No. 16-992

IN THE
Supreme Court of the United States

MARISA N. PAVAN, ET AL.,
Petitioners,
v.
NATHANIEL SMITH, M.D., MPH,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GLBTQ LEGAL ADVOCATES & DEFENDERS, AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GLBTQ ADVOCATES & DEFENDERS

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and GLBTQ Advocates & Defenders ("GLAD") respectfully move for leave to file a brief as *amici curiae* in support of petitioners.

Counsel for proposed *amici* timely notified counsel of record for the parties of their intent to file this brief as required by this Court's Rule 37.2(a). Counsel for petitioners consented to the filing of this brief, and the letter of consent has been submitted to the Clerk of this Court.

Counsel for respondent "t[ook] no position on the filing of the brief," stating that "[i]t is [respondent's] policy to ask for a copy of the *amicus* brief before we decide whether we will consent or not." While respondent "d[id] not oppose" this brief and acknowledged that "[i]n nearly all cases, after we see a copy, we consent," respondent asserted that, absent reviewing the brief in advance, respondent could "[n]ot affirmatively consent because we have no way of knowing whether the brief meets the proper standards of *amicus* briefs." Proposed *amici* believe that respondent's demand to review the proposed brief in advance before respondent will consent to its filing is not appropriate. Among other things, satisfying respondent's requirement of providing an advance copy of the brief for respondent's review would have prejudiced the timing of drafting, printing, and filing of this brief, necessitating the filing of this motion.

Lambda Legal is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender persons, and people living with HIV. GLAD works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Proposed *amici* seek leave to submit this brief in support of petitioners to explain why a state's refusal to issue birth certificates identifying the non-biological parent in married same-sex couples is a disturbing failure to comply with this Court's recent decisions in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), and *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). Lambda Legal and GLAD have a strong interest in guaranteeing that married same-sex parents and their children receive the full range of protections afforded by marriage—and have a long history of presenting issues related to equal rights for same-sex couples to this Court, including participating as party counsel in *Obergefell* and *amici* in *Windsor*. Lambda Legal and GLAD have deep experience representing same-sex couples and their families in a range of legal matters and are well-situated to describe the importance of having both parents appear on a child's birth certificate.

Lambda Legal and GLAD therefore respectfully seek leave to file the attached brief as *amici curiae* in support of petitioners.

Respectfully submitted.

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March 15, 2017

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), founded in 1973, is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender persons, and people living with HIV, through impact litigation, education, and policy advocacy.

Through litigation, public policy advocacy, and education, *amicus curiae* GLBTQ Legal Advocates & Defenders ("GLAD") works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation.

Amici submit this brief in support of petitioners to explain why a state's refusal to issue birth certificates identifying the non-biological parent in married same-sex couples is a disturbing failure to comply with this Court's recent decisions in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), and *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), landmarks recognizing lesbian and gay couples' constitutional right to

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored any portion of this brief, and no person other than *amici* or its counsel or members made any monetary contribution intended to fund the preparation or submission of the brief. As explained in the accompanying motion, counsel of record for the parties received timely notice of *amici*'s intent to file this brief, but counsel for respondent took no position on the filing of this brief.

equality in marriage and to the protections that flow from marriage. The right of married same-sex parents to have their children's birth certificates accurately reflect parentage falls squarely within the constellation of benefits afforded through marriage, as recognized in *Obergefell*, 135 S. Ct. at 2601, is paramount to the full equality of married same-sex couples, and is important in their day-to-day lives.

Amici have a strong interest in guaranteeing that married same-sex parents and their children receive the full range of benefits afforded by marriage—and a long history of presenting issues related to equal rights for same-sex couples to this Court. Lambda Legal has participated as party counsel or *amicus* in numerous challenges to laws prohibiting same-sex couples from marrying or receiving legal respect for their existing marriages, including as party counsel in *Obergefell* and as *amicus* in *Windsor*. Lambda Legal also participated as party counsel in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and *Romer* v. *Evans*, 517 U.S. 620 (1996), other decisions in which this Court recognized lesbian and gay individuals' constitutional rights to liberty and equality. Lambda Legal has deep experience representing same-sex couples and their families in a range of legal matters and is well-situated to describe the importance of having both parents appear on a child's birth certificate. GLAD has litigated cases representing same-sex couples seeking the freedom to marry and respect for their marriages from states and the federal government, including on behalf of a Michigan couple in *Obergefell*. GLAD has also represented LGBT persons and families seeking equal

treatment in all manner of cases in state and federal courts.

