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*\*Pro hac vice motion to follow*

*Attorneys for Plaintiffs*

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**IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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**ANGELA LESLIE ROE and KAMI ROE,**  
  
Plaintiffs,

vs.

**W. DAVID PATTON**, in his official  
capacity as the Executive Director of the  
Utah Department of Health, and  
**RICHARD OBORN**, in his official capacity  
as the Director of Utah’s Office of Vital  
Records and Statistics,

Defendants.

**MOTION FOR  
PRELIMINARY INJUNCTION**

Case No. \_\_\_\_\_

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**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

**RELIEF REQUESTED**

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Angela Leslie (“Angie”) Roe and Kami Roe (“Plaintiffs”), by and through their undersigned attorneys, hereby move the Court for a preliminary injunction against W. David Patton, in his official capacity as the Executive Director of the Utah Department of Health, and Director Richard Oborn, in his official capacity

as the Director of Utah's Office of Vital Records and Statistics ("Defendants"), and each Defendant's officers, employees, and agents; and against all persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control, as follows:

Defendants must issue a birth certificate recognizing both Angie Roe and Kami Roe as legal parents of L.R. and recognize Angie Roe and Kami Roe as the legal parents of L.R. for all purposes under Utah law.

Defendants must recognize the female spouses of women who give birth through assisted reproduction as legal parents under the Utah Uniform Parentage Act, subject to the same terms and conditions that apply to male spouses.

## FACTS

1. Angie and Kami have been together as a committed couple for five years. (A. Roe Decl. ¶ 1, April 7, 2015, attached as Ex. A; K. Roe Decl. ¶ 1, April 07, 2015, attached as Ex. B).

2. Angie and Kami married on December 20, 2013, the first day it became legal for same-sex couples to marry in Utah pursuant to the injunction issued by the U.S. District Court for the District of Utah in *Kitchen v. Herbert*, No. 2:13-CV-00217-RJS. (A. Roe Decl. ¶ 2; K. Roe Decl. ¶ 2).

3. Marriages of same-sex couples entered into between December 20, 2013, and January 6, 2014, must be afforded all the protections, benefits, and responsibilities given to all other marriages under Utah law, pursuant to a permanent injunction issued by the U.S. District Court for the District of Utah in *Evans v. Utah*, No. 2:14-cv-55- DAK

4. Angie and Kami jointly decided to have a child together with the assistance of sperm from an anonymous donor. (A. Roe Decl. ¶ 3; K. Roe Decl. ¶ 3).

5. On May 21, 2014, with Angie's knowledge and consent, Kami conceived through intrauterine insemination at the University of Utah School of Medicine. (A. Roe Decl. ¶ 4; K. Roe Decl. ¶ 4).

6. In connection with the intrauterine insemination, Angie and Kami both signed a document titled "Donor Semen Storage Agreement," which acknowledged that donor semen was being used for artificial insemination of Kami and identified Angie as Kami's wife. (Storage Agmt., Ex. B to A. Roe Decl. and K. Roe Decl.).

7. Kami gave birth to L.R. in February 2015, at Jordan Valley Medical Center (the "hospital"). (A. Roe Decl. ¶ 6; K. Roe Decl. ¶ 6).

8. After L.R.'s birth, Angie and Kami signed an additional document memorializing, ratifying, and reaffirming Angie's consent for Kami to conceive with the assistance of donor semen. (A. Roe Decl. ¶ 7; K. Roe Decl. ¶ 7).

9. Both Angie and Kami have consistently held out Angie as L.R.'s legal parent. (A. Roe Decl. ¶ 8; K. Roe Decl. ¶ 8).

10. When hospital staff gave Angie and Kami paperwork to fill out for L.R.'s birth certificate, Angie wrote in her name as L.R.'s parent. (A. Roe Decl. ¶ 10).

11. The hospital staff would not accept the paperwork and instructed Angie to call the "Adoption/Court Order Specialist" at the Utah Department of Health's Office of Vital Records and Statistics (the "Office"). (A. Roe Decl. ¶ 11).

12. The Adoption/Court Order Specialist, pursuant to an official policy, told Angie that because Angie and Kami are a same-sex couple, Angie could not be listed as a parent on

L.R.'s birth certificate unless she adopted L.R. through a step-parent adoption. (A. Roe Decl. ¶¶ 12-13).

