

## RECENT DEVELOPMENTS IN LAW AND SEXUALITY

I.	THE POST-OBERGEFELL LANDSCAPE .....	145
	<i>More Than Marriage: Supreme Court Clarifies Post-Obergefell Marital Benefits in Pavan v. Smith</i> .....	145
II.	THE FAIR HOUSING ACT AND LGBT DISCRIMINATION.....	149
	<i>Smith v. Avanti: Paving the Way for Same-Sex Couples Under the Fair Housing Act</i> .....	149

I. THE POST-OBERGEFELL LANDSCAPE

*More Than Marriage: Supreme Court Clarifies Post-Obergefell Marital Benefits in Pavan v. Smith*

A. *Overview*

Two same-sex married couples, Leigh and Jana Jacobs and Terrah and Marisa Pavan, conceived children through anonymous insemination. *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam). In 2015, Leigh Jacobs and Terrah Pavan gave birth to two babies in Arkansas. *Id.* While the Arkansas Department of Health (ADH) listed the two birth mothers on the birth certificates, the ADH did not recognize Jana Jacobs or Marisa Pavan, the spouses of the birth mothers. *Id.* Using Arkansas Code section 20, the ADH determined that the spouses were not “husbands” as required by the statute. *Id.*; ARK. CODE ANN. § 20-18-401(f)(1) (West 2014) (“If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child.”).

The two families sued the director of the ADH, asserting that the state’s refusal to recognize both spouses on the birth certificates was a violation of their constitutional rights. *Pavan*, 137 S. Ct. at 2077. Ruling on a motion for summary judgment, the Sixth Division Circuit Court of Arkansas agreed and held that the Arkansas code was “inconsistent with *Obergefell*” because it prohibited same-sex married couples from enjoying the same benefits available to opposite-sex married couples. *Id.* (citing Petition for Writ of Certiorari at 59a, *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (No. 16-992)). On appeal, the Arkansas Supreme Court reversed the trial court’s judgment, ruling that the statute did not “run

afoul of *Obergefell* because it “center[ed] on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife.” *Id.* (quoting *Smith v. Pavan*, 505 S.W.3d 169, 178 (Ark. 2016)). The Jacobses and Pavans successfully petitioned the United States Supreme Court for a writ of certiorari. *Id.* at 2079. The United States Supreme Court held that Arkansas granted a legal benefit upon birth certificates available to married parents and, inconsistent with *Obergefell*, denied same-sex couples this benefit linked to marriage. *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam).

### *B. Background*

The United States Supreme Court has continuously held that marriage is a fundamental right protected by the Constitution. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987)). In *Obergefell v. Hodges*, the United States Supreme Court held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples are entitled to the same fundamental rights to marriage as opposite-sex couples. *Id.* at 2604-05. The Court held that states were required to grant marriages to same-sex couples and recognize same-sex marriages lawfully performed in other states. *Id.* at 2607-08.

States have long provided married couples with an extensive list of legal and social benefits. Recognition on birth certificates is merely one. *Id.* at 2601. Over a thousand federal provisions relate to the recognition of marriage under state law and yet, prior to the Court’s decision in *Obergefell*, “same-sex couples [were] denied the constellation of benefits that the States have linked to marriage.” *Id.* The Court in *Obergefell* further held that the relevant state laws challenged by the petitioners were unconstitutional “to the extent they exclude[d] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Id.* at 2605. However, this holding applied in force to more than those state laws challenged by the petitioners; *Obergefell* means that married same-sex couples are entitled to *all* benefits linked to marriage that have been afforded to opposite-sex couples. *Id.* at 2607 (“The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”).

### C. Court's Decision

In *Pavan*, the United States Supreme Court reversed summary judgment in favor of the director of the Arkansas Department of Health and held that section 20 of the Arkansas Code denied same-sex married couples access to the benefits linked to marriage. *Pavan*, 137 S. Ct. 2075. The Court invoked the guiding principle of *Obergefell*: state laws must not treat same-sex couples differently from opposite-sex couples. *Id.* at 2078 (citing *Obergefell*, 135 S. Ct. at 2605). Recognizing that Arkansas utilizes a birth certificate as a legal device linked with marriage, the Court held that the state did not afford the same legal benefits of this device to married same-sex couples when compared to married opposite-sex couples. *Id.* at 2078-79.

