IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHELSEA TORRES and JESSAMY TORRES, individually and as next friends and parents of A.T., a minor child, on behalf of themselves and all others similarly situated,

Plaintiffs,

versus

KITTY RHOADES, in her official capacity as Secretary of the State of Wisconsin Department of Health Services,

Defendant.

CASE NO. 3:15-cv-00288

HON. BARBARA B. CRABB

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Named Plaintiffs Chelsea Torres ("Chelsea") and Jessamy Torres ("Jessamy"), both women, reside in Madison, Dane County, Wisconsin, and legally married each other in 2012. Plaintiffs' Proposed Findings of Fact in Support of Motion for Summary Judgment ("PPFF") at ¶¶ 1-7.[1] Chelsea gave birth at Meriter Hospital in Madison on March 14, 2015, to their son, Plaintiff A.T., who was conceived through anonymous donor insemination. PPFF at ¶¶ 11-14.

Chelsea and Jessamy filled out the Wisconsin Department of Health Services ("DHS") birth certificate worksheet at the hospital, indicating on the form that they are married and that both are A.T.'s parents. PPFF at ¶¶ 20-22. However, Defendant Kitty Rhoades, in her official capacity as Secretary of DHS, has refused to provide A.T. with an accurate birth certificate that identifies both Chelsea and Jessamy as his parents—even though DHS routinely provides two-parent birth certificates to all children born to different-sex spouses without requiring a court order, and without any regard to how these children are conceived, or whether these children share a genetic connection to both spouses. PPFF at ¶¶ 23-27, 31-41.

The refusal by DHS to provide a two-parent birth certificate to A.T. and other children of same-sex spouses deprives these families of dignity, legitimacy, and security. PPFF at ¶¶ 42, 52-56. It also violates the equal protection guarantee of the United States Constitution by discriminating against Chelsea, Jessamy, and other married same-sex parents on the basis of their sexual orientation and sex, and against A.T. and other children of same-sex spouses on the basis of their parents' sex, sexual orientation, and status, all without adequate justification. The actions of DHS also violate the due process guarantee of the United States Constitution by unconstitutionally infringing on the liberty interests of same-sex spouses and their children to

[1] Jessamy is a Deputy with the Dane County Sheriff's Office, and Chelsea is the Operations Manager for a local business. PPFF at ¶¶ 8-9.

family privacy, integrity, and association, parental autonomy, and the fundamental right to marry.

Accordingly, the Torres family brought this action on behalf of themselves and the Plaintiff Class seeking declaratory and injunctive relief. Plaintiffs now move for summary judgment on their claims that the refusal by DHS to provide two-parent birth certificates to children born to same-sex spouses violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

LEGAL STANDARD

Summary judgment shall be rendered when the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); Fed. R. Civ. P. 56(c). Once the moving party makes such a showing, the burden shifts to the nonmoving party, who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). However, "the mere existence of *some* alleged factual dispute between parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there by no *genuine* issue of *material* fact." *Id.* at 247-48. Here, there are no material facts in dispute, and application of the controlling law to the facts shows that summary judgment should be granted to Plaintiffs.

ARGUMENT

By denying A.T. and other marital children of same-sex spouses birth certificates listing both spouses as parents, DHS puts a significant obstacle in the way of these families' economic, emotional, and physical security, and labels these children incorrectly as children of an unwed parent. DHS's policy punishes these children for their parents' status as members of a same-sex

couple and stigmatizes them as less worthy of dignity and respect than children of other families. PPFF at ¶¶ 42, 52-56.

Wisconsin's statutes codifying the spousal presumption of parentage and mandating issuance of two-parent birth certificates (§§ 69.14(1)(e)1, 891.40(1), and 891.41(1)(a)) use gendered language excluding the marital children of same-sex spouses. These statutes, as applied to the marital children of same-sex spouses, and DHS's policy and practice of relying on these statutes to deny such birth certificates for A.T. and other children, violates the Constitution's due process and equal protection guarantees. These statutes discriminate impermissibly against same-sex couples based on sex and sexual orientation, and with respect to their exercise of fundamental rights—namely, the right to marry, to parental autonomy, family integrity, and association. These statutes also discriminate impermissibly against the marital children of same-sex spouses based on their parents' sex, sexual orientation, and status.

Laws discriminating on these bases and infringing on fundamental rights are presumptively unconstitutional. *Baskin v. Bogan*, 766 F.3d 648, 654-55 (7th Cir. 2014); *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997). This "presumption is rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." *Baskin*, 766 F.3d at 654-55. However, DHS lacks even a legitimate justification for this differential treatment, let alone a compelling one, and Wisconsin's exclusionary birth certificate statutes therefore are unconstitutional as applied to the marital children of same-sex spouses.

As *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), demonstrates, the spousal presumption of parentage is a crucial aspect of marital status, and the Due Process and Equal Protection clauses of the Constitution require that the spousal presumption now apply to children born to

same-sex spouses, just as it does to other marital children. Indeed, one of the consolidated appeals resolved in *Obergefell* was *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014), *rev'd sub nom DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom Obergefell*, 135 S. Ct. 2584 (2015), which challenged Ohio's marriage ban solely for the purpose of obtaining two-parent birth certificates for the marital children of same-sex spouses. The *Henry* plaintiffs received two-parent birth certificates as the relief granted by *Obergefell*. The decision in *Obergefell* thus has settled this issue, and Wisconsin is out of step with the vast majority of states in refusing to acknowledge it.

