UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRITTANI HENRY and BRITTNI ROGERS, et al.,	:	**Civil Action No. 1:14-cv-129**
	:	
	:	**Judge Timothy S. Black**
Plaintiffs,	:	
	:	**Plaintiffs' Motion for Declaratory**
vs.	:	**Judgment and Permanent Injunctive**
	:	**Relief**
Theodore E. Wymyslo, M.d., et al.,	:	
	:	
Defendants.	:	
	:	

Pursuant to Fed. R. Civ. Pro. 57 and 65, Plaintiffs hereby move for:

(1) a declaration that those portions of Ohio Const. Art. XV, §11 and Ohio Rev. Code § 3101.01(C), and any other provisions of the Ohio Revised Code that may be relied on to deny legal recognition to the marriages of same-sex couples validly entered in the jurisdiction of celebration (collectively the "marriage recognition bans"), violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio and to enjoy the rights, protections and benefits of marriage provided to opposite-sex married couples under Ohio law, are denied their fundamental right to marriage recognition without due process of law and their right to equal protection; and

(2) a permanent injunction prohibiting the Defendants and their officers and agents from (a) enforcing the marriage recognition bans, (b) denying same-sex couples validly married in the jurisdiction of celebration all the rights, protections and benefits of

marriage provided under Ohio law, and (c) denying full faith and credit to decrees of adoption duly obtained by same-sex couples in sister jurisdictions; and

(3) issuance of birth certificates to the Plaintiffs for their children listing both same sex parents; attorney fees and such other and further relief as this court shall deem fair and reasonable. A memorandum in support and a proposed order are attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/Alphonse A Gerhardstein
Trial Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
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BRITTANI HENRY and BRITTNI ROGERS, et al.,	:	
	:	**Case No. 1:14-cv-129**
Plaintiffs,	:	
	:	**Judge: Timothy S. Black**
vs.	:	
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	:	
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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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I. INTRODUCTION AND SUMMARY PURSUANT TO LOCAL RULE 7.2(a)(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. Parents named on a birth certificate are accepting legal responsibilities to feed, clothe, protect, and educate their children. Birth certificates are the prime currency allowing parents to fulfill their constitutionally-protected right to care for their children, providing the standard proof to allow an adult to make critical health care decisions for their child, enroll their child in school, insure their child, and travel with their child. 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 emotional and legal harms on their children. This Court should act to stop this unjust discrimination.

Plaintiffs include three same-sex female couples married in states where marriage between same-sex couples is legal. These Plaintiffs include the Henry/Rogers Family, the Yorksmith Family, and the Noe/McCracken Family. One woman in each marriage is pregnant through artificial insemination ("AI"). Each of these Plaintiff couples used anonymous sperm donors. Each couple's baby will be born in a Cincinnati hospital within the next few months. If they were in marriages with opposite-sex husbands, the couples would apply for their birth certificates while in the hospital and Defendant Dr. Camille Jones, the Cincinnati Vital Statistics Registrar, would place the names of both parents on the child's birth certificate as a matter of course. Because these mothers are married to same-sex spouses, and Ohio refuses to recognize such out-of-state marriages, Ohio will place only one parent on the birth certificate of each

couple's child. This lawsuit seeks to require the State to put both parents on the birth certificates of these expected Ohio children.

Plaintiffs also include a male same-sex couple legally married in New York and their Ohio-born adopted son, the Vitale/Talmas Family, along with the adoption agency that assisted with the adoption. The couple has an order of adoption from a New York court decreeing that both of these married men are the parents of their adopted child. But Ohio will not treat them as it would an opposite-sex married couple and accord the full faith and credit due to their New York adoption decree. Instead, Ohio will allow only one of these two parents to appear on their child's amended birth certificate, attempting to force these two fathers to choose which of them will be recorded on the birth certificate as the parent of their son. These Plaintiffs cannot be forced by Ohio to make that choice. Ohio's current practice of intentionally issuing a legally inaccurate official birth certifcate containing the name of only one adoptive parent permanently chronicles discrimination on a child's primary, life-long identity document. This lawsuit seeks to require Ohio to end that unfair discrimination.

The Defendants in this case are the same government officials sued in *Obergefell v. Wymyslo*, No. 1:13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013), in which this Court recently declared Ohio's statutory and constitutional bans to recognition of out-of-state marriages between same-sex couples unconstitutional. As this Court noted in *Obergefell*, Ohio's statutory and constitutional marriage recognition bans, both enacted in 2004, single out only same-sex couples to deny recognition to their marriages, when other out-of-state marriages, similarly unavailable within Ohio, are invariably accorded comity. *Obergfell*, 2013 WL 6726688, at *2-3. *See* Ohio Const. art. XV § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions.");

Ohio Rev. Code § 3101.01(C)(2) ("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.") (collectively, the "marriage recognition bans"). The marriage recognition bans are extraordinary, animus-driven measures, whose "*clear primary purpose and practical effect*" is "*to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community.*" *Obergefell*, 2013 WL 6726688, at *21. In *Obergefell*, Ohio refused state-issued death certificates naming the lawfully married spouses of the decedents. Here Ohio denies state-issued birth certificates listing both same-sex spouses as parents to their children. Ohio's refusal to recognize marriages between same-sex couples has thus damaged lesbian and gay married couples and their families through the life-span, from birth to death. Just as in *Obergefell*, Ohio can proffer no legitimate or rational state interest that could justify denying recognition to the out-of-state marriages of same-sex couples. *Id.* at *20-21.[1]

This Court's reasoning and holding in *Obergefell* are templates for consideration of this case, and should dictate the same outcome here. The Court declared the marriage recognition bans unconstitutional and unenforceable under the due process and equal protection guarantees of the Fourteenth Amendment of the United State Constitution. *Id.* at *23. Plaintiffs now seek a ruling that the marriage recognition bans are facially unconstitutional and must be struck down in Ohio.

[1] This Court may take judicial notice of the record in *Obergefell*, including the extensive expert declarations filed in that case. Significantly, the Defendants in *Obergefell* – the same Defendants as in this case – did not submit any evidence to challenge plaintiffs' evidence. The expert declarations in *Obergefell* are hereby submitted in support of this motion as well. *See* Docs. 17-1, and 17-3 through 17-9. Defendants do not object to this Court taking judicial notice of the entire record, including the expert declarations, in *Obergefell*. Defendant Director of the Ohio Department of Health's Answer to the Plaintiffs' Complaint, Doc. 15, ¶ 73.

