No. 19-1385

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, PETITIONER

v.

ASHLEE AND RUBY HENDERSON, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Obergefell* v. *Hodges*, this Court held that same-sex couples' constitutional right to marry includes the "constellation of benefits that the States have linked to marriage." 135 S. Ct. 2584, 2601 (2015). In *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017), addressing Arkansas law, the Court confirmed that when a state grants the opposite-sex spouse of a birth mother certain benefits, such as inclusion on the child's birth certificate if the couple conceived through assisted reproductive technology, the state must afford the same benefits to a birth mother's same-sex spouse. Petitioner does not challenge the holdings of *Obergefell* or *Pavan*. The question presented is therefore:

Whether the court of appeals correctly construed Indiana law to establish the right of a birth mother's spouse to be listed on the child's birth certificate, including when the couple used assisted reproduction to conceive a child and the spouse has no biological relationship to the child, which the state is granting to opposite-sex spouses but not to same-sex spouses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 947 F.3d 482. 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 Judgment is unreported, and is reproduced at pages 12a–22a of the Petition Appendix. The order of the United States District Court for the Southern District of Indiana granting Plaintiffs' Motion for Summary Judgment (Pet. App. 25a-67a) is reported at 209 F. Supp. 3d 1059.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on January 17, 2020. The Court has jurisdiction under 28 U.S.C. 1254(1).

INTRODUCTION

This Court does not make a practice of granting certiorari to resolve questions of state law—for which the district courts and courts of appeal are better suited than this Court—yet that is what petitioner seeks. Petitioner does not challenge the federal precedent on which the court of appeals based its decision, but rather asks the Court to revisit the appellate court's construction of state law as it relates to those established federal principles. But nothing in the court of appeals' interpretation of Indiana law warrants this Court's review.

Petitioner argues that it should be able to exclude same-sex spouses from being listed on their children's birth certificates notwithstanding the requirement under *Pavan* and *Obergefell* that states must treat same-sex and opposite-sex spouses equally because, according to petitioner, Indiana lists only biological and adoptive parents on birth certificates. The court of appeals rejected this argument based on its interpretation of Indiana law, which it construed in the same manner that the Indiana Supreme Court and intermediate state appellate courts have done. The court of appeals followed the Indiana Courts' conclusion that Indiana law permits a birth mother's spouse who consents to conceive a child through donor insemination to be listed on the child's birth certificate even when the spouse has no biological tie to the child. There is no reason for this Court to review that purely state law determination here.

As petitioner implicitly acknowledges, there is no conflict as to analogous state law issues, among either the circuit courts or state courts of last resort. Indeed, every state court of last resort to consider analogous

questions of state law since *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017), has similarly held that if a state recognizes both spouses as parents when an opposite-sex married couple has a child through donor insemination, it must apply the same rule to married same-sex couples. Nor has any other federal court of appeal been presented with this issue. Nothing about the court of appeals' decision, which faithfully applied this Court's decision in *Pavan* and state court statutory and judicial authority, warrants this Court's review.

This Court has already held, in *Obergefell* v. *Hodges*, that same-sex couples' constitutional right to marry includes the "constellation of benefits that the States have linked to marriage," including "birth and death certificates." 135 S. Ct. 2584, 2601 (2015). In *Pavan*, the Court affirmed that married same-sex parents must have "the same right as opposite-sex parents to be listed on a child's birth certificate." 137 S. Ct. at 2078. Petitioner acknowledged these settled principles below, and does not ask this Court to revisit them; thus, as the court of appeals noted, "this appeal depends on the resolution of a dispute about the meaning of Indiana law." Pet. App. 3a. A court of appeals' construction of state law does not ordinarily warrant this Court's review, and petitioner has not identified any reason to depart from that standard practice here.

In any event, the court of appeals correctly construed state law. Based on its analysis of Indiana statutes and case law, the court of appeals found that Indiana law affords a birth mother's husband the right to be listed on the birth certificate of a child born during the marriage, including when a child is born through donor insemination and it is known that the husband is not the

child's biological parent. Having made that determination, the court of appeals held that, under *Pavan*, the same rule must be applied to married same-sex couples. As the court of appeals noted, the outcome here is dictated by interpretation of Indiana law and the unchallenged holding in *Pavan*. There is no issue warranting the Court's review.

STATEMENT OF THE CASE

A. Indiana's Legal Regime Regarding Birth Certificates

When a child is born in Indiana, state law requires that the physician or midwife present at the birth must file with the local health officer a certificate of birth. Ind. Code §§ 16-37-2-1, -2. If neither a physician nor midwife is present at the birth, "one of the parents"—or, if neither is able to complete the form, a local health official—is required to submit it. Among other information, the birth certificate must include the "name of the parents." *Id.* § 16-37-2-9.

