license, they could have returned to pick up the license they applied for. They have not.

As the existence and claims of the co-Plaintiffs from Riley County demonstrate, if Marie, Brown, Wilks and DiTrani don't have a marriage license, it is through their own actions or choices, their own "timetable," as they admit. The Clerks Doug Hamilton and Bernie Lumbreras are not preventing Marie, Brown, Wilks and DiTrani from obtaining a marriage license. The allegations in the Amended Complaint to that effect are false. Although the Clerks have presented evidence on this point, undisputed by Plaintiffs, the Court can take judicial notice of the fact that same-sex marriage licenses are being issued in Douglas, Sedgwick, Johnson and other counties in the State (even Riley County, as the Amended Complaint concedes).[1] The Amended Complaint concedes that as to these Clerks, Marie, Brown, Wilks and DiTrani, their claims are solely in the past, representing a request for retrospective relief.[2] There is no "ongoing" violation of federal law, and hence, Eleventh Amendment immunity bars the Amended Complaint against the Clerks.

For the reasons and under the authorities stated in the initial Motion to Dismiss the Amended Complaint and as reiterated and supported herein,[3] and based upon the similar arguments and authorities advanced by Defendant Moser in his Motion to Dismiss, Supporting Memorandum and Reply,[4] Defendants Douglas A. Hamilton and Bernie Lumbreras, Clerks of the District Court of the 7th and 18th Judicial District respectively, request that they be dismissed 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 or assuming jurisdiction in the alternative, for failure to join indispensable, but immune parties, the Chief Judges of the Districts in question.

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[1] Fed. R. Evid. 201(b)(1), (2).
[2] Am Complt. (Doc. 52), at 8 ("the Unmarried Plaintiffs **Were** Unable to Marry in Kansas Because of the Kansas Marriage Ban.").
[3] Doc. 58, 59.
[4] Doc. 57, 77.

Plaintiffs Bear the Burden of Showing Jurisdiction, Including Standing, Which is a Continuous Obligation

Doug Hamilton and Bernie Lumbreras join in the Statement of the Procedural Posture of this case contained in Secretary Moser's Reply.[5]

Plaintiffs' Response *fails to address at all* most of the arguments and authorities in the Clerks' Motion to Dismiss and supporting Memorandum, focusing exclusively on mootness and the Rule 19 argument. In particular, the Statement of Facts set forth in the Motion, facts bearing on jurisdiction, are not responded to and should be deemed uncontroverted.[6]

The Legal Standard section in which the Clerks point out, among other things, that it is **Plaintiff's burden to maintain standing at all times throughout the litigation for a court to retain jurisdiction**, is not responded to, and hence, is uncontroverted.[7]

Plaintiffs' Response fails to address the Clerks' arguments and authorities regarding standing and the Eleventh Amendment. Plaintiffs' sole response is the counter-factual statement that "*nothing has changed*" since October 2014 or even when the Court issued its Order on November 4, 2014.[8] Really? The fact of the matter as set forth by Hamilton and Lumbreras in their submissions with the Motion to Dismiss, uncontroverted by Plaintiffs, is that there currently is no "barrier" to issuance of licenses to Plaintiffs, at least none of these Clerks' making.

As stated in the Motion to Dismiss and as not controverted by Plaintiffs in their Response, Plaintiffs bear a continuing burden of showing jurisdiction, including standing.[9] Plaintiffs' general, but indirect, assertion that they have no burden of showing jurisdiction for their Amended Complaint is contrary to law, including the law cited in the Motion to Dismiss and the authorities cited by this Court in its earlier Order.[10] "A plaintiff must maintain standing at all times throughout the litigation for a

[5] *Id.*
[6] Doc. 59, at 2-4.
[7] Doc. 59, at 5-6.
[8] Doc. 68, at 2.
[9] *Id.*
[10] Doc. 29, at 8-9.

