UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRITTANI HENRY and BRITTNI ROGERS, et al.,	:	
	:	**Case No. 1:14-cv-129**
Plaintiffs,	:	
	:	**Judge: Timothy S. Black**
vs.	:	
	:	
Theodore E. Wymyslo, M.d., et al.,	:	**MOTION FOR TEMPORARY**
	:	**RESTRAINING ORDER AND**
Defendants.	:	**PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. Pro. 65, Plaintiffs hereby move for a temporary restraining order and preliminary injunction prohibiting the Defendants from enforcing Ohio Rev. Code §3101.01(C) and Art. XV, §11 of the Ohio Constitution as applied to their requests for birth certificates that accurately identify their childrens' parents. Specifically, Plaintiffs seek an order requiring Defendants to place the names of both of the married plaintiff same-sex parents on the birth certificates of their children. A proposed order is attached as Exhibit 1.

Notice will be provided to the Defendants but due to the inability of Plaintiffs to secure proper identifying documents for the children of the Henry/Rogers Family, the Yorksmith Family, the Noe/McCracken Family and the Vitale/Talmas Family, Plaintiffs request an expedited hearing and an expedited ruling on the merits.

Plaintiffs request that bond be set at $1.00.

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MEMORANDUM OF LAW

I. INTRODUCTION AND SUMMARY PURSUANT TO LOCAL RULE 7.2 (3)

This civil rights case is about family and the need of children born in Ohio to have birth certificates that accurately identify their legal parents. Birth certificates are the primary identity documents in our society. They name our parents; they define our families. They should be accurate. By purposefully denying to children of same-sex couples birth certificates that accurately identify their legal parents, Ohio is attacking the dignity of all same-sex married couples and imposing life-long harms on their children. This Court should act to stop this unjust discrimination.

Plaintiffs include three same-sex female couples married in states where same-sex marriage is legal. These plaintiffs include the Henry/Rogers Family, the Yorksmith Family, and the Noe/McCracken Family. One of the women in each marriage is pregnant through artificial insemination ("AI"). They all used anonymous sperm donors. Their babies will all be born in Cincinnati hospitals in the next few months. If they were in marriages with opposite-sex husbands they would apply for their birth certificates while in the hospital and the Cincinnati registrar would place the names of both parents on the child's birth certificate. Because these moms are in same-sex marriages, Ohio will only place only one parent on their birth certificates because Ohio does not recognize same-sex marriages from other states. This lawsuit seeks to force Ohio to put both parents on the birth certificates.

Plaintiffs also include a male same-sex couple legally married in New York and their son, the Vitale/Talmas Family, and the adoption agency that has helped them adopt their child born in Ohio. The couple has an order of adoption from a New York court stating that both of these married men are the parents of their adopted child. But Ohio will not treat them like an opposite-

sex married couple. Instead, Ohio will force these two dads to choose and allow only one of their names on the amended birth certificate of their adopted child. These plaintiffs refuse to make that choice. This lawsuit seeks to force Ohio to end that unfair discrimination.

II. STATEMENT OF FACTS

A. Henry/Rogers Family[1]

1. Plaintiffs Brittani Henry and Brittni ("LB") Rogers met in 2008. They have been in a loving, committed same-sex relationship since that time.

2. After the decision was rendered in *Obergefell v. Wymyslo*, the couple formalized their commitment through marriage. On January 17, 2014, they were married in the state of New York.

3. Brittani Henry has worked in the health care field and LB Rogers has worked in the package service industry. Having established a home together and enjoying the loving support of their families, the couple decided that they wanted to have children.

4. Brittani Henry became pregnant through AI, and she is due to deliver a baby boy in June 2014. The sperm donor is anonymous.

5. Without action by this Court, Defendants Jones and Wymyslo will list only one of these plaintiffs as a parent of their son on his birth certificate when he is born. Their son will have two parents but will have a birth certificate that only lists one of them as his parent.

B. Yorksmith Family[2]

1. Nicole and Pam Yorksmith met and fell in love in 2006. They were married in California on October 14, 2008.

[1] *See* Declaration of Brittni Rogers, attached as Exhibit 2.
[2] *See* Declaration of Georgia Nicole Yorksmith, attached as Exhibit 3.

2. The Yorksmith family already includes a three year old son born in 2010 in Cincinnati. He was conceived through AI. The sperm donor is anonymous.

3. Nicole is their son's birth mother but Pam was fully engaged in the AI process, pregnancy and birth. They share and love their ongoing role as parents.

4. Only Nicole is listed on their son's birth certificate because Defendants will not list the names of both same-sex married parents on the birth certificates of their children conceived through AI.

5. Failing to have both parents listed on their son's birth certificate has caused the Yorksmith Family great concern. They have created documents attempting to ensure that Pam will be recognized with authority to approve medical care, deal with child care workers and teachers, travel alone with their son and otherwise address all of the issues parents must resolve.

6. Denying recognition of Pam's role as parent to their child is degrading and humiliating for the family. Nicole and Pam are treated differently by Defendants than opposite-sex married parents who seek a birth certificate for their children born under similar circumstances.

