No. _____

IN THE
Supreme Court of the United States

KRISTINA BOX, IN HER OFFICIAL CAPACITY AS COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH,

Petitioner,

v.

ASHLEE AND RUBY HENDERSON, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017), the Court said that while a State may adopt a biology-based birth-certificate system, if it instead "uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents," it must afford the same recognition to opposite- and same-sex marriages. The Court thus invalidated a law that placed the name of a birth-mother's husband—but not wife—on the birth certificate of a child conceived using donor sperm. Such a law makes "birth certificates about more than just genetics" but fails to treat all marriages alike. *Id.* at 2078. Here, the Seventh Circuit affirmed that a State may "establish[] a birth-certificate regimen that uses biology rather than marital status to identify parentage." App. 10a. Yet it held that Indiana's birth-certificate system is based on marriage rather than biology—and is unconstitutional—because Indiana presumes, subject to evidentiary rebuttal, that a birth-mother's husband (but not wife) is the child's biological father. *Id.*

This case thus presents the following question:

May a State, consistent with the Fourteenth Amendment Due Process and Equal Protection Clauses, adopt a biology-based birth-certificate system that includes a rebuttable presumption that a birth mother's husband—but not wife—is the child's biological parent?

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PETITION FOR WRIT OF CERTIORARI

The Commissioner of the Indiana State Department of Health respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

PARTIES TO THE PROCEEDING

Plaintiffs are: seven minor children, H.N.B., G.R.M.B., I.J.B. a/k/a I.J.B.-S., L.W.C.H., F.G.J., H.S., and L.J.P.-S. (the "Children"); their birth mothers, Lyndsey Bannick, Donnica Rae Barrett, Elizabeth (Nicki) Bush-Sawyer, Ruby Henderson, Calle Janson, Jennifer Singley, Lisa Phillips-Stackman, and Crystal Allen[1] (the "Birth Mothers"); and the Birth Mothers' spouses, Cathy Bannick, Nikkole Shannon McKinley-Barrett, Tonya Lea Bush-Sawyer, Ashlee Henderson, Sarah Janson, Nicole Singley, Jacqueline Phillips-Stackman, and Noell Allen (the "Spouses").

Plaintiffs named as Defendants Dr. Jerome M. Adams in his official capacity as Commissioner of the Indiana State Department of Health, and health officials of Bartholomew, Marion, Tippecanoe, and Vigo Counties, all in their official capacities. App. 26a–27a n.1. Specifically, the other named defendants were Dr. Brian Niedbalski in his official capacity as Health Officer of the Bartholomew County Health Department; Collis Mayfield in his official capacity as Director of the Bartholomew County Health Department;

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[1] Tragically, Crystal Allen's twin children were born prematurely and passed away on November 21, 2015. Appellant's App. 5.

Beth Lewis in her official capacity as Registrar of Vital Records of the Bartholomew County Health Department; and Dennis Stark, Dr. Michael Chadwick, Dr. Susan Sawin-Johnson, Michael Meyer, Dr. Charles Hatcher, Dr. Brooke F. Case, Cindy Boll, and Jim Reed in their official capacities as members of the Bartholomew County Board of Health; Dr. Virginia A. Caine in her official capacity as Director and Health Officer of the Marion County Health Department; Darren Klingler in his official capacity as Administrator of Vital Records of the Marion County Health Department; and Dr. James D. Miner, Gregory S. Fehribach, Lacy M. Johnson, Charles S. Eberhardt, II, Deborah J. Daniels, Dr. David F. Canal, and Joyce Q. Rogers in their official capacities as Trustees of Health & Hospital Corporation of Marion; Dr. Jeremy P. Adler in his official capacity as Health Officer for the Tippecanoe County Health Department; Craig Rich in his official capacity as Administrator of the Tippecanoe County Health Department; Glenda Robinette in her official capacity as Registrar of Vital Records of the Tippecanoe County Health Department; and Pam Aaltonen, Dr. Thomas C. Padgett, Thometra Foster, Karen Combs, Kate Nail, Dr. John Thomas, and Dr. Hsin-Yi Weng in their official capacities as members of the Tippecanoe County Board of Health; Dr. Darren Brucken in his official capacity as Health Officer of the Vigo County Health Department; Joni Wise in her official capacity as Administrator of the Vigo County Health Department; Terri Manning in his official capacity as Supervisor of Vital Statistics of the Vigo County Health Department; and Jeffery DePasse, Dora Abel, Dr. Irving Haber, Brian Garcia, Michael Eldred, Dr. James Turner, and Dr. Robert Burkle in

their official capacities as members of the Vigo County Board of Health. *Id.*

The district court dismissed all county defendants from the case at summary judgment on the grounds that they performed solely ministerial functions and Plaintiffs lacked standing to sue them. App. 42a–46a. Hence, only the State Defendant, Indiana State Department of Health Commissioner Dr. Kristina Box, remains.

OPINIONS BELOW

The Seventh Circuit opinion, *Henderson v. Box*, is reported at 947 F.3d 482 (7th Cir. 2020). The order of the United States District Court for the Southern District of Indiana granting in part and denying in part Defendant's Motion to Alter or Amend the Judgment is unreported, but is reproduced at pages 12 through 22 of the Appendix. The order of the United States District Court for the Southern District of Indiana granting Plaintiffs' Motion for Summary Judgment, App. 25a-67a, is reported at 209 F. Supp. 3d 1059 (S.D. Ind. 2016).

JURISDICTION

The Seventh Circuit panel entered a judgment and opinion on January 17, 2020. App. 1a. The Court has jurisdiction under 28 U.S.C. section 1254(1). On March 19, 2020, the Court issued an order extending the deadline for any cert petition due after the date of the order to 150 days after judgment. 150 days after January 17, 2020, is June 15, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code sections 31-9-2-15, 31-9-2-16, and 31-14-7-1 are reproduced at pages 73a through 75a of the appendix.

INTRODUCTION AND STATEMENT OF THE CASE

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015), the Court required States to treat opposite- and same-sex couples the same with respect to rights of marriage. In *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017), the Court said that if States accord parental rights to male spouses of birth mothers by virtue of marriage—even where everyone knows the husband lacks a biological connection to the child—they must do the same for female spouses.

Now, however, the Seventh Circuit is requiring Indiana, which merely presumes the biological paternity of a birth mother's husband *in the absence of contrary evidence*, also to allocate, at birth, parental rights, reflected on the child's birth certificate, to the birth-mother's wife. Doing so, however, is in tension with the traditional, constitutionally protected understanding that, at birth, only a baby's biological parents have legal rights and obligations toward the child. To protect these rights, Indiana lists a child's biological parents, and no one else, on the child's birth certificate unless the child is legally adopted. This case, then, is about whether Indiana may, to advance its unquestionably legitimate policy of safeguarding the rights and obligations of biological parents in the context of completing birth certificates, presume a birth-mother's husband to be the biological father of the child, without also presuming the "parentage" of a birth-mother's wife.

States need guidance with respect to the permissible constitutional parameters of laws allocating paternal and maternal presumptions at birth, and the Court's decision in *Pavan* has proven insufficient in that regard. There, the Court had before it only the most basic, binary allocation of parental rights at birth, and a state law that plainly discriminated between opposite-sex and same-sex couples. Even so, three Justices of this Court would have ordered plenary review rather than summary reversal. *Id.* at 2079. Indiana's law is in even greater need of plenary review, for it functions differently and ultimately treats same-sex and opposite-sex couples the same in terms of the rights of spouses of birth mothers who are not biologically related to the child.

The decision below unreasonably extended *Obergefell* and *Pavan* by requiring Indiana either to require genetic testing of all new parents or else abandon the biological foundation for allocating parental rights altogether—as happens when both a birth mother *and* her wife are "presumed" to be parents.

The Court should, therefore, take this case to address whether Indiana's paternity-presumption law is consonant with *Obergefell*.

I. Indiana's Parentage Law Framework

When a child is born in Indiana, that child has two legal parents (unless one or both are deceased): a biological mother and a biological father. All statutory and regulatory treatment of parental rights, including adoption, proceed from that premise. Indiana law defines "parent" as: "a biological or an adoptive parent." Ind. Code § 31-9-2-88(a); *see also* 410 Ind. Admin. Code 18-0.5-10.

Adoptive parents are easy to identify via court records. Alas, biological parents—particularly fathers—sometimes are not. Yet biological parents nevertheless have constitutional and statutory rights and obligations that must be accounted for. That circumstance has given rise to a system that uses rebuttable presumptions to facilitate the efficient identification of those most likely to have constitutionally protected rights and obligations to a child at birth, even if an initial identification is later corrected via judicial process.

Indiana has always conferred parental rights on the biological parents in the first instance. *See, e.g.*,

Gilmore v. Kitson, 74 N.E. 1083, 1084 (Ind. 1905) ("Both under the common law and the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be entrusted with their care, control, and education.").

A. Biological parenthood identification

Indiana law provides three legal methods for identifying a child's biological parents: presumption, affidavit, and genetic test (via judicial action). Legal presumptions and paternity affidavits are only valid until they are challenged—only a paternity test can definitively prove parentage. Adults who are not biological parents of the child must use the legal adoption process to establish parentage.

1. Identification by presumption

In early statehood, parental rights in Indiana were governed by common law rather than statutes. Indiana courts, recognizing that "establishing the biological heritage of a child is the express public policy of this State[,]" adopted legal presumptions to identify a child's biological mother and father. *In re Paternity of Infant T.*, 991 N.E.2d 596, 600 (Ind. Ct. App. 2013) (quoting *In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 61–62 (Ind. Ct. App. 2010)), *trans. denied*, 999 N.E.2d 843 (Ind. 2013). In particular, courts concluded that the birth mother is the person most likely to be the biological mother (she will be in all circumstances other than gestational surrogacy) and that the birth mother's husband (if she was married) is the person most likely to be the biological father. *Infant R.*, 922 N.E.2d at 61; *Infant T*, 991 N.E.2d at 599.

Accordingly, the woman who gave birth to a child was—and still is—presumed to be the child's biological mother. *Infant T*, 991 N.E.2d at 601 (citing *Infant R.*, 922 N.E.2d at 61); *see also Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1059 (Ind. 1992) ("Because it is generally not difficult to determine the biological mother of a child, a mother's legal obligations to her child arise when she gives birth."); Ind. Code § 31-9-2-10 (defining "birth parent" in relevant part as "the woman who is legally presumed under Indiana law to be the mother of biological origin").

And a man married to that woman was—and still is—presumed to be the child's biological father. *See, e.g.*, *Tarver v. Dix*, 421 N.E.2d 693, 696 n.2 (Ind. Ct. App. 1981) (noting 1979 legislation "merely codified" existing common-law presumption); *see also In re Paternity of I.B.*, 5 N.E.3d 1160, 1160 (Ind. 2014) (Dickson, C.J., dissenting to denial of transfer) ("Like most states, Indiana has long adhered to a strong presumption that a child, born of a woman during marriage, is also the *biological child* of the woman's husband." (emphasis added)).

The common-law presumption of maternity has never been codified, but the common-law presumption of paternity was enacted in 1979. That 1979 codification repeatedly referred to the child's *biological* father and mother, leaving no doubt that the statute's purpose was to vest parental rights in the two individuals biologically connected to the child:

> (a) A man is presumed to be a child's *biological* father if:

> (1) he and the child's *biological* mother are or have been married to each other . . .
>
> (2) he and the child's *biological* mother attempted to marry each other . . .
>
> (3) after the child's birth, he and the child's *biological* mother marry, or attempt to marry, each other . . . and he acknowledged his paternity in a writing filed with the registrar of vital statistics of the Indiana state board of health or with a local board of health.
>
> (b) If there is no presumed *biological* father under subsection (a), a man is presumed to be the child's *biological* father if, with the consent of the child's mother:
>
> (1) he receives the child into his home and openly holds him out as his *biological* child; or
>
> (2) he acknowledges his paternity in writing with the registrar of vital statistics of the Indiana state board of health or with a local board of health.

H.E.A. 2121, 101st Gen. Assemb., 1st Reg. Sess. (Ind. 1979) (also cited at Pub. L. No. 277-1979, § 9) (codified at Ind. Code § 31-6-6.1-9) (emphases added).

Both presumptions were—and still are—rebuttable by clear and convincing evidence that the *presumed* biological parent is not the *actual* biological

parent. *See, e.g., Infant T*, 991 N.E.2d at 600–01 (acknowledging the presumption of maternity is rebuttable, though the evidence was insufficient to do so in that case). Indiana courts have found the presumption of paternity rebutted by evidence that the husband was "impotent," *Phillips v. State*, 145 N.E. 895, 897 (Ind. Ct. App. 1925); "steril[e]," *Whitman v. Whitman*, 215 N.E.2d 689, 691 (Ind. Ct. App. 1966); had no access to his wife during the period of conception, *Pilgrim v. Pilgrim*, 75 N.E.2d 159, 162 (Ind. Ct. App. 1947); or "was present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse." *Phillips*, 145 N.E. at 897.

As technology progressed, the presumption of biological fatherhood became rebuttable through increasingly sophisticated methods, such as blood grouping test results, *Murdock v. Murdock*, 480 N.E.2d 243, 246 (Ind. Ct. App. 1985), and the presence or absence of a sickle-cell trait. *Fairrow v. Fairrow*, 559 N.E.2d 597, 598, 600 (Ind. 1990). The legislature recognized this development by amending the statute in 1994 to provide that a man is presumed to be a child's biological father when "the man undergoes a blood test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's *biological* father." H.E.A. 1344, 108th Gen. Assemb., 2d Reg. Sess. (Ind. 1994) (also cited at Pub. L. No. 101-1994, § 17) (emphasis added).[2]

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[2] In 2001, the legislature amended the statute to require a "genetic" test rather than a "blood" test. H.E.A. 1841, 112th Gen. Assemb., 1st Reg. Sess. (Ind. 2001) (also cited at Pub. L. No. 238-2001, § 6).

