No. 17-1141

In the
United States Court of Appeals
for the Seventh Circuit

ASHLEE and RUBY HENDERSON, a married couple, et al.,

Plaintiffs-Appellees,

v.

DR. 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 49 PROFESSORS OF FAMILY LAW AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES ASHLEE AND RUBY HENDERSON, A MARRIED COUPLE, AND L.W.C.H., *ET AL.* AND OF THE AFFIRMANCE OF THE DISTRICT COURT'S DECISION

Eileen Ridley
Counsel of Record
FOLEY & LARDNER LLP
555 California Street, Suite 1700
San Francisco, California 94104
Telephone: (415) 434-4484
Facsimile: (415 434-4507
Email: eridley@foley.com

David B. Goroff
FOLEY & LARDNER LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60654
Telephone: (312) 832-4500
Facsimile: (312)832-4700
Email: dgoroff@foley.com

Counsel for Amici Curiae 49 Professors Of Family Law

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1141

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

49 professors of family law as amici curiae (Names attached as Appendix A to brief).

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Foley & Lardner LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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/ Eileen Ridley Date: 4/3/17

Attorney's Printed Name: Eileen Ridley

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

Address: 555 California Street, Suite 1700
San Francisco, CA 94104

Phone Number: 415-434-4484 Fax Number: 415-434-4507

E-Mail Address: eridley@foley.com

rev. 01/15 GA

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1141

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

49 professors of family law as amici curiae (Names attached as Appendix A to brief).

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Foley & Lardner LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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/ David B. Goroff Date: 4/3/17

Attorney's Printed Name: David B. Goroff

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

Address: 321 North Clark, Street, Suite 2800
Chicago, IL 60654

Phone Number: 312-832-4500 Fax Number: 312-832-4700

E-Mail Address: dgoroff@foley.com

rev. 01/15 GA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

State Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a),[1] *Amici Curiae*, 49 family law professors—all scholars of family law[2]—respectfully submit this brief in support of Plaintiffs-Appellees.[3] Amici have substantial knowledge of, and experience with, the state family laws that address marriage, parentage, and birth certificates, as well as the harms that families and children face when they are not treated equally. Based on our knowledge, this brief explains that Indiana's refusal to place same-sex spouses on their children's birth certificates is inconsistent both with Indiana's own law and with the laws of other states, as well as with the requirements of the U.S. Constitution. This brief also demonstrates how this unequal and discriminatory treatment harms same-sex parents and their children.

SUMMARY OF ARGUMENT

Birth certificates are official documents that are used to prove a child's identity, including the names of a child's legal parents. Indiana, like all states, uses birth certificates to reflect and record legal parentage, and all states recognize that

---

[1]This brief is filed pursuant to consent. Consent to file this amicus was received from the Plaintiffs-Appellees on March 23, 2017, and from the Defendants-Appellants on March 29, 2017. *See* Fed. R. App. P. 29(a)(2).

[2]*Amici* professors are listed in Appendix A.

[3]Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no counsel for any party authored this brief in whole or in part, no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

non-biological parents can be legal parents in some circumstances. All states presume that the spouse of a woman who gives birth is a legal parent, and most states, including Indiana, specifically recognize that a spouse who consents to the use of donor insemination to conceive a child is a legal parent. In this case, the plaintiff parents, who conceived their children through donor insemination, are legal parents under settled Indiana law. But rather than treating these parents equally, the state is refusing to issue birth certificates that list both same-sex spouses as parents, even though it does so for different-sex married couples who use donor insemination to have children.

That discriminatory treatment harms same-sex parents and their children. It destabilizes these families and marks them as unequal, sending a message to them and to the world that they are not worthy of legal recognition. It also prevents parents from being able to prove their parentage in numerous aspects of daily life, including obtaining medical care for their child, making educational decisions, traveling, and obtaining government benefits.

This discrimination also violates the equal protection and due process rights of the plaintiffs and all married same-sex parents and their children. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). The United States Supreme Court has already held that same-sex spouses are entitled to the same full "constellation of benefits" given to other spouses under

state law, including the right to be listed on their children's birth certificates. *Obergefell*, 135 S. Ct at 2601-02.

In sum, Indiana's refusal to name the plaintiff parents on their children's birth certificate is inconsistent with Indiana law, harms the plaintiffs and other married same-sex parents and their children in Indiana, and violates settled constitutional precedent from this Court and the United States Supreme Court.

ARGUMENT

I. INDIANA'S REFUSAL TO PLACE BOTH MARRIED SAME-SEX PARENTS ON THEIR CHILDREN'S BIRTH CERTIFICATES CONFLICTS WITH INDIANA LAW AND THE LAW OF OTHER STATES.