Under settled Indiana law, the term "parent" includes a spouse who consents to have a child through donor insemination even when he/she is not the child's biological parent. Indiana courts have applied this rule to both same-sex and opposite-sex married couples. The birth certificate statute does not provide its own definition of "parents," but other statutes and judicial precedent make clear that the term does not necessarily require a genetic relationship. Indiana law specifies that when a woman married to a man gives birth, the husband is *presumed* to be the child's "biological father," Ind. Code § 31-14-7-1 (the "marital presumption"), and

the child is deemed "born in wedlock" as long as that presumption is not challenged and rebutted, *id.* § 31-9-2-15. Another statute defines a "child of the marriage" as one "born or adopted during the marriage of the parties." *Id.* § 31-9-2-13(a)(2). Applying this statutory law, the Supreme Court of Indiana has held that "a husband who consents to the * * * artificial insemination of his wife is the legal father of the resulting child" even when he is not the child's biological parent. *Levin* v. *Levin*, 645 N.E.2d 601, 603 (Ind. 1994). The Indiana court of appeals has held that this principle applies as well to same-sex spouses. *Gardenour* v. *Bondelie*, 60 N.E.3d 1109, 1120-1121 (Ind. Ct. App. 2016), trans. denied 83 N.E.3d 1218 (Ind. 2017).

The State's practices and policies with regard to birth certificates are consistent with this law except for its refusal to list a birth mother's same-sex spouse. After a child is born, hospital staff typically work with the birth mother to fill out a form, the "Birth Worksheet," which the State uses to obtain information to be included on the birth certificate. Pet. App. 34a. The Worksheet asks, among other things, whether the birth mother is married to the child's "father," which the Worksheet does not define. *Ibid.* If the woman answers "yes," the form directs her to questions requesting information about the father. *Id.* at 34a-35a. If the woman answers "no," she is directed to a question inquiring if a paternity affidavit has been completed for the child. *Ibid.* If the answer to that question is also "no," the birth mother is directed to skip the remaining questions related to the identity of the father. *Id.* at 35a. If a married woman and her opposite-sex spouse have agreed to conceive through donated semen from another man, the woman

and her opposite-sex spouse will be "listed as the parents of the child on the birth certificate." *Levin*, 645 N.E.2d at 603. The mother's opposite-sex spouse will also be deemed "the legal father of the child." *Ibid.*

Petitioner concedes that, consistent with the above, "[i]f a married birth mother" indicates on the Birth Worksheet that she is married to the father of the child "and provides her husband's name, he is listed on the birth certificate as the child's father." Pet. 15. But petitioner seeks to deny that benefit when both spouses are women. If a birth mother lists the name of her same-sex spouse on the Birth Worksheet, petitioner contends that the State may omit that information on the birth certificate and require the spouse to adopt the child before she may be listed, even though no such requirement applies to an opposite-sex spouse in the exact same circumstances. Pet. App. 14a-15a.

B. Factual History

Respondents are eight female same-sex married or previously married couples and their children. Each of the couples jointly decided to have a child, and to raise that child together. Pet. App. 28a-33a. With the aid of a sperm donor, one spouse in each couple became pregnant and gave birth. *Id.* at 33a. In one case, one of the spouses provided an egg, and the other spouse gave birth to the child, which means that the birth mother's same-sex spouse is a genetic parent. *Id.* at 32a. In each case, including the couple for whom the birth mother's spouse is the child's genetic mother, the birth certificate issued by the State listed only one parent—the birth mother—and did not list her spouse. *Id.* at 33a.

After being excluded from their children's birth certificates, some of the birth mothers' spouses completed adoptions in order to be listed on their children's birth certificates. Pet. App. 15a. Absent the district court decision requiring the State to issue new birth certificates listing both spouses, the birth mothers' spouses who did not obtain adoptions would not be recognized on their children's birth certificates.

One of the respondent-couples, Elizabeth and Tonya Bush-Sawyer, were married in 2010. Pet. App. 14a. In 2014, Elizabeth gave birth to I.J.B.S. after conceiving via a sperm donor, and listed Tonya's information in response to the Birth Worksheet's questions about the child's father. *Ibid.* Shortly thereafter, the couple received a birth confirmation letter listing Elizabeth and Tonya as parents of I.J.B-S. and reflecting that the child's last name was a hyphenated version of Elizabeth and Tonya's last names. *Ibid.* When the couple received the official birth certificate, however, it listed Elizabeth as the only parent, and Tonya's last name had been removed from I.J.B-S.'s last name. *Ibid.* Tonya then sought a stepparent adoption, which required her to undergo fingerprinting and a criminal background check; to submit her driving profile, financial profile, and veterinary records for any pets living in her home; and for a home study, which involved an examination of Tonya and Elizabeth's relationship and parenting philosophy and required them to write an autobiography and open their home for inspection, all at a cost of over $4,000. *Id.* at 15a.

