NO. CV-15-988

IN THE SUPREME COURT OF ARKANSAS

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

v.

MARISSA 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

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES, BY THE AMERICAN CIVIL LIBERTIES UNION AND THE ARKANSAS CIVIL LIBERTIES UNION

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The Arkansas Civil Liberties Union ("ACLU of Arkansas") is one of its statewide affiliates. The ACLU and the ACLU of Arkansas advocate for equal rights of lesbian, gay, bisexual and transgender (LGBT) people in Arkansas and across the country. They have a vital interest in ensuring that the Constitution's guarantee of equal protection effectively protects same-sex couples and their children from discriminatory treatment and that these families enjoy the same protections available to different-sex couples and their children. *Amici* have appeared as counsel or *amici* in numerous cases in Arkansas and across the country involving the rights of LGBT parents and their children. *See, e.g.*, *Dep't of Human Servs. v. Howard*, 367 Ark. 55 (2006) (striking down regulation barring foster parenting by lesbians and gay men); *Ark. Dep't of Human Servs. v. Cole*, 380 S.W.3d 429 (Ark. 2011) (striking down law barring adoption and fostering by individuals living with unmarried partners); *Moix v. Moix*, 430 S.W.3d 680 (2013) (in case involving a gay father, Court rejected blanket rule barring unmarried cohabitation in child custody cases); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (establishing right to marry for same-sex couples); *Roe v. Patton*, No. 2:15–cv–00253–DB, 2015 WL

4476734 (D. Utah, July 22, 2015) (granting preliminary injunction mandating that statute establishing parenthood for husbands of women who give birth via donor insemination apply equally to female spouses of women who give birth this way); *Florida Dep't of Children and Families v. Matter of Adoption of X.X.G.*,45 So.3d 79 (Fla. 3rd D.C.A. 2010) (striking down law barring adoption by gay people).

ARGUMENT

I. The Supreme Court's decision in *Obergefell* requires the Arkansas Department of Health to issue new birth certificates for children born to same-sex couples who subsequently marry on the same terms as it does for children born to opposite-sex couples who subsequently marry.

When a child is born in Arkansas to an unmarried opposite-sex couple, if the couple later marries, the Arkansas Department of Health (ADH) will provide a new birth certificate listing both spouses as parents if presented with evidence that the child has been "legitimated." Ark. Code Ann. § 20-18-406(a)(2). In contrast, when a child is born to a same-sex couple that is unmarried—or was considered unmarried by the State at the time because it did not recognize their marriage—it will not provide a new birth certificate listing both spouses as parents unless the

couple completes the process of a step-parent adoption or otherwise obtains a court order determining parentage.[1]

ADH's unequal treatment of married same-sex couples means that their families, at best, experience a delay in having children's birth records reflect the reality of their families and the protection that provides. At worst—since not all families have the resources to pursue an adoption or other court order—children will grow up with a birth certificate that names only one of their two parents, causing them to feel insecurity and stigma, and compromising their sense of "integrity and closeness of their own family and its concord with other families in

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[1] This litigation does not address the issuance of original birth certificates for children born to married same-sex couples after Arkansas began recognizing marriages of same-sex couples. Under state law, a husband may be listed as a parent of a child born to his wife regardless of biological relatedness unless someone else's paternity is established by i) a court order or ii) notarized affidavits submitted by the mother, her husband, and the putative father. Ark. Code Ann. § 20-18-401(f). An affidavit submitted in this case by the Vital Records registrar suggests that ADH will treat married same-sex couples the same way if hospitals submit documentation reflecting a woman and her female spouse as parents. *See* Affidavit of Melinda Allen, Exh. 1 to Def.'s Mot. Summ. J., at 2.