The state's contention that birth certificates are simply records of biological parentage, (Brief of Appellant at 3, ECF No. 9), contradicts well-settled law, both in Indiana and in other states. As Indiana's own law makes clear, a birth certificate is a legal document intended to identify an individual's legal parentage, date and place of birth, citizenship, and gender. For example, Indiana law provides for the issuance of a new birth certificate when a child is adopted, so that the certificate accurately identifies the child's legal parents. Ind. Code §§ 31-19-13-1, -2, -4 (2016) (providing for issuance of "a new certificate of birth for an individual born in Indiana upon a receipt of an official report that the individual has been adopted" and then placing the original birth certificate under seal). Similarly, Indiana

permits the issuance of a new birth certificate when a person has legally changed his or her gender. *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707, 709 (Ind. Ct. App. 2014). As these examples show, Indiana is similar to other states in recognizing that a birth certificate is a legal document, not a medical record. *See, e.g.*, *Henry v. Himes*, 14 F. Supp. 3d 1036, 1052 (S.D. Ohio) ("An Ohio birth certificate is a legal document, not a medical record."), *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); *Raftopol v. Ramey*, 12 A.3d 783, 793 (Conn. 2011) ("A birth certificate is a vital record that must accurately reflect legal relationships between parents and children").

Because they are such important legal documents, birth certificates play a central role in a wide variety of circumstances, affecting many different areas of a person's life. The ramifications of not having a legally accurate birth certificate are far-reaching and adverse, as explained below more fully in Section II. As one court has aptly noted, a birth certificate is "the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts." *Henry v. Himes*, 14 F. Supp. 3d at 1050.

The State also seeks to justify its discriminatory treatment of married same-sex couples by claiming that biology and adoption are the only ways to be legally

recognized as a parent under Indiana law. (Brief of Appellant at 2.) But as the Indiana Supreme Court has already held, Indiana law recognizes that when a married different-sex couple uses donor insemination to have a child, the husband is the child's legal father, despite having no genetic connection to the child. *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994) (holding that "where the husband and wife knowingly and voluntarily consent to artificial insemination, the resulting child is a child of the marriage"). *See also Engelking v. Engelking*, 982 N.E.2d 326, 328-29 (Ind. Ct. App. 2013) (holding that *Levin* applies even where the spouses used a known donor to conceive).[4] And Indiana courts have already held,

[4] Like Indiana, nearly every state in the country, including the other states in the Seventh Circuit, confers legal parentage by statute or case law on a spouse who consents to the use of donor insemination. *See* Ala. Code § 26-17-702 (West 2017); Alaska Stat. Ann.§ 25.20.045 (West 2016); Ariz. Rev. Stat. Ann. § 25-501(B) (West 2017); Ark. Code Ann.§ 9-10-201(a) (West 2017); Cal. Fam. Code § 7613(a) (West 2017); Colo. Rev. Stat. Ann. § 19-4-106(1) (West 2017); Conn. Gen Stat. Ann. § 45a-774 (West 2017); Del. Code Ann. tit. 13, § 8-703 (West 2017); D.C. Code Ann. § 16-909(e)(1) (West 2017); Fla. Stat. Ann. § 742.11 (West 2017); Ga. Code Ann.§ 19-7-21 (West 2017); Idaho Code Ann. § 39- 5405(3) (West 2017); 750 Ill. Comp. Stat. 46/703(a) (West 2016); La. Civ. Code Ann. art.188 (West 2017); Me. Rev. Stat. Ann. tit. 19-a, § 1923 (West 2017); Md. Code Ann., Est. & Trusts § 1-206(b) (West 2017); Mass. Gen. Laws Ann. ch. 46, § 4B (West 2017); Mich. Comp. Laws Ann. § 333.2824(6) (West 2016); Minn. Stat. Ann. § 257.56(1) (West 2017); Mo. Ann. Stat. § 210.824(a) (West 2016); Mont. Code Ann. § 40- 6-106(1) (West 2017); Nev. Rev. Stat. Ann. § 126.670 (West 2016); N.H. Rev. Stat. Ann. § 168-B:2(II) (West 2017); N.J. Stat. Ann. § 9:17-44(a) (West 2017); N.M. Stat. Ann. § 40-11A-703 (West 2017); N.Y. Dom. Rel. Law § 73(1) (West 2017); N.C. Gen. Stat. Ann. § 49A-1 (West 2017); N.D. Cent. Code Ann. § 14-20-61 (703) (West 2017); Ohio Rev. Code Ann. § 3111.95(A) (West, 2016); Okla. Stat. Ann. tit. 10, § 552 (West 2017); Or. Rev. Stat. Ann. § 109.243

as they must, that this rule applies to same-sex spouses. *Gardenour v. Bondelie*, 60 N.E.3d 1109, 1119 & n.4 (Ind. Ct. App. 2016) (holding that *Levin* applies equally to a same-sex couple who used donor insemination to have a child after entering into a registered domestic partnership in California, which is the equivalent of a marriage under California law and is treated as a marriage under comity in Indiana), *transfer denied*, 2017 WL 897559 (Ind. Mar. 2, 2017). Thus, under settled Indiana law, it is plain that the plaintiff parents are legal parents.

