

July 2019

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Brad Aldridge
University of Arkansas, Fayetteville

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Recommended Citation

Brad Aldridge, *A Constellation of Benefits and a Universe of Equal Protection: The Extension of the Right to Marry Under Pavan v. Smith*, 72 Ark. L. Rev. 245 (2019).

Available at: <https://scholarworks.uark.edu/alr/vol72/iss1/8>

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A Constellation of Benefits and a Universe of Equal Protection: The Extension of the Right to Marry Under *Pavan v. Smith**

In 2015, the Supreme Court of the United States in *Obergefell v. Hodges* recognized the constitutional right of all persons, including same-sex couples, to lawfully marry.¹ In 2017, in *Pavan v. Smith*, the Court recognized that *Obergefell* extends that right to much more than the act of marriage in itself.² Any person who would have been denied the right to marry the person of her choice before *Obergefell* now enjoys not only the rights of marriage licensing and recognition, but also the full “constellation” of rights and responsibilities that attend marriage among traditional opposite-sex couples.³ The Court believed that this interpretation was so plainly visible on *Obergefell*’s face that it rendered its decision in *Pavan* summarily, without oral argument.⁴

Before *Pavan*, Arkansas’s birth certificate regime would have denied legally recognized motherhood to the woman married to a biological mother at the time of birth by denying a place for her name on the birth certificate.⁵ In its unsigned, per curiam opinion, the Supreme Court struck down the gender-specific statutory language that made this outcome acceptable.⁶ Dissenting Justice Neil Gorsuch, joined by Justices Alito and Thomas, did not believe that such an outcome was so clear from

* J.D. Candidate, University of Arkansas School of Law, 2019. The author is indebted to Prof. Jordan Woods, Assistant Professor of Law, University of Arkansas School of Law, for his invaluable advice and encouragement in the drafting process. The author would also like to thank Luke Brasuell for his assistance as Note and Comment Editor—as well as fellow editors, family, and friends—for their continual support.

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

2. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam) (citing *Obergefell*, 135 S. Ct. at 2605).

3. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2601).

4. *Id.* at 2076-77.

5. *Id.* at 2077 (citing ARK. CODE ANN. § 20-18-401(e), (f)(1) (2014)). *See generally* *infra* Appendix (copy of statutory text).

6. *Pavan*, 137 S. Ct. at 2078-79.

the text of *Obergefell* and would have constrained the right to marry to the rights to licensing and recognition of marriage.⁷

But what should be most troubling for advocates of same-sex couples is not that Justice Gorsuch has a narrow, conservative vision of the right to marry. Instead, advocates should more carefully note the exception to the broader right of marriage that he implies for purportedly “biology based” family law regimes.⁸ Under *Nguyen v. INS*, which Justice Gorsuch and the Arkansas Supreme Court majority cite with approval,⁹ gender discrimination may surmount heightened scrutiny under the Equal Protection Clause if it is based on the biological differences between the sexes rather than impermissible stereotypes.¹⁰ Yet *Nguyen* was met with a forceful dissent and abundant criticism from commentators for its weak application of heightened scrutiny and its use of impermissible gender stereotypes glossed as rational assumptions.¹¹ *Sessions v. Morales-Santana*, decided two weeks before *Pavan*, more strongly applies heightened scrutiny to gender discrimination and takes a stronger stance against “overbroad generalizations” of gender than *Nguyen*.¹²

This Note on *Pavan v. Smith* will argue not only that Justice Gorsuch erroneously interprets *Obergefell*, other caselaw, and the relevant statutes, but also that his preference for *Nguyen* over *Morales-Santana* signals the dangerous potential for a future Court and many lower courts to disrupt the lives of same-sex parents. To meet that threat, advocates should use *Obergefell*, *Pavan*, and *Morales-Santana* in analytical concert. This Note provides a starting point for such analysis.

Part I of this Note tracks the procedural history of this case from the trial court to the U.S. Supreme Court.¹³ Part II sets up the argument by synthesizing two relevant lines of U.S. Supreme Court precedent on: (1) the importance of the benefits of marriage

7. *Id.* at 2079 (Gorsuch, J., dissenting).

8. *Id.*

9. *Id.* (citing *Nguyen v. INS*, 533 U.S. 53, 73 (2001)); *Smith v. Pavan*, 2016 Ark. 437, at 17-18, 505 S.W.3d 169, 181 (citing *Nguyen*, 533 U.S. at 73), *rev'd per curiam* 137 S. Ct. 2075 (2017).

10. *Nguyen v. INS*, 533 U.S. 53, 68, 73 (2001).

11. *Id.* at 74 (O'Connor, J., dissenting); see sources cited *infra* note 323.

12. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692-93 (2017).

13. See *infra* Part I.

to a definition of marriage;¹⁴ and, (2) the use of biological distinctions in equal-protection sex discrimination jurisprudence.¹⁵

Part III makes two arguments agreeing with the majority's analysis and countering the dissent of Justice Gorsuch.¹⁶ First, the opinion of the Arkansas Supreme Court majority is "clearly in error" because the Court's interpretation of *Obergefell* is correct and the Arkansas birth certificate statutes do not create a purely biology-based birth records regime.¹⁷ The Court's opinion is supported by three types of precedent: (1) cases incorporating the legal benefits of marriage within the right to marry; (2) earlier cases implying the right of a married couple to a birth certificate; and, (3) *Obergefell*, which plainly requires states to grant same-sex marriage on the same "terms and conditions" as opposite-sex marriage.¹⁸ Second, the application of *Nguyen v. INS* to defend statutes conferring marriage benefits unequally between opposite-sex and same-sex couples is limited by both the heightened scrutiny standard articulated in *Morales-Santana* and the expanded definition of the fundamental right to marry clarified in *Pavan*.¹⁹ Although other commentators have already explored the flaws of *Nguyen* and shown how *Morales-Santana* limits it,²⁰ this Part demonstrates how the broad reach of *Pavan* can be and has been used together with *Obergefell* and *Morales-Santana* to protect the rights of married same-sex couples, individual parents in same-sex divorces, and possibly even transgender persons who are not in same-sex marriages.²¹

14. See *infra* Section II.A.

15. See *infra* Section II.B.

16. See *infra* Part III.

17. See *infra* Section III.A.

18. See *infra* Section III.A.

19. See *infra* Section III.B.

20. See sources cited *infra* note 323.

21. See *infra* Section III.B.

I. CASE SUMMARY

A. FACTS AND CIRCUIT COURT HOLDING

Three married female couples, the Pavans, the Jacobses, and Courtney Kassell and Kelly Scott (“the couples”), filed suit to seek declaratory and injunctive relief against the Arkansas Department of Health (“ADH”).²² The suit stemmed from the refusal of ADH to issue birth certificates for their respective children that included the names of both spouses, which they argued “violated their constitutional rights to equal protection and due process.”²³ The Jacobses and Pavans married in 2010 and 2011.²⁴ Terrah Pavan and Leigh Jacobs gave birth to their children in Arkansas in May and June 2015.²⁵ Both conceived through assisted reproductive technology (“ART”) involving an anonymous donor.²⁶ In both cases, ADH would not place the names of Marisa Pavan and Jana Jacobs on the birth certificate.²⁷ Courtney Kassell and Kelly Scott resided in Arkansas when Courtney gave birth in January 2015.²⁸ As with the Pavans and Jacobses, Courtney and Kelly conceived through ART involving an anonymous donor.²⁹ The couple married in July 2015.³⁰ The couple made multiple requests that ADH place Kelly’s name on

22. Complaint at 10-12, *Pavan v. Smith*, 2015 WL 12990015 (Ark. Cir. Ct. Dec. 1, 2015) (No. 60CV-15-3153).

23. *Smith v. Pavan*, 2016 Ark. 437, at 3, 505 S.W.3d 169, 173, *rev’d per curiam* 137 S. Ct. 2075 (2017).

24. *Id.* at 2-3, 505 S.W.3d at 172.

25. *Id.* at 2, 505 S.W.3d at 172.

26. *Id.* at 2-3, 505 S.W.3d at 172. Note that all courts involved use the term “artificial insemination” to describe the means by which the child is conceived. Apart from mentions of the “artificial insemination” statute, ARK. CODE ANN. § 9-10-201 (2015), where the term is explicitly used, this author believes it is more appropriate to give the label of “assisted reproductive technology” to any means of conception other than insemination by intercourse. This term is meant to encompass not only intrauterine or intracervical insemination of donor sperm but also in vitro fertilization, which is performed outside the body. However, federal law, and therefore the CDC, defines ART more narrowly to include only treatments involving “the handling of human oocytes or embryos,” not sperm alone. 42 U.S.C. § 263a-7(1) (2012); *see also* CDC, *What is Assisted Reproductive Technology?* (Feb. 7, 2017), <https://www.cdc.gov/art/whatis.html> [<https://perma.cc/2ZCW-7PLL>].

27. *Pavan*, 2016 Ark. 437, at 2-3, 505 S.W.3d at 172.

28. *Id.* at 3, 505 S.W.3d at 172-73.

29. *Id.* at 3, 505 S.W.3d at 173.

30. *Id.*

the birth certificate, both before and after the marriage, and ADH denied them the alteration each time.³¹

The couples sought three avenues of relief: (1) to have certain statutory provisions governing the issuance of birth certificates, including Arkansas Code Annotated sections 20-18-401(e), (f) and 20-18-406(a)(2), “declared unconstitutional as written;”³² (2) to enjoin the Director of ADH, Nathaniel Smith, from “refusing to list the names of both spouses of a same-sex couple on the birth certificate of [a] minor child;”³³ and (3) to require Smith, by court order, “to issue corrected birth certificates naming both spouses.”³⁴

There were two statutory provisions against which the couples sought declaratory relief: Arkansas Code Annotated sections 20-18-401(e), (f) and -406(a)(2).³⁵ The portions of section 20-18-401 governed entry of the names of the parents on a child’s birth certificate,³⁶ while section 20-18-406(a)(2) addressed the issuance of a new birth certificate to a “person” who has been “legitimated.”³⁷ Petitioners’ constitutional complaints arose from section 20-18-401’s gender-specific references to the “father” of the child and the “husband” of the mother and the State’s exclusionary interpretation of the term “legitimated” as used in section 20-18-406(a)(2).³⁸

31. *Id.*

32. *Pavan*, 2016 Ark. 437, at 3, 505 S.W.3d at 173. This Note cites to the 2014 replacement volume of the Arkansas Code Annotated when referring to sections 20-18-401 and 20-18-406. When referring to section 9-10-201, this Note cites to the 2015 replacement volume. This is because both the Arkansas Supreme Court and the U.S. Supreme Court refer to these replacement volumes. *See Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam); *Pavan*, 2016 Ark. 437, at 2, 4, 505 S.W.3d at 172-73. Since the Supreme Court handed down *Pavan*, the Arkansas legislature has not amended any of these statutes in compliance with *Pavan*, and the text remains substantially the same as of 2018. *See* ARK. CODE ANN. §§ 9-10-201, 20-18-401(e), (f); 20-18-406(a)(2) (2018).

33. *Pavan*, 2016 Ark. 437, at 3, 505 S.W.3d at 173.

34. *Id.*

35. Plaintiffs’ Motion for Summary Judgment and Response to Defendants’ Motion for Summary Judgment with Incorporated Brief at 14-16, *Pavan v. Smith*, 2015 WL 12990015 (Ark. Cir. Ct. Dec. 1, 2015) (No. 60CV-15-3153) [hereinafter “Plaintiffs’ Motion for Summary Judgment”]; *see* ARK. CODE ANN. § 20-18-401(e), (f) (2014), *invalidated by Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam); ARK. CODE ANN. § 20-18-406(a)(2) (2014). *See generally infra* Appendix (copy of statutory text).

36. ARK. CODE ANN. § 20-18-401(e), (f).

37. ARK. CODE ANN. § 20-18-406(a)(2).

38. Plaintiffs’ Motion for Summary Judgment, *supra* note 35, at 12, 15-16.

In its Motion for Summary Judgment, the State claimed that Petitioners' constitutional challenges should have failed because "parental rights, and parental designations on birth certificates, do not arise from marital relationships."³⁹ Though the common-law doctrine of *in loco parentis* and the statutory construct of adoption both exist as modes of finding a relationship between a parent and a child not biologically related, each doctrine "does not turn on any marital relationship between the intended parent and a biological parent of a child."⁴⁰ There would be no due process violation, so the State claimed, because non-biological parents and children do not have the constitutional right to a parental relationship with each other.⁴¹ The State also claimed that there was no equal protection violation because the statutes classified based on the biological parentage of the couples, not their gender or sexual orientation.⁴²

In the couples' own motion for summary judgment and response, they made four arguments that were ultimately relevant: (1) that in 2014, the State had already been enjoined by Judge Chris Piazza of the Pulaski County Circuit Court in *Wright v. State* from enforcing any law which denied same-sex married couples "the rights, recognition and benefits associated with marriage in the State of Arkansas;"⁴³ (2) that the State was not in compliance with *Obergefell v. Hodges* because the decision mandated the extension of both civil marriage and its benefits to same-sex couples, specifically including "birth and death certificates;"⁴⁴ (3) that Petitioners could not wait for "the democratic process" to amend the offending statutes in lieu of a court order;⁴⁵ and (4) that Petitioners' rights under the Due

39. Defendant's Motion for Summary Judgment ¶9, at 4, *Pavan v. Smith*, 2015 WL 12990015 (Ark. Cir. Ct. Dec. 1, 2015) (No. 60CV-15-3153).

40. *Id.*

41. *Id.* ¶9, at 5.

42. *Id.* ¶10, at 5. On a minor note, the State made no citation to *Obergefell v. Hodges* in its Motion for Summary Judgment Motion and brief, despite an admission in its Answer to the Complaint that *Obergefell* "speaks for itself." Answer ¶4, at 2, *Pavan v. Smith*, 2015 WL 12990015 (Ark. Cir. Ct. Dec. 1, 2015) (No. 60CV-15-3153).