court to retain jurisdiction."[11] A plaintiff must show a personal stake in the outcome.[12] 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. [13] 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. [14] 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)." [15] In the case of a factual attack upon subject matter jurisdiction, the Court is not required to assume the truth of the complaint's factual allegations.[16]

In granting the preliminary injunction on November 4, 2014, the Court stated that these Plaintiffs had standing for their claims as to Lumbreras and Hamilton based upon and accepting as true the allegations made in their October 13, 2014 Complaint,[17] *facts which are now demonstrably false:*

> Plaintiffs' facts, ones defendants do not challenge, assert that Kansas' laws banning same-sex marriage prevented the two court clerks from issuing marriage licenses to them. These undisputed facts satisfy all three parts of *Lujan's* test. As it pertains to Clerks Lumbreras and Hamilton, these facts, first, establish that plaintiffs suffered an actual ("in fact") injury when the Clerks, acting on account of state law, refused to issue marriage licenses to plaintiffs. Second, this injury is "fairly traceable" to Kansas' laws. Chief Judge Fairchild's Administrative Order 14-13 explains why the license did not issue to plaintiffs Marie and Brown. Likewise, the prepared statement read by the Sedgwick county deputy clerk reveals that Kansas' ban was the only reason the clerk refused to issue a license to plaintiffs Wilks and DiTrani. And last, common logic establishes that the relief sought by plaintiffs, if granted, would redress plaintiffs' injuries. The Clerks refused to issue licenses because of Kansas' same-sex marriage ban. It stands to reason that enjoining enforcement of this ban would redress plaintiffs' injuries by

[11] *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)).
[12] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
[13] *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *Phelps v. Hamilton*, 122 F.3d at 1315-16.
[14] *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).
[15] *Paper, Allied-Industrial, Chemical and Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1293 (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).
[16] *Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1272 (10th Cir. 2012).
[17] Doc. 1.

removing the barrier to issuance of licenses.[18]

Of course the originally tendered facts relied upon by the Court in granting the preliminary injunction (facts which were not the basis of an evidentiary hearing or testimony), included that Plaintiffs wanted to get married, were being prevented in doing so **only** by the Clerks or Administrative Order 14-13 (now repealed), and were in fact suffering irreparable harm every day Clerks Hamilton and Lumbreras did not issue them a marriage license: "[t]here is no question that Plaintiffs suffer irreparable harm every day that Kansas' unconstitutional marriage bans remain in force. . . . Aside from the unquestionable irreparable harm suffered by Plaintiffs due to Defendants' refusal to allow Plaintiffs to enjoy the fundamental right to marry their partners. . ..To continue to deny Plaintiffs the enjoyment and benefits of one of the most important liberties in life is to continue to irreparably harm them" and similar assertions. [19] They also filed Declarations stating that "I want to marry [Michelle/Kail/Donna/Kerry] but my desire to marry has been denied because the laws of the State of Kansas prohibit us and other same-sex couples from marrying."[20] This Court took Plaintiffs at their word – "Plaintiffs are two same-sex couples who wish to marry in the state of Kansas;" "Plaintiffs' affidavits establish the facts stated below….the Court accepts them as true for purposes of the present motion."[21] Based upon Admin Order 14-13 (no longer in existence), the Court presumed the fact not stated by Plaintiffs Marie and Brown that the Clerk would have denied the application, presumably as of November 4, 2014, the date of the Order.[22] Similarly, the Court's Order accepted as true the allegations made by Wilks and DiTrani; based upon Plaintiffs' October allegations, the Court stated that the Plaintiffs were seeking "prospective" injunctive relief for an "ongoing deprivation of their constitutional rights."[23]

In issuing its preliminary indication that Marie, Brown, Wilks and DiTrani had standing at that

[18] Doc. 29, at 8-9.
[19] Doc. 4, at 7-8.
[20] Doc. 4-1, at ¶ 3; Doc. 4-2, at ¶ 3; Doc. 4-3, at ¶ 3; Doc. 4-4, at ¶ 3.
[21] Doc. 29, at 2, 3.
[22] Doc. 29, at 3-4.
[23] Doc. 29, at 4-5, 16.