Currently, "[a] man is presumed to be a child's biological father" where: (1) "the man and the child's biological mother are or have been married to each other and" the "child is born during the marriage or not later than three hundred (300) days [or 9.8 months] after the marriage is terminated . . . ."; (2) the "man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage . . ." is void or voidable and the child is born during the attempted marriage or within 300 days after the attempted marriage terminated; or (3) "the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father." Ind. Code § 31-14-7-1.

The presumption of paternity may still be rebutted, however, where the husband is impotent, sterile, or otherwise precluded from establishing biological parentage by direct, clear, and convincing evidence—or if there is clear and convincing evidence that another man is the child's biological father. *Id.* § 31-14-7-2; *Cooper v. Cooper*, 608 N.E.2d 1386, 1387–88 (Ind. Ct. App. 1993).

Thus, the "presumption" of paternity based upon genetic evidence is effectively conclusive and trumps any marital presumption. *See, e.g.*, *Minton v. Weaver*, 697 N.E.2d 1259, 1260–61 (Ind. Ct. App. 1998) (holding it "clearly erroneous" for a trial court to find marital presumption unrebutted in the face of DNA evidence that a different man was the child's father).

2. Identification by oath

Because not all biological parents are married to each other, the General Assembly permits putative fathers to establish biological paternal status through affidavit. *See generally* Ind. Code § 16-37-2-2.1. When the child's biological parents are not married to each other, "a person who attends or plans to attend the birth" must "provide an opportunity for: (A) the child's mother; and (B) a man who reasonably appears to be the child's *biological* father" to execute a paternity affidavit. *Id.* § 16-37-2-2.1(b) (emphasis added). The affidavit must include a sworn statement from the mother asserting that her co-affiant "is the child's *biological* father." *Id.* § 16-37-2-2.1(g)(1) (emphasis added). Critically, "[a] woman who knowingly or intentionally falsely names a man as the child's *biological* father under this section commits a Class A misdemeanor." *Id.* § 16-37-2-2.1(i) (emphasis added).

Underscoring the centrality of a biological relationship to this exercise, the paternity affidavit must also include a statement from the putative father "attesting to a belief that he is the child's *biological* father." *Id.* § 16-37-2-2.1(g)(2) (emphasis added). The parties must review the agreement outside each other's presence. *Id.* § 16-37-2-2.1(r). Through the affidavit, the parties may agree to share joint legal custody, but that agreement will be void unless they submit a DNA test demonstrating that the putative father "is the child's *biological* father" to the local health officer within sixty days of the child's birth. *Id.* § 16-37-2-2.1(h)(5) (emphasis added).

A paternity affidavit confers legal "parental rights and responsibilities" upon the man who executes it except where: (1) a court "determine[s] that fraud, duress, or material mistake of fact existed in the execution" of the affidavit, or (2) if, within sixty days after executing the affidavit, a genetic test excludes the man as the biological father. *Id.* §§ 16-37-2-2.1(j)(2), (k), (l), (n), 31-14-7-3. But even after that sixty-day period, if another man comes forward with evidence that he is the child's true biological father, the court will set the paternity affidavit aside. *See, e.g.*, *Paternity of Davis v. Trensey*, 862 N.E.2d 308, 314 (Ind. Ct. App. 2007).

3. Identification by genetic test

When a child's paternity is unknown or disputed, Indiana law provides a mechanism for resolving the matter: a genetic test via paternity action. The child, the child's mother, and the putative father are all statutorily entitled to file a paternity action; under certain circumstances, the department of child services or the county prosecutor may file one as well. Ind. Code § 31-14-4-1. Generally, the action must be filed within two years of the child's birth, but that time limit does not apply if the biological father and mother agree to waive it and file the action jointly, if either has previously acknowledged the biological father's paternity in writing, or if the biological father has supported the child. *Id.* § 31-14-5-3. "The child, the child's mother, and each person alleged to be the father are necessary parties" to a paternity action. *Id.* § 31-14-5-6. Case law allows maternity actions under the same procedures. *See Infant R.*, 922 N.E.2d 59, 61–62 (Ind. Ct. App. 2010).

Under Indiana law paternity and maternity actions turn on genetic evidence of biological parenthood. Any party to the action may file a motion for all parties "to undergo blood or genetic testing[,]" and "the court shall" grant the motion—there is no discretion to deny it. Ind. Code § 31-14-6-1. What is more, if an adoption is pending, the court shall, *sua sponte,* "order all the parties to the paternity action to undergo blood or genetic testing." *Id.* § 31-14-21-9.1. "The results of the tests . . . constitute *conclusive* evidence if" they "exclude a party as the biological father of the child." *Id.* § 31-14-6-3 (emphasis added).

B. Birth certificates as records of biological or adoptive parentage

It is, of course, important for state government to have reliable birth and parentage records, to the extent reasonably possible. The Indiana General Assembly has charged the State Department of Health with maintaining a system of vital statistics, which is administered by the State Registrar. Ind. Code §§ 16-37-1-1, -2. And the Registrar's duties include, among other things, "[k]eep[ing] the files and records pertaining to vital statistics" such as births and deaths. *Id.* § 16-37-1-2(1).

When a child is born, a "person in attendance" must file a "certificate of birth" with the local health officer using the electronic Indiana Birth Registration System. *Id.* § 16-37-2-2(a), (b). If that is not done, the local health officer must "prepare a certificate of birth from information secured from any person who has knowledge of the birth" and file it using the Indiana

Birth Registration System. *Id.* § 16-37-2-2(c). Regardless, the local health officer must report the birth to the State Department of Health within five days. *Id.* § 16-37-1-5(a).

In practice, when a child is born, the birth mother completes the Indiana Birth Worksheet, a questionnaire prepared by the State Department of Health to collect vital statistics, demographic, and medical history information about the child and parents. Appellant's App. 19, 22–33. For this case, the critical inquiry is Question 37 on the Worksheet:

> 37. MOTHER'S Marital Status, ARE YOU MARRIED TO THE FATHER OF YOUR CHILD?"

Id. at 25.

If the birth mother answers "yes," she is directed to answer questions about the father. *Id.* at 25–26. If she answers "no," she is directed to Question 38, which is "If not married, has a Paternity Affidavit been completed for this child?" *Id.* If she answers "yes," she is prompted to provide the date of the affidavit. *Id.* The State Department of Health treats the term "father" to mean "biological father." Appellant's App. 19.

The birth mother's answers to these questions are used to generate the child's birth certificate. *Id.* at 19. If a married birth mother answers Question 37 "yes" and provides her husband's name, he is listed on the birth certificate as the child's father. *Id.* If she answers "no," he is not listed on the birth certificate and, unless and until a court enters an order of adoption or paternity, or the birth mother and biological father

execute a paternity affidavit, no one's name other than the birth mother is listed as a parent on the birth certificate. *Id.* A birth mother who knowingly gives an untruthful response to Question 37—or any of the questions on the Worksheet—commits fraud and may be prosecuted. *Id.* (citing Ind. Code § 16-37-1-12).

A birth certificate may not be amended or altered unless (1) the State Health Department receives "adequate documentary evidence, including the results of a DNA test . . . or a paternity affidavit," Ind. Code § 16-37-2-10(b); or (2) the child is adopted. Even when a child is adopted, however, the original birth certificate is not destroyed, but is instead retained and filed with the evidence of adoption (though it may not be released except in the case of a step-parent adoption or in other limited circumstances). *Id.* § 31-19-13-2.

II. Procedural History

A. The plaintiffs

Plaintiffs are a group of eight female same-sex married couples and seven of their minor children. One member of these couples gave birth to one or more children, and the plaintiffs would like both the birth mothers and their spouses to be listed as a parent on the birth certificates. With the exception of Plaintiffs Jackie and Lisa Phillips-Stackman, each of the Children Plaintiffs was conceived via artificial insemination using donor sperm (some known, some anonymous) and the birth mother's egg. Appellant's App. 4–5, 9-10, 39–40, 48–49, 59–60, 71–72, 81–82, 91–92. For the Phillips-Stackmans, doctors created

an embryo using Jacqueline's egg and a known donor's sperm, which they implanted in Lisa, who gave birth to L.J.P.-S. on October 21, 2015. Appellant's App. 9–10. Thus, though Jacqueline is L.J.P.-S.'s *actual* biological mother, Lisa is L.J.P.-S.'s birth mother and *presumed* biological mother under Indiana law. *See* Ind. Code § 31-9-2-10 (defining, in relevant part, a "birth parent" to be "the woman who is legally presumed under Indiana law to be the mother of biological origin").

Jacqueline Phillips-Stackman has not filed a maternity action to establish her parentage, though such an action is allowed under Indiana law. *See In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 61–62 (Ind. Ct. App. 2010). And with the exception of Plaintiff Tonya Lea Bush-Sawyer, the Spouses have not filed petitions to adopt the Children, *id.* at 5, 11–13, 39–40, 48–49, 59, 71–72, 81–82, 91, although they could do so under Indiana law. Ind. Code § 31-19-2-4; *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (permitting petitioner to adopt her same-sex partner's biological children).

In summary, the Plaintiff birth mothers, with the exception of Lisa Phillips-Stackman, are biologically related to the Plaintiff Children. Their Spouses, with the exception of Jacqueline Phillips-Stackman, have no biological relationships to the Children.

B. Proceedings in the district court

Plaintiffs want *both* Spouses listed on each respective child's birth certificate: They want the birth

mother listed as "Parent 1" and the birth mother's female spouse listed as "Parent 2." When the State refused this request as barred by Indiana law, Plaintiffs challenged three Indiana statutes: Indiana Code section 31-9-2-15, which defines "child born in wedlock"; section 31-9-2-16, which defines "child born out of wedlock"; and section 31-14-7-1, which provides a presumption of paternity to the birth mother's husband. App. 12a–13a. They argued that each violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. ECF No. 80, Plaintiffs' Brief in Support of their Motion for Summary Judgment [hereinafter Pls.' SJ Br.] at 5.

On cross-motions for summary judgment, the district court declared that the Paternity Presumption and Wedlock Statutes violate both the Equal Protection Clause and Due Process Clause. App. 12a–13a. The court accepted Plaintiffs' assertion that the statutes do not apply equally to all married couples regardless of sex. *Id.* 48a–49a. It then applied "intermediate" scrutiny to Plaintiffs' Equal Protection claims and concluded the challenged statutes were not "substantially related or narrowly tailored to meet the stated interests[.]" *Id.* at 49a. As to Plaintiffs' Due Process claims, the district court applied strict scrutiny and reached a similar result. *Id.* 58a–60a. Citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the court concluded that "there is no conceivable important governmental interest that would justify the different treatment of female spouses of artificially-inseminated birth mothers from the male spouses of artificially-inseminated birth mothers." App. 64a.

The Court entered final judgment for Plaintiffs and issued an order that (1) declared that the Wedlock Statutes violate both the Equal Protection Clause and Due Process Clause, (2) enjoined the State from enforcing these statutes, (3) enjoined the State "to recognize children born to a birth mother who is married to a same-sex spouse as a child born in wedlock," (4) enjoined the State "to recognize each of the Plaintiff Children in this matter as a child born in wedlock," and (5) enjoined the State "to recognize each of the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate." *Id.* 65a–66a.

Even so, on July 18, 2016, uncertain about the meaning and scope of the court's declaration and injunction in all particulars, the State filed a motion under Rule 59(e) urging the court to alter or amend its judgment. ECF No. 119, Defendant's Motion to Alter or Amend Judgment. The district court granted the motion in part and denied it in part. App. 13a. The court granted the motion to clarify that its previous judgment "is a declaration of unconstitutionality *as applied* to female, same-sex married couples who have children during their marriage[,]" rather than a facial invalidation. *Id.* 20a–21a (emphasis added). It further stated that its injunction applied regardless whether the child was conceived using sperm from an anonymous or known donor. *Id.* Finally, it stated that "the same methods for rebutting the presumption of parenthood of the husband of a birth mother are available for rebutting the presumption of parenthood of the wife of a birth mother." *Id.* 22a.

C. The appeal

The State appealed to the Seventh Circuit. Shortly after briefing and argument, the Supreme Court issued a summary decision in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which involved a challenge brought by two married same-sex couples, who had conceived children through anonymous sperm donation, against an Arkansas law that required the State to identify an opposite-sex-married mother's *husband* as the father on the child's birth certificate (even in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor). The plaintiffs argued that because the Arkansas law did not require the State to identify a same-sex-married mother's *wife* as the child's mother, it discriminated against same-sex couples in violation of the Constitution as construed by the Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Arkansas defended its law on the grounds that the law was simply a device for recording biological parentage—regardless of whether the child's parents are married.

The Court rejected Arkansas's argument that its system was based on biology, concluding that the Arkansas law made "birth certificates about more than just genetics" because "when an opposite-sex couple conceives a child by way of anonymous sperm donation—just as the petitioners did here—state law requires the placement of the birth mother's husband on the child's birth certificate." *Pavan*, 137 S. Ct. at 2078. The Court thus concluded that while a biology-based birth-certificate system would be constitu-

tional, because the Arkansas law was not based on biology but instead used birth "certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition." *Id.* at 2078–79.

Finally, on January 17, 2020—32 months after oral argument—a Seventh Circuit panel issued a ten-page decision affirming the district court. App. 11a. The panel acknowledged that "the Fourteenth Amendment does not forbid a state from establishing a birth-certificate regimen that uses biology rather than marital status to identify parentage." *Id.* 10a. Nevertheless, it held that Indiana's presumption of a husband's paternity means that its birth-certificate system is necessarily *not* based on biology—even though (unlike in *Pavan*) under Indiana law the presumption is rebutted by contrary evidence, including the birth mother's knowledge (even before she fills out the birth certificate form) that another person is the biological father. *Id.* 8a–11a. The panel concluded that the fact "[t]hat Indiana uses a presumption rather than a bright-line rule does not change the fact that both states treat same-sex and opposite-sex marriages differently when deciding how to identify who is a parent," *id.* 2a, arguing in particular that Indiana's presumption has real force because it "cannot be overcome after a husband dies." *Id.* 7a. The panel thus largely affirmed the district court's decision, including its requirement that Indiana identify a birth mother's wife as the child's parent on the child's birth certificate. *Id.* 11a.