Another couple, Nicole and Jennifer Singley, were married in January 2014. Pet. App. 30a. In 2015, Jen-

nifer gave birth to H.S., who had been conceived via donor insemination. *Ibid.* Although the couple requested that both parents be listed on the Birth Worksheet, hospital personnel insisted on filling out the form and listed only Jennifer as a parent. Affidavit of Captain Nicole and Jennifer Singley ¶ 7, *Henderson* v. *Adams*, 209 F. Supp. 3d 1059 (S.D. Ind. 2016) (No. 15-cv-220), ECF No. 78-9. Later, when the birth certificate arrived, it did not include Nicole. *Id.* ¶ 8. Even though H.S. was born to the couple during their marriage, the birth certificate was accompanied by a notice informing Jennifer of the State's regulations concerning children born "out-of-wedlock." *Ibid.*; see also Wedlock Notice, *Henderson*, *supra*, ECF No. 78-11.

Jackie and Lisa Phillips-Stackman also decided to have a child together. An egg from Jackie was fertilized with sperm from a third-party donor and implanted in Lisa, who then gave birth to their child, L.J.P-S. C.A. App. 10. Jackie is the child's genetic mother, and Lisa is the birth mother. While they were at the hospital, a representative informed the couple that only Lisa could be listed as a parent. *Id.* at 10-11. As a result, Jackie—who is both Lisa's spouse and their child's biological parent—was not listed on her child's birth certificate. *Id.* at 11.

Noelle and Crystal Allen married in 2013, formalizing a relationship that started fourteen years earlier. Pet. App. 31a. In 2015, Crystal conceived via a sperm donor and became pregnant with twins, Ashton and Alivea, who were born prematurely and passed away the same day. *Id.* at 32a. Noelle is not listed on the birth certificate, and the State informed Noelle that it would not add her without an adoption, which she cannot obtain because the children are deceased. *Ibid.*

C. Procedural History

Respondents filed suit in the Southern District of Indiana, requesting injunctive relief to list both same-sex parents on their children's birth certificates and recognize their children as born in wedlock. Pet. App. 41a. Respondents also challenged the constitutionality of three Indiana statutes to the extent they confer rights exclusively on opposite-sex spouses and deny the same rights to same-sex spouses: Ind. Code § 31-14-7-1 (husband presumed to be father of child born to married parents); § 31-9-2-15 (child born to woman and man who is presumed to be father is born "in wedlock"); and § 31-9-2-16 (child born to woman and man not presumed to be father is born "out of wedlock"). Pet. App. 40a-41a.

The district court granted plaintiffs' motion for summary judgment, holding that the State must provide married same-sex couples who have children using donor insemination the same marital protections given to married opposite-sex couples who have children using donor insemination, including the right of both spouses to be listed as parents on the child's birth certificate. The court noted "Indiana's long-articulated interest in doing what is in the best interest of the child," including recognizing rights of the birth mother's opposite-sex spouse with respect to a child born within the marriage, in order "to protect, promote, and preserve Indiana families." Pet. App 64a. In light of *Obergefell* having "extend[ed] to same-sex married couples all benefits afforded to opposite-sex married couples," the district court enjoined the state from applying its marital presumption addressing when a child is "born in wedlock" so as to treat differently "female spouses of artificially-

inseminated birth mothers from the male spouses of artificially-inseminated birth mothers." *Id.* at 64a-65a. The court further enjoined the state 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." *Id.* at 66a.

The State appealed. While the appeal was pending, this Court decided *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017). This Court ruled that because Arkansas listed both spouses on a child's birth certificate when a married opposite-sex couple used donor insemination to have a child, it must apply the same rule to married same-sex couples who use donor insemination to have a child. *Id.* at 2078. Because the state had "give[n] [opposite sex] married parents a form of legal recognition that is not available to unmarried parents," the state could "not, consistent with *Obergefell*, deny married same-sex couples that recognition." *Id.* at 2078-2079.

Applying *Pavan*, the court of appeals affirmed the district court's holding that Indiana could not "treat same-sex and opposite-sex marriages differently when deciding how to identify who is a parent." Pet. App. 2a. The court observed that "Indiana lists a husband as a biological parent (when a child is born during a marriage) even if he did not provide sperm" and held that it must likewise "treat a wife as a parent even if she did not provide an egg." *Ibid.*[1]

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[1] It bears emphasis that with respect to Jackie and Lisa Phillips-Stackman, the State refused to place Jackie on the birth certificate even though Jackie did provide an egg and is a biological parent.

The court rejected Indiana's assertion that its birth certificate regime was *exclusively* a record of genetic relationships. The court noted that, under the State's marital presumption, "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," even if the father did not provide the sperm, but the State denied the same benefit "to an all-female married couple." Pet. App. 5a. As a result, in the case of a child conceived through donor insemination, "[o]pposite-sex couples can have their names on children's birth certificates without going through adoption; same-sex couples cannot." *Id.* at 6a-7a.