point, the Court's Memorandum and Order relied upon the statement that Defendants '*did not challenge Plaintiffs' facts*.' Although Defendants don't concede this point, it is true that Defendants were not in a position to suggest that Marie, Brown, Wilks and DiTrani were lying about wanting to obtain a Kansas marriage license based upon Plaintiffs' declarations, the absence of discovery, and the presumption that counsel would conform to their obligations of candor to the Court. [24]

Since then, on November 13, 2014, the Judges of the 7th and 18th Districts issued Administrative Orders directing the issuance of same-sex licenses.[25] Those jurisdictional facts are true, subject to judicial notice and are not disputed by Plaintiffs' response. Nor can they be. On November 18, 2014, the Kansas Supreme Court lifted its stay on the issuance of same-sex marriage licenses in Johnson County. [26] There is no legal barrier in these and other counties in Kansas to Marie, Brown, Wilks and DiTrani receiving a Kansas marriage license.

While Plaintiffs attempt to generally distinguish the cases cited in the Clerks' Memorandum on the basis that they at one time attempted to get a license, the Amended Complaint, filed on November 26, 2014 (Doc. 52), does not allege that Plaintiffs Marie, Brown, Wilks or DiTrani made any attempt to get a license after November 13, 2014. Thus, the cases cited where Plaintiffs failed to reapply after a change in circumstances are on point here.[27] Further, the cases stand for the more general proposition that a Plaintiff cannot manufacture an injury, standing or a case or controversy by his or her own actions, precisely what is going on here now. In particular, the *Pucket* case cited in the Clerks' initial Memorandum is precisely on point. There, the Eighth Circuit found that the Plaintiffs had failed to request that the district reinstate busing after a policy change. The Circuit found the Plaintiffs lacked standing, concluding:

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[24] The suggestion in Plaintiffs' Response that Defendants file a Motion for Reconsideration lacks merit for a number of reasons, including that the preliminary injunction is on appeal and within the Tenth Circuit's jurisdiction, not this Court's. Also, as indicated above, there were no findings of fact – no one testified, no evidence was presented and there was no hearing on the merits. The Clerks also incorporate by reference Secretary Moser's arguments on this point, Doc. 77, at 5-6.
[25] Doc. 59-3, 59-5.
[26] Doc. 59-6.
[27] Doc. 59, at 11, n.44, 45.

> "the evidence leads us to believe that the Puckets may well have deliberately failed to request that the School District reinstate busing in an attempt to create a case or controversy for the overriding purpose of challenging the constitutionality of the South Dakota Constitution provisions. . . . .we cannot sanction the Puckets' attempt to manufacture a lawsuit designed to challenge the South Dakota constitution provisions without having met the essential elements of standing. Therefore, the Puckets lack standing to challenge the failure to reinstate busing between March 3 and May 16, 2003, because they failed to take even the simple step of requesting that the School District resume busing, which we cannot conclude would have been futile." [28]

Similarly to the Puckets, Marie, Brown, Wilks and DiTrani make no suggestion that they would not receive a license were they to take the simple step of going to a Clerk's Office, which has been open and available to them on a daily basis (absent holidays), as per the Affidavits filed in this matter.

On November 26, 2014, Plaintiffs filed an Amended Complaint. (Doc. 52). As a matter of law, the Amended Complaint supersedes the previously filed Complaint.[29] The sole claims against the Clerks are by the original Plaintiffs, Marie, Brown, Wilks and DiTrani and are identical to those made in the initial Complaint despite the obvious and undisputed current facts of record. It is an attempt to maintain standing where no basis exists. Since Marie, Brown, Wilks and DiTrani are only being precluded from getting a license by their own personal preferences rather than action by Hamilton or Lumbreras, the Amended Complaint must be dismissed, at least as to these Clerks. [30]

There is no Basis for Ex Parte Young Jurisdiction and Relief

As argued in the Motion to Dismiss and as not responded to by Plaintiffs in their Response,[31]

