

AND NOW, on this \_\_\_\_\_ day of \_\_\_\_\_, 2021, upon consideration of Defendants Marlon Osbourne, MD, and City of Philadelphia Office of the Medical Examiner's Motion for Summary Judgment and accompanying Memorandum of Law, and any response thereto, it is hereby ORDERED that the Motion for Summary Judgment is GRANTED and Judgment is entered in favor of Defendants on all counts of the Complaint.

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, J.

Case ID: 191001241  
Control No.: 21063511



than “suicide, or for a declaratory judgment for this Court to itself declare Ellen Greenberg’s manner of death to be “undetermined.”

2. Plaintiffs argue that the Defendants’ refusal to amend the certificate as they request has harmed them, because of the stigma of suicide. However, as a matter of law, such stigma is insufficient to give them standing. They further wrongly assert that Defendants had no authority to change the initial determination of manner of death, “homicide,” following consideration of additional information from the police investigation, or to consider any non-medical information, yet inconsistently argue that Defendants are *required* to amend the certificate based upon the opinions of their own preferred forensic pathologists and professionals that disagree with Defendants’ determination.

3. As a matter of longstanding Pennsylvania law, mandamus is not available to compel the Medical Examiner to amend the manner of death.

4. Plaintiffs lack standing to seek mandamus because Pennsylvania law does not recognize the stigma of suicide as an injury in this context and Plaintiffs have not identified any other injury in fact..

5. Plaintiffs assert no legal basis for a right to an amended “manner of death,” and accordingly, declaratory judgment is not available.

6. Therefore, summary judgment in Defendants’ favor is appropriate on all counts.

## **STATEMENT OF UNDISPUTED MATERIAL FACTS**

### **Ellen Greenberg’s Death in 2011**

7. Ellen Greenberg died on January 26, 2011 from multiple stab wounds. Complaint (“Cmpl.”) ¶ 2. Exhibit A (Complaint Exhibits at A1).

8. After conducting a “thorough autopsy,” Defendant Marlon Osbourne, M.D., initially determined the manner of death to be “homicide.” Cmpl., ¶ 3, Exhibit B, Death

Certificate, January 27, 2011. .

9. Following a “thorough” toxicology analysis, a February 8, 2011, report revealed low levels of various medications Ellen had been taking for anxiety. Exhibit C, MEO Report FIN, Cmpl. ¶3.

10. The Medical Examiner’s investigator submitted a report that indicated that the door to Ellen’s apartment had been locked from the inside, and that outside her apartment on the patio “[t]here is snow present with no tracks or footprints, completely undisturbed.” Exhibit D, Olszewski Report.

11. By January 29, 2011, a spokesman for the Philadelphia Police Department had announced that the police were leaning toward suicide, but that the investigation was ongoing. Cmpl. ¶ 23; see also Exhibit E, Philadelphia Inquirer, “Police Leaning Toward Suicide in Teacher Death,” January 29, 2011.

12. On February 18, 2011, the Police Department announced that they had determined Ellen Greenberg’s death was a suicide. Cmpl. ¶ 25.

13. On March 3, 2011, Dr. Osbourne “updated” the manner of death to “suicide.”<sup>1</sup> Cmpl. ¶ 26.

14. Dr. Osbourne formally amended the death certificate on April 4, 2011, listing the manner of death as “suicide.” Cmpl., ¶ 27; Exhibit F.

**Office of the Attorney General Closes Investigation and Concludes Ellen Greenberg’s Death was Suicide; Plaintiffs’ Counsel Sends Opinions of Other Forensic Pathologists to Defendants and Asks Defendants to Change the Manner of Death**

15. In 2012, Plaintiffs retained now-District Attorney Larry Krasner, then in private

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<sup>1</sup> Dr. Osbourne has testified that there were factors other than the police investigation that led him to this conclusion, but agrees that the police investigation was part of his determination. Deposition of Marlon Osbourne, April 22, 2021, pp.

practice, who contacted various City officials in an effort to obtain information concerning the investigation of Ellen's death. Exhibit G, Plaintiffs' Answer to New Matter, ¶ 83.

16. In 2018, the Greenbergs again contacted Mr. Krasner, now the District Attorney, and asked him to reopen the investigation.. Id., ¶ 84.

17. Mr. Krasner referred the matter to the Pennsylvania Office of the Attorney General ("OAG") to avoid the appearance of a conflict. Id., ¶ 85.

18. On March 8, 2019, OAG contacted Stephanie Farr, a reporter working on an article about Ellen Greenberg for the Philadelphia Inquirer, and informed her in an email available on the Inquirer website and referenced in Ms. Farr's subsequent article, that the OAG had "concluded that [the] evidence supports 'Suicide' as a manner of death" and had closed its investigation. Exhibit H, Stephanie Farr, "A Locked Room Mystery," Philadelphia Inquirer, March 15, 2019; Exhibit I, Email from Joe Grace to Stephanie Farr, March 8, 2019; Exhibit J, Declaration of Kirsten Heine, Chief Deputy for Criminal Prosecution, OAG (investigation supported MEO determination; investigation completed.)

19. The OAG concurred with the determination of the Medical Examiner that the evidence supported suicide. Their investigation is complete. Exh. J, Declaration of Kirsten Heine, July 15, 2021.

20. On September 3, 2019, counsel for Plaintiffs contacted Dr. Osbourne by letter, enclosing the reports of certain forensic pathologists and professionals which the Greenbergs had obtained, and asked him to amend the death certificate to "reflect a manner of death other than suicide." Cmpl. ¶ 29, Exh., letter from Joseph Podraza to Marlon Osbourne, M.D. Exhibit K.

21. The reports from these other pathologists and forensic professionals all offered the opinion that the manner of death was not suicide, but homicide. Cmpl., ¶ 30-33, Exhibits L-O

(see also Complaint Exhibits A1) .

22. Dr. Osbourne did not revise the death certificate. Cmpl. ¶ 53.

23. On August 29, 2019, at the request of Chief Medical Examiner Samuel Gulino, Lyndsey Emery, M.D., Ph.D., a neuropathologist working at the Philadelphia Office of the Medical Examiner, reexamined Ellen Greenberg's brain stem, spinal cord and a portion of the cervical vertebral column. Exhibit P, Emery Deposition; Exhibit Q, Notes of Lyndsey Emery; Exhibit R, Declaration of Lyndsey Emery.

### **Plaintiffs Seek Mandamus and Declaratory Judgment; Discovery Follows**

24. On October 15, 2019, Plaintiffs filed a complaint in this matter, seeking mandamus relief and a declaratory judgment. Exhibit A,

25. Plaintiffs asserted that, as a matter of law, Defendants had no discretion to amend the death certificate from homicide to suicide, and that it was "final, binding, and not subject to amendment." They did not cite any legal basis for this assertion. Cmpl. ¶¶ 4, 22.

26. Plaintiffs asserted that the "negative consequences of Defendants' misconduct is far reaching," for Ellen's family, vital statistics, and the goals of criminal justice. Cmpl. ¶ 5.

27. They further asserted that Defendants' "acts and omissions" had caused harm, specifically that "society stigmatizes suicide" and that "this stigma deprives surviving family members of the closure and peace of mind to which they are otherwise entitled." Cmpl. ¶ 56.