7. Now Nicole is pregnant with their second child. She expects to give birth in June in Cincinnati.

8. Nicole and Pam are married now and will continue to be a married couple when their second child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the California marriage on the birth certificate of their baby boy.

9. Without action by this Court, Defendants Jones and Wymyslo will list only one of these plaintiffs as a parent of their son on his birth certificate when he is born. Their son will have two parents but will have a birth certificate that only lists one of them as his parent.

C. The Noe/McCracken Family[3]

10. Plaintiffs Kelly Noe and Kelly McCracken have been in a loving, committed same-sex relationship since 2009.

11. From the beginning of their time together they agreed that they would have children in their family.

12. They were married in the state of Massachusetts in 2011.

13. Kelly Noe became pregnant through artificial insemination AI. The sperm donor is anonymous.

14. Kelly Noe expects to deliver a baby in a Cincinnati, Ohio hospital in June 2014.

15. Kelly McCracken consented to and was a full participant in the decision to build their family using AI. From the beginning they intended to raise this child as their own, together.

16. Kelly Noe and Kelly McCracken are married now and will continue to be a married couple when their child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the Massachusetts marriage on the birth certificate of their baby.

17. Without action by this Court, Defendants Jones and Wymyslo will list only one of these plaintiffs as a parent of their child on his/her birth certificate when the child is born. Their child will have two parents but will have a birth certificate that only lists one of them as a parent of the child.

[3] *See* Declaration of Kelly Noe, attached as Exhibit 4.

D. Vitale/Talmas Family[4]

18. Plaintiffs Joseph J. Vitale and Robert Talmas (Joe and Rob) met in 1997. They live and work as executives in corporations in New York City. They love to travel, enjoy nature and love to spend time with their extended families.

19. Joe and Rob married in New York on September 20, 2011, and commenced work with Adoption S.T.A.R. to start a family through adoption.

20. Adopted Child Doe was born in Ohio in 2013. Custody was transferred to Plaintiff Adoption S.T.A.R. shortly after birth. Joe and Rob immediately assumed physical custody and welcomed their young boy into their home.

21. On January 17, 2014, an Order of Adoption of Adopted Child Doe was issued by the Surrogate's Court of the State of New York, County of New York, naming both Joe and Rob as parents. Thus, Joe and Rob are full legal parents of Adopted Child Doe.

22. The Plaintiffs are applying to the Ohio Department of Health, Office of Vital Statistics, for an amended birth certificate listing Adopted Child Doe's adoptive name and the names of Joe and Rob as his adoptive parents.

23. Based on the experience of Plaintiff Adoption S.T.A.R. with other clients and their direct communications with the Defendant Wymyslo' s staff at the Ohio Department of Health, Plaintiffs Adopted Child Doe and his parents, Joe and Rob will be denied a birth certificate that lists both Joe and Rob as parents.

24. Opposite-sex couples married in New York who secure an order of adoption from a New York court regarding a child born in Ohio routinely have the child's adoptive name placed

[4] *See* Declaration of Joseph Vitale, attached as Exhibit 5.

on his or her birth certificate along with the names of both the man and the woman as the parents of the adoptive child. Plaintiffs Joe and Rob will be denied treatment equal to that of similarly situated opposite-sex couples and Adopted Child Doe will be denied treatment equal to that of similarly situated children adopted by different-sex couples.

25. Without action by this Court Defendant Wymyslo will allow only one of these plaintiffs to be listed as the parent on the birth certificate of Adopted Child Doe. Joe and Rob refuse to be forced to pick just one of them to be recognized as their son's parent and refuse to allow this vitally important document to misrepresent the status of their family. They do not wish to expose their son to the life-long risks and harms attendant to having only one of his parents on his birth certificate. They seek relief through this action instead.

E. Adoption S.T.A.R.[5]

26. As a result of Ohio's practice of not amending birth certificates for the adopted children of married same-sex parents, Adoption S.T.A.R. has been forced to change its placement agreements to inform potential same-sex adoptive parents that they will not be able to receive an accurate amended birth certificate for adopted children born in Ohio. Adoption S.T.A.R. has expended unbudgeted time and money to change its agreements and advise same-sex adoptive parents of Ohio's discriminatory practice, and it has devoted extra time and money to cases like this involving same-sex married couples who adopt children born in Ohio through court actions in other states. The process to seek an accurate birth certificate for Adopted Child Doe – including necessary participation in this lawsuit – is also expected to be a protracted effort that will cause the expenditure of extra time and money.

[5] *See* Declaration of Barbara Ginn, attached as Exhibit 6.

27. Adoption S.T.A.R. has served same-sex married couples in previous adoption cases and currently is serving other same-sex married couples in various stages of completing the adoption process in other states for children born in Ohio. Adoption S.T.A.R.will serve more same-sex married couples in this capacity in the future. Unless these couples are able to secure amended birth certificates from Defendant Wymyslo accurately listing both same-sex married persons as the legal parents of their adopted children, they will have clients unable to secure equal rights and full faith and credit for their adoption decrees. This will impose a significant burden on the agency'sability to provide adequate and equitable adoption services to its clients resulting in incomplete adoptions and loss of revenue, frustrating the very purpose of providing adoption services to its clients.

