No. _____

IN THE
# Supreme Court of the United States

KRISTINA BOX, IN HER OFFICIAL CAPACITY AS COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH,

*Petitioner*,

v.

ASHLEE AND RUBY HENDERSON, *et al.*,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017), the Court said that while a State may adopt a biology-based birth-certificate system, if it instead "uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents," it must afford the same recognition to opposite- and same-sex marriages. The Court thus invalidated a law that placed the name of a birth-mother's husband—but not wife—on the birth certificate of a child conceived using donor sperm. Such a law makes "birth certificates about more than just genetics" but fails to treat all marriages alike. *Id.* at 2078. Here, the Seventh Circuit affirmed that a State may "establish[] a birth-certificate regimen that uses biology rather than marital status to identify parentage." App. 10a. Yet it held that Indiana's birth-certificate system is based on marriage rather than biology—and is unconstitutional—because Indiana presumes, subject to evidentiary rebuttal, that a birth-mother's husband (but not wife) is the child's biological father. *Id.*

This case thus presents the following question:

May a State, consistent with the Fourteenth Amendment Due Process and Equal Protection Clauses, adopt a biology-based birth-certificate system that includes a rebuttable presumption that a birth mother's husband—but not wife—is the child's biological parent?

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## PETITION FOR WRIT OF CERTIORARI

The Commissioner of the Indiana State Department of Health respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## PARTIES TO THE PROCEEDING

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[1] (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").

Plaintiffs 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. App. 26a–27a n.1. 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;

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

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 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. *Id.*

The district court dismissed all county defendants from the case at summary judgment on the grounds that they performed solely ministerial functions and Plaintiffs lacked standing to sue them. App. 42a–46a. Hence, only the State Defendant, Indiana State Department of Health Commissioner Dr. Kristina Box, remains.

## OPINIONS BELOW

The Seventh Circuit opinion, *Henderson v. Box*, is reported at 947 F.3d 482 (7th Cir. 2020). The order of the United States District Court for the Southern District of Indiana granting in part and denying in part Defendant's Motion to Alter or Amend the Judgment is unreported, but is reproduced at pages 12 through 22 of the Appendix. The order of the United States District Court for the Southern District of Indiana granting Plaintiffs' Motion for Summary Judgment, App. 25a-67a, is reported at 209 F. Supp. 3d 1059 (S.D. Ind. 2016).

## JURISDICTION

The Seventh Circuit panel entered a judgment and opinion on January 17, 2020. App. 1a. The Court has jurisdiction under 28 U.S.C. section 1254(1). On March 19, 2020, the Court issued an order extending the deadline for any cert petition due after the date of the order to 150 days after judgment. 150 days after January 17, 2020, is June 15, 2020.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code sections 31-9-2-15, 31-9-2-16, and 31-14-7-1 are reproduced at pages 73a through 75a of the appendix.

## INTRODUCTION AND STATEMENT OF THE CASE

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015), the Court required States to treat opposite- and same-sex couples the same with respect to rights of marriage. In *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017), the Court said that if States accord parental rights to male spouses of birth mothers by virtue of marriage—even where everyone knows the husband lacks a biological connection to the child—they must do the same for female spouses.

Now, however, the Seventh Circuit is requiring Indiana, which merely presumes the biological paternity of a birth mother's husband *in the absence of contrary evidence*, also to allocate, at birth, parental rights, reflected on the child's birth certificate, to the birth-mother's wife. Doing so, however, is in tension with the traditional, constitutionally protected understanding that, at birth, only a baby's biological parents have legal rights and obligations toward the child. To protect these rights, Indiana lists a child's biological parents, and no one else, on the child's birth certificate unless the child is legally adopted. This case, then, is about whether Indiana may, to advance its unquestionably legitimate policy of safeguarding the rights and obligations of biological parents in the context of completing birth certificates, presume a birth-mother's husband to be the biological father of the child, without also presuming the "parentage" of a birth-mother's wife.

States need guidance with respect to the permissible constitutional parameters of laws allocating paternal and maternal presumptions at birth, and the Court's decision in *Pavan* has proven insufficient in that regard. There, the Court had before it only the most basic, binary allocation of parental rights at birth, and a state law that plainly discriminated between opposite-sex and same-sex couples. Even so, three Justices of this Court would have ordered plenary review rather than summary reversal. *Id.* at 2079. Indiana's law is in even greater need of plenary review, for it functions differently and ultimately treats same-sex and opposite-sex couples the same in terms of the rights of spouses of birth mothers who are not biologically related to the child.