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[28] *Pucket v. Hot Springs School Dist. No. 23-2*, 526 F.3d 1151, 1163 (8th Cir. 2008).
[29] *Davis v. TXO Prod., Corp.*, 929 F.2d 1515, 1516 (10th Cir. 1991) (It is well established that an amended complaint, filed pursuant to Fed. R. Civ. P. 15(a), supersedes the complaint it modifies and renders the prior complaint of no legal effect).
[30] *See, e.g., Bronson v. Swensen*, 500 F.3d 1099, 1111-12 (10th Cir. 2007).
[31] *Compare* Doc. 59, at 6, *with* Doc. 68, at 2.

there is no basis for relief under *Ex parte Young* which allows a limited exception to Eleventh Amendment immunity for prospective injunctive relief premised upon a state official's *continued* or *ongoing* conduct in violation of the Constitution,[32] based upon allegations of "ongoing violations of federal law."[33] Assuming, *arguendo*, there was any action by the Clerks in the first place (any decisions as to these licenses were made by Chief Judges), there is certainly no factual basis for finding any "continued" or "ongoing" action on the undisputed facts of record and hence, these Clerks, as state officials, must be dismissed from this action based upon Eleventh Amendment immunity.[34]

As the Tenth Circuit stated the matter in *Johns v. Stewart*, "[b]ecause *Ex parte Young* is designed to end continuing violations of federal law, when there is 'no ongoing violation of federal law," *Green [v. Mansour]*, 474 U.S. [64], at 66 [(1986)], 'a suit against a state officer – a suit the decision of which will as a practical matter bind the state – should be treated for what it is: a suit against the state'. . . . The Eleventh Amendment 'does not permit judgments against state officers declaring that they violated federal law in the past.' *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)."[35] As the Supreme Court noted in the *Arizonans for Official English* case, suits against state officials in such circumstances are barred by the Eleventh Amendment. [36] The Eleventh Amendment does not allow for "notice relief," or a declaratory judgment that state officers violated federal law in the past.[37] *Green v. Mansour* is on point as given changes in circumstances, there is no basis for prospective injunctive relief on this Amended Complaint ("there is no continuing violation of federal law to enjoin in this case, [and hence] an injunction is not available"), and hence any claim for declaratory or notice relief is barred by the Eleventh Amendment.[38]

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[32] 209 U.S. 123 (1908).
[33] *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (citing and quoting *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011)).
[34] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69-70 (1997) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989)), and n.24; *Peterson v. Martinez*, 707 F.3d 1197, 1205-06 (10th Cir. 2013).
[35] 57 F.3d 1544, 1552-53 (10th Cir. 1995).
[36] *Arizonans for Official English*, 520 U.S. at 69-70; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).
[37] *Green v. Mansour*, 474 U.S. 64, 64-65 (1985).
[38] *Id.*, at 71-74. *See generally, Clark v. Stovall*, 158 F. Supp. 2d 1215, 1220-25 (D. Kan. 2001) (dismissing an action against

The Eleventh Amendment bars suits such as the Amended Complaint against the Clerks where the state official is named as a mere place holder. As was demonstrated before and is even more clear now, the Clerks have no particular interest in enforcing the prohibition on same-sex marriage; they merely do as they are ordered to do by their respective Chief Judges. They are not state officials with the requisite "demonstrated willingness" to enforce the same-sex prohibition as required by *Ex parte Young*.[39] The claim against them by Plaintiffs Marie, Brown, Wilks and DiTrani must be dismissed for lack of jurisdiction given the clear bar of the Eleventh Amendment.