their community . . . ." *United States v. Windsor*, 133 S.Ct. 2675, 2694-95 (2013). Moreover, without any documentation of their relationship with one of their parents, these children may lose out on important benefits that flow from that parent. And they are vulnerable to the loss of that parental relationship in the event something happens to their biological parent or their parents separate. This unequal treatment is clearly unconstitutional after the Supreme Court's decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Obergefell makes clear not only that states must permit same-sex couples to marry, but also that they must afford them every benefit provided to married couples on equal terms with opposite-sex married couples. *Obergefell*, 135 S.Ct. at 2605 (state bans on marriage for same-sex couples "are now held invalid to the extent they exclude same-sex couples from civil marriage **on the same terms and conditions as opposite-sex couples**.") (emphasis added).[2] The Court declined to

[2] Because *Obergefell* bars states from denying same-sex couples any of the incidents of marriage afforded to opposite-sex couples, there is no need to delve into the question of what level of scrutiny applies. However, *amici* note that, as two federal courts of appeal have recognized, the Supreme Court in *Windsor*, 133 S.Ct. 2675, applied a heightened form of scrutiny to a law that discriminated based on sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471,

"stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples" because to do so "would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.*, at 2606. The Supreme Court, after emphasizing the importance of

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480-84 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014). Numerous other courts have held that sexual orientation classifications warrant heightened scrutiny under the traditional factors evaluated by the Supreme Court. *See, e.g., Windsor v. United States*, 699 F.3d 169, 181-84 (2d Cir. 2012); *Love v. Beshear*, 989 F. Supp. 2d 536, 545-47 (W.D. Ky. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-30 (M.D. Pa. 2014); *Griego v. Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-32 (Conn. 2008). In addition, a federal district court in Arkansas, as well as other courts, have applied heightened scrutiny to discrimination against same-sex couples because it constitutes discrimination based on sex. *Jernigan v. Crane*, 64 F.Supp.3d 1260, 1286 (E.D. Ark. 2014); *see, e.g., Waters v. Ricketts*, 48 F.Supp.3d 1271, 1288 (D. Neb. 2015); *Lawson v. Kelly*, 58 F.Supp.3d 923, 934 (W.D.Mo. 2014).

ensuring that children of same-sex parents have the same rights, protections, and security as children of opposite-sex parents, specifically identified birth certificates as one of the marital protections afforded by states that must be provided equally to married same-sex couples. *Id.*, at 2601.

Given this sweeping language, there is no basis for ADH's incredulous assertion that "[t]here is no language in *Obergefell* that controls or even informs the question of who must be listed on the birth certificates of children born into same-sex marriages." App. Br. 7.[3] Indeed, states across the country are complying with *Obergefell*'s mandate and providing birth certificates to children of same-sex couples on the same terms as they do for children of opposite-sex couples.[4] And

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[3] For the same reason, the *Wright* injunction—which enjoined the Defendants (including the ADH) from enforcing all laws and regulations "to the extent that they . . . deny same-sex married couples the rights, recognition and benefits associated with marriage in the State of Arkansas"—also requires equal treatment of same-sex and opposite-sex married couples and their children with respect to birth certificates. *Wright, et. al. v. State*, Pulaski County Circuit Court 60CV-13-2662 (May 15, 2014), at 2.

[4] *See, e.g.*, Missouri Dep't of Health and Senior Services, "Birth certificate update following Barrier v. Vasterling," available at

where they haven't, courts have made clear that they must. *See* Order Granting Summ. J., at 7, *Brenner v. Scott*, No. 4:14-cv107-RH/CAS (N.D.Fla. Mar. 30, 2016), ECF No. 144 ("[I]in circumstances in which the [state] lists on a birth certificate an opposite-sex spouse who is not a biological parent, the [state] must list a same-sex spouse who is not a biological parent."); Order at 2, *De Leon v. Abbott*, No. SA-13-CA-00982-OLG (W.D. Tex. Aug. 11, 2015), ECF No. 113

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http://health.mo.gov/data/vitalrecords/birthcertificateupdate.php (announcing that women in a same-sex marriage who give birth in Missouri can have their spouse listed as a parent on the birth certificate); Beth Walton, *New birth certificate rules recognize lesbian mothers*, Citizen-Times, May 15, 2015, available at http://www.citizen-times.com/story/news/local/2015/05/15/newbirth-certificate-rules-recognize-lesbian-mothersnew-birth-certificate-guidelines-welcome-newslesbian-parents/27400819/ (reporting that North Carolina Vital Records will issue birth certificates naming both spouses in married same-sex couples); AJ Trager, *State Now Recognizing Married Same-sex Parents on Birth Certificates*, PrideSource, July 23, 2015, available at http://www.pridesource.com/article.html?article=72408 (reporting that Michigan Department of Health and Human Services will allow the spouse of a biological parent to be placed on a child's birth certificate for female married couples).

