

No. 19-1385

In the Supreme Court of the United States

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

Petitioner

v.

ASHLEE AND RUBY HENDERSON, *et al.*

*On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Seventh Circuit*

**BRIEF OF
THEM BEFORE US
AS AMICUS CURIAE
SUPPORTING PETITIONER**

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INTRODUCTION & INTEREST OF AMICUS CURIAE¹

The overarching issue in this case is whether the States have authority to make policy judgments about how best to balance the sometimes-competing interests of parents and children in the realm of family law. The decision below imposes a one-size-fits-all approach in the context of children born into same-sex marriages, forcing states to prioritize the desires and interests of adults over those of children when designing birth certificate regimes. But states should be free to balance the competing interests of children and their parents or legal guardians on their own and, should they choose, to design a system that gives greater weight to the interests of children.

There is no denying that a child, especially one who has grown to adulthood, has a legitimate interest in knowing who his biological parents are. Decades of experience with children who have been adopted or donor-conceived demonstrate that children suffer when deprived of accurate information about both biological parents. It affects every aspect of their lives: their health, their romantic relationships, and their identity formation. In addition, *automatically* extending parental rights to non-biologically related

¹ No one other than *Them Before Us* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented in writing to its filing.

caregivers can also put children at greater risk of abuse and neglect. Further, individuals whose birth certificates do not list both biological parents often feel that the certificate has been intentionally “falsified.” They overwhelmingly wish the state had insisted on recording their biological parentage. The state should be free to do so.

This Court need not deny the legitimate interests of spouses to conclude that the task of balancing these interests should be left to the states. A state should be allowed to give greater weight to the needs and interests of children and to create a birth-certificate system based on biology rather than marital status. The Court should grant the present petition to reaffirm the States’ legitimate authority in this area.

Amicus *Them Before Us* is a non-profit organization that advances social policies that encourage adults to actively respect the needs and interests of children. Amicus takes no position in this case on questions of fit or tailoring.

STATEMENT

This case involves a challenge to Indiana’s birth-certificate system. Indiana requires that a child’s biological mother and biological father be listed on a child’s original birth certificate. The statute contains a rebuttable presumption of paternity for a birth mother’s husband. Plaintiffs in this case are married lesbian couples who claim the law violates the Fourteenth Amendment because the same

presumption is not extended to a birth mother's wife. The Seventh Circuit agreed.

REASONS FOR GRANTING THE PETITION

I. The question presented is an important one that affects every state and was incorrectly decided below.

The Court should grant certiorari to protect the authority of states to make policy judgements that prioritize the interests of children over those of the adults who raise them, a right that is jeopardized by the Seventh Circuit's egregious misinterpretation of this Court's precedent. Given the extraordinarily important issues arising out of this Court's mandatory legalization of same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015), there is no reason to wait for a circuit split.

1. Children have an interest in knowing the identity of both of their biological parents. Indeed, research has shown that children generally fare best when raised by their married biological mother and father.² Even when this ideal is not possible—because of death, divorce, abandonment, adoption, or the use of third-party reproduction—children have an interest in at least knowing, at some point, the identity of their biological parents. They suffer when they are forced to

² See, e.g., Matthew D. Bramlett and Laura F. Radel, *Adverse Family Experiences Among Children in Nonparental Care, 2011–2012*, Center for Disease Control (2014), <https://www.cdc.gov/nchs/data/nhsr/nhsr074.pdf>.

live their lives in ignorance of their genetic origins. For this reason, states have a compelling government interest in creating birth-certificate systems that accurately document a child's biological parentage.

