

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

ASHLEE HENDERSON, et al.

Plaintiffs,

v.

DR. JEROME ADAMS, et al.

Defendants,

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CAUSE NO. 1:15-CV-220-TWP-MJD

**TIPPECANOE COUNTY DEFENDANTS'
MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR
SUMMARY JUDGMENT**

Come now Defendants, Dr. Jeremy Adler, Craig Rich, Glenda Robinette, Pam Aaltonen, Thomas Padgett, Thometra Foster, Karen Combs, Kate Nail, Dr. John Thomas, and Dr. Hsin-Yi Weng, all in their official capacities (hereinafter "Defendants" or "Tippecanoe County Defendants") and submit this memorandum of law in support of their motion for summary judgment.

STATEMENT OF FACTS NOT IN DISPUTE

a. The Parties

The Tippecanoe County Defendants consist of individuals associated with the Tippecanoe County Health Department ("TCHD"). Dr. Jeremy Adler is the Tippecanoe County Health Officer. Craig Rich is the administrator of the Tippecanoe County Health Department. Glenda Robinette is the birth registrar for Tippecanoe County. The remaining Tippecanoe County Defendants make up the board of health for Tippecanoe County. (R. Doc. 38 Second Amended Complaint at ¶11).

The plaintiffs with claims related to the Tippecanoe County Health Department are Ashlee

and Ruby Henderson. The remaining plaintiffs make no claims having to do with Tippecanoe County. (*See* R. Doc. 38 Second Amended Complaint at ¶20 - 25).

b. Procedural History

Plaintiffs filed their Complaint on February 13, 2015, their Amended Complaint on March 11, 2015, and their Second Amended Complaint on June 4, 2015. The Tippecanoe County Defendants filed their Answer to the Second Amended Complaint on June 22, 2015. The Second Amended Complaint seeks a determination that IC 31-9-2-15 (definition of "child born in wedlock"), IC 31-9-2-16 (definition of "child born out of wedlock"), and IC 31-14-7-1 (presumption of biological fatherhood) violate the Equal Protection Clause and/or the Due Process Clause of the Fourteenth Amendment; a mandate that TCHD recognize L.W.C.H. as a "child born in wedlock" to Ashlee and Ruby Henderson; and a mandate that TCHD presume that Ashlee Henderson is the parent of L.W.C.H. (R. Doc. 38 Second Amended Complaint at p. 22 - 23, Prayer for Relief). On December 4, 2015, the Plaintiffs filed their Motion for Summary Judgment and supporting documentation. (R. Docs. 77 - 80).

c. Historical facts

As it pertains to the Tippecanoe County Defendants, the Second Amended Complaint makes allegations concerning Ashlee and Ruby Henderson's interactions with the Tippecanoe County Health Department. The other Plaintiffs do not allege any involvement with Tippecanoe County. In November 2014, Ruby Henderson was pregnant with L.W.C.H. (R. Doc. 38 Second Amended Complaint at ¶21) During the week of November 2, 2014, shortly before their marriage, Ashlee and Ruby Henderson contacted the Tippecanoe County Health Department to inquire whether Ashlee would be listed on L.W.C.H's birth certificate because it was anticipated that Ashlee and Ruby would

be married before the baby was born. At that time, they were told that, to be placed on the birth certificate, Ashlee would have to go through a judicial process and obtain a court order. (R. Doc. 38 Second Amended Complaint at ¶21-22). Ashlee and Ruby were married on November 11, 2014. (R. Doc. 38 Second Amended Complaint at ¶20).

On December 2, 2014, Ashlee Henderson was in communication with Glenda Robinette who was the birth registrar for Tippecanoe County. (R. Doc. 38 Second Amended Complaint at ¶23). Ms. Robinette provided Ashlee with a page from the Indiana Vital Records Association newsletter indicating that Indiana law recognized two categories of parent: biological and adoptive and that non-biological parents were required to go through an adoption process to be listed on a birth certificate. (R. Doc. 38 Second Amended Complaint at ¶23, Exhibit A; R. Doc. 78-5 Affidavit of Ashlee and Ruby Henderson at ¶8; R. Doc. 78-6 IVRA Newsletter "Same Sex Marriage and the Filing of Birth Certificates")