F. The Marriages of the Henry/Rogers, Yorksmith, Noe/McCracken, and Vitale/Talmas Families are Not Recognized in Ohio

28. The Henry/Rogers marriage is legally recognized in New York where it was celebrated.

29. The Yorksmith marriage is legally recognized in California where it was celebrated.

30. The Noe/McCracken marriage is legally recognized in Massachusetts where it was celebrated.

31. The Vitale/Talmas marriage is legally recognized in New York where it was celebrated.

32. The marriages of these plaintiffs are also recognized by the federal government by virtue of the decision in *United States v. Windsor*, 133 S.Ct. 2675 (June 26, 2013).

33. The marriages of the plaintiffs are not recognized under current Ohio law.

34. Ohio statutory law prohibits legal recognition of the same-sex marriages of the plaintiff couples. Ohio Rev. Code. § 3101.01(C)(2) states, "Any marriage entered into by

persons of the same-sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state."

35. The Ohio Constitution also prohibits recognition of the same-sex marriages of the couples. OH Const. Art. XV, §11 states, "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

36. Unless this Court acts to enjoin these provisions of Ohio law as unconstitutional as applied to these married same-sex plaintiffs they will not be able to secure birth certificates for their children on an equal basis as similarly situated married opposite-sex parents. Further, without action by this Court the Vitale/Talmas Family and other families served by Adoption S.T.A.R. will continue to be unlawfully prevented from receiving full faith and credit for their out-of-state adoption decrees as they seek accurate Ohio birth certificates.

G. Need for Injunction

37. Defendants Jones and Wymyslo will deny to the Henry/Rogers Family a birth certificate for their baby boy who is due to be born in June 2014 listing both women as the child's parents because Defendants, relying on Ohio law, refuse to recognize the Henry/Rogers same-sex New York marriage.

38. Defendants Jones and Wymyslo will deny to the Yorksmith Family a birth certificate for their baby boy who is due to be born in June 2014 listing both women as the child's parents because Defendants, relying on Ohio law, refuse to recognize the Yorksmith same-sex California marriage.

39. Defendants Jones and Wymyslo will deny to the Noe/McCracken Family a birth certificate for their baby who is due to be born in June 2014 listing both women as the child's parents because Defendants, relying on Ohio law, refuse to recognize the Noe/McCracken same-sex Massachusetts marriage.

40. Defendant Wymyslo will deny the Vitale/TalmasFamily an amended birth certificate for their son born in Ohio listing both men as the child's parents because Defendants, relying on Ohio law, refuse to recognize the Vitale/Talmas same-sex New York marriage and New York adoption decree.

41. These actions by Defendants deny to Plaintiffs the same status and dignity that Defendants extend to similarly situated families with opposite-sex parents.

42. These actions also deny the full faith and credit due to the adoption decree declaring both Joe Vitale and Rob Talmas to be the parents of Adopted Child Doe.

43. By denying amended birth certificates to Adopted Child Doe and the expected children of all the other plaintiffs listing both of their parents' names, the Defendants hinder the ability of the children to receive accurate identity papers and also hinders the ability of their parents to care for and nurture their children. Birth certificates are documents of high importance that prove parental relationship and custody and are required in many instances for parents to exercise their legal right to make decisions for their children. By denying accurate birth certificates to minor children of same-sex married parents, the Defendants violate the equal protection and substantive due process rights of those parents and those children.

44. Defendants have violated the married plaintiffs' right to remain married. "The right to remain married… is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution." *Obergefell v. Wymyslo*, 1:13-CV-501, 2013 WL

6726688 *6 (S.D. Ohio Dec. 23, 2013). When one jurisdiction refuses to recognize family relationships legally established in another jurisdiction, "the differentiation demeans the couple, whose moral and sexual choices the Constitution protects … and whose relationship the State has sought to dignify." *U.S. v. Windsor*, 133 S.Ct. 2675, 2694 (2013). The differential treatment "humiliates tens of thousands of children now being raised by same-sex couples," including the child that will be born to the Henry/Rogers Family, the Yorksmith Family, the Noe/McCracken Family, and Adopted Child Doe. *Id*.

45. The right of plaintiffs to remain married and have their lawful family relationships recognized in other states is a fundamental constitutional right. Its violation constitutes irreparable harm as a matter of law.

46. Defendants have violated Plaintiffs' right to travel. Plaintiffs need accurate amended birth certificates to apply for passports.[6] Federal law requires that passport applications include full names of the applicant's parents.[7] Without a birth certificate for their child that accurately records the names of both adoptive parents and the adoptive names of Adopted Child Doe, the Vitale/Talmas Family is unable to secure a passport for their son. Plaintiffs Joe and Rob routinely engage in international and domestic travel, and they have an international trip planned with their son in May 2014 that is not in their power to reschedule.[8] The constitutional right of all plaintiff families to travel is being violated by Defendants' refusal to issue amended birth certificates that properly list both parents.