REASONS FOR GRANTING THE PETITION

The Court Should Take This Case To Confirm that States May Adopt a Birth-Certificate System that Includes a Rebuttable Presumption that a Birth Mother's Husband—But Not Wife—Is the Child's Biological Parent

Indiana and other States have grounded paternal rights in biology for centuries and have long used presumptions to do so. The Seventh Circuit, however, effectively has said that States may not do so and may allocate parental rights on the basis of biology only via universal genetic testing. The Court should take this case to confirm that States may, as a valid step toward recognition of biological parental rights, presume the paternity of a birth-mother's husband without also presuming the "parentage" of a birth-mother's wife. This is a critical, nationally important question regarding the implications of *Obergefell*, and one with which many States have something at stake.

A. The Constitution permits States to design their birth-certificate systems to record biological parenthood at birth

The Fourteenth Amendment protects the rights and obligations of biological parents to the care and custody of their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 60–63 (2000) (plurality); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Even cases permitting judicial termination of a biological parent's parental rights begin with the understanding that a biological connection between parent and child provides the starting point

for determining parental rights and obligations. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Lehr v. Robertson*, 463 U.S. 248, 257–58 (1983).

It follows that States may design birth certificate systems to bear the names of biological parents in the first instance. That is the upshot of the Court's summary decision in *Pavan*, where the Court rejected the Arkansas birth certificate directive because it was so steadfast in requiring a birth mother's husband's name on the birth certificate even where all concerned know full well the husband has no biological connection to the child. *See Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017) ("Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships. . . . Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.").

Indeed, the decision below embraces that same idea: It recognizes that States may, in the first instance, require the names of biological parents—and only biological parents—to be on a child's birth certificate. *See* App. 10a ("[T]he Fourteenth Amendment does not forbid a state form establishing a birth-certificate regimen that uses biology rather than marital status to identify parentage.").

Rightly so: With respect to opposite-sex married couples *every* State presumes the paternity of the birth-mother's husband. And several States, including Indiana, permit third parties to overcome that presumption with contrary genetic evidence, even in cases of artificial insemination. *See* Ind. Code §§ 16-37-2-2; 16-37-2-10; Iowa Code Ann. §§ 144.13,

600B.41A; La. Stat. Ann. §§ 40:34.5, 40:46.8, La. Civ. Code Ann. art. 185, art. 198; Miss. Code. Ann. §§ 41-57-14, 41-57-23, 93-9-9; Neb. Rev. Stat. Ann. §§ 71-640.01, 71-640.04, 43-1414; 35 Pa. Stat. Ann. § 450.401, *Brinkley v. King*, 549 Pa. 241, 701 A.2d 176, 180 (1997); R.I. Gen. Laws Ann. §§ 15-8-3, 15-8-11, 23-3-10, 23-3-15; S.C. Code Ann. §§ 44-63-60, 63-17-800, 63-17-10, 63-17-30, *Hudson v. Blanton*, 316 S.E.2d 432, 434 (S.C. Ct. App. 1984); S.D. Codified Laws §§ 34-25-8, 34-25-13.1, 25-8-57, 25-5-3.

Accordingly, even in the context of artificial insemination, several States vest parental rights in the first instance with the child's *biological* parents and use birth certificates to record who those biological parents are. The next question is, how may they go about determining *who* is a biological parent?

B. Rebuttably presuming the biological parentage of a birth mother and her husband—but no one else—is a reasonable, efficient, longstanding, constitutional rule

1. When a child is born, a State has only three reasonable ways to determine the identity of the biological parent: genetic testing, marital presumption, and oath. Genetic testing, to be sure, is highly accurate. *See* DNA Paternity Test, Cleveland Clinic, https://my.clevelandclinic.org/health/diagnostics/10119-dna-paternity-test. But it is also invasive, inconvenient, expensive, and, in the vast majority of cases, unnecessary.

Even with the advent of artificial reproductive technology and gestational surrogacy, when a woman gives birth to a baby, there is a greater than 99%

chance that she is the baby's biological mother; a birth mother will *not* be the biological mother only in the rare case of gestational surrogacy.[3] And while data regarding legitimacy of children born to man-woman married couples is scarce, the rate of "misattributed paternity"—where the father is someone other than believed—ranges from only 1 to 3%.[4] On the other hand, of course, if the birth mother is married to a woman there is 0% chance the wife is the biological

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[3] Firm statistics for gestational surrogacy are difficult to come by, but the New York Times reported in 2014 only about 2,000 babies are born per year on the United States to gestational surrogates. Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, New York Times (Sept. 17, 2014), https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html. Meanwhile, CDC reported 3.8 million babies born in the U.S. in 2018. Center for Disease Control, *National Vital Statistics Report* (Nov. 27, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.

The Seventh Circuit mistakenly asserted "that both women in a same-sex marriage may be biological mothers." App. 8a. Gestational surrogacy does not confer genetic parentage. The genetic parents of the child are the woman who contributed the egg and the man who contributed the sperm, not the surrogate mother. *See* Julie Granka, *Chimeras, Mosaics, and Other Fun Stuff*, The Tech Interactive (July 13, 2011).

[4] *See* Ann Young *et al.*, *Discovering Misattributed Paternity in Living Kidney Donation: Prevalence, Preference, and Practice*, Transplantation (May 27, 2009), https://journals.lww.com/transplantjournal/Fulltext/2009/05270/Discovering_Misattributed_Paternity_in_Living.1.aspx (estimating the rate of misattributed paternity to be between 1 and 3%).

father—and only a minute chance that the wife (rather than the birth mother) is the child's biological mother (a la plaintiff Jacqueline Phillips-Stackman).

Accordingly, presuming motherhood and fatherhood in a birth mother and her husband is a reasonable starting point for determining who has the biological connection necessary to have a place on the baby's birth certificate. These presumptions will be accurate in the vast majority of cases, and they avoid the invasion of privacy, inconvenience and expense attendant to genetic testing.

Furthermore, oath is a reliable substitute for the presumption where the putative father, vouched for by the birth mother, is not married to the birth mother yet steps forward to claim a biological connection to, and thus responsibility for, the child. Incentives for both mother and putative father doing so falsely would seem to be very rare.

At the same time, permitting evidentiary rebuttal of marital presumptions allows for proper identification of others as biological parents in exceptional cases. Again, the problem with the Arkansas statute in *Pavan* was that it *required* counterfactual attribution of a biological connection where it was obvious none existed. 137 S. Ct. at 2078. In the Indiana system, however, while the birth-mother's husband is *presumed* to be the child's biological father absent contrary evidence, that presumption may be rebutted by the mother's knowledge of contrary facts, impossibility, or a genetic test. Ind. Code § 31-14-7-1(3). And

when the presumption is rebutted, the presumed father's name is removed from the birth certificate. Appellant's App. 19–20.[5]

2. States have been employing such presumptions of biological parentage for hundreds of years. The marital presumption and biological paternity are universally relevant and have been closely intertwined since the outset of paternity law. *See* Nara Milanich, *Reassembling Motherhood: Procreation and Care in a Globalized World* 20 (Yasmine Ergas, Jane Jenson & Sonya Michel eds., 2017). "[T]he so-called presumption of marital legitimacy traverses a variety of legal traditions ancient and modern, religious and secular, Western and 'non-Western.'" *Id.* The presumption is "[p]resent in Catholic canon law and Jewish and Islamic legal traditions," and is also "found in Anglo-American law and the civil law of continental Europe as well as in Latin American and some Middle Eastern legal systems." *Id.*

At Roman law, for example, long before the advent of genetic testing, the marital presumption of paternity developed as a way to infer the biological connec-

[5] The Seventh Circuit deemed Indiana's presumption to be unrelated to biology because it is irrefutable after the presumed father's death. App. 7a. The point of that rule, however, is to ensure the child inherits as expected from the presumed father's estate, not to deprive biological parents of their rights and obligations concerning the child. The mere possibility that, in the rare case, the presumed father's death prevents a third party from establishing paternity does not, in the overwhelming majority of cases, negate the Indiana birth certificate system as a means of recognizing biological parentage and its corresponding rights and obligations.

tion between father and child. T. Vernon Drew, *Conceiving the Father: An Ethicist's Approach to Paternity Disestablishment*, 24 Del. Law. 18, 19 (2006) ("This, of course, is the presumption that the husband of a woman who gives birth to a child is the child's genetic father.").

Centuries later, jurisdictions in the United States adopted this presumption by way of the common law. David D. Meyer, *Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood*, 54 Am. J. Comp. L. 125, 127–28 (2006) ("The law traditionally presumed, for instance, that a child born to a married woman was fathered by her husband. The presumption was a strong one and could be overcome only in limited circumstances."). Over time, States permitted rebuttal of the marital presumption in cases of impossibility—where "the husband was impotent, sterile, or not around during the time of conception . . . ." Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 Fam. L.Q. 55, 56 (2003). Such grounds for rebuttal confirm the connection between biology and the marital presumption: "By permitting rebuttal based on proof that the husband could not have been the biological father, the marital presumption was plainly grounded in assumptions about the husband's likely procreative role." Meyer, *supra* at 127. Indeed, "[m]arriage supported the assignment of paternity to the husband because it supported an inference that he was the biological father." *Id.*

On the eve of the advent of same-sex marriage in the United States, the marital presumption existed as

a way to identify a child's biological father in "all states, by common law or by statute." Leslie J. Harris & Lee E. Teitelbaum, *Family Law* 995 (2d ed. 2000). Even as same-sex marriage took hold in state law, States maintained the presumption with a view toward identification of biological fathers. New York first recognized same-sex marriages in 2011, yet even in 2015 the Appellate Division declared that, for a married man-woman couple, "[a] child born during marriage is presumed to be the biological result of the marriage, and this presumption has been described as one of the strongest and most persuasive known to law." *Ariel G. v. Greysy C.*, 20 N.Y.S.3d 145, 147 (N.Y. App. Div. 2015) (internal citations omitted).

3. Nevertheless, the Seventh Circuit held that Indiana's presumption that a birth-mother's husband is a biological parent means that, in fact, Indiana allocates parental rights based on *marriage* rather than biology. App. 10a. Indiana has made no such allocation. The Indiana statute affords the husband of a birth mother only a *presumption* of paternity, nothing more. It does not prevent a married birth mother from listing the *actual* biological father on the birth worksheet, regardless of whether that person is her husband. And it does not prevent an actual biological father from filing a paternity action to establish his legal and biological parentage. The presumption merely creates a low-cost, convenient, highly accurate starting point for determining the identity of biological parents.

If Indiana's presumption is unlawfully discriminatory, that leaves only *one* way for a State to insist on respect for biological parental rights at birth in all

cases—genetic testing. But it extends *Obergefell* (and *Pavan*) well beyond any reasonable understanding of their limits to hold that they require States either to require genetic testing of all new parents or else abandon the biological foundation for allocating parental rights altogether, which is what occurs when States "presume" both a birth mother *and* her wife to be parents.

In this regard, while the judgment below superficially declared the parentage of a birth-mother's wife to be rebuttable, App. 10a–11a, it is unclear exactly how that could work, since, given the birth-mother's presumption of motherhood, no one supposes the wife to be a biological parent anyway. Except in the rarest of cases (such as with the Phillips-Stackmans), only the marital consent of the birth mother confers *any* claim to the child on the wife. Such is not the case with opposite-sex couples, where not merely marital status, but actual biological connection, confers a claim on the husband. The function of paternity (and maternity) actions is to correct misidentification of individuals supposedly having a biological connection to a child. But presuming the wife of a birth mother to be a parent—while also presuming the birth mother's biological maternity—does not misidentify a biological connection; rather, it jettisons the relevance of biology and substitutes marriage as the key determinant of parental rights from the moment of birth. If that is what States must do, no grounds exist for reallocating parental rights just because someone outside the marriage comes forward with a positive paternity (or maternity) test.

Indiana's presumption, therefore, is not a now-obsolete vestige of a pre-*Obergefell* understanding of marriage. It continues to be, rather, a longstanding, reasonable method of identifying the people most likely to have a biological connection to a child when it is born. And, it is a method that allows for its underlying assumptions to be overturned in appropriate cases. The Seventh Circuit has seriously misread *Obergefell* and *Pavan* to require States to abandon that longstanding, reasonable policy and substitute a wholly new "presumption of parentage" based on marriage—unless the State embraces genetic testing in all cases.

As three justices were inclined to do in *Pavan*, the Court should take this case for plenary review and hold that *Obergefell* does not preclude States from reasonably (and rebuttably) presuming that a birth-mother's husband, but not a birth-mother's wife, is the biological father of her child. The Court did not wait for a circuit conflict before taking *Pavan*, and it has no reason to do so here, either.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: June 15, 2020

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-1411

ASHLEE AND RUBY HENDERSON, *ET AL.*,

Plaintiffs-Appellees,

v.

KRISTINA BOX, INDIANA STATE HEALTH COMMISSIONER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:15-cv-00220-TWP-MJD – **Tanya Walton Pratt**, *Judge*.

ARGUED MAY 22, 2017
DECIDED JANUARY 17, 2020

Before BAUER, FLAUM, EASTERBROOK, AND SYKES, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. The district court issued an injunction requiring Indiana to treat children born into female-female marriages as having two female parents, who under the injunction must be listed on the birth certificate. 209 F. Supp. 3d 1059, 1079–

80 (S.D. Ind. 2016). Because Indiana lists only two parents on a birth certificate, this effectively prevents the state from treating as a parent the man who provided the sperm, while it requires the identification as parent of one spouse who provided neither sperm nor egg. The judge concluded that this approach is required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which as understood in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), oblige governmental bodies to treat same-sex couples identically to opposite-sex couples. Because Indiana lists a husband as a biological parent (when a child is born during a marriage) even if he did not provide sperm, the district judge concluded, it must treat a wife as a parent even if she did not provide an egg.

