APPENDIX A

IN THE ARKANSAS SUPREME COURT

CV-15-988

December 6, 2017

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
PLAINTIFF-APPELLEES

V.

NATHANIEL W. SMITH, M.D., M.P.H.
DEFENDANT-APPELLANT

APPELLANT'S RESPONSE IN OPPOSITION TO APPELLEES' FEE MOTIONS

Appellant Nathaniel W. Smith, M.D., M.P.H. files this response in opposition to Appellees' recent fee motions pursuant to Ark. Sup. Ct. R. 2-1 and, in support, states:

1. In this appeal, Dr. Nathaniel Smith, Director of the Arkansas Department of Health, challenged the circuit court's order granting declaratory judgment and injunctive relief to Plaintiffs-Appellees. Appellant specifically challenged as one of his principal arguments the circuit court's decision to unilaterally re-write significant portions of Arkansas law in a way that signifi-

cantly and needlessly undermined the General Assembly's rational and intricate set of laws governing birth certificates.

2. On December 8, 2016, this Court issued its majority opinion reversing the decision of the circuit court and dismissing this case. *Smith v. Pavan*, 2016 Ark. 437, 505 S.W.3d 169. The State was the prevailing party on appeal.

3. Plaintiffs-Appellees filed a petition for a writ of certiorari with the Supreme Court of the United States, which was granted. In *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), the Supreme Court held that, pursuant to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Arkansas's birth-certificate law, Ark. Code Ann. § 20-18-401, is unconstitutional to the extent it treats similarly-situated same-sex couples differently from opposite-sex couples. The Supreme Court reversed the judgment of this Court and remanded for further proceedings. Plaintiffs-Appellees were the prevailing parties before the Supreme Court of the United States.

4. The parties filed supplemental briefs on remand to this Court. On October 19, 2017, this Court issued a majority opinion holding that it could not "simply affirm the circuit court's previous order" because it "impermissibly rewrote the statutory scheme." *Smith v. Pavan*, 2017 Ark. 284, at 2. This Court therefore reversed the circuit court's order and remanded with instructions to "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[.]" *Id.* "Extending the benefit of the statutes at issue to same-sex spouses will implement the mandate of the Su-

preme Court of the United States without an impermissible rewriting of the statutes." *Id.* Because the Court reversed the judgment of the circuit court as urged by the State, Appellant should be considered a prevailing party before this Court on remand.

5. Appellees filed a "Motion for Clarification" seeking a ruling from this Court that, "as part of this remand, the circuit court should consider in the first instance any award of attorney's fees and expenses incurred on appeal." Appellees' Mot. for Clarification (Nov. 2, 2017) at 2. Appellees explained to the Court the State's position that the circuit court cannot award fees and costs for appellate work. *Id.*

6. The mandate issued on November 7, 2017.

7. On November 21, 2017, which was after the motion for clarification was submitted to the Court for decision, Appellees filed two additional fee-related motions in this Court: (1) a "protective motion" for appellate attorney's fees in the approximate amount of $220,000, reimbursement of approximately $6,000 in appellate expenses, and attorney's fees and expenses incurred in litigating attorney's fees issues; and (2) a motion to transfer the issue of attorney's fees and expenses to the circuit court. Appellees' request for fees and costs incurred on appeal was not supported by any evidence.

8. This Court denied the motion for clarification on November 30, 2017.

9. The Court should likewise deny Appellees' barebones "protective motion" for appellate attorney's fees and costs for three independently dispositive reasons.