This action also challenges application of Ohio Rev. Code § 3107.18(A) to bar recognition of the out-of-state adoption decrees of same-sex parents. That statute provides: "*[e]xcept 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." (Emphasis supplied.) Defendant Wymyslo, Director of the Ohio Department of Health, interprets this provision to allow full faith and credit to a two-parent adoption decree only if the out-of-state adoption meets Ohio's purported restriction limiting adoptions by two persons to a married "husband and wife." Ohio Rev. Code § 3107.03.[2] Not only does Defendant Wymyslo thereby give further effect to the discriminatory marriage recognition bans by refusing to acknowledge that the Plaintiff adoptive couple in this case *is* married, but he also violates the State's obligation to accord adoption decrees full faith and credit under Article IV, § 1 of the U.S. Constitution, which allows no "public policy" exception when it comes to inter-state recognition of a judicial decree.

Worst of all, denial of birth certificates accurately identifying both of a child's parents levies special harms on the children of married same-sex parents, in violation of the parents' and childrens' constitutional rights and the State's paramount duty to protect the best interests of Ohio-born children. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court expressly condemned the harm to *children* wrought by the federal government's refusal to recognize the marriages of their same-sex parents, decrying the "humiliat[ion],"*id.* at 2694;

[2] *See* Letter from Ohio Department of Health attached to Declaration of Barbara Ginn, Ex. 6 to Motion for TRO, Doc. 4-6, Page ID 73-74. The Ohio Supreme Court has expressly declined to rule on whether second parent adoption by the unmarried partner of a parent is permissible in Ohio, leaving the issue an open question in that court. *Compare In re Bonfield*, 96 Ohio St. 3d 218, 219, 773 N.E.2d 507 (2002), *with In re Bonfield*, 97 Ohio St. 3d 387, 38-89, 780 N.E.2d 241 (2002) (stripping out any reference to the legality of second parent adoption in Ohio, leaving the issue open).

"financial harm," *id.* at 2695; and stigma, *id.* at 2696, imposed on children by governmental disrespect for their parents' marriages. The Court described the insidious effect on children of discrimination against their lesbian and gay parents: "[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*. at 2694. *Windsor* made clear that governments injure children when they treat their parents' love and commitment as worthless. Refusing to recognize a lawful marriage harms the entire family.

Defendants inflict these same unjustified and irreparable injuries on the children and parents involved in this case. Plaintiffs are entitled to a declaratory judgment and a permanent injunction ending this discrimination.

II. STATEMENT OF FACTS[3]

A. Henry/Rogers Family[4]

1. Plaintiffs Brittani Henry ("Brittani") 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*, the couple formalized their commitment through marriage. On January 17, 2014, they were validly married in the state of New York, which legally recognizes their marriage.

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

[3] Defendant Wymyslo "does not dispute" any of the personal information provided by Plaintiffs in the Complaint. *See* Defendant Director of the Ohio Department of Health's Answer to the Plaintiffs' Complaint, Doc. 15, Page ID 117, n.1, and ¶¶ 4-8, 12-17, 21-23, 27, 31-36, 40-44.
[4] *See* Declaration of Brittni Rogers, Doc. 4-2.

4. Brittani 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 lists only one of them as his parent.

B. Yorksmith Family[5]

6. Nicole and Pam Yorksmith met and fell in love in 2006. They were married on October 14, 2008 in California, which legally recognizes their marriage.

7. 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.

8. 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.

9. 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.

10. 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 the issues parents must resolve.

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

[5] *See* Declaration of Georgia Nicole Yorksmith, Doc. 4-3.

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

13. 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 and both married spouses on the birth certificate of the Yorksmith's baby boy.

14. 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 listing only one as his parent.

C. The Noe/McCracken Family[6]

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

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

17. They were married in 2011 in the state of Massachusetts, which legally recognizes their marriage.

18. Kelly Noe became pregnant through AI. The sperm donor is anonymous.

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

20. 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.

21. 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

[6] *See* Declaration of Kelly Noe, Doc. 4-4.

under Ohio law from recognizing the Massachusetts marriage and the marital presumption of parentage that should apply to this family for purposes of naming both parents on the baby's birth certificate.

22. Without action by this Court, Defendants Jones and Wymyslo will list only one of these Plaintiffs as a parent on the baby's birth certificate when the child is born. The couple's child will have two parents but will have a birth certificate that lists only one parent.

D. Vitale/Talmas Family[7]

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

24. Joe and Rob married on September 20, 2011 in New York, which legally recognizes their marriage. The couple commenced work with Plaintiff Adoption S.T.A.R. to start a family through adoption.

25. 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.

26. On January 17, 2014, an Order of Adoption of Adopted Child Doe was duly 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.[8]

[7] *See* Declaration of Joseph Vitale, Doc. 4-5.
[8] *See* Final Decree of Adoption (redacted), attached as Exhibit A to Declaration of Alphonse A. Gerhardstein, Doc. 17-2.

27. 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 naming Joe and Rob as his adoptive parents.

28. Based on the experience of Plaintiff Adoption S.T.A.R. with other clients and their direct communications with 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 men as parents.

29. As a matter of routine, opposite-sex couples married in New York who secure an order of adoption from a New York court regarding a child born in Ohio have the child's adoptive name placed on his or her birth certificate along with the names of both spouses 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 opposite-sex couples.

30. 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 choose 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.

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

E. Adoption S.T.A.R.[9]

[9] *See* Declaration of Barbara Ginn, Doc. 4-6.

32. On information and belief, prior to when Governor Kasich, Attorney General DeWine, and Defendant Wymyslo took office in January, 2011, the Ohio Department of Health provided same-sex married couples such as Plaintiffs Joe and Rob with birth certificates for their adopted children, consistent with that requested in this complaint. Defendant Wymyslo has changed that practice, and now denies married same-sex couples with out-of-state adoption decrees amended birth certificates for their Ohio-born children naming both adoptive parents.[10]

33. As a result of Ohio's practice not to amend 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. 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 expected to be a protracted effort that will cause the expenditure of extra time and money.

34. 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 the adoption process in other states for children born in Ohio. Adoption S.T.A.R. will serve additional 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, Adoption S.T.A.R. will have clients unable to secure

[10] *See* Decls. of William S. Singer, Jeffrey Scott Seay, and Barbara Ginn, Docs. 4-6 through 4-8.

equal rights and full faith and credit for their adoption decrees. This will impose a significant burden on the agency's ability to provide adequate and equitable adoption services to its clients, result in incomplete adoptions and loss of revenue, and frustrate the very purpose of providing adoption services to its clients.

