COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 30, 2013

Adrian R. King, Jr.
First Deputy Attorney General
Office of Attorney General
16th Floor Strawberry Square
Harrisburg, PA 17120

Re: *Whitewood, et al. v. Corbett, et al.*, No. 13-1861 (M.D. Pa.)

Dear Mr. King:

This responds to your July 12 letter and Attorney General Kane's purported delegation of her legal duty to defend the constitutionality of a lawfully enacted Pennsylvania statute. The Attorney General's unprecedented public adjudication of the statute's alleged unconstitutionality was an improper usurpation of the role of the courts, which at a minimum, causes confusion among those charged with administering the law and places any lawyer defending the case at a disadvantage from the outset.

Section 204(a)(3) of the Commonwealth Attorneys Act ("Act") states: "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." 71 P.S. § 732-204(a)(3). That duty is mandatory, not discretionary; and it is imposed exclusively on the Attorney General, who under Article IV, § 4.1, of the Constitution of Pennsylvania is required to "exercise such powers and perform such duties as may be imposed by law."

The Attorney General's constitutional and statutory duty is clear. Exception is made only when a court of competent jurisdiction has issued a controlling decision that the law (or a materially indistinguishable law) is unconstitutional. No court, expressly or implicitly, has declared the provisions of Pennsylvania's Marriage Law (23 Pa. C.S. Part II) that are challenged in *Whitewood, et al. v. Corbett, et al.*, No. 13-01861 (M.D. Pa.), to be unconstitutional. Accordingly, nothing excuses the Attorney General from undertaking her legal duty to defend the statute challenged in *Whitewood*; her personal opinion that the law is unconstitutional is not a valid basis for her refusal to do her job.

Your letter and the Attorney General's public comments indicate that she has decided to "delegate" her responsibility to the Office of General Counsel ("OGC") under a separate provision of the Act, namely section 204(c). That provision allows the Attorney General, "upon determining that it is *more efficient* or otherwise is *in the best interest of the Commonwealth*, to authorize the General Counsel ... to ... conduct or defend any particular litigation ... *in [her] stead.*" 71 P.S. § 732-204(c) (emphasis added). It is neither more efficient nor in the best interest of the Commonwealth for the Attorney General to refuse to undertake her responsibilities in this case.

Determinations of efficiency under section 204(c) are typically made where the litigation at issue involves complex regulatory matters in which the expertise of an agency and its lawyers make representation by OGC a more effective and prudent use of Commonwealth resources. The Marriage Law is not a complicated regulatory regime, nor are any Commonwealth agencies or OGC lawyers involved substantially in the administration of the Marriage Law so as to implicate their specialized knowledge or experience. Moreover, there is certainly no reasonable basis to determine that it would be in the best interest of the Commonwealth for OGC to defend the Marriage Law when no court of competent jurisdiction has decided that the Pennsylvania Marriage Law (or a substantially similar state law) is unconstitutional. For decades, the career attorneys in the Office of Attorney General have been successfully defending the laws of this Commonwealth.

More importantly, Section 204(a)(3) does not permit the Attorney General to unilaterally delegate to OGC actions challenging the constitutionality of statutes. To assert otherwise is to disregard the specific and uncompromising duty that the General Assembly has imposed upon the Attorney General through section 204(a)(3). Thus, the Attorney General should do her duty under section 204(a)(3) of the Act, irrespective of her personal legal opinion or prediction of how a court will decide the issue.

In 1996, then-Attorney General Corbett, rendering an official opinion to the Secretary of Public Welfare regarding the constitutionality of several Pennsylvania statutes, elaborated on the duties of the Attorney General under section 204(a)(3) and, more specifically, what constitutes a "controlling decision" of a court of competent jurisdiction:

> [T]he Attorney General is required by Section 204(a)(3) of the Commonwealth Attorneys Act "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." Since each of the [statutory provisions in question] implicates a decision of the United States Supreme Court relevant to its constitutionality, it is incumbent upon me to determine whether the Supreme Court decision is "controlling" so as to compel the advice that the provision to which it relates is unenforceable.
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> As a threshold matter, it must be emphasized that the concept of a "controlling decision by a court of competent jurisdiction" is not susceptible to precise definition. Clearly, it cannot be construed so narrowly as to require a decision by a court of last resort holding unconstitutional the very provision on which the Attorney General's advice is sought, since that construction would render the Attorney General's advice a meaningless gesture. On the other hand, **the decision said to be "controlling" must be more than merely predictive of the constitutionality of the statutory provision on which the Attorney General's advice is sought; it must adjudicate the constitutionality of a statutory provision materially indistinguishable from the statutory provision on which the advice is sought, and it must be rendered by a court that has jurisdiction over the entirety of Pennsylvania.**

