IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-1141

ASHLEE and RUBY HENDERSON, a married couple and L.W.C.H., *et al.*,

Plaintiffs/Appellees,

v.

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

Defendant/Appellant.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:15-cv-220-TWP-MJD, The Honorable Tanya Walton Pratt, Judge

REPLY BRIEF OF APPELLANT DR. JEROME ADAMS

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SUMMARY OF THE ARGUMENT

Like the District Court, Plaintiffs continue to attack a parental rights system that does not exist. Indiana confers parental rights based on a biological parent-child relationship or adoption, not marriage. The Paternity Presumption Statute creates a biologically plausible presumption of a fact that can be disproven, not an entitlement of parental rights. Similarly, the Wedlock Statutes draw a distinction based upon biological parent-child relationships, not marriage. In any event, the Wedlock Statutes apply narrowly and do not injure Plaintiffs, who have no standing to challenge them.

Plaintiffs reject the notion that parental rights in Indiana are biologically driven and assert the Constitution requires States to confer parental rights based upon emotional connections. But equitable decisions estopping established providers from denying responsibility for children do not confer entitlement to parental rights *ab initio*. Nor does the Constitution require States to privilege adult preferences over biological connections when conferring parental rights; rather, biological parents have a Constitutional right to develop relationships with their children, and vice-versa. *Obergefell* and *Baskin* say nothing to the contrary.

Finally, Plaintiffs offer no solutions for the shortcomings of their parental rights theory. They fail to explain how a biological father could use *factual* evidence to rebut a female spouse's presumption of legal parenthood, when everyone already knows she is not the father. They are silent as to why it is fair to exclude from this new system of automatic non-biological parental rights same-sex male couples who

procreate with the help of a surrogate. And they ignore the child's right to a relationship with and support from both biological parents.

Prior to this case, Indiana's parental rights statutes treated all persons equally and protected the constitutional rights of biological parents while enabling adults to become parents without a biological connection to the child. The same cannot be said for the District Court's judgment and injunction, which should be reversed.

ARGUMENT

I. Indiana's Parental Rights Statutes Do Not Discriminate

A. Plaintiffs have provided no evidence that they are treated differently from similarly situated opposite-sex married couples with respect to birth certificates

Plaintiffs' case rests on the premise that artificially inseminated, married, heterosexual birth mothers falsely ascribe paternity to their husbands, who thereby acquire, without adoption, parental rights and two-parent birth certificates. But there is *no evidence* that heterosexual birth mothers do that, and regardless, such fraud would not create parental rights.

1. First, the State needs to correct the record in one respect. Based on evidence submitted by both the Plaintiff and the State, the District Court said: "When children are born in Indiana, the procedure for creating and processing birth certificates for these newborns begins with the hospital staff working with the birth mother to complete the State of Indiana's 'Certificate of Live Birth Worksheet.'" Short App. 24. That Worksheet is indeed the only ISDH document designed to gather information from the mother. App. 2.

During preparation of this reply brief, however, the Office of Attorney General has learned that some hospitals use different forms that omit many Worksheet questions or phrase them differently. So, for example, rather than prompt a mother to ask "are you married to the father of your child," as the State form does, App. 2, some hospitals may simply ask the birth mother for information regarding "father."

Regardless, Indiana's birth registration system depends upon hospital staff collecting information from the birth mother—including some representation from the birth mother as to the identity of the child's father if she knows it—and then entering the information into the State database. App. 2. The premise of Plaintiffs' argument, and much of the District Court's decision, is that during that information-gathering process, mothers will routinely lie about the identity of the father. Appellees' Br. 16–17.

2. Plaintiffs, however, have cited no evidence that this supposedly rampant fraud on the Indiana birth registration system actually happens. Undeterred, the District Court declared that "[c]ommon sense says that an artificially-inseminated woman married to a man who has joined in the decision for this method of conception, and who intends to treat the child as his own, would indicate that she is married to the father of her child. Why would she indicate otherwise?" Short App. 37–38.

A mother would have many reasons to "indicate otherwise," among them: a moral duty and desire to be truthful; a legal duty not to commit fraud; an intention that her husband will adopt the child and thereby attain actual parental rights rather than a false veneer of them. Surely Plaintiffs' cynical and unproven speculation that

heterosexual birth mothers routinely lie about paternity cannot be the basis for imputing discrimination to a state law that is facially non-discriminatory.