SUMMARY OF ARGUMENT

I. Arkansas refuses to include the non-biological parent on the birth certificate of a child born to a married same-sex couple as the result of donor insemination—even though Arkansas generally *requires* non-biological parents to be included on such certificates if the couple consists of a man and a woman. The sanctioning of that state-sponsored discrimination by the Arkansas Supreme Court is irreconcilable with this Court's decisions in *Obergefell* and *Windsor*, which guarantee same-sex spouses the same protections afforded different-sex spouses. Unfortunately, the Arkansas Supreme Court is not alone in its disregard of this Court's marriage equality precedents, at the cost of married same-sex couples and their children. Review is therefore warranted.

II. Few documents are more significant to a married couple raising a child than the permanent and official record of their child's birth and parentage. Birth certificates play a pivotal role when parents seek to enroll their child in school, travel with their child, and make other critical decisions shaping their child's life. In refusing to give effect to *Obergefell* and *Windsor*, the decision below singles out married same-sex couples and their children and deprives them of the numerous tangible and intangible protections that birth certificates afford. These families once again are consigned to the "instability" different-sex families "would deem intolerable in their own lives"—the very instability that *Obergefell*

should have ended once and for all. 135 S. Ct. at 2602.

ARGUMENT

I. THE ARKANSAS SUPREME COURT'S DECISION FLATLY CONTRADICTS *OBERGEFELL* AND *WINDSOR*, SIGNALING TROUBLING ONGOING RESISTANCE TO AFFORDING SAME-SEX SPOUSES THE MARRIAGE RIGHTS THOSE DECISIONS UPHELD.

The U.S. Constitution prohibits the federal government and the states from placing "same-sex couples in an unstable position of being in a second-tier marriage." *Windsor*, 133 S. Ct. at 2694. As this Court held only two Terms ago, same-sex and different-sex spouses must receive equal access to all "aspects of marital status," including "birth … certificates." *Obergefell*, 135 S. Ct. at 2601. In simplest terms, states must treat same-sex and different-sex spouses equally under the law. Yet the Arkansas Supreme Court refused to allow the wife of a woman who achieved pregnancy by anonymous donor insemination to appear on her child's birth certificate, even though Arkansas would list an identically situated husband on the birth certificate. The Court should step in now to reaffirm the central principle of *Obergefell* and *Windsor*: A marriage between a same-sex couple, with all the attendant protections, is legitimate, worthy, and—above all—*equal*.

The specific question at issue in this case—whether a state can refuse to name a same-sex spouse on a birth certificate, notwithstanding that the state would name a different-sex spouse in the same situation—was at the heart of the *Obergefell*

proceedings. For example, several of the couples whose case was consolidated in *Obergefell* "gave birth to children in Ohio and wish[ed] to have both of their names listed on each child's birth certificate rather than just the child's biological mother." *DeBoer* v. *Snyder*, 772 F.3d 388, 398 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. Just like the couples here, those couples achieved pregnancy via anonymous donor insemination and sought to name the non-biologically related spouses on their children's respective birth certificates. Brief for Petitioners 8-9 & n.1, *Obergefell* (No. 14-556), 2015 WL 860738. The *Obergefell* petitioners argued that Ohio's refusal to name both parents on the birth certificates "place[d] same-sex couples in Ohio and beyond 'in an unstable position of being in a second-tier marriage,' and '[made] 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 27 (quoting *Windsor*, 133 S. Ct. at 2694). As the petitioners explained, "[t]he bans make it impossible for the … Petitioners to obtain accurate birth certificates for their children … or for Petitioners to receive a myriad of other protections the government guarantees married couples and their families through all other phases of life." Reply Brief for Petitioners 14, *Obergefell* (No. 14-556), 2015 WL 1776076.