This interest finds ample support in international opinion, which, although not binding on the Court, is instructive. As the United Nations Convention on the Rights of the Child states, a child has a right to be “registered immediately after birth and ... as far as possible, the right to know ... his or her parents.” U.N. Conv. Art. Rights of Child 7. On the thirtieth anniversary of this Convention, one donor-conceived individual admonished the United Nations, “Identity should not literally be a corporate or state secret.”³

2. But the Seventh Circuit decision below declared that biology-based birth-certificate systems designed to protect these interests are unconstitutional—at least to the extent that they include a rebuttable presumption of paternity for a birth-mother's husband that is not extended to a birth-mother's wife. Although 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,” Pet. App. 2a, its opinion effectively forbids states from taking basic facts about human biology into consideration

³ *Donor conceived people present at United Nations, We Are Donor Conceived* (2019) <https://www.wearedonorconceived.com/homepage-featured-article/donor-conceived-people-present-at-the-united-nations/>.

when crafting such a biology-based system. The opinion does so by forcing states to extend the presumption of paternity to a birth mother's wife even though the presumed fact is *never* true.

The reason that the presumption of paternity is “one of the strongest and most persuasive known to law”⁴ is biology: all but a miniscule fraction of children are conceived through sexual intercourse between a man and a woman, and the overwhelming majority of married women do not have sexual relations with anyone other than their husbands.⁵ As a result, for opposite-sex married couples, the presumption of paternity unites a child with both biological parents nearly 100% of the time. Research indicates that cases of misattributed paternity are rare—somewhere between one and three percent.⁶ These exceptional cases are the reason the presumption is rebuttable.

The opposite is true for same-sex couples. It is no slight to them to say that biology itself *always* rebuts

⁴ *Ariel G. v. Greysy C.*, 20 N.Y.S.3d 145, 147 (N.Y. App. Div. 2015) (internal citations omitted).

⁵ See Wendy Wang, *Who Cheats More? The Demographics of Infidelity in America*, Institute of Family Studies (Jan. 10, 2018) (finding only 11% of married women age 18–39 report *ever* having sex with someone other than their husband while married), <https://ifstudies.org/blog/who-cheats-more-the-demographics-of-cheating-in-america>.

⁶ See Ann Young, *et al.*, *Discovering Misattributed Paternity in Living Kidney Donation: Prevalence, Preference, and Practice*, 87 *Transplantation* 1427 (2009).

the presumption.⁷ A human female is obviously not capable of fathering a child.⁸ So too, when a child is born to a same-sex couple, a third-party is *always* involved. Extending the presumption of paternity to a birth mother’s wife, as the Seventh Circuit now requires, is therefore nonsensical and—from a children’s interest perspective—harmful because it *always* results in the child’s being severed permanently from one of his or her biological parents. Losing a parent is always tragic. That is why under Indiana law, the birth mother’s spouse—regardless of sex—should appear on the birth certificate *only* if that person is a biological or has undergone the rigorous vetting of the adoption process. See Pet. 13–15.

3. Contrary to the Seventh Circuit’s conclusion, this Court’s precedent does not require states to ignore biological reality when designing laws regulating

⁷ In this respect, there should be no equal protection violation. Even if the presumption is extended to a birth mother’s wife, biology immediately rebuts it.

⁸ This is true even in cases like the Philip-Stackman Plaintiffs here where the birth mother carried and gave birth to a child created using not her own egg, but that of her wife. Paternity (the contribution of genetic material through a sperm) is not the same thing as maternity (the contribution of genetic material through an egg). A third-party sperm donor was still used to create the Philip-Stackmans’ child. The Philip-Stackmans’ situation therefore implicates Indiana’s common law presumption of maternity, rather than its statutory presumption of paternity. Contrary to the Seventh Circuit’s opinion, in such situations both women are *not* “biological mothers.” Pet. App. 2a. The egg donor is the actual biological mother. The birth mother is a surrogate.

birth certificates. To be sure, in *Obergefell*, this Court held that same-sex couples have a right to the same “constellation of benefits that the States” have extended to opposite-sex couples through the institution of marriage. 576 U.S. at 656. But the Court has never held that the right to appear on the birth certificate of a spouse’s child must be included in that “constellation of benefits.” *Ibid.* On the contrary, it has specifically held “the States are in general free to vary the benefits they confer on all married couples.” *Id.* at 670–671.