3. Next, even if a birth mother does fraudulently identify her husband as the father, and thereby procures a fraudulent birth certificate showing the same, *that does not make the husband the child's legal parent*. Being listed on a birth certificate does not confer parental rights; rather, the birth certificate, properly used, merely records parental rights that already exist. *See Steele v. Campbell*, 82 N.E.2d 274, 275 (Ind. Ct. App. 1948) (finding birth certificate not admissible to prove paternity).

Plaintiffs enumerate ways birth certificates are useful in caring for a child. Such utility says nothing about the creation of parental rights—or the right to be listed on a birth certificate. Parents who use a fraudulent birth certificate to procure access to day care, sign up for Social Security, or execute any number of other transactions for their children are not acting based on genuine parental rights recognized by law. Nothing may come of such false moves, but not because Indiana law has conferred parental rights. It is, rather, because the law does not force the issue of paternity absent legitimate court challenge, in which case the birth certificate will not protect a false claim of paternity.

B. The Paternity Presumption Statute does not confer parental rights and is not discriminatory

1. The Paternity Presumption Statute is not discriminatory because it does not *create* parental rights. It is merely a means of identifying who holds rights that already exist because of a biological paternal relationship. In that respect, it is highly accurate—over 99% of the time according to a report in evidence. *See* App. 20. If the

birth mother, a sperm donor, or any other party files a paternity action, the court must order a DNA test on the motion of any party. Ind. Code § 31-14-6-1. If the results show that a man other than the husband is the child's biological father, the court will issue an order establishing paternity in the actual biological father, thereby disestablishing it in the husband. *See, e.g.*, *K.S. v. R.S.*, 669 N.E.2d 399, 401 (Ind. 1996) (upholding a trial court order establishing paternity in a man over objections from the mother and her husband).

Such circumstances could cause pain and upheaval for the entire family, especially if they occur in the context of marital dissolution. That is why Indiana law vests parental rights through more permanent and substantial bonds than marriage: immutable biological relationships and court-ordered adoptions. If a biological mother's spouse—whether man or woman—is not the biological father of her child but nonetheless wishes to be a legal parent, the spouse should use the mechanism the Indiana General Assembly has provided: adoption.

Plaintiffs believe the Paternity Presumption Statute renders it unnecessary for a presumed father to adopt his non-biological child, but Indiana law expressly contemplates this action. Indiana Code section 31-19-9-1 states that written consent to adoption is required from "[e]ach living parent of a child born in wedlock, including a man who is presumed to be the child's biological father under [the Paternity Presumption Statute] *if the man is the biological or adoptive parent of the child*." (emphasis added). If the presumed biological father was automatically the legal father, the italicized text would be redundant. But the presumed biological father is

not automatically the legal father; that is why the presumed biological father's consent is required only if he is the actual biological or adoptive father.

Plaintiffs suggest that "[i]f the birth mother died before completing the Worksheet, the State would hardly refuse to name her husband as the father of the child because it would then be creating a parentless child." Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Their Motion for Summary Judgment, ECF No. 100 at 7. In that circumstance, the mother's husband, as the presumed the biological father, is indeed charged with immediate parental responsibility for that child. Ind. Code § 31-14-7-1. If he is not the child's actual biological father he is estopped from disclaiming paternal responsibility, see *In re Paternity of E.M.L.G.*, 863 N.E.2d 867, 869 (Ind. Ct. App. 2007) ("[T]he Indiana statutes governing paternity actions, found in Article 14 of Title 31 of the Indiana Code provide a means to establish paternity, not to disestablish it"), but the actual biological father may ultimately disestablish his paternity by legal process. His only secure means of securing full legal parental rights is to adopt.

When there is no husband (whether because the deceased birth mother was unmarried or because she was married to a woman), there is no one in whom to presume a biological relationship—which again is the touchstone of parental rights and responsibilities in the first instance. The child would be a ward of the State, but with a same-sex female couple, the wife would obviously be available as custodian of the child—and may have kinship priority. Ind. Code § 31-34-4-2. Such custody would first arise on an emergency basis and then more permanently via legal process (such

as CHINS placement, then adoption). Indiana law even permits couples to start adoption proceedings during pregnancy, *see* Ind. Code ch. 31-19-3.

Regardless, there is no discrimination because *biology*—and the likely biological connection marriage signifies—is what accounts for any differential outcomes. And even if one unfairly infers discriminatory treatment, the legal process required of the wife of a birth mother is justifiable by reference to the constitutional rights of the child's biological father (and the corresponding rights of children to a relationship with a biological father), who must be given a chance to step forward and claim the child. That is a compelling interest, vindicated by narrowly tailored means.