At the outset, the Court reiterated the holding of *Obergefell*: same-sex couples are entitled to marriage “on the same terms and conditions as opposite-sex couples.” *Id.* at 2076 (quoting *Obergefell*, 135 S. Ct. at 2605). Recognizing that marriage encompasses more than the act of civil marriage, the Court maintained that marriage includes “access to the ‘constellation of benefits that the Stat[e] ha[s] linked to marriage.’” *Id.* at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601). The Court cited the list of examples of benefits linked to marriage in *Obergefell*, in which the *Obergefell* Court “expressly identified” birth certificates. *Id.* (citing *Obergefell*, 135 S. Ct. at 2601). Furthermore, the Court referenced several of the *Obergefell* plaintiffs, who similarly challenged “a State’s refusal to recognize their same-sex spouses on their children’s birth certificates.” *Id.* (citing *DeBoer v. Snyder*, 772 F.3d 388, 398-99 (6th Cir. 2014), *rev’d*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)). The Court maintained that these state laws were held unconstitutional in *Obergefell* because “they treated same-sex couples differently from opposite-sex couples.” *Id.* (citing *Obergefell*, 135 S. Ct. at 2605). Thus the Court determined that the holding related to the invalid state laws in *Obergefell* applied to Arkansas Code section 20. *Id.*

The Court dismissed the State’s argument that a birth certificate is merely a device to record the biological parentage of a child and not a benefit linked with marriage. *Id.* The Court recognized that the State’s biological reasoning was contradicted by Arkansas Code sections 9 and 20. *Id.* Under Arkansas law, when a married opposite-sex couple conceives a child by anonymous insemination, the birth mother’s husband *must* be placed on the birth certificate, despite the husband not being the biological father. *Id.* (citing ARK. CODE ANN. § 20-18-401(f)(1) (West 2014); ARK. CODE ANN. § 9-10-201(a) (West 2014)).

This legal recognition on the birth certificate is not afforded to unmarried parents, and the Court thus concluded that Arkansas attaches a legal benefit linked to marriage to birth certificates. *Id.* at 2078-79. Furthermore, the Court reasoned that this legal recognition afforded to a married, nonbiological father is not similarly afforded to a birth mother's same-sex spouse. *Id.* at 2078. Thus, the Court determined that the State's biological parentage rationale was inadequate, and that the statute treated married same-sex parents differently from married opposite-sex parents when conferring a legal benefit linked to marriage. *Id.*

*D. Analysis*

The Supreme Court correctly reversed the summary judgment of the Arkansas Supreme Court. The per curiam opinion reinforced *Obergefell's* holding that married same-sex couples are entitled to the same "constellation of benefits that the Stat[e] ha[s] linked to marriage" for opposite-sex couples. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2601). These benefits now afforded to married same-sex couples include the extensive list of legal and social benefits provided by states and the more than one thousand federal provisions already applicable to married opposite-sex couples. *Obergefell*, 135 S. Ct. at 2601. Courts throughout the United States have followed the settled jurisprudence of the Supreme Court in *Obergefell* and granted same-sex couples access to these newly acquired marriage benefits. See *McLaughlin v. Jones*, 401 P.3d 492, 494 (Ariz. 2017) (holding that the presumption of marital paternity for children's birth certificates is a benefit of marriage and should therefore be afforded equally to same-sex spouses). However, seeds of doubt in this jurisprudence are already seeping into the legal system. See *Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017) (ruling that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons"). Therefore, advocates and judges steadfastly committed to the equal treatment of same-sex couples under the laws are still necessary to combat the critics and skeptics of *Obergefell*.

Eric Novak

## II. THE FAIR HOUSING ACT AND LGBT DISCRIMINATION

*Smith v. Avanti: Paving the Way for Same-Sex Couples  
Under the Fair Housing Act*

In *Smith v. Avanti*, a Colorado District Court ruled in favor of a same-sex married couple against a landlord who refused to rent them one of her available townhomes based on one of the plaintiffs' transgender status, the plaintiffs' "unique relationship," and their familial status. *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1201-03 (D. Colo. 2017). Rachel Smith and her wife Tonya (the Smiths) along with their two children, both of whom are minors, were told that their landlord was selling the place they were renting, which left the plaintiffs scrambling to find a new home. Tonya Smith saw an advertisement on Craigslist about an available townhome, so she emailed the owner, Avanti, to schedule a showing. In their emails, Tonya discussed her family and the fact that her wife, Rachel, is transgender. Ms. Avanti told Tonya about the available townhouse, asked for photographs of the family, and scheduled a tour. After the tour, Ms. Avanti emailed the Smiths twice. In the first email, she explained that the Smith Family could not rent from her because of her concern about the "noise" associated with having children move in. *Id.* at 1198. In the second email, she said she could not rent to them because she wanted to keep a "low profile," which she later explained meant the Smiths' "unique relationship" would interfere with her family's low profile in the community. As a result of Avanti's denial, the Smiths were forced to rent a house that was in a worse school district and much farther from Rachel's work than the defendant's townhome.