Shockingly, the State fails even to cite these cases in its brief. Instead, the State relies on an irrelevant case about the use of donor insemination by an unmarried couple. (*See* Brief of Appellant at 35 (citing *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010) (declining to find that an unmarried partner who consents to donor insemination is a legal parent)).) That case has no application to the plaintiff parents in this case because they are all married. The resolution these plaintiff parents seek does not require the state to change its parentage or birth certificate laws, as the State contends, (Brief of Appellant at 3 & 24.) Rather, the plaintiffs are simply asking the state to treat them equally and provide them with

---

(West 2016); *In re Baby Doe*, 353 S.E.2d 877, 878 (1987); Tenn. Code Ann. § 68-3-306 (West 2016); Tex. Fam. Code Ann. § 160.703 (West 2015); Utah Code Ann. § 78B-15-703 (West 2016); Va. Code Ann. § 20-158(A)(2) (West 2016); Wash. Rev. Code Ann. § 26.26.710 (West 2017); Wis. Stat. Ann. § 891.40(1) (West 2017); and Wyo. Stat. Ann. § 14-2-903 (West 2016). *See also* Model State Vital Statistics Act § 11(h)(1) (Ctrs. For Disease Control and Prevention 2011); Unif. Parentage Act §§ 702–703 (Unif. Law Comm'n 2002).

birth certificates that accurately identify their children's legal parentage under Indiana law, just as the State does for the children of married different-sex parents in the very same circumstances.

As Indiana's own law again makes plain, the State's argument that the sole purpose of the marital presumption is to identify biological fathers has no merit. In Indiana and every other state, a husband is presumed to be the legal parent of his wife's child without having to prove a genetic connection. *See* Ind. Code §§ 31-14-7-1 & 31-9-2-13(a)(2) (2016); Wis. Stat. § 891.41(1) (2015–16); 750 Ill. Comp. Stat. Ann. 46/204 (West 2017); Leslie Harris, Lee E. Teitelbaum, June R. Carbone, *Family Law* 865 (5th ed. 2014) ("In all states a child born to a married woman is at least rebuttably presumed to be the child of her husband.").[5] As the United Supreme Court noted in *Michael H. v. Gerald D.*, the marital presumption is deeply rooted in the common law, and "our traditions have protected the marital family" against challenges based on the alleged absence of biological bonds. 491 U.S. 110, 124-25 (1989) (plurality opinion). *See also Gardenour v. Bondelie*, 60 N.E.3d at 1118 ("a child's welfare is promoted by ensuring she has two parents to

[5] *See also* Model State Vital Statistics Act § 11(h)(1) (Ctrs. For Disease Control and Prevention 2011) ("If the mother was married at the time of either conception or live birth, or between conception and live birth, the name of the husband [spouse] shall be entered on the report as the (father, parent) of the child, unless parentage has been determined otherwise by a court of competent jurisdiction.") (brackets in original).

provide financial support"). Not surprisingly, courts that have considered the question have concluded that the same rules that apply to determine the legal parentage of children born through assisted reproduction to married different-sex spouses must be applied equally to married same-sex spouses. *See, e.g.*, *McLaughlin v. Jones*, 382 P.3d 118, 122–23 (Ariz. Ct. App. 2016); *Della Corte v. Ramirez*, 961 N.E.2d 601, 602–603 (Mass. App. Ct. 2012); *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845 (Sup. Ct. 2014), and that married same-sex parents must thus be named as legal parents on their children's birth certificates, *see, e.g.*, *Torres v. Seemeyer*, No. 15-cv-288-bbc, 2016 WL 4919978, at *8–9 (W.D. Wis. Sept. 14, 2016); *De Leon v. Abbott*, No. 5:13-cv-00982-OLG (W.D. Tex. Aug. 11, 2015); *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL 4476734, at *1 (D. Utah July 22, 2015); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013, as amended May 23, 2013).[6] Thus, the state's argument that it would somehow be unworkable to recognize same-sex spouses as legal parents has no merit. (Brief of Appellant at 36-38.) The experience of both Indiana and all other states that have considered this question demonstrates just the opposite.

[6] The only case that has not held that same-sex spouses must be named on their children's birth certificates is currently pending on a Petition for Certiorari to the United States Supreme Court. *Smith v. Pavan*, 505 S.W.3d 169 (Ark. 2016), *petition for cert. filed*, No. 16-992 (Feb. 13, 2017).

