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

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT DR. JEROME ADAMS

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JURISDICTIONAL STATEMENT

Several minor children, their birth mothers, and the mothers' spouses brought two separate suits seeking declaratory and injunctive relief against Defendants, state and local government officials, with regard to three Indiana statutes relating to parental rights and adoption. Appellant's Appendix ("App.") 102–36. Plaintiffs claim that these statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. App. 110–16, 127–33. The district court had subject-matter jurisdiction over these cases under 28 U.S.C. §§ 1131 and 1343.

On February 8, 2016, the district court consolidated the two cases, App. 15–17, and on June 30, 2016, it entered final judgment with respect to both. Short App. 18–49. First, it dismissed the county defendants from the case on the grounds that their role in the process was strictly ministerial. Short App. 11–12, 19, 30–33. Next, it declared that "Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution." Short App. 47. Finally, it enjoined the "State Defendant" (1) from "enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers as to any child born during the marriage"; (2) "to recognize children born to a birth mother who is legally married to a same-sex spouse as a child born in wedlock"; (3) "to recognize the Plaintiff Children in this matter as a child born in wedlock"; and (4) "to recognize the Plaintiff Spouses in this

matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate." Short App. 47–48.

On July 18, 2016, Defendant Dr. Jerome Adams, Commissioner of the Indiana State Department of Health, timely filed a motion pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. District Court Electronic Filing Number ("ECF No.") 119, Defendant's Motion to Alter or Amend Judgment. On December 30, 2016, the district court granted that motion in part and denied it in part. Short App. 2.

Defendant Dr. Adams, Commissioner of the Indiana State Department of Health, timely filed a Notice of Appeal on January 20, 2017. ECF No. 132, Notice of Appeal to the Seventh Circuit. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Indiana law provides parental rights through two sources: biological connection to the child and adoption. If a supposed father or mother is, in fact, a biological progenitor of a child, that person has parental rights to the child. If not, that person may become the child's parent only by adopting the child. Indiana law also presumes—rebuttably—that a birth mother's *husband* is the *biological father* of her child, but makes no presumption of biological connection between a birth mother's *wife* and the child. Against this background, the questions presented in this case are as follows:

1. Whether a state may, consistent with substantive and equal rights protected by the Fourteenth Amendment, refutably presume the fact of biological fatherhood of a birth mother's *husband* without also automatically conferring legal parental rights on a birth mother's *wife*.

2. Whether Article III's case or controversy requirement precludes the wife of a birth mother who could adopt without notice to the biological father from challenging a statute specifying when a biological father must receive notice of adoption.

STATEMENT OF THE CASE

This is a case about whether a system that is useful for *identifying* biological parents as a factual matter must, by virtue of constitutional right, be adapted to *confer legal rights* on non-biological parents in a particular context, namely when two women married to each other have a child.

When a child is born in Indiana, that child has two legal parents (unless one or both are deceased): a biological mother and a biological father. All statutory and regulatory treatment of parental rights, including adoption, proceed from that premise. Indiana law defines "parent" as: "a biological or an adoptive parent." Ind. Code § 31-9-2-88(a); *see also* 410 Ind. Admin. Code 18-0.5-10 ("'Parent' means the biological or adoptive mother or father of the individual."). "Adoptive parent" is "an adult who has become a parent of a child through adoption." Ind. Code § 31-9-2-6.

Adoptive parents are easy to identify via court records. Alas, biological parents—particularly fathers—sometimes are not, and yet have constitutional and statutory rights and obligations that must be accounted for. That circumstance has given rise to a system that uses rebuttable presumptions to facilitate the efficient identification of those most likely to have constitutionally protected rights and obligations to a child at birth, even if that identification is later subject to correction via judicial process.

I. The Historical Development of Indiana's Parentage Laws

Indiana has always conferred parental rights on the biological parents in the first instance. *See, e.g.*, *Gilmore v. Kitson*, 74 N.E. 1083, 1084 (Ind. 1905) ("Both under the common law and the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be intrusted with their care, control, and education."). Similarly, it recognizes, by virtue of judicial approval, adoptive parents enjoy the same status, rights, and obligations as biological parents. *Scott v. Peters*, 158 N.E. 490, 492 (Ind. 1927) ("The relation between an adoptive parent and the child adopted is a reciprocal relation of the same nature as that between a natural parent and the child.").

A. Biological parenthood – an issue of identification

Indiana law provides three legal methods for identifying a child's biological parents: presumption, affidavit, and judicial action. Now that genetic testing can

conclusively determine the identity of a child's biological parents, all of these methods may incorporate genetic testing in one way or another.

1. Identifying biological parents by presumption

In the early years of statehood, parental rights in Indiana, like most states, was governed by common law rather than statutes. Indiana courts, recognizing that "establishing the biological heritage of a child is the express public policy of this State[,]" adopted legal presumptions designed to identify a child's biological mother and father. *In re Paternity of Infant T.*, 991 N.E.2d 596, 600 (Ind. Ct. App. 2013) (quoting *In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 61–62 (Ind. Ct. App. 2010)), *trans. denied*, 999 N.E.2d 843 (Ind. 2013). In particular, courts concluded that the biological mother was most likely to be the birth mother and that the biological father was most likely to be the birth mother's husband (if she was married).

Accordingly, the woman who gave birth to a child was—and still is—presumed to be the child's biological mother. *Id.* at 601 (citing *In re Paternity & Maternity of Infant R.*, 922 N.E.2d at 61); *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."); Ind. Code § 31-9-2-10 (defining "birth parent" in relevant part as "the woman who is legally presumed under Indiana law to be the mother of biological origin").

And the man married to that woman was—and still is—presumed to be the child's biological father. *See, e.g.*, *Tarver v. Dix*, 421 N.E.2d 693, 696 n.2 (Ind. Ct. App. 1981) (noting 1979 legislation "merely codified" existing common-law presumption); *see also In re Paternity of I.B.*, 5 N.E.3d 1160, 1160 (Ind. 2014) (Dickson, C.J., dissenting to denial of transfer) ("Like most states, Indiana has long adhered to a strong presumption that a child, born of a woman during marriage, is also the *biological child* of the woman's husband." (emphasis added)).

The common-law presumption of maternity has never been codified, but the common-law presumption of paternity was enacted in 1979, and at that point it provided as follows:

> (a) A man is presumed to be a child's *biological* father if:
>
> (1) he and child's *biological* mother are or have been married to each other . . .
>
> (2) he and the child's *biological* mother attempted to marry each other . . .
>
> (3) after the child's birth, he and the child's *biological* mother marry, or attempt to marry, each other . . . and he acknowledged his paternity in a writing filed with the registrar of vital statistics of the Indiana state board of health or with a local board of health.
>
> (b) If there is no presumed *biological* father under subsection (a), a man is presumed to be the child's *biological* father if, with the consent of the child's mother:
>
> (1) he receives the child into his home and openly holds him out as his *biological* child; or

> (2) he acknowledges his paternity in writing with the registrar of vital statistics of the Indiana state board of health or with a local board of health.

H.E.A. 2121, 101st Gen. Assemb., 1st Reg. Sess. (Ind. 1979) (also cited at Pub. L. No. 277-1979, § 9) (codified at Ind. Code § 31-6-6.1-9 (1980)) (emphases added).

Both presumptions were—and still are—rebuttable by clear and convincing evidence that the *presumed* biological parent is not the *actual* biological parent. *Infant T*, 991 N.E.2d at 600–01 (acknowledging the presumption of maternity is rebuttable, though the evidence was insufficient to do so in that case). Indiana courts have found the presumption of paternity rebutted by evidence that the husband was "impotent," *Phillips v. State*, 145 N.E. 895, 897 (Ind. Ct. App. 1925); "steril[e]," *Whitman v. Whitman*, 215 N.E.2d 689, 691 (Ind. Ct. App. 1966); had no access to his wife during the period of conception, *Pilgrim v. Pilgrim*, 75 N.E.2d 159, 162 (Ind. Ct. App. 1947); or "was present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse." *Phillips*, 145 N.E. at 897.

As technology progressed, the presumption of biological fatherhood became rebuttable through increasingly sophisticated methods, such as blood grouping test results, *Murdock v. Murdock*, 480 N.E.2d 243, 246 (Ind. Ct. App. 1985), and the presence or absence of a sickle-cell trait. *Fairrow v. Fairrow*, 559 N.E.2d 597, 598, 600 (Ind. 1990). The legislature recognized this development by amending the statute in 1994 to provide that a man is presumed to be a child's biological father when "the man undergoes a blood test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's *biological* father." H.E.A.

1344, 108th Gen. Assemb., 2d Reg. Sess. (Ind. 1994) (also cited at Pub. L. No. 101-1994, § 17) (emphasis added).[1]

Currently, "[a] man is presumed to be a child's biological father" where: (1) the "man and the child's biological mother are or have been married to each other" and the "child is born during the marriage or not later than three hundred (300) days [or 9.8 months] after the marriage is terminated . . . ."; (2) the "man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage . . ." is void or voidable and the child is born during the attempted marriage or within 300 days after the attempted marriage terminated; or (3) "the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father." Ind. Code § 31-14-7-1 (2016).

The presumption of paternity may still be rebutted, however, where the husband is impotent, sterile, or otherwise precluded from establishing biological parentage by direct, clear, and convincing evidence—or if there is clear and convincing evidence that another man is the child's biological father. *Id.* § 31-14-7-2; *Cooper v. Cooper*, 608 N.E.2d 1386, 1387–88 (Ind. Ct. App. 1993).

Thus, the "presumption" of paternity based upon biological test evidence in subpart (3) is effectively conclusive and trumps the marital presumption in subparts (1) and (2). *See, e.g.*, *Minton v. Weaver*, 697 N.E.2d 1259, 1261 (Ind. Ct.

[1] In 2001, the legislature amended the statute to require a "genetic" test rather than a "blood" test. H.E.A. 1841, 112th Gen. Assemb., 1st Reg. Sess. (Ind. 2001) (also cited at Pub. L. No. 238-2001, § 6).

App. 1998) (holding it was "clearly erroneous" for a trial court to find the marital presumption unrebutted in the face of DNA evidence that a different man was the child's father).

2. Identifying biological parents by affidavit

Because not all biological parents are married to each other, the General Assembly also has provided the means for establishing biological paternal status through affidavit. *See generally* Ind. Code § 16-37-2-2.1. When the child's biological parents are not married to each other, "a person who attends or plans to attend the birth" must "provide an opportunity for: (A) the child's mother; and (B) a man who reasonably appears to be the child's *biological* father" to execute a paternity affidavit. *Id.* § 16-37-2-2.1(b) (emphasis added). The affidavit must include a sworn statement from the mother asserting that her co-affiant "is the child's *biological* father." *Id.* § 16-37-2-2.1(g)(1) (emphasis added). Critically, "[a] woman who knowingly or intentionally falsely names a man as the child's *biological* father under this section commits a Class A misdemeanor." *Id.* § 16-37-2-2.1(i) (emphasis added).

Underscoring the centrality of a biological relationship to this exercise, the paternity affidavit must also include a statement from the putative father "attesting to a belief that he is the child's *biological* father." *Id.* § 16-37-2-2.1(g)(2) (emphasis added). The parties must review the agreement outside each other's presence. *Id.* § 16-37-2-2.1(r). Through the affidavit, the parties may agree to share joint legal custody, but that agreement will be void unless they submit a DNA test

demonstrating that the putative father "is the child's *biological* father" to the local health officer within sixty days of the child's birth. *Id.* § 16-37-2-2.1(h)(5) (emphasis added).

A paternity affidavit confers legal "parental rights and responsibilities" upon the man who executes it except where: (1) a court "determine[s] that fraud, duress, or material mistake of fact existed in the execution" of the affidavit, or (2) if, within sixty days after executing the affidavit, a genetic test excludes the man as the biological father. *Id.* § 16-37-2-2.1(j)(2), (k), (l), (n); Ind. Code § 31-14-7-3. But even after that sixty-day period, if another man comes forward with evidence that he is the child's true biological father, the court will set the paternity affidavit aside. *See, e.g.*, *Paternity of Davis v. Trensey*, 862 N.E.2d 308, 314 (Ind. Ct. App. 2007).

3. Identifying biological parents by paternity action

When a child's paternity is unknown or disputed, Indiana law provides a mechanism for resolving the matter: a paternity action. The child, the child's mother, and the putative father are all statutorily entitled to file a paternity action; under certain circumstances, the department of child services or the county prosecutor may file as well. *Id.* § 31-14-4-1. Generally, the action must be filed within two years of the child's birth, but that 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. *Id.* § 31-14-5-3. "The child, the child's

mother, and each person alleged to be the father are necessary parties" to a paternity action. *Id.* § 31-14-5-6.

Paternity actions are almost always decided on the basis of DNA evidence of biological fatherhood. Any party to the action may file a motion for all parties "to undergo blood or genetic testing[,]" and "the court shall" grant the motion—there is no discretion to deny it. *Id.* § 31-14-6-1. What is more, if there is an adoption pending, the court shall, *sua sponte,* "order all the parties to the paternity action to undergo blood or genetic testing." *Id.* § 31-14-21-9.1. "The results of the tests . . . constitute conclusive evidence if" they "exclude a party as the biological father of the child." *Id.* § 31-14-6-3.

Finally, "[u]pon finding that a man is the child's biological father, the court shall, in the initial determination, conduct a hearing to determine the issues of support, custody, and parenting time." *Id.* § 31-14-10-1.

B. Becoming adoptive parents

Because a child's biological parents may be unwilling, unable or unfit to care for their child, Indiana law provides a mechanism by which a person who is not a child's biological parent may establish a legal parental relationship with that child: adoption. Any Indiana resident may file a petition to adopt a child under eighteen. *Id.* § 31-19-2-2. A couple, married or unmarried, opposite-sex or same-sex, may file a joint petition. *In re Infant Girl W.*, 845 N.E.2d 229, 242 (Ind. Ct. App. 2006). A married petitioner must file jointly with the spouse, Ind. Code § 31-19-2-4(a), except for a step-parent adoption. *Id.* § 31-19-2-4(b).

While the Indiana adoption code provides many procedural and substantive prerequisites and safeguards, the essential operational legal standard for adoption is this: If the court finds that "the adoption requested is in the best interest of the child[,]" the court shall grant the petition. *Id.* § 31-19-11-1(a)(1). Ordinarily, adoption extinguishes biological parents' rights and obligations respecting the child. *Id.* § 31-19-15-1. But where "the adoptive parent of a child is married to a biological parent of the child, the parent-child relationship of the biological parent is not affected by the adoption." *Id.* § 31-19-15-2. Consequently, the adoption statutes operate to ensure that a child will never have more than two legal parents (though others may have custodial or visitation rights).

II. The "Wedlock" Statutes and Indiana "Legitimacy" Law

For the purpose of facilitating parental consent to adoption, Indiana law recognizes a distinction between children whose biological parents are married to each other and children whose biological parents are not married to each other. A "child born out of wedlock," "for purposes of IC 31-19-3, IC 31-19-4-4, and IC 31-19-9"—all of which relate to adoption notice or consent—is a child born to a woman and a "man who is not presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2)." *Id.* § 31-9-2-16. And a "child born in wedlock," "for purposes of IC 31-19-9," is a child born to a woman and a "man who is presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2) *unless the presumption is rebutted*." *Id.* § 31-9-2-15 (emphasis added).