III. STANDARD FOR GRANTING INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs seek a permanent injunction enjoining enforcement of the marriage recognition bans. They also seek an injunction requiring Defendants to accord full faith and credit to out-of-state adoption decrees of same-sex parents, including for purposes of issuing birth certificates identifying the adoptive parents and the adopted child's correct name. In this case the Plaintiffs go beyond the as-applied challenge pursued in *Obergefell* and now seek a declaration that the marriage recognition bans are facially unconstitutional, invalid, and unenforceable. In other words, "no set of circumstances exists under which the [challenged marriage recognition bans] would be valid," and the bans should therefore be struck down in their entirety. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also De Leon v. Perry*, No. SA-13-CA-00982-OLG, slip op. at 46 n.7 (W.D. Texas Feb. 26, 2014) (declaring that Texas's ban on same-sex marriages and marriage recognition "fails the constitutional facial challenge because. . . Defendants have failed to provide any – and the Court finds no – rational basis that banning same-sex marriage furthers a legitimate governmental interest."). The case is limited to the issue of marriage recognition and does not include any request that Ohio must permit same-sex couples to marry in Ohio. Additional litigation seeking such broader relief may be pursued later.

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 583 (6th Cir.

2012); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998)); *Obergefell*, 2013 WL 6726688, at *4. It lies within the sound discretion of the district court to grant or deny a motion for permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Obergefell*, 2013 WL 6726688, at *4, citing *Kallstrom*, 136 F.3d at 1067; *Wayne v. Vill. of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994).

The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. Fed. R. Civ. P. 57. In the Sixth Circuit, "[t]he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Savoie v. Martin*, 673 F.3d 488, 495-96 (6th Cir. 2012) (quoting *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984)); *see also Obergefell*, 2013 WL 6726688, at *5. Plaintiffs are entitled to both permanent injunctive and declaratory relief.

IV. ARGUMENT

This Court has already held in *Obergefell* that Ohio's refusal to recognize the out-of-state marriages of same-sex couples violates the Fourteenth Amendment due process "right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections." 2013 WL 6726688, at *5. Defendants again refuse to recognize the marriages of the Plaintiff couples and to afford their families the "attendant benefits and protections" that come with a birth certificate reflecting both spouses as parents of the families' children.

This Court further held in *Obergefell* that the same marriage recognition bans challenged in this case "violate Plaintiffs' constitutional rights by denying them equal protection of the

laws." *Id.* at *9. The Court declared the marriage recognition bans unconstitutional and unenforceable. Plaintiffs respectfully submit that this Court's reasoning in *Obergefell*, applied to the facts of this case, should compel the same conclusion — Ohio's marriage recognition bans unjustifiably violate due process and equal protection guarantees. Indeed, following the Supreme Court's *Windsor* ruling, a spate of federal and state courts around the nation have issued rulings similar to *Obergefell*, holding that a state's ban on the right of same-sex couples to marry[11] or to have their out-of-state marriages recognized violates the constitutional rights of these families.

The full faith and credit claim is equally strong and provides an independent ground for relief to the Vitale/Talmas Family and to other families like theirs whose out-of-state adoption decrees are disrespected by Defendant Wymsylo for purposes of receiving the accurate birth certificates their Ohio-born children need to travel securely through life.

Plaintiff families will suffer ongoing irreparable harm from Defendants' refusal to recognize their marriages and grant accurate birth certificates protecting their children. The injunctive and declaratory relief sought is necessary to ensure that the Plaintiff families, and Adoption S.T.A.R. and its clients, are relieved of the multiple disabilities caused by Ohio's ongoing violations of protected constitutional rights.

A. Defendants Violate Plaintiffs' Right to Due Process

1. As this Court Held in *Obergefell*, Defendants Infringe the Plaintiff Couples' Right of Marriage Recognition, Requiring Heightened Scrutiny of the Marriage Recognition Bans

Defendants violate the married Plaintiffs' right to remain married, which this Court identified as "a fundamental liberty interest appropriately protected by the Due Process Clause of

[11] Plaintiffs, who are already married, do not contest here Ohio's ban on the freedom to marry within the State.

the United States Constitution." *Obergefell*, 2013 WL 6726688, at *6. "When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Id.* at *7. *See also Windsor*, 133 S. Ct. at 2694 (When one jurisdiction refuses recognition to family relationships legally established in another, "the differentiation demeans the couple, whose moral and sexual choices the Constitution protects … and whose relationship the State has sought to dignify."). The differential treatment "humiliates tens of thousands of children now being raised by same-sex couples," *id.*, including Adopted Child Doe and the children who will be born to the Henry/Rogers, Yorksmith, and Noe/McCracken families. In *Obergefell*, for purposes of the due process claim, this Court applied intermediate scrutiny to the marriage recognition bans. That standard requires that "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Obergefell*, 2013 WL 6726688, at * 6 (internal quotations and citations omitted). This Court concluded that Defendants failed to meet its burden to justify "Ohio's refusal to recognize and give the effect of law to their legal unions." *Id.* at *8.[12]

This Court's reasoning clearly was not confined to the circumstance of death certificates naming married spouses, the specific issue presented in *Obergefell*. Instead, this Court more broadly identified the State's gross intrusion on matters ranging from "finances" to "property" to the "family lives" of married same-sex couples. *Id.* at *6; *see also id.* at *6-8. Indeed, the Court expressly emphasized the marriage recognition bans' unjustified intrusion on parent-child relationships for same-sex couples: "[i]n the family law context, while opposite-sex married

[12] Purported governmental interests are discussed in Section. IV.C. below.

couples can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. While Ohio courts allow an individual gay or lesbian person to adopt a child, a same-sex couple cannot." *Id.* at 8 (citing Becker Dec., ¶ 17).