I. Birth Certificates Document Legal Parentage, Not Genetic Connections.

A birth certificate is the primary document used to establish parentage. PPFF at ¶ 50. Birth certificates are relied upon and often required to: (a) prove a person's identity, age, parentage, or nationality; (b) authorize medical treatment for a child; (c) enroll a child in school and in extracurricular activities or take exams; (d) be adopted; (e) marry; (f) open a bank account; (g) hold a driver's license; (h) obtain a passport for a child; (i) travel abroad with a child; (j) provide inheritance to a child in the event of a parent's death intestate; (k) register to vote; (l) report a child as missing or recover a lost child from law enforcement authorities; (m) recover child support; (n) obtain a Social Security card for a child; (o) establish a right to Social Security survivor benefits for a child in the event of the parent's death; (p) bring a wrongful death claim; and (q) obtain health insurance coverage for the child through a parent's employer-sponsored group health plan. *See, e.g., id.* at ¶¶ 43-49.

A birth certificate in Wisconsin has never served as a proxy for biology. As the myriad Wisconsin birth certificates issued after adoptions, use of reproductive technology, or a married woman's nonmarital relationship demonstrate, birth certificates document a child's legal parent-

child relationships, and not a child's genetic and biological relationships. Wis. Stat. §§ 69.14(1)(g),(h) (birth certificates for children born through surrogacy or donor insemination); 69.15 (birth certificates after adoption). Specifically with respect to marital children, "the name of the husband of the mother ***shall*** be entered on the birth certificate as the legal father." Wis. Stat. § 69.14(e)(1) (emphasis added); *State ex rel. Bennett v. Sobczak*, 102 Wis. 2d 720, 308 N.W.2d 419 (Wis. Ct. App. 1981) (unpublished) ("whenever a child is born to a woman while she is the lawful wife of a specified man, the child's birth certificate shall list the husband as the father of the child unless and until the paternity of the child is proven in any proceeding"). This statute permits no discretion; it is irrelevant whether the husband lacks a genetic connection to his child either because the birth mother had intercourse with another man, or because the couple used reproductive technology and donor sperm. PPFF at ¶¶ 30-31, 34-37.

Consistent with Wis. Stat. § 69.14(e)(1), the birth certificate worksheets provided by DHS to birth mothers for completion, and which serve as the basis for issuance of a birth certificate, state that if a woman is married, "Husband's Information ***must*** be completed" (emphasis added), meaning that the husband's biographical information must be provided in the section for the infant's father. *See* PPFF at ¶¶ 33-38. These and other forms issued by DHS do not allow exceptions for husbands who are not genetic parents, whether as a result of reproductive technology or because of a mother's nonmarital relationship. *Id.* Neither do the forms permit exceptions for husbands who are not genetic parents because the couple used assisted insemination and donor sperm but not in full compliance with Wis. Stat.§ 69.14(1)(g) ("Birth by artificial insemination") (requiring doctor certification and husband's written consent

for insemination, among other things).[2] PPFF at ¶¶ 34-41. Thus, pursuant to Wisconsin law and DHS's policies and practices, as evidenced by their forms and instructions both to parents and its staff, when a woman is married to a man and gives birth in Wisconsin, her husband's name ***always*** appears on the child's birth certificate.

II. Wisconsin's Requirement Of Two-Parent Birth Certificates For Marital Children Is Consistent With Wisconsin Law Establishing The Parentage Of A Birth Mother's Husband.

Wisconsin law requiring a two-parent birth certificate for a marital child regardless of whether the child and husband share a biological link is consistent with Wisconsin law establishing the husband's parentage in a different-sex marriage. A man is presumed to be the father of a child born during his marriage to the mother. *See* Wis. Stat. §§ 891.41(1)(a) (a "man is presumed to be the natural father of a child" if "he and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties"); 891.40 ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband of the mother at the time of the conception of the child shall be the natural father of a child conceived.");[3]

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[2] In fact, the worksheets prescribed by DHS do not even seek information about whether a couple and their doctor complied with Wis. Stat. § 69.14(1)(g). The sole reference to "artificial insemination" appears on the worksheet as part of a question about "risk factors in this pregnancy," where a mother is directed to say whether her "[p]regnancy resulted from infertility treatment," and is invited to check a box indicating that she has used "fertility-enhancing drugs, artificial insemination, or intrauterine insemination (e.g., Clomid, Pergonal)." *See* PPFF at ¶¶ 38-41. The worksheet does not ask, among other things, where the insemination was performed, which doctor performed it, whether the couple executed consent forms, whether their doctor certified such forms, or whether the doctor filed such consents with DHS. *Id.*

[3] In one Wisconsin decision issued prior to *Obergefell*, a court held that Wisconsin's "artificial insemination" statute, Wis. Stat. § 891.40(1), does not apply to same-sex couples because it uses gendered terms like "husband," and "father," and because the statute referred only to married couples, and Wisconsin law at that time barred same-sex couples from marrying. *In re Paternity*

69.14(1)(e)1. Although Wisconsin law permits rebuttal of this presumption under certain circumstances, *see* Wis. Stat. § 891.41(2), Wisconsin courts long have refused to disturb the presumption, particularly where there is evidence that a "child was the beneficiary of a stable, intact marriage and that preservation of that relationship would be threatened by a paternity proceeding," regardless of whether evidence exists that the husband is not the child's genetic father. *In re Paternity of T.R.B.*, 154 Wis. 2d 637, 454 N.W.2d 561, 562 (Ct. App. 1990).

