APPENDIX A

STATE OF ARKANSAS,
SUPREME COURT

FORMAL ORDER

**BE IT REMEMBERED,** THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON JANUARY 4, 2018, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-15-988

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAP A CITY, AND HIS SUCCESSORS IN OFFICE
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANAS. JACOBS, INDIVIDUALLY AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD
Appellees

APPEAL FROM PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION - 60CV-15-3153

Appellees' protective motion for appellate attorney's fees and expenses is DENIED. Wynne, J., would grant in part and set a schedule for briefing and submission of evidence. Kemp, C.J., would note. Appellees' motion to transfer motion for attorney's fees and expenses is DENIED. Appellant's motion for leave to file a belated response to appellees' fee motions is DENIED.

In testimony, that the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Stacey Pectol, clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 4th day of January, 2018.

/s/ Stacey Pectol
CLERK

BY:_____
DEPUTY CLERK

ORIGINAL TO CLERK

CC: Cheryl Maples
Jonathan Wiessglass and Andrew Kushner
Amy Whelan
Lee P. Rudofsky, Solicitor General
Monty V. Baugh, Deputy Attorney General
Honorable Timothy Davis Fox, Circuit Judge

# APPENDIX B

## 42 U.S.C. § 1988 - Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in

its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX C

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

CASE NO. 60CV-15-3153

MARISA N. PAVAN and TERRAH D. PAVAN,
PLAINTIFFS
individually and as parents, next friends, and guardians of T.R.P., a minor child

LEIGH D.W. JACOBS and JANA S. JACOBS,
individually, and as parents, next friends, and guardians of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT,
individually, and as parents, next friends, and guardians of A.G.S., a minor child

vs.

NATHANIEL SMITH, MD, MPH
DEFENDANT
Director of the Arkansas Department of Health, in his official capacity, and his successors in office

## INJUNCTION

On the 8th day of December, 2017, this matter came on for consideration and from all things and matters properly before the court, the court doth find and order as follows:

1. The United States Supreme Court has ruled that the Arkansas statutory scheme concerning the issuance of birth certificates contained in A.C.A. § 20-18-401 and A.C.A. § 20-18-406 is unconstitutional as being violative of the equal protection clause of the Constitution of the

United States. The Arkansas Supreme Court has ordered certain portions of those statutes stricken.

2. The Arkansas Supreme Court, in its mandate to this court has ordered that this court issue such, "injunctive relief as necessary to ensure same sex spouses are afforded the same right as opposite sex spouses to be listed on a child's birth certificate."

3. Pursuant to the mandate of the United States Supreme Court and the Arkansas Supreme Court, the defendant, his successors and assigns are hereby immediately enjoined from the issuance of any and all birth certificates pursuant to either A.C.A. § 20-18-401 or A.C.A. § 20-18-406 unless and until such time as the defendant, his successors, and assigns, are able to issue birth certificates to all same sex spouses and opposite sex spouses in accordance with the mandate from the United States Supreme Court and the Arkansas Supreme Court.

4. If the defendant is unable to comply with such injunction with the remaining constitutional portions of such statutes, then the defendant, his successors, and assigns, are enjoined from the issuance of any and all birth certificates.

5. The court is hopeful that the executive branch may have the authority to issue such curative executive regulations as are necessary to allow for the issuance of birth certificates under the remaining constitutional portions of A.C.A. § 20-18-401 or A.C.A. § 20-18-406 in a constitutional manner, but expresses no opinion on those issues because they are not before the court.

6. In the event the defendant is unable to comply with this injunction with the remaining constitutional portions of A.C.A. § 20-18-401 or A.C.A. § 20-18-406 and

the executive branch does not have the authority to issue curative regulations, then the defendant, his successors, and assigns, are enjoined from the issuance of any and all birth certificates until such time as the General Assembly can meet, in special or general session, and pass curative legislation.

7. The injunctive relief ordered herein is effective immediately upon the filing of this *Order*.

IT IS SO ORDERED

/s/ Timothy Davis Fox
Timothy Davis Fox
Circuit Judge

12/8/17

DATE

APPENDIX D

OFFICE OF THE CI.ERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

November 30, 2017

Cheryl Maples
P.O. BOX 59
Heber Springs, AR 72543

RE: SUPREME COURT CASE NO. CV-15-988

NATHANIEL SMITH, M,D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, TN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE V. MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P, A MINOR CHILD; LEIGH D,W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S,, A MINOR CHILD

Dear Ms. Maples:

The Arkansas Supreme Court issued the following order today in the above styled case:

"Appellees' motion for clarification is denied. Kemp, C.J., and Wynne, J., would deny as moot."