2. Defendants Infringe Other Protected Liberty Interests, Including the Right to Parental Autonomy and the Right to Travel

Obergefell's holding that the marriage recognition bans violate due process applies with even greater force here, given Defendants' even broader infringements on Plaintiffs' protected liberty interests. The Constitution accords parents significant rights in the care and control of their children. *See Parham v. J.R.*, 442 U.S. 584, 602 (1979). They have unique rights to make crucial decisions for their children, including about schooling, religion, medical care, and with whom the child may have contact. *See*, *e.g.*, *id.* (medical decisions); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (education and religion); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (education); *Troxel v.Granville*, 530 U.S. 57 (2000) (visitation with relatives). U.S. Supreme Court rulings, reflected in state laws, make clear that these parental rights are fundamental and may be curtailed only under exceptional circumstances. *See id.* at 66; *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *see also, e.g.*, *In re D.A.*. 113 Ohio St. 3d 88, 90-91, 862 N.E.2d 829 (2007) (citing Ohio cases on parents' "paramount" right to custody of their children).

Identification on the child's birth certificate is the basic currency by which parents can freely exercise these protected parental rights and responsibilities. It is also the only common governmently-conferred record that establishes identity, parentage, and citizenship in one document, and that is uniformly recognized, readily accepted, and often required in an array of legal contexts. Obtaining a birth certificate that accurately identifies both parents of a child born using anonymous donor insemination or adopted by those parents is vitally important for

multiple purposes. The birth certificate can be critical to registering the child in school;[13] determining the parents' (and child's) right to make medical decisions at critical moments; obtaining a social security card for the child;[14] obtaining social security survivor benefits for the child in the event of a parent's death; establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death;[15] claiming the child as a dependent on the parent's insurance plan; claiming the child as a dependent for purposes of federal income taxes; and obtaining a passport for the child and traveling internationally.[16] The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that inaccurately reflects the child's parentage. It also severely burdens the ability of the child's parents to exercise their parental rights and responsibilities.

By withholding an accurate birth certificate and preventing Plaintiff families from obtaining appropriate passports for their children, Defendants likewise violate Plaintiffs' constitutional right to travel. *See Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("[T]he constitutional right to travel from one State to another is firmly embedded in [Supreme Court] jurisprudence"); *Kent v. Dulles*, 357 U.S. 116 (1958) (right to travel internationally is protected under the Fifth Amendment). For example, Plaintiffs Joe and Rob routinely engage in international and domestic travel, and they have an international trip planned in May 2014 to attend the wedding

[13] *See* Ohio Rev. Code Ann. § 3313.672(A)(1) (birth certificate generally must be presented at time of initial entry into public or nonpublic school); *Enrollment Guidelines*, Cincinnati Public Schools, http://www.cps-k12.org/schools/enroll (last visited Feb. 26, 2014).
[14] *See* Social Security Administration, Social Security Numbers for Children, http://www.ssa.gov/pubs/EN-05-10023.pdf#nameddest=adoptiveparents (last visited Feb. 26, 2014).
[15] *See Sefcik v. Mouyos*, 171 Ohio App. 3d 14, 18, 869 N.E.2d 105 (Ohio Ct. App. 11th Dist. 2007) (noting that child's birth certificate is prima facie evidence of parentage for inheritance purposes).
[16] *See* U.S. Department of State, *Minors under Age 16*, U.S. Passports & Int'l Travel, http://travel.state.gov/passport/get/minors/minors_834.html (last visited Feb. 26 2014); U.S. Department of State, *New U.S. Birth Certificate Requirement*, U.S. Passports & Int'l Travel, http://travel.state.gov/passport/passport_5401.html (last visited Feb. 26, 2014) (certified birth certificates listing full names of applicant's parents must be submitted with passport application as primary evidence of citizenship).

of a life-long family friend, where their son will be the intended ring-bearer.[17] But without a birth certificate accurately recording the names of both adoptive parents and the adoptive name of Adopted Child Doe, the Vitale/Talmas Family is unable to secure a passport for their son and will be unable to attend this event.

B. Defendants Violate Plaintiffs' Right to Equal Protection

1. Plaintiffs Are Similarly-Situated to Other Couples Whose Marriages and Rights Attendant to Marriage Are Recognized by the State

Obergefell again compels the conclusion that Defendants violate Plaintiffs' right to equal protection by denying recognition to their marriages and the protections for families attendant to marriage. In *Obergefell*, this Court noted Ohio's long history of respecting out-of-state marriages if valid in the place of celebration, with only the marriages of same-sex couples singled out for differential treatment. *Obergefell*, 2013 WL 6726688, at *12-13.

Under Ohio law, if the Henry/Rogers, Yorksmith, and Noe/McCracken couples' marriages were accorded respect, *both* spouses in the couple would be entitled to recognition as the parents of their expected children. As a matter of statute, Ohio respects the parental status of the non-biologically related parent whose spouse uses AI to conceive a child born to the married couple. *See* O.R.C. § 3111.95 (providing that if "a married woman" uses "non-spousal artificial insemination" to which her spouse consented, the spouse "shall be treated in law and regarded as" the parent of the child, and the sperm donor shall have no parental rights); *see also* O.R.C. § 3111.03 (providing that a child born to a married couple is presumed the child of the birth mother's spouse). An Ohio birth certificate is a legal document, not a medical record. Birth certificates for newborn babies are generated by Defendants through use of the Integrated

[17] *See* Declaration of Joseph Vitale, Doc. 4-5, ¶¶ 15-16.

Perinatal Health Information System (IPHIS) with information collected at birth facilities.[18] Informants are advised that, "The birth certificate is a document that will be used for important purposes including proving your child's age, citizenship and parentage. The birth certificate will be used by your child throughout his/her life."[19] The Ohio Department of Health routinely issues birth certificates naming as parents both spouses to opposite-sex married couples who use AI to conceive their children.[20] But Defendants refuse to recognize these Plaintiffs' marriages and the parental presumptions that flow from them, and will refuse to issue birth certificates identifying both women in these couples as parents of their expected children.[21]

Similarly, when an Ohio-born child is adopted by the decree of a court of a sister state, the Ohio Department of Health "*shall* issue . . . a new birth record using the child's adoptive name and the names of and data concerning the adoptive parents." O.R.C. § 3705.12(A)(1) (emphasis supplied). Yet the Department of Health refuses to comply with this requirement based on O.R.C. § 3107.18(A), which provides that "[e]xcept when giving effect to such a decree would violate the public policy of this state, a court decree . . . establishing the relationship by

[18] A suggested worksheet is provided to the hospital or other birth facility by the Ohio Department of Health (ODH) for use by the birth mother or other informant. A copy of the worksheet can be found at Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3&TopicRelationID=5&Content=5994 (last visited February 28, 2014). The hospital or birth facility then enters the information gathered into the Integrated Perinatal Health Information System (IPHIS), a database maintained by ODH which collects pregnancy and newborn data. Two flow sheets describing the typical sequence of steps leading to a birth certificate can be found at *Birth Facility Easy-Step Guide For IPHIS*, pages 4-5, Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3&TopicRelationID=519&Content=4597 (last visited February 28, 2014).

