



2. Melissa and Meredith (together, “the Weisses”) are a married couple who legally wed in Ontario, Canada on August 5, 2003, after the Court of Appeal for Ontario in *Halpern v. Canada (Att’y Gen.)* (2003) 65 O.R.3d 161, on June 10, 2003, upheld a lower court ruling that same-sex couples could not be denied the freedom to marry within that province. The Weisses have two children, both born during their marriage, conceived through medically assisted reproductive technology (“A.R.T.”).

3. The Weisses’ first child, L.W., was conceived by Melissa via *in vitro* fertilization with Meredith’s ova and anonymous donor sperm. L.W. was born in 2006. The Weisses reversed their roles in their initial efforts to have a second child, with Meredith attempting to become pregnant via *in vitro* fertilization with Melissa’s ova. After two miscarriages, and learning that Meredith had a medical condition that prevented her from carrying a child to term, Melissa became pregnant with their second child, D.W., via *in vitro* fertilization with her own ova and the same anonymous donor sperm used to conceive L.W.

4. D.W. was born in 2008. Melissa gave birth to both L.W. and D.W., who are genetically related to each other in that they were conceived using the same donor sperm.

5. Although the Weiss children were born after the Weisses’ lawful marriage and were conceived via A.R.T. with spousal consent, North Carolina DHHS has refused to place both Melissa and Meredith’s names on either of the Weiss children’s birth certificates. Instead, DHHS placed solely Meredith’s name on the birth certificate of L.W. in 2006 and placed solely Melissa’s name on the birth certificate of D.W. in 2008, in both instances omitting the name of the listed woman’s spouse, who is the other parent of each of the Weiss children.

6. On October 14, 2014, following the decision by the Fourth Circuit Court of Appeals in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), which held unconstitutional

Virginia’s laws denying legal recognition to the marriages of same-sex couples, and the decision by a district court on October 10, 2014, in *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (M.D.N.C. 2014), similarly striking down North Carolina’s laws denying marital rights to same-sex couples, the Weisses: (a) completed two “Request to Amend a Record” forms provided by DHHS (“DHHS Amendment Forms”) requesting new birth certificates for the Weiss children adding the omitted parent’s name to the birth certificate for each of the Weiss children to reflect that each was born to married parents; (b) provided the requisite fee along with a copy of their marriage certificate and court orders (further described in paragraph 35, below) declaring that both Melissa and Meredith are the Weiss children’s legal parents; and (c) sent the completed DHHS Amendment Forms to N.C. Vital Records, as instructed on the forms. As of the date of the filing of this lawsuit, DHHS has failed to provide the requested amended birth certificates.

7. Upon information and belief, DHHS has issued and continues to issue two-parent birth certificates to the marital children of same-sex spouses in recognition of DHHS’s constitutional obligation to treat the marital children of same-sex spouses as having two legal parents from birth—but only if those children were born after October 10, 2014. Upon information and belief, DHHS refuses to issue two-parent birth certificates for children born to same-sex spouses before October 10, 2014. Further, DHHS routinely provides two-parent birth certificates to all children born to different-sex spouses (a) without requiring a court order, (b) regardless of whether these children were born before or after October 10, 2014, (c) without regard to how these children were conceived, and (d) regardless of whether these children share a genetic connection to both spouses.

8. The failure of DHHS to amend the Weiss children’s birth certificates deprives these children of the dignity, legally-recognized parent-child status, security, support, and

protections available upon birth to other marital children, and denies Melissa and Meredith the privacy, dignity, security, support, and protections available to other married parents.

9. The failure of DHHS to provide two-parent birth certificates to the Weiss children violates the equal protection guarantee of the United States Constitution by discriminating (a) against Melissa and Meredith on the basis of their sexual orientation and sex, (b) against the Weiss children on the basis of their parents' sexual orientation, sex, and status as a same-sex couple, and (c) against the Weisses and the Weiss children (together, the "Weiss family") based on the Weiss children's birth dates relative to the birth dates of other marital children of same-sex spouses, all without adequate justification. Such arbitrary line-drawing cannot withstand even the lowest level of constitutional scrutiny.