[6] U.S. Department of State, Minors under Age 16, http://travel.state.gov/passport/get/minors/minors_834.html (last visited Jan. 3 2014).
[7] U.S. Department of State, New Requirements for U.S. Birth Certificates, http://travel.state.gov/passport/passport_5401.html (last visited Jan. 3, 2014).
[8] *See* Attached Declaration of Joseph Vitale, Exhibit 5, ¶ 15-16.

47. A birth certificate will be required for Adopted Child Doe and for the children to be born to the Henry/Rogers Family, the Yorksmith Family, and the Noe/McCracken Family to register for public school and to obtain a state identification card or driver's license.

48. Birth certificates are widely used as primary evidence of identity. They are weighty documents of extreme importance. When the authenticity or accuracy of a birth certificate is questioned, huge controversies can result.[9] Children are harmed when their parents are not recognized on birth certificates because it is the official document establishing a person's identity and their family.

49. This court should take judicial notice of the factual record in the *Obergefell* case, including the expert declarations filed by the parties.

50. On information and belief, prior to Governor Kasich, Attorney General DeWine and Defendant Wymyslo taking office in January, 2011, the Ohio Department of Health was providing same-sex married couple such as plaintiffs Joe and Rob with birth certificates for their adopted children consistent with that requested in this complaint. There is no legitimate state interest to support this change in policy.

51. There is no adequate remedy at law. The Henry/Rogers Family, the Yorksmith Family, the Noe/McCracken Family, the Vitale/Talmas Family and the families served by Adoption S.T.A.R. are all suffering irreparable harm. There is no harm to the state or local governments by granting a declaratory judgment and an injunction prohibiting Defendants' enforcement of the challenged statute and Ohio constitutional amendment as applied to the plaintiffs with respect to the issuance of birth certificates. The public interest is clearly served by this Court acting to order recognition of the true nature of the plaintiff families consistent with

[9] The controversy over President Barack Obama's birth certificate, which began prior to his presidency, continues today. *See* Soumya Karlamangla, Los Angeles Times, Crash fuels conspiracists, Dec. 13, 2013, http://articles.latimes.com/2013/dec/13/nation/la-na-hawaii-plane-crash-20131213 (last visited Jan. 3, 2014).

the manner in which Ohio treats similarly situated families with opposite-sex parents as applied to the issuance of birth certificates. The public interest is also clearly served by according full faith and credit to the duly issued judicial decrees of sister states. Only prompt action by this Federal Court ordering declaratory and injunctive relief will serve the public interest.

III. ARGUMENT

A. Standard for Granting Preliminary Relief

The standard for evaluating a request for preliminary injunctive relief under Rule 65 is well established in this Circuit. Though, there is no "rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief," *Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984) (citations omitted), the court should consider the following four factors:

> (1) Whether the party seeking the injunction has shown a substantial likelihood of success on the merits;
> (2) Whether the party seeking the injunction will suffer irreparable harm absent the injunction;
> (3) Whether the injunction will cause others to suffer substantial harm;
> (4) Whether the public interest would be served by the preliminary injunction.

Memphis Planned Parenthood, Inc. v. Sunquist, 175 F.3d 456, 460 (6th Cir. 1999); *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 n.3 (6th Cir. 1991). *See also Jane Doe v. Barron,* 92 F.Supp.2d 694, 695 (S.D. Ohio 1999); *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995), aff'd, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). These factors are "to be balanced and [are] not prerequisites that must be satisfied . . . they are not meant to be rigid and unbending requirements." *McPherson v. Michigan High School Athletic Association*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). A finding of irreparable injury "is the single most important prerequisite that the Court must examine when ruling upon a motion for preliminary injunction."

Even if the Court is not certain that a plaintiff is likely to succeed on the merits, a preliminary injunction is still appropriate where the plaintiff shows "'serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant,'" *DeLorean*, 755 F.2d 1223, 1229 (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)), or if "the merits present a sufficiently serious question to justify further investigation," *DeLorean*, 755 F.2d at 1230.

In this case, as thoroughly set out below and in the accompanying declarations, the plaintiffs meet the test for preliminary relief. Their likelihood of success on the merits, their irreparable harm, the balance of hardships, and the public interest all strongly favor the issuance of an injunction.

B. Plaintiffs Have a Substantial Likelihood of Success on the Merits

Plaintiffs are most likely to succeed on the merits because this case follows several recent court decisions holding that states violate the Constitution when they refuse to recognize same-sex marriages. The most significant decision was the Supreme Court ruling in *U.S. v. Windsor*, 133 S. Ct. 2675 (June 26, 2013).

In *Windsor*, the issue was the federal Defense of Marriage Act ("DOMA"), which denied recognition to same-sex marriages for the purposes of federal law. This included marriages from the 12 states and District of Columbia where same-sex couples could legally marry. The Court held that the law was unconstitutional because it violated equal protection and due process principles guaranteed by the Fifth Amendment. In one portion of the decision, the Supreme Court described how discriminatory marriage laws affect families with same-sex parents: "The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, ... and it humiliates … children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at

2694 (internal citations omitted). The Court described how discrimination against same-sex couples has an insidious effect on their children: "[It] makes it even more difficult for the 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." *Id*. The *Windsor* Court made it clear that governments harm children when they treat their parents' love and commitment as worthless. Refusing to recognize a lawful marriage harms the entire family.

