No. 17-1141

In the
United States Court of Appeals
for the Seventh Circuit

ASHLEE HENDERSON, a married couple, et al.,

Plaintiffs-Appellees,

v.

JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division, No. 1:15-cv-0020-TWP-MJD.
The Honorable **Tanya Walton Pratt**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLEES

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1141

Short Caption: Ashlee & Ruby Henderson, a married couple and L.W.C.H., et al v. Dr. Jerome Adams

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Karen Celestino-Horseman Date: March 24, 2017

Attorney's Printed Name:

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Please see attached list.

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Norris Choplin Schroeder LLP (Raymond L. Faust, Of Counsel): Austin & Jones P.C. (Karen Celestino-Horseman, Of Counsel); Fillenworth Dennerline Groth & Towe, LLP; Mann Law, P.C.

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Not Applicable

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Not Applicable

Attorney's Signature: s/ Raymond L. Faust Date: March 24, 2017

Attorney's Printed Name: Raymond L. Faust

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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CONTINUATION OF PARAGRAPH 1:

ASHLEE and RUBY HENDERSON, a married couple, and L.W.C.H., by his parent and next friend, Ruby Henderson; CAPTAIN NICOLE and JENNIFER SINGLEY, a married couple and H.S., by his mother and next friend, Jennifer Singley; ELIZABETH "NICKI" and TONYA BUSH-SAWYER, a married couple and I.J.B. a/k/a I.J.B-S by his parent and next friend Nicki Bush-Sawyer; LYNDSEY and CATHY BANNICK, a married couple and H.N.B. by his parent and next friend, Lyndsey Bannick; CALLE and SARAH JANSON and F.G.J. by his next friend and mother, Calle Janson; NIKKOLE MCKINLEY-BARRETT and DONNICA BARRETT, a married couple and G.R.M.B., by his mother and next friend, Donnica Barrett; NOELL and CRYSTAL ALLEN; JACQUELINE "JACKIE" and LISA PHILLIPS-STACKMAN and L.J.P.S, by his parent and next friend, Lisa Phillips-Stackman, Plaintiffs/Appellees.

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Not applicable

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Not applicable

Attorney's Signature: s/ Richard A. Mann Date: March 24, 2017

Attorney's Printed Name: Richard A. Mann

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Megan L. Gehring Date: March 24, 2017

Attorney's Printed Name: Megan L. Gehring

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/William R. Groth Date: March 24, 2017

Attorney's Printed Name: William R. Groth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Statutes, Rules & Other Authorities

JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement is complete and correct.

STATEMENT OF ISSUES

1. Whether the grant by Indiana Code § 31-14-7-1(1) of a presumption of parenthood to men married to birth mothers who conceive via third-party artificial insemination is in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment as it does not allow the grant of parenthood to the female same-sex spouse of a birth mother who also conceives via third-party artificial insemination.

2. Whether I.C. §§ 31-9-2-15 and -16, which declare a child born to a married opposite-sex couple as a child born in wedlock when the child was conceived via third-party artificial insemination while declaring a child born to a same-sex female couple and conceived via third-party artificial insemination as a child born out of wedlock, are in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

3. Whether Appellees have standing to challenge I.C. §§ 31-9-2-15 and -16.

STATEMENT OF THE CASE

I. Background

A. The Appellees

The Appellees (Plaintiffs below) are female, same-sex married couples ("Couples"), and their children ("Children") (collectively, "Families") whose

birth certificate lists only the birth mother as a parent with no second parent. Short App., p. 18.[1] The Families are as follows:

1. Ashlee and Ruby Henderson and their child, L.W.C.H. ("Hendersons"); ECF 78-5, pp. 1-4; 78-6; 78-7, pp. 1-7; 78-8;

2. Elizabeth and Tonya Bush-Sawyer and their child, I.J.B.-S. ("Bush-Sawyers"); ECF 79-1, pp. 1-5; 79-2, pp. 1-2; 79-3; 79-4; 79-5, pp. 1-11; 79-6, pp. 1-10; 79-7, pp. 1-11;

3. Nicole and Jennifer Singley and their child, H.S. ("Singleys"); ECF 78-9, pp. 1-6; 78-10; 78-11, pp. 1-2;

4. Lyndsey and Cathy Bannick and their child H.N.B. ("Bannicks"); ECF 79-9, pp. 1-4; 79-10, pp. 1-3; 79-11; 79-12; 79-13, pp. 1-2;

5. Calle and Sarah Janson and their child, F.G.J. ("Jansons"); ECF 79-8, pp. 1-4;

6. Nickkole McKinley-Barrett and Donnica Barrett and their child, G.R.M.B. ("McKinley-Barrett/Barretts"); ECF 78-12, pp. 1-5; 78-13, pp. 1-4; 78-14;

7. Noell and Crystal Allen and their children, Ashton Allen and Alivea Allen ("Allens"); App. 4-8; ECF 100-1, pp. 1-5; 100-2, pp. 1-2; and

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[1] Citations to Appellant's Required Short Appendix appear as "Short App. __"; citations to Appellant's Appendix appear as "App. __"; citations to record appear as "ECF ___ p.__"; citations to Appellant's Brief appear as "App. Br. __".

8. Jacqueline "Jackie" and Lisa Phillips-Stackman and their child, L.J.P.-S. ("Phillips-Stackmans"). App. 9-14; ECF 100-3, pp. 1-6; 100-4; 100-5; 100-6.

Each of the Couples agreed to have children together and conceived using sperm from third-party donors.[2] The Couples seek to have the non-birth mothers listed on the Children's birth certificate and to be recognized as a parent. The Children seek to have the spouse of their birth mothers be recognized as their mother. Each of the Children were born during the Couples' marriages, and the Families want their children to be recognized as being legitimate, i.e., born in wedlock. The Couples have been informed that the non-birth mother may become a legally recognized parent of her child only if she goes through the legal adoption process. Short App. 24.

At the time of the district court hearing, Tonya Bush-Sawyer was seeking a stepparent adoption. To obtain one, she must be fingerprinted, undergo a criminal background check, and submit her driving record, her financial profile, and the veterinary records for any pet living in the home. A home study must be conducted, which examines the history of Elizabeth

[2] Despite the fact that Lisa and Jackie Phillips-Stackman, Lyndsey and Cathy Bannick, and Captain Nicole and Jennifer Singley were lawfully married at the time of their child's birth, each couple received a notice from the their respective County Health Department, explaining how a male could be added to the birth certificate of a child born out of wedlock. Short App. 23; App. 9-14; ECF 78-11 p. 1-2; ECF 79-13, p. 2; ECF 100-6.

and Tonya's relationship, requires them to write an autobiography and discuss their parenting philosophy, and requires them to allow a home inspection. The cost for a stepparent adoption is approximately $4,200.00. Short App 21.

Nicole Singley is on active duty in the U.S. Army and is entitled to all the benefits available to service members, including health insurance. Currently, her spouse, Jennifer, and her child H.S. are covered by Nicole's military health insurance. H.S. is considered to be Nicole's stepchild, and therefore eligible for healthcare coverage under the military insurance program because If Jennifer should predecease H.S., then H.S. will no longer be covered by Nicole's health insurance (or other military benefits) because Nicole no longer will be considered his stepparent. Short App. 21-22

Similarly Jackie Phillips-Stackman is a detective with the Indianapolis Metropolitan Police Department. Jackie's health insurance provides coverage for L.J.P-S., who is considered her stepchild. L.J.P-S. suffers from serious medical problems, so this coverage is vital.[3] If Lisa should die while L.J.P-S. is covered under Jackie's policy, then L.J.P-S

[3] While most of the Couples opted for artificial insemination, Jackie and Lisa Phillips-Stackman decided to have a child through *in vitro* fertilization. Jackie's egg was fertilized with sperm from a third-party donor, then implanted in Lisa. When L.J.P.-S. was born, hospital staff advised the Couple that only Lisa could be listed as a parent on the baby's birth certificate without a court order, even though she was L.J.P.-S.'s biological parent.

would no longer qualify for coverage because Jackie is not L.J.P-S.'s legal parent. Short App. 23-24; App. 9-11.

Noell and Crystal Allen decided to have a child. Crystal became pregnant with twins but they were born prematurely and died the same day. Hospital staff and the Indiana State Department of Health ("ISDH") advised that Noell would not be listed as a parent on the twins' birth certificates. Because the twins are deceased, Noell cannot adopt them and thus has no means to become their legal parent. Paradoxically, while Noell is not listed as a parent on the twins' birth certificates, she *is* listed as a parent on their death certificates. Short App. 23.