Indeed, "Wisconsin favors preserving the status of marital children, ***even when it can be positively shown that the husband of the mother could not have been the father of the child***." *Randy A.J. v. Norma I.J.*, 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630, 641 (2004) (emphasis added); *see also W.W.W. v. M.C.S.*, 161 Wis. 2d 1015, 468 N.W.2d 719 (1991); *Rosecky v. Schissel*, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634, 660 (2013) ("a husband is presumed to be the father of a child when the child is born during wedlock . . . [and] when a woman is artificially inseminated with semen donated by a man who is not her husband, the husband is deemed the natural father of the child (and the donor has no rights regarding the child)"). The spousal presumption of parentage is "one of the strongest presumptions known to law." *Matter of Estate of Schneider*, 150 Wis. 2d 286, 441 N.W.2d 335, 337 (Ct. App. 1989) (citing *Estate of Lewis*, 207 Wis. 155, 240 N.W. 818, 819 (Wis. 1932)); *see also* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 Boston Univ. L. Rev. 227, 231 (2006) (referring to the presumption of legitimacy as "an important incident of marriage"). Thus, the spousal presumption has never functioned under

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of Christian R.H., 2011 WI App 2, 331 Wis. 2d 158, 794 N.W.2d 230 (Ct. App. 2010). The litigants in that case did not raise, and the court did not consider the questions at issue here concerning whether such a gendered exclusion of same-sex couples and reliance on Wisconsin's marriage ban violates federal guarantees of liberty and equality. The result in *Paternity of Christian R.H.* therefore has been abrogated by *Obergefell*.

Wisconsin law as a mere proxy for a genetic relationship. To the contrary, the presumption protects marital children regardless of evidence that a spouse is not the child's genetic parent, or that a married couple is incapable of having children to whom they are genetically related.[4]

The primary purposes of the presumption are twofold. First, in the past, the presumption protected a child from the stigma of what historically was termed "illegitimacy" or "bastardy," which is a status that continues up until the present day to subject children to private bias and expressions of disapproval, even though it has diminished social and legal force. *See, e.g., Riley v. State*, 187 Wis. 156, 203 N.W. 767, 767 (1925) (prosecution for "bastardy"; discussing that "a child born in lawful wedlock is legitimate" and that this rule was "founded in decency, morality, and policy"). Second, the presumption serves to preserve a child's bond with the presumed father against attack by someone outside the marital family who claims a genetic connection to the child. *See* Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth Century America 220 (1985) (tracing history of spousal presumption of parentage, and emphasizing that

[4] In this Court's Order Denying Plaintiffs' Motion for Clarification in *Wolf v. Walker*, No. 3:14-cv-00064, Dkt. No. 210 (W.D. Wis. Jul. 7, 2015), this Court inquired whether the remedy Plaintiffs seek—a gender-neutral interpretation of the birth certificate and other spousal presumption statutes so as to apply to lesbian spouses—would be appropriate in light of the use of the term "natural" in Wis. Stat. §§ 891.41 (1)(a) and 891.40, and the fact that a lesbian non-birthing spouse cannot be the contributor of sperm. However, the term "natural," as used in Wis. Stat. §§ 891.41(1)(a) and 891.40 is a term of art reflecting a legal fiction—that the law will treat the husband as though he shares a biological connection with the child when in fact he does not. This is particularly evident from the text of Wis. Stat. § 891.40, which states that a husband "shall be the *natural* father" of a child born through "semen donated by a man not [the] husband," and from case law applying Wis. Stat. § 891.41(1)(a) to hold that a husband remains the legal parent of a marital child even if he shares no genetic connection. Further, in an increasing number of cases, lesbian couples use ovum donation and *in vitro* fertilization to make it possible for both members of the couple to share a biological connection with their child, which means that both can be "natural" parents, to the extent that the word is read to mean "biological." *See, e.g., K.M. v. B.G.*, 117 P.3d 673, 675 (Cal. 2005) (one woman provided her ova, which then were fertilized by donated semen and implanted in her partner for gestation and birth); *In re J.D.M.*, 2004 WL 2272063, 2004-Ohio-5409 (Ohio Ct. App. Oct 11, 2004) (same).

the presumption elevated child welfare over other interests, stating, "By continuing to deny married couples the most effective means of establishing the illegitimacy of a child, the courts placed child welfare above parental rights, thus ignoring the growing conviction of jurists that litigants had the right to present all evidence that supported their causes").