(ordering Defendants to implement policy guidelines recognizing same-sex marriage in death and birth certificates issued in Texas); *Roe v. Patton*, No. 2:15–cv–00253–DB, 2015 WL4476734, 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); *see also Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335 (Iowa 2013) (holding that excluding female spouse from birth certificate of child born to her wife during their marriage violated Iowa Constitution). Similarly, a federal district court in Mississippi enjoined enforcement of a state law barring adoption by same-sex couples, relying on that fact that *Obergefell* "extended its holding to marriage-related benefits-which includes the right to adopt." *Campaign for S. Equality v. Miss. Dep't of Human Servs.*, No. 3:15cv578-DPJ-FKB, 2016 WL 1306202 at *13 (S.D. Miss. Mar. 31, 2016).

Because ADH provides new birth certificates listing both parents for children of opposite-sex parents who marry after their birth without the requirement of an adoption or other court order, after *Obergefell*, it must treat children of same-sex couples the same way.

II. ADH offers no valid defense of its discriminatory treatment of married same-sex couples and their children.

ADH's assertion that the birth certificate statutes classify based on biological parentage

ADH attempts to defend its discriminatory practice by arguing that Arkansas's birth certificate statutes do not classify based on gender or sexual orientation or even marital status but rather, just biological parentage. That is simply untrue.[5] ADH provides birth certificates for children of married opposite-

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[5] It is also contrary to the position previously taken by ADH. In May, 2014, after the circuit court's ruling in *Wright*, ADH's general counsel issued a memo stating that "[s]ame-sex couples who already have children are now similarly situated" to a "newly married heterosexual couple seeking to legitimize their child." *See* May 13, 2014, Memo from Rick Hogan to Stephanie Williams and Ann Purvis re: Amendment of Parentage for Same-Sex Couples, available at http://www.acluarkansas.org/contentitemdocuments/355.pdf. The memo further says "[t]o state that now legally married, same-sex couples must have a court order to add the name of the second parent to the birth certificate is to treat these couples differently than we treat married couples. This would violate the equal protection clause. . . ." *See also* May 14, 2014, Memo from ADH Legal Services to Melinda Allen re: Amendments of Paternity for Same-Sex Couples, *Id*. At that time, ADH created an Affidavit for Amendment of Parentage form for married same-sex couples seeking a new birth certificate. *See* May 12, 2014, email from Melinda

sex couples naming non-biological fathers. Indeed, it acknowledged that when a child is born to a married opposite-sex couple via donor insemination, it issues a birth certificate listing the husband as a parent. App. Br. 29.

Much of ADH's argument is based on its confusion between what it means to be designated as a parent on a birth certificate and to establish legal parentage. Birth certificates are prima facie evidence of parentage but may be affirmed or set aside by courts adjudicating questions of parentage. Ark. Code Ann. § 9-10-108(b). Arkansas statutes do not require a husband of a woman who gives birth to demonstrate that he is the biological father to be listed on the original birth certificate or to get a new birth certificate based on "legitimation". He is entitled to be listed on the original birth certificate from the moment of birth even if it known that he is *not* a biological parent. And he can get a new birth certificate listing him if he and the child's mother marry after the child is born. Ark. Code Ann. § 20-18-406(a)(2).[6]

Allen to Anne Purvis, et al re: Update on adding the parent of a same-sex marriage to the birth certificate, and attached form and instructions, *Id.*

[6] Ark. Code Ann. § 20-18-406(a)(2) provides that a new certificate shall be issued upon request submitted to Vital Records with "any evidence, as required by the regulation, proving that the person has been legitimated . . . ." The regulation

