UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

STATE DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE ACTIONS

Dr. Jerome M. Adams ("State Defendant"), Pam Aaltonen, Dr. Jeremy P. Adler, Craig Rich, Glenda Robinette, Dr. Thomas C. Padgett, Karen Combs, Kate Nail, Dr. John Thomas, Hsin-Yi Weng, Thometra Foster (collectively "Tippecanoe County Defendants"), Dr. Virginia Caine, Darren Klingler, Dr. James Miner, Gregory S. Fehribach, Deborah J. Daniels, Lacy M. Johnson, Charles S. Eberhardt, II, Dr. David F. Canal, Joyce Q. Rodgers (collectively "Marion County Defendants"), Dr. Brian Niedbalski, Collis Mayfield, Beth Lewis, Dennis Stark, Dr. Michael Chadwick, Dr. Susan Sawin-Johnson, Michael Meyer, Dr. Charles Hatcher, Dr. Brooke F. Case, Cindy Boll, Jim Reed (collectively "Bartholomew County Defendants"), Dr. Darren Brucken, Joni Wise, Terri Manning, Jeffery DePasse, Dora Abel, Dr. Irving Haber, Brian Garcia, Michael Eldred, Dr. James Turner, and Dr. Robert Burkle (collectively "Vigo County Defendants"), (all collectively "County

Defendants"), by their respective counsel, respectfully request the Court deny Plaintiffs' Motion to Consolidate Actions (ECF No. 86).

FACTUAL BACKGROUND

I. *Henderson v. Adams*

The Henderson case is almost a year old and, after four-way discovery and cross-motions for summary judgment, nearly ready for decision. Plaintiffs filed their initial Complaint for Declaratory and Injunctive Relief on February 13, 2015 (ECF No. 1), and their First Amended Complaint on March 11, 2015 (ECF No. 15). Parties jointly tendered a Case Management Plan on May 4, 2015 (ECF No. 27), and this Court approved that plan on May 13, 2015 (ECF No. 31).[1] The plan established deadlines for discovery and dispositive motions. Plaintiffs subsequently filed their Second Amended Complaint (ECF No. 38).

Both parties conducted discovery. Plaintiffs propounded interrogatories, requests for production, and requests for admission to State Defendant and to each group of County Defendants. State Defendant propounded interrogatories, requests for production, and requests for admission to each of the Plaintiff families, as well as third-party discovery to Plaintiffs' three cryobanks including subpoenas for deposition testimony and documents. State Defendant received responses from all of the Plaintiff families and two of the cryobanks, and State Defendant used information and documents from these responses to support his Motion for

[1] The Court later amended this Case Management Plan to extend certain discovery deadlines, but the dispositive motion deadlines remained the same (ECF No. 72).

Summary Judgment. *See* ECF Nos. 85 and 85-1 through 85-9. The discovery cut-off date was November 17, 2015, and all discovery in the case is now complete.

Consistent with the deadlines this Court established in the Case Management Plan, Plaintiffs filed their Motion for Summary Judgment on December 4, 2015 (ECF No. 77). Defendants filed cross-motions for summary judgment on January 8, 2016 (ECF Nos. 82, 84). Assuming Plaintiffs file their responsive brief on February 8, 2016 as scheduled, Defendants will file their responsive briefs on February 22, 2016. At that time, the motions will be fully briefed, and the case will be ripe for a final decision on its merits.

II. *Allen v. Adams*

Allen v. Adams, No. 1:15-cv-1929-TWP-MJD, is a brand-new case filed on December 7, 2015 and purporting to challenge the constitutionality of the same statutes at issue in *Henderson* (*Allen* ECF No. 1). Two families, the Allens and the Phillips-Stackmans, sued State Defendant and Marion County Defendants, but not Tippecanoe, Bartholomew or Vigo County Defendants (*Allen* ECF No. 1). One week after filing this new complaint, Plaintiffs' counsel filed a motion for preliminary injunction (*Allen* ECF No. 10). That same day, this Court *sua sponte* reassigned *Allen* from Judge Richard L. Young to Judge Tanya Walton Pratt (*Allen* ECF No. 12).

This Court set a briefing schedule for Plaintiffs' preliminary injunction motion (*Allen* ECF No. 24). Parties proceeded with limited discovery focused on the preliminary injunction motion, and Defendants timely filed their responsive brief on

January 11, 2016 (*Allen* ECF No. 27). Plaintiffs sought an extension of time to file their reply brief from January 19, 2016 to January 22, 2016 (*Allen* ECF No. 29). The Court granted that motion (*Allen* ECF No. 30), and Plaintiffs did file their reply brief on January 22 (*Allen* ECF No. 31). Meanwhile, the court set a hearing on the motion for preliminary injunction for February 5, 2016 (*Allen* ECF No. 25).