On December 22, 2014, L.W.C.H. was born at I.U. Arnett Hospital in Lafayette. (R. Doc. 38 Second Amended Complaint at ¶24; R. Doc. 78-8 Certificate of Live Birth for L.W.C.H.) The hospital staff had Ruby complete the State's Certificate of Live Birth Worksheet and uploaded the information through the State of Indiana's software concerning birth records. (R. Doc. 38 Second Amended Complaint at ¶24; R. Doc. 15 Amended Complaint at ¶22). The hospital staff indicated that the state software would not accommodate the couple's efforts to list a "Mother #2" in the records. (R. Doc. 15 Amended Complaint at ¶22-23).¹ On January 22, 2015, the Tippecanoe County

¹ Ruby attempted to mark through Question #37 of the State's Certificate of Live Birth Worksheet to have it ask whether she was married to the mother #2 of her child rather than ask whether she was married to the father of her child. (R. Doc. 78-7 at p. 4) With that revised question answered in the affirmative, she proceeded to question 39 (skipping question 38 concerning a paternity affidavit) which she completed with Ashlee Henderson's biographical information, striking

Health Department issued a birth certificate listing Ruby Henderson, but not Ashlee Henderson, as the mother of L.W.C.H. (R. Doc. 38 Second Amended Complaint at ¶25, Exhibit C).

d. Birth Certificate Process

With respect to the Tippecanoe County Health Department (TCHD), the procedure for processing the birth certificates of newborns begins with the hospital having the birth mother complete the State's Certificate of Live Birth Worksheet. *See* IC 16-37-1-3.1. The hospitals upload the information provided on the Certificate of Live Birth Worksheet to the State database. The Tippecanoe County Health Department receives notification that birth information has been added to the database. A notification letter to the mother is generated, in a form provided by the State, which indicates that information has been received by TCHD and requests that the mother notify TCHD if there is an error with respect to the child's name, the date of birth, and the mother's name, state of birth, and date of birth. This notice also informs the mother that a certified copy of the record of birth is available from the "Local Health Office." If a person wishes to obtain a birth certificate, the individual is required to complete an "Application for a Certified Birth Certificate." That application requires the individual to provide information required by the State. Upon successful completion, the Health Department will generate a birth certificate based on information available to TCHD through the State database. (R. Doc. 78-2 Tippecanoe County Defendants' Response to Interrogatory 6).

The responses to questions 37 - 52 of the State's Certificate of Live Birth Worksheet

out "father" and placing "Mother #2". Had she answered Question #37 as formulated on the State Worksheet in the negative (and Question #38 concerning a paternity affidavit in the negative) she would have been directed to skip the questions concerning the father's biographical information entirely.

determine whether and what information concerning the identity of the child's father will appear on the birth certificate. (R. Doc. 78-6 Certificate of Life Birth Worksheet). 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 is asked to go to question 39. Question 38 asks if a paternity affidavit has been completed for the child. If the answer is in the affirmative, the birth mother proceeds to questions 39 - 52. If the answer is negative, the birth mother is asked to skip questions 39-52 and go to question 53. Questions 39-52 all pertain to the father. *Id.* Therefore, if the birth mother indicates that she is not married to the father of the child and indicates that she has not completed a paternity affidavit, there would be no information about the father provided on the Worksheet and, consequently, no information about the father available when the birth certificate was generated. (*Id.*; R. Doc. 78-2 Tippecanoe County's Answer to Interrogatory Numbers 3, 6, 9-10.)

e. State Law with respect to birth records

The Indiana State Department of Health (ISDH) is charged with providing a system of vital statistics. IC 16-37-1-1. Among other things ISDH prescribes information to be contained in each kind of application or certificate under IC 16-37 (IC 16-37-1-3), administers the putative father registry under IC 31-19-5-2 (IC 16-37-1-2(4)), and is charged with establishing the Indiana Birth Registration Record (IBRS) for recording in an electronic format of live births in Indiana. (IC 16-37-1-3.1(a)). Records of births in the IBRS are to be submitted by physicians, persons in attendance at birth, and local health departments using the electronic system created by the State. IC 16-37-1-3.1(b)(2), (5), (6). Those in attendance at birth (to the extent not licensed under IC 25) and local health departments that recklessly violate or fail to comply with the provisions of IC 16-37-1 commit a Class B misdemeanor. IC 16-37-1-13.