In other words, the presumption exists for child-centered reasons to protect children and their bonded relationships to the individuals who parent them day-to-day regardless of biology ***precisely because*** there is a possibility that these individuals may not be genetic parents. *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion) (purpose of the presumption is to protect children from a declaration of illegitimacy, and to protect the peace and tranquility of families). These justifications and other oft-stated reasons for the spousal presumption, including protection of a child's right of inheritance and to financial support against a husband's claim that he is not a genetic parent, and protecting the public purse by ensuring that both spouses are financially responsible for the child's support, apply equally to same-sex spouses and their children. *See, e.g.*, Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, 5 Pierce Law Review 1, 8 (2006) ("Originating in the common law of England to prevent children from losing their inheritance and succession rights, the presumption was also meant to protect the integrity of families, regardless of the biological connections").[5]

[5] Although a spouse who lacks a genetic connection to a marital child eventually may perform an adoption to secure further their legal relationship, obtaining an adoption decree takes months, costs significant money, and takes time and effort on the part of the parents. By contrast, the spousal presumption attaches at birth without delay, permitting a birth mother's spouse to be with the child in the hospital and take custody of the child if the mother is incapacitated. There are reasons that same-sex and different-sex spouses may choose to seek an adoption or parentage order to provide additional protection for a relationship between a spouse and marital child, but

Wisconsin cases illustrate both the strength and child-centered nature of the presumption. For example, in *Randy A.J.*, the Wisconsin Supreme Court affirmed the dismissal of a paternity action brought by an unwed man whom DNA tests identified as the genetic father of a child born to a married woman. *See* 677 N.W.2d at 638. The court also rejected efforts by the mother herself to disestablish her husband's parentage. In doing so, the court found that the genetic father did not have a constitutionally protected interest in his paternity because he failed to develop a sufficiently substantial relationship with the child. *Id*. The court equitably estopped the mother from challenging her husband's paternity, both because the husband and child had developed a significant bonded relationship to each other, and because of the "State's interest in preserving [the child's] status as a marital child." *Id.* at 641. The court explained that "the presumption of legitimacy is a fundamental principle of common law" that reflects "an aversion to declaring children illegitimate" and promotes "the peace and tranquility of States and families." *Id.* at 636 (citations and quotation marks omitted).

The concern with maintaining the legitimacy of marital children, regardless of whether the husband is genetically related, was also central in *W.W.W.*, 468 N.W.2d 719. In that case, the Wisconsin Supreme Court affirmed the lower courts' refusal to permit an unwed putative genetic father to establish paternity of marital children on the ground that such a determination would not be in the best interests of the children. The court reasoned: "To allow a blood test in such a situation, and later determine at a dispositional hearing that it was in the best interests of the children to continue the children's relationship with the presumed father (husband of the mother), would in effect bastardize the children and rupture the existing father/child

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some couples will not secure an adoption and even those who do adopt will benefit from the protections the presumption offers them until the adoption process is completed.

relationship." *Id.* at 726. The court emphasized the "sanctity of a family unit and the traditional protections the marital family has received," noting the judicial "unwillingness to look at the relationship of the putative father with the child in isolation, without reference to the existing family unit." *Id.* at 727. The court concluded that the "existing family unit should be kept intact, not for the benefit [of the mother or her husband], but for the benefit of [the children], whose interests in this matter are paramount." *Id.* at 729.

III. DHS's Refusal To Issue Two-Parent Birth Certificates To Marital Children Of Same-Sex Spouses Impermissibly Discriminates With Respect To The Spouses' Sex And Sexual Orientation, And Against The Children Based On The Sex And Sexual Orientation Of Their Parents.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State . . . [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").

Wisconsin laws governing the spousal presumption and issuance of birth certificates, Wis. Stat. §§ 69.14(1)(e)1, 891.40, and 891.41(1)(a), classify persons based on their sex and sexual orientation. *Baskin*, 766 F.3d at 654. If Jessamy were a man, she, Chelsea and A.T. would have a birth certificate today with Jessamy listed as A.T.'s parent, pursuant to these statutes, as well as in accordance with the DHS policies and practices described above. However, because she is a woman, and she and Chelsea are lesbian spouses, DHS has not issued the family a two-parent birth certificate for A.T.

This Court must employ heightened constitutional review under the Equal Protection Clause when evaluating the constitutionality of governmental differential treatment based on sex

or sexual orientation, because both sex and sexual orientation constitute "suspect" classifications. *Baskin*, 766 F.3d at 654; *see also SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 181-82 (2nd Cir. 2012). Such classifications are presumptively unconstitutional as a denial of equal protection, and this "presumption is rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." *Baskin*, 766 F.3d at 654-55 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003), *United States v. Virginia*, 518 U.S. 515, 531-33 (1996)).

Additionally, Wis. Stat. §§ 69.14(1)(e)1 classifies children based on who their parents are. Children born to different-sex spouses are entitled to a birth certificate listing both of their parents. Those born to same-sex spouses are not. Numerous cases make clear that the State may not impose penalties or burdens on children because of the status or conduct of their parents. *See, e.g., Levy v. Lousiana*, 391 U.S. 68, 72 (1968); *Weber v. Aetna Ca. 7 Sur. Co.*, 406 U.S. 164, 175 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'"); *Pickett v. Brown*, 462 U.S. 1, 7-8 (1983); *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *State ex rel. Rake v. Ohden*, 346 N.W.2d 826, 829 (Iowa 1984). Differential treatment of children based upon their parents' conduct or status also triggers heightened scrutiny. *Pickett*, 462 U.S. at 7-8.