That freedom was implicit in *Pavan v. Smith*, 137 S. Ct. 2075 (2017). There, Arkansas’s birth certificate regime was declared unconstitutional only because the state had “chosen to make its birth certificates more than a mere marker of biological relationships.” *Id.* at 2078. The state *required* the birth mother’s husband to be listed as the father, even when all parties knew that was a lie. It could not be rebutted.

But Indiana has not made that choice. Rather, it designed its birth-certificate system to serve the interests of children rather than to affirm the birth-mother’s romantic relationship. The opinion below overrides that legitimate choice, and thereby hinders states from protecting children’s interests to accurate information about their biological origins. As Archbishop Desmond Tutu has explained, “[A birth certificate is] a small little paper but it actually establishes *who you are* and gives access to the rights

and privileges, and the obligations, of citizenship.”⁹ But the Seventh Circuit’s decision requires states to transform birth certificates into a second marriage certificate, prioritizing what the adults *wish* the child was—the product of two adults of the same sex—over who (s)he actually is: the child of a particular man and a particular woman.

II. Children are harmed when the state forever deprives them of accurate information about their biological origins by falsifying birth certificates.

The prioritization of adult desires over the interests of children—and the resulting falsified birth certificates—long predates the debate over same-sex marriage. As *Pavan* demonstrates, since 1947 Arkansas has *required* the spouse of the birth mother to be listed as the parent of the child even in instances where all parties involved know that is a lie—thus depriving some children forever of their right to know their biological parentage. Elsewhere, when a child is adopted at birth, the adoptive parents are listed on a reissued birth certificate, and the original certificate listing the biological parents is often sealed

⁹ *Count Me In!: The Global Campaign for Universal Birth Registration* 4, https://americasns.org/wp-content/uploads/2020/01/count_me_in_-_the_global_campaign_for_universal_birth_registration_plan_international_-_engelstalig.pdf (emphasis added).

permanently¹⁰—thus depriving adopted children and their adoptive parents of critical information about the child’s genetic origins.¹¹

Consequently, we have decades of experience with the impact of falsified birth certificates on the health and general well-being of children. Regardless of how loving a home the child is raised in, being permanently deprived of accurate information about one’s biological parentage has consequences that can last long into adulthood. To demonstrate this, we collected the stories of individuals who had their birth certificates falsified for one reason or another and asked them about their experiences.¹² The respondents represent the full panoply of American family life: Some were raised by opposite-sex couples, others by same-sex couples, and others still by single parents. Some were

¹⁰ In Indiana, when a child is adopted a new birth certificate listing the adoptive parents rather than the biological parents is generated and the original birth certificate is sealed. Ind. Stat. ch. 13. Interested persons, including adoptees and their adoptive parents, may request release of sealed adoption information from any court with probate jurisdiction in Indiana. Ind. Stat. ch. 24.

¹¹ See Nina Williams-Mbengue, *Adult Adoptee Access to Original Birth Certificates*, National Conference of State Legislatures (May 15, 2019), <https://www.ncsl.org/research/human-services/adult-adoptee-access-to-original-birth-certificates.aspx>.

¹² Those stories that are not otherwise available online have been made available for the Court’s convenience. Testimonials of Individuals with Falsified Birth Certificates, <https://tinyurl.com/y6qcjlnr> (last updated Oct. 28, 2020) [hereinafter “Testimonials”].

adopted, others conceived using donor sperm, and others conceived the old-fashioned way. Some maintain close relationships with the parents who raised them, others are estranged. Regardless of background, the respondents spoke with one voice in affirming that a falsified birth certificate that permanently deprives them of accurate information about their parentage has affected virtually every aspect of their lives. Surely, the state has a legitimate interest in creating a birth-certificate system that minimizes these harms.

The sections that follow address the harms most frequently reported by the individuals we surveyed: (1) deprivation of complete family medical histories; (2) difficulty in identity formation; (3) fears of accidental incest; and (4) increased exposure to abuse and neglect. Finally, we highlight the fact that the respondents in our survey feel the falsification of their birth certificates shows that the state does not care about their interests.

