No. _____

In the Supreme Court of the United States

MARISA N. PAVAN, ET AL., PETITIONERS

v.

NATHANIEL SMITH, M.D., MPH

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2601 (2015), this Court held that, under the Fourteenth Amendment, States must recognize and give equal effect to marriages between same-sex spouses with respect to all "aspects of marital status" under state law, including with respect to "birth and death certificates." Under Arkansas law, when a married woman gives birth, her husband must be listed as the second parent on the child's birth certificate, including when he is not the child's genetic parent because the child was conceived by artificial insemination. The Supreme Court of Arkansas held below that, notwithstanding *Obergefell*, Arkansas may deny this right to married same-sex couples. Every other court to consider this question has held to the contrary. The question presented is:

Whether a State violates the Fourteenth Amendment by denying married same-sex couples the same right afforded to married opposite-sex couples under state law to have the name of the birth mother's spouse entered as the second parent on their child's birth certificate.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioners Marisa Pavan, Terrah Pavan, Leigh D.W. Jacobs, and Jana Jacobs were the appellees in the Arkansas Supreme Court. Courtney Kassel and Kelly Scott were also appellees in the Arkansas Supreme Court but are not petitioners.

Respondent Nathaniel Smith, in his official capacity as Director of the Arkansas Department of Health, was the appellant in the Arkansas Supreme Court.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marisa N. Pavan, Terrah D. Pavan, Leigh D.W. Jacobs, and Jana S. Jacobs respectfully petition for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App., *infra*, 1a-25a) is reported at --- S.W.3d ---, 2016 WL 7156529. The opinion of the Circuit Court of Pulaski County, Arkansas, (App., *infra*, 48a-66a) is unreported.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on December 8, 2016. This Court has jurisdiction pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution is reproduced at App., *infra*, 73a. Arkansas Code Section 20-18-401 is reproduced at App., *infra*, 76a-79a.

STATEMENT OF THE CASE

Petitioners are two married same-sex couples who each live in Arkansas with their children. Like many opposite-sex couples, petitioners conceived their children through anonymous sperm donation. For children born to married opposite-sex parents, Ark. Code § 20-18-401 (the Birth Certificate Law) requires the birth mother's husband to be listed on the birth certificate regardless of whether he is genetically related to the child. The State conceded on appeal that it had no rational basis to apply the Birth Certificate Law differently to similarly situated same-sex and opposite-sex couples. Nonetheless, the Arkansas Supreme Court held that the State may refuse to place a birth mother's female spouse on their child's birth certificate because she is not a biological parent. The court acknowledged this Court's decision in *Obergefell*, but construed that decision very narrowly, concluding that it addressed only the right of same-sex couples to marry and does not require equal treatment of same-sex spouses under State laws regarding the issuance of birth certificates to married parents. In so holding, the Arkansas Supreme Court departed from every other court to consider whether *Obergefell* requires that state birth certificate laws must be applied equally to same-sex and opposite-sex spouses. If permitted to stand, that extraordinary ruling will undermine *Obergefell* and invite

other States to deny marital rights and protections selectively to married same-sex couples, once again subjecting them to an official regime of disfavored treatment and stigma.

A. Arkansas's Birth Certificate Law

Like other states, Arkansas provides that birth certificates be issued to children born within the state. Ark. Code § 20-18-401(a). In Arkansas, as in other states, a birth certificate is a legal document that identifies a child's legal or presumed parents, who may or may not be the child's genetic parents. Thus, under Arkansas law, there are a variety of circumstances in which a birth certificate lists parents who are not genetically related to the child.

Of particular relevance here, Arkansas law has long provided that when a child is born to a mother "married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child." Ark. Code § 20-18-401(f)(1). That requirement is mandatory, applying in all cases in which a child is born to a married woman, regardless of whether the husband is the child's biological father. *Ibid.* There are only two narrow exceptions to that categorical rule: (1) when a court of competent jurisdiction has determined that another man is the child's legal father; or (2) if the "mother," "husband," and "putative father" each execute affidavits that the "husband is not the father" and "the putative father is the father." *Id.* § 20-18-401(f)(1)(A) and (B).

Once a husband's name has been entered on the birth certificate, even when another man is or claims to be a child's biological father and seeks to assert legal

parentage, the husband's presumption of legal parentage cannot be rebutted, and the husband cannot be removed from the child's birth certificate, except under extremely narrow circumstances. The putative biological father must "show that rebutting that presumption is in the best interest of a child whose parents" may "remain married and plan to continue as the only parents the child has ever known." *R.N.* v *J.M.*, 61 S.W.3d 149, 155 (Ark. 2001); see also *Martin* v. *Pierce*, 257 S.W.3d 82, 87 (Ark. 2007) (rejecting former husband's attempt to disestablish paternity of marital child based on genetic testing, in order to avoid child support, in light of "the interests of the state, the family, and the child in maintaining the continuity, financial support, and psychological security of an established parent-child relationship").

Arkansas law also expressly provides that when a married couple uses donor insemination to have a child, the child is "deemed the legitimate natural child of * * * the woman's husband," and the husband is the child's legal father. Ark. Code § 9-10-201(a). In such cases, the husband is placed on the child's birth certificate at the time of the child's birth, as directed by the Birth Certificate Law, *id.* § 20-18-401(f)(1)(A) and (B), and the husband's legal parentage cannot be challenged or disavowed based on his lack of a genetic connection to the child. See, *e.g.*, *Brown* v. *Brown*, 125 S.W.3d 840 (Ark. Ct. App. 2003) (holding that husband who, through his conduct, consented to have a child through donor insemination was estopped from seeking to disavow paternity when the parties divorced).

In addition, when a child who is born in Arkansas is adopted, the State issues "a new certificate of birth" that names the adoptive parents as the child's legal

parents. Ark. Code § 20-18-406(a)(1). That birth certificate must be indistinguishable from an original. It is not to be marked "amended," Code Ark. R. 007.12.1-5.5(a), and the original certificate is kept under seal. See Ark. Code § 20-18-406(b). A child with such a birth certificate would have no indication that there is an original record somewhere identifying his or her biological parents, nor would anyone else.

Finally, when a child's genetic parents are not married to one another, Arkansas law permits the biological father to be listed on the birth certificate only if both biological parents (and the mother's spouse, if any) file affidavits to establish the biological father's parentage. Ark. Code § 20-18-401(f)(2). Thus, the birth certificates of children conceived by unmarried couples are not required to, and in some circumstances do not, include the child's genetic father.

In sum, under Arkansas law, there are a variety of circumstances in which a child's legal parents are not the child's genetic parents. In such cases, including for children born to married opposite-sex parents through anonymous sperm donation, the parents named on the child's birth certificate are not both genetically related to the child.

B. The Importance Of Birth Certificates

A birth certificate serves many important legal and practical functions. Indeed, a birth certificate is "the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts." *Henry* v. *Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio), rev'd sub nom. *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom.

Obergefell v. *Hodges*, 135 S. Ct. 2584 (2015). Especially for minor children and their parents, but also continuing throughout the child's life, it is among the most critical government-issued records.

A child's birth certificate affects parental decision-making authority in the medical and educational context. For example, some Arkansas public schools allow only those parents named on the child's birth certificate to receive educational information absent a court order. See *Bryant Pub. Schools Student Handbook* 14, http://bryantschools.org/system/files/documents/570/Elementary%20Handbook%202016-17.pdf. Should the family move to another state, a birth certificate may be required to enroll the child in a new school. See, *e.g.*, Ohio Rev. Code Ann. § 3313.672(A)(1). Parents who are not listed on their child's birth certificate also have "extra reason to dread medical emergencies, fearing that doctors will delay a child's emergency treatment while trying to figure out whether a parent has authority to consent." Shohreh Davoodi, *More Than a Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates*, 90 Chi.-Kent L. Rev. 703, 709 (2015). Access to various state public benefits also stems from a parent having her name on a child's birth certificate. See, *e.g.*, Ark. Code § 24-12-117(b) (requiring birth certificate to apply for survivor benefits for certain public officers and employees); Code Ark. R. 208.00.1-2212 (birth certificate serves as proof of parental relationship when applying for Transitional Employment Assistance).

Birth certificates issued under state law also have importance under federal law. For example, birth certificates enable parents to verify their relationship to

minor children. See, *e.g.*, 20 C.F.R. 401.45(b)(6); 31 C.F.R. 1.34; 45 C.F.R. 5b.5(b)(2)(iii). Similarly, a parent's ability to obtain a passport for a minor child is affected by the child's birth certificate. See 22 C.F.R. 51.28(a)(2) and (3)(ii)(A); U.S. Dep't of State, *Children Under 16*, https://travel.state.gov/content/passports/en/passports/under-16.html#consent.

Beyond the many legal and practical difficulties it imposes on married same-sex couples and their children, Arkansas' refusal to list both spouses on their child's birth certificate causes those children to "suffer the stigma of knowing their families are somehow lesser." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2600 (2015). The children will face this stigma throughout their lives, as they look to and use their birth certificates as an official record of their own identity and the identity of their parents. "The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities." *Henry*, 14 F. Supp. 3d at 1050.

C. Factual Background

Petitioners Marisa and Terrah Pavan were legally married in New Hampshire in 2011. Ark. S. Ct. Add. 2. The Pavans were living in Arkansas in 2015 when Terrah gave birth to a baby girl. *Ibid.* Marisa and Terrah jointly planned their daughter's conception, and arranged and paid for an anonymous sperm donor. *Ibid.* Terrah and Marisa's daughter, T.R.P., was born on May 15, 2015, at the University of Arkansas for Medical Sciences Hospital in Little Rock. *Ibid.* Marisa and Terrah completed the application to receive a birth cer-

tificate at the hospital when their daughter was born, listing both women as parents on the application. *Ibid.* However, when the Arkansas Department of Health (Department) issued the child's birth certificate, it did not list Marisa's name on the birth certificate and listed Terrah as the only parent. *Ibid.*

Petitioners Leigh and Jana Jacobs were legally married in Iowa in 2010. Ark. S. Ct. Add. 2-3. They live in Arkansas, which is where Leigh gave birth to their son, F.D.J., on June 26, 2015. Ark. S. Ct. Add. 3. As with the Pavans, both parents arranged and paid for an anonymous sperm donor. *Ibid.* And as with the Pavans, despite the parents' request that they both be placed on the birth certificate, they were issued a birth certificate listing only the birth parent (Leigh) on their son's birth certificate. *Ibid.*

D. Procedural Background

1. Complaint and state circuit court decision

Petitioners filed suit seeking declaratory and injunctive relief on July 13, 2015, in the Circuit Court of Pulaski County, Arkansas, alleging that the Department's refusal to provide birth certificates for petitioners' children naming both spouses as parents violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. Ark. S. Ct. Add. 8-10. Petitioners also sought a declaration that, for the same reasons, the Birth Certificate Law, Ark. Code § 20-18-401, must be interpreted to apply equally to same-sex and opposite-sex married couples. Petitioners brought their complaint against respondent Nathaniel Smith in his official capacity as the Director of the Department.

The parties filed cross-motions for summary judgment. On November 23, 2015, after hearing argument, the circuit court issued an order from the bench requiring respondent "to immediately issue amended certificates of birth" to petitioners, see App., *infra*, 48a, which was followed by a memorandum opinion to that effect on December 1, 2015, App., *infra*, 48a-66a. The circuit court held that, under *Obergefell*, the provisions in the Birth Certificate Law directing that the "husband" of a birth mother "shall" be listed on the birth certificate needed to be invalidated to ensure that same-sex married couples have "the same spousal benefits * * * available to every opposite-sex married couple." *Id.* at 59a-62a.[1]

Respondent moved for a stay, which the circuit court denied. App., *infra*, 67a-72a.

2. Respondent's appeal to the Arkansas Supreme Court

Respondent appealed to the Arkansas Supreme Court, which agreed to hear the case. At oral argument before the Arkansas Supreme Court, respondent conceded for the first time that the State has no legitimate basis for applying the Birth Certificate Law differently to married same-sex couples who have children

[1] The circuit court first held that the issues before the court had been litigated in a previous case, *Wright* v. *Smith*, 60CV-13-2662, appeal dismissed sub nom. *Smith* v. *Wright*, 2015 Ark. 298 (2015) (per curiam), and that the Department was bound by *res judicata* to issue birth certificates to the children of married same-sex couples listing both spouses as parents. App., *infra*, 52a-53a. The Arkansas Supreme Court rejected that holding, and Petitioners do not seek review of that holding here.

through donor insemination than to opposite-sex couples who have children through donor insemination: "We would agree that this differential treatment fails equal protection under the plain old rational basis standard." *Id.* at 82a. The State conceded that, under *Obergefell*, Arkansas's law that when a married couple uses donor insemination to have a child, they are both legal parents, must be applied equally to same-sex spouses. *Id.* at 82-83a. The State also conceded that in such a case both the birth mother and her spouse "would be entitled to be placed on the birth certificate initially when they were at the hospital and through the hospital's submission to the Department of Health." *Id.* at 83a.

3. The decision of the Arkansas Supreme Court

Despite the State's concession during oral argument that its "differential treatment [of married same-sex couples] fails equal protection under the plain old rational basis standard," App., *infra*, 82a, a divided Arkansas Supreme Court held that the State could permissibly treat married same-sex parents differently under the Birth Certificate Law, based on the absence of a genetic connection between both parents and the child.[2] Based on that conclusion, the court held that

[2] Although the State did not object to the specific relief already granted to the named plaintiffs, namely, the issuance of birth certificates listing both parents, App., *infra*, 4a, the Arkansas Supreme Court exercised jurisdiction over the appeal to resolve the facial constitutionality of the Birth Certificate Law. Because the Arkansas Supreme Court held that Arkansas law does not permit a birth mother's same-sex spouse to be listed as a parent on an original birth certificate, the Arkansas Department of

when a married woman gives birth to a child, the Birth Certificate Law must be enforced as written, so that only a "husband" may be listed as a second parent on the original birth certificate. *Id.* at 16a-22a.

The court acknowledged this Court's decision in *Obergefell*, but held that it applied only to the right to marry and did not require States to apply state laws regarding the issuance of birth certificates equally to married same-sex and opposite-sex couples. App., *infra*, 11a (holding that *Obergefell* "did not address Arkansas's statutory framework regarding birth certificates, either expressly or impliedly"); see also *id.* at 14a-15a (holding that applying the Birth Certificate Law only to "husbands" "does not run afoul of *Obergefell*").

The court rejected Petitioners' claim that enforcing the Birth Certificate Law to discriminate against same-sex spouses violated the requirement of due process, including by infringing upon their right to marry and to the protections and benefits of marriage. The court held that same-sex couples' fundamental right to marry and to be recognized as legal parents does not encompass the right to have both parents listed on their child's birth certificate, finding that "the circuit court * * * conflated distinct categories of marriage, parental rights, and vital records." App., *infra*, 20a. The court

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Health is barred from doing so, and the validity of the birth certificates previously issued to Petitioners is uncertain. In addition, one of the petitioner couples is again expecting a child, and the birth mother's spouse—like many other similarly situated same-sex spouses throughout the state—again seeks recognition of her right under state law, when the child is born, to be listed as the child's parent on the birth certificate.

held that, even if a same-sex spouse is a legal parent, she has no due process right to be listed on her child's birth certificate: "[W]e cannot say that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord the interest its respect * * * ." *Id.* at 20a.