[19] *Mother's Worksheet for Child's Birth*, available at Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3&TopicRelationID=5&Content=5994 (last visited February 28, 2014).

[20] *See* O.R.C. § 3111.03(A)(1) ("[a] man is presumed to be the natural father of a child," including when "[t]he man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement." *See also* O.R.C. § 3111.95(A) ("If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband."), and O.R.C. § 3705.08(B) ("All birth certificates shall include a statement setting forth the names of the child's parents. . . ").

[21] Defendant Director of the Ohio Department of Health's Answer to the Plaintiffs' Complaint, Doc. 15, ¶¶ 59-62.

adoption, issued pursuant to due process of law by a court of any jurisdiction outside this state . . . shall be recognized in this state."

Prior to Governor Kasich's administration and Defendant Wymyslo's leadership of the Department of Health, Ohio recognized out-of-state adoption decrees of same-sex couples and supplied amended birth certificates identifying the adoptive parents.[22] But the current administration takes the position that issuing birth certificates under such circumstances would violate "public policy," i.e., Ohio's purported limitation on adoptions within the State to couples only if they are married, *see* O.R.C. § 3107.03(A). If the Vitale/Talmas spouses were an opposite-sex couple, Defendant Wymyslo would recognize their marriage, their New York adoption decree, and their right to an accurate birth certificate for Adopted Child Doe.

2. Defendants Discriminate on the Basis of Sexual Orientation, Which, as This Court Held in *Obergefell*, Is Subject to Review Under Heightened Scrutiny

Defendants thus discriminate against the Plaintiff families based on the sexual orientation of the lesbian and gay spouses. In *Obergefell,* this Court held that differential treatment based on the sexual orientation of the spouses is subject to heightened scrutiny. *Obergefell*, 2013 WL 6726688, at *18.[23] The Court declared that the Sixth Circuit's prior holdings denying heightened

[22] *See* Decls. of William S. Singer, Jeffrey Scott Seay, and Barbara Ginn, Docs. 4-6 through 4-8.

[23] This discrimination is subject to heightened scrutiny on other bases as well. Defendants also discriminate against these families on the basis of the sex of the spouses; if each couple had an opposite-sex partner, Defendants would recognize their marriages and issue the birth certificates sought. This sex-based discrimination is likewise subject to, and fails, heightened scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Califano v. Westcott*, 443 U.S. 76 (1976). Moreover, singling out same-sex couples to deny their fundamental rights implicates not only the due process guarantee but also the right to equal protection, triggering heightened scrutiny on that basis as well. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). Also, as argued in *Obergefell*, the constitutional marriage recognition ban is subject to heightened scrutiny because it excludes same-sex couples from the normal policital process and makes it uniquely more difficult for them to secure ameliorative legislation on their behalf. *See, e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969); *see also Plaintiffs' Memorandum in Support of Motion for Declaratory Judgment and Permanent Injunction*, Doc. 53-1, Page ID 801-802.

scrutiny based on sexual orientation are no longer sound precedent. *Id*. at *13[24] The Court went on to analyze the four factors that, to varying degrees, may be considered to determine whether classifications qualify as suspect or quasi-suspect: whether the class (1) has faced historical discrimination, (2) has a defining characteristic that bears no relation to contribute to society, (3) has immutable characteristics, and (4) is politically powerless. *Id*. at *14.[25] After a thorough discussion, the Court held that "[s]exual 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*. Likewise, they cannot do so in the present case.

3. Defendants Discriminate Against the Children of Same-Sex Spouses Based on Disapproval of the Status or Actions of Their Parents, Yet Another Basis for Heightened Scrutiny

In this case, Defendants' discriminatory conduct most directly lashes out at the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of the same-sex relationships of their parents. Defendants withhold accurate birth certificates from these children, burdening the children because their parents are not the opposite-sex married couples given the State's special stamp of approval. The Supreme Court has long held that disparate treatment of children based on disapproval of their parents' status or conduct violates the Equal Protection Clause. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202,

[24] Subsequent to this Court's *Obergefell* decision, the Ninth Circuit similarly held that *Windsor* "requires heightened scrutiny" for classifications based on sexual orientation. *Smithkline Beechan Corp. v. Abbott Laboratories*, 740 F.3d 471, 484 (9th Cir. Jan. 21, 2014). "[W]e are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. . . . Thus, there can no longer be any question that gays and lesbians are no longer a 'group or class of individuals normally subject to "rational basis" review.'" *Id.* (citation omitted).

[25] Plaintiffs in *Obergefell* submitted expert declarations, refiled in this case, demonstrating that sexual orientation classifications satisfy the factors considered in analyzing whether discrimination based on a particular trait should be accorded heightened scrutiny. *See* Declarations of Susan J. Becker, George Chauncey, Megan Fulcher, Joanna L. Grossman, Bernard L. McKay, Letitia Anne Peplau, and Gary M. Segura (*See* Docs. 17-3 through 17-9).

220 (1982) (striking down statute prohibiting undocumented immigrant children from attending public schools because it "imposes its discriminatory burden on the basis of a legal characteristic over which the children can have little control"); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'"); *Weber v. Aetna Ca. Sur. Co.*, 406 U.S. 164, 175 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *see also Walton v. Hammons*, 192 F.3d 590, 599 (6th Cir. 1999) (holding state could not withhold children's food stamp support based on their parents' non-cooperation in establishing paternity of their children). Moreover, such discriminations also trigger heightened scrutiny. *See, e.g.*, *Pickett v. Brown*, 462 U.S. 1, 8 (1983).

The children in the Plaintiff families should not be denied the right to two legal parents, reflected on their birth certificates and given legal respect, because of the State's discrimination.

C. As This Court Concluded in *Obergefell*, the Marriage Recognition Bans Do Not Satisfy Rational Basis Review, Much Less Heightened Scrutiny

This Court considered and rejected as not even legitimate and rational any purported State interests justifying the marriage recognition ban. *Obergefell*, 2013 WL 6726688, at *20-21. The government certainly cannot meet its burden under heightened scrutiny to demonstrate that the marriage recognition bans are necessary to further important State interests. *Id.* at *6-9. Any purported State interests are as inadequate now as they were several months ago to warrant the discrimination caused by the marriage recognition bans and the bans' particularly harmful impact on Ohio-born children.