**A. The falsification of birth certificates
leaves children in the dark about their
family medical history.**

“Every year I learn about a new problem”— Falsified birth certificates deprive children of a complete health history. Jo Lloyd was one of many donor-conceived adults to testify on behalf of the donor conceived community at the United Nations last year. She has a congenital heart defect called Tetralogy of Fallot, which is hereditary in a small number of cases.

But her parents always told her and her doctors “that there was no history of heart issues on her father’s side.” And yet, “[a]ged 54, I discovered that I was donor conceived. My father was Mr. Anonymous. Amidst the shock of discovery was the trauma of knowing I had been given inaccurate medical history all my life. This was incredibly scary.”¹³

Gregory Loy’s experience demonstrates why.¹⁴ He was conceived through an anonymous sperm donor. Like Lloyd, his birth certificate lists his mother’s husband as his father, a man he believed to be his biological father for the first three decades of his life. When the truth came out, the revelation shattered him. To deal with the stress, he “went through a period of alcohol substance abuse.”¹⁵ In his own words, “[i]t nearly cost me my career and my family. The irony ... is that had I known who my biological father was ... I would have known that there was a family history of alcohol dependency. ... I was denied critical medical information because I didn’t even know it existed.”¹⁶

Theodore expressed similar frustrations.¹⁷ He was raised by a loving lesbian couple. Although they

¹³ *Donor conceived people present at United Nations*, *supra* note 3.

¹⁴ Testimonials, *supra* note 12, at 1a–6a.

¹⁵ *Id.* at 2a.

¹⁶ *Ibid.*

¹⁷ Testimonials, *supra* note 12, at 7a–11a. Theodore requested that his last name be withheld for privacy purposes.

separated when he was ten, he remains close to both his biological mother and his “non-bio mom.”¹⁸ Only his biological mother is listed on the birth certificate. Because he was “conceived via a sperm bank,” no father is listed, and he knows next to nothing about him to this day—a fact that has complicated his efforts to treat his own underlying medical conditions:

Every year I learn about a new problem that I wish I had known about sooner. The severity of my scoliosis could have been mitigated had I known it was a genetic issue on my father’s side I have no idea if the man is alive and what cancers or other conditions he may suffer from. This information is crucial, and I’m denied access to it for his right to have anonymously sold his sperm.¹⁹

Theodore continues, “I want to know his health history and who his kids are and not much else. I don’t want to go to talk to him, go to baseball games or sue him for back child support, but I want to know who he is.”²⁰

The need for accurate medical information is a top concern for children created through sperm-and-egg donations. Ninety-nine percent of donor-children believe they should have access to their donor’s

¹⁸ *Id.* at 7a.

¹⁹ *Id.* at 9a.

²⁰ *Ibid.*

medical history.²¹ Having accurate birth certificates that list the identities of both biological parents ensures that children receive (at least eventually) the information they need for life-long health.

B. The falsification of birth certificates can lead to identity crises.

“These absences haunt and recirculate throughout my life”—Children who are deprived of accurate information about their biological origins often struggle with identity formation, torn between the family they were raised by and their desire to know more about their biological parents. They often feel guilty seeking out such information, afraid that it will hurt the parents who raised them. According to the landmark study *My Daddy’s Name is Donor*, over half (53%) of donor-conceived children agree that “I have worried that if I try to get more information about or have a relationship with my sperm donor, my mother and/or the father who raised me would feel angry or hurt.”²²

²¹ *We Are Donor Conceived 2019 Survey Results*, We Are Donor Conceived (May 1, 2019), <https://www.wearedonorconceived.com/uncategorized/we-are-donor-conceived-2019-survey-results/>.

²² Elizabeth Marquardt, Norval D. Glenn, and Karen Clark, *My Daddy’s Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* 7, Institute for American Values (2010), http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf.