The court also rejected Petitioners' claims that treating them differently than similarly situated opposite-sex spouses denied them the equal protection of the laws. The court held that permitting only "husbands" to be listed on birth certificates passed intermediate equal protection review because, in the court's view, "[i]t does not violate equal protection to acknowledge basic biological truths." App., *infra*, 21a. Citing an affidavit from Arkansas's registrar of vital records, the court found that "the challenged classification serves an important government objective—tracing public-health trends and providing critical assistance to an individual's identification of personal health issues and genetic conditions." *Id.* at 22a. The Court also found that "the means employed—requiring the mother and father [of the child] on the birth certificate to be biologically related to the child—are substantially related to the achievement of those objectives." *Ibid.*

The court acknowledged Arkansas's law providing that a husband is the legal father of a child born to his wife through donor insemination, despite having no genetic connection to the child, Ark. Code § 9-10-201(a), but held that statute to be irrelevant to the constitutionality of the Birth Certificate Law. App., *infra*, 22a-23a. The court also deemed irrelevant the State's concession that the donor insemination statute had to be

applied equally to same-sex spouses and that the State had no rational basis for treating same-sex spouses differently than opposite-sex spouses under the Birth Certificate Law. *Ibid.*[3]

Three Justices issued separate opinions, each of which concluded that preventing the issuance of birth certificates listing both same-sex spouses as their children's parents, on equal terms with the issuance of birth certificates to opposite-sex spouses, violates *Obergefell* and denies married same-sex couples due process and equal protection.

Chief Justice Brill, concurring in part and dissenting in part, would have affirmed the circuit court's holding that the Birth Certificate Law must be applied equally to same-sex couples. Noting this Court's holding in *Obergefell* that "same-sex couples may not be denied 'the constellation of benefits that the States have linked to marriage,'" Chief Justice Brill found that "[t]he right to a birth certificate is a corollary to the right to a marriage license." App., *infra*, 28a. In his view, *Obergefell* requires that "a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple." *Ibid.*

Justice Wood also concurred in part and dissented in part. Like Chief Justice Brill, she recognized that, under *Obergefell*, "states cannot constitutionally deny

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[3] The court also rejected a claim by a same-sex couple who had not been married at the time of their child's birth but married shortly after the decision in *Obergefell*, who sought an amended birth certificate. That couple has subsequently established the non-birth parent's rights through adoption proceedings and therefore does not seek further review by this Court.

same-sex couples the benefits of marital status, which include equal access to birth certificates." App., *infra*, 40a. However, based on the State's concessions at argument, which suggested that the State might agree to start issuing birth certificates listing both same-sex spouses as parents, Justice Wood would have remanded the case to the circuit court to further explore that possibility and "to give the legislature time * * * to amend the birth-certificate statutes to comply with *Obergefell*." *Ibid.*

Justice Danielson would have affirmed the circuit court's decision in its entirety based on *Obergefell* as well as on a prior Arkansas state court decision striking down Arkansas's marriage ban. App., *infra*, 41a-42a. Justice Danielson explained that, under *Obergefell*, "states are not free to deny same-sex couples 'the constellation of benefits that the States have linked to marriage,'" *id.* at 43a (quoting *Obergefell*, 135 S.Ct. at 2601), and noted that this Court identified birth certificates "specifically as one of those benefits." *Id.* at 43a. Further, Justice Danielson highlighted that *Tanco* v. *Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), rev'd sub nom. *Deboer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), "one of the cases on review in *Obergefell*," "involved a same-sex married couple" who "challenged the Tennessee law providing that their child's nonbiological parent would not be recognized as the child's parent" on the birth certificate, "which affected various legal rights." App., *infra*, 43a.

As further support, Justice Danielson noted that the right to marry must apply with equal force to same-sex couples, in part, because marriage "'safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and educa-

tion,'" and that this emphasis on "the protection of children and the stability of the family unit was a foundation for the Court's decision." App., *infra*, 43a-44a (quoting *Obergefell*, 135 S. Ct. at 2600).

Justice Danielson therefore disagreed with the court's conclusions "that the right to be named as a parent on a birth certificate is not a benefit associated with marriage" under Arkansas law. App., *infra*, 44a-45a. He also rejected the majority's contention that "the specific statutes at issue here focus on biological relationships rather than marital ones," noting that the Birth Certificate Law "provides that the name of the 'husband' of the mother shall be entered on a birth certificate as the father of the child, without regard to any biological relationship and on the sole basis of his marriage to the mother." *Id.* at 45a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH *OBERGEFELL* V. *HODGES* AND *UNITED STATES* V. *WINDSOR*

In *Obergefell* v. *Hodges*, this Court held that, consistent with the requirements of the Fourteenth Amendment, states may not deprive same-sex couples of the fundamental right to marry, including the right to participate in the benefits and responsibilities of marriage to the same extent and on equal terms as opposite-sex couples. 135 S. Ct. 2584 (2015). In *United States* v. *Windsor*, this Court held that a federal law denying equal recognition and protection to married same-sex couples impermissibly relegated them to a "second-tier marriage." 133 S. Ct. 2675, 2694 (2013). Arkansas law provides that when a child is born to a married mother, the "husband['s]" name "shall be en-

tered" on the birth certificate. That requirement is mandatory and applies regardless of whether the husband is genetically related to the child. The Arkansas Supreme Court held that same-sex couples may be denied this vital benefit of marriage. That decision merits this Court's review because it directly conflicts with this Court's decisions in *Obergefell* and *Windsor* and, if permitted to stand, renders those decisions hollow by permitting states to once again relegate same-sex couples and their families to the stigma, injury, and inequality of "second-tier" status. *Obergefell*, 135 S. Ct. at 2600-2601; *Windsor*, 133 S. Ct. at 2694.

A. *Obergefell* Held That Married Same-Sex Couples Are Entitled To The Same "Constellation Of Benefits" Of Marriage As Married Opposite-Sex Couples, Including The Listing of Both Spouses As Parents On A Birth Certificate

1. Obergefell *and* Windsor *provide that the government may not discriminate within the institution of marriage*

"[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty." *Obergefell*, 135 S. Ct. at 2604. This Court emphasized that marriage is the "basis for an expanding list of governmental rights, benefits, and responsibilities," on both the state and federal level. *Id.* at 2601. In *Turner* v. *Safley*, the Court acknowledged that "marital status often is a precondition to the receipt of [government] benefits * * *

property rights * * * and other, less tangible benefits." 482 U.S. 78, 96 (1987).

Because the legal protections of marriage—and particularly those related to children—are so central to the institution, a state violates that fundamental right when it selectively denies some or all of those protections to same-sex married couples. As the Court has observed, a marriage shorn of those aspects of marital status is a "marriage" in name only, which "demeans the couple" and "diminish[es] the stability and predictability of basic personal relations." *Windsor*, 133 S. Ct. at 2694.

Whether a same-sex couple receives the legal protections associated with marriage goes to the very heart of this Court's holding in *Obergefell*. Marriage is "at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples [were being] denied the constellation of benefits that the States have linked to marriage." *Obergefell*, 135 S. Ct. at 2590. This Court expressly rejected an approach under which "determination of the required availability of specific public benefits to same-sex couples" would be determined on a "case-by-case" basis, because such an incremental approach "would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at 2606.

This Court's opinion in *Windsor* likewise rejected the unequal treatment of married same-sex and opposite-sex couples. In invalidating Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (DOMA), this Court explained that the statute's infirmity arose because its "principal effect is to identi-

fy a subset of state-sanctioned marriages and make them unequal." *Windsor*, 133 S. Ct. at 2694. The Due Process and Equal Protection Clauses did not permit the "creat[ion of] two contradictory marriage regimes within the same State." *Ibid.* DOMA's effect of treating some marriages differently from others impermissibly "place[d] same-sex couples in an unstable position of being in a second-tier marriage." *Ibid.* The Arkansas Supreme Court's decision has a similar effect here. By denying married same-sex couples one of the most important protections given to other married couples, the court's decision has relegated those couples to the same "second-tier status" this Court has twice held to be an unconstitutional denial of their right to equal liberty, dignity, and protection of the laws.

Obergefell and *Windsor* demonstrate that the Constitution does not countenance denying lawfully married same-sex couples any aspect of the legal protections that are premised upon marital status. Although states are generally able "to vary the benefits they confer on all married couples," *Obergefell*, 135 S. Ct. at 2601, they cannot give benefits to opposite-sex married couples while denying them to similarly situated same-sex couples. To permit states to pick and choose which marital protections married same-sex couples and their children may enjoy, based on the same rationales used to justify their exclusion from marriage in the past, would undermine this Court's precedent and return these families to a caste-like position of official stigma and disfavor.

2. This Court has identified the issuance of birth certificates as one of the "constellation of benefits" that must be afforded equally to same-sex married couples

In *Obergefell*, this Court expressly identified the issuance of birth certificates as one of the "governmental rights, benefits, and responsibilities" that states have made part of the "constellation of benefits" of marriage. In recounting those benefits, the Court stated clearly that the "aspects of marital status include * * * birth and death certificates." *Obergefell*, 135 S. Ct. at 2601.

Obergefell's reference to birth certificates as an aspect of marital status was deliberate and central to both the facts and the holding in that case. Several of the petitioner couples in *Obergefell* presented this very issue. As one example, *Henry* v. *Himes* involved same-sex married couples who sought to be listed on their children's birth certificates. Three of the couples had children using anonymous sperm donors. 14 F. Supp. 3d 1036, 1041-1042 (S.D. Ohio), rev'd sub nom. *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom. *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). In each case, the couples planned the conception and sought to raise a family together, yet in each case, Ohio would list only the birth mother as the child's parent on the birth certificate. *Ibid.* So too, in *Tanco* v. *Haslam*, one of the reasons that Valeria Tanco and Sophy Jesty sought to have their marriage recognized by the State of Tennessee was so that, when Dr. Tanco gave birth to their daughter, both parents would be listed on the birth certificate, as would be the case if Dr. Jesty were a man. 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014), rev'd sub nom. *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom. *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). Those *Obergefell* petitioners were in precisely the same situation as petitioners here: they were legally married couples who had given birth while married but were

denied the right granted opposite-sex couples under state law to have both parents listed on their children's birth certificates. Those *Obergefell* petitioners sought, *and this Court upheld*, their equal right to have a female non-birth spouse listed as a parent on their children's birth certificates as was provided to male non-birth spouses under state law. *Obergefell*, 135 S. Ct. at 2601-2602, 2608.

In short, *Obergefell* and *Windsor* make clear that the protection of marital status guaranteed by the Fourteenth Amendment includes equal access to the rights and benefits of marriage. Included among these is the right of a married couple to be included on their child's birth certificate—to the same extent as that right is afforded opposite-sex couples under state law.

B. The Arkansas Supreme Court's Unequal Treatment Of Married Same-Sex Couples Cannot Be Justified Based On The Same Rationale Rejected In *Obergefell* And *Windsor*

As a consequence of the decision below, Arkansas treats opposite-sex spouses and same-sex spouses differently. In an attempt to justify that unequal treatment, the Arkansas Supreme Court cited the same rationale previously used to justify state laws excluding same-sex couples from the right to marry—namely, their inability to procreate a child that is genetically related to both parents. The State may refuse to list a birth mother's female spouse on the child's birth certificate, the court held, because she is not genetically related to the child. According to the court, such a rule is permissible because it advances important state interests related "to an individual's identification of personal health issues and genetic conditions." App., *infra*, 22a.

But regardless of any interest the State may have in recording a child's genetic parentage, the State cannot invoke such an interest selectively, only when issuing birth certificates to same-sex couples. As Arkansas's statutes and case law make clear, Arkansas does not require birth certificates to list only genetic parents for children born to married opposite-sex parents. Indeed, Arkansas law *mandates* that a non-genetic parent be listed on the birth certificate when a child is born to a married opposite-sex couple under circumstances identical to those of the Petitioners here. The court's arbitrary imposition of that limitation only for same-sex spouses cannot be justified and conflicts with the express holdings of *Obergefell* and *Windsor*.

The Birth Certificate Law contains no requirement that a husband must be a genetic parent to be named as a parent on the child's birth certificate. To the contrary, his name must be entered on the birth certificate unless "paternity has been [judicially] determined otherwise," Ark. Code § 20-18-401(f)(1)(A), or the mother, her husband, and the putative father all agree in writing that the putative father should be named instead. In all other cases, the statute mandates that the husband must be listed even when no biological tie to the child exists, and even when the absence of any such tie is definitively known. In particular, a husband who consents to have a child through donor insemination is deemed to be the child's legal father, despite the obvious absence of any biological tie. See Ark. Code § 9-10-201(a) (providing that such a child is "deemed the legitimate natural child of * * * the woman's husband"). And as the State confirmed at oral argument, he is listed on the child's birth certificate, as the plain lan-

guage of the Birth Certificate Law requires. App., *infra*, 82a-83a.

As the Birth Certificate Law attests, Arkansas strongly protects the bond between married parents and their children, including in situations where no biological tie exists. Arkansas law has long held that children born to a married couple are presumed to be the offspring of both spouses. See, *e.g.*, *Jacobs* v. *Jacobs*, 225 S.W. 22 (Ark. 1920). That presumption is not merely a device for identifying biological relationships but reflects the State's compelling interest in the stability and autonomy of marital families and the best interests of marital children. See *id.* at 23 (holding that the marital presumption serves the state's desire to protect marital children, "to preserve the peace of families, and to promote the interest of society"). Those interests, unrelated to biology, are so strong that, in situations where a husband's legal parentage of a marital child is disputed, "the challenging party must first show that rebutting that presumption is in the best interest of a child whose parents" may "remain married and plan to continue as the only parents the child has ever known." *R.N.* v. *J.M.*, 61 S.W.3d 149, 155 (Ark. 2001). As this Court noted in *Michael H.* v. *Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion), the protection of these compelling state interests is deeply rooted in the common law; "our traditions have protected the marital family" against challenges based on the alleged absence of biological bonds.

Moreover, when a child's genetic parents are not married to one another, Arkansas's statutes *do not permit* listing the genetic father on the original birth certificate *unless* both genetic parents (and the mother's spouse, if any) file affidavits to establish the puta-

tive father's paternity. See Ark. Code § 20-18-401(f)(1) and (2); see also *id.* § 20-18-406(e). In the default situation, where the exception is not satisfied, a child's birth certificate will not reflect the genetic parents but instead will list only the mother (or the mother and her spouse), and the child could not rely on a birth certificate in order to pursue the "identification of personal health issues and genetic conditions." App., *infra*, 22a.

In sum, whatever interest Arkansas may have in "maintaining reliable and comprehensive statistics of all vital events for purposes of public health research and identification of public health trends," App., *infra*, 17a, that interest may not be invoked selectively to justify discrimination only against married same-sex parents. As described above, in numerous circumstances Arkansas law requires male spouses to be listed on their children's original birth certificates regardless of whether they are genetically related to their children—including children conceived through donor insemination, as Petitioners' children were here.

In *Obergefell*, this Court put to rest the notion that discrimination against same-sex couples in marriage can be justified based on arguments relating to biological procreation. In *Obergefell*, the Court reversed the opinion of the Sixth Circuit permitting such discrimination based in part upon "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes." *DeBoer* v. *Snyder*, 772 F.3d 388, 405 (6th Cir. 2014), rev'd sub nom. *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). Throughout the proceedings below and in their arguments to this Court, the *Obergefell* respondents defended their policies by citing opposite-sex couples' capacity for procreation. See, *e.g.*, Resp. Br. at 38-39, *Tanco* v. *Haslam*, 135 S. Ct.

2584 (No. 14-562); Resp. Br. at 28-29, *Bourke* v. *Beshear*, 135 S. Ct. 2584 (No. 14-574).

This Court rejected such arguments, recognizing that same-sex couples "establish families" just as opposite-sex couples do, and that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted." *Obergefell*, 135 S. Ct. at 2600. The Court held that same-sex couples must be permitted to marry in order to protect those parent-child bonds. As the Court recognized, "[w]ithout the recognition, stability, and predictability marriage offers, the[] children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser." *Ibid.*; see also *Windsor*, 133 S. Ct. at 2694 (holding that DOMA "humiliates" children of same-sex couples and "makes it even more difficult for [them] to understand the integrity and closeness of their own family").