The decision below unreasonably extended *Obergefell* and *Pavan* by requiring Indiana either to require genetic testing of all new parents or else abandon the biological foundation for allocating parental rights altogether—as happens when both a birth mother *and* her wife are "presumed" to be parents.

The Court should, therefore, take this case to address whether Indiana's paternity-presumption law is consonant with *Obergefell*.

## I. Indiana's Parentage Law Framework

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.

Adoptive parents are easy to identify via court records. Alas, biological parents—particularly fathers—sometimes are not. Yet biological parents nevertheless 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 an initial identification is later corrected via judicial process.

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 entrusted with their care, control, and education.").

### A. Biological parenthood identification

Indiana law provides three legal methods for identifying a child's biological parents: presumption, affidavit, and genetic test (via judicial action). Legal presumptions and paternity affidavits are only valid until they are challenged—only a paternity test can definitively prove parentage. Adults who are not biological parents of the child must use the legal adoption process to establish parentage.

#### 1. Identification by presumption

In early statehood, parental rights in Indiana were 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 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 birth mother is the person most likely to be the biological mother (she will be in all circumstances other than gestational surrogacy) and that the birth mother's husband (if she was married) is the person most likely to be the biological father. *Infant R.*, 922 N.E.2d at 61; *Infant T*, 991 N.E.2d at 599.

Accordingly, the woman who gave birth to a child was—and still is—presumed to be the child's biological mother. *Infant T*, 991 N.E.2d at 601 (citing *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 a 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. That 1979 codification repeatedly referred to the child's *biological* father and mother, leaving no doubt that the statute's purpose was to vest parental rights in the two individuals biologically connected to the child:

> (a) A man is presumed to be a child's *biological* father if:

> (1) he and the 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) (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. *See, e.g., 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).[2]

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[2] 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).

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.

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 genetic evidence is effectively conclusive and trumps any marital presumption. *See, e.g.*, *Minton v. Weaver*, 697 N.E.2d 1259, 1260–61 (Ind. Ct. App. 1998) (holding it "clearly erroneous" for a trial court to find marital presumption unrebutted in the face of DNA evidence that a different man was the child's father).

### 2. Identification by oath

Because not all biological parents are married to each other, the General Assembly permits putative fathers to establish 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), 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. Identification by genetic test**

When a child's paternity is unknown or disputed, Indiana law provides a mechanism for resolving the matter: a genetic test via 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 one as well. Ind. Code § 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. Case law allows maternity actions under the same procedures. *See Infant R.*, 922 N.E.2d 59, 61–62 (Ind. Ct. App. 2010).

Under Indiana law paternity and maternity actions turn on genetic evidence of biological parenthood. 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. Ind. Code § 31-14-6-1. What is more, if an adoption is 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 (emphasis added).

### B. Birth certificates as records of biological or adoptive parentage

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. And 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" 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, the local health officer must report the birth to the State Department of Health 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 of Health to collect vital statistics, demographic, and medical history information about the child and parents. Appellant's App. 19, 22–33. For this case, the critical inquiry is Question 37 on the Worksheet:

> 37. MOTHER'S Marital Status, ARE YOU MARRIED TO THE FATHER OF YOUR CHILD?"

*Id.* at 25.

If the birth mother answers "yes," she is directed to answer questions about the father. *Id.* at 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 State Department of Health treats the term "father" to mean "biological father." Appellant's App. 19.

The birth mother's answers to these questions are used to generate the child's birth certificate. *Id.* at 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 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. Even when a child is adopted, however, the original birth 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.

## II. Procedural History

### A. The plaintiffs

Plaintiffs are a group of eight female same-sex married couples and seven of their minor children. One member of these couples gave birth to one or more children, and the plaintiffs would like both the birth mothers and their spouses to be listed as a parent on the birth certificates. With the exception of Plaintiffs Jackie and Lisa Phillips-Stackman, each of the Children Plaintiffs was conceived via artificial insemination using donor sperm (some known, some anonymous) and the birth mother's egg. Appellant's App. 4–5, 9-10, 39–40, 48–49, 59–60, 71–72, 81–82, 91–92. For the Phillips-Stackmans, doctors created

an embryo using Jacqueline's egg and a known donor's sperm, which they implanted in Lisa, who gave birth to L.J.P.-S. on October 21, 2015. Appellant's App. 9–10. Thus, though Jacqueline is L.J.P.-S.'s *actual* biological mother, Lisa is L.J.P.-S.'s birth mother and *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").