13. To begin a step-parent adoption, Angie and Kami would have to file a Petition to Adopt a Minor Stepchild in Utah State Court and pay a filing fee of \$360. (*See* Utah Courts, *Adopting a Minor Stepchild*<sup>1</sup>; Utah District Court Cover Sheet for Civil Actions at 2.<sup>2</sup>)

14. In addition, Angie would have to submit to a background check by the Utah Bureau of Criminal Identification and the Utah Division of Child and Family Services. (*Id.*)

15. Once the adoption petition is submitted, Angie and Kami would have to wait until a judge schedules a hearing on their adoption petition, and they would then have to appear in person at the hearing to get the judge's approval for Angie to adopt L.R. (*Id.*)

16. If Angie were male instead of female, the Office would recognize her as L.R.'s parent pursuant to Utah's assisted reproduction statutes and issue a birth certificate with both spouses listed as parents without requiring that they undergo a step-parent adoption process. (*Id.*)

17. Angie and Kami worry that the Office's refusal to recognize Angie as a parent casts a cloud of uncertainty over their parental status and could leave L.R. in a vulnerable situation if she only had one legal parent. (A. Roe Decl. ¶ 15; K. Roe Decl. ¶ 10).

### ARGUMENT

To secure a preliminary injunction, a movant "must establish the following elements: (1) a substantial likelihood of success on the merits; (2) irreparable injury will result if the injunction does not issue; (3) the threatened injury to the movant outweighs any damage the injunction may cause the opposing party; and (4) issuance of the injunction would not be adverse to the public interest." *N. Natural Gas. Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259 (10th Cir. 2012) (internal

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<sup>1</sup> <http://www.utcourts.gov/howto/family/adoption/stepchild/>

<sup>2</sup> [https://www.utcourts.gov/resources/forms/civil/Civil\\_Filing\\_Cover\\_Sheet.pdf](https://www.utcourts.gov/resources/forms/civil/Civil_Filing_Cover_Sheet.pdf)

quotation marks and citation omitted). Parties seeking a mandatory injunction that alters the status quo “must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms.” *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc).

**I. Plaintiffs Have Made a Strong Showing They Are Likely to Success on the Merits.**

**A. The Refusal to Recognize Same-Sex Spouses as Parents Pursuant to Utah’s Assisted Reproduction Statutes Is Subject to Heightened Scrutiny Because it Discriminates Based on Sex and Sexual Orientation.**

On its face and as applied to Plaintiffs, the Office’s policy facially discriminates based on sex. After Angie and Kami married, Kami conceived a child through donor insemination with Angie’s consent. Utah Code Ann § 78B-15-703; Statement of Facts ¶ 5. That consent was manifested in writing at the time the conception occurred. Utah Code Ann § 78B-15-704(a); Statement of Facts ¶ 6. That consent was also memorialized, ratified, and reaffirmed after Kami gave birth to L.R. Utah Code Ann § 78B-15-704(a); Statement of Facts ¶ 8. Both Angie and Kami have consistently held out Angie as L.R.’s legal parent. Utah Code Ann § 78B-15-704(b); Statement of Facts ¶ 9. Under these facts, if Angie were a man instead of a woman, the Office would recognize her as a legal parent pursuant to Utah’s assisted reproduction statute and would issue a birth certificate listing Angie as L.R.’s parent with no need for a step-parent adoption. Because she is a woman instead of a man, however, the Office refuses to recognize Angie as a legal parent to L.R. pursuant to Utah’s assisted reproduction statutes.

Because the Office’s policy facially discriminates based on sex, it is subject to heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 532 (1996); *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). Under heightened scrutiny “[t]he burden of justification is demanding and it rests entirely on the State.” *Virginia*, 518 U.S.

at 533. “Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’” *Id.* at 532-33. “The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 533 (internal quotation marks and brackets omitted). “The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.*

On its face and as applied to Plaintiffs, the Office’s policy of refusing to recognize same-sex spouses for purposes of establishing parentage under Utah’s assisted reproduction statutes also discriminates based on sexual orientation. The Office automatically recognizes both married different sex spouses as legal parents of children born through donor insemination, but the Office refuses the same recognition to married same-sex couples who conceive children in that way.

Discrimination based on sexual orientation is also subject to heightened scrutiny. The Tenth Circuit has not addressed what level of scrutiny applies to sexual orientation discrimination since the Supreme Court decided *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See Kitchen v. Herbert*, 755 F.3d 1193, 1223 n.11 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) (declining to address whether heightened scrutiny applies for sexual orientation discrimination). But the Seventh and Ninth Circuits have held that “*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.” *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014), *cert. denied sub nom.*,

*Walker v. Wolf*, 135 S. Ct. 316 (2014). When it struck down the Defense of Marriage Act, “*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review.” *SmithKline*, 740 F.3d at 481. The *Windsor* Court did not begin with a presumption that discrimination against same sex couples is constitutional. *Baskin*, 766 F.3d at 671; *Smithkline*, 740 F.3d at 483. Rather, *Windsor* held that same-sex couples are entitled to “equal dignity” and there must be a “legitimate purpose” to “overcome[ ]” the harms that DOMA imposed by treating those couples unequally. *Windsor*, 133 S. Ct. at 2696. *Windsor* thus requires a court to evaluate sexual orientation discrimination by “balancing the government’s interest against the harm or injury to gays and lesbians.” *Baskin*, 766 F.3d at 671.<sup>3</sup>

Whether analyzed as sex discrimination or sexual orientation discrimination, this Court must employ heightened scrutiny to evaluate the constitutionality of the Office of Vital Records and Statistics’ discrimination between female spouses of women who conceive through donor insemination and male spouses of women who conceive the same way.