2. The Paternity Presumption Statute also creates no impermissible sex discrimination because there is no implicit elevation of one sex over the other (indeed, the presumption of biological fatherhood operates as much to impose legal burdens as it does to afford benefits) and no effort to codify traditional gender roles. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (noting that distinctions predicated on "enduring" "[p]hysical differences between men and women" are constitutional so long as they do not "denigrat[e]" either sex or "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

There is only an attempt to account for legitimate biological differences between the sexes—only men can be biological fathers, so only men should ever be presumed to be such—and such laws survive even heightened scrutiny. *See, e.g.*, *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) (upholding stricter citizenship requirements for children of citizen fathers than for citizen mothers).

And, just as the biological differences between men and women demonstrate there is no cognizable sex discrimination, those differences also provide a compelling justification for the narrowly tailored statute, which is to presume *constitutionally protected* fatherhood, subject to rebuttal in the few cases where the presumption is inaccurate. App. 20. The obvious connection between husbands and biological fatherhood makes the statute neither "overinclusive" nor "underinclusive."

C. The Wedlock Statutes are not discriminatory and not properly before the court anyway

Plaintiffs claim that "the State grants legitimacy, *i.e.*, born in wedlock status, to the children of opposite-sex couples conceived via artificial insemination" with third-party donor sperm. Appellees' Br. 19. That is inaccurate, and Plaintiffs still have not established standing to challenge the Wedlock Statutes in any event.

1. Plaintiffs do not establish that they have standing to challenge the Wedlock Statutes. First, they claim the Wedlock Statutes cause "the exclusion of the non-birth mother's surname from her child's name." Appellees' Br. 49. But none allege a need for an injunction to procure a preferred surname for their children.

Next, Plaintiffs claim that "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" because "his notice and consent are required in the event that someone seeks to adopt his child." Appellees' Br. 49. Even if that reading of the Statute is accurate—*but see* Part I.C.2, *infra*—Plaintiffs have not alleged any plausible threat that anyone outside the marriage seeks to adopt their Children.

Plaintiffs also complain that a "child born out of wedlock cannot inherit from the non-birth mother's estate under Indiana's intestate succession statute." Appellees' Br. 49. Plaintiffs, however, have never alleged that any Spouses are currently intestate or intend to die intestate. Any operational impact of the law to these plaintiffs is therefore beyond speculative. *Cf. Teesdale v. City of Chicago*, 690 F.3d 829, 836–37 (7th Cir. 2012) (standing to bring a pre-enforcement challenge arises only where plaintiffs show "they are under threat of an actual and imminent injury in fact . . . ." (internal quotations omitted)).

Plaintiffs argue that they have standing to challenge the Wedlock Statutes because they "incorporate and are dependent on the Presumption Statute." Appellees' Br. 50. But that only means that they object to not being presumed parents for purposes of a statute that would not apply to them even if they were. That is a classic generalized grievance, not Article III injury.

Finally, aside from the Surname Statute, Plaintiffs make no demonstration how, even if they are sufficiently injured by any hypothetical applications of the Wedlock Statutes, the Commissioner is a proper defendant under Article III. The Commissioner has no authority over adoptions or estates, so there is no means for him to provide relief. The District Court's declaration that the Wedlock Statutes are invalid is simply an abstraction with no real-world consequences for any of the parties.

Indeed, because the Wedlock Statutes have no operational impact here, it is impossible to understand whether they are susceptible of constitutional application.

The State can offer no justification for treatment that does not occur. And without a meaningful analysis of potential constitutional applications, the Wedlock Statutes cannot be facially invalidated. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

Plaintiffs' challenge to the Wedlock Statutes is, accordingly, an Article III non-starter.

2. The Wedlock Statutes do not discriminate on the basis of gender or sexual orientation; what matters is whether the mother's spouse is the biological father of her child. Jack K. Levin, 5 Ind. Law Encyc. Children Born Out of Wedlock § 1 ("[A] child born into an intact marriage but fathered by a man other than the husband is a child born out of wedlock."). As the Indiana Supreme Court said in *K.S. v. R.S.*, 669 N.E.2d 399, 402 (Ind. 1996), "the fact that the child was born while mother was married does not establish that the child was born during wedlock." Rather, whether a child is born in wedlock depends on "the status of the biological parents of the child in relation to each other." *Id.*

Plaintiffs reject the significance of *K.S.* because it was decided the year before the Wedlock Statutes were enacted. But courts "presume that the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication." *Hinshaw v. Bd. of Comm'rs of Jay Cty.*, 611 N.E.2d 637, 639 (Ind. 1993). Plaintiffs cite nothing to suggest a clear derogation of the common law, and indeed the relevant statutory text suggests an intention to codify it, defining as it does "child born in wedlock" to be "a child born to: (1) a woman; and (2) a man who is presumed to be the child's father . .