IV. DHS's Refusal To Issue Two-Parent Birth Certificates To Marital Children Of Same-Sex Spouses Infringes Upon These Spouses' Fundamental Rights To Marry And To Parental Autonomy, And Upon All Family Members' Liberty Interests In Family Integrity And Association.

The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1, and protects individuals from arbitrary governmental intrusion into fundamental rights, including each person's fundamental right to marry and to receive respect for an existing valid marriage, *Obergefell*, 135 S. Ct. 2584, and each parent's protected liberty interest in parental autonomy, *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Equally fundamental is the right of a child "to be raised and nurtured by his parents." *Doe v. Heck*, 327 F.3d 492, 517-18 (7th Cir. 2003) (citations omitted). Moreover, numerous precedents establish that parentage and the liberty interest in parental autonomy and familial association does not turn on a biological parent-child relationship. *Michael H.*, 491 U.S. at 126-27 (plurality opinion) (noting distinction between biological fatherhood and determination that one is a parent); *Prince v. Massachusetts*, 321 U.S. 158 (1994) (aunt and legal guardian enjoyed parental autonomy rights); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring") (Stewart, J., concurring); *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (citing same). Further, the right to marry and the mutual rights of parents and children to family association and integrity are mutually reinforcing and often intertwined. *See Doe*, 327 F.3d at 517-18 (citing *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000)).

Thus, Chelsea, Jessamy, and other same-sex spouses enjoy a fundamental right to receive respect from their government for their valid marriages. Additionally, Chelsea, Jessamy, A.T., and other same-sex spouses and their children share a constitutionally protected fundamental

liberty interest in their family integrity, and association, which includes the right to security and recognition for their legal parent-child bonds. To withhold from the Torres family means of demonstrating A.T.'s identity and Jessamy's parental authority over his care and custody, unconstitutionally infringes on these liberty interests, depriving the family of the single most important identity document necessary for A.T.'s parents to demonstrate their relationship to him, and to protect him in myriad circumstances.

When legislation infringes on the fundamental right to marry, government bears the burden of demonstrating that it is necessary to the achievement of a compelling governmental interest. *Eisenstadt v. Baird*, 405 U.S. 438, 447, fn. 7 (1972); *Doe*, 327 F.3d at 519 (citing *Clark v. Jeter*, 486 U.S. 456 (2003)). With respect to infringements on parental autonomy, family integrity and association, courts have acknowledged some difference of opinion about the level of scrutiny, but it is recognized that heightened scrutiny is required. *Doe*, 327 F.3d at 519.

V. The Supreme Court's Decision In *Obergefell* Requires Issuance Of Two-Parent Birth Certificates To Children Born To Same-Sex Spouses.

In *Obergefell*, 135 S. Ct. 2584, the Supreme Court struck down bans excluding same-sex couples from marriage as unconstitutional under the U.S. Constitution's due process and equal protection guarantees. The Court held that such bans violate the fundamental right to marry and also discriminate against same-sex couples with respect to their exercise of that fundamental right. *Id.* at 2604-05.

In reaching its decision, the Supreme Court mentioned two-parent birth certificates for marital children as one of the benefits of marriage unfairly denied same-sex couples as a result of the unconstitutional marriage bans. Specifically, the Court described "birth and death certificates" as "aspects of marital status" conferred on married couples by every state in the country, among an "expanding list of governmental rights, benefits, and responsibilities" tied to

marriage. *Id.* at 2601. The Court's inclusion of birth certificates on the list of rights integral to marriage is consistent with the Court's "third basis for protecting the right to marry:" namely, that marriage "safeguards children and families." *Id.* at 2590. As the Court explained, marriage bans impermissibly harm the children of same-sex couples as well as the members of the couple themselves, in both financial and dignitary ways, in violation of constitutional guarantees of liberty and equality:

> Without the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

Id. The Court also dismissed arguments that a different-sex couple's ability to procreate through sexual intercourse justified preferential treatment of traditional family structures or the exclusion of same-sex couples and their children from benefits associated with marriage. *Id.* at 2601. Thus, the Court intended to extend all marital child-related benefits to the children of same-sex couples in striking down the marriage ban.

Indeed, one of the cases consolidated in *Obergefell* involved three married couples whose sole basis for challenging Ohio's marriage ban was that they needed marital recognition to obtain two-parent birth certificates for their children. *See Henry v. Himes*, No. 14-cv-00129, Dkt. No. 1 (Complaint) at 2 (S.D. Ohio Feb. 10, 2014); *see also Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014) (district court opinion holding Ohio's marriage ban unconstitutional and explicitly requiring issuance of two-parent birth certificates to the marital children of same-sex spouses), *rev'd sub nom DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom Obergefell*, 135 S. Ct. 2584 (2015); Brief for Petitioners, *Obergefell v. Hodges*, Sup. Ct. No. 14-556, filed Feb. 27, 2015, at 8-9 (describing the claims of the *Henry* plaintiffs to two-parent birth certificates for

marital children in reliance on the spousal presumption). In reversing the Sixth Circuit's decision, the relief granted by *Obergefell* to these plaintiffs was that they were permitted to keep the two-parent birth certificates that they had been awarded pursuant to the district court's order. *Henry v. Hodges*, No. 14-cv-00129, Dkt. No. 28 (S.D. Ohio Apr. 14, 2014).

