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 and next friend Ruby Henderson, *et al.*,	)	
Plaintiffs,	)	Case No. 1:15-cv-00220-TWP-MJD
v.	)	
DR. JEROME ADAMS in his official capacity as Indiana State Health Commissioner, *et al.*,	)	
Defendants.		

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO ALTER OR AMEND JUDGMENT

Defendant Indiana State Health Commissioner Dr. Jerome Adams respectfully submits this reply memorandum in support of his motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment of this Court entered June 30, 2016.

I. Plaintiffs Lack Standing to Challenge the Wedlock Statutes

A. The Wedlock Statutes do not injure Plaintiffs

Plaintiffs' continued assertion that this Court has jurisdiction to adjudicate the constitutionality of the Wedlock Statutes is predicated on a misunderstanding of how those statutes operate. First, Plaintiffs argue vaguely that "Defendants were using [the Wedlock Statutes] to classify the Plaintiff children," but they do not explain how that is so. ECF No. 126 at 2–3. As the State has explained before, the Wedlock Statutes define "child born in wedlock" and "child born out of wedlock" expressly—and *only*—"for the purpose of" requiring that notice of adoption proceedings be given to the biological father "in order for him to have the

opportunity to consent." ECF No. 120 at 4–5. Plaintiffs do not allege that they are parties to adoption proceedings such that these statutory definitions would apply to them, much less cause them any injury.

Plaintiffs call the State "disingenuous" for stating that the Wedlock Statutes "apply only in the adoption context." ECF No. 126 at 4. But again, Indiana Code section 31-9-2-15 expressly states that its definition of "[c]hild born in wedlock" is "for purposes of IC 31-19-9." Similarly, Indiana Code section 31-9-2-16 expressly states that its definition of "[c]hild born out of wedlock" is "for purposes of IC 31-19-3, IC 31-19-4-4, and IC 31-19-9." As the State described in its summary judgment briefing, those chapters specify when a biological father's consent to adoption is required. ECF No. 85 at 17; *see also* ECF No. 108 at 6–7. To be sure, the terms "child born in wedlock" and "child born out of wedlock" appear in other state statutes, but Plaintiffs do not (1) explain how the wedlock definition they challenge controls those statutes; (2) explain how any of those statutes apply to them or cause them injury, or (3) even purport to challenge any of them.

Plaintiffs contend they are "injured, i.e., stigmatized, when the children were declared to be born out-of-wedlock, despite being born to a married couple" and "declar[ed] their children bastards with all the accompanying stigma." ECF No. 126 at 8–9. But they point to no such declaration, at least not on the part of the Commissioner or ISDH. The only "declaration" they can possibly be referring to is Indiana Code section 31-9-2-16 itself, which by its plain terms denominates a child born to a woman and a man who is not presumed under Indiana law to be the child's biological father as a "child born out of wedlock." Such a statutory definition is both neutral on its face and necessary to the operation of the law. Plaintiffs' assertion that it stigmatizes Plaintiff Children is akin to a claim that the statutory definition of "[h]ard to place

child" stigmatizes and thus constitutionally injures a child with a "physical, mental, or medical disability[.]" Ind. Code § 31-9-2-51. It does nothing of the sort. Rather, it ensures that statutory language will have a clear and constant meaning—that when a statute speaks of a "hard to place child," the reader will know what is meant thereby. The same is true here; the statutory definition of "child born out of wedlock" simply creates a term that can be used to refer to such children in statutes enacted to protect them and their families. That is not a constitutional injury without more, and so does not confer standing upon these Plaintiffs, who do not allege more.

By Plaintiffs' theory, anyone who feels abstractly "stigmatized" by a statutory classification—even one with no operational relevance to them—would have Article III standing to challenge that classification. That is plainly not consistent with the Article III requirement that a plaintiff suffer legally cognizable injury to have standing to challenge a statute. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Even in cases such as *Baskin* and *Obergefell*, where plaintiffs' arguments focused in considerable measure on the stigmatic impact of traditional marriage definitions, all plaintiff couples were directly affected by that definition, as all desired to marry but could not. *Baskin v. Bogan*, 766 F.3d 648, 653 (7th Cir. 2014); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015). Plaintiffs in this case cannot point to any similar operational impact on them wrought by the Wedlock Statutes. Their objection to those statutes is pure abstraction and impermissible under Article III. *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 665 (7th Cir. 2015) ("The mere allegation of unequal treatment, absent some kind of actual injury, is insufficient to create standing."); *see also Clay v. Fort Wayne Cmty. Sch.*, 76 F.3d 873, 879 (7th Cir. 1996) ("Indignation is not an injury-in-fact sufficient to confer standing.").