In a vigorous dissent, Justice Scalia predicted that lower courts applying the *Windsor* decision would use it to invalidate state laws prohibiting and refusing to recognize same-sex marriages. *Id*. at 2710. His prediction has proved accurate.

In the span of one week, three courts released decisions relying upon *Windsor* that required states to celebrate or recognize same-sex marriages. First, the New Mexico Supreme Court extended marriage rights to same-sex couples. *Griego v. Oliver*, No. 34,306, 2013 WL 6670704 (N.M. Dec. 19, 2013). Then a federal court in Utah applied *Windsor* to strike down that state's constitutional amendment preventing same-sex marriages. *Kitchen v. Herbert,* 2:13–CV–00217, 2013 WL 6697874 (D.Utah Dec. 20, 2013) (stayed, *Herbert v. Kitchen*, 13-A-687, 2014 WL 30367 (U.S. Jan. 6, 2014)). Finally, this Court required the State of Ohio to issue death certificates recording that decedents legally married to a person of the same gender were "married" at death and that they were survived by a "surviving spouse." *Obergefell v. Wymyslo*, No. 1:13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013). *See also Bishop v. U.S. ex rel. Holder*, 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014) (holding Oklahoma's constitutional definition of marriage as a union of one man and one woman violated equal protection).

The Defendants in *Obergefell* are the same as the Defendants in this case. Plaintiffs have requested that this Court take judicial notice of the extensive record – particularly the expert declarations that have been filed in *Obergefell*, including the reports of Megan Fulcher and Susan Becker which address issues of marriage, family, and child rearing. In *Obergefell*, this Court analyzed whether classifications based on sexual orientation should be recognized as a suspect class and afforded heightened scrutiny. *Id*. at *13. The Court declared that the Sixth Circuit's prior holdings denying heightened scrutiny based on sexual orientation are no longer sound precedent. *Id*. The Court went on to analyze the four factors that determine whether classifications qualify as a suspect or quasi-suspect class: whether the class (1) has faced historical discrimination, (2) has a defining characteristic that bears a relation to contribute to society, (3) has immutable characteristics, and (4) is politically powerless. *Id*. at *14. After a thorough discussion, the Court held that "sexual orientation discrimination accordingly fulfills all the criteria the Supreme Court has identified, and thus Defendants must justify Ohio's failure to recognize same-sex marriages in accordance with a heightened scrutiny analysis." *Id*. at *18. The defendants "utterly failed to do so." *Id*. This Court also found that Ohio failed the most deferential standard of equal protection analysis because it "is engaging in 'discrimination[] of an unusual character' without a rational basis for doing so." *Id*. at *19 (quoting *Windsor*, 133 S.Ct. at 1693). Thus, the Court held that Ohio's refusal to recognize same-sex marriages performed in other jurisdictions violated the Equal Protection Clause. *Id*.

The *Obergefell* Court also recognized that the right to remain married when moving from one state to another is a fundamental liberty interest protected by substantive due process. *Id*. at *6. The Court found that intermediate scrutiny was appropriate in such a context because "Ohio is intruding into – and in fact erasing – Plaintiffs' already-established marital and family

relations." *Id*. The Court did not find "evidence of any state interest compelling enough to counteract the harm Plaintiffs suffer when they *lose*, simply because they are in Ohio, the immensely important dignity, status, recognition, and protection of lawful marriage." *Id*. at *9. Accordingly, the court held that "Ohio's refusal to recognize same-sex marriages performed in other states violates the substantive due process rights of the parties to those marriages." *Id*. In sum, under Supreme Court jurisprudence and recent lower court decisions states do not have governmental interests compelling enough to justify their refusals to celebrate or recognize same-sex marriages. Their refusals violate the substantive due process and equal protection rights of same-sex couples.

Ohio has refused to issue birth certificates to minor children listing both of their parents because their married parents are of the same gender.[10] Even though the married Plaintiffs are legally married, Ohio will not list them on their children's birth certificates. The parallels to *Obergefell* are obvious. The rationale for refusing recognition on the birth certificates is completely lacking. Ohio has already been found to lack any rational basis for refusing to recognize same-sex marriages on vital records. Just as it lacks a rationale at death, it lacks a rationale at birth. At both ends of the lifespan, a marriage is a marriage and Ohio must recognize its existence in vital records. The harm to these families is life-long. Ohio has no compelling interest or rational basis for its refusal to record the true nature of the Plaintiffs' families on their children's birth certificate. As a result, Plaintiffs have a high likelihood of success on their equal protection and due process claims.

The Vitale/Talmas Family and Adoption S.T.A.R. also have a substantial likelihood of success on their full faith and credit clause claim. Article IV section 1 of the United States

[10] *See* Declaration of Georgia N. Yorksmith regarding the birth certificate of her three-year-old and of attorney Barbara Ginn regarding the experience of families with married same-sex parents who have court orders identifying them both as the parents of an adopted child born in Ohio.