Within five days after the birth occurs, a person in attendance at a live birth is responsible for filing a certificate of birth and/or paternity affidavit using the IBRS. IC 16-37-1-3.1(d); IC 16-37-2-2; IC 16-37-2-3. The local health officer is required to make a permanent birth record of information from the certificate. The record includes the child's name, sex, date of birth, place of birth, name of parents, birthplace of parents, date of filing the birth certificate, the person in attendance at the birth, and location of the birth. The Indiana State Department of Health is charged with administering corrections or additions to the certificate. IC 16-37-2-10(b). 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. IC 16-37-2-10, 14. *See In re Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014) (Noting, in the case of a request for a change of genders, that ISDH had the power to amend the birth certificate which the court could order pursuant to its inherent equitable authority (absent contrary directive from the General Assembly) upon a showing that the petition was made in good faith and not for fraudulent or unlawful purpose).

IC 31-19-13 governs the establishment of a new birth certificate following adoption. The Indiana State Department of Health is directed to establish a new certificate of birth following receipt of a report of adoption unless the court decreeing the adoption, the adoptive parents, or the adopted individual requests that ISDH not do so. The new certificate of birth must show the actual place and date of birth. IC 31-19-13-1. The new certificate of birth replaces the original and the original is to be filed with the evidence of adoption and withheld from inspection except where the child is adopted by a step-parent or except as provided under IC 31-19-17 through IC 31-19-25.² IC 31-19-

² IC 31-19-17 (Preparation of Adoption History for Adoptive Parents), IC 31-19-18 (Establishment of Adoption History Program), IC 31-19-19 (Confidentiality Requirement for Adoption History), IC 31-19-20 (Release of Medical History Information), IC 31-19-21 (Consent

13-2. If an adoption is annulled or revoked, the original birth certificate is required to be restored. IC 31-19-3-3. If ISDH replaces a birth certificate following an adoption, a local health department having a custody of the certificate that is being replaced is required to either seal the replaced certificate or surrender it to ISDH as ISDH directs. IC 31-19-13-4.

f. Relief Requested

By way of relief, the Plaintiffs are requesting: 1) a declaratory judgment that IC 31-9-2-15, 16 and IC 31-14-7-1 violate the Equal Protection and/or Due Process clauses of the United States Constitution and enter an order mandating that the defendants "recognize" L.W.C.H.³ as a child born in wedlock within the State of Indiana and to presume Ashlee Henderson is the parent of L.W.C.H. by identifying her as a parent of L.W.C.H. on the birth certificate. (R. Doc. 38 Second Amended Complaint at Prayer for Relief at a - d.)

STATEMENT OF MATERIAL FACTS IN DISPUTE

Plaintiffs contend that a male spouse who is not biologically related to his wife's biological child is, nevertheless, named on a birth certificate by virtue of IC 31-14-7-1. *See* R. Doc. 80 Plaintiff's Brief in Support of Summary Judgment at 17, 21. ("Because of IC 31-14-7-1(1), Defendants refuse to list the Spouses of Plaintiff birth mothers on the birth certificates of the Plaintiff children." "Similarly situated males simply have their name entered on the birth certificate by

to Release of Identifying Information), IC 31-19-22 (Release of Identifying Information), IC 31-19-23 (Release of Non-Identifying Information), IC 31-19-24 (Court Proceeding to Request Release of Adoption History Information Not Available from State Registrar), IC 31-19-25 (Release of Identifying Information for Adoptions Filed After December 31, 1993; Requests for Information Concerning Pre-Adoptive Siblings), and IC 31-19-25.5 (Requests for Information Concerning Adoptees and Pre-Adoptive Siblings).

³ Plaintiffs have made the same requests with respect to the other children and couples involved, but Tippecanoe County is not involved with those individuals.

operation of law.") The Tippecanoe County Defendants contend that this is not accurate as a statement of law. And, to the extent this is a factual question, it is either in dispute or uncontested in favor of the opposite proposition. If a birth mother states on the Certificate of Live Birth Worksheet that she is not married to the child's father, her spouse will not be entered on the birth certificate. (R. Doc. 78-2 Tippecanoe County Defendants' Response to Interrogatory #3 and #6; R. Doc 78-4 Certificate of Live Birth Worksheet at 37.)

ARGUMENT

I. Standard of Review

Summary judgment is proper when the designated evidence as supported by pleadings, depositions, answers to interrogatories, admissions, and 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." Fed. R. Civ. P. 56(c); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818-819 (7th Cir. 1999). A genuine issue of fact exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole. *Id.*

The material facts in this matter are not believed to be in dispute except as noted above, and this matter is appropriate for a resolution as a matter of law.