In these definitions, biology is paramount. "[A] child born into an intact marriage but fathered by a man other than the husband is a child born out of wedlock." Jack K. Levin, 5 Ind. Law Encyc. Children Born Out of Wedlock § 1 (citing *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996); *Cochran v. Cochran*, 717 N.E.2d 892 (Ind. Ct. App. 1999); *Johnson Controls, Inc. v. Forrester*, 704 N.E.2d 1082 (Ind. Ct. App. 1999); *C.J.C. v. C.B.J.*, 669 N.E.2d 197 (Ind. Ct. App. 1996)). "[T]he fact that the child was born while mother was married does not establish that the child was born during wedlock." *K.S.*, 669 N.E.2d at 402. So, for example, a child born to a married couple—whether opposite-sex or same-sex—but conceived using sperm from a donor is a "child born out of wedlock."

These statutory definitions are expressly intended for use in the context of consent to adoption. Ind. Code §§ 31-19-3-1 to -9 (governing pre-birth notice of adoption); *id.* § 31-19-4-4 (specifying the format for giving notice of an adoption proceeding to an unknown putative father); *id.* §§ 31-19-9-0.2 to -19 (governing consent to adoption). Specifically, when a child is born out of wedlock, the biological father's consent is sometimes not required for an adoption. *Id.* § 31-19-9-8(a)(3)–(6).

III. Indiana Vital Records Related to Parentage Laws

It is, of course, important for state government to have reliable birth and parentage records, to the extent reasonably possible. The Indiana General Assembly has charged the State Department of Health with maintaining a system of vital statistics, which is administered by the State Registrar. Ind. Code §§ 16-37-1-1, -2. The Registrar's duties include, among other things, "[k]eep[ing] the files

and records pertaining to vital statistics" such as births and deaths. *Id.* § 16-37-1-2(1).

When a child is born, a "person in attendance" (or if there is no such person, one of the child's parents) must file a "certificate of birth" with the local health officer using the electronic Indiana Birth Registration System. *Id.* § 16-37-2-2(a), (b). If that is not done, the local health officer must "prepare a certificate of birth from information secured from any person who has knowledge of the birth" and file it using the Indiana Birth Registration System. *Id.* § 16-37-2-2(c). Regardless of who files the certificate of birth, the local health officer must report the birth to the State Department within five days. *Id.* § 16-37-1-5(a).

In practice, when a child is born, the birth mother completes the Indiana Birth Worksheet, a questionnaire prepared by the State Department to collect vital statistics, demographic, and medical history information about the child and parents. App. 19, 22–33. Question 37 on the Worksheet is "MOTHER'S Marital Status, ARE YOU MARRIED TO THE FATHER OF YOUR CHILD?" App. 25. If the birth mother answers "yes," she is directed to answer questions about the father. App. 25–26. If she answers "no," she is directed to Question 38, which is "If not married, has a Paternity Affidavit been completed for this child?" *Id.* If she answers "yes," she is prompted to provide the date of the affidavit. *Id.*

The birth mother's answers to these questions are used to generate the child's birth certificate. App. 19. If a married birth mother answers Question 37 "yes" and provides her husband's name, he is listed on the birth certificate as the

child's father. *Id.* If she answers "no," he is not listed on the birth certificate and, unless and until a court enters an order of adoption or paternity or the birth mother and biological father execute a paternity affidavit, no one's name other than the birth mother is listed as a parent on the birth certificate. *Id.* A birth mother who knowingly gives an untruthful response to Question 37—or indeed any of the questions on the Worksheet—commits fraud and may be prosecuted. *Id.* (citing Ind. Code § 16-37-1-12).

A birth certificate may not be amended or altered unless (1) the State Health Department receives "adequate documentary evidence, including the results of a DNA test . . . or a paternity affidavit," Ind. Code § 16-37-2-10(b); or (2) the child is adopted. Following adoption, the Department must issue a new birth certificate showing the child's "actual place and date of birth"—unless the court decreeing the adoption, the adoptive parents, or the adopted individual requests that the department not issue a new certificate. *Id.* § 31-19-13-1. In all events, the original certificate is not destroyed, but is instead retained and filed with the evidence of adoption (though it may not be released except in the case of a step-parent adoption or in other limited circumstances). *Id.* § 31-19-13-2.

IV. The Plaintiffs

Plaintiffs are: seven minor children H.N.B., G.R.M.B., I.J.B. a/k/a I.J.B.-S., L.W.C.H., F.G.J., H.S., and L.J.P.-S. (the "Children"); their birth mothers Lyndsey Bannick, Donnica Rae Barrett, Elizabeth (Nicki) Bush-Sawyer, Ruby Henderson,

Calle Janson, Jennifer Singley, Lisa Phillips-Stackman, and Crystal Allen[2] (the "Birth Mothers"); and the Birth Mothers' spouses Cathy Bannick, Nikkole Shannon McKinley-Barrett, Tonya Lea Bush-Sawyer, Ashlee Henderson, Sarah Janson, Nicole Singley, Jacqueline Phillips-Stackman, and Noell Allen (the "Spouses"). Short App. 18–19.

Each of the Children Plaintiffs was conceived via artificial insemination using donor sperm. App. 4–5, 10, 39–40, 48–49, 59–60, 71–72, 81–82, 91–92.

Two of the children, L.W.C.H. and L.J.P.-S., were conceived using sperm from known donors. App. 9–10, 71. Prior to L.W.C.H.'s birth, the parties (Ruby and Ashlee Henderson, the donor, and the donor's wife) executed a "Donor Insemination Agreement" in which they acknowledge that biological parenthood carries with it certain rights and duties such as support and custody. App. 97–98.[3] Ruby Henderson also purported to waive all rights to child support from the donor, App. 97, even though under Indiana law the right to support belongs to the child, and a parent may not waive it. Ind. Code § 31-16-6-6. Finally, the donor purported to waive his parental rights, App. 98, though the legal effect of such a purported waiver is unclear under Indiana law (*see* Part I.C, *infra*).

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[2] Tragically, Crystal Allen's twin children were born prematurely and passed away on November 21, 2015. App. 5.

[3] In response to Defendants' discovery requests, the Henderson Plaintiffs provided a document titled Donor Insemination Agreement marked "For Attorneys' Eyes Only" subject to a protective agreement. The Henderson Plaintiffs agreed to waive that protective agreement for the excerpts from the Donor Insemination Agreement included in the Appendix at 97–98.

The Phillips-Stackman situation is more complex. Using Jackie's egg and a known donor's sperm, an embryo was created and implanted in Lisa, who gave birth to L.J.P.-S. on October 21, 2015. App. 9–10. Thus, Jackie is L.J.P.-S.'s biological mother, but Lisa is L.J.P.-S.'s 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"). The sperm donor purported to waive his parental rights. ECF No. 100, Plaintiffs Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of their Motion for Summary Judgment [hereinafter Pls.' SJ Reply] at 22.[4]

The other Children were conceived using sperm from anonymous donors. App. 39, 48, 59, 81, 91. Commercial cryobanks typically require donors to sign contracts in which they purport to waive their parental rights to any children conceived using their donated sperm. *See, e.g.*, App. 99–101. The cryobank keeps the donor's identity confidential unless required to disclose it by law. App. 99.

According to the record, the Spouses (with the exception of Jacqueline Phillips-Stackman) and Lisa Phillips-Stackman have no biological relationships to the Children, nor (with the exception of Tonya Lea Bush-Sawyer) have they filed petitions to adopt the Children, App. 5, 11–13, 39–40, 48–49, 59, 71–72, 81–82, 91, although they could do so under Indiana law. Ind. Code § 31-19-2-4; *In re K.S.P.*,

[4] The record does not reflect whether the sperm donor for Crystal Allen's children was known or anonymous, nor whether he purported to waive his parental rights.

804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (permitting petitioner to adopt her same-sex partner's biological children).

V. Proceedings Below

In the district court, Plaintiffs challenged three Indiana statutes, arguing that each violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. ECF No. 80, Plaintiffs' Brief in Support of their Motion for Summary Judgment [hereinafter Pls.' SJ Br.] at 5. They named as Defendants Dr. Jerome M. Adams in his official capacity as Commissioner of the Indiana State Department of Health, and health officials of Bartholomew, Marion, Tippecanoe, and Vigo Counties, all in their official capacities. Short App. 11–12.[5]

[5] Specifically, the other named defendants were Dr. Brian Niedbalski in his official capacity as Health Officer of the Bartholomew County Health Department; Collis Mayfield in his official capacity as Director of the Bartholomew County Health Department; Beth Lewis in her official capacity as Registrar of Vital Records of the Bartholomew County Health Department; and Dennis Stark, Dr. Michael Chadwick, Dr. Susan Sawin-Johnson, Michael Meyer, Dr. Charles Hatcher, Dr. Brooke F. Case, Cindy Boll, and Jim Reed in their official capacities as members of the Bartholomew County Board of Health; Dr. Virginia A. Caine in her official capacity as Director and Health Officer of the Marion County Health Department; Darren Klingler in his official capacity as Administrator of Vital Records of the Marion County Health Department; and Dr. James D. Miner, Gregory S. Fehribach, Lacy M. Johnson, Charles S. Eberhardt, II, Deborah J. Daniels, Dr. David F. Canal, and Joyce Q. Rogers in their official capacities as Trustees of Health & Hospital Corporation of Marion; Dr. Jeremy P. Adler in his official capacity as Health Officer for the Tippecanoe County Health Department; Craig Rich in his official capacity as Administrator of the Tippecanoe County Health Department; Glenda Robinette in her official capacity as Registrar of Vital Records of the Tippecanoe County Health Department; and Pam Aaltonen, Dr. Thomas C. Padgett, Thometra Foster, Karen Combs, Kate Nail, Dr. John Thomas, and Dr. Hsin-Yi Weng in their official capacities as members of the Tippecanoe County Board of Health; Dr. Darren Brucken in his official capacity as Health Officer of the Vigo County Health Department; Joni Wise in her official capacity as Administrator of the Vigo County Health Department; Terri Manning in his official capacity as Supervisor of Vital

The statutes Plaintiffs challenged are as follows:

The "Paternity Presumption Statute"

Ind. Code § 31-14-7-1(1):

A man is presumed to be a child's biological father if:

(1) the:

(A) man and the child's biological mother are or have been married to each other; and

(B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution[.]

The "Wedlock Statutes"

Ind. Code § 31-9-2-15:

"Child born in wedlock", for purposes of IC 31-19-9, means a child born to:

(1) a woman; and

(2) a man who is presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2) unless the presumption is rebutted.

Ind. Code § 31-9-2-16:

"Child born out of wedlock", for purposes of IC 31-19-3, IC 31-19-4-4, and IC 31-19-9, means a child who is born to:

(1) a woman; and

(2) a man who is not presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2).

Statistics of the Vigo County Health Department; and Jeffery DePasse, Dora Abel, Dr. Irving Haber, Brian Garcia, Michael Eldred, Dr. James Turner, and Dr. Robert Burkle in their official capacities as members of the Vigo County Board of Health. Short App. 19.

Plaintiffs have argued these statutes are unconstitutional because they treat a birth mother's female spouse and children differently from a birth mother's male spouse and children. Specifically, Plaintiffs object to the statutes because (1) they do not create a presumption of legal parenthood for the same-sex spouse, (2) they "stigmatize[]" children of same-sex married couples by denominating them children "born out of wedlock," and (3) they do not permit a same-sex spouse to be automatically listed on a child's birth certificate. ECF No. 80, Pls.' SJ Br. at 14, 33. Plaintiffs sought three forms of relief: (1) for the State to "presume" Spouses to be the parents of the Children pursuant to the Paternity Presumption Statute; (2) for the State to "recognize" Children as "born in wedlock" as that term is defined in the Wedlock Statutes; and (3) for Spouses to be listed as parents on the Children's birth certificates. *Id.* at 34–35.

Defendants argued that Indiana law confers parental rights solely through biological and adoptive relationships—not through marriage relationships. ECF No. 85, Memorandum off State Defendant and Defendants of Bartholomew, Marion, and Vigo Counties in Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 32. They also argued that Plaintiffs lacked a colorable Fourteenth Amendment claim because the challenged statutes apply equally to all Indiana residents; any difference in the outcome of that application is a result of biological reality, not discrimination. *Id.* at 16. Finally, they argued that Plaintiffs lacked standing to challenge the Wedlock

Statutes because they apply only to circumstances, such as adoption proceedings, not at issue here. *Id.* at 17.

As a threshold matter, on cross-motions for summary judgment, the district court dismissed all county defendants from the case on the grounds that they performed solely ministerial functions and Plaintiffs lacked standing to sue them. Short App. 32–33. Hence, only the State Defendant, Indiana State Department of Health Commissioner Dr. Jerome Adams, remains.

On the merits, the Court declared that the Paternity Presumption and Wedlock Statutes violate both the Equal Protection Clause and Due Process Clause. Short App. 47. The court accepted Plaintiffs' assertion that the statutes do not apply equally to all married couples regardless of sex. Short App. 38. It then applied "intermediate" scrutiny to Plaintiffs' Equal Protection claims and concluded the challenged statutes were not "substantially related or narrowly tailored to meet the stated interests[.]" Short App. 40. As to Plaintiffs' Due Process claims, the district court applied strict scrutiny and reached a similar result. Short App. 44–45. Citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the court concluded that "there is no conceivable important governmental interest that would justify the different treatment of female spouses of artificially-inseminated birth mothers from the male spouses of artificially-inseminated birth mothers." Short App. 46.

The Court entered final judgment for Plaintiffs and issued an order that (1) declared "Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the

United States Constitution"; (2) enjoined the "State Defendant . . . from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers as to any child born during the marriage"; (3) enjoined the "State Defendant . . . to recognize children born to a birth mother who is married to a same-sex spouse as a child born in wedlock"; (4) enjoined the "State Defendant . . . to recognize each of the Plaintiff Children in this matter as a child born in wedlock"; and (5) enjoined the "State Defendant . . . to recognize each of the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate." Short App. 13.

After the district court issued its ruling, the Commissioner complied with the final judgment and injunctions by ensuring that all Plaintiffs who requested a new birth certificate listing the names of both the Birth Mother and her Spouse have been issued such a certificate by their local county health departments. App. 2–3. Furthermore, the Commissioner has ensured that birth certificates listing both wives' names as parents are now available for any child born while the couple is married. *Id.* The Department is also working to establish both a form and policy to provide birth certificates to children who were born to married female, same-sex couples prior to the district court's ruling. *Id.*

Even so, on July 18, 2016, uncertain about the meaning and scope of the court's declaration and injunction in all particulars, the Commissioner filed a

motion under Rule 59(e) respectfully urging the court to alter or amend its judgment. ECF No. 119, Defendant's Motion to Alter or Amend Judgment. Specifically, the Commissioner asked the court to (1) address the argument that Plaintiffs lacked standing to challenge the Wedlock Statutes and to declare that they, in fact, did not have such standing; (2) clarify whether it had declared the challenged statutes invalid on their face or only as applied to Plaintiffs; (3) clarify whether its injunction applied to all wives of birth mothers regardless of whether the donor's identity was known; and (4) clarify whether the new presumption of legal parenthood that it had created for wives of birth mothers was conclusive or rebuttable, and if the latter, how it could be rebutted. *Id.*

On December 30, 2016, the district court issued a ruling on that motion granting it in part and denying it in part. Short App. 1–10. The court granted the motion to clarify that its previous judgment "is a declaration of unconstitutionality *as applied* to female, same-sex married couples who have children during their marriage[,]" rather than a facial invalidation. Short App. 7 (emphasis added). It further stated that its injunction applied regardless whether the child was conceived using sperm from an anonymous or known donor. Short App. 8. Finally, it stated 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." *Id.*

SUMMARY OF THE ARGUMENT

No one disputes that the married couples who are plaintiffs in this case may, and indeed should, ultimately have joint parentage of the children born to their marriages. But, given that one member of each couple is not biologically related to the children born to them, the question is how that non-biological parent may acquire parental rights: Must she adopt, or does the Fourteenth Amendment guarantee parental rights through marriage? The answer: Only a biological relationship confers constitutional parental rights, and in all other cases the state may require would-be parents to adopt so that a court may account for the rights of others and determine the best interests of the child. For while no one has disputed the parental beneficence of the Spouses in this case, other cases may be different, regardless whether the married couple is same-sex or opposite-sex. That is why a process exists for contesting the bestowal of parental rights on those not biologically related to the child.