43. Plaintiffs' Motion for Summary Judgment, *supra* note 35, at 6-8 (quoting *Wright v. State*, No. 60CV-13-2662, 2014 WL 1998002, at *2 (Ark. Cir. Ct. May 15, 2014), *appeal dismissed as moot sub nom.* *Smith v. Wright*, 2015 Ark. 298 (per curiam)).

44. *Id.* at 9-10.

45. *Id.* at 10-11.

Process and Equal Protection Clauses were violated.⁴⁶ The due process claim linked the naming of both spouses on the birth certificate to both the fundamental right to marry and the right for a parent to raise a child as she sees fit.⁴⁷ For their equal protection claim, Petitioners argued as members of two classes—sexual orientation and gender—that heightened scrutiny should apply and that the statutes survive neither intermediate scrutiny nor even the “basic standards” of rational-basis review.⁴⁸

In its reply,⁴⁹ the State first interpreted the *Wright* injunction narrowly in light of Arkansas Rule of Civil Procedure 65(e), which mandated that injunction orders “shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained or mandated.”⁵⁰ Because the *Wright* court never mentioned birth certificates or gave any related instruction to ADH, Rule 65(e) foreclosed the argument “that ADH ha[d] already been enjoined to amend birth certificates.”⁵¹ Next, the State similarly limited *Obergefell* to its basic holding protecting same-sex marriage in itself and pointed to the absence of specific language in *Obergefell* “requiring states to amend birth certificates as requested in this case.”⁵² Finally, the State rebutted Petitioners’ direct equal protection and due process arguments and so asked the court to subject its actions to rational basis review and hold its actions justified by “numerous rational, and even compelling, governmental interests.”⁵³

46. *Id.* at 16-26.

47. *Id.* at 25-26.

48. Plaintiffs’ Motion for Summary Judgment, *supra* note 35, at 17-25.

49. Reply in Support of Motion for Summary Judgment and Response to Plaintiffs’ Motion for Summary Judgment, Pavan v. Smith, 2015 WL 12990015 (Ark. Cir. Ct. Dec. 1, 2015) (No. 60CV-15-3153) [hereinafter “Defendant’s Reply”].

50. *Id.* at 4 (quoting ARK. R. CIV. P. 65(e) (2017) (omitted 2018)) (emphases omitted). Although the Defendant’s Reply and the Circuit Court both cite to Rule 65(e), the Arkansas Supreme Court opinions instead cite to Rule 65(d)(1)(C), which contains the same instruction in substance: “Every order granting an injunction . . . must . . . describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” ARK. R. CIV. P. 65(d)(1)(C). In 2018, Rule 65(e) was omitted from the Rules of Civil Procedure for stylistic purposes. ARK. R. CIV. P. 65 reporter’s note 6.

51. Defendant’s Reply, *supra* note 49, at 4.

52. *Id.* at 4-5.

53. *Id.* at 5-9. The interests cited by the State included: “ensuring the accuracy of vital records; allowing the ADH to compile, maintain, and analyze accurate vital statistics for purposes of public health research and identification of public health trends; and allowing individual identification of personal health issues and genetic conditions.” *Id.* at 8-9.

The Circuit Court of Pulaski County, under Judge Davis Fox, issued a memorandum opinion denying the State's Motion for Summary Judgment with respect to the couples in their individual capacities and granting in part and denying in part the couples' Motion for Summary Judgment in their individual capacities.⁵⁴ First, the court found that the *Wright* injunction was binding on the State as *res judicata* because it had missed two opportunities in its appeal of *Wright* to raise the issue of the injunction's compliance with Rule 65(e) and could not collaterally attack the judgment in the instant proceeding.⁵⁵ Next, the court issued its own judgment declaring the majority of section 20-18-401(e), (f) unconstitutional and ordering an interpretation of section 20-18-406(a)(2) that would be inclusive of same-sex couples.⁵⁶ In its explanation of the legal effect of the judgment, the court passed on a guarantee of broad constitutional rights for same-sex persons and instead defined the "sum total" of the decision's legal effect as a guarantee to the Petitioners of "the same constitutional rights with respect to the issuance of birth certificates and amended birth certificates as opposite-sex couples."⁵⁷ The court specifically found that section 20-18-401(e), (f) "intertwined the concepts of 'parent' with certain rights and presumptions occurring within a marital relationship, using now impermissible limiting spousal terms of 'husband' and 'wife.'"⁵⁸ To Judge Fox, this language "categorically prohibits" same-sex married couples from enjoying spousal benefits equal to those available to opposite-sex couples.⁵⁹ Although the State foreclosed an as-applied challenge by issuing birth certificates

54. *Pavan v. Smith*, No. 60CV-15-3153, 2015 WL 12990015, at *1 (Ark. Cir. Ct. Dec. 1, 2015). The court granted and denied the State's and couples' motions for summary judgment, respectively, "with respect to the claims of the plaintiffs as parents, next friends, and guardians of their respective minor children." *Id.* at *2. The court dismissed with prejudice all causes of action pursued in such "representative capacities." *Id.*

55. *Id.* at *4-5.

56. *Id.* at *5-8.

57. *Id.* at *11.

58. *Id.* at *6.

59. *Pavan*, 2015 WL 12990015, at *6.

naming both spouses of each couple,⁶⁰ it appealed on the other merits.⁶¹

B. ARKANSAS SUPREME COURT HOLDING

The Arkansas Supreme Court reversed and dismissed the Circuit Court's judgment.⁶² The justices were divided 6-1 on some issues and 5-2 on others, but Justice Hart could only gain a majority of four votes for her opinion.⁶³ On the constitutional merits issues, Justice Hart's majority limited *Obergefell* to its basic holding recognizing the right to marriage recognition, and then ruled against the couples on their due process and equal protection claims.⁶⁴ The other three justices were divided between the two very different partial concurrences of Chief Justice Brill and Justice Wood, as well as the full dissent of Justice Danielson.⁶⁵

1. Hart's Majority

First, as to the issue of the *Wright* orders, the Arkansas Supreme Court held that the State was not required to follow the *Wright* injunction due to *Wright*'s lack of specific instructions concerning birth certificates.⁶⁶ The majority reasoned that it does not matter that the State could have raised the issues at certain points in the *Wright* appeal because the language of the *Wright* orders "would not have placed Smith on notice" of a need to raise arguments "related to "the overbreadth of the injunctive relief granted and to the issuance of birth certificates."⁶⁷ As for the Circuit Court's reliance on *Obergefell* to strike or reinterpret the statutes at issue, the state high court majority rejected its analysis,

60. *Smith v. Pavan*, 2016 Ark. 437, at 14, 505 S.W.3d 169, 179.

61. See Amended Notice of Appeal ¶2, at 2, *Pavan v. Smith*, 2015 WL 12990015 (Ark. Cir. Ct. Dec. 1, 2015) (No. 60CV-15-3153).

62. *Pavan*, 2016 Ark. 437, at 2, 505 S.W.3d at 172.

63. *Id.* at 1, 505 S.W.3d at 169.

64. *Id.* at 9-13, 19, 505 S.W.3d at 176-78, 181-82.

65. *Id.* at 21-28, 505 S.W.3d at 183-86 (Brill, C.J., concurring in part and dissenting in part); *id.* at 28-33, 505 S.W.3d at 186-89 (Wood, J., concurring in part and dissenting in part); *id.* at 33-37, 505 S.W.3d at 189-91 (Danielson, J., dissenting).

66. *Id.* at 7, 505 S.W.3d at 175 (majority opinion).

67. *Pavan*, 2016 Ark. 437, at 7, 505 S.W.3d at 175.

favoring the State's narrow interpretation of *Obergefell* which limited the decision to its fundamental holding.⁶⁸

The court then concluded that despite language in *Obergefell* warning against a "slower case-by-case determination of the required availability of specific public benefits to same-sex couples,"⁶⁹ the statutes at issue "pass constitutional muster."⁷⁰ Using plain-meaning construction and a presumption of constitutionality, the court concluded that each of the statutes at issue center "on the relationship of the biological mother and the biological father to the child, not on the marital relationship," even though section 20-18-401(e), (f) uses terms such as "husband" and "wife."⁷¹

Not only did the majority find no language in *Obergefell* which answered the questions presented in the case, but it could find no other support for a facial challenge to the statutory language on due process and equal protection grounds.⁷² The court stated that only one distinct issue was subject to its due process analysis: "whether the birth-certificate statutes as written deny the [couples] due process."⁷³ The scope of the question is narrow because the purpose of the statutes, "to truthfully record the nexus of the biological mother and the biological father to the child," concerned neither the right to same-sex marriage nor the right to be a parent to the child of one's same-sex spouse.⁷⁴ As such, the fundamental rights to marry and make decisions as a parent were irrelevant, and the naming of the nonbiological spouse on a birth certificate was not a fundamental "interest of the person."⁷⁵

In response to the equal protection claim, the court first answered the contention of disparate treatment resulting from the statutes' permission of male spouses to be listed as fathers, "even though the male spouse may not be the child's biological

68. *Id.* at 9-10, 505 S.W.3d at 176-77.

69. *Id.* at 10, 505 S.W.3d at 177 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015)).

70. *Id.*

71. *Id.* at 10-12, 505 S.W.3d at 177-78.

72. *Pavan*, 2016 Ark. 437, at 12-19, 505 S.W.3d at 178-82.

73. *Id.* at 16, 505 S.W.3d at 180.

74. *Id.* at 16-17, 505 S.W.3d at 180.

75. *Id.* at 17, 505 S.W.3d at 180.

father.”⁷⁶ The court countered with the observation that a husband’s designation as the father may be refuted under section 20-18-401(f), “which evidences that the biological connection is what the birth certificate intends to record,” rather than a statement on the marriage of the parents.⁷⁷ Citing United States Supreme Court precedent, the court stated, “[i]t does not violate equal protection to acknowledge basic biological truths.”⁷⁸ The court acquiesced to the couples’ request for heightened scrutiny,⁷⁹ but then applied it in the State’s favor: the statutes serve the “important governmental objective [of] tracing public-health trends and providing critical assistance to an individual’s identification of personal health issues and genetic conditions,” and the requirement on a birth certificate of biological relation of a mother and father to the child was “substantially related to the achievement” of that objective.⁸⁰

In its final comment on the merits of the case, the court addressed an alternative form of relief for the couples raised by the State in its brief and during oral argument: that the court amend Arkansas Code Annotated section 9-10-201(a).⁸¹ The State conceded that this statute, permitting a child conceived by “artificial insemination” to be “deemed the legitimate natural child” of its married mother and the mother’s “husband,” was unconstitutional.⁸² But because the court “is not a legislative body” and because the Circuit Court never ruled on that statute’s constitutionality, the court declined to address the issue.⁸³

76. *Id.*

77. *Pavan*, 2016 Ark. 437 at 17, 505 S.W.3d at 180.

78. *Id.* at 17-18, 505 S.W.3d at 181; *see* *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (“The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”).

79. *Pavan*, 2016 Ark. 437, at 18, 505 S.W.3d at 181.

80. *Id.*

81. *Id.* at 18-19, 505 S.W.3d at 181.

82. *Id.* (quoting ARK. CODE ANN. § 9-10-201(a) (2015)). *See generally infra* Appendix (copy of statutory text).

83. *Pavan*, 2016 Ark. 437, at 18-19, 505 S.W.3d at 181.

2. Brill's Concurrence/Dissent

In his partial concurrence and dissent, Chief Justice Brill argued that the issuance of birth certificates to same-sex married couples “on the same basis” as opposite-sex married couples was “[t]he logical extension of *Obergefell*, mandated by the Due Process Clause and the Equal Protection Clause.”⁸⁴ The Chief Justice presented his argument by framing the issue “in light of three scenarios:” artificial insemination with married couples, artificial insemination with unmarried couples, and adoption.⁸⁵ Each scenario presents two couples, one same-sex with two women and one opposite-sex, who wish to become parents.⁸⁶ This Note will only address the first two scenarios in detail, as the Chief Justice’s solution for the third is trivial: “Under the rationale of *Obergefell*, both married couples are to be treated equally. The law is now gender-neutral. . . .”⁸⁷

In the first scenario, the couples are married.⁸⁸ Each uses ART with an anonymous donor’s sperm, and each woman bearing a child gives birth.⁸⁹ To the Chief Justice, the applicable statute was section 9-10-201(a), the provision which directly addressed artificial insemination and which the majority refused to address.⁹⁰ Under that statute, the sperm donor “has no legal responsibility or rights to the child” of the opposite-sex couple, and the birth certificate would name each member of that couple as a parent, provided that the “husband” has consented in writing to the artificial insemination.⁹¹ But as for the same-sex couple, the statutory language states “husband” instead of “spouse,” excluding that couple from the ability to consent to the

84. *Id.* at 23, 505 S.W.3d at 183-84 (Brill, C.J., concurring in part and dissenting in part).

85. *Id.* at 23-26, 505 S.W.3d at 184-85. The scenario involving unmarried couples was ultimately not pertinent to the United States Supreme Court’s decision, since Courtney Kassell and Kelley Scott, the subjects of the Chief Justice’s second scenario, did not petition for certiorari alongside their co-plaintiffs. *Petition for Writ of Certiorari at II, Pavan v. Smith*, 137 S. Ct. 2075 (2017) (No. 16-992).

86. *Pavan*, 2016 Ark. 437, at 23-24, 26, 505 S.W.3d at 184-85.

87. *Id.* at 26, 505 S.W.3d at 185.

88. *Id.* at 23, 505 S.W.3d at 184.

89. *Id.*

90. *Id.* at 24, 505 S.W.3d at 184.