The district court's understanding of *Obergefell* has been confirmed by *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which holds that same-sex and opposite-sex couples must have the same rights with respect to the identification of children's parentage on birth certificates. *Pavan* held unconstitutional a provision of Arkansas's law that required a birth certificate to list as parents the names of the child's mother and her husband.

Plaintiffs in this suit contend that *Pavan* is equally applicable to them. That Indiana uses a presumption rather than a bright-line rule does not change the fact that both states treat same-sex and opposite-sex marriages differently when deciding how to identify who is a parent. And even in Arkansas mutual agreement among mother, husband, and "putative father" could

lead to a different list of parents on the birth certificate. If that did not save Arkansas's law, the possibility of rebutting the presumption does not save Indiana's.

The state argues that *Obergefell* and *Pavan* do not control. In its view, birth certificates in Indiana follow biology rather than marital status. The state insists that a wife in an opposite-sex marriage who conceives a child through artificial insemination must identify, as the father, not her husband but the sperm donor. The plaintiffs do not contend that a regimen using biology rather than marital status to identify parentage violates the federal Constitution, but they submit that Indiana's law is status-based. Thus this appeal depends on the resolution of a dispute about the meaning of Indiana law. Once we decide who is right about the state's system, the outcome follows from *Pavan*.

The district court found forbidden discrimination by putting together three of Indiana's statutes: Ind. Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1. The first of these says:

> "Child born in wedlock" … means a child born to:
>
> (1) a woman; and
>
> (2) a man who is presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2) unless the presumption is rebutted.

The second provides:

"Child born out of wedlock" … means a child who is born to: (1) a woman; and

(2) a man who is not presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2).

And the third reads:

A man is presumed to be a child's biological father if:

(1) the:

(A) man and the child's biological mother are or have been married to each other; and

(B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) the:

(A) man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage:

(i) is void under IC 31-11-8-2, IC 31-11-8-3, IC 31-11-8-4, or IC 31-11-8-6; or

(ii) is voidable under IC 31-11-9; and

(B) child is born during the attempted marriage or not later than three hundred (300) days after

> the attempted marriage is terminated by death, annulment, or dissolution; or
>
> (3) the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.

The district court treated the presumption in §31-14-7-1(1)(A) as the principal problem: a husband is presumed to be a child's biological father, so that both spouses are listed as parents on the birth certificate and the child is deemed to be born in wedlock. There's no similar presumption with respect to an all-female married couple—or for that matter an all-male married couple. The district court's injunction, which requires both women in a female-female marriage to be listed as parents (and treated as having parental rights and duties), solves the problem.

Indiana tells us that looking only at the statutory text is myopic. It wants us to place substantial weight on something the statutes do *not* say: How the presumption of male parentage in a male-female marriage is overcome. According to the state, women who give birth are asked to provide the name of the child's "father"—not of the "husband" but of the "father." And one form (the "birth worksheet") given to new mothers indeed calls for this information, though without defining the terms. The state wants us to treat this form, rather than §31-14-7-1(1), as the governing rule.

As the state sees things, "father" means "biological father," so if a child is a result of in vitro fertilization using donated sperm, or of sexual relations outside marriage, then the presumption has been overcome and there is no remaining difference between female-male marriages and female-female marriages. In either situation the birth mother must name as the child's father the man who provided the sperm, and every birth certificate will have one male parent and one female parent. To achieve any other result, the state insists, a married couple (all-female, all-male, or opposite-sex) must use the adoption system. Only following an adoption would it be proper to list "Mother #1" and "Mother #2" on a child's birth certificate, as the district judge required. Indiana issues an amended birth certificate following adoption, while keeping the original as a record of biological parentage. The state then achieves two objectives: identifying biological parentage in the original birth certificate, and identifying legal parentage (and duties) in the second. Trying to do both is not discriminatory, Indiana tells us.

The district judge thought the state's account of mothers' behavior to be implausible. Some mothers filling in the form may think that "husband" and "father" mean the same thing. Others may name their husbands for social reasons, no matter what the form tells them to do. Indiana contends that it is not responsible for private decisions, and that may well be so—but it *is* responsible for the text of Ind. Code §31-14-7-1(1), which establishes a presumption that applies to opposite-sex marriages but not same-sex marriages. Opposite-sex couples can have their names on

children's birth certificates without going through adoption; same-sex couples cannot. Nothing about the birth worksheet changes that rule.

Indiana insists that the presumption of parenthood in an opposite-sex marriage does not have legal consequences. Even after a husband's name is on the birth certificate, the state maintains, that does not affect parental rights and duties. A husband does not have any legal rights or duties unless he is the biological father. See *Cochran v. Cochran*, 717 N.E.2d 892, 894 (Ind. App. 1999). Yet even a bursting-bubble presumption—one that vanishes as soon as it is contested— has *some* consequences. Unless the presumption is contested, the husband is deemed the father too, with parental rights and parental duties, in a way that both women in a female-female marriage are not.

One problem with this suit has been the paucity of state decisions interpreting the three statutes at issue. Indiana Code §§ 31-9-2-15 and 31-9-2-16 have never been the subject of litigation, while Ind. Code §31-14-7-1 has rarely been litigated. We have been tempted to certify to the Supreme Court of Indiana the question whether the presumption in Ind. Code §31-14-7-1 is indeed a bursting bubble and whether the instructions on the birth worksheet should be treated as if they had been enacted. But we have decided not to certify, because a few decisions hold that the statutory presumption has real force, and none holds otherwise. For example, *Lamey v. Lamey*, 689 N.E.2d 1265, 1268 (Ind. App. 1997), holds that the presumption cannot be overcome after a husband dies—something that may happen at any time. And

Myers v. Myers, 13 N.E.3d 478, 482–83 (Ind. App. 2014), holds that only the clearest of evidence can overcome the presumption if the husband has signed the birth certificate. Another decision says that this means clear and convincing evidence, a long way from a bursting bubble. *Richard v. Richard*, 812 N.E.2d 222, 228 (Ind. App. 2004).

There's a deeper problem and a stronger reason not to certify: all of the contested statutes were enacted long before *Obergefell* and *Pavan*. They are products of a time when only opposite-sex marriages were recognized in Indiana. There's nothing a court can do to remove from the state's statute books provisions assuming that all marriages are opposite-sex. Judges could reduce the weight of a presumption that a husband is also a father, but no act of intellectually honest interpretation could make that presumption vanish. It would not be seemly for us to ask the Supreme Court of Indiana to save the state statutes by rewriting them. They are what they are. The legislature can rewrite them; the judiciary cannot.

In revising the statutes, a legislature could take account of the fact—as the current statutes do not—that both women in a same-sex marriage may indeed be biological mothers. Indiana asserts an interest in recording biological facts, an interest we cannot gainsay. But Indiana's current statutory system fails to acknowledge the possibility that the wife of a birth mother also is a biological mother. One set of plaintiffs in this suit shows this. Lisa Philips-Stackman is the birth mother of L.J.P.-S., but Jackie Philips-Stackman, Lisa's wife, was the egg donor. Thus Jackie is

both L.J.P.-S.'s biological mother and the spouse of L.J.P.-S.'s birth mother. There is also a third biological parent (the sperm donor), but Indiana limits to two the number of parents it will record.

We agree with the district court that, after *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages. Because Ind. Code §31-14-7-1(1) does that, its operation was properly enjoined.

Other parts of the district court's remedy, however, are not appropriate. For example, the judge declared that the three statutes are invalid in their entireties and forbade their operation across the board. Yet some parts of these statutes have a proper application. For example, Ind. Code §31-14-7-1(3) declares that a man is deemed to be a biological father if a genetic test shows a 99% or higher probability of parenthood. And Ind. Code §31-14-7-1(2), operating in conjunction with Ind. Code §31-9-2-15(2), provides that a child is born in wedlock if the parents attempted to marry each other but a technical defect prevented the marriage from being valid. Neither of these provisions even arguably violates the Constitution, as understood in *Obergefell* and *Pavan*. A remedy must not be broader than the legal justification for its entry, so the order in this suit must be revised.

Some parts of the injunction, like some parts of the district court's opinion, appear to turn a *presumption* of parent- age into a *rule* of parentage, so that in a same-sex marriage the birth certificate must list

"Mother #1" and "Mother #2" even if, say, the birth mother conceives through sexual relations with a man and freely acknowledges the child's biological parentage. As we have stated several times, the Fourteenth Amendment does not forbid a state from establishing a birth-certificate regimen that uses biology rather than marital status to identify parentage. A state is entitled to separate the questions "whose genes does a given child carry?" from "what parental rights and duties do spouses have?" The problem is that Indiana appears to merge these questions while specifying that biological heritage wins in the event of conflict—that's the function of §31-14-7-1(3)—yet providing husbands with a presumption, withheld from wives, that a given legal status supports an inference of parenthood. There's no constitutional reason why a presumption that can be defeated for men can't be defeated for women too. This means that although the district court was on solid ground to enjoin the state "from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers" (209 F. Supp. 3d at 1079), other language needs revision.

Finally, some language in the opinion and injunction might be understood to suggest that female-female married couples must be treated differently from male-male couples, for whom adoption is the only way to produce "Father #1" and "Father #2" on a birth certificate. Although the plaintiffs in this suit are adult women (and children of both sexes), and it would therefore be inappropriate for the court to decide the proper treatment of children born during male-male

marriages, it would be helpful for the district court to provide expressly that this question is left open for resolution by the legislature or in some future suit. It also is important to be clear that this litigation does not decide what parental rights and duties (if any) biological fathers such as sperm donors have with respect to the children of female-female marriages. No biological father is a litigant.

Having expressed these concerns, we must be clear what need *not* change. The district court's order requiring Indiana to recognize the children of these plaintiffs as legitimate children, born in wedlock, and to identify both wives in each union as parents, is affirmed. The injunction and declaratory judgment are affirmed to the extent they provide that the presumption in Ind. Code §31-14-7-1(1) violates the Constitution. The remainder of the judgment is vacated, and the case is remanded for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASHLEE HENDERSON and RUBY HENDERSON a married couple, and L.W.C.H. by his parent Next friend Ruby Henderson, et al.	)	
Plaintiffs	)	
v.	)	Case no. 1:15-cv-0220-TWP-MJD
DR. JEROME ADAMS In his official capacity As Indiana State Health Commissioner, et al.	)	
Defendants	)	

ENTRY ON DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

This matter is before the Court on a Motion to Alter or Amend Judgment ("Motion to Amend Judgment") filed pursuant to Federal Rule of Civil Procedure 59(e) by Defendant Dr. Jerome Adams in his official capacity as the Indiana State Health Commissioner ("State Defendant") (Filing No. 119). The Plaintiffs in this case are a number of female, same-sex

married couples and their children whose birth certificates list only the birth mother as a parent with no second parent. The Plaintiffs initiated this lawsuit, seeking injunctive relief to list both the birth mother and her same-sex spouse on their children's birth certificate and to have their children recognized as children born in wedlock. They also sought a declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

Following cross-motions for summary judgment, the Court granted the County Defendant's motion for summary judgment, granted the Plaintiffs' motion for summary judgment against the State Defendant, and denied the State Defendant's motion for summary judgment (Filing No. 116). The Court entered declaratory relief and a permanent injunction in favor of the Plaintiffs as well as a Rule 58 final judgment (Filing No. 117; Filing No. 118). The State Defendant then filed its Motion to Amend Judgment, asking the Court to clarify aspects of the declaratory relief and permanent injunction and to remove any declaration or injunction that the children are "born in wedlock", as defined in the Wedlock Statutes, Indiana Code §§ 31-9-2-15 and 31-9-2-16 (Filing No. 119 at 1). For the following reasons, the State Defendant's Motion to Amend Judgment is **granted in part and denied in part**.

I. BACKGROUND

Plaintiffs Ashlee Henderson, Ruby Henderson, L.W.C.H., Nicole Singley, Jennifer Singley, H.S., Elizabeth Bush-Sawyer, Tonya Bush-Sawyer, I.J.B-S, Cathy Bannick, Lyndsey Bannick, H.N.B., Nikkole McKinley-Barrett, Donnica Barrett, G.R.M.B., Calle Janson, Sarah Janson, F.G.J., Jackie Phillips-Stackman, Lisa Phillips-Stackman, L.J.P-S, Noell Allen, and Crystal Allen (collectively "Plaintiffs") are female, same-sex married couples and their children whose birth certificates list only the birth mother as a parent with no second parent.

Plaintiffs Elizabeth and Tonya Bush-Sawyer were married in 2010 in Washington, D.C. They artificially conceived I.J.B-S, who was born on January 10, 2014. When I.J.B-S was born, Elizabeth, the birth mother, completed the Indiana Birth Worksheet and provided Tonya's information for all the questions that asked about the father of the child. After returning home from the hospital with I.J.B-S, the couple received a birth confirmation letter that listed both women as the parents of I.J.B-S and that listed the child's name as a hyphenated version of both their last names. In March 2014, Elizabeth went to the Marion County Health Department to obtain a birth certificate for I.J.B-S. At the health department, she was told there was something wrong, and she would need to return the next day. When she returned, Elizabeth was presented with a birth certificate that listed her as the only parent of I.J.B-S, and the child's name had been changed from I.J.B-S to I.J.B. Shortly thereafter,

Elizabeth and Tonya received a new social security card for I.J.B-S, which listed the name as I.J.B.

Because of this incident, Tonya sought a stepparent adoption, which required her to undergo fingerprinting and a criminal background check in addition to submitting her driving record, her financial profile, and the veterinary records for any pet living in the home. A home study was required, which examines the relationship history of Elizabeth and Tonya, requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection. The cost for their stepparent adoption was approximately $4,200.00. This same costly and time-consuming adoption process is not required of opposite-sex married couples who artificially conceive a child. Instead, the non-biological father who is married to the birth mother is listed on the birth certificate and recognized as the child's father.