Accordingly, with respect to parental rights in Indiana, it is biology or adoption; constitutional right or judicial process. That dual structure exists for everyone, and it is valid. The district court ruling, however, creates a new third source of parental rights—marriage to the birth mother—solely for female same-sex married couples. That ruling has no grounding in fundamental constitutional rights and introduces inequality into Indiana's parental rights system that did not previously exist.

The district court fundamentally misunderstood constitutional parental rights. The Constitution protects the fundamental right to procreate through sexual intercourse, and it protects the fundamental rights of parents in the care and upbringing of their children. It does not, however, otherwise protect a fundamental right to *become* a parent. The district court essentially got this backward when it concluded that *Obergefell* overruled all prior case law on familial relationships, stating "[t]he State Defendant offers a litany of cases to support its position and argues that Indiana's long history of statutory and case law recognizes that an individual may become a parent only through biology or adoption. However, all of those cases precede *Baskin* and *Obergefell*." Short App. 37. But *Obergefell* cannot possibly mean that biological parents no longer have fundamental rights to their own children, or that states are now required to confer non-biological parental rights on spouses of birth mothers. These are converse ways of saying the same thing: Regardless of marriage, every child has a biological father and a biological mother. And before anyone else can properly claim parentage, the status of the biological father and the biological mother must be addressed with due process.

Next, the district court's theory that Indiana must, as a matter of Equal Protection, "presume" legal parental rights of wives of birth mothers misunderstands Indiana law presuming the biological fatherhood of the mother's husband. Regardless of that presumption, a man whose wife gives birth to a child created with the sperm of a third-party donor is *not* the child's legal parent without adoption. Under the Paternity Presumption Statute, the husband in that scenario

is merely *presumed* to be the child's biological father, but because he is not *actually* the child's biological father, the presumption may be negated through a paternity action, whether filed by the actual biological father, the mother (perhaps during a divorce), or the child (perhaps by a guardian ad litem). Accordingly, the husband in that scenario must adopt the child to secure his legal parental rights.

In contrast, under the district court's ruling, a "presumption of parenthood" exists where, even without adoption, a woman's wife gives birth to a child (necessarily created with the sperm of a third-party donor). Short App. 38, 44. This is not a *factual* presumption of paternity, but a *legal* presumption of parental rights. Yet the district court also said that such "presumed" rights may be rebutted using "the same methods for rebutting the presumption of parenthood of the husband of a birth mother," which means a genetic test establishing the *factual* identity of the baby's biological father. But if the key to permanent parental rights in the birth-mother's spouse is paternity-in-fact, a presumption favoring the wife of the birth mother is pointless. When the birth mother's spouse is a woman, no genetic test for biological fatherhood is needed and the "presumption" would stand rebutted from the get-go in every case, leaving the same-sex couple at square one, needing to adopt.

On the other hand, an irrefutable "presumption" of parental rights only for wives of birth mothers would not only be unfair to husbands of birth mothers, but would also extinguish the constitutionally protected rights of biological fathers

without notice or hearing. The district court's ruling did not address those rights in any respect, except to suggest they had been eliminated by *Obergefell*.

The district court's ruling also was predicated on an acceptance of Plaintiffs' assertion that the Department "allows [birth mothers] to name their husband on their child's birth certificate even when the husband is not the biological father." Short App. 41. That statement is untrue, and Plaintiffs designated no evidence supporting it.

As the Commissioner stated in his affidavit, the state form from which the birth certificate is generated asks whether the birth mother is married to the child's biological father; if she answers "no," her husband's name is not included on the child's birth certificate. The district court, however, dismissed this actual evidence in favor of the "common sense" proposition that a birth mother will incorrectly claim on the form that her husband is her child's father so that he is listed as the father on the birth certificate. So, according to the district court, because it is theoretically possible that a woman married to a man *could* misidentify the father on a state form, the Constitution *requires* the State to permit a woman married to a woman to identify a non-biological parent on that form. That conclusion is not consonant with equal protection doctrine.

As to the Wedlock Statutes, they apply only in the contexts of adoption and birth-certificate surnames, and Plaintiffs lack standing to challenge them. Because Plaintiffs are not seeking to adopt, they are not aggrieved by the notice and consent statutes that depend on "born in wedlock" status. Plaintiffs claim that the Wedlock

Statutes stigmatize them, but a claim of stigma absent accompanying injury to a cognizable legal interest is insufficient to confer standing.

The district court ignored these standing problems and declared the Wedlock Statutes unconstitutional because they "do not refer to biology when they define the terms 'child born in wedlock' and 'child born out of wedlock.'" Short App. 40. Indiana cases applying the statute, however, make clear that biology is critical in this context: a child is "born in wedlock" only if the child's biological mother is married to the child's *biological* father. If she is married to anyone else, regardless of that person's sex or sexual orientation, the child is "born out of wedlock."

Ultimately, all of Plaintiffs' claims in this case must fail because these statutes impinge no fundamental rights, apply equally to all, reflect biological reality rather than legislative discrimination, and in any event are narrowly tailored to vindicate compelling state interests. Presuming the paternity of the husband of a birth mother is an efficient and highly accurate means of identifying biological fathers, who have constitutionally protected parental rights. Given the fundamental constitutional rights of biological parents, it is not possible to afford an identical presumption in the context of same-sex couples.

ARGUMENT

I. There Are No Substantive Fourteenth Amendment Rights at Stake in this Case

While parents have fundamental rights relating to the care and upbringing of their children, no case establishes that a person has a fundamental right to *be* a parent in the absence of a biological or adoptive relationship. The district court

unfortunately ignored this distinction, and indeed proceeded from the premise that *Obergefell* overrides long-established fundamental rights of biological parents, at least where all concerned intend for a married, female same-sex couple to be the parents of a newborn.

A. The right to same-sex marriage does not require states to confer parental rights via marriage or include non-parents on birth certificates

1. A fundamental right is one that is "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed[.]" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotations and citations omitted). There simply is no "history and tradition" of conferring parental rights upon persons who have no biological or adoptive relationship to the child. On the contrary, "[f]or most of its history, American law proceeded on the assumption that parents were persons who created a child through sexual reproduction or who assumed the legal obligations of parenthood through formal adoption." David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 Wm. & Mary Bill Rts. J. 857, 859 (2006).

Parents, of course, have fundamental rights to direct the upbringing and education of their children. *See Meyer v. Nebraska*, 262 U.S. 390, 400, 403 (1923). But legal parental status is a necessary prerequisite to the exercise of those rights, and such status is unquestionably conferred by state law. *Michael H. v. Gerald D.*, 491 U.S. 110, 129–30 (1989) ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a

couple desiring to retain a child conceived within and born into their marriage to be rebutted."); *see also* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 Rutgers L. Rev. 305, 313 (2010) ("Legal parentage is a status that is conferred by a state statute. Therefore, before a person can exercise the fundamental right to raise one's child, the State must deem that person to be a legal parent."). Indiana law confers parental rights exclusively through biological relationships and adoption. *See* pp. 4–12, *supra*.

To the extent the Constitution protects a fundamental right to *be* a parent, it protects only the rights of biological parents. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the "fundamental liberty interest of natural parents in the care, custody, and management of their child" engendered by "blood relationships"). So, like every State—if not the entire world—Indiana holds that, in the main, it is best for children to be raised by their biological parents. *See, e.g., In re Guardianship of L.L.*, 745 N.E.2d 222, 230 (Ind. Ct. App. 2001) ("[T]here is a presumption in all cases that the natural parent should have custody of his or her child."); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

That presumption may be overcome where the biological parents are unwilling or unfit. And the law permits many scenarios where, via adoption, courts may bestow parental rights on one or two people who wish to be parents of a child

that is not biologically their own. But the availability of such procedures does not expand constitutional rights to become parents. Spouses in this case therefore cannot assert fundamental rights of legal parents.

2. The district court, however, concluded that *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), mean Indiana cannot limit parental rights to persons with a biological or adoptive relationship: "[T]he 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." Short App. 41. It continued, "Because of *Baskin* and *Obergefell*, this benefit—which is directly tied to marriage—must now be afforded to women married to women." Short App. 41–42. But the premise is false, and those cases plainly do not so hold.

First, the State does not "allow" birth mothers to "name their husband" on the birth certificate "even when the husband is not the biological father." Indiana has no law, policy, or practice of putting the names of people on birth certificates who are not biological or adoptive parents. Rather, when a birth mother married to a man answers "no" to the question "are you married to the father of your child?", her husband is not listed on the child's birth certificate. He would still be *presumed* to be the child's biological father, but he would not have any legal parental rights unless he were *actually* the child's biological father. And being listed on a child's birth certificate does not confer parental rights; only biology or adoption can do that. In this case, in any event, Birth Mothers all answered "no" when asked

whether they were married to the child's father. Pls.' SJ Br. at 3. Thus, if the State were to list Spouses on Children's birth certificates in this case, it would actually be treating them differently from similarly situated opposite-sex married couples.

Second, the injunction in *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1165 (S.D. Ind. 2014), *aff'd* 766 F.3d 648 (7th Cir. 2014), only precludes officials from denying "married same-sex couples any of the rights, benefits, privileges, obligations, responsibilities, and immunities that accompany marriage in Indiana." That injunction does not support the district court's decision here. Neither parental rights nor inclusion on a child's birth certificate are rights that "accompany marriage." Rather, parental rights accompany a biological or adoptive relationship. A biological relationship may be presumed in the birth mother's husband, but that presumption is rebuttable, and what ultimately counts is the husband's actual biological connection to the child (or an adjudication vesting him with parental rights), not merely his marriage to the child's mother.

Nor does *Obergefell* extend further than *Baskin*. It held "that same-sex couples may exercise the fundamental right to marry[,]" *Obergefell*, 135 S. Ct. at 2604–05, but also said that "the States are in general free to vary the benefits they confer on all married couples." *Id.* at 2601. At most, *Obergefell* stands for the proposition that any benefit of marriage must now be extended to same-sex married couples just as it would be to opposite-sex married couples. Indiana does that, as discussed below. *See* Part II, *infra*.

The district court took *Baskin* and *Obergefell* well beyond this limited requirement of marriage parity. It rejected precedents on parental rights because "[a]ll of those cases precede *Baskin* and *Obergefell*." Short App. 37. But *Obergefell* nowhere purported to overrule *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) and *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), which establish parents' fundamental rights regarding their biological children. *Obergefell* disconnected the right to marry from the general procreative capabilities of opposite-sex couples, but that does not imply elimination of biological parental rights. *See Obergefell*, 135 S. Ct. at 2601. In any event, lower courts may not infer that the Supreme Court intended to overrule longstanding precedents bearing on fundamental rights *sub silentio*. *See, e.g.*, *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) ("The Supreme Court has made it clear that, in deciding cases presented in the normal course of decision, a lower court judge ought not anticipate changes in established doctrine." (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))).

Accordingly, *Santosky*, *Stanley*, and related cases remain in full force, and lower courts must account for their holdings when considering new claims and sources of parental rights.

B. Automatically conferring parental rights upon spouses through marital relationships to birth mothers improperly curbs the rights of biological fathers and their children

To protect biological parents' rights and the best interests of children, Indiana requires adjudication of any knowing departure from the biological parent standard. *See generally* Ind. Code art. 31-19 (governing adoption). Often (such as

with Plaintiffs in this case), the best interests of the child will be clear, and the adoption may even be uncontested. But in contested or other difficult cases, the adoption process ensures protection of everyone's fundamental constitutional rights and provides certainty as to the identity of the legal parents.

The district court's order for Spouses to be "presumed parents" ignores two important fundamental constitutional rights: Biological fathers' rights to their Children, and Children's rights to their biological fathers. *In re B.W.*, 908 N.E.2d 586, 593 (Ind. 2009) (noting that a biological father's parental rights are "constitutionally protected"); *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.").

1. The Henderson and Phillips-Stackman Plaintiffs contend that their children's biological fathers executed waivers purporting to terminate their parental rights. App. 72, 97–98; ECF No. 100, Pls.' SJ Reply at 22. The other Plaintiffs have not expressly claimed that the biological fathers of their children executed any such waivers. It is unclear, in any event, what effect under Indiana law any purported waiver would have on a biological father's parental rights and obligations.

In terms of statutory law, in Indiana a biological parent's rights can be terminated only by a court, either through adoption by another person, Ind. Code § 31-19-15-1, or through adjudication that the child's parents have failed to meet their parental obligations, *id.* § 31-35-2-4; *C.A. v. Ind. Dep't of Child Servs.*, 15 N.E.3d 85, 92 (Ind. Ct. App. 2014) ("[A]lthough parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities." (internal quotations and citations omitted)). There is no statute authorizing either direct conveyance of parental rights via private agreement or out-of-court assumption of rights by one parent following abandonment by another.

What is more, children have a non-waivable right to support from their parents, which includes biological parents at birth. *See* Ind. Code § 31-16-6-6; *see also Dunson v. Dunson*, 769 N.E.2d 1120, 1124 (Ind. 2002) ("We believe the legislature's intent in enacting the emancipation statute is to require that parents provide protection and support for the welfare of their children until the children reach the specified age or no longer require such care and support."). On top of that, while one Indiana intermediate appellate case has enforced a donor's waiver where a doctor was involved and the writing was formal, *In re Paternity of M.F.*, 938 N.E.2d 1256, 1260–61 (Ind. Ct. App. 2010), the Indiana Supreme Court has invalidated a waiver where no doctor was involved and the contract was rudimentary. *Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 598, 601 (Ind. 1994). To

say the least, the ability of a donor to declare himself free of rights and obligations to the child produced by his sperm is far from settled under Indiana law.

2. Unquestionably, where a sperm donor has *not* signed a release his rights and obligations would need to be respected and taken into account. *See, e.g.*, *In the Interest of R.C.*, 775 P.2d 27, 35 (Colo. 2005) (refusing to bar donor-father's claim to establish parental rights based on a conversation between donor and unmarried recipient and parties' subsequent conduct). Accordingly, a general "presumption of parenthood" in Birth Mother's spouse undermines the fundamental rights of biological fathers (and children) in a substantial set of cases.

For example, if a woman married to another woman were to conceive a child via secret extramarital affair with a man, her female spouse would be presumed a parent of the child, even if the biological father wished to assert his parental rights. It is unclear from the district court's injunction how Indiana courts should resolve such scenarios. On one hand, the district court said "the same methods for rebutting the presumption of parenthood of the husband of a birth mother are available for rebutting the presumption of parenthood of the wife of a birth mother." Short App. 8. But of course everyone already knows the wife of the birth mother cannot be the biological father, so it is not clear what the point of the presumption would be. But on the other hand, the district court also said that a biological connection is no longer relevant to parental rights after *Obergefell*. Short App. 37.