The court of appeals affirmed the district court's conclusion that, under *Obergefell* and *Pavan*, Indiana "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." Pet. App. 9a. It affirmed the district court's injunction that petitioner "recognize the children of these plaintiffs as legitimate children, born in wedlock, and * * * identify both wives in each union as parents." *Id.* at 11a.[2]

REASONS FOR DENYING THE PETITION

I. THE ONLY QUESTION PRESENTED IS ONE OF STATE LAW THAT DOES NOT WARRANT THIS COURT'S CONSIDERATION

This case does not present an important question of federal law for the Court to resolve, but instead merely

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[2] The court of appeals vacated other portions of the district court's injunction as overbroad. Pet. App. 9a-11a.

asks this Court to review the court of appeals' construction of Indiana law. For good reason, this Court generally does not grant review to determine whether the lower federal courts have correctly construed a pure question of state law.

In *Obergefell* and *Pavan*, this Court has already established the principles of federal law that the court of appeals faithfully applied. If a state lists both spouses on the birth certificate when a married opposite-sex couple uses donor insemination to have a child, even though the husband is not the child's biological father, it must list both spouses on the birth certificate when a married same-sex couple uses donor insemination to have a child. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2601 (2015); *Pavan* v. *Smith*, 137 S. Ct. 2075, 2078-2079 (2017). Petitioner does not ask the Court to revisit *Obergefell* or *Pavan*.

Rather, petitioner argues (Pet. 22-24) that Indiana's birth certificate regime is purportedly based exclusively on biology. But that is purely a question of state law, not a controlling issue of federal law requiring the Court's resolution. As the court of appeals noted, "this appeal depends on the resolution of a dispute about the meaning of Indiana law," such that "[o]nce [the court] decide[s] who is right about the state's system, the outcome follows from *Pavan*." Pet. App. 3a.

This Court does not make a practice of granting certiorari to resolve pure questions of state law. By definition, a question of state law is not one on which the Supreme Court's opinion is necessary. The issue is generally directly relevant only to one state, and even as to that state, this Court's decision would not be binding on the state's own courts. See *Animal Sci. Prods., Inc.* v.

Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1874 (2018). Moreover, this Court generally defers to district court resolutions of state law questions, especially where both the district court and court of appeals agree. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976) (noting the Court's practice of "accept[ing] the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion"); *United States* v. *Hohri*, 482 U.S. 64, 75 n.6 (1987) (observing that "local federal district judges" are "likely to be familiar with * * * applicable state law" and that a "district judge's determination of a state-law question usually is reviewed with great deference"). Even if the state law question is one that can arise in multiple states, the Court's construction of Indiana's law would necessarily be specific to that jurisdiction, rather than having broader effect.

Moreover, as petitioner implicitly acknowledges (Pet. 31), there is no conflict as to analogous state law issues, among either the circuit courts or state courts of last resort. Since *Pavan*, every state court of last resort to consider whether a marital presumption must be applied to same-sex spouses or whether same-sex spouses must be listed on their children's birth certificates on the same basis as opposite-sex couples has come out the same way. See, *e.g.*, *McLaughlin* v. *Jones*, 401 P.3d 492, 500 (Ariz. 2017), cert. denied, 138 S. Ct. 1165 (2018); *L.C.* v. *M.G.*, 430 P.3d 400, 412 (Haw. 2018), cert. denied 140 S. Ct. 234 (2019); *Strickland* v. *Day*, 239 So. 3d 486 (Miss. 2018). No dispute has reached another federal court of appeals, and no state other than Indiana continues to contest their obligation to list same-sex spouses of birth

mothers on their children's birth certificates on the same terms as opposite-sex spouses. Courtney G. Joslin et al., *Lesbian, Gay, Bisexual and Transgender Family Law* § 8:1 (2020). The Court has repeatedly denied petitions for certiorari in such cases, see *McLaughlin*, 401 P.3d 492, *L.C.*, 430 P3d 400, and petitioner fails to identify any factor that would warrant a different result here.

Petitioner (Pet. 5) casts the issue presented as whether a state may "safeguard[] the rights and obligations of biological parents in the context of completing birth certificates," but, as both the district court and the court of appeals found, Indiana *already* lists both spouses on a child's birth certificate for opposite-sex couples even when the husband is not the child's biological father.[3] Because the court of appeals determined that Indiana *already* does not rely exclusively on biology in determining who is listed on a child's birth certificate, the issue of whether it could do so is simply not presented by this case. As discussed *infra*, that holding comports with Indiana statutes and judicial decisions, but whether the court of appeals correctly construed state law on that point is not an issue that warrants this Court's review.

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[3] The suggestion that the "rights and obligations of biological parents," Pet. 5, are at issue here has no basis whatsoever. In the present case, no biological parent other than a spouse is a party, and there is no indication that any party outside the respondents' marriages has ever asserted any parental right. In any event, to the extent petitioner seeks to protect the interests of sperm donors, it must do so in a way that treats opposite-sex and same-sex couples equally.