10. The failure of DHHS to provide two-parent birth certificates to the Weiss children also violates the due process guarantee of the United States Constitution by arbitrarily depriving each member of the Weiss family of a government benefit without even a legitimate justification. DHHS's failure also violates the due process guarantee by unconstitutionally infringing on the liberty interests of each member of the Weiss family to family privacy, integrity, and association, which includes the fundamental right to security in their legal parent-child bonds. DHHS's failure also violates Melissa's and Meredith's fundamental rights to parental autonomy and unconstitutionally infringes upon their fundamental liberty interests in their existing marriage. DHHS lacks even a legitimate justification for these deprivations, let alone a compelling one.

11. Melissa and Meredith now bring this action on behalf of themselves and as next friends of their children, L.W. and D.W., asking this Court to: (1) declare that DHHS's refusal to issue two-parent birth certificates to the Weiss children is unconstitutional; (2) enjoin Defendants from continuing their practice of denying two-parent birth certificates to the marital children of

same-sex spouses born prior to October 10, 2014; and (3) order Defendants immediately to issue corrected birth certificates for L.W. and D.W. listing both Melissa and Meredith as each of L.W.'s and D.W.'s parents.

### **JURISDICTION**

12. This civil rights action is brought pursuant to, *inter alia*, the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction over these federal claims pursuant to the constitutional provisions enumerated and 28 U.S.C. § 1331 and § 1343(3) and (4), as these claims are brought to redress deprivations of rights, privileges, and immunities secured by the United States Constitution and by law. Jurisdiction is also proper pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202.

13. This Court has personal jurisdiction over Defendants because they are domiciled in the State of North Carolina.

### **VENUE**

14. Venue is proper in the Western District of North Carolina, under 28 U.S.C. § 1391(b), because Defendants are located in this state and district, and a substantial part of the acts and/or omissions giving rise to Plaintiffs' claim occurred in this district.

### **PARTIES**

15. Plaintiffs Melissa and Meredith Weiss are citizens and residents of North Carolina and have been a legally married couple for more than 12 years; each appear individually and as next friends of their sons, 9 year-old L.W., and 7 year-old D.W. Melissa and Meredith Weiss are harmed by the refusal of Defendants to: (a) to amend the birth certificates of L.W. and D.W. to reflect that the Weiss children were born to married parents, and (b) to name both Melissa and Meredith as the Weiss children's parents.

16. Plaintiffs L.W. and D.W., who were born and reside in North Carolina, sue through their parents, Plaintiffs Melissa and Meredith Weiss, because L.W. and D.W. are harmed by the refusal of Defendants to issue corrected birth certificates to name both Melissa and Meredith as their parents and to reflect that they are related to each other.

17. Defendant Rick Brajer (“Brajer”) is sued in his official capacity as Secretary of DHHS. In this official capacity, Brajer is required to administer and enforce the provisions of all the articles within Chapter 130A (“Public Health”) of the General Statutes of North Carolina, including Article 4 (“Vital Statistics”), except Articles 9 and 10.

18. Defendant Catherine Ryan (“Ryan”) is sued in her official capacity as State Registrar and Director of Vital Records, the part of the DHHS Division of Public Health responsible for recording North Carolina vital events, including registering all births and issuing birth certificates. In this official capacity, Ryan is obligated to secure and maintain all vital records under Chapter 130A, Article 4 of the General Statutes of North Carolina and to do all things necessary to carry out its provisions. Pursuant to 10A N.C. Admin. Code 41H.0901, Ryan is empowered to correct errors to vital records by her own observation and by request from an informant.

### **FACTUAL ALLEGATIONS**

19. After several years of courtship, Melissa and Meredith traveled to Ontario, Canada to marry each other on August 5, 2003 after Ontario, on June 10, 2003, became the first North American jurisdiction to permit same-sex couples to legally marry. Among the reasons Melissa and Meredith married each other was that they hoped to have and raise children within a married household.

The Weisses' Efforts to Conceive L.W. and to Establish and Protect Both Woman's Parental Relationship to Him

20. In order to become pregnant with their first child, and in a manner intended to increase familial ties, the Weisses went through the painful process of harvesting Meredith's ova, *in vitro* fertilization with anonymous donor sperm, and implantation of a fertilized embryo in Melissa's womb. After approximately six unsuccessful attempts, Melissa became pregnant with L.W.