There is No Present, Live Case or Controversy as to the Clerks

For similar reasons to those stated above, and as argued in the initial Motion to Dismiss, Plaintiffs' Amended Complaint fails to demonstrate standing or a live case or controversy as to the Clerks. "As a general rule, where a law has been declared unconstitutional by a controlling court, pending requests for identical declaratory relief become moot."[40] The *Arizonans for Official English* case, discussed in Defendants' Motion to Dismiss and not distinguished in Plaintiffs' Response, is on point as are the other cases cited therein. Contrary to Plaintiffs' bald assertion, the Clerks did submit evidence of changed circumstances showing the absence of a jurisdictional basis.[41] As previously suggested, the fact that things have changed is subject to judicial notice as per Fed. R. Evid. 201(b).

The authorities Plaintiffs cite where a court has declined to dismiss a case as moot, including but not limited to the assortment of noncontrolling cases about *a named defendant's* compliance with a preliminary injunction,[42] are distinguishable. First, it is not a matter of voluntary cessation of illegal conduct on the *Clerks'* part or even compliance with the preliminary injunction on the *Clerks'* part;

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the State Attorney General based upon Eleventh Amendment immunity for lack of an ongoing violation of federal law and a basis for prospective injunctive relief).

[39] *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013).

[40] *See Bishop v. U.S. 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).

[41] Affidavit of Douglas Hamilton, Affidavit of Bernie Lumbreras; Admin Orders 14-07 (Douglas County), 14-03 (Sedgwick County), Docs. 59.1, 59.2, 59.3, 59.4, 59.5.

[42] Doc. 68, at 4-5.

their Chief Judges (non-parties to this action), changed their Administrative Orders. It is undisputed that all Clerks Hamilton and Lumbreras have ever done is follow the law as stated to them by their Chief Judges. As of November 13, 2014, those directions have changed. This is undisputed.

Any cases cited by Plaintiffs that don't involve government defendants are not on point. As courts have held, as opposed to private defendants, government officials are entitled to a presumption of good faith.[43] Plaintiffs concede that government officials are entitled to a presumption of good faith, but basically rely upon their general allegations about "other Kansas officials," other state agencies, KDOR, KDHE, etc.[44] However, the Kansas Judicial Branch is constitutionally separate from the Executive Branch.[45] Each state official is responsible only for his or her own conduct. Certainly, the Clerks and Chief Judges within the Kansas Judiciary are entitled to at least as much of a presumption of good faith as any other government official and probably more as they are law followers and law interpreters by definition, job description, and oath of office; for the judges, this is also a matter of judicial ethics. This Court must afford a similar presumption of good faith to the Clerks and Chief Judges Fairchild and Fleetwood as there is certainly no basis from which this Court can find otherwise.

Plaintiffs' argument that the case is not moot because Chief Judges Fleetwood and Fairchild might reverse their respective Administrative Orders is based upon pure speculation and does not establish a basis for maintaining federal court jurisdiction. As the Supreme Court stated in the seminal case of *City of Los Angeles v. Lyons*, Plaintiff's claims that he was subjected to a constitutional deprivation in the past (illegal chokehold) did not provide a case or controversy within the limited jurisdiction of the federal courts.[46] Based upon this record, Plaintiffs Marie, Brown, Wilks and DiTrani's claim that they can't get a marriage license in Kansas are even more bizarre and speculative than those of the Plaintiff in *Lyons*. There is no reason to think that these Chief Judges would want to

[43] *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).
[44] Doc. 68, at 5.
[45] *See* Kan. Const., art. III.
[46] 461 U.S. 95 (1983).

create even more public confusion at this point by reversing their Orders of November 13, 2014.

In addition and critically, given the Kansas Supreme Court's order lifting its stay as to Johnson County's issuance of same-sex marriage licenses, in the record as Doc. 59.6 and subject to judicial notice as per Fed. R. Evid. 201, the Plaintiffs also have the option of going there or any number of other Kansas counties to obtain a marriage license, in addition to Douglas and Sedgwick Counties.