91. ARK. CODE ANN. § 9-10-201(a) (2015).

insemination for purposes of naming each spouse on the birth certificate.⁹² Given that this first scenario applies to two of the three couples and that the Circuit Court decreed the issuance of their birth certificates pursuant to *Obergefell* without rewriting the artificial insemination statute,⁹³ the Chief Justice “would [have] remand[ed] this part of the circuit court’s order for appropriate action.”⁹⁴

In the second scenario, neither couple is married, but each also uses artificial insemination to conceive and bear children.⁹⁵ Because neither couple is married at the time of artificial insemination, neither may use section 9-10-201(a).⁹⁶ To address these couples, the Chief Justice first asks the question, “[a]fter *Obergefell*, may the burden on the same-sex couple be greater than the burden on the opposite-sex couple?”⁹⁷ To Chief Justice Brill, that burden is palpable within the applicable statute, section 20-18-406(a)(2), because its process for determining that a “person has been legitimated” is “not obvious in the case of a same-sex couple.”⁹⁸ Nonetheless, the Circuit Court “exceeded its authority in giving a court-ordered definition of the phrase ‘person has been legitimated,’” and furthermore “had no basis” to strike section 20-18-401(e), (f).⁹⁹ Even though the Chief Justice stressed that “[l]egislative and executive actions are necessary to provide what *Obergefell* requires,” he concurred with the majority in its refusal to alter or reinterpret the statutes at issue.¹⁰⁰

3. Justice Wood’s Concurrence/Dissent

Justice Wood also joined the court in its reversal of the constitutional challenges to sections 20-19-401 and -406, but

92. *Pavan*, 2016 Ark. 437, at 24, 505 S.W.3d at 184 (quoting ARK. CODE ANN. § 9-10-201(a)).

93. *Id.*

94. *Id.*

95. *Id.* The Chief Justice here draws the term “artificial insemination” directly from the statute. See *supra* note 26.

96. *Pavan*, 2016 Ark. 437, at 24, 505 S.W.3d at 184.

97. *Id.*

98. *Id.* at 25, 505 S.W.3d at 184 (quoting ARK. CODE ANN. § 20-18-406(a)(2) (2014)).

99. *Id.* at 25, 505 S.W.3d at 185 (quoting ARK. CODE ANN. § 20-18-406(a)(2)).

100. *Id.* at 25-26, 505 S.W.3d at 185.

would have remanded the order instead of dismissing it.¹⁰¹ For Justice Wood, a remand would make sense under the federal court doctrine of “prudential-mootness,” which she encouraged the court to adopt.¹⁰² Because the case was “fluctuating and underdeveloped,” the court should have withheld relief in light of “considerations of prudence and comity for coordinate branches of government [that] counsel the court to stay its hand, and to withhold relief it has the power to grant.”¹⁰³ Two developments since the start of litigation, the State’s issuance of relief in the form of “the appropriate birth certificates” and its concession that the artificial insemination statute should comply with *Obergefell*, “render the majority’s decision provisional.”¹⁰⁴ Because there was such a change in both the material facts and the posture of the State, Justice Wood argued that the court should have remanded for the Circuit Court to consider these facts,¹⁰⁵ though she agreed with Chief Justice Brill that the legislature could address the issue as well, especially with the opportunity presented by a remand.¹⁰⁶ Justice Wood also departed with the majority’s interpretation of *Obergefell*, believing that under its equal protection analysis, “states cannot constitutionally deny same-sex couples the benefits of marital status, which include equal access to birth certificates.”¹⁰⁷

4. Justice Danielson’s Dissent

Justice Danielson was the only justice to fully dissent from the majority opinion.¹⁰⁸ He argued that both the *Wright* orders and *Obergefell* compelled the result reached in the Circuit Court’s order.¹⁰⁹ First, Justice Danielson concluded that the *Wright* injunction encompassed “all” the injunctive relief requested by

101. *Pavan*, 2016 Ark. 437, at 28, 505 S.W.3d at 186 (Wood, J., concurring in part and dissenting in part).

102. *Id.*

103. *Id.* (quoting *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997)).

104. *Id.* at 29, 505 S.W.3d at 187.

105. *Id.* at 30-31, 505 S.W.3d at 187-88.

106. *Pavan*, 2016 Ark. 437, at 32, 505 S.W.3d at 188.

107. *Id.* at 32, 505 S.W.3d at 188-89.

108. *Id.* at 33, 505 S.W.3d at 189 (Danielson, J., dissenting).

109. *Id.*

the *Wright* plaintiffs, including the issuance of appropriate birth certificates for children born of same-sex parents.¹¹⁰ Even though the injunction failed to meet the specificity required by Rule 65(d)(1) and (e), Justice Danielson agreed with the Circuit Court that this argument against *Wright* in the instant proceeding is an impermissible collateral attack on the judgment.¹¹¹

Second, Justice Danielson concluded that the language, principles, and history of *Obergefell* show that it extended the benefits of marriage to same-sex couples.¹¹² As applied to this case, he reasoned that *Obergefell* requires “the inclusion of a parent’s name on a child’s birth certificate” to “be accorded to same-sex spouses and opposite-sex spouses with equal force.”¹¹³ He also concluded that the majority’s holding that section 20-18-401(f) “focus[es] on biological relationships rather than marital ones” was in error.¹¹⁴ For parents married “at the time of either conception or birth or between conception and birth,” section 20-18-401(f) presumptively names the “husband” of the mother on the birth certificate as father of the child.¹¹⁵ This parental presumption, made “without regard to any biological relationship and on the sole basis of [the father’s] marriage to the mother,” was enacted for an “obvious” policy: “to legitimate children whenever possible.”¹¹⁶

C. U.S. SUPREME COURT SUMMARY REVERSAL

1. *Per Curiam* Opinion

In the first sentence of its *per curiam* opinion in *Pavan v. Smith*,¹¹⁷ the United States Supreme Court provides a simple explanation for its summary reversal of the Arkansas Supreme Court: “As this Court explained in *Obergefell v. Hodges*, . . . the

110. *Id.* (quoting *Wright v. State*, No. 60CV-13-2662, 2014 WL 1998002, at *1 (Ark. Cir. Ct. May 15, 2014), *appeal dismissed as moot sub nom.* *Smith v. Wright*, 2015 Ark. 298 (per curiam)).

111. *Pavan*, 2016 Ark. 437, at 34, 505 S.W.3d at 189.

112. *Id.* at 34-35, 505 S.W.3d at 189-90.

113. *Id.* at 34-36, 505 S.W.3d at 189-90.

114. *Id.* at 35, 505 S.W.3d at 190.

115. *Id.* at 36, 505 S.W.3d at 190.

116. *Pavan*, 2016 Ark. 437, at 36, 505 S.W.3d at 190.

117. 137 S. Ct. 2075 (2017).

Constitution entitles same-sex couples to civil marriage ‘on the same terms and conditions as opposite-sex couples.’”¹¹⁸ The Court stressed that *Obergefell* contained a “commitment to provide same-sex couples ‘the constellation of benefits that the States have linked to marriage.’”¹¹⁹ It further reasoned that the state court’s decision allows “differential treatment” in that the State of Arkansas “need not . . . issue birth certificates including the female spouses of women who give birth in the State.”¹²⁰ In the Court’s view, the result of the state court’s opinion would be that “same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on the child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school.”¹²¹

In *Obergefell*, the Court “held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples.”¹²² The Court in *Pavan* concluded that this holding “applies with equal force to [Arkansas Code Annotated section] 20-18-401.”¹²³ The Court answered the argument of the State that “a birth certificate is simply a device for recording biological parentage” rather than “a benefit that attends marriage” by pointing to the statute’s *requirement* that the “husband” of the birth mother of a child conceived by anonymous sperm donation be placed on the birth certificate.”¹²⁴ Because the husband “is definitively not the biological father” under such circumstances, Arkansas “has thus chosen to make its birth certificates more than a mere marker of biological relationships.”¹²⁵ The State instead uses the certificates “to give married parents a form of legal recognition that is not available to unmarried parents.”¹²⁶

118. *Id.* at 2076 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)).

119. *Id.* at 2077 (quoting *Obergefell*, 135 S. Ct. at 2601).

120. *Id.*

121. *Id.* at 2078.

122. *Pavan*, 137 S. Ct. at 2078.

123. *Id.*

124. *Id.* (citing Brief for the Respondent in Opposition at 3-4, *Pavan*, 137 S. Ct. 2075 (No. 16-992), 2017 WL 1397395; Petition for Writ of Certiorari at 4, *Pavan*, 137 S. Ct. 2075 (No. 16-992), 2017 WL 587527).

125. *Id.*

126. *Id.* at 2078-79.

2. Justice Gorsuch's Dissent

Justice Gorsuch, joined by Justices Thomas and Alito, dissented in the belief that the case does not warrant “the strong medicine of summary reversal.”¹²⁷ Because summary reversal requires that “the decision below [be] clearly in error,”¹²⁸ he addressed the challenge to section 20-18-401 by limiting the scope of *Obergefell*'s “holding to “the question whether a State must recognize same-sex marriages.”¹²⁹ To Justice Gorsuch, “nothing in *Obergefell* spoke (let alone clearly) to the question whether [section] 20-18-401 . . . must go.”¹³⁰ He was convinced that the rationales for biology-based birth registration regimes proffered by the State “in no way offend *Obergefell*.”¹³¹ In his view, the Arkansas Supreme Court opinion was not an act of defiance, but rather an attempt to “earnestly engage *Obergefell*.”¹³² And “to the extent they speak to the question at all,” precedents suggest that birth registration “based on biology” does not offend the Constitution,¹³³ and the Court’s opinion does not “purport to identify any constitutional problem” with such a regime.¹³⁴

Justice Gorsuch then supposed that the Court issued summary reversal because it was concerned instead with the marriage-based artificial insemination exception to Arkansas’s biology-based birth certificate regime.¹³⁵ Justice Gorsuch had three problems with the use of section 9-10-201(a) for a summary reversal.¹³⁶ First, the couples “didn’t actually challenge [section] 9-10-201 in their lawsuit.”¹³⁷ Second, the State conceded that the benefits of section 9-10-201 “must be afforded equally” to all

127. *Pavan*, 137 S. Ct. at 2079-80 (Gorsuch, J., dissenting).

128. *Id.* at 2079 (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Pavan*, 137 S. Ct. at 2079.

133. *Id.* (citing *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (plurality opinion)).

134. *Id.*

135. *Id.*

136. *Id.* at 2079-80.

137. *Pavan*, 137 S. Ct. at 2079.

couples, meaning that with the issuance of birth certificates to Petitioners and those similarly situated, it is not clear what will “happen on remand that hasn’t happened already.”¹³⁸ Third, in the case of adoption, another exception to the biology-based birth certificate regime, adopting parents are always eligible for placement on birth certificates “without respect to sexual orientation.”¹³⁹ Because section 9-10-201 was not “fairly challenged,” amending that statute by state supreme court order would be “hardly the usual reward for seeking faithfully to apply, not evade, this Court’s mandates.”¹⁴⁰ It is therefore a problem for Gorsuch that this is the only “remedial suggestion” that he can offer and that the Court offers none at all.¹⁴¹

II. TWO RELEVANT LINES OF PRECEDENT

This section summarizes two lines of U.S. Supreme Court precedent relevant to the courts’ reasoning in *Pavan* as the case progressed from the Arkansas Circuit Court to the U.S. Supreme Court. Part A concerns the line of cases leading up to and including *Obergefell* that addressed the importance of the *material benefits* of marriage with respect to a fundamental right to marry.¹⁴² Part B involves the way in which laws based on biological differences should be subject to heightened scrutiny for compliance with equal protection.¹⁴³ As scholars have amply argued, these purportedly “biological” differences are usually based in impermissible generalizations of gender, including social roles and statistical generalities, as well as outright unfounded stereotypes.¹⁴⁴

138. *Id.* at 2080.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See infra* Section II.A.

143. *See infra* Section II.B.

144. *See* sources cited *infra* note 323.

A. THE BENEFITS OF MARRIAGE

1. *Loving, Zablocki, and Turner*

In the six decades before the U.S. Supreme Court seriously considered marriage as a right applicable to same-sex couples, the Court defended the right to marry regardless of the race,¹⁴⁵ child support status,¹⁴⁶ or even imprisonment of a partner.¹⁴⁷ On this last issue, Justice O'Connor, writing for the Court in *Turner v. Safley*, concluded that prison inmates without life sentences were entitled to the right to marry.¹⁴⁸ In reaching the result, the Court drew on a definition of a constitutionally significant marital relationship that incorporates various attendant benefits of marriage.¹⁴⁹

Turner was the culmination of a trilogy of cases establishing and defining the fundamental right to marry.¹⁵⁰ The first of these was *Loving v. Virginia*, in which the Court famously invalidated laws banning interracial marriage.¹⁵¹ That unanimous decision rested on both equal protection and due process grounds, and it was the due process ruling which provided constitutional law with its first post-World War II defense of the marriage right.¹⁵² Yet *Loving* is rooted in the rather traditional rationale of ensuring procreation, a policy expressed in the older cases it cites: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."¹⁵³

145. *Loving v. Virginia*, 388 U.S. 1 (1967).

146. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

147. *Turner v. Safley*, 482 U.S. 78 (1987).

148. *Turner*, 482 U.S. at 95-96; *c.f.* *Butler v. Wilson*, 415 U.S. 953 (1974) (affirming trial court's denial of marriage to inmates sentenced to life imprisonment).

149. *Turner*, 482 U.S. at 95-96.

150. *See id.*; *Zablocki*, 434 U.S. at 384-86; *Loving*, 388 U.S. at 12.

151. *Loving*, 388 U.S. at 12.

152. *Id.*; *see also* *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [due process under the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . .").

