

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUSAN WATERS and SALLY)	
WATERS, et al.)	CASE NO. 8:14-CV-356
)	
Plaintiffs,)	
v.)	SUPPLEMENT TO PLAINTIFFS’
)	MOTION FOR SUMMARY
PETE RICKETTS, et al.)	JUDGMENT AND BRIEF
)	IN SUPPORT
Defendants.)	

Since the briefing was completed on the cross-motions for summary judgment, it has come to Plaintiffs’ attention that the Department of Health and Human Services (DHHS), whose CEO is a Defendant in this case, is refusing to provide married same-sex couples birth certificates for their children on the same terms and conditions as married different-sex couples. Specifically, when a child is born to a married different-sex couple, both spouses are listed as parents on the birth certificate regardless of whether the husband is the biological father of the child. Neb. Rev. Stat. § 71-640.01. In contrast, when a child is born to a married same-sex couple, DHHS will only list the spouse who gave birth; it will not include the other spouse. This is what representatives of DHHS’s Office of Vital Records have told at least two married same-sex couples who have had children since *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Declarations of Brooke Wagner, Nicole Wagner, Jennifer McGowan, Bobbie McGowan and Stefanie Flodman (attached as Exs. A through E). Plaintiffs supplement their motion for summary judgment to apprise the Court of this unequal treatment that clearly violates the Supreme Court’s mandate that states make marriage available to same-sex couples “on the same terms and conditions as opposite-sex couples.” *Obergefell*, 135 S.Ct. at 2605. This unequal

treatment further demonstrates Plaintiffs' continued need for both declaratory and injunctive relief, and that Plaintiffs' claims are not moot. And Plaintiffs request that the Court issue an injunction that specifically makes clear that the State must provide birth certificates for children born to married same-sex couples listing both spouses as parents just as it does for children born to married different-sex couples. One Plaintiff couple -- Jessica and Kathleen Kallstrom-Schreckengost -- is in the process of trying to have another child. Declaration of Jessica Kallstrom-Schreckengost dated November 30, 2014, par. 6; Declaration of Jessica Kallstrom-Schreckengost dated September 22, 2015 (attached as Exhibits F and G). Only such an injunction from this Court can ensure that a child born to the marriage will be able to have both parents listed on his or her birth certificate.

Obergefell requires the State to issue birth certificates to married same-sex couples listing both spouses as parents as it does for married different-sex couples.

The Supreme Court's decision in *Obergefell* made clear not only that states must permit same-sex couples to marry, but also that they must afford them every benefit provided to married couples on equal terms with different-sex married couples. *Obergefell*, 135 S.Ct. at 2605 (state bans on marriage for same-sex couples "are now held invalid to the extent they exclude same-sex couples from civil marriage **on the same terms and conditions as opposite-sex couples.**") (emphasis added). The Court declined to "stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples" because to do so "would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at 2606. The Court specifically identified birth certificates as one of the marital protections afforded by states that must be provided equally to married same-sex couples. *Id.*, at 2601.

Nebraska law provides that if a mother was married at the time of conception or birth, “the name of the husband shall be entered on the [birth] certificate as the father of the child” absent a court order or affidavit from the mother to the contrary. Neb. Rev. Stat. § 71-640.01. This is not limited to husbands who are biologically related to children born to their wives. By providing this protection only to children born to different-sex married couples, the State is denying married same-sex couples and their children a “right [. . .] intertwined with marriage.” *Obergefell*, 135 S.Ct. at 2606.

Numerous states across the country are complying with *Obergefell*'s mandate and issuing birth certificates to children born to married same-sex parents that list both spouses as parents.¹ And where they haven't, courts have ordered them to do so. *See* Order at 2, *De Leon v. Abbott*, No. SA-13-CA-00982-OLG (W.D. Tex. Aug. 11, 2015), ECF No. 113 (“[T]he Court ORDERS Defendants to submit an advisory to the Court, no later than Monday August 24, 2015: (1) notifying the Court they have created, issued, and implemented policy guidelines recognizing same-sex marriage in death and birth certificates issued in the State of Texas, and (2) assuring the Court that the Department of State Health Services has granted all pending applications for death and birth certificates involving same-sex couples, assuming the applications are otherwise complete and qualify for approval.”); *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL

¹ *See, e.g.*, Beth Walton, *New birth certificate rules recognize lesbian mothers*, Citizen-Times, May 15, 2015, available at <http://www.citizen-times.com/story/news/local/2015/05/15/new-birth-certificate-rules-recognize-lesbian-mothersnew-birth-certificate-guidelines-welcome-news-lesbian-parents/27400819/> (reporting that North Carolina Vital Records sent guidelines to hospitals for the registration of births of children whose mothers are married to female spouses and they will issue a parent/parent birth certificate rather than a mother/father birth certificate); AJ Trager, *State Now Recognizing Married Same-sex Parents on Birth Certificates*, PrideSource, July 23, 2015, available at <http://www.pridesource.com/article.html?article=72408> (reporting that Michigan Department of Health and Human Services will allow the spouse of a biological parent to be placed on a child's birth certificate for female married couples)

4476734, at *1 (D. Utah July 22, 2015) (granting preliminary injunction requiring issuance of birth certificates to same-sex spouses on same terms and conditions as opposite-sex spouses).

Plaintiffs need an injunction to ensure equal access to all of the benefits of marriage, including birth certificates.

Defendants have argued that Plaintiffs' claims are moot, citing evidence showing that they are currently providing some of the benefits that are afforded to married couples to same-sex couples and statements from the Governor and Attorney General that the State will comply with *Obergefell*. As the Eighth Circuit recognized in its order affirming this Court's preliminary injunction, that argument fails to meet Defendants' high burden even if the current administration were fully in compliance with the *Obergefell* ruling. But the Department's refusal to provide birth certificates to married same-sex couples on the same terms and conditions as different-sex married couples demonstrates that the State is *not* in full compliance. This is an additional reason that both declaratory and injunctive relief from this Court is needed to ensure that the unconstitutional conduct will cease. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (Defendants have burden of demonstrating that Plaintiffs "no longer ha[ve] any need of the judicial protection that i[s] sought.") Plaintiffs need that relief to explicitly address birth certificates. Only an injunction requiring the State to issue birth certificates for children born to same-sex couples that list both spouses, as it does for children born to different-sex spouses, will ensure that any child born to a married same-sex couple, including Plaintiffs Jessica and Kathleen Kallstrom-Schreckengost, will be able to have both parents listed on his or her birth certificate.

Wherefore Plaintiffs respectfully request that their motion for summary judgment be granted, and that this Court issue a permanent injunction that makes clear that DHHS must issue birth certificates to married same-sex couples on the same terms and conditions as married different-sex couples. Specifically, Plaintiffs request that the Court issue an injunction providing:

IT IS ORDERED that all relevant state officials are ordered to treat same-sex couples the same as different-sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage. This includes but is not limited to all rights, protections, obligations and benefits of marriages associated with parentage and birth certificates.

IT IS FURTHER ORDERED that when a child is born in Nebraska to someone who is married to a same-sex spouse, DHHS allow the names of both spouses to be listed as parents on the birth certificate.

Respectfully submitted,

s/SUSAN KOENIG, #16540
s/ANGELA DUNNE, #21938
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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2015, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

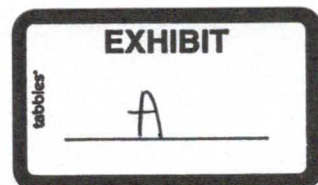
/s/Susan Koenig

DECLARATION OF BROOKE WAGNER

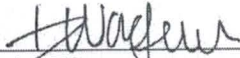
STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, Brooke Wagner, declare as follows:

1. I am a resident of Omaha, Nebraska and am legally married to Nicole Wagner. We married on June 21, 2014, in Iowa.
2. My wife Nicole gave birth to our son M.W. on August 4, 2015.
3. A birth certificate administrator at Methodist Women’s Hospital told us she called the Nebraska Office of Vital Records and was told we can’t get a birth certificate for our son because they don’t have forms for same-sex couples. She said she would enter our information in the computer but could not send it in until Vital Records resolves the issue. She gave us the contact information for Stanley Cooper, the Administrator of the Office of Vital Records, and told us to call him.
4. I called Mr. Cooper on August 10, 2015, to discuss getting a birth certificate for our son. He said birth certificates for children born to married same-sex couples was an issue they were working on but he could not give a time frame for getting an answer. He said to keep calling to check in. I called Mr. Cooper again the following week and, once again, he said they were working on it and could not give a time frame for getting an answer. I asked for his supervisor’s contact information and he gave me the name and number of Jennifer Roberts-Johnson, who, according to the Department of Health and Human Services’ website, is the Deputy Director in charge of Health Licensure and Health Data.
5. I called Ms. Roberts-Johnson and spoke with her on August 31, 2015. She said the matter was still under review and she could not give me a time frame for getting an answer.
6. On September 2, 2015, I received a call from Mr. Cooper informing me that Nicole could be listed on our son’s birth certificate as “mother” but I could only be listed as “friend” or not at all. I told him this would not fix the problem.
7. We do not want a birth certificate listing me as our son’s “friend”. I need to be listed as one of his parents.



