UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NOELL and CRYSTAL ALLEN, a married couple; JACKIE and LISA PHILLIPS-STACKMAN, a married couple and L. J. P-S, by her mother and next friend, Lisa Phillips-Stackman,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:15-cv-01929-TWP-MJD**
DR. JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner; *et al.*,	)	
Defendants.	)	

RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs have filed a motion for preliminary injunction seeking this Court enjoin the Defendants from enforcing Indiana Code Sections 31-14-7-1(1), 31-9-2-15 and 31-9-2-16. In essence, Plaintiffs are seeking an order requiring the Defendants to place the Plaintiffs' names on the birth certificates of their children and to consider the children to be children "born in wedlock." The challenged statutes are set forth below.

But under Indiana law, parental rights flow from only two sources: a biological parental relationship or a legal adoption proceeding. Plaintiffs here seek to create a new third source of parental rights—a marriage relationship with a biological parent—solely for same-sex married couples. But the Constitution does not require Indiana to confer parental rights through a marriage relationship; thus, Plaintiffs' public policy arguments are better addressed to the General Assembly.

Indiana Code Section 31-14-7-1(1) (the "Paternity Presumption Statute") provides:

> A man is presumed to be a child's biological father if: (1) the: (A) man and the child's biological mother are or have been married to each other; and (B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution.

Indiana Code Section 31-9-2-15 (the "Child Born in Wedlock Statute") states:

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

Indiana Code Section 31-9-2-16 (the "Child Born Out of Wedlock Statute") states:

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

I. Introduction

Indiana 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 ("'[p]arent' means the biological or adoptive mother or father of the individual."). "Adoptive parent" is "an adult who has become a parent of a child through adoption." Ind. Code § 31-9-2-6.

Indiana courts have rejected attempts to broaden this statutory definition. Indeed, when the Indiana Court of Appeals held "that when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child," *In re A.B.*, 818 N.E.2d 126, 131–32 (Ind. Ct. App. 2004), the Indiana Supreme Court vacated the opinion in full and issued a much narrower decision. *King v. S.B.*, 837 N.E.2d 965, 967 (Ind. 2005) (concluding that Indiana trial courts have authority to grant visitation to "persons other than natural parents" under certain circumstances). The Court of Appeals has since said of that vacatur: "Although the

Court did not expressly disapprove of this court's holding in *In re A.B.*, we believe its decision to vacate our opinion and decide the case on a much narrower procedural basis amounts to the same thing; the Court's discomfort with the breadth of our holding bespeaks its disapproval." *A.C. v. N.J.*, 1 N.E.3d 685, 692 (Ind. Ct. App. 2013).

Thus, when a child is born in Indiana, that child has two legal parents: a biological mother and a biological father. Identifying those persons has been made more difficult by the decline of marriage among biological parents, whether owing to artificial reproductive technologies or other causes. Indiana's parentage laws have evolved incrementally to accommodate those developments.

A. The Development of Indiana's Parentage Laws

1. The establishment of biological parenthood

a. By presumption

In the early years of statehood, parental rights in Indiana were governed by the common law; there were no statutes codifying them. The woman who gave birth to a child was—and still is—presumed to be the child's biological mother. *In re Paternity of Infant T.*, 991 N.E.2d 596, 601 (Ind. Ct. App. 2013) *trans. denied* (citing *In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 61 (Ind. Ct. App. 2010)); *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 Ann. § 31-9-2-10 (defining "birth parent" in relevant part as "the woman who is legally presumed under Indiana law to be the mother of biological origin"). And the man married to that woman was—and still is—presumed to be the child's biological father. *See, e.g.*, *Tarver v. Dix*, 421 N.E.2d 693, 698 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 (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)).

Both presumptions were—and still are—rebuttable by clear and convincing evidence. *Infant T*, 991 N.E.2d at 601 (finding affidavits and stipulations insufficient to rebut the presumption of maternity); *Fairrow v. Fairrow*, 559 N.E.2d 597, 600 (Ind. 1990) (finding absence of sickle-cell trait sufficient to rebut presumption of paternity). 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 (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.

The common-law presumption of maternity has never been codified, but the common-law presumption of paternity was enacted in 1979:

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

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

Pub. L. No. 1979-277, 101st Gen. Assemb., 1st Reg. Sess., 1979 Ind. Acts 1448 (April 10, 1979), § 1 (codified at Ind. Code § 31-6-6.1-9 (1980)) (emphases added). Like the common-law presumption, the statute was intended to confer legal parental rights only where a biological parental relationship already existed.