B. Plaintiffs' Wedlock Statute claims are not redressable because the State has no way to "recognize" Plaintiff Children as "born in wedlock"

It is even more obvious that Plaintiffs lack standing to challenge the Wedlock Statutes because there is no way for Defendants to provide them any meaningful redress. The Court has directed the State to "recognize each of the Plaintiff Children in this matter as a child born in wedlock." ECF No. 117 at 1. But as the State has pointed out, the Commissioner (and even the former county official defendants) has no meaningful way to comply with that directive. ECF No. 120 at 6. Plaintiffs describe several ways they believe the Commissioner could "recognize" that the Plaintiff Children are "born in wedlock," but none is actually possible.

1. Plaintiffs incorrectly claim that "*ISDH* is required to '[a]dvise the mother of a child born out of wedlock of . . . the availability of paternity affidavits[,]" ECF No. 126 at 7 (emphasis added) (quoting Ind. Code § 16-37-2-2(a)), and that the birth mother of a child born out of wedlock must be "provide[d] an opportunity" to execute a paternity affidavit. *Id.* (quoting Ind. Code § 16-37-2-2.1(b)(1)). But both of these statutory duties actually fall upon third parties—specifically, "[a] person in attendance at a live birth" and "a person who attends or plans to attend the birth," respectively—and not upon the Commissioner, ISDH, or any State (or county) entity. Ind. Code §§ 16-37-2-2, -2.1. What is more, such advice and provision is a method of recognizing that a child is born *out of wedlock*—not particularly useful here, where the Commissioner has been ordered to recognize the Plaintiff Children as born *in wedlock*. And indeed Plaintiffs do not allege that ISDH (or anyone else) has in the past treated them as parents of children born out of wedlock—*i.e.*, by advising them of the availability of paternity affidavits and providing them the opportunity to execute paternity affidavits—which confirms the irrelevance of these provisions.

2. Plaintiffs further contend that Indiana Code section 16-37-2-13 (the Surname Statute) "instructs the ISDH how to record the birth of [a] child born out of wedlock." ECF No. 126 at 8. That statute provides that "[a] child born out of wedlock shall be recorded: (1) under the name of the mother; or (2) as directed in a paternity affidavit . . . ." Ind. Code § 16-37-2-13.

First, as the State has explained, *see* ECF No. 120 at 5–6, Plaintiffs have never purported to challenge the Surname Statute. Nor did the Court issue an injunction regarding the Surname Statute. Indeed, until now, Plaintiffs have never even argued the Wedlock Statute definitions apply to the Surname Statute. But even if those definitions do apply to the Surname Statute, Plaintiffs have not demonstrated constitutional injury traceable to Defendants as a result. They say that the Bannick and Singley Plaintiffs received letters from *county* officials notifying them that their children would be "recorded" only under the birth mother's name, but it is not clear what that meant to them. ECF No. 126 at 3. If it meant that only the birth mother's name appeared on the birth certificate, that would have been a function of the presumption statute (Indiana Code section 31-14-71-1), not the Wedlock Statutes. If it meant that the child's surname would have to be that of the birth mother rather than her wife, that would have been immaterial to the Bannicks and Singleys because both spouses share the same surname. Notably, the Bush-Sawyers did not share the same last name when their child was born, and they even had a surname problem with their child's birth certificate (*see* ECF No. 79-1), yet they do not allege that episode justifies *their* challenge to the Wedlock Statute. Regardless, any injury flowing from the Surname Statute could only justify a challenge to application of *that* statute, a challenge that, again, has never before been alleged. It would not justify a broadside challenge to the definitional Wedlock Statutes, which so plainly apply to adoptions and therefore are not directly relevant to these plaintiffs.