21. The Weisses consented in writing to the aforescribed artificial insemination techniques resulting in the conception of their first child, L.W.

22. Prior to L.W.'s birth, the Weisses petitioned for and, on May 8, 2006, were granted a pre-birth declaration of parentage from the North Carolina District Court in Chatham County (the "Order of Parentage"), that declared both Melissa and Meredith to be L.W.'s legal parents upon his birth and ordered "that a birth certificate be issued listing both parties as parents of BABY WEISS."

23. Janice Oldham, Clerk of Court of Chatham County, sent DHHS the Order of Parentage by facsimile on or before June 1, 2006 ordering the agency to place both Melissa's and Meredith's names on the child's birth certificate.

24. L.W. was born in 2006, several days after the transmission of the Order of Parentage by Janice Oldham to DHHS. The Weisses explained to hospital staff that they were a legally-married couple and filled out paperwork listing Meredith as the "FATHER (second parent)" and answering the question "MOTHER MARRIED" with "Yes (Melissa & Meredith were married in Canada to each other)". The hospital provided the Weisses with a Certificate of Delivery certifying the date and time of L.W.'s birth, L.W.'s birth weight, and the parentage of

L.W. The Certificate of Delivery states that the “parents are Melissa Marie Weiss and Meredith Leigh Weiss.”

25. On June 17, 2006, after L.W. was born, Meredith applied for a certified copy of L.W.’s birth certificate adding Melissa as his parent, marking out the word “Father” with the words “2nd Mother.” Despite this application setting out that Meredith and Melissa were L.W.’s parents, and notwithstanding that a) Melissa and Meredith were legally married when L.W. was born, b) that Melissa gave birth to L.W. and c) DHHS was in receipt of the North Carolina District Court order declaring both Melissa and Meredith to be L.W.’s legal parents upon his birth and ordering that a birth certificate be issued listing both Melissa and Meredith as L.W.’s parents, DHHS instead provided a birth certificate with only Meredith’s name listed, refusing to recognize that L.W. was born to a married woman and refusing to list both Melissa and Meredith as L.W.’s parents on his birth certificate.

26. On September 20, 2006, Glenn Cutler, then State Registrar and Director of Vital Records, sent the Weisses’ attorney, Sharon Thompson, a letter, stating that “Vital Records was not able to put both Melissa Marie Weiss and Meredith Leigh Weiss on the birth certificate as parents as requested.” This September 20, 2006 letter enclosed a copy of a letter dated June 1, 2006 from Patty Raper, NC Vital Records Birth Registration Manager, to Janice Oldham, Clerk of Court of Chatham County, verifying receipt of the Order of Parentage and stating that “Vital Records will be able to put Meredith Leigh Weiss on the birth certificate as the biological mother based on the court order, which finds her to be the egg donor of the child who was conceived via in vitro fertilization. Pursuant to NCGS 130-101, Vital Records will not be able to put Melissa Marie Weiss on the birth certificate as a parent.”

27. On September 24, 2008, Meredith sent a letter to the North Carolina Attorney General, attaching the Order of Parentage filed May 8, 2006 declaring both women to be L.W.'s legal parents, seeking clarification as to why the Registrar refused to honor the Order and provide a new birth certificate for L.W. listing both his parents.

28. On December 31, 2008, Grayson Kelley, North Carolina Chief Deputy Attorney General, responded to Meredith's September 24, 2008 letter. In the December 31, 2008 response, Mr. Kelley stated that "N.C.G.S. §130A-101 allows only the name of a mother and a father to be listed on a birth certificate. Therefore, as the statutes are currently written, Melissa Marie Weiss could not also be listed as a parent on [L.W.]'s birth certificate."