B. The Appellants

The Defendants below were State and County agencies responsible for the issuance of birth certificates to one or more of the Children, and for administering the Indiana Birth Registration System. The Families agree with the listing provided in the State's Statement of the Case. Short App. 19, n.1. The only Appellant is Dr. Jerome M. Adams, in his official capacity as Commissioner of the Indiana State Department of Health.

C. Indiana Birth Certificates

When a child is born in Indiana, hospital staff and the child's birth mother complete the State's "Certificate of Live Birth Worksheet." This Worksheet information is uploaded to a State database. A standardized notification letter is sent to the birth mother which indicates that information has been received by the county health department and

requests that the mother notify the health department if there is an error in the child's identifying information. The notification letter also indicates that a certified copy of the record of birth is available from the local health office. If a person wants a child's birth certificate, he or she must complete an "Application for a Certified Birth Certificate." The applicant must provide information required by the State. When the application has been completed, the county health department generates a birth certificate based on the information available to it through the State's database. App. 18-21.

The Worksheet is designed so that if the birth mother indicates that she is not married to the father of the child and a paternity affidavit has not been completed, there will be no information about the father on the Worksheet and, consequently, no such information on the birth certificate. App. 22-33. The Worksheet also inquires if the baby was conceived with the aid of artificial insemination, regardless of whether it is an opposite-sex or same-sex couple. App. 28-29.

The Worksheet also asks, "What will be your BABY'S legal name (as it should appear on the birth certificate)?" App. 23 (Question 11). Regardless of how the birth mother answers that question, Indiana law requires that a "child born out of wedlock" be given the mother's surname unless a paternity affidavit dictates to the contrary. Ind. Code § 16-37-2-13.

D. The Statutes Found Unconstitutional

The District Court held Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1(1) unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. These statutes are set forth verbatim in the Appellant's Brief and the Argument section of this brief.

II. Procedural Posture of the Case

The Families filed their Motion for Summary Judgment on December 4, 2015. ECF 77. On January 8, 2016, all defendants filed cross-motions for summary judgment. ECF 82; ECF 83; ECF 84; ECF 85.

The Families' motion requested summary judgment on their claims for injunctive relief and declaratory judgment. Following oral argument, by Order dated June 30, 2016, the District Court:

> (1) Granted the Families' Motion for Summary Judgment against the State, declaring that Indiana Code §§ 31-9-2-15, 31-9-2-16 and 31-14-7-1 violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution; enjoining the State from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16 and 31-14-7-1 in a manner that prevents the Presumption of parenthood to be granted to female, same-sex spouses of birth mothers; and enjoining the State to recognize children born to a birth mother who is legally married to a same-sex spouse as a child born in wedlock.
>
> (2) Denied the State's Motion for Summary Judgment.

(3) Granted the County Defendants' Motions for Summary Judgment, dismissing them for lack of jurisdiction.

Short App. 11-49.

On June 30, 2016, the district court also entered final judgment in accordance with its decision on the Motions for Summary Judgment. Short App. 11-14.

On July 18, 2016, the State filed a Motion to Alter or Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e). While the District Court granted the motion in part to clarify its judgment, it did not revise its holdings. Short App. 1-9. This appeal followed.

SUMMARY OF THE ARGUMENT

Appellees are legally-married female spouses and their children, each of whom was artificially conceived. The State issues two-parent birth certificates to similarly situated opposite-sex married couples identifying both parents as long as the birth mother identifies her husband as the father on the State's Live Birth Worksheet. But the State will not issue a two-parent birth certificate if the birth mother identifies her spouse as female. As a result, the only way she may assume the rights and responsibilities of parenthood is to formally adopt the child of her marriage, an expensive and time-consuming process. Appellees alleged below that the State's refusal to treat them equally regarding this important aspect of marital status violates their Fourteenth Amendment rights to equal protection and due process. The district court agreed, and in so ruling

correctly determined that the Families have standing to bring their claims challenging both Indiana's gender-specific Presumption Statute and its Wedlock Statutes.

When two persons in a marital relationship have a child through consensual artificial insemination and the birth mother identifies her spouse as the second parent, Indiana presumes that both are the child's parents and that the child was born in wedlock. However, the State applies this presumption only for the benefit of opposite-sex married couples. This means that in cases of artificial insemination a birth mother's *male* spouse is listed on his child's birth certificate, but a birth mother's *female* spouse is not even if the birth mother identifies her as her lawful spouse. As a result, the only way she may assume the rights and responsibilities of parenthood is to formally adopt the child of her marriage, a quite expensive and time-consuming process. Birth certificates are a critical aspect of marriage for the Families, as they are used for a panoply of purposes, including establishing citizenship, identity, insurance, education, and inheritance. The effect of Indiana's discrimination is that only female, same-sex married couples who conceive by donor insemination are denied this aspect of marriage. This in turn means their marriages and children are treated less favorably than marriages between members of opposite sexes and their children.

In addition to violating the clear and direct mandates of the Supreme Court's 2015 ruling in *Obergefell v. Hodges,* the State's application of its

Parenthood Statutes to preclude female same-sex spouses from obtaining a two-parent birth certificate unconstitutionally discriminates against the Couples and Children based on parents' gender and sexual orientation. This Court in *Baskin v. Bogan* held that Indiana's marriage laws violated the Equal Protection Clause of the Fourteenth Amendment, in part because they discriminated on the basis of sexual orientation without any substantial or valid justification. In the process, this Court ruled that sexual orientation is a protected class, and that laws that discriminate on the basis of sexual orientation are subject to a heightened form of scrutiny, also known as intermediate scrutiny, the same as those that discriminate on the basis of gender. Heightened scrutiny also applies to the State's enforcement of the Parenthood Statutes because it renders those Children illegitimate even though they were born into a lawful marriage. The United States Supreme Court has also recognized illegitimacy to be a quasi-suspect class requiring an elevated level of scrutiny of a state law that discriminates on the basis of legitimacy.

Under the intermediate level of scrutiny, the State must establish that its discrimination is substantially related to achieving an important public interest. The State claims that its enforcement of the Parenthood Statutes is based on its interest in "identifying biological parents." However, Indiana has codified the goals and interests behind its Parenthood Statutes at I. C. § 31-10-2-1. Those goals are to:

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

(2) recognize the responsibility of the state to enhance the viability of children and family in our society;
(3) acknowledge the responsibility each person owes to the other;
(4) strengthen family life by assisting parents to fulfill their parental obligations. . . .

The State's proffered biological interest is nowhere to be found in that statute and it is but a *post hoc* rationalization.

The State cites in its brief a number of Indiana state court decisions to support its asserted "substantial" interest in biology. While it is true that biology is a factor frequently taken into account by Indiana's judiciary in disputes involving parental rights, both the above statute and Indiana case law make clear that the State's paramount consideration in every case is doing what is in the child's best interest. Thus, its courts have repeatedly found that biological considerations must give way to competing public policies such as protecting the child's welfare and interest in having two rather than a single legal parent when those two interests cannot be reconciled. Accordingly, the State cannot establish that its interest in biological procreation is so profound or substantial as to justify its denial of a two-parent birth certificate to Couples and their Children. In other words, the State cannot show that its discrimination against the Families is, in this Court's words in *Baskin,* "substantially related to the achievement" of its claimed objectives.

Further, as the State construes and applies them, Indiana's Parenthood Statutes are both underinclusive and overinclusive. The Presumption Statute is underinclusive because it only provides to fathers a

presumption of parenthood and fails to allow a similarly-situated female spouses that same presumption. It is overinclusive because whatever amorphous benefits the State may receive from discriminating against parents because of their gender and sexual orientation are clearly outweighed by the resulting harm to Couples and their Children. The Wedlock Statutes are also over- and underinclusive. I.C. § 31-9-2-15 is underinclusive because it does not classify the children conceived by artificial insemination and born to a lawfully married same-sex couple as children born in wedlock, instead expressly limiting children born in wedlock to only those children born to a man and a woman. I.C. § 31-9-2-15 is overinclusive because the harms it imposes upon children born to a same-sex marriage, stigma from being labelled illegitimate and not being allowed to carry the spouse's name, are not necessary to preserve and protect families nor is it in the best interests of the child. Thus, the State's enforcement of the Parenthood Statutes cannot withstand the required heightened level of scrutiny.