For example, when Joanna Rose was eight years old, she walked in on her father sobbing alone in the family room. Concerned, she asked what was wrong. He took her on a walk in the park where he confessed that he was not her biological father. Despite the fact that he was listed on her birth certificate, she had been conceived using donor sperm. “Instead of thinking about what this meant for me,” she explains, “I felt very responsible for my parents’ feelings. I wiped away my father’s tears and told him: ‘Don’t worry, you are the only father I know, and I love you.’”²³ And while that remains true, the “invisible absence” of her biological father—and the fact that she knows nothing about him—“burdens and impinges on my welfare, it troubles me.”²⁴ As she put it:

These absences haunt and recirculate throughout my life; they were there when I was a child trying to make sense of my own reflection and physique that was so different to those around me. I surely resembled those that weren’t visible to me. I felt such pressure to celebrate others’ heritage, be that Jewish or aristocracy, as both were in my immediate family. These were imbued with significance,

²³ Helen Carrol, *How would YOU feel to find you are a sperm donor’s child? These women say it shattered their lives*, Daily Mail (Jun. 24, 2015) <https://www.dailymail.co.uk/femail/article-3138016/How-feel-sperm-donor-s-child-women-say-shattered-lives.html>; see also Testimonials, *supra* note 12, at 12a–15a.

²⁴ Testimonials, *supra* note 12, at 12a.

while I was being intensely coerced to be silenced about the loss or falsification of my own identity, genetics, and heritage.²⁵

For Joanna, the loss is now multigenerational. “Now I have children and our shared medical, social, and personal heritage is absent yet important to them too.”²⁶

Gregory Loy experienced similar pain when he discovered well into adulthood that his mother’s husband was not his biological father. The “discovery of the deception of [his] birth”—aided and abetted by the government who issued his birth certificate—caused his “entire identity [to be] torn apart.”²⁷

One half of my genetic makeup, affecting traits, aptitudes, likes and dislikes, health, etc. was completely unknown. It has been a bewildering experience, not unlike feeling like you are lost at sea in a life raft with nobody to call to for help. I felt alone, as the two people I was supposed to trust in this world, my mother and father, had perpetrated a three decade lie and were still unwilling to provide information.

Mr. Loy then explains the psychological impact of his falsified birth certificate:

²⁵ *Id.* at 12a–13a.

²⁶ *Id.* at 13a.

²⁷ Testimonials, *supra* note 12, at 1a.

To add to the challenge of finding my identity, there are no legal documents in existence to tie me to my real identity. My birth certificate lists my social father, which according to the state is a legal definition, but it left me feeling like an illegitimate member of society. Every government document I have ever filled out that required me to list my father's name, including passport applications, security clearance questionnaires, marriage applications, the list goes on ... felt like an unwitting deception on my part. Nothing I had ever done in that regard was truth, and that is because that truth was stolen from me at the beginning of life.²⁸

Yet the Seventh Circuit has made it so that an increasing number of children will be raised without ever knowing even the identity of one of their biological parents.

C. The falsification of birth certificates complicates dating and intimacy.

“Dating is hard enough without having to genetically screen all my Tinder matches”—Falsified birth certificates also increase the risk of accidental incest. For example, Adriana is a Brazilian woman who was abandoned by her mother at the age of one. In 2004, she met and fell in love with Leondro. After seven years together, Leondro discovered that the

²⁸ *Id.* at 1a–2a.

woman he thought was his mother was actually his stepmom: His biological mother, like Adriana's, had abandoned him when he was a small child. This revelation prompted the couple to seek out their biological mothers together. With the help of a local radio program, Adriana reconnected with her birth mother, and discovered in the process that Leandro—her sexual partner for almost a decade and the love of her life—was actually her younger brother.²⁹

The same thing happened to a British couple in 2008. Both were adopted and, as such, neither had their biological parents listed on their birth certificates. Sometime after they were married, they discovered not only that they were siblings, but twins, and had to have their marriage annulled.³⁰

Fears of accidentally dating or marrying a relative are only amplified with children of third-party reproduction. It's one of the many reasons why donor-conceived children oppose anonymous sperm donations.³¹ Many of these children have dozens to

²⁹ Matt Roper, *Woman tracks down the mother who abandoned her as a baby ... only to realise she has unwittingly married her BROTHER*, Daily Mail (Aug. 6, 2014), <https://www.dailymail.co.uk/news/article-2718216/Woman-tracks-mother-abandoned-baby-realises-unwittingly-married-BROTHER.html>.