**B. The Refusal to Recognize Same-Sex Spouses as Parents Pursuant to Utah’s Assisted Reproduction Statutes Violates Equal Protection Under Any Level of Constitutional Scrutiny.**

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<sup>3</sup> Before *Windsor*, the Tenth Circuit stated in dicta that sexual orientation discrimination is subject to rational-basis review. See *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008). Despite this dicta, however, the Tenth Circuit has never used rational-basis review to uphold sexual orientation discrimination. Instead, the Tenth Circuit’s cases have either upheld sexual orientation discrimination under heightened scrutiny, see *Walmer v. Dep’t of Def.*, 52 F.3d 851, 854 (10th Cir. 1995); *Rich v. Sec’y of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Nat’l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), or struck down sexual orientation discrimination under even rational-basis review, see *Price-Cornelison*, 524 F.3d at 1114.

The Office's disparate treatment of female and male spouses cannot survive the heightened scrutiny that the Constitution requires of governmental discrimination based on sex or sexual orientation. Indeed, it cannot survive any level of constitutional review.

A same-sex spouse and a different-sex spouse of a woman who conceives through donor insemination are similarly situated in all relevant respects. The purpose of Utah's assisted reproduction statutes is to establish parentage of a spouse who consents to bringing a child into the world whether or not the spouse shares a genetic relationship with the child. In fact, the Tenth Circuit in *Kitchen* specifically cited to Utah's assisted reproduction statutes to explain that same-sex couples are similarly situated to different-sex couples who conceive through assisted reproduction. *Kitchen*, 755 F.3d at 1220 (citing Utah Code Ann. §§ 78B-15-701 to 707).<sup>4</sup>

Requiring married same-sex couples, but not married different-sex couples, to go through a step-parent adoption to provide two legal parents for their children conceived through donor insemination imposes a significant and unjustified burden on same-sex couples and their families. To initiate a step-parent adoption, a couple must file a Petition to Adopt a Minor Stepchild in Utah State Court and pay a filing fee of \$360. Statement of Facts ¶ 13. As a precondition to filing the petition, they must submit to a background check by the Utah Bureau of Criminal Identification and the Utah Division of Child and Family Services. *Id.* ¶ 14. Once

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<sup>4</sup> In arguing that same-sex couples and different-sex couples are similarly situated with respect to the Utah Uniform Parentage Act's provisions regarding assisted reproduction, Plaintiffs do not intend to imply that same-sex couples and different-sex couples are *not* similarly situated with respect to other provisions of the Utah Uniform Parentage Act, such as the marital presumption of parentage. *See* Utah Code Ann. § 78B-15-204(1)(a) (establishing that a man is presumed to be the father of a child if "he and the mother of the child are married to each other and the child is born during the marriage"). The marital presumption of parentage is also designed to establish parental rights and responsibilities despite the absence of a genetic connection. *R.P. v. K.S.W.*, 320 P.3d 1084, 1097 (Utah Ct. App. 2014). However, Plaintiffs here do not need to invoke the presumption of parentage because the assisted reproduction statutes automatically establish Angie a legal parent.



they file the adoption petition, they must wait until a judge schedules a hearing on their adoption petition, and they would then have to appear in person at the hearing to get the judge's approval for the adoption to take place. *Id.* ¶ 15. Different-sex spouses who conceive through donor insemination are not required to go through this expense, scrutiny, and delay to have their legal parent-child relationships recognized. Rather, the Office recognizes that Utah's assisted reproduction statutes immediately and automatically establish parentage for both spouses at the moment of the child's birth. Equal protection requires that same-sex spouse and their children the same protection. As discussed below, the Office's refusal to recognize same-sex spouses as legal parents pursuant to Utah's assisted reproduction statutes imposes irreparable harm on the married couple and their children.

**C. Utah's Assisted Reproduction Statutes Must Be Interpreted to Apply Equally to Male and Female Spouses.**

The Office has statutory authority to apply Utah's assisted reproduction statutes in a constitutional and gender-neutral manner to comply with the requirements of equal protection. The Utah legislature has enacted the general rules of statutory construction that "[a] word used in one gender includes the other gender" unless doing so would be "inconsistent with the manifest intent of the Legislature" or "repugnant to the context of the statute." Utah Code Ann. §§ 68-3-12(1)(a), (c). Moreover, in the specific context of the Utah Uniform Parentage Act, the legislature instructed that "[p]rovisions of this chapter relating to determination of paternity also apply to determinations of maternity." Utah Code Ann. § 78B-15-106. These rules of construction provide authority for the Office to apply Utah's assisted reproduction statutes equally to female and male spouses of women who conceive via assisted reproduction.