ARGUMENT

I. Consolidation Will Squander Judicial and Party Resources

Consolidation is inappropriate because it would delay final judgment in *Henderson* and thereby prejudice many Defendants. *Henderson* has been pending for nearly one year, and the cross-motions for summary judgment will be fully briefed and ripe for adjudication on February 22, 2016—just three weeks from now. In contrast, *Allen* does not even have a case management plan in place yet. Granting Plaintiffs' motion would force *Henderson* defendants either to wait for work-up of the *Allen* case before getting a decision in *Henderson*, or to forego the opportunity to seek discovery and present factually tailored arguments in *Allen*. What is more, consolidation is unnecessary because both cases are already before the same judge; thus, there is no risk of inconsistent outcomes.

A. Consolidation will unnecessarily delay resolution of *Henderson* and cause prejudice to *Henderson* Defendants, particularly those who are not parties in *Allen*

"Rule 42 is designed to encourage the consolidation of actions where a common question of law or fact is present a*nd where consolidation would not cause prejudice to any party*." *Hansa Med. Products, Inc. v. Bivona, Inc.*, No. IP 85-1056-C, 1987 WL 14496 at *1 (S.D. Ind. Jan. 14, 1987) (emphasis added). A substantial

"delay in the processing of one or more of the individual cases" is generally prejudicial to some or all of the parties. 9A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2383 (3d ed. 2015).

Courts—including this one—have repeatedly refused to consolidate cases that are at vastly different procedural stages to avoid delaying of the more advanced case. *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:12-cv-1019-JMS-DKL, 2014 WL 4722527 at *3 (S.D. Ind. Sept. 23, 2014) (denying consolidation when one case had "been pending for more than two years" and the other was "in its infancy"); *see also Ulibarri v. Novartis Pharm. Corp.*, 303 F.R.D. 402, 404 (D.N.M. 2014) (denying consolidation when cases were "in a completely different procedural stage"); *KGK Jewelry LLC v. ESDNetwork*, Nos. 11-cv-9236 & 12-cv-9130, 2014 WL 7333291 at *2 (S.D.N.Y. Dec. 24, 2014) (denying consolidation because "judicial economy would not be served by consolidating two actions at disparate stages of litigation."); *Stewart v. Whitecap Inv. Corp.*, No. 2012-28, 2013 WL 1337892 at *2–*3 (D.V.I. Apr. 3, 2013) (denying consolidation even though cases raised common questions of law and fact because one case had already been pending for a year and consolidation would delay its resolution); *Bruno v. Borough of Seaside Park*, No. Civ. 04-5084, 2006 WL 2355489 at *2 (D.N.J. Aug. 14, 2006) (denying consolidation in part because actions were at "much different stages of litigation"); *Long v. Dickson*, No. 06-4012, 2006 WL 1896258 at *1 (D. Kan. June 29, 2006) (denying consolidation even though cases involved "some common questions of law and fact"

because actions were at "widely separate stages of preparation" and consolidation "would cause further delay and could prejudice the parties").

Here, consolidation would delay resolution in *Henderson*, which has been pending for nearly a year and is mere weeks away from being ripe for final judgment. If it were consolidated with *Allen*, in which discovery has not yet even begun, final judgment would no longer be imminent but rather many months away. The case management plan would have to be completely revised, discovery re-opened, and dispositive motions re-briefed. This delay would be particularly prejudicial to those defendants in *Henderson* who were not named in the *Allen* complaint—a group that includes numerous defendants from Tippecanoe, Bartholomew, and Vigo Counties. They have no stake in *Allen*, but would nonetheless be forced to wait with all other parties for *Allen* to be ripe for final judgment.

B. Any attempt to consolidate without delay would rob the *Allen* Defendants of a fair opportunity to litigate the case against them

Plaintiffs have suggested that there should be no delay because no discovery is necessary in *Allen* and the *Allen* plaintiffs should be permitted to join in the pending *Henderson* summary judgment motion—*after* that motion is fully briefed. Defendants disagree on both points. Although Defendants have done some discovery related to the preliminary injunction, they have not yet begun merits discovery, which will likely include interrogatories, requests for production, and requests for admission to each of the Plaintiff families, as well as possible third-party discovery to Plaintiffs' cryobanks, including subpoenas for deposition

testimony and documents. Additionally, the Phillips-Stackman Plaintiffs' claim is predicated on the notion that unless certain information is listed on their minor child's birth certificate, that minor child will lose medical insurance coverage in the event of the insuring spouse's death. Thus, State Defendant may also need to seek third-party discovery, including subpoenas for deposition testimony and documents, from the relevant medical insurance provider regarding its policies and procedures. Without that discovery, Defendants will be unable to effectively litigate the case.

