UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASHLEE and RUBY HENDERSON, a married couple and L.W.C.H., *et al.*, Plaintiffs, vs. DR. JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner, *et al.*, Defendants.	)	No. 1:15-cv-220-TWP-MJD
NOELL and CRYSTAL ALLEN, a married couple, *et al.*, Plaintiffs, vs. DR. JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner, *et al.*, Defendants.	)	

STATE DEFENDANT'S RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant Dr. Jerome M. Adams ("State Defendant"), by counsel, respectfully submits this Response to Plaintiffs' Notice of Supplemental Authority (ECF No. 114).

Plaintiffs' Notice cites *Varble v. Varble*, No. 39A01–1508–DR–1180, 2016 WL 3058340 (Ind. Ct. App. May 31, 2016), for the proposition that "biology" does not "always control[ ] determinations of a child's parents under Indiana law." ECF No. 114 at 1. *Varble*, however, merely applies existing precedent to determine the jurisdiction of a marriage

dissolution court and does not concern either of the Indiana statutes challenged here—the Paternity Presumption and Wedlock statutes.

In *Varble*, Husband and Wife's 2009 marital dissolution decree listed two children of the marriage, including A.C. (born in 2008), who, it turned out, was not Husband's biological child. In 2011, Wife married A.C.'s Biological Father, who three years later filed an action in a different court to establish his biological paternity of A.C. Although Husband never received notice of that separate paternity action, the paternity court established biological paternity of A.C. in Biological Father, which Biological Father used to intervene in the dissolution action, where he moved to modify the 2009 decree to exclude A.C. as a child of the marriage. This time, however, Husband received notice and not only contested the motion to modify, but filed his own motion to set aside the paternity order. Husband prevailed on both fronts, leaving Biological Father with no modification and no paternity order.

On appeal, Biological Father argued the dissolution court lacked subject matter jurisdiction over A.C., who was not the biological child of both Husband and Wife and thus not a "child of the marriage." But the Court of Appeals affirmed, citing *In re Marriage of Huss*, 888 N.E.2d 1238, 1241 (Ind. 2008), for the proposition that a dissolution court has exclusive jurisdiction over child custody, including any subsidiary challenges to a husband's paternity.

Varble, in short, stands not for any substantive rule of parental rights, but only for the already-established procedural rule that a dissolution court has exclusive jurisdiction over the gamut of custodial issues, including efforts to establish paternity in someone other than the husband. It does not change the definition of "child of the marriage," much less inform the allocation of parental rights.

What is more, Plaintiffs' Notice quotes *Varble* only as it summarizes *Russell v. Russell*, 682 N.E.2d 513 (Ind. 1997), which, as the State has already discussed (*see* ECF No. 108 at 6–7), holds that "[a] determination as to whether a child is a child of the marriage in a dissolution proceeding is not necessarily a determination that the divorcing husband is the biological father of the child." *Russell*, 682 N.E.2d at 518. Indeed, "the term 'child of the marriage' includes all 'children . . . born or adopted during the marriage of the parties[,]'" *Russell v. Russell*, 682 N.E.2d 513, 515–16 (Ind. 1997) (quoting Ind. Code 31-9-2-13(a))." ECF No. 108 at 6. Even so, "the term 'child born in wedlock' does not include 'a child born into an intact marriage but fathered by a man other than the husband[.]' 5 Ind. Law Encyc. Children Born Out of Wedlock § 1 (citing *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996))." ECF No. 108 at 6.

In sum, *Varble* merely applied existing Indiana law concerning the jurisdiction of dissolution courts. It has no bearing on the question in this case, which is whether the Constitution requires a presumption of that which cannot be true, *i.e.*, that women are biological *fathers* of babies born to their wives during their marriage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

s/ Thomas M. Fisher
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