. *unless the presumption is rebutted*." Ind. Code § 31-9-2-15 (emphasis added). In other words, because the actual biological relationship between the presumed father and the child expressly remains relevant, the Wedlock Statutes are consistent with the common law rule.

Subsequent Indiana case law seems to confirm as much. In *Regalado v. Estate of Regalado*, 933 N.E.2d 512, 522 (Ind. Ct. App. 2010), the court, citing *K.S.*, observed that "[u]nder Indiana common law, the term wedlock refers to the status of the *biological parents* of the child in relation to each other" and that "the legislature has not expressly indicated in [the intestate succession statute] any intent contrary to the common law." And while the *Regalado* court was addressing intestate succession and did not cite or expressly construe the Wedlock Statutes, Plaintiffs claim that "born out of wedlock" means the same thing in both. Appellees' Br. 49.

II. Indiana Does Not Confer Parental Rights Through Marriage, and Indeed the Constitution Requires Respect for Biological Parents' Rights in the First Instance

Indiana confers parental rights solely through biological and adoptive relationships, not through marital relationships. *See* Ind. Code § 16-37-2-2.1; Ind. Code §§ 31-14-4-2, -7-1; Ind. Code art. 31-19. Plaintiffs believe the Constitution requires States to accord parental rights based on marital rather than biological connections, asserting "states must provide birth certificates to all married couples" and "this Court has also recognized the unconstitutionality of biology as a qualifier regarding the care and protection of families and children." Appellees' Br. 13, 37. But to confer parental rights through marriage rather than biology inevitably repudiates the rights of some biological parents.

A. Indiana courts use equity to ensure children receive support in dissolution cases, but that does not yield plenary parental rights based on marriage rather than biology or adoption

Plaintiffs and amici cite Indiana cases they believe show "Indiana has historically looked beyond genetics to establish parenthood." Appellees' Br. 29–34. *See also* Family Equality Council & Colage ("FECC") Br. 9; 49 Professors of Family Law ("FLP") Br. 5; National Center for Lesbian Rights ("NCLR"), et al. Br. 16. These cases, however, stand at most for the proposition that the responsibilities of parenthood, once voluntarily assumed, cannot easily be cast aside. They do not stand for the proposition that the rights of parenthood are an entitlement appurtenant to marriage.

In *Levin v. Levin*, the court held that a husband who knowingly and voluntarily consented to the artificial insemination of his wife with donor semen, and then held the child out as his own for fifteen years, was equitably estopped from denying his obligation to support the child. 645 N.E.2d 601, 604–05 (Ind. 1994). The court also stated that "[a] child conceived through artificial insemination, with the consent of both parties, is correctly classified as a child of the marriage," *id.* at 605, but that is a construct peculiar to the dissolution context that enables equitable allocation of parental responsibilities. *See also Engelking v. Engelking*, 982 N.E.2d 326, 328 (Ind. Ct. App. 2013) (applying the same equitable principle).

Other cases Plaintiffs cite also rest on equitable principles, not entitlement in the first instance. *Ohning v. Driskill*, 739 N.E.2d 161, 164 (Ind. Ct. App. 2000) (holding mother "estopped" from challenging former husband's paternity because she

accepted child support payments from him); *In re Paternity of H.H.*, 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (concluding mother who executed paternity affidavit was "estopped" from contesting paternity years later); *Sheetz v. Sheetz*, 63 N.E.3d 1077, 1078 (Ind. Ct. App. 2016) (finding birth mother's husband "estopped" from contesting his own paternity because he held the child out as his own for twelve years); *see also Myers v. Myers*, 13 N.E.3d 478, 483–84 (Ind. Ct. App. 2014) (holding the "doctrine of laches" prevented mother from challenging paternity).

In some cases, the father was deceased, and the court refused to disestablish paternity based on the child's equitable interests. *Estate of Lamey v. Lamey*, 689 N.E.2d 1265, 1268, 1270 (Ind. Ct. App. 1997) (rejecting uncle's standing to disestablish paternity of child's deceased father because of the "potential harmful effect" on the child's inheritance); *Paternity of H.J.B. ex rel. Sutton v. Boes*, 829 N.E.2d 157, 159–60 (Ind. Ct. App. 2005) (rejecting guardian grandmother's standing to disestablish deceased son-in-law's paternity of grandchild because it would have significant negative emotional and financial consequences on the child).