153. *Loving*, 388 U.S. at 12 (quoting *Skinner*, 316 U.S. at 541); *see also* *Maynard v. Hill*, 125 U.S. 190 (1888) ("[Marriage] is an institution, in the maintenance of which in its

The second case of the trilogy, *Zablocki v. Redhail*, reaffirms this policy while linking it to the even broader fundamental right to privacy recognized in *Griswold v. Connecticut*.¹⁵⁴ Invalidating a Wisconsin statute which prevented noncustodial parent-obligors of child support from marrying without a court order, the Court recognized marriage's placement on the same level as other decisions of family life, including procreation, childbirth, child rearing, and family relationships.¹⁵⁵ To the Court, it would have made "little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."¹⁵⁶ The Court in *Zablocki* thus linked marriage not only to procreation but also to the social construct of the family overall.¹⁵⁷

In *Turner*, the right of most prisoners to marry, even without the involvement of procreation or children, was protected because the Court recognized an even broader scope to the spousal relationship than it did in *Zablocki*. To the Court, a "constitutionally protected marital relationship" exists because enough "important attributes of marriage" remain "unaffected by the fact of confinement or the pursuit of legitimate corrections goals."¹⁵⁸ Such elements not only include "religious and personal aspects" but also legal "incidents of marriage" including "government benefits (e.g. Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)."¹⁵⁹ Justice O'Connor thus culminated the trilogy of the first modern marriage right cases with a constitutionally

purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.").

154. *Zablocki*, 434 U.S. at 383-84; see *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

155. *Zablocki*, 434 U.S. at 386-87, 390-91 (citing *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977)).

156. *Id.* at 386.

157. *Id.*

158. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

159. *Id.*

significant definition of marriage made partly in terms of the benefits conferred on the union by the government.¹⁶⁰

2. *United States v. Windsor*

In *United States v. Windsor*, the Court invalidated section 3 of the Defense of Marriage Act (“DOMA”), which limited the federal definition of “marriage” to opposite-sex couples.¹⁶¹ The statute thus denied the application of over 1,000 federal statutes and regulations to lawfully married same-sex couples.¹⁶² The plaintiff, Edith Windsor, filed suit to challenge the constitutionality of DOMA because it barred her from claiming a federal benefit of marriage to her late spouse, the estate tax exemption for surviving spouses.¹⁶³ Justice Kennedy, writing for the Court, stated his argument in two components. First, DOMA departed from the “history and tradition of reliance on state law to define marriage” to the end of injuring a class protected by a state.¹⁶⁴ Second, this disruption of “the federal balance” violated both Due Process and Equal Protection principles under the Fifth Amendment by evidencing “a bare congressional desire to harm a politically unpopular group.”¹⁶⁵

DOMA’s effect on federal benefits was a central consideration for Justice Kennedy in both of these component arguments.¹⁶⁶ By its interference with the States’ interest in “the definition and regulation of marriage,” DOMA rejected “the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary . . . from one State to the next.”¹⁶⁷ That DOMA deviated from such tradition and operated to “deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages” was cited as strong evidence of DOMA’s impermissible “purpose and effect of

160. *Id.* at 95-96.

161. *United States v. Windsor*, 570 U.S. 744, 749-52 (2013).

162. *Id.* at 752.

163. *Id.* at 753.

164. *Id.* at 767-68.

165. *Id.* at 770 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

166. *Windsor*, 570 U.S. at 752, 768-70.

167. *Id.* at 768.

disapproval” of same-sex married couples.¹⁶⁸ By the operation of denial of benefits, DOMA forced same-sex couples to live “unmarried for the purpose of federal law” even with a state license, and thus “DOMA undermine[d] both the public and private significance of state-sanctioned same-sex marriages.”¹⁶⁹

3. *Obergefell v. Hodges*

The Court made its attention to the state-provided benefits of marriage more explicit as it held, in *Obergefell v. Hodges*,¹⁷⁰ that same-sex couples were entitled to civil marriage “on the same terms and conditions as opposite-sex couples.”¹⁷¹ Eight of the case’s fourteen plaintiff couples, and both plaintiff widowers, challenged a state’s refusal to recognize an out-of-state marriage license because the state denied the benefits which would accompany such a license.¹⁷² The widowers, James Obergefell and David Michener, filed an injunction to require Ohio to list their names as spouses on their husbands’ death certificates.¹⁷³ Four other Ohio couples sought recognition of their marriages on their children’s birth certificates, and argued that Ohio’s refusal to recognize their marriages violated the Fourteenth Amendment “no matter what marital benefit [was] affected.”¹⁷⁴ Four Kentucky couples sought to enjoin that state’s recognition ban while citing its associated hardships, including “loss of tax breaks” and “exclusion from intestacy laws.”¹⁷⁵ Indeed, Justice Kennedy’s opinion for the Court characterized the petitioners’ motive for seeking recognized marriage as “their respect—and need—for its *privileges* and responsibilities.”¹⁷⁶

In its recognition of marriage as a fundamental right protected under the Equal Protection and Due Process clauses of the Fourteenth Amendment, the Court cited four “principles and

168. *Id.* at 770.

169. *Id.* at 772.

170. 135 S. Ct. 2584 (2015).

171. *Id.* at 2593, 2605.

172. *Deboer v. Snyder*, 772 F.3d 388, 397-99 (6th Cir. 2014), *rev’d sub nom.*

Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

173. *Obergefell*, 135 S. Ct. at 2594; *Deboer*, 772 F.3d at 398.

174. *Deboer*, 772 F.3d at 398.

175. *Id.*

176. *Obergefell*, 135 S. Ct. at 2594 (emphasis added).

traditions” of its jurisprudence in its characterization of the right.¹⁷⁷ The fourth and final listed principle involved the nature of marriage as “a keystone of our social order.”¹⁷⁸ The Court explained that because marriage is such an essential institution of American society, “society pledge[s] to support the couple, offering symbolic recognition and *material benefits* to protect and nourish the union.”¹⁷⁹ Although the Court noted that “States are in general free to vary the benefits they confer on all married couples,” it drew a list of specific “governmental rights, benefits, and responsibilities” of which states have “made marriage the basis.”¹⁸⁰ Thus the denial of “the constellation of benefits that the States have linked to marriage” to same-sex couples is itself a “harm [that] results in more than just material burdens.”¹⁸¹

The dissenting opinions did not deny that the availability of government benefits was an aspect of marriage.¹⁸² Chief Justice Roberts noted his belief that his equal protection analysis, which was not favorable to same-sex marriage in general, “might be different . . . if [the Court was] confronted with a more focused challenge to the denial of certain tangible benefits.”¹⁸³ Likely as a counter to this suggestion, the Court cautioned, “Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.”¹⁸⁴ Justice Alito,

177. *Id.* at 2599-2602.

178. *Id.* at 2601.

179. *Id.* at 2601 (emphasis added).

180. *Id.* The Court listed several examples of such “aspects of marital status:”

[T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; *birth and death certificates*; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.

Id. (emphasis added).

181. *Obergefell*, 135 S. Ct. at 2601.

182. *Id.* at 2623, 2626 (Roberts, C.J., dissenting); *id.* at 2641 (Alito, J., dissenting); *id.* at 2630 (Scalia, J., dissenting); *id.* at 2631, 2634-37 (Thomas, J., dissenting).

183. *Id.* at 2623 (Roberts, C.J., dissenting). Although the following remark may be interpreted as sarcasm, the Chief Justice also invited those who support same-sex marriage to “[c]elebrate the availability of new benefits.” *Id.* at 2626.

184. *Id.* at 2606 (majority opinion).

meanwhile, in his defense of a “traditional” definition of marriage linked to procreation, framed the definitional arguments of the “different schools of philosophy” as explanations for “why society should formalize marriage and *attach special benefits* and obligations to persons who marry.”¹⁸⁵

Justices Scalia and Justice Thomas characterized the benefits described by the court as “entitlements.”¹⁸⁶ But while Justice Scalia briefly dismissed such benefits as part of his rebuttal to the Court’s conception of substantive due process,¹⁸⁷ Justice Thomas framed a large portion of his argument as a philosophical rejection of liberty as “entitlement to government benefits.”¹⁸⁸ And just as the Court did, so Justice Thomas characterized the petitioners’ claims in terms of specific benefits, including “the State’s *imprimatur*” in the form of “marriage licenses, death certificates, and other official forms.”¹⁸⁹

B. BIOLOGICAL DIFFERENCES AND EQUAL PROTECTION

In his defense of purely biology-based birth registration, Justice Gorsuch relies on a constitutional history of cases which uphold gender discrimination in regulation of the family on the basis of purported biological factors.¹⁹⁰ Yet the caselaw is neither unanimous nor confident in its acceptance of biological distinctions,¹⁹¹ and one of the opinions Justice Gorsuch cites, *Nguyen v. INS*,¹⁹² inspired a particularly strong dissent from Justice O’Connor and a large body of scholarly criticism.¹⁹³ The

185. *Id.* at 2641 (Alito, J., dissenting) (emphasis added).

186. *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting); *id.* at 2631 (Thomas, J., dissenting).

187. *See id.* at 2630 (“What say? What possible ‘essence’ does substantive due process ‘capture’ in an ‘accurate and comprehensive way’? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. . . . Hardly a distillation of essence.”).

188. *Id.* at 2631, 2634-37.

189. *Id.* at 2636.

190. *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (citing *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *Michael H. v. Gerald D.*, 491 U.S. 110, 124-125 (1989) (plurality opinion)).

191. *See infra* Section II.B.i-ii.

192. 533 U.S. 53 (2001).

193. *See id.* at 74 (O’Connor, J., dissenting); sources cited *infra* note 313.

currency of *Nguyen* as a defense of biology-based sex discrimination is also limited by *Sessions v. Morales-Santana*, a decision filed only two weeks before *Pavan*.¹⁹⁴ Examining this background, the analysis below first addresses the history of cases relying on biological distinctions prior to *Nguyen*,¹⁹⁵ followed by the cases striking down gender discrimination laws that rely on stereotypes,¹⁹⁶ and finally the opinions in *Nguyen* and *Morales-Santana*.¹⁹⁷

1. The “Biological” Difference Between Mothers and Fathers

In its early application of the heightened scrutiny of *Craig v. Boren*,¹⁹⁸ the Court tended to tolerate gender differentiation on the basis of “biological” differences, particularly where the laws affected parenthood or were otherwise related to reproductive biology.¹⁹⁹ In fact, the Court at least once explicitly applied what Kim Shayo Buchanan terms the “sex discount” of equal protection review.²⁰⁰ While upholding a statute precluding fathers from suing for wrongful death of illegitimate children in *Parham v. Hughes*, the plurality held that minimal rational-basis review applies to sex discrimination unless there is some indication of “invidious discrimination.”²⁰¹ In a companion case, *Caban v. Mohammed*, dissenting Justices Stewart and Stevens linked their votes in the plurality of *Parham* to the supposed “biological” differences between mothers and fathers in parenthood.²⁰²

194. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692-93 (2017).

195. See *infra* Section II.B.i.

196. See *infra* Section II.B.ii.

197. See *infra* Section II.B.iii-iv.

198. That well-traveled heightened scrutiny standard commands that gender discrimination serve “important governmental objectives” and bear a substantial relationship to those interests. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

199. See Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1176-81 (2010).

200. *Id.* at 1149.

201. *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (plurality opinion). Justice Powell arrived at the same result by purporting to apply intermediate scrutiny, supplying the decisive vote. *Id.* at 359-61 (Powell, J., concurring in the judgment).

202. *Caban v. Mohammed*, 441 U.S. 380, 397-99 (1979) (Stewart, J., dissenting); *id.* at 404 (Stevens, J., dissenting); see also *Parham*, 441 U.S. at 354-55 (plurality opinion).

In *Lehr v. Robertson*, the Court further reasoned from purportedly “biological” principles to raise the bar of legal recognition for unwed fathers above that of unwed mothers.²⁰³ In *Lehr*, Justice Stevens quoted Justice Stewart’s *Caban* dissent on behalf of the Court: “The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures.”²⁰⁴ That bar was justified by the assumption that “for women,” as Professor Douglas NeJaime has described it, “the social aspects of parenthood . . . flow inevitably from the biological.”²⁰⁵

Yet it should be noted that one of the cases that Justice Gorsuch cited to support birth registration regimes “based on biology” did not privilege biological relationships.²⁰⁶ In *Michael H. v. Gerald D.*, the Court upheld California’s conclusive marital presumption as applied *against* a biological father attempting to assert parentage over a child born from his extramarital affair without the consent of the mother and her husband.²⁰⁷ Ironically, when Justice Scalia, in his plurality opinion, declared that “California law, like nature itself, makes no provision for dual fatherhood,”²⁰⁸ he protected a purely social parenthood sanctioned by marriage above a biological parenthood that actually involved significantly greater social investment.²⁰⁹ In the specific passage of *Michael H.* cited by Justice Gorsuch in *Pavan*,²¹⁰ Justice Scalia claimed that this presumption of legitimacy for the husband over the natural father “was a fundamental principle of the common law,” and that there was nothing in such “older sources . . . addressing specifically the power of the [unwed] natural father to assert parental rights” superior to those of the husband.²¹¹ *Michael H.* therefore follows

203. *Lehr v. Robertson*, 463 U.S. 248 (1983).

204. *Id.* at 260 n.16 (1983) (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

205. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. J. 2260, 2280 (2017).

206. *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (plurality opinion)).

207. *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989) (plurality opinion).

208. *Id.* at 118.

209. *Id.* at 113-15, 124.

210. *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting) (citing *Michael H.*, 491 U.S. at 124-25).

211. *Michael H.*, 491 U.S. at 124-25.

from a history supporting a doctrine that discounts, rather than supports, biological connections.²¹²

2. *The Anti-Stereotyping Principle*

There were other cases in which the Court instead decided to reject stereotypes and assumptions about the capacities of men and women in all situations. In *Craig v. Boren*, the intermediate-scrutiny standard was forged to overturn Oklahoma's sex-differentiated drinking ages in part because "social stereotypes" were likely to "distort the accuracy" of the state's purportedly empirical statistical methodologies.²¹³ Cases prior to *Craig* had already invalidated various parental restrictions on fathers because of their motivation from similar stereotypes of the social roles of the sexes.²¹⁴ *Weinberger v. Wiesenfeld*, in which a husband and stay-at-home father dependent on his wife's earnings fought for "mother's benefits" after her death, was particularly remembered by his attorney, Ruth Bader Ginsburg, as the "most critical" sex discrimination case decided in the 1970s.²¹⁵

Shortly after appointment to the Court, Justice Ginsburg would refine this anti-stereotyping doctrine with her majority opinion in *United States v. Virginia*, the case which opened the Virginia Military Institute (VMI) to enrollment of women.²¹⁶ That opinion affirmed the "exceedingly persuasive justification," a somewhat higher form of intermediate scrutiny for gender

212. *See id.* at 140 (Brennan, J., dissenting) (noting that common law conclusive marital presumption was formed in a time before blood tests could accurately prove paternity); *see also id.* at 161 (White, J., dissenting) ("[W]e have now clearly recognized the use of blood tests as an authoritative means of evaluating allegations of paternity.").