Second, the recording referenced in the Surname Statute is performed by the "local health officer," *see* Ind. Code § 16-37-2-9, not by ISDH or any other State entity. If Plaintiffs sought relief against enforcement of the Surname Statute, they should have argued that it justified keeping the county health commissioners in the case, which they did not do. The State Commissioner is not an adequate substitute defendant when he does not enforce the statute himself. *See, e.g., Okpalobi v. Foster*, 244 F.3d 405, 427–28 (5th Cir. 2001) (en banc) ("[A] state official cannot be enjoined to act in any way that is beyond his authority to act in the first place. . . . This is not to say that the administrators of [the statute] themselves could not be enjoined to do a particular act that was within their authority—but the[] plaintiffs must sue those individuals authorized to exercise the orders of the injunction."); *S. Pac. Trans. Co. v. Brown*, 651 F.2d 613, (9th Cir. 1980) (affirming dismissal of lawsuit against Oregon Attorney General where the challenged statute was enforced through prosecution by district attorneys who were not named as parties); *Libertarian Party of Ind. v. Marion Cnty. Bd. of Voter Registration*, 778 F. Supp. 1458, 1461 (S.D. Ind. 1991) (holding that claims against the members of the Indiana State Election Board in a suit seeking to obtain copies of Marion County voter registration data were not justiciable because the Marion County Board of Voter Registration could provide all requested relief and the State Election Board could not discipline or remove members of the county board).

3. Plaintiffs assert that Indiana Code section 16-37-2-16 "directs the ISDH on how to correct a birth certificate of a child born out of wedlock once the parents marry." ECF No. 126 at 8. That statute requires ISDH to add the biological father's name to the birth certificate of a child born out of wedlock if two conditions are satisfied: (1) the birth mother marries "a man claiming to be the child's *biological father*" and (2) "the man and the mother . . . produce proof

of the marriage and execute a paternity affidavit." Ind. Code § 16-37-2-16 (emphasis added). Demonstrably, this statute has no application to Plaintiffs, who do not seek to add a biological father's name to their children's birth certificates. Indeed, as it prescribes steps to be taken when a child is born *out of wedlock*, presumably Plaintiffs would not want it applied to them at all.

If Plaintiffs mean that there ought to be a parallel procedure for female same-sex couples who marry after the birth of a child to add the non-birth mother spouse's name to the child's birth certificate, none of them has standing to raise that issue, as all were married prior to the birth of their children. And in any event, such a procedure does exist: stepparent adoption. *See* Ind. Code § 31-19-2-4; *In re K.S.P.*, 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (permitting petitioner to adopt her same-sex partner's biological children). That statute permits creation of a legal parental relationship in circumstances where there is no biological relationship between the child and the parent's spouse. Ind. Code § 31-19-2-4. In any event, there is no way the Commissioner could take any action pursuant to the stepparent adoption statute that would "recognize" that the Plaintiff Children were born in wedlock.

4. Plaintiffs note that Indiana law prohibits any reference on a child's birth certificate to the fact that the child was born out of wedlock. ECF No. 126 at 8 (citing Ind. Code § 16-37-2-18(3)). That is true, but that rule already applies equally in all cases. Plaintiffs do not allege that anyone violated that statute, *i.e.*, that any of their children's original birth certificates contained a reference to an out-of-wedlock birth. So, it is again unclear how the Commissioner could take any action pursuant to the "no-reference" statute to "recognize" that the Plaintiff Children were born in wedlock.

As the State explained in its memorandum in support of its Rule 59(e) motion, even if the Wedlock Statutes imposed constitutional injury on Plaintiffs—and they do not—such injury is

not redressable because "the Commissioner has no way to 'recognize each of the Plaintiff Children in this matter as a child born in wedlock[.]'" ECF No. 120 at 6 (quoting ECF No. 117 at 1). This Court should therefore alter or amend its judgment to dismiss Plaintiffs' Wedlock Statute claims for lack of standing.

II. The Court Should Alter or Amend Its Judgment to Clarify to Whom It Applies and Whether the New Legal Presumption It Creates Is Rebuttable

As the State described in its opening memorandum, the Court's judgment is ambiguous and in need of clarification in three important respects. First, it does not state whether the Court found the challenged statutes unconstitutional on their face or merely as applied to these Plaintiffs. Second, it does not specify whether it applies to all artificially inseminated birth mothers or only those who receive sperm from an unknown donor. Third, it requires the State to grant the Plaintiff Spouses a "presumption of parenthood" but does not say whether that presumption is rebuttable, and if it is, how it might be rebutted. The Court should alter or amend its judgment to answer these questions.

