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 *Pavan* v. *Smith*, 137 S. Ct. 2075, 2076 (2017) (per curiam), this Court summarily reversed a decision of the Arkansas Supreme Court that had upheld, notwithstanding *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), a state law that denied married same-sex couples equal access to a right afforded opposite-sex couples, namely to have the birth mother's spouse listed as the second parent on their child's birth certificate. The Court remanded in *Pavan* to the Arkansas Supreme Court "for further proceedings not inconsistent with this opinion." 137 S. Ct. at 2079. On remand, the trial court enjoined respondent from denying same-sex spouses equal rights to be listed on their children's birth certificates. Petitioners are indisputably prevailing parties within the meaning of the fee-shifting provision, 42 U.S.C. 1988(b). Consistent with Arkansas procedural rules, petitioners filed a motion in the Arkansas Supreme Court for an award of appellate attorney's fees. On January 4, 2018, the Arkansas Supreme Court issued an order stating, without further explanation: "Appellees' motion for appellate attorney's fees and expenses is denied."

The question presented is:

Whether, when this Court has summarily reversed a state supreme court's denial of a constitutional right previously recognized by this Court, that state court may subsequently deny the prevailing party's application for attorney's fees under 42 U.S.C. 1988 without providing any basis for its denial.

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, M.D., MPH, in his official capacity as Director of the Arkansas Department of Health, was the appellant in the Arkansas Supreme Court.

TABLE OF CONTENTS

Table of Contents Continued:

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: Page(s)

Constitution, statutes and rules:

Miscellaneous:

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PETITION FOR A WRIT OF CERTIORARI

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

OPINION BELOW

The ruling of the Arkansas Supreme Court at issue (App., *infra*, 1a-2a) is a summary order with no associated opinion or stated reasoning.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on January 4, 2018. This Court has jurisdiction pursuant to 28 U.S.C. 1257.

STATUTORY PROVISION INVOLVED

The Civil Rights Attorney's Fees Award Act of 1976, codified at 42 U.S.C. 1988, is reproduced at App., *infra*, 3a-4a.

STATEMENT OF THE CASE

Petitioners are two married same-sex couples who previously sought and won from this Court vindication of their right to have the non-birth parent's name listed on their child's birth certificate to the same extent that married opposite-sex couples enjoy that right under State law, as required by this Court's holding in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). In so ruling, this Court summarily reversed a decision of the Arkansas Supreme Court denying petitioners that right. On remand, the Arkansas Supreme Court issued a mandate to the State trial court, which entered an injunction in petitioners' favor.

Having prevailed on their claims, petitioners sought an award of appellate attorney's fees,[1] to which they were entitled under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988 and this Court's rulings interpreting that statute. These provide generally that prevailing plaintiffs are entitled to an award of attorney's fees as a matter of course. See 42 U.S.C. 1988(b); *Lefemine* v. *Wideman*, 568 U.S. 1, 5 (2012). Moreover, a court must explain any departure from that presumption in favor of a fee award. Notwithstanding those well-established federal mandates, the Arkansas

[1] Petitioners also sought in the trial court fees for the work performed in that court. Those fees have been awarded and are not at issue in this petition.

Supreme Court denied petitioners' request for an award of appellate attorney's fees in its entirety, without providing any explanation of its action.

The Arkansas Supreme Court's denial of fees without explanation shows a complete disregard for the requirements of Section 1988 and this Court's cases construing that statute. The Arkansas court's refusal to follow and apply this binding federal law reflects its continuing intransigence in the face of this Court's ruling in *Obergefell*, which has already merited one summary reversal from this Court.

This is a case in which this Court's customary reluctance to engage in "error correction" is overcome by the need to reaffirm the basic principle that, in our federal structure, this Court is the ultimate arbiter of federal constitutional and statutory law. Having already resisted a clear requirement of the Constitution (as established by *Obergefell*) in its initial decision in this case, the Arkansas Supreme Court now seeks to deny petitioners a federal statutory right—an award of attorney's fees—that flows directly from their having prevailed on their constitutional claims. State courts cannot be left free to ignore civil rights plaintiffs' federal right to recover fees. This is all the more so where the denial of any fee award is done without explanation, and in relation to a question of constitutional rights on which the state court has already shown itself to be resistant to this Court's rulings.

The Court should grant the petition for a writ of certiorari, vacate the order of the Arkansas Supreme Court, and remand with directions to make an award of fees consistent with this Court's Section 1988 precedent.

A. Litigation In The Arkansas State Courts

This Court is familiar with the underlying litigation, which is discussed in the Court's decision in *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017) (per curiam). In short, petitioners are two married same-sex couples who resided in Arkansas and who conceived their children through anonymous sperm donors. *Id.* at 2077. Respondent, the director of the Arkansas Department of Health, refused to place the name of each birth mother's female spouse on her child's birth certificate, even though Arkansas law requires that a mother's male spouse be placed on the birth certificate under similar circumstances. *Ibid*; see also Ark. Code § 20-18-401 (the Birth Certificate Law). Petitioners thereafter sought a writ of certiorari from this court.