213. *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976).

214. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-39 (1975) (invalidating statute on due process grounds which provided social security benefits based on earnings of deceased spouse only to widows and children, excluding widowers); *Stanley v. Illinois*, 405 U.S. 645, 657-59 (1972) (concluding on both due process and equal protection grounds that unmarried fathers are entitled to the same proceedings on parental fitness as unwed mothers in dependency proceedings).

215. Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL'Y 41, 43 (1986); *see also* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 NYU L. REV. 83, 132-42 (2010) (detailing history of *Wiesenfeld* and other Burger Court cases establishing the anti-stereotyping doctrine).

216. *United States v. Virginia*, 518 U.S. 515, 519 (1996).

classification which the Court first articulated in *Mississippi University for Women v. Hogan*.²¹⁷ By rejecting the state of Virginia's weak reasoning—that women could not generally cope with the “[p]hysical rigor, mental stress,” and other challenges of VMI's “adversative method”²¹⁸—Justice Ginsburg condemned and barred justifications relying on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”²¹⁹

In the case of VMI, because *some* women could bridge the physical gap and handle the social and psychological challenges of the adversative method, no proffered general difference between men and women could persuade the Court to allow exclusively male admission.²²⁰ As for whatever “inherent differences” between the sexes remain, they are “cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.”²²¹ To the Court, one example of permitted gender classification would be operating a single-sex college designed “to dissipate, rather than perpetuate, traditional gender classifications.”²²² The Court thus applies the “exceedingly persuasive justification” review and anti-stereotyping doctrine to all gender classifications, including those implicating “real” differences, as both sword and shield against gender inequality.²²³ It would be a sword for plaintiffs to challenge governmental institutions relying on “overbroad generalizations” of gender, and it would be a shield for governments seeking to deconstruct gender roles through legitimate gender classifications.²²⁴

217. *Id.* at 532-33 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

218. *Id.* at 577 (Scalia, J., dissenting) (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

219. *Id.* at 533, 550-51 (majority opinion).

220. *Id.* at 550-51.

221. *Virginia*, 518 U.S. at 533.

222. *Id.* at 533 n.7 (quoting Brief of Twenty-six Private Women's Colleges as Amici Curiae in Support of Petitioner at 5, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107), 1995 WL 702837).

223. *Id.* at 549, 556.

224. *See id.* at 533.

3. *Nguyen v. INS*

Yet Justice Kennedy would later turn Justice Ginsburg's affirmation of the "[p]hysical differences between men and women" back onto her and the other dissenters in *Nguyen v. INS*.²²⁵ At issue was the constitutionality of an immigration statute which puts a greater burden on the citizenship claim for a nonmarital child when the child has a citizen father and a noncitizen mother.²²⁶ If the citizen parent is the mother, the child acquires the mother's nationality status at birth.²²⁷ But for his child's citizenship, the citizen father must not only prove a biological connection by clear and convincing evidence,²²⁸ but also provide additional evidence of his social bond, such as legitimation, a written acknowledgment of paternity, or adjudication of paternity.²²⁹

The Court had previously considered this statute in *Miller v. Albright* and did not hold it unconstitutional, but the majority was split between three opinions of two justices each.²³⁰ Justice Stevens, joined only by Chief Justice Rehnquist in his opinion announcing the judgment, believed that the anti-stereotyping principle of *Virginia* was only "indirectly involved in this case" and that none of the premises of the statutory classification could be "fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex."²³¹ Justice Stevens concluded that "[t]he biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands."²³²

In *Nguyen*, Justice Kennedy confirmed the applicability of that biological basis on behalf of a slim, 5-4 majority.²³³ There,

225. *Nguyen v. INS*, 533 U.S. 53, 68 (2001) (quoting *Virginia*, 518 U.S. at 533).

226. *Id.* at 57-58.

227. 8 U.S.C. § 1409(c) (2012).

228. 8 U.S.C. § 1409(a)(1).

229. 8 U.S.C. § 1409(a)(4).

230. *Miller v. Albright*, 523 U.S. 420, 423-24 (1998) (Stevens, J.); *id.* at 445 (O'Connor, J., concurring in the judgment); *id.* at 452 (Scalia, J., concurring in the judgment).

231. *Id.* at 442, 444-45 (Stevens, J.).

232. *Id.* at 445.

233. *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

the Court purported to apply the standards of intermediate scrutiny, including the “exceedingly persuasive justification” standard of *Hogan* and *Virginia*.²³⁴ The Court then offered two important governmental interests for the statutory distinction between children of unwed citizen fathers and citizen mothers.²³⁵ The first was “assuring that a biological parent-child relationship exists.”²³⁶ Justice Kennedy observed that this relation was “verifiable from the birth itself” in the mother’s case, but that the father “need not be present at birth” and cannot incontrovertibly verify paternity even with his presence.²³⁷ The Court rejected the challengers’ argument that it substitute gender-neutral DNA testing, as Congress was not constitutionally required to “elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method.”²³⁸

The second important interest was to ensure the “opportunity” for a parent-child relationship consisting of “real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”²³⁹ For a citizen mother, such “opportunity” exists at the “initial point of contact” of birth.²⁴⁰ But that opportunity is not a “biological inevitability” for an unwed citizen father.²⁴¹ The Court expressed a particular concern that a father might not know that he has a child and that a mother might not know the father’s identity.²⁴² The Court then provided another reason to reject the exclusive use of DNA testing: that the proof of biological paternity “does nothing, by itself, to ensure contact between father and child during the child’s minority” and thereby satisfy the government interest in social opportunity.²⁴³

234. *Id.* at 60-61, 70.

235. *Id.* at 62-68.

236. *Id.* at 62-64.

237. *Id.* at 62.

238. *Nguyen*, 533 U.S. at 63.

239. *Id.* at 64-65.

240. *Id.* at 65.

241. *Id.*

242. *Id.*

243. *Nguyen*, 533 U.S. at 67.

At the conclusion of his analysis of the interests, Justice Kennedy rejected the notion that the statute was based in gender stereotypes because it was not a conclusion of “irrational or uncritical analysis” to recognize that “the mother’s knowledge of the child and the fact of parenthood [are] established [at birth] in a way not guaranteed in the case of the unwed father.”²⁴⁴ To support the constitutional relevance of this observation, the Court cited Justice Ginsburg’s statement in *Virginia* that “[p]hysical differences between men and women . . . are enduring.”²⁴⁵

In her vigorous dissent, Justice O’Connor criticized the Court on two fronts: first, the Court failed to apply the proper standard of review; and second, the Court concealed and applied the kinds of stereotypes that heightened scrutiny is designed to eliminate.²⁴⁶ She emphasized that under intermediate scrutiny, unlike rational basis review, the government has the burden to prove an exceedingly persuasive justification, which means at least an important, *actual* government interest and a means of classification *substantially related* to that interest.²⁴⁷ Another difference between heightened scrutiny and rational basis review is the relevance of the availability of non-discriminatory alternatives.²⁴⁸ Neither interest asserted by the Court had a substantial fit,²⁴⁹ and one, the guarantee of “opportunity” for a social parental bond, was diluted in weight from the actual interest asserted by INS in formal proof of the bond in itself.²⁵⁰ The requirement of proof for that opportunity also did not substantially further the opportunity.²⁵¹ Sex-neutral alternatives, such as DNA tests or documentation of the father’s presence at birth, would be more effective in ensuring a biological record or the opportunity for a parental relationship.²⁵²

But Justice O’Connor’s most damning argument was her demonstration that the government interest in the goal of a “real,

244. *Id.* at 68.

245. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

246. *Id.* at 74, 83-91 (O’Connor, J., dissenting).

247. *Id.* at 74-75.

248. *Nguyen*, 533 U.S. at 82-83.

249. *Id.* at 80, 88.

250. *Id.* at 84-85.

251. *Id.* at 85.

252. *Id.* at 80-81, 86.

practical relationship” was only related to the statute by means of a stereotype.²⁵³ The Court’s appeals to “biological” reality cover for a generalization “that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.”²⁵⁴ This generalization, that the mother was the “natural guardian” of the nonmarital child, was Congress’s actual motivation, just as it had been the force behind centuries of common-law and statutory family regimes.²⁵⁵ The Court “relies on ‘the very stereotype the law condemns,’ ‘lends credibility’ to the generalization, and helps to convert that ‘assumption’ into a ‘self-fulfilling prophecy.’”²⁵⁶ Even the Court’s definition of a stereotype to exclude only irrational “frame[s] of mind” was constitutionally misframed.²⁵⁷ Ever since *Wiesenfeld*, the Court had historically invalidated overbroad generalizations with empirical support “when more accurate and impartial functional lines [could] be drawn.”²⁵⁸

4. *Sessions v. Morales-Santana*

In *Morales-Santana*, the Court appeared to vindicate Justice O’Connor’s view of the anti-stereotyping principle when it struck down a gender differential in immigration law related to the statute at issue in *Nguyen*.²⁵⁹ Under the applicable immigration rules, if a married couple of mixed citizenship had a child born abroad, the child would become a citizen if the citizen parent was physically present in the United States for five years before birth, two of which after age 14.²⁶⁰ This avenue was not open for unwed citizen fathers, but the presence requirement was lowered to one year before birth, with no age bracket, for unwed citizen

253. *Nguyen*, 533 U.S. at 88-89.

254. *Id.* at 89 (quoting *Miller v. Albright*, 523 U.S. 420, 482-83 (1998) (Breyer, J., dissenting)).

255. *Id.* at 91-92 (quoting *To Revise and Codify the Nationality Laws of the United States: Hearings on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess., 431 (1940)).

256. *Id.* at 89 (citations omitted).

257. *Id.* at 89-90.

258. *Nguyen*, 533 U.S. at 90 (quoting *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting)).

259. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

260. 8 U.S.C. § 1401(g) (2012).

mothers.²⁶¹ In her majority opinion, Justice Ginsburg marked this disparity as “gender-based” and “gender-biased.”²⁶² In doing so, she applied both the *Virginia* heightened scrutiny formulation of the “exceedingly persuasive justification” and an additional requirement that a classification “must substantially serve an important governmental interest *today*.”²⁶³ The latter derives from Justice Kennedy’s observation in *Obergefell* that in equal protection analysis, the Court has historically “recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.”²⁶⁴

The immigration statute’s differential treatment between both men and women and the married and unmarried was justified at its inception on the same “untenable” notion of the mother as “natural and sole guardian of a nonmarital child” that was condemned by Justice O’Connor’s dissent in *Nguyen*.²⁶⁵ While the Court recognized this rationale as the kind of “overbroad generalizations” of gender “roles and abilities” that could not survive heightened scrutiny, it notably did not consider that the statute had any “biological” basis.²⁶⁶ The Court explicitly mentioned *Nguyen* to distinguish rather than overrule it, but only to point out that the parental-acknowledgment requirement was not contested and was also “minimal” in comparison to the physical-presence requirement.²⁶⁷

III. ARGUMENT

A. THE ARKANSAS MAJORITY OPINION WAS “CLEARLY IN ERROR”

Although a majority of the Supreme Court has never articulated any clear standard of review for summary reversals, Justice Gorsuch does not have an easy argument against the

261. 8 U.S.C. § 1409(c) (2012).

262. *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Califano v. Westcott*, 443 U.S. 76, 84 (1979)).

263. *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

264. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2603).

265. *Id.* at 1690-91.

266. *Id.* at 1692.

267. *Morales-Santana*, 137 S. Ct. at 1694.

Court's decision here even with the standard he suggests. Summary reversal, where the Court decides the merits of the case simultaneously with its grant of certiorari, has long been criticized,²⁶⁸ even if the practice is currently accepted.²⁶⁹ It is "well established" that the Court "has never been[] primarily concerned with the correction of errors in lower court decisions."²⁷⁰ Because the Court primarily acts in a lawmaking capacity, it can also be problematic when a summary opinion makes law, as it is "poorly suited to the task," having had no merits briefing and oral argument.²⁷¹

The opinion which Justice Gorsuch cites in *Pavan*,²⁷² from *Schweiker v. Hansen*,²⁷³ was one of many dissents by Justice Marshall challenging the perceived abuse of summary disposition by the Burger and early Rehnquist Courts.²⁷⁴ In his most elaborate statement against the practice in *Montana v. Hall*, Justice Marshall suggested that because "*per curiam*" means "[b]y the court," such opinions should be used only to "speak for the entire Court on a matter so clear that the Court can and should speak with one voice."²⁷⁵ Otherwise, summary disposition "deprive[s] the litigants of a fair opportunity to be heard."²⁷⁶ This is only one of a variety of arguments advanced by Justices across the ideological spectrum against summary reversals both in specific cases and in general.²⁷⁷

Although it is now generally accepted that summary disposition is appropriate for correcting clearly erroneous lower

268. Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 592-93 (2016) (summarizing history of summary reversal up to the Roberts Court).

269. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 352 (10th ed. 2013).

270. Alex Hemmer, Student Essay, *Courts as Managers: American Tradition Partnership v. Bullock and Summary Disposition at the Roberts Court*, 122 YALE L.J. ONLINE 209, 212 (2013) (quoting Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), in 69 S. Ct. v, vi (1949)).

271. *Id.* at 212-13.

