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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ANGELA LESLIE ROE and KAMI ROE, Plaintiffs, v. W. DAVID PATTON, in his Official Capacity as Executive Director of the Utah Department of Health, and RICHARD OBORN, in his Official Capacity as Director of Utah's Office of Vital Statistics, Defendants.	**DEFENDANTS' MEMORANDUM IN RESPONSE TO THE COURT'S JUNE 26, 2015 ORDER** Case No. 2:15-cv-00253-DB Judge Dee V. Benson

As directed by the Court's order of June 26, 2015, Defendants W. David Patton and Richard Oborn, in their official capacities ("Utah"), submit through counsel this memorandum to address the effect, if any, on this case of the United States Supreme Court ruling in *Obergefell* et al. v. *Hodges, Director, Ohio Department of Health*, et al., --S.Ct.--, 2015 WL 2473451 (June

26, 2015)[1], with respect to the Plaintiffs' pending motion for preliminary injunction ("Motion" or "Mot."). Doc. #3. As described below, the *Obergefell* decision changes the analysis of the issues before the court not at all. It is unhelpful to Plaintiffs' argument for at least two separate and independent reasons, each addressed in turn.

DISCUSSION

I. The Scope of *Obergefell*'s Two Holdings Make the Opinion Irrelevant with Respect to the Issues in this Case

First, the *Obergefell* Court made it clear that its holding was limited to two distinct issues that were carefully circumscribed by the Court. Even when the majority decision's language was broadly sweeping, the Court was careful to include summary phrases to clearly limit the holding to the two issues directly before it.

> This Court granted review, limited to two questions[:] The first . . . is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex[;] The second . . . is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

Obergefell, Slip. Op. at 2-3.

While the recognition from the state sought by Plaintiffs seems to have varied from pleading to pleading,[2] their latest iteration is that Plaintiffs are suing to for "Defendants to recognize Angie as L.R.'s legal parent and to list her on L.R.'s birth certificate as such." Reply in Further Support of Plaintiffs' Mot. for Prelim. Inj., Doc. #10, at 5 ("Pls.' Reply"). The two

[1] Citations to the *Obergefell* Slip Opinion are in the following form "Slip Op. at X". The Slip Opinion is attached as Exhibit A.

[2] Defendants have already noted the variability of Plaintiffs' recognition requests in different parts of their pleadings. *See* Defendants' Mem. in Opp. To Pls.' Mot. for Prelim. Inj. ("Utah's brief" or "Utah Br."), Doc. #8, at 20.

rights to recognition Plaintiffs seek in this reiteration of their request plainly are not encompassed by the issues addressed in *Obergefell* which were:

> whether the Fourteenth Amendment requires states to issue marriage licenses to same-sex couples, and whether the Fourteenth Amendment requires states to recognize same-sex marriage licenses granted in another state. The Court held same-sex couples may exercise the fundamental right to marry in all States [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., Slip. Op. at 28.

The issues and constitutional analysis the Plaintiffs ask this Court to adjudicate were not before the *Obergefell* Court, and are not part of its holding. *See*, *e.g.*, *Marks v. United States*, 430 U.S. 188, 193 (1977) (discussing the importance of lower federal courts heeding only the Supreme Court's actual holding). To find that *Obergefell* stands for more with respect those issues would both ignore our Constitution's case-or-controversy limitation on federal judicial authority, expressed in Article III of the Constitution, and treat *Obergefell* as a binding advisory opinion, also in violation of Article III's dictates. U.S. Const. Art III; *see also e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (the "'judicial Power' is one to render dispositive judgments," not advisory opinions) (internal quotation marks omitted); *Michigan v. Long*, 463 U.S. 1032, 1041–1042 (1983) (noting same).

Given these express constitutional limitations on *Obergefell*'s reach, one should note that even amicus briefs specifically cited by the *Obergefell* Court noted that parental rights, as sought here, Slip. Op. at 17, are a matter of state law; the State of Michigan, for instance, does not have an avenue of same-sex spouse parental adoption, *see* Brief for American Bar Association as Amicus Curiae, 2015 WL 1045422 (U.S., Mar. 4, 2015) at 11, as compared to the State of Utah, which does. *See* Utah Br. at 7-9, 10-11; *see also* Brief of the United States as Amicus Curiae,

2015 WL 1004710 (U.S., Mar. 6, 2015) at 7-8 (noting prohibitions on parentage in some states before the Court in *Obergefell*, which are not present in Utah law). *See Obergefell*, Slip Op. at 17 (citing amici briefs of United States and American Bar Association).