Thus, *Obergefell* makes clear the Supreme Court's expectation that marital children of same-sex couples now are entitled to two-parent birth certificates as a result of the elimination of marriage bans. To single out the marital children of same-sex couples for designation on their birth certificates as children of an unwed parent would violate *Obergefell's* command that state laws are "now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," and would deprive these families impermissibly of equal dignity. *Obergefell*, 135 S. Ct. at 2605.

Since *Obergefell*, lower courts in cases concerning the constitutionality of various marriage bans have concluded that *Obergefell* itself mandates issuance of two-parent birth certificates to marital children of same-sex spouses, without the need to perform further equal protection or due process analysis. *Robicheaux v. Caldwell*, No. 13-5090, 2015 WL 4099353 (E.D. La. July 2, 2015); *DeLeon v. Abbott*, No. 13-cv-00982, Dkt. Nos. 113, 117 (W.D. Tex. Aug. 11, 2015 and Sept. 1, 2015). At least one court has performed a thorough analysis, citing *Obergefell* and concluding that denial of such birth certificates cannot survive even the lowest level of equal protection scrutiny. *See Roe v. Patton*, No. 2:15-cv-00253–DB, 2015 WL 4476734 (C.D. Utah July 22, 2015).

VI. There Is Not Even A Legitimate Justification, Let Alone The Compelling Justification Necessary, For Denying Marital Children Of Same-Sex Spouses Two-Parent Birth Certificates.

DHS cannot meet its burden of demonstrating that denying two-parent birth certificates to the marital children of same-sex spouses is necessary to serve even a legitimate state interest, let alone a compelling one. Similarly, DHS cannot demonstrate that denying such birth certificates is precisely tailored so as to use the least restrictive means consistent with the attainment of that interest, *see Plyler v. Doe*, 457 U.S. 202, 239 (1982), or that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims, *see Baskin*, 766 F.3d at 654.

The child-centered protections provided by the spousal presumption are just as important to the marital children of same-sex spouses as they are to those of different-sex spouses. Both classes of children equally deserve protection from the stigma of birth records labeling their families as lacking legitimacy, and unworthy of equal dignity and respect. *See United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (discrimination against same-sex spouses impermissibly "makes it even more difficult for the children [of these couples] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives"). Another purpose of the presumption—protection of the child's bond with the presumed parent—also is equally important to the marital children of same-sex spouses. *See Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (non-biological mother had standing to seek custody in dispute with child's biological mother pursuant to spousal presumption of parentage established by Vermont civil union); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006) (non-biological mother is presumed parent of child born to her civil union partner and therefore entitled to seek custody, visitation, and support).[6] All marital children also are equally deserving

[6] In this Court's Order Denying Plaintiffs' Motion for Clarification in *Wolf v. Walker*, No. 3:14-cv-00064, Dkt. No. 210 (W.D. Wis. Jul. 7, 2015), this Court inquired whether the spousal

of protection for their right of inheritance and to financial support from both parents regardless of genetic connection. Further, to the extent that the presumption serves the purpose of protecting the public purse by ensuring the child's support from both parents, there is no justification for excluding same-sex spouses' children on this ground, either.

That most same-sex spouses do not both share a biological connection to their child[7] makes no difference as to whether the spousal presumption applies, as *Randy A.J.* and *W.W.W.* make clear in the context of different-sex spouses. Additionally, that same-sex spouses are unable to procreate without the assistance of reproductive technology—a circumstance that is equally true for many different-sex spouses, as Wisconsin law expressly acknowledges—also

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presumption of parentage ever has application to male spouses of male genetic parents. Although Wisconsin has statutory guidance for birth certificates issued for children born through surrogacy arrangements (Wis. Stat. § 69.14(1)(h), requiring the surrogate's name to go on the birth certificate until a court otherwise determines parentage), many other states, courts, agencies, and legislatures have determined that a surrogate is not a parent, and that her name does *not* go on a birth certificate in the absence of a court order. *See Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011) (intended parent, who is neither the biological nor adoptive parent, is the legal parent pursuant to a gestational surrogacy agreement; ordering state department of public health to issue replacement birth certificate listing solely two men as parents, and omitting the name of the surrogate); "Illinois Gestational Surrogate Act," 750 ILCS 47/15; Illinois Vital Records, *Surrogate Parentage*, available at http://www.idph.state.il.us/vitalrecords/surrogateinfo.htm (last visited Sept. 3, 2015 ("The names of the gestational surrogate and the gestational surrogate's husband/partner, if any, are not placed on the birth certificate"); *see also* Unif. Parentage Act 801(a) (2002). In other words, the presumption that a person who gives birth is a parent is rebuttable, and a surrogacy agreement is sufficient in some jurisdictions to rebut the presumption. Thus, other jurisdictions adopt the practice, endorsed by the Uniform Parentage Act, of issuing a birth certificate to a child born of a surrogate that lists solely the gay genetic father and his male spouse as parents in reliance on the spousal presumption. Of course, in this case, Plaintiffs do not challenge DHS's procedures or Wisconsin's statute for issuing birth certificates in the context of surrogacy, and the Court need not reach this issue. Plaintiffs point this out simply to show that the spousal presumption of parentage has potential application to male as well as female same-sex spouses.