28. They asserted that the NAME's Guide, a guide published by the National Association of Medical Examiners, "maintains that the selection of suicide as a manner of death requires a 70% or greater degree of medical certainty." Cmpl. ¶68; Exhibit X, NAME's Guide, (excerpted at Complaint Exhibits A1, Exhibit I).

29. They asserted that Dr. Osbourne's "selection of suicide was an arbitrary and

capricious act.” Cmpl. ¶ 4.

30. Defendants filed preliminary objections, which were denied without opinion by the Court (Honorable Paula Patrick) on January 7, 2020. Defendants filed an Answer and New Matter on February 14, 2020, Exh. G. Discovery followed.

31. In response to interrogatories, Plaintiffs stated that the law on which they rely in asserting that the medical examiner had no discretion to change the manner of Ellen’s death is the NAME’s Guide, a manual published by the National Association of Medical Examiners. Exhibit S, Plaintiffs’ Answers & Objections to Defendants First Set of Interrogatories, No.4; see also Exhibit T, Defendants’ Letter Request for Supplemental Answers, and Exhibit U, Plaintiffs’ Supplemental Response to Defendants First Set of Interrogatories, No. 4. Plaintiffs further asserted that the “non-discretionary” act that is the subject of the mandamus action is Defendants’ refusal to voluntarily amend the death certificate to read “could not be determined.” Exh. U, Pl.Suppl.Resp.to Def. First Set of Interrog., No.1. See Cmpl. ¶ 1.

32. The NAME’s Guide states: “This book is a Guide. The recommendations contained herein are not standards and should not be used to evaluate the performance of a given certifier in a given case. Death certification and manner-of-death classification require judgment, and room must be allowed for discretion in a case by case basis.” Preface and Caveats, p. 2 (Emphasis supplied) Exh. X. (Plaintiffs’ Complaint Exhibit I omits this page, including the cover and skipping to page 4. Exh A1, Plaintiff’s Cmpl. Exhibits.)

33. In response to Defendants’ Interrogatory No. 5, seeking specific examples of “negative consequences” as set forth at Complaint ¶ 5, Plaintiffs asserted that the death certificate is “prima facie evidence of the fact of death that can be introduced in court as evidence, and would have evidentiary value in a claim or dispute involving Ellen’s Estate. Also,

like it or not our society stigmatizes suicide . . . [which] deprives surviving family members . . . of the closure and peace of mind to which they are entitled.” Exh. S, Pl. Response to Defendants First Set of Interrogatories, No. 5. (emphasis supplied),

34. Plaintiffs further stated that the death certificate had a function in vital statistics. Id.

35. Plaintiffs stated that the benefit of a revised death certificate to them incorporated the previous response and that “it would benefit the general public if Ellen’s killer(s) were actually brought to justice.” Id. at No. 6.

36. In response to a subsequent request to supplement their responses and to list any “actual legal matters” that would be affected by an amended death certificate, Plaintiffs answered that an amended death certificate “would have bearing on the resumption of further investigative efforts by the authorities” and “would be” evidence in a wrongful death lawsuit. Exh. U, Supplemental Responses to Defendants First Set of Interrogatories, at No. 5; Exh. T, Letter from Ellen Berkowitz to Counsel for Plaintiffs requesting further responses, April 27, 2021.

37. Again in response to a request to supplement their responses to the First set of interrogatories, Plaintiffs asserted that the legal basis for their assertion that Dr. Osbourne’s original determination was “final, binding, and not subject to amendment,” Cmpl. ¶22, was 2 Pa.Code § 1.37. Id. at No. 11; see also Exh. T, Letter from Ellen Berkowitz, April 27, 2021.

38. Plaintiffs took the depositions of Samuel Gulino, Chief Medical Examiner at the time of Ellen’s death; defendant Marlon Osbourne, M.D., who performed the autopsy and completed and later amended the death certificate; and Lyndsey Emery, M.D., Ph.D., a Board-certified neuropathologist who works in the office of the Medical Examiner. Exhibit V, Gulino Deposition; Exhibit W, Osbourne Deposition; Exhibit P, Emery Deposition.

39. Dr. Gulino testified that it was his professional opinion based on 25 years of practice that Ellen Greenberg's manner of death was a suicide. Gulino Dep., Exh V., p. 98. Dr. Osbourne testified that it was his opinion that Ellen Greenberg's death was a suicide according to a preponderance standard, as the NAME's Guide recommends. Osbourne Dep., Exh. W, p. 168. Dr. Emery testified that there was nothing in her examination that would rule out suicide or cause her to question Dr. Osbourne's conclusion, and that she had no opinion as to the manner of death, as she had no information about the case other than her own examination and Dr. Osbourne's photographs. Emery Dep., Exh. P, at 89-90.; *see also* Emery Declaration, Exh. R.

### **STANDARD OF REVIEW**

40. Pennsylvania Rule of Civil Procedure 1035.2 mandates that summary judgment must be entered "where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law." *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001). Failing to provide support for an essential issue in the case on which the plaintiff bears the burden of proof "establishes the entitlement of the moving party to judgment as a matter of law." *Young v. Commonwealth Dep't of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000).

41. Viewing "the record in the light most favorable to the non-moving party," with "all doubts as to the existence of a genuine issue of material fact... resolved against the moving party," if no genuine factual dispute is shown, the movant is entitled to judgment as a matter of law. *Murphy*, 777 A.2d at 429 (*citing Pa. State Univ. v. County of Centre*, 615 A.2d 303, 304 (Pa. 1992)).

### **ARGUMENT**

**Defendants Are Entitled to Summary Judgment Because Pennsylvania Law Expressly Bars Mandamus for the Discretionary Determinations of Medical Examiners**

42. Defendants are entitled to summary judgment because, as a matter of law, mandamus is not available to compel Dr. Osbourne, or in the alternative, the Medical Examiner of the City of Philadelphia, to amend the manner of death on Ellen Greenberg's death certificate. Pennsylvania courts have long held that mandamus is not available to force a medical examiner to change the manner of death, because the law has "clothed [the coroner] with discretionary powers." *Chadwick v. Dauphin County Office of the Coroner*, 905 A.2d 600, 605 (Pa.Cmwlth.2006); see also *Czako v. Maroney*, 194 A.2d 867 (Pa. 1963) *Nader v. Hughes*, 643 A.2d 747 (Pa.Cmwlth. 1994) (coroner's determination is discretionary; appeal denied for lack of standing); *Rubeck v. McLucas*, 42 Pa. D&C 89 (Cumberland CP, 1967);

43. "Mandamus will not lie to compel a revision of the decision resulting from [the] exercise of discretion," even if that decision might be wrong. *Chadwick*, citing *Anderson v. Philadelphia*, 36 A.2d 442, 444 (1944). Under Pennsylvania law, the determination of manner of death is discretionary pursuant to the powers delegated to the Medical Examiner by statute and the Pennsylvania Code.

44. Title 16 P.S. § 9521 establishes that:

It shall be the duty of the coroner or the deputy coroner of any county in this Commonwealth, in all cases where death is sudden or violent or is of a suspicious nature and character, to cause a careful investigation of the facts concerning said death to be made, to ascertain whether the death was due to other than natural causes, and to make or cause to be made such an autopsy as the facts of the case demand.