II. THE COURT OF APPEALS CORRECTLY CONSTRUED INDIANA LAW

Even if resolving a pure question of state law could in theory warrant this Court's review, it does not do so here, because the question as characterized by petitioner is not genuinely presented. As framed by petitioner, the question in dispute presumes that Indiana has an exclusively "biology-based birth-certificate system." Pet. i. But, as the court of appeals correctly held, it does not. Indiana courts, interpreting Indiana law, have held that opposite-sex married couples who conceive using donor insemination have the ability to have both spouses listed on the child's birth certificate—even though the male spouse has no genetic link to the child. And in practice, the State does provide this benefit to opposite-sex couples—while denying married female same-sex couples the same marital benefit. That is precisely the kind of discrimination against same-sex married couples that *Obergefell* and *Pavan* forbid. Petitioner purports to dispute the lower courts' interpretation of Indiana law, but it has not offered any persuasive argument that they erred.

A. As the courts below correctly found, the State's characterization of Indiana law is belied by the State's own policies and practices. The State relies on a form commonly given to a birth mother to fill out if she gives birth in a hospital (the "Birth Worksheet"), Pet. at 14-16, but that document simply asks the birth mother to list her child's "father." C.A. App. 25-26. Among other things, the Birth Worksheet asks the mother if she is married to the child's "father," and, if so, to identify him. *Ibid.* It does not use the term "biological" or otherwise

indicate that the "father" must have a genetic tie to the child.

While the State asserts that it "treats the term 'father' to mean 'biological father,'" Pet. 15, that meaning is neither evident from the form nor supported by Indiana law, and it is contradicted by the form itself. Nowhere does the Birth Worksheet define the term "father," nor does it suggest that she should not list her husband if the couple has, by agreement, conceived with the assistance of donor insemination. To the contrary, numerous cues inform the mother that she *should* list her husband as father in that situation. Question 37 asks the mother to indicate "MOTHER'S Marital Status, ARE YOU MARRIED TO THE FATHER OF YOUR CHILD?" *Ibid.* (quoting C.A. App. 25). This phrasing of the question makes clear that the question is directed to the mother's "Marital Status" (*i.e.*, whether she is married) rather than to whether there is a biological relationship between her husband and her child. That understanding is reinforced by the next question, to which she would be directed if the first answer is negative: "If not married, has a Paternity Affidavit been completed for this child?" *Ibid.* (quoting C.A. App. 25-26). The introductory clause "If not married" confirms that these two questions address the mother's two possible marital statuses: if she is married, she answers the first question, if she is not married, she answers the second.

Notably, the form does *not* ask whether the child was conceived using donor insemination in connection with questions regarding the child's second parent. The only reference to anything related to donor insemination on the Birth Worksheet appears in a separate section entitled "Risk factors in this pregnancy." C.A. App. 28.

There, the mother is simply instructed to check a box if the pregnancy resulted from infertility treatment—which would include fertility treatments that facilitated the conception of a child who is genetically related to both parents—but is not asked to specify between forms of assisted reproduction technology, nor is she asked to identify the sperm donor if one was used. *Ibid.*

Indeed, the State's refusal to list Jackie Phillips-Stackman on her child's birth certificate, despite the fact that she is a biological parent and the spouse of the birth mother, indicates that the State is not enforcing an exclusively biologically-based system but rather merely excluding same-sex spouses from a benefit it provides to opposite-sex spouses.

B. Indiana's statutes and judicial opinions confirm that the opposite-sex spouse of a birth mother who conceives through sperm donation is the child's "legal parent," which makes it entirely appropriate for the mother to list her husband as "father" on the Birth Worksheet in those circumstances. In *Levin* v. *Levin*, the Supreme Court of Indiana held that "a husband who consents to the * * * artificial insemination of his wife is the legal father of the resulting child." 645 N.E.2d 601, 603 (Ind. 1994). In *Levin*, the court considered the case of a married couple who relied on donor insemination to conceive. The court noted that, when the child was born, the wife and husband—and not the sperm donor—"were listed as the parents of the child on the birth certificate." *Ibid.*

The court specifically held that "[a] child conceived through artificial insemination, with the consent of both parties, is correctly classified as a child of the marriage." *Levin*, 645 N.E.2d at 605. The court relied on the fact

that "both [spouses] agreed to go forward with [the wife's] artificial insemination," and that the husband had held the child out as his own, including by being listed on the birth certificate. *Id.* at 603. The court further observed that, by statute, Indiana deems a child "born or adopted during the marriage of the parties" to be a "child of the marriage." *Id.* at 605 (quoting Ind. Code § 31-1-11.5-1 (1994) (now Ind. Code § 31-9-2-13(a)(2)). See also *Engelking* v. *Engelking*, 982 N.E.2d 326, 327-328 (Ind. Ct. App. 2013) (affirming ruling that children born to mother and her husband who "knowingly and voluntarily consent[ed]" to donor insemination were, "by all rights and purposes, legally the children of [Father]" (citation omitted & alteration in original)).