This Court agreed that petitioners were entitled to appear on their children's birth certificates. As Justice Danielson correctly observed in his dissent in the present case, "the United States Supreme Court held in *Obergefell* that states are not free to deny same-sex couples 'the constellation of benefits that

the States have linked to marriage'" and "the Court listed 'birth and death certificates' specifically as one of those benefits attached to marital status"; therefore, Arkansas cannot treat same- and different-sex spouses disparately in this regard. Pet. App. 43a (quoting *Obergefell*, 135 S. Ct. at 2601). The *Obergefell* dissents agreed that this was the effect of *Obergefell*. Chief Justice Roberts's principal dissent, joined by Justices Scalia and Thomas, acknowledged that "petitioners … seek public recognition of their relationships, *along with corresponding government benefits*." *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (emphasis added). Justice Alito similarly noted that he "use[d] the phrase 'recognize marriage' as shorthand for issuing marriage licenses *and conferring those special benefits and obligations provided under state law for married persons*." *Id.* at 2640 n.1 (Alito, J., dissenting) (emphasis added). Indeed, Arkansas itself, as an *amicus* in *Obergefell*, argued that marriage "ripple[s] across vital areas of law, including the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' One could add to that list laws regulating adoption … [and] reproductive technology." Brief for Louisiana *et al.* as *Amici Curiae* Supporting Respondents 7, *Obergefell* (No. 14-556), 2015 WL 1608213 (internal citation omitted). Even the Arkansas Supreme Court majority in the present case acknowledged that *Obergefell* recognizes birth certificates as one of the "conferred benefits on married couples." Pet. App. 12a.

Given that *Obergefell* held that states must provide the full "constellation of benefits" to married same-sex couples and their families, including "birth

… certificates," 135 S. Ct. at 2601, Arkansas and every other state should have promptly applied marital presumptions of parentage on the same terms to married same- and different-sex parent couples alike and issued two-parent birth certificates to married same-sex parents without question. Yet Arkansas, as well as a number of other states resistant to *Obergefell*'s constitutional decree, have forced same-sex couples to litigate their right to accurate birth certificates, perpetuating the burdens on their families that *Obergefell* should have eliminated.

Thus far, the federal courts hearing these cases have faithfully followed *Obergefell*, uniformly ruling that states may not refuse to name a same-sex spouse on a birth certificate. *See*, *e.g.*, *Carson* v. *Heigel*, No. 3:16-cv-45, 2017 WL 624803, at *2 (D.S.C. Feb. 15, 2017) ("[T]his Court refuses to countenance Defendant's refusal to name both Plaintiffs on their twins' birth certificates. Defendant's present practice is violative of Plaintiffs' fundamental right to marriage and other protected liberties."); *Henderson* v. *Adams*, __ F. Supp. 3d __, 2016 WL 3548645, at *16 (S.D. Ind. June 30, 2016) ("The State Defendant and its officers … are ENJOINED to recognize the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate."), *appeal docketed*, No. 17-1141 (7th Cir. Jan. 20, 2017); *Brenner* v. *Scott*, No. 4:14-cv-107, 2016 WL 3561754, at *3 (N.D. Fla. Mar. 30, 2016) ("[I]n circumstances in which the Surgeon General lists on a birth certificate an opposite-sex spouse who is not a biological parent, the Surgeon General must list a same-sex spouse who is not a bio-

logical parent."); *Roe* v. *Patton*, No. 2:15-cv-523, 2015 WL 4476734, at *4 (D. Utah July 22, 2015) ("Defendants are enjoined from enforcing Utah [law] … in a way that differentiates between male spouses of women who give birth through assisted reproduction with donor sperm and similarly situated female spouses of women who give birth through assisted reproduction with donor sperm."); *Robicheaux* v. *Caldwell*, No. 13-cv-5090, 2015 WL 4090353, at *2 (E.D. La. July 2, 2015) (Defendant "must issue forthwith a birth certificate for the child of Plaintiff M. Lauren Brettner identifying Jacqueline M. Brettner as one of the child's parents.").

Like these federal courts, the Arkansas Supreme Court was required to follow *Obergefell*. "As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.'" *James* v. *City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) (per curiam) (quoting *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)).

Yet the Arkansas Supreme Court allowed its state to give preferential treatment to different-sex spouses and to list husbands who are not biologically related to the child—but not similarly-situated wives—on the child's birth certificate. Pet. App. 20a. Although the court recognized that *Obergefell* involved consideration of birth certificates, the court deemed this irrelevant because *Obergefell* "men-

tioned birth certificates only once." Pet. App. 11a-12a. The Arkansas Supreme Court then rejected petitioners' challenge because "[t]he purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child," Pet. App. 20a—even though the state generally requires a woman's husband to appear on the birth certificate of a child conceived through use of an anonymous sperm donor, Ark. Code §§ 9-10-201(b), 20-18-401(f)(1); generally requires a woman "intended to be the mother" to be listed on the birth certificate when a heterosexual married couple uses an egg donor and a surrogate, *id.* § 9-10-201(b)(1); and issues a second birth certificate listing the names of parents who adopt a child, *id.* § 20-18-406(a)(1). The claim that birth certificates are limited to a record of a child's biological parents is thus belied by the multiple circumstances in which the state records nonbiological parents on birth certificates. The bottom line is that "[t]he exclusion of the nonbirthing spouse on the birth certificate of a child born to a married lesbian couple is not substantially related to the objective of establishing parentage." *Gartner* v. *Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 353-54 (Iowa 2013).