B. This Court's Decision In *Pavan* v. *Smith*

On June 26, 2017, this Court summarily reversed the Arkansas Supreme Court in a per curiam order. The Court held that the Birth Certificate Law, as construed by the Arkansas Supreme Court, "infringes *Obergefell*'s commitment to provide same sex couples 'the constellation of benefits that the States have linked to marriage.'" *Pavan*, 137 S. Ct. at 2077 (quoting 135 S. Ct. at 2601). The Court rejected the State's argument that the Birth Certificate Law is "simply a device for recording biological parentage," noting that Arkansas law requires the placement of a birth mother's husband on the birth certificate of a child conceived through anonymous sperm donation. *Id.* at 2078. Thus, the Court held, Arkansas had "chosen to make its birth certificates more than a mere marker of biological relationships," and so the State "may not, consistent with *Obergefell*, deny married same-sex couples that recognition." *Id.* at 2078-2079.

In obtaining summary reversal, petitioners attained relief both for themselves and all other married same-sex parents in Arkansas who were being denied equal access to the rights of married couples with respect to their children's birth certificates. The Court remanded to the Arkansas Supreme Court "for further proceedings not inconsistent with this opinion." *Pavan*, 137 S. Ct. at 2079.

C. Proceedings After This Court's Decision

On remand, before the Arkansas Supreme Court, respondent continued to advance arguments that he had made unsuccessfully to this Court in opposing certiorari. Specifically, respondent contended that petitioners' remedy lay under Arkansas's assisted reproduction statute, Ark. Code § 9-10-201(a) (the Assisted Reproduction Law), rather than the Birth Certificate Law.[2] Respondent urged the Arkansas Supreme Court to limit petitioners' remedy to relief under the Assisted Reproduction Law and to decline to give relief under the Birth Certificate Law, as required by this Court's order. See Appellant's Supp. Br. 2 (Aug. 14, 2017) (No. CV-15-988).

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[2] In his opposition to the petition for certiorari, respondent had argued that petitioners should have brought their claims under Arkansas's Assisted Reproduction Law instead of under the Birth Certificate Law. Resp. Br. at 22, *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017) (No. 16-992). As petitioners explained in reply, and this Court's summary order implicitly recognized, the Assisted Reproduction Law was not the operative statute, because it does not mention birth certificates nor directs the Arkansas Department of Health to issue them. Reply Br. at 6-8, *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017) (No. 16-992). Thus, as this Court held, petitioners were entitled to the relief they sought under the Birth Certificate Law. *Pavan*, 137 S. Ct. at 2078-2079.

On October 19, 2017, the Arkansas Supreme Court rejected respondent's position, and issued an order "remand[ing] for entry of a final judgment consistent with the mandate of the Supreme Court of the United States." App., *infra*, 15a. In its order, the state court acknowledged that this Court had "granted [petitioners'] petition for a writ of certiorari [and] reversed the judgment of" the Arkansas Supreme Court, *id.* at 13a, and rejected respondent's argument that "a gender-neutral reading of [the Assisted Reproduction Law] would adequately address the constitutional infirmity found," *id.* at 14a.

On November 7, 2017, the Arkansas Supreme Court issued its mandate, returning this case to the trial court. Pursuant to that mandate, on December 8, 2017, the Circuit Court of Pulaski County, Arkansas permanently enjoined respondent and his successors from issuing birth certificates except pursuant to a policy that "issue[s] birth certificates to all same sex spouses and opposite sex spouses in accordance with the mandate from the United States Supreme Court and the Arkansas Supreme Court." App., *infra*, 6a.

As the "prevailing party" in this litigation, petitioners sought recovery of their attorneys' fees pursuant to Section 1988. Petitioners followed the relevant Arkansas procedural requirements with respect to the petition for appellate fees at issue here.

First, petitioners appropriately filed their application in the Supreme Court of Arkansas. In Arkansas, applications for appellate attorneys' fees must be filed in the appellate court in the first instance. See *Race* v. *Nat'l Cashflow Sys., Inc.*, 810 S.W.2d 46, 47-48 (Ark. Ct.

App. 1991), aff'd, 817 S.W.2d 876 (Ark. 1991).[3] Petitioners did so on November 21, 2017. [4] App., *infra*, 10a-12a.

Second, petitioners timely filed their application for appellate attorney's fees. The relevant Arkansas rule requires that a motion for attorney's fees be filed no later than fourteen days after the entry of judgment. See Ark. R. Civ. P. 54(e). Petitioners filed their application in the Arkansas Supreme Court on November 21, 2017, fourteen days after that court's mandate issued. Petitioners separately moved to transfer consideration of the motion for appellate fees to the circuit court, which the State Supreme Court denied. See Appellees' Mot. to Transfer (No. CV-15-988); App., *infra*, 2a.

Finally, petitioners provided a sufficient description of their claim in the application. Like the Federal Rules of Civil Procedure, Arkansas rules require that an initial motion for fees state only "the amount" or "a fair estimate of the amount [of fees] sought," Ark. R. Civ. P. 54(e)(2), to be supplemented later with documentation

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[3] Noting this requirement, respondent had previously argued that the trial court lacked jurisdiction to make an award for appellate attorneys' fees. See Defendant's Response to Mot. for Fees 8 (Jan. 5, 2016) (No. 60CV 15-3153) (arguing in original attorney's fees response in circuit court that "any fees and costs awarded to a prevailing part on appeal must come from the appellate court").