10. First, Appellees seek an extraordinary amount of fees for appellate work despite the fact that Appellant was actually the prevailing party in two of the three appellate orders in this matter. Appellees are not entitled to attorney's fees and costs when they were not the prevailing party. *See Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) ("[T]he court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs" under 42 U.S.C. § 1988); *Jones v. Flowers*, 373 Ark. 213, 215, 283 S.W.3d 551 (2008) ("A court has discretion to award reasonable attorney's fees for a successful § 1983 action."). Indeed, in cases like this one in which both parties prevail on some important points on appeal, this Court holds that each party should be responsible for his or her own costs and attorney's fees. *Skokos v. Skokos*, 333 Ark. 396, 399-400, 968 S.W.2d 26,41 (1998)

11. Second, Appellees' request for "appellate attorney's fees in the approximate amount of $220,000" is wholly unsupported. Appellees did not provide any evidence to support their six-figure fee request. Absent any proof of the fees expended on appeal, any fee award is inappropriate. *See Skokos*, 333 Ark. at 400, 968 S.W.2d at 41 (denying appellant's motion for attorney's fees despite the fact that she prevailed on important points of appeal; there were other points on which she did not prevail, she submitted no invoices or hourly fee figures upon which to calculate attorney's fees, and she requested compensation for repetitious and excessive work).

12. Third, Appellees' request for approximately $220,000 in appellate attorney's fees is excessive and unreasonable. This appeal involved issues that were thoroughly briefed below and were also the subject of a

final ruling in a prior case (*Wright v. Smith*, Pulaski County No. 60CV-13-2662) in which Appellees' counsel already received an award of reasonable attorney's fees and costs. Under this Court's rules, Appellees were not required to prepare an abstract of the circuit court's hearing or an addendum. There was only one oral argument throughout the duration of the appeal before this Court as well as the Supreme Court of the United States on Appellees' petition for a writ of certiorari. And, as the Supreme Court of the United States held, this case was controlled by one binding precedent, *Obergefell v. Hodges*. As a result, the issues presented were not particularly novel or complex. Under all of these circumstances, the Court should decline to provide Appellees with a financial windfall by granting their unsupported motion for $220,000 in appellate attorney's fees. *See Riverside v. Rivera*, U.S. 561, 580 (1986) (plurality op.) (explaining that fee awards under § 1988 were never intended to "produce windfalls to attorneys").

13. Where a fee request is excessive and unreasonable, a court may deny a prevailing party's fee request entirely. *See, e.g., Envtl. Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. Jul. 13, 1993), as supplemented (Sep. 10, 1993) (denying all recovery for the work of an attorney who claimed to have spent an excessive amount of time on certain tasks; "[w]e may deny in its entirety a request for an 'outrageously unreasonable' amount, lest claimants feel free to make 'unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place'") (quoting *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980)); *Fair Housing Council of Greater*

Washington v. Landow, 999 F.2d 92, 96 (4th Cir. 1993) ("[W]e hold that a district court may, in its discretion, deny a request for attorneys' fees in its entirety when the request, submitted pursuant to 42 U.S.C. § 1988, is so outrageously excessive it shocks the conscience of the court.") (quotation and citation omitted); *Lewis v. Kendrick*, 944 F.2d 949, 957-58 (1st Cir. 1991) (where plaintiff prevailed on a portion of claim, failure to separate fees for separate claims warranted total denial of attorneys' fees); *Sun Publishing Co., Inc. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987) ("[A] request for attorney's fees, which is so exorbitant as to shock the conscience of the court, may be denied without a [detailed analysis]."); *Jordan v. Dep't of Justice*, 691 F.2d 514, 518 (D.C. Cir. 1982) ("[T]he court may, as a means of enforcing the applicable standards, deny a fee motion when the submission is 'manifestly inadequate[;]'" disallowance of attorneys' fees under these circumstances serves as a "means of encouraging counsel to maintain adequate records and submit reasonable, carefully calculated and consciously measured claims.") (quoting *Nat'l Assoc. of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319 (D.C. Cir. 1982)). Because the fee request in this case is excessive and unreasonable and unsupported by any billing records, the Court has the discretion to deny the request entirely.

14. For each and all of the foregoing reasons, the Court should deny Appellees' motion for appellate attorney's fees in its entirety.

