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**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

ANGELA LESLIE ROE and KAMI ROE,

Plaintiffs,

vs.

W. DAVID PATTON, in his official capacity as the Executive Director of the Utah Department of Health, and
RICHARD OBORN, in his official capacity as the Director of Utah's Office of Vital Records and Statistics,

Defendants.

**SUPPLEMENTAL MEMORANDUM IN
FURTHER SUPPORT OF
PRELIMINARY INJUNCTION**

Case No. 2:15-CV-00253-db

Judge Dee V. Benson

**SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs respectfully submit this Supplemental Memorandum of Law pursuant to the Court's order dated June 26, 2015, requesting supplemental briefing regarding the impact of *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, 14-574, 2015 WL 2473451 (U.S. June 26, 2015), on this case.

I. *Obergefell* Does Not Directly Address What Standard of Scrutiny Should Apply to Sexual Orientation Discrimination But Supplies Additional Support for Applying Heightened Scrutiny.

As discussed in Plaintiffs' previous submissions, the Office of Vital Records and Statistics' refusal to recognize female spouses of women who conceive through donated sperm as parents pursuant to Utah's assisted reproduction statutes, Utah Code Ann § 78B-15-701, *et seq.*, is subject to heightened scrutiny as (a) discrimination based on sex and (b) discrimination based on sexual orientation. The parties dispute whether discrimination based on sexual orientation should be subjected to heightened scrutiny, and the Tenth Circuit has not addressed the continuing vitality of cases applying rational basis review to differential treatment based on sexual orientation following the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Obergefell did not directly address what standard of scrutiny applies to discrimination based on sexual orientation. The Court did not need to reach that issue because it concluded that the exclusion of same-sex couples from marriage discriminated with respect to the exercise of a fundamental right. *See Obergefell*, 2015 WL 2473451, at *19 (citing *Zablocki v. Redhail*, 434 U.S. 374, 382-88 (1978), and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). The Tenth Circuit followed the same approach in *Kitchen v. Herbert*, 755 F.3d 1193, 1223 n.11 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) ("Because we conclude that marriage is a fundamental right . . . we do not address whether Amendment 3 might be subject to heightened scrutiny on any alternative basis.").

Nevertheless, even though *Obergefell* did not specifically discuss the standard of scrutiny for sexual orientation discrimination, the Court's opinion recognizes that sexual orientation classifications satisfy all of the factors the Court examines when determining whether a

classification should be recognized as suspect or quasi-suspect. The Court recognized the long history of discrimination against gay people in the United States. *Obergefell*, 2015 WL 2473451, at *9, *19. The Court recognized that homosexuality does not impair an individual's ability to contribute to society and is instead "a normal expression of human sexuality." *Id.* at *9. And the Court recognized that sexual orientation is "immutable." *Id.* at *7, *9. Moreover, although some courts have argued that same-sex couples have too much political power to warrant the protection of heightened scrutiny, the Court stated that, for purposes of addressing the constitutional question of due process and equal protection, "[i]t is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process." *Id.* at *20.

In any event, this Court does not have to resolve what standard of scrutiny applies to sexual orientation discrimination after *Windsor* and *Obergefell* because Defendants' refusal to treat female spouses the same as identically situated male spouses independently requires heightened scrutiny as sex discrimination. And even if heightened scrutiny did not apply, Defendants' policy would violate equal protection under any standard of review.

II. *Obergefell* Recognized that Married Same-Sex Couples Must Be Treated the Same as Married Different-Sex Couples With Respect to Birth Certificates.

Although *Obergefell* does not resolve the standard of scrutiny for evaluating sexual orientation discrimination, the *Obergefell* decision makes clear that same-sex couples must be treated the same as married different-sex couples with respect to the issuance of birth certificates. In explaining why same-sex couples cannot be excluded from marriage, *Obergefell* emphasized that same-sex couples have an equal claim to various state benefits and obligations that are tied to marital status, including the recognition of both spouses on their children's birth certificates:

“[W]hile the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; *birth and death certificates*; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.

Obergefell, 2015 WL 2473451, at *15 (emphasis added). The Court emphatically declared that “[t]here is no difference between same- and opposite-sex couples with respect to this principle.” *Id.* at *16. Significantly, *Obergefell* requires that same-sex couples have not merely access to “marriage” in the abstract, but also to “civil marriage on the same terms and conditions as opposite-sex couples.” *Id.* at *19.

In recognizing that same-sex married couples must be treated the same as different-sex married couples for purpose of governmental benefits and obligations tied to marriage – including birth certificates – *Obergefell* builds upon “the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State.” *Windsor*, 133 S. Ct. at 2692. Indeed, both the majority and dissenting opinions in *Obergefell* recognized that married same-sex couples would now be entitled to all the same ancillary rights and obligations provided to married different-sex couples. *See id.* at *21 (“Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.”); *id.* at *38 (Roberts, C.J., dissenting) (“The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective

claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.”)

CONCLUSION

For all these reasons, and for all the reasons set forth in Plaintiffs’ previous submissions, the motion for preliminary injunction should be granted.

DATED this 13th day of July, 2015.

/s/ Leah Farrell

ACLU of Utah
Counsel for Plaintiffs