272. *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting).

273. 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

274. See *Montana v. Hall*, 481 U.S. 400, 405 & n.1 (1987) (Marshall, J., dissenting) (collecting cases).

275. *Id.* at 409.

276. *Id.* at 405.

277. See Hemmer, *supra* note 270, at 219-23, 211 n.9 (collecting and analyzing summary dispositions).

court decisions,²⁷⁸ recent scholarship has been critical of the Roberts Court's relatively high ratio of summary reversal.²⁷⁹ One explanation is that the Court is acting in a "managerial capacity:" that summary disposition is "a tool to manage and oversee" an ever-larger docket of cert petitions.²⁸⁰ Though such caseload-trimming has the procedural advantages of a more efficient rate of disposition, swift correction of egregious legal error, and conservation of the Court's finite resources,²⁸¹ it also sometimes results in arguably imprudent decisions on the facts or careless lawmaking.²⁸² As Alex Hemmer argues, the Roberts Court's disposition of "notably fact-bound" cases runs against a tradition of denying review to such cases,²⁸³ and lawmaking without adversarial presentation and plenary review runs the risk of "rendering erroneous or ill-advised decisions that may confuse the lower courts."²⁸⁴ Hemmer argues that although "the benefits of a managerial approach are clear," the Court should introduce restrictions on summary disposition to control the risk of error.²⁸⁵

Yet Hemmer also notes the curious disposition of one such "managerial" case, *American Tradition Partnership, Inc. v. Bullock*,²⁸⁶ that was neither fact-bound nor legally contested, but rather simply partisan in posture.²⁸⁷ There, the Court, with five votes, summarily reversed the Supreme Court of Montana because the state court upheld an election statute which, with "no serious doubt,"²⁸⁸ was subject to and violated *Citizens United v.*

278. SHAPIRO ET AL., *supra* note 269, at 234.

279. See Hartnett, *supra* note 268, at 593-94 ("[T]he odds of having a Supreme Court merits decision handled summarily rather than with full briefing and argument are considerably greater than having a Supreme Court merits decision at all."); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1207 ("In the first six years of Chief Justice Roberts's tenure, almost nine percent of the Court's full opinions were per curiams.").

280. Hemmer, *supra* note 270, at 210.

281. *Id.* at 213.

282. See *id.* at 219-23.

283. *Id.* at 219 (quoting *Cavazos v. Smith*, 565 U.S. 1, 16 (2011) (Ginsburg, J., dissenting)).

284. *Id.* at 222 (quoting *Harris v. Rivera*, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting)).

285. Hemmer, *supra* note 270, at 223-24.

286. 567 U.S. 516 (2012) (per curiam).

287. Hemmer, *supra* note 270, at 224.

288. *Bullock*, 567 U.S. at 516.

FEC.²⁸⁹ The four-member dissent did not only refuse to accept *Citizens United* on its constitutional merit.²⁹⁰ It also saw that “Montana’s experience, like considerable experience elsewhere” with independent campaign expenditures by corporations, “casts grave doubt on the Court’s supposition” of the incorruptible nature of independent expenditures.²⁹¹ Though the violation was indeed clear, and the majority clearly saw the law as “settled and stable,” the dissent “certainly saw the law as anything but settled and stable,” either because *Citizen’s United* was bad law at its inception or because the emerging facts of campaign financing discredited the decision’s value.²⁹²

In *Pavan*, Justice Gorsuch does accuse the Court of answering an unsettled legal question with bad lawmaking.²⁹³ While the Court’s lawmaking exercise appears to have broad strokes, Justice Gorsuch is effectively only disputing the language of settled law with bare assertions of interpretation. His first dispute with the Court concerns the scope of *Obergefell*: Justice Gorsuch does not believe that *Obergefell* spoke “clearly,” or at all, to the validity of Arkansas Code Annotated section 20-18-401.²⁹⁴ By limiting *Obergefell* to its protection of marriage recognition, Justice Gorsuch echoes the concern of the Arkansas Supreme Court that the Circuit Court “conflated distinct categories” of marriage and other rights when the latter invalidated the statute.²⁹⁵

Yet the Court’s decision is supported by more than a concern for the limitation of its own holdings. Early cases recognizing the right to marry, from *Maynard v. Hill* to *Loving*, all linked the importance of marriage to the *social necessity* of procreation within marriage.²⁹⁶ As discussed previously, *Zablocki* went further and linked the right to marry with fundamental *rights* to

289. *Id.* (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (2010)).

290. *Id.* at 517 (Breyer, J., dissenting).

291. *Id.*

292. Hemmer, *supra* note 270, at 224.

293. *See Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting).

294. *Id.*

295. *Smith v. Pavan*, 2016 Ark. 437, at 16-17, 505 S.W.3d 169, 180.

296. *See cases cited supra* notes 150-153.

procreation and to other incidents of the family.²⁹⁷ States administer birth certificates partly to record procreation or adoption and ensure that the state gives parents all available public benefits of having children within marriage.²⁹⁸ Because birth certificates are thus historically attendant on rights to the incidents of the family,²⁹⁹ it does not make constitutional sense to deny a birth certificate which fully recognizes a marriage where the spouses mutually consent to the biological parenthood of one and the functional parenthood of both. Such a position becomes even less constitutionally tenable once one takes *Turner* into account. In *Turner*, Justice O'Connor lists the "legitimation of children born out of wedlock" as one of the legal incidents of the protected marriage relationship.³⁰⁰ As birth certificates are the primary record of such legitimacy,³⁰¹ the legitimizing purpose of marriage is certainly thwarted if both spouses cannot list their names on a birth certificate for a child they conceived *within* the marriage.

Obergefell itself cites all of these cases and yet does even more to ensure an equality of benefits between same-sex couples.³⁰² In the same sentence in *Obergefell* where the Court unambiguously makes a binding holding by overruling *Baker v. Nelson*, it fashions a remedy: "[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage *on the same terms*

297. *Zablocki v. Redhail*, 434 U.S. 374, 385-86 (1978) (citing *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977)).

298. See Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 396-98 (2014) ("The birth certificate assigns, memorializes, and codifies the parent-child relationship as the law constructs it. This creates a range of protections, freedoms, benefits, and obligations for the parents and the child."); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J.C.R. & C.L. 201, 213 (2009) ("[O]ur laws facilitate the formation of legal parental relationships within the context of adult relationships recognized by law. This method of assigning legal parentage is grounded in the expectation that the two members of the legally cognizable adult relationship will raise the child.").

299. Appell, *supra* note 298, at 396-97.

300. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

301. See Appell, *supra* note 298, at 393 ("The birth certificate literally signifies legitimacy (or a lack thereof). . . . [T]he birth certificate continues to track the legal relationship status of a child's parents—a status that can affect the rights (and disabilities) a child will have.").

302. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2601 (2015).

and conditions as opposite-sex couples.”³⁰³ In the previous two sentences, the Court made its basic holding that the liberty of marriage could no longer be denied to same-sex couples.³⁰⁴

Justice Gorsuch would have this be the only holding of *Obergefell* and have that last sentence remain as dicta.³⁰⁵ But the prescribed remedy is also a holding because it is the only remedy the Court lays down.³⁰⁶ Its unambiguous plain language extends beyond marriage recognition alone to the entire contract between the married family and society.³⁰⁷ With the support of the full factual and procedural context of *Obergefell*, the Court in *Pavan* concluded that this holding was correct.³⁰⁸ Precedent dating back to *Turner* (and *Zablocki*, if only for benefits attending procreation) further supports the Court’s holding.³⁰⁹ Justice Gorsuch, on the other hand, offers no support for his implied

303. *Id.* at 2604-05 (emphasis added).

304. *Id.* at 2604.

305. *See Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting).

306. One of the narrowest definitions of “holding” as opposed to “dicta” is the “necessity” definition: those parts of the opinion that are “necessary” to the result. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 223 & nn.24-26 (2010). If we define the Court’s “same terms and conditions” remedy in *Obergefell* as the remedy, *Obergefell*, 135 S. Ct. at 2605, then under a broad definition of “necessary to the result,” that remedy is the holding because it *is* the result. *See* Stinson, *supra*, at 223 (internal quotations omitted). But as scholars have noted, taking the necessity approach to its logical conclusion would “not allow a case to have precedential weight as applied to any other case.” Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661, 676 (2018). For that reason, modern scholars reject both the “necessity” approach and the “pure” limitation of a case to its facts and outcome. *Id.* at 674-75, 704. Yet under the more manageably narrow “material” facts-and-outcome approach suggested by Arthur Goodhart—which finds the “principle of the case” in the facts treated as material and the decision based on them—the *Obergefell* remedy is still a holding. Arthur Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 181-83 (1930). Goodhart’s most relevant principle of “materiality” here is that “[i]f the opinion does not distinguish between material and immaterial facts,” then all facts in an opinion are material. *Id.* at 182. Because *Obergefell* neither explicitly delineates material facts nor “impliedly treats” particular facts as immaterial, *see id.*, one may conclude that the plaintiffs’ desire for marital benefits and the “aspects of marital status” listed by the Court were both “material” facts. *Obergefell*, 135 S. Ct. at 2594-95, 2601 (emphasis added). Because the invalidation of statutes limiting the right to marry “on the same terms and conditions as opposite-sex couples” impliedly follows from these facts, that remedy is a holding. *Id.* at 2605; *But see generally* Michaels, *supra* (critiquing various holding/dicta models, including Goodhart’s, and offering his own).

307. *Obergefell*, 135 S. Ct. at 2604.

308. *Pavan*, 137 S. Ct. at 2076, 2078-79.

309. *See supra* text accompanying notes 153-57.

contention that this guarantee of a social contract between two spouses and a state is only the dicta of *Obergefell*.³¹⁰

Justice Gorsuch follows his misguided analysis of *Obergefell*'s scope with a few other unsupported assertions. He does not argue that any court beyond this case has held that reasons for biology-based birth registration regimes exist which “in no way offend *Obergefell*.”³¹¹ Justice Gorsuch instead recites the State’s arguments and approves of “biological” birth registration regimes with citation to two cases predating *Obergefell* and addressing distinct questions of law.³¹² And without fully addressing the Court’s guarantee of a social contract between the marriage and the state, Justice Gorsuch simply asserts that Arkansas law creates a biology-based birth registration regime and that *Obergefell* does not address purely biology-based birth registration regimes.³¹³

As the Court and Arkansas Supreme Court Justice Danielson both adequately explain, Arkansas’s birth certificate statutes tie birth certificates to marriage, and not only to biology.³¹⁴ While the Court points to Arkansas Code Annotated section 9-10-201(a), the statute imputing paternity to the husband with conception by anonymous sperm donation,³¹⁵ Justice Danielson cuts even deeper to the statute actually at issue, section 20-18-401(f).³¹⁶ The statute establishes the kind of presumption of paternity in marriage that the Court upheld in *Michael H. v. Gerald D.*,³¹⁷ in which the husband was presumed the father until a court or the mother rebuts that presumption.³¹⁸

310. *Pavan*, 137 S. Ct. at 2079 (Gorsuch J., dissenting).

311. *Id.*

312. *Id.* (citing *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *Michael H. v. Gerald D.*, 491 U.S. 110, 124-125 (1989) (plurality opinion)).

313. *Id.*

314. *See id.* at 2078-79 (majority opinion); *Smith v. Pavan*, 2016 Ark. 437, at 35-36, 505 S.W.3d 169, 190 (Danielson, J., dissenting).

315. *Pavan*, 137 S. Ct. at 2078-79.

316. *Pavan*, 2016 Ark. 437, at 35-36, 505 S.W.3d at 190 (Danielson, J., dissenting).

317. *Michael H. v. Gerald D.*, 491 U.S. 110, 117-18, 124 (1989) (plurality opinion) (citing CAL. EVID. CODE § 621 (West Supp. 1989) (repealed 1994)).

318. *Compare* ARK. CODE ANN. § 20-18-401(f)(1) (2014) (presumption rebuttable with paternity adjudication or affidavits executed by mother, husband, and putative father), with CAL. EVID. CODE § 621 (presumption rebuttable with blood test performed pursuant to motion by husband or mother within two years of birth).

The Court may have decided to recognize broader relevant boundaries to the Arkansas birth registration regime than Justice Danielson did in order to avoid unnecessarily applying *Michael H.* to the case or reviving its constitutional questions. Nonetheless, the primary utility of the parental presumption as a protector of social institutions, marriage and family, is unassailable.³¹⁹ That policy, which Justice Danielson called “obvious,” renders the parental presumption an incident of marriage even if birth certificates were designed to also accurately record biological descent.³²⁰ Because the Arkansas Supreme Court instead read a pure biological basis into the birth certificate regime,³²¹ it was in clear legal error with respect to its method of statutory interpretation.

Justice Gorsuch neither cites any authority which directly contradicts the Court on its broader interpretation of *Obergefell* nor otherwise provides a convincing rebuttal to the substantive holding of *Pavan*. He has thus presented a case against summary reversal even weaker than the *American Tradition Partnership* dissent, characterized by shaky statutory interpretation rather than adequate support for legal dispute or bold broadsides against the underlying doctrine behind same-sex marriage. If Justice Gorsuch only took the route of *American Tradition Partnership* and simply rejected *Obergefell*, he would have had plenty of rhetorical ammunition, courtesy of *Obergefell*'s dissenting opinions.³²² But even if Justice Gorsuch did that, the Court and the facts nonetheless show the clear error in the Arkansas Supreme Court's decision.

319. *Pavan*, 2016 Ark. 437, at 36, 505 S.W.3d at 190 (Danielson, J., dissenting).

320. *Id.*

321. *Id.* at 35, 505 S.W.3d at 190.

322. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611-26 (Roberts, C.J., dissenting); *id.* at 2626-31 (Scalia, J., dissenting); *id.* at 2631-40 (Thomas, J., dissenting); *id.* at 2640-43 (Alito, J., dissenting).

