No. 19-1385

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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Biological parents have a fundamental liberty interest in "the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This case concerns whether a State may rebuttably presume the biological paternity of the husband of a birth mother without presuming the same of the wife of a birth mother. Common sense suggests the answer must be yes, for the husband of a birth mother is *usually* the biological father, but the wife of a birth mother is *never* the biological father. And neither the Constitution nor this Court's holdings in *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), commands States to act contrary to biological facts.

The decision below, however, puts Indiana in a difficult position: either forgo grounding parental rights in biology (potentially violating the fundamental liberty interest of biological parents) or require a DNA test for every child, even those for whom biological parentage is uncontested. Because the Constitution does not require Indiana to make such a costly and intrusive choice, petitioners urge the Court to grant certiorari and uphold Indiana's common-sense system for presuming the identity of biological parents at birth.

ARGUMENT

I. This Case Presents a Nationally Important Question of Federal Law

The question presented is whether a State may, consistent with the Fourteenth Amendment, adopt a

biology-based birth-certificate system that, rather than requiring a DNA test for every child, employs a rebuttable presumption that a birth mother's husband—but not wife—is the child's biological father. *See* Pet. for Cert. i.

Respondents attempt to recast the constitutional question as one of state law: whether "Indiana's birth certificate regime is purportedly based exclusively on biology." Br. in Opp'n 12. But the legal details of Indiana's birth certificate "regime" have never been in dispute. What *is* in dispute is whether the Constitution permits Indiana to *identify* biological fathers by way of a common-sense—but rebuttable—presumption that the husband of a birth mother is the biological father, without also presuming the *non-biological* "parentage" of a birth mother's wife. The decision below answered that question no, holding that "a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages." Pet. App. 9a. The decision thereby requires Indiana either to insist on genetic testing for all new purported parents or else abandon a biological basis for initial parentage recognition in favor of marital assignment. Whether the Seventh Circuit was correct in that holding is a nationally important question that requires the Court's consideration.

Furthermore, the Constitution—even as interpreted in *Obergefell* and *Pavan*—does not demand that States abandon the reasonable, efficient, longstanding, and rebuttable presumption that a birth mother's husband is a newborn child's biological father. The Seventh Circuit's holding to the contrary

defies both common sense and the constitutional rights and obligations of biological parents. In the vast majority of cases, a birth mother's husband will, in fact, be the biological father of the child, with all the rights and obligations attendant thereto. But a birth mother's wife will *never* be the biological father of the child, meaning that, whenever a birth-mother's wife gains presumptive "parentage" status, a biological father's rights and obligations to the child have *necessarily* been undermined without proper adjudication.

Respondents' contention that "there is no indication that any party outside the respondents' marriages has ever asserted any parental right" is irrelevant to the fundamental question of how the State may go about identifying biological parents in the first instance. Br. in Opp'n 14 n.3. The Seventh Circuit affirmed a *facial* injunction against the statute, meaning that the presumption of "parentage" will apply to wives of birth mothers even when a biological father *does* assert his rights. Pet. App. 72a. And while the district court allowed that a biological father could come forward to "rebut" the presumption of "parentage" in the wife of a birth mother, Pet. App. 22a, such a paternity claim would not actually "rebut" anything, since no one ever supposed that the birth-mother's wife was the child's father.[1]

[1] In this regard the decisions below expressly leave open the fate of parental rights of two men married to each other. App. 10a–11a, 20a–21a. The courts below thus have attempted to remedy one supposed inequality in the law only by introducing another. If the fact that a woman cannot be a child's father is insufficient

In other words, the apparent rationale for the decision below appears to be that, for the convenience of the adults involved, the *Constitution* requires States to respect maternal assignment of parental rights in the first instance, with adjudication necessary only if the father shows up, in which case (presumably) biology wins out. This Court, however, has never suggested the Constitution imposes such a requirement. Many States, including Indiana, have long protected the rights of biological parents by requiring anyone else who wishes to obtain parental rights to go to Court to prove such rights to be in the best interests of the child notwithstanding someone else's biological connection. The constitutional rights of biological parents justify (and indeed require) such procedural safeguards, but the courts below have now declared them to be an unnecessary inconvenience—that is, if the State does not go to the trouble of requiring genetic tests of all putative parents.

The question presented to the Court in this case is therefore distinct from the question presented in *Pavan*, where all parties agreed that "the requirement that a married woman's husband appear on her child's birth certificate applies in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor." *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017). Indiana does not

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to justify Indiana's refusal to presume *her* parenthood, it is hard to understand how the fact that a man cannot have a baby can justify refusal to presume *his* parenthood. Only the State's existing presumption of biological paternity in a birth mother's husband treats all similarly situated individuals (and couples) equally.

require, or even lawfully permit, the birth mother's husband to be on the birth certificate as a matter of presumption in such circumstances.