In *Gardenour* v. *Bondelie*, the Indiana Court of Appeals applied *Levin* to a same-sex couple, holding that the same rule must be applied when same-sex spouses use donor insemination to have a child.[4] 60 N.E.3d 1109, 1120-1121 (2016), trans. denied 83 N.E.3d 1218 (Ind. 2017). The court held that "[i]n Indiana, spouses who knowingly and voluntarily consent to artificial insemination are the legal parents of the resulting child," including where both spouses are female. *Ibid.*

Notably, the State sought the Indiana Supreme Court's review in *Gardenour*, but that court declined the request to transfer. The State asserted, without success, essentially the same argument that it makes here,

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[4] Prior to moving to Indiana, where their child was born, the couple had entered into a California Domestic Partnership, which the court held constituted a spousal relationship. *Gardenour* v. *Bondelie*, 60 N.E.3d 1109, 1112-1113, 1118 (Ind. Ct. App. 2016), trans. denied 83 N.E.3d 1218 (Ind. 2017).

arguing that the decision would improperly "confer full legal parental rights on the wife of the birth mother—*i.e.*, a person with no biological or adoptive relationship to the child—based only on her spousal status." Indiana Amicus Br. at 6, *Gardenour* v. *Bondelie*, 60 N.E.3d 1109 (Ind. Ct. App. 2016) (No. 32A01-1601-DR-00082).

Petitioner previously asserted that *Levin* and *Gardenour* are inapposite because they do not address "parental rights at birth." Response to Rule 28(j) Letter, *Henderson*, 947 F.3d 482 (7th Cir. 2017) (No. 17-1141), ECF No. 43. But the determination that a child is a "child of a marriage" is the legal equivalent of a parentage determination. *Huss* v. *Huss*, 888 N.E.2d 1238, 1242 (Ind. 2008).[5] Accordingly, a parental relationship addressed in the context of a dissolution of marriage proceeding does not spring into being at the time of divorce; rather, the divorce decree confirms the parent-child relationship that arose at birth. That is why *Levin* stressed the spouses' consent to the insemination at the time of conception and noted that the wife and husband—and not the sperm donor—"were listed as the parents of the child on the birth certificate." 645 N.E.2d at 603.

In light of that precedent, as the district court observed, "[c]ommon 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 [on the Birth

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[5] For example, courts deciding dissolution of marriage cases routinely apply the marital presumption, which petitioner acknowledges is a statutory rule that applies at the time of the child's birth. See, *e.g.*, *Myers* v. *Myers*, 13 N.E.3d 478, 482-483 (Ind. App. 2014).

Worksheet] that she is married to the father of her child." Pet. App. 53a. That is fatal to petitioner's contention that Indiana has established an exclusively "biology-based birth-certificate system." Pet. i. While biology undoubtedly plays an important role in that system,[6] it is not the sole determinant either of legal parentage or of who is listed as a child's parents on the birth certificate.[7]

C. Petitioner's reliance on Indiana's statutory marital presumption as creating a purely biology-based birth certificate system is misplaced. Pet. App. 8a. To be sure, biology plays an important role in Indiana's parentage law. But as the district court and the court of appeals

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[6] The State appears to argue that if it is required to list both same-sex spouses on a child's birth certificate, then it must abandon any reliance on biology to determine legal parentage. See, *e.g.*, Pet. 30 (asserting that, if a State must presume the wife of a birth mother to be a parent, then "no grounds exist for reallocating parental rights just because someone outside the marriage comes forward with a positive paternity (or maternity) test"). But the State's current system already does exactly that by including the husband's name on a birth certificate in the first instance regardless of his biological relationship with the child, and allowing a putative genetic father who is not a sperm donor to come forward and assert parental rights if he can provide a positive paternity test. See Ind. Code § 16-37-2-10(b). And as the court of appeals held, same-sex and opposite-sex spouses are subject to the same standard for rebutting the marital presumption. *Gardenour*, 60 N.E.3d at 1120-1121.

[7] For this reason, the amicus brief submitted by Them Before Us is inapposite. Indiana has not adopted a purely biology-based birth certificate regime that applies to all married couples equally. The policy interests advanced by *amici* can be taken up with the legislature, but that is no reason for this Court to grant review of the petition.

correctly found, the marital presumption does *not* depend *exclusively* on biology. Rather, under Indiana law, there are a number of circumstances in which a male spouse who is not genetically related to a child is the child's legal parent.

First, of particular relevance here, when a husband agreed to conceive a child through donor insemination, he is the child's legal parent notwithstanding his lack of a biological relationship to the child. See *Levin*, 645 N.E.2d at 603. As the courts below correctly held, under *Obergefell* and *Pavan*, Indiana must apply the same rule to a married same-sex couple.