Equitable principles also explain the cases addressing a father's petition to disestablish his own responsibilities. *Pinter v. Pinter*, 641 N.E.2d 101, 105 (Ind. Ct. App. 1994) (precluding father from setting aside a child support order based on "public policies of protecting the child's interests"); *In re Paternity of K.M.*, 651 N.E.2d 271, 276 (Ind. Ct. App. 1995) (rejecting, as "outside the equitable discretion of the trial court," father's request to set aside paternity order he had sought fifteen years earlier); *but see Fairrow v. Fairrow*, 559 N.E.2d 597, 600 (Ind. 1990) (permitting

presumed father to disestablish paternity as part of marital dissolution in view of how he came to learn he was not the father, *i.e.*, incidentally through medical testing undertaken in the child's best interests).

These equitable principles now apply equally to same-sex couples who create a child via artificial insemination. In *Gardenour v. Bondelie,* 60 N.E.3d 1109, 1119 (Ind. Ct. App. 2016), *trans. denied*, the court affirmed joint legal custody, parenting time and child support because the couple should be "treat[ed] similarly to the married couples in *Levin* and *Engelking*."

Plaintiffs cite *Gardenour* for the expansive proposition that, "[u]nder 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." Appellees' Br. 16. And, to be sure, the *Gardenour* court deemed the former domestic partner a "legal parent." 60 N.E.3d at 1120. But it is one thing to hold a person who has acted in the role of parent to the commitments that role implies for the sake of the child's best interests. It is quite another to infer from such equitable imposition of parental responsibility an entitlement to parental rights from birth.

Moreover, if *Gardenour* actually defines legal parental rights and entitlements from birth, Plaintiffs would have no grounds for constitutional challenge—only a state law mandamus claim for the birth certificates they demand. *See* Ind. Code § 34-27-3-1. In that event, the proper course would be to declare this case moot by happenstance and vacate the District Court's judgment. *See, e.g.*, *U.S. Bancorp*

Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 22 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950).

Doing so would be premature, of course. Indiana courts in future cases may distinguish *Gardenour*, such as where a biological father claims parental rights against the non-adopting wife of a birth mother. It would be more prudent to treat *Gardenour* only as a fact-dependent equitable solution to family dissolution—and a marker of equal treatment at that.

B. *Baskin* and *Obergefell* do not require states to confer parenthood with marriage, and other states' cases are easily distinguishable

1. Plaintiffs say that *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), forecloses the State's arguments because there the State unsuccessfully argued "against same-sex marriage on the grounds of biology—primarily procreation." Appellees' Br. 37. Comparing the two arguments because both use terms like "biology" and "procreation" is fatally imprecise. Whether general procreative capability justifies regulating relationships among adults has no logical bearing on whether it justifies regulating relationships between adults and children.

Plaintiffs and amici curiae spend many pages proving the uncontested proposition that *Obergefell* requires states to confer benefits of marriage equally on opposite-sex and same-sex couples. Appellees' Br. 13, 25–27; NCLR Br. 13–16; FLP Br. 20–21. But the parentage statutes that injured plaintiffs in the consolidated *Obergefell* cases *expressly* conferred parental rights based on *marriage*, regardless of *biology*. Mich. Comp. Laws § 333.2824(6) (conferring parental rights to a "husband" who consents to his wife's "utilization of assisted reproductive technology"); Ohio Rev.

Code Ann. § 3111.95(A) (regarding the "husband" of a woman undergoing "non-spousal artificial insemination" as the "natural father of child"); Tenn. Code Ann. § 68-3-30 (regarding a child "born to a married woman as a result of artificial insemination" as the "legitimate child" of the woman's "husband").

The problem with that argument for this case is that Indiana does not confer parental rights as benefits of marriage; it confers them as matters of biology and adoption. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (observing states are "free to vary the benefits they confer on all married couples").

2. Plaintiffs and amici also cite post-*Obergefell* cases from other states that supposedly support them. Appellees' Br. 27–29. But again, Indiana's parental rights laws differ from those states, so those cases are unhelpful.