[4] To make absolutely certain that they met all procedural requirements, on November 2, 2017, petitioners filed a motion requesting that the Arkansas Supreme Court clarify in its mandate, which had not yet issued, where the application for appellate fees should be filed. See Appellees' Mot. for Clarification (No. CV-15-988). The Arkansas Supreme Court issued the mandate on November 7, 2017 without any reference to fees and on November 30, 2017, also denied without explanation petitioners' motion to clarify. See Mandate to Clerk (No. CV-15-988); App, *infra*, 8a-9a.

supporting the request, see Ark. R. Civ. P. 54, addition to reporter's notes, 1997 amendment (noting that the Rule "does not require that the motion for attorneys' fees be supported at the time of filing with the evidentiary material bearing on the fees"). Consistent with that rule, petitioners provided an approximation of the attorney's fees to which they were entitled: $220,000. App., *infra*, 11a. Additionally, pursuant to Arkansas procedure, petitioners requested an opportunity to file briefing substantiating their fee application, to which they were entitled under Arkansas Rule of Civil Procedure 54(e)(3). *Ibid.*

Respondent did not timely oppose petitioners' motions, and instead sought leave to file a belated opposition. See Appellant's Mot. for Leave to File Belated Response (Dec. 6, 2017) (No. CV-15-988).

On January 4, 2018, the Arkansas Supreme Court denied petitioners' motions without any explanation or reasoning whatsoever, and without requesting the submission of any substantive briefing regarding the appropriate dollar amount for fees, as contemplated in the commentary to the relevant rule. App., *infra*, 1a-2a. The court also denied respondent's motion to file a belated opposition, leaving petitioners' motions unopposed. *Ibid.* The full extent of the court's statement regarding petitioners' fee application is in a docket entry, as follows:

> Appellees' protective motion for appellate attorney's fees and expenses is DENIED. Wynne, J. would grant in part and set a schedule for briefing and submission of evidence. Kemp, C.J., would note. Appellees' motion to transfer motion for attorney's fees and expenses is DENIED. Appellant's motion

for leave to file a belated response to appellees' fee motions is DENIED.

Ibid.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW REFLECTS A COMPLETE DISREGARD FOR SETTLED FEDERAL LAW REGARDING PREVAILING CIVIL RIGHTS PLAINTIFFS' ENTITLEMENT TO FEES

A. Petitioners Were Entitled To An Award Of Appellate Attorney's Fees Calculated In Accordance With This Court's Well-Established Precedent

Congress enacted the Civil Rights Attorney's Fees Award Act of 1976, codified at 42 U.S.C. 1988, to "ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 1558, 94th Cong., 2nd Sess. at 1 (1976)). Section 1988, which applies equally in State courts, is an "integral part of the remedies necessary to obtain" compliance with federal civil rights laws. *Maine* v. *Thiboutot*, 448 U.S. 1, 11 (1980) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. at 5 (1976)). This Court has repeatedly held that attorney's fees in Section 1983 cases should be awarded to a prevailing plaintiff absent special circumstances. See *Lefemine* v. *Wideman*, 568 U.S. 1, 5 (2012) (quoting *Hensley*, 461 U.S. at 429) (Plaintiffs who are prevailing parties "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."). Here petitioners were a "prevailing party"

within the meaning of Section 1988 and have met all procedural requirements with respect to their application for fees.

1. Section 1988 and the Law Interpreting it Apply in State Courts Such As the Arkansas Supreme Court

This Court has recognized that Congress, in passing Section 1988, intended the statute to authorize "the award of a reasonable attorney's fee in actions brought *in State or Federal courts*." *Thiboutot*, 448 U.S. at 11 (emphasis added) (quoting 122 Cong. Rec. 35122 (1976)). Accordingly, State courts are bound by Section 1988's mandates and this Court's interpretation of them. Prevailing parties in civil rights actions are entitled to fees in State court to the same extent they would be in federal court. See *James* v. *City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of [Section 1988]."); *Thiboutot*, 448 U.S. at 10 (finding "no merit to [the] argument" that Section 1988 does not apply in state courts). Therefore, the Arkansas Supreme Court is bound by Section 1988 and to apply it in a manner consistent with this Court's authoritative rulings. See U.S. Const. Art. VI, Cl. 2.

2. Petitioners Were the "Prevailing Party" in This Litigation

A plaintiff "prevails" within the meaning of Section 1988 "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar* v. *Hobby*, 506 U.S. 103, 111-112 (1992). Here, as a direct result of this Court's ruling, petitioners obtained from the State trial

court on December 8, 2017, an injunction preventing respondent and his successors from issuing any birth certificates except under a policy that "issue[s] birth certificates to all same sex spouses and opposite sex spouses in accordance with the mandate from the United States Supreme Court and the Arkansas Supreme Court." App., *infra*, 5a-7a. This injunction altered the legal relationship between petitioners and respondent in a way that benefits petitioners and those similarly situated. On the same day the trial court issued its injunction, Arkansas Governor Asa Hutchinson directed the Arkansas Department of Health in a letter to "list the spouse of a woman who gives birth, regardless of the gender of the spouse, on their children's birth certificates." Letter from Asa Hutchinson, Governor, Arkansas, to Nathaniel Smith, M.D., MPH, Director, Arkansas Dept. of Health (Dec. 8, 2017). Consequently, petitioners are the "prevailing party" under Section 1988(b). Indeed, respondent has conceded in connection with recovery of petitioners' attorney's fees incurred at the trial court level that petitioners are prevailing parties. See Defendant's Response to Mot. for Fees 2 (Jan. 5, 2016) (No. 60CV-15-3153).