The Smiths filed a lawsuit against the defendant on five counts. *Id.* at 1198. The first and second claims alleged discrimination based on sex and familial status in violation of the Fair Housing Act. *Id.*; 42 U.S.C. § 3604(a) & (c) (1988). The Smiths' third, fourth, and fifth claims alleged discrimination based on sex, sexual orientation, and familial status, respectively, in violation of the Colorado Anti-Discrimination Act (CADA). *Smith*, 249 F. Supp. 3d at 1198; Colo. Rev. Stat. § 24-34-502 (2014). The Smiths moved for summary judgment as to liability on all counts; their motion was unopposed, and the only issue was whether the plaintiffs met their burden of production and demonstrated that they were legally entitled to summary judgment under Federal Rule of Civil Procedure 56. The U.S. District Court for the District of Colorado held that the plaintiffs were entitled to summary judgment on all counts. *Smith*, 249 F. Supp. 3d at 1203.

In its reasoning, the court extended the rule from *Price Waterhouse* beyond employment discrimination to cover discrimination based on an individual's nonconformity with gender stereotypes in the housing context as well. *Smith*, 249 F. Supp. 3d at 1200-01; see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The court had several different holdings. *Smith*, 249 F. Supp. 3d at 1200-03. First, the court held that owning a single-family house does not exempt someone from the Fair Housing Act's (FHA) antidiscrimination provisions. *Id.* The court also held that emails sent from a prospective landlord to prospective tenants constituted "statements," which are unlawful when they show preference or discriminate against a person's protected status. *Id.* Third, the court held that Avanti discriminated against the Smiths based on their sex, and therefore violated the FHA and CADA by refusing to rent to them because of their "unique relationship" and their family's "uniqueness." *Id.* at 1201. Also, the court held that Avanti violated the FHA and CADA when she discriminated against the Smiths based on their familial status. *Id.* at 1201-02. Finally, the court chose to include not only the Smiths' sexual orientation but also Rachel's transgender status as protected classes under CADA. *Id.* at 1202-03.

This court's decision to expand Title VII protections to the FHA sets a new precedent that property owners cannot discriminate against tenants (future or current) based on their failure to conform to stereotypes based on sexual orientation and transgender status. If other courts start applying this holding to all FHA cases, landlords and property owners will not be able to discriminate in the housing market based on a person's sexual orientation or transgender status when choosing tenants. When deciding whether a same-sex couple is protected under the FHA when someone refuses to lease/rent/sell to them, the court looked to the rule from *Price Waterhouse* that discriminating against a person for failing to conform to gender stereotypes is a violation of Title VII. *Id.*; see *Price Waterhouse*, 490 U.S. 228. Similarly, in *Avanti*, the court determined that the Smiths were discriminated against for their failure to conform to gender stereotypes of how women should act and whom they should marry, and by analyzing the case using Title VII precedent, held that the Smiths had suffered sex discrimination under the FHA. *Id.*

While recent decisions like the repeal of Don't Ask, Don't Tell, the Affordable Care Act's prohibition on discrimination against LGBT individuals by insurers, and *Obergefell v. Hodges* have helped expand LGBT rights, these holdings are not binding on all areas of the law. Similarly, the *Smith* decision demonstrates the limitations of expanding civil rights through judicial decisions. The *Smith* court only expanded

protections to people who do not conform to sex stereotypes. *Id.* at 1200-01. It did not expand protection to same-sex couples facing discrimination based on their sexual orientation. If courts can find that nonconformity based on sex stereotypes is protected under Title VII and Title VIII, then they should also find that sexual orientation is protected. There is no difference in saying that a same-sex couple is protected because you cannot discriminate against them based on their nonconformity to stereotypical norms of a woman marrying a man but then say that you can discriminate against a same-sex couple based on their being married to or attracted to one another. Otherwise, LGBT individuals who do conform to gender stereotypes fall through the cracks.

While the Tenth Circuit refused to extend Title VII and Title VIII protections to discrimination based on a person's sexual orientation, some state statutes, like CADA, which was litigated in *Avanti*, do include sexual orientation. COLO. REV. STAT. § 24-34-301(7) (2014). Moreover, some circuits have started holding that sexual orientation discrimination is covered by the "sex" category of Title VII. In 2017, the Seventh Circuit Court of Appeals ruled that it is a violation of federal civil rights to discriminate against someone based on their sexual orientation. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017) (holding that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes"). In 2018, the Second Circuit Court of Appeals also held that it is a violation of Title VII to discriminate against someone based on their sexual orientation. *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2018 WL 1040820, at \*20 (2d Cir. Feb. 26, 2018). While the court in *Avanti* declined to address sexual orientation, holdings like *Hively* and *Zarda* have paved the way for more judicial determinations that sexual orientation discrimination is prohibited not only by Title VII but the FHA as well. In its own way, *Avanti* is also an important step toward prohibiting all discrimination on the basis of sexual orientation, because of its extension of Title VII precedent prohibiting gender identity discrimination to the FHA. Hopefully, when faced with the same issue, other judges will be influenced by this holding.

Amanda Breslaw