45. In Philadelphia County, pursuant to Philadelphia Code ("Code") § 2-102, the office of coroner has been abolished and "[a]ll powers and duties previously exercised and performed by the Coroner relating to inquests shall be exercised and performed by an Examiner to be appointed by the Health Commissioner." Code § 2-102. "All powers and duties previously exercised and performed by a Coroner relating to the determination of the cause of death and

conducting of autopsies are transferred to the Department of Public Health and shall be exercised and performed by an Examiner.” § 2-102(5).

46. “The common law writ of mandamus lies to compel an official's performance of a ministerial act or a mandatory duty.” *Sinkiewicz v. Susquehanna Cty. Bd. of Comm'rs*, 131 A.3d 541, 546 (Pa. Commw. Ct. 2015). Mandamus may not be used to “interfere with a public official’s exercise of discretion.” *Id.* Where a public official has exercised discretion, “mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, *though in fact, the decision may be wrong.*” *Id.* (emphasis in original) (internal quotations omitted).

47. While mandamus can be used to compel a public official to exercise discretion where he refuses to do so, *id.*, mandamus does not lie to compel a public official to revise a discretionary act merely because the plaintiff believes the act was arbitrary. *Chadwick*, 905 A.2d at 603, *citing Tanenbaum v. D’Ascenzo*, 51 A.2d 757, 758 (Pa. 1947).

48. Before a writ of mandamus may be issued, the petitioner must demonstrate three conditions: “(1) a clear legal right for the performance of the ministerial act or mandatory duty, (2) a corresponding duty in the [government actor] to perform the ministerial act or mandatory duty, and (3) the absence of any other appropriate or adequate remedy.” *Council of City of Philadelphia v. St.*, 856 A.2d 893, 896 (Pa. Cmwlth. 2004). In this case, Plaintiffs cannot establish either a clear legal right (element one) or a corresponding government duty (element two).

49. As to the first element, the legal right to the act demanded in the writ must be “immediate, specific, well defined and complete.” *Southerland v. Com.*, 36 Pa. D. & C.2d 786,

791 (Pa. Com. Pl. 1965) (citing *Zaccagnini v. Vandergrift Borough*, 395 Pa. 285 (1959)), *see also Heffner v. Com.*, 28 Pa. 108, 112 (1857) (asserting that the right to be enforced must be “specific, complete, and legal”). Further, “[m]andamus is not available to establish legal rights but only to enforce rights that have been established.” *Sinkiewicz*, 131 A.3d at 546. Plaintiff have no right to the designation of a particular manner of death – the determination of the manner of death is discretionary, and as set forth above, the right to make it is held by the medical examiner.

50. As to the second element, Defendants have no mandatory or ministerial duty to amend the death certificate to the result Plaintiffs seek simply because Plaintiffs would prefer a different result.. Nor do Defendants have a duty to revise their opinion solely because Plaintiffs have submitted the opinions of other pathologists or experts with a different view. On the contrary, the Pennsylvania Supreme Court “has long enjoined that ‘[w]here the [public official] is clothed with discretionary powers, and has exercised those powers, mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, [even] though in fact, the decision may be wrong.’” *Id.* at 606, citing *Anderson v. Philadelphia*, 36 A.2d 442, 444 (Pa. 1944)(emphasis supplied).

51. The facts in this case are virtually identical to those in *Chadwick*, in which a grieving sister sought to compel the coroner to change the manner of death from “suicide” to accidental, and submitted her own investigation. The Court rejected her action in mandamus, stating that the law “does not require a coroner to convince members of the public, including family members, of the accuracy of their findings.” *Id.* at 605.

52. There is no requirement that Defendants accept the opinions of other forensic professionals over their own determination. “Because the Coroner has exercised his discretionary

powers, ‘mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, though in fact, the . . . decision may be wrong.’” *Id.*, citing *Anderson*.

53. In this case, Dr. Osbourne conducted an autopsy on January 27, 2011, which Plaintiffs characterized as thorough, and initially concluded, solely on the basis of that autopsy, that the manner of death was a homicide. Cmpl. ¶ 21. After obtaining additional information from the police and toxicology reports, Dr. Osbourne amended the death certificate to reflect his revised conclusion that Ellen Greenberg had taken her own life. Cmpl.. ¶¶ 26-27. These actions represented an exercise of discretion not susceptible to mandamus.

54. Plaintiffs’ assertion that Dr. Osbourne’s determination does not meet the preponderance standard they reference in the NAME’s Guide does not undermine the essential fact that it was Dr. Osbourne’s determination, and does not render his decision susceptible to mandamus. Dr. Osbourne testified that he believes his final determination satisfies the preponderance standard,, and Dr. Gulino testified that it was his professional opinion based on 25 years of work that it was a suicide, but regardless, the law makes clear that a medical examiner can be wrong as to the manner of death yet cannot be compelled to change it. Osbourne Dep at 168; Gulino Dep at 98.

55. Finally, Plaintiffs’ reliance on 2 Pa.Code § 1.37 for the proposition that the certificate cannot be amended is mistaken. The Code provision on which Plaintiffs rely is found in a section entitled “Correction of Records” and nowhere prohibits the revision of records. The amended death certificate is the writing that supports the amendment, and the Vital Statistics code contemplates corrections. *See* 2 Pa.Code § 1.31 (b) (“The Division of Vital Records may require additional evidence to substantiate a correction when it is deemed necessary and proper to preserve the integrity of the records.”)

56. Plaintiffs cannot identify any law that prohibits a change when a medical examiner believes one is warranted. Nor is it logical, if their understanding of the law were correct, that they would file an action asserting that Dr. Osbourne had the authority to change the manner of death to “could not be determined,” which is not a finding he ever made.

57. Accordingly, Plaintiffs cannot establish a right to mandamus, and Defendants are entitled to summary judgment.

**Defendants are Entitled to Summary Judgment Because Pennsylvania Law Rejects Stigma As a Basis for Standing in Identical Circumstances, and There Is No Other Cognizable Harm**

58. Defendants are additionally entitled to summary judgment because Plaintiffs have not satisfied their threshold burden of showing that they suffered any direct harm from the Defendants’ refusal to amend the death certificate as they would like. As a threshold matter, a plaintiff must establish standing to sue. “The traditional concept of standing focuses on the idea that a person who is not adversely impacted by the matter he seeks to challenge does not have standing to proceed with the court system’s dispute resolution process.” *Pittsburgh Palisades Park, LLC v. Com*, 888 A.2d 655, 659 (Pa. 2005) (citing *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280-81 (1975) (plurality)).

59. “The keystone to standing . . . is that the person must be negatively impacted in some real and direct fashion . . . In particular, it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Pittsburgh Palisades Park*, 888 A.2d at 660.