The district court correctly declared Indiana's Parenthood Statutes to be unconstitutional as applied to the Families and as was required by *Obergefell.* In *Obergefell,* the Supreme Court ruled that the fundamental right to marry is guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In the course of his majority opinion for the Court in *Obergefell,* Justice Kennedy also observed that marriage has historically been the basis for an expanded list of

governmental benefits, rights and responsibilities, denominated as "aspects of marital status." One of those aspects that the states must provide birth certificates to all married couples. The Supreme Court's inclusion of birth certificates on the list of marital benefits that states routinely confer was not accidental, as some of the same-sex couples in *Obergefell* had directly raised in the lower courts their state's denial to them of a two-parent birth certificate. Just as every other post-*Obergefell* federal court decision, the district court ruled that the Constitution requires the State to accord equal respect and dignity to same- and opposite-sex marriages in all of the traditional aspects of marriage, one of which is the issuance of birth certificates accurately identifying both parents of children born into a marriage.

The district court's ruling is the latest in a growing procession of cases in which the lower federal courts have ruled that *Obergefell* mandates that states treat same-sex married couples who conceive by donor insemination the same as opposite-sex married couples who conceive by donor insemination with respect to the issuance of two-parent birth certificates. Moreover, the Indiana Court of Appeals in *Gardenour v. Bondelie* held that same-sex spouses who give birth by artificial insemination were entitled to the same parental rights regarding their child as any opposite-sex married couple.

The discriminatory manner in which Indiana enforces its Parenthood Statutes also violates the Families' rights under the Due Process Clause of

the Fourteenth Amendment. The United States Supreme Court has ruled that parents have a fundamental right and interest in the "care, custody, and control of their children. " *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The primary source of these fundamental rights is not simply a biological connection, but the bonds of familial love and affection between parent and child.

Under Due Process (as under Equal Protection), accurately identifying both parents on their child's birth certificate is vitally important for a multitude of purposes. A child's inability to obtain an accurate birth certificate that correctly reflects the child's parentage imposes life-long disabilities on the child and burdens the ability of the child's parents to exercise their fundamental parental rights and duties to raise their child. By refusing to issue birth certificates that accurately list the names of both the birth mother and her same-sex spouse, the State interferes with the fundamental rights of parenthood and the ability to make parental decisions. For this reason, Indiana's manner of applying the Parenthood Statutes is subject to strict scrutiny, and can survive only if the State establishes both a compelling interest and narrow tailoring. However, the Parenthood Statutes' are neither narrowly tailored, nor is the State's asserted interest in promoting biological relationships a compelling one, just like the statutes do not serve important governmental objectives as required by Equal Protection.

Lastly, while conceding the Families' standing to challenge the Presumption Statute, the State contends the Families lack standing to challenge the Wedlock Statutes. The State erroneously claims these statutes only apply in the adoption context and, because the Parents are not seeking to adopt their Children, they lack standing regarding this aspect of their claims. The State is wrong as a matter of law, and its argument is directly contradicted by the notices it sent to the Families advising them that their children were considered to have been born out of wedlock. Because they have suffered concrete and particularized injuries that are fairly traceable to the existence of and the State's unequal application to them of both the Presumption and Wedlock Statutes, the Families also have standing to challenge the Wedlock Statutes.

The district court's injunction ordering the State to treat the Families the same as similarly situated opposite-sex families redressed the harm caused by the State's previous discrimination. Prior to the district court's judgment, the State's application of the Parenthood Statutes resulted in the non-birth mother's parental rights being less secure which, among other things, deprived children born to two married women of the right to intestate succession. The Families' harms are traceable to the State's conduct, and those harms have been remedied by the district court's injunction. Therefore, the Families have standing to challenge the Wedlock Statutes.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the district court's ruling on summary judgment *de novo*. *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 812 (7th Cir. 2015).

II. The Parenthood Statutes deny the Families protection under the Equal Protection Clause.

A. The laws at issue

Under Indiana law, a same-sex spouse of a birth mother who conceived via artificial insemination is the legal parent of a child born to the marriage. *Gardenour v. Bondelie*, 60 N.E.3d 1109 (Ind. Ct. App. 2016) *trans. denied* 2017 WL 897559 (Ind. Mar. 2, 2017) (where couple planned for child conceived by artificial insemination, non-birth mother and birth mother were both "legal parents" with full parental rights).[4] Despite the *Gardenour* decision, the State continues to insist that the only means by which a same-sex spouse can establish a parental relationship is through adoption or genetics and, therefore, same-sex spouses of birth mothers cannot be presumed to be the parent of the child born to the birth mother spouse.

In cases of married opposite-sex couples who utilize third-party artificial insemination, the State grants the father a rebuttable presumption

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[4] The State filed an *amicus* brief in *Gardenour* requesting that the Indiana Supreme Court review the decision and informed the court that *Henderson* was upon appeal upon the issue of the Presumption Statute. The Indiana Supreme Court declined to grant transfer.

of parenthood and the husband is listed as the child's father on the birth certificate pursuant to the Presumption Statute which provides in part:

> Sec. 1. A man is presumed to be a child's biological father if:
>
> (1) the:
>
> (A) man and the child's biological mother are or have been married to each other; and
>
> (B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution . . .

I.C. § 31-14-7-1(1).

In other words, the man need only to be married to the birth mother to be granted the presumption he is the biological father of the child. In contrast, if the birth mother answers on the Worksheet that she is not married to the father of her child or identifies her female spouse as the second parent, no name other than the birth mother's name is listed as a parent on the birth certificate. ECF 78-10; ECF 78-14. This is because the State refuses to grant the same-sex spouse of the birth mother the rebuttable presumption of parenthood even though it grants the presumption to similarly situated opposite-sex spouses.

The State argues that a woman who claims to be married to the father of her child when in actuality the child was conceived by the aid of a third-party sperm donor, "commits fraud and may be prosecuted," App. Br. 15, under I.C. § 16-37-1-12, which provides:

> A person who, with intent to defraud:

> (1) makes a false or fraudulent statement in applying to a local health officer or to the state registrar for a certified copy of a birth certificate;
>
> (2) makes a false or fraudulent statement in applying to the state registrar for permission to inspect public birth records held by the state registrar;
>
> (3) alters, counterfeits, or mutilates a certified copy of a birth certificate issued by a local health officer or by the state registrar; or
>
> (4) uses an altered, a counterfeit, or a mutilated certified copy of a birth certificate;
>
> commits a Level 6 felony.

The district court correctly disagreed with the State's interpretation of the statute:

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

Short App. 39. In other words, as correctly interpreted by the district court, I.C. § 16-37-1-12 does not apply to the gathering of information to be used in generating the birth certificate but rather goes to discourage identity theft, e.g., making it a crime to lie when making application for a certified copy of a birth certificate.

The State claims that applying the presumption to the same-sex spouse creates a new "irrefutable presumption." App. Br. 26. However, the district court correctly noted that "the same methods for rebutting the presumption of parenthood of the husband of a birth mother are available for rebutting the presumption of parenthood of the wife of a birth mother." Short App. 8. Further, the fact that the spouse of the birth mother is a woman does not automatically rebut the presumption. App. Br. 26. Removal of a parent from the birth certificate requires an order of paternity or maternity. A man challenging the presumption given the same-sex spouse must be able to show he is genetically related to the child. [5] Under current Indiana law, the only person who can challenge the paternity of a child under these circumstances would be the biological father through a paternity action. *Paternity of E.M.L.G.*, 863 N.E.2d 867, 869-70 (Ind. Ct. App. 2007) (there is no provision to disestablish paternity); *Paternity of T.M.*, 953 N.E.2d 96, 99 (Ind. Ct. App. 2011) ("A legal father may challenge paternity only in extreme and rare instances."); I.C. § 31-14-5-3 (biological father must file paternity action within 2 years of birth).

Additionally, the State grants legitimacy, i.e., born in wedlock status, to the children of opposite-sex couples conceived via artificial insemination. The State denies legitimacy to the children of same-sex couples conceived

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[5] As discussed *infra*, p. 33, the courts will not release a parent listed on the birth certificate from his or her parental obligations unless there is another stepping into his/her place.

of wedlock. There is only one statutory source of definitions utilized by the State of "children born in wedlock" and "children born out of wedlock."

I.C. § 31-9-2-15 provides:

> "Child born in wedlock", for purposes of IC 31-19-9, means a child born to:
> (1) a woman; and
>
> (2) a man who is presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2) unless the Presumption is rebutted.

I.C. § 3 1-9-2-16 provides:

> "Child born out of wedlock", for purposes of IC 31-19-3, IC 31-19- 4-4, and IC 31-19-9, means a child who is born to:
>
> (1) a woman; and
>
> (2) a man who is not presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2).

B. The meaning and use of a birth certificate

The State argues that "being listed on a child's birth certificate does not confer parental rights." App. Br. 31. In actuality, it is the birth certificate that allows an individual to exercise parental rights. Due to the Presumption Statute, the State does not question who is listed as the second parent on the birth certificate if the spouse is a man.