Of particular relevance to this case, in *Obergefell* this Court analyzed and roundly rejected any claimed government justifications based on a preference for procreation or

childrearing by heterosexual couples. *Id.* at *20. Thus, the Defendants cannot claim that denying recognition to Plaintiff couples' marriages and adoption decrees, denying recognition to the legal parent-child relationships in these families, and withholding accurate birth certificates to their children, advances any legitimate child-related government purpose. This Court rejected as "fundamentally baseless" and "offensive" any suggestion that "adopted children are less emotionally healthy than children raised by birth parents." *Obergfell*, 2013 WL 6726688, at *3 n.4. The Court was presented in *Obergefell* with expert evidence comparing parenting by lesbian and gay couples with that of their heterosexual counterparts.[26] This Court decisively concluded that "*[t]he overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples*." *Id.* at *20 n.20 (emphasis in original). The Court noted that the leading mainstream psychological and medical professional organizations "have all released statements in support of gay and lesbian parents and their ability and rights to rear children." *Id.*

The Court observed that this overwhelming consensus "has also been recognized by numerous courts." *Id.* (citing precedents). Indeed, the U.S. Supreme Court in *Windsor*, and, most recently, a spate of lower courts around the nation, have similiarly rejected a purported government interest in preferencing or encouraging parenting by heterosexual couples as a justification for denying marital rights to same-sex couples and their families. The Supreme Court in *Windsor* was offered the same false conjectures about child welfare this Court rejected

[26] *See* Expert Decl. of Megan Fulcher, *Obergefell* Doc. 43-1, submitted for the Court's consideration in this case as well.

in *Obergefell* — arguments so insubstantial that the Supreme Court found them unnecessary even expressly to acknowledge.[27] Instead, the Court concluded:

> DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, *including their own children*, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others [the federal government's non-recognition of marriages is unconstitutional].

Windsor, 133 S. Ct. at 2696 (emphasis added).

Many lower courts recently have trod the same ground this Court covered in *Obergefell*, and have reached the same conclusion that child welfare concerns weigh only *in favor* of recognizing the marital rights of same-sex couples. *See, e.g.*, *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Texas Feb. 26, 2014) (declaring unconstitutional Texas bans on same-sex marriage and out-of-state marriage recognition, and rejecting as irrational purported childrearing and procreation justifications); *Bostic v. Rainey*, No. 2:13-cv-395 , 2014 WL 561978, at *18 (E.D. Va. Feb. 13, 2014) (declaring unconstitutional Virginia's marriage ban, which has effect of "needlessly stigmatizing and humiliating children who are being raised" by same-sex couples and "betrays" rather than serves an interest in child welfare); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014) (rejecting purported government interest in withholding marriage recognition to advance procreation and childrearing goals, and holding Kentucky's marriage recognition ban, similar to Ohio's, unconstitutional); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *28–33 (N.D.

[27] *See* Brief on the Merits for the Respondent Bipartison Legal Advisory Group of the U.S. House of Representatives in *United States v. Windsor*, 2013 WL 267026, at *47-49 (arguing, inter alia, that governmental preference that child be reared by child's biological mother and father justifies discrimimination against married same-sex couples).

Okla. Jan. 14, 2014) (rejecting purported government interests in responsible procreation and childrearing as justifications for Oklahoma's same-sex marriage ban, which was held unconstitutional); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *25–27 (D. Utah Dec. 20, 2013) (declaring Utah's marriage ban unconstitutional and finding that same-sex couples' "children are also worthy of the State's protection, yet" the marriage ban "harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples"); *Griego v. Oliver*, No. 34,306, 2013 WL 6670704, at *3 (N.M. Dec. 19, 2013) (rejecting "responsible procreation and childrearing" rationales to justify New Mexico's marriage ban, and declaring ban in violation of state constitution).

In sum, under Supreme Court jurisprudence, and as confirmed in numerous recent lower court decisions, states do not have governmental interests sufficient to justify their refusals to celebrate or recognize marriages between same-sex couples. Defendants have already been found in *Obergefell* to lack even a rational basis for refusing to recognize marriages between same-sex couples, including on vital records. Just as Defendants lack a rationale at death, they lack a rationale at birth. Indeed, there are no circumstances in which the State's marriage recognition bans are constitutional. At both ends of the lifespan, a marriage between same-sex couples that is valid where celebrated must be recognized by Ohio and acknowledged in the State's vital records. The State's marriage recognition bans and non-recognition of marital presumptions of parentage violate the substantive due process and equal protection rights of same-sex couples and their children.

D. The Full Faith and Credit Clause of the U.S. Constitution Compels Ohio to Recognize and Give Effect to the Judicial Decrees of Adoption from Other States, Including for Purposes of Issuing an Amended Birth Certificate Identifying a Same-Sex Couple as an Ohio-Born Child's Adoptive Parents

Plaintiffs Vitale/Talmas Family and Adoption S.T.A.R. are also entitled to prevail on their Full Faith and Credit Clause claim. Article IV, § 1 of the U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." In incorporating this clause into our Constitution, 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). The Supreme Court has explained that the "animating purpose" of the full faith and credit command is:

> to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1988) (quoting *Milwaukee Cnty v. M.E., White Co.*, 296 U.S. 268, 277 (1935)).

In the context of judgments, the full faith and credit obligation is exacting, giving nationwide force to a final judgment rendered in a state by a court of competent jurisdiction. *Baker*, 522 U.S. at 233. Proper full faith and credit analysis distinguishes between public acts, which may be subject to public policy exceptions to full faith and credit, and judicial proceedings, which decidedly are not subject to any public policy exception to the mandate of full faith and credit. *See Baker*, 522 U.S. at 232 ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments."); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 437 (1943) ("The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another.").

The Supreme Court has thus rejected any notion that a state may disregard the full faith and credit obligation simply because the state finds the policy behind the out-of-state judgment contrary to is own public policies. According to the Court, *"our decisions support no roving 'public policy exception' to the full faith and credit due judgments." Baker*, 522 U.S. at 233 (emphasis added). *See also Estin v. Estin*, 334 U.S. 541, 546 (1948) (Full Faith and Credit Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); *Williams v. North Carolina*, 317 U.S. 287 (1942) (requiring North Carolina to recognize change in marital status effected by Nevada divorce decree contrary to laws of North Carolina).