Nor is *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994)—which the decision below did not even cite—to the contrary. *Levin* did not address birth certificate rules or parental rights. Rather, it adjudicated the consequences of acting like a child's parent (notwithstanding the lack of a biological or adoptive tie) when a marriage dissolves and issues of estoppel and the child's "best interests" come to the fore. The husband had held the child out as his own for fifteen years—including by fraudulently lending his name to the birth certificate—and the court held that allowing him to disclaim biological paternity after such a time would be unjust to the child. Similarly, in *Engelking v. Engelking* (also not cited by the Seventh Circuit), the husband was estopped from disclaiming biological paternity where he had "supported the children during the marriage, exercised his visitation rights during most of the lengthy period between the filing of the petition for dissolution and the final hearing, and claimed the oldest child on his tax return." 982 N.E.2d 326, 328 (Ind. Ct. App. 2013).

These cases do not permit two adults to negate, before a child is conceived (let alone born), the constitutionally protected rights and obligations of a child's biological father. And they in no way suggest that it is "entirely appropriate," Br. in Opp'n 17, for a birth mother to list her husband's name on her child's birth certificate where another man is the biological father—which is why the decision below cited neither case and never remotely suggested a dispute of State

law in this regard. The only question here is whether the Constitution permits Indiana to use a rebuttable presumption, rather than a genetic test, to recognize, on a birth certificate, the biological paternity of a birth mother's husband. The Seventh Circuit held that it does not, *see* Pet. App. 9a, and that decision merits this Court's review.

II. Indiana May Recognize Initial Parental Rights and Obligations Based on Biology Without Requiring a Genetic Test and Adjudication for Every Child

The decision below leaves Indiana with two options: either require a DNA test for the purported biological parents of every child or else abandon altogether biological parentage in favor of (in effect) the birth mother's assignment of parentage. Respondents acknowledge this choice when they suggest that "[w]hile Indiana could require an *adjudication* of parentage to be certain that the husband is a legal parent before listing him on the birth certificate, it does not do so." Br. in Opp'n 25–26 (emphasis added). The Constitution does not require Indiana to identify a newborn baby's biological parents only by adjudication (or otherwise guarantee an accurate identification of a biological connection in every family). Indiana provides multiple ways to rebut the presumption of paternity, and only Respondents' ungrounded demand for birth-mother-assigned parental status—*not* a demand for actual equality—justifies cumbersome, costly, and unnecessary procedures to establish biological fatherhood.

1. First, again, under Indiana's presumption of paternity, the husband of a mother who gives birth to a child conceived with donor sperm is *not* the child's legal parent. Indiana law says, in plain terms, that a "parent" is "a biological or an adoptive parent." Ind. Code § 31-9-2-88(a). It does not, therefore, recognize mere assignment of parental rights to anyone who is neither a biological or adoptive parent—including the birth mother or her husband.

That said, as a means of *identifying* biological parents in the first instance, the law employs two common-sense presumptions. First, the woman who gives birth to a child is presumed to be the child's biological mother. Ind. Code § 31-9-2-10. Second, her husband, if she is married, is presumed to be the child's biological father. Ind. Code § 31-14-7-1. But both presumptions are factual, not legal, and are rebuttable with contrary evidence. *See* Ind. Code § 31-14-7-1 (paternity); *In re Paternity of Infant T.*, 991 N.E.2d 596 (Ind. Ct. App. 2013) (maternity). As discussed in the cert petition, this system is nearly always accurate, *see* Pet. for Cert. 24–25 & nn. 3–4, and by limiting genetic testing to situations where the biological parentage of the child is in question, it serves the State's interests in cost efficiency and marital privacy.

Furthermore, formal adjudication is not the only means by which facts rebutting a presumption of biological parentage affect the birth certificate. When a child is born, the birth mother completes the Indiana Birth Worksheet. Question 37 on the birth worksheet asks, "Are you married to the father of your child?" Appellants' App. 25. A birth mother who knows her husband is not the child's father, *i.e.*, who has

knowledge of facts rebutting the presumption of paternity, must answer that question "no," with the consequence that the husband will not be listed as the father on the birth certificate. The birth worksheet treats same-sex couples the same. The birth mother knows that her wife is not the "father" of the child, so she, too, must answer question 37 "no."