Plaintiffs may likely argue, and with some cause, that the recognition or rights they seek are part of the "constellation of rights that States have linked to marriage." *Obergefell*, Slip Op. at 17. In this they would be partially correct, though partially misled, as the *Obergefell* decision makes clear that such "rights" are not the "fundamental rights" at issue in the Court's majority opinion. *Id*., Slip Op. at 16-17. The "States are in general free to vary the benefits they confer on all married couples [and] they have throughout our history made marriage the basis for an expanding list of *governmental* rights, benefits, and responsibilities." *Id*. (emphasis added). As the emphasized portion this passage makes clear, while wide ranging in much of its rhetoric, the majority opinion of the Court distinguished between "fundamental rights," which the Court said were constitutionally beyond the purview of state regulation and legislation, and "governmental rights" which the Court specifically notes remain under the purview of state legislation and regulation.

Consequently, the actual holding of *Obergefell* does nothing to change the analysis already in briefing before this Court.

II. *Obergefell* Did Not Alter the Level of Scrutiny for Constitutional Equal Protection Analysis Regarding Distinctions Based on Sexual Orientation

Second, the *Obergefell* majority's Equal Protection analysis has drawn almost uniform criticism outside of the five member majority and provides nothing new to guide this Court in the instant case with respect to the relevant Equal Protection analysis. The majority's conception of the way that the Due Process Clause and Equal Protection Clause are "connected in a profound

way" such that the "two Clauses" for analytical purposes "may converge in the identification and definition of [a] right" and that the Clauses' "synergy" reveal such unwritten rights does not provide a usable test to guide lower courts regarding how to conduct such synergistic analysis. *See*, *e.g.*, *Obergefell*, Slip Op. at 24 (Roberts, C.J., dissenting and noting the majority "does not serious engage with this [Equal Protection] claim" and criticizing the majority's Equal Protection analysis as "frankly difficult to follow"); *Id*. at 9 (Scalia, J., dissenting and criticizing the majority's "synergistic" analysis: "The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis."); *Id*. at 3 (Thomas, J. dissenting: "Despite the synergy it finds between these two protections, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.") (internal citation, brackets and quotation marks omitted); *see also* Ilya Somin, "A Great Decision on Same-Sex Marriage – But Based on Dubious Reasoning," *Washington Post* (June 26, 2015) at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/ (criticizing the majority's Equal Protection analysis as "incoherent" and "nonsensical"); Nan D. Hunter, "The Undetermined Legacy of 'Obergefell v. Hodges'", *The Nation* (June 29, 2015) at http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/ (noting the majority's treatment of Equal Protection is "based on jumbled constitutional analysis").

Yet, in spite of this criticism and the rhetoric of the *Obergefell* majority which prompted it, the salient point for this Court is that *each* of the case examples *Obergefell* provides for an Equal Protection analysis justification for its ruling is an example where the majority finds a

fundaments right is also protected under the doctrine of substantive due process. *See* Slip Op. at 18-23. In short, in spite of the language that has received almost uniform criticism, the *Obergefell* majority deviates not at all from traditional Equal Protection analysis which applies strict scrutiny in cases where a court first finds under a substantive due process analysis that a fundamental right is at issue.

Consequently, *Obergefell* does not address with any specificity the only Equal Protection issue that is relevant to the Court's analysis here. The *Obergefell* majority is silent on the issue of whether the equal protection analysis regarding sexual orientation distinction merits more than the rational basis scrutiny given to it by prior Supreme Court and Tenth Circuit decisions. Plaintiffs assume without basis in argument or logic that: "Now that same-sex couples may marry under Utah law[,] the Equal Protection Clause requires that the [Utah Uniform Parentage Act] be extended to provide automatic parentage for males spouses of women who conceive through donor sperm and female spouses of women who conceive in the same way." Reply Br. at 8.