The presence of the husband's name on the birth certificate undermines the State's argument that a husband is "*presumed* to be the child's biological father, but he would not have any legal parental rights

unless he were *actually* the child's biological father." App. Br. 31.[6] By having his name on the birth certificate, the husband is accorded a number of parental benefits, regardless of whether he has a genetic relationship to the child.

The birth certificate is used for a panoply of purposes, including the establishment of citizenship, identity, and parentage:

> Obtaining a birth certificate that accurately identifies both parents of a child born using anonymous donor insemination or adopted by those parents is vitally important for multiple purposes. The birth certificate can be critical to registering the child in school; determining the parents' (and child's) right to make medical decisions at critical moments; obtaining a social security card for the child; obtaining social security survivor benefits for the child in the event of a parent's death; establishing a legal parent child relationship for inheritance purposes in the event of a parent's death; claiming the child as a dependent on the parent's insurance plan; claiming the child as a dependent for purposes of federal income taxes; and obtaining a passport for the child and traveling internationally. The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities.

Henry v. Himes, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), rev'd sub nom. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The birth certificate serves as

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[6] Not only does the State fail to cite any law in support of this position but it also fails to explain how any father has parental rights if he is required to prove his genetic connection with the child before he can make parental decisions.

a child's written introduction to the world and remains with that child throughout his/her life.

The Worksheet itself states, "The birth certificate is a document that will be used for legal purposes to prove your child's...parentage." ECF 78-4, p. 1. In Indiana, the birth certificate is utilized by parents seeking to exercise and meet the rights and responsibilities associated with parenthood. *See, e.g.,* § I.C. 29-1-2-7(b)(6) (the rights of inheritance of children); I.C. § 31-17-2-17 (the right to make decisions regarding a child's medical and emotional healthcare); I.C. § 31-17-4-1 (parenting time and custodial rights in the event of divorce); 470 IAC 3-4.7-36 (parent must also provide a birth certificate to enroll a child in daycare). Additionally, there is a plethora of other uses of the birth certificate outside of Indiana law.

A parent seeking to secure a passport for a minor child is required to provide "evidence of Parental Relationship." 22 C.F.R. 51.28; https://travel.state.gov/content/passports/en/passports/under-16.html (Last visited Mar. 18, 2017). School districts require a parent to present a birth certificate or other reliable proof regarding the child's identity, otherwise the school is required to notify the Indiana clearinghouse on missing children the child's birth certificate when enrolling the child. I.C. § 20-33-2-10. *See also* http://www.myips.org/ENROLL (Last visited Mar. 5, 2017). Enrolling a child in organized sports also requires presenting a birth certificate. See, e.g.,

http://www.littleleague.org/assets/forms_pubs/tournaments/proof-of-age-requirement.pdf (Last visited Mar. 18, 2017).

C. The Parenthood Statutes require heightened scrutiny.

The Parenthood Statutes discriminate against the Families based on gender and sexual orientation. The Presumption Statute creates two classes of similarly situated individuals, one of which is favored and granted rights (married male spouses in opposite-sex marriages), and the other of which is disfavored and severely burdened (married female spouses in same-sex marriages). The former is presumed to hold parental rights while the latter is not.

The Wedlock Statutes also create two classes of similarly situated parents and children. The favored class consists of those opposite-sex couples who conceive their children by artificial insemination and whose children are deemed "born in wedlock" which in turn means the child is able to share the husband's name. The disfavored and severely burdened class is comprised of female same-sex married couples who conceived their children by artificial insemination and whose children the State deems to be "born out of wedlock" and only allowed to carry the last name of the birth mother.

Because the Presumption Statute by its own terms only applies to opposite-sex married couples, the statute denies equal protection to female same-sex married couples and their children. This Circuit, as well as the Second and Ninth Circuits, has applied intermediate scrutiny to a statute

which on its face denies equal protection on the basis of sexual orientation. *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014); *Windsor v. U.S.*, 699 F.3d 169, 181-82 (2d Cir. 2012), aff'd on other grounds 133 S. Ct. 2675 (2013); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014). Additionally, because the plain language of the contested statutes are gender-exclusive classifications which afford rights and benefits that are available only to males and their children but not to females and their children, this Court should apply intermediate scrutiny. *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014) ("Gender is a quasi-suspect class that triggers intermediate scrutiny in the equal protection context").

Further, heightened scrutiny is applied where, as here, a child is disadvantaged because of the circumstances of the child's birth. *See Pickett v. Brown*, 462 U.S. 1, 7-8 (1983) ("we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny"); *Matthews v. Lucas*, 427 U.S. 495, 504 (1976) ("legislation treating legitimate and illegitimate offspring differently is constitutionally suspect"). Because the Wedlock Statutes favor children born to a marriage consisting of a man and a woman and disfavors children born to a marriage consisting of two women, intermediate scrutiny also applies as the classification of children is dependent upon the sex of the parents.

Under the heightened standard of review, a challenged statute can survive intermediate scrutiny only if the State can show that it "serves

important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656 (citing *U.S. v. Virginia*, 518 U.S. 515, 524 (1996), *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982)). These justifications must be genuine, not hypothesized or invented post hoc in response to litigation, *U.S. v. Virginia*, 518 U.S. at 533, and they must be "exceedingly persuasive." *Varner v. Illinois State Univ.*, 226 F.3d 927, 934 (7th Cir. 2000) (quoting *U.S. v. Virginia*, 518 U.S. at 531). The State cannot meet this standard.

D. *Obergefell* requires Indiana to list the Spouses on the birth certificates.

Under *Obergefell v. Hodges*, same-sex married couples may no longer be denied "the constellation of benefits that the States have linked to marriage." 135 S.Ct. 2584, 2590 (2015). In recognition of this rule of law, the U.S. Supreme Court has held that same-sex spouses are entitled to be named on birth certificates on the same terms as opposite-sex spouses. Several of the same-sex couples in *Obergefell* presented the identical issue pending in the instant case, i.e., they were married same-sex couples who sought to be listed on their children's birth certificates after Ohio refused to list the birth mother's same-sex spouse on the birth certificate. See, *Henry v. Himes*, 14 F. Supp. 3d at 1041-42. Similarly, in *Tanco v. Haslam*, a same-sex couple sought to have their marriage recognized by Tennessee so both parents would be listed on the birth certificate just like opposite-sex couples

who also conceived through artificial insemination. *Tanco v. Haslam*, 7 F. Supp.3d 759, 764 (M.D. Tenn. 2014), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*. The Court specifically addressed the issue of birth certificates in cases of children born to female same-sex parents in its opinion:

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

Obergefell, 135 S. Ct. at 2601 (emphasis added). Thus the U.S. Supreme Court intentionally identified same-sex spouses being listed on a birth certificate as an aspect of marriage.

The breadth of the *Obergefell* majority's holding prompted Chief Justice Roberts to observe that the majority had shut the door on litigation over the "ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents." *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting). Indeed, in *Obergefell* the Court expressly held that same-sex marriage includes the benefits, rights and responsibilities "intertwined with marriage." *Id.* at 2606. This includes the right of a married same-sex couple who give birth during their marriage to a two-parent birth certificate, just as it is accorded opposite-sex married couples who rely upon artificial insemination. As the Supreme Court further observed, "[w]ithout the recognition, stability, and

predictability marriage offers, the[] children [of same-sex couples] suffer the stigma of knowing that their families are somehow lesser." *Id.*

The district court below recognized the controlling force of *Obergefell*:

> Regarding the Supreme Court's decision in *Obergefell*, the State Defendant asserts that *Obergefell* actually decoupled marriage from parenthood because the right to marry cannot be conditioned on the capacity or commitment to procreate. It argues that, at most, the *Obergefell* decision stands for the proposition that any benefit of marriage must now be extended to same-sex married couples on an equal basis with opposite-sex married couples. But this is exactly what the Plaintiffs seek—the extension of a benefit of marriage on an equal basis.
>
> When the State Defendant created and utilized the Indiana Birth Worksheet, which asks "are you married to the father of your child," the State created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father. Because of *Baskin* and *Obergefell*, this benefit—which is directly tied to marriage—must now be afforded to women married to women.

Short App. 24-25.

E. Other federal and state courts have held that states must treat same-sex and opposite-sex couples equally regarding two-parent birth certificates.