Jacqueline Phillips-Stackman has not filed a maternity action to establish her parentage, though such an action is allowed under Indiana law. *See In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 61–62 (Ind. Ct. App. 2010). And with the exception of Plaintiff Tonya Lea Bush-Sawyer, the Spouses have not filed petitions to adopt the Children, *id.* at 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 Adoption of K.S.P.*, 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (permitting petitioner to adopt her same-sex partner's biological children).

In summary, the Plaintiff birth mothers, with the exception of Lisa Phillips-Stackman, are biologically related to the Plaintiff Children. Their Spouses, with the exception of Jacqueline Phillips-Stackman, have no biological relationships to the Children.

### B. Proceedings in the district court

Plaintiffs want *both* Spouses listed on each respective child's birth certificate: They want the birth

mother listed as "Parent 1" and the birth mother's female spouse listed as "Parent 2." When the State refused this request as barred by Indiana law, Plaintiffs challenged three Indiana statutes: Indiana Code section 31-9-2-15, which defines "child born in wedlock"; section 31-9-2-16, which defines "child born out of wedlock"; and section 31-14-7-1, which provides a presumption of paternity to the birth mother's husband. App. 12a–13a. They argued 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.

On cross-motions for summary judgment, the district court declared that the Paternity Presumption and Wedlock Statutes violate both the Equal Protection Clause and Due Process Clause. App. 12a–13a. The court accepted Plaintiffs' assertion that the statutes do not apply equally to all married couples regardless of sex. *Id.* 48a–49a. 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[.]" *Id.* at 49a. As to Plaintiffs' Due Process claims, the district court applied strict scrutiny and reached a similar result. *Id.* 58a–60a. 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." App. 64a.

The Court entered final judgment for Plaintiffs and issued an order that (1) declared that the Wedlock Statutes violate both the Equal Protection Clause and Due Process Clause, (2) enjoined the State from enforcing these statutes, (3) enjoined the State "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 "to recognize each of the Plaintiff Children in this matter as a child born in wedlock," and (5) enjoined the State "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." *Id.* 65a–66a.

Even so, on July 18, 2016, uncertain about the meaning and scope of the court's declaration and injunction in all particulars, the State filed a motion under Rule 59(e) urging the court to alter or amend its judgment. ECF No. 119, Defendant's Motion to Alter or Amend Judgment. The district court granted the motion in part and denied it in part. App. 13a. 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. *Id.* 20a–21a (emphasis added). It further stated that its injunction applied regardless whether the child was conceived using sperm from an anonymous or known donor. *Id.* 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.* 22a.

### C. The appeal

The State appealed to the Seventh Circuit. Shortly after briefing and argument, the Supreme Court issued a summary decision in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which involved a challenge brought by two married same-sex couples, who had conceived children through anonymous sperm donation, against an Arkansas law that required the State to identify an opposite-sex-married mother's *husband* as the father on the child's birth certificate (even in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor). The plaintiffs argued that because the Arkansas law did not require the State to identify a same-sex-married mother's *wife* as the child's mother, it discriminated against same-sex couples in violation of the Constitution as construed by the Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Arkansas defended its law on the grounds that the law was simply a device for recording biological parentage—regardless of whether the child's parents are married.

The Court rejected Arkansas's argument that its system was based on biology, concluding that the Arkansas law made "birth certificates about more than just genetics" because "when an opposite-sex couple conceives a child by way of anonymous sperm donation—just as the petitioners did here—state law requires the placement of the birth mother's husband on the child's birth certificate." *Pavan*, 137 S. Ct. at 2078. The Court thus concluded that while a biology-based birth-certificate system would be constitu-

tional, because the Arkansas law was not based on biology but instead used birth "certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition." *Id.* at 2078–79.

Finally, on January 17, 2020—32 months after oral argument—a Seventh Circuit panel issued a ten-page decision affirming the district court. App. 11a. The panel acknowledged that "the Fourteenth Amendment does not forbid a state from establishing a birth-certificate regimen that uses biology rather than marital status to identify parentage." *Id.* 10a. Nevertheless, it held that Indiana's presumption of a husband's paternity means that its birth-certificate system is necessarily *not* based on biology—even though (unlike in *Pavan*) under Indiana law the presumption is rebutted by contrary evidence, including the birth mother's knowledge (even before she fills out the birth certificate form) that another person is the biological father. *Id.* 8a–11a. The panel concluded that the fact "[t]hat Indiana uses a presumption rather than a bright-line rule does not change the fact that both states treat same-sex and opposite-sex marriages differently when deciding how to identify who is a parent," *id.* 2a, arguing in particular that Indiana's presumption has real force because it "cannot be overcome after a husband dies." *Id.* 7a. The panel thus largely affirmed the district court's decision, including its requirement that Indiana identify a birth mother's wife as the child's parent on the child's birth certificate. *Id.* 11a.