1996 Pa. AG LEXIS 2, at *1-*3 (Dec. 9, 1996) (emphasis added) (citation omitted).

General Kane's predecessors also have recognized that it is not the Attorney General's place to usurp the role of the courts in these matters. In 1988, then-Attorney General Zimmerman explained in an official opinion the constitutional and statutory duty of the Attorney General and the deference that an Attorney General (and other executive officials) owes to the General Assembly and to the courts in the exercise of their respective powers under our constitutional form of government. In advising the Secretary of Education that the Department of Education must enforce a statute of seemingly dubious constitutionality, the Attorney General said:

> No court has had occasion to hear or consider the Commonwealth's justification for the statute. **It would be wholly inconsistent with Section 204 of the Commonwealth Attorneys Act for me to undertake the judicial fact-finding necessary to that inquiry in the setting of an Attorney General's opinion.**
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> ...
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> No **court** has had occasion to consider the balance of benefit, burden and state interest with respect to [the statute]. Again, **it would be wholly inconsistent with Section 204 of the Commonwealth Attorneys Act for me to undertake that judicial assessment in the setting of an Attorney General's opinion.**

1988 Pa. AG LEXIS 4, at *3, *5 (June 15, 1988) (emphasis added).

In support of the Attorney General's public declaration that the Pennsylvania Marriage Law is "wholly unconstitutional" under both the U.S. and Pennsylvania Constitutions, your letter cites (but provides no supporting analysis of) the recent decision of the United States Supreme Court in *United States v. Windsor*.

The Attorney General's professed reliance on *Windsor* is simply wrong. The Supreme Court did not rule that any state law regulating the legal institution of marriage violates the due process or equal protection clauses of the U.S. Constitution. Rather, the Court declared the federal Defense of Marriage Act to be unconstitutional because Congress had improperly intruded upon the States' "historic and essential authority to define the marital relation." *U.S. v. Windsor*, No. 12-307, 2013 U.S. LEXIS 4921, at *37 (June 26, 2013).

As the *Windsor* Court described at some length, the "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, at *34.

> 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 *36.

The Court in *Windsor* enforced the principles of federalism that are embedded in the U.S. Constitution, declaring that only the States have the authority to define marriage. The Court in no way adjudicated the question of whether a ***state*** law defining marriage as exclusively between a man and a woman violates due process or equal protection. To the contrary, *Windsor* clearly leaves for another day the limits that the U.S. Constitution might impose on the States in their regulation of the marital relationship.

For the foregoing reasons, the Attorney General cannot, in the manner she has done, invoke section 204(c) to evade her duty under section 204(a)(3). Accordingly, the legal position she has taken must be interpreted by OGC as a refusal to defend the Governor and the Secretary of Health in this litigation. Therefore, as required by section 301(6) of the Act, 71 P.S. § 732-301(6), OGC will defend those officials. In so doing, OGC and its public official clients have decided to defend the constitutionality of the Marriage Law, as this Governor's Administration would do where it is a party to the challenge of any duly enacted law the Attorney General has refused her obligation to defend.

Notwithstanding our decision to defend a statute that the Attorney General without legal cause has refused to do, her refusal to defend the Marriage Law establishes a very troubling precedent. Any Attorney General faced with a statute with which he or she personally disagrees can simply declare, with no reasoned explanation necessary, that the law is "unconstitutional" and then refuse to defend it. This has the very real potential to compromise, among other things, the functions of the legislative and judicial branches of our government and the defense of our laws.

The members of the General Assembly, of either party, will not know whether the Attorney General will defend their work. And administrators and law enforcement will not know which laws are valid and which laws are not. This will create chaos and uncertainty – not unlike what we are seeing in the unlawful actions of the Clerk of the Orphans' Court of Montgomery County, who has cited the Attorney General's public declarations as justification for his own refusal to enforce the law.

Moreover, those who are left to assume the Attorney General's job will have the unenviable task of defending the constitutionality of a law that the Commonwealth's chief legal and law enforcement officer has already publicly declared to be unconstitutional. In cases where OGC declines to do the Attorney General's job, statutes would be left undefended.

Finally, future Attorneys General and other public officials will be able to cite this precedent to ignore their duty when it is inconvenient or uncomfortable for them to perform it. In deciding to do the job of the Attorney General, we are certainly not sanctioning her conduct or assuming any responsibility for the problems, which will inevitably arise as a result of it.

Sincerely,

James D. Schultz
General Counsel