60. Plaintiffs assert that they have been harmed because the death certificate is “prima facie evidence of the fact of death that can be introduced in court as evidence, and would have evidentiary value in a claim or dispute involving Ellen’s Estate. Also, like it or not our society

stigmatizes suicide . . . [which] deprives surviving family members . . . of the closure and peace of mind to which they are entitled.” Cmpl. ¶ 5. Plaintiffs also made vague reference to vital statistics and the interests of criminal justice. Asked specifically to identify any legal matter in which the manner of death was an issue, Plaintiffs repeated their original answer and stated the death certificate “would be” evidence in a wrongful death suit. Letter Req. to Amend Responses; Pl. Suppl. Responses to Interrog Exh. T.,

61. In *Nader v. Hughes*, 643 A.2d 747 (Pa. Cmwlth. 1994), the Commonwealth Court rejected standing in nearly identical circumstances, where a a grief-stricken parent seeking a writ of mandamus to compel an inquest into his son’s death from a gunshot wound asserted, as have Plaintiffs, that he had an interest in “clearing the stigma of suicide,” which the Coroner had determined was the manner of death. *Nader*, 643 A.2d at 750.

62. In finding the plaintiff had no standing, the Court found “any stigma the family and the decedent may suffer cannot be said to have resulted from the coroner’s exercise of discretion whether or not to conduct an inquest.”

63. Here, as in *Nader*, the Medical Examiner’s exercise of discretion in concluding Ellen’s manner of death was suicide is not “a precipitating factor” in the stigma her grieving parents feel and does not, accordingly, confer standing.

64. Plaintiffs’ stated interest in reopening the investigation, which they believe the death certificate hinders, their concern for the reliability of vital statistics, even their wish to find their daughter’s “killer(s)” are all general or speculative. The requirement of standing ensures that courts “do not render decisions in the abstract or offer purely advisory opinions” and arises from “the principle that judicial intervention is appropriate only when the underlying controversy is real and concrete . . .” *Pittsburgh Palisades*, 888 A.2d at 659.

65. Finally, Plaintiffs assertion that the death certificate “would be” evidence does not confer standing. First, Plaintiffs have identified no actual suits or legal matters – any claim of harm is thus purely speculative. Exh. U, Pl. Supplemental Answers. Nor is it at all clear that the corrected death certificate, on its own, would have much evidentiary value: *See, e.g., Pittsburgh National Bank v. Mutual Life Insurance Co. Of New York*, 417 A.2d 1206, 1209 (Pa. Super. 1980) (official death certificate not admissible in action to recover on accidental death policy as substantive evidence that death was accidental; “ courts have recognized that certain information recited on the certificate is hearsay.”)

66. Plaintiffs’ grief and concern, however real, about the stigma of suicide, do not constitute actual harm in the sense that the law requires. Accordingly, Plaintiff lacks standing and Defendants are entitled to summary judgment.

**Defendants Are Entitled To Summary Judgment Because Plaintiffs Have Identified No Right that Can Be Recognized as the Basis for a Declaratory Judgment**

67. As an alternative to mandamus, Plaintiffs ask that the Court itself “enter an order declaring the manner of Ellen Greenberg’s death to be classified as “Could not be determined.” Cmpl. ¶ 23. In essence, Plaintiffs are asking this Court to usurp the role of the medical examiner by itself amending the death certificate to satisfy the Plaintiffs. The law will not allow that.

68. Declaratory relief is appropriate only where there is an actual controversy. *Clark v. Township of Hamilton*, 562 A.2d 965, 967 (Pa.Cmwlt. 1989). Plaintiffs assert only a difference of opinion, a preference for a different stated manner of death on the death certificate. There is no justiciable controversy here. *See, e.g., Curry v. Coyne*, 992 S.W. 2d 858 (Ky.App. 1998) (“A coroner’s investigation is not an adversarial proceeding, and [the coroner’s] conclusion as to the cause of death is but a mere expression of opinion.”). The medical examiner’s determination is binding on no one. *Nader*, 643 A.2d 747, 752 (citing *Bair v.*

*Fourhman*, 442 A.2d 35 (Pa.Cmwlth. 1982) for the proposition that the findings of an inquest jury are merely advisory).

69. Declaratory relief is further inappropriate where Plaintiffs can assert no right to a different manner of death. “Declaratory judgments are nothing more than judicial searchlights, switched on at the behest of a litigant to illuminate an existing legal right, status, or other relation. They may not be used to search out new legal doctrines.” *Doe v. Johns-Manville Corp.*, 471 A.2d 1252, 1254 (Pa. Super. 1984).

70. Plaintiffs have not asserted any facts or law that can establish a right to a particular cause of death. Where Plaintiffs have failed to establish any right under the writ of mandamus, they cannot ask this Court to stand in for the Medical Examiner and substitute its own judgment.. *See Chadwick*, 905 A.2d at 606 (“the Coroner may have been wrong in its determination that Decedent committed suicide, but that judgment cannot be revisited by a court sitting in mandamus,”).

71. Accordingly, Plaintiffs can establish no right to declaratory relief, and Defendants are entitled to summary judgment.

**WHEREFORE**, Defendants respectfully request that this Honorable Court enter summary judgment in their favor and dismiss the Complaint with prejudice.

CITY OF PHILADELPHIA  
LAW DEPARTMENT

BY: /s/ Ellen Berkowitz  
Senior Attorney  
Attorney I.D. No. 80186  
1515 Arch Street, 15<sup>th</sup> Floor  
Philadelphia, PA 19102  
Phone: (215) 683-5253  
Fax: (215) 683-5299  
Ellen.Berkowitz@phila.gov

DATED: June 21, 2021



**CITY OF PHILADELPHIA LAW DEPARTMENT**

DIANA CORTES, CITY SOLICITOR  
ELLEN BERKOWITZ  
Senior Attorney  
Identification No. 80186  
1515 Arch Street, 15<sup>th</sup> Floor  
Philadelphia, PA 19102-1595  
Tel (215) 683-5253 and Fax (215) 683-5299

*Attorney for Defendants, Marlon Osbourne  
and City of Philadelphia Office of the  
Medical Examiner*

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**JOSHUA M. GREENBERG and**  
**SANDRA GREENBERG, administrators**  
**of the**  
**Estate of Ellen R. Greenberg**  
  
Plaintiffs  
  
v.  
  
**MARLON OSBOURNE, MD, and**  
**CITY OF PHILADELPHIA OFFICE**  
**of the MEDICAL EXAMINER**  
Defendants

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CIVIL TRIAL DIVISION

OCT. TERM 2019  
No. 01241

**DEFENDANTS' MEMORANDUM OF LAW**  
**IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**I. MATTER BEFORE THE COURT**

Plaintiffs, Joshua and Sandra Greenberg, Administrators of the Estate of Ellen Greenberg, Deceased (“Greenbergs,” “Parents,” or “Plaintiffs”) brought this action in mandamus to compel Defendants Marlon Osbourne, M.D. (“Dr. Osbourne”) and the City of Philadelphia Office of the Medical Examiner (“MEO” or “the City”) (collectively, “Defendants”) to amend the manner of death listed on their daughter Ellen Greenberg’s 2011 death certificate to read “could not be determined” rather than “suicide.” Alternatively, Plaintiffs seek a declaratory judgment asking this Court to itself so declare Ellen Greenberg’s cause of death.

Plaintiffs argue both that Defendants lacked the authority to change their initial

determination of manner of death, “homicide,” after considering additional information, yet that they must be compelled to change the certificate again based on the opinions of certain forensic pathologists and professionals offered by the Greenbergs that disagree with Defendants’ determination. As a matter of law in Pennsylvania, mandamus is not available to compel a Medical Examiner to amend the manner of death, the determination of which is an inherently discretionary act. Nor, as a matter of law, is a Medical Examiner bound by his initial conclusion if persuaded by additional information which he does find persuasive.