As the District Court correctly found, Indiana already permits both spouses to be named as parents on a child's birth certificate when a woman who is married to a man gives birth to a child conceived through donor insemination. *Henderson v. Adams*, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645, at *11 (S.D. Ind. June 30, 2016), *clarified*, No. 1:15-cv-00220-TWP-MJD, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016). When a child is born in Indiana, the birth mother must complete a "Certificate of Live Birth Worksheet." *Id.* at *4. This Worksheet gathers information used to create a child's birth certificate, including the demographics of the child and the parents and the medical histories of the child and the woman who gave birth. Question 37 asks the mother to answer whether she is "married to the father" of her child. *Id*. If she answers affirmatively, the form directs the mother to provide the father's relevant information,[7] which is then used to generate the child's birth certificate listing the husband as the father of the child. *Id*.[8]

A husband is not required to undergo genetic testing in order to be placed on a birth certificate, and nothing on the form indicates that the mother may name her

[7] None of these questions relate to biology or genetics. (Appellant's App. at 26-27). The form asks for the father's name, date of birth, place of birth, Social Security number, highest level of schooling, occupation, race, and ethnicity. (*Id.*)

[8] The Indiana State Department of Health is authorized by statute to promulgate and implement regulations relating to the issuance of birth certificates. *See* Ind. Code § 16-19-3-4(b)(12) (2016) (authorizing the State Department to adopt rules concerning "vital statistics"); §16-37-1-3(2)(A) (permitting the state department to implement rules relating to "[c]ollecting, transcribing, compiling, and preserving vital statistics").

husband as the child's father only if he is the genetic father. As the District Court explained, "[w]hen 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." *Henderson*, 2016 WL 3548645, at *13. Women with infertile husbands who conceived using donor insemination properly can and do name their husbands as their children's fathers. Husbands of women who conceived through donor insemination in Indiana are thus allowed to be listed on their children's birth certificates, without the need for an adoption, even though they are not genetic fathers.

In sum, birth certificates are legal documents that identify a child's legal parentage. Indiana law, like the law of other states, recognizes husbands as legal parents and allows them to be named on the birth certificates of children born to their wives, including when the child was born through donor insemination and has no genetic connection to the husband. For the reasons explained below in Section III, Indiana cannot selectively deny that right only to same-sex spouses, who are also legal parents under Indiana law.

II. INDIANA'S REFUSAL TO PLACE BOTH MARRIED SAME-SEX PARENTS ON THEIR CHILDREN'S BIRTH CERTIFICATES CAUSES SERIOUS HARMS.

Birth certificates are among the most important and universally recognized items in the "constellation of benefits that the States have linked to marriage." *Obergefell*, 135 S. Ct at 2601. A birth certificate affirms the family's integrity, provides ready access to other legal protections, and plays a central role in many ordinary daily activities where parent-child status is of concern. Indiana's refusal to provide this documentation on an equal basis to all married parents denies same-sex couples and their children the same privacy and integrity as other families, relegates them to a second-class status, destabilizes their families and subjects them to potentially life-threatening harms, and denies them a wide variety of tangible protections across a host of ordinary activities in which adults must routinely demonstrate their legal status as parents.

Children who lack a birth certificate identifying their legal parents "suffer the significant material costs . . . relegated through no fault of their own to a more difficult and uncertain family life." *See Obergefell*, 135 S. Ct. at 2590. Birth certificates are treated nearly universally as critical evidence of the legal parent-child relationship. As one of the district courts affirmed in *Obergefell* explained:

> Identification on the child's birth certificate is the basic currency by which parents can freely exercise . . . protected parental rights and responsibilities. It is also the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity . . . . 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 at 1050 (emphasis omitted) (footnotes omitted).

A. Dignitary Harms

Indiana's refusal to issue birth certificates that identify the legal parentage of children born to married same-sex couples destabilizes these families and harms them in the same ways the Supreme Court held to be unconstitutional in *Obergefell*. A birth certificate "giv[es] recognition and legal structure to" the parent-child relationship, just as a marriage certificate does for a spousal relationship. *Obergefell*, 135 S. Ct. at 2600. A birth certificate serves as a badge of "the integrity and closeness of [the] family and its concord with other families . . . ." *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)). Access to a legally accurate birth certificate recognizing the child's family relationship also "affords the permanency and stability important to children's best interests." *Obergefell*, 135 S. Ct. at 2600. It offers children "recognition, stability, and predictability." *Id.* Without it, "children suffer the stigma of knowing their families are somehow lesser." *See id.* Like the denial of marriage itself, Indiana's refusal to provide birth certificates on equal terms to the children of married same-sex couples "harm[s] and humiliate[s]" those children and their families, without serving any legitimate purpose. *Id.* at 2600-01.

B. Medical Decisions

Medical emergencies underscore the risks families face when they are denied birth certificates accurately reflecting their child's legal parentage. In these heart-wrenching situations, a child's life and health may depend on a parent's ability to make quick decisions on the child's behalf. However, medical providers may insist on seeing a birth certificate to verify a parent's right to make decisions or to have any involvement in a child's medical care. *See, e.g.*, *Tanco v. Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn.) (describing how [the nonbiological parent] may be deprived of "the right to … make medical decisions regarding the medical care provided to their baby in the event that [the biological parent was] unable to make those decisions"), *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). *See also* Brief for Petitioners at 9-10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 860738, at *9-10.