So, if the biological father tries to assert parental rights, what then? Do his biological rights automatically take precedence over the legal rights of the wife of

the birth mother? If so, the "presumption of parenthood" conferred by the district court means little. If not, the biological father's constitutionally protected parental rights have been thwarted.

And what if the birth mother and her spouse *both* desire that the biological father be the child's legal parent, perhaps to confer financial advantages upon the child? Prior to the injunction, the child's two biological parents could file a paternity action and obtain a court order stating they are the child's legal parents. Ind. Code § 31-14-4-1; *In re Infant Girl W.*, 845 N.E.2d 229, 242 (Ind. Ct. App. 2006). But the new "presumption of parentage" creates confusion. A presumed biological father is not permitted to disestablish his own paternity. *In re Paternity of Infant T.*, 991 N.E.2d 596, 600 (Ind. Ct. App. 2013). Can a same-sex-spouse-presumed-parent disclaim a child everyone knows is not biologically hers? If so, she has greater rights than a presumed biological father. If not, the district court's "presumption of parenthood" is in reality conclusive, and other means of sorting out parental rights other than adoption would be foreclosed.

And what if the wife of the birth mother is concerned about the obvious risks posed by her mere "presumption" and wishes to settle the matter by adoption? The district court has just imposed a burdensome requirement on that adoption: the biological father's written consent. After all, under the district court's injunction, the child is "born in wedlock," so no adoption can be ordered unless "[e]ach living parent" consents to that adoption in writing. Ind. Code § 31-19-9-1. And again, "parent" means "a biological or an adoptive parent." *Id.* § 31-9-2-88(a); *see also* 410

Ind. Admin. Code 18-0.5-10. So, by its plain language, this statute requires that the sperm donor *must* consent to any adoption, because he is a parent of a child born in wedlock. In contrast, prior to the district court's injunction, the child would have been classified as "born out of wedlock," meaning that the consent of an absent sperm donor to the adoption would not have been required.

To sum up: Before the district court's decision, the wife of a birth mother who wished to be a second parent to the child needed to adopt, but in so doing did not need the consent of the child's biological father. Now, under the district court's injunction, that wife has a rebuttable "presumption of parenthood," but if she wishes to adopt anyway so as to quiet any competing parental rights claims, she must obtain the biological father's written consent—even if he was an anonymous donor. Such unintended consequences underscore why the district court's ruling is profoundly misguided.

C. The district court's presumption creates problems for opposite-sex and same-sex couples alike

Rewriting the Paternity Presumption Statute to create automatic legal parenthood for a biological parent's spouse carries still *other* shortcomings for other contexts. Were a male same-sex married couple to conceive a child using one spouse's sperm and a surrogate's egg, the resulting child would seemingly have *three* legal parents: (1) the birth mother, who cannot disestablish her own presumed maternity without establishing it in another woman, (2) the biological father, who could assert rights through paternity affidavit or paternity action, and

(3) the biological father's spouse, who would apparently be the "presumed second father."

To be sure, the district court said that its injunction and declaration applied only to female same-sex couples. But if that is correct, it introduces yet another new and needless inequality into the system.

Regardless, similarly confusing scenarios would arise in the cases of female same-sex spouses who become pregnant using donor eggs or have a surrogate carry a child for them (or both). In these cases, the presumed parents and biological parents are all different, and the married couple would surely need to seek judicial relief to clarify parental rights.

In other words, the district court's alternative parental rights presumption apparently accounts for *Plaintiffs*' circumstances, but not many other plausible family configurations and preferences. The injunction accordingly not only erases the connection between biology and "presumed parentage," but it also introduces inequality in the bestowal of parental rights that did not previously exist. Such an alternative method of determining parental rights detached from a biological or adoptive connection imposes unpredictable outcomes on untold family configurations.

II. Presuming That a Husband is the Biological Father of His Wife's Child Does Not Discriminate Against Women Married to Each Other

In a system where biological parents have constitutional parental rights to their offspring, same-sex couples and most opposite-sex couples will have different paths to parenthood. But such differences are an unavoidable result of biological

reality, not discriminatory lawmaking. A man can be a child's biological father, but a woman cannot. That is not sex discrimination; it is a natural, biological fact. Similarly, a man and a woman, whether married or unmarried, can both be a child's biological parents, but two women cannot. That is not sexual orientation discrimination; it is a natural, biological fact. When the district court concluded the challenged statutes impermissibly treat opposite-sex married couples differently from same-sex married couples (and treat women differently from men), it confused differential *outcomes* arising from biology for discrimination under law. No such discrimination exists here, so no form of heightened scrutiny applies.

A. The district court concluded that the State was engaging in disparate treatment because "[w]hen a child is born to a married man and woman as a result of the wife being artificially inseminated by a man other than her husband," the State permits that man and woman "engage in a legal fiction that presumes the husband is the child's legal parent even though the child's family, medical provider and others know that the husband is not the biological father of the child." ECF No. 80, Pls.' SJ Br. at 7.

But that statement—and seemingly the entire premise of this litigation—is just not correct. The Paternity Presumption Statute provides only that a husband married to the birth mother is "*presumed* to be [the] child's *biological* father[.]" Ind. Code § 31-14-7-1 (emphasis added). If such a husband is not *actually* the child's biological father, then he is not *actually* entitled to parental rights unless he adopts the child. *See Cochran v. Cochran*, 717 N.E.2d 892, 894 (Ind. Ct. App. 1999)

(stating that a husband in a dissolution who requested a DNA test that excluded him as the biological father of his wife's children was not seeking to disestablish his own paternity status because "[s]uch status never existed in the first place"); *see also Russell v. Russell*, 682 N.E.2d 513, 517 n.7 (Ind. 1997) (noting that "a husband who is not the biological father of his wife's child may pursue legally adopting the child"). The law presumes him to be the biological father because (1) *someone* is the father, and public policy dictates that both biological parents should be identified and held responsible for support and care of the child in the first instance; and (2) requiring a genetic test when an opposite-sex couple is married and the husband reasonably expects he is *actually* the father of his wife's child would impose unnecessary costs.

Yet because biology is fundamental to the entire system, the law permits the husband's presumed biological fatherhood to be extinguished. *See* Ind. Code § 31-14-4-1 (allowing children themselves or the Indiana Department of Child Services to bring a paternity action). This facilitates correct identification of a child's biological parents, which "should prove to be in the best interests of the child for medical or psychological reasons. It also plays a role in the just determination of child support . . . public policy disfavors a support order against a man who is not the child's father." *Russell*, 682 N.E.2d at 517 n.7 (quoting *In re S.R.I.*, 602 N.E.2d 1014, 1016 (Ind. 1992)).

B. The birth certificate, which the district court treated as the source of parental rights and the focus of supposedly unequal treatment, is actually the

secondary, dependent variable. It is designed to reflect parental rights that otherwise exist, not to create them. So, the Worksheet is designed to elicit information establishing who, in the first instance, the legal parents are. The birth certificate is then subject to change if the legal system reallocates parental rights. To facilitate this system, the birth mother must answer truthfully Question 37 on the Worksheet ("ARE YOU MARRIED TO THE FATHER OF YOUR CHILD?"). App. 25. If she does not, she commits fraud. Ind. Code § 16-37-1-12. No matter the sex of her spouse, a married birth mother whose spouse is not the father of her child must answer this question the same way, with the same consequences.

The district court, however, concluded that this system discriminates against same-sex couples because Indiana tolerates fraudulent answers from mothers married to men, but not mothers married to women. Short App. 38–39. The court, however, cited no evidence supporting that conclusion, and Plaintiffs did not designate any in support of their motion for summary judgment. Instead, the district court relied on its view of "common sense," *i.e.* a mother who is married to a man who is not the father of her child will incorrectly state on the Worksheet that her husband is the father. *Id.*

First, without evidence this actually happens, it was improper to grant summary judgment to Plaintiffs on a mere assumption—especially in light of Dr. Adams's affidavit describing how the Worksheet is intended to be completed, which supports summary judgment for the State. *See LINC Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 922 (7th Cir. 1997) (holding that party was entitled to summary judgment

when he presented a "detailed affidavit" and the opponent "offered only [a] bare assertion").

Second, and more fundamentally, an incorrect answer on the Worksheet does not actually confer parental rights. A husband who is not in fact the biological father ultimately has no greater parental rights than a wife of the birth mother. If his parenthood is ever contested, unless he has adopted the child, he will lose.

C. The district court rejected the State's contention that the Wedlock Statutes provides biologically based definitions: "Importantly, the legitimacy statutes do not refer to biology when they define the terms 'child born in wedlock' and 'child born out of wedlock.'" Short App. 40. Yet "Indiana common law is clear that the term wedlock refers to the status of the biological parents of the child in relation to each other." *K.S. v. R.S.*, 669 N.E.2d 399, 402 (Ind. 1996).

Thus, the Wedlock Statutes classify children as born "out of wedlock" when their biological mothers are not married to their biological fathers. *Id.* ("A child born to a married woman, but fathered by a man other than her husband, is a 'child born out of wedlock' for purposes of the statute."). That is equally true of children born to opposite-sex married couples as it is of children born of same-sex married couples: "[A] child born into an intact marriage but fathered by a man other than the husband is a child born out of wedlock." Jack K. Levin, 5 Ind. Law Encyc. Children Born Out of Wedlock § 1 (citing *K.S.*, 669 N.E.2d 399; *Cochran v. Cochran*, 717 N.E.2d 892 (Ind. Ct. App. 1999); *Johnson Controls, Inc. v. Forrester*, 704 N.E.2d 1082 (Ind. Ct. App. 1999); *C.J.C. v. C.B.J.*, 669 N.E.2d 197 (Ind. Ct. App. 1996)).

Only by disregarding the relevant interpretive case law was the district court able to assert that these statutory terms do not describe biological relationships between parents and children. Federal courts, however, are bound by definitive state court interpretations of state statutes. *Cole v. Young*, 817 F.2d 412, 416 (7th Cir. 1987) ("State courts are the ultimate expositors of their own states' laws . . . ." (internal quotations omitted)). Accordingly, there is no inequality in the Wedlock Statutes to explain or defend.

III. Indiana's Paternity Presumption Statute Satisfies Any Level of Constitutional Review

The State has not just a legitimate interest, but a compelling interest, in ensuring that biological parents are vested with legal parental rights (subject to any subsequent adoption). That interest is compelling because biological parents have a constitutionally protected liberty interest in their relationships with their children. *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' . . . ." (internal citation omitted)); *In re the Paternity of S.R.I.*, 602 N.E.2d 1014, 1016 (Ind. 1992) ("[T]here is a substantial public policy in correctly identifying parents and their offspring. Proper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons."); *In re the Paternity of Infant T.*, 991 N.E.2d 596, 600 (Ind. Ct. App. 2013) ("[E]stablishing the biological heritage of a child is the express public policy of this State." (internal quotations and citations omitted)); *In re Paternity &*

Maternity of Infant R., 922 N.E.2d at 60 ("[I]t is well-settled that it is in the best interests of a child to have his or her biological parentage established.").

Indiana's Paternity Presumption Statute is a highly accurate and low-cost way to determine a child's biological father in the first instance: At least one medical study shows that the incidence of misattributed paternity in the United States is less than 1%. App. 20. Even if Indiana could theoretically ensure 100% accuracy by requiring DNA testing before listing a parent on a child's birth certificate, such a solution would be prohibitively expensive and time-consuming. App. 20–21.

Accordingly, with opposite-sex couples, but not same-sex couples, the paternity presumption serves Indiana's compelling interest in identifying the two biological parents of each child with the greatest practicable accuracy, efficiency, and cost-effectiveness. There is no significant gap, therefore, between the State's means and its ends, and, if necessary, the statutes meet the narrow tailoring required by strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) ("Narrow tailoring does not require exhaustion of every conceivable [non-discriminatory] alternative."). Here, there is no alternative that would serve the State's interest "about as well." *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

IV. Plaintiffs Lack Standing To Challenge the Wedlock Statutes

Finally, Plaintiffs challenged the Wedlock Statutes, but they have no standing to do so. Those statutes define when a child is born in wedlock or out of

wedlock only for purposes of determining when a biological father's consent to adoption is required. Plaintiffs have not argued that they intend to adopt under circumstances where invalidation of the Wedlock Statutes would aid their cause. Indeed, to the extent Spouses would, absent this litigation, adopt the Children, the wedlock statutes would make that process easier, as they would likely excuse any need for consent from a biological father whose paternity has not been established. Ind. Code § 31-19-9-8(a)(3). Accordingly, as Plaintiffs cannot claim to suffer injury from application of the wedlock statutes, they lack Article III standing to challenge them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs have conceded the Wedlock Statutes do not "impact the legal rights of Plaintiffs' children[.]" ECF No. 100, Pls.' SJ Reply at 19 n.4. Yet they have continued to challenge the Wedlock Statutes because they "impose stigma by implying that the Plaintiffs' marriage[s] are not sufficiently enough a 'marriage' to make the resulting children 'legitimate.'" *Id.*

Mere "stigma," however, does not rise to the level of a cognizable Article III injury absent invasion of some legally protected interest. *O'Gorman v. City of Chicago*, 777 F.3d 885, 891 (7th Cir. 2015) ("It is well-established that an individual does not have any cognizable liberty interest in his reputation, and therefore mere defamation by the government does not deprive a person of liberty protected by the Fourteenth Amendment . . . [unless] paired with the alteration of legal status[.]" (internal citations omitted)); *see also Paul v. Davis*, 424 U.S. 693, 701 (1976) (noting that notwithstanding "the frequently drastic effect of the 'stigma' which may result

from defamation by the government[,] . . . reputation alone, apart from some more tangible interests such as employment, is" not "sufficient to invoke the procedural protection of the Due Process Clause").

Cases where courts concluded that state marriage definitions imposed substantive legal burdens on *and* stigmatized same-sex couples are not to the contrary. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury"); *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) (noting that such laws denied plaintiffs "considerable[,]" "tangible . . . benefits of marriage"). In those cases, there was cognizable legal injury owing to application of the marriage statutes being challenged. Nothing of the sort exists here, by Plaintiffs' own admission.

It is also worth observing that Defendant has no practical way even to carry out an injunction related to the Wedlock Statutes. Because the Commissioner does not enforce those statutes in the adoption context, and because those statutes are not implicated by Plaintiffs' claimed injuries, the Commissioner has no way to "recognize each of the Plaintiff Children in this matter as a child born in wedlock[.]" Short App. 15. The Defendant has, of course, ensured that all Plaintiffs have been issued birth certificates bearing the names of each spouse. App. 2. But the legal barrier to doing that was never the Wedlock Statutes. Rather, it was the Paternity Presumption Statute and the Worksheet. Ind. Code § 31-14-7-1. Defendant's inability to "recognize" the status of the Plaintiff Children under the Wedlock Statutes confirms the lack of any case or controversy over those statutes. *See Steel*

Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Ultimately, the Wedlock Statutes threaten no interference with Plaintiffs' legally protected interests. The statutes would work to Plaintiffs' benefit by relieving them of any need to notify biological fathers of adoption, even if Plaintiffs felt stigmatized in the process. The alternative would be to put additional burdens of notice and consent on these and other same-sex couples seeking to adopt. The Court should reject this aspect of Plaintiffs' challenge for lack of Article III standing.