II. The Plaintiffs lack standing to sue the Tippecanoe County Defendants because 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.

The judicial authority under Article III of the United States Constitution is limited to "cases or controversies." To have standing, a plaintiff must have "an injury in fact," a causal connection between the injury and the conduct complained of, and it must be likely (as opposed to 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.* The suit should be brought against entities that have legal responsibilities for the flaws Plaintiffs perceive in the system and from whom they ask something which would conceivably help their cause. *Hearne v. Board of Education*, 185 F.3d 770, 777 (7th Cir. 1999) ("Technically, therefore, it is not the Eleventh Amendment that bars the plaintiffs' action for prospective injunctive relief against the governor; it is their inability to show that he bears any legal responsibility for the flaws they perceive in the system.")⁴ The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Lujan* at 561.

Tippecanoe County's involvement with the Plaintiffs is purely ministerial. The Plaintiffs' true conflict is with the laws of the State of Indiana and the State's administration of its birth record system. The Tippecanoe County Health Department produced a birth certificate that is consistent with the information provided to the Tippecanoe County Health Department through the state's birth record database but inconsistent with the Plaintiffs' desire to have Ashlee Henderson listed as an additional mother or parent of L.W.C.H. on the birth certificate. If there was a violation of the Hendersons' rights, it was not committed by the Tippecanoe County Defendants, and it is not properly remedied through an order to the Tippecanoe County Defendants.

⁴ See also, *Love v. Pence*, 28 F.Supp. 3d 793, 796 (S.D. Ind. 2014) citing *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) ("The requirements of *Lujan* are entirely consistent with the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute.") *1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113-14 (3d Cir. 1993) (The "[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law" and holding that the school district officials, not the Attorney General or state Secretary of Education, were the proper defendants in a challenge to a contractor residency requirement); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state law does not make him a proper defendant in every action attacking the constitutionality of a state statute.")

Accordingly, the Plaintiffs lack standing to bring this suit against the Tippecanoe County Defendants.

a. There is no causal connection between the conduct of Tippecanoe County & the Hendersons' injury

The failure of the Tippecanoe County Defendants to place Ashlee Henderson on L.W.C.H's birth certificate is a function of state law, and the Tippecanoe County Defendants have no authority to place her on the birth certificate as a parent of L.W.C.H. where she is not a biological or adoptive parent of the child. *See* IC 31-9-2-88 ("Parent for purposes of the juvenile law, means a biological or an adoptive parent"); 410 IAC 18-0.5-10 ("Parent" means the biological or adoptive mother or father of the individual.)

ISDH prescribes information to be contained in a birth certificate or application for birth certificate. IC 16-37-1-3. Certification of births are governed by IC 16-37-2. Additionally, ISDH is charged with establishing the Indiana Birth Registration Record (IBRS) for recording in an electronic format of live births in Indiana. IC 16-37-1-3.1(a). Records of births in the IBRS are to be submitted by physicians, persons in attendance at birth, and local health departments using the electronic system created by the State. IC 16-37-1-3.1(b)(2), (5), (6). Under the electronic system created by the State, persons in attendance at birth (in the case of the Hendersons, members of I.U. Arnett Hospital) upload the information as provided in response to the Certificate of Live Birth Worksheet (R. Doc. 78-4). When using the Worksheet, the two ways for information about an individual other than the biological mother to be included in the State's database are for the biological mother to answer that she is married to the child's father or to answer that she has completed a paternity affidavit. *Id.* at Questions 37 and 38.

The definitions of "child born in wedlock" (IC 31-9-2-15) and "child born out of wedlock"

(IC 31-9-2-16) and the presumption of biological fatherhood (IC 31-14-7-1) are statutes that were created by the Indiana General Assembly. These statutes are unrelated to the County's issuance of a birth certificate. The definitions (IC 31-9-2-15 and 16) are used in the context of statutes governing the types of notice and consents that are required during an adoption process. (*See* footnote 6, *infra*) and do not implicate the birth certificate process.