Constitution provides "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The purpose of this clause has always been clear. The framers "foresaw that there would be a perpetual change and interchange of citizens between the several states." *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. 312, 315 (1839). Defendants are failing to issue an amended birth certificate as mandated by statute. O.R.C. § 3705.12.[11] In so doing, Defendants are violating the Constitution of the United States by failing to give full faith and credit to the judgment of a New York State Court. U.S. Const. Art. IV § 1.

In a similar case, *Finstuen v. Crutcher*, 469 F.3d 1139 (10th Cir. 2007), a married same-sex family from California who had legally adopted a child from Oklahoma was granted an amended birth certificate listing both the child's adoptive parents. The Tenth Circuit granted this relief under the Full Faith and Credit Clause because Oklahoma had a statute providing for the issuance of amended birth certificates for children adopted in foreign courts, and the Full Faith and Credit Clause required Oklahoma "to apply its own law to enforce [those] adoption order[s] in an 'even-handed' manner." *Id*. at 1154 *citing Baker ex rel. Thomas v. Gen. Motors Corp.* 522 U.S. 222, (1998). [12] Ohio also has such a law, O.R.C. § 3705.12, which mandates the issuance of amended birth certificates upon the presentation of a valid adoption decree from another state and the result in this case should therefore be the same.

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[11] O.R.C. § 3705.12 states, in part, "the department of health *shall* issue, unless otherwise requested by the adoptive parents, a new birth record using the child's adopted name and the names of and data concerning the adoptive parents . . . ." (emphasis added). When the adoption of a child born in Ohio is decreed by a court in another state and the Department of Health receives from that court an official communication containing information similar to the information Ohio courts must report, the department *shall* issue a new birth record as if the adoption had occurred in Ohio. *Id*. at (B).

[12] The Fifth Circuit, in *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011), did not require Louisiana to issue a birth certificate consistent with a New York adoption order. That case should be distinguished. It pre-dates *Windsor* and the plaintiffs in that case were an *unmarried* same-sex couple. Moreover the Louisiana statutory scheme for addressing foreign orders was different from that in Ohio.

Defendant Wymyslo justifies his non-recognition of child Doe's adoption by citing to Ohio Rev. Code § 3107.18(A): "*Except when giving effect to such a decree would violate the public policy of this state*, [an adoption decree] issued pursuant to due process of law by a court of any jurisdiction outside this state … shall be recognized in this state … as though the decree were issued by a court of this state." His staff has indicated that issuing an amended birth certificate to child Doe would recognize his parents' marriage which violates the public policy of Ohio.[13] The Department has read this exception too broadly because its reading conflicts with Ohio Supreme Court precedent and the United States Constitution.

The Tenth Circuit recognized that although it is debatable whether there is a public policy exception related to a state's requirement to give effect to state laws, there is no such exception to judgments such as adoption decrees:

> Regarding judgments ... the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.

Finstuen, 496 F.3d at 1153 quoting *Baker*, 522 U.S. at 232-33).

The public policy exception to recognizing foreign adoptions in Ohio has only been invoked where the adoption proceedings in the foreign court may have violated fundamental procedural guarantees of Ohio's adoption law. *See State ex rel. Smith v. Smith*, 75 662 N.E.2d 366 (Ohio 1996) (South African adoption not recognized because biological parent not given adequate notice of adoption and opportunity to object); *Matter of Bosworth*, No. 86-AP-903, 1987 WL 14234 *2 (Ohio Ct. App. July 16, 1987) (Florida adoption decree recognized in Ohio because Florida's service procedures were followed and "if due process was followed by another state's court in issuing an adoption decree, an Ohio court is mandated to give full faith and credit

[13] *See* Letter from Ohio Department of Health attached to Declaration of Barbara Ginn, Exhibit 6.

to that state's decree"); *Matter of Swanson*, No. 90-CA-23, 1991 WL 76457 (Ohio Ct. App. May 3, 1991) (Ohio biological parents lost preferential status when child legally adopted in New York, unless they could claim the New York court lacked jurisdiction). There are no Ohio cases denying recognition of a sister state's adoption decree for any "public policy" reason other than procedural defects in the adoption proceedings.

Defendants cannot refuse to apply O.R.C. § 3705.12 because of Ohio's refusal to recognize same-sex marriages. The Supreme Court has held that "credit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded." *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (holding that judgment for taxes from Wisconsin be must honored in Illinois).