Federal courts addressing the same issues presented in this case have held that under *Obergefell*, both same-sex married parents must be included on birth certificates. For example, following *Obergefell*, Florida's Surgeon General argued that complying with the Supreme Court's decision with regard to birth certificates would cause it to violate the state's presumption of paternity statute, which, like Indiana, was limited to husbands. *Brenner v. Scott*, Case Nos. 4:14cv107-RH/CAS, 4:14cv138-

RH/CAS, 2016 WL 3561754 at *3 (N.D. Fla. Mar. 30, 2016). The district court dismissed the state's concerns, and expressed impatience with the state's failure to do "what *Obergefell* plainly requires with respect to birth certificates" and ordered the Surgeon General to include both same-sex parents on the birth certificate. *Id.*; *See also Carson v. Heigel*, 2017 WL 624803, No. CV 3:16-0045-MGL, (D.S.C. Feb. 15, 2017) (failure to treat same-sex spouses in same manner as opposite-sex spouses regarding birth certificates violated Fourteenth Amendment); *Torres v. Seemeyer*, 15-cv-288-bbc, 2016 WL 4919978, at *8-9 (W.D. Wis. Sept. 14, 2016) (granting summary judgment to class of same-sex married couples seeking birth certificates including names of both parents); *Marie v. Mosier*, 196 F. Supp.3d 1202 (D. Kan. July 22, 2016) (under *Obergefell*, married couples must be treated equally regardless of biological connection to child); *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL 4476734 (D. Utah July 22, 2015) (requiring issuance of birth certificates to same-sex spouses on same terms and conditions as opposite-sex spouses); *Campaign v. Miss. Dep't of Human Servs.*, 175 F. Supp.3d 691 (S.D. Miss. 2016) (right of gay couples to adopt is "marriage-related benefit" and under *Obergefell* states cannot grant right to heterosexuals but deny right to gay couples). *See also Gartner v. Dep't of Public Health*, 830 N.W.2d 335, 341 (Iowa 2013) (deciding prior to *Obergefell*

that equal protection provisions of Iowa constitution required Iowa to include birth mother's same-sex spouse on birth certificate).[7]

Additionally, although not a birth certificate case, the Arizona court of appeals in *McLaughlin v. Jones* held that the state's presumption of paternity statute must be applied in a gender-neutral manner in light of *Obergefell*. 382 P.3d 118, 122 (Ariz. Ct. App. 2016); *See also Roe*, No. 2:15-cv-00253-DB, 2015 WL 4476734, at *9. *McLaughlin* is noteworthy because the appellate court explicitly rejected the same argument made by the State here - that the statute was a "biological paternity statute" which could not possibly apply to the female spouse of a birth mother. *Id.* at 123. According to the court, paternity "encompasses the notion of parenthood voluntarily established without regard to biology." *Id.* The presumption's purposes, which are to promote the child's support and preserve families, "are equally served whether the child is born during the marriage of a heterosexual couple or to a couple of the same sex." *Id.*

F. Indiana law historically establishes that both spouses are parents of a child born during the marriage, regardless of biology.

The State presents what it considers to be the "historical development" of laws governing parenthood. But this outline of Indiana

[7] Only one court has held otherwise, and a petition for certiorari in that case is currently pending before the U.S. Supreme Court. *Smith v. Pavan*, 2016 Ark. 437, 505 S.W.3d 169 (2016), petition for cert. filed Feb. 13, 2017.

jurisprudence - all pre-*Obergefell*,[8] *Baskin*, and *Gardenour* - completely overlooks the fact that in actuality, Indiana has long promoted parenthood when it is in the best interests of the child, regardless of genetic relationships.

The foundation of Indiana's jurisprudence regarding parenthood is firmly anchored to the notion that both spouses are to be considered the legal parent of the child whenever it is in the best interests of the child, regardless of genetics. We know this because 1) without relying upon adoption or genetics, Indiana has declared that same-sex couples are the legal parents of children conceived by artificial insemination; 2) historically, Indiana's overarching goal has been to recognize parenthood regardless of biological connection; and, 3) Indiana's articulated interest is in promoting and protecting families, not vital statistics.

1. Under Indiana law, married same-sex spouses are the legal parents of children conceived by artificial insemination.

Based on Indiana law, the state courts have held that a same-sex spouse of a birth mother is the legal parent of a child conceived by artificial insemination. *Gardenour*, 60 N.E.3d 1109. In *Gardenour*, a couple joined in a California registered domestic partnership agreement, together successfully planned and provided for the conception of a child by artificial

[8] The Indiana Court of Appeals recently recognized that *Obergefell* changes the legal landscape regarding parental rights now that same-sex couples may marry. *Brown v. Lunsford*, 63 N.E.3d 1057, 1065 (Ind. Ct. App. 2016).

insemination. After moving to Indiana, the couple filed for divorce. The issue before the trial court was whether the child was a child of the marriage.

The *Gardenour* court held, "In Indiana, spouses who knowingly and voluntarily consent to artificial insemination are the *legal parents* of the resulting child." *Gardenour*, 60 N.E.3d at 1120-1121 (emphasis added). *Gardenour* is premised upon Indiana jurisprudence which first answered the question of parenthood regarding children conceived by artificial insemination and born to a married opposite-sex couple *See also*, *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994) (inferring parent-child relationship where child was conceived by artificial insemination with consent of both marital partners); *Engelking v. Engelking*, 982 N.E.2d 326, 328-29 (Ind. Ct. App. 2013) (divorcing husband who "knowingly and voluntarily consent[ed]" to artificial insemination is obligated to support children of his former marriage, even though there is no biological relationship between father and children).

To apply the Parenthood Statutes to female same-sex couples is not a change in the law but rather, as in *Gardenour,* a logical extension of existing law after *Obergefell*.

2. A biological relationship between the non-birth spouse and the child has never been the single factor controlling parenthood.

In retracing the historical development of Indiana's parenthood laws, the State leaves out a very significant and important aspect of the arc of

Indiana's jurisprudence. That is, Indiana has historically held that both married spouses are parents of children born during the course of a marriage regardless of genetics.[9] *See Estate of Lamey v. Lamey*, 689 N.E.2d 1265 (Ind. Ct. App. 1997) (where child was "born into an intact marriage and held out to the public by [father] as his daughter" father's family was not permitted to set aside paternity); *Paternity of H.J.B.*, 829 N.E.2d 157 (Ind. Ct. App. 2005) (husband's family could not disestablish paternity because declaring child was not husband's "would undoubtedly produce a negative emotional effect"); *Pinter v. Pinter*, 641 N.E.2d 101 (Ind. Ct. App. 1994) (father was not biological father of the child, but was not permitted to set aside paternity.); *Paternity of K.M.*, 651 N.E.2d 271, 276 (Ind. Ct. App. 1995) (public policy of protecting child's interest took precedent over biology); *Ohning v. Driskill*, 739 N.E.2d 161 (Ind. Ct. App. 2000) (as mother listed child's father on birth certificate, mother estopped from disputing child's paternity); *Sheetz v. Sheetz*, 63 N.E.3d 1077, 1083 & n.6 (Ind. Ct. App. 2016) (husband not biologically related to child but who signed birth certificate equitably estopped from rebutting parenthood); *Myers v Myers*, 13 N.E.3d 478, 483 (Ind. Ct. App. 2014) (mother estopped from challenging father's parenthood as father was identified on child's birth certificate). [10]

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[9] Indiana law further provides for the presumption of parenthood if a man receives the child into his home and openly hold the child out as his own. I.C. § 31-14-7-2.

[10] Interestingly, in cases other than those involving same-sex couples, it is the State that argues the man should continue to be considered the father of the child, even after it is discovered there is no biological

One of the reasons why Indiana has historically looked beyond genetics to establish parenthood is that it recognizes whenever a child can have two parents rather than one parent, it is to the child's advantage. *See, e.g., Paternity of E.M.L.G.*, 863 N.E.2d 867, 870 (Ind. Ct. App. 2007) (Indiana policy strongly disfavors leaving a child without two parents); *In re the Paternity of H.J.B.*, 829 N.E.2d 157, 160 (Ind. Ct. App. 2005) (*citing D.R.S. v. R.S.H.*, 412 N.E.2d 1257, 1261 (Ind. Ct. App. 1980)) (it is appropriate to withhold disestablishment of deceased father's paternity until paternity established in another as "[w]ere we to hold otherwise, our courts could create a 'filius nullius [son of no one],' which is exactly what paternity statutes were created to avoid"); *Paternity of H.H.*, 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (no proof of biological relationship required to protect a father's and child's rights in parental relationship).

The district court correctly noted that "the legitimacy statutes do not refer to biology when they define the terms 'child born in wedlock' and 'child born out of wedlock.'" Short App. 40. The State argues that Indiana law defines wedlock as the status of the biological parents in relation to each other and cites *K.S. v. R.S.*, 669 N.E.2d 399, 402 (Ind. 1996). App. Br. 43.