Plaintiffs list cases from states that, unlike Indiana, *do* condition parental rights or birth certificates on marital status. Sometimes, the statutes were facially discriminatory. *Marie v. Mosier*, 196 F. Supp. 3d 1202, 1218 (D. Kan. July 22, 2016) (holding that a Kansas law declaring any child born from artificial insemination to be "in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique," Kan. Stat. Ann. § 23-2302, must be applied to same-sex married couples); *Brenner v. Scott*, Nos. 4:14cv107-RH/CAS, 4:14cv138-RH/CAS, 2016 WL 3561754 at *3 (N.D. Fla. Mar. 30, 2016) (requiring statute providing that "[i]f the mother is married at the time of birth, the name of the husband shall be entered on the birth certificate as the father of the child," Fla. Stat. § 382.013, apply to same-sex married couples); *Campaign for S.*

Equality v. Miss. Dep't of Human Servs., 175 F. Supp.3d 691, 710 (S.D. Miss. 2016) (invalidating statute providing that "Adoption by couples of the same gender is prohibited"); *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL 4476734 at *4 (D. Utah July 22, 2015) (requiring that statute conferring parental rights on a "husband" who consents to wife's artificial insemination apply to female spouses); *see also Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 350–52 (Iowa 2013) (invalidating under state constitution a statute requiring state health department to place the "husband's" name on the birth certificate "if a married opposite-sex couple has a child born during the marriage and if the couple used an anonymous sperm donor to conceive the child").

Other times, the decision was predicated on *proof* of systematic unequal treatment, which, again, does not exist here. In *Carson v. Heigel*, No. CV 3:16-0045-MGL, 2017 WL 624803 at *1 (D.S.C. Feb. 15, 2017), even the State agreed that "[u]nder the same circumstances, if Plaintiffs were an opposite-sex married couple, both of their names would be listed on the birth certificates." In *Torres v. Seemeyer*, 207 F. Supp. 3d 905, 914 (W.D. Wis. 2016), the department of health denied a two-parent birth certificate to a lesbian couple based on lack of statutorily required spousal consent for artificial insemination. But because evidence showed the department did not enforce that statute against opposite-sex married couples, the court found discrimination. *Id.*

Amici add two more cases, but neither is helpful. NCLR Br. 7. In *Robicheaux v. Caldwell*, No. 13-cv-5090, 2015 WL 4090353 at *1–*2 (E.D. La. July 2, 2015), the

court provided no explanation of its holding regarding birth certificates. And in *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), after the Fifth Circuit said nothing about birth certificates, the district court on remand ordered state officials to "create[], issue[], and implement[] policy recognizing same-sex marriage in death and birth certificates," but provided no explanation as to how the Texas system may have run afoul of *Obergefell*. *De Leon v. Abbott*, SA-13-CA-00982-OLG, ECF No. 113 (W.D. Tex. Aug. 11, 2015). Such lack of analysis may explain why Plaintiffs do not cite these cases.

Plaintiffs also focus on *McLaughlin v. Jones*, 382 P.3d 118, 121 (Ariz. Ct. App. 2016), *review granted* April 18, 2017. But there, Arizona presumed the birth mother's husband to be a parent under conditions that a wife could also meet, such as signing the birth certificate. Ariz. Rev. Stat. § 25-814(A). The court inferred from those conditions that Arizona's paternity presumption statute "is not necessarily biologically based" but rather "based, instead, on the presumed father's declared intent to be the child's parent," such that being a presumptive parent was actually conclusive. *McLaughlin*, 382 P.3d at 121–23. Regardless whether the Arizona Supreme Court reverses, that is not what Indiana law requires, so *McLaughlin* is not instructive.

Finally, while Plaintiffs dismiss *Smith v. Pavan*, 505 S.W.3d 169, 178 (Ark. 2016), *cert. pending*, where the Arkansas Supreme Court upheld a paternity presumption statute like Indiana's, it affords a better comparison than the above cases. There, the Arkansas statutes centered "on the relationship of the biological

mother and the biological father to the child, not on the marital relationship of husband and wife." *Id.* Because a "husband" would not legally be the "father" where (1) a court established paternity or (2) where the "mother," "husband, and "putative father" file appropriate affidavits, the statutes did not "'intertwine[]' the concepts of 'parent' with the rights and presumptions of marriage by using the words 'husband' and 'wife.'" *Id.* *Pavan* demonstrates that the details of state parental rights laws matter when deciding whether *Obergefell* applies.

C. Meanwhile, the Constitution actually does protect the rights of biological fathers, not to mention the rights of children to have relationships with both biological parents

Plaintiffs dismiss biological parental relationships as but "a factor frequently taken into account by Indiana's judiciary in disputes involving parental rights" and declare that "the State's paramount consideration in every case is doing what is in the child's best interest." Appellees' Br. 11. That assertion would be deeply troubling if true, for it would suggest all newborns are but wards of the State, which suffers parental rights at its whim.