Animus against gays and lesbians and same-sex couples is the true basis for Ohio's refusal to recognize the marriages of the plaintiffs through the birth certificates of their children. The animus is obvious from the very wording of the Ohio marriage ban and recognition ban. But even when a court order requires that both same-sex parents be named on a birth certificate, the current administration in Ohio refuses to do so. This is clear when one tracks how Ohio formerly placed both parents on the birth certificates of children born to same-sex couples through surrogacy but now does not. In these situations one member of the same-sex couple is normally the sperm donor and is the actual biological father. The other member of the couple then typically secures a second parent adoption. Attorney Bill Singer reports on a client he represented in 2007 who secured a second parent adoption in the state of New Jersey. [14] The adopted child was born in Ohio. (*Id.*) At the time, the couple was in a same-sex civil union and they are now married. (*Id.*) Ohio honored the adoption decree and placed the same-sex adoptive

[14] *See* Declaration of Bill Singer, Esq., attached as Exhibit 7.

dad as the second parent on the Ohio birth certificate of the Ohio-born child. (*Id.*) Similarly, in 2010, Mr. Jeffrey Scott Seay also secured a second parent adoption of a child born to a surrogate in Ohio. The adoption was granted through a Washington D.C. Court.[15] At the time, he was in a same-sex civil union with his now-husband. (*Id.*) The Director of the Ohio Department of Health at the time honored the D.C. adoption order and placed Mr. Seay on the adopted child's birth certificate as the second parent. (*Id.*) Two years later, Mr. Seay and his partner again extended their family, this time with twins. (*Id.*) The twins were born to a surrogate in Ohio. (*Id.*) Mr. Seay was again named as a legal parent when the D.C. Court granted his second parent adoption for those two children. (*Id.*) This time, the current administration in Ohio refused to place Mr. Seay on the birth certificates of the twins even though the D.C. Court had declared him the adopted dad. (*Id.*) The flip-flop by Ohio in dealing with out-of-state adoption orders demonstrates that the issue is simply political for Defendant Wymyslo, and it demonstrates the current administration's animus toward same-sex couples.

For the foregoing reasons, Plaintiffs have a substantial likelihood of success on the merits of their claims.

C. Plaintiffs Are Experiencing Irreparable Harm

Plaintiffs are experiencing irreparable harm. Birth certificates are vitally important documents. Ohio's refusal to issue accurate birth certificates to the Plaintiffs imposes numerous indignities and legal disabilities. Further, the state is violating the Plaintiffs' fundamental constitutional rights to remain married, to function as a family, and to travel. These violations, disabilities, and indignities all constitute irreparable harm.

[15] *See* Declaration of Jeffrey Scott Seay, attached as Exhibit 8.

The violation of an individual's fundamental constitutional rights constitutes irreparable harm as a matter of law. *See e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (violation of right to travel interstate constituted irreparable injury); *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati,* 822 F.2d 1390 (6th Cir.1987) (finding irreparable injury where plaintiff has shown substantial likelihood of success on merits of constitutional challenge to abortion regulation); *Amalgamated Transit Union, Local 1277, AFL-CIO v. Sunline Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987) (violation of right to be free of unreasonable seizures during litigation constitutes irreparable harm).

The Defendants have violated Plaintiffs' fundamental constitutional right to care for their children without interference by the state. "The interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It is well-established under the law "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "A family's right to remain together without the coercive interference of the awesome power of the state is the most essential and basic aspect of familial privacy." *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 478 (7th Cir. 2011). By refusing to issue accurate birth certificates to the Plaintiff families, the State hinders the ability of the Plaintiff parents to care for and nurture their children. Birth certificates are important documents that prove parental custody and are required in many instances for parents

to exercise their legal rights to make decisions for their children.[16] By denying accurate birth certificates to minor children of same-sex married parents, the state violates the substantive due process rights of those parents.

Defendants have also violated the married Plaintiffs' fundamental constitutional right to remain married. "The right to remain married… is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution." *Obergefell v. Wymyslo*, 1:13-CV-501, 2013 WL 6726688 *6 (S.D. Ohio Dec. 23, 2013). When one jurisdiction refuses to recognize family relationships legally established in another jurisdiction, "the differentiation demeans the couple, whose moral and sexual choices the Constitution protects … and whose relationship the State has sought to dignify." *U.S. v. Windsor*, 133 S.Ct. 2675, 2694 (2013). The differential treatment "humiliates tens of thousands of children now being raised by same-sex couples," including the children in this case. *Id*. The right to have your marriage entered into in one state recognized in other states is a fundamental constitutional right. Ohio's violation of this right constitutes irreparable harm as a matter of law.

Defendants have also violated Plaintiffs' right to international travel. Plaintiffs need accurate birth certificates to apply for passports.[17] Federal law requires that passport applications include full names of the applicant's parents.[18] For the Vitale/Talmas Family, without a birth certificate for their child that accurately records the names of both adoptive parents and Adopted Child Doe's adoptive name, Plaintiffs Joe and Rob are severely restricted from securing a passport for Adopted Child Doe through normal means. The Vitale/Talmas

[16] For example, birth certificates are required to register your child for school and travel internationally, as described below.
[17] U.S. Department of State, Minors Under Age 16, http://travel.state.gov/passport/get/minors/minors_834.html (last visited Jan. 3 2014).
[18] U.S. Department of State, New Requirements for U.S. Birth Certificates, http://travel.state.gov/passport/passport_5401.html (last visited Jan. 3, 2014).

family has an important wedding of a family friend coming up on May 9, 2014, in the Dominican Republic.[19] They want to take their son, who has been asked to be the ring-bearer, but cannot do so without a birth certificate.[20] The constitutional right to travel is being violated by Defendant Wymsylo's refusal to issue an accurate amended birth certificate for Adopted Child Doe, and to issue an accurate birth certificates for the other children of Plaintiff Families when they are born. Such a violation constitutes irreparable harm as a matter of law. *See Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("The constitutional right to travel from one State to another is firmly embedded in [Supreme Court] jurisprudence"); *Kent v. Dulles*, 357 U.S. 116 (1958) (The right to travel internationally is protected under the Fifth Amendment).