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relationship. *See, Paternity of E.M.L.G.*, 863 N.E.2d 867 (Ind. Ct. App. 2007) (man who signed paternity affidavit knowing he is not biological father of the child, will not be released from his parental obligations); *Paternity of M.M.B.*, 877 N.E.2d 1239 (Ind. Ct. App. 2007); (State defeated father's attempt to set aside paternity after father obtained DNA test showing he was not biological father).

However, this case was handed down the year prior to the legislature passing the Wedlock statutes. In *K.S.* the court specifically stated that the statutes "do not define 'child born out of wedlock.'" *K.S.*, 669 N.E.2d at 402. Therefore, *K.S.* is arguably no longer controlling, as the Legislature effectively reversed the ruling.

Given Indiana's disregard for biology in the fashioning of parental relationships, it is strange for the State now to claim that "Indiana law confers parental rights exclusively through biological relationships and adoption." App. Br. 30. This is obviously not true. The foregoing cases present a wealth of jurisprudential history conveniently overlooked by the State and which repeatedly demonstrates that parenthood in Indiana is *not* premised solely upon biology and adoption as is claimed by the State.

3. The Indiana legislature has declared that the State's interest in adopting the Parenthood Statutes is in promoting and protecting families and not vital statistics regarding biology.

Indiana law expressly provides that the State's interest in enacting the Presumption Statute is to:

> (1) recognize the importance of family and children in our society;
>
> (2) recognize the responsibility of the state to enhance the viability of children and family in our society;
>
> (3) acknowledge the responsibility each person owes to the other;
>
> (4) strengthen family life by assisting parents to fulfill their parental obligations . . .

I.C. § 31-10-2-1(1)-(4); See also *Straub v. B.M.T, by Todd*, 645 N.E.2d 597, 599 (Ind. 1994) ("One well-established public policy of this State is protecting the welfare of children….[T]his policy is of the utmost importance."). As the district court noted, "Courts in Indiana have repeatedly focused on the State's interest in protecting the best interests of the child when making determinations in the family law context." Short App. 19 (*citing In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1257 (Ind. Ct. App. 2004) ("The guiding principle of statutes governing the parent child relationship is the best interests of the child.")). Failure to recognize the same-sex spouse of the birth mother as the legal parent goes against the State's interest in the protection of families and children:

> [O]ur paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle.
> * * * *
> We are not called upon to approve or disapprove of the relationship between the appellants. Whether we do or not, the fact remains that Deborah [the same-sex partner who is not biologically related to the children] has acted as a parent of [the children] from the moment they were born. To deny legal protection of their relationship, as a matter of law, is inconsistent with the children's best interests and therefore with the public policy of this state, as expressed in our statutes affecting children.

In re K.S.P., 804 N.E.2d at 1259-60 (citation omitted). *See also, A.C. v. N.J.*, 1 N.E.3d 685, 692 (Ind. Ct. App. 2013) (where child was artificially conceived while unmarried same-sex couple lived in committed

relationship, "partner who did not give birth to child has standing to seek visitation with the child").[11]

Instead of recognizing the express statutory purpose supporting the Presumption Statute, the State argues that discrimination against same-sex married couples can be justified on the basis of biology. App. Br. 13, 20. *Obergefell* rejects this argument. The Supreme Court reversed the Sixth Circuit, which had permitted such discrimination based on "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes." *DeBoer v. Snyder*, 772 F.3d at 405. In rejecting this argument, the Supreme Court noted that same-sex couples also establish families and many "provide loving and nurturing homes to their children." *Obergefell*, 135 S. Ct. at 2600. As the Supreme Court further observed, "[w]ithout the recognition, stability, and predictability marriage offers, the[] children [of same-sex couples] suffer the stigma of knowing that their families are somehow lesser." Id.

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[11] An example of how the presumption works against the best interests of the child is the situation where the birth mother dies during child birth and the sperm donor is anonymous. By refusing to apply the presumption of parenthood for the same-sex spouse, the child would be left without a second parent and the child would become a ward of the state, a double tragedy. Under Indiana law it is a crime to disclose the identity of a sperm donor if the donor chooses to be unidentified. I.C. § 16-41-14-15. Even where the sperm donor is known, if he signed a sperm donor agreement, he is under no obligation to assume responsibility for the child. *See Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010) (upholding sperm donor agreement).

This Court has also recognized the unconstitutionality of biology as a qualifier regarding the care and protection of families and children. In *Baskin v. Bogan*, the State argued against same-sex marriage on the grounds of biology - primarily procreation - claiming that the purpose of marriage was to protect children born as a result of a spontaneous coupling between a man and a woman. 766 F.3d at 660-62. As same-sex couples cannot procreate, there is no need for marriage, or so the argument went and failed. *Baskin*, 766 F.3d at 662. In its arguments in the present case, as in *Baskin*, the State once again repeatedly uses the qualifier "biological." And once again, the unconstitutional use of the qualifier is clear:

> The state's lawyers tell us that "the point of marriage's associated benefits and protections is to encourage child-rearing environments where parents care for their biological children in tandem." Why the qualifier "biological"? The state recognizes that family is about raising children and not just about producing them.

Id. at 663. In *Baskin*, the primary concern for the Court was the "welfare of the children." *Id.* at 654.

The district court rejected the State's claimed objective of protecting biological fathers:

> The Indiana Birth Worksheet asks, "are you married to the father of your child" yet it does not define "father." This term can mean different things to different women. Common sense says that an artificially-inseminated woman married to a man who has joined in the decision for this method of conception and intends to treat that child as his own, would indicate that she is married to the father of her child. Why would she indicate otherwise? It does not state that the father must be the biological father of the child and it does not indicate that

> it is completed under penalties of perjury. There is no warning of fraud or criminal liability.

Short. App. 38-39.

The State claims, "the paternity presumption serves Indiana's compelling interest in identifying the two biological parents of each child with the greatest practicable accuracy, efficiency, and cost-effectiveness", claiming "[a]t least one medical study shows that the incidence of misattributed paternity in the United States is less than 1%." App. Br. 45 (citing L.F. Ross, *Good Ethics Requires Good Science: Why Transplant Programs Should NOT Disclose Misattributed Parentage*, 10 Am. J. of Transplantation 742, 744 (2010)). The State's reliance upon the article is misplaced.

The article upon which the State relies is actually an opinion piece relating to the ethical question of whether women who undergo testing to determine compatibility for purposes of living donor-recipient compatibility should be informed of misattributed paternity. App. 20. The referenced testing involved not the population in general but a limited number of people who are a subset of the population based upon their HLA not DNA test results. Contrary to the State's claim, nowhere within the opinion piece is it claimed that there is only a 1% misattribution of paternity in the general population in Indiana or nationwide.[12]

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[12] Before the district court, the Families also argued that the paragraphs in the affidavit introducing the opinion piece and discussing the opinion piece should be stricken or given no weight because it was irrelevant and

Ignoring the legislative interest in protecting and promoting families and the history of endowing parenthood upon married spouses without regard for genetics, the State claims that its interest is "in ensuring that biological parents are vested with legal parental rights (subject to any subsequent adoption)" and in protecting the rights of the biological parent's relationship with the child. App. Br. 44. Any biologically related father can seek to be named on a child's birth certificate provided he files a paternity action within two years after the child's birth. I.C. § 31-14-5-3. This applies equally to both opposite-sex and same-sex couples. Thus, contrary to the State's claim, there is no more usurping of the rights of the biological father.

4. Requiring same-sex couples to adopt their children is contrary to the protection and promotion of families and unduly burdensome upon the Families.

Through use of the Worksheet, the State has established a process by which the husband of the birth mother is named on the birth certificate of a child conceived by artificial insemination, without having to adopt the child. By refusing to name as parent the same-sex spouse of the birth mother of a child conceived by artificial insemination, the State requires the

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that these portions of the affidavit failed to satisfy the requirements of Fed. R. Civ. P. 56(c)(4). ECF 100, pp. 27-30. The district court did not rule upon the request to strike the affidavit but it apparently disregarded it because it does not discuss the opinion piece nor the affidavit's discussion of the opinion piece in its opinion.

same-sex spouse to go through the expensive,[13] cumbersome,[14] emotionally draining, and time-consuming stepparent adoption process in order to legally establish her status as a co-parent of the child born into her marriage and for which she carefully planned.