Windsor and *Obergefell* considered and rejected this same appeal to "biology" as a shield for discrimination against same-sex couples and their children. The respondent's unsuccessful brief in *Windsor* attempted to justify denial of federal recognition to marriages of same-sex spouses based on the contention that "the biological link of parents to children [is] deserving of special recognition and protection." Brief for Respondent BLAG 18, *Windsor* (No. 12-

307), 2013 WL 267026 (quoting *Windsor* v. *United States*, 699 F.3d 169, 206 (2d Cir. 2012) (Straub, J., dissenting), *aff'd*, 133 S. Ct. 2675). This argument did not succeed then, and it should not succeed now. *Windsor*, 133 S. Ct. at 2695-96. The same reasoning was resurrected in *Obergefell* and rejected yet again by this Court. *See*, *e.g.*, Brief for Respondents 39-40, *Tanco* v. *Haslam* (No. 14-562), *subsequently consolidated with Obergefell*, 2015 WL 1384102 ("Obviously, same-sex couples cannot procreate naturally. Biology alone, therefore, provides a rational explanation for not expanding marriage to add same-sex couples."); *see also Obergefell*, 135 S. Ct. at 2600-01. This Court emphasized in *Obergefell* that the right to marry is fundamental in part because "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education," and that these "varied rights" must be understood "as a unified whole." *Id.* at 2600. The Arkansas Supreme Court's attempt to divorce licensing marriage for same-sex couples from recognition of the parental rights that flow from the marriage ignores that these rights form "a unified whole" that must be protected on equal terms for same- and different-sex couples. "Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser." *Id.* at 2600. They are denied the "equal dignity in the eyes of the law" that the Constitution guarantees same-sex couples and their families. *Id.* at 2608.

Unfortunately, the state of Arkansas and its Supreme Court are not alone in their continuing resistance to this Court's holding in *Obergefell*. This

Court should enforce the principle of marriage equality before further impermissible limitations take hold.

On January 20, 2017, the Texas Supreme Court, on rehearing, granted review of *Parker* v. *Pidgeon*, 477 S.W.3d 353 (Tex. App. 2015) (per curiam), in which the Texas Court of Appeals had vacated a temporary injunction prohibiting the City of Houston from offering spousal benefits to same-sex spouses of City employees and remanded for further consideration in light of *Obergefell*. In doing so, the court noted *Obergefell* effected a substantial change in the law regarding recognition of marriage between same-sex couples and that "'there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.'" *Id.* at 354 (quoting *Obergefell*, 135 S. Ct. at 2607-08). The Texas Supreme Court had initially denied the petition for review over a dissent by Justice Devine; however, after the Arkansas Supreme Court's decision in this case was released, the Texas court changed its mind, siding with Justice Devine on the decision to accept review. *Pidgeon* v. *Turner*, __ S.W.3d __, 2016 WL 4938006 (Tex. Sept. 2, 2016) (mem.), *reh'g granted*, No. 15-688 (Tex. Jan. 20, 2017). Justice Devine's dissent from the original denial is grounds for concern: Like the Arkansas Supreme Court, it relies on a crabbed interpretation of *Obergefell* and on discredited biology-based justifications for discrimination. According to Justice Devine, "at most, the majority" in *Obergefell* "merely *described* the benefits that states confer on married couples and *assumed* states would extend them to all married couples. Generalized assump-

tions about state laws do not constitute a legal holding." *Id.* at *3. Relying on reasoning rejected by this Court in both *Windsor* and *Obergefell*, he then asserted: "[T]hat only opposite-sex couples may procreate justifies limiting government incentives and security for childbearing to spouses of the opposite sex. … By misapplying *Obergefell*, the court of appeals overlooked this legitimate and important interest." *Id.* at *5. Oral argument in *Pidgeon* occurred on March 1, 2017, and same-sex spouses and their families in Texas anxiously wait to learn whether the Texas Supreme Court will open a door to depriving them of spousal benefits afforded different-sex couples.