***

In sum, Indiana law recognizes biological and adoptive parental rights. The Spouses in this case currently have neither (though they could adopt their wives' children), but that is not a function of their sex or sexual orientation. A man whose wife is artificially inseminated by a third-party donor has no definitive parental rights to the child produced thereby, only a presumption of paternity. And a heterosexual married woman has no parental rights to the biological child of her husband and another woman. Thus, there is no discrimination here, and in any event the parentage statutes as written advance the compelling state interest of identifying both *biological* parents through an efficient, accurate means. Any additional paths to legal parenthood must come from the people's representatives in the legislature; they are not provided by the Constitution.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 12,812 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 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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REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellant submits the following as his Required Short Appendix. Appellant's Required Short Appendix, as well as the separately attached Appellant's Appendix, contains all of the materials required under Circuit Rule 30(a) and 30(b).

By: s/ Thomas M. Fisher
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASHLEE HENDERSON and RUBY HENDERSON a married couple, and L.W.C.H. by his parent and next friend Ruby Henderson, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:15-cv-00220-TWP-MJD
DR. JEROME ADAMS in his official capacity as Indiana State Health Commissioner, *et al.*,	)	
Defendants.	)	

ENTRY ON DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

This matter is before the Court on a Motion to Alter or Amend Judgment ("Motion to Amend Judgment") filed pursuant to Federal Rule of Civil Procedure 59(e) by Defendant Dr. Jerome Adams in his official capacity as the Indiana State Health Commissioner ("State Defendant") (Filing No. 119). The Plaintiffs in this case are a number of female, same-sex married couples and their children whose birth certificates list only the birth mother as a parent with no second parent. The Plaintiffs initiated this lawsuit, seeking injunctive relief to list both the birth mother and her same-sex spouse on their children's birth certificate and to have their children recognized as children born in wedlock. They also sought a declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

Following cross-motions for summary judgment, the Court granted the County Defendant's motion for summary judgment, granted the Plaintiffs' motion for summary judgment against the State Defendant, and denied the State Defendant's motion for summary judgment

(Filing No. 116). The Court entered declaratory relief and a permanent injunction in favor of the Plaintiffs as well as a Rule 58 final judgment (Filing No. 117; Filing No. 118). The State Defendant then filed its Motion to Amend Judgment, asking the Court to clarify aspects of the declaratory relief and permanent injunction and to remove any declaration or injunction that the children are "born in wedlock", as defined in the Wedlock Statutes, Indiana Code §§ 31-9-2-15 and 31-9-2-16 (Filing No. 119 at 1). For the following reasons, the State Defendant's Motion to Amend Judgment is **granted in part and denied in part**.

I. BACKGROUND

Plaintiffs Ashlee Henderson, Ruby Henderson, L.W.C.H., Nicole Singley, Jennifer Singley, H.S., Elizabeth Bush-Sawyer, Tonya Bush-Sawyer, I.J.B-S, Cathy Bannick, Lyndsey Bannick, H.N.B., Nikkole McKinley-Barrett, Donnica Barrett, G.R.M.B., Calle Janson, Sarah Janson, F.G.J., Jackie Phillips-Stackman, Lisa Phillips-Stackman, L.J.P-S, Noell Allen, and Crystal Allen (collectively "Plaintiffs") are female, same-sex married couples and their children whose birth certificates list only the birth mother as a parent with no second parent.

Plaintiffs Elizabeth and Tonya Bush-Sawyer were married in 2010 in Washington, D.C. They artificially conceived I.J.B-S, who was born on January 10, 2014. When I.J.B-S was born, Elizabeth, the birth mother, completed the Indiana Birth Worksheet and provided Tonya's information for all the questions that asked about the father of the child. After returning home from the hospital with I.J.B-S, the couple received a birth confirmation letter that listed both women as the parents of I.J.B-S and that listed the child's name as a hyphenated version of both their last names. In March 2014, Elizabeth went to the Marion County Health Department to obtain a birth certificate for I.J.B-S. At the health department, she was told there was something wrong, and she would need to return the next day. When she returned, Elizabeth was presented with a birth

certificate that listed her as the only parent of I.J.B-S, and the child's name had been changed from I.J.B-S to I.J.B. Shortly thereafter, Elizabeth and Tonya received a new social security card for I.J.B-S, which listed the name as I.J.B.

Because of this incident, Tonya sought a stepparent adoption, which required her 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 was required, which examines the relationship history of Elizabeth and Tonya, 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 was approximately $4,200.00. This same costly and time-consuming adoption process is not required of opposite-sex married couples who artificially conceive a child. 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.

Plaintiffs Ashlee and Ruby Henderson were married on November 11, 2014, in Tippecanoe County, Indiana. They had been together as a couple for over eight years prior to their marriage, and they decided that they wanted a child in their family. After the couple's artificial conception of L.W.C.H., the Indiana statute prohibiting same-sex marriage was declared unconstitutional, so Ashlee and Ruby married.

During the week of November 2, 2014, the couple contacted IU Health Arnett Hospital, where L.W.C.H. would be born, to ask if both spouses would be listed on the birth certificate as parents of L.W.C.H. after the couple was married. They were told to contact the Tippecanoe County Health Department, which they did the same day. They were informed that Ashlee would not be listed on the birth certificate as a parent of L.W.C.H. without a court order.

On December 22, 2014, L.W.C.H. was born at IU Health Arnett Hospital in Lafayette, Indiana. After the child's birth, Ruby was asked to complete the Indiana Birth Worksheet. The couple revised each question asking for information regarding the father of the child by replacing the term "father" with the term "Mother #2." All information provided regarding "Mother #2" related to Ashlee, the legal spouse of Ruby who was the birth mother. On January 22, 2015, the Tippecanoe County Health Department issued L.W.C.H.'s birth certificate, which noted only Ruby Henderson as a parent.

The other Plaintiff female, same-sex married couples have had similar experiences as Elizabeth and Tonya Bush-Sawyer and Ashlee and Ruby Henderson and their children. Only the birth mother has been recognized as a parent of the couples' children, and only the birth mother's name has appeared on the birth certificate of the child. Because of this result, the Plaintiffs filed this action and requested declaratory and injunctive relief. They asked the Court to direct the State Defendant to recognize both Plaintiff spouses as a parent of their children and to list both Plaintiff spouses as a parent on their children's birth certificate. They also asked the Court for a declaration that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The parties filed cross-motions for summary judgment on the Plaintiffs' claims, and the Court granted the County Defendant's motion, granted the Plaintiffs' motion against the State Defendant, and denied the State Defendant's motion (Filing No. 116). The Court determined that the challenged statutes and the State Defendant's implementation of the statutes through the Indiana Birth Worksheet resulted in the State's discriminatory treatment of female, same-sex married couples when creating and issuing birth certificates, thereby violating the Equal Protection Clause. The Court further determined that the Plaintiffs' due process rights were violated.

The Court entered a permanent injunction enjoining the State Defendant (1) from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers; (2) to recognize children born to a birth mother who is legally married to a same-sex spouse as a child born in wedlock; (3) to recognize the Plaintiff children in this matter as a child born in wedlock; and (4) to recognize the Plaintiff spouses in this matter as a parent to their respective Plaintiff child and to identify both Plaintiff spouses as parents on their respective Plaintiff child's birth certificate (Filing No. 117). The State Defendant filed its Motion to Amend Judgment, seeking clarification and modification of the declaratory judgment and permanent injunction.

II. LEGAL STANDARD

A motion to alter or amend a judgment under Rule 59(e) "must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The purpose of a motion to alter or amend a judgment under Rule 59(e) is to ask the Court to reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989). "A Rule 59(e) motion will be successful only where the movant clearly establishes: (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (citation and quotation marks omitted). Relief pursuant to a Rule 59(e) motion to alter or amend is an "extraordinary remed[y] reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008). A Rule 59(e) motion may be used "to draw the district court's attention to a manifest error of law or fact or to newly discovered evidence." *United States v. Resnick*, 594 F.3d 562, 568 (7th Cir. 2010). A manifest error "is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent."

Oto v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000) (citation and quotation marks omitted). Furthermore, "a Rule 59(e) motion is not an opportunity to relitigate motions or present arguments, issues, or facts that could and should have been presented earlier." *Brownstone Publ'g, LLC v. AT&T, Inc.*, 2009 U.S. Dist. LEXIS 25485, at *7 (S.D. Ind. Mar. 24, 2009).

III. DISCUSSION

The State Defendant asks the Court to modify and clarify the declaratory judgment and permanent injunction. First, it asserts that the Court lacks jurisdiction to enter a declaration or injunction governing enforcement of Indiana Code §§ 31-9-2-15 and 31-9-2-16, concerning whether children are "born in wedlock" or "born out of wedlock." It asks the Court to remove any declaration or injunction directed at these two statutes. The State Defendant argues that the Plaintiffs lack Article III standing to challenge the statutes because the statutes only apply to adoption proceedings, and thus, the Plaintiffs are not injured by the statutes because their alleged injuries do not arise within the adoption context. The State Defendant asserts the challenged statutes simply have no relevance to the Plaintiffs; therefore, they have no standing, resulting in a lack of jurisdiction in this Court.

In one cursory paragraph in its opening summary judgment brief, the State Defendant alleged that the Plaintiffs lack standing to challenge the statutes (*see* Filing No. 85 at 22). Then, in three pages of its reply brief, the State Defendant more fully addressed its standing argument (Filing No. 108 at 9–12). The State Defendant now again advances this same argument that the Plaintiffs lack standing to challenge the statutes because the statutes only apply to adoption proceedings, and thus, the Plaintiffs are not injured by the statutes. However, the State Defendant has failed to point out a manifest error of law or fact. Furthermore, a Rule 59(e) motion is not an opportunity to relitigate motions.

In the Court's summary judgment order, the Court explained that it was convinced by the evidence and argument that the State's regulatory system for creating and issuing birth certificates in the State of Indiana is dictated and implemented by the State Defendant, and thus, the real injury to the Plaintiffs came from the State Defendant's implementation of the statutes (Filing No. 116 at 15). The Court also addressed the void that Indiana's statutory framework has created that has led to the State's discriminatory conduct when completing the Indiana Birth Worksheet and creating and issuing birth certificates (Filing No. 116 at 22).

Because the State Defendant has failed to point out a manifest error of law or fact and seems to simply relitigate its argument from its summary judgment reply brief, the Court **DENIES** the Motion to Amend Judgment regarding the request to remove any declaration or injunction directed at Indiana Code §§ 31-9-2-15 and 31-9-2-16.

Next, the State Defendant asks the Court to clarify the declaratory judgment regarding the constitutionality of the statutes, whether they are unconstitutional facially or as applied. The Court **GRANTS** the State Defendant's request to clarify the judgment, not to modify the judgment but to simply provide clarification. As discussed throughout the Court's summary judgment Order, the constitutionality of the challenged statutes were analyzed in the context of the "benefits being afforded to female, same-sex married couples," "applying the same rights to female, same-sex married couples," "applying the statutes," "application of the statutes," and "implementation of the statutes." (*See* Filing No. 116.) The Court's declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses is a declaration of unconstitutionality as applied to female, same-sex married couples who have children during their marriage.

The State Defendant also asks the Court to clarify the permanent injunction regarding whether it applies to wives of all birth mothers or only to wives of birth mothers who conceived through artificial insemination by an anonymous donor. Again, the Court **GRANTS** the State Defendant's request to clarify the judgment, not to modify the judgment but to simply provide clarification. The State Defendant seems to advance new argument to apply further limitations to the Court's already-issued permanent injunction. Again, "a Rule 59(e) motion is not an opportunity to relitigate motions or present arguments, issues, or facts that could and should have been presented earlier." *Brownstone Publ'g*, 2009 U.S. Dist. LEXIS 25485, at *7. Nowhere in the Court's Orders were "anonymous donors" discussed or considered. The Court's permanent injunction provides relief to "female, same-sex spouses of birth mothers" and "children born to a birth mother who is married to a same-sex spouse." (Filing No. 117 at 1.) The Order means what it says and says what it means. It applies to female, same-sex spouses of birth mothers and children born to a birth mother who is married to a same-sex spouse. It does not apply additional limitations as the State Defendant questions.

Finally, the State Defendant asks the Court to clarify the permanent injunction regarding whether the presumption of parenthood is conclusive or rebuttable. The Court **GRANTS** the State Defendant's request to clarify the judgment. The State Defendant notes that "[t]he Court appears to intend to give wives of birth mothers comparable rights to husbands of birth mothers." (Filing No. 120 at 11.) The State Defendant's observation is correct. The Court's Orders did not modify or limit the rebuttable nature of the presumption of parenthood. Thus, 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.

IV. CONCLUSION

For the reasons discussed above, the State Defendant's Motion to Amend Judgment (Filing No. 119), seeking to clarify and modify the Court's declaratory judgment and permanent injunction, is **granted in part and denied in part**.

SO ORDERED.

Date: 12/30/2016

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASHLEE HENDERSON and RUBY HENDERSON a married couple, and L.W.C.H. by his parent and next friend Ruby Henderson, *et al.*,	)	
Plaintiffs,	)	Case No. 1:15-cv-00220-TWP-MJD
v.	)	
DR. JEROME ADAMS in his official capacity as Indiana State Health Commissioner, *et al.*,	)	
Defendants.	)	

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day made its Entry directing the entry of final judgment, the Court now enters **FINAL JUDGMENT**.

I.

All claims asserted against the County Defendants **are dismissed for lack of subject matter jurisdiction.** As just used, the term "County Defendants" refers to: Dr. Virginia A. Caine in her official capacity as Director and Health Officer of the Marion County Health Department; Darren Klingler in his official capacity as Administrator of Vital Records of the Marion County Health Department; and Dr. James D. Miner, Gregory S. Fehribach, Lacy M. Johnson, Charles S. Eberhardt, II, Deborah J. Daniels, Dr. David F. Canal, and Joyce Q. Rogers in their official capacities as Trustees of Health & Hospital Corporation of Marion; Dr. Jeremy P. Adler in his official capacity as Health Officer for the Tippecanoe County Health Department; Craig Rich in his official capacity as Administrator of the Tippecanoe County Health Department; Glenda Robinette in her official capacity as Registrar of Vital Records of the Tippecanoe County Health

Department; and Pam Aaltonen, Dr. Thomas C. Padgett, Thometra Foster, Karen Combs, Kate Nail, Dr. John Thomas, and Dr. Hsin-Yi Weng in their official capacities as members of the Tippecanoe County Board of Health; Dr. Brian Niedbalski in his official capacity as Health Officer of the Bartholomew County Health Department; Collis Mayfield in his official capacity as Director of the Bartholomew County Health Department; Beth Lewis in her official capacity as Registrar of Vital Records of the Bartholomew County Health Department; and Dennis Stark, Dr. Michael Chadwick, Dr. Susan Sawin-Johnson, Michael Meyer, Dr. Charles Hatcher, Dr. Brooke F. Case, Cindy Boll, and Jim Reed in their official capacities as members of the Bartholomew County Board of Health; Dr. Darren Brucken in his official capacity as Health Officer of the Vigo County Health Department; Joni Wise in her official capacity as Administrator of the Vigo County Health Department; Terri Manning in his official capacity as Supervisor of Vital Statistics of the Vigo County Health Department; and Jeffery DePasse, Dora Abel, Dr. Irving Haber, Brian Garcia, Michael Eldred, Dr. James Turner, and Dr. Robert Burkle in their official capacities as members of the Vigo County Board of Health.

II.