Second, under Indiana law, the marital presumption can be challenged only by one of the spouses (and even then only in limited circumstances), or by a person seeking to establish that he, and not the birth mother's husband, is the biological father. Put differently, only those with a direct, specific interest—*i.e.*, a spouse, or someone seeking to establish his own parental rights, is even *eligible* to challenge the presumption. As a result, there are many circumstances in which a husband who is not a biological father is nonetheless a legal parent because no one who has standing challenges the marital presumption. See, *e.g.*, *Lamey* v. *Lamey*, 689 N.E.2d 1265, 1268 (Ind. Ct. App. 1997) (holding that decedent's relatives could not challenge decedent's paternity because "[t]o hold otherwise would be contrary to our state's long held public policy against the disestablishment of paternity which is reflected in our state's statutory and common law"), trans. denied (1998); *Varble* v. *Varble*, 55 N.E.3d 879 (Ind. Ct. App. 2016) (rejecting mother's new husband's challenge to former husband's paternity despite former husband's lack of genetic link to child).

Third, under Indiana law both the birth mother and her husband can be estopped from challenging the marital presumption even when either or both know that the husband is not a biological father. In *Sheetz* v. *Sheetz*, for example, a husband who had signed the birth certificate of a child born to his spouse and raised the child as his own was equitably estopped from rebutting the marital presumption despite a stipulation between the husband and wife that he was not the child's biological father. 63 N.E.3d 1077, 1083 (Ind. Ct. App. 2016); see also *Myers* v. *Myers*, 13 N.E.3d 478, 483 (Ind. Ct. App. 2014) (holding that mother was equitably estopped from rebutting the marital presumption despite her husband's lack of genetic link when she had not objected to husband's parental rights until child was teenager and husband was only father child had known); *In re Paternity of A.J.*, 146 N.E.3d 1075, 1082 (Ind. Ct. App.) (rejecting former husband's challenge to ex-wife's parental rights despite her lack of a biological link to the child, who was born via surrogacy, and holding that the child was "nevertheless a child of the marriage"), trans. denied, 153 N.E.3d 1096 (Ind. 2020); *Ohning* v. *Driskill*, 739 N.E.2d 161 (Ind. Ct. App. 2000) (holding that a mother who listed her husband on the birth certificate was estopped from later disputing his paternity of child).

Relatedly, in the context of unmarried parents, Indiana enforces its strong policy against leaving a child without two parents, even when there is evidence that one of the parents lacks a genetic tie to the child. In *In re Paternity of E.M.L.G.*, for example, the court refused requests for genetic testing by four men who had previously signed paternity affidavits for their respective children and later contested child support, reasoning

that "[i]f genetic testing were to disestablish paternity, then each child would be considered a 'filius nullius,' [son of no one]. * * * Indiana's paternity statutes were created to avoid such an outcome, which could carry with it countless detrimental emotional and financial effects." 863 N.E.2d 867, 870 (Ind. Ct. App. 2007) (internal quotation marks omitted).[8] Similarly, Indiana disfavors releasing an individual listed on a child's birth certificate from his or her parental obligations unless another individual is attempting to assume those responsibilities. See *In re Paternity of H.J.B.*, 829 N.E.2d 157, 160 (Ind. Ct. App. 2005) (withholding disestablishment of deceased father's paternity until paternity established in another).

Indeed, the Indiana legislature itself has made clear that Title 31, which includes the marital presumption, furthers several important state policies *other* than identifying a child's biological parent. In codifying the marital presumption, the State explained that it is the policy of Indiana and the purpose of Title 31 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;

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[8] Notably, the State was the very party arguing against an exclusively biological determination of parental rights in that case. *Paternity of E.M.L.G.*, 863 N.E.2d at 868.

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

Ind. Code § 31-10-2-1(1)-(4).[9] See also *Straub* v. *B.M.T. ex rel. Todd*, 645 N.E.2d 597, 599 (Ind. 1997) (discussing "well-established public policy of this State" in "protecting the welfare of children").

The courts' consistent recognition and protection of parental relationships established by the marital presumption, notwithstanding the absence of a genetic tie, confirms that the presumption is designed to further these important social policies, not *exclusively* to identify genetic relationships.

For an opposite-sex couple who agrees to conceive through donor insemination, this means that the mother's husband can be listed on the child's birth certificate without having to adopt the child even when his lack of a biological relationship to the child is known. But petitioner seeks to deny that same marital right to same-sex spouses. As the courts below correctly found, *Pavan* prohibits this type of unequal treatment.

D. Petitioner's attempt to distinguish *Pavan* is unpersuasive. Instead, petitioner merely recycles many of the same arguments that Arkansas made and this Court rejected. Petitioner argues, as Arkansas did in *Pavan*,

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[9] Of the twelve policy goals listed in this statute, none mention tracking biological parentage. The remaining eight policy goals include items such as "remove children from families only when it is in the child's best interest or in the best interest of public safety" and "use diversionary programs when appropriate." Ind. Code § 31-10-2-1(2) and (9).

that its unequal treatment of same- and opposite-sex married couples is permissible because its birth certificate regime simply records a child's biological parents and does not confer a marital benefit on opposite-sex spouses. Pet. 31; *Pavan*, 137 S. Ct. at 2078. But Indiana does not require birth certificates to list only genetic parents for children born to married opposite-sex parents. In fact, except in limited circumstances, Indiana presumes the male spouse of a woman who gives birth to be the child's parent and lists him on the child's birth certificate even when he is not the child's biological father.