Plaintiffs Ashlee and Ruby Henderson were married on November 11, 2014, in Tippecanoe County, Indiana. They had been together as a couple for over eight years prior to their marriage, and they decided that they wanted a child in their family. After the couple's artificial conception of L.W.C.H., the Indiana statute prohibiting same-sex marriage was declared unconstitutional, so Ashlee and Ruby married.

During the week of November 2, 2014, the couple contacted IU Health Arnett Hospital, where L.W.C.H. would be born, to ask if both spouses would be listed on the birth certificate as parents of L.W.C.H. after the couple was married. They were told to contact the

Tippecanoe County Health Department, which they did the same day. They were informed that Ashlee would not be listed on the birth certificate as a parent of L.W.C.H. without a court order.

On December 22, 2014, L.W.C.H. was born at IU Health Arnett Hospital in Lafayette, Indiana. After the child's birth, Ruby was asked to complete the Indiana Birth Worksheet. The couple revised each question asking for information regarding the father of the child by replacing the term "father" with the term "Mother #2." All information provided regarding "Mother #2" related to Ashlee, the legal spouse of Ruby who was the birth mother. On January 22, 2015, the Tippecanoe County Health Department issued L.W.C.H.'s birth certificate, which noted only Ruby Henderson as a parent.

The other Plaintiff female, same-sex married couples have had similar experiences as Elizabeth and Tonya Bush-Sawyer and Ashlee and Ruby Henderson and their children. Only the birth mother has been recognized as a parent of the couples' children, and only the birth mother's name has appeared on the birth certificate of the child. Because of this result, the Plaintiffs filed this action and requested declaratory and injunctive relief. They asked the Court to direct the State Defendant to recognize both Plaintiff spouses as a parent of their children and to list both Plaintiff spouses as a parent on their children's birth certificate. They also asked the Court for a declaration that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The parties filed cross-motions for summary judgment on the Plaintiffs' claims, and the Court granted the County Defendant's motion, granted the Plaintiffs' motion against the State Defendant, and denied the State Defendant's motion (Filing No. 116). The Court determined that the challenged statutes and the State Defendant's implementation of the statutes through the Indiana Birth Worksheet resulted in the State's discriminatory treatment of female, same-sex married couples when creating and issuing birth certificates, thereby violating the Equal Protection Clause. The Court further determined that the Plaintiffs' due process rights were violated.

The Court entered a permanent injunction enjoining the State Defendant (1) from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers; (2) to recognize children born to a birth mother who is legally married to a same-sex spouse as a child born in wedlock; (3) to recognize the Plaintiff children in this matter as a child born in wedlock; and (4) to recognize the Plaintiff spouses in this matter as a parent to their respective Plaintiff child and to identify both Plaintiff spouses as parents on their respective Plaintiff child's birth certificate (Filing No. 117). The State Defendant filed its Motion to Amend Judgment, seeking clarification and modification of the declaratory judgment and permanent injunction.

II. LEGAL STANDARD

A motion to alter or amend a judgment under Rule 59(e) "must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The purpose of a motion to alter or amend a judgment under Rule 59(e) is to ask the Court to reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989). "A Rule 59(e) motion will be successful only where the movant clearly establishes: (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (citation and quotation marks omitted). Relief pursuant to a Rule 59(e) motion to alter or amend is an "extraordinary remed[y] reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008). A Rule 59(e) motion may be used "to draw the district court's attention to a manifest error of law or fact or to newly discovered evidence." *United States v. Resnick*, 594 F.3d 562, 568 (7th Cir. 2010). A manifest error "is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (citation and quotation marks omitted). Furthermore, "a Rule 59(e) motion is not an opportunity to relitigate motions or present arguments, issues, or facts that could and should have been presented earlier." *Brownstone Publ'g, LLC v. AT&T, Inc.*, 2009 U.S. Dist. LEXIS 25485, at *7 (S.D. Ind. Mar. 24, 2009).

III. DISCUSSION

The State Defendant asks the Court to modify and clarify the declaratory judgment and permanent injunction. First, it asserts that the Court lacks jurisdiction to enter a declaration or injunction governing enforcement of Indiana Code §§ 31-9-2-15 and 31-9-2-16, concerning whether children are "born in wedlock" or "born out of wedlock." It asks the Court to remove any declaration or injunction directed at these two statutes. The State Defendant argues that the Plaintiffs lack Article III standing to challenge the statutes because the statutes only apply to adoption proceedings, and thus, the Plaintiffs are not injured by the statutes because their alleged injuries do not arise within the adoption context. The State Defendant asserts the challenged statutes simply have no relevance to the Plaintiffs; therefore, they have no standing, resulting in a lack of jurisdiction in this Court.

In one cursory paragraph in its opening summary judgment brief, the State Defendant alleged that the Plaintiffs lack standing to challenge the statutes (*see* Filing No. 85 at 22). Then, in three pages of its reply brief, the State Defendant more fully addressed its standing argument (Filing No. 108 at 9–12). The State Defendant now again advances this same argument that the Plaintiffs lack standing to challenge the statutes because the statutes only apply to adoption proceedings, and thus, the Plaintiffs are not injured by the statutes. However, the State Defendant has failed to point out a manifest error of law or fact. Furthermore, a Rule 59(e) motion is not an opportunity to relitigate motions.

In the Court's summary judgment order, the Court explained that it was convinced by the evidence and argument that the State's regulatory system for creating and issuing birth certificates in the State of Indiana is dictated and implemented by the State Defendant, and thus, the real injury to the Plaintiffs came from the State Defendant's implementation of the statutes (Filing No. 116 at 15). The Court also addressed the void that Indiana's statutory framework has created that has led to the State's discriminatory conduct when completing the Indiana Birth Worksheet and creating and issuing birth certificates (Filing No. 116 at 22).

Because the State Defendant has failed to point out a manifest error of law or fact and seems to simply relitigate its argument from its summary judgment reply brief, the Court **DENIES** the Motion to Amend Judgment regarding the request to remove any declaration or injunction directed at Indiana Code §§ 31-9-2-15 and 31-9-2-16.

Next, the State Defendant asks the Court to clarify the declaratory judgment regarding the constitutionality of the statutes, whether they are unconstitutional facially or as applied. The Court **GRANTS** the State Defendant's request to clarify the judgment, not to modify the judgment but to simply provide clarification. As discussed throughout the Court's summary judgment Order, the constitutionality of the challenged statutes were analyzed in the context of the "benefits being afforded to female, same-sex married couples," "applying the same rights to female, same-

sex married couples," "applying the statutes," "application of the statutes," and "implementation of the statutes." (*See* Filing No. 116.) The Court's declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses is a declaration of unconstitutionality as applied to female, same-sex married couples who have children during their marriage.

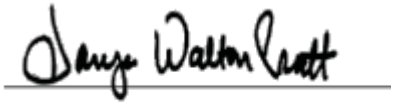
The State Defendant also asks the Court to clarify the permanent injunction regarding whether it applies to wives of all birth mothers or only to wives of birth mothers who conceived through artificial insemination by an anonymous donor. Again, the Court **GRANTS** the State Defendant's request to clarify the judgment, not to modify the judgment but to simply provide clarification. The State Defendant seems to advance new argument to apply further limitations to the Court's already-issued permanent injunction. Again, "a Rule 59(e) motion is not an opportunity to relitigate motions or present arguments, issues, or facts that could and should have been presented earlier." *Brownstone Publ'g*, 2009 U.S. Dist. LEXIS 25485, at *7. Nowhere in the Court's Orders were "anonymous donors" discussed or considered. The Court's permanent injunction provides relief to "female, same-sex spouses of birth mothers" and "children born to a birth mother who is married to a same-sex spouse." (Filing No. 117 at 1.) The Order means what it says and says what it means. It applies to female, same-sex spouses of birth mothers and children born to a birth mother who is married to a same-sex spouse. It does not apply additional limitations as the State Defendant questions.

Finally, the State Defendant asks the Court to clarify the permanent injunction regarding whether the presumption of parenthood is conclusive or rebuttable. The Court **GRANTS** the State Defendant's request to clarify the judgment. The State Defendant notes that "[t]he Court appears to intend to give wives of birth mothers comparable rights to husbands of birth mothers." (Filing No. 120 at 11.) The State Defendant's observation is correct. The Court's Orders did not modify or limit the rebuttable nature of the presumption of parenthood. Thus, the same methods for rebutting the presumption of parenthood of the husband of a birth mother are available for rebutting the presumption of parenthood of the wife of a birth mother.

IV. CONCLUSION

For the reasons discussed above, the State Defendant's Motion to Amend Judgment (Filing No. 119), seeking to clarify and modify the Court's declaratory judgment and permanent injunction, is **granted in part and denied in part**.

SO ORDERED.

Date: 12/30/2016	 TANYA WALTON PRATT, JUDC United States District Court Southern District of Indiana

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UNITED STATES DISTRICT COURT
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ASHLEE HENDERSON and RUBY HENDERSON a married couple, and L.W.C.H. by his parent Next friend Ruby Henderson, et al.	)	
Plaintiffs	)	
v.	)	Case no. 1:15-cv-0220-TWP-MJD
DR. JEROME ADAMS In his official capacity As Indiana State Health Commissioner, et al.	)	
Defendants	)	

ENTRY ON CROSS MOTION FOR SUMMARY JUDGMENT

The disputes in this matter surround complex legal issues following the United States Supreme Court's mandate that legally married same-sex couples in the United States are entitled to the same privileges and benefits as legally married heterosexual couples. The Plaintiffs in this case are female, same-sex married couples and their children whose birth certificates list only the birth mother as a parent with

no second parent. The Plaintiffs seek injunctive relief to list both the birth mother and her same-sex spouse on their children's birth certificates and to have their children recognized as children born in wedlock. They also seek declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Defendants assert that Plaintiffs' claims must fail because the challenged statutes impinge no fundamental rights and in any event are narrowly tailored to vindicate compelling state interests.

Before the Court are cross-motions for summary judgment filed pursuant to Federal Rule of Civil Procedure 56. Plaintiffs Ashlee Henderson, Ruby Henderson, L.W.C.H., Nicole Singley, Jennifer Singley, H.S., Elizabeth Bush-Sawyer, Tonya Bush-Sawyer, I.J.B-S, Cathy Bannick, Lyndsey Bannick, H.N.B., Nikkole McKinley-Barrett, Donnica Barrett, G.R.M.B., Calle Janson, Sarah Janson, F.G.J., Jackie Phillips-Stackman, Lisa Phillips-Stackman, L.J.P-S, Noell Allen, and Crystal Allen (collectively "the Plaintiffs") filed their motion on December 4, 2015 (Filing No. 77). Shortly thereafter, Tippecanoe County Defendants (Filing No. 82), and Marion County Defendants, Bartholomew County Defendants, Vigo County Defendants, and the State Defendant[1] (Filing No. 84), filed cross-motions for summary judgment.

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[1] The State and County Defendants are (1) Dr. Jerome M. Adams in his official capacity as Commissioner of the Indiana State Department of Health ("State Defendant"); (2) Dr. Virginia

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A. Caine in her official capacity as Director and Health Officer of the Marion County Health Department; Darren Klingler in his official capacity as Administrator of Vital Records of the Marion County Health Department; and Dr. James D. Miner, Gregory S. Fehribach, Lacy M. Johnson, Charles S. Eberhardt, II, Deborah J. Daniels, Dr. David F. Canal, and Joyce Q. Rogers in their official capacities as Trustees of Health & Hospital Corporation of Marion County (collectively "Marion County Defendants"); (3) Dr. Jeremy P. Adler in his official capacity as Health Officer for the Tippecanoe County Health Department; Craig Rich in his official capacity as Administrator of the Tippecanoe County Health Department; Glenda Robinette in her official capacity as Registrar of Vital Records of the Tippecanoe County Health Department; and Pam Aaltonen, Dr. Thomas C. Padgett, Thometra Foster, Karen Combs, Kate Nail, Dr. John Thomas, and Dr. Hsin-Yi Weng in their official capacities as members of the Tippecanoe County Board of Health (collectively "Tippecanoe County Defendants"); (4) Dr. Brian Niedbalski in his official capacity as Health Officer of the Bartholomew County Health Department; Collis Mayfield in his official capacity as Director of the Bartholomew County Health Department; Beth Lewis in her official capacity as Registrar of Vital Records of the Bartholomew County Health Department; and Dennis Stark, Dr. Michael Chadwick, Dr. Susan Sawin-Johnson, Michael Meyer, Dr. Charles Hatcher, Dr. Brooke F. Case, Cindy Boll, and Jim Reed in their official capacities as members of the Bartholomew County Board of Health (collectively "Bartholomew County Defendants"); and (5) Dr. Darren Brucken in his official capacity as Health Officer of the Vigo County Health Department; Joni Wise in her official capacity as Administrator of the Vigo County Health Department; Terri Manning in his official capacity as Supervisor of Vital Statistics of the Vigo County Health Department; and Jeffery DePasse, Dora Abel, Dr. Irving Haber, Brian Garcia, Michael Eldred, Dr. James Turner, and Dr. Robert Burkle in their official capacities as members of the Vigo County Board of Health (collectively "Vigo County Defendants").

The parties request summary judgment on the Plaintiffs' claims for injunctive relief and declaratory judgment. For the following reasons, the Court **GRANTS** the Plaintiffs' Motion for Summary Judgment against the State Defendant, **GRANTS** the Tippecanoe County Defendants' Motion for Summary Judgment, and **DENIES** the State Defendant's Motion for Summary Judgment.

I. BACKGROUND

The parties essentially do not dispute the key background facts. Where there is a disputed fact, the Court has construed all inferences in the light most favorable to the non-moving party.