Judgment is entered for Ashlee Henderson, Ruby Henderson, L.W.C.H., Nicole Singley, Jennifer Singley, H.S., Elizabeth Bush-Sawyer, Tonya Bush-Sawyer, I.J.B-S., Cathy Bannick, Lyndsey Bannick, H.N.B., Nikkole McKinley-Barrett, Donnica Barrett, and G.R.M.B., Calle Janson, Sarah Janson, F.G.J., Jackie Phillips-Stackman, Lisa Phillips-Stackman, L.J.P-S., Noell Allen, and Crystal Allen ("prevailing plaintiffs") and against Defendant Dr. Jerome M. Adams in his official capacity as Commissioner of the Indiana State Department of Health ("State Defendant") as to claims asserted by such plaintiffs against the State Defendant, as follows:

It is **DECLARED** that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 **violate** the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The State Defendant and its officers, agents, servants, employees, and attorneys, including political subdivisions of the State of Indiana, and those acting in concert with them are **ENJOINED** from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers as to any child born during their marriage.

The State Defendant and its officers, agents, servants, employees, and attorneys, including political subdivisions of the State of Indiana, and those acting in concert with them are **ENJOINED** to recognize children born to a birth mother who is married to a same-sex spouse as a child born in wedlock.

The State Defendant and its officers, agents, servants, employees, and attorneys, including political subdivisions of the State of Indiana, and those acting in concert with them are **ENJOINED** to recognize each of the Plaintiff Children in this matter as a child born in wedlock.

The State Defendant and its officers, agents, servants, employees, and attorneys, including political subdivisions of the State of Indiana, and those acting in concert with them are **ENJOINED** to recognize each of the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate.

A Permanent Injunction setting forth the relief awarded to the prevailing plaintiffs against the State Defendant shall issue as required by Rule 65(d) of the Federal Rules of Civil Procedure.

III.

Judgment is entered accordingly, and this action is **TERMINATED**.

The prevailing plaintiffs' costs are assessed against the State Defendant.

Dated: 6/30/2016

Laura A. Briggs, Clerk

BY: _____
Deputy Clerk, U. S. District Court

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
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ASHLEE HENDERSON and RUBY HENDERSON a married couple, and L.W.C.H. by his parent and next friend Ruby Henderson, *et al.*,	)	
Plaintiffs,	)	Case No. 1:15-cv-00220-TWP-MJD
v.	)	
DR. JEROME ADAMS in his official capacity as Indiana State Health Commissioner, *et al.*,	)	
Defendants.	)	

PERMANENT INJUNCTION ENJOINING THE ENFORCEMENT OF INDIANA CODE §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1

Consistent with the Final Judgment entered this day,

Dr. Jerome M. Adams in his official capacity as Commissioner of the Indiana State Department of Health and officers, agents, servants, employees, and attorneys of the State of Indiana, including political subdivisions of Indiana, and those acting in concert with them are:

- **ENJOINED** from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers as to any child born during their marriage;
- **ENJOINED** to recognize children born to a birth mother who is married to a same-sex spouse as a child born in wedlock;
- **ENJOINED** to recognize each of the Plaintiff Children in this matter as a child born in wedlock; and

- **ENJOINED** to recognize each of the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate.

Dated: 6/30/2016

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: _____
Deputy Clerk, U. S. District Court

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UNITED STATES DISTRICT COURT
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ASHLEE HENDERSON and RUBY HENDERSON a married couple, and L.W.C.H. by his parent and next friend Ruby Henderson, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:15-cv-00220-TWP-MJD
DR. JEROME ADAMS in his official capacity as Indiana State Health Commissioner, *et al.*,	)	
Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The disputes in this matter surround complex legal issues following the United States Supreme Court's mandate that legally married same-sex couples in the United States are entitled to the same privileges and benefits as legally married heterosexual couples. The Plaintiffs in this case are female, same-sex married couples and their children whose birth certificates list only the birth mother as a parent with no second parent. The Plaintiffs seek injunctive relief to list both the birth mother and her same-sex spouse on their children's birth certificates and to have their children recognized as children born in wedlock. They also seek declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Defendants assert that Plaintiffs' claims must fail because the challenged statutes impinge no fundamental rights and in any event are narrowly tailored to vindicate compelling state interests.

Before the Court are cross-motions for summary judgment filed pursuant to Federal Rule of Civil Procedure 56. Plaintiffs Ashlee Henderson, Ruby Henderson, L.W.C.H., Nicole Singley,

Jennifer Singley, H.S., Elizabeth Bush-Sawyer, Tonya Bush-Sawyer, I.J.B-S, Cathy Bannick, Lyndsey Bannick, H.N.B., Nikkole McKinley-Barrett, Donnica Barrett, G.R.M.B., Calle Janson, Sarah Janson, F.G.J., Jackie Phillips-Stackman, Lisa Phillips-Stackman, L.J.P-S, Noell Allen, and Crystal Allen (collectively "the Plaintiffs") filed their motion on December 4, 2015 (Filing No. 77). Shortly thereafter, Tippecanoe County Defendants (Filing No. 82), and Marion County Defendants, Bartholomew County Defendants, Vigo County Defendants, and the State Defendant[1] (Filing No. 84), filed cross-motions for summary judgment.

The parties request summary judgment on the Plaintiffs' claims for injunctive relief and declaratory judgment. For the following reasons, the Court **GRANTS** the Plaintiffs' Motion for Summary Judgment against the State Defendant, **GRANTS** the Tippecanoe County Defendants' Motion for Summary Judgment, and **DENIES** the State Defendant's Motion for Summary Judgment.

[1] The State and County Defendants are (1) Dr. Jerome M. Adams in his official capacity as Commissioner of the Indiana State Department of Health ("State Defendant"); (2) Dr. Virginia A. Caine in her official capacity as Director and Health Officer of the Marion County Health Department; Darren Klingler in his official capacity as Administrator of Vital Records of the Marion County Health Department; and Dr. James D. Miner, Gregory S. Fehribach, Lacy M. Johnson, Charles S. Eberhardt, II, Deborah J. Daniels, Dr. David F. Canal, and Joyce Q. Rogers in their official capacities as Trustees of Health & Hospital Corporation of Marion County (collectively "Marion County Defendants"); (3) Dr. Jeremy P. Adler in his official capacity as Health Officer for the Tippecanoe County Health Department; Craig Rich in his official capacity as Administrator of the Tippecanoe County Health Department; Glenda Robinette in her official capacity as Registrar of Vital Records of the Tippecanoe County Health Department; and Pam Aaltonen, Dr. Thomas C. Padgett, Thometra Foster, Karen Combs, Kate Nail, Dr. John Thomas, and Dr. Hsin-Yi Weng in their official capacities as members of the Tippecanoe County Board of Health (collectively "Tippecanoe County Defendants"); (4) Dr. Brian Niedbalski in his official capacity as Health Officer of the Bartholomew County Health Department; Collis Mayfield in his official capacity as Director of the Bartholomew County Health Department; Beth Lewis in her official capacity as Registrar of Vital Records of the Bartholomew County Health Department; and Dennis Stark, Dr. Michael Chadwick, Dr. Susan Sawin-Johnson, Michael Meyer, Dr. Charles Hatcher, Dr. Brooke F. Case, Cindy Boll, and Jim Reed in their official capacities as members of the Bartholomew County Board of Health (collectively "Bartholomew County Defendants"); and (5) Dr. Darren Brucken in his official capacity as Health Officer of the Vigo County Health Department; Joni Wise in her official capacity as Administrator of the Vigo County Health Department; Terri Manning in his official capacity as Supervisor of Vital Statistics of the Vigo County Health Department; and Jeffery DePasse, Dora Abel, Dr. Irving Haber, Brian Garcia, Michael Eldred, Dr. James Turner, and Dr. Robert Burkle in their official capacities as members of the Vigo County Board of Health (collectively "Vigo County Defendants").

I. BACKGROUND

The parties essentially do not dispute the key background facts. Where there is a disputed fact, the Court has construed all inferences in the light most favorable to the non-moving party.

A. The Plaintiffs

Plaintiffs Ashlee and Ruby Henderson were lawfully married in Tippecanoe County, Indiana on November 11, 2014. Prior to their marriage, the couple had been together for over eight years and decided they wanted a child in their family. After the couple's artificial conception of L.W.C.H., the Indiana statute prohibiting same-sex marriage was declared unconstitutional, so Ashlee and Ruby married.

During the week of November 2, 2014, the couple contacted IU Health Arnett Hospital, where L.W.C.H. would be born, to ask if both spouses would be listed on the birth certificate as parents of L.W.C.H. after the couple was married. The couple was told to contact the Tippecanoe County Health Department. On the same day, the couple contacted the Tippecanoe County Health Department and were told that Ashlee would not be listed on the birth certificate as a parent of L.W.C.H. without a court order.

L.W.C.H. was born on December 22, 2014, at IU Health Arnett Hospital in Lafayette, Indiana. After the child's birth, Ruby was asked to complete the Indiana Birth Worksheet. The couple revised each question asking for information regarding the father of the child by replacing the term "father" with the term "Mother #2." All information provided regarding "Mother #2" related to Ashlee, the legal spouse of Ruby who was the birth mother. On January 22, 2015, the Tippecanoe County Health Department issued L.W.C.H.'s birth certificate, which noted only Ruby Henderson as a parent.

Plaintiffs Elizabeth and Tonya Bush-Sawyer were lawfully married in Washington, D.C. in 2010. They artificially conceived I.J.B-S, who was born on January 10, 2014. When I.J.B-S was born, Elizabeth, the birth mother, completed the Indiana Birth Worksheet, providing Tonya's information for all the questions that asked about the father of the child. After returning home from the hospital with I.J.B-S, the couple received a birth confirmation letter that listed both women as the parents of I.J.B-S and that listed the child's name as a hyphenated version of both their last names. In March 2014, Elizabeth went to the Marion County Health Department to obtain I.J.B-S's birth certificate. At the health department, she was told there was something wrong, and she would need to return the next day. When she returned, Elizabeth was presented with a birth certificate that listed her as the only parent of I.J.B-S, and the child's name had been changed from I.J.B-S to I.J.B. Shortly thereafter, Elizabeth and Tonya received a new social security card for I.J.B-S, which listed the name as I.J.B.

Tonya 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 Elizabeth and Tonya, 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 (Filing No. 79-1 at 3–4).

Nicole and Jennifer Singley were lawfully married in January 2014. The couple artificially conceived a baby, and on March 29, 2015, H.S. was delivered by Jennifer. Nicole was not listed as a parent on the birth certificate of H.S. Nicole is an active duty member of the U.S. Army and is entitled to all the benefits available to members of the Army, including health insurance. Currently, her family is covered by military health insurance. H.S. is eligible for healthcare

coverage under the military insurance program because H.S. is considered to be the stepchild of Nicole. If Jennifer should predecease H.S., then H.S. will no longer be eligible for Nicole's health insurance and other military benefits (such as in-state tuition) because Nicole no longer will be considered his stepparent.

Lyndsey and Cathy Bannick were lawfully married in Iowa in October 2013. They decided to have a child, and Lyndsey was artificially inseminated. H.N.B. was born to the couple on May 8, 2015, in Bartholomew County, Indiana. Cathy's information was provided on the Indiana Birth Worksheet so that she could be listed as the second parent on H.N.B.'s birth certificate. However, Lyndsey was the only parent listed on the birth certificate.

Calle and Sarah Janson were lawfully married in Indianapolis on June 27, 2014. They decided to have a child, and through artificial conception, Calle became pregnant. F.G.J. was born to the couple on December 1, 2015; however, F.G.J.'s birth certificate does not list Sarah as a parent.

Nikkole McKinley-Barrett and Donnica Barrett were lawfully married on June 25, 2014, and they have been together for approximately twelve years. They decided to have a child together, and Donnica was artificially inseminated. G.R.M.B. was born to the couple on April 3, 2015, in Vigo County, Indiana. Nikkole's information was provided on the Indiana Birth Worksheet so that she could be listed as the second parent on G.R.M.B.'s birth certificate. However, Donnica was the only parent listed on the birth certificate.

Noell and Crystal Allen were lawfully married in New York City on November 22, 2013. They had already been together fourteen years. They have a daughter, E.A., who was conceived through artificial insemination and delivered by Noell. Crystal subsequently adopted E.A., and both Noell and Crystal are legal parents of E.A.

The couple decided that they wanted to add to their family, and Crystal also wanted the experience of giving birth. With the aid of intra-uterine insemination, Crystal became pregnant. Their twins, Ashton and Alivea Allen, were born prematurely on November 21, 2015, and died the same day. The following day, hospital staff informed the couple that Noell would not be listed on the twins' birth certificates. Noell was later informed by the Indiana State Department of Health ("ISDH") that the State was unwilling to add Noell to the birth certificates in the absence of a court order. Because the twins are deceased, Noell cannot adopt them to become their legal parent. While Noell is not listed as a parent on the birth certificates, she is listed as a parent on the twins' death certificates.

Jackie and Lisa Phillips-Stackman were lawfully married on October 5, 2015. Together, they decided to have a child with the assistance of in vitro fertilization. Jackie's egg was fertilized with sperm from a third-party donor and then implanted in Lisa. Lisa carried the baby and then delivered on October 21, 2015. While at the hospital, hospital staff completed the Indiana Birth Worksheet with the couple. It was explained that only Lisa could be listed as a parent on the birth certificate and that Jackie could not be listed as a parent without a court order even though Jackie was the biological parent. Although the couple was lawfully married at the time of their child's birth, Jackie and Lisa received a notice from the Marion County Health Department explaining how a parent could be added to the birth certificate of a child born out of wedlock.

Jackie is a detective with the Indianapolis Metropolitan Police Department, and her health insurance provides coverage for L.J.P-S, who is considered Jackie's stepchild. Unfortunately, L.J.P-S suffers from serious medical problems. If Lisa should predecease L.J.P-S, because Jackie is not legally recognized as a parent of L.J.P-S, L.J.P-S would no longer qualify for health care under Jackie's insurance.

Each of the Plaintiff female, same-sex married couples agreed to have children together and conceived through various forms of assisted reproduction, using sperm from third-party donors. In each instance, the birth mother was listed on the child's birth certificate, but the same-sex spouse was not listed on the birth certificate as a parent. The non-birth mothers seek to be listed on their child's birth certificate and to be recognized as a parent. Each of the children were born during the couples' marriage, and the couples want their children to be recognized as being born in wedlock. The married couples have been informed that the non-birth mother may become a legally recognized parent only if she goes through the legal adoption process to adopt her child.

B. Indiana Birth Certificates

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." The Indiana Birth Worksheet was created by the State of Indiana as part of the Indiana Birth Registration System. Staff at the hospital upload the information provided on the Indiana Birth Worksheet to a State database. The county health department then receives notification that birth information has been added to the database. A notification letter to the birth mother is generated in a form provided by the State, which indicates that information has been received by the county health department and requests that the mother notify the county health department if there is an error with respect to the child's identifying information. The notification letter also informs the mother that a certified copy of the record of birth is available from the local health office. If a person wants to obtain a birth certificate, the individual is required to complete an "Application for a Certified Birth Certificate." The birth certificate application requires the individual to provide information required by the State of Indiana. Upon successful completion of the application, the county health

department will generate a birth certificate based on the information available to it through the State's database.