This harm is not hypothetical. In several earlier cases, same-sex parents faced serious difficulties caring for their ill children because they were not accurately listed on their children's birth certificates. In one case, because only one spouse was listed on the child's birth certificate, when the child had to be hospitalized, the parents feared that the omitted parent would be unable "to authorize emergency medical care if it became necessary," thus requiring the other

parent to be present at all times. The birth mother "had to miss a great deal of work she would not otherwise have had to miss," causing "additional stress and anxiety to [the parents], which would not have been necessary had [the spouse] been on the child's birth certificate." *Gartner v. Iowa Dep't of Pub. Health*, No. CE 67807, 2012 WL 28078 (5th Dist. Ct. Iowa, Jan 4. 2012), *aff'd*, 830 N.W.2d 335 (Iowa 2013). In another case, same-sex parents who did not have a birth certificate reflecting their child's parentage were "told by both an ambulance crew and emergency room personnel that only 'the mother' could accompany [the child] and thus initially faced a barrier to being with their child in a medical emergency." *Finstuen v. Crutcher*, 496 F.3d 1139, 1142, 1145 (10th Cir. 2007).

C. Disability And Survivorship Benefits

If a parent is not named on her child's birth certificate, it is much harder for that child to receive benefits under an array of laws protecting children in the event of that parent's disability or death.[9] The Social Security Administration ("SSA") requires parents to provide a child's birth certificate when applying for these

[9] *See* Social Security Administration, *Benefits for Children* (March 2016), https://www.ssa.gov/pubs/EN-05-10085.pdf (March 2016) ("Those dollars help to provide the necessities of life for family members and help make it possible for those children to complete high school. When a parent becomes disabled or dies, Social Security benefits help stabilize the family's financial future.").

benefits.[10] SSA also requires parents to produce a birth certificate before claiming their child as a dependent on a parent's Social Security retirement benefits.[11] The U.S. Department of Veteran Affairs ("VA") likewise requires a birth certificate or comparable document to process claims when a veteran parent has died.[12] In a guidance document explaining how the VA would comply with this Court's decision in *Obergefell*, the VA reiterated that it would require couples to provide a birth certificate or judicial decree[13] to establish parentage when applying for benefits.[14]

D. Education

Evidence establishing a legal parent-child relationship is also critical in the context of education, as well as in a variety of other programs ranging from after-

[10] *Id.* (requiring "the child's birth certificate and the parent's and child's Social Security numbers").

[11] *See* Social Security Administration, *Retirement Benefits* 11 (January 2017), https://www.ssa.gov/pubs/EN-05-10035.pdf.

[12] *See* U.S. Department of Veterans Affairs, Introduction, https://www.va.gov/opa/publications/benefits_book/benefits_introduction.asp (last visited March 30, 2017).

[13] Requiring families to obtain a court decree of parentage or adoption is not an adequate substitute for a legally accurate original birth certificate. Adoption is a burdensome and expensive process that requires judicial approval. For many married same-sex couples – especially poorer ones – these additional costs and procedures may be an insurmountable barrier to obtaining access to benefits for their children. When a child is born to a married different-sex couple the parents are not required to shoulder these additional burdens for their parentage to be acknowledged in a legal document.

[14] *See* U.S. Department of Governmental Affairs, *Important Information on Marriage*, https://www.va.gov/opa/marriage/ (last visited March 30, 2017).

school care to sports clubs. Parents must verify their parentage in order to register their child for school or daycare, and most schools rely on birth certificates for that purpose. A parent not listed on her child's birth certificate will also face difficulties overseeing and staying updated on her child's education. One of the cases affirmed in *Obergefell* provides an example. There, one parent in a married same-sex couple was forced to execute a general power of attorney in favor of the other, who was not listed on the birth certificate, to enable the other parent to speak with their son's teacher and daycare workers. Brief for Appellant-Petitioner at 10, *Obergefell v. Hodges* (No. 14-556), 2015 WL 860738 at *10.

E. Identity

Families who lack legally accurate birth certificates will also face difficulties ensuring that their children's other official documents identify and authorize the roles of both parents in the children's lives. SSA recommends that parents apply for their child's social security number as soon as possible after the child's birth.[15] Families who are unable to do so face a far more burdensome process.[16] Two of the married plaintiffs in this case conceived a daughter through artificial insemination

[15] *See* Social Security Administration, *Social Security Numbers for Children* 2 (Sept. 2016), https://www.ssa.gov/pubs/EN-05-10023.pdf ("The easiest time to [apply] is when you give information for your child's birth certificate while you're still at the hospital. If you wait to apply for a number at a Social Security office, there may be delays while we verify your child's birth certificate.")

[16] *Id.*

and provided the information requested on the Indiana Birth Worksheet, listing their child's name as a hyphenated version of both of their last names. *Henderson*, 2016 WL 3548645, at *2. Nonetheless, they were issued a birth certificate that listed only the birth mother and her last name, rather than the name they had chosen for their daughter. *Id.* Shortly thereafter, the parents received a new social security card that did not include the hyphenated name. *Id.* The adverse financial and emotional consequences for the family were substantial. As the district court explained,

> [the non-biological parent] is seeking a stepparent adoption. She is required to undergo fingerprinting and a criminal background check in addition to submitting her driving record, her financial profile, and the veterinary records for any pet living in the home. A home study is being conducted, which examines the relationship history of [the parents] requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection. The cost for their stepparent adoption is approximately $4,200.00.