As evidence in paternity cases became more scientific, parties rebutted the presumption through 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, 600 (Ind. 1990). The legislature recognized this development by amending the statute in 1994 to create a presumption of paternity 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." Pub. L. No. 101-1994, 108th Gen. Assemb., 2d Reg. Sess., 1994 Ind. Acts 1238 (Mar. 11, 1994), § 17 (emphasis added). In 2001, the legislature amended the statute to require a "genetic" test rather than a "blood" test. Pub. L. No. 138-2001, 112th Gen. Assemb., 1st Reg. Sess., 2001 Ind. Acts 873 (May 2, 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.

b. By affidavit

Because not all biological parents are married to each other, the General Assembly has provided for the establishment of paternal rights through affidavit. *See generally* Ind. Code § 16-37-2-2.1. When a child "is born out of wedlock, 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. Ind. Code § 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," Ind. Code § 16-37-2-2.1(g)(1) (emphasis added), and "[a] woman who knowingly or intentionally falsely names a man as the child's biological father under this section commits a Class A misdemeanor." Ind. Code § 16-37-2-2.1(i). The affidavit must also include a statement from the purported father "attesting to abelief that he is the child's *biological* father." Ind. Code § 16-37-2-2.1(g)(2) (emphasis added). The parties must review the agreement outside each other's presence. Ind. Code § 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 purported father "is the child's *biological* father" to the local health officer within sixty days of the child's birth. Ind. Code § 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 biological father. Ind. Code §§ 16-37-2-2.1(j)(2); 31-14-7-3; 16-37-2-2.1(k), (l), (n).

2. The establishment of adoptive parenthood

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

The statutory requirements for an adoption petition evince a concern for the preservation of biological, genealogical, and medical history information about the child. A petition must state the child's birthplace, sex, race, and age. Ind. Code § 31-19-2-6(a)(1). It must be accompanied by a medical report that includes "neonatal, psychological, physiological, and medical care history" on a form "prescribed by the state registrar." Ind. Code § 31-19-2-7. The report must be sent to the registrar and the "prospective adoptive parents." *Id.* If the court finds that "the adoption requested is in the best interest of the child" and that other statutory requirements are met, the court shall grant the petition. Ind. Code § 31-19-11-1(a). Ordinarily, adoption extinguishes biological parents' rights and obligations respecting the child. Ind. Code § 31-19-15-1. But where "the adoptive parent of a child is married to a biological parent of the child, the parent-child relationship of the biological parent is not affected by the adoption." Ind. Code § 31-19-15-2.

B. The "Wedlock" Statutes and Indiana legitimacy law

For the narrow purpose of obtaining parental consent to adoption, Indiana law recognizes a distinction between children whose biological parents are married to each other and children whose biological parents are not married to each other. A "child born out of wedlock," "for purposes of IC 31-19-3, IC 31-19-4-4, and IC 31-19-9," is a child born to a woman and a "man who is not presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2)." Ind. Code § 31-9-2-16. And a "child born in wedlock," "for purposes of IC 31-19-9," is a child born to a woman and a "man who is presumed to be the child's father under IC 31-14-7-1(1) or IC 31-14-7-1(2) *unless the presumption is rebutted*." Ind. Code § 31-9-2-15 (emphasis added). These statutory definitions are expressly and exclusively intended for use in the context of consent to adoption. Ind. Code ch. 31-19-3 (governing pre-birth notice of adoption); § 31-19-4-4 (specifying the format for giving notice of an adoption proceeding to an unknown putative father); ch. 31-19-9 (governing consent to adoption). Specifically, when a child is born out of wedlock, the biological father's consent is sometimes not required for an adoption. Ind. Code § 31-19-9-8(a)(3)-(6).

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

couple—whether opposite-sex or same-sex—but conceived using sperm from an anonymous donor is plainly a "child born out of wedlock."

These statutes do not disfavor anyone based on illegitimacy.[1] Indiana did once disfavor children born out of wedlock, such as by disinheritance. *Townsend v. Meneley*, 74 N.E. 274, 275 (Ind. Ct. App. 1905). But that ended decades ago. *See* Ind. Probate Code Study Comm'n, Comments, § 207 (1953) ("We have erased the Scarlet Letter."). Indiana now grants inheritance rights to children born out of wedlock the same as children born in wedlock. Ind. Code § 29-1-2-7. The only scenario where it is legally relevant whether a child was born in wedlock is when determining whether the father's consent must be obtained prior to an adoption.