Consistent with the guarantee of full faith and credit, Defendant Wymyslo's Department of Health is mandated under a provision of the Vital Statistics section of the Ohio Code to issue an amended birth certificate upon receipt of an adoption decree issued by the court of another state. Pursuant to O.R.C. § 3705.12(A) and (B), upon receipt of a decree of adoption of an Ohio-born child, issued with due process by the court of another state, "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.)

This statute does not leave discretion in Defendant Wymyslo's hands to reject duly issued out-of-state adoption decrees based on whether the adoption could have been obtained under Ohio law. Indeed, prior to the tenure of Defendant Wymyslo, Ohio issued amended birth certificates based on the out-of-state adoption decrees of same-sex parents, notwithstanding

Ohio's purported policy against adoptions by unmarried couples within the State.[28] Only now, under Defendant Wymyslo, does the Department of Health taken the position that O.R.C. § 3107.18, a separate provision of the "Adoption" section of the Code, frees it of its obligation to issue a corrected birth certificate upon receipt of a sister state's duly issued judgment of adoption decreeing a same-sex couple as adoptive parents.[29] According to Defendant Wymyslo, that provision requires the Department of Health to refuse recognition to out-of-state adoption decrees of same-sex parents, whose marriages are disrespected under Ohio law, because "giving effect to such a decree would violate the public policy of this state." O.R.C. § 3107.18. This backward evolution in Ohio — from granting accurate birth certificates to adoptive same-sex parents and their children, to the current administration's refusal to do so — is yet another manifestation of the irrational animus motivating Defendants' discriminatory treatment of lesbian and gay families.

Section 3107.18's "public policy" exception may authorize refusing comity, or recognition, to an adoption decree entered in a *foreign nation*, which is not governed by the Full Faith and Credit Clause. *See State ex rel. Smith v. Smith*, 662 N.E.2d 366 (Ohio 1996) (Ohio may deny comity to South African adoption decree entered without notice to biological father, which would have violated federal constitutional due process requirements in this country). But its application to the adoption decree of a sister state, where full faith and credit governs, is contrary to Ohio's consistent recognition of the duly-issued adoption decrees of sister state courts of competent jurisdiction. *See, e.g.*, *Matter of Bosworth*, No. 86-AP-903, 1987 WL 14234, at *2 (Ohio Ct. App. 10th Dist. July 16, 1987) (recognizing Florida adoption decree because, "if due process was followed by another state's court in issuing an adoption decree, an

[28] *See* Decls. of William S. Singer, Jeffrey Scott Seay, and Barbara Ginn, Docs. 4-6 through 4-8.
[29] *See* Letter from Ohio Department of Health attached to Declaration of Barbara Ginn, Doc. 4-6, Page ID 73-74.

Ohio court is mandated to give full faith and credit to that state's decree"); *Matter of Swanson*, No. 90-CA-23, 1991 WL 76457 (Ohio Ct. App. 5th Dist. May 3, 1991) (recognizing New York adoption decree over objection of Ohio biological parents).

Defendant Wymyslo impermissibly injects a "roving 'public policy exception' to the full faith and credit due judgments," precisely what the Supreme Court has made clear the Full Faith and Credit Clause prohibits. In a very similar case, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), the Tenth Circuit held that Oklahoma was required to issue an amended birth certificate listing as parents both members of a California same-sex couple that had legally adopted a child born in Oklahoma, notwithstanding Oklahoma's prohibition against such adoptions within the state. *Id.* at 1141-42. The Tenth Circuit granted this relief in an action, similar to the claim here, brought under 42 U.S.C. § 1983. Oklahoma, like Ohio, had a statute providing for issuance of amended birth certificates for children adopted in other states' courts. The Tenth Circuit ruled that 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*, 522 U.S. at 235). The Tenth Circuit concluded, "We hold today that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause." *Id.* at 1156. Oklahoma's "refusal to recognize final adoption orders of other states that permit adoption by same-sex couples" was therefore "unconstitutional." *Id.*[30] The same principles should apply here to prohibit Defendant Wymyslo's harsh treatment of Ohio-born children adopted in other states by same-sex parents.

[30] 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 is dintinguishable. 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. In any event, *Adar* did not adequately recognize the equal protection rights of the plaintiffs or the proper scope of the Full Faith and Credit Clause. The Tenth Circuit's reasoning in *Finstuen* should guide this Court.

V. PLAINTIFFS SUFFER IRREPARABLE HARM FOR WHICH THERE IS NO ADEQUATE REMEDY AT LAW AND NEED THE CERTAINTY OF INJUNCTIVE AND DECLARATORY RELIEF REGARDING THE RECOGNITION DUE THEIR MARRIAGES AND PARENTAL STATUSES

Plaintiffs suffer irreparable harm from Defendants' violation of their rights to due process, equal protection, and full faith and credit for their adoption decrees. Birth certificates are vitally important documents. Ohio's refusal to issue accurate birth certificates to the Plaintiffs imposes numerous indignities, legal disabilities, and psychological harm. *See* Section IV.A.2., above. Further, the State violates the Plaintiffs' fundamental constitutional rights to remain married, to function as a family, and to travel. How could it ever serve as a proper governmental purpose, with respect to these Plaintiffs who are caring for children, to block them when they step up and formally acknowledge their role as parents? When they willingly submit to the criminal, civil, and administrative control of the State with respect to their care of a child? And when they say to the community, "hold *me* legally responsible for the care and welfare of this child"? Ohio's refusal to recognize Plaintiffs' marriages and adoption decrees serves only the "improper purpose" to "impose inequality" and "make gay citizens unequal under the law." *Obergefell*, 2013 WL 6726688, at *21 (internal quotations and citation omitted).

These violations, disabilities, and indignities all constitute irreparable harm. "Constitutional violations are routinely recognized as triggering irreparable harm unless they are promptly remedied." *Id.* at *22; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Saenz*, 526 U.S. at 498 (violation of right to travel interstate constitutes irreparable injury).

Without a permanent injunction and declaratory relief, Plaintiffs and their children must navigate life without the birth certificates that pave the way through numerous transactions large

and small. They will needlessly suffer harmful delays, bureaucratic complications, increased costs, embarrassment, invasions of privacy, and disrespect. The legal parental status of these children's parents will be open to question, including in moments of crisis when time and energy cannot be spared to overcome the extra hurdles Ohio's discrimination erects.[31] The marital status of the couples will likewise be open to question, depriving these families of the far-reaching security, protections, and dignity that come with recognition of their marriages. The Plaintiff families require injunctive and declaratory relief to lift the stigma imposed by Defendants' disrespect for their spousal and parental statuses.