³⁰ Allegra Stratton, *Twins Separated at Birth Married Each Other*, The Guardian (Jan. 11, 2008), <https://www.theguardian.com/uk/2008/jan/11/allegrastratton>.

³¹ *We Are Donor Conceived 2019 Survey Results*, *supra* note 21.

hundreds of half-siblings who often live in the same area.

For Zave Fors it could be up to a thousand. “I went to high school with a half-brother and didn’t even know until years later. Due to the quantity of siblings and the fact that many donor-conceived people aren’t aware that they’re donor-conceived, I have to worry about accidental incest. Dating is hard enough without having to genetically screen all my Tinder matches.”³²

As these stories demonstrate, the risk of inadvertent incest weighs heavily on those who lack a complete knowledge of their biological origins. Recent research shows that forty-six percent of donor offspring and seventeen percent of adopted adults have worried that they might be unknowingly related to someone to whom they were romantically attracted. A similar percentage—forty-three percent of adult donor offspring and sixteen percent of adopted adults—have feared having sexual relations unknowingly with someone to whom they are biologically related.³³ As one donor-conceived woman explained,

I was ... shocked to find out what a huge number of donor-conceived half siblings I

³² Zave Fors, *I Was Artificially Created, We Are Donor Conceived*, <https://www.wearedonorconceived.com/personal-stories/i-was-artificially-created/> (last visited October 28, 2020).

³³ Marquardt, *supra* note 22.

probably have living near me. At least 20, maybe over 50 ... They are unlikely to have been told they were donor conceived. ... I'm grateful that I didn't accidentally marry one of them, and I worry that my own children will accidentally enter into a romantic relationship with one of their many (hundreds, maybe?) of cousins. They won't know they are related without DNA testing. Can you imagine having to screen dates for potentially being your unknown cousin?³⁴

These fears are especially pronounced for certain sub-groups, such as the donor-conceived children of lesbians. As one study put it, “the fact that lesbian and gay parents tend to concentrate in lesbian and gay-friendly cities and neighborhoods,” means that children living near each other and approximately the same age may have had parents who used the same local sperm bank and—perhaps because of cultural similarities and shared interests—were unknowingly drawn to the same sperm-donor profile.³⁵ This complicates having a crush on the kid down the street. The study further observes that “[t]he same social network argument can be made about the independent, alternative-life style embracing women who might opt for being a single mom by choice and who move in circles with other like-minded

³⁴ Ellie, *Now it is my turn to speak. I hate my conception*, Them Before Us (Jan 2, 2018), <https://thembeforeus.com/ellie/>.

³⁵ Marquardt, *supra* note 22.

mothers.”³⁶ One such woman has “concluded that in the future her son, who is currently still a [child], will simply have to have genetic testing with any girl he seriously considers having sex with.”³⁷

A system like Indiana’s, that requires biological parents to be listed on a birth certificate and makes it illegal to falsify this information, can ameliorate these concerns. As David Alton, a former member of the British Parliament and later a member of the House of Lords has pointed out, “[t]he right for children to know the identity of their biological parents is a human right. There will be more cases [of inadvertent incest in the future] if children are not given access to the truth. The needs of the child must always be paramount.”³⁸

D. The falsification of birth certificates places children at a higher risk of abuse.

“*[A] convicted pedophile is listed on my birth certificate*”—For some children, an inaccurate birth certificate also connects them to dangerous adults. For example, Elizabeth Howard was conceived using an anonymous sperm donor. Her birth certificate lists her “social father” as her father. However, “[h]e was

³⁶ *Ibid.*

³⁷ *Id.* at 34–35.