A. Plaintiffs dismiss the State's request for clarification on the facial versus as-applied issue, complaining that the "State fails to discuss how the declaratory judgment forecloses the State from applying the Statute in any manner, even a constitutional manner." ECF No. 126 at 10–11. That is untrue. The judgment states "Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clause of the Fourteenth Amendment to the United States Constitution." ECF No. 118 at 3. As the State explained in its opening memorandum, if that portion of the judgment means the Court has invalidated the challenged statutes on their face, then those statutes may not be applied to anyone under any circumstances. ECF No. 120 at 8. For it is fundamental that "a successful facial attack means the statute is wholly invalid and cannot be applied to anyone." *Ezell v. City of Chicago*, 651 F.3d

684, 698 (7th Cir. 2011); *see also Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 832 (7th Cir. 2014) ("The statute is unconstitutional on its face, so it cannot be enforced *against anyone*." (emphasis in original)). Thus, with respect to the Paternity Presumption Statute, a successful facial attack would mean that the State would be unable any longer to grant a presumption of biological fatherhood to men married to birth mothers.

Plaintiffs seem to believe that the Court invalidated the challenged statutes only as applied; they argue that the State is now *required* to apply the Paternity Presumption Statute to women married to birth mothers and suggest the State could further *choose* to apply the statute to men married to biological fathers. ECF No. 126 at 11. But, lack of statutory discretion aside, how would that even work? Two men appear at the hospital and claim parental rights over a child born to a woman not married to either of them, and their rights are somehow to be presumed? Surely there would need to be safeguards in place, including DNA tests to establish that one of the men is the biological father of the child and an accounting of the birth mother's rights. But the Court seems to permit nothing comparable for the new presumption of legal parenthood for women in same-sex marriages when one of them gives birth—even though the birth mother might theoretically be a surrogate mother with no actual biological connection to the child, and even though the biological father's rights are in limbo.

In short, it is not clear why the involvement of a birth mother might constitute a legitimate distinction between male and female couples for purposes of bestowing a purely law-based (as opposed to biology-based) presumption of parental rights. Even if at least one parent's biological connection to the child is essential to getting the presumption ball rolling, a man in a same-sex relationship can be biologically connected to a child he claims as his own just as much as a birth mother (who may merely be a surrogate) can.

Of course, all of these interpretative considerations are moot if the Court has invalidated the Paternity Presumption Statutes on their face. Thus, the Court should alter or amend its judgment to clarify whether the challenged statutes are invalid on their face or only as applied to Plaintiffs.

B. What is more, as the State pointed out in its opening brief on this motion, and as alluded to above, the Court's order takes no account of the effect its injunction has on the rights of biological fathers—particularly those biological fathers whose identity is known and who may not have intended to waive their parental rights. ECF No. 120 at 9–10. Even if such men have executed purported waivers of parental rights, the waivers may not be enforceable either against a biological father who later asserts his rights or against a State action for child support pursuant to Title IV-D. *See, e.g.*, *Straub v. B.M.T by Todd*, 645 N.E.2d 597, 601 (Ind. 1994) (finding sperm donation contract "void and unenforceable" where no doctor was involved and the contract was rudimentary); *In the Interest of R.C.*, 775 P.2d 27, 35 (Colo. 2005) (refusing to bar donor-father's claim to establish parental rights based on oral agreement between donor and unmarried recipient, and parties' subsequent conduct); *Mints v. Zoernig*, 198 P.3d 861, 864 (N.M. Ct. App. 2008) (finding that the Uniform Parentage Act did not apply, so the donor father was liable for child support regardless of an agreement to absolve the father of responsibility). The Court's judgment is silent as to how these biological fathers' rights are affected by the new legal presumption of parenthood in the birth mother's female spouse.

Surprisingly, Plaintiffs allow that a biological father could file a paternity action and thereby defeat the newly won parental rights of birth mothers' spouses. ECF No. 126 at 13. But while these Plaintiffs may be willing to give way so easily, it is by no means clear such a rule would be consonant with the Court's judgment. The existing statutory presumption is one of

biological fatherhood and is therefore rebuttable by biological evidence; but the Court's new presumption is one of "legal parenthood" *not* based on the spouse's supposed biological connection to the child. Permitting such "legal parenthood" to be overridden by biology would seem to be in tension with the fundamental rationale of "legal parenthood," which is marriage, pure and simple, not biology. Put another way, everyone already knows that the wife of the birth mother *is not* the child's biological parent, so how can her parental rights be affected by evidence that someone outside the marriage *is* the child's biological parent? Neither the Court's judgment nor Plaintiffs' brief answers this question.