IC 31-14-7-1 creates a rebuttable presumption of biological fatherhood for a man married to the mother at the time of the birth. However, that presumption does not appear to play direct role, if any role at all, in the information that appears on a birth certificate. As noted above, the Tippecanoe County Defendants' alleged wrongdoing centers on TCHD's failure to produce a birth certificate listing Ashlee Henderson as a parent of L.W.C.H. *See* R.Doc. 38 Second Amended Complaint at ¶¶20-25. Tippecanoe County has not defined L.W.C.H. as a child born in or out of wedlock under IC 31-9-2-15 or 16, and those definitions do not impact TCHD's handling of the birth certificate. Furthermore, regardless of IC 31-14-7-1's presumption of biological fatherhood, under the State's procedures, a husband would not appear on a birth certificate if the mother indicates on the Certificate of Live Birth Worksheet that her husband is not the child's father. (R. Doc. 78-2 Interrogatory Responses of Tippecanoe County at questions 3, 6, 7, 10.)

Plaintiffs have cited *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994) and *Engelking v. Engelking*, 982 N.E.2d 326, 328 (Ind. Ct. App. 2013) for the proposition that "a child conceived through artificial insemination, with the consent of both parties, is classified as a child of the marriage." (Plaintiff's Memorandum at 9).⁵ Both *Levin* and *Engelking* involved divorces with

⁵ Plaintiffs state that they learned that "the State of Indiana requires the same-sex spouse to adopt her child before the same-sex spouse will have any recognized legal parental rights or responsibilities[.]" (Plaintiffs Memorandum at 9). For its part, the Tippecanoe County Defendants'

husbands attempting to avoid child support after consenting to artificial insemination of their wives. Under those circumstances, the courts have decided that the position of the father was analogous to an adoption agreed to by husband and wife. The cases did not involve the issuance of birth certificates, and it is doubtful that the presence or absence of the husbands' names on the birth certificate would have altered their support obligations. Nor is it clear from those cases or others whether a spouse, male or female, who is not a biological parent of a child conceived through assisted reproduction would have the same rights as a spouse who is a biological parent to appear on a birth certificate if the biological mother objected. *See A.C. v. N.J.*, 1 N.E. 3d 865 (Ind. Ct. App. 2013), *citing King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).

The source of, extent of, and process for determining parental rights is distinct from the right to be listed on a birth certificate. The right to be listed on a birth certificate and the process of being listed are dictated by the State and not by the County Health Department. Therefore, there is no causal connection between the injury claimed by the Plaintiffs and the conduct of Tippecanoe County. Consequently, the Plaintiffs lack standing to bring this claim against the Tippecanoe County Defendants. Judgment should be entered in favor of the Tippecanoe County Defendants and against the Plaintiffs.

b. The Hendersons' alleged injuries will not be redressed by a favorable decision against the Tippecanoe County Defendants.

In addition to the lack of a causal connection between the Tippecanoe County Defendants and the Plaintiffs' injuries, those injuries are not likely to be redressed by a favorable decision against

communications with the Hendersons concerned only the placement of non-biological parents on a birth certificate and did not address the larger question of parental rights and responsibilities generally. *See* R.Doc. 78-5 Henderson Affidavit at ¶¶7-8; R.Doc. 78-6 IVRA Newsletter concerning "Same Sex Marriage and the Filing of Birth Certificates".

the Tippecanoe County Defendants. A favorable decision against the Tippecanoe County Defendants (but not the State Defendants) does the Plaintiffs no good. A favorable decision against the State (even in the absence of a favorable decision against the County) grants the Plaintiffs the relief they seek inasmuch as birth certificates generated by TCHD are a function of state policy.

The Plaintiffs have put forward a challenge to IC 31-9-2-15 (definition of "child born in wedlock"), IC 31-9-2-16 (definition of "child born out of wedlock"), and IC 31-14-7-1 (presumption of biological fatherhood). They have further asserted a connection between the presumption of biological fatherhood under IC 31-14-7-1 and placement of a male spouse's name on a birth certificate even where he is not the biological father of the child as well as the non-placement of a female spouse's name on a birth certificate where she is not biologically related to the child. (Plaintiffs' Brief at 17, 21).