³⁸ Sophie Goodchild & Amy Iggulden, *Twins Marry Each Other*, London Evening Standard (Jan. 11, 2008), <https://www.standard.co.uk/news/twins-marry-each-other-6671157.html>.

convicted of child sex abuse against my brother and other children and went to prison when I was 13. ... My 'social father' who is a convicted pedophile is listed on my birth certificate and that pains me greatly.”³⁹

Similarly, Tara Westrich’s birth certificate was knowingly falsified by her mother who listed her husband of one month as the father, despite knowing Tara’s father to be the man from her previous relationship.⁴⁰ “I was raised by my mother and this man—a stepfather she passed off as my real father to me.”⁴¹ And being raised without one biological parent affected her before she even knew the truth: “My stepfather was verbally abusive ... I always felt like I didn’t love this father in my home the way I thought I was supposed to love a dad. When I learned the truth of my parentage, I felt relief. Suddenly, I knew the reason behind my lack of attachment to him.”⁴² But decades later, her birth certificate still causes her pain. “Since I learned the truth of my paternity, I have ALWAYS wished that the document recording my birth was accurate. Even as a 48-year-old woman, I hate that this piece of paper stating my identity is inherently wrong.”⁴³

³⁹ Testimonials, *supra* note 12, at 19a.

⁴⁰ Testimonials, *supra* note 12, at 16a–18a.

⁴¹ *Id.* at 16a.

⁴² *Ibid.*

⁴³ *Id.* at 17a.

Thankfully, most social parents and stepparents are not abusive and are doing their best in what are often difficult circumstances. But research demonstrates that biological parents tend to be the most connected to,⁴⁴ protective of,⁴⁵ and invested in their children.⁴⁶ While there are certainly many heroic stepparents and adoptive parents who deserve praise, non-biologically-related adults living in the home are far more likely to abuse, neglect, or kill a child than a child's biological parents.⁴⁷ That's why adoptive

⁴⁴ Kirsten van Houdt, *et. al.*, *Stepparental Support to Adult Children: The Diverging Roles of Stepmothers and Stepfathers*, 82 *Journal of Marriage and Family* 639 (2019).

⁴⁵ W. Bradford Wilcox, *Suffer the Little Children: Cohabitation and the Abuse of America's Children*, Public Discourse (April 22, 2001), <https://www.thepublicdiscourse.com/2011/04/3181/>.

⁴⁶ Keith Zvoch, *Family type and investment in education: a comparison of genetic and stepparent families*, 20 *Evolution & Human Behavior* 453 (1999).

⁴⁷ See, *e.g.*, Theresa Porter, *The Wicked Stepmother: Fairy Tales, Child Abuse, and Historical Epidemiology*, in *Retold Feminine Memoirs: Our Collective Past and Present* 39–49 (2013) (finding stepchildren experience “higher rates of neglect and abuse as well as higher likelihood of an early death.”); Martin Daly & Margo Wilson, *An Assessment of Some Proposed Exceptions to the Phenomenon of Nepotistic Discrimination Against Stepchildren*, 38 *Ann. Zool. Fennici* 287, 287 (2001) (“Stepparents commit child abuse and homicide at much higher rates than genetic parents.”); Anne Case & Christina H. Paxson, *Mothers & Others: Who Invests in Children's Health?*, *Nat'l Bur. of Econ. Research* (2000) (finding stepchildren less likely to receive regular medical care) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=228984.

parents rightly undergo screening and vetting prior to child placement. Casually connecting children to biological strangers on the birth certificate can place children in risky households and grant parental authority to adults who are statistically more likely to abuse or neglect them, or both.

E. Falsified birth certificates cause children to feel as if their interests are not important to the state.

“My birth certificate was not created with me in mind”—Finally, falsified birth certificates leave children feeling abandoned by not just their missing biological parents, but also by the government that enabled, and in some cases mandated, the deception. Gregory Loy’s response is typical: “My birth certificate was not created with me in mind.”⁴⁸ He continues:

Birth certificates are used as tools for state sponsored lies that support multiple people, really everyone except the children that they are about. These certificates enable a legal record that hides the truth for the parents’ benefit [to] the detriment of the child. They create an environment that props up the adoption and fertility industries by giving parents that false peace of mind that the real identity is now hidden by [a] legal record. ... This is a system actively hiding a child’s

⁴⁸ Testimonials, *supra* note 12, at 5a.