Id. This same costly and time consuming adoption process is not required of different-sex married couples who artificially conceive a child. *Id.* at *10. Instead, the non-biological father who is married to the birth mother is listed on the birth certificate and recognized as the child's father.

F. Travel

Travel poses another set of difficulties for families who have been denied a legally accurate birth certificate. Parents must submit legal proof of parental

relationship, such as a birth certificate or a judicial decree, to obtain a United States passport for their child.[17] One of the *Obergefell* couples encountered difficulties with the passport system. Because the parent who was not the birth mother was not named on the birth certificate, she was denied the right to apply for the child's passport. *See* Brief for Appellant-Petitioner at 10, *Obergefell v. Hodges* (No. 14-556), 2015 WL 860738 at *10. A parent not named on her child's birth certificate may also be stopped at the border when traveling internationally with the child. To prevent kidnappings, some countries require a single parent travelling with a child to produce proof of the parent's relationship with the child.[18] The State Department has issued a warning suggesting that parents travelling with their child carry documentation of their relationship.[19]

In sum, Indiana's refusal to treat married same-sex couples and their children equally has far-reaching ramifications. By denying them the most

---

[17] *See* U.S. Dept. of State, *Children Under 16*, https://travel.state.gov/content/passports/en/passports/under-16.html (last visited March 30, 2017).

[18] *See, e.g.*, Government of Canada, *Minor Children traveling to Canada*, http://www.cic.gc.ca/english/visit/minors.asp ("The parent should present: the child's passport, a copy of the child's birth certificate, and a letter of authorization … which is signed by the parent who is not travelling with them") (last visited March 30, 2017).

[19] *See* U.S. Customs & Border Protection, *Children – Child Traveling With One Parent or Someone Who is Not a Parent or Legal Guardian or a Group*, https://help.cbp.gov/app/answers/detail/a_id/268/~/children---child-traveling-with-one-parent-or-someone-who-is-not-aparent-or (last visited March 30, 2017).

important document used to prove a child's identity and to document legal parent-child ties, Indiana destabilizes and burdens their daily lives and stigmatizes their families—reimposing the very indignity and inequality that *Obergefell* held to be impermissible.

III. INDIANA'S REFUSAL TO PLACE SAME-SEX MARRIED PARENTS ON THEIR CHILDREN'S BIRTH CERTIFICATES IS UNCONSTITUTIONAL.

In *Baskin v. Bogan*, this Court held that equal protection requires states to allow same-sex couples to marry and provide the same benefits of marriage enjoyed by different-sex spouses. 766 F.3d 648 (7th Cir. 2014). In *Obergefell v. Hodges*, the United States Supreme Court held that, consistent with the requirements of the Fourteenth Amendment, states may not deprive same-sex couples of the fundamental right to marry, including the right to participate in the benefits and responsibilities of marriage to the same extent and on equal terms as opposite-sex couples. 135 S. Ct. 2584 (2015). As the District Court recognized, because Indiana places the husbands of women who give birth on their children's birth certificates, it must do the same for the wives of women who give birth. *Henderson*, 2016 WL 3548645, at *13 (recognizing that under *Baskin* and *Obergefell*, "this benefit—which is directly tied to marriage—must now be afforded to women married to women.").

A. Married Same-Sex Spouses Are Entitled To Be Placed On Their Children's Birth Certificates Under *Obergefell* And *Baskin*.

Because the legal protections of marriage—and particularly those related to children—are so central to the institution, a state violates the fundamental right to marry when it selectively denies some or all of those protections to same-sex married couples. Although states are generally able "to vary the benefits they confer on all married couples," *Obergefell*, 135 S. Ct. at 2601, they cannot confer benefits on different-sex married couples while denying them to similarly-situated same-sex couples. *See also Baskin*, 766 F.3d at 659 (providing only some of the benefits of marriage to same-sex couples "places same-sex couples in an unstable position of being in a second-tier marriage"). To permit states to pick and choose which marital protections married same-sex couples and their children may enjoy would undermine this Court's and the Supreme Court's precedent and return these families to a caste-like position of official stigma and disfavor.

In *Obergefell*, the Supreme Court expressly identified the issuance of birth certificates as one of the "governmental rights, benefits, and responsibilities" that states have made part of the "constellation of benefits" of marriage. In recounting those benefits, the Court stated clearly that the "aspects of marital status include . . . birth and death certificates." *Obergefell*, 135 S. Ct. at 2601. *See also Brenner v. Scott*, 999 F. Supp. 2d 1278, 1292 (N.D. Fla. 2014), *clarified*, No. 4:14CV107-

RH/CAS, 2015 WL 44260 (N.D. Fla. 2015) (requiring Florida to list a surviving same-sex spouse on a death certificate). *Obergefell's* reference to birth certificates as an aspect of marital status was deliberate and central to both the facts and the holding in that case. Several of the petitioner couples in *Obergefell* directly raised this very issue. For example, *Henry v. Himes* involved same-sex married couples who sought to be listed on their children's birth certificates. 14 F. Supp. 3d at 1041-1043. The couples planned the conception of their children and sought to raise a family together, yet Ohio would list only the birth mother as the child's parent on the birth certificate. *Id.* Those *Obergefell* petitioners were in precisely the same situation as petitioners here: they were legally married couples who had given birth while married but were denied the right granted opposite-sex couples under state law to have both parents listed on their children's birth certificates. In short, *Obergefell* requires that a same-sex married couple be included on their child's birth certificate under the same rule applied to different-sex spouses under state law.