In contrast, a married man and woman who conceive through third party donor insemination are not required to go through the expense, scrutiny, and delay of adoption proceedings to have their parent-child relationship recognized by the State of Indiana. The husband is granted the presumption of parenthood as shown by the issuance of the birth certificate containing husband's name as the father of the child. Thus the opposite-sex family is protected by the State while the same-sex family is not.[15]

The State argues that if the Children are declared to be born in wedlock, as ordered by the district court, and if the Spouses seek to adopt the Children, then the Spouses are burdened by attempting to get consent to the adoption from anonymous sperm donors. App. Br. 37. If the sperm

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[13] These expenses include attorney fees, filing fees, and all fees associated with the criminal background check and home study. The Bush-Sawyers estimated the cost to be approximately $4,200.00. ECF 79-1, p. 3.

[14] The spouse would be required to file a petition (I.C. § 31-19-2-2), complete a medical report (I.C. § 31-19-2-7), criminal history check (I.C. § 31-19-2-7.5), home study (I.C. § 31-19-8-1), present extensive personal and financial documentation, and have a court hearing.

[15] The State's refusal to apply the presumption of parenthood to same-sex couples creates impossible situations. Jackie Phillips-Stackman, whose egg was fertilized and implanted into her wife, Lisa, App. 10, would require Jackie to either adopt her biologically related child or file an action to declare Jackie the mother. This would result in Lisa being declared to not be the mother despite being the birth mother.

donor is known, then he is entitled to notice. If the sperm donor is unknown, notice is impossible. In anonymous sperm donor cases. notice should not be a problem because the donor is required by the agency to sign a sperm donor agreement wherein he waives all parental rights. The State actually questions the validity of donor agreements but Indiana courts have addressed this and upheld such agreements. *Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010). App. Br. 35.[16]

As the Parenthood Statutes fail to promote and protect families and children, they deny the Families equal protection.

G. The State's discrimination against the Families on the basis of gender and sexual orientation is not substantially related to the achievement of an important governmental objective.

The Parenthood Statutes are underinclusive and overinclusive in violation of the Equal Protection Clause resulting in discrimination against the Families. Under intermediate scrutiny, there are primarily two questions to be resolved:

> The question is whether the statutes are substantially related to the achievement of promoting, protecting and preserving families and acting in the best interests of the child. Or, as this Court has asked: "[I]s the discriminatory policy overinclusive because the benefit it confers on society could be achieved in a way less harmful to the discriminated-against group, or underinclusive because the government's

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16 The State cites *Straub,* 645 N.E.2d at 601, to question the validity of donor agreements. *Straub* was not a case of artificial insemination. In actuality *Straub* found that "there is no such thing as 'artificial insemination by intercourse.'" Therefore, the donor agreement in that case was invalid for lack of lawful consideration.

> purported rationale for the policy implies that it should equally apply to other groups as well?"

Baskin, 766 F.3d at 655.

1. The Presumption Statute is underinclusive and overinclusive.

The Presumption Statute is both underinclusive in terms of the class of persons it seeks to protect and overinclusive because the harm it imposes outweighs the benefit.

"[T]o say that the policy is underinclusive is to say that its exclusion of other, very similar groups is indicative of arbitrariness." *Baskin*, 766 F.3d at 656. Granting the rebuttable presumption of parenthood to a male spouse who is not biologically related to the child while denying the same rebuttable presumption to a female spouse who is similarly situated is indicative of arbitrariness in this case because the statute is not substantially related to promoting and protecting families and doing what is in the best interests of the child. The Presumption Statute is underinclusive because it only provides for men and fails to allow a female spouse in a similar situation the same presumption of parenthood.

The Presumption Statute is overinclusive because in its effort to create a biological presumption between a man and a child, it unnecessarily imposes unequal treatment. Granting the rebuttable presumption of parenthood to a male spouse who is not biologically related to the child while denying the same rebuttable presumption to a female spouse who is similarly situated is indicative of arbitrariness because the statute is not

substantially related to promoting and protecting families and doing what is in the best interests of the child.

As discussed *supra,* p. 34-41, the discrimination against these Families is not outweighed by any possible benefit to them or to society. The harm to these Families is not necessary to achieve, and is, in fact, inimical to the promotion and protection of families or doing what is in the best interests of the child. Because the Presumption Statute imposes harm beyond any benefit, it is also overinclusive.

2. I.C. § 31-9-2-15 is underinclusive and I.C. § 31-9-2-16 is overinclusive.

I.C. § 31-9-2-15 is underinclusive because it does not classify the children conceived by artificial insemination and born to a lawfully married same-sex couple as children born in wedlock, instead expressly limiting children born in wedlock to only those children born to a man and a woman. I.C. § 31-9-2-16 is overinclusive because the harm it imposes upon children born to a same-sex marriage, stigma from being labelled illegitimate and not being allowed to carry the spouse's name, as well as the harms set forth in this brief is not necessary to preserve and protect families nor is it in the best interests of the child.[17]

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[17] The State argues that the legislature should be left to decide how all of this should be handled, App. Br. 49; however, the Indiana legislature has never addressed parental obligations and rights when a child is conceived artificially by a married couple. Instead, Indiana courts have had the delicate task of sorting out the complicated web of rights and responsibilities that arise when artificial insemination results in a child born into such a partnership. In fact, Indiana courts have pleaded with

III. The Parenthood Statutes deny the Families due process.

The Fourteenth Amendment of the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 ("Due Process Clause").

A. The Parenthood Statutes implicate a fundamental right.

The State erroneously argues, "To the extent the Constitution protects a fundamental right to be a parent, it protects only the rights of biological parents." App. Br. 30. The State fails to recognize the parental relationship is not limited by the genetic relationship of parent and child.

The United States Supreme Court has held that the core of the parent-child relationship protected by the Due Process Clause derives neither from biology nor legal status, but rather from the emotional bonds that develop between family members as a result of shared daily life. *Lehr v. Robertson,* 463 U.S. 248, 261 (1983). Biology alone is neither necessary nor sufficient to establish a constitutionally protected familial relationship. The United States Supreme Court has recognized that a relationship between a child and an adult who has acted as a parent is constitutionally

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the legislature to act but it has declined to do so. *See, Brown v. Lunsford,* 63 N.E.3d at 1064-65 (noting that the court of appeals had previously requested guidance from the legislature concerning the legal questions surrounding "the status of the law surrounding a lesbian partner's right, if any, to enjoy the right of a legal parent of a child born to her partner"*); In re A.B.*, 818 N.E.2d 126, 131 (Ind. Ct. App. 2004), vacated sub nom. *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005) ("We encourage the Indiana legislature to help us address the current social reality by enacting laws to protect children who, through no choice of their own, find themselves born into unconventional familial settings").

protected. See *Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977) (grandmother who was raising her grandsons had constitutionally protected relationship with them); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (biological father's substantive due process right to maintain connection with child was insufficient to overcome California's presumption that husband of child's mother was the child's father, where the husband was raising the child).

Fundamental rights, although generally limited, have long been deemed to include "matters relating to marriage, family, procreation, and the right to bodily integrity," *Albright v. Oliver*, 510 U.S. 266, 272 (1994), and what has been described as "perhaps the oldest of the fundamental liberty interests recognized," a parents' liberty interest in the "care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Parents hold a protected liberty interest in controlling their children's religious upbringing, *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children"); in the way they choose to educate their child, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (law that required children to attend public schools unreasonably interfered with fundamental parental right to guide child's intellectual and religious upbringing); and in controlling their child's education. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *see also, Stanley v. Illinois*, 405 U.S. 645 (1972) (unwed father who acted as parent to his

children and lived with mother for many years holds liberty interest in parental control); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (recognizing constitutional protection of personal decisions regarding marriage, procreation, contraception, family relationships, child rearing, and education); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (there is "a fundamental liberty interest of natural parents in the care, custody, and management of their child."). Preserving families promotes not just the parents' fundamental liberty interest in raising and caring for their own children but also promotes and protects the children's interests. *E.M. v. Ind. Dept. of Child Servs.*, 4 N.E.3d 636, 647 (Ind. 2014).

Just like any man married to a woman artificially inseminated by another, Ashlee, Elizabeth, Nicole, Noell, Tonya, Cathy, Sarah and Donnica decided with their spouses to conceive a child and are each loving and deeply committed parents. They act as parents in every sense of the word and as the spouse of the birth mother, just like any man in the same circumstances. Like any other parent, they have a fundamental right to make decisions that involve the welfare and raising of their children and the State should not penalize their children by labeling them illegitimate and limiting the child to carrying only the name of the birth mother.

