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STATE OF NEW YORK,)
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COUNTY OF NEW YORK)

Howard Daniels being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 19 day of December 2014 deponent served 3 copies of the within

REPLY BRIEF FOR PETITIONERS

upon the attorneys at the addresses below, and by the following method:

BY FEDERAL EXPRESS NEXT BUSINESS DAY DELIVERY AND ELECTRONIC MAIL

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I, Howard Daniels, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, executed on December 19, 2014, pursuant to Supreme Court Rule 29.5(c). All parties required to be served, have been served.

Howard Daniels

Sworn to me this

December 19, 2014

NADIA R. OSWALD HAMID
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2016

Notary Public

Case Name: Henry v. Hodges

Docket/Case No. 14-556

Lambda Legal
making the case for equality

December 19, 2014

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Obergefell, et al. v. Hodges* and *Henry, et al. v. Hodges*, No. 14-556

Dear Mr. Harris:

Please find enclosed forty copies of the Reply Brief For Petitioners in the above-referenced matter, along with a word certification and letter waiving the 14-day waiting period for distribution of the joint petition, response, and reply to the Court for its consideration.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Susan L. Sommer

Enclosures

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Re: *Obergefell, et al. v. Hodges* and *Henry, et al. v. Hodges*, No. 14-556

Dear Mr. Harris:

Please accept this letter as the waiver pursuant to Supreme Court Rule 15.5 by the *Obergefell* and *Henry* Petitioners of the 14-day waiting period, and kindly distribute the petition, response, and reply in the above-referenced matter.

Please call me if you have any questions. Thank you for your assistance.

Respectfully submitted,

Susan L. Sommer

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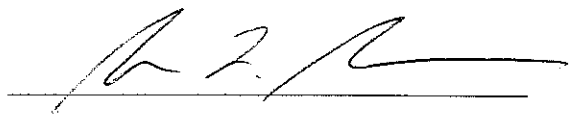
Counsel of Record for Respondent

WORD CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,466 words, excluding the parts of the document that are excluded by Rule 33.1(d).

I am a member of the Bar of this Court, and I declare under penalty of perjury that the foregoing is true and correct.



Susan L. Sommer

Executed on December 19, 2014.

No. 14-556

Supreme Court of the United States

BRITTANI HENRY, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Respondent.

JAMES OBERGEFELL, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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STATUTES

ARGUMENT

Respondent in these two cases challenging Ohio's marriage recognition ban agrees that whether a state may deny recognition to marriages of same-sex couples—the first question presented in the Petition—poses a pressing national question on which the circuits are split. In Respondent's words, "[t]he present status quo is unsustainable." Br. in Resp. at 3. Respondent joins in asking this Court to grant certiorari and resolve the untenable conflict among the circuits as to whether same-sex couples are constitutionally entitled to respect across state lines for their existing marriages and to the freedom to marry nationwide.

But Ohio's refusal to recognize the legitimacy of the families of same-sex couples extends beyond denial of recognition of their marriages, to denial of recognition even of their out-of-state adoption decrees. This reply addresses the *second* question raised in the Petition—whether Ohio's refusal to recognize a judgment of adoption of an Ohio-born child issued to a same-sex couple by the courts of a sister state violates the Full Faith and Credit Clause of the U.S. Constitution. Pet. at i.

That question was addressed in *Henry v. Hodges* in a claim brought pursuant to 42 U.S.C. § 1983 on behalf of Petitioners Joseph Vitale, Robert Talmas, and the Ohio-born child they adopted in New York. The district court held that Ohio's refusal to grant Adopted Child Doe a corrected birth certificate listing both fathers as his parents, based on a purported state public policy against adoption by unmarried couples, violates the full faith and credit guarantee

and inflicts needless harm on children adopted by same-sex parents. App. 148a, 153a-58a. Indeed, Ohio's denial of full faith and credit to these families' judgments of adoption does precisely what this Court condemned in *United States v. Windsor*, 133 S. Ct. 2675 (2013)—it "humiliates . . . children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* at 2694.

The Sixth Circuit, in reversing the judgment below, stripped these Petitioners of the dignity of a birth certificate reflecting the reality of their family and the many tangible protections that come with a complete and accurate birth certificate. It also widened a clear circuit split on the issue that may embolden more states to refuse children adopted out of state by same-sex couples, whether married or not, the protection of accurate birth certificates as they travel in the nation and through life.

Respondent urges the Court to decline certiorari on this important question. Pursuant to Supreme Court Rule 15.6, Petitioners address the new points raised by Respondent on this question, which cries out for review at this time. The present status quo on this second issue also cannot be sustained.

I. This Court's Review Is Warranted on Petitioners' Second Question Presented, to Resolve a Circuit Split on Whether the Full Faith and Credit Clause Obligates One State to Recognize Another State's Judgment of Adoption for Purposes of Naming Both Same-Sex Parents on Their Adopted Child's Birth Certificate.

A. The District Court Thoroughly Addressed This Question in Its Ruling for the Vitale-Talmas Petitioners, and the Sixth Circuit's Reversal Renders the Question Ripe for Review.