Sincerely,

/s/ Stacey Pectol

Stacey Pectol, Clerk

cc: Lee Rudofsky, Solicitor General
Monty V. Baugh, Deputy Attorney General

APPENDIX E

In the Arkansas Supreme Court

CV-15-988

Nathaniel Smith, M.D., MPH, Director of the Arkansas Department Of Health, in His Official Capacity, and His Successors in Office
Appellant

v.

Marisa N. Pavan and Terrah D. Pavan, Individually and as Parents, Next Friends, and Guardians of T.R.P., a Minor Child, et al.
Appellees

On Appeal from the Circuit Court of Pulaski County, Sixth Division, the Honorable Timothy Fox, Circuit Judge

**Appellees' Protective Motion for Appellate Attorney's Fees and Expenses**

As the prevailing parties in this litigation, appellees hereby move for an award of attorney's fees and expenses pursuant to 42 U.S.C. §1988. This motion is made as a protective matter pursuant to Arkansas Rule of Civil Procedure 54(e)(2), which provides that a motion for attorney's fees must be filed no later than 14 days after entry of judgment. On November 7, 2017, this Court issued its mandate, which remanded the case to the circuit court for entry of final judgment consistent with the mandate of the U.S. Supreme Court. Although the Arkansas Supreme Court does not have a rule requiring fee motions within a particular time and although no final judgment has yet been entered, appellees file this motion out of an abundance of caution.

Appellees respectfully request an award of appellate attorney's fees in the approximate amount of $220,000, and reimbursement for approximately $6,000 in appellate expenses. Appellees will also request reasonable attorney's fees and expenses incurred in litigating attorney's fees issues commonly known as fees-on-fees) in an amount to be determined, if such fees are incurred.

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Appellees file with this motion a separate Motion to Transfer Attorney's Fees and Expenses to the circuit court. Transfer is appropriate for the reasons set forth in that motion. If, however, this Court denies the motion to transfer, appellees request that the Court set a schedule for briefing and submission of evidence. *See* Addition to Reporter's Notes to Rule 54, 1997 Amendment.

Respectfully submitted,

**CHERYL K. MAPLES**

By: */s/Cheryl Maples*
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Special Fees Counsel for Appellees

November 21, 2017

APPENDIX F

SUPREME COURT OF ARKANSAS
No. CV-15-988

Opinion Delivered: October 19, 2017

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

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FR IENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD
Appellees

HONORABLE TIMOTHY DAVIS FOX,JUDGE

REVERSED AMD REMANDED

ROBIN F. WYNNE, Associate Justice

This case is before us once again after the Supreme Court of the United States granted the appellees' petition for a writ of certiorari, reversed the judgment of this court, and remanded for "further proceedings not inconsistent with" the opinion of the Court. *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam). The Supreme

Court held that pursuant to *Obergefell v. Hodges*, 576 U.S._, 135 S. Ct. 2584 (2015), Arkansas's birth-certificate law, Arkansas Code Annotated section 20-18-401 (Repl. 2014), is unconstitutional to the extent it treats similarly-situated same-sex couples differently from opposite-sex couples. The parties have now filed supplemental briefs with this court. We take this opportunity to reject appellant's interpretation of the United States Supreme Court's opinion and the suggestion that a gender-neutral reading of Arkansas Code Annotated section 9-10-201(a) (the assisted-reproduction statute) would adequately address the constitutional infirmity found. The birth-certificate law must be addressed,[1] but we cannot simply affirm the circuit court's previous order, which impermissibly rewrote the statutory scheme. An order rewriting a statute "amounts to a judicial intrusion upon the legislative prerogative and violates the constitutional doctrine of separation of powers." *Cox v. Comm'rs of Maynard Fire Imp. Dist. No. 1*,287 Ark. 173,176,697 S.W.2d 104, 106 (1985). On remand, the circuit court should award declaratory and injunctive relief as necessary to ensure that same-sex spouses are afforded the same right as opposite-sex spouses to be listed on a child's birth certificate in Arkansas, as required under *Pavan v. Smith*, supra. Extending the benefit of the statutes at issue to same-sex spouses will implement the mandate of the Supreme Court of the United States without an impermissible rewriting of the statutes. See *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492 (Ariz. 2017) (extending the benefit of Ari-

[1] We note that Arkansas Code Annotated sections 20-18-401(e), (f) and 20-18-406(a)(2) (Repl. 2014) were at issue in the present case.

zona's statutory marital-paternity presumption to similarly situated female spouses rather than nullifying the statute).