B. HOW PAVAN AND MORALES-SANTANA LIMIT NGUYEN

Scholars have largely backed Justice O'Connor's dissent in *Nguyen* ever since the decision was handed down.³²³ While sharing the concerns she expressed, some also attributed concealed rationales to the majority, including the unsympathetic character of the petitioner and a deference towards Congress's plenary power over immigration.³²⁴ And since even before *Morales-Santana* was decided, scholars have anticipated that it or a similar decision would limit the application of *Nguyen* in both immigration law and the more general family law context.³²⁵ As

323. See, e.g., Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1192-93, 1219-21 (2016) (citing *Nguyen* as an example of the "inferior" legal status of unwed fathers derived from equal protection doctrine focused on integration of the family and the market, rather than individual liberty); Buchanan, *supra* note 199, at 1182-85 (arguing the Court applied a "sex discount" in *Nguyen* to purported heightened scrutiny to accommodate cultural assumptions that men have a "biologically-programmed" indifference to their children and that this apathy is "cured" by marriage); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1085 (2002) (arguing that feminist analyses against "sex/gender ideologies" would help the Court avoid "mistakes" such as *Nguyen*); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 208-10 (2016) (agreeing with Justice O'Connor's criticisms, noting that Justice Kennedy "transgressed doctrinal boundaries" of heightened scrutiny and that the stereotype he advanced was a "paternalistic conception of mothers"); Jung Kim, Comment, *Nguyen v. INS: The Weakening of Equal Protection in the Face of Plenary Power*, 24 WOMEN'S RTS. L. REP. 43, 54 (2002) ("[T]he Court glaringly reveals its own limitations and prejudices regarding its archaic notions of women and men, mothers and fathers.").

324. See, e.g., Franklin, *supra* note 215, at 148 n.352 (pointing to the Court's reiteration without judgment of Justice Stevens's suggestion in *Miller* that a more deferential standard of review was appropriate for an exercise of Congress's immigration and naturalization power); Nina Pillard, *Plenary Power Underground in Nguyen v. INS: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 836 (2002) (suggesting that if the Court did not implicitly account for the immigration context, the Court would not likely have sustained an overt sex-based classification as "overbroad and ill matched to its objective" as the distinction drawn by the statute); Kim, *supra* note 323, at 58-59, 62-63 (surmising that the Court was holding *Nguyen* accountable for his child sexual assault convictions and noting signs of the Court's "discomfort" with challenging congressional plenary power).

325. The residency requirements at issue in *Morales-Santana* were previously reckoned with by the Court in *Flores-Villar v. United States*, but that decision only affirmed the Ninth Circuit by an equally divided Court thanks to Justice Kagan's recusal. *Flores-Villar v. United States*, 564 U.S. 210 (2011) (per curiam) *aff'g* 536 F.3d 990 (9th Cir. 2008). One commentator speculated that if a challenge to the statute again arrived, the Court would overrule *Nguyen* or at least resolve its tension with *Virginia* in the latter's favor. Stephen Kanter, Essay, *Brevity is the Soul of Wit: Nguyen is Dead*, 16 LEWIS & CLARK L. REV. 1305, 1314-15 (2012). After the Court granted certiorari in *Morales-Santana*, Professor Douglas

Professor Kristin Collins argues in her commentary on *Morales-Santana*, for which she co-wrote an *amicus* brief,³²⁶ Justice Kennedy's choice of employing a "watered-down" equal protection analysis as if it were any other nonimmigration statute (i.e., without invocation of the plenary power doctrine) led to it becoming "easily enlisted as a precedent in domestic family law cases" involving the gender-based regulation of parentage and the family in general.³²⁷

Absent the intervention of the Court, the state court decision in *Pavan* would have joined this cohort of successful application of the pseudo-biological reasoning of *Nguyen* to state family law. Given that Justice Gorsuch approved of *Nguyen*'s analysis, and given that *Morales-Santana* did not overrule or *explicitly* limit its logic, *Nguyen* still presents a palpable threat to the equal status of same-sex couples in parenthood. Both scholars and some lower courts have attacked the philosophical premise of *Nguyen* and similar cases rendering legal significance to "real" gender differences.³²⁸ Any further philosophical or pre-*Nguyen* constitutional attack by this author on *Nguyen* would be redundant and unoriginal. It would also not be as powerful as an application of subsequent Supreme Court decisions. Advocates for recognition of functional same-sex parenthood outside of biological motherhood must find some post-*Nguyen* answer by the Court to Justice Gorsuch's dissent. This need is demonstrated

NeJaime predicted that if the Court affirmed the Second Circuit's decision, it would possibly "begin to question the wisdom of relying on biological justifications to distinguish between motherhood and fatherhood for purposes of family law." NeJaime, *supra* note 205, at 2354. And once the decision came, Professor Kristin Collins argued that *Morales-Santana* does limit *Nguyen*'s application. Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 199-200 (2017). One should be careful to temper speculation about the Court's future direction on this issue however, given that Justice Gorsuch did not participate in *Morales-Santana* and given the likelihood of a future Supreme Court appointment during the presidency of Donald Trump. *Id.* at 201 n.185.

326. Brief Amici Curiae of Professors of History, Political Science, and Law in Support of Respondent, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (No. 15-1191), 2016 WL 5800340.

327. Collins, *supra* note 325, at 195; *see, e.g.*, *Child Support Enf't Agency v. Doe*, 125 P.3d 461, 470 (Haw. 2005); *Grimes v. Van Hook-Williams*, 839 N.W.2d 237, 245-46 (Mich. Ct. App. 2013); *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 308 (Ct. App. 2006).

328. *See, e.g.*, *Free the Nipple v. City of Fort Collins*, 216 F. Supp. 3d 1258, 1265-66 (D. Colo. 2016) (endorsing the empowering treatment of "real" gender differences in *Virginia* and ignoring *Nguyen* to invalidate an ordinance prohibiting public female breast exposure).

by the fact that other lawyers continue to use *Nguyen* to privilege biological over nonbiological parents, even after *Morales-Santana* and *Pavan*.³²⁹

Kristin Collins convincingly argues that *Morales-Santana* helps these advocates advance part of the way towards an answer.³³⁰ The majority opinion offered a “clear account of the gender-based stereotypes concerning parental roles that have shaped the derivative citizenship statute in its every detail.”³³¹ “[W]ithout so much as blinking,” Collins notes, “the Court held that it would approach ‘all gender-based classifications’ with the same judicial skepticism.”³³² From this posture, she posits a “significant tension” between laws privileging the biological mother’s position as “natural guardian” above the rights and responsibilities of nonbiological parents, on the one hand, and “*Morales-Santana*’s deep skepticism of gender-based allocations of parental rights and status,” on the other.³³³ She also points to the Court’s “modernizing message” that gender-based distinctions must “serve an important governmental interest *today*,” noting that this “forward-looking understanding of equality” was lifted from *Obergefell*.³³⁴ Collins predicts that advocates for recognition of “the various functional parenting relationships that exist outside of . . . biological motherhood”—including those of same-sex couples and their children—will use *Morales-Santana* to compel judges and legislators to attend to “unjustified” forms of inequality which have previously “passed unnoticed and unchallenged.”³³⁵

Indeed, the patently heteronormative logic of *Nguyen*’s “natural guardian” narrative is laughably anachronistic in the face of two-mother parenthood, where the non-biological mother’s

329. See, e.g., Reply Brief of Movants-Intervenors-Appellants at 18, *Witt v. Witt*, No. E2017-00884-COA-R3-CV, 2018 WL 1505485 (Tenn. Ct. App. Mar. 27, 2018), 2017 WL 6888042; Petition for Writ of Certiorari at 11-13, *McLaughlin v. McLaughlin*, 138 S. Ct. 1165 (2018) (No. 17-878), 2017 WL 6508408.

330. Collins, *supra* note 325, at 202-03.

331. *Id.* at 173.

332. *Id.* at 174 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017)).

333. *Id.* at 203.

334. *Id.* at 200 (quoting *Morales-Santana*, 137 S. Ct. at 1690 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015))).

335. Collins, *supra* note 325, at 203 (quoting *Morales-Santana*, 137 S. Ct. at 1684 (quoting *Obergefell*, 135 S. Ct. at 2603)).

parental involvement is usually assured by the fact that conception involves many more practical and legal steps than one single session of unprotected sex.³³⁶ But in *Pavan*, the State of Arkansas did not offer the possibility of the nonbiological mother's lack of presence at birth as its biological rationale. Rather, the State attempted to explain that the birth certificate regime was only a genetic record made to advance the child's health and potential legal rights.³³⁷ Such an exclusionary contention—that the scheme could *only* be a genetic record—was easily dispelled by the Court when it pointed to the exceptions with a marriage- or adoption-protecting operation.³³⁸ *Nguyen* relied on precedent that also posited purportedly “biological” motivations to statutes which, like those involved in *Nguyen*, were stirred by and protected gender roles in parenting.³³⁹

The application by Justices Gorsuch, Thomas, and Alito of *Nguyen* to “biology based” policies with a narrower and more “purely” biological rationale, protecting health through genetic records,³⁴⁰ seems at first glance an acceptably restrained use of *Nguyen*, as there is no stereotype involved in the basic facts of genetics. Though it is arguably an overbroad generalization to presume that fathers will not be present at birth, it is only fact that the parent contributing sperm in conception may pass unhealthy genes to the child.³⁴¹ The problem with assuming Justice

336. See, e.g., *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492, 494-95 (Ariz. 2017) (presenting facts where both partners attempt to conceive using anonymous sperm donors, parents enter into “joint parenting agreement” to ensure rights pre-*Obergefell*, nonbiological mother stays home to raise the child for first two years, and the same mother sues to enforce the parenting agreement).

337. See Defendant's Reply, *supra* note 49, at 8-9.

338. *Pavan v. Smith*, 137 S. Ct. 2075, 2078-79 (2017) (per curiam).

339. See *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (citing *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983)); see also *Ben-Asher*, *supra* note 323, at 1231-32 (noting that equal protection claims in cases like *Lehr* “often fail” because of perceptions of biological differences).

340. *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting) (emphasis added).

341. Through “multifactorial” inheritance, a combination of multiple genes and environmental factors may lead to common disorders like heart disease, high blood pressure, Alzheimer's disease, arthritis, diabetes, cancer, and obesity. See Melissa Conrad Stöppler, *Genetic Diseases (Inherited) Symptoms, Causes, Treatments, and Prognosis*, MEDICINENET.COM, https://www.medicinenet.com/genetic_disease/article.htm [https://perma.cc/YRN6-Z9WQ] (last visited May 17, 2018). The effects of “epigenetic inheritance patterns,” changes made to gene expression by experiences and habits, are increasingly under close study. See J.R. Thorpe, *How a Man's Health Affects the Genetics*

Gorsuch's restraint of *Nguyen* is that he was wrong to argue a purely biological logic behind the State's motivation, since the statutory scheme was not *purely* a genetic record on several fronts.³⁴² Justice Gorsuch is actually *expanding* the application of *Nguyen* to whatever laws he sees fit, even if the facts do not support his analysis. The analytical posture of the three dissenting votes thus presents itself as substantial competition to *Morales-Santana*, which limits *Nguyen* to its facts by affirming *Virginia*'s application to all gender-based classifications.³⁴³ Further change in the ideological composition of the Court could thus easily result in the expansion of *Nguyen* at the expense of *Morales-Santana* and *Virginia*.

Because "*Morales-Santana* certainly will not do all the work" in challenging the gendered pseudo-biological logic of *Nguyen*, we must propose additional tools for the task.³⁴⁴ And for married individuals seeking to claim status as parents of the biological children of their same-sex spouses, the *Pavan* majority offers that tool, especially when used in conjunction with *Morales-Santana*.³⁴⁵ Before *Obergefell*, states' defense counsel sometimes used *Nguyen* to respond to arguments that the prohibition of same-sex marriage or limitations on the rights of lawful same-sex spouses constituted sex discrimination.³⁴⁶ With *Pavan*, there is no more room for states to prevent same-sex spouses from embracing the rights that opposite-sex spouses enjoy.³⁴⁷

The *Pavan* majority emphasized *Obergefell*'s protection of "civil marriage 'on the same terms and conditions as opposite-sex couples'" with no qualifiers.³⁴⁸ The list of "terms and conditions" was not simply made to support *Obergefell*'s application of the fundamental right to marry to same-sex couples, as the Arkansas

of *His Offspring*, BUSTLE (May 16, 2016), <https://www.bustle.com/articles/160983-how-a-mans-health-affects-the-genetics-of-his-offspring> [<https://perma.cc/LL9N-476L>] (collecting studies).

342. See *Pavan*, 137 S. Ct. at 2078-79 (section 9-10-201); *Smith v. Pavan*, 2016 Ark. 437, at 35-36, 505 S.W.3d 169, 190 (Danielson, J., dissenting) (section 20-18-401(f)(1)).

343. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017).

344. Collins, *supra* note 325, at 203.

345. See *Pavan*, 137 S. Ct. at 2078-79; *Morales-Santana*, 137 S. Ct. at 1689.

346. See Collins, *supra* note 325, at 195 n.152 (collecting briefs).

347. See *Pavan*, 137 S. Ct. at 2078.

348. *Id.* at 2076 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)).

majority supposed.³⁴⁹ Rather, *Obergefell* entitles same-sex couples to all “rights, benefits, and responsibilities” of marriage that are established for opposite-sex couples, not simply marriage recognition.³⁵⁰ Used on its own, this absolute command to award a right to same-sex couples where the right attends opposite-sex marriage should call courts to deeply scrutinize claims of a law’s “biological” motivation. The *Pavan* majority itself went to great lengths to dispel the State’s conception of its birth certificate regime as a purely genetic registry; it traversed traditional boundaries of statutory review by invoking statutes that were not at issue in the case but were nonetheless components of a larger birth certificate system.³⁵¹

One of the few lower court decisions that has so far relied on *Pavan* did so, like the *Pavan* majority, by sidestepping a philosophical confrontation with *Nguyen*’s premises in favor of direct application of *Pavan*’s absolute expansion of *Obergefell*.³⁵² In *McLaughlin v. Jones in and for County of Pima*, the Arizona Supreme Court expanded the statutory presumption of paternity to any woman whose wife gives birth to a child during the marriage.³⁵³ In that case, a non-biological mother, Suzan McLaughlin, filed for dissolution of her marriage to birth mother Kimberly McLaughlin, legal decision-making *in loco parentis*, and “parenting time.”³⁵⁴ The trial court relied on *Obergefell* to apply to Suzan the same presumption of paternity “that applies to a similarly situated man in an opposite-sex marriage.”³⁵⁵

Although the intermediate appellate court affirmed,³⁵⁶ another division of that court reached a contrary result in *Turner v. Steiner*.³⁵⁷ That court concluded that a female same-sex spouse

349. *Smith v. Pavan*, 2016 Ark. 437, at 10, 505 S.W.3d 169, 176-77.