B. Concern For Biological Procreation Is An Impermissible Reason For Denying A Benefit Of Marriage To Same-Sex Spouses.

In an attempt to justify its unequal treatment of same-sex married parents, the State cites the same rationale rejected by *Obergefell* and other decisions striking down state laws excluding same-sex couples from the right to marry—

namely, their inability to procreate a child that is genetically related to both parents. (Brief of Appellant at 39-40.) As explained above, Indiana, like all other states, lists a male spouse on a birth certificate even when the parties used donor insemination and know the husband is not the genetic father. As both this Court and *Obergefell* have made clear, the State cannot selectively rely on a purported interest in biological procreation only in cases involving same-sex couples. *Baskin*, 766 F.3d at 656 ("the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously"); *Obergefell*, 135 S. Ct. at 2606-607.

Indiana's discrimination here can no more be justified based on an asserted state interest in identifying or protecting biological parents, selectively applied only to same-sex couples, than could the discrimination at issue in *Baskin* and *Obergefell*. Treating similarly-situated same-sex and opposite-sex couples equally does not impede any legitimate interest Indiana may have in tracking biological relationships—information about the conception of each child born in Indiana is still collected through the Birth Worksheet and stored by the state. Plaintiffs seek to be named as parents on their children's birth certificates only to the same extent that Indiana already does so for married different-sex couples who have children. Having decided that a husband who is not a biological parent may be named on a

birth certificate when his wife gives birth to a child, the state cannot invoke biology as a ground to deny that right only to same-sex couples.

C. Plaintiffs Have A Due Process Right To Recognition Of Their Parent-Child Relationships.

The state improperly asserts that only biological parents have a fundamental due process right to be parents, despite the Supreme Court's explicit holdings to the contrary. (Brief of Appellant at 30.) In fact, non-biological parents and their children have a constitutionally protected liberty interest in their parent-child relationship. The United States Supreme Court has held that the core of the parent-child relationship protected by the Due Process Clause derives not from biology, but rather from the emotional bonds that develop between family members as a result of shared daily life. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977). Indeed, biology alone is neither necessary nor sufficient to establish a constitutionally protected familial relationship. For over 70 years, the United States Supreme Court has recognized that a relationship between a child and an adult who has acted as a parent is constitutionally protected. *Prince v. Massachusetts*, 321 U.S. 158, 159, 166 (1944) (child's aunt, who had raised child from birth, was entitled to be treated as a parent for constitutional purposes). *See also, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 505-506 (1977)

(grandmother who was raising her grandsons had constitutionally protected relationship with them).

The state also erroneously asserts that recognizing non-biological parents without requiring them to adopt would violate the rights of biological parents. (Brief of Appellant at 25.) The United States Supreme Court rejected that argument in *Michael H. v. Gerald D.*, holding that California's refusal to permit a child's biological father to challenge the legal paternity of the mother's husband did not raise any constitutional concerns. 491 U.S. 110. The remedy the plaintiffs seek does not require finding that biological parents no longer have fundamental rights—or that *Obergefell* overruled cases establishing that biological parents have fundamental rights—as the state suggests, (Brief of Appellant at 33.) Both biological and non-biological parents have due process rights, and Indiana law already recognizes both biological and non-biological parents. The plaintiffs seek only to be provided with legally accurate birth certificates in the same manner that such birth certificates are provided to different-sex spouses who use donor insemination to conceive.

CONCLUSION

For the foregoing reasons *amici* respectfully request that the Court affirm the District Court and require the defendant to allow the plaintiffs and other same-sex spouses to be named on their children's birth certificates.

Dated: April 3, 2017

Respectfully submitted,

/s/ David B. Goroff

Eileen Ridley
FOLEY & LARDNER LLP
555 California Street, Suite 1700
San Francisco, California 94104
Telephone: (415) 434-4484
Facsimile: (415 434-4507
Email: eridley@foley.com

David B. Goroff
FOLEY & LARDNER LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60654
Telephone: (312) 832-4500
Facsimile: (312) 832-4700
Email: dgoroff@foley.com

Counsel for Amici Curiae 49 Professors of Family Law Professors

CERTIFICATE PURSUANT TO FED. R. APP. P. 32(g)

This appellate brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B)(ii) and Circuit Rule 32 because this brief contains 6,109 words (using the "word count" function of Microsoft Word), excluding the parts of the brief exempted by Fed. R. App. P. 32(F). This appellate brief complies with the typeface requirements of Circuit Rule 32(b) 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 2010 in 14 point Times New Roman (14 point for footnotes).