The Weisses' Efforts to Conceive D.W. and to Establish and Protect Both Woman's Parental Relationship to Him

29. Not long after L.W. was born, the Weisses began their efforts to have another child. They used the same anonymous donor sperm as had been used to conceive L.W. and attempted the same painful – and expensive – procedure they had used to conceive L.W., but this time reversing the roles. Melissa went through the difficult process of having her ova harvested, which were fertilized *in vitro* and implanted in Meredith's womb using the same anonymous donor sperm as had been used to conceive L.W. – an intentional decision to ensure that the children were filially related. --. After Meredith was unable to successfully conceive after two attempts, including and one painful miscarriage, the Weisses used the last of the donor sperm to fertilize the ova harvested from Melissa and the embryos were then implanted into both Meredith's and Melissa's uteruses. Unfortunately, Meredith miscarried. Melissa's procedure resulted in a successful pregnancy.

30. The Weisses consented in writing to the aforescribed artificial insemination techniques resulting in the conception of their second child, D.W.

31. D.W. was born in 2008. His birth certificate inaccurately reflects that he was born to an unmarried woman by listing Melissa as his only parent.

32. Because DHHS had refused to respect the pre-birth order of parentage they had obtained for L.W., the Weisses did not seek a pre-birth order of parentage for D.W. Instead, after D.W.'s birth, the Weisses petitioned to adopt D.W., and were granted an adoption order (in a proceeding often termed a "second parent adoption") in Durham County, North Carolina, on December 8, 2008, which legally confirmed that both Melissa and Meredith are D.W.'s parents. Based upon information provided to them by their attorney that the DHHS Registrar had refused to file or index birth certificates of second parent adoptees, the Weisses did not seek a new birth certificate from DHHS for D.W. following the adoption.

The Weisses' Efforts to Obtain Accurate Birth Certificates Following Federal Court Decisions Striking Down the North Carolina Laws that Discriminate Against Married Same-sex Couples

33. On October 10, 2014, in *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (M.D.N.C. 2014), a federal district court in the Middle District of North Carolina held that North Carolina's laws denying legal recognition to the lawful marriages of same-sex couples entered in other jurisdictions were unconstitutional and enjoined the State of North Carolina, Attorney General, and all officers, agents, and employees of the State from "implementing or enforcing any provisions" of the laws that "prohibit the State of North Carolina from recognizing same-sex couples' lawful out-of-state marriages."

34. On that same day, October 10, 2014, the Western District of North Carolina issued its decision in *General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d

790, 791 (W.D.N.C. 2014) holding unconstitutional any “source of state law that operates to ... prohibit[] recognition of same-sex marriages lawfully solemnized in other States....”.

35. A few days later, on October 14, 2014, the Weisses jointly submitted two forms titled “Request to Amend a Record” to DHHS for both L.W. and D.W. requesting that the Registrar amend the Weiss children’s birth certificates to reflect that the Weiss children were born to a married woman and listing both spouses as the children’s parents. The Weisses also provided the requisite fees, copies of their marriage certificate, and copies of the court orders declaring both women to be the Weiss children’s legal parents. The requests sought new birth certificates adding Melissa as a parent to L.W.’s birth certificate and Meredith as a parent to D.W.’s birth certificate. As of the date of filing, DHHS has failed to respond to these requests.

North Carolina Laws and Regulations Regarding Birth Certificates of Marital Children

36. Section 130A-101(e) of the General Statutes of North Carolina requires the State of North Carolina to issue birth certificates listing the birth mother’s spouse as a parent, and Section §130A-118 (b)(2) of the General Statutes of North Carolina requires issuance of a new certificate of birth when notification is received by the State Registrar from the clerk of a court of competent jurisdiction of a judgment, order or decree disclosing different or additional information relating to the parentage of a person.

37. Section 49A-1 of the General Statutes of North Carolina requires that any child or children born as a result of artificial insemination to be considered at law in all respects the same as a naturally conceived legitimate child of the spouses requesting and consenting in writing to the use of such technique.

38. Section 41.H.0104.4 of Title 10A of the North Carolina Administrative Code mandates that birth certificates may not contain improper or inconsistent data.

39. Pursuant to Section 0901(a) of Title 10A of the North Carolina Administrative Code, Defendant Ryan, as the State Registrar, may correct errors by her own observation and by request from the individual or institution responsible for filing the original certificate, the informant, or the local registrar or his/her deputized agent.