350. *Pavan*, 137 S. Ct. at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601).

351. *Id.* at 2077-79 (citing ARK. CODE ANN. § 9-10-201(a) (2015)).

352. *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492, 496-98 (Ariz. 2017).

353. *Id.* at 498.

354. *Id.* at 494-95. In Arizona, “parenting time” is a statutory term for what is traditionally known as parental visitation. ARIZ. REV. STAT. ANN. § 25-401(5) (2019); *Owen v. Blackhawk*, 79 P.3d 667, 670 (Ariz. Ct. App. 2003). “Visitation” is defined separately as a third-party child access schedule. ARIZ. REV. STAT. ANN. § 25-401(7).

355. *McLaughlin*, 401 P.3d at 495.

356. *McLaughlin v. Jones in & for Cty. of Pima*, 382 P.3d 118, 119 (Ariz. Ct. App. 2016).

357. *Turner v. Steiner*, 398 P.3d 110, 111 (Ariz. Ct. App. 2017).

could not benefit from the presumption of paternity, due to its basis in the biological differences between men and women, and that *Obergefell* imposed no contrary requirement.³⁵⁸ There, the majority not only relied on *Nguyen*,³⁵⁹ but also borrowed from the Arkansas Supreme Court in *Pavan* by imposing the latter's constricted limitation of *Obergefell* to marriage recognition.³⁶⁰ The dissenting judge believed that a gender-neutral interpretation was consistent with *Obergefell*'s recognition that the right to marry provides "profound benefits" to children raised by same-sex couples.³⁶¹

In light of *Pavan* and its own interpretation of *Obergefell*, the Arizona Supreme Court abrogated *Turner* and held the paternity presumption's gender-specific application unconstitutional.³⁶² The legal parent status conferred by the paternity presumption was "undoubtedly[] a benefit of marriage," and the gender-specific language of the statute authorized "differential treatment of similarly situated same-sex couples."³⁶³ Although the court assumed the constitutional validity of *Nguyen*'s argument that "fathers and mothers are *not similarly situated* with regard to proof of biological parenthood," it disclaimed any relevance of biological parentage to the facts.³⁶⁴ For the court, *Nguyen* did not apply to facts where "males and females are similarly situated but treated differently."³⁶⁵ Justice Bolick, partially concurring, recognized that equitable considerations may favor Suzan's parenting rights, but he nonetheless dissented from the court's "rewrit[ing]" of the paternity statute.³⁶⁶ He would have affirmed the constitutionality of its existing form, citing *Nguyen*.³⁶⁷ Justice Bolick also implied that *Pavan* only condemns "the *absence* of a mechanism to

358. *Id.* at 113-16.

359. *Id.* at 115 (citing *Nguyen v. INS*, 533 U.S. 53, 63 (2001)).

360. *Id.* at 114 (citing *Smith v. Pavan*, 2016 Ark. 437, at 9-10, 505 S.W.3d 169, 176-77).

361. *Id.* at 117 (Winthrop, J., dissenting) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015)).

362. *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492, 496-98 (Ariz. 2017).

363. *Id.* at 497.

364. *Id.* at 498 (quoting *Nguyen*, 533 U.S. at 54).

365. *Id.*

366. *Id.* at 503 (Bolick, J., concurring in part and dissenting in part).

367. *McLaughlin*, 401 P.3d at 503 (citing *Nguyen*, 533 U.S. at 63).

provide parenthood opportunities to single-sex couples on equal terms.”³⁶⁸

Likely for the sake of judicial economy, the *McLaughlin* majority missed an opportunity to challenge the pseudo-biological premise of *Nguyen* in light of the stricter equal protection analysis affirmed in *Morales-Santana*. As a result, the defendant birth mother, Kimberly, was left free to use both *Nguyen* and Justice Gorsuch’s dissent in *Pavan* to support the central argument of her petition for certiorari to the U.S. Supreme Court.³⁶⁹ There, she interpreted the paternity statute as having an exclusively biological basis and accepted Justice Gorsuch’s *Nguyen*-inflected contention that “nothing in *Obergefell* indicates that a birth registration regime based on biology . . . offends the Constitution.”³⁷⁰ But not only did Kimberly gloss over the social functions of the paternity presumption, such as the protection of marriage and the parental rights of the spouse married to the birth mother;³⁷¹ she also failed to reckon with *Morales-Santana* and its broad application to all gender-based classifications.³⁷² It would have been interesting to see whether the Court would have closely considered Kimberly’s arguments, but the Court instead denied her petition, leaving the constitutional merit of *Nguyen* and Justice Gorsuch’s *Pavan* dissent in ongoing contention.³⁷³

Some of the other briefs and motions discussing either Justice Gorsuch’s dissent or some other conjunction between *Nguyen* and *Pavan* have also bypassed the *Morales-Santana* test and accepted Justice Gorsuch’s assumption of the importance of a biological basis to a birth registration regime in constitutional review of those statutes.³⁷⁴ On the other hand, there is one federal

368. *Id.*

369. Petition for Writ of Certiorari, at i, 7, 11-13, *McLaughlin v. McLaughlin*, 138 S. Ct. 1165 (2017) (No. 17-878), 2017 WL 6508408.

370. *Id.* at 7 (quoting *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting)).

371. *See Michael H. v. Gerald D.*, 491 U.S. 110, 125-27, 130 (1989) (plurality opinion) (“Here, to provide protection to an adulterous father is to deny protection to a marital father.”).

372. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017).

373. *McLaughlin v. McLaughlin*, 138 S. Ct. 1165, *denying cert. sub nom. to McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492 (Ariz. 2017).

374. *See Reply Brief of Movants-Intervenors-Appellants*, at 18, *Witt v. Witt*, No. E2017-00884-COA-R3-CV, 2018 WL 1505485 (Tenn. Ct. App. Mar. 27, 2018), 2017 WL

district court brief that this author has found which does integrate *Morales-Santana* and *Pavan* into the same constitutional analysis.³⁷⁵ That brief was written for *Arroyo Gonzalez v. Rossello Nevares*, a case that does not involve same-sex marriage, but does implicate both birth certificates and another issue of LGBT rights.³⁷⁶

Before the district court's ruling in April 2018, Puerto Rico denied birth certificate amendments to transgender persons that accurately reflect their gender identities without revealing their transgender status.³⁷⁷ In support of their motion for summary judgment, the *Arroyo Gonzalez* plaintiffs cited *Virginia* and *Morales-Santana* for their challenge to Puerto Rico's Birth Certificate Policy as sex discrimination in violation of equal protection.³⁷⁸ In their criticism of the Commonwealth's purported government interest in providing a "historical X-ray document of the person at birth,"³⁷⁹ the plaintiffs pointed to the statutory substitution, upon adoption, of a certificate including only adoptive parents' names for the original birth certificate.³⁸⁰ Puerto Rico had, like Arkansas in *Pavan*, chosen to give a significance to birth certificates beyond biology.³⁸¹ Although these plaintiffs, like other litigants, have chosen not to directly challenge the flawed premises of *Nguyen* or Justice Gorsuch's dissent, they have nonetheless utilized *Pavan* to rebut arguments for the existence of a purely biology-based birth records regime.³⁸² The district court ultimately ruled in the plaintiffs' favor on separate constitutional grounds, but the Commonwealth

6888042; *but see also* Brief of Appellees/Cross-Appellants, at 37-38, *Ermold v. Davis*, Nos. 17-6119, 17-6233 (6th Cir. Jan. 22, 2018), 2018 WL 572796 (conceding that *Obergefell* was "unclear" as to rights other than marriage itself, but also emphasizing that the latter right was "clearly established" in *Obergefell*).

375. Plaintiffs' Reply Memorandum in Further Support of Plaintiffs' Motion for Summary Judgment at 2-6, *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018) (No. 3:17-CV-01457) [hereinafter Plaintiffs' Reply Memorandum], 2017 WL 6398353.

376. *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 328 (D.P.R. 2018).

377. *Id.*

378. Plaintiffs' Reply Memorandum, *supra* note 375, at 3-4.

379. *Id.* at 5.

380. *Id.* (citing P.R. LAWS ANN. tit. 24, § 1136 (2017)).

381. *Id.* (citing *Pavan v. Smith*, 137 S. Ct. 2075, 2078-79 (2017) (per curiam)).

382. *Id.* (citing *Pavan*, 137 S. Ct. at 2078-79).

might appeal to the First Circuit.³⁸³ It will be interesting to see how far the *Arroyo Gonzalez* plaintiffs, along with other transgender plaintiffs seeking birth certificate changes, take their analyses of *Morales-Santana* and *Pavan* in the future.

Understandably, litigants on behalf of spouses in same-sex marriages and their children may not have the resources to revive a challenge to *Nguyen* after *Morales-Santana* in any context other than deportation proceedings involving the parental acknowledgment requirements. They may also believe that the Court in *Morales-Santana* did not do enough to limit *Nguyen*'s application to "biology-based family law even if it rejected the myth of birth mother as "natural guardian," one of *Nguyen*'s pseudo-biological premises.³⁸⁴ But as Justices Gorsuch, Thomas, and Alito push to find purportedly "biological" government interests using even weaker arguments than that of *Nguyen*,³⁸⁵ these litigants should find any way possible to limit them in order to succeed. *Nguyen* and its precedents upheld sexist, heteronormative stereotypes cloaked as purportedly "biological" truisms.³⁸⁶ Both the broad anti-stereotyping principle of *Morales-Santana* and the wide-ranging and absolute *Obergefell* interpretation held by the *Pavan* majority provide tools to protect the rights of married same-sex parents from the dangers of broadly applying these cases.

IV. CONCLUSION

Pavan v. Smith is a rare kind of summary reversal for the Supreme Court for three reasons. First, it engages in what first appears to be unusually broad lawmaking for a summary reversal.³⁸⁷ Second, it renders this broad expansion of *Obergefell* with a compelling, yet simple argument—that the broad scope of the right to marry was already made plain in *Obergefell*.³⁸⁸ But finally, and most importantly, its dissent demonstrates the broader

383. *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 327, 333-34 (D.P.R. 2018).

384. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1691 (2017) (citing *Nguyen v. INS*, 533 U.S. 53, 91-92 (2001) (O'Connor, J., dissenting)).

385. See discussion *supra* Section III.A.

386. See discussion *supra* Section III.B.

387. See Hemmer, *supra* note 270, at 221-23.

388. See discussion *supra* Section III.A.

doctrinal character of a new justice and foreshadows the way the Court could potentially treat *Obergefell* and its broader constitutional sphere.³⁸⁹ The Court in *Pavan* confirms that same-sex couples can now light on every star in a “constellation of benefits” of marriage.³⁹⁰ Meanwhile, Justice Gorsuch confirms his denial of any right to these material benefits while offering no alternative.³⁹¹ The Court in *Morales-Santana* repudiates all stereotypes and “overbroad generalizations” used to justify gender discrimination.³⁹² Yet Justice Gorsuch in *Pavan* shows he is willing to apply *Nguyen* to disregard statutory text and possibly defend stereotypes, all to help justify a state’s proffered “biological” distinctions.³⁹³

Advocates should be optimistic for the power of *Pavan* to defend married same-sex couples and similar parties from the discriminatory encroachment of governments on their birth certificates and other rights attending marriage.³⁹⁴ But because the Court may ideologically shift in the future of the Trump Administration, advocates should also attempt to limit the force of Justice Gorsuch’s future use of *Nguyen* by meeting him with *Morales-Santana* and, where applicable, *Pavan*. Both a constellation of benefits and a universe of equal protection may depend on whether the legal community will treat *Pavan*’s diminutive opinion and dissent with the seriousness they deserve.

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389. See Collins, *supra* note 325, at 201 n.185.

390. *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam).

391. *Id.* at 2079 (Gorsuch, J., dissenting).

392. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692-93 (2017).

393. *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting).

394. See discussion *supra* Section III.B.

APPENDIX

Arkansas Code Annotated § 20-18-401(e), (f) (2014)

(e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.

(f) (1) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:

(A) Paternity has been determined otherwise by a court of competent jurisdiction; or

(B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavits may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.

(2) If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.

(3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and

surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

(4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

Arkansas Code Annotated § 20-18-406(a)(2) (2014)

(a) The State Registrar of Vital Records shall establish a new certificate of birth for a person born in this state when he or she receives the following:

...

(2) A request that a new certificate be established and any evidence, as required by regulation, proving that the person has been legitimated, or that a court of competent jurisdiction has determined the paternity of the person or that both parents have acknowledged the paternity of the person and request that the surname be changed from that shown on the original certificate.

Arkansas Code Annotated § 9-10-201 (2015)

(a) Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination.

(b) A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband except in the case of a surrogate mother, in which event the child shall be that of:

(1) The biological father and the woman intended to be the mother if the biological father is married;

(2) The biological father only if unmarried; or

(3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(c) (1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:

(A) The biological father and the woman intended to be the mother if the biological father is married;

(B) The biological father only if unmarried; or

(C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(2) For birth registration purposes, in cases of surrogate mothers the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.