In *Pavan*, a state statute specifically provided that the child of a married woman born via donor insemination "shall be deemed the legitimate natural child of the woman" if the husband consented to the donor insemination. 137 S. Ct. at 2077 (citing Ark. Code 9-10-201(a) (2015)). Indiana law likewise provides—through judicial authority, rather than statutory—that "a husband who consents to the * * * artificial insemination of his wife is the legal father of the resulting child." *Levin*, 645 N.E.2d at 603.

The State also attempts to distinguish *Pavan* by arguing that the Arkansas statute *required* that the husband be listed on the birth certificate whereas Indiana affords husbands only a rebuttable presumption of legal parentage. Pet. 26-27. This is incorrect. Indiana law requires that a birth certificate include the "name of the parents," Ind. Code § 16-37-2-9, and Indiana's policy and practice are to list the birth mother's husband as a father whenever the mother lists her husband on the Birth Worksheet. While Indiana could require an adjudication of parentage to be certain that the husband is a legal parent before listing him on the birth certificate, it does not

do so, and, under *Obergefell* and *Pavan*, it cannot do so selectively only for same-sex spouses.

Petitioner's argument also misses the mark in that the marital presumption is similarly rebuttable under both Arkansas and Indiana law. In Arkansas, the husband shall be entered on the child's birth certificate unless (i) a court of competent jurisdiction determined that another man was the child's legal father, or (ii) the "mother," "husband," and "putative father" executed affidavits making clear that the putative father, and not the husband, was the child's father. Ark. Code § 20-18-401(a); see *Pavan*, 137 S. Ct. at 2077. In Indiana, the Birth Worksheet asks the birth mother if she is married to the child's "father," and there is no specific instruction for mothers of children conceived through sperm donation. The marital presumption creates legal parentage unless and until overcome by a narrow set of affirmative acts similar to those in Arkansas: for example, if a third party wishes to rebut the marital presumption, he must initiate a paternity action and obtain a court order of paternity by showing, through clear and convincing evidence that he, and not the husband, is the child's parent. *Myers*, 13 N.E.3d at 482-483; *Richard* v. *Richard*, 812 N.E.2d 222, 228 (Ind. App. 2004) (clear and convincing evidence required to overcome presumption). Accordingly, as was the case in Arkansas, "[Indiana] has thus chosen to make its birth certificates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents." *Pavan*, 137 S. Ct. at 2078-2079.

As the court of appeals held, this case is directly controlled by the Court's decision in *Pavan*. The petition presents no new issue for the Court to decide.

III. Even If The Issue The Petition Attempts To Raise Might Warrant Review, This Case Is A Poor Vehicle To Do So

Even assuming, as petitioner contends, that a state may adopt a system of birth certificates based *exclusively* on a child's genetic lineage, this case would not present an appropriate vehicle for addressing that issue, because Indiana has not adopted such a system.

If the State had established such a system, the Court would have the benefit of state judicial opinions applying that rule and clarifying its contours. Here, by contrast, the Indiana Supreme Court has held that when both spouses in a married couple consent to conceive a child through donor insemination, they are the legal parents of the resulting child even if the birth mother's spouse is not a biological parent. *Levin* v. *Levin*, 645 N.E.2d 601, 603 (Ind. 1994). The Indiana Court of Appeals has already applied that decision to a married same-sex couple, and the Indiana Supreme Court declined the State's request to review. *Gardenour* v. *Bondelie*, 60 N.E.3d 1109, 1120-1121 (Ind. Ct. App. 2016), trans. denied 83 N.E.3d 1218 (Ind. 2017). And in many other cases, Indiana courts have held that there are additional circumstances in which Indiana's marital presumption gives rise to legally enforceable parental rights and obligations notwithstanding the absence of a genetic tie between the husband and the child, including the right to be listed on the child's birth certificate. In sum, petitioner cannot support its claim that Indiana's

birth certificate system is based exclusively on biology; as a consequence, there is no basis for the Court to assess the question petitioner has presented.

Under Indiana's current law and practice, a birth mother's husband may be listed on the birth certificate even if he lacks a genetic relationship to the child. As the district court and the court of appeals correctly held, Indiana must either afford that benefit to same- and opposite-sex spouses alike, or to neither. It cannot afford the benefit only to opposite-sex spouses. *Pavan* v. *Smith*, 137 S. Ct. 2075, 2078 (2017).

Because the petition is based on a characterization of Indiana law that was correctly rejected by the courts below, this case is not an appropriate vehicle for the Court to consider the question the petition purports to present.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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