1. The critical starting point is that the Constitution protects the rights of *biological* parents to raise their children. It is "plain beyond the need for multiple citation" that "natural parents" have a "fundamental liberty interest . . . in the care, custody, and management of their child" that is "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 753, 758–59 (1982) (quotation omitted). And the right is of biological—not marital—origin. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("Nor has the law refused to recognize those family relationships

unlegitimized by a marriage ceremony."); *id.* at 652 ("To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." (quotations and citation omitted)).

Plaintiffs reject this venerable authority and assert that 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." Appellees' Br. 14. They also say parents' due process rights "derive[] neither from biology nor legal status, but rather from the emotional bonds that develop between family members as a result of shared daily life." But Plaintiffs' doctrinal support for their re-imagined parental rights philosophy, *Lehr v. Robertson*, 463 U.S. 248, 249–50 (1983), only permits states to treat biological parents differently *after* giving them a substantial opportunity to establish a relationship with the child. It does not permit a state to negate them from birth.

Moreover, unless Plaintiffs seek judicial involvement in every birth, what they really demand is substitution of one imperfect parentage presumption for another. Instead of a presumption that marriage signifies a biological bond between the child and the husband of a birth mother, they prefer a presumption that marriage signifies an emotional bond between the child and the spouse of the birth mother. But unlike a presumption that enables vindication of the biological connection, there is no constitutional grounding for a presumption that enables vindication of an emotional connection. *Cf. N.E. v. Hedges*, 391 F.3d 832, 833–34, 836 (6th Cir. 2004) ("[T]here

are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child.").

2. In addition, children may have a due process right to be cared for and supported by the child's biological parents. *See Rivera v. Minnich*, 483 U.S. 574, 582 (1987) (observing that the requirement of clear and convincing evidence to support termination of parental rights "protects the parents, and to some degree the child, from renewed efforts to sever their familial ties" (emphasis added)); *id.* at 581 (observing that the child has an interest in preventing "an erroneous determination" of paternity).

Plaintiffs' position in this case would not only negate that constitutional interest, but would also undermine the longstanding national commitment to holding fathers financially responsible for their children. *See id.* at 580; *see also*, *e.g.*, Social Security Act, 42 U.S.C. § 654 (known as Title IV-D).

III. Plaintiffs Do Not Dispute that Their Theory Creates Inequalities, and Do Not Explain Why Biology Matters Only Sometimes

Under the District Court's ruling, the Paternity Presumption Statute is a source of legal parental rights—but only for spouses of birth mothers, not for two men married to each other.

A. Plaintiffs' system discriminates

Plaintiffs never even address, let alone refute, the point that this result introduces inequality into Indiana's parental rights system. Prior to the District Court's injunction, when a married woman conceived a child through artificial

insemination using donor sperm, her spouse—whether male or female—was required to adopt the child in order to secure parental rights. But now, only male spouses must seek an adoption; female spouses need not, because they now enjoy a "presumption of legal parenthood."

Married male couples, in particular, are left out of this new-age system of presuming parental rights. Even where one of them is the biological father of a child, neither is a "presumed" anything because neither is married to the birth mother. Under the State's theory, the lack of any presumption for the men in that scenario is easy to explain: the birth mother is the presumed biological mother, but there is no basis for presuming biological fatherhood in any particular man not married to her. But under Plaintiffs' theory, that explanation falls apart, because it concedes the role of biology when it comes to parental presumptions. The coherence of Plaintiffs' system is shattered once the birth mother's parental rights are presumed, let alone her wife's. If biology is not relevant for the birth mother's spouse, there is no reason it should be relevant for her—particularly when there is no guarantee the birth mother is biologically connected to the child (as in the case of the Phillips-Stackmans).

Perhaps the explanation is more practical. Two gay men must always get the baby from outside the marriage, while the lesbian couple does not. But if unique biological self-sufficiency were a satisfactory basis for parental-presumption line-drawing, such would defeat Plaintiffs' entire premise. With a lesbian couple, the birth mother must always get the sperm from outside the marriage; not so for an opposite-

sex couple. Ignoring biological reality with female couples while accounting for it with male couples is surely sex discrimination.

B. Plaintiffs do not explain how parental rights not predicated on biological connection to the child can be affected by evidence of another's biological connection to the child

Confusingly, both Plaintiffs and the District Court proclaim that female spouses have only a rebuttable presumption of legal parenthood, and 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." Appellees' Br. 19 (quoting Short App. 8). But how can that be so? The "presumption of parenthood" for the husband is a presumption of fatherhood, which can be rebutted with a paternity test. Whatever the nature of the presumption for the wife, it is surely not a presumption of *fatherhood*.