The district court unequivocally reached and thoroughly addressed the full faith and credit question, expressly siding with the reasoning of the Tenth Circuit and other circuits and disagreeing with the Fifth Circuit on the issues involved. *See* App. 156a-57a. The district court explicitly ruled that "Plaintiffs have . . . demonstrated a compelling basis on which to find, and the Court does so find, that **Plaintiffs Vitale and Talmas have a right to full faith and credit for their New York adoption decree here in Ohio.**" App. 148a (emphasis in original). The court further found that "Plaintiffs have easily met their burden to demonstrate they are suffering irreparable harm from Defendants' violation of their rights to . . . full faith and credit for their adoption decrees." *Id.* The court's analysis spans five densely written pages in an endnote devoted to the subject. App. 153a-57a. The court specifically enjoined the Respondent from "denying full faith and credit to decrees of adoption duly

obtained by same-sex couples in other jurisdictions." App. 151a.

Although the Sixth Circuit did not expressly address the full faith and credit question, in reversing the district court judgment in its entirety the Sixth Circuit did do so implicitly. Moreover, the Sixth Circuit's neglect to offer analysis of the issue should not have the perverse effect of immunizing its flawed holding from further consideration. Under the circumstances presented here—a widening split in the circuits with children adopted by same-sex parents suffering the brunt of the conflict—this Court's review is especially warranted.

B. The Circuits Are Divided on This Question, Which Presents Far-Reaching Issues This Court Should Resolve.

Contrary to Respondent's suggestion, Br. in Resp. at 27-32, there is an irreconcilable circuit conflict on this question, with the Sixth Circuit's ruling only deepening the divide. In *Adar v. Smith*, 639 F.3d 146 (5th Cir.), *cert. denied*, 132 S. Ct. 400 (2011), the en banc Fifth Circuit, over a vigorous and thorough dissent, denied a challenge under § 1983 to Louisiana's refusal to accord full faith and credit to an out-of-state adoption decree for the purpose of naming both same-sex parents on their Louisiana-born adopted child's birth certificate—the identical outcome here. In direct contrast, the Tenth Circuit in *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), sustained a challenge under § 1983 to Oklahoma's refusal to accord full faith and credit to an out-of-state adoption decree for the purpose of naming both same-sex parents on their Oklahoma-

born adopted child's birth certificate. The split in the circuits resulting from these three cases, which pose nearly identical material facts and legal issues, is stark.

Respondent contends that a purported "thorny preliminary issue about the proper scope and meaning of 42 U.S.C. § 1983" makes this a poor vehicle to address the constitutionality of a state's denial of full faith and credit to an adoption decree. Br. in Resp. at 28. Although the Fifth Circuit in *Adar*, and the Sixth Circuit now, have assumed the wrong answer to this question, it is not nearly so "thorny" as Respondent suggests. In fact, faithful application of this Court's precedents leads to the conclusion that § 1983 indeed provides a cause of action for violation of the guarantee of full faith and credit. Moreover, that this remains a question at all—and one dividing the circuits—warrants guidance, not avoidance, by this Court.

The Court has "rejected attempts"—such as Respondent's—"to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities'" in § 1983's plain text. *Dennis v. Higgins*, 498 U.S. 439, 445 (1991) (holding that § 1983 supports claim for violations of dormant Commerce Clause). The Full Faith and Credit Clause easily meets this Court's three-part test, articulated in *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989), and applied in *Dennis*, for whether a constitutional provision creates a federal right enforceable under § 1983: if it 1) "creates obligations binding on the governmental unit," 2) that are sufficiently concrete and specific as

to be judicially enforced, and 3) "intended to benefit the putative plaintiff." *Dennis*, 498 U.S. at 449 (internal quotations omitted).

The Full Faith and Credit Clause satisfies each of these criteria. The Clause expressly creates obligations binding on the states; it is concrete, specific, and judicially cognizable; and it plainly was intended to confer and protect the rights of judgment-holders to respect across state lines for judicial decrees in their favor. This Court has confirmed that the Clause is a "*command* . . . to give full faith and credit to every judgment of a sister State." *Morris v. Jones*, 329 U.S. 545, 553 (1947) (emphasis added). The Court has repeatedly referred specifically to the *right* conferred by the Clause upon judgment holders—its intended beneficiaries—to interstate respect for judicial decrees. *See, e.g.*, *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 278 n.23 (1980); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 443 (1943); *see also Haywood v. Drown*, 556 U.S. 729, 755 n.5 (2009) (Thomas, J. dissenting) (describing Clause as "prohibition on discrimination" designed to "address state-to-state discrimination").

Rather than credit these and many similar precedents, Respondent instead relies on inapposite cases that did not involve claims under § 1983 to require state executive officials to execute their obligation to give full faith and credit to out-of-state judgments. *See* Br. in Resp. at 29, citing *Thompson v. Thompson*, 484 U.S. 174 (1988); *Minnesota v. N. Secs. Co.*, 194 U.S. 48, 72 (1904); *Stewart v. Lastaiti*, 409 Fed. Appx. 235, 236 (11th Cir. 2010).