The Tippecanoe County Defendants have no connection to the cited definition sections. IC 31-9-2-15 is a definition for "child born in wedlock" which states that, for purposes of IC 31-19-9 (Consent to Adoption), the term "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." IC 31-9-2-16 is a definition for "child born out of wedlock" which states that, for purposes of IC 31-19-3 (Notice of Adoption Before Birth of Child), IC 31-19-4-4 (Form of Notice to Unnamed Father), and IC 31-19-9 (Consent to Adoption),⁶ the term means a child who is born to:

⁶ Under IC 31-19-3-4 and IC 31-19-4-4, the term "child born out of wedlock" is used in the form of notice to a putative father prior to an adoption, advising him that, "under Indiana law, a putative father is a person who is named as or claims that he may be the father of a child born out of wedlock but who has not yet been legally proven to be the child's father." IC 31-19-3 governs the procedure when the adoption is prior to birth, and IC 31-19-4 governs the procedure when the adoption is following birth. IC 31-19-9 uses both the terms "child born in wedlock" and "child born out of wedlock." Under that chapter, each living parent of a child born in wedlock, "including a man

(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). Those definitions were adopted by the General Assembly and pertain to notice requirements in the State's adoption procedures. The County Health Department simply has no relation to those statutory definitions.

With respect to the presumption of biological fatherhood, Tippecanoe County's connection is tenuous at best.⁷ The connection between TCHD and IC 31-14-7-1's presumption of biological fatherhood depends entirely on the Plaintiffs' assertion that the failure of TCHD to put Ashlee Henderson on L.W.C.H.'s birth certificate was a function of that presumption. However, there is no clear legal connection between the presumption and the content of the birth certificate.

Additionally, the designated evidence does not demonstrate, particularly where the Tippecanoe County Defendants are concerned, a double standard with respect to the treatment of female spouses who are not the biological parents of children conceived through artificial insemination versus similarly situated males. As such, the Hendersons' alleged injuries would not be redressed by a favorable decision against the Tippecanoe County Defendants. Finally, the contents of the birth certificate are not a matter of discretion for the Tippecanoe County Health Department. If TCHD went outside the state's regulatory scheme for birth certificates and took it upon itself to

who is presumed to be the child's biological father under IC 31-14-7-1(1) if the man is the biological or adoptive parent of the child" is required to execute a consent to adoption before a petition to adopt is granted. In the case of a child born out of wedlock, consents are required from the mother and the father whose paternity has been established.

⁷ IC 31-14-7-1 creates a presumption of biological fatherhood if the man and the child's biological mother are married to each other when the child is born or not later than 300 days after the marriage is terminated. This presumption is rebuttable. *I.J. v. L.D.*, 2015 Ind. App. LEXIS 509 at 8-9 (Ind. Ct. App. 2015) (Presumption of biological fatherhood under IC 31-14-7-1 can be rebutted by genetic testing).

list Ashlee Henderson despite the State's procedures, such an action would be an *ultra vires* act and would not result in a valid birth certificate.

The Hendersons object that a male spouse who was not the biological father of a child conceived through a sperm donor and artificial insemination would be presumed to be the child's father by virtue of IC 31-14-7-1.⁸ (R. Doc. 80 Plaintiffs' Brief in support of Summary Judgment at 9.) Plaintiffs argue, without designating evidence in support, that such a spouse would have his name listed on a birth certificate. *Id.* at 21. ("Similarly situated males simply have their name entered on the birth certificate by operation of law[.]") *See also, id.* at 9 (after discussing IC 31-14-7-1: "this creates a contradiction where a non-birth mother female spouse is currently not listed on the birth certificate. . . "); and at 17 ("Because of IC 31-14-7-1(1), Defendants refuse to list the Spouses of Plaintiff birth mothers on the birth certificates[.]")

To the contrary, the available evidence indicates that -- unless the mother represented on the Live Birth Worksheet that she was married to the child's father -- a similarly situated male would not be listed on the birth certificate. R. Doc. 78-2 Interrogatory Responses of Tippecanoe County at Question 3 and 9 (indicating that if a mother of a child conceived through artificial insemination declared that she was not married to the father of the child and has not filed a paternity affidavit, her husband would not be listed on the birth certificate.) The non-biological father of a child conceived through a sperm donor would be listed as the father on the birth certificate only if the mother stated

⁸ The Plaintiffs have characterized the presumption as a "presumption of parenthood," however, the statute creates a presumption of biological fatherhood. *See* R. Doc. 38 Second Amended Complaint at ¶1, 7, and Count II generally; compare to IC 31-14-7-1 ("A man is presumed to be a child's biological father . . . ") This presumption can be rebutted by, among other things, genetic evidence that another man is the biological father. *I.J. v. L.D.*, 39 N.E.3d 1184 (Ind. Ct. App. 2015).