I declare under penalty of perjury that the foregoing is true and correct.



Brooke Wagner

SUBSCRIBED and SWORN to before me this 22nd day of September, 2015.





Notary Public

DECLARATION OF NICOLE WAGNER

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, Nicole Wagner, declare as follows:

1. I am a resident of Omaha, Nebraska and am legally married to Brooke Wagner. We married on June 21, 2014, in Iowa.

2. On, August 4, 2015, I gave birth to our son M.W., in Omaha, Nebraska. When a birth certificate administrator at Methodist Women's Hospital brought me the birth certificate paperwork, it only had spaces for "mother" and "father." I put my name down in the space for "mother" and filled in Brooke's name in the space for "father," but told the administrator that I want Brooke listed but of course not as "father."

3. The hospital administrator came back and told us she called the Nebraska Office of Vital Records and was told we can't get a birth certificate for our son because they don't have forms for same-sex couples. She said she would enter our information in the computer but could not send it in until Vital Records resolves the issue. She gave us the contact information for Stanley Cooper, the Administrator of the Office of Vital Records, and told us to call him.

4. Without a birth certificate for our son, we can't register him for Social Security or have him covered by our health insurance.

5. On September 2, I received a call from Alexis at the birth certificate office at Methodist Women's Hospital, who said she talked to the Office of Vital Records and was told that I could get a birth certificate for our son listing me at "Mother" and listing Brooke as "friend".

6. We do not want a birth certificate listing Brooke as our son's "friend". We need her to be listed as one of his parents.

I declare under penalty of perjury that the foregoing is true and correct.

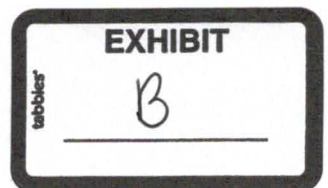
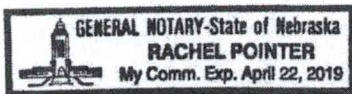
Nicole Wagner

Nicole Wagner

SUBSCRIBED and SWORN to before me this 22nd day of September, 2015.

Rachel Pointer

Notary Public



AFFIDAVIT OF JENNIFER MCGOWAN

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

COMES NOW Jennifer L. McGowan, and being first duly sworn upon oath, states as follows to the facts contained:

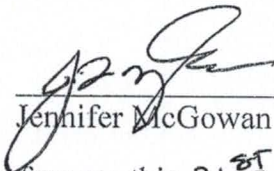
1. I am 30 years old and live in Lincoln, Lancaster County, Nebraska. I legally married Bobbie McGowan on July 15, 2013, in Potsdam, New York. We have been in a committed relationship for five years.

2. On August 2, 2015, I gave birth to our son S.A. McGowan, in Lincoln, Nebraska. I requested that my spouse, Bobbie McGowan be added on the birth certificate while in the hospital. Hospital staff indicated they did not have new forms yet and told me to contact the Office of Vital Records to obtain a birth certificate.

3. My insurance company sent me a letter on August 20, 2015, stating if we did not provide a record of birth our son's insurance would be canceled.

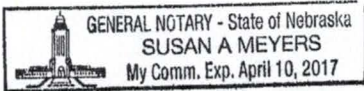
4. The administrator of Bryan Hospital, Jean, called on September 2, 2015, at 2:56 p.m. and left a voice mail stating that the State of Nebraska had made a decision regarding the birth certificate and to return her call for more information. I returned her call the same day at 3:00 p.m. Jean then told me that the State had decided that only the biological parents would be listed on the birth certificate.

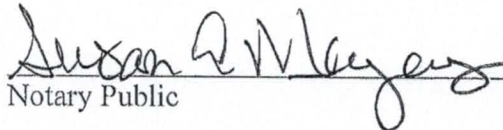
5. I went in person to the Office of Vital Records on September 9, 2015, to get a copy of our son's birth certificate. I was provided a birth certificate listing only my name as a parent to our child. It did not indicate that I was married at the time of his birth.



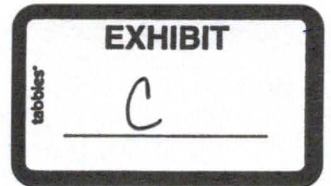
Jennifer McGowan

SUBSCRIBED and SWORN to before me this 21st day of September, 2015.