A husband can only be removed from a child's birth certificate in the event that he (along with his wife and the putative father) agrees to submit a notarized affidavit attesting to the fact that he is not the father, or a court establishes that someone else is the child's father. Ark. Code Ann. § 20-18-401(f)(1). And the latter may occur only if a party challenges paternity in court and the court determines not only that someone else is in fact the biological father, but also that rebutting the presumption of paternity is in the best interest of the child. Ark. Code Ann. § 16-43-901(G)(2); *R.N. v. J.M.*, 61 S.W.3d 149, 155 (Ark. 2001). Contrary to ADH's assertion, the statutes do not "direct[] that the biological father be listed as the parent instead of the husband" in "situations where the husband is not the biological father." App. Br. 24. The default is that husbands who are non-biological fathers remain on the birth certificate, not that they be removed.

ADH claims that with respect to amended birth certificates, the circuit court's interpretation of the term "legitimated" allows *any* person to marry a

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requires "an affidavit of paternity signed by the natural parent of said child, together with a certified copy of the parents' marriage record." Ark. Admin. Code § 007.12.1-5.2. State law recognizes that the term "natural parent" includes non-biological parents of children conceived through assisted reproduction. *See* Ark. Code Ann. § 9-10-201.

biological parent and be listed as a parent on the child's birth certificate. App. Br. 27. That is not so. The court held that the phrase "person has been legitimated" includes "the minor children *of any couple*—same-sex or opposite-sex—who married subsequent to the birth of the minor child . . . ." Mem. Opinion 10 (emphasis added). Arkansas law already recognizes circumstances in which a child is born to a couple when one member of the couple is not a biological parent. *See* Ark. Code Ann. § 9-10-201 (when a couple has children through artificial insemination, the child is "the legitimate natural child of the woman and the woman's husband" if the husband consents to the insemination in writing).

By requiring same-sex couples who marry after the birth of their child—or whose marriage was not recognized by the State until after the birth of their child—to get an adoption or other court order to get a birth certificate naming both spouses, while not imposing this requirement on opposite-sex couples who marry after the birth of a child, ADH is discriminating against same-sex couples based on their sex and sexual orientation, and this violates the Equal Protection Clause.

ADH's asserted interest in maintaining reliable statistics

ADH argues that its discriminatory treatment furthers the State's "interest in maintaining reliable and comprehensive statistics of all vital events to conduct public-health research and identify public-health trends." App. Br. 21. This argument falls flat given that ADH acknowledges that it names husbands as fathers

on birth certificates even if they are not biologically related to the child. App. Br. 29.

A federal district court rejected this same argument when it was asserted by the State of Utah in defending its refusal to list both same-sex spouses on birth certificates when it does so for opposite-sex spouses who have children via donor insemination. *Roe v. Patton*, no. 2:15-cv-00253-DB, 2015 WL 4476734, at *3 (D. Utah. July 22, 2015). *See also Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335, 354 (Iowa 2013) (holding that a stated interest in "accuracy of birth certificates" failed to justify exclusion of female spouses from birth certificates given that male spouses were listed when children were born by donor insemination).

This is not merely an imperfect fit between the classification and the purported rationale as ADH claims.[7] This is a complete disconnect that fails any level of scrutiny. *Cf., Romer v. Evans*, 517 U.S. 620, 632 (1996); *see, e.g., Roe v. Patton*, 2015 WL4476734 (holding that Utah's refusal to recognize same-sex spouses under its law recognizing parentage of husbands of women who conceive through donor sperm failed rational basis review). If the purpose was to keep a

[7] Given that rational basis review is not the appropriate standard, *see supra* note 2, this would not be enough to uphold the discriminatory treatment.

record of biological parents, the legislature could have written the birth certificate statutes to say that. It didn't.