A. The Plaintiffs

Plaintiffs Ashlee and Ruby Henderson were lawfully married in Tippecanoe County, Indiana on November 11, 2014. Prior to their marriage, the couple had been together for over eight years and decided they wanted a child in their family. After the couple's artificial conception of L.W.C.H., the Indiana statute prohibiting same-sex marriage was declared unconstitutional, so Ashlee and Ruby married.

During the week of November 2, 2014, the couple contacted IU Health Arnett Hospital, where L.W.C.H. would be born, to ask if both spouses would be listed on the birth certificate as parents of L.W.C.H. after the couple was married. The couple was told to contact the Tippecanoe County Health Department. On the same day, the couple contacted the Tippecanoe

County Health Department and were told that Ashlee would not be listed on the birth certificate as a parent of L.W.C.H. without a court order.

L.W.C.H. was born on December 22, 2014, at IU Health Arnett Hospital in Lafayette, Indiana. After the child's birth, Ruby was asked to complete the Indiana Birth Worksheet. The couple revised each question asking for information regarding the father of the child by replacing the term "father" with the term "Mother #2." All information provided regarding "Mother #2" related to Ashlee, the legal spouse of Ruby who was the birth mother. On January 22, 2015, the Tippecanoe County Health Department issued L.W.C.H.'s birth certificate, which noted only Ruby Henderson as a parent.

Plaintiffs Elizabeth and Tonya Bush-Sawyer were lawfully married in Washington, D.C. in 2010. They artificially conceived I.J.B-S, who was born on January 10, 2014. When I.J.B-S was born, Elizabeth, the birth mother, completed the Indiana Birth Worksheet, providing Tonya's information for all the questions that asked about the father of the child. After returning home from the hospital with I.J.B-S, the couple received a birth confirmation letter that listed both women as the parents of I.J.B-S and that listed the child's name as a hyphenated version of both their last names. In March 2014, Elizabeth went to the Marion County Health Department to obtain I.J.B-S's birth certificate. At the health department, she was told there was something wrong, and she would need to return the next day. When she returned, Elizabeth was presented with a birth certificate that listed her

as the only parent of I.J.B-S, and the child's name had been changed from I.J.B-S to I.J.B. Shortly thereafter, Elizabeth and Tonya received a new social security card for I.J.B-S, which listed the name as I.J.B.

Tonya is seeking a stepparent adoption. She is required to undergo fingerprinting and a criminal background check in addition to submitting her driving record, her financial profile, and the veterinary records for any pet living in the home. A home study is being conducted, which examines the relationship history of Elizabeth and Tonya, requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection. The cost for their stepparent adoption is approximately $4,200.00 (Filing No. 79-1 at 3–4).

Nicole and Jennifer Singley were lawfully married in January 2014. The couple artificially conceived a baby, and on March 29, 2015, H.S. was delivered by Jennifer. Nicole was not listed as a parent on the birth certificate of H.S. Nicole is an active duty member of the U.S. Army and is entitled to all the benefits available to members of the Army, including health insurance. Currently, her family is covered by military health insurance. H.S. is eligible for healthcare coverage under the military insurance program because H.S. is considered to be the stepchild of Nicole. If Jennifer should predecease H.S., then H.S. will no longer be eligible for Nicole's health insurance and other military benefits (such as in-state tuition) because Nicole no longer will be considered his stepparent.

Lyndsey and Cathy Bannick were lawfully married in Iowa in October 2013. They decided to have a child, and Lyndsey was artificially inseminated. H.N.B. was born to the couple on May 8, 2015, in Bartholomew County, Indiana. Cathy's information was provided on the Indiana Birth Worksheet so that she could be listed as the second parent on H.N.B.'s birth certificate. However, Lyndsey was the only parent listed on the birth certificate.

Calle and Sarah Janson were lawfully married in Indianapolis on June 27, 2014. They decided to have a child, and through artificial conception, Calle became pregnant. F.G.J. was born to the couple on December 1, 2015; however, F.G.J.'s birth certificate does not list Sarah as a parent.

Nikkole McKinley-Barrett and Donnica Barrett were lawfully married on June 25, 2014, and they have been together for approximately twelve years. They decided to have a child together, and Donnica was artificially inseminated. G.R.M.B. was born to the couple on April 3, 2015, in Vigo County, Indiana. Nikkole's information was provided on the Indiana Birth Worksheet so that she could be listed as the second parent on G.R.M.B.'s birth certificate. However, Donnica was the only parent listed on the birth certificate.

Noell and Crystal Allen were lawfully married in New York City on November 22, 2013. They had already been together fourteen years. They have a daughter, E.A., who was conceived through artificial

insemination and delivered by Noell. Crystal subsequently adopted E.A., and both Noell and Crystal are legal parents of E.A.

The couple decided that they wanted to add to their family, and Crystal also wanted the experience of giving birth. With the aid of intra-uterine insemination, Crystal became pregnant. Their twins, Ashton and Alivea Allen, were born prematurely on November 21, 2015, and died the same day. The following day, hospital staff informed the couple that Noell would not be listed on the twins' birth certificates. Noell was later informed by the Indiana State Department of Health ("ISDH") that the State was unwilling to add Noell to the birth certificates in the absence of a court order. Because the twins are deceased, Noell cannot adopt them to become their legal parent. While Noell is not listed as a parent on the birth certificates, she is listed as a parent on the twins' death certificates.

Jackie and Lisa Phillips-Stackman were lawfully married on October 5, 2015. Together, they decided to have a child with the assistance of in vitro fertilization. Jackie's egg was fertilized with sperm from a third-party donor and then implanted in Lisa. Lisa carried the baby and then delivered on October 21, 2015. While at the hospital, hospital staff completed the Indiana Birth Worksheet with the couple. It was explained that only Lisa could be listed as a parent on the birth certificate and that Jackie could not be listed as a parent without a court order even though Jackie was the biological parent. Although the couple was lawfully married at the time of their child's birth,

Jackie and Lisa received a notice from the Marion County Health Department explaining how a parent could be added to the birth certificate of a child born out of wedlock.

Jackie is a detective with the Indianapolis Metropolitan Police Department, and her health insurance provides coverage for L.J.P-S, who is considered Jackie's stepchild. Unfortunately, L.J.P-S suffers from serious medical problems. If Lisa should predecease L.J.P-S, because Jackie is not legally recognized as a parent of L.J.P-S, L.J.P-S would no longer qualify for health care under Jackie's insurance.

Each of the Plaintiff female, same-sex married couples agreed to have children together and conceived through various forms of assisted reproduction, using sperm from third-party donors. In each instance, the birth mother was listed on the child's birth certificate, but the same-sex spouse was not listed on the birth certificate as a parent. The non-birth mothers seek to be listed on their child's birth certificate and to be recognized as a parent. Each of the children were born during the couples' marriage, and the couples want their children to be recognized as being born in wedlock. The married couples have been informed that the non-birth mother may become a legally recognized parent only if she goes through the legal adoption process to adopt her child.

B. Indiana Birth Certificates

When children are born in Indiana, the procedure for creating and processing birth certificates for these

newborns begins with the hospital staff working with the birth mother to complete the State of Indiana's "Certificate of Live Birth Worksheet." The Indiana Birth Worksheet was created by the State of Indiana as part of the Indiana Birth Registration System. Staff at the hospital upload the information provided on the Indiana Birth Worksheet to a State database. The county health department then receives notification that birth information has been added to the database. A notification letter to the birth mother is generated in a form provided by the State, which indicates that information has been received by the county health department and requests that the mother notify the county health department if there is an error with respect to the child's identifying information. The notification letter also informs the mother that a certified copy of the record of birth is available from the local health office. If a person wants to obtain a birth certificate, the individual is required to complete an "Application for a Certified Birth Certificate." The birth certificate application requires the individual to provide information required by the State of Indiana. Upon successful completion of the application, the county health department will generate a birth certificate based on the information available to it through the State's database.

When the hospital staff and the birth mother complete the Indiana Birth Worksheet, the responses to questions 37 through 52 determine whether and what information concerning the identity of the child's father will appear on the birth certificate. Question 37 asks, "are you married to the father of your child." If the answer is "no," the birth mother is asked to go to

question 38, and if the answer is "yes," the birth mother proceeds to questions 39 through 52. Question 38 asks if a paternity affidavit has been completed for the child. If the answer is "yes," the birth mother proceeds to questions 39 through 52. If the answer is "no," the birth mother is asked to skip questions 39 through 52 and go to question 53. Questions 39 through 52 pertain to information about the father. Thus, if the birth mother indicates that she is not married to the father of the child and that a paternity affidavit has not been completed, there would be no information about the father provided on the Indiana Birth Worksheet and, consequently, no information about the father would be available when the birth certificate is generated.

Question 11 of the Indiana Birth Worksheet asks, "What will be your BABY'S legal name (as it should appear on the birth certificate)?" Regardless of how the birth mother answers question 11, Indiana law requires that a "child born out of wedlock" be given the mother's surname unless a paternity affidavit dictates to the contrary. Ind. Code § 16-37-2-13.

ISDH is statutorily charged with providing a system of vital statistics in Indiana. Among other things, ISDH prescribes information to be contained in each kind of application or certificate of vital statistics, administers the putative father registry, and establishes the Indiana Birth Registration System for recording in an electronic format all live births in Indiana. Records of births submitted to the Indiana Birth Registration System are submitted by physicians,

persons in attendance at birth, or local health departments using the electronic system created by ISDH.

Within five days of the birth, a certificate of birth or paternity affidavit must be filed using the Indiana Birth Registration System. The local health officer is required to make a permanent birth record of information from the certificate of birth. The record includes the child's name, sex, date of birth, place of birth, name of parents, birthplace of parents, date of filing the certificate of birth, the person in attendance at the birth, and the location of the birth. ISDH is charged with making corrections or additions to the birth certificate. Such additions or corrections can be made by ISDH upon receipt of adequate documentation, including the results of a DNA test or a paternity affidavit.

C. The Challenged Statutes

The Plaintiffs challenge the constitutionality of Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Indiana Code §§ 31-9-2-15 and 31-9-2-16 define the terms "child born in wedlock" and "child born out of wedlock." Indiana Code § 31-14-7-1 establishes a presumption of paternity in a birth mother's husband. Indiana Code § 31-9-2-15 states:

"Child born in wedlock", for purposes of IC 31-19-9, means a child born to:

(1) a woman; and

(2) a man who is presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2) unless the presumption is rebutted.

Indiana Code § 31-9-2-16 states:

"Child born out of wedlock", for purposes of IC 31-19-3, IC 31-19-4-4, and IC 31- 19-9, means a child who is born to:

(1) a woman; and
(2) a man who is not presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2).

Indiana Code § 31-14-7-1 states:

A man is presumed to be a child's biological father if:

(1) the:

(A) man and the child's biological mother are or have been married to each other; and
(B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) the:
(A) man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage:
(i) is void under IC 31-11-8-2, IC 31-11-8-3, IC 31-11-8-4, or IC 31-11-8-6; or
(ii) is voidable under IC 31-11-9; and

> (B) child is born during the attempted marriage or not later than three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or
> (3) the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.

The Plaintiffs assert that these statutes violate the Fourteenth Amendment's guarantees of equal protection and due process because they create a presumption of parenthood for men married to birth mothers but not for women married to birth mothers and because they stigmatize children born to same-sex married couples as children born out of wedlock.

On February 13, 2015, the Plaintiffs filed their Complaint, asking the Court for declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 are unconstitutional, for injunctive relief to list both the birth mother and her same-sex spouse on their children's birth certificates, and to recognize their children as being born in wedlock. The parties then filed cross-motions for summary judgment on the Plaintiffs' claims for injunctive relief and declaratory judgment. On April 8, 2016, the parties presented oral argument to the Court on the cross-motions for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489–90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). "However, inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007) (citation and quotation marks omitted). Additionally, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence." *Sink v. Knox County Hosp.*, 900 F. Supp. 1065, 1072 (S.D. Ind. 1995) (citations omitted).

"In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to

conduct a paper trial on the merits of [the] claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citations and quotation marks omitted). "[N]either the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and quotation marks omitted).

These same standards apply when each party files a motion for summary judgment. The existence of cross-motions for summary judgment does not imply that there are no genuine issues of material fact. *R.J. Corman Derailment Serv., LLC v. Int'l Union of Operating Eng'rs.*, 335 F.3d 643, 647 (7th Cir. 2003). The process of taking the facts in the light most favorable to the non- moving party, first for one side and then for the other, may reveal that neither side has enough to prevail without a trial. *Id.* at 648. "With cross-motions, [the Court's] review of the record requires that [the Court] construe all inferences in favor of the party against whom the motion under consideration is made." *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001) (citation and quotation marks omitted).

III. DISCUSSION

The Plaintiffs move for summary judgment, asking the Court for a declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses of the

Fourteenth Amendment by not recognizing their children as being born in wedlock and by not granting a presumption of parenthood to the non-birth mother same-sex spouse. The Plaintiffs also request injunctive relief to list both same-sex spouses on their children's birth certificates and to recognize their children as being born in wedlock. The Defendants argue that declaratory judgment and injunctive relief are inappropriate because the challenged statutes do not provide unequal treatment and are narrowly tailored to serve a compelling state interest. The Tippecanoe County Defendants further assert that Plaintiffs lack standing to sue the Tippecanoe County Defendants. The Court will address each argument, beginning with the standing issue.

A. The Plaintiffs' Standing to Sue County Defendants

The Tippecanoe County Defendants argue that Plaintiffs lack standing to sue them because the Plaintiffs' alleged injuries are not fairly traceable to the challenged action of the Tippecanoe County Defendants, and their alleged injuries will not be redressed by a favorable decision against the Tippecanoe County Defendants. These arguments apply equally to the Marion County Defendants, Bartholomew County Defendants, and Vigo County Defendants.

