IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CASE NO.: 17-1141

ASHLEE and RUBY HENDERSON, a married couple and L.W.C.H., et al.,	)
	) APPEAL FROM UNITED STATES
	) DISTRICT COURT FOR THE
Plaintiffs-Appellees,	) SOUTHERN DISTRICT OF INDIANA
	) INDIANAPOLIS DIVISION
	)
v.	) Case No. 1:15-cv-220
	)
DR. JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner,[1]	) THE HONORABLE
	) TONYA WALTON PRATT
	)
	)
Defendants-Appellants.	)

MOTION FOR ADDITIONAL BRIEFING IN LIGHT OF *PAVAN V. SMITH*

Come now Appellees, by their undersigned counsel, and hereby request that the Court permit them to submit post-argument briefing in this case. In support of this motion they state the following:

1. On June 30, 2016, the district court for the Southern District of Indiana entered summary judgment in favor of Appellees (plaintiffs below).

[1] Dr. Kristina Box became Indiana State Health Commissioner on October 16, 2017, replacing Appellant, Dr. Jerome M. Adams, who a month earlier resigned to become the Surgeon General of the United States. Dr. Box is automatically substituted as a party pursuant to Fed. R. App. P. 43 (c)(2).

2. Appellees are female same-sex married couples who had become parents by virtue of consensual artificial insemination but were denied two-parent birth certificates for their respective children.

3. The district court below held that certain Indiana statutes conferring a presumption of parenthood on opposite-sex but not same-sex married couples violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment because those statutes had the effect of denying to Appellees and their children the same rights and benefits accorded to opposite-sex married couples, namely, having both parents identified on their child's birth certificate. *Henderson v. Adams,* 209 F.Supp.3d 1059 (S.D. Ind. 2016). The district court also entered a permanent injunction enjoining the state from enforcing those statutes in a manner that prevented the presumption of parenthood from being granted to the same-sex spouse of the birth mothers. It also ordered the state to recognize Appellee children born to the birth mother and legally married to a same-sex spouse as a child born in wedlock, and to identify Appellee spouses as the parents of their respective children on their child's birth certificate.

4. On December 30, 2016, the district court entered an order granting in part and denying in part the State Defendant's motion to amend judgment. 2016 WL 7492478. This appeal ensued.

5. Following full briefing, this case was argued on May 22, 2017, to a panel consisting of Circuit Judges Easterbrook, Flaum and Sykes.

6. Five weeks after oral argument on June 26, 2017, the Supreme Court decided *Pavan v. Smith,* 137 S. Ct. 2075 (2017) (per *curiam*), which held that under *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015), the rebuttable evidentiary presumption of legal parent status flowing from marriage is a benefit "linked to marriage,", *Obergefell,* 135 S. Ct. at 2601, that must also be extended to same-sex married couples, thus requiring the state to confer on same-sex married couples the same right to a two-parent birth certificate for their child conceived in wedlock that is accorded to opposite-sex married couples. The Supreme Court thus reversed the decision of the Arkansas Supreme Court that had rejected *Obergefell's* holding that a two-parent birth certificate is a benefit, or incident, of marriage.

7. Pursuant to Fed. R. App. P. 28(j), Appellees promptly notified the panel of the Supreme Court's ruling in *Pavan.* And on September 21, 2017, they filed

a second Rule 28(j) letter to advise the panel that the Arizona Supreme Court in *McLaughlin v. Jones,* 401 P.3d 492 (Ariz. 2017), had also concluded that *Obergefell* requires states to apply equally to same-sex and different-sex married couples state-law presumption of parenthood statutes, expressly rejecting lower Arizona appellate court's ruling that biological differences between males and females justified granting the presumption of parenthood only to the opposite-sex married parents who have a biological connection to their child.

8. This Court has previously observed that a Rule 28(j) letter may sometimes be an inadequate and ill-suited means of apprising the Court of new and arguably controlling Supreme Court authority, and in such circumstances has granted a party leave to submit additional briefing. See *Spiegla v. Hull,* 481 F.3d 961, 965 (7th Cir. 2007) (approving a request for additional briefing when, after oral argument, the Court is obliged to reevaluate the arguments made on appeal in light of a Supreme Court ruling handed down after briefing was completed but while a case remained on appeal).

9. In view of the fact that this case has been pending without a decision for over a year since oral argument and that Appellees did not have a prior

opportunity to fully brief the effect of *Pavan* on the issues presented in this appeal, Appellees respectfully request the Court to permit post-argument additional briefing of not more than 3,000 words per side.

WHEREFORE, Appellees respectfully request that the Court grant them leave to submit further briefing, not to exceed 3,000 words, limited to the issue of the effect of the Supreme Court's subsequent ruling in *Pavan* on this appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2018, I caused a true and correct copy of the foregoing MOTION FOR ADDITIONAL BRIEFING IN LIGHT OF *PAVAN V. SMITH* to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ William R. Groth
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