on the Certificate of Live Birth Worksheet that she was married to the child's father. (*See* R. Doc. 78-4, Certificate of Live Birth Worksheet at 37). If the mother answered "no" to that question based on the fact that her husband was not the child's biological father, her husband's information would never be part of the Worksheet and, in turn, not be entered into the State's database and, therefore, would not be part of the birth certificate generated by the Tippecanoe County Health Department. (R. Doc. 78-2 Tippecanoe County's Answer to Interrogatory Numbers 3, 6, 9-10).⁹ IC 31-14-7-1's presumption of biological fatherhood is not a consideration for TCHD when it follows this process. *Id.*

Even if, for the sake of argument, men and women who are not biological parents were treated differently, Tippecanoe County lacks authority to alter that treatment. The State's system of vital records is maintained under the authority of IC 16-37 and ISDH is charged with administering the system. IC 16-37-1-1 and 2. Included in these duties is the responsibility for developing the forms used to report information relevant to and apply for birth certificates. IC 16-37-1-3. In the Hendersons' case, the information was provided to the hospital where the birth took place and uploaded by the hospital to the State's database. (R. Doc. 38 Second Amended Complaint at 24; R.Doc. 78-2 Tippecanoe County Interrogatory Response #6; IC 16-37-1-3.1.) TCHD's role in the birth certificate process is very limited. In the Hendersons' case, TCHD produced a certificate on a form dictated by the State with information provided through the State's database. (R. Doc. 78-2 Tippecanoe County Interrogatory Response #6).

⁹ The United States District Court for Utah recently decided a birth certificate case in favor of same-sex spouses complaining of disparate treatment when compared to opposite sex spouses receiving reproductive assistance. However, this was based on specific assisted-reproduction statutes found in the Utah Code for which there is no equivalent in the Indiana Code. *See Roe v. Patton*, 2015 U.S. Dist. LEXIS 96207 (D. Utah 2015).

An action taken by a unit of government that exceeds its authority is *ultra vires* and void. *Mies v. Steuben County Bd. of Zoning Appeals*, 970 N.E.2d 251, 258 (Ind. Ct. App. 2012); *Planned Parenthood v. Carter*, 854 N.E.2d 853, 864 (Ind. Ct. App. 2006). The State has, at least nominally, given local units of government broad Home Rule powers. IC 36-1-3. However, a unit may not exercise power that is expressly denied by the Indiana Constitution or by statute, may not exercise power that is expressly granted to another entity, and does not have the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute. IC 36-1-3-5; IC 36-1-3-8(a)(7). Because the legislature has charged ISDH with developing a system of vital statistics, prescribing information to be contained in applications and certificates, and establishing the Indiana Birth Registration System, TCHD is pre-empted from administering the Henderson's birth record in a manner contrary to the requirements set forth by statute and by ISDH. IC 16-37-1-1; IC 16-37-1-3; IC 16-37-1-3.1.

If TCHD had placed Ashlee Henderson on the birth certificate outside of Indiana's regulatory scheme for vital records, it would have been acting outside of its authority. Similarly, 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.

Accordingly, the Henderson's injuries would not be redressed by a favorable decision against

the Tippecanoe County Defendants, and the Plaintiffs therefore lack standing to sue the Tippecanoe County Defendants.

III. The Tippecanoe County Defendants join in the State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the State's Motion for Summary Judgment.

Because the Tippecanoe County Defendants believe that the question of the constitutionality of the State's laws and practices concerning birth records and the challenged statutes are matters for the State to address and defend, the Tippecanoe County Defendants hereby defer to the State's arguments on the matter. Furthermore, to the extent necessary to resist judgment against them and in favor of the Plaintiffs, the Tippecanoe County Defendants hereby incorporate those arguments by reference.

CONCLUSION

Plaintiffs lack standing under Article III of the United States Constitution to sue the Tippecanoe County Defendants because the injuries alleged by the Plaintiffs 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. A material question of fact exists to the extent a judgment in favor of the Plaintiffs would be premised on a factual conclusion that male spouses who are not biological fathers of children conceived through artificial conception are named on the children's birth certificates under circumstances where similarly situated female spouses would not be listed. The Tippecanoe County Defendants further incorporate the arguments of the State by reference.

WHEREFORE, the Tippecanoe County Defendants hereby request judgment in their favor and against the Plaintiffs and for all other appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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