In order to establish standing, a plaintiff must show an injury in fact, a causal connection between the injury and the conduct complained of, and it must be likely (not just speculative) that the injury will be

redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The injury has to be fairly traceable to the challenged action of the defendant. *Id.* at 560. Citing Seventh Circuit case law, the Tippecanoe County Defendants explain that the suit should be brought against entities that have legal responsibility for the flaws Plaintiffs perceive in the system and from whom they ask something which would conceivably help their cause. *See Hearne v. Board of Education*, 185 F.3d 770, 777 (7th Cir. 1999) (plaintiffs' inability to show that the defendant bears any legal responsibility for the flaws they perceive in the system bars the plaintiffs' action).

The Tippecanoe County Defendants explain that their involvement with the Plaintiffs is purely ministerial, and the Plaintiffs' true conflict is with the laws of the State of Indiana and the State's administration of its birth records system. The Tippecanoe County Health Department produces birth certificates that are consistent with the information provided to it through the State's birth records database. ISDH prescribes the information that is required for birth certificates and for applications for birth certificates. Local hospitals collect the State prescribed information from birth mothers and submit that information to the State's database. The Tippecanoe County Health Department then produces birth certificates based on that State prescribed information which is contained in the State's database. The Tippecanoe County Defendants have no authority to deviate from this procedure, to change the information in the State's database, to use different information to create birth certificates, or to place a Plaintiff non-

birth mother on the birth certificate. The right to be listed on a birth certificate and the process of being listed are dictated by the State of Indiana, not by the county health departments. Therefore, there is no causal connection between the injury claimed by the Plaintiffs and the conduct of the Tippecanoe County Defendants. Additionally, the Tippecanoe County Defendants' role in the process does not in any way define children as being born in or out of wedlock under the Indiana statutes. Thus, the Tippecanoe County Defendants argue, the Plaintiffs' injuries cannot be fairly traceable to the challenged action of the Tippecanoe County Defendants. Consequently, the Plaintiffs lack standing to bring this action against the Tippecanoe County Defendants.

The Tippecanoe County Defendants also argue that the Plaintiffs' alleged injuries will not be redressed by a favorable decision against them because the contents of birth certificates are not discretionary for the county health departments; birth certificate information is dictated by ISDH. If the Tippecanoe County Defendants were to attempt to go outside the State's regulatory system for producing birth certificates, their actions would be *ultra vires* and would result in invalid birth certificates. They assert that,

> [A] mandate from this Court requiring TCHD to add Mrs. Henderson to the birth certificate -- in the absence of an order altering the State's regulatory scheme -- would be outside TCHD's authority and, while TCHD would comply with the order of this court, a certificate issued by TCHD outside of the State's

> regulatory scheme would be of questionable value. The value in a birth certificate is founded upon the regulatory system underlying the certificate. Alternately, if this Court issued a mandate altering the State's regulatory scheme for issuing birth certificates, TCHD would be bound to comply with the new state system even in the absence of an order directed at TCHD.

(Filing No. 83 at 17.) The Tippecanoe County Defendants assert that, for this additional reason, the Plaintiffs lack standing to bring this action against them.

In response to these arguments regarding a lack of standing, the Plaintiffs assert that their injuries are traceable to the County Defendants' actions because it is the County Defendants that actually issue the birth certificates that do not list both same-sex spouses as parents on the birth certificates. The Plaintiffs also assert that a favorable decision against the County Defendants will redress the Plaintiffs' injuries because the Tippecanoe County Defendants acknowledge that they would comply with an order from this Court mandating the issuance of birth certificates listing both spouses as parents.

The Court is convinced by the evidence and argument that the County Defendants do not have authority or discretion to deviate from the State's regulatory system for creating and issuing birth certificates in the State of Indiana. The State dictates what information is collected, the method by which information

is collected, how information is stored, and how information can be used to generate birth certificates. The State also governs how information on a birth certificate may be modified. The real injury to the Plaintiffs stems from the State's regulatory framework and ISDH's control over the State's vital statistics system. Injury is not fairly traceable to the County Defendants. Additionally, the Plaintiffs ignore the Tippecanoe County Defendants' clear qualifier that it would comply with an order from the Court, but adhering to such an order would not redress the injuries suffered because the actions would be *ultra vires*, and the resulting birth certificates would be invalid and of questionable value.

Because the Plaintiffs' injuries are not fairly traceable to the challenged action of the County Defendants, and their injuries will not be redressed by a favorable decision against the County Defendants, the Plaintiffs lack standing to sue the Tippecanoe County Defendants, Marion County Defendants, Bartholomew County Defendants, and Vigo County Defendants.

If a plaintiff lacks standing, the district court has no subject matter jurisdiction. *See Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) (internal citation omitted). If the court lacks jurisdiction over the subject matter, its only proper course is to note the absence of jurisdiction and dismiss the case on that ground. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). "A dismissal for lack of federal jurisdiction is without prejudice." *Bovee v. Broom*, 732 F.3d 743 (7th Cir. 2013); *see also El v.*

AmeriCredit Fin. Servs., Inc., 710 F.3d 748, 751 (7th Cir. 2013) ("Dismissals because of absence of federal jurisdiction ordinarily are without prejudice . . . 'because . . . once a court determines it lacks jurisdiction over a claim, it perforce lacks jurisdiction to make any determination of the merits of the underlying claim.'" (quoting *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1217 (10th Cir. 2006)).

For this reason, the Court **GRANTS** the Tippecanoe County Defendants' Motion for Summary Judgment, and the claims against each of the County Defendants are **dismissed for lack of subject matter jurisdiction.**

B. Equal Protection

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This Amendment provides protection against discrimination on the basis of gender or sexual orientation. *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (sexual orientation discrimination); *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576–82 (7th Cir. 2014) (gender discrimination).

The Plaintiffs assert that Indiana's refusal to grant the status of parenthood to female spouses of artificially-inseminated birth mothers while granting the status of parenthood to male spouses of artificially-inseminated birth mothers violates the Equal Protection Clause. The Plaintiffs explain that Indiana

is required to recognize same-sex marriage as determined by *Baskin*, 766 F.3d 648. And the benefits conferred upon opposite-sex married couples must be equally conferred upon same-sex married couples. *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1165 (S.D. Ind. 2014). As the United States Supreme Court recently explained,

> Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: adoption rights; . . . birth and death certificates; . . . and child custody, support, and visitation rules.

Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (U.S. 2015).

Based on these recent developments in constitutional jurisprudence, the Plaintiffs ask the Court for declaratory and injunctive relief, seeking to enjoin the Defendants from refusing to issue birth certificates listing the non-birth mother same-sex spouses as parents on their respective children's birth certificates "and to otherwise accord them all rights accorded to parents identified on a birth certificate." They also ask that the Defendants be enjoined from declining to recognize their children as being born in wedlock.

To make their case, the Plaintiffs provide the example of a man and a woman who are married and

who become pregnant through the aid of a third-party sperm donor. The married woman then gives birth to a child who is not biologically related to her husband. Even though the mother, the husband, the doctor, and possibly the hospital staff know that the man is not the biological father of the child, the State of Indiana will presume parenthood of the child in the husband. This same presumption of parenthood is not afforded to the female, same-sex spouse of a birth mother who also becomes pregnant through the aid of a third-party sperm donor. The Plaintiffs assert that the State Defendant's refusal to apply the same presumption of parenthood to the non-birth mother same-sex spouse as would apply to the husband of a birth mother who conceives by artificial insemination violates the Equal Protection Clause of the Fourteenth Amendment.

With respect to Indiana Code §§ 31-9-2-15 and -16, the Plaintiffs contend that these statutes are unconstitutional on their face and as applied to the Plaintiffs because Indiana law says that a child born to a husband and wife is a child born in wedlock, but because these birth mothers are married to women, their children are labeled as children born out of wedlock, are not allowed to carry their second parent's surname, and suffer the stigma of illegitimacy. The State Defendant responds that the purpose of these statutes is limited only for the purpose of determining who must be notified and given an opportunity as a biological father to consent to an adoption procedure; therefore, "[t]hese statutes do not disfavor anyone based on illegitimacy." (Filing No. 85 at 13.)

The Plaintiffs contend, and the Court agrees, that the "Parenthood Statutes" (Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1) are reviewed under heightened "intermediate" scrutiny because of the gender and sexual orientation classifications at issue. *See Hayden*, 743 F.3d at 577 ("Gender is a quasi-suspect class that triggers intermediate scrutiny in the equal protection context; the justification for a gender-based classification thus must be exceedingly persuasive."); *Baskin*, 766 F.3d at 671 (statutes that discriminate on the basis of sexual orientation are subject to heightened intermediate scrutiny). A statute survives intermediate scrutiny if it "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656.

The purposes and objectives of Indiana's Parenthood Statutes are codified at Indiana Code § 31-10-2-1, which declares,

It is the policy of this state and the purpose of this title to:

(1) recognize the importance of family and children in our society;

(2) recognize the responsibility of the state to enhance the viability of children and
family in our society;

(3) acknowledge the responsibility each person owes to the other;

(4) strengthen family life by assisting parents to fulfill their parental obligations….

Courts in Indiana have repeatedly focused on the State's interest in protecting the best interests of the child when making determinations in the family law context. *See In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1257 (Ind. Ct. App. 2004) (". . . the guiding principle of statutes governing the parent-child relationship is the best interests of the child").

The Plaintiffs argue that the challenged Parenthood Statutes do not serve these governmental objectives. It is undisputed that the State of Indiana wants to serve the best interests of children and to protect, promote, and preserve families. In light of the legal recognition of same-sex marriage, the Plaintiffs argue that there is no governmental interest in denying the presumption of parenthood to the same-sex spouse of a birth mother. Instead, applying the Parenthood Statutes undermines and discourages families that are required by the Supreme Court's decision in *Obergefell* to be recognized and strengthened.

An example offered by the Plaintiffs of unequal treatment resulting from application of the Parenthood Statutes is that the denial of a presumption of parenthood to same-sex spouses requires them to go through the lengthy and costly adoption process to secure parental rights, which is not required of similarly situated men married to birth mothers who conceive through artificial insemination. Additionally, not permitting both same-sex spouses to be listed as parents on birth certificates leaves children in a vulnerable position of having only one legal parent,

which affects many daily activities and choices available to children and parents. Denial of a presumption of parenthood to the Plaintiffs does not serve the best interests of the Plaintiff Children or protect, promote, and preserve their families and numerous other similar families in Indiana.

In response to the Plaintiffs' equal protection arguments, the State Defendant explains that it has an important governmental interest in preserving the rights of biological fathers and recording and maintaining accurate records regarding the biological parentage of children born in Indiana. The State Defendant asserts that the Parenthood Statutes substantially relate to the achievement of these interests.

The State Defendant offers a litany of cases to support its position and argues that Indiana's long history of statutory and case law recognizes that an individual may become a parent only through biology or adoption. However, all of those cases precede *Baskin* and *Obergefell*. The State Defendant contends that there are only two ways by which a person becomes a parent in Indiana; therefore, the Plaintiffs must utilize the adoption process to become parents because the non-birth mother same-sex spouse cannot be biologically related to the child. Furthermore, the Parenthood Statutes do not violate the Equal Protection Clause because the statutes apply equally to all male and female spouses of birth mothers. The State Defendant argues that a husband who is not the biological father of the child should not be listed on the birth certificate because the birth mother should acknowledge that she is not married to the father of

her child when she has been artificially inseminated. In such a case, the husband would have to adopt the child to be listed on the birth certificate and recognized as a parent.

Finally, the State Defendant asserts that the Parenthood Statutes do not apply at all to the creation and issuance of birth certificates. Rather, the Parenthood Statutes only apply in the adoption context. Therefore, challenging the Parenthood Statutes will not provide the relief that the Plaintiffs seek.

The Court first notes that when determining the appropriateness of summary judgment, it draws reasonable inferences in the non-moving party's favor, *Zerante*, 555 F.3d at 584, and when doing so, the Court need not set aside common sense and logic. *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 580 n.7 (4th Cir. 2010). Moreover, the State Defendant has presented no evidence or affidavit to support its theory that a heterosexual couple who has conceived by artificial insemination would interpret the Indiana Birth Worksheet in the manner is explains.

The State Defendant's response does not account for or address the realities of the example provided by the Plaintiffs. A man and a woman are married, and the woman conceives through the aid of a third-party sperm donor. The child is not biologically related to the birth mother's husband. In completing the Indiana Birth Worksheet, the birth mother declares that she is married to the father of her child. The State of Indiana will presume parenthood of the child in the

husband, and the husband is listed on the child's birth certificate despite the lack of biological or adoptive connection. This same presumption of parenthood is not afforded to the female, same-sex spouse of a birth mother who conceived through the aid of a third-party sperm donor. Thus, a husband who is not biologically related to the child born to his wife does not have to adopt the child to enjoy the status of a parent. In contrast, a female, same-sex spouse always has to adopt to enjoy the status of a parent.

The State Defendant's argument that the birth mother should acknowledge that she is not married to the father of her child when she has been artificially inseminated or else she is committing fraud is not consistent with the Indiana Birth Worksheet, Indiana law, or common sense.

The Indiana Birth Worksheet asks, "are you married to the father of your child," yet it does not define "father." This term can mean different things to different women. Common sense says that an artificially-inseminated woman married to a man who has joined in the decision for this method of conception, and who intends to treat the child as his own, would indicate that she is married to the father of her child. Why would she indicate otherwise? The Indiana Birth Worksheet does not define "father," it does not state that the father must be the biological father of the child, and it does not indicate that it is completed under penalties of perjury. There is no warning of fraud or criminal liability. The State Defendant points to Indiana Code § 16-37-1-12 to argue that an

artificially-inseminated birth mother would be committing fraud if she were to falsify statements on the Indiana Birth Worksheet. However, the Indiana Birth Worksheet does not refer to Indiana Code § 16-37-1-12, and this code provision does not relate to when an individual provides information that leads to the creation of the birth certificate. Rather, this section relates to when an individual, with intent to defraud, applies to receive a certified copy of a birth certificate.