Moreover, even if the Office's statutory authority were unclear, this Court has jurisdiction to extend the protections of Utah's assisted reproduction statutes to both female and

male spouses in order to cure the equal protection violation that would otherwise occur. “Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.” *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result)). In most cases, “extension, rather than nullification, is the proper course.” *Califano*, 443 U.S. at 89; *accord Heckler*, 465 U.S. at 739 n.5; *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 435 (6th Cir. 2008). The appropriate remedy in this case is to extend the protections of the statutes to female spouses instead of nullifying the protections that currently exist for male spouses and their children. *Cf. Kitchen*, 755 F.3d at 1230 (affirming injunction requiring Utah to allow same-sex couples to marry instead of nullifying the ability to marry for both same-sex and different-sex couples).

## **II. Plaintiffs Will Suffer Irreparable Injury If the Injunction Does Not Issue**

The violation of constitutional rights for any period of time constitutes irreparable harm as a matter of law. *Awad v. Ziriya*, 670 F.3d 1111, 1131 (10th Cir. 2012). That is especially true where, as here, the violation of constitutional rights imposes its own dignitary harms as a result of unequal treatment. “[Discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.” *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (internal quotation marks and citations omitted); *accord Windsor*, 133 S. Ct. at 2694 (noting that “[t]he differentiation demeans the couple”).

The Office's legal position also casts a cloud of uncertainty over the parental status of Angie and Kami, and other same sex couples. If Utah's assisted reproduction statutes did not apply to same-sex spouses, then L.R. would be placed in the unstable position of having just one legal parent until the step-parent adoption is complete. If L.R. needs emergency medical care, Angie would not be automatically authorized that care and could even be excluded from her child's side in the hospital. If something were to happen to Angie before the adoption is finalized, L.R. could be deprived of critical economic benefits as her surviving child. For families who cannot afford to pay the costs required to petition for a step-parent adoption, the children would indefinitely remain in this vulnerable position of being a legal stranger to one of his or her parents.

For all these reasons, the drafters of the model Uniform Parentage Act made clear that the provisions creating automatic parentage for spouses of women who conceive with assisted reproduction was based on "concern for the best interests . . . children of assisted reproduction". Unif. Parentage Act (2000) § 703.<sup>5</sup> By placing hurdles and delay in the way of Angie and Kami and other same sex couples seeking to provide the security of two legal parents for their children, the Office of Vital Records and Statistics' policy needlessly harms and destabilizes the lives of same-sex couples' children. *See Kitchen*, 755 F.3d at 1215 (describing how the lack of a legal relationship with both parents harmed the children of same-sex couples).

### **III. THE BALANCE OF HARMS STRONGLY FAVORS PLAINTIFFS.**

The balance of harms strongly favors the Plaintiffs. "When [a] law...is likely unconstitutional, the [] interest [of those the government represents, such as voters] do not outweigh [a plaintiff's interest] in having [its constitutional rights protected]." *Hobby Lobby*

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<sup>5</sup> [http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf).

*Stores, Inc. v. Sebelius*, 723 F.3d. 1114, 1145 (10th Cir. 2013) (en banc) (plurality) (quoting *Awad*, 670 F.3d 1131-32 (alternations in *Hobby Lobby*)). The Plaintiffs suffer daily harm from the violation of their constitutional rights. The Defendants, by contrast, will not suffer any harm at all by treating applying the assisted reproduction statutes equally to same-sex and different-sex spouses. Forcing same-sex couples to go through an unnecessary step-parent adoption process creates more burdens for the State, not less.

#### **IV. AN INJUNCTION IS IN THE PUBLIC INTEREST**

An injunction is in the public interest because “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Awad*, 670 F.3d at 1132. In this case, moreover, an injunction is also necessary to prevent the legal uncertainty about the parental rights of same-sex spouses that has been caused by the Office of Vital Statistics and Records’ policy. It is in the interest of the public – and for these families – for the courts to provide clarity now.

#### **CONCLUSION**

For all these reasons, Plaintiffs move the court to issue an injunction against Defendants as follows:

Defendants must issue a birth certificate recognizing both Angie Roe and Kami Roe as legal parents of L.R. and recognize Angie Roe and Kami Roe as the legal parents of L.R. for all purposes under Utah law.

Defendants must recognize the female spouses of women who give birth through assisted reproduction as legal parents under the Utah Uniform Parentage Act, subject to the same terms and conditions that apply to male spouses.

DATED this 15<sup>th</sup> day of April, 2015.

s/ John Mejia \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing pleading was served upon the following via the CM/ECF electronic delivery system:

/s/ John Mejia