Respondent argued in its belated opposition to petitioners' fee application in the Arkansas Supreme Court that petitioners were not entitled to appellate attorney's fees because they were not a "prevailing party" under Section 1988(b) at all stages of the litigation, including in the initial litigation before the Arkansas Supreme Court that erroneously declined to recognize petitioners' constitutional rights. See Appellant's Mot. for Leave to File Belated Response, Ex. 1 (Dec. 6, 2017) (No. CV-15-988). Whatever temporary successes respondent may have

had at different stages in the litigation, it is beyond legitimate dispute that petitioners are fully prevailing parties for purposes of Section 1988.

The State court's initial denial of petitioners' constitutional claims at an earlier stage in this litigation has no bearing on the fact that petitioners were ultimately prevailing parties, and are now entitled to recover fees with respect to each of the steps that were necessary to vindicate that right. In the context of attorney's fees, "[t]he result is what matters." *Hensley*, 461 U.S. at 435. "Where a plaintiff has obtained excellent results," this Court has held, plaintiff's "attorney should recover a fully compensatory fee [that] encompass[es] all hours reasonably expended on the litigation." *Ibid.* It is beyond legitimate dispute that work spent before an intervening court to defend a lower court victory is by definition "reasonably expended." Consistent with this Court's precedent, courts uniformly recognize that a party who prevails in the litigation as a whole, but had been unsuccessful during stages of that litigation, is entitled to fees for the *entire* case, including for the unsuccessful stages. See, *e.g.*, *Air Transp. Ass'n of Canada* v. *FAA*, 156 F.3d 1329, 1335 (D.C. Cir. 1998) (a plaintiff "who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage" (quoting *Cabrales* v. *Cty. of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991))); *Buffington* v. *Baltimore Cty.*, 913 F.2d 113, 128 n.12 (4th Cir. 1990) (stating that on remand the district court "need not revisit the argument * * * that fees and expenses attributable to the first trial, which ended in a mistrial, should be excluded on the ground that the plaintiffs did not prevail in that proceeding").

Thus there can be no doubt that petitioners are a "prevailing party" within the meaning of Section 1988.

3. Petitioners Satisfied the Relevant Arkansas Procedural Requirements

In making their application for appellate attorney's fees, petitioners also followed applicable Arkansas procedural law and rules as to the timing, venue, and content of their fee request.

As to timing, Arkansas Rule of Civil Procedure 54(e)(2) provides that a motion for attorney's fees must be filed no later than fourteen days after the entry of judgment. Petitioners complied with this rule by filing their motion for attorney's fees in the Arkansas Supreme Court on November 21, 2017, fourteen days after that court's Mandate. App., *infra*, 10a-12a.

As to venue, under established Arkansas precedent, motions for appellate attorney's fees must be filed in the first instance in the appeals court, not the trial court. See *Race* v. *Nat'l Cashflow Sys., Inc.*, 810 S.W.2d 46, 47, 48 (Ark. Ct. App. 1991), aff'd, 817 S.W.2d 876 (Ark. 1991) (holding that the appeals court "has the authority" to "award attorney fees to the prevailing party for services of his attorney on appeal," and that the "trial court [is] without authority to award" those fees absent the appeals court's order). Consistent with this precedent, petitioners filed their appellate fees motion in the Arkansas Supreme Court—not the circuit court. Out of an abundance of caution, petitioners also filed a motion for clarification as to where they should file for appellate attorney's fees. See Appellees' Mot. for Clarification (Nov. 2, 2017) (No. CV-15-988). The Arkansas Supreme Court summarily denied that motion. App., *infra*, 8a-9a. Peti-

tioners additionally filed a motion in the alternative asking the Arkansas Supreme Court to transfer the motion for fees to the circuit court. See Appellees' Mot. to Transfer (Nov. 21, 2017) (No. CV-15-988). The Arkansas Supreme Court summarily denied that motion as well. App., *infra*, 1a-2a.

As to the substantive content of the application, the Arkansas Rules of Civil Procedure require only that a party filing an attorney's fees motion state in that motion "the amount" or "a fair estimate of the amount sought." Ark. R. Civ. P. 54(e)(2). As the commentary to the Rule notes, the Rule "does not require that the motion for attorneys' fees be supported at the time of filing with the evidentiary material bearing on the fees." Ark. R. Civ. P. 54, addition to reporter's notes, 1997 amendment. Instead, all that is required is "the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees or a fair estimate." *Ibid.* A party propounding or opposing a fees motion may request "an opportunity for adversary submissions," which the court "shall afford" at the "request of a party." Ark. R. Civ. P. 54(e)(3); see also Ark. R. Civ. P. 54, addition to reporter's notes, 1997 amendment (Rule 54(e)(3) "assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services.").[5]

[5] This procedure is consistent with federal practice. See Fed. R. Civ. P. 54(d)(2)(B) (requiring that a fee motion disclose only "the amount sought or provide a fair estimate of it"), and (2)(C) (requiring a court to "give an opportunity for adversary submissions" on a party's request).