C. Indiana's vital records and their relationship to parentage laws

The Indiana General Assembly has charged the State Department of Health with maintaining a system of vital statistics, which is administered by the State Registrar. Ind. Code § 16-37-1-1, -2. The Registrar's duties include, among other things, "[k]eep[ing] files and records pertaining to vital statistics" such as births and deaths. Ind. Code § 16-37-1-2(1). When a child is born, a "person in attendance" (or if there is no such person, one of the child's parents) must file a "certificate of birth" with the local health officer using the electronic Indiana Birth Registration System. Ind. Code § 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. Ind. Code § 16-37-2-2(c). Regardless of who files the certificate of birth, the local health officer must report the birth to the State Department within five days. Ind. Code § 16-37-1-5(a). Indiana law requires

[1] The Supreme Court has held such discrimination unconstitutional. *Jimenez v. Weinberger*, 417 U.S. 628, 632 (1974) ("the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972))).

that a "child born out of wedlock" be given the mother's surname unless a paternity affidavit dictates to the contrary. Ind. Code § 16-37-2-13.

Once a birth certificate is created, it may not be changed unless (1) the State Department receives "adequate documentary evidence, including the results of a DNA test . . . or a paternity affidavit," Ind. Code § 16-37-2-10(b); or (2) the child is adopted. Following adoption, the State Department must issue a new birth certificate showing the child's actual place and date of birth—unless the court decreeing the adoption, the adoptive parents, or the adopted individual requests that the department not issue a new certificate. Ind. Code § 31-19-13-1. But the original certificate is not destroyed; rather, it is 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. Ind. Code § 31-19-13-2.

D. Plaintiffs in this matter

Plaintiffs Crystal and Noell Allen are married. (Deposition of Crystal Allen, 5:4-5; Deposition of Noell Allen, 5:18-21[2].) The Allens had two children who passed away on November 21, 2015. (Depo. of Noell Allen, 6:16-19.) Crystal Allen's name will appear on the birth certificates of the two children. (Depo. of Crystal Allen, 6:21-25.) Noell Allen would like her name on her children's birth certificates because she would like closure, she is tired of fighting, it is a connection to her children, and she does not want her children to be stigmatized. (Depo. of Noell Allen, 22:24-25-24:14.)

Plaintiffs Lisa Phillips-Stackman and Jacqueline Phillips-Stackman are married. (Deposition of Lisa Phillps-Stackman, 5:22-25; Deposition of Jacqueline Phillips-Stackman, 5:3-

[2] In support of Defendants' response in opposition, Defendants designate portions of the transcripts of the depositions of Plaintiffs, Crystal Allen, Noell Allen, Jacqueline Phillips-Stackman, and Lisa Phillips-Stackman. Defendants reserve the right to introduce additional testimony at the hearing currently scheduled for February 5, 2015, at 9:00 a.m.

6.) The Phillips-Stackman's have one child. (Depo. of Jacqueline Phillips-Stackman, 5:12-13.) Lisa Phillips-Stackman's name will appear on the birth certificate for the child. (Depo. of Lisa Phillips-Stackman, 7:5-7.) Jacqueline Phillips-Stackman is employed as a violent crimes detective for the Indianapolis Metropolitan Police Department. (Depo. of Jacqueline Phillips-Stackman, 5:18-20.) Jacqueline Phillips-Stackman would like her name on her child's birth certificate because she is concerned that her child will not receive benefits if she is killed in the line of duty, she is concerned that her child will not have health insurance if something happens to her wife, Lisa Phillips-Stackman, and she is concerned that she will not be recognized as a parent able to make medical decisions at doctor's appointments or in the event of a medical emergency. (Depo. of Jacqueline Phillips-Stackman, 8:22-25-11:15.)

II. Standard for Preliminary Injunctions

While a court may exercise the "very far-reaching power" of a preliminary injunction, such power should never "be indulged in except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (internal quotations and citation omitted).

A court should consider several factors when a party moves for a preliminary injunction: the moving party must show a likelihood of success on the merits, no adequate remedy at law, and irreparable harm if the court does not grant the preliminary injunction. *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1020–21 (7th Cir. 2002). After considering these factors, a court should balance any irreparable harm an injunction would cause an opposing party, adjusting the calculus depending on the party's likelihood of success. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). A party with little likelihood of success must show more harm than would a party with a strong likelihood of a

success. *Id.* This harm must be real and a court may only award relief "upon a clear showing that the plaintiff is entitled to such relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (*citing Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). The court should also consider the public interest, including that of any nonparties to the litigation. *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1100.

III. Plaintiffs do not have a likelihood of success on the merits.

Plaintiffs here challenge three Indiana statutes, arguing that each violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, pp. 5-6.[3] Plaintiffs' claims must fail, however, because these statutes impinge no fundamental rights, apply equally to all, reflect biological reality rather than legislative discrimination, and in any event are narrowly tailored to vindicate compelling state interests.

A. Plaintiffs do not have standing to challenge the "wedlock" statutes

Plaintiffs challenge Indiana's "wedlock" statutes, but it is not clear that they have standing to do so. Those statutes define when a child is born in wedlock or out of wedlock only for purposes of determining when a biological father's consent to adoption is required. Plaintiffs have not argued that they intend to adopt under circumstances where invalidation of the wedlock statutes would aid their cause. Indeed, to the extent Spouses would, absent this litigation, adopt the Children, the wedlock statutes would make that process easier, as they would likely excuse any need for consent from a biological father whose paternity has not been established. Ind. Code § 31-19-9-8(a)(3).