The Arkansas Supreme Court ignored that direction in carving same-sex married couples out of an aspect of marriage available to other couples in the state. That discrimination can no more be justified based on an asserted state interest in identifying or protecting biological parents, selectively applied only to same-sex couples, than could the discrimination at issue in *Obergefell* and *Windsor*. Plainly, treating similarly situated same-sex and opposite-sex couples equally does not impede any legitimate interest Arkansas may have in tracking biological relationships. Petitioners seek to be named as parents on their children's birth certificates only to the same extent that Arkansas already does so for married opposite-sex couples who have children, including when the husband has no biological relationship to the child. Having decided that a non-biological parent's legal status should be reflected on birth certif-

icates in a variety of circumstances involving opposite-sex couples, the State cannot invoke biology as a ground to deny that right only to same-sex couples. In so holding, the opinion below disregards the holdings of *Obergefell* and *Windsor*, and requires this Court's review.

II. THE QUESTION PRESENTED MERITS THIS COURT'S REVIEW

The Arkansas Supreme Court's decision conflicts directly with the unanimous conclusion of other courts that *Obergefell* prohibits the discrimination at issue here. Allowing the decision below to stand would open the door for other courts to pursue a similarly blatant path of denying same-sex couples important marital rights and protections based on equally specious grounds—including especially the procreation and biology-based rationales rejected by *Obergefell* and *Windsor*. This Court should grant review to foreclose that destabilizing path.

All other courts to address this issue since *Obergefell* have recognized that the decision requires that when a child is born to a married same-sex couple, both spouses must be listed as parents on their child's birth certificate, just as both opposite-sex spouses are. Those decisions have recognized that when, as here, states rely on marriage to determine who is listed on a birth certificate, inclusion on the birth certificate is an aspect of marriage that must be extended to same- and opposite-sex couples alike. In *Henderson* v. *Adams*, the district court recognized that "[w]hen the State Defendant created and utilized the Indiana Birth Worksheet, which asks 'are you married to the father of your child,' the State created a benefit for married women

based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father." No. 1:15cv00220, 2016 WL 3548645, at *13 (S.D. Ind. June 30, 2016). The court further recognized that, under *Obergefell*, "this benefit—which is directly tied to marriage—must now be afforded to women married to women." *Ibid.*; see also *Torres* v. *Seemeyer*, 15-cv-288-bbc, 2016 WL 4919978, at *8-9 (W.D. Wis. Sept. 14, 2016) (granting summary judgment to class of same-sex married couples seeking birth certificates reflecting both parents); Order, *De Leon* v. *Abbott*, SA-13-CA-00982-OLG (W.D. Tex. Aug. 11, 2015) (ordering State of Texas to "implement[] policy guidelines recognizing same-sex marriage in death and birth certificates"); *Roe* v. *Patton*, No. 2:15–cv–00253–DB, 2015 WL 4476734, at *1 (D. Utah July 22, 2015) (granting preliminary injunction requiring issuance of birth certificates to same-sex spouses on same terms and conditions as opposite-sex spouses).[4]

This Court's decision in *Obergefell* recognized the profound importance that marriage and the creation of stable family units play in children's lives. "By giving recognition and legal structure to their parents' rela-

[4] Courts reached similar conclusions under state constitutional law in jurisdictions that permitted same-sex couples to marry before this Court's decision in *Obergefell*. See, *e.g.*, *Gartner* v. *Dep't of Public Health*, 830 N.W.2d 335, 341 (Iowa 2013) (holding that the court's prior decision striking down Iowa's law barring same-sex couples from marriage required issuance of birth certificates listing a birth mother's same-sex spouse as a parent on equal terms with the treatment of children born to opposite-sex spouses).

tionship, marriage allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." See *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2600 (2015). A birth certificate is the legal document that connects children to their parents and helps parents "navigate life" by "pav[ing] the way through numerous transactions, large and small." *Henry*, 14 F. Supp. 3d at 1060. Birth certificates have expansive consequences for parents under state and federal law. See pp. 5-7, *supra*. A birth certificate also provides legal documentation of the profound connection between a child and her parents. *Obergefell* warned that "[w]ithout the recognition, stability, and predictability marriage offers, [] children [of same-sex couples would] suffer the stigma of knowing their families are somehow lesser." 135 S. Ct. at 2600-2601. The Arkansas Supreme Court's decision seeks to embed that lesser treatment of same-sex married couples into law.

The issue is of critical importance to families across the country. Arkansas's discriminatory Birth Certificate Law is far from an outlier. Many states have statutes that have not been updated to reflect the impact of *Obergefell* and thus continue to use gendered terms when directing the issuance of birth certificates to children born to married couples. See, *e.g.*, Ala. Code § 22-9A-7(f)(1) (where child born to married woman, "the husband shall be entered on the [birth] certificate as the father" except in certain narrow circumstances); Alaska Stat. § 18.50.160(d) (same); N.C. Gen. Stat. § 130A-101(e) (same); Wis. Stat. § 69.14(e)(1) ("husband" entered on certificate without exception); Wyo. Stat. § 35-1-411(a) (same except in certain narrow circumstances). Officials in those states are likely to rely on

the Arkansas Supreme Court's decision as grounds to refuse to give the gendered terms in those statutes a gender-neutral reading.

This Court should grant review in light of the profound importance of this issue to petitioners and other Arkansas families, and to prevent other jurisdictions from depriving same-sex married couples of equal marriages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2017

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APPENDIX

APPENDIX A

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Appeal from the Pulaski County Circuit Court
[No. 60CV-15-3153]

Honorable Timothy Davis Fox, Judge

Reversed and Dismissed

JOSEPHINE LINKER HART, Associate Justice

Nathaniel Smith, M.D., M.P.H., Director of the Arkansas Department of Health (Smith), appeals from the circuit court's order granting declaratory judgment and

injunctive relief to three couples, appellees Marisa N. Pavan and Terrah D. Pavan, Leigh D.W. Jacobs and Jana S. Jacobs, and Courtney M. Kassel and Kelly L. Scott. At issue is whether the disposition of this case is controlled by the doctrine of res judicata and whether two state statutes governing the issuance of birth certificates violate federal constitutional rights to equal protection and due process under *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584 (2015), which held that the right of same-sex couples to marry is a fundamental right inherent in the liberty of the person.

In challenging the circuit court's decision on appeal, Smith argues that the circuit court (1) erred in finding that another circuit court had previously granted injunctive relief regarding birth certificates in its orders in *Smith v. Wright*, 60CV-13-2662 (Pulaski Co. Cir. Ct. May 9, 2014 and May 15, 2014), that was later appealed to this court and dismissed by this court as moot, *Smith v. Wright*, 2015 Ark. 298 (per curiam); (2) erred in granting declaratory relief based on its conclusion that *Obergefell* had resolved issues relating to the issuance of birth certificates for the minor children of same-sex couples; (3) erred in finding a due-process violation by the Arkansas Department of Health's (ADH) refusal to issue birth certificates for minor children of married female couples showing the name of the spouse of the mother; (4) erred in finding an equal-protection violation by ADH's refusal to issue birth certificates for minor children of married female couples showing the name of the spouse of the mother; (5) erred by not applying to the facts of this case Arkansas Code Annotated section 9-10-201(a) (Repl. 2015), which addresses children born to married women by means of artificial insemination. We reverse and dismiss.

Appellees are three married female couples. The Pavans were married in New Hampshire in 2011, and the minor child was born to Terrah in Arkansas in May 2015. The child was conceived through artificial insemination involving an anonymous donor. ADH would not place Marisa's name on the minor child's birth certificate. The Jacobses were married in Iowa in 2010, and the minor child was born to Leigh in Arkansas in June 2015, also having been conceived through artificial insemination involving an anonymous donor. ADH would not place Jana's name on the minor child's birth certificate. Courtney Kassell and Kelly Scott resided in Arkansas when the minor child was born to Courtney in Arkansas in January 2015. The conception took place through artificial insemination involving an anonymous donor. The couple married in July 2015. Both before and after their marriage, the couple sought to have Kelly's name placed on the minor child's birth certificate, but ADH denied the request.

Appellees filed suit in the circuit court, seeking a declaration that the refusal to issue birth certificates with the names of both spouses on the birth certificates of their respective minor children violated their constitutional rights to equal protection and due process. Appellees also sought to have certain statutory provisions governing the issuance of birth certificates declared unconstitutional as written. Appellees further sought to enjoin Smith from refusing to list the names of both spouses of a same-sex couple on the birth certificate of the minor child. The three couples also asked for an order requiring Smith to issue corrected birth certificates naming both spouses.

Smith answered the complaint, and both parties filed competing motions for summary judgment. At the

conclusion of the hearing on the motions, the circuit court announced its intention to order Smith to amend the birth certificates of appellees' children. Smith filed a motion for stay. In a subsequent order and memorandum opinion, the motion for stay was denied. In the order and opinion, the circuit court again ordered Smith to issue three amended birth certificates showing the names of both spouses on the birth certificates of their respective minor children.[1] The court, however, dismissed the claims made by the couples in their capacities as representatives of their respective minor children.[2]

In reaching its decision, the circuit court concluded that the circuit court in *Wright* had previously granted injunctive relief regarding birth certificates, and thus, the case was controlled by res judicata. The circuit court also declared as unconstitutional portions of Arkansas Code Annotated section 20-18-401(e), (f) (Repl. 2014), which governs entry of the name of the mother

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[1] After the circuit court denied Smith's petition for a stay, Smith petitioned this court for an emergency stay of the circuit court's order. Because Smith indicated that he did not wish to challenge the portion of the order requiring him to provide amended birth certificates to the appellees, this court denied the petition for a stay as to the portions of the order and memorandum opinion ordering him to provide amended birth certificates to the appellees. This court granted the petition for an emergency stay as to the remainder of the order and memorandum opinion. This court also granted the motion of the American Civil Liberties Union and the Arkansas Civil Liberties Union for permission to file an amicus curiae brief.

[2] The crux of the case before us is the registration of children's births. Despite the central question of the children's rights relating to their birth certificates, this question was not argued by the parties; nor was it addressed or ruled on by the circuit court.

and the father of the child on birth certificates. Further, the circuit court stated that it would interpret Arkansas Code Annotated section 20-18-406(a)(2), which addresses the issuance of a new birth certificate to a "person" who has been "legitimated," in a manner that the circuit court concluded would make the statute constitutional. Smith brought this appeal from the circuit court's decision.

Summary judgment may be granted only when there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *See, e.g.*, *Washington Cty. v. Bd. of Tr. of the Univ. of Ark.*, 2016 Ark. 34, at 3, 480 S.W.3d 173, 175.

Ordinarily, upon reviewing a circuit court's decision on a summary-judgment motion, we would examine the record to determine if genuine issues of material fact exist. *Id.*, 480 S.W.3d at 175. However, in a case where the parties agree on the facts, we determine whether the appellee was entitled to judgment as a matter of law. *Id.*, 480 S.W.3d at 175. When parties file cross-motions for summary judgment, as in this case, they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case. *Id.*, 480 S.W.3d at 175. As to issues of law presented, our review is de novo. *Id.*, 480 S.W.3d at 175.

We first address Smith's argument that the circuit court erred in concluding that the disposition of this case is controlled by res judicata. In its opinion, the circuit court noted that Smith was a party in *Wright*. The circuit court further noted that the *Wright* plaintiffs

filed a summary-judgment motion, requesting that the court issue a permanent mandatory injunction

> [r]equiring Defendant Nathaniel Smith, M.D., as interim director of the Arkansas Department of Health, and his successors, to henceforth issue birth certificates for children born of marriages between members of the same sex that were entered into in other states to reflect that the married parents are the parents of the children born of the marriage; and, also, requiring said Defendant to issue amended birth certificates to any married couples of the same sex that previously gave birth to children in Arkansas to reflect that the married parents are the parents of the children born of the marriage.

The circuit court further noted that in *Wright*, the final judgment of May 15, 2014, stated that

> it is and was the intent of the Order to grant Plaintiff's Motion for Summary Judgment without exception and as to all injunctive relief requested therein. In fact, this was the expressly stated title of the May 9, 2014 Order. Plaintiff's motion requested injunctive relief and properly identified the relevant laws at issue in this challenge.

The circuit court concluded that the claims brought by the Pavans and the Jacobses were fully and completely litigated in *Wright* and that the *Wright* injunction is res judicata and binding on Smith.

On appeal, Smith argues that the *Wright* court did not expressly grant injunctive relief regarding birth

certificates. The parties note that the May 15, 2014 order provided

> that Plaintiffs request for a permanent injunction is GRANTED and the Court does hereby permanently enjoin all Defendants . . . from enforcing Amendment 83 to the Arkansas Constitution, Act 146 of 1997, § 1(b)-(c) (codified at Ark. Code Ann. 9-11- 208(a) (1)-(2)) and Act 144 of 1997 (codified at Ark. Code Ann. §§ 9-11-107 (b), -109); and all other state and local laws and regulations identified in Plaintiff's complaint or otherwise in existence to the extent they do not recognize same-sex marriages validly contracted outside Arkansas, prohibit otherwise qualified same-sex couples from marrying in Arkansas or deny same-sex married couples the rights, recognition and benefits associated with marriage in the State of Arkansas.

What is at issue here is whether the doctrine of collateral estoppel applies. Collateral estoppel, also known as issue preclusion, bars relitigation of issues of law or fact previously litigated by a party. *See, e.g., Johnson v. Union Pac. R.R.*, 352 Ark. 534, 544, 104 S.W.3d 745, 750 (2003). The elements of collateral estoppel are that (1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) it must have been determined by a valid and final judgment, and (4) the determination must have been essential to the judgment. *Id.*, 104 S.W.3d at 750.

Rule 65(d)(1) of the Arkansas Rules of Civil Procedure requires that "[e]very order granting an injunc-

tion and every restraining order must (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Thus, an injunction order cannot refer to the complaint or any other document. *See Baptist Health v. Murphy*, 362 Ark. 506, 209 S.W.3d 360 (2005) (applying rule).

A fair reading of the *Wright* orders indicates that the orders did not address the issues presented here relating to birth certificates. In fact, birth certificates are not mentioned at all in the orders. Instead, in examining the *Wright* orders, the *Wright* court ruled on the constitutionality of amendment 83 and statutes governing marriage. We note that the circuit court, in concluding that *Wright* should be given the effect of res judicata, ruled that if the *Wright* judgment did not comply with Rule 65(d) concerning the specificity of its injunctive language, then that issue could have been raised by Smith in an appeal in *Wright*. Further, the circuit court stated that when this court dismissed the *Wright* appeal as moot, Smith had the opportunity to point out to the court that all of the issues relating to the injunction were not resolved by *Obergefell*. We hold, however, that the language in the *Wright* orders would not have placed Smith on notice that he needed to appeal those orders to this court and raise on appeal arguments related to the overbreadth of the injunctive relief granted and to the issuance of birth certificates.

In the next issue on appeal, Smith argues that the circuit court erred in granting declaratory relief based on *Obergefell*. The circuit court's opinion suggests that it based its analysis of the constitutionality of the birth-certificate statutes at issue here entirely on the holding

of *Obergefell*. There are two statutes that the circuit court considered. The first, Arkansas Code Annotated section 20-18-401 provides in part as follows:

> (e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.
>
> (f)(1) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:
>
> (A) Paternity has been determined otherwise by a court of competent jurisdiction; or
>
> (B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavits may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.
>
> (2) If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be en-

> tered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.
>
> (3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.
>
> (4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

In considering Arkansas Code Annotated section 20-18-401(e), (f), the circuit court found that the statute "intertwined the concepts of 'parent' with certain rights and presumptions occurring within a marital relationship, using now impermissible limiting spousal terms of 'husband' and 'wife.'" The circuit court concluded that "[sluch language categorically prohibits every same-sex married couple, regardless of gender, from enjoying the same spousal benefits which are available to every opposite-sex married couple." The circuit court found that, based on *Obergefell*, the majority of subsections (e) and (f) had to be struck down as unconstitutional.