DHHS Current Policies Regarding the Marital Children of Same-Sex Couples

40. On or about May 13, 2015, DHHS issued official directives, guidelines and/or policies regarding birth certificates for children of married same-sex couples (“DHHS Policies Regarding the Marital Children of Same-Sex Couples”). Defendant Ryan sent an email dated May 13, 2015 to all North Carolina Birth Registrars, Health Directors, Deputy Registrars, and Assistant Deputy Registrars with instructions on registering birth records and providing certified birth certificates of children born to same-sex couples.

41. The DHHS Policies Regarding the Marital Children of Same-Sex Couples allow the same-sex spouse of a woman who, after May 13, 2015, gives birth to a child during the marriage to be listed as an additional parent on the child’s birth certificate.

42. On information and belief, marital children born to female couples after October 10, 2014 but prior to May 13, 2015 (the date that DHHS announced new policies concerning children born to married same-sex parents, *see* para. 38 above) are eligible to receive a new birth certificate recognizing the spouse as a parent pursuant to a properly completed DHHS Amendment Form and evidence of the marriage.

43. Further, DHHS routinely provides two-parent birth certificates to all children born to different-sex spouses who were married when the child was born, (a) without requiring a court order, (b) regardless of whether these children were born before or after October 10,

2014, (c) without regard to how these children were conceived, and (d) regardless of whether these children share a genetic connection to both spouses.

44. However, DHHS Policies Regarding the Marital Children of Same-Sex Couples do not allow married female couples who gave birth before October 10, 2014, such as the Weisses, to obtain a new birth certificate naming both spouses as parents.

45. On information and belief, DHHS Policies Regarding the Marital Children of Same-Sex Couples are a result of the decisions and actions of the State's policymaking officials, including Defendants, and/or are based on practices so persistent and widespread as to have the force of law.

The Weisses' Efforts to Ensure that Both Women Appear on the Weiss Children's Birth Certificates Following *Obergefell v. Hodges*

46. On June 26, 2015, the United States Supreme Court ruled in *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015), that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage" and that laws seeking to do so are "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." The Court further held that state laws denying recognition to the valid marriages of same-sex couples violate both the due process and equal protection guarantees of the United States Constitution. The Court applied its ruling to marriages entered *prior* to its decision, including with respect to death certificates of individuals who had died in Ohio prior to the state's recognition of marriages of same-sex couples entered in other states and with respect to birth certificates of children born in Ohio whose parents married in other states prior to Ohio's recognition of marriages entered in other states.

47. On July 27, 2015, the Weisses sent a letter to Emery E. Milliken, DHHS General Counsel, through counsel, renewing their request to amend L.W.'s and D.W.'s birth certificates. The letter referenced the controlling court decisions, including *Obergefell v. Hodges*, *Bostic v. Schaefer*, and *Fisher-Borne v. Smith*. The letter also noted that the Registrar is in possession of two North Carolina court orders recognizing that both Melissa and Meredith are the parents of both L.W. and D.W.

Plaintiffs Need for Birth Certificates Listing Both Women as the Weiss Children's Parents

48. Without accurate two-parent birth certificates, it is difficult if not impossible for parents to comply with legal identification requirements for their children in many instances. By way of illustration, birth certificates are requested prior to a child obtaining a Social Security card or a passport; state agencies and employers often request birth certificates to enroll a child in needed insurance and other benefits; and recognition of a parent on a birth certificate provides important evidence for obtaining Social Security survivor benefits to the child in the event of the parent's death and inheritance to the child if the parent dies intestate. Other instances when birth certificates may be required include, but are not limited to, school registrations and interactions with insurance providers and healthcare and emergency workers. If a family falls on hard economic times, birth certificates may be required to apply for benefits on behalf of the child. Moreover, if a child goes missing or is kidnapped, law enforcement agencies often require parents to produce a birth certificate to report a missing child or secure the child's return. If a couple's marriage breaks down, birth certificates commonly are required in order for a state agency to obtain delinquent child support.