Notary Public



AFFIDAVIT OF BOBBIE MCGOWAN

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

COMES NOW Bobbie J. McGowan, and being first duly sworn upon oath, states as follows to the facts contained:

1. I am a resident of Lancaster County Nebraska and am legally married to Jennifer L. McGowan. We married July 15, 2013, in Potsdam, New York, and have been in a committed relationship for five years.

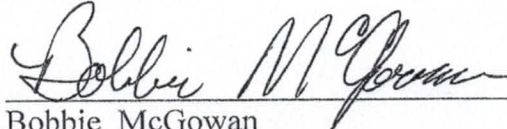
2. On August 2, 2015, Jennifer gave birth to our son S.A. McGowan, in Lincoln, Nebraska. Jennifer requested that I, as her spouse, be added on the birth certificate after giving birth. Hospital staff indicated they did not have new forms and we would need to contact the Office of Vital Records to obtain a birth certificate.

3. Jennifer's insurance company sent her a letter on August 20, 2015, stating if we did not provide a record of birth our son's insurance would be canceled.

4. I called the office of Vital Records on August 20, 2015, at 1:29 p.m. and again at 1:32 p.m. I was transferred me to someone in the birth certificate office. The lady who answered the phone said she could not help me and I would have to talk with Stanley Cooper, the HHS Administrator. I was then transferred to his line where I left a message explaining we were a legally married couple waiting on our copy of the birth certificate with both our names on it for medical insurance coverage for our son.

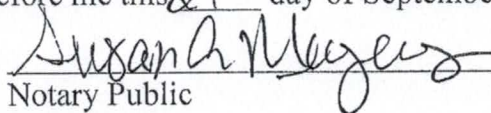
5. On September 8, 2015, at 11:55 p.m., I called Stanley Cooper, the administrator of Vital Records and left a voice mail. Mr. Cooper called back at 1:43 p.m., then I called him back two more times that day, at 2:00 p.m. and at 2:06 p.m., both times leaving voice mails. He returned the calls on September 10, 2015 at 8:45 a.m. leaving a voice mail to return his call.

6. Jennifer went in person to the office of Vital Records on September 9, 2015 to get a copy of our son's birth certificate. She received a copy of the birth certificate that had did not list me as a parent and did not indicate she was married.

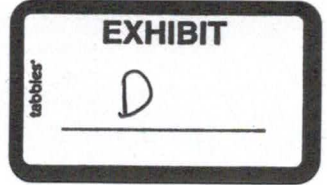
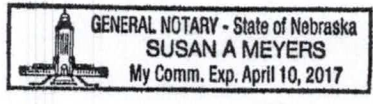


Bobbie McGowan

SUBSCRIBED and SWORN to before me this 21st day of September, 2015.



Notary Public



AFFIDAVIT OF STEFANIE FLODMAN

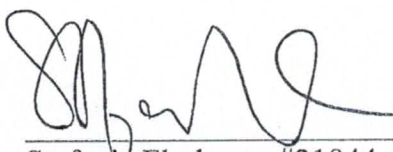
STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

COMES NOW Stefanie Flodman and being first duly sworn upon oath, states as follows to the facts contained:

1. On or about September 10, 2015, I called the Lincoln, Lancaster County Office of Vital Records on behalf of my Clients, Jennifer and Bobbie McGowan.

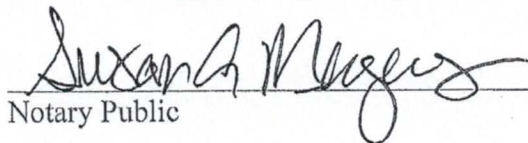
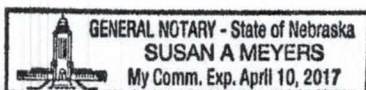
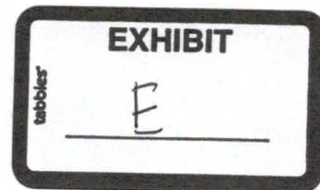
2. I am an attorney in the State of Nebraska, I explained that my clients were a legally married lesbian couple who had given birth to a child on August 2, 2015, and both wanted to be on the birth certificate. I was told I would need to speak to the administrator regarding that issue. I left a message for Stanley Cooper, the Administrator of the Office of Vital Records.