## REASONS FOR GRANTING THE PETITION

### The Court Should Take This Case To Confirm that States May Adopt a Birth-Certificate System that Includes a Rebuttable Presumption that a Birth Mother's Husband—But Not Wife—Is the Child's Biological Parent

Indiana and other States have grounded paternal rights in biology for centuries and have long used presumptions to do so. The Seventh Circuit, however, effectively has said that States may not do so and may allocate parental rights on the basis of biology only via universal genetic testing. The Court should take this case to confirm that States may, as a valid step toward recognition of biological parental rights, presume the paternity of a birth-mother's husband without also presuming the "parentage" of a birth-mother's wife. This is a critical, nationally important question regarding the implications of *Obergefell*, and one with which many States have something at stake.

#### A. The Constitution permits States to design their birth-certificate systems to record biological parenthood at birth

The Fourteenth Amendment protects the rights and obligations of biological parents to the care and custody of their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 60–63 (2000) (plurality); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Even cases permitting judicial termination of a biological parent's parental rights begin with the understanding that a biological connection between parent and child provides the starting point

for determining parental rights and obligations. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Lehr v. Robertson*, 463 U.S. 248, 257–58 (1983).

It follows that States may design birth certificate systems to bear the names of biological parents in the first instance. That is the upshot of the Court's summary decision in *Pavan*, where the Court rejected the Arkansas birth certificate directive because it was so steadfast in requiring a birth mother's husband's name on the birth certificate even where all concerned know full well the husband has no biological connection to the child. *See Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017) ("Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships. . . . Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.").

Indeed, the decision below embraces that same idea: It recognizes that States may, in the first instance, require the names of biological parents—and only biological parents—to be on a child's birth certificate. *See* App. 10a ("[T]he Fourteenth Amendment does not forbid a state form establishing a birth-certificate regimen that uses biology rather than marital status to identify parentage.").

Rightly so: With respect to opposite-sex married couples *every* State presumes the paternity of the birth-mother's husband. And several States, including Indiana, permit third parties to overcome that presumption with contrary genetic evidence, even in cases of artificial insemination. *See* Ind. Code §§ 16-37-2-2; 16-37-2-10; Iowa Code Ann. §§ 144.13,

600B.41A; La. Stat. Ann. §§ 40:34.5, 40:46.8, La. Civ. Code Ann. art. 185, art. 198; Miss. Code. Ann. §§ 41-57-14, 41-57-23, 93-9-9; Neb. Rev. Stat. Ann. §§ 71-640.01, 71-640.04, 43-1414; 35 Pa. Stat. Ann. § 450.401, *Brinkley v. King*, 549 Pa. 241, 701 A.2d 176, 180 (1997); R.I. Gen. Laws Ann. §§ 15-8-3, 15-8-11, 23-3-10, 23-3-15; S.C. Code Ann. §§ 44-63-60, 63-17-800, 63-17-10, 63-17-30, *Hudson v. Blanton*, 316 S.E.2d 432, 434 (S.C. Ct. App. 1984); S.D. Codified Laws §§ 34-25-8, 34-25-13.1, 25-8-57, 25-5-3.

Accordingly, even in the context of artificial insemination, several States vest parental rights in the first instance with the child's *biological* parents and use birth certificates to record who those biological parents are. The next question is, how may they go about determining *who* is a biological parent?

### B. Rebuttably presuming the biological parentage of a birth mother and her husband—but no one else—is a reasonable, efficient, longstanding, constitutional rule

1. When a child is born, a State has only three reasonable ways to determine the identity of the biological parent: genetic testing, marital presumption, and oath. Genetic testing, to be sure, is highly accurate. *See* DNA Paternity Test, Cleveland Clinic, https://my.clevelandclinic.org/health/diagnostics/10119-dna-paternity-test. But it is also invasive, inconvenient, expensive, and, in the vast majority of cases, unnecessary.