15. The Court should also deny Appellees' separate motion to transfer this issue to the circuit court. Only this Court may award costs on appeal to the prevailing party pursuant to Ark. Sup. Ct. R. 6-7, and even then the appellee is only entitled to costs if this Court af-

firms the judgment of the lower court. That is not the case here, so there is no basis for an award of appellate attorney's fees and costs at all in this case. In addition, any fees and costs awarded to a prevailing party on appeal must come from this Court, not the circuit court. *See, e.g.*, *Race v. Nat'l Cashflow Systems, Inc.*, 34 Ark. App. 261, 264, 810 S.W.2d 46, *aff'd*, 307 Ark. 131, 817 S.W.2d 876 (1991) (holding that the trial court lacked authority to award additional attorney's fees for an appeal).

16. As shown, both of the Appellees' fee motions lack merit and should be denied.

WHEREFORE, Appellant Nathaniel W. Smith, M.D., M.P.H. prays that the Court deny Appellees' fee motions and for all other relief to which he may be entitled.

APPENDIX B

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

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, PLAINTIFFS,

V.

NATHANIEL W. SMITH, M.D., M.P.H., DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE, DEFENDANT

JANUARY 5, 2016

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS AND INCORPORATED BRIEF

[1] COMES NOW Nathaniel Smith, MD, MPH, Director of the Arkansas Department of Health ("ADH"), in his official capacity, and his successors in office, by and through undersigned counsel, and offers the following Response to "Plaintiffs' Motion for Attorneys' Fees and Costs" and incorporated Brief. The Defendant is represented herein by the Office of the Arkansas Attorney General pursuant to Ark. Code Ann. § 25-16-702(a), which requires the Attorney General to serve as

counsel for state agencies and entities when requested. *Id.*

[2] I. INTRODUCTION

ADH concedes that the Plaintiffs are prevailing parties under this Court's Order and Memorandum Opinion entered December 1, 2015. However, ADH is appealing this Court's Order and Memorandum Opinion, and the Arkansas Supreme Court has issued a partial stay of this Court's Order and Memorandum Opinion pending resolution of ADH's appeal. *See* Per Curiam, Arkansas Supreme Court No. CV-15-988 (Dec. 10, 2015), at 4 ("Substantial confusion could result if the circuit court's order were to remain in effect and subsequently be altered by a decision of this court on appeal. Under these circumstances, the best course of action is to preserve the status quo ante with regard to the statutory provisions while we consider the circuit court's ruling."). The Court should therefore hold the Plaintiffs' request for attorney's fees and costs in abeyance pending resolution of ADH's appeal.[1] * * *

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[1] This Court awaited resolution of the appeal before considering the Plaintiffs' fee request in *Wright et al. v. Smith et al.*, Pulaski County No. 60CV-13-2662 (2nd Division). In *Wright*, the Court entered orders in favor of the Plaintiffs on May 9 and May 15, 2014. The Plaintiffs filed an initial motion for attorneys' fees and costs on May 29, 2014, and an amended motion on June 27, 2014. On June 27, 2014, the Court entered an order denying the *Wright* Plaintiffs' motion for attorneys' fees and costs. The Court entered an amended order on July 2, 2014, denying the Plaintiffs' motion without prejudice and stating that "[t]he Plaintiffs may refile the motion for attorney's fees within thirty (30) days after the resolution of this case on appeal." *Id.*

[8] * * * Of course, this Court should not award attorney's fees to the Plaintiffs for the appellate phase of the case even if the Plaintiffs prevail in the appeal, because any fees and costs awarded to a prevailing party on appeal must come from the appellate court. *See, e.g., Race v. Nat'l Cashflow Systems, Inc.*, 34 Ark. App. 261, 264, 810 S.W.2d 46, *affirmed*, 307 Ark. 131, 817 S.W.2d 876 (1991) (holding that the trial court lacked authority to award additional attorney's fees for an appeal). * * *

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[17] * * * WHEREFORE, the Director of the Arkansas Department of Health prays that the Court deny the Plaintiff's request for attorney's fees as excessive and unreasonable, or alternatively, hold the Plaintiffs' Motion for Attorney's Fees and Costs in abeyance pending resolution of the appeal, and if the Plaintiffs are prevailing parties following the appeal, that the Court award no more than $14,872.50 in attorney's fees to the Plaintiffs.

[18] Respectfully Submitted,

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