49. Because they lack accurate two-parent birth certificates for their sons, the Weisses now encounter obstacles when they are required to show that they are both parents to their two

sons in interactions with individuals, institutions, agencies, and others. The Weisses suffer from the stress and anxiety that one of them would be unable to make medical and emergency decisions without proof of their parentage on the children's birth certificates, and of knowing that their children are more vulnerable without having both parents listed on their birth certificates. These fears have been confirmed on a number of occasions, as when they needed emergency medical care for D.W.-while traveling in Florida. Without a birth certificate listing both women as D.W.'s presumptive legal parents, medical personnel wanted to know which woman was the "real mother," discussed removing one of them from their son's side-on the basis that she was not entitled to access as a family member, and required the women to struggle with hospital personnel to ensure that neither was denied access and information, actions which created and exacerbated the Weisses' anxieties, fears, and emotional distress. The Weisses encounter such interrogation to determine the identity of the "real mother" with frequency as a result of not having a birth certificate listing both parents. Even if the Weisses can explain discrepancies in their children's birth certificates and establish the omitted parent's equal claim to exercise control over their children's care and custody, having to do so is likely to invade the privacy of their family by revealing which mother does or does not have a genetic connection to each child, a fact that they do not wish to share in every circumstance. In addition, the Weisses experience anxiety and worry that the children's rights to inheritance could be contested, as well as other benefits and entitlements where the entitlement to coverage arises based on the status of dependent children. Because the children are now old enough to read, the Weisses worry that as a result of seeing their birth certificates listing only one parent, they will question the other parents' status and legitimacy, as well as suffer the anxieties associated with believing that they only have one legal parent.

50. Defendants' failure to issue two-parent birth certificates to the Weiss children harms them by inaccurately describing their parents' marital status and their own legal relationships to their parents and by communicating to them and to any other people who may see their birth certificates that their government does not perceive them as a legal family, each with two legally recognized parents and each the sibling of the other. Through no fault of their own, the Weiss children suffer the stigma of being told by their government that their family is somehow lesser than other marital families. In addition, the Weiss children suffer practical harms in a variety of ways where birth certificates reflect parentage. For example, they cannot use their own birth certificates to show who both of their parents are for the purposes of school registrations and interactions with insurance providers and healthcare workers. The Weiss children are more vulnerable without having both parents listed on their birth certificates with respect to government benefits, government pension and inheritance, traveling internationally, and many other rights and benefits, given that a range of institutions, individuals, and agencies accept birth certificates as *prima facie* evidence of parentage.

51. Beyond the harms listed in paragraphs 48-50 above, the refusal of DHHS to issue new birth certificates to the Weiss family is disruptive to their current and future family integrity and security in a variety of ways. For example, as they continue to grow up, the Weiss children are and will be burdened, if not barred, in their ability to establish their relationship to each other as siblings, despite that Melissa gave birth to both of them and that they are genetically related to each other. For example, should an emergency arise in the future, the Weiss children may have difficulty establishing that they are the sibling of the other, if one must step in to care for the other, to visit the other in a hospital, or for inheritance purposes.

52. The arbitrariness and harmfulness of the DHHS policies and/or actions that refuse to provide new birth certificates to children born to female spouses prior to October 10, 2014 to the integrity of the Weiss family are further illustrated should the Weisses have additional children in the future. The current policies and/or actions of DHHS with respect to children born to married female couples would mean that future children born to the Weisses would have two parents reflected on their birth certificates while the oldest two children continue to reflect a parental relationship to only Melissa or Meredith, despite that they were all born to the same married parents. In addition, later born children would have a sibling relationship reflected on their birth certificates to either L.W., whose birth certificate now lists only Meredith as a parent, or D.W., whose birth certificate now lists only Melissa as a parent, but not to both siblings.

53. At all times relevant hereto, Defendants were acting under color of state law.

**FIRST CLAIM FOR RELIEF**  
**(Violation of the Equal Protection Clause of the United States Constitution,  
42 U.S.C. § 1983)**

54. Plaintiffs reallege and incorporate herein paragraphs 1 through 53, above.

55. Section 1 of the Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”

56. On June 26, 2015, the United States Supreme Court ruled in *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015), that the due process and equal protection clauses of the U.S. Constitution bar states from refusing to allow same-sex couples to marry and from denying recognition to the marriages same-sex couples legally entered in other jurisdictions. The Court further held that states may not subject same-sex couples to different terms and conditions

of marriage than apply to different-sex couples and requiring Ohio to recognize the marriages of same-sex couples entered prior to its decision with respect to birth and death certificates.