Even with the advent of artificial reproductive technology and gestational surrogacy, when a woman gives birth to a baby, there is a greater than 99%

chance that she is the baby's biological mother; a birth mother will *not* be the biological mother only in the rare case of gestational surrogacy.[3] And while data regarding legitimacy of children born to man-woman married couples is scarce, the rate of "misattributed paternity"—where the father is someone other than believed—ranges from only 1 to 3%.[4] On the other hand, of course, if the birth mother is married to a woman there is 0% chance the wife is the biological

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[3] Firm statistics for gestational surrogacy are difficult to come by, but the New York Times reported in 2014 only about 2,000 babies are born per year on the United States to gestational surrogates. Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, New York Times (Sept. 17, 2014), https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html. Meanwhile, CDC reported 3.8 million babies born in the U.S. in 2018. Center for Disease Control, *National Vital Statistics Report* (Nov. 27, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.

The Seventh Circuit mistakenly asserted "that both women in a same-sex marriage may be biological mothers." App. 8a. Gestational surrogacy does not confer genetic parentage. The genetic parents of the child are the woman who contributed the egg and the man who contributed the sperm, not the surrogate mother. *See* Julie Granka, *Chimeras, Mosaics, and Other Fun Stuff*, The Tech Interactive (July 13, 2011).

[4] *See* Ann Young *et al.*, *Discovering Misattributed Paternity in Living Kidney Donation: Prevalence, Preference, and Practice*, Transplantation (May 27, 2009), https://journals.lww.com/transplantjournal/Fulltext/2009/05270/Discovering_Misattributed_Paternity_in_Living.1.aspx (estimating the rate of misattributed paternity to be between 1 and 3%).

father—and only a minute chance that the wife (rather than the birth mother) is the child's biological mother (a la plaintiff Jacqueline Phillips-Stackman).

Accordingly, presuming motherhood and fatherhood in a birth mother and her husband is a reasonable starting point for determining who has the biological connection necessary to have a place on the baby's birth certificate. These presumptions will be accurate in the vast majority of cases, and they avoid the invasion of privacy, inconvenience and expense attendant to genetic testing.

Furthermore, oath is a reliable substitute for the presumption where the putative father, vouched for by the birth mother, is not married to the birth mother yet steps forward to claim a biological connection to, and thus responsibility for, the child. Incentives for both mother and putative father doing so falsely would seem to be very rare.

At the same time, permitting evidentiary rebuttal of marital presumptions allows for proper identification of others as biological parents in exceptional cases. Again, the problem with the Arkansas statute in *Pavan* was that it *required* counterfactual attribution of a biological connection where it was obvious none existed. 137 S. Ct. at 2078. In the Indiana system, however, while the birth-mother's husband is *presumed* to be the child's biological father absent contrary evidence, that presumption may be rebutted by the mother's knowledge of contrary facts, impossibility, or a genetic test. Ind. Code § 31-14-7-1(3). And

when the presumption is rebutted, the presumed father's name is removed from the birth certificate. Appellant's App. 19–20.[5]

2. States have been employing such presumptions of biological parentage for hundreds of years. The marital presumption and biological paternity are universally relevant and have been closely intertwined since the outset of paternity law. *See* Nara Milanich, *Reassembling Motherhood: Procreation and Care in a Globalized World* 20 (Yasmine Ergas, Jane Jenson & Sonya Michel eds., 2017). "[T]he so-called presumption of marital legitimacy traverses a variety of legal traditions ancient and modern, religious and secular, Western and 'non-Western.'" *Id.* The presumption is "[p]resent in Catholic canon law and Jewish and Islamic legal traditions," and is also "found in Anglo-American law and the civil law of continental Europe as well as in Latin American and some Middle Eastern legal systems." *Id.*

At Roman law, for example, long before the advent of genetic testing, the marital presumption of paternity developed as a way to infer the biological connec-

[5] The Seventh Circuit deemed Indiana's presumption to be unrelated to biology because it is irrefutable after the presumed father's death. App. 7a. The point of that rule, however, is to ensure the child inherits as expected from the presumed father's estate, not to deprive biological parents of their rights and obligations concerning the child. The mere possibility that, in the rare case, the presumed father's death prevents a third party from establishing paternity does not, in the overwhelming majority of cases, negate the Indiana birth certificate system as a means of recognizing biological parentage and its corresponding rights and obligations.

tion between father and child. T. Vernon Drew, *Conceiving the Father: An Ethicist's Approach to Paternity Disestablishment*, 24 Del. Law. 18, 19 (2006) ("This, of course, is the presumption that the husband of a woman who gives birth to a child is the child's genetic father.").