B. The Parenthood Statutes are subject to strict scrutiny.

When legislation burdens the exercise of a fundamental right, strict scrutiny applies, and the State must show that the statutory classification serves a compelling state interest "and is closely tailored to effectuate only

those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Inasmuch as the Parenthood Statutes cannot withstand even intermediate scrutiny, they cannot survive the more demanding strict scrutiny required by substantive due process.

C. The Parenthood Statutes are not narrowly tailored to any State interest.

As discussed *supra*, p.34-41, the Parenthood Statutes are neither closely tailored nor rationally related to any State interest. The statute's exclusion of the same-sex spouses of birth mothers does not legally bind the second parent to the newborn and denies the second parent the joys, obligations and rights of parenthood. At the same time, the Children are stigmatized, made to feel their family is of lesser value than families headed by a man and a woman, and are denied the security and benefits of having two people legally recognized as their parents.

IV. The Families have standing to challenge the Wedlock Statutes.

"[S]tanding requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 801 (7th Cir. 2016) (*quoting Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013)) (internal quotations omitted). For claims "challenging the legality of government action or inaction," the facts needed "to establish standing depend[ ] considerably upon whether the plaintiff is… an object of the action (or

forgone action) at issue." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992). If so, "there is ordinarily little question that the action or inaction has caused [the] injury, and that a judgment preventing or requiring the action will redress it." *Id.* Stated in equal protection terms, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (citation omitted); *see, also Orr v. Orr*, 440 U.S. 268, 272 (1979) (claim seeking to escape burdens of allegedly underinclusive, gender-based statute sufficient to demonstrate standing).

The State argues that the Families lack standing to challenge the Wedlock Statutes because: (1) the Families are not harmed by the statutes, and (2) their injuries cannot not be redressed by a favorable ruling. App. Br. 45-48. According to the State, the Families benefit from the State's refusal to recognize their children as born in wedlock. App. Br. at 48 ("The statutes would work to Plaintiffs' benefit by relieving them of any need to notify biological fathers of adoption, even if Plaintiffs felt stigmatized in the process.") The State is wrong. The Families have standing to challenge the State's deprivation of this important incident of marriage and its disparate and gender-based treatment of the Families.

First, the Wedlock Statutes, which adopt and incorporate the Presumption Statute,[18] place the Families and other similarly situated families under threat of a concrete and particularized injury. The most visible harm is the exclusion of the non-birth mother's surname from her child's name.[19] "Regardless of how the birth mother answers question 11, Indiana law requires that a 'child born out of wedlock' be given the mother's surname unless a paternity affidavit dictates to the contrary." Short App. 25. Further, the non-birth mother's parental rights are less secure than those of a similarly situated husband whose child will be deemed born in wedlock. For the latter, his notice and consent are required in the event that someone seeks to adopt his child. See I.C. § 31-19-9-1(a)(1) (requiring consent of "[e]ach living parent of a child born in wedlock" to adoption). Female spouses of birth mothers do not receive this protection. Finally, the child born out of wedlock cannot inherit from the non-birth mother's estate under Indiana's intestate succession statute. *See* I.C. § 29-1-2-7. In fact, that statute, written in the same gender-specific terms as the parentage laws at issue in this case, does not even provide for intestate succession in families headed by same-sex parents. *Id.* Thus, the Wedlock Statutes directly harm the Families.

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[18] The State does not dispute the Families' standing to challenge the presumption statute. Nor does the State dispute that the statutory definitions provided by the Wedlock Statutes are the same definitions applied to the Phillips-Stackmans, the Bannicks and the Bush-Sawyers.

[19] I.C. § 31-14-5-2.

Next, the Families' injuries are fairly traceable to the Parenthood Statutes and their enforcement by the State. The Wedlock Statutes incorporate and are dependent on the Presumption Statute. That is, the child is "born in wedlock" when the Presumption Statute applies to the birth mother's spouse. Compare I.C. § 31-9-2-15 ("Child born in wedlock") with I.C. § 31-9-2-16 ("Child born out of wedlock"). The Families' injuries are the direct result of the State's erection of these statutory barriers that make it more difficult for female, same-sex spouses to obtain the same benefits as their male counterparts. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am*, 508 U.S. at 666. By issuing two-parent birth certificates to similarly situated opposite-sex spouses, but not same-sex female spouses, the State denies the birth mother's female spouse and the child the legal presumption that spouse is the child's parent and that the child was born in wedlock. The Families' harm—being denied this incident of marriage, which is manifested in a two-parents birth certificate—is fairly traceable to the Parenthood Statutes and the State's application of those laws.

Finally, the Families' injuries are redressed by a favorable ruling. The State claims that "the Commissioner has no way to recognize each of the Plaintiff Children in this matter as a child born in wedlock[.]" App. Br. 47 (internal quotation omitted). The State is wrong. Since the district court issued its order the State has redressed the injury and directed the counties to complete the Worksheet with the same-sex spouse of the birth mother listed on the birth certificates. App. 2.

It is disingenuous for the State to claim that the Wedlock Statutes have no application to Families. When interpreting Indiana statutes, Indiana courts utilize the doctrine of *in pari materia* which directs that "[s]tatutes which relate to the same thing or general subject matter . . . should be construed together." *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Company*, 485 N.E.2d 610, 617 (Ind. 1985). "A word or phrase which appears in different parts of the statute will be given the same meaning, unless an intention to the contrary clearly appears." *Id.* (citations omitted). For example, while the term postsecondary is not defined in the family law and juvenile law titles of the Code, it is defined in the higher education title and it is the definition of "approved postsecondary educational institution" from the higher education title that is used in interpreting the term in the family law and juvenile law titles. *Allen v. Allen*, 54 N.E.3d 344, 347 (Ind. 2016); *See also State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 347–348 (Ind. Ct. App. 1995), *trans. denied.* ("The legislative definition of certain words in one statute, while not conclusive, is entitled to consideration in construing those same words in another statute.").

In this case, there is no doubt that the State relied upon the two statutes to determine that the Children were all born out of wedlock. The Singleys, Bannicks, and Phillips-Stackmans each received the following notice:

> INDIANA LAW REQUIRES THAT A CHILD BORN OUT-OF--WEDLOCK BE RECORDED UNDER THE NAME OF THE MOTHER.
>
> THE FATHER'S NAME MAY BE ADDED TO THE RECORD IN ONE OF THREE WAYS:
>
> THROUGH AN ORDER OF THE COURT…
> BY MARRIAGE TO THE NATURAL FATHER…
> BY VOLUNTARY PATERNITY…

Short App. 23; App. 9-14; ECF 78-11 p.2; ECF 79-13 p.2; ECF 100-6. The only "Indiana law" defining "child born out-of-wedlock" is I.C. § 31-9-2-16. By claiming that the birth mother must be married to the natural father, the State is utilizing the definition of "child born-in-wedlock" or I.C. § 31-9-2-15 to determine that the Children are illegitimate.[20]

CONCLUSION

The Families respectfully request that the judgment of the District Court be affirmed in its entirety.

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[20] The Indiana Code repeatedly refers to "child born-out-of-wedlock" and "child born-in-wedlock" and there is nothing indicating that the statutes utilize anything but the definitions contained in I.C. § 31-9-2-15 and I.C. § 31-9-2-16. *See,* I.C. § 5-20-3-7(5); I.C. § 12-14-7-3; I.C. § 16-37-2-2(a)(2)(A)-(b); I.C. § 16-37-2-2.1(b)(1)(A)-(B); I.C. § 16-37-2-13; I.C. § 16- 37-2-16; I.C. § 16-37-2-18(3); I.C. § 22-3-3-19(b); I.C. § 22-3-7-13(b); I.C. § 27-8-23-5(1); I.C. § 29-1-1-3(1); I.C. § 29-1-2-7; I.C. § 29-1-6-1; I.C. § 30-4-1-12; I.C. § 31-9-2-10(3); I.C. § 31-9-2-13(1); I.C. § 31-14-1-1; I.C. § 31-14-13-1; I.C. § 31-17-5-1(a)(3); I.C. § 31-17-5-8(a); I.C. § 31-19-9-1(a)(2); I.C. § 31-19-9-8(a)(3)-(4); I.C. § 31-25-4-17(a)(3); I.C. § 31-34-15-6(a); I.C. § 31-35-1-4(a).

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CERTIFICATE OF RULE 32 COMPLIANCE

This brief complies with the type-volume limitation of 7th Cir. R. 32(c) because this brief contains 13,025 words, excluding the parts of the brief excepted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Bookman Old Style, 12 point type.

Dated: March 27, 2017 /s/ Karen Celestino-Horseman

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I caused a true and correct copy of the foregoing BRIEF OF PLAINTIFFS-APPELLEES to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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