57. When the Supreme Court applies a rule of law to the parties before it, that rule is the controlling interpretation of federal law and government agencies and officials are obliged to apply that rule retroactively to their actions and determinations. Accordingly, the Weisses' marriage is entitled to recognition, and to the rights and benefits that flow from marriage, including with respect to birth certificates accurately reflecting the marital status of the Weiss children's parents and the parentage of the Weiss children, at the time the Weiss children were born, prior to the dates of the relevant court rulings.

58. DHHS' failure to amend birth certificates for same-sex spouses' marital children born prior to October 10, 2014 to reflect that these children have two parents discriminates against the Plaintiffs on the basis of both the sex and sexual orientation of Melissa and/or Meredith. Defendants are responsible for this failure. Defendants' failure lacks even a rational relationship to a legitimate justification, let alone the required substantial relationship to an important objective.

59. Defendants' failure to amend birth certificates for same-sex spouses' marital children born prior to October 10, 2014 to reflect that these children have two parents also discriminates against the Weiss children and other marital children of same-sex spouses on the basis of their parents' status as a same-sex couple, their parents' sex and sexual orientation, and the dates on which the children were born. There is not even a rational, let alone important, justification for such discrimination.

60. Defendants' failure to amend birth certificates for same-sex spouses' marital children born prior to October 10, 2014 to reflect that these children have two parents treats these

families, including the Plaintiffs, differently based solely on the date of birth of the children in these families. Married female spouses who gave birth on October 10, 2014, or thereafter, may request and receive from DHHS a new birth certificate reflecting that their children were born to two married parents based on evidence of a valid marriage. Yet, married female spouses who gave birth before October 10, 2014 and who provide evidence of valid marriages to DHHS will be denied new birth certificates and these children will have birth certificates listing only one parent and inaccurately reflecting that they were born to unmarried women.

61. Defendants' failure to provide new birth certificates to female couples whose marital children were born prior to October 10, 2014 arbitrarily discriminates against the Weiss family and other families with lesbian spouses whose marital children were born prior to October 10, 2014, relative to all other married parents, including all lesbian spouses and the spouses' marital children born after that date, without a rational justification.

62. Line-drawing based on the date that a North Carolina district court struck down as unconstitutional laws discriminating against married same-sex couples is not an action that is rationally related to a legitimate purpose because a law found repugnant to the Constitution, including the law that refused to recognize the valid marriages of same-sex couples prior to October 10, 2014, is considered void and as no law, and was unconstitutional prior to October 10, 2014.

63. Defendants' failure to amend birth certificates of marital children of same-sex spouses born prior to October 10, 2014 to reflect that these children have two parents are a result of the decisions and actions of the State's policymaking officials, and/or based on practices so persistent and widespread as to have the force of law, and deprives all Plaintiffs of their

constitutional right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

64. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

### **SECOND CLAIM FOR RELIEF**

#### **(Violation of the Due Process Clause of the United States Constitution through Governmental Interference with the Fundamental Rights to Family Integrity and Association, Parental Autonomy, and Marriage, 42 U.S.C. § 1983)**

65. Plaintiffs reallege and incorporate herein paragraphs 1 through 53, above.

66. The Due Process Clause of the United States Constitution protects parents' fundamental rights to parental autonomy, family integrity and association, and all individuals' fundamental right to marry. Plaintiffs have a liberty interest in their family privacy, integrity and association, which includes the fundamental right to security in their legal parent-child bonds. Moreover, Melissa and Meredith have a protected liberty interest in their parental autonomy, including the fundamental right to make decisions concerning when, whether and how to increase their family, and concerning the care, custody and control of their children that are presumptively in their children's best interests.

67. Defendants' failure to amend L.W.'s and D.W.'s birth certificates to reflect that both Melissa and Meredith are their parents violates the Due Process Clause of the United States Constitution by unconstitutionally infringing on these liberty interests and depriving all Plaintiffs of a critical identity document necessary to demonstrate their familial relationships.