When the hospital staff and the birth mother complete the Indiana Birth Worksheet, the responses to questions 37 through 52 determine whether and what information concerning the identity of the child's father will appear on the birth certificate. Question 37 asks, "are you married to the father of your child." If the answer is "no," the birth mother is asked to go to question 38, and if the answer is "yes," the birth mother proceeds to questions 39 through 52. Question 38 asks if a paternity affidavit has been completed for the child. If the answer is "yes," the birth mother proceeds to questions 39 through 52. If the answer is "no," the birth mother is asked to skip questions 39 through 52 and go to question 53. Questions 39 through 52 pertain to information about the father. Thus, if the birth mother indicates that she is not married to the father of the child and that a paternity affidavit has not been completed, there would be no information about the father provided on the Indiana Birth Worksheet and, consequently, no information about the father would be available when the birth certificate is generated.

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

ISDH is statutorily charged with providing a system of vital statistics in Indiana. Among other things, ISDH prescribes information to be contained in each kind of application or certificate of vital statistics, administers the putative father registry, and establishes the Indiana Birth Registration System for recording in an electronic format all live births in Indiana. Records of

births submitted to the Indiana Birth Registration System are submitted by physicians, persons in attendance at birth, or local health departments using the electronic system created by ISDH.

Within five days of the birth, a certificate of birth or paternity affidavit must be filed using the Indiana Birth Registration System. The local health officer is required to make a permanent birth record of information from the certificate of birth. The record includes the child's name, sex, date of birth, place of birth, name of parents, birthplace of parents, date of filing the certificate of birth, the person in attendance at the birth, and the location of the birth. ISDH is charged with making corrections or additions to the birth certificate. Such additions or corrections can be made by ISDH upon receipt of adequate documentation, including the results of a DNA test or a paternity affidavit.

C. The Challenged Statutes

The Plaintiffs challenge the constitutionality of Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Indiana Code §§ 31-9-2-15 and 31-9-2-16 define the terms "child born in wedlock" and "child born out of wedlock." Indiana Code § 31-14-7-1 establishes a presumption of paternity in a birth mother's husband.

Indiana Code § 31-9-2-15 states:

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

Indiana Code § 31-9-2-16 states:

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

Indiana Code § 31-14-7-1 states:

> A man is presumed to be a child's biological father if:
> (1) the:
> (A) man and the child's biological mother are or have been married to each other; and
> (B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;
> (2) the:
> (A) man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage:
> (i) is void under IC 31-11-8-2, IC 31-11-8-3, IC 31-11-8-4, or IC 31-11-8-6; or
> (ii) is voidable under IC 31-11-9; and
> (B) child is born during the attempted marriage or not later than three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or
> (3) the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.

The Plaintiffs assert that these statutes violate the Fourteenth Amendment's guarantees of equal protection and due process because they create a presumption of parenthood for men married to birth mothers but not for women married to birth mothers and because they stigmatize children born to same-sex married couples as children born out of wedlock.

On February 13, 2015, the Plaintiffs filed their Complaint, asking the Court for declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 are unconstitutional, for injunctive relief to list both the birth mother and her same-sex spouse on their children's birth certificates, and to recognize their children as being born in wedlock. The parties then filed cross-motions for summary judgment on the Plaintiffs' claims for injunctive relief and declaratory judgment. On April 8, 2016, the parties presented oral argument to the Court on the cross-motions for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489–90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). "However, inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007) (citation and quotation marks omitted). Additionally, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence." *Sink v. Knox County Hosp.*, 900 F. Supp. 1065, 1072 (S.D. Ind. 1995) (citations omitted).

"In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to conduct a paper trial on the merits of [the] claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citations and quotation marks omitted). "[N]either the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and quotation marks omitted).

These same standards apply when each party files a motion for summary judgment. The existence of cross-motions for summary judgment does not imply that there are no genuine issues of material fact. *R.J. Corman Derailment Serv., LLC v. Int'l Union of Operating Eng'rs.*, 335 F.3d 643, 647 (7th Cir. 2003). The process of taking the facts in the light most favorable to the non-moving party, first for one side and then for the other, may reveal that neither side has enough to prevail without a trial. *Id.* at 648. "With cross-motions, [the Court's] review of the record requires that [the Court] construe all inferences in favor of the party against whom the motion under consideration is made." *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001) (citation and quotation marks omitted).

III. DISCUSSION

The Plaintiffs move for summary judgment, asking the Court for a declaratory judgment that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment by not recognizing their children as being born in wedlock and by not granting a presumption of parenthood to the non-birth mother same-sex spouse. The Plaintiffs also request injunctive relief to list both same-sex spouses on their children's birth certificates and to recognize their children as being born in wedlock. The Defendants argue that declaratory judgment and injunctive relief are inappropriate because the challenged statutes do not provide unequal treatment and are narrowly tailored to serve a compelling state interest. The Tippecanoe County Defendants further assert that Plaintiffs lack standing to sue the Tippecanoe County Defendants. The Court will address each argument, beginning with the standing issue.

A. The Plaintiffs' Standing to Sue County Defendants

The Tippecanoe County Defendants argue that Plaintiffs lack standing to sue them because the Plaintiffs' alleged injuries are not fairly traceable to the challenged action of the Tippecanoe County Defendants, and their alleged injuries will not be redressed by a favorable decision against the Tippecanoe County Defendants. These arguments apply equally to the Marion County Defendants, Bartholomew County Defendants, and Vigo County Defendants.

In order to establish standing, a plaintiff must show an injury in fact, a causal connection between the injury and the conduct complained of, and it must be likely (not just speculative) that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The injury has to be fairly traceable to the challenged action of the defendant. *Id.* at 560. Citing Seventh Circuit case law, the Tippecanoe County Defendants explain that the suit should be brought against entities that have legal responsibility for the flaws Plaintiffs perceive in the system and from whom they ask something which would conceivably help their cause. *See Hearne v. Board of Education*, 185 F.3d 770, 777 (7th Cir. 1999) (plaintiffs' inability to show that the defendant bears any legal responsibility for the flaws they perceive in the system bars the plaintiffs' action).

The Tippecanoe County Defendants explain that their involvement with the Plaintiffs is purely ministerial, and the Plaintiffs' true conflict is with the laws of the State of Indiana and the State's administration of its birth records system. The Tippecanoe County Health Department produces birth certificates that are consistent with the information provided to it through the State's birth records database. ISDH prescribes the information that is required for birth certificates and for applications for birth certificates. Local hospitals collect the State prescribed information from birth mothers and submit that information to the State's database. The Tippecanoe County Health

Department then produces birth certificates based on that State prescribed information which is contained in the State's database. The Tippecanoe County Defendants have no authority to deviate from this procedure, to change the information in the State's database, to use different information to create birth certificates, or to place a Plaintiff non-birth mother on the birth certificate. The right to be listed on a birth certificate and the process of being listed are dictated by the State of Indiana, not by the county health departments. Therefore, there is no causal connection between the injury claimed by the Plaintiffs and the conduct of the Tippecanoe County Defendants. Additionally, the Tippecanoe County Defendants' role in the process does not in any way define children as being born in or out of wedlock under the Indiana statutes. Thus, the Tippecanoe County Defendants argue, the Plaintiffs' injuries cannot be fairly traceable to the challenged action of the Tippecanoe County Defendants. Consequently, the Plaintiffs lack standing to bring this action against the Tippecanoe County Defendants.

The Tippecanoe County Defendants also argue that the Plaintiffs' alleged injuries will not be redressed by a favorable decision against them because the contents of birth certificates are not discretionary for the county health departments; birth certificate information is dictated by ISDH. If the Tippecanoe County Defendants were to attempt to go outside the State's regulatory system for producing birth certificates, their actions would be *ultra vires* and would result in invalid birth certificates. They assert that,

> [A] mandate from this Court requiring TCHD to add Mrs. Henderson to the birth certificate -- in the absence of an order altering the State's regulatory scheme -- would be outside TCHD's authority and, while TCHD would comply with the order of this court, a certificate issued by TCHD outside of the State's regulatory scheme would be of questionable value. The value in a birth certificate is founded upon the regulatory system underlying the certificate. Alternately, if this Court issued a mandate altering the State's regulatory scheme for issuing birth certificates, TCHD would be bound to comply with the new state system even in the absence of an order directed at TCHD.

(Filing No. 83 at 17.) The Tippecanoe County Defendants assert that, for this additional reason, the Plaintiffs lack standing to bring this action against them.

In response to these arguments regarding a lack of standing, the Plaintiffs assert that their injuries are traceable to the County Defendants' actions because it is the County Defendants that actually issue the birth certificates that do not list both same-sex spouses as parents on the birth certificates. The Plaintiffs also assert that a favorable decision against the County Defendants will redress the Plaintiffs' injuries because the Tippecanoe County Defendants acknowledge that they would comply with an order from this Court mandating the issuance of birth certificates listing both spouses as parents.

The Court is convinced by the evidence and argument that the County Defendants do not have authority or discretion to deviate from the State's regulatory system for creating and issuing birth certificates in the State of Indiana. The State dictates what information is collected, the method by which information is collected, how information is stored, and how information can be used to generate birth certificates. The State also governs how information on a birth certificate may be modified. The real injury to the Plaintiffs stems from the State's regulatory framework and ISDH's control over the State's vital statistics system. Injury is not fairly traceable to the County Defendants. Additionally, the Plaintiffs ignore the Tippecanoe County Defendants' clear qualifier that it would comply with an order from the Court, but adhering to such an order would not redress the injuries suffered because the actions would be *ultra vires*, and the resulting birth certificates would be invalid and of questionable value.

Because the Plaintiffs' injuries are not fairly traceable to the challenged action of the County Defendants, and their injuries will not be redressed by a favorable decision against the

County Defendants, the Plaintiffs lack standing to sue the Tippecanoe County Defendants, Marion County Defendants, Bartholomew County Defendants, and Vigo County Defendants.

If a plaintiff lacks standing, the district court has no subject matter jurisdiction. *See Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) (internal citation omitted). If the court lacks jurisdiction over the subject matter, its only proper course is to note the absence of jurisdiction and dismiss the case on that ground. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). "A dismissal for lack of federal jurisdiction is without prejudice." *Bovee v. Broom*, 732 F.3d 743 (7th Cir. 2013); *see also El v. AmeriCredit Fin. Servs., Inc.*, 710 F.3d 748, 751 (7th Cir. 2013) ("Dismissals because of absence of federal jurisdiction ordinarily are without prejudice . . . 'because . . . once a court determines it lacks jurisdiction over a claim, it perforce lacks jurisdiction to make any determination of the merits of the underlying claim.'" (quoting *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1217 (10th Cir. 2006)).

For this reason, the Court **GRANTS** the Tippecanoe County Defendants' Motion for Summary Judgment, and the claims against each of the County Defendants are **dismissed for lack of subject matter jurisdiction.**

B. Equal Protection

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This Amendment provides protection against discrimination on the basis of gender or sexual orientation. *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (sexual orientation discrimination); *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576–82 (7th Cir. 2014) (gender discrimination).

The Plaintiffs assert that Indiana's refusal to grant the status of parenthood to female spouses of artificially-inseminated birth mothers while granting the status of parenthood to male

spouses of artificially-inseminated birth mothers violates the Equal Protection Clause. The Plaintiffs explain that Indiana is required to recognize same-sex marriage as determined by *Baskin*, 766 F.3d 648. And the benefits conferred upon opposite-sex married couples must be equally conferred upon same-sex married couples. *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1165 (S.D. Ind. 2014). As the United States Supreme Court recently explained,

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

Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (U.S. 2015).

Based on these recent developments in constitutional jurisprudence, the Plaintiffs ask the Court for declaratory and injunctive relief, seeking to enjoin the Defendants from refusing to issue birth certificates listing the non-birth mother same-sex spouses as parents on their respective children's birth certificates "and to otherwise accord them all rights accorded to parents identified on a birth certificate." They also ask that the Defendants be enjoined from declining to recognize their children as being born in wedlock.

To make their case, the Plaintiffs provide the example of a man and a woman who are married and who become pregnant through the aid of a third-party sperm donor. The married woman then gives birth to a child who is not biologically related to her husband. Even though the mother, the husband, the doctor, and possibly the hospital staff know that the man is not the biological father of the child, the State of Indiana will presume parenthood of the child in the husband. This same presumption of parenthood is not afforded to the female, same-sex spouse of a birth mother who also becomes pregnant through the aid of a third-party sperm donor. The Plaintiffs assert that the State Defendant's refusal to apply the same presumption of parenthood to

the non-birth mother same-sex spouse as would apply to the husband of a birth mother who conceives by artificial insemination violates the Equal Protection Clause of the Fourteenth Amendment.

With respect to Indiana Code §§ 31-9-2-15 and -16, the Plaintiffs contend that these statutes are unconstitutional on their face and as applied to the Plaintiffs because Indiana law says that a child born to a husband and wife is a child born in wedlock, but because these birth mothers are married to women, their children are labeled as children born out of wedlock, are not allowed to carry their second parent's surname, and suffer the stigma of illegitimacy. The State Defendant responds that the purpose of these statutes is limited only for the purpose of determining who must be notified and given an opportunity as a biological father to consent to an adoption procedure; therefore, "[t]hese statutes do not disfavor anyone based on illegitimacy." (Filing No. 85 at 13.)

The Plaintiffs contend, and the Court agrees, that the "Parenthood Statutes" (Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1) are reviewed under heightened "intermediate" scrutiny because of the gender and sexual orientation classifications at issue. *See Hayden*, 743 F.3d at 577 ("Gender is a quasi-suspect class that triggers intermediate scrutiny in the equal protection context; the justification for a gender-based classification thus must be exceedingly persuasive."); *Baskin*, 766 F.3d at 671 (statutes that discriminate on the basis of sexual orientation are subject to heightened intermediate scrutiny). A statute survives intermediate scrutiny if it "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656.

The purposes and objectives of Indiana's Parenthood Statutes are codified at Indiana Code § 31-10-2-1, which declares,

> It is the policy of this state and the purpose of this title to:
> (1) recognize the importance of family and children in our society;

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

Courts in Indiana have repeatedly focused on the State's interest in protecting the best interests of the child when making determinations in the family law context. *See In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1257 (Ind. Ct. App. 2004) (". . . the guiding principle of statutes governing the parent-child relationship is the best interests of the child").

The Plaintiffs argue that the challenged Parenthood Statutes do not serve these governmental objectives. It is undisputed that the State of Indiana wants to serve the best interests of children and to protect, promote, and preserve families. In light of the legal recognition of same-sex marriage, the Plaintiffs argue that there is no governmental interest in denying the presumption of parenthood to the same-sex spouse of a birth mother. Instead, applying the Parenthood Statutes undermines and discourages families that are required by the Supreme Court's decision in *Obergefell* to be recognized and strengthened.

An example offered by the Plaintiffs of unequal treatment resulting from application of the Parenthood Statutes is that the denial of a presumption of parenthood to same-sex spouses requires them to go through the lengthy and costly adoption process to secure parental rights, which is not required of similarly situated men married to birth mothers who conceive through artificial insemination. Additionally, not permitting both same-sex spouses to be listed as parents on birth certificates leaves children in a vulnerable position of having only one legal parent, which affects many daily activities and choices available to children and parents. Denial of a presumption of parenthood to the Plaintiffs does not serve the best interests of the Plaintiff Children or protect, promote, and preserve their families and numerous other similar families in Indiana.

In response to the Plaintiffs' equal protection arguments, the State Defendant explains that it has an important governmental interest in preserving the rights of biological fathers and recording and maintaining accurate records regarding the biological parentage of children born in Indiana. The State Defendant asserts that the Parenthood Statutes substantially relate to the achievement of these interests.