Judges in Alabama and Puerto Rico have also tried to ignore or limit *Obergefell*, although their efforts were ultimately corrected as the cases proceeded. In the months after *Obergefell*, Chief Justice Moore of the Alabama Supreme Court unilaterally issued an administrative order directing all probate judges to deny marriage licenses to same-sex couples.[2] *See In re Moore*, No. 46, 2016 WL 7106075, at *5 (Ala. Jud. Inq. Comm. July 15, 2016). He refused to apply *Obergefell* to Alabama's ban on marriage for same-sex couples because "[t]he *Obergefell* opinion, being manifestly absurd and unjust and contrary to reason and divine law, is not entitled to precedential

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[2] This Court is familiar with the Alabama Supreme Court's resistance to recognizing rights of same-sex couples. *See Ex parte E.L.*, __ So. 3d __, 2015 WL 5511249 (Ala. Sept. 18, 2015), *rev'd sub nom.*, *V.L.* v. *E.L.*, 136 S. Ct. 1017 (2016) (per curiam) (holding that Alabama must give full faith and credit to Georgia state-court judgment permitting a woman to be the adoptive parent of children born to her same-sex partner).

value." *Ex parte State ex rel. Ala. Policy Inst.*, 200 So. 3d 495, 589 (Ala. 2016) (Moore, C.J., concurring). The Alabama Court of the Judiciary suspended the Chief Justice for his defiance, defusing that effort to disobey *Obergefell*. *Moore*, 2016 WL 7106075, at *31. Similarly, in *Conde Vidal* v. *Garcia-Padilla*, a district court refused to apply *Obergefell* to invalidate Puerto Rico's marriage ban, instead contending that the plaintiffs' fundamental right to marry had not been incorporated to Puerto Rico. 167 F. Supp. 3d 279, 287 (D.P.R. 2016). The First Circuit granted a writ of mandamus and criticized the court for a ruling that "errs in so many respects that it is hard to know where to begin." *In re Conde Vidal*, 818 F.3d 765, 766-67 (1st Cir. 2016).

State legislators have also proposed bills purporting to overrule *Obergefell*. Bills in South Carolina and Tennessee attempt to declare, by statute, that "[n]atural marriage between one man and one woman as recognized by the people of this State remains the law in South Carolina [or Tennessee], regardless of any court decision to the contrary" and "[a] court decision purporting to strike down natural marriage, including *Obergefell* … is unauthoritative, void, and of no effect."[3] The Michigan Legislature introduced a resolution that "urge[s] the Governor and all executive officers in the state of Michigan to uphold their oaths of office and re-claim this state's sovereignty by not recognizing or enforcing the Unit-

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[3] H.B. 4513 § 2, 121st Leg., 2d Reg. Sess. (S.C. 2015); *accord* H.B. 892 § 1, 110th Leg., 1st Reg. Sess. (Tenn. 2017); S.B. 752 § 1, 110th Leg., 1st Reg. Sess. (Tenn. 2017).

ed States Supreme Court's *Obergefell* decision as a rule of law."[4]

The present case is both a manifestation of recent resistance to this Court's marriage equality decisions and the continuation of a long history of discrimination against same-sex couples. Although most states have seen faithful, orderly application of *Obergefell*, just two Terms after the Court's ruling, a troubling "history of resistance" to the Court's orders on marriage equality persists. *Brenner*, 2016 WL 3561754, at *3; *see also Moore*, 2016 WL 7106075, at *29 (recognizing "an aggressive public relations campaign about 'standing up to the federal judiciary'" in the wake of the marriage equality decisions). Only this Court can restore uniformity and certainty to this critically important area of constitutional law. The Arkansas Supreme Court should not be allowed to ignore the holding of *Obergefell* and deny same-sex spouses and their children legal recognition afforded to identically situated different-sex spouses and their children. Same-sex couples and their families need the Court's protection to ensure that they are afforded equal dignity and equal rights.

II. TWO-PARENT BIRTH CERTIFICATES ARE CRITICALLY IMPORTANT TO SAME-SEX PARENTS AND THEIR CHILDREN.

Few documents are more significant to a married couple raising a child than the permanent and official record of their child's existence. Birth certificates establish citizenship and provide legal identity, grant access to government benefits, and, perhaps

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[4] H.C. Res. 17, 98th Leg., Reg. Sess. (Mich. 2015).

most importantly, serve as proof of a child's relationship to her parents. In refusing to apply *Obergefell* and *Windsor*, the decision below singles out married same-sex couples and their children for the burdens of state-sponsored discrimination.