Similarly, permitting the *Allen* Plaintiffs to join in the pending *Henderson* summary judgment motion would deny the *Allen* Defendants a full and fair opportunity to address the merits of the *Allen* Plaintiffs' as-applied claims—which are, as discussed in Section II, *infra*, predicated on facts that are materially different from the *Henderson* Plaintiffs' claims. Both of these results would be prejudicial to all the *Allen* Defendants.

Consolidation without causing this prejudice to the *Allen* Defendants would require re-opening the discovery period, setting new deadlines for dispositive motions, and re-briefing those motions. Alternatively, the Court could enter partial judgment under Rule 54(b) on the current summary judgment motion, but that would seem to defeat the point of consolidation.

C. There is no need for consolidation because the cases are already before the same judge

Consolidation is not only unwarranted and prejudicial; it is also unnecessary in light of this Court's order transferring *Allen* to Judge Pratt. The two cases are now both before the same judge, so there is no danger of conflicting rulings or

wasted judicial resources. To the extent that this Court's future ruling in *Henderson* affects *Allen*, that impact can be assessed and dealt with after the ruling comes down.

II. Materially Different Facts Make Consolidation Inappropriate

Rule 42 permits the court to consolidate actions that "involve a common question of law or fact" to conserve judicial resources. Fed. R. Civ. Proc. 42(a). The burden is on the moving party to show that the cases should be consolidated. 9A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2383 n.1 (3d ed. 2015) (citing *Adams v. N. Ind. Pub. Serv. Co.*, No. 2:10-cv-469, 2012 WL 2375324 at *1 (N.D. Ind. June 22, 2012)). The Seventh Circuit has said that even when "there are similarities between the actions," consolidation "is improper" if "the respective inquiries are different" and "the two proceedings seek different things." *Star Ins. Co. v. Risk Mktg. Grp. Inc.*, 561 F.3d 656, 661 (7th Cir. 2009).

Allen and *Henderson* may at first appear to raise "a common question of law or fact," but in light of materially different background facts they may ultimately present different as-applied issues, not to mention different forms of relief. These critical differences make consolidation inappropriate.

In *Henderson*, all six plaintiff families are similar; each consists of a birth mother, her spouse, and their child. Each of the birth mothers is also the child's biological mother. And each spouse could seek to obtain legal parental rights by filing an adoption petition. But in *Allen*, the two plaintiff families are dissimilar both from one another and from the *Henderson* plaintiff families.

First, in the case of Lisa and Jackie Phillips-Stackman, Lisa is the birth mother and thus the "presumed" biological mother under Indiana law. *See* Ind. Code § 31–9–2–10 (defining, in relevant part, a "birth parent" to be "the woman who is legally presumed under Indiana law to be the mother of biological origin"); *see also Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1059 (Ind. 1992) ("Because it is generally not difficult to determine the biological mother of a child, a mother's legal obligations to her child arise when she gives birth."). But Plaintiffs allege that the Phillips-Stackmans' child was actually created using Jackie's egg and a donor's sperm; thus, Jackie is the actual biological mother. *Allen* ECF No. 11 at 3–4. Jackie has raised the fact of her biological maternity as an additional reason why she should be the presumed mother of the child, and as a reason why it is inappropriate for her to seek to adopt the child.[2] *Allen* ECF No. 11-3 at 4. For purposes of the as-applied challenge, therefore, the parties and the court will need to take account of what significance, if any, arises from a factual scenario not established or discussed in the *Henderson* briefing.

Second, in the case of Nicole and Crystal Allen, the children at issue tragically passed away shortly after their birth. Crystal, as the children's birth mother, was listed on their birth certificates, but Nicole was not and would like to be. Thus, while the *Henderson* plaintiffs are seeking parental rights that they could

[2] As Defendants read the statutes, in order for both spouses to have irrebuttable parental rights, Jackie must file a maternity action and establish her maternity, thereby indirectly disestablishing Lisa's maternity. Then Lisa must file an adoption petition.

obtain through alternative means, the precise contours of the declaratory relief the Allens are seeking are less clear.

In short, plaintiffs in both cases challenge the statutes both on their faces and as applied, and material factual differences mean the as-applied claims are not entirely parallel. The two cases are therefore ill-suited for consolidation.

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In summary, consolidation is inappropriate because the cases raise different issues and would needlessly disrupt *Henderson*, which is now progressing smoothly toward final judgment. Wherefore, Defendants respectfully request the Court to deny Plaintiffs' Motion to Consolidate Actions, and all other just and proper relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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