In seeming concession that their claims against the Clerks are moot, Plaintiffs argue that their case is within the "capable of repetition yet evading review" exception to the mootness doctrine, "because Plaintiffs' injuries would recur again as soon as they once again seek to marry."[47] Plaintiffs don't explain why or how that could possibly happen, and offer no evidence in support of this assertion, which again, is counter-factual. The sole case Plaintiffs cite as support in their Response, *Honig v. Doe*, reiterates the points relied upon by the Clerks here: "[u]nder Article III of the constitution this Court may only adjudicate actual, ongoing controversies. That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires."[48] In *Honig*, the suggestion as made for the first time at oral argument before the Supreme Court that the case was moot.[49] While the Court found it was moot as to one of the plaintiffs, the Supreme Court found that a 20-year-old named Smith, met his obligation to demonstrate "a sufficient likelihood that he will again be wronged in a similar way" because of the record was "replete" with Smith's "inability to conform his conduct to socially acceptable norms," finding that it was "certainly reasonable to expect, based on his prior history of behavioral problems, that he will again engage in classroom misconduct."[50] The Court also found it reasonable to apply the capable of repetition exception because an "adolescent student improperly disciplined for misconduct . . . will often be finished with school or

[47] Doc. 68, at 7.
[48] 484 U.S. 305, 317-18 (1988) (citations omitted).
[49] *Id.*, at 318.
[50] *Id.*, at 318-23.

otherwise ineligible for [statutory] protections by the time review can be had in this Court."[51]

Here, Plaintiffs have not met their burden of showing that there is a sufficient likelihood that Clerks Hamilton or Lumbreras would deny them a license if they went to the Clerks' Offices tomorrow to pick them up. Nor does the capable of repetition exception apply in this circumstance. These are not adolescents who will age out of school or where their statutory claims are subject to a temporal limitation. There is no likelihood, and this case is like *Lyons*, *Arizonans for Official English,* the Circuit's decision in *Southern Utah Wilderness Alliance*, and the disabled Plaintiff's request for an injunction in *Tyler*, cases cited in the Clerks' Memorandum in Support of their Motion to Dismiss and not distinguished in Plaintiffs' Response.[52]

As has been previously noted and as is undisputed, the Clerks only interest is in complying with the obligations imposed upon them by law as reflected in their oaths of office and the orders of their Chief Judges.[53] Plaintiffs cite no facts to the contrary and it is disrespectful to the Kansas Judiciary to suggest otherwise.

The Judges are Indispensable Parties

Plaintiffs' Response cites the elements of Rule 19, which apply to the Chief Judges because in their absence, the court cannot accord complete relief among the parties (since it is the Chief Judges' Administrative Orders which are in question, not the Clerks' actions).[54] The Judges are the parties who have the power to do what Plaintiffs want, not these Clerks. Since there is an "or" between subsection (A) or (B), this is sufficient.

However, subsection (B) of Fed. R. Civ. P. 19(a)(1) also applies. The Chief Judges' Administrative Orders and directions to their Clerks are at stake, establishing the interest in (B). Any orders entered by this Court in the Judges' absence impair or impede the Chief Judges' ability to protect

[51] *Id.*, at 322-23.
[52] *Compare* Doc. 59, at 6-11 *with* Doc. 68.
[53] *See* Statement of Facts, Mem. in Supp. of Motion to Dismiss (Doc. 59), at 2-4*; see, e.g.,* K.S.A. 54-106; K.S.A. 20-3102.
[54] Fed. R. Civ. P. 19(a)(1)(A).

their interest in enforcing their own Orders and directions and in directing their Clerks.[55] Further, in the absence of the Chief Judges, the Clerks are subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations.[56] If the Chief Judges, non-parties, had not chosen to voluntarily comply with this Court's preliminary injunction, the Clerks would have been left with the choice of facing contempt of this Court or termination of their employment, no choice at all. Plaintiffs' argument that this case is not moot because the Chief Judges might change their minds about their Administrative Orders[57] supports the argument that if this case were to proceed despite the obvious and insurmountable barriers to Article III jurisdiction, problems, the Chief Judges are necessary and indispensable parties within the meaning of Rule 19.