The other statute at issue, Arkansas Code Annotated section 20-18-406(a) (2), provides in part as follows:

> (a) The State Registrar of Vital Records shall establish a new certificate of birth for a person born in this state when he or she receives the following:
>
> ....

> (2) A request that a new certificate be established and any evidence, as required by regulation, proving that the person has been legitimated, or that a court of competent jurisdiction has determined the paternity of the person or that both parents have acknowledged the paternity of the person and request that the surname be changed from that shown on the original certificate.

In considering this statute, the circuit court found that, in light of *Obergefell*,

> the phrase "person to be legitimated" is declared to include the minor children of any couple—same-sex or opposite-sex—who married subsequent to the birth of the minor child, and who present proof to the Arkansas Department of Health of the date of birth of the minor child and of the date of their marriage. In the event any biological parent is listed on a birth certificate sought to be amended, a court order shall be required before an amended certificate is issued which removes such person(s) name. In the event one or both of the spouses was married to another individual at any time from the birth of the minor child forward, no amended birth certificate shall be issued absent a court order naming the current spouses as the parents of the minor child.

We disagree with the circuit court's analysis of both statutes. *Obergefell* did not address Arkansas's statutory framework regarding birth certificates, either expressly or impliedly. Rather, the United States Supreme Court stated in *Obergefell* that "the right to

marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Obergefell*, __U.S. at ___, 135 S. Ct. at 2604. The Court mentioned birth certificates only once, stating,

> Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

Obergefell, __ U.S. at __, 135 S. Ct. at 2601. This single mention of birth certificates was related only to its observation that states conferred benefits on married couples, which in part demonstrated that " the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." *Id.* at __, 135 S.Ct. at 2599.

The amicus curiae brief notes that in *Obergefell*, the Court stated that it declined to "stay its hand to allow slower case-by-case determination of the required

availability of specific public benefits to same sex- couples" because "it would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at __, 135 S. Ct. at 2606. We conclude below, however, that *Obergefell* does not impact these statutes governing the issuance of birth certificates and that these statutes pass constitutional muster.[3]

In interpreting the statutes, every act carries a strong presumption of constitutionality. Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear. *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, at 3, 490 S.W.3d 298, 300. When possible, we will construe a statute so that it is constitutional. *Id.*, 490 S.W.3d at 300. In determining the constitutionality of a statute, we look to the rules of statutory construction. *Id.*, 490 S.W.3d at 300. When construing a statute, the basic rule is to give effect to the intent of the legislature, and where the language of a statute is plain and unambiguous, we determine the legislative intent from the ordinary meaning of the language used. *Id.*, 490 S.W.3d at 300. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.*, 490 S.W.3d at 300. This court reviews both the circuit court's interpretation of the constitution as well as issues of statutory in-

[3] Both Chief Justice Brill and Justice Danielson misread and essentially add to the language they cite from Obergefell to suggest that the United States Supreme Court has ruled on the issue before us. While Justice Wood relies on Obergefell, she essentially acknowledges that Obergefell did not specifically address the issue before us.

terpretation de novo, because it is for this court to determine the meaning of a statute. *Brown v. State*, 2015 Ark. 16, at 6, 454 S.W.3d 226, 231.

Arkansas Code Annotated section 20-18-401(e) provides that the mother is deemed to be the woman who gives birth to the child. Subsection (f) governs who would be considered the father, providing that if the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child. Because we determine legislative intent from the ordinary meaning of the language used, we note that "husband" is defined as "a married man." *Webster's Third New International Dictionary* 1104 (2002). "Father" is defined as "a man who has begotten a child." *Webster's Third New International Dictionary* 828 (2002). Thus, in subsection (f), "father" identifies the child's biological father, and "husband" identifies the mother's male spouse. The mother's spouse, or "husband," is entered on the certificate as the "father" of the child if the mother was married at the time of either conception or birth or between conception and birth. Subsection (f)(1), however, further provides that the name of the husband would not be entered on the certificate as the father upon a determination of paternity by a court order or by the proper affidavits regarding the child's paternity. Thus, the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife. We see no basis for the circuit court's conclusion that the statute impermissibly "intertwined" the concepts of "parent" with the rights and presumptions of marriage by using the words "husband"

and "wife." We hold that Arkansas Code Annotated section 20-18-401(e), (f) does not run afoul of *Obergefell*.

Under Arkansas Code Annotated section 20-18-406(a)(2), a new birth certificate is provided when it is proved that the "person has been legitimated." While the phrase "person has been legitimated" is not defined, we have observed that "an illegitimate child is a child who is born at the time that his parents, though alive, are not married to each other," and that "a child is considered legitimate if the parents were married at the time of its conception and before its birth, even though they were not married to each other at the time the child was born." *Willmon v. Hunter*, 297 Ark. 358, 360, 761 S.W.2d 924, 925 (1988). Thus, Arkansas Code Annotated section 20-18-406(a)(2) provides that a new birth certificate may be issued on a showing that the child's parents, who conceived the child, have married. This interpretation comports with ADH's own regulations, which provide that "[i]f the natural parents marry after the birth of a child, a new certificate of birth shall be prepared by the State Registrar for a child born in this State, upon receipt of an affidavit of paternity signed by the natural parent of said child, together with a certified copy of the parents' marriage record." Code Ark. R. 007.12.1-5.2. Thus, this statute considers the relationship of the biological mother and the biological father to the child. Accordingly, we see no basis for the circuit court's conclusion that *Obergefell* requires this court to construe the biologically based phrase "person to be legitimated"—in a statute governing birth certificates—to include the minor children of a same-sex couple who married after the birth of the minor child. We hold that *Obergefell* did not answer the questions presented in this case regarding the constitutionality of

Arkansas statutes relating to the issuance of birth certificates.

We turn to the circuit court's finding that Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2) unconstitutionally deprive appellees of due process and equal protection. There are two primary ways to challenge the constitutionality of a statute: an as-applied challenge, in which the court assesses the merits of the challenge by considering the facts of the particular case in front of the court, not hypothetical facts in other situations, and a facial challenge, which seeks to invalidate the statute itself. *Layman v. State*, 2015 Ark. 485, at 3, 478 S.W.3d 203, 205. A facial invalidation of a statute is appropriate if it can be shown that no set of circumstances exists under which the statute would be valid. *Martin v. Kohls*, 2014 Ark. 427, at 11, 444 S.W.3d 844, 850. We conclude that because the couples received the relief they requested and because that relief is not challenged on appeal—the issuance of birth certificates naming both spouses on the birth certificate—we do not have before us an as-applied challenge. Though the circuit court did not describe the challenge presented by the appellees, we conclude that their challenge was a facial challenge.

In our analysis of the statutes presented above, it is the nexus of the biological mother and the biological father of the child that is to be truthfully recorded on the child's birth certificate. That truthful information is required in the application for an initial or amended birth certificate is evidenced by Arkansas Code Annotated section 20-18-105(a)(1), which allows a person to be punished by a $10,000 fine and five years' imprisonment for knowingly making a false statement in a vital

record. Our conclusion is supported by the only evidence presented in the record, the affidavit of Melinda Allen, ADH's Vital Records State Registrar. Allen averred that, in that capacity, she supervised the issuance and maintenance of birth certificates. She further averred as follows:

> The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect. The accuracy of the records allows ADH to compile, maintain, and analyze vital statistics. ADH had a legitimate interest in maintaining reliable and comprehensive statistics of all vital events for purposes of public health research and identification of public health trends.
>
> Identification of biological parents through birth records is critical to ADH's identification of public health trends, and it can be critical to an individual's identification of personal health issues and genetic conditions. Even in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, the statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s). The original birth certificates is sealed, but maintained by ADH. In cases, of adoption, ADH also maintains sealed copies of original birth certificates reflecting biological parent-

> age. This is important because a child may need to access information about biological parentage for health-related reasons. The State has a legitimate interest in maintaining such information (even if under seal and releasable only pursuant to a court order) in order to protect the future health of the child.

We now consider appellees' due process challenge to Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2). On the question of due process, the United States Supreme Court has stated,

> Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.
>
> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.

Obergefell, __ U.S. at __, 135 S. Ct. at 2597-98 (internal citations omitted).

As stated in the court's order, the examples provided by appellees of how the failure to include both same-sex spouses on birth certificates or amended birth certificates may adversely affect their legal status regarding the minor children included

> identification procedures for Social Security numbers and passports, denial of the right to authorize medical care for the minor, denial of the right to authorize school related activities, denial of the right to apply for needed governmental or employment related benefits, denial of survivor benefits in the case of death of one of the spouses, denial to the child of inheritance rights, disruption of the parent-child relationship in the event of divorce of the same-sex couple, and the award of child support in the event of divorce of a same-sex couple.

In its ruling, however, the circuit court stated that its order "does not legally resolve any of those potential issues." Furthermore, appellees did not present evidence, or even statutory authority, to support their assertion that any of these issues are answered by who is listed as the mother and the father on a birth certificate.

As noted above, the *Obergefell* Court held that the right of same-sex couples to marry is a fundamental right inherent in the liberty of the person under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Obergefell*, __ U.S. at ___, 135 S. Ct. at 2604. The Court has further stated that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care,

custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

In finding a due-process violation, however, the circuit court has conflated distinct categories of marriage, parental rights, and vital records. The question presented in this case does not concern either the right to same-sex marriage or the recognition of that marriage, or the right of a female same-sex spouse to be a parent to the child who was born to her spouse. What is before this court is the narrow issue of whether the birth-certificate statutes as written deny the appellees due process. The purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child. On the record presented, we cannot say that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord the interest its respect under either statute.

As for appellees' equal-protection challenge to Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2), we have observed here that under these statutes, the birth certificate evidences biological relationships. Appellees contend that the statutes result in disparate treatment by permitting male spouses of female mothers to be listed as fathers, even though the male spouse may not be the child's biological father. We observe, however, that under Arkansas Code Annotated section 20-18-401(f), the husband's designation as father may be refuted, which evidences that the biological connection is what the birth certificate intends to record. Moreover, our statutes penalize anyone who knowingly makes a false statement in a vital record. Ark. Code Ann. § 20-18-105(a)(1). In the situation involving the female

spouse of a biological mother, the female spouse does not have the same biological nexus to the child that the biological mother or the biological father has. It does not violate equal protection to acknowledge basic biological truths. As has been noted,

> [t]o fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 73 (2001).

Nevertheless, in considering an equal-protection claim, and in considering a heightened standard to withstand equal-protection scrutiny, it must be established at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. *Id.*, 533 U.S. at 60.

We conclude that the evidence presented by Smith—the affidavit of the vital records state regis-

trar—established that the challenged classification serves an important governmental objective—tracing public-health trends and providing critical assistance to an individual's identification of personal health issues and genetic conditions—and that the means employed—requiring the mother and father on the birth certificate to be biologically related to the child—are substantially related to the achievement of those objectives.

Finally, in his brief and during oral argument to this court, Smith cited Arkansas Code Annotated section 9-10-201(a), which provides that "[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination." In oral argument, Smith conceded that this statute is constitutionally infirm and suggests that if this court were to review this statute on appeal, the court could resolve many of the concerns raised by the appellees by amending the wording of the statute. However, this court is not a legislative body, and it cannot change the wording of the statute. The legislative branch of the state government has the power and responsibility to proclaim the law through statutory enactments, and the judicial branch has the power and responsibility to interpret the legislative enactments. *Fed. Express Corp. v. Skelton*, 265 Ark. 187, 197-98, 578 S.W.2d 1, 7 (1979). Furthermore, the circuit court did not rule on the constitutionality of this statute. Thus, Smith has failed to preserve this issue for appeal. *See, e.g., TEMCO Constr.*,

LLC v. Gann, 2013 Ark. 202, at 12, 427 S. W.3d 651, 658. We decline to address Smith's argument.[4]

Because we conclude that the circuit court erred in finding that the case was controlled by *Wright*, and because we conclude that the circuit court erred in finding that Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2) facially violated the appellees' rights to due process and equal protection, we reverse and dismiss.[5]

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[4] "Chief Justice Brill's extended discussion of the statute is purely advisory in nature. As this court has said on numerous occasions, we neither answer academic questions nor issue advisory opinions. *See, e.g.*, *Hampton v. State*, 2014 Ark. 303, at 7, 437 S.W.3d 689, 693. The State suggested that we rewrite this same statute to address an issue that was never ruled on by the circuit court. Consistently with our longstanding practices and jurisprudence, we decline to do so. We further note that neither the Solicitor General in his oral argument nor Chief Justice Brill in his opinion has addressed the right of a child to knowledge of his or her biological parentage and the right of the child to a birth certificate issued by ADH that truthfully sets out his or her lineage.

[5] Justice Wood contends that this court should reverse and vacate the circuit court's order to conduct a full evidentiary hearing in light of concessions made by the State. The parties, however, have not requested such relief. The parties consider the case fully litigated and ready for a determination concerning whether the circuit court committed trial error. It would be inappropriate for this court to reverse and remand a case for retrial—not because the circuit court committed trial error—but because this court wants the parties to present more evidence and raise more issues. This court has repeatedly stated that matters outside of the record will not be considered on appeal. *See, e.g.*, *McDermott v. Sharp*, 371 Ark. 462, 465, 267 S.W.3d 582, 585 (2007). Justice Wood further suggests that this court might stay its hand and remand to allow action by the General Assembly. However, there is nothing in the record to suggest that the General Assembly will pass laws that will address issuance of birth certificates. Morever, staying a case

On a collateral matter, in *Smith v. Pavan*, 2015 Ark. 474 (per curiam), this court granted in part and denied in part Smith's petition for an emergency stay pending appeal. This court also observed that the circuit court's order contained "inappropriate remarks," and we stated our intent to address the remarks following our receipt of the entire record on appeal. The gist of Judge Fox's remarks was that if this court granted the stay, then it would deprive persons of their constitutional rights, and that this court previously had deprived people of their constitutional rights in a separate matter. We remind Judge Fox that, in accordance with the Arkansas Code of Judicial Conduct, all courts take great care to "uphold and apply the law" and "perform all duties of judicial office fairly and impartially." Ark. Code Jud. Conduct R. 2.2. All courts intend to faithfully apply both federal and state constitutional law in a manner that does not result in the deprivation of constitutional rights. We remind Judge Fox that this same code requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Ark. Code Jud. Conduct R. 1.2. A remark made to gain the attention of the press and to create public clamor undermines "public confidence in the independence, integ-

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to await action by the General Assembly is unlike circumstances where we stay an appeal pending the disposition of another case that is on appeal in federal court that addresses the same issues. *See Unborn Child Amendment Comm. v. Ward*, 318 Ark. 165, 883 S.W.2d 817 (1994) (staying appeal of a circuit-court order after recognizing that, until such time as the federal court's decision is reversed by the appropriate appellate court, the permanent injunction issued by the federal district court will be binding on the State of Arkansas and its instrumentalities).

rity, and impartiality," not only of this court, but also of the entire judiciary. Judge Timothy Davis Fox is hereby admonished for his inappropriate comments made while performing the duties of his judicial office.[6]

Reversed and dismissed.

BRILL, C.J., and WOOD, J., concur in part and dissent in part.

DANIELSON, J., dissents.

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[6] Citing several cases, Justice Danielson asserts that this court should not caution Judge Fox for his inappropriate comments made while performing the duties of his judicial office. These cases, however, are wholly inapposite to the present situation; they do not involve the cautioning of a trial judge for comments made while performing judicial duties, but rather concern criminal or contempt proceedings against laymen. When one rules as a judge, he is governed by ethical considerations and restrictions not required or even expected of laymen. Experience has established that the public will benefit if the judge obeys them. The question presented is whether a circuit judge may indulge in unfounded and intemperate criticism or abuse of the courts while on the bench.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Concurring In Part; Dissenting In Part

HOWARD W. BRILL, Chief Justice

Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you is worth savin'

Then you better start swimmin' or you'll sink like a stone
For the times they are a-changin'
. . . .

Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside and it is ragin'

Bob Dylan[1]

The Supreme Court of the United States has held that state bans on same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). *See also* Ark. Const. art. II, § 3 ("The equality of all persons before the law is recognized."). The six plaintiffs in this case have sought judicial relief to obtain birth certificates for their children. It is true that "individuals need not await legislative action before asserting a fundamental right." *Obergefell*, 576 U.S. at ___, 135 S. Ct. at 2605. But our tripartite system of government rests on the premise that the three

[1] Bob Dylan, *The Times They Are A-Changin' on The Times They Are A-Changin*, (Columbia Records 1964). The Nobel Prize in Literature was awarded to Bob Dylan for having created new poetic expressions within the great American song tradition."

Press Release-The Nobel Prize in Literature 2016 (Oct. 13, 2016), <https://nobelpnze.org/nobelprizes/literature/laureates/2016/press/html

branches not only have separate powers, but also have unique powers and responsibilities and capabilities. I write this opinion, concurring in part and dissenting in part, to highlight the roles of all three branches. I would affirm in part the ruling of the circuit court, and I would reverse in part the ruling of the circuit court.

I. *The Effect of Obergefell*

The holding in *Obergefell* is narrow: The Supreme Court declared same-sex marriage legal in all fifty states. The question here is the broader impact of that ruling as it affects birth certificates. In its list of aspects of marital status, the Court mentioned "birth certificates." The present case asks whether a married same-sex couple is entitled to a birth certificate for a child born to one of the married individuals. The logical extension of *Obergefell*, mandated by the Due Process Clause and the Equal Protection Clause, is that a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple. As the Court stated in *Obergefell*, same-sex couples may not be denied "the constellation of benefits that the States have linked to marriage." 576 U.S. at ___, 135 S. Ct. at 2601. The right to a birth certificate is a corollary to the right to a marriage license. I analyze the circuit court's ruling, and the issues presented, in light of three scenarios.

A. Scenario One

Two married couples wish to be parents. Unable to conceive naturally, they use an anonymous donor's sperm for artificial insemination. In each couple, the woman gives birth to a child.

The first couple is a man and a woman. Arkansas Code Annotated section 9-10- 201(a) (Repl. 2015)

"deems" the husband to be the father of the child, provided that he has consented in writing to the artificial insemination. The donor has no legal responsibility or rights to the child. The birth certificate will name the woman and her husband as the parents of the child.

The second couple is a woman and a woman. But the language of the statute says "husband." At oral argument, the State of Arkansas conceded, properly so, that, pursuant to the Court's holding in *Obergefell*, the second couple is entitled to a birth certificate listing both women as parents. The State suggested that this court simply substitute the word "spouse" for "husband" in section 9-10-201(a). This statutory provision was not fully litigated below and was not ruled on by the circuit court. Without engaging in that statutory legerdemain, the circuit court granted the relief in decreeing the issuance of birth certificates to the two married same-sex couples. In light of *Obergefell*, this court should affirm that result. Accordingly, I dissent from that part of the majority opinion denying relief.[2] I would remand this part of the circuit court's order for appropriate action.

B. Scenario Two

Two unmarried couples wish to be parents. Unable to conceive naturally, they use the sperm of an anonymous donor for artificial insemination. In each instance, the woman gives birth to a child. The first couple is a man and woman. The second couple is a woman and a woman.

After the child is born to the woman, the couple marries and seeks a birth certificate with both names.

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[2] Although I find some of Judge Fox's comments inappropriate, I dissent from the majority's decision to admonish him.

Neither couple may use section 9-10-201(a), which is limited to couples married at the time of the artificial insemination. How is the other individual to be added to the birth certificate as a parent? How do these couples obtain a birth certificate? After *Obergefell*, may the burden on the same-sex couple be greater than the burden on the opposite-sex couple?

Arkansas Code Annotated section 20-18-406(a)(2) (Repl. 2014) states that a new birth certificate will be issued when there is "any evidence, as required by regulation, proving that the person has been legitimated, or that a court of competent jurisdiction has determined the paternity of the person or that both parents have acknowledged the paternity of the person." Although the application of this provision may be obvious in the case of an opposite-sex couple, it is not obvious in the case of a same-sex couple. What is the "evidence, as required by regulation"? What is the meaning of "the person has been legitimated"? What is the "paternity of the person"?

I concur with the majority's decision that the circuit court exceeded its authority in giving a court-ordered definition of the phrase "person has been legitimated" in Arkansas Code Annotated section 20-18-406. In addition, the circuit court's striking subsections (e) and (f) of Arkansas Code Annotated section 20-18-401 may have unforeseen consequences or an impact on parents going far beyond those in this litigation. The circuit court had no basis to award this particular relief to the unmarried couple who had a child and subsequently married. Legislative and executive actions are necessary to provide what *Obergefell* requires.

The need for legislative and executive action is demonstrated by consideration of an affidavit submitted by the State in its motion for summary judgment. Melinda Allen, the Vital Records State Registrar for the Arkansas Department of Health, stated, in relevant part,

> If an Arkansas hospital where a woman gives birth to a child submits documentation to ADH reflecting both the woman and her spouse or another person as parents of the child, ADH issues an original birth certificate reflecting both the woman and her spouse or other indicated person as parents of the child. . . . ADH processes all original birth certificates of children born in Arkansas hospitals based upon information submitted by the hospitals without regard to the sexual orientation, gender, or marital status of the woman giving birth to the child, and without regard to the sexual orientation, gender, or marital status of any other parent of the child.

The affidavit of Melinda Allen also states,

> ADH amends birth certificates to add a parent if presented with a court order determining parentage or otherwise granting parental rights to an intended parent, or approving adoption by an intended parent, or otherwise instructing ADH to amend a birth certificate to add an intended parent. ADH processes such amendments without regard to the sexual orientation, general, marital status, or any other characteristic of any parent or intended parent of a child.

The circuit court appears to have relied on Allen's affidavit that the unmarried, same-sex couple was nevertheless entitled to a birth certificate at the time of the child's birth. However, that affidavit, and the practice that it proclaims, may be inconsistent with the existing Arkansas statutes. For instance, the affidavit speaks of the "intended parent," a phrase not found in that statutory provision. I can only repeat the point made above that legislative and executive actions are needed to effect appropriate and required changes.

C. Scenario Three

Two married couples, one opposite-sex and one same-sex, wish to be parents. In the case of each couple, none of the spouses could give birth. If a child becomes available to the couples, the statutory mechanism for parenthood is adoption. See Ark. Code Ann. §§ 9-9-201 et seq. Under the rationale of *Obergefell*, both married couples are to be treated equally. The law is now gender-neutral: each couple may now seek adoption under the statutory standards and obtain a birth certificate.

II. *Conclusion*

These scenarios are a mere preview of the variations that may be presented by the changes in society and the changes in reproductive methods. Regardless of personal values and regardless of a belief that the United States Supreme Court may have wrongfully decided a legal issue, all are bound by the law of the land.[3]

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[3] Following the *Obergefell* decision, Governor Asa Hutchinson issued the following statement: "'While my personal convictions will not change, as Governor I recognize the responsibility of the state to follow the direction of the U.S. Supreme Court. As a result of

See U.S. Const, art. VI, cl. 2. The oath taken by state judges, legislators, and executive officers is to uphold the Constitution of the United States and the Constitution of the State of Arkansas. This court has no power to order the legislature to make statutory changes or the executive branch to alter regulations.[4]

The three branches of our government protect the constitutional rights of its citizens. In *Federal Express Corporation v. Skelton*, 265 Ark. 187, 197, 578 S.W.2d 1, 7 (1979), this court aptly stated,

> Our government is composed of three separate independent branches: legislative, executive and judicial. Each branch has certain specified powers delegated to it. The legislative branch of the State government has the power and responsibility to proclaim the law through statutory enactments. The judicial branch has the power and responsibility to interpret the legislative enactments. The executive branch has the

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this ruling, I will direct all state agencies to comply with the decision. . . ." Press Release of June 26, 2015.

[4] *See Marie v. Mosier*, ___ F. Supp. 3d____, 2016 WL 3951744 (D. Kan. July 22, 2016) (issuing an injunction against state defendants to comply with the broad holding of *Obergefell* and stating that the court "cannot assign plaintiffs' constitutional rights to . . . . uncertainty . . . . [of] defendants 'assurances of future compliance); *Henderson v. Adams*, ___ F. Supp. 3d ___, 2016 WL 3548645 (S.D. Ind. June 30, 201,6) (holding that statutory scheme violated same-sex parents' rights to equal protection); *Brenner v. Scott*, 2016 WL 3561754 (N.D. Fla. Mar. 30, 2016) ("That the Legislature chose not to pass legislation to bring Florida['s birth certificate statute] into compliance [with the ruling in *Obergefell*] does not help [state officials].").

> power and responsibility to enforce the laws as enacted and interpreted by the other two branches.

The times indeed are a-changin'. All three branches of the government must change accordingly. It is time to heed the call.

APPENDIX C

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Concurring In Part And Dissenting In Part

Rhonda K. Wood, Associate Justice

The fluid nature of everyone's reaction to the same-sex marriage decision and the State's understandably evolving response to it requires this court to reverse, vacate, and remand the portion of the circuit court's order regarding the facial and as-applied constitutional challenges to Ark. Code Ann. §§ 20-19-401 and 406. Under the prudential-mootness doctrine, which I en-

courage this court to adopt, a court may withhold relief based on considerations of prudence and comity for coordinate branches of government [that] counsel the court to stay its hand, and to withhold relief it has the power to grant." *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (citing *Chamber of Commerce v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)).

In simple terms, this case is fluctuating and underdeveloped. In addition, and contrary to the majority's view, I believe states must comprehensively review their laws so that married same-sex couples and opposite-sex couples receive the same benefits of marriage in light of the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). I encourage the legislature to address the relevant birth-certificate statutes in the upcoming session to avoid a plethora of litigation and confusion for the courts. After all, these decisions are matters of policy that are best made by the legislative branch, which has the exclusive authority to determine public policy. *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 342, 150 S.W.3d 276, 280 (2004).

The federal court's prudential-mootness doctrine should be adopted and applied to this case. This doctrine has "particular applicability in cases . . . where the relief sought is an injunction against the government." *S. Utah Wilderness All.*, 110 F.3d at 727. The key consideration is whether "circumstances changed since the beginning of litigation that forestall any occasions for meaningful relief." *Id.* Two key circumstances have developed since this litigation started. First, plaintiffs received relief in that the State has issued the appropriate birth certificates to them. Second, the

State concedes that the relevant statutes involving determination of parentage must comply with *Obergefell*, including the statute governing the status of people born via artificial insemination. These developments render the majority's decision provisional.

The provisional nature of this case is enhanced by its procedural posture. The parties filed cross-motions for summary judgment. When summary judgment is sought, the circuit court must decide if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ark. R. Civ. P. 56(c) (2016). But this does not mean that the mere existence of cross-motions for summary judgment implies there are no genuine issues of material fact. "The fact that both parties simultaneously are arguing that there is no genuine dispute of fact, however, does not establish that a trial is unnecessary thereby empowering the court to enter judgment as it sees fit." Charles A. Wright, Arthur Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2720, 327-28 (3d ed. 1998) (explaining in terms of the federal rules). In other words, when two parties file cross-motions, there may still be undisputed or unresolved facts. The parties in those cases are only "contending for the purpose of his own motion that there is no material issue of fact in the case." *Wood v. Lathrop*, 249 Ark. 376, 379, 459 S.W 2d 808 809 (1970). Thus, even with the parties' stipulation, the court must still determine whether the material facts needed to prove the allegation are indeed present and undisputed.

The difficulty on appeal is much has changed: both parties concede that material facts have changed; the

State's application of Arkansas' statutes has changed; and the State's interpretation of *Obergefell* has changed. First, according to the affidavit of the State Registrar of Vital Records, the Department of Health will issue birth certificates listing both same- sex parents if the hospital submits documentation reflecting that fact. However, the parties disputed at oral argument how the department's decision is actually being applied. There are no facts in the record to resolve this dispute. Moreover, the State has now conceded that children born of artificial insemination should have both parents deemed the natural parents, whether same-sex or opposite sex, under Ark. Code Ann. § 9-10-201 (Repl. 2015) and asserts that it will place both same-sex parents on the birth certificate under the State's new interpretation of this statute. This statute provides that "[a]ny child born to a married women by means of artificial insemination shall be deemed the legitimate natural child of the women and the women's husband [read spouse] if the [spouse] consents in writing to the artificial insemination." Ark. Code Ann. § 9-10-201(a). It is likely, therefore, that a same-sex couple will now have both spouses' names listed on the original birth certificate without a court order, so long as the child was conceived via artificial insemination, the same-sex marriage occurred prior to the insemination, and the nonbiological parent consented to the insemination. Appellants and appellees both conceded at oral argument this would resolve the challenge by two of the three same-sex marriage couples. Thus, any legal challenge in this regard could be moot if the trial court finds that the facts are as presented at oral argument.

The case thus shifts to whether section 20-18-406, which provides for the issuance of new birth certifi-

cates, is constitutional. This statute allows the registrar to issue a new certificate upon "any evidence, as required by regulation, proving that the person has been legitimated." Ark. Code Ann. § 20-18-406(a)(2) (Repl. 2014). The department currently has a regulation that provides for legitimation upon "an affidavit of paternity signed by the natural parent of said child, together with a certificate copy of the parents' marriage record." Ark. Admin. Code § 007.12.1-5.2. The State claims that the affidavit of paternity requires the parent to swear to *biological* parentage. Thus, it maintains, the regulation survives an equal-protection challenge because it discriminates on biology rather than sexual orientation. However, because the circuit court did not have this affidavit before it, neither it nor this court can consider whether the State's contention is sufficient to survive rational- basis review. In other words, the both parties failed to prove entitlement to summary judgment regarding this statute because this critical material fact is still in dispute.

This court considers only the record before us and the arguments presented to the trial court. E.g., *Dodge v. Lee*, 352 Ark. 235, 236-37, 100 S.W.3d 707, 709 (2003) (noting the well-settled "rule that matters outside the record will not be considered on appeal"). Clearly, this fluid situation has caused the facts to change from when the circuit court granted summary judgment until now. It is doubtful whether the material statements made by the registrar in her affidavit, though correct at the time, still exist today. Nor had the State conceded below, as it has done on appeal, that some of the plaintiffs were entitled to relief under another statute. We should apply the prudential-mootness doctrine, refrain from addressing the constitutional challenges, and remand for

the circuit court to consider the case in light of the now-disputed facts and the State's concession. We will not be the only court to have done so on birth-certificate issues arising from *Obergefell*. *See Marie v. Mosier*, __F. Supp. 3d __, 2016 WL 3951744 (D. Kansas Jul. 22, 2016).

A remand to the circuit court would also give the legislature time in the upcoming session to amend the birth-certificate statutes to comply with *Obergefell*. In fact, the State argued that the legislature is the proper forum to address this issue. I also depart from the majority regarding its interpretation of *Obergefell*. There, the Court concluded that state-law bans on same-sex marriage violated the equal-protection clause of the Fourteenth Amendment. In addition to this, the Court concluded that same-sex marriage bans also violated the Due Process Clause. 135 S. Ct. at 2604. But focusing on equal protection, the Court held that "same-sex couples may exercise the fundamental right to marry." *Id.* at 2604-05. And earlier in the opinion, the Court noted that "birth and death certificates" were "aspects of marital status." *Id.* at 2601. Thus, in my view, states cannot constitutionally deny same-sex couples the benefits to marital status, which include equal access to birth certificates. To bring our state laws in compliance with *Obergefell*, the legislature may choose to either amend the statute to apply neutrally to same-sex marriages or base the benefit on something other than marital status. For these reasons, I cannot join the majority opinion.

Last, I have not participated in the majority's decision to admonish the circuit court.