Petitioners complied with this requirement by providing a reasonable estimate of their appellate attorney's fees, in the amount of $220,000, and requested that the court set a briefing schedule for petitioners to provide evidence substantiating their fee request, as they were entitled to receive under Rule 54(e)(3). App., *infra*, 11a. The Arkansas Supreme Court, however, did not seek further briefing or request the provision of any additional information regarding petitioners' fee request, as Rule 54 and its commentary provide. *Id.* at 1a-2a. Recognizing this variation from Arkansas procedure, Justice Wynne dissented from the court's summary disposition, writing that he would have "schedule[d petitioners' motion] for briefing and submission of evidence." *Id.* at 2a.

4. While the Precise Amount of the Fee Award Needs to be Determined, It Must be Calculated Consistent with This Court's Precedent

Because petitioners were prevailing parties and complied with all relevant procedural requirements in seeking attorney's fees, petitioners were entitled to a fee award as a matter of law. Under this Court's precedent, once a civil rights plaintiff has prevailed and made a fee request, the only remaining question is the amount of the award. Moreover, this Court has established in unambiguous terms the straightforward manner in which that award is to be calculated. Courts are to use the "lodestar" method of calculating attorney's fees: as a "starting point," the court should calculate "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986) (quoting *Henlsey*, 461 U.S. at 433)). Only

then may courts "adjust this lodestar calculation by other factors." *Blanchard* v. *Bergeron*, 489 U.S. 87, 94 (1989). "[T]he lodestar method yields a fee that is presumptively sufficient" to achieve the statute's objective of "enforce[ing] the covered civil rights statutes." *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

In other words, even as to the calculation of the fee award, the state court's consideration is tightly circumscribed by federal law. The Arkansas Supreme Court had no discretion simply to deny petitioners' fee application outright.

B. The Arkansas Supreme Court's Failure To Explain Its Denial Of Fees Independently Violates This Court's Settled Precedent And Cannot Shield That Court's Action From Review

To ensure that courts award Section 1988 fees in accordance with the mandates of federal law, courts assessing such fees must "provide a concise but clear explanation of [their] reasons for the fee award." *Hensley*, 461 U.S. at 437. In particular, while the presumption in favor of an award of fees to prevailing plaintiffs can be overcome only in certain limited "special circumstances," this Court has made clear that a court that denies fees due to "special circumstances" must provide a reasoned explanation for that decision. *Lefemine*, 568 U.S. at 5. "When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the [courts assessing fees] should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Hensley*, 461 U.S. at 437. As the Court has explained, this rule is motivated by the concern that

"awards may be influenced (or at least appear to be influenced) by a judge's subjective opinion regarding * * * the importance of the case." *Perdue*, 559 U.S. at 557. An adjustment without "proper justification" may appear to be "essentially arbitrary." *Ibid.* (questioning why the court below adjusted the award by "75% rather than 50% or 25% or 10%"). The risk that a court's subjective opinions regarding the underlying claims will influence the Section 1988 fees award is particularly pronounced where, as here, the state court's failure to adhere to this Court's precedent on the subject has already resulted in a summary reversal by this Court.

Here, the Arkansas Supreme Court did not articulate any "special circumstances" justifying the denial of petitioners' attorney's fees application. Indeed, its summary order did not articulate any reasoning at all. By failing to provide any basis for its denial of fees in the face of petitioners' presumptive right to such an award, the Arkansas Supreme Court has defied this Court's order to proceed in a manner "not inconsistent" with its previous order in this matter, *Pavan*, 137 S. Ct. at 2079, and the State court's decision does not accord with binding federal law.

The Arkansas Supreme Court's failure to provide any explanation whatsoever for its denial of fees *by itself* warrants reversal by this Court, accompanied by instruction to the State court to consider petitioners' application in accordance with this Court's precedent. See *Lefemine*, 568 U.S. at 5 ("Neither of the courts below addressed whether any special circumstances exist in this case, * * *. Accordingly, the petition for certiorari is granted, the judgment [of the lower court] is vacated, and the case is remanded for further proceedings consistent with this opinion.").

Any attempt by respondent to proffer a rationale for the Arkansas Supreme Court's unexplained order must be rejected. It is the court's order that this Court reviews, and here that order gives no hint of any justification for denying petitioners' fee request.

In particular, the Court should reject any attempt by respondent to shield the state court's decision from review by suggesting that it stands on an independent state law ground. Again, the court's order does not suggest any state law grounds for the denial. Petitioners' fee dispute arises out of, and exclusively turns on, the application of federal law regarding the appropriateness of attorney's fees under Section 1988. The Arkansas Supreme Court is bound by this Court's interpretation of Section 1988. See U.S. Const. Art. VI, Cl. 2. And, even if the Arkansas Supreme Court had offered some novel state law ground for rejecting petitioners' fee application, such a novel rule would not be "adequate" to support denial of fees here. See, *e.g.*, *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

The absence of any explanation for the denial of fees thus represents an independent violation by the Arkansas Supreme Court of this Court's binding precedent applying Section 1988. Respondent should not be heard to offer speculative rationales in an effort to avoid this Court's review.