3. I received a call back from Mr. Cooper on September 14, 2015. Mr. Cooper indicated the department would be unable to place the same-sex spouse on the birth certificate as requested. I asked Mr. Cooper to clarify whether he could not or would not place the spouse on the birth certificate. I explained the trouble my clients were having with accessing insurance and funding my clients set aside to pay for the hospital NICU expenses. Mr. Cooper indicated the policy was directed from "the top" meaning his superiors and there was nothing he could do.



Stefanie Flodman, #21944

SUBSCRIBED and SWORN to before me this 21st day of September, 2015.


Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUSAN WATERS and SALLY WATERS,)
NICKOLAS KRAMER and JASON)
CADEK, CRYSTAL VON KAMPEN and)
CARLA MORRIS-VON KAMPEN,)
GREGORY TUBACH and WILLIAM)
ROBY, JESSICA KALLSTROM-)
SCHRECKENGOST and KATHLEEN)
KALLSTROM-SCHRECKENGOST,)
MARJORIE PLUMB and TRACY WEITZ,)
and RANDALL CLARK and THOMAS)
MADDOX,)

CASE No. 8:14cv00356

Plaintiffs,)

DECLARATION OF
JESSICA KALLSTROM-
SCHRECKENGOST

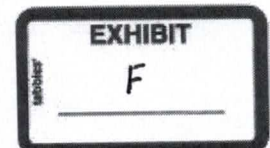
v.)

DAVE HEINEMAN in his official)
capacity as Governor of Nebraska,)
JON BRUNING in his official)
capacity as Attorney General of Nebraska,)
and KIM CONROY in her official capacity)
as Tax Commissioner of the Nebraska)
Department of Revenue,)

Defendants.)

I, Jessica Kallstrom-Schreckengost, declare as follows:

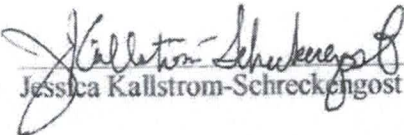
1. I am 33 years old and a resident of Omaha, Nebraska. I am a lawyer.
2. I submit this declaration in support of Plaintiffs' Motion for a Preliminary Injunction.
3. I have been in a committed relationship with Kathleen Kallstrom-Schreckengost since we met in college over ten years ago. Kathleen and I got married on May 12, 2010, in Massachusetts.



4. Kathleen and I would like our marriage to be recognized in Nebraska.
5. Kathleen and I recently returned to Nebraska, where Kathleen grew up, after living in New Jersey and New York several years. Our decision to come to Nebraska was motivated in part by our desire to be near Kathleen's extended family after the birth of their son, S.K.S., now 9 months old. S.K.S. was born in New York.
6. Kathleen and I are planning to have another child and worry about the fact that if that child is born before the law changes, he or she will be denied the protection of having two legal parents.
7. The fact that our marriage isn't recognized is stigmatizing and demeaning to our family.
8. Kathleen and I are concerned that the state's refusal to recognize our marriage sends the message to our son that his family is less deserving of respect and support than other families.
9. Kathleen and I file our federal income taxes as married filing jointly. We would like to file our state income taxes the same way but are required to file Nebraska taxes as "single". Having to file state taxes as "single" while filing federal taxes as married couple will cause us to incur greater fees from our accountant. And having to file as single and leave blank the space provided on our tax returns for "spouse", denying the existence of our marriage, is demeaning and hurtful to us.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 30 day of November, 2014.



Jessica Kallstrom-Schreckengost

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUSAN WATERS and SALLY WATERS, et al.)
)
)
 Plaintiffs,)
 v.)
)
 PETE RICKETTS, et al.)
)
)
 Defendants.)

CASE NO. 8:14-CV-356

**DECLARATION OF
JESSICA KALLSTROM-
SCHRECKENGOST**

I, Jessica Kallstrom-Schreckengost, declare as follows:


1. My spouse, Kathleen Kallstrom-Schreckengost, and I are plaintiffs in this case.
2. We have a son, S.K.S., now 1 1/2 years old. He was born in New York and has a birth certificate listing both of us as his parents.
3. We are planning to grow our family. We have a fertility doctor and plan to undergo donor insemination in November 2015.
4. We would like any child that results to be able to have a birth certificate, like his or her brother, that lists both parents from the moment of birth. We are concerned that a birth certificate that lists only one parent would deny the child access to benefits and cause insecurity and stigma.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 22 day of September, 2015


Jessica Kallstrom-Schreckengost

SUBSCRIBED and SWORN to before me this 22nd day of September, 2015.


Notary Public