Plaintiffs also lack standing to seek relief because Pennsylvania law does not recognize the stigma of suicide as an injury in this context and Plaintiffs have not identified any other injury that would vest them with standing.

Finally, with respect to their claim for declaratory judgment, Plaintiffs can assert no law establishing a right to an amended “manner of death,” and accordingly, declaratory judgment is not available. Nor, as a matter of policy, should a court second-guess and supplant a Medical Examiner’s discretionary findings. Therefore, Defendants respectfully request that summary judgment be granted in their favor on all counts of the Complaint..

## **II. QUESTIONS PRESENTED**

A. Should summary judgment be granted in favor of Defendants pursuant to Pa.R.Civ.P. No. 1035.1 *et seq.* because Plaintiff’s Complaint improperly seeks a writ of mandamus to compel Defendants to amend the manner of death on Ellen Greenberg’s death certificate, contrary to longstanding Pennsylvania law?

**Suggested Answer: Yes**

B. Should summary judgment be granted in favor of Defendants pursuant to Pa.R.Civ.P. No. 1035.1 *et seq.* because Plaintiffs have not asserted any injury in fact and Pennsylvania law rejects the “stigma of suicide” in support of standing?

**Suggested Answer: Yes**

C. Should summary judgment be granted in favor of the Defendants pursuant to Pa.R.Civ.P. No. 1035.1 *et seq.* because Plaintiffs cannot establish any right that would justify their request for declaratory judgment?

**Suggested Answer: Yes**

**III. STATEMENT OF UNDISPUTED MATERIAL FACTS**

**A. Ellen Greenberg's Death and the Medical Examiner's Determination.**

On January 26, 2011, Ellen Greenberg died inside her apartment from multiple stab wounds. Complaint at ¶ 2, Exh. A. Defendant Marlon Osbourne, M.D., then employed by the Philadelphia Medical Examiner's office, conducted a "thorough autopsy" and initially determined that the manner of death was "homicide." Complaint, ¶ 3, Exh. B (death certificate, January 27, 2011). The investigative report from the Medical Examiner's investigator indicated that the door to Ellen's apartment had been locked from the inside, and that outside her apartment on the patio "[t]here is snow present with no tracks or footprints, completely undisturbed." Exh. D. Although the case was initially reported as a homicide, by January 29, 2011, a spokesman for the Philadelphia Police Department had announced that the police were leaning toward suicide, but that the investigation was ongoing. Cmpl. ¶ 23; see also Exh.E. Philadelphia Inquirer, "Police Leaning Toward Suicide in Teacher Death." On February 18, 2011, the Police Department announced that they had determined Ellen Greenberg's death was a suicide. Cmpl. ¶ 25. Subsequently a "thorough" toxicology examination revealed on February 8, 2011 low levels of various medications Ellen was taking for anxiety. Exh. C, MEO Report FIN, Cmpl. ¶3. At some point, Dr. Osbourne met with police to discuss their investigation. Osbourne Dep. Exh. W, at 73-74, *infra.*

On March 3, 2011, Dr. Osbourne "updated" the manner of death. . Cmpl. ¶ 3, ¶ 26.. He

formally amended the death certificate on April 4, 2011, listing the manner of death as “suicide.” Cmpl., ¶ 27; Exh. F.

**B. Plaintiffs Pursue Investigation of Daughter’s Death; Office of the Attorney General Closes Its Investigation and Also Concludes Ellen Greenberg’s Death was Suicide; Plaintiffs’ Counsel Sends Opinions of Other Forensic Pathologists to Defendants and Asks Them to Change the Manner of Death.**

In 2012, Plaintiffs retained now-District Attorney Larry Krasner (then in private practice), who contacted various City officials in an effort to obtain information concerning the investigation of Ellen’s death. Plaintiffs’ Answer to New Matter, ¶ 83. In 2018, the Greenbergs again contacted Mr. Krasner, by then the District Attorney, and asked him to reopen the investigation.. Id., ¶ 84. Mr. Krasner referred the matter to the Pennsylvania Office of the Attorney General (“OAG”) to avoid the appearance of a conflict. Id., ¶ 85. On March 8, 2019, the OAG responded to Stephanie Farr, a reporter working on an article about Ellen Greenberg for the Philadelphia Inquirer, in an email available on the Inquirer website and referenced in Ms. Farr’s subsequent article, that the OAG had “concluded that [the] evidence supports ‘Suicide’ as a manner of death” and that the OAG had closed its investigation. Stephanie Farr, “A Locked Room Mystery,” Philadelphia Inquirer, March 15, 2019; Email from Joe Grace to Stephanie Farr, March 8, 2019, Exhs.H and I; *see also* Exh. J, Declaration of Kirsten Heine, Chief Deputy of Criminal Prosecution, OAG (OAG’s investigation concluded that the evidence supported the Medical Examiner’s determination that the manner of death was suicide; investigation complete).

On August 29, 2019, at the request of Chief Medical Examiner Sam Gulino, Lyndsey Emery, M.D., Ph.D., a neuropathologist working at the Philadelphia Office of the Medical Examiner, reexamined Ellen Greenberg’s brain stem, spinal cord and a portion of the cervical vertebral column. Emery Deposition, Exh. P; Notes of Lyndsey Emery, Exh. Q; Declaration of Lyndsey Emery, Exh. R.

On September 3, 2019, a month before filing the complaint in this matter, counsel for Plaintiffs submitted to Dr. Osbourne the opinions of certain forensic pathologists and professionals they had solicited and asked him to amend the death certificate to “reflect a manner of death other than suicide.” Cmpl. ¶ 29, .Exh. K, letter from Joseph Podraza to Marlon Osbourne, M.D. The reports from these other forensic professionals all offered their professional opinions that the manner of death was not suicide, but homicide. Cmpl., ¶ 30-33, Exh )L-O (see also A1, Complaint Exhibits. Dr. Osbourne did not revise the death certificate. Cmpl. ¶53.

### **C. Plaintiffs Seek Mandamus and Declaratory Judgment; Discovery Follows**

On October 15, 2019, Plaintiffs filed their complaint in this matter, seeking mandamus and declaratory judgment. Exh.A. Plaintiffs asserted that, as a matter of law, Defendants lacked the discretion to amend the death certificate from homicide to suicide. "that the original determination was “final, binding, and not subject to amendment,” and that accordingly the amendment was “arbitrary and capricious.” Cmpl. ¶¶4 and 22. They asserted that Dr. Osbourne’s determination did not meet the “preponderance” standard set forth in the NAME’s Guide. Cmpl. ¶68, and that the “negative consequences of Defendants’ misconduct is far reaching,” for Ellen’s family, vital statistics, and the goals of criminal justice. Cmpl. ¶ 5. They further asserted that Defendants’ “acts and omissions” in amending the death certificate and refusing to amend it again at their request had caused harm, specifically that “society stigmatizes suicide” and that “this stigma deprives surviving family members of the closure and peace of mind to which they are otherwise entitled.” Cmpl. ¶ 56.