Respondents make much of the fact that the birth worksheet does not define "father" as biological father. But what else would it mean? Respondents argue that "the question is directed to the mother's 'Marital Status' . . . rather than to whether there is a biological relationship between her husband and her child." Br. in Opp'n 16. Yet if the State's objective were merely to permit the mother to denominate her husband to be her child's legal parent regardless of biological connection, the worksheet would merely ask, "are you married?" Instead it asks about marriage to a specific person—the *father* of the child—which plainly connotes a relationship between the child and the birth mother's spouse *apart from* the marriage. That other relationship *must* be biological, for adoption cannot occur until after the child is born. *See* Ind. Code § 31-19-9-2.[2]

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[2] Furthermore, the word "father" is commonly understood to mean "biological father" or, as defined by Merriam-Webster, "a man who has begotten a child." *Father*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/father; *see also* Daniel, *Dad vs. Father—What's the Definition, the Difference, and Why It Should Matter to You*, Dadtography (June 2019), https:// www.dadtography.com/definition-of-dad-vs-fa-

The binary biology-or-adoption requirement of Indiana parentage law remains even when a woman bears a child that is genetically related not to her, but to her wife (or any other woman). In that circumstance, the law ultimately confers biological parental rights on the egg donor, even as it presumes the birth mother to be the biological mother. *See Infant T*, 991 N.E.2d at 601 (permitting an egg donor to bring an action establishing her maternity against the claim of the birth mother). Consequently, the State's refusal to list Jackie Phillips-Stackman as her child's biological father on the birth certificate is reasonable: Jackie Phillips-Stackman is the child's biological *mother,* not biological *father,* and her remedy is to file a maternity action.

2. Second, Respondents are incorrect to assert that "the marital presumption can be challenged only by one of the spouses . . . or by a person seeking to establish that he . . . is the biological father." Br. in Opp'n 21. The child or the Department of Child Services may also file a paternity action. Ind. Code § 31-14-4-1.

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ther-and-a-fathers-right-to-parent/ ("[A] father is more of a biological term than a role or relationship."); Evan, *What Is the Difference Between a Father and a Dad?*, Dad Fixes Everything (Feb. 4, 2020), https://dadfixeseverything.com/father-vs-dad/ ("Most people agree that 'father' is a biological title and little more."); Mykh, *Being a Father Versus Being a Dad: 6 Important Differences*, Mind Journal, https://themindsjournal.com/6-important-differences-between-being-a-father-and-being-a-dad/ ("In a way any man whose sperm was responsible for your birth is your father, technically speaking.").

3. Third, Respondents contend that "Indiana enforces its strong policy against leaving a child without two parents, even when there is evidence that one of the parents lacks a genetic tie to the child," Br. in Opp'n 22, with the implication that Indiana's system is inequitable for not conferring automatic parentage on wives of birth mothers. But the cases Respondents cite are, once again, merely equitable estoppel cases holding that once a child's legal parentage has been established (whether by adjudication, affidavit, or death of the presumed father), it may not later be disestablished. *See In re Paternity of E.M.L.G.*, 863 N.E.2d 867, 868–69 (Ind. Ct. App. 2007) (holding putative fathers to paternity affidavits they signed); *In re Paternity of H.J.B.*, 829 N.E.2d 157, 160 (Ind. Ct. App. 2005) (rejecting attempt to disestablish paternity of presumed father that had already passed away). These cases are not about identifying biological parents at birth, but about preventing already-established parents from later circumventing support and inheritance requirements.

Separately, *Huss v. Huss*, 888 N.E.2d 1238 (Ind. 2008), Br. in Opp'n 19, also has nothing to do with the fundamental rule that parental rights at birth start with biology. There, the court said that a "determination that a child of the marriage 'is the legal equivalent of a parentage determination'" only to preclude one spouse from collaterally attacking an uncontested finding in a marital dissolution action—*not* as a way to assign parentage at birth. *Huss*, 888 N.E.2d at 1242 (quoting *Russell v. Russell*, 682 N.E.2d 513, 518 (Ind. 1997)). Indeed, to confirm the limited significance of its holding, the Indiana Supreme Court said in *Huss*

that a "child of the marriage" determination in a dissolution action would not preclude the *child* from challenging parentage in a later proceeding. *Id.*

These equitable rulings prevent adults from denying their own or their spouse's assumed parental obligations years after the child's birth. And as *Gardenour v. Bondelie* 60 N.E.3d 1109, 1120 (Ind. Ct. App. 2016), shows, when it comes to such equitable obligations, state law treats same-sex couples and opposite-sex couples the same. But equitable relief turns on facts as they develop over time in individual cases. The possibility of equitable relief in some circumstances does not justify requiring the State to allow would-be parents having no biological connection to a child (whether single or as part of a same-sex or opposite-sex couple) to declare themselves parents at the time of birth—and thereby deny the rights of the true biological parent.

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As three justices recognized in *Pavan*, "nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution. To the contrary, to the extent they speak to the question at all, this Court's precedents suggest just the opposite conclusion." 137 S. Ct. at 2079 (Gorsuch, J., dissenting) (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 124–125 (1989); *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001)). This case gives the Court a critical opportunity to clarify that States may, consistent with *Obergefell* and *Pavan*, establish a biology-based system for allocating parental

rights (reflected on the child's birth certificate) without insisting that every supposed biological parent undergo genetic testing and adjudication.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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