II. The Arkansas Supreme Court's Order Warrants This Court's Review and Correction Because It Flouts Binding Precedent and Will Discourage Plaintiffs From Vindicating Constitutional Rights In State Courts

This case implicates issues well beyond petitioners' entitlement in this case to attorney's fees under Section 1988. After having been summarily reversed by this Court for failing to apply *Obergefell*, the Arkansas Supreme Court has responded by depriving petitioners of the attorney's fees to which they are entitled. The Arkansas Supreme Court's actions frustrate the purposes of Section 1988 and, if allowed to stand, will inhibit plaintiffs from vindicating their civil rights in State courts.

As Congress recognized when it enacted Section 1988, "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 1011, 94th Cong., 2d Sess. at 2 (1976). Should this Court leave the error here uncorrected, state courts that disagree with this Court's rulings implementing civil rights laws would have a roadmap to deprive successful civil rights plaintiffs of their entitlement to recover the attorneys' fees expended in vindicating their rights.

If the state courts were free simply to ignore successful civil rights plaintiffs' federal statutory right to recover fees, citizens would understandably hesitate to vindicate their constitutional rights through the state courts. State courts, which both the Constitution and federal statutes regard as of equal stature for vindicating federal rights, would in practice be relegated to a

second-tier status, with plaintiffs understandably avoiding an otherwise viable state forum for fear of being denied fees to which they are entitled under Section 1988.

Moving litigation from state to federal court would also frustrate the opportunity in appropriate cases for the state courts to avoid some constitutional questions. It is often the case in constitutional litigation concerning state laws that the state laws are subject to narrowing constructions that would avoid constitutional problems—constructions that are the proper province of the State courts. See, *e.g.*, *Harris Cty. Com'rs Court* v. *Moore*, 420 U.S. 77, 83 (1975) (citing *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941)) (holding stay of federal litigation appropriate "in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding the constitutional question"); see also *Juidice* v. *Vail*, 430 U.S. 327, 347 (1977) (Stewart, J., dissenting) (noting that "state-court construction [of state law] may obviate or significantly modify the federal questions seemingly presented, thus avoiding * * * premature constitutional adjudication" (internal quotation marks and citations omitted)). If civil rights plaintiffs are discouraged for fear of being denied recovery of attorney's fees from seeking to vindicate their constitutional rights in state court, this Court would be denied the benefit of state courts' view on such questions of state law.

This Court, "by force of the Constitution" is "the ultimate arbiter" of constitutional and federal law. *United States* v. *Reynolds*, 235 U.S. 133, 148 (1914); see also U.S. Const. Art. VI, Cl. 2. This case has become an unfortunate situation in which this Court must demonstrate (yet again) its role in the federal structure, and refuse to

countenance the Arkansas Supreme Court's blatant defiance of this Court's rulings. The Court should again make clear that state courts are "bound by this Court's interpretation of federal law." *James* v. *City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam); see also *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 21 (2012) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994))).

CONCLUSION

The petition for a writ of certiorari should be granted and either set for argument or, in the alternative, the judgment of the Supreme Court of Arkansas should be vacated and the case remanded with clear instructions to make an award of petitioners' appellate attorney's fees and expenses, including for this second petition, in accordance with federal law and this Court's well-established standards for calculating fees under Section 1988.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
CHRISTOPHER THOMAS BROWN
DANIEL FINE
PATRICK ROATH
ROPES & GRAY LLP

SHANNON MINTER
CHRISTOPHER STOLL
AMY WHELAN
NATIONAL CENTER FOR LESBIAN RIGHTS

CHERYL MAPLES

Counsel for Petitioner

APRIL 2018

APPENDIX

APPENDIX A

STATE OF ARKANSAS,
SUPREME COURT

FORMAL ORDER

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON JANUARY 4, 2018, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-15-988

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAP A CITY, 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 JANAS. 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 PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION - 60CV-15-3153

Appellees' protective motion for appellate attorney's fees and expenses is DENIED. Wynne, J., would grant in part and set a schedule for briefing and submission of evidence. Kemp, C.J., would note. Appellees' motion to transfer motion for attorney's fees and expenses is DENIED. Appellant's motion for leave to file a belated response to appellees' fee motions is DENIED.

In testimony, that the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Stacey Pectol, clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 4th day of January, 2018.

/s/ Stacey Pectol
CLERK

BY:_____
DEPUTY CLERK

ORIGINAL TO CLERK

CC: Cheryl Maples
Jonathan Wiessglass and Andrew Kushner
Amy Whelan
Lee P. Rudofsky, Solicitor General
Monty V. Baugh, Deputy Attorney General
Honorable Timothy Davis Fox, Circuit Judge

APPENDIX B

42 U.S.C. § 1988 - Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in

its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX C

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

CASE NO. 60CV-15-3153

MARISA N. PAVAN and TERRAH D. PAVAN,
PLAINTIFFS
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

vs.

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

INJUNCTION

On the 8th day of December, 2017, this matter came on for consideration and from all things and matters properly before the court, the court doth find and order as follows:

1. The United States Supreme Court has ruled that the Arkansas statutory scheme concerning the issuance of birth certificates contained in A.C.A. § 20-18-401 and A.C.A. § 20-18-406 is unconstitutional as being violative of the equal protection clause of the Constitution of the

United States. The Arkansas Supreme Court has ordered certain portions of those statutes stricken.

2. The Arkansas Supreme Court, in its mandate to this court has ordered that this court issue such, "injunctive relief as necessary to ensure same sex spouses are afforded the same right as opposite sex spouses to be listed on a child's birth certificate."