Defendants filed preliminary objections, which the Court overruled without opinion on January 7, 2020. Defendants filed an Answer and New Matter on January 27, 2020, Exh.G, and

on February 14, 2020, Plaintiffs replied to the New Matter. Discovery followed.

In response to interrogatories, Plaintiffs stated that the law on which they relied in paragraph 4 of the Complaint for the premise that the medical examiner had no discretion to change the manner of Ellen's death was the NAME's Guide, a manual published by the National Association of Medical Examiners. Exh. X. Plaintiffs' Answers & Objections to Defendants First Set of Interrogatories, Exh. S, No.4; *see also* Defendants' Letter Request, Exh. T, and Plaintiffs' Supplemental Answers, Exh. U. But the NAME's Guide itself states, "This book is a Guide. The recommendations contained herein are not standards and should not be used to evaluate the performance of a given certifier in a given case. Death certificates and manner-of-death classification require judgment, and room must be allowed for discretion in a case by case basis." Preface and Caveats, p.2 (emphasis supplied). (Plaintiffs' Complaint Exhibit I omits this page, including the cover and skipping to page 4. Exh A1, Plaintiff's Cmpl. Exhibits.)

Asked to identify specific examples of "negative consequences" as referenced in paragraph 5 of the Complaint, Plaintiffs asserted that the death certificate is "prima facie evidence of the fact of death that can be introduced in court as evidence, and would have evidentiary value in a claim or dispute involving Ellen's Estate. Also, like it or not our society stigmatizes suicide . . . [which] deprives surviving family members . . . of the closure and peace of mind to which they are entitled." Pl. Resp. to Def. First Set of Interrogatories, Exh. S, no. 5 (emphasis supplied). They further stated that the death certificate had a function in vital statistics. Id. They added that the benefit of a revised death certificate to them included the response about negative consequences, and noted that "it would benefit the general public if Ellen's killer(s) were brought to justice." Id. at No. 6.

In response to a subsequent request to supplement their responses and to list "actual legal

matters” that would be affected by an amended death certificate, Plaintiffs could name none, answering only that an amended death certificate “would have bearing on the resumption of further investigative efforts by the authorities.” Supplemental Responses to Defendants First Set of Interrogatories, at No. 5; Letter from Ellen Berkowitz to Counsel for Plaintiffs requesting further responses, April 27, 2021. In this same supplemental finding, they stated that the source of law for the assertion that the initial determination could not be and was “final” at ¶22 of the Complaint was Pa.Code § 1.37. Id. at No. 11.

Plaintiffs took the depositions of Samuel Gulino, Chief Medical Examiner at the time of Ellen’s death; Marlon Osbourne, M.D., who performed the autopsy and filled out the death certificate; and Lyndsey Emery, M.D., Ph.D., a Board-certified neuropathologist who works in the office of the Medical Examiner. Gulino Deposition, Exh. V, April 20, 2021; Osbourne Deposition, Exh. W, April 22, 2021; Emery Deposition, Exh. P, May 11, 2021. Both Drs. Gulino and Dr. Osbourne testified that it was their opinion that Ellen Greenberg’s death was a suicide. Exh. V at 98; Exh. W at 168. Dr. Emery testified that she had not identified anything that would rule out suicide, such as incapacity, but had no opinion on the manner of death and did not learn anything that would invalidate Dr. Osbourne’s determination Exh. P at 89-90. See also Declaration of Lyndsey Emery, Exh. R

#### **IV. STANDARD OF REVIEW**

Pennsylvania Rule of Civil Procedure 1035.2 mandates that summary judgment must be entered “where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law.” *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001). Failing to provide support for an essential issue in the case on which the plaintiff bears the burden of proof “establishes the entitlement of the moving party to judgment as a matter of law.” *Young v. Commonwealth Dep’t of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000). Viewing

“the record in the light most favorable to the non-moving party,” with “all doubts as to the existence of a genuine issue of material fact... resolved against the moving party,” if no genuine factual dispute is shown, the movant is entitled to judgment as a matter of law. *Murphy*, 777 A.2d at 429 (citing *Pa. State Univ. v. County of Centre*, 615 A.2d 303, 304 (Pa. 1992)).

## **V. ARGUMENT**

Longstanding Pennsylvania law expressly bars the very remedy which Plaintiffs seek in this action, and for good reason. Mandamus is not available to compel a medical examiner to reach a certain result; the determination of manner of death is a distinctly discretionary exercise of professional judgment which should not be second-guessed, even if there might be a difference of opinion as in this case. And grieving family members lack standing to seek this. Nor should a court be asked to usurp the role of a medical professional and substitute its own opinion for that of the medical examiner.

### **A. Defendants are Entitled to Summary Judgment Because Longstanding Pennsylvania Law Squarely Bars Mandamus to Compel the Medical Examiner to Revise the Manner of Death**

Defendants are entitled to summary judgment because, as a matter of law, mandamus is not available to compel Dr. Osbourne, or in the alternative, the Medical Examiner of the City of Philadelphia, to change the manner of death on Ellen Greenberg’s death certificate as Plaintiffs, would prefer. In fact, Pennsylvania courts have long held that mandamus is not available to force a medical examiner to change the manner of death, because the law has “clothed [the coroner] with discretionary powers.” *Chadwick v. Dauphin County Office of the Coroner*, 905 A.2d 600, 605 (Pa.Cmwlth. 2006). *See also Commonwealth ex rel. Czako v. Maroney*, 194 A.2d 867 (Pa. 1963); *Nader v. Hughes*, 643 A.2d 747 (Pa.Cmwlth 1994) (coroner’s determination is discretionary; appeal denied for lack of standing; *Rubeck v. McLucas*, 42 Pa.D&C 89

(Cumberland C.P. 1967).

Under Pennsylvania law, the determination of manner of death is reserved to the discretion of the Medical Examiner through the powers delegated to it by statute and the Pennsylvania Code. Title 16 P.S. § 9521 establishes that

It shall be the duty of the coroner or the deputy coroner of any county in this Commonwealth, in all cases where death is sudden or violent or is of a suspicious nature and character, to cause a careful investigation of the facts concerning said death to be made, to ascertain whether the death was due to other than natural causes, and to make or cause to be made such an autopsy as the facts of the case demand.

In Philadelphia County, pursuant to Philadelphia Code (“Code”) § 2-102, the office of coroner has been abolished and “[a]ll powers and duties previously exercised and performed by the Coroner relating to inquests shall be exercised and performed by an Examiner to be appointed by the Health Commissioner.” Code § 2-102. “All powers and duties previously exercised and performed by a Coroner relating to the determination of the cause of death and conducting of autopsies are transferred to the Department of Public Health and shall be exercised and performed by an Examiner.” § 2-102(5).

“The common law writ of mandamus lies to compel an official’s performance of a ministerial act or a mandatory duty.” *Sinkiewicz v. Susquehanna Cty. Bd. of Comm’rs*, 131 A.3d 541, 546 (Pa. Cmwlth. 2015). Mandamus may not be used to “interfere with a public official’s exercise of discretion.” *Id.* Where, as here, a public official has exercised discretion, “mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, *though in fact, the decision may be wrong.*” *Id.* (emphasis in original) (internal quotations omitted). While mandamus can be used to compel a public official to exercise discretion where he refuses to do so, *id.*, mandamus does not lie to compel a public official to revise a discretionary act because the plaintiff believes the act was arbitrary. *Chadwick*, 905 A.2d

at 603, citing *Tanenbaum v. D'Ascenzo*, 51 A.2d 757, 758 (Pa. 1947) (emphasis supplied).