The State Defendant offers a litany of cases to support its position and argues that Indiana's long history of statutory and case law recognizes that an individual may become a parent only through biology or adoption. However, all of those cases precede *Baskin* and *Obergefell*. The State Defendant contends that there are only two ways by which a person becomes a parent in Indiana; therefore, the Plaintiffs must utilize the adoption process to become parents because the non-birth mother same-sex spouse cannot be biologically related to the child. Furthermore, the Parenthood Statutes do not violate the Equal Protection Clause because the statutes apply equally to all male and female spouses of birth mothers. The State Defendant argues that a husband who is not the biological father of the child should not be listed on the birth certificate because the birth mother should acknowledge that she is not married to the father of her child when she has been artificially inseminated. In such a case, the husband would have to adopt the child to be listed on the birth certificate and recognized as a parent.

Finally, the State Defendant asserts that the Parenthood Statutes do not apply at all to the creation and issuance of birth certificates. Rather, the Parenthood Statutes only apply in the adoption context. Therefore, challenging the Parenthood Statutes will not provide the relief that the Plaintiffs seek.

The Court first notes that when determining the appropriateness of summary judgment, it draws reasonable inferences in the non-moving party's favor, *Zerante*, 555 F.3d at 584, and when

doing so, the Court need not set aside common sense and logic. *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 580 n.7 (4th Cir. 2010). Moreover, the State Defendant has presented no evidence or affidavit to support its theory that a heterosexual couple who has conceived by artificial insemination would interpret the Indiana Birth Worksheet in the manner is explains.

The State Defendant's response does not account for or address the realities of the example provided by the Plaintiffs. A man and a woman are married, and the woman conceives through the aid of a third-party sperm donor. The child is not biologically related to the birth mother's husband. In completing the Indiana Birth Worksheet, the birth mother declares that she is married to the father of her child. The State of Indiana will presume parenthood of the child in the husband, and the husband is listed on the child's birth certificate despite the lack of biological or adoptive connection. This same presumption of parenthood is not afforded to the female, same-sex spouse of a birth mother who conceived through the aid of a third-party sperm donor. Thus, a husband who is not biologically related to the child born to his wife does not have to adopt the child to enjoy the status of a parent. In contrast, a female, same-sex spouse always has to adopt to enjoy the status of a parent.

The State Defendant's argument that the birth mother should acknowledge that she is not married to the father of her child when she has been artificially inseminated or else she is committing fraud is not consistent with the Indiana Birth Worksheet, Indiana law, or common sense.

The Indiana Birth Worksheet asks, "are you married to the father of your child," yet it does not define "father." This term can mean different things to different women. Common sense says that an artificially-inseminated woman married to a man who has joined in the decision for this

method of conception, and 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? The Indiana Birth Worksheet does not define "father," it does not state that the father must be the biological father of the child, and it does not indicate that it is completed under penalties of perjury. There is no warning of fraud or criminal liability. The State Defendant points to Indiana Code § 16-37-1-12 to argue that an artificially-inseminated birth mother would be committing fraud if she were to falsify statements on the Indiana Birth Worksheet. However, the Indiana Birth Worksheet does not refer to Indiana Code § 16-37-1-12, and this code provision does not relate to when an individual provides information that leads to the creation of the birth certificate. Rather, this section relates to when an individual, with intent to defraud, applies to receive a certified copy of a birth certificate.

Next, the State Defendant's argument that the Parenthood Statutes do not apply at all to the creation and issuance of birth certificates highlights the void that Indiana's statutory framework has created that leads to the State's discriminatory conduct when completing the Indiana Birth Worksheet and creating and issuing birth certificates. The Indiana Birth Worksheet was created by ISDH as part of the Indiana Birth Registration System. The Indiana Birth Worksheet asks birth mothers if they are married and then asks, "are you married to the father of your child." As the husband is presumed to be the biological father of the birth mother's child, the birth mother can affirmatively answer the question, and the husband will be listed on the birth certificate as the father of the child, even if he is not the actual biological father of the child. No such presumption, or question on the Indiana Birth Worksheet, exists for a non-birth mother same-sex spouse.

Some states have attempted to legislatively fill the statutory void similar to Indiana's statutory shortcoming. As an example, Wisconsin has a more comprehensive statutory scheme to

address parentage, artificial insemination, and birth certificates. *See* Wis. Stat. §§ 69.14, 891.40, 891.41. These statutes dictate a presumption of paternity, parentage following artificial insemination, and the contents of birth certificates. However, even with the additional statutory protections and guidance, a similar challenge to Wisconsin's statutes is pending in *Torres v. Rhoades*, No. 15-cv-288-bbc (W.D. Wis.), because these statutes allegedly do not provide for equal protection to same-sex married couples. It is the lack of clarity and comprehensiveness in Indiana's statutory framework that has led to the State's discriminatory treatment of same-sex married couples when completing the Indiana Birth Worksheet and creating and issuing birth certificates.

Concerning the State's important governmental interests, the State Defendant points to its interests in preserving the rights of biological fathers and recording and maintaining accurate records regarding the biological parentage of children. The State Defendant asserts that the Parenthood Statutes substantially relate to the achievement of these interests. The State Defendant further claims that these interests are compelling, and the Parenthood Statutes are narrowly tailored to meet these interests.

The Court is not convinced that the challenged Parenthood Statutes are substantially related or narrowly tailored to meet the stated interests of preserving the rights of biological fathers and maintaining accurate records of biological parentage. Importantly, the legitimacy statutes do not refer to biology when they define the terms "child born in wedlock" and "child born out of wedlock."

In the example provided by the Plaintiffs, the biological father will not be listed on the birth certificate because he is simply a third-party sperm donor. His paternal rights will not be preserved or recognized. Rather, the birth mother's husband will be listed on the birth certificate, and he will

enjoy the status of a parent. In fact, it will be incorrectly recorded in the State's vital statistics records and incorrectly presumed that the husband is the biological father of the child when he actually has no biological connection to the child.

During oral argument, the State Defendant asserted that the birth mother should not name her husband as the father of the child when a third-party sperm donor is involved. However, as noted above, common sense says that she will name her husband as the father. Whether she names her husband as the father or states that she is not married to the father, the biological father's parental rights are not preserved and accurate records of biological parentage are not maintained. If the mother names her husband, the third-party sperm donor who is the biological father is not listed on the birth certificate. If the mother says she is not married to the father, the third-party sperm donor who is the biological father still is not listed on the birth certificate. In either event, the State's interests in preserving the rights of biological fathers and maintaining accurate records of biological parentage are not served.

Regarding the Supreme Court's decision in *Obergefell*, the State Defendant asserts that *Obergefell* actually decoupled marriage from parenthood because the right to marry cannot be conditioned on the capacity or commitment to procreate. It argues that, at most, the *Obergefell* decision stands for the proposition that any benefit of marriage must now be extended to same-sex married couples on an equal basis with opposite-sex married couples. But this is exactly what the Plaintiffs seek—the extension of a benefit of marriage on an equal basis.

When the State Defendant created and utilized the Indiana Birth Worksheet, which asks "are you married to the father of your child," the State created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father. Because of *Baskin* and *Obergefell*,

this benefit—which is directly tied to marriage—must now be afforded to women married to women.

During oral argument, the Plaintiffs made this very point: The State has granted mothers the power to enter a legal fiction because the mother who conceived her child with the aid of a third-party sperm donor is allowed to claim that her husband is the father of her child. But birth mothers with same-sex spouses are not allowed to enter into the same legal fiction. That husband has no more relationship to the child than the same-sex spouse, yet the same-sex spouse cannot be listed as a parent on the birth certificate while the man can be listed simply because the birth mother says he is married to her.

Indiana's statutory scheme leads to unequal treatment of same-sex married women who bring children into their families with the assistance of third-party sperm donors. This unequal treatment is based on the individual's gender and sexual orientation. The Parenthood Statutes and the State of Indiana's implementation of the statutes are not substantially related to, and do not accomplish, the State Defendant's claimed governmental objectives. For these reasons, the Court determines that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause of the Fourteenth Amendment.

C. <u>Due Process</u>

The Plaintiffs also challenge the Parenthood Statutes under the Due Process Clause of the Fourteenth Amendment, which provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

> The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan* v. *Louisiana*, 391 U.S. 145, 147-149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g.*, *Eisenstadt* v. *Baird*, 405

> U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Obergefell, 135 S. Ct. at 2597–98. "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

The Plaintiffs assert their Due Process claim is reviewed under strict scrutiny because it involves a fundamental right. Fundamental rights, although generally limited, have long been deemed to include "matters relating to marriage, family, procreation, and the right to bodily integrity," *Albright v. Oliver*, 510 U.S. 266, 272 (1994), and what has been described as "perhaps the oldest of the fundamental liberty interests recognized," a parent's liberty interest in the "care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Under strict scrutiny, "when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The Plaintiffs reassert their equal protection argument to explain that the State Defendant does not have a compelling governmental interest, and the Parenthood Statutes are not narrowly tailored to serve any compelling State interests, when it denies the presumption of parenthood to the Plaintiffs.

The State Defendant responds that the Constitution provides protection to fundamental rights of parents to direct the upbringing, education, and support of their children. However, there is no fundamental right to be a parent. Rather, in this context, constitutionally protected fundamental rights exist only after an individual has become a parent. Contrary to the Plaintiffs'

assertion, the State Defendant argues that the rational basis standard applies, not strict scrutiny. The State Defendant then explains that, under any level of constitutional review, the Parenthood Statutes satisfy constitutional standards. It asserts that Indiana has a compelling interest in protecting the parental rights of biological parents and maintaining accurate records of biological parentage, and the Parenthood Statutes are narrowly tailored to serve these interests.

The Supreme Court long ago recognized a fundamental liberty interest "to marry, establish a home and bring up children," *Meyer*, 262 U.S. at 399, with the "freedom of personal choice in matters of marriage and family life." *Moore*, 431 U.S. at 499. "[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). At least one court has interpreted the Supreme Court's decision in *Troxel v. Granville* to mean that there is an established fundamental liberty interest in being a parent. *State v. Renfro*, 40 Kan. App. 2d 447, 451 (Kan. Ct. App. 2008) ("the right to be a parent is a fundamental right recognized as a liberty interest to be protected by the Due Process Clause").

The Parenthood Statutes and the State Defendant's implementation of the statutes through the Indiana Birth Worksheet significantly interferes with the Plaintiffs' exercise of the right to be a parent by denying them any opportunity for a presumption of parenthood which is offered to heterosexual couples. What Plaintiffs seek is for their families to be respected in their dignity and treated with consideration. During its discussion above concerning Equal Protection, the Court rejected as unpersuasive the State Defendant's argument that it has compelling interests that are served by the narrowly tailored Parenthood Statutes. The Court will not repeat that analysis and discussion here. As previously stated, the Parenthood Statutes are not narrowly tailored to meet a compelling governmental interest. By refusing to grant the presumption of parenthood to same-

sex married women, the State Defendant violates the Plaintiffs' fundamental right to parenthood under the Due Process Clause.

D. Injunctive Relief

The Plaintiffs request that the Court permanently enjoin Defendants from enforcing Indiana Code § 31-14-7-1 in a way that differentiates between male and female spouses of women who give birth with the aid of artificial insemination by a third-party. Additionally, the Plaintiffs request that the children born of their same-sex unions be accorded the same equal protections of children born to a man and a woman using artificial insemination; therefore, the children should not be considered children born out of wedlock under Indiana Code §§ 31-9-2-15 and -16.

> Where a permanent injunction has been requested at summary judgment, we must determine whether the plaintiff has shown: (1) success, as opposed to a likelihood of success, on the merits; (2) irreparable harm; (3) that the benefits of granting the injunction outweigh the injury to the defendant; and, (4) that the public interest will not be harmed by the relief requested.

Collins v. Hamilton, 349 F.3d 371, 374 (7th Cir. 2003). As discussed above, the Plaintiffs have been successful on the merits of their case under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Irreparable harm is presumed for some kinds of constitutional violations. *See* 11A Charles Alan Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). This has been true in the context of violations of the First and Second Amendments. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (irreparable harm is presumed in First Amendment violation); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (irreparable harm is presumed in Second Amendment violation). The Equal Protection and Due Process Clauses of the Fourteenth Amendment similarly protect

intangible and unquantifiable interests. Infringement of these rights cannot be compensated by a damages award; thus, irreparable harm exists.

No injuries to the State Defendant have been shown that would result from the issuance of injunctive relief which would outweigh the benefits of the injunctive relief. The State Defendant argues that if Plaintiffs wish to create a third path to legal parenthood, whether through marriage or any other means, they should seek relief from the General Assembly—not this Court. The Supreme Court in *Obergefell* recognized that the initial inclination might be to await further legislation, litigation, and debate; however, *Obergefell* noted that the Plaintiffs' stories show the urgency of the issues they present before the Court. This Court is hard-pressed to imagine an injury to the State Defendant if it is ordered to apply the Parenthood Statutes in a non-discriminatory way. In contrast, the injury to these Plaintiffs is unfeigned. The public interest in serving the best interests of the child will not be harmed by injunctive relief but actually will be furthered by legally recognizing two parents for children and providing stability for children and families. Therefore, injunctive relief is an appropriate remedy.

IV. CONCLUSION

Given Indiana's long-articulated interest in doing what is in the best interest of the child and given that the Indiana legislature has stated the purpose of Title 31 is to protect, promote, and preserve Indiana families, there is no conceivable important governmental interest that would justify the different treatment of female spouses of artificially-inseminated birth mothers from the male spouses of artificially-inseminated birth mothers. As other district courts have noted, the holding of *Obergefell* will inevitably require "sweeping change" by extending to same-sex married couples *all* benefits afforded to opposite-sex married couples. *Campaign for Southern Equality v. Miss. Dep't of Human Servs.*, 2016 U.S. Dist. LEXIS 43897, at *35 (S.D. Miss. Mar. 31, 2016).

Those benefits must logically and reasonably include the recognition sought by Plaintiffs in this action.

For the reasons stated herein, the Court **GRANTS** the Tippecanoe County Defendants' Motion for Summary Judgment (Filing No. 82), and claims against each of the County Defendants are **dismissed for lack of jurisdiction**. The Court **GRANTS** the Plaintiffs' Motion for Summary Judgment against the State Defendant (Filing No. 77), and **DENIES** the State Defendant's Motion for Summary Judgment (Filing No. 84).

For the reasons set forth above, the Court **DECLARES** that Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are **ENJOINED** from enforcing Indiana Code §§ 31-9-2-15, 31-9-2-16, and 31-14-7-1 in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are **ENJOINED** to recognize children born to a birth mother who is legally married to a same-sex spouse as a child born in wedlock.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are **ENJOINED** to recognize the Plaintiff Children in this matter as a child born in wedlock.

The State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are **ENJOINED** to recognize the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate.

Final judgment will issue under separate order. A separate Permanent Injunction will also be issued as required by Rule 65(d) of the Federal Rules of Civil Procedure.

The Plaintiffs who have prevailed in securing relief are entitled to recover their costs.

The Plaintiffs have requested an award of costs and attorneys' fees under 42 U.S.C. § 1988. The Plaintiffs are ordered to file a bill of costs and a petition for attorneys' fees within **thirty (30) days** of the date of this Order. A **Response** may be filed within **fourteen (14) days** of such a submission. The Plaintiffs may file a **Reply** within **seven (7) days** of such Response.

SO ORDERED.

Date: 6/30/2016

Tanya Walton Pratt

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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