Plaintiffs' counsel here begs the question through argument by assertion, a logical fallacy which is no argument with consequent persuasive force at all. The legal distinctions based on sexual orientation in Utah laws at issue in this case are, as discussed above, non-identical with the issues before the Court in *Obergefell*, or *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), which first required Utah to issue marriage licenses to same-sex couples and to recognize same-sex marriages licensed in other states. The Vital Statistic and Parentage Acts involve state granted "governmental rights" as *Obergefell* itself terms them, whereas marriage license access for same sex couples and nationwide recognition of those licenses are now "fundamental rights"

after *Obergefell*. *Obergefell*, Slip Op. at 16-17. As a matter of constitutional interpretation, these are apples and oranges.

As described above in the initial treatment of the legal distinction between "governmental rights" and "fundamental rights" suggests, the issue remaining after *Obergefell* is the same issue that faced this Court before: Does the Due Process Clause or Equal Protection Clause (or both) of the Fourteenth Amendment to the United States Constitution either mandate the recognition sought in Plaintiffs' pleadings or prohibit the distinctions in Utah law about which Plaintiffs complain?

Obergefell does not answer either of these questions. The fact that the *Obergefell* majority distinguished between "governmental rights" and "fundamental rights" is telling, and dispositive on the issue of whether *Obergefell*'s holding should be read broadly applicable to the issues before the Court in this case. Plainly, it should not. In *Guttman v. Khalsa*, 669 F.3d 1101 (10th Cir. 2012), under Equal Protection and Procedural Due Process rights challenge regarding medical licensure in an ADA context, the Tenth Circuit Court of Appeals drew the appropriate distinctions based on rational basis in its equal protection analysis because neither a suspect class nor a fundamental right was involved in the case.

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. *The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest*. Although certain classifications—such as race or national origin—are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest, the States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.

Id. at 1116, (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001)) (internal citations and quotation marks omitted); *accord Kitchen v. Herbert*, (noting strict scrutiny applies "if a classification impinges upon the exercise of a fundamental right, the Equal Protection Clause requires the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.") (citation, internal quotation marks and brackets omitted).

Regarding methodical distinctions between fundamental rights and governmental rights for Equal Protection Clause analysis, the Tenth Circuit demands that district courts carefully maintain such distinctions for analytical purposes of claims before them.

> By tethering our analysis to state professional licensing decisions and an individual's right to practice in a given profession, we may focus our analysis on a limited set of *governmental rights*, interests, and historical violations. If we were to instead focus on the general category of public licensing, *we would need to address a heterogeneous set of state action—everything from regulating the fundamental right of marriage to the decidedly non-fundamental rights to fish or cut hair*—so as to distract the inquiry from Congress's § 5 enforcement authority, which is proportional to the importance of the right asserted. Recognizing this, the district court correctly concluded: "*Lumping* these licensing *categories together eliminates the case-specific balancing that is necessary to resolve the question* before the Court."

Id. at 1120 (emphasis added, citation to district court record omitted).

Here, as in *Guttman*, this Court is not facing simply a fundamental right to marry that would mandate that it address a heterogeneous set of state actions; rather, it is facing a claim that Utah's Vital Statistics and Parentage Acts draw irrational distinctions based on sexual-orientation. This case does not deal with marriage licenses or marriage license recognition. It deals with the specific provisions under Utah law regarding how persons are classified under the Parentage and Vital Statistic Acts for purposes of how those statutes treat differently situated

individuals. Just as the *Obergefell* majority opinion mentioned but did not mandate uniform treatment of married couples for tax, professional ethics rules etc. among the states even as it announced uniform recognition of same-sex couple for marriage licenses and marriage license recognition, Slip Op. at 17, so it did not answer the question regarding how such distinctions should subsequently be evaluated. The law governing such questions is the same now as it was before the *Obergefell* decision. As this case deals with access and distinctions based on governmental rather than fundamental rights, the Court's Equal Protection analysis is altered not at all by the *Obergefell* decision and has been briefed by and will be argued by the parties accordingly. Consequently, this Court should analyze the Equal Protection claims before it as they have been previously briefed, as the *Obergefell* not only gives no different guidance regarding how to conduct an Equal Protection analysis based on sexual orientation distinctions, but it speaks to the specific statutory requirements and recognitions at issue in this case not at all.

CONCLUSION

As the *Obergefell* decision does nothing to change the analysis previously provided to the Court, for the foregoing reasons and those previously submitted in Defendants' brief in opposition to Plaintiffs' motion for preliminary injunction, this Court should DENY that Motion.

Respectfully submitted July 13, 2015.

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