Although the plaintiff Families could obtain inaccurate birth certificates listing only one parent for the purpose of obtaining a passport and to address other problems, this would put them in the unacceptable situation of having to choose one legal parent, even temporarily. The non-chosen parent could potentially be denied recognition as a parent in the event that something happened to the parent listed on the birth certificate before the birth certificate could be amended. Just as John Arthur in the *Obergefell* case should not have received a death certificate which inaccurately portrayed his family, the children in the Plaintiff Families in this case should not ever receive official birth certificates that deny the true nature of their families.

Defendants' refusal to issue accurate birth certificates imposes numerous other disabilities and indignities. The Social Security Administration requires a birth certificate before issuing a social security number.[21] A birth certificate is required to register children for school.

[19] Declaration of Joe Vitale, ¶ 15-16.
[20] *Id.*
[21] *See* Social Security Administration, Social Security Numbers for Children, http://www.ssa.gov/pubs/EN-05-10023.pdf#nameddest=adoptiveparents (last visited Jan. 3, 2014).

A birth certificate is required to obtain identification cards or driver's licenses.[22] And generally, birth certificates are widely used as primary evidence of identity. They are weighty documents of extreme importance and when their authenticity or accuracy is questioned it can result in minor inconveniences as well as huge controversies.[23]

D. An Injunction Will Not Cause Harm to the Defendants or Anyone Else

An injunction in this case will have no material effect on anyone other than the Plaintiffs, who will benefit greatly. The State of Ohio will not be harmed by continuing to perform its ministerial functions of issuing and amending birth certificates. The public will not be harmed by the Plaintiffs receiving legal documentation accurately recording the true nature of their families. The Plaintiffs are families in the eyes of their neighbors, colleagues, and friends. It is appalling that the State of Ohio is asking them to choose to exclude one of the parents in the eyes of the law.

H. E. The Balance of Hardships and the Public Interest Favor Issuance of an Injunction

In constitutional cases, an inquiry into the public interest is difficult to separate from the likelihood of success on the merits because "the public interest is promoted by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban Mobility for Reg. Transp.,* 698 F.3d 885, 896 (6th Cir.2012). In this case, the public interest is clearly served by awarding an injunction. Ohio is not harmed by the treatment of married same-sex couples on an equal basis with unmarried same-sex couples. The harm on the other hand to the married same-sex couples and their families is severe. The harm in this case stems from married same-sex

[22] *See* New York State, Department of Motor Vehicles Proofs of Identity and Date of Birth for NYSDMV Photo Documents, http://www.dmv.ny.gov/forms/id44.pdf (last visited Jan. 3, 2014); Ohio Department of Public Safety Bureau of Motor Vehicles "Acceptable Documents List," http://publicsafety.ohio.gov/links/bmv2424.pdf (last visited February 5, 2014).

[23] The controversy over President Barack Obama's birth certificate, which began prior to his presidency, continues today. *See* Soumya Karlamangla, Los Angeles Times, Crash fuels conspiracists, Dec. 13, 2013, http://articles.latimes.com/2013/dec/13/nation/la-na-hawaii-plane-crash-20131213 (last visited Jan. 3, 2014).

parents' inability to secure accurate birth certificates for their children. But the harm imposed on same-sex spouses by Ohio's refusal to recognize their marriage is much broader. They must meticulously keep powers of attorney, medical power of attorney, and living wills up to date and available. They are denied tax benefits, public benefits and employer benefits that are tied to their status as legally married in Ohio. In *Windsor*, the Supreme Court stated that there were over 1,000 federal benefits that are impacted. The status of those federal benefits is still at risk for families like Henry/Rogers, Yorksmiths, and Noe/McCracken who are legally married but not residing in a state that recognizes their marriage. But Ohio's non-recognition also harms families like the Vitale/Talmas Family and other served by Adoption S.T.A.R. who do not live in Ohio, but have adopted a child born in Ohio. The balance of hardships clearly favors relief for the plaintiffs.

IV. CONCLUSION

This Court should issue a preliminary injunction restraining the defendants from enforcing Ohio Rev. Code §3101.01(C) (3) and (4) and Art. XV, §11, of the Ohio Constitution as applied to same-sex couples married in jurisdictions where same-sex marriage is legal who seek to have their out of state marriage accepted as legal in Ohio. This includes but is not limited to such officials completing birth certificates as the need arises for the Plaintiffs in a manner consistent with the attached proposed order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify all defendants were served with a copy of this Motion by email service on February 10, 2014, and putative counsel for defendants have also been served by email on that date.

/s/Alphonse A Gerhardstein