Dated: April 3, 2017 /s/ David B. Goroff

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 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.

Dated: April 3, 2017 /s/ David B. Goroff

APPENDIX — LIST OF AMICI

Ann E. Freedman
Associate Professor of Law
Rutgers Law School

Audrey Rogers
Professor of Law
Elisabeth Haub School of Law at Pace University

Aviva Orenstein
Professor of Law and Val Nolan Fellow
Indiana University Maurer School of Law

Barbara A. Atwood
Mary Anne Richey Professor of Law Emerita
University of Arizona, James E. Rogers School of Law

Barbara Bennett Woodhouse
L.Q.C. Lamar Professor of Law
Emory University School of Law

Carlos A. Ball
Distinguished Professor of Law
Rutgers University

Catherine J. Ross
Professor of Law
George Washington University Law School

Clare Huntington
Professor of Law
Fordham Law School

Courtney G. Joslin
Professor of Law
Martin Luther King Jr. Hall Research Scholar
University of California Davis School of Law, King Hall

Cynthia Grant Bowman
Professor of Law
Cornell Law School

Deborah L. Forman
Professor of Law Emerita
J. Allan Cook & Mary Schalling Cook Children's Law Scholar
Whittier Law School

Deborah Widiss
Professor of Law
Indiana University Maurer School of Law

Deseriee Kennedy
Associate Dean of Diversity & Inclusion, Professor of Law
Touro Law Center

Douglas NeJaime
Professor of Law
UCLA School of Law

Elizabeth Scott
Harold R. Medina Professor of Law
Columbia Law School

Earl R.C. Singleton
Clinical Professor of Law
Indiana University Maurer School of Law

Dr. Gwendolyn Leachman
Assistant Professor
University of Wisconsin Law School

Ira Mark Ellman
Charles J. Merriam Distinguished Professor of Law
Affiliate Professor of Psychology
Faculty Fellow, Center for Law, Science & Innovation
Arizona State University, Sandra Day O'Connor College of Law

Jana Singer
Jacob A. France Professor of Law
University of Maryland, Francis King Carey School of Law

Prof. Jennifer A. Drobac
R. Bruce Townsend Professor of Law
Indiana University Robert H. McKinney School of Law

Joan Heifetz Hollinger
John & Elizabeth Boalt Lecturer-in-Residence, Emerita
University of California Berkeley Law School

Joanna L. Grossman
Ellen K. Solender Endowed Chair in Women and the Law
SMU Dedman School of Law

Jody Lyneé Madeira
Professor of Law
Indiana University Maurer School of Law

Julie A. Nice
Herbst Foundation Professor of Law
University of San Francisco School of Law

June Carbone
Robina Chair of Law, Science and Technology
University of Minnesota Law School

Katharine K. Baker
University Distinguished Professor of Law
IIT Chicago-Kent College of Law

Katharine T. Bartlett
A. Kenneth Pye Professor of Law
Duke University School of Law

Kimberly M. Mutcherson
Vice-Dean and Professor of Law
Rutgers Law School

Leonore F. Carpenter
Associate Professor of Law
Temple University Beasley School of Law

Leslie J. Harris
Dorothy Kliks Fones Professor
University of Oregon School of Law

Linda C. McClain
Professor of Law
Paul M. Siskind Research Scholar
Boston University School of Law

Lois A. Weithorn
Professor of Law
UC Hastings College of Law

Marcia Zug
Professor of Law
University of South Carolina

Margaret B. Drew
Associate Professor of Law
University of Massachusetts Law School

Martin Guggenheim
Fiorello LaGuardia Professor of Clinical Law
New York University School of Law

Maxine Eichner
Graham Kenan Distinguished Professor of Law
University of North Carolina School of Law

Melanie B. Jacobs
Professor of Law
Michigan State University College of Law

Melissa L. Breger
Professor of Law
Albany Law School

Michael S. Wald
Jackson Eli Reynolds Professor of Law Emeritus
Stanford Law School

Nancy E. Dowd
Professor and David H. Levin Chair in Family Law
University of Florida, Fredric G. Levin College of Law

Nancy D. Polikoff
Professor of Law
American University Washington College of Law

Professor Naomi Cahn
Harold H. Greene Chair
George Washington University Law School

Richard F. Storrow
Professor of Law
City University of New York School of Law

J. Stephen Clark
Professor of Law
Albany Law School

Steve Sanders
Associate Professor of Law
Adjunct Associate Professor of Gender Studies and Political Science
Indiana University Maurer School of Law

Susan Frelich Appleton
Lemma Barkeloo & Phoebe Couzins Professor of Law
Washington University School of Law

Suzanne A. Kim
Professor of Law
Rutgers Law School, Rutgers University

Taylor Flynn
Professor of Law
Western New England Law School

Theresa Glennon
Professor of Law
Temple University Beasley School of Law