3. Pursuant to the mandate of the United States Supreme Court and the Arkansas Supreme Court, the defendant, his successors and assigns are hereby immediately enjoined from the issuance of any and all birth certificates pursuant to either A.C.A. § 20-18-401 or A.C.A. § 20-18-406 unless and until such time as the defendant, his successors, and assigns, are able to issue birth certificates to all same sex spouses and opposite sex spouses in accordance with the mandate from the United States Supreme Court and the Arkansas Supreme Court.

4. If the defendant is unable to comply with such injunction with the remaining constitutional portions of such statutes, then the defendant, his successors, and assigns, are enjoined from the issuance of any and all birth certificates.

5. The court is hopeful that the executive branch may have the authority to issue such curative executive regulations as are necessary to allow for the issuance of birth certificates under the remaining constitutional portions of A.C.A. § 20-18-401 or A.C.A. § 20-18-406 in a constitutional manner, but expresses no opinion on those issues because they are not before the court.

6. In the event the defendant is unable to comply with this injunction with the remaining constitutional portions of A.C.A. § 20-18-401 or A.C.A. § 20-18-406 and

the executive branch does not have the authority to issue curative regulations, then the defendant, his successors, and assigns, are enjoined from the issuance of any and all birth certificates until such time as the General Assembly can meet, in special or general session, and pass curative legislation.

7. The injunctive relief ordered herein is effective immediately upon the filing of this *Order*.

IT IS SO ORDERED

/s/ Timothy Davis Fox
Timothy Davis Fox
Circuit Judge

12/8/17

DATE

APPENDIX D

OFFICE OF THE CI.ERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

November 30, 2017

Cheryl Maples
P.O. BOX 59
Heber Springs, AR 72543

RE: SUPREME COURT CASE NO. CV-15-988

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

Dear Ms. Maples:

The Arkansas Supreme Court issued the following order today in the above styled case:

"Appellees' motion for clarification is denied. Kemp, C.J., and Wynne, J., would deny as moot."

Sincerely,

/s/ Stacey Pectol

Stacey Pectol, Clerk

cc: Lee Rudofsky, Solicitor General
Monty V. Baugh, Deputy Attorney General

APPENDIX E

In the Arkansas Supreme Court

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, et al.
Appellees

On Appeal from the Circuit Court of Pulaski County, Sixth Division, the Honorable Timothy Fox, Circuit Judge

Appellees' Protective Motion for Appellate Attorney's Fees and Expenses

As the prevailing parties in this litigation, appellees hereby move for an award of attorney's fees and expenses pursuant to 42 U.S.C. §1988. This motion is made as a protective matter pursuant to Arkansas Rule of Civil Procedure 54(e)(2), which provides that a motion for attorney's fees must be filed no later than 14 days after entry of judgment. On November 7, 2017, this Court issued its mandate, which remanded the case to the circuit court for entry of final judgment consistent with the mandate of the U.S. Supreme Court. Although the Arkansas Supreme Court does not have a rule requiring fee motions within a particular time and although no final judgment has yet been entered, appellees file this motion out of an abundance of caution.

Appellees respectfully request an award of appellate attorney's fees in the approximate amount of $220,000, and reimbursement for approximately $6,000 in appellate expenses. Appellees will also request reasonable attorney's fees and expenses incurred in litigating attorney's fees issues commonly known as fees-on-fees) in an amount to be determined, if such fees are incurred.

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Appellees file with this motion a separate Motion to Transfer Attorney's Fees and Expenses to the circuit court. Transfer is appropriate for the reasons set forth in that motion. If, however, this Court denies the motion to transfer, appellees request that the Court set a schedule for briefing and submission of evidence. *See* Addition to Reporter's Notes to Rule 54, 1997 Amendment.

Respectfully submitted,

CHERYL K. MAPLES

By: */s/Cheryl Maples*
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Special Fees Counsel for Appellees

November 21, 2017

APPENDIX F

SUPREME COURT OF ARKANSAS
No. CV-15-988

Opinion Delivered: October 19, 2017

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 FR IENDS, 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

HONORABLE TIMOTHY DAVIS FOX,JUDGE

REVERSED AMD REMANDED

ROBIN F. WYNNE, Associate Justice

This case is before us once again after the Supreme Court of the United States granted the appellees' petition for a writ of certiorari, reversed the judgment of this court, and remanded for "further proceedings not inconsistent with" the opinion of the Court. *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam). The Supreme

Court held that pursuant to *Obergefell v. Hodges*, 576 U.S._, 135 S. Ct. 2584 (2015), Arkansas's birth-certificate law, Arkansas Code Annotated section 20-18-401 (Repl. 2014), is unconstitutional to the extent it treats similarly-situated same-sex couples differently from opposite-sex couples. The parties have now filed supplemental briefs with this court. We take this opportunity to reject appellant's interpretation of the United States Supreme Court's opinion and the suggestion that a gender-neutral reading of Arkansas Code Annotated section 9-10-201(a) (the assisted-reproduction statute) would adequately address the constitutional infirmity found. The birth-certificate law must be addressed,[1] but we cannot simply affirm the circuit court's previous order, which impermissibly rewrote the statutory scheme. An order rewriting a statute "amounts to a judicial intrusion upon the legislative prerogative and violates the constitutional doctrine of separation of powers." *Cox v. Comm'rs of Maynard Fire Imp. Dist. No. 1*,287 Ark. 173,176,697 S.W.2d 104, 106 (1985). On remand, the circuit court should award declaratory and injunctive relief as necessary to ensure that same-sex spouses are afforded the same right as opposite-sex spouses to be listed on a child's birth certificate in Arkansas, as required under *Pavan v. Smith*, supra. Extending the benefit of the statutes at issue to same-sex spouses will implement the mandate of the Supreme Court of the United States without an impermissible rewriting of the statutes. See *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492 (Ariz. 2017) (extending the benefit of Ari-