Before a writ of mandamus may be issued, the petitioner must demonstrate three conditions: “(1) a clear legal right for the performance of the ministerial act or mandatory duty, (2) a corresponding duty in the [government actor] to perform the ministerial act or mandatory duty, and (3) the absence of any other appropriate or adequate remedy.” *Council of City of Philadelphia v. St.*, 856 A.2d 893, 896 (Pa. Cmwlth. 2004). Plaintiff cannot establish either a clear legal right (element one) or a corresponding government duty (element two).

As to the first element, the legal right to the act demanded in the writ must be “immediate, specific, well defined and complete.” *Southerland v. Com.*, 36 Pa. D. & C.2d 786, 791 (Pa. Com. Pl. 1965) (citing *Zaccagnini v. Vandergrift Borough*, 395 Pa. 285 (1959)), see also *Heffner v. Com.*, 28 Pa. 108, 112 (1857) (asserting that the right to be enforced must be “specific, complete, and legal”). Further, “[m]andamus is not available to establish legal rights but only to enforce rights that have been established.” *Sinkiewicz*, 131 A.3d at 546. Plaintiffs have no right to a particular manner of death on a death certificate, nor does any other litigant – the determination of the manner of death is discretionary, and as set forth above, a duty held by the medical examiner.

As to the second element, Defendants have no mandatory or ministerial duty to amend the death certificate simply because Plaintiffs would prefer a different result, however understandable their desire or strong their belief. Nor do Defendants have a duty to revise their opinion because Plaintiffs have obtained the opinions of some experts who hold a different view. To the contrary, the Pennsylvania Supreme Court “has long enjoined that ‘[w]here the [public official] is clothed with discretionary powers, and has exercised those powers, mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, [even]

though in fact, the decision may be wrong.” *Id.* at 606, citing *Anderson v. Philadelphia*, 36 A.2d 442, 444 (Pa. 1944) (emphasis supplied).

The facts in this case are on all fours with *Chadwick*, in which a grieving sister sought to compel the coroner to change the manner of death from “suicide” to accidental. In *Chadwick*, the plaintiff engaged a pathologist to review the autopsy report, police reports, medical records and photographs. That pathologist opined that the death was not a suicide, but accidental. Here, Plaintiffs collected and presented to Defendants the reports of various forensic professionals who reviewed the autopsy report and other investigative information about the state of Ellen’s apartment and concluded that the manner of death was not suicide, but homicide. Defendants did not amend the death certificate when presented with those reports. The plaintiff in *Chadwick* argued that the coroner’s investigation was inadequate because it “disregarded [her expert’s] report and did not explain [his reasoning]” *Chadwick* at 605. The Court rejected this argument, stating that the law “does not require a coroner to convince members of the public, including family members, of the accuracy of their findings.” *Id.* at 605. Similarly, there is no requirement that Defendants accept the opinions of other forensic professionals over their own determination. Plaintiffs have offered no authority whatsoever that stands for the proposition that Defendants are required to amend the death certificate because Plaintiffs or other experts believe it is wrong. “Because the Coroner has exercised his discretionary powers, ‘mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, though in fact, the . . . decision may be wrong.’” *Id.*, citing *Anderson*.

In this case, Dr. Osbourne conducted an autopsy on January 27, 2011, which Plaintiffs characterize as “thorough,” and initially concluded, based on that autopsy alone, that Ellen Greenberg’s death was a homicide. Cmpl. ¶ 21. But after considering additional information

from the police investigation and the toxicology report, Dr. Osbourne amended the death certificate to reflect his conclusion that Ellen Greenberg had taken her own life. Cmpl. ¶¶ 26-27. Dr. Osbourne's actions were an exercise of discretion, even if Plaintiffs and their forensic professionals disagree with the conclusion.. His determination is not susceptible to mandamus.

Because Dr. Osbourne's determination as a matter of law is discretionary, and cannot be disturbed even if controversial or wrong, Plaintiffs' assertion that it does not meet the preponderance standard they reference in the NAME's Guide—a guide, not to be mechanically applied and subjective – is legally irrelevant. Regardless, Dr. Osbourne testified that he believes the amended death certificate satisfied that standard, and Dr. Gulino testified that in his professional opinion, based on 25 years of experience, the manner of death was suicide. Exh W, Osbourne Dep at 168, Exh. V, Gulino Dep at 98.

Finally, Plaintiffs' reliance on 2 Pa.Code § 1.37 for the proposition that the certificate cannot be amended is mistaken. The Code section from which this provision is taken is entitled "Correction of Records," and, far from prohibiting amendment, clearly contemplates that records will be revised. The amended death certificate is the writing that supports the amendment, and the Vital Statistics code anticipates corrections. See 2 Pa.Code § 1.31 (b) ("The Division of Vital Records may require additional evidence to substantiate a correction when it is deemed necessary and proper to preserve the integrity of the records.")

In sum, Plaintiffs cannot identify any law that either prohibits a change when a medical examiner believes one is warranted, or that would justify compelling a change over his professional judgment. Nor is it even logical, if the medical examiner was unable to amend a death certificate, for Plaintiffs nevertheless to simultaneously claim that Dr. Osbourne *must* change the manner of death to "could not be determined," a finding he never made.

Accordingly, Plaintiffs cannot establish a right to mandamus, and Defendants are entitled to summary judgment on that claim.

**B. Defendants Also Are Entitled to Summary Judgment Because Pennsylvania Law Rejects Stigma As a Basis for Standing in Identical Circumstances, and Plaintiffs Assert No Other Cognizable Harm.**

Defendants are additionally entitled to summary judgment in this case because Plaintiffs have not satisfied their threshold burden of showing that *they* were directly harmed by the Defendants' refusal to amend Ellen Greenberg's death certificate.

As a threshold matter, a plaintiff must establish standing to sue. "The traditional concept of standing focuses on the idea that a person who is not adversely impacted by the matter he seeks to challenge does not have standing to proceed with the court system's dispute resolution process." *Pittsburgh Palisades Park, LLC v. Com*, 888 A.2d 655, 659 (Pa. 2005) (citing *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280-81 (1975) (plurality)). "The keystone to standing . . . is that the person must be negatively impacted in some real and direct fashion . . . In particular, it is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procuring obedience to the law." *Pittsburgh Palisades Park*, 888 A.2d at 660.

Plaintiffs assert that they have been harmed because the death certificate is "prima facie evidence of the fact of death that can be introduced in court as evidence, and would have evidentiary value in a claim or dispute involving Ellen's Estate. Also, like it or not our society stigmatizes suicide . . . [which] deprives surviving family members . . . of the closure and peace of mind to which they are entitled." Cmpl. ¶ 5. Plaintiffs also made vague reference to vital statistics and the interests of criminal justice. Asked specifically to identify any legal matter in

which the manner of death was an issue, Plaintiffs simply repeated that the certificate “would be” evidence in a wrongful death suit. Exh. T, Letter Req. to Amend Responses; Exh. U, Pl. Supplemental Responses to Interrog.