APPENDIX D

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Dissenting In Part

Paul E. Danielson, Associate Justice

I disagree with the majority's holdings. I would affirm the circuit court's order because the result reached therein was compelled by both the Pulaski County Circuit Court's orders in *Wright v. Smith*, 60CV-13-2662, *appeal dismissed sub nom. Smith v. Wright*, 2015 Ark. 298 (per curiam), and by the United States Supreme

Court's decision in *Obergefell v. Hodges*, __U.S. ___, 135 S. Ct. 2584 (2015).

First, the Pulaski County Circuit Court in *Wright* entered a permanent injunction enjoining all defendants in that case, which included Smith, from enforcing any state or local laws or regulations that denied same-sex married couples "the rights, recognition and benefits associated with marriage in the State of Arkansas." *Wright v. Smith*, 60CV-13-2662 (*Pulaski Cty. Cir. Ct.* May 15, 2014). In fact, the circuit court explicitly granted "all" of the injunctive relief requested by the plaintiffs in *Wright*, including requiring Smith and his successors in office to issue birth certificates for children born to same-sex marriages reflecting both names of the married parents. *See id.* The majority's statement that the *Wright* injunction had nothing to do with birth certificates is simply and demonstrably wrong. And because this court dismissed as moot the appeal in *Smith v. Wright*, 2015 Ark. 298, the injunction stands to this day. This issue was actually litigated in *Wright* and was determined by a valid and final judgment; accordingly, relitigation of the same issue in the instant case is barred by collateral estoppel, the issue-preclusion facet of res judicata. *See, e.g., Graham v. Cawthorn*, 2013 Ark. 160, 427 S.W.3d 34.

I note Smith's argument that the *Wright* injunction failed to meet the specificity requirement of Arkansas Rule of Civil Procedure 65(d) and (e) (2016). However, as the circuit court pointed out, that argument is a collateral attack on the judgment. *See Rose v. Harbor E., Inc.*, 2013 Ark. 496, 430 S.W.3d 773 (citing *Hooper v. Wist*, 138 Ark. 289, 211 S.W. 143 (1919)) (stating that a collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judg-

ment is challenged, except those made in the action wherein the judgment is rendered, or by appeal, and except suits brought to obtain decrees declaring judgments to be void ab initio). Judgments may not be collaterally attacked unless the judgment is void on the face of the record or the issuing court did not have proper jurisdiction. *See id.* Smith's remedy for any purported failure of specificity in the *Wright* orders was an appeal.

Second, the United States Supreme Court held in *Obergefell* that states are not free to deny same-sex couples "the constellation of benefits that the States have linked to marriage." ___U.S. at ___, 135 S. Ct. at 2601. Importantly, the Court listed "birth and death certificates" specifically as one of those benefits attached to marital status. *Id.* Thus, the majority is clearly wrong in holding that *Obergefell* has no application here. Indeed, one of the cases on review in *Obergefell*, *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), involved a same-sex married couple who challenged the Tennessee law providing that their child's nonbiological parent would not be recognized as the child's parent, which affected various legal rights that included the child's right to Social Security survivor benefits, the nonbiological parent's right to hospital visitation, and the nonbiological parent's right to make medical decisions for the child.

Furthermore, one of the four principles discussed by the Court in *Obergefell*, for purposes of demonstrating that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples, is that the right to marry "safeguards children and families and thus draws meaning from related rights of

childrearing, procreation, and education. ___U.S. at ___, 135 S. Ct. at 2600. The opinion makes clear that the protection of children and the stability of the family unit was a foundation for the Court's decision:

> Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Marriage also affords the permanency and stability important to children's best interests. . . .
>
> . . . .
>
> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

Obergefell, ____ U.S. at ____, 135 S. Ct. at 2600-01 (internal citations omitted).

The majority errs in suggesting that the right to be named as a parent on a birth certificate is not a benefit

associated with marriage and likewise errs in holding that the specific statutes at issue here focus on biological relationships rather than marital ones. Arkansas Code Annotated section 20-18-401 (f) (Repl. 2014) provides that the name of the "husband" of the mother shall be entered on a birth certificate as the father of the child, without regard to any biological relationship and on the sole basis of his marriage to the mother—specifically, if he is married to the mother at the time of either conception or birth or between conception and birth. The obvious reason for this is to legitimate children whenever possible, even when biological ties do not exist. Thus, there can be no reasonable dispute that the inclusion of a parent's name on a child's birth certificate is a benefit associated with and flowing from marriage. *Obergefell* requires that this benefit be accorded to same-sex spouses and opposite-sex spouses with equal force.

Additionally, I dissent from the majority's decision to admonish the circuit judge for his critical comments. As the Supreme Court of the United States has recognized, a major purpose of the First Amendment is to "protect the free discussion of governmental affairs." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). This includes discussion of"[t]he operations of the courts and the judicial conduct of judges," which are "matters of utmost public concern." *Id.* at 839. Injury to official reputation is an insufficient reason for repressing speech that is otherwise free, and speech cannot be punished when the purpose is simply "to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democra-

cy other public servants are exposed." *Id.* at 842 (quoting *Bridges v. California*, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting)). In the words of Justice Frankfurter,

> Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.

Bridges, 314 U.S. at 289 (Frankfurter, J., dissenting).

Moreover, the Court has cautioned against repressing speech under the guise of promoting public confidence in the integrity of the judiciary:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited,

> solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges, 314 U.S. at 270-71 (footnote omitted). In short, the fact that members of this court have personally taken offense to the circuit judge's remarks is not a sufficient basis for suggesting that those remarks violate our disciplinary rules.

For these reasons, I dissent.

APPENDIX E

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

CASE NO. 60CV-15-3153

MARISA N. PAVAN and TERRAH D.PAVAN, individually and as parents, next friends, and guardians of T.RP., a minor child, LEIGH D.W.JACOBS and JANA S. JACOBS, individually, and as parents, next friends, and guardians of F.D.J., a minor child, COURTNEY M. KASSEL and KELLY L. SCOTT, individually, and as parents, next friends, and guardians of A.G.S., a minor child,
Plaintiffs

v.

NATHANIEL SMITH, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, and his successors in office,
Defendant

MEMORANDUM OPINION

This case was submitted to the court on cross-motions for summary judgment. A hearing was conducted on Monday, November 23, 2015. At the conclusion of the bearing, the court orally ordered from the bench that the defendant was to immediately issue amended certificates of birth to each of the three plaintiff couples evidencing both spouses as the parents of their respective minor children. The court took under advisement all further rulings pending issuance of a written decision. This *Memorandum Opinion* is issued

in conjunction with the Order filed on even date herewith in this case.

SUMMARY OF MATERIAL FACTS

The parties have filed cross-motions for summary judgment in which each side avers there are no material facts in dispute.[1] After reviewing the parties' pleadings the court agrees with the litigants.

The plaintiffs Pavan are a same-sex couple legally married in New Hampshire in 2011. The minor child T.R.P. was born in Arkansas in May of 2015. The Pavans completed the birth certificate form at the hospital indicating they were married and the parents of the minor child. The Arkansas Department of Health, Bureau of Vital Statistics did not include Marisa Pavan on the original birth certificate. In July of 2015, the Pavans requested that the birth certificate be amended to show them both as the minor's parents. The Arkansas Department of Health refused to amend the birth certificate absent a court order.

The plaintiffs Jacobs are a same-sex couple legally married in Iowa in 2010. The minor child F.D.J. was born in Arkansas in June of 2015. The Jacobs completed the birth certificate form at the hospital indicating they were married and the parents of the minor child. The Arkansas Department of Health, Bureau of Vital

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[1] The only disputed fact between the parties is whether without court action In this matter, the minor children of the plaintiffs can be added to health insurance plans as dependents. The court agrees with the State that such factual dispute is not material to resolution of the Plaintiffs' constitutional claims by summary proceeding.

Statistics did not include Jana Jacobs on the original birth certificate. In July of 2015, the Jacobs requested that the birth certificate be amended to show them both as the minor's parents. The Arkansas Department of Health refused to amend the birth certificate absent a court order.

Plaintiffs Kassel and Scott are a same-sex couple who were married on July l, 2015 in Arkansas. The minor child A.G.S. was born in January of 2015. Only one of the two plaintiffs was included on the original birth certificate. Subsequent to their marriage, the plaintiffs Kassel and Scott were told by the Arkansas Department of Health that it would not amend the birth certificate to include both plaintiffs as parents absent a court order.

Wright v. State, 60CV•13-2662 and *Smith v. Wright*, 2015 Ark. 298 (June 26, 2015)

The Arkansas litigation challenging the ban on same-sex marriage was filed in Pulaski County as *Wright v. State*, 60CV-13-2662. The defendant in the present case, Nathaniel Smith, was also a named defendant in *Wright*. He was named both times in his official capacity as either Acting Director or Director of the Arkansas Department of Health. The Bureau of Vital Statistics is a division of the Arkansas Department of Health and is the state agency charged with maintenance of vital records, including the issuance of certificates of birth and amended certificates of birth. *See*, A.C.A. § 20-18•20 1.

The defendant appealed the trial court's decision in *Wright*, the case being styled as *Smith v. Wright* on appeal. The Arkansas Supreme Court entered an *Order*

dismissing that appeal on June 26, 2015. See, *Smith v. Wright*, 2015 Ark. 298 (June 26, 2015).

The *Wright* plaintiffs filed a *Motion for Summary Judgment* on February 26, 2014. In their prayer for relief, the plaintiffs requested that the court issue a permanent mandatory injunction as follows:

> [R]equiring Defendant Nathaniel Smith, M.D., as interim director of the Arkansas Department of Health, and his successors, to henceforth issue birth certificates for children born of marriages between members of the same sex that were entered into in other states to reflect that the married parents are the parents of the children born of the marriage; and, also, requiring said Defendant to issue amended birth certificates to any married couples of the same sex that previously gave birth to children in Arkansas to reflect that the married parents arc the parents of the children born of this marriage.

The trial court in *Wright* entered Summary Judgment in favor of the plaintiffs on May 9, 2014. On May 15, 2014, the trial court issued a *Final Judgment and Rule 54(b) Certification*. The *Final Judgment* reads, in relevant part, that:

> [I]t is and was the intent of the Order to grant Plaintiffs' Motion for Summary Judgment without exception and as to all injunctive relief requested therein. In fact, this was the expressly stated title of the May 9, 2014 Order.

RES JUDICATA

The Arkansas Supreme Court recently addressed the principle of *res judicata* in the case of *Abraham v. Beck*, 2015 Ark. 80, 456 S.W.3d 744, 2015 LEXIS 88, where it stated:

> The concept of res judicata has two facets, one being issue preclusion and the other claim preclusion. *Huffman v. Alderson*, 335 Ark. 411,414,983 S.W.2d 899, 901 (1998) ... Collateral estoppel, also known as issue preclusion, bars relitigation of issues of law or fact previously litigated by a party. *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 544, 104 S.W.3d 745, 750 (2003). The elements of collateral estoppel are as follows; (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *Id.* In *Johnson v. Union Pacific R.R.*, this court adopted the offensive use of collateral estoppel, which prevents a defendant from relitigating a defense, approved by the United States Supreme Court in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L.E. 2d 552 (1979). This court held that the offensive use of collateral estoppel should be available only in limited cases, and that the trial court should be given broad discretion to determine if it should be applied.

Defendant Smith has raised the issue that Judge Piazza's *Final Judgment* didn't strictly comply with

Rule 65(d) of the Arkansas Rules of Civil Procedure concerning the specificity of injunctive language. This is an issue that could have been and should have been raised by the defendant Smith in the appeal in *Wright*. When the Arkansas Supreme Court dismissed *Wright* as being moot in light of the decision in *Obergefell v. Hodges*, 567 U.S. __ (2015), the defendant Smith again had the opportunity to point out to the Court that all of the issues involved in the injunction had not been conclusively resolved by *Obergefell*. Collateral attacks on judgments are only allowed if there are allegations of fraud or lack of jurisdiction.[2]

It is clear with respect to the claims of the plaintiffs Pavan and Jacobs that the issu.es before the court now were fully and completed litigated in the *Wright* case, and that the *Wright* injunction is res judicata and binding upon the defendant Smith.

DECLARATORY JUDGMENT AS TO THE CONSTITUTIONALITY OF A.C.A. §20-18-401 AND A.C.A. §20-18-406

The plaintiffs seek declaratory judgment alleging that two statutes addressing birth certificates are unconstitutional in whole or part pursuant to the United States Supreme Court decision in *Obergefell*. The subject statutes are A.C.A. § 20-18-401 and A.C.A. § 20-18-406.[3]

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[2] *See, Fannie Mae v. Taylor*, 2015 Ark. 78,455 S.W.3d 811,2015 Ark. LEXIS 79, and *Powers v. Bryant*, 309 Ark. 568, S71, 832 S.W.2d 232, 233 (1992).

[3] 20-18-401. **Birth Registration generally**,
(a) A certificate of birth for each live birth which occurs in this state shall be flied with the Division of Vital Records of the Department of Health. or as otherwise directed by the State Regis-

trar of Vital Records, within ten (10) days after the birth and shall be registered if it has been completed and filed in accordance with this section.

(b) When a birth occurs in an institution or en route thereto, the person in charge of the institution or his or her authorized designee shall obtain the personal data, prepare the certificate, certify that the child was born alive at the place, time, and date stated on the certificate either by signature or in an approved electronic process, and file the certificate as directed in subsection (a) of this section. The physician or other person in attendance shall provide the medical information required by the certificate within seventy-two hours after the birth.

(c) When a birth occurs outside an institution:

(1) The certificate shall be prepared and filed by one (1) of the following in the indicated order of priority:

(A) The physician in attendance at or immediately after the birth, or in the absence of such a person;

(B) Any other person in attendance at or immediately after the birth, or in the absence of such a person; or

(C) The father, the mother, or in the absence of the mother, the person in charge of the premises where the birth occurred and

(2) The division shall determine what evidence may be required to establish the fact of birth.

(d) When a birth occurs on a moving conveyance within the United States and the child is first removed from the conveyance in this state, the birth shall be registered in this state and the place where it is first removed shall be considered the place of birth. When a birth occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the child is first removed from the conveyance in this state, the birth shall be registered in this state, but the certificate shall show the actual place of birth insofar as can be determined.

(e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.

(f)(l) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:

(A) Paternity has been determined otherwise by a court of competent jurisdiction; or

(B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavi1s may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.

(2) If the mother was not married at the time of either conception or birth or between conception and birth. the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.

(3) In any case. in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

(4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

(g) Either of the parents of the child or other informant shall verity by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) days prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be registered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "DELAYED". The state registrar may require additional evidence in support of the facts of birth.

20-18-406. **New certificates**.