[7] In this case, solely Chelsea has a genetic connection to A.T. because Chelsea and Jessamy agreed that Chelsea would be the one to undergo donor insemination. PPFF at ¶ 10. Had Chelsea been unable to conceive, Jessamy would have been happy to carry their child. *Id*. However, it is worth noting that in an increasing number of cases, both members of a lesbian same-sex couple ***do*** actually share a biological connection to their child. *See* fn 4, above.

cannot justify depriving their children of the same security of a presumed parent-child relationship at birth. Same-sex spouses and their children have the same need for both parents to be able to authorize medical treatment for a child in an emergency, to receive government benefits and support from both spouses, and for the shield it provides from attacks on the integrity of the marital family.[8] In this case, Jessamy was fortunate that the hospital respected her relationship to Chelsea and A.T. when both suffered significant complications shortly after A.T.'s birth and Chelsea was incapacitated, but Jessamy may not be as lucky in future health emergencies absent an accurate birth certificate for A.T. PPFF at ¶¶ 15-19, 51.

These issues are not abstract or theoretical to many families. Most new parents count on being able to seek parental leave from an employer or put a child on a health insurance policy based on the assumption that a child born into their marriage will be considered their child, and that they will not have to demonstrate parentage by DNA in order to qualify for these benefits immediately upon the child's birth. The spousal presumption, which attaches immediately upon the birth of a child, is consistent with this common sense understanding of parenthood.

The harm caused by DHS in denying two-parent birth certificates to the marital children of same-sex spouses has constitutional significance, as *Baskin* makes clear. In *Baskin*, 766 F.3d 648, the Seventh Circuit Court of Appeals affirmed this Court's judgment in *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014), striking down Wisconsin's marriage ban as unconstitutional. In holding that the ban could not survive even the lowest level of constitutional scrutiny, the

[8] Same-sex couples denied a two-parent birth certificate also may be vulnerable to legal action taken by the State to seek an adjudication of paternity and child support. In *State v. Robin M. W. (In re Paternity of T.J.D.C.)*, 310 Wis. 2d 786, 750 N.W.2d 957 (Ct. App. 2008), a court held that the State was obligated to begin an action to establish a child's parentage and seek support, even though the child admittedly was born to married parents, because the child's birth certificate listed only the mother.

Seventh Circuit focused on the harm caused by marriage discrimination to the children of same-sex couples. The court opined that Wisconsin's ban "harms the children [of lesbian and gay parents], by telling them they don't have two parents, like other children, and harms the parent who is not the adoptive parent by depriving him or her of the legal status of a parent." *Baskin*, 766 F.3d at 671. Indeed, the Seventh Circuit repeatedly stressed the harm caused to children by depriving them of the ability to "feel secure in being the child of a married couple." *Id.* at 664. DHS's denial of a two-parent birth certificate causes this same harm. As in *Baskin*, there is not even a rational justification for the State's discrimination, let alone "a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." *Id.* at 654.

For these reasons, the overwhelming majority of courts around the country have concluded, either in the course of holding marriage bans unconstitutional or in the wake of such decisions, that the marital children of same-sex spouses are entitled to the benefits of the spousal presumption.[9] *See, e.g.*, *In re Guardianship of Madelyn B.*, 98 A.3d 494, 496 (N.H. 2014) (New Hampshire's parentage presumption, which "is driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family," "applies equally to women and men"); *Della Corte v. Ramirez*, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012); *Debra*

[9] Like Wisconsin, the spousal presumption statutes in many other states also use gendered terms such as "husband," "man," "father," and "paternity." *See, e.g.*, Mass. Gen. Laws Ann. ch. 209C, § 6 ("a man is presumed to be the father of a child . . . if: [] he is or has been married to the mother and the child was born during the marriage"); Or. Rev. Stat. Ann. § 109.070 ("The paternity of a person may be established as follows: [] A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other at the time of the child's birth"). However, because these states also recognize that same-sex couples may marry or enter other relationships with all the rights and responsibilities of marriage, courts have held that these spousal presumptions must be applied to a female spouse of a birth mother regardless of the statute's use of gendered terms.

H., 930 N.E.2d 184; *Elisa B. v. Superior Court*, 37 Cal.4th 108, 117 P.3d 660 (2005) (non-biological mother presumed to be "natural mother" of children born to same-sex partner with whom the non-biological mother was in a legal relationship); *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 956-57 (Mass. 2003) (identifying "presumptions of legitimacy and parentage of children born to a married couple" as benefits of marriage improperly denied to plaintiffs and their children by the Massachusetts marriage ban, and ordering marriage licenses issued to same-sex couples).[10] Indeed, the overwhelming majority of states now issue two-parent birth certificates to the marital children of same-sex spouses.[11]

For example, in *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 338 (Iowa 2013), the Iowa Supreme Court considered Iowa's birth certificate statute, which, as Wisconsin's does, mandates the placement of the name of the husband on the certificate.[12] The Iowa Supreme Court

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[10] The only exception to this trend is a recent intermediate appellate court decision from New York, *see Paczkowski v. Paczkowski*, 128 A.D. 3d 968 (N.Y. App. Div. 2015). That decision, however, is not only an outlier nationally, but directly conflicts with controlling New York law. *See Debra H.*, 14 N.Y.3d 576; *Wendy G-M v. Erin G-M*, 45 Misc. 3d 574, 595 (N.Y. Sup. Ct. 2014) (legal parentage extends equally to lesbian spouses).