In *Nader v. Hughes*, 643 A.2d 747 (Pa. Cmwlth. 1994), the Commonwealth Court rejected standing in nearly identical circumstances, a grief-stricken parent seeking a writ of mandamus to compel an inquest into his son’s death from a gunshot wound. The Coroner ordered an autopsy, gathered ballistics information, and reviewed the police investigation. The plaintiff hired his own investigators and wrote to the Coroner and to the District Attorney, just as Plaintiffs have, asking them to change their conclusions (and, in *Nader*, to conduct an inquest). The plaintiff in *Nader* asserted, as have Plaintiffs, that he had an interest in “clearing the stigma of suicide.” *Nader*, 643 A.2d at 750.

The Commonwealth Court rejected the plaintiff’s argument, noting that “[t]he emotional trauma which family members of the deceased suffer, whatever the degree, does not result from the statutory duty of the coroner to investigate such a death, but . . . from the death of the decedent. Likewise, the discretion of the coroner whether or not to conduct an inquest is not a precipitating factor of the emotional trauma of the decedent’s death.” *Id.* at 753. The Court continued, “any stigma the family and the decedent may suffer cannot be said to have resulted from the coroner’s exercise of discretion whether or not to conduct an inquest.” Here, as in *Nader*, the Medical Examiner’s exercise of discretion in concluding Ellen’s manner of death was suicide is not “a precipitating factor” in the stigma her grieving parents feel and does not, accordingly, confer standing.

Nor does Plaintiffs’ stated interest in reopening the investigation, which they believe the death certificate hinders, or their concern for the reliability of vital statistics, even their wish to

find their daughter's "killer(s)" confer standing, since all these are either general or speculative. The requirement of standing ensures that courts "do not render decisions in the abstract or offer purely advisory opinions" and arises from "the principle that judicial intervention is appropriate only when the underlying controversy is real and concrete . . ." *Pittsburgh Palisades*, 888 A.2d at 659.

Finally, Plaintiffs' assertion that the death certificate "would be" evidence does not confer standing. Plaintiffs have identified no actual suits or legal matters – any claim of harm is thus purely speculative. Nor is it at all clear that a corrected death certificate, on its own, would have much evidentiary value: *See, e.g., Pittsburgh National Bank v. Mutual Life Insurance Co. Of New York*, 417 A.2d 1206, 1209 (Pa. Super. 1980) (official death certificate not admissible in action to recover on accidental death policy as substantive evidence that death was accidental; "courts have recognized that certain information recited on the certificate is hearsay.") Thus, while it is generally "prima facie evidence" of the *fact* of death, in most cases the opinion as to the *manner* of death would require the testimony of the medical examiner, who in this case would testify he was compelled to alter his actual conclusion. *See, e.g., Heffron v. Prudential Ins.*, 8 A.2d 491 (Pa. Super. 1939) ("where death results from external causes or violence, the attending physician or coroner is instructed to state only whether the death was probably accidental, suicidal, or homicidal, which is not a statement of fact, but merely the expression of opinion as to probabilities, not receivable in evidence as a fact."). *See also Commonwealth v. Brown*, 133 A.2d 208 (Pa. Super 2016) (confrontation clause requires testimony of medical examiner).

Accordingly, Plaintiffs lack standing; Defendants are entitled to summary judgment on this basis alone.

**C. Defendants Are Entitled To Summary Judgment Because Plaintiffs Can Identify No Right that Can Be Recognized in Declaratory Judgment.**

As an alternative to mandamus, Plaintiffs ask this Court to “enter an order declaring the manner of Ellen Greenberg’s death to be classified as “Could not be determined.” Cmpl. ¶ 23. In other words, they ask this Court to sit as a sur-medical examiner, to overrule the determination of the medical professional vested by state law and the Philadelphia Code with the sole responsibility and discretion to determine the cause and manner of death. .

Declaratory relief is appropriate only where there is an actual controversy. *Clark v. Township of Hamilton*, 562 A.2d 965, 967 (Pa.Cmwlth. 1989). Plaintiffs here assert only a difference of opinion, a preference for a different cause of death on the death certificate. There is no justiciable controversy here. *See, e.g., Curry v. Coyne*, 992 S.W. 2d 858 (Ky.App. 1998) (“A coroner’s investigation is not an adversarial proceeding, and [the coroner’s] conclusion as to the cause of death is but a mere expression of opinion.”). The medical examiner’s determination is binding on no one. *Nader*, 643 A.2d 747, 752 (citing *Bair v. Fourhman*, 442 A.2d 35 (Pa.Cmwlth. 1982) for the proposition that the findings of an inquest jury are merely advisory). Plaintiffs can offer no law that says otherwise.

Declaratory relief is further inappropriate here where Plaintiffs cannot assert any facts or law that would establish a *right* to a different cause of death. “Declaratory judgments are nothing more than judicial searchlights, switched on at the behest of a litigant to illuminate an existing legal right, status, or other relation. They may not be used to search out new legal doctrines.” *Doe v. Johns-Manville Corp.*, 471 A.2d 1252, 1254 (Pa. Super. 1984) (emphasis supplied). And indeed, it would be a new legal doctrine, if courts could amend death certificates despite the bar on mandamus in these circumstances, simply by overruling the determination by declaratory judgment. Where Plaintiffs have failed to establish any right under the writ of

mandamus, they cannot ask this Court to stand in for the Medical Examiner and substitute its (obviously non-medical) judgment. *See Chadwick*, 905 A.2d at 606 (“the Coroner may have been wrong in its determination that Decedent committed suicide, but that judgment cannot be revisited by a court sitting in mandamus.”).

This Court accordingly should decline Plaintiffs’ invitation to itself “declare” Ellen Greenberg’s manner of death contradicting the role of the medical examiner prescribed by Pennsylvania law. Defendants are entitled to summary judgment on Plaintiffs’ declaratory judgment claim.

## **VI. CONCLUSION**

For all of these reasons, the Court should grant Defendants’ Motion for Summary Judgment and dismiss the Complaint, with prejudice.

CITY OF PHILADELPHIA  
LAW DEPARTMENT

BY: /s/ Ellen Berkowitz  
Senior Attorney  
Attorney I.D. No. 80186  
1515 Arch Street, 15<sup>th</sup> Floor  
Philadelphia, PA 19102  
Phone: (215) 683-5253  
Fax: (215) 683-5299  
Ellen.Berkowitz@phila.gov

DATED: June 21, 2021

**CERTIFICATE OF SERVICE**

I, Ellen Berkowitz, hereby certify that I served a true and correct copy of the foregoing Motion for Summary Judgment and Memorandum of Law on June 21, 2021 by sending this paper to the Court's electronic filing system (EFS) website pursuant to Pa.R.C.P. 205.4(g) and Phila. Civil Rule \*205.4(f), and by virtue of automatic electronic service by the Court to all parties, who have entered their appearance on the Court's electronic docket.

\_\_\_\_\_  
/s/ Ellen Berkowitz  
Ellen Berkowitz  
Senior Attorney  
City of Philadelphia Law Department.

DATED: June 21, 2021