Next, the State Defendant's argument that the Parenthood Statutes do not apply at all to the creation and issuance of birth certificates highlights the void that Indiana's statutory framework has created that leads to the State's discriminatory conduct when completing the Indiana Birth Worksheet and creating and issuing birth certificates. The Indiana Birth Worksheet was created by ISDH as part of the Indiana Birth Registration System. The Indiana Birth Worksheet asks birth mothers if they are married and then asks, "are you married to the father of your child." As the husband is presumed to be the biological father of the birth mother's child, the birth mother can affirmatively answer the question, and the husband will be listed on the birth certificate as the father of the child, even if he is not the actual biological father of the child. No such presumption, or question on the Indiana Birth Worksheet, exists for a non-birth mother same-sex spouse.

Some states have attempted to legislatively fill the statutory void similar to Indiana's statutory short-

coming. As an example, Wisconsin has a more comprehensive statutory scheme to address parentage, artificial insemination, and birth certificates. *See* Wis. Stat. §§ 69.14, 891.40, 891.41. These statutes dictate a presumption of paternity, parentage following artificial insemination, and the contents of birth certificates. However, even with the additional statutory protections and guidance, a similar challenge to Wisconsin's statutes is pending in *Torres v. Rhoades*, No. 15-cv-288-bbc (W.D. Wis.), because these statutes allegedly do not provide for equal protection to same-sex married couples. It is the lack of clarity and comprehensiveness in Indiana's statutory framework that has led to the State's discriminatory treatment of same-sex married couples when completing the Indiana Birth Worksheet and creating and issuing birth certificates.

Concerning the State's important governmental interests, the State Defendant points to its interests in preserving the rights of biological fathers and recording and maintaining accurate records regarding the biological parentage of children. The State Defendant asserts that the Parenthood Statutes substantially relate to the achievement of these interests. The State Defendant further claims that these interests are compelling, and the Parenthood Statutes are narrowly tailored to meet these interests.

The Court is not convinced that the challenged Parenthood Statutes are substantially related or narrowly tailored to meet the stated interests of preserving the rights of biological fathers and maintaining accurate records of biological parentage. Importantly,

the legitimacy statutes do not refer to biology when they define the terms "child born in wedlock" and "child born out of wedlock."

In the example provided by the Plaintiffs, the biological father will not be listed on the birth certificate because he is simply a third-party sperm donor. His paternal rights will not be preserved or recognized. Rather, the birth mother's husband will be listed on the birth certificate, and he will enjoy the status of a parent. In fact, it will be incorrectly recorded in the State's vital statistics records and incorrectly presumed that the husband is the biological father of the child when he actually has no biological connection to the child.

During oral argument, the State Defendant asserted that the birth mother should not name her husband as the father of the child when a third-party sperm donor is involved. However, as noted above, common sense says that she will name her husband as the father. Whether she names her husband as the father or states that she is not married to the father, the biological father's parental rights are not preserved and accurate records of biological parentage are not maintained. If the mother names her husband, the third-party sperm donor who is the biological father is not listed on the birth certificate. If the mother says she is not married to the father, the third-party sperm donor who is the biological father still is not listed on the birth certificate. In either event, the State's interests in preserving the rights of biological fathers and maintaining accurate records of biological parentage are not served.

Regarding the Supreme Court's decision in *Obergefell*, the State Defendant asserts that *Obergefell* actually decoupled marriage from parenthood because the right to marry cannot be conditioned on the capacity or commitment to procreate. It argues that, at most, the *Obergefell* decision stands for the proposition that any benefit of marriage must now be extended to same-sex married couples on an equal basis with opposite-sex married couples. But this is exactly what the Plaintiffs seek—the extension of a benefit of marriage on an equal basis.

When the State Defendant created and utilized the Indiana Birth Worksheet, which asks "are you married to the father of your child," the State created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father. Because of *Baskin* and *Obergefelthis* benefit—which is directly tied to marriage—must now be afforded to women married to women.

During oral argument, the Plaintiffs made this very point: The State has granted mothers the power to enter a legal fiction because the mother who conceived her child with the aid of a third-party sperm donor is allowed to claim that her husband is the father of her child. But birth mothers with same-sex spouses are not allowed to enter into the same legal fiction. That husband has no more relationship to the child than the same-sex spouse, yet the same-sex

spouse cannot be listed as a parent on the birth certificate while the man can be listed simply because the birth mother says he is married to her.

Indiana's statutory scheme leads to unequal treatment of same-sex married women who bring children into their families with the assistance of third-party sperm donors. This unequal treatment is based on the individual's gender and sexual orientation. The Parenthood Statutes and the State of Indiana's implementation of the statutes are not substantially related to, and do not accomplish, the State Defendant's claimed governmental objectives. For these reasons, the Court determines that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause of the Fourteenth Amendment.

C. <u>Due Process</u>

The Plaintiffs also challenge the Parenthood Statutes under the Due Process Clause of the Fourteenth Amendment, which provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

> The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147-149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U.S.

> 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Obergefell, 135 S. Ct. at 2597–98. "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

The Plaintiffs assert their Due Process claim is reviewed under strict scrutiny because it involves a fundamental right. Fundamental rights, although generally limited, have long been deemed to include "matters relating to marriage, family, procreation, and the right to bodily integrity," *Albright v. Oliver*, 510 U.S. 266, 272 (1994), and what has been described as "perhaps the oldest of the fundamental liberty interests recognized," a parent's liberty interest in the "care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Under strict scrutiny, "when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The Plaintiffs reassert

their equal protection argument to explain that the State Defendant does not have a compelling governmental interest, and the Parenthood Statutes are not narrowly tailored to serve any compelling State interests, when it denies the presumption of parenthood to the Plaintiffs.

The State Defendant responds that the Constitution provides protection to fundamental rights of parents to direct the upbringing, education, and support of their children. However, there is no fundamental right to be a parent. Rather, in this context, constitutionally protected fundamental rights exist only after an individual has become a parent. Contrary to the Plaintiffs' assertion, the State Defendant argues that the rational basis standard applies, not strict scrutiny.

The State Defendant then explains that, under any level of constitutional review, the Parenthood Statutes satisfy constitutional standards. It asserts that Indiana has a compelling interest in protecting the parental rights of biological parents and maintaining accurate records of biological parentage, and the Parenthood Statutes are narrowly tailored to serve these interests.

The Supreme Court long ago recognized a fundamental liberty interest "to marry, establish a home and bring up children," *Meyer*, 262 U.S. at 399, with the "freedom of personal choice in matters of marriage and family life." *Moore*, 431 U.S. at 499. "[O]ur laws and tradition afford constitutional protection to personal decisions relating to

marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). At least one court has interpreted the Supreme Court's decision in *Troxel v. Granville* to mean that there is an established fundamental liberty interest in being a parent. *State v. Renfro*, 40 Kan. App. 2d 447, 451 (Kan. Ct. App. 2008) ("the right to be a parent is a fundamental right recognized as a liberty interest to be protected by the Due Process Clause").

The Parenthood Statutes and the State Defendant's implementation of the statutes through the Indiana Birth Worksheet significantly interferes with the Plaintiffs' exercise of the right to be a parent by denying them any opportunity for a presumption of parenthood which is offered to heterosexual couples. What Plaintiffs seek is for their families to be respected in their dignity and treated with consideration. During its discussion above concerning Equal Protection, the Court rejected as unpersuasive the State Defendant's argument that it has compelling interests that are served by the narrowly tailored Parenthood Statutes. The Court will not repeat that analysis and discussion here. As previously stated, the Parenthood Statutes are not narrowly tailored to meet a compelling governmental interest. By refusing to grant the presumption of parenthood to same-sex married women, the State Defendant violates the Plaintiffs' fundamental right to parenthood under the Due Process Clause.

D. Injunctive Relief

The Plaintiffs request that the Court permanently enjoin Defendants from enforcing Indiana Code § 31-14-7-1 in a way that differentiates between male and female spouses of women who give birth with the aid of artificial insemination by a third-party. Additionally, the Plaintiffs request that the children born of their same-sex unions be accorded the same equal protections of children born to a man and a woman using artificial insemination; therefore, the children should not be considered children born out of wedlock under Indiana Code §§ 31-9-2-15 and -16.

> Where a permanent injunction has been requested at summary judgment, we must determine whether the plaintiff has shown: (1) success, as opposed to a likelihood of success, on the merits; (2) irreparable harm; (3) that the benefits of granting the injunction outweigh the injury to the defendant; and, (4) that the public interest will not be harmed by the relief requested.

Collins v. Hamilton, 349 F.3d 371, 374 (7th Cir. 2003). As discussed above, the Plaintiffs have been successful on the merits of their case under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Irreparable harm is presumed for some kinds of constitutional violations. *See* 11A Charles Alan Wright et al., Federal Practice & Procedure §

2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). This has been true in the context of violations of the First and Second Amendments. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (irreparable harm is presumed in First Amendment violation); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (irreparable harm is presumed in Second Amendment violation). The Equal Protection and Due Process Clauses of the Fourteenth Amendment similarly protect intangible and unquantifiable interests. Infringement of these rights cannot be compensated by a damages award; thus, irreparable harm exists.

No injuries to the State Defendant have been shown that would result from the issuance of injunctive relief which would outweigh the benefits of the injunctive relief. The State Defendant argues that if Plaintiffs wish to create a third path to legal parenthood, whether through marriage or any other means, they should seek relief from the General Assembly—not this Court. The Supreme Court in *Obergefell* recognized that the initial inclination might be to await further legislation, litigation, and debate; however, *Obergefell* noted that the Plaintiffs' stories show the urgency of the issues they present before the Court. This Court is hard-pressed to imagine an injury to the State Defendant if it is ordered to apply the Parenthood Statutes in a non-discriminatory way. In contrast, the injury to these Plaintiffs is unfeigned. The

public interest in serving the best interests of the child will not be harmed by injunctive relief but actually will be furthered by legally recognizing two parents for children and providing stability for children and families. Therefore, injunctive relief is an appropriate remedy.

IV. CONCLUSION

Given Indiana's long-articulated interest in doing what is in the best interest of the child and given that the Indiana legislature has stated the purpose of Title 31 is to protect, promote, and preserve Indiana families, there is no conceivable important governmental interest that would justify the different treatment of female spouses of artificially-inseminated birth mothers from the male spouses of artificially-inseminated birth mothers. As other district courts have noted, the holding of *Obergefell* will inevitably require "sweeping change" by extending to same-sex married couples *all* benefits afforded to opposite-sex married couples. *Campaign for Southern Equality v. Miss. Dep't of Human Servs.*, 2016 U.S. Dist. LEXIS 43897, at *35 (S.D. Miss. Mar. 31, 2016). Those benefits must logically and reasonably include the recognition sought by Plaintiffs in this action.

For the reasons stated herein, the Court **GRANTS** the Tippecanoe County Defendants' Motion for Summary Judgment (Filing No. 82), and claims against each of the County Defendants are **dismissed for lack of jurisdiction**. The

Court **GRANTS** the Plaintiffs' Motion for Summary Judgment against the State Defendant (Filing No. 77), and **DENIES** the State Defendant's Motion for Summary Judgment (Filing No. 84).

For the reasons set forth above, the Court **DECLARES** that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are **ENJOINED** from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are **ENJOINED** to recognize children born to a birth mother who is legally married to a same-sex spouse as a child born in wedlock.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political

subdivisions of the State of Indiana, are **ENJOINED** to recognize the Plaintiff Children in this matter as a child born in wedlock.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are **ENJOINED** to recognize the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate.

Final judgment will issue under separate order. A separate Permanent Injunction will also be issued as required by Rule 65(d) of the Federal Rules of Civil Procedure.

The Plaintiffs who have prevailed in securing relief are entitled to recover their costs.

The Plaintiffs have requested an award of costs and attorneys' fees under 42 U.S.C. § 1988. The Plaintiffs are ordered to file a bill of costs and a petition for attorneys' fees within **thirty (30) days** of the date of this Order. A **Response** may be filed within **fourteen (14) days** of such a submission. The Plaintiffs may file a **Reply** within **seven (7) days** of such Response.

SO ORDERED.

Date: 6/30/2016

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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FINAL JUDGMENT

January 17, 2020

Before: JOEL M. FLAUM, Circuit Judge
FRANK H. EASTERBROOK, Circuit Judge
DIANE S. SYKES, Circuit Judge

No. 17-1141	ASHLEE and RUBY HENDERSON, et al., Plaintiffs – Appellees v. KRISTINA BOX, Indiana State Health Commissioner, Defendant – Appellant
Originating Case Information:	
District Court No: 1:15-cv-00220-TWP-MJD Southern District of Indiana, Indianapolis Division District Judge Tanya Walton Pratt	

The district court's order requiring Indiana to recognize the children of these plaintiffs as legitimate children, born in wedlock, and to identify both wives in each union as parents, is AFFIRMED. The injunction and declaratory judgment are AFFIRMED to the extent they provide that the presumption in Ind. Code §31-14-7-1(1) violates the Constitution. The remainder of the judgment is VACATED, and the case is REMANDED for proceedings consistent with this opinion.

The above is in accordance with the decision of this court entered on this date. Henderson and the other appellees recover costs.

Indiana Code § 31-9-2-15

"Child born in wedlock", for purposes of IC 31-19-9, means a child born to:

(1) a woman; and

(2) a man who is presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2) unless the presumption is rebutted.

Indiana Code § 31-9-2-16

"Child born out of wedlock", for purposes of IC 31-19-3, IC 31-19-4-4, and IC 31-19-9, means a child who is born to:

(1) a woman; and

(2) a man who is not presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2).

Indiana Code § 31-14-7-1

A man is presumed to be a child's biological father if:

(1) the:

(A) man and the child's biological mother are or have been married to each other; and

(B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) the:

(A) man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage:

(i) is void under IC 31-11-8-2, IC 31-11-8-3, IC 31-11-8-4, or IC 31-11-8-6; or

(ii) is voidable under IC 31-11-9; and

(B) child is born during the attempted marriage or not later than three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or

(3) the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.