Plaintiffs' first argument is that Clerks have an independent duty to issue marriage licenses under K.S.A. 23-2505(a), to those "legally entitled to a marriage license." On its face, the Kansas statute applies to clerks ***or* judges.**[58] The Kansas statute is different in significant respects from the Utah statute and the Oklahoma statute at issue in *Kitchen v. Herbert* and *Bishop*, respectively, one of which was referred to in this Court's November 4 Order.[59] In Utah, **county clerks and *only county clerks* issue marriage licenses**.[60] Judges are apparently not involved. Similarly, although an Oklahoma judge may issue a marriage license, the Oklahoma statute regarding the application and issuance of the license speaks **only** in terms of the clerk ("if the clerk of the district court is satisfied of the truth and sufficiency of the application and that there is no legal impediment to such marriage, the court clerk shall issue the marriage license authorizing the marriage and a marriage certificate…").[61] Kansas law is different.

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[55] Fed. R. Civ. P. 19(a)(1)(B)(i).
[56] Fed. R. Civ. P. 19(a)(1)(B)(ii).
[57] Doc. 68, at 4.
[58] Doc. 68, at 8. Plaintiffs also cite the general duty imposed in K.S.A. 20-3102. However, this is far too general, and must be read in conjunction with all of the other statutory duties imposed on Clerks, including their obligation to respond to their respective appointing authorities as stated in the uncontested Statement of Facts in Defendants' Memorandum. (Doc. 59), at 2-4.
[59] Doc. 29, at 15 (citing the Circuit's finding in *Bishop*, 760 F.3d at 1092 regarding Oklahoma law).
[60] U.C.A. 30-1-7.
[61] 43 Okla. Stat. Ann. §5 (B.1.).

Moreover, the allegations of the Amended Complaint (parroting the outdated original), are that judges, not Hamilton and Lumbreras, made the determination that Marie, Brown, Wilks and DiTrani were not "legally entitled" to a marriage license.[62] The undisputed evidence in the record is that Clerks were to refer these questions to judges, as they in fact undisputedly did.[63] Administrative Orders were entered to that effect by the Chief Judges, applying law to fact to issue a legal determination.[64] As the Kansas Supreme Court found in a ruling after this Court's November 4, 2014, ruling, these rulings were judicial in nature, not ministerial.[65] However Judge Fairchild chose to characterize his Administrative Order, it is the function that controls, which the Kansas Supreme Court has now determined to be judicial. The Kansas Supreme Court's decision was not available to the Court at the time it made its ruling. This Court is free to re-examine prior rulings.[66] The Court also should defer to the Kansas Supreme Court on its interpretation of Kansas law.[67] Under the Supreme Court's decision in *State ex rel. Schmidt v. Moriarty*, and under the arguments and authorities previously tendered to the Court, judicial immunity applies to the Chief Judges for their judicial actions challenged in this case.

Proceeding with this case, including to a final judgment (assuming Plaintiffs could establish jurisdiction for their Amended Complaint against these Clerks), without the Chief Judges would leave the Plaintiffs with an Order that is only enforceable as to the Clerks and their staffs, but not as to the Chief Judges. As stated earlier, the Clerks risk inconsistent obligations should their appointed Chief

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[62] Am. Complt. (Doc. 52), at ¶¶ 24, 27, 29;
[63] Doc. 59.1, 59.2, 59.4, 59.5; Doc. 23-2.
[64] *Id.*
[65] *State ex rel. Schmidt v. Moriarty*, No. 112, 590 (Kan. Nov. 18, 2014), attached as Exhibit 59.5 to the Clerks' Memorandum in Support of their Motion to Dismiss.
[66] *See, e.g., Stewart v. Beach*, No. 08-3295-JAR-KGG, 2011 WL 6740545 (D. Kan. Dec. 22, 2011) (citing *Rimbert v. Eli Lilly and Co.*, 647 F.3d 1247 (10th Cir. 2011).
[67] In its Order (Doc. 29, at 14), the Court relied upon *Cook v. City of Topeka*, 654 P.2d 953, 957 (Kan. 1982), a case discussing whether recall of a warrant was a judicial function within the meaning of the Kansas Tort Claims Act judicial function exception. No judges were alleged to have been involved in the recall process, which was conducted solely by Clerks. *Schmidt* is obviously directly on point, more so than *Cook*. Deference to the Kansas Supreme Court in this instance is reasonable and appropriate. *See, e.g., Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (state court's interpretation of state law binds a federal court sitting in habeas corpus); *Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1295 (10th Cir. 2010) (to properly determine the content of state law in a diversity case, courts 'must defer to the most recent decisions of the state's highest court.').