[11] *See, e.g.*, Laura Masnerus, *Child Born to Lesbian Couple Will Have Two Mothers Listed*, N.Y. TIMES, Nov. 16, 2006, http://tinyurl.com/ogmgle5 (New Jersey family court holding that a birth mother's female domestic partner could be listed on the child's birth certificate); Associated Press, *NYC Changes Birth Certificate Policy for Lesbians*, Mar. 25, 2009, http://tinyurl.com/cqf9z6; Oregon Dep't of Health Servs., *Fast Facts: for female Oregon Registered Domestic Partners who are registering the birth of a child*, Oct. 22, 2008, http://tinyurl.com/okmaupj (providing "parent-parent" birth certificates to lesbian couples who had children through artificial insemination); Advocate, *MD OKs Two Moms on Birth Certificate*, Feb. 14, 2011, http://tinyurl.com/obz8p7p (Maryland Department of Health announcing in 2011 that it would begin automatically recognizing a birth mother's wife as a parent on their child's birth certificate).

[12] This Court incorrectly suggested in its Order Denying Plaintiffs' Motion for Clarification in *Wolf v. Walker*, No. 3:14-cv-00064, Dkt. No. 210 (W.D. Wis. Jul. 7, 2015) that *Gartner* and *Della Corte* "involved a statute that applied in the context of artificial insemination." In fact, Iowa has no statute establishing parentage in the context of the use of reproductive technology, but instead relies on a common law spousal presumption of parentage, a provision that provides that marital children are "legitimate as to both parties" (Iowa Stat. § 598.31), and its birth certificate statute (Iowa Stat. § 144.13), which makes no mention of reproductive technology, to

held that failure to provide the marital children of lesbian spouses with a two-parent birth certificate violated their right to equal protection. *Id*. at 354. The court explained:

> "It is important for our laws to recognize that married lesbian couples who have children enjoy the same benefits and burdens as married opposite-sex couples who have children. . . . Therefore, the only explanation for not listing the nonbirthing lesbian spouse on the birth certificate of a child born to a married lesbian couple is stereotype or prejudice."

Id. at 353. Consequently, Wis. Stat. §§ 69.14(1)(e)1, 891.40, and 891.41(1)(a), as applied, infringe impermissibly on equal protection and due process guarantees.

When plaintiffs bring a constitutional challenge to a statute that is fatally under-inclusive, the proper remedy is simply to "extend the coverage of the statute to include those who are aggrieved by the exclusion." *Califano v. Westcott*, 443 U.S. 76, 89, 92 (1979) (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)) (addressing a discriminatory statute providing financial assistance to certain families when a father—but not a mother—became unemployed, and holding that the proper remedy was simply to treat the term "father" as if replaced with "its gender-neutral equivalent"); *Gartner*, 830 N.W.2d at 354. Accordingly, plaintiffs respectfully request that this Court order DHS to interpret Wis. Stat. §§ 69.14(1)(e)1, 891.40, and 891.41(1)(a) in a gender-neutral manner and provide an accurate two-parent birth certificate to A.T. and the marital children of other same-sex spouses on equal terms as to the marital children of different-sex spouses.

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establish that husbands are presumed to be legal parents regardless of how a child is conceived, or whether they share a genetic connection. Similarly, in *Della Corte*, the Massachusetts Court of Appeals held that the birth mother's same-sex spouse was a legal parent of the child born during their marriage under the spousal presumption as well as the Massachusetts statute providing that a "husband" who consents to his wife's insemination is a father. 961 N.E.2d at 602-04 (citing Mass. Gen. Law c. 46, § 4B (2012)). The court explained that under the Massachusetts Supreme Judicial Court case holding that same-sex couples must be allowed to marry, same-sex spouses must be given all the rights of marriage, including the protections of statutes addressing the paternity of husbands. *Id.* (citing *Goodridge*, 798 N.E.2d 941).

CONCLUSION

For the foregoing reasons, this Court should enter summary judgment in favor of Plaintiffs and: declare that DHS's refusal to issue birth certificates to the marital children of same-sex spouses on the same terms as to marital children of different-sex spouses violates all Plaintiffs' guarantees of equal protection under the Constitution of the United States; declare that Wis. Stat. §§ 69.14(1)(e)1, 891.40(1), and 891.41(1)(a) are invalid and unconstitutional as written and are henceforth to be construed in a gender-neutral manner to require application of the spousal presumption of parentage to the marital children of same-sex spouses and issuance of two-parent birth certificates to these children accordingly; declare that DHS's refusal to issue two-parent birth certificates to these children violates all Plaintiffs' rights under the Due Process Clause of the Constitution of the United States; enjoin DHS from continuing to enforce its policy, or custom and practice, of denying two-parent birth certificates to the marital children of same-sex spouses absent a court order; order DHS to immediately issue correct two-parent birth certificates to Plaintiff class members.

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Respectfully submitted,

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