It could be that the Court intends such a child to have three legal parents. *Cf.* Cal. Fam. Code § 3040(d). If so, the Court should make that plain so that married female couples understand that reality. Or, it could be that the Court intends for a biological father to reclaim parental rights from the wife of a birth mother only upon a showing that his petition is in the best interests of the child. Again, if so, the Court should make that standard clear. *But see, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that an unmarried biological father's constitutional parental rights may be overridden only by a showing that he is unfit). The Court should alter or amend its judgment to provide additional guidance on these issues.[1]

III. Plaintiff's Supplemental Authority Is Unhelpful

After filing their response to Defendants' Rule 59(e) motion, Plaintiffs filed a notice of supplemental authority directing the Court's attention to *Gardenour v. Bondelie*, No. 32A01-

[1] It is also worth remembering that, absent the Court's judgment and injunction, the wife of a birth mother needed to adopt in order to have parental rights. Plaintiffs brought this suit to avoid having to do that. But if indeed, notwithstanding the Court's judgment and injunction, a biological father may assert parental rights and thereby disestablish the rights of the birth mother's wife (or add a third parent to the mix), the Court's judgment will not have abated the wife's need to adopt in order to secure her own parental rights or exclude the possibility of a third parent. In short, the wife would still need to adopt the child in the first instance so that her parental rights would be invulnerable.

1601-DR-82, 2016 WL 4268708 (Ind. Ct. App. Aug. 15, 2016). ECF No. 127. Plaintiffs, however, do not explain how *Gardenour* is relevant to the Rule 59(e) motion, which is all that is pending before the Court.

As a procedural matter, the Indiana Court of Appeals decided *Gardenour* a mere week ago. The time for filing a petition to transfer has not yet run, Ind. R. App. P. 57(C), and the opinion has not yet been certified. Ind. R. App. P. 65(E). Even the parties in that case are prohibited from taking "any action in reliance upon the opinion . . . until [it] is certified." *Id.* There is no reason for this Court to do otherwise.

Regardless, as a substantive matter, it is not clear how *Gardenour* could be useful here. In that case, the court in no way purported to apply federal constitutional principles to determine that a same-sex couple shared parental rights by virtue of being married when the child was born. Rather, it declared that Indiana law itself already afforded that recognition. *Gardenour*, 2016 WL 4268708, at *8–9. But if such a holding accurately reflects the state of Indiana law, that could only mean that Plaintiffs' claims in this case are moot. In other words, if *Gardenour* was correctly decided, there would be no need to declare the Wedlock and Paternity Presumption Statutes invalid as a matter of constitutional law, as Indiana law *already* would provide the rights, status, or recognition Plaintiffs demand.

On this point, one way to consider *Gardernour*'s significance is to observe how it treats *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994), and *Engelking v. Engelking*, 982 N.E.2d 326 (Ind. Ct. App. 2013). Plaintiffs in this case have cited those precedents as evidence of supposed inequality between same-sex and opposite-sex married couples when it comes to parental rights under Indiana law. ECF No. 80 at 8–10. In *Gardenour*, however, the Court relied on those cases in arriving at its decision that a functionally married same-sex couple shared parental rights with

respect to a child born during the marriage. *Gardenour*, 2016 WL 4268708, at *8–9. In the State's view, the court in *Gardenour* misunderstood the meaning of *Levin* and *Engelking*. *See* ECF No. 85 at 23–24 (describing *Levin* and *Engelking* as merely instances where Indiana courts found equitable solutions to child support and custody issues but did not purport to bestow the full panoply of parental rights on non-biological, non-adoptive parents). Regardless, there can be no doubt that the *Gardenour* court purported to apply those precedents to a (functionally) married same-sex couple. In other words, taken at face value, *Gardenour*, negates the purported inequality that forms the basis for this lawsuit.

If it is indeed the case that, because of *Gardenour*, Indiana law now affords Plaintiffs all the rights, recognition, and status they seek, then the proper course would be to declare this case moot by happenstance and vacate the judgment. *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990); *Deakins v. Monaghan*, 484 U.S. 193, 204 (1988); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950). But, of course, it would be premature to read *Gardenour* so broadly. *Gardenour* is unlikely to be the last word on the origin and meaning of same-sex couples' parental rights, either because it will be reviewed by the Indiana Supreme Court or because it will be distinguished by other courts reviewing different factual circumstances (such as a biological father's claim of parental rights as against the non-adopting spouse of a birth mother). Accordingly, *Gardenour* really offers nothing of use here, and the Court should not feel compelled to take account of it when ruling on the Rule 59(e) motion.

CONCLUSION

For the reasons set forth above, under Federal Rule of Civil Procedure 59(e), this Court should alter or amend its judgment entered on June 30, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

s/ Thomas M. Fisher
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