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To Whom It May Concern:

I am writing to explain the legal authority that permits, and indeed requires, all county clerks in Illinois to begin immediately issuing marriage licenses to same-sex couples on the basis of the recent decision in *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014). In that ruling, the Court struck down Illinois' ban on marriage for same-sex couples[1] as unconstitutional and ordered the Cook County Clerk's office to begin issuing marriage licenses to same-sex couples immediately. While the opinion stated that it applied only to the Cook County Clerk's office, federal court precedent demonstrates that the ruling binds the State and provides authority to all Illinois clerks to begin issuing marriage licenses on equal terms to same-sex couples immediately.

Lee v. Orr declared Illinois' ban on marriages of same-sex couples to be unconstitutional "on its face." When a court declares a statute to be facially unconstitutional, it has necessarily found that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). As the Seventh Circuit held in *Ezell v. City of Chicago*, "a successful facial attack means the statute is wholly invalid and cannot be applied *to anyone*." 651 F.3d 684, 698 (7th Cir. 2011) (emphasis in original). Thus, it follows that the State's ban on marriages of same-sex couples, having been found to be facially unconstitutional in Cook County, must also be invalid in every other county in the State. This conclusion is affirmed by the Supreme Court, which has found that a facial challenge and "the relief that would follow" will necessarily "reach beyond the particular circumstances of the[] plaintiffs." *Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010).

Furthermore, although the plaintiffs in *Lee* named only the Cook County Clerk as the defendant in the lawsuit, the Illinois Attorney General intervened as a defendant. Having intervened in this action, the State (represented by the Attorney General) acquired "all the rights of a party." 24 U.S.C. § 2403(b) (2012). An intervenor "renders itself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (internal quotations marks omitted). Accordingly, intervenors with a full and fair opportunity to litigate a matter are precluded from re-litigating those matters again. *See, e.g., Local 322, Alliked Indus. Workers of Am., AFL-CIO v. Johnson Controls, Inc.*, 921 F.2d 732 (7th Cir. 1991); *Petit v. City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991). Since the State intervened in *Lee*, the Court's ruling was a conclusive adjudication as to not just the Cook County Clerk, but the State itself and all of its instrumentalities. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[I]f the judgment of the Court of Appeals is left undisturbed, the [intervening] State will be bound by the conclusive adjudication that the import ban is unconstitutional.")

Finally, the State and all county clerks are bound by the preclusive effect of the *Lee* ruling because of the privity between them and the Cook County Clerk Defendant. The Supreme Court has articulated the doctrine regarding officials-in-privity as follows: "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940). This doctrine also applies to

[1] The Court struck down the provisions of the Illinois Marriage and Dissolution of Marriage Act that authorized only marriage between a man and a woman, 750 Ill. Comp. Stat. 5/201, prohibited marriage "between 2 individuals of the same sex," 750 Ill. Comp. Stat. 5/212(a)(5), and stated that marriage between members of the same-sex was "contrary to the public policy" of Illinois, 750 Ill. Comp. Stat. 5/213.1.

officials of state governments. *See, e.g.*, *Baker v. Chisom*, 501 F.3d 920, 925 (8th Cir. 2007) (privity between officers of county government). Clerks of different counties may still be in privity so long as the parties are "so closely aligned that they represent the same legal interest." *Kunzelman v. Thompson*, 799 F.2d 1172 (7th Cir. 1986). Illinois county clerks operate as functionaries of the state, performing the same ministerial duty in issuing marriage licenses, have no discretion, and therefore share the same legal interest in issuing marriage licenses in accordance with the State's statutory scheme and the Constitution. Consequently, a ruling against one clerk that the State's law is unconstitutional will bind the State and all of its clerks because no county clerk can articulate an independent interest in continuing to administer an unconstitutional statute.

Thus, in addition to the Cook County Clerk, all other county clerks in Illinois may rely on the *Lee v. Orr* ruling and begin issuing marriage licenses to same-sex couples. Should you wish to further discuss the contents of this letter, please feel free to contact Lambda Legal at 312-663-4413.

Sincerely,

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Lambda Legal Defense and Education Fund, Inc.