ADH's asserted lack of authority

Finally, ADH argues that it lacks authority to interpret statutes contrary to their plain language. App. Br. 1. It is true that the birth certificate statutes and regulations use gendered terminology such as "husband" and "father" and "paternity" as is true of numerous state laws affording incidents of marriage.[8] But Arkansas rules of statutory construction provide that "[w]hen any subject matter, party, or person is described or referred to by words importing . . . the masculine gender, . . . females as well as males . . . shall be deemed to be included." Ark. Code Ann. § 1-2-203(a).

Moreover, the Supreme Court has ruled that the Constitution requires the states to allow same-sex couples to marry under the same terms and conditions as opposite-sex couples, notwithstanding the use of the terms "husband" and "wife" and "man" and "woman" in state marriage laws. If the State could continue to deny same-sex married couples any incidents of marriage where the statutes use gendered terminology, *Obergefell's* mandate of equality for married same-sex

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[8] *See, e.g.* Ark. Code Ann.§ 26-51-911(e) (providing for joint tax filing by "a husband and wife").

couples and their families would be meaningless. Compliance with a Supreme Court mandate gives the State the "authority"—and duty—to cease unconstitutional application of its laws. Relying on *Obergefell*, a federal district court in Florida recently rejected the State's contention that "[t]he gender specific language of the [birth certificate statute] appears to preclude married same-sex couples from being listed as parents on birth certificates." *See* Motion for Clarification, *Brenner v. Scott*, No. 4:14-cv107-RH/CAS (N.D.Fla. Aug. 13, 2015), ECF No. 113 (Florida defendants asserted that "[t]he gender specific language of the [birth certificate statute] appears to preclude married same-sex couples from being listed as parents on birth certificates."); Order Granting Summary Judgment at 7, *Brenner v. Scott*, No. 4:14-cv107-RH/CAS (N.D.Fla. Mar. 30, 2016), ECF No. 144 (recognizing state must treat same-sex spouses same as different-sex spouses on birth certificates). Arkansas must also comply with this Supreme Court precedent.

III. ADH's suggestion that the State's birth certificate statutes and the assisted reproduction statute are mutually exclusive has no basis.

ADH argues that assuming *arguendo* there is a valid constitutional claim, the remedy is to alter the assisted reproduction statute, not the birth certificate statutes. App. Br. 25. But again, ADH is confusing birth certificate designations and legal parentage. The birth certificate statutes dictate who may be designated as a parent on a child's birth certificate. The assisted reproduction statute determines

legal parentage in the case of couples who use assisted reproduction. Specifically, it 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." Ark. Code Ann. § 9-10-201.

As ADH appears to recognize, this statute must, after *Obergefell*, be applied equally to married same-sex couples who have children through donor insemination. Indeed, this was the basis of the court's ruling in *Roe v. Patton*, addressing Utah's similar assisted reproduction statute. This means that any married same-sex couples who satisfy the terms of the statute, *i.e.* the spouse consents in writing to the insemination, must both be recognized as parents of children born into the marriage. But the assisted reproduction statute does not address birth certificates. The birth certificate statutes dictate who can be designated as a parent on a child's birth certificate. Under the statutes, a man whose wife conceives through donor insemination can be listed as father on the child's birth certificate because he is the mother's husband, not because he met the terms of the assisted reproduction statute.

To comply with the equality mandate of *Obergefell*, both the assisted reproduction statute and the birth certificate statutes must be applied equally to same-sex married couples.

CONCLUSION

The Court should hold the Equal Protection Clause requires the State of Arkansas to provide new birth certificates for children born to same-sex couples who subsequently marry (or whose marriage is subsequently recognized by the State) on the same terms and conditions as it issues them to children born to opposite-sex couples who subsequently marry. This means ADH must allow both spouses to be listed as parents upon their submission of an affidavit acknowledging parentage and a certified copy of the marriage record.

DATED: May 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon counsel of record on this 23rd day of May, 2016.

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Case Name: *Smith, et al. v. Pavan,et al.*
Docket Number: Arkansas Supreme Court No. CV-15-988
Title of Document: Amicus Curiae brief in support of Appellees by the American Civil Liberties Union Foundation, Inc. and the Arkansas Civil Liberties Union Foundation, Inc.

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