[1] We note that Arkansas Code Annotated sections 20-18-401(e), (f) and 20-18-406(a)(2) (Repl. 2014) were at issue in the present case.

zona's statutory marital-paternity presumption to similarly situated female spouses rather than nullifying the statute).

Accordingly, we reverse the circuit court's order, and we remand for entry of a final judgment consistent with the mandate of the Supreme Court of the United States.

Reversed and remanded.

WOMACK, J., concurs.

GOODSON and HART, J.J., dissent.

APPENDIX G

SUPREME COURT OF ARKANSAS
No. CV-15-988

Opinion Delivered: October 19, 2017

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 FR IENDS, 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

CONCURRING OPINION

SHAWN A. WOMACK, Associate Justice

I agree with the majority that we must reverse and remand this case to the circuit court following the Supreme Court's decision. However, I would additionally require the circuit court to conduct a hearing and

make findings of fact regarding how, specifically, the law treats similarly situated same-sex couples differently than opposite-sex couples and to make specific findings as to how those couples are similarly situated for the purpose of the application of the statutes in question. While the majority of this court remands to the circuit court only for an order consistent with the Supreme Court's ruling, the Supreme Court's majority on remand clearly calls for "further proceedings." Only after conducting such further proceedings and making the necessary findings of fact should the circuit court then issue an order, based on those findings. Said order should determine the constitutionality of the relevant statutes in a way that both comports with the law and is narrowly tailored so as to balance the legislative presumption in favor of constitutionality with the equal treatment of law under the statutes and should have limited application to parties and circumstances that are, in fact, similarly situated.

The Equal Protection Clause of the Constitution prohibits a government actor from treating similarly situated people dissimilarly. See *Brown v. State*, 2015 Ark. 16, at 6, 454 S.W.3d 226, 231; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). There is no doubt that the position of the parties has drastically changed since this case was originally presented to the circuit court below. See *Smith v. Pavan*, 2016 Ark. 437, 505 S.W.3d 169 (Wood, J., concurring in part and dissenting in part). The appellant even avers in its brief that the department of health has since revised its policy regarding birth certificates for assisted- reproduction situations. As noted before, that information is not in the record before us. Additionally, despite the cornerstone that the Equal Protection Clause prohibits dissimilar

treatment of similarly situated individuals, there is no analysis of that rule in the circuit court's order; nor is there a specific analysis regarding how the classification survives the appropriate level of scrutiny. See *Klinger v. Dep't of Corr.*, 31 F.3d 727, 730 (8th Cir. 1994). Therefore, it would be not only prudent, but indeed mandatory according to the Supreme Court's ruling, to order the circuit court to conduct a hearing and make specific findings of fact as stated above.

Finally, beyond determining the constitutionality of various portions of the challenged statutes, it is not the role of this or any other court to attempt to fashion a remedy that breaches into the realm of policy making. The role of determining policy belongs to the people through their elected representatives in the legislature. Once the scope of constitutional application is finally determined, it is incumbent upon the General Assembly to re-engage and to establish the state of the law going forward within those boundaries.

APPENDIX H

SUPREME COURT OF ARKANSAS
No. CV-15-988

Opinion Delivered: October 19, 2017

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 FR IENDS, 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 OPINION

KAREN R. BAKER, Associate Justice

I dissent from the majority's opinion because I would not remand this matter to the circuit court. I would simply vacate our previous opinion and issue a substituted opinion reversing and dismissing the circuit court's order which impermissibly rewrote the statute. Further, based on *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam) and the State's concession that Ark. Code Ann. § 9-10-201 is unconstitutional, I would declare Ark.

Code Ann. §§ 9-10-201(a) and 20-18-401(f)(1) unconstitutional, stricken, and void. We should not remand this matter to the circuit court for an order consistent with the majority's opinion.

Moreover, despite the State 's urging to take up a pen and set off through the Arkansas Code replacing the words "husband" and "wife" with "spouse" or other gender neutral alternatives, the truth is that that pen does not belong to us, nor does it belong to the circuit court. The pen belongs to the legislature and it is their duty to determine the best way to address the constitutional infirmity in these two statutes. We cannot fashion the remedy, the authority to do so rests solely with the legislature. Thus, there is no need to remand this matter to the circuit court, which is in no better position and has no more authority than we do to rewrite these statutes. To do so only delays this matter further. Therefore, based on the States's concession that Ark. Code Ann. § 9-10-201 is unconstitutional and the United States Supreme Court's mandate in Pavan, supra, I would reverse the circuit court's order and declare that Ark. Code Ann. §§ 9-10-201(a) and 20-18-401(Q)(1) are unconstitutional, stricken and void.

GOODSON and HART, J.J., join.