The District Court instead is requiring a "presumption" that the wife of a birth mother is the legal parent of her wife's child, without regard to any factual predicate other than the marriage. There would not seem to be any logical connection between an abstract presumption of legal parenthood and evidence of another's paternity. Permitting "legal parenthood" to be overridden by biology would conflict with the fundamental rationale of "legal parenthood," which is the existence of a marital connection, not a biological one.

And there is a real risk Plaintiffs' new-found presumed rights may be "rebutted" in many cases. Plaintiffs are incorrect that only a biological father may file a paternity action and that he must do so within two years of the birth. Again,

the child, the child's mother, and the putative father are all statutorily entitled to file a paternity action. The department of child services or the county prosecutor also may sometimes file. Ind. Code § 31-14-4-1. And the two-year time limit "does not apply if the biological father and mother agree to waive it and file the action jointly, if either has previously acknowledged the biological father's paternity in writing, or if the biological father has supported the child." Appellant's Br. 10 (citing Ind. Code § 31-14-5-3). There is no telling the number of cases where any dimension of this rebuttal system might be pertinent.

Nor are Plaintiffs necessarily correct in saying a sperm donor would have no obligation or right to the child. Under Indiana law, sperm donor rights and responsibilities are uncertain. *See Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 598 (Ind. 1994) (requiring donor to pay support where there was no doctor involved in the insemination and the contract was rudimentary); *but see In re Paternity of M.F.*, 938 N.E.2d 1256, 1260–61 (Ind. Ct. App. 2010) (finding a contract for sperm donation enforceable where doctor involved and the writing was formal). The Henderson Plaintiffs' own donor agreement stated: "Each party . . . acknowledges that under current Indiana law the rights, duties and obligations of semen donors with respect to any resulting children are unclear." App. 97.

Plaintiffs now dismiss *Straub* because it involved natural rather than artificial insemination. But in *Paternity of M.F.*, a split court of appeals emphasized that in order for a donor agreement to be enforceable, "a physician must be involved in the process of artificial insemination." 938 N.E.2d at 1261. Plainly, that will not be so

in all cases. In fact, becoming artificially inseminated with anonymous donor sperm can be very expensive. *See* App. 10. In this case alone, while several women were artificially inseminated with anonymous donor sperm, one was not. App. 9–10.

C. Precisely because there are so many ways to form a family, the State must be able to ensure parental rights are bestowed fairly in light of the fundamental rights of all concerned

Indiana law already provides the means to sort through the various ways of forming a family and all the competing interests that can arise. Plaintiffs seek complete parental rights for each birth mother and her wife, and Indiana law provides for that. Indiana has permitted adoption by same-sex couples for over a decade, and in the case of the Phillips-Stackmans, it would permit Jackie to file a maternity action to establish her biological maternity, and for Lisa to then seek a stepparent adoption. *See* ECF No. 108 at 17 (State's district court brief describing this process).

Plaintiffs would prefer a simpler process, but some procedural complexity is reasonable given the array of interests inherently involved in assisted reproduction. The "presumed parenthood" solution introduces—as a matter of constitutional law, no less—an entirely new concept that would either (1) if conclusive, simplify matters only by negating rights of others, or (2) if rebuttable, incoherently shift the complexity around.

The Family Equality Council argues that the state's refusal to list both same-sex spouses on the birth certificate at the time of the child's birth "caus[es] children 'to suffer the stigma of knowing their families are somehow lesser.'" FECC Br. 9. But *all* adopted children—whether adopted by an opposite-sex couple, a same-sex couple,

or a step-parent—lack a birth certificate at the time of birth that lists the names of both parents who will raise them. That does not mean that families with adopted children are "somehow lesser" in the eyes of the State, particularly since all may ask a court to order the birth certificate to be amended following the adoption. Ind. Code § 31-19-2-2. Because of adoption, neither Plaintiffs nor infertile heterosexuals are "locked out" of parenting (NCLR Br. 12), and they already have a legal avenue "to validate the love" that they have for their children (FECC Br. 10).

The State provides these avenues, and at the same time accounts for the inherent and fundamental constitutional rights biological fathers have in the care and upbringing of their children. Plaintiffs' confusing alternative scheme threatens the State's ability to serve the interests of all its citizens in this way.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which sent notification of such filing to the following:

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