(a) The State Registrar of Vital Records shall establish a new certificate of birth for a person born in this state when he or she receives the following:
(1) A certificate of adoption as provided in 2018-405 [repealed], or a certificate of adoption prepared and filed in accordance with the laws of another state or foreign country, or a certified copy of the decree of adoption, together with the information necessary to identify the original certificate of birth and to establish a new certificate of birth. However, a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents, or the adopted person;
(2) A request that a new certificate be established and any evidence, as required by regulation, proving that the person has been legitimated, or that a court of competent jurisdiction has determined the paternity of the person or that both parents have acknowledged the paternity of the person and request that the surname be changed from that shown on the original certificate.
(b) When a new certificate of birth is established, the actual city or county, or both, and date of birth shall be shown. The new certificate shall be substituted for the original certificate of birth. Thereafter, the original certificate and the evidence of adoption, paternity determination, or legitimation shall not be subject to inspection except upon order of an Arkansas court of competent Jurisdiction or as provided by regulation.
(c) Upon receipt of a report of an amended certificate of adoption, the certificate of birth shall be amended as provided by regulation.
(d) Upon receipt of a report of annulment of adoption, the original certificate of birth shall be restored to its place in the files, and the new certificate and evidence shall not be subject to inspection except upon order of a court of competent jurisdiction or as provided by regulation.
(e) Upon written request of both parents and receipt of a swam acknowledgment of paternity signed by both parents or a child born out of wedlock, the state registrar shall reflect paternity on the certificate of birth in the manner prescribed by regulation if paternity is not already shown on the certificate of birth.
(f)(1) Upon request, the state reg1strar shall prepare and register an Arkansas certificate of birth for a person born in a foreign country, who is not a citizen of the United States, and for whom a final

It is well settled under the doctrine of separation of powers that it is not the business of the courts or of the executive branch to legislate. *See, Ark. State Bd. Of Election Comm'rs v. Pulaski County Election Commission*, 2014 Ark. 236, 437 S.W.3d 80, 2014 LEXIS 367. Further, the courts have a duty to only declare unconstitutional those portions of an Act that are unconstitutional, and if the constitutional remainder remains complete in itself, the court's obligation is to uphold that portion of the legislation. *See*, *Seagrave v. Price*, 349 Ark. 433, 79 S.W.3d 339, 2002 LEXIS 393 (2002),

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order of adoption has been entered In a court of competent jurisdiction in Arkansas when he or she receives the following:

(A) A certificate of adoption as provided in 20-18-405 [repealed];

(B) Proof of the date and place of the adopted child's birth:

(C) A request by the court decreeing the adoption, the adoptive parents, or the adopted person if eighteen (18) years of ago or older.

(2) After preparation of the birth certificate in the new name of the adopted person, the state registrar shall seal and file the certificate of adoption. This certificate shall not be subject to Inspection except upon order of a court of competent jurisdiction or as provided by regulation or as otherwise provided by state law.

(3) The birth certificate shall show the actual foreign country of birth and shall state that the certificate is not evidence of United States citizenship for the child for whom it is issued.

(g) Either of the parents of the child or other informant shall verity by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) day prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be registered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "DELAYED". The state registrar may require additional evidence in support of the facts of birth.

quoting *Levy v. Albright*, 204 Ark. 657, 163 S.W.2d 529 (1942).

The defendant Smith states on page 5 of his *Brief in Support of Defendant's Motion for Summary Judgment*, that:

> As explained below, Plaintiffs' constitutional challenges fail because parental rights, and parental designations on birth certificates, do not arise from marital relationships. Plaintiffs' claims conflate statutorily distinct legal categories of marriage, vital records, and parental rights. In Arkansas and most states, and under the common law that predates statutory law, parental rights arise from biological parentage, not from marriage.

The defendant's argument on this point is supported collaterally by the definition of "parent" as defined in A.C.A. § 9-27-303(40) [4]

Defendant's argument is legally well fashioned and has been extremely well argued but it is not correct factually with respect to the actual language of A.C.A. § 20-18-401. In that statute, the General Assembly has intertwined the concepts of "parent" with certain rights and presumptions occurring within a marital relation-

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[4] "Parent" is defined in § 9-27-303(40) as a "biological mother, an adoptive parent, or a man to whom the biological mother was married at the time of conception or birth or who has signed an acknowledgment of paternity pursuant to § 9-10-120 or who has been found by a court of competent jurisdiction to be the biological father of the juvenile." This definition is from the Arkansas Juvenile Code subchapter of the Family Law title, but is instructive of the type of present code language that exists which may need to be changed as a result of the *Obergefell* decision.

ship, using now impermissible limiting spousal terms of "husband" and "wife." Such language categorically prohibits every same-sex married couple, regardless of gender, from enjoying the same spousal benefits which are available to every opposite-sex married couple.

The majority of A.C.A. § 20-18-401 remains constitutional under *Obergefell*. The stricken parts below are declared unconstitutional, the remainder is constitutional:

20-18-401. **Birth Registration generally**.

(a) A certificate of birth for each live birth which occurs in this state shall be flied with the Division of Vital Records of the Department of Health or as otherwise directed by the State Registrar of Vital Records, within ten (10) days after the birth and shall be registered if it has been completed and filed in accordance with this section.

(b) When a birth occurs in an institution or en route thereto, the person in charge of the institution or his or her authorized designee shall obtain the personal data, prepare the certificate, certify that the child was born alive at the place, time, and date stated on the certificate either by signature or in an approved electronic process, and file the certificate as directed in subsection (a) of this section. The physician or other person in attendance shall provide the medical information required by the certificate within seventy-two hours after the birth.

(c) When a birth occurs outside an institution:

(1) The certificate shall be prepared and filed by one (1) of the following in the indicated order of priority:

(A) The physician in attendance at or immediately after the birth, or in the absence of such a person;

(B) Any other person in attendance at or immediately after the birth, or in the absence of such a person; or

(C) The father, the mother, or in the absence of the mother, the person in charge of the premises where the birth occurred and

(2) The division shall determine what evidence may be required to establish the fact of birth.

(d) When a birth occurs on a moving conveyance within the United States and the child is first removed from the conveyance in this state, the birth shall be registered in this state and the place where it is first removed shall be considered the place of birth. When a birth occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the child is first removed from the conveyance in this state, the birth shall be registered in this state, but the certificate shall show the actual place of birth insofar as can be determined.

(e) ~~For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.~~

~~(f)(l) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:~~

~~(A) Paternity has been determined otherwise by 11 court of competent jurisdiction; or~~

~~(B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavi1s may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.~~

(2) ~~If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father.~~ The parents may give the child any surname they choose.

~~(3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.~~

~~(4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.~~

(g) Either of the parents of the child or other informant shall verity by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) days prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be registered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "DELAYED". The state registrar may require additional evidence in support of the facts of birth.

The nonstricken portions allow either spouse, as the parents of the child—without gender restrictive language—to provide the personal data to either the hospital, if it is a hospital birth, or for either of the spouses to give that information directly to the Arkansas Department of Health in the event of a non hospital birth.

In analyzing the challenge to A.C.A. § 20-18-406, a separate rule of statutory construction is applicable. It is the court's obligation, if possible, to interpret a statute as constitutional if such interpretation can reasonably be reached. The use of the term "legitimated" occurs only twice in the entire Arkansas Code. Once in A.C.A. § 20-18-406(a)(2) in the phrase, "that the person has been legitimated," and one other time, also in Title 20. "Legitimated" is not a legislatively defined term, it is only defined by State Board of Health regulation, and is therefore subject to reasonable judicial interpretation in order to insure A.C.A. § 20-18-406 is constitutional, as presently written.

In light of the decision in *Obergefell*, and in addition to any other meaning presently given to the term by existing case law, the phrase "person has been legitimated, is declared to include the minor children of any couple—same-sex or opposite-sex—who married subsequent to the birth of the minor child, and who present

proof to the Arkansas Department of Health of the date of birth of the minor child and of the date of their marriage. In the event any biological parent is listed on a birth certificate sought to be amended, a court order shall be requited before an amended certificate is issued which removes such person(s) name. In the event one or both of the spouses was married to another individual at any time from the birth of the minor child forward, no amended birth certificate shall be issued absent a court order naming the current spouses as the parents of the minor child.

This court-ordered definition of the phrase will allow the Department of Health to immediately begin issuing amended birth certificates to same-sex couples without requiring the State Board of Health to first amend its regulations. This interpretation also gives both the State Board of Health and the General Assembly the time to fully and completely consider all viewpoints prior to promulgating any rule changes or amending the subject legislation.

LEGAL EFFECT OF DECLARATORY JUDGMENT

From their own different litigation perspectives, the parties have each touched on a very important legal issue. The plaintiffs framed the issue by averring that issuance of a decision acknowledging their constitutional right to be treated the same as opposite-sex married couples with respect to being named as parents on birth certificates, would be a panacea with respect to a litany of potential legal issues[5] created by the decision in *Obergefell*. The defendant Smith first argues that the

[5] *Complaint for Declaratory and Injunctive Relief*, Paragraph 31.

Department of Health only has a non-discretionary ministerial duty to issue and amend birth certificates in accordance with applicable statutes and regulations[6], but then attempts to become the advocate for the minor children involved by alleging that the relief requested by the plaintiffs is contrary to the 'best interests of the minor children."[7]

In cases involving title to real property, the execution of a deed, whether warranty or quitclaim, is only evidence of title between the parties to the deeds, and does not affect the rights of anyone else in the entire world. The proper way to obtain good and valid title against the entire world is to institute and prosecute a quiet title action. At the end of such proceeding, provided that all persons who may claim interest in the real property have been made parties, the court issues a decree vesting title in the claimant. This legal scenario is analogous to that presented in the present case. The defendant Smith, in his pleadings, correctly warns the plaintiffs of potential future problems.

The *Obergefell* case was decided less than six months ago. In the years to come it will cause significant changes to established law in many areas. Those cases are not before the court, nor are the legal issues that will be presented by those cases being decided in this case. Today's decision affords the plaintiffs, as same-sex couples, the same constitutional rights with

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[6] Defendant's Reply in Support of Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, p. 2.

[7] Defendant's Reply in Support of Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, pp. 5-7.

respect to the issuance of birth certificates and amended birth certificates as opposite-sex couples. That is the sum total of the legal effect of this decision.

In paragraph 31 of their Complaint, the plaintiffs list eight specific examples of how the failure to include both same-sex spouses on birth certificates or amended birth certificates may adversely affect legal status with respect to the minor children. The list includes: identification procedures for Social Security numbers and passports, denial of the right to authorize medical care for the minor, denial of the right to authorize school related activities, denial of the right to apply for needed governmental or employment related benefits, denial of survivor benefits in the case of death of one of the spouses, denial to the child of inheritance rights, disruption of the parent-child relationship in the event of divorce of the same-sex couple, and the award of child support in the event of divorce of a same-sex couple. The court's declaration today does not conclusively resolve any of those legal issues. It may create equitable and legal arguments for resolution of issues that involve only the two spouses of the same sex-marriage, such as child support or child custody. It does not in any manner resolve the multitude of legal issues that may arise involving third parties. Biological parents, mother or father, whose statutory and/or common law rights may not have been properly terminated, whether through an adoption proceeding or by the signature of surrogacy documents, are not bound by the listing of two names on a birth certificate. Other heirs claiming against a same-sex spouse estate, or attempting to disallow a minor child's interest in the estate of one of the same-sex spouses, are not bound by an amended birth certificate. Insurance companies—life, health, or casu-

alty—may decide in order to prevent potential duplication of claims, or liabilities not actuarially considered in premium calculations, to change their contract language to exclude birth certificates as indicia of acceptable legal relationship, and may require other documentation such as adoption decrees. In the future, government benefits, both state and federal, may key off of legal documentation other than a birth certificate. Today's decision does not legally resolve any of those potential issues. The defendant Smith addresses these potential legal problems several times in his pleadings, and the warnings have substance to them. The plaintiffs are constitutionally entitled to the declaration issued today by the court, but the only way for same sex couples to foreclose potential future legal problems involving their minor children is the exact same way that opposite-se couples, who are not both the biological parents of the minor child or children, must follow. There must be a court-approved adoption, or surrogacy contracts must be executed in accordance with statutory procedure, or any of the other statutorily approved methods for legally foreclosing all other individuals from claiming parentage of the minor child or children must be utilized.

IT IS SO ORDERED.

/s/ Timothy Davis Fox
TIMOTHY DAVIS FOX
CIRCUIT JUDGE

12-1-2015
DATE

APPENDIX F

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

CASE NO. 60CV-15-3153

MARISA N. PAVAN and TERRAH D.PAVAN, individually and as parents, next friends, and guardians of T.RP., a minor child, LEIGH D.W.JACOBS and JANA S. JACOBS, individually, and as parents, next friends, and guardians of F.D.J., a minor child, COURTNEY M. KASSEL and KELLY L. SCOTT, individually, and as parents, next friends, and guardians of A.G.S., a minor child,
Plaintiffs

v.

NATHANIEL SMITH, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, and his successors in office,
Defendant

ORDER

On the 23rd day of November, 2015 came on for hearing the pending motions in this matter, and from the pleadings filed herein, together with all material s properly attached to such pleadings, and the argument of counsel, the court doth order as follows:

1. *The Motion for Summary Judgment* of plaintiffs Marisa Pavan and Terrah Pavao, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment*, of plain-

tiffs Marisa Pavan and Terrah Pavan, as parents, next friends, and guardians of their minor child, is denied.

2. The *Motion for Summary Judgment* of plaintiffs Leigh Jacobs and Jana Jacobs, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment* of plaintiffs Leigh Jacobs and Jana Jacobs, as parents, next friends, and guardians of their minor child, is denied.

3. The *Motion for Summary Judgment* of plaintiffs Courtney Kassel and Kelly Scott, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment* of plaintiffs Courtney Kassel and Kelly Scott, as parents, next friends, and guardians of their minor child, is denied.

4. Defendant's *Motion for Summary Judgment*, filed on August 13, 2015, is granted in part and denied in part. Summary judgment is granted with respect to the claims of the plaintiffs as parents, next friends, and guardians of their respective minor children, and all causes of action by the plaintiffs in such representative capacities are hereby dismissed with prejudice. Defendant's motion is denied with respect to all other relief requested.

5. Defendant's *Motion for Stay*, filed on November 24, 2015, is denied. The majority of the defendant's arguments are mooted by entry of this written *Order* and accompanying *Memorandum Opinion*. Any other grounds for requesting a stay are specifically rejected and denied. This court has diligently reviewed the pleadings filed in this case, together with all of the relevant case law. The court has made the best legal deci-

sion it can make, and has done so in the most judicially efficient manner available—and as promptly as possible—given the complicated nature of the arguments and the quickly evolving law.

It is important that the general public have confidence that decisions issued by the judiciary are based solely on the Rule of Law. This does not mean everyone will agree with any given decision. In fact, a substantial argument can be advanced that in a healthy, flourishing democracy there will always be some citizens who agree—and others who disagree—with every legal conclusion reached by the courts. This is true whether the subject decision is in a criminal matter, a domestic proceeding, or any type of civil case, including cases involving constitutional issues.

Unnecessary delays in the issuance of opinions, as in the recent case of *Smith v. Wright*, 2015 Ark. 298 (June 26, 2015), do not promote societal confidence in judicial decisions. Such delays provide a breeding ground for speculation of political intrigue or other illegitimate reasons for the delay—whether true or not.

The default during appeal should be in favor of affording all United States citizens their full and complete constitutional protections and rights during the appeal, not the continued deprivation of those rights. As stated by the United States Supreme Court in *Romer v. Evans*, 717 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), "The United States Constitution 'neither knows nor tolerates classes among citizens.' "

The Supreme Court, in *Obergefell v. Hodges*, 576 U.S. __ (2015), specifically enumerated "birth and death certificates" as benefits of marital status. The plaintiffs herein, as well as many other Arkansas citizens nega-

tively affected by the present statutory birth certificate language, were deprived for many years of their constitutional right to marriage. Those constitutional rights continued to be unnecessarily denied to them during the lengthy appeal process in *Wright*.

If, upon proper application by the State, the Arkansas Supreme Court desires to issue a stay that deprives the Plaintiffs, and all other similarly situated Arkansas citizens, of their constitutional rights pending the appeal of this matter, the Justices have been elected to judicial positions with the authority to issue such a stay. This court, however, will not allow its authority to be used to deprive these Arkansans any longer of their constitutional rights.

6. The Supreme Court issued the *Obergefell* decision in June of this year, and the full impact of such decision on many areas formerly considered to be established law will not be realized for some time. The Arkansas General Assembly has not yet even had the opportunity to meet in legislative session to begin addressing any revisions to the Arkansas Code that may be required by the *Obergefell* decision. The defendant herein has correctly pointed out that the Arkansas Department of Health, as part of the executive branch does not have the authority to enact legislation. Further, defendant also correctly states that it is the State Board of Health, not the Department of Health, which has been given the authority by the General Assembly to promulgate rules or regulations concerning certificates of birth.