Accordingly, we reverse the circuit court's order, and we remand for entry of a final judgment consistent with the mandate of the Supreme Court of the United States.

Reversed and remanded.

WOMACK, J., concurs.

GOODSON and HART, J.J., dissent.

APPENDIX G

SUPREME COURT OF ARKANSAS
No. CV-15-988

Opinion Delivered: October 19, 2017

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE
Appellant
v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FR IENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD
Appellees

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60CV-15 - 3153]

HONORABLE TIMOTHY DAVIS FOX, JUDGE

CONCURRING OPINION

**SHAWN A. WOMACK, Associate Justice**

I agree with the majority that we must reverse and remand this case to the circuit court following the Supreme Court's decision. However, I would additionally require the circuit court to conduct a hearing and

make findings of fact regarding how, specifically, the law treats similarly situated same-sex couples differently than opposite-sex couples and to make specific findings as to how those couples are similarly situated for the purpose of the application of the statutes in question. While the majority of this court remands to the circuit court only for an order consistent with the Supreme Court's ruling, the Supreme Court's majority on remand clearly calls for "further proceedings." Only after conducting such further proceedings and making the necessary findings of fact should the circuit court then issue an order, based on those findings. Said order should determine the constitutionality of the relevant statutes in a way that both comports with the law and is narrowly tailored so as to balance the legislative presumption in favor of constitutionality with the equal treatment of law under the statutes and should have limited application to parties and circumstances that are, in fact, similarly situated.

The Equal Protection Clause of the Constitution prohibits a government actor from treating similarly situated people dissimilarly. See *Brown v. State*, 2015 Ark. 16, at 6, 454 S.W.3d 226, 231; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). There is no doubt that the position of the parties has drastically changed since this case was originally presented to the circuit court below. See *Smith v. Pavan*, 2016 Ark. 437, 505 S.W.3d 169 (Wood, J., concurring in part and dissenting in part). The appellant even avers in its brief that the department of health has since revised its policy regarding birth certificates for assisted- reproduction situations. As noted before, that information is not in the record before us. Additionally, despite the cornerstone that the Equal Protection Clause prohibits dissimilar

treatment of similarly situated individuals, there is no analysis of that rule in the circuit court's order; nor is there a specific analysis regarding how the classification survives the appropriate level of scrutiny. See *Klinger v. Dep't of Corr.*, 31 F.3d 727, 730 (8th Cir. 1994). Therefore, it would be not only prudent, but indeed mandatory according to the Supreme Court's ruling, to order the circuit court to conduct a hearing and make specific findings of fact as stated above.

Finally, beyond determining the constitutionality of various portions of the challenged statutes, it is not the role of this or any other court to attempt to fashion a remedy that breaches into the realm of policy making. The role of determining policy belongs to the people through their elected representatives in the legislature. Once the scope of constitutional application is finally determined, it is incumbent upon the General Assembly to re-engage and to establish the state of the law going forward within those boundaries.

APPENDIX H

SUPREME COURT OF ARKANSAS
No. CV-15-988

Opinion Delivered: October 19, 2017

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

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FR IENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD
Appellees

DISSENTING OPINION

**KAREN R. BAKER, Associate Justice**

I dissent from the majority's opinion because I would not remand this matter to the circuit court. I would simply vacate our previous opinion and issue a substituted opinion reversing and dismissing the circuit court's order which impermissibly rewrote the statute. Further, based on *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam) and the State's concession that Ark. Code Ann. § 9-10-201 is unconstitutional, I would declare Ark.

Code Ann. §§ 9-10-201(a) and 20-18-401(f)(1) unconstitutional, stricken, and void. We should not remand this matter to the circuit court for an order consistent with the majority's opinion.

Moreover, despite the State 's urging to take up a pen and set off through the Arkansas Code replacing the words "husband" and "wife" with "spouse" or other gender neutral alternatives, the truth is that that pen does not belong to us, nor does it belong to the circuit court. The pen belongs to the legislature and it is their duty to determine the best way to address the constitutional infirmity in these two statutes. We cannot fashion the remedy, the authority to do so rests solely with the legislature. Thus, there is no need to remand this matter to the circuit court, which is in no better position and has no more authority than we do to rewrite these statutes. To do so only delays this matter further. Therefore, based on the States's concession that Ark. Code Ann. § 9-10-201 is unconstitutional and the United States Supreme Court's mandate in Pavan, supra, I would reverse the circuit court's order and declare that Ark. Code Ann. §§ 9-10-201(a) and 20-18-401(Q)(1) are unconstitutional, stricken and void.

GOODSON and HART, J.J., join.