Judges change (they are subject to periodic appointment),[68] or give them orders or directions at odds with those of this Court. The Clerks' choice is contempt of this Court or termination of employment as they serve in merely appointed positions.[69] This Court cannot do anything, nor has it been asked to by Plaintiffs, to lessen or avoid this prejudice (nor can it). In equity and good conscience, this case should be dismissed for lack of joinder of the Chief Judges as they are necessary and indispensable parties under the factors set forth in *Citizen Potawatomi Nation v. Norton*, cited in Plaintiffs' Response.[70]

The Plaintiffs' final argument that Chief Judges Fairchild and Fleetwood are in the same "office" as Hamilton and Lumbreras makes no sense as they are each appointed to different offices.[71] This is not the same as substituting a state official where the official dies or resigns, *e.g.*, Susan Mosier for Robert Moser as Secretary of KDHE. Nothing at the cited page of *Hafer v. Melo,*[72] supports Plaintiffs' argument that suing a Clerk is the same as suing a Chief Judge. This is contrary to all the arguments and authorities, including those argued previously herein regarding *Ex parte Young* that it is essential

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[68] K.S.A. 20-329.
[69] K.S.A. 20-343, 20-345; *see* Statement of Facts, Defendants' Mem. (Doc. 59), at 2-4.
[70] Doc. 68, at 9 (citing *Norton*, 248 F.3d 993, 1000 (10th Cir. 2001).
[71] Doc. 59, at 2-4 (K.S.A. 20-329, K.S.A. 20-343, K.S.A. 20-345).
[72] Doc. 6, at 9 (citing 502 U.S. 21, 25 (1991) (In its entirety, the cited page, 25, states:

"In *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), the Court sought to eliminate lingering confusion about the distinction between personal- and official-capacity suits. We emphasized that official-capacity suits " 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Id.*, at 165, 105 S.Ct., at 3104 (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978)). Suits against state officials in their official capacity therefore should be treated as suits against the State. 473 U.S., at 166, 105 S.Ct., at 3105. Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. See Fed.Rule Civ.Proc. 25(d)(1); Fed.Rule App.Proc. 43(c)(1); this Court's Rule 35.3. Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, "the entity's 'policy or custom' must have played a part in the violation **362 of federal law." *Graham, supra*, at 166, 105 S.Ct., at 3105 (quoting *Monell, supra*, 436 U.S., at 694, 98 S.Ct., at 2037). For the same reason, the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses. 473 U.S., at 167, 105 S.Ct., at 3105. Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, "[o]n the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Id.*, at 166, 105 S.Ct., at 3105. While the plaintiff in a personal-capacity suit need not establish a connection to governmental "policy or custom," officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law. *Id.*, at 166–167, 105 S.Ct., at 3105–3106. Our decision in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), turned in part on these differences between …."

Hafer v. Melo, 502 U.S. 21, 25-26 (1991). *Hafer* does not support Plaintiffs' point.

in cases such as these to sue the right state official, not merely to find the most convenient target.

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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CERTIFICATE OF SERVICE

This is to certify that on this 5th day of January, 2015, 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 and Joshua A. Block, American Civil Liberties Foundation, 125 Broad Street, 18th Floor, New York, NY 100004, jblock@aclu.org and upon Steve R. Fabert, Assistant Attorney General, Attorney for Defendant Robert Moser, Steve.Fabert@ag.ks.gov.

/s M.J. Willoughby
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