Centuries later, jurisdictions in the United States adopted this presumption by way of the common law. David D. Meyer, *Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood*, 54 Am. J. Comp. L. 125, 127–28 (2006) ("The law traditionally presumed, for instance, that a child born to a married woman was fathered by her husband. The presumption was a strong one and could be overcome only in limited circumstances."). Over time, States permitted rebuttal of the marital presumption in cases of impossibility—where "the husband was impotent, sterile, or not around during the time of conception . . . ." Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 Fam. L.Q. 55, 56 (2003). Such grounds for rebuttal confirm the connection between biology and the marital presumption: "By permitting rebuttal based on proof that the husband could not have been the biological father, the marital presumption was plainly grounded in assumptions about the husband's likely procreative role." Meyer, *supra* at 127. Indeed, "[m]arriage supported the assignment of paternity to the husband because it supported an inference that he was the biological father." *Id.*

On the eve of the advent of same-sex marriage in the United States, the marital presumption existed as

a way to identify a child's biological father in "all states, by common law or by statute." Leslie J. Harris & Lee E. Teitelbaum, *Family Law* 995 (2d ed. 2000). Even as same-sex marriage took hold in state law, States maintained the presumption with a view toward identification of biological fathers. New York first recognized same-sex marriages in 2011, yet even in 2015 the Appellate Division declared that, for a married man-woman couple, "[a] child born during marriage is presumed to be the biological result of the marriage, and this presumption has been described as one of the strongest and most persuasive known to law." *Ariel G. v. Greysy C.*, 20 N.Y.S.3d 145, 147 (N.Y. App. Div. 2015) (internal citations omitted).

3. Nevertheless, the Seventh Circuit held that Indiana's presumption that a birth-mother's husband is a biological parent means that, in fact, Indiana allocates parental rights based on *marriage* rather than biology. App. 10a. Indiana has made no such allocation. The Indiana statute affords the husband of a birth mother only a *presumption* of paternity, nothing more. It does not prevent a married birth mother from listing the *actual* biological father on the birth worksheet, regardless of whether that person is her husband. And it does not prevent an actual biological father from filing a paternity action to establish his legal and biological parentage. The presumption merely creates a low-cost, convenient, highly accurate starting point for determining the identity of biological parents.

If Indiana's presumption is unlawfully discriminatory, that leaves only *one* way for a State to insist on respect for biological parental rights at birth in all

cases—genetic testing. But it extends *Obergefell* (and *Pavan*) well beyond any reasonable understanding of their limits to hold that they require States either to require genetic testing of all new parents or else abandon the biological foundation for allocating parental rights altogether, which is what occurs when States "presume" both a birth mother *and* her wife to be parents.

In this regard, while the judgment below superficially declared the parentage of a birth-mother's wife to be rebuttable, App. 10a–11a, it is unclear exactly how that could work, since, given the birth-mother's presumption of motherhood, no one supposes the wife to be a biological parent anyway. Except in the rarest of cases (such as with the Phillips-Stackmans), only the marital consent of the birth mother confers *any* claim to the child on the wife. Such is not the case with opposite-sex couples, where not merely marital status, but actual biological connection, confers a claim on the husband. The function of paternity (and maternity) actions is to correct misidentification of individuals supposedly having a biological connection to a child. But presuming the wife of a birth mother to be a parent—while also presuming the birth mother's biological maternity—does not misidentify a biological connection; rather, it jettisons the relevance of biology and substitutes marriage as the key determinant of parental rights from the moment of birth. If that is what States must do, no grounds exist for reallocating parental rights just because someone outside the marriage comes forward with a positive paternity (or maternity) test.

Indiana's presumption, therefore, is not a now-obsolete vestige of a pre-*Obergefell* understanding of marriage. It continues to be, rather, a longstanding, reasonable method of identifying the people most likely to have a biological connection to a child when it is born. And, it is a method that allows for its underlying assumptions to be overturned in appropriate cases. The Seventh Circuit has seriously misread *Obergefell* and *Pavan* to require States to abandon that longstanding, reasonable policy and substitute a wholly new "presumption of parentage" based on marriage—unless the State embraces genetic testing in all cases.

As three justices were inclined to do in *Pavan*, the Court should take this case for plenary review and hold that *Obergefell* does not preclude States from reasonably (and rebuttably) presuming that a birth-mother's husband, but not a birth-mother's wife, is the biological father of her child. The Court did not wait for a circuit conflict before taking *Pavan*, and it has no reason to do so here, either.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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