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July 12, 2017

Electronically Filed

Hon. Michael A. Shipp, U.S.D.J.
Clarkson S. Fisher Building & U.S. Courthouse
402 East State Street
Trenton, NJ 08608

Re: Jane Doe v. Vincent T. Arrisi
Docket No.: CIV-16-08640-MAS-DEA

Dear Judge Shipp:

The State's motion to dismiss is currently pending in the above-referenced matter. On July 3, 2017, counsel for Plaintiff submitted a copy of the recent Supreme Court of the United States decision in Pavin v. Smith, 528 U.S. ___ (June 26, 2017). In the cover letter, counsel for Plaintiff set forth legal argument. We write in response to that legal argument.

Plaintiff argues incorrectly that the reasoning in Pavin "controls" here. The Court in Pavin considered an Arkansas state law creating a presumption of fatherhood in favor of a birth mother's husband. That law requires the husband at the time of birth to be listed as the father on the birth certificate, regardless of the biological relationship to the child. The Arkansas Supreme Court refused to extend that rule to similarly-situated same-sex couples. In other words, the Arkansas Supreme Court held that Arkansas need not issue birth certificates listing the female spouses of women who give birth in the State. The Court reversed, holding that Arkansas's actions infringed upon the full rights associated with marriage first recognized by the Supreme Court of the United States in Obergefell v. Hodges, 576 U.S. ___ (2015).



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Arkansas had argued that being named on a child's birth certificate is not a "benefit that attends marriage." Pavin, slip. op. at 4. According to Arkansas, "a birth certificate is simply a device for recording biological parentage--regardless of whether the child's parents are married." Ibid. The Court rejected that argument, reasoning that "Arkansas law makes birth certificates about more than just genetics" because the birth mother's husband is required to be listed as the father on the birth certificate, even if the husband is "definitely not the biological father." Ibid.

That reasoning is plainly inapplicable here. The Arkansas law at issue made "birth certificates about more than just genetics" by creating a legal presumption that the husband is the father, regardless of the biological relationship. Pavin, slip. op. at 4. Here, on the other hand, N.J.S.A. 26:8-40.12 makes no presumptions, legal or otherwise. The New Jersey statute is premised entirely and solely upon a child's biological attributes at birth. As explained in the State's previous filings, gender and physical sex are different concepts, and New Jersey birth certificates only describe physical sex. As New Jersey law is consistent in treating the sex designation on birth certificates as a purely biological description, Pavin is inapposite.

Furthermore, Arkansas's failure to extend its marital presumption statute to same-sex couples was found to be unconstitutional because Arkansas treated similarly situated opposite-sex and same-sex married couples differently. In contrast, the physical sex description on New Jersey birth certificates applies equally to every individual born within the State. New Jersey birth certificates accurately describe the physical sex at birth, and N.J.S.A. 26:8-40.12 merely allows for that physical description to be changed if an individual undergoes sexual reassignment surgery. In other words, N.J.S.A. 26:8-40.12 ensures the accuracy of the physical sex description on all birth certificates, and applies equally to every individual holding a New Jersey birth certificate to ensure that the physical sex description remains accurate. The Pavin decision is silent on and its reasoning is irrelevant to these issues.

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For these reasons, the court should reject Plaintiff's baseless assertion that the Pavin decision "controls" the instant matter.

Respectfully submitted,

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