Respondent also denies the circuit split on this issue, asserting that, while *Adar* rejected § 1983 as a vehicle to vindicate the right to full faith and credit, 639 F.3d at 151-52, *Finstuen* did not cite § 1983 or expressly discuss the subject. Br. in Resp. at 30. *Finstuen*, however, reached the merits of a § 1983 claim to enforce the full faith and credit guarantee, holding that Oklahoma's refusal to issue a revised birth certificate violated the plaintiffs' "substantive constitutional rights . . . that the [plaintiffs'] final judgment . . . adjudicating their status as adoptive parents be given full faith and credit." *Finstuen*, 496 F.3d at 1155; *see* Second Am. Compl., ¶ 10, *Finstuen v. Crutcher*, No. 5:04-cv-01152-C (W.D. Okla. filed Aug. 4, 2005) (stating that "Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988"). In contrast to the Fifth Circuit, other circuits, too, have unremarkably entertained such claims. *See Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir. 2010) (adjudicating full faith and credit claim against state actors on the merits in § 1983 action); *United Farm Workers v. Ariz. Agric. Emp't Rels. Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (same).

Respondent's further attempt to minimize the circuit split based on variations between the Oklahoma law at issue in *Finstuen* and the laws at issue in this case and *Adar* only draws the split into starker relief. The Oklahoma law in *Finstuen* prohibited the state government from "'recogniz[ing] an adoption by more than one individual of the same sex from any other state. . . .'" 496 F.3d at 1142. The Louisiana law in *Adar* did not expressly prohibit all recognition, and Louisiana, like Respondent here, made the sophistic claim that it did not refuse to

recognize the adoption decree, only any obligation to *enforce* the decree by issuing a birth certificate as it would for children adopted by couples whose marriages the state recognized. *Adar*, 639 F.3d at 157. But whether called "recognition" or "enforcement" of out-of-state judgments of adoption, the reality remains that the Full Faith and Credit Clause bans discrimination among out-of-state judgments based on a state's policy assessment of the wisdom of the adoptions. If a state's refusal to "recognize" an out-of-state judgment of adoption and on that basis withhold an amended birth certificate violates the Clause—as the Tenth Circuit concluded—then a state's claim to "recognize" the judgment while withholding a birth certificate consistent with that judgment must also violate the Clause. Full faith and credit requires a state to give more than lip-service to an out-of-state judgment. The Fifth and Tenth Circuits are in direct conflict on this issue, and the Sixth has now aligned itself with the Fifth Circuit's unconstitutional stance.

The position of the Fifth and Sixth Circuits grants states the extraordinary ability to refuse to enforce sister state judgments based on any parochial policy reason states may choose, with potential adverse consequences for our federal system far beyond the adoption context. Review by this Court is warranted to address these issues of nationwide concern.

II. Review Is Warranted Given the Importance of This Issue for Children Adopted by Same-Sex and Unmarried Parents.

Even leaving aside the circuit conflict, this Court's review is warranted to address the harm Ohio inflicts on children like Adopted Child Doe, who are denied accurate birth certificates based on the state's disapproval of their parents. If unchecked by this Court, additional states may be encouraged to follow the path sanctioned by the Fifth and Sixth Circuits, on which adopted children whose parents are same-sex and unmarried couples will confront life-long hurdles.

For most families, a child's birth certificate is the badge by which adults exercise their protected rights and responsibilities as parents. But for families like the Vitale-Talmases, Ohio has made it a badge of stigma. Respondent euphemistically refers to this issue as a mere matter of how it "keep[s] its internal records." Br. of Resp. at 31. But far more than bureaucratic recordkeeping is at stake for these families.

A birth certificate is the only common government-conferred record that establishes identity, parentage, and citizenship in one document and that is uniformly recognized, readily accepted, and often required in an array of legal contexts. As the district court found,

> [t]he birth certificate can be critical to registering the child in school; determining the parents' (and child's) right to make medical decisions at critical moments;

> obtaining a social security card for the child; obtaining social security survivor benefits for the child in the event of a parent's death; establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death; claiming the child as a dependent on the parent's insurance plan; claiming the child as a dependent for purposes of federal income taxes; obtaining a passport for the child and traveling internationally.

App. 133a (internal citations omitted).

Respondent's refusal to issue accurate birth certificates tethers children like Adopted Child Doe for life to government identity documents denying their parentage, impairing their parents' ability to rear them, and perpetually reminding them that their birth state believes their family "is less worthy" than others. *Windsor*, 133 S. Ct. at 2696. It "impose[s] a disadvantage, a separate status, and so a stigma upon" these children and their parents that should not be tolerated. *Id.* at 2693. This is harmful discrimination, not mere internal recordkeeping.

Respondent suggests that "additional percolation" should follow before this Court resolves the dilemma for children born in states that refuse to accord full faith and credit to their adoption decrees. Br. in Resp. at 28. But "additional percolation" translates to emboldening Ohio, Louisiana, and other states to deny full faith and credit to judgments of adoption, and to saddling more adopted children with the profound stigma of birth certificates that disrespect them and their families.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their joint petition for a writ of certiorari.

Respectfully submitted,

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