68. The interest of parents in the care, custody and control of their children is deeply intertwined with the fundamental right to marry. A two-parent birth certificate is an aspect of marital status and a benefit of marriage that protects marital children and their bonds to, and right

of support from, both parents. By declining to amend L.W.'s and D.W.'s birth certificates to reflect that they have two parents, and depriving Melissa's and Meredith's children of accurate two-parent birth certificates, Defendants not only have infringed impermissibly on Melissa's and Meredith's fundamental parental interests but also upon their fundamental liberty interests in their existing marriage.

69. Defendants' decisions, policies and/or actions penalize certain married parents and their marital children, including all Plaintiffs, for the parents' decision to have a child prior to October 10, 2014, and thus constitute a heavy burden on the exercise of fundamental freedoms protected by the Due Process Clause, such as the freedom from unwarranted governmental intrusion into matters fundamentally affecting a person such as the decision whether and when to have a child. There is no constitutionally adequate basis for Defendants to infringe on the fundamental rights of all Plaintiffs, let alone an interest that can survive the elevated scrutiny required to justify infringement of these fundamental rights.

70. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

### **THIRD CLAIM FOR RELIEF**

#### **(Violation of the Due Process Clause of the United States Constitution for Arbitrary and Capricious Government Action, 42 U.S.C. § 1983)**

71. Plaintiffs reallege and incorporate herein paragraphs 1 through 53, above.

72. Section 1 of the Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

73. The Due Process Clause protects individuals from arbitrary and capricious government action, including actions unjustified by any circumstance or governmental interest.

74. Defendants have acted arbitrarily and capriciously in failing to apply the holdings of the United States Supreme Court in *Obergefell v. Hodges* that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage,” or to deny access to marriage “on the same terms and conditions as opposite-sex couples,” as well as the holdings of federal court decisions similarly striking down as unconstitutional all North Carolina laws denying recognition to lawful marriages of same-sex couples, to requests for corrected birth certificates for same-sex spouses’ marital children born prior to October 10, 2014 while applying these holdings to recognize that same-sex spouses’ marital children born after that date have two legal parents from birth and are entitled to two-parent birth certificates. Line-drawing based on the date that North Carolina district courts struck down as laws discriminating against married same-sex couples is arbitrary and capricious because a law found repugnant to the Constitution, including the law that refused to recognize the valid marriages of same-sex couples prior to October 10, 2014, is considered void and as no law. Thus, Defendants’ refusal to amend L.W.’s and D.W.’s birth certificates relies upon an arbitrary and capricious distinction between same-sex married couples who had children before October 10, 2014, and married couples whose children were born after October 10, 2014.

75. Defendants’ actions in denying two-parent birth certificates to same-sex spouses’ marital children who were born prior to October 10, 2014 while simultaneously providing birth certificates to same-sex spouses’ marital children born after that date based solely on the fact that the State was enforcing an unconstitutional law at the time the children were born are so

egregious and outrageous that they may fairly be said to shock the contemporary conscience, and violate the Due Process Clause of the United States Constitution.

76. Defendants' blanket denial of new birth certificates listing both spouses as parents of children born to married female couples prior to October 10, 2014 provides neither pre-deprivation protections nor adequate post-deprivation state remedies to Plaintiffs or other families in similar circumstances. Defendants' arbitrary distinction violates substantive due process as action that is unjustifiable by any government interest and not in the service of a legitimate interest.

77. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs seek the following relief:

1. A declaration that DHHS's and Defendants' refusal to issue two-parent birth certificates to same-sex spouses' marital children born prior to October 10, 2014 violates all Plaintiffs' guarantees of equal protection under the Constitution of the United States.

2. A declaration that DHHS's and Defendants' refusal to issue two-parent birth certificates to same-sex spouses' marital children born prior to October 10, 2014 violates all Plaintiffs' rights under the Due Process Clause of the Constitution of the United States.

3. A preliminary and permanent injunction requiring Defendants and their respective agents, employees, and successors, as well as all others acting in concert with any of them, to issue two-parent birth certificates for L.W. and D.W. that recognize both Melissa and Meredith Weiss as legal parents of both L.W. and D.W., and for other similarly situated children.

4. An award of Plaintiffs' costs, expenses and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

5. Such other relief that the Court deems just and proper.

Respectfully submitted this 17<sup>th</sup> day of December, 2015.

/s/ John M. Moye

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to L.R. 83.1(e)*

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