fundamental right to know their own identity.⁴⁹

Ben Smith expressed similar sentiments.⁵⁰ He was raised by his biological mother and her wife, both of whom were listed on his birth certificate. He notes that the fact “[t]hat my mother’s wife was able to be listed as my second parent allowed my mother and her wife to feel affirmed in their perspective ... that my father does not matter, that he doesn’t need to take a presence in my life”⁵¹—that having two moms could eliminate the need for a dad. It also allowed his father to remain anonymous and by so doing not “value and prize what he gave away” and shirk the obligations he owed to his offspring.⁵² “So at the end of the day, I’m left feeling there’s a big disconnect between what matters and what is actually celebrated, and the distortion of the birth certificate enabled this to happen.”⁵³

Over and over, survey respondents expressed feeling that their interests didn’t matter to the state. As Theodore put it, “I’m clearly at the bottom of the pecking order as far as rights are concerned.”⁵⁴

⁴⁹ *Ibid.*

⁵⁰ Testimonials, *supra* note 12, at 21a.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Testimonials, *supra* note 12, at 10a.

Overwhelmingly, those we surveyed indicated that they would have preferred that both of their biological parents be listed accurately on their birth certificates and that their lives would be significantly different had it been so. For example, Sarah St. Onge was born out of wedlock to a mother who intentionally lied about the identity of her biological father. She was an incredibly negligent mother.⁵⁵ But “[b]ecause she falsified his name, social services was not able to locate him. I always assumed he was in and out of jail, or something, because we never received any child support.”⁵⁶ It turned out he was actually from a fairly wealthy family. And “[i]f my bio dad’s real name had been on my certificate, I believe even if he’d shown no interest, his family would have. I’ve spoken at length with his sister who informed me that my paternal grandfather would have never allowed [me to continue being abused and neglected by my mother].”⁵⁷

Similarly, for Joanna Rose—who grew up in a loving home and has achieved great professional success as an adult—her falsified birth certificate has prevented her from “invest[ing] [her] energy and focus on other areas of ... personal security.”⁵⁸ Instead it has defined her career. Her Ph.D. dissertation was entitled “A Critical Analysis of Sperm Donation

⁵⁵ Testimonials, *supra* note 12, at 27a–28a.

⁵⁶ *Id.* at 27a.

⁵⁷ *Id.* at 27a–28a.

⁵⁸ Testimonials, *supra* note 12, at 13a.

Practices.”⁵⁹ She was also the lead plaintiff in *Rose & Another v. Secretary of State for Health and Human Fertilization and Embryology Authority* [2002] EWHC (Admin) 1593 (Eng.), the lawsuit that resulted in the Queen’s Bench declaring that anonymous sperm donation violated the European Convention on Human Rights. These were “all emotionally expensive appeals to try to explain the significance of this loss to me and others, and have it responded and corrected. My energy was not consequently utilised towards personal stability, finance, and pension due to my attention being in this.”⁶⁰ The impact is impossible to quantify. “I would ... not have spent my adult life hunting for the proverbial ‘needle in the haystack’ and to resolve injustice. I would have my correct information and feel supported by the State ... rather than [feel the] State sanctioned and facilitated deception.”⁶¹

These survey responses confirm that a birth certificate should not serve as a second marriage license for a parent who chooses to live with someone other than the child’s other biological parent. States should be free to prioritize children’s interests and needs when designing a birth-certificate system.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Id.* at 15a.

CONCLUSION

The decision below ignores the important government interest in protecting children. It gives adults the option of state-sanctioned denial of a child's interest in knowing and having access to his/her biological identity. In these cases, the birth certificate erases a child's genetic parentage and replaces it with someone's *intent* to parent. It centers the birth story on the adults' emotions, and not the child's truth. In other words: it prioritizes *alternative* facts. If allowed to stand, the Seventh Circuit's decision will take society further down the path of treating children as a means to fulfill adult desires, rather than encouraging adults to orient their lives around their children's wellbeing.

For these reasons, certiorari should be granted, and the Seventh Circuit's decision should be reversed.

Respectfully submitted,

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