Imposition of these burdens on Plaintiffs serves no legitimate public interest that could counter-balance the severe and irreparable harm to Plaintiffs from the marriage recognition bans and deprivation of birth certificates reflecting their legal parent-child relationships. Plaintiffs thus demonstrate entitlement to a permanent injunction and declaratory judgment.

VI. CONCLUSION

This Court should issue a declaration that those portions of Ohio Const. Art. XV, § 11 and Ohio Rev. Code § 3101.01(C), and any other provisions of the Ohio Revised Code that may be relied on to deny legal recognition to the marriages of same-sex couples validly entered in the jurisdiction of celebration, violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio and to enjoy the rights, protections and benefits of marriage provided to opposite-sex married

[31] For example, although Ohio same-sex couples may obtain co-custody agreements for their children, such an agreement "does not . . . create the full rights and responsibilities of a legally recognized child-parent relationship." (Becker Declaration, Doc. 17-3, ¶ 19). Families can be barred in hospitals from their loved ones' bedsides due to a lack of legally-recognized relationship status. (*Id.* at ¶ 23). "Same-sex married couples and their children live in the Ohio that automatically denies most state and federal rights, benefits and privileges to them." (*Id.* at ¶ 103). Children are entitled to bring wrongful death actions. (McKay Declaration, Doc. 17-7, ¶ 37). Inheritance is governed in part by parentage. (*Id.* at ¶¶ 21, 24, 30).

couples under Ohio law, are denied their fundamental right to marriage recognition without due process of law and their right to equal protection.

This Court should further issue a permanent injunction prohibiting the Defendants and their officers and agents from (a) enforcing the marriage recognition bans, (b) denying same-sex couples validly married in the jurisdiction of celebration all the rights, protections, and benefits of marriage provided under Ohio law, and (c) denying full faith and credit to decrees of adoption duly obtained by same-sex couples in sister jurisdictions.

Finally, the injunctive relief should include but not be limited to requiring Defendants to complete 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 that on February 28, 2014, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/Alphonse A Gerhardstein
Trial Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRITTANI HENRY and BRITTNI ROGERS, et al.,	:	
Plaintiffs,	:	**Case No. 1:14-cv-129**
vs.	:	**Judge Timothy S. Black**
THEODORE E. WYMYSLO, M.D., et al.,	:	**PROPOSED DECLARATORY JUDGMENT AND PERMANENT INJUNCTION ORDER**
Defendants.	:	

Upon consideration of the Plaintiffs' motion and memorandum in support of declaratory and injunctive relief, the responses of the Defendants, the Plaintiffs' Reply, and the exhibits and declarations submitted by the parties, this Court has found and concluded that Plaintiffs' motion is appropriately granted. Consequently, the Court now enters its final judgment granting a declaratory judgment and a permanent injunction.

Specifically with respect to plaintiffs' claim for marriage recognition, the Court finds, that those portions of Ohio Const. Art. XV, §11 and Ohio Rev. Code § 3101.01(C), and any other provisions of the Ohio Revised Code including but not limited to Ohio Rev. Code § 3107.18(A) that may be relied on to deny legal recognition to the marriages of same-sex couples validly entered in the jurisdiction of celebration (collectively the "marriage recognition bans"), violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio and to enjoy the rights, protections and benefits of marriage provided to opposite-sex married couples under Ohio law, are denied their fundamental right to marriage recognition without due process of law and their

right to equal protection when Ohio does recognize heterosexual marriages from other jurisdictions, even if the heterosexual marriage is of a kind not authorized in Ohio. The evidence demonstrates that there is no state interest sufficient to justify denying same-sex married couples the same recognition of their existing marriages.

Therefore, this Court hereby **DECLARES** that the Ohio marriage recognition bans are unconstitutional and the marriages of same-sex couples validly entered in the jurisdiction of celebration are entitled to full legal recognition in the State of Ohio. This includes, but is not limited to, (a) application of marital presumptions of parentage under which both spouses have the status of legal parent to a child conceived using AI and/or born to the marriage, and (b) granting same-sex married couples the same rights as opposite-sex married couples with respect to enforcement of adoption decrees from sister jurisdictions, and (c) issuing birth certificates for children of married same-sex couples that include both same-sex parents on the same basis that birth certificates of children of married opposite sex couples include both parents.

The Court further **DECLARES** that the Ohio marriage recognition bans violate the constitutional rights of same-sex couples with marriages validly entered in the jurisdiction of celebration who become clients of Plaintiff Adoption S.T.A.R. and/or who secure adoption orders for children born in Ohio and who seek birth certificates that record both persons in the marriage as the legal parents.

This Court further **DECLARES** that Defendants shall recognize and grant full faith and credit to decrees of adoption duly obtained by same-sex couples in sister jurisdictions;

This Court further **DECLARES** that Plaintiff Adoption S.T.A.R. and same-sex couples with marriages validly entered in the jurisdiction of celebration may, consistent with the Constitution of the United States and this Court's Final Order, enforce existing decrees of

adoption, and request and obtain birth certificates listing two adoptive parents of the same-sex from the Ohio Department of Health on the same basis and subject to the same criteria as married opposite–sex couples.

THEREFORE, Defendants Theodore Wymyslo and Camille Jones, and their officers, agents, and employees, and those persons (including all state and local officials) in active concert or participation with Defendants who receive actual notice of this Order, are also **PERMANENTLY ENJOINED** from enforcing the Ohio marriage recognition bans, those portions of Ohio Const. Art. XV, §11 and Ohio Rev. Code. § 3101.01(C), and any other provisions of the Ohio Revised Code including but not limited to Ohio Rev. Code § 3107.18(A) that may be relied on to deny legal recognition of same-sex marriages validly entered in the jurisdiction of celebration and from denying full faith and credit to decrees of adoption duly obtained by same-sex couples in sister jurisdictions. Compliance by Defendants with this order shall include but not be limited to, issuing birth certificates to the plaintiffs in this case listing both of their same-sex parents. Defendants shall also issue directives or notices as appropriate to all state and local officials involved in matters that relate to or require a determination regarding marriage recognition informing them of the contents of this order and providing instructions on compliance.

IT IS SO ORDERED.

Date: _____

_____
Timothy S. Black
United States District Judge