Birth certificates convey an array of practical benefits that affect every American's day-to-day life. Identification on a child's birth certificate "is the basic currency by which parents can freely exercise … protected parental rights and responsibilities." *Henry* v. *Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. It is "the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship." *Ibid.* When parents "make important decisions for a child," no other document is "as convenient as, or less likely to result in bureaucratic delays than a birth certificate." *In re C.R.O.*, No. CN10-02-06tn, 2012 WL 7989408, at *6 (Del. Fam. Ct. Dec. 17, 2012); *cf. Delgado* v. *Osuna*, 837 F.3d 571, 581 (5th Cir. 2016) (noting that birth certificates are among the "most important documents" that an individual has). Birth certificates are critical to:

- "registering the child in school" and extracurricular activities, *Henry*, 14 F. Supp. 3d at 1050;
- "determining the parents' (and child's) right to make medical decisions at critical moments,"

ibid., and accessing and verifying hospital and other medical records;[5]

- establishing a child's identity to law enforcement in the event the child goes missing or is kidnapped;
- "obtaining a social security card for the child," *ibid.*;[6]
- "establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death," and "obtaining social security survivor benefits for the child in the event of a parent's death," *ibid.*;[7]
- obtaining child support in the event of the parents' separation;
- setting up a bank or other financial account in the child's name;
- "claiming the child as a dependent on the parent's insurance plan," *ibid.*;
- "claiming the child as a dependent" for state-income tax purposes, *ibid.*; and

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[5] *See* U.S. Dep't of Health & Human Servs., *Personal Representatives*, http://bit.ly/2lEqqtP (last visited Mar. 13, 2017).

[6] *See* Social Security Administration, *Learn What Documents You Need to Get a Social Security Card*, http://bit.ly/1Vh1Yu7 (last visited Mar. 13, 2017).

[7] *See* Social Security Administration, *Benefits for Children* (2016), http://bit.ly/2l6zUef.

- "obtaining a passport for the child,"[8] and traveling internationally without the encumbrance of additional documentation, *ibid.*[9]

When a state refuses to permit a same-sex spouse to appear on her child's birth certificate, the child is "denied the security of two legal parents," as well as all the protections that follow. *Patton*, 2015 WL 4476734, at *4. The state's refusal to list both parents on a child's birth certificate may have serious consequences for the child's safety and security: "In the case when a sole parent listed on a birth certificate is not available in an emergency, any number of difficulties or delays in being able to verify the other parent's legal status may place a child at risk." *C.R.O.*, 2012 WL 7989408, at *6. Even where the child's birth certificate can later be made accurate through costly and time-consuming adoption proceedings, these burdens on same-sex parents and their children—and the uncertainty the families must suffer in the interim—are intolerable.

Beyond the practical benefits birth certificates confer, permitting states to target same-sex couples and their children for unequal treatment is an affront to those families' dignity. *See Obergefell*, 135 S. Ct. at 2608. Children without accurate birth certificates will be subject to repeated challenges to their identity and will need repeatedly to explain why the

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[8] *See* U.S. Dep't of State, *Children Under 16*, http://bit.ly/2fWaluY (last visited Mar. 13, 2017).

[9] *See* U.S. Customs & Border Protection, *Children – Child Traveling with One Parent or Someone Who Is Not a Parent or Legal Guardian or a Group* (Feb. 2, 2017), http://bit.ly/2kXYjBD.

document recording their parentage is incomplete. The state's denial of accurate birth certificates to these children on the basis that their parents are a married same-sex couple stigmatizes the children and parents alike, sending a message that their family is less worthy of the state's recognition, "thus harm[ing] and humiliat[ing] the children of same-sex couples." *Id.* at 2600-01. Arkansas "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." *Windsor*, 133 S. Ct. at 2694. The result: married same-sex couples' children are forced to "suffer the stigma" of believing "their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600.

These families are *not* lesser. They only "ask for equal dignity in the eyes of the law," which "[t]he Constitution grants them." *Obergefell*, 135 S. Ct. at 2608. This Court's review is necessary to ensure that these same-sex parents and their children are no longer saddled with the tangible and intangible burdens from efforts to relegate them to "second-tier marriage." *Windsor*, 133 S. Ct. at 2694.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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