The court also notes that the judicial branch does not have the authority to legislate. Enactment of legislation is the sole province of the legislative branch. The

courts do however have the authority to strike unconstitutional words and phrases from statutes, if the remaining portion makes sense as redacted. That is what the court has attempted to do in its ruling in this case, so that the State Board of Health can revise its rules and regulations concerning birth certificates to meet the constitutional parameters established in *Obergefell*. This would allow the vital statistics relating to original and amended birth certificates to be made in a constitutional and orderly manner until such time as the General Assembly can address changes to the statutory scheme.

7. The court's *Memorandum Opinion* issued on even date herewith is incorporated by reference herein as though set forth word for word.

8. If the defendant has not already complied with the court's oral instruction from the bench, it is ordered to forthwith issue amended birth certificates showing: Marisa N. Pavan and Terrah D. Pavan as the parents of T.R.P., a minor child, Leigh D.W. Jacobs and Jana S. Jacobs as the parents of F.D.J., a minor child, and Courtney M. Kassel and Kelly L. Scott, as the parents of A.G.S., a minor child.

9. This *Order* and accompanying *Memorandum Opinion* fully and completely resolve all pending issues and causes of action before the court[1] and therefore constitute a final judgment for purposes of any appeal.

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[1] The Complaint also requests the award of attorney's fees and costs. The Court has repeatedly stated the award of attorney's fees and costs is a collateral matter that does not affect the finality of a judgment. *See, Midwest Terminals of Toledo, Inc. v. Palm*, 2011 Ark. 81, 378 S.W3d 761, 2011 LEXIS 76, *Nettleton Sch. Dist. v. Owens, 329Ark. 367, 948 S.W2d 94 (1997); Marsh & Mclennan of*

IT IS SO ORDERED AND ADJUDGED.

/s/ Timothy Davis Fox
TIMOTHY DAVIS FOX
CIRCUIT JUDGE
12-1-2015
DATE

Ark. v. Herget, 321 Ark. 180, 900 S.W2d 195 (1995); and Pledger v. Bosnlck, 306Ark 45,8/1 S.W.2d 286 (1991).

APPENDIX G

U.S. Const. Amend. XIV, § 1

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

Arkansas Code § 9-10-201. Child born to married or unmarried woman—Presumptions—Surrogate mothers

(a) Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination.

(b) A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband except in the case of a surrogate mother, in which event the child shall be that of:

(1) The biological father and the woman intended to be the mother if the biological father is married;

(2) The biological father only if unmarried; or

(3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(c) (1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:

(A) The biological father and the woman intended to be the mother if the biological father is married;

(B) The biological father only if unmarried; or

(C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(2) For birth registration purposes, in cases of surrogate mothers the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.

APPENDIX I

Arkansas Code § 20-18-401. Birth registration generally.

(a) A certificate of birth for each live birth which occurs in this state shall be filed with the Division of Vital Records of the Division of Health of the Department of Health and Human Services, or as otherwise directed by the State Registrar of Vital Records, within ten (10) days after the birth and shall be registered if it has been completed and filed in accordance with this section.

(b) When a birth occurs in an institution or en route thereto, the person in charge of the institution or his or her authorized designee shall obtain the personal data, prepare the certificate, certify that the child was born alive at the place, time, and date stated on the certificate either by signature or in an approved electronic process, and file the certificate as directed in subsection (a) of this section. The physician or other person in attendance shall provide the medical information required by the certificate within seventy-two (72) hours after the birth.

(c) When a birth occurs outside an institution:

(1) The certificate shall be prepared and filed by one (1) of the following in the indicated order of priority:

(A) The physician in attendance at or immediately after the birth, or in the absence of such a person;

(B) Any other person in attendance at or immediately after the birth, or in the absence of such a person;

(C) The father, the mother, or in the absence of the father and the inability of the mother, the person in charge of the premises where the birth occurred; and

(2) The Division of Vital Records shall determine what evidence may be required to establish the fact of birth.

(d) When a birth occurs on a moving conveyance within the United States and the child is first removed from the conveyance in this state, the birth shall be registered in this state and the place where it is first removed shall be considered the place of birth. When a birth occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the child is first removed from the conveyance in this state, the birth shall be registered in this state, but the certificate shall show the actual place of birth insofar as can be determined.

(e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.

(f) (1) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:

(A) Paternity has been determined otherwise by a court of competent jurisdiction; or

(B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavits may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.

(2) If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.

(3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

(4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

(g) Either of the parents of the child or other informant shall verify by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) days prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be regis-

tered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "Delayed". The state registrar may require additional evidence in support of the facts of birth.

APPENDIX J

SUPREME COURT OF ARKANSAS

No. CV-15-988

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Appeal from the Pulaski County Circuit Court
[No. 60CV-15-3153]

November 3, 2016

B E F O R E :

CHIEF JUSTICE HOWARD BRILL

JUSTICE RHONDA K. WOOD

JUSTICE PAUL E. DANIELSON

JUSTICE JOSEPHINE LINKER HART

[00002] P R O C E E D I N G S

CLERK: Everyone, rise. Hear ye, hear ye, hear ye, the Arkansas Supreme Court is now in session. All persons having business before the sovereign court draw near, give attention and ye shall be heard. May God save these United States, and the State of Arkansas, and this honorable court. You may be seated.

CHIEF JUSTICE HOWARD BRILL: Good morning. The Court is handing down decisions in the following cases today: CR-16-244, Mark Aaron Looper v. the State of Arkansas from Benton County Circuit Court, affirmed.

JUSTICE PAUL E. DANIELSON: CR-16-106, Thomas Conan Ortega v. the State of Arkansas from Garland County Circuit Court, affirmed. Justice Goodson concurs, and Justice Danielson and Justice Hart dissent.

CHIEF JUSTICE HOWARD BRILL: Would the clerk read the submissions, please?

CLERK: There are four appeals being submitted to the Court for decision today. Civil Case 15-988, Nathaniel Smith and others in their capacities as Director of the Department of Health v. Marisa Ann Pavan and others from [00003] Pulaski Circuit. This case will be orally argued this morning. The other appeals are Criminal Case 15-724, Daryl Dennis v. the State of Arkansas from Pulaski Circuit, Civil Case 16-219, Tony Havner v. Northeast Arkansas Electric Cooperative and Tony L. Walker, III from Baxter Circuit. And, finally, Civil Case 16-316, Cody Ward v. Wendy Kelly as Director of the Department of Corrections from Jefferson Circuit.

There is also one petition for review of a decision from the Court of Appeals being submitted today. Criminal Case 16-540, WJS v. the State of Arkansas from Crawford Circuit. There are 16 other various motions and petitions that are being submitted to the Court today. Those are available on the Court's website.

CHIEF JUSTICE HOWARD BRILL: Thank you. We are hearing oral argument sin the case of Smith v. Pavan. The State, you may approach.

LEE RUDOFSKY: Good morning, Mr. Chief Justice, may it please the Court. My name is Lee Rudofsky. I'm the Solicitor General of Arkansas from the Arkansas Attorney General's Office. And in this case I represent Nathanial Smith in his official capacity as the Director of the Arkansas [00004] Department of Health.

I'd like to start off this morning by explaining the specific concession that the state makes in this case. If a heterosexual married couple has a baby conceived using artificial insemination from a sperm donor, the husband will be, quote-unquote, "deemed the natural legitimate father of the child under Arkansas Code 910-201." That's the Assisted Reproduction Statute.

This statute was written prior to same-sex marriage in Arkansas and therefore it used the word husband. So, under the statute, for a lesbian married couple, like two of the plaintiffs in this case, who has a baby when they're married and the baby was conceived using artificial insemination from a sperm donor, the statute doesn't deem the spouse a natural legitimate parent.

We would agree that this differential treatment fails equal protection under the plain old rational basis standard. In our view, the remedy should be to have

the Court either read or revise the word husband in the statute to mean spouse. And that's specifically the Artificial Insemination or Assisted Reproduction Statute.

[00005] If the Court did so, both women in a same-sex marriage would be, quote-unquoted, "deemed the natural legitimate parent of a child born into the marriage and conceived by artificial insemination through a sperm donation." This would mean that they would be entitled to be placed on the birth certificate initially when they were at the hospital and through the hospital's submission to the Department of Health.

It would also mean that if for some reason the spouse wasn't placed on the birth certificate, they could use the legitimation process in 2018-406A2 to get onto the birth certificate.

If that's what Judge Fox had done in this case we would not have appealed and we would not be here today. Unfortunately, that's not what Judge Fox did. Judge Fox entirely ignored the Assisted Reproduction Statute and instead, he unilaterally rewrote whole portions of the Arkansas Code. In so doing he created two very serious problems and that's the reason we're here today.

The first problem is that his rewrite [00006] of Section 2018-406 upends centuries of family law and flies in the face of clear legislative intent. Under his rewrite of that section, a person, whether heterosexual or homosexual, who is not the biological parent of a living child can get on a child's birth certificate merely by marrying that child's mother without a court ever considering whether it's in the best interest of the child to get onto the birth certificate.

This would mean that any stepparent, again, whether a heterosexual marriage or a same-sex marriage, could sidestep the required judicial review process to make sure that getting that person on the birth certificate is in the best interest of the child.

That is a century's old rule in family law. It's long been the rule that a person who marries a woman after she has had a child doesn't get on the birth certificate just by virtue of that marriage. That is what Judge Fox has changed. There was no reason for it. And that is why that part of his order should be reversed.

JUSTICE RHONDA K. WOOD: Counsel, my question is 2018--I'm sorry, 910201, that's not the statute before us. And that statute wasn't

* * * * *

[00052] Gotham Transcription states that the preceding transcript was created by one of its employees using standard electronic transcription equipment and is a true and accurate record of the audio on the provided media to the best of that employee's ability. The media from which we worked was provided to us. We can make no statement as to its authenticity.

Attested to by: Sonya Ledanski Hyde

APPENDIX K

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS CIVIL DIVISION

Case No. 60CV-15-3153

July 13, 2015

MARISA N. PAVAN and TERRAH D. PAVAN, Individually, and Marisa N. Pavan and Terrah D. Pavan, as parents, next friends and guardians of T.R.P., a minor child

LEIGH D. W. JACOBS and JANA S. JACOBS, Individually, and Leigh D. W. Jacobs and Jana S. Jacobs, as parents, next friends and guardians of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT, Individually, and Courtney M. Kassel and Kelly L. Scott, as parents, next friends and guardians of A.G.S., a minor child,
Plaintiffs

v.

NATHANIEL SMITH, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, and his successors in office,
Defendant

AFFIDAVIT

Comes now Melinda Allen, and states as follows:

1. I am the Vital Records State Registrar for the Arkansas Department of Health ("ADH"), and I have held this position since December 23, 2013. I held this position at all times pertinent to this affidavit. I have

personal knowledge regarding the facts stated herein and I am competent to testify.

2. In my capacity as the Vital Records State Registrar, my job duties include supervising the issuance and maintenance of vital records, including birth certificates, by the ADH Division of Vital Records.

3. ADH is an agency within the executive branch, and it lacks the legal authority to interpret legislation contrary to the plain language of its operative statutes. In addition, ADH regulations must be adopted and amended by the State Board of Health, and ADH lacks the authority to interpret State Board of Health regulations contrary to their plain language. ADH's performance of its ministerial duty to issue and amend birth certificates in accordance with Arkansas statutes and regulations governing birth certificates is not discretionary. Any rule changes must be adopted by the State Board of Health, which ADH does not control. Any statutory amendments must be adopted by the Arkansas General Assembly, which ADH likewise does not control.

4. If an Arkansas hospital where a woman gives birth to a child submits documentation to ADH reflecting both the woman and her spouse or another person as parents of the child, ADH issues an original birth certificate reflecting both the woman and her spouse or other indicated person as parents of the child. If an Arkansas hospital where a woman gives birth to a child submits documentation to ADH reflecting only the woman as a parent of the child, but not the woman's spouse or any other person, ADH issues an original birth certificate reflecting only the woman as a parent of the child. ADH does not independently investigate

the vital information submitted by a hospital when a woman gives birth to a child in Arkansas. ADH processes all original birth certificates of children born in Arkansas hospitals based upon information submitted by the hospitals without regard to the sexual orientation, gender, or marital status of the woman giving birth to the child, and without regard to the sexual orientation, gender, or marital status of any other parent of the child.

5. After ADH issues an original birth certificate based upon information submitted by a hospital, the hospital may amend the original birth certificate within one year if the hospital determines that there is an error or omission in the vital information originally submitted by the hospital. Aside from amendments by hospitals within one year, ADH's authority to issue amended birth certificates is governed by Ark. Code Ann. § 20-18-406.

6. ADH amends birth certificates to add a parent if presented with a court order determining parentage or otherwise granting parental rights to an intended parent, or approving adoption by an intended parent, or otherwise instructing ADH to amend a birth certificate to add an intended parent. ADH processes such amendments without regard to the sexual orientation, gender, marital status, or any other characteristic of any parent or intended parent of a child.

7. The electronic birth certificate information transmitted by UAMS to ADH listed only Terrah Pavan as a parent of T.R.P. Accordingly, ADH issued an original birth certificate for T.R.P. reflecting Terrah Pavan as a parent of T.R.P. UAMS has not contacted ADH to request an amendment of T.R.P.'s original

birth certificate due to a clerical error or omission. If presented with a court order determining parentage or otherwise granting parental rights to Marisa Pavan, or approving adoption by Marisa Pavan, or otherwise instructing ADH to amend T.R.P.'s birth certificate to add Marisa Pavan as a parent, ADH will amend T.R.P.'s birth certificate to add Marisa Pavan as a parent.

8. The electronic birth certificate information transmitted by Baptist Medical Center to ADH listed only Leigh Jacobs as a parent of F.D.J. Accordingly, ADH issued an original birth certificate for F.D.J. reflecting Leigh Jacobs as a parent of F.D.J. Baptist Medical Center has not contacted ADH to request an amendment of F.D.J.'s original birth certificate due to a clerical error or omission. If presented with a court order determining parentage or otherwise granting parental rights to Jana Jacobs, or approving adoption by Jana Jacobs, or otherwise instructing ADH to amend F.D.J.'s birth certificate to add Jana Jacobs as a parent, ADH will amend F.D.J.'s birth certificate to add Jana Jacobs as a parent.

9. The electronic birth certificate information transmitted by Saline Memorial Hospital to ADH listed only Courtney Kassel as a parent of A.G.S. Accordingly, ADH issued an original birth certificate for A.G.S. reflecting Courtney Kassel as a parent of A.G.S. Saline Memorial Hospital has not contacted ADH to request an amendment of A.G.S.'s original birth certificate due to a clerical error or omission. If presented with a court order determining parentage or otherwise granting parental rights to Kelly Scott, or approving adoption by Kelly Scott, or otherwise instructing ADH to amend A.G.S.'s birth certificate to add Kelly Scott as a parent,

ADH will amend A.G.S.'s birth certificate to add Kelly Scott as a parent.

10. The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect. The accuracy of the records allows ADH to compile, maintain, and analyze vital statistics. ADH has a legitimate interest in maintaining reliable and comprehensive statistics of all vital events for purposes of public health research and identification of public health trends.

11. Identification of biological parents through birth records is critical to ADH's identification of public health trends, and it can be critical to an individual's identification of personal health issues and genetic conditions. Even in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, the statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s). The original birth certificate is sealed, but maintained by ADH. In cases of adoption, ADH also maintains sealed copies of original birth certificates reflecting biological parentage. This is important because a child may need to access information about biological parentage for health-related reasons. The State has a legitimate interest in maintaining such information (even if under seal and releasable only pursuant to a court order) in order to protect the future health of the child.

FURTHER AFFIANT SAYETH NOT.

I swear, under penalty of perjury, that the foregoing statements are true.

/s/ *Melinda Allen*
MELINDA ALLEN

County of Pulaski)
)
State of Arkansas)

Subscribed and sworn to before me this 6th day of Aug., 2015.

NOTARY PUBLIC

/s/

My commission expires:

4-11-2021.

SEAL