Standing requires federal courts to satisfy themselves that the plaintiff has made an allegation that he has a personal stake in the outcome of the controversy so as to warrant his

[3] Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction is cited hereinafter as Plaintiffs' Memo.

invocation of federal-court jurisdiction. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992); *Los Angeles v. Lyons*, 461 U.S. 95, 111-112 (1983)). Plaintiffs bear the burden of showing that they have standing for each type of relief sought. *Id*. To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized. *Id*. The threat must be actual and imminent, not conjectural or hypothetical. It must also be fairly appreciable to the challenged action of the defendant. *Id*. (citing *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)). This requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party[.]" *Id*. (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)). If that need does not exist, it would permit courts to oversee legislative or executive action and would significantly alter the allocation of power away from a democratic system of government. *Id*. As Judge Posner stated in *American Bottom Conservancy v. U.S. Army Corp of Engineers*, 650 F.3d, 652, 656 (7th Cir. 2011), "[t]he doctrine [of standing] is needed to limit premature judicial interference with legislation."

Plaintiffs generally lack standing because they present no actual or imminent threat of harm, only a hypothetical one. There is no particularized or concrete injury that the Plaintiffs point to in support of their claims. As such, each of them and the classes that they purport to represent do not have standing to raise their claims. *See Rock Energy Cooperative v. Village of Rockton*, 614 F.3d 745, 747 (7th Cir. 2010). Indeed, a ruling without standing is tantamount to an advisory opinion. *See Lyons*, 461 U.S. at 134.

Accordingly, as Plaintiffs cannot claim to suffer injury from application of the wedlock statutes, they lack Article III standing to challenge them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

B. The Fourteenth Amendment Does Not Protect a Right to "Intended Parenthood," Either as a Matter of Due Process or Equal Protection

Though Plaintiffs cite cases establishing that parents have certain fundamental rights with regard to their children, Plaintiffs' Memo., pp. 13-14, they cite no case establishing that a person has a fundamental right to *be* a parent in the absence of a biological or adoptive relationship. A fundamental right is one that is "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed[.]" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotations and citations omitted). There simply is no "history and tradition" of conferring parental rights upon persons who have no biological or adoptive relationship to the child. On the contrary, "[f]or most of its history, American law proceeded on the assumption that parents were persons who created a child through sexual reproduction or who assumed the legal obligations of parenthood through formal adoption." David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 Wm. & Mary Bill Rts. J. 857, 859 (2006).

Parents, of course, have fundamental rights to direct the upbringing and education of their children. *Meyer v. Nebraska*, 262 U.S. 390, 400, 403 (1923). But legal parental status is a necessary prerequisite to the exercise of those rights, and such status is unquestionably conferred by state law. *Michael H. v. Gerald D.*, 491 U.S. 110, 129–30 (1989) ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."); *see also* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or*

the Child?, 62 Rutgers L. Rev. 305, 313 (2010) ("Legal parentage is a status that is conferred by a state statute. Therefore, before a person can exercise the fundamental right to raise one's child, the State must deem that person to be a legal parent."). Indiana law confers parental rights exclusively through biological relationships and adoption.

To the extent the Constitution protects a fundamental right to *be* a parent, it protects only the rights of biological parents, not the rights of spouses of biological parents. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the "fundamental liberty interest of natural parents in the care, custody, and management of their child" engendered by "blood relationships"). Spouses in this case therefore do not have fundamental constitutional rights to be legal parents, and cannot assert any fundamental rights of legal parents.

C. The Challenged Statutes Apply Equally to All

Plaintiffs allege the challenged statutes impermissibly treat opposite-sex married couples differently from same-sex married couples or on the basis of gender, Plaintiffs' Memo., pp. 12-13, but that is not so. Any differential outcomes arise from biology, not discrimination, so no heightened scrutiny applies.

1. Application of the Paternity Presumption Statute to the Spouses would be inconsistent with biological reality

Plaintiffs contend that it is "discrimination" not to apply the Paternity Presumption Statute to confer legal parental rights upon the Spouses. Plaintiff's Memo., pp. 11-13. But the Paternity Presumption Statute is a substitute for a definitive fact-finding; it is intended to confer parental rights on the child's "biological father." Ind. Code § 31-14-7-1. In the context of a same-sex married couple in which both spouses are women, it defies reality to presume that when one of the female spouses gives birth to a child, the other female spouse is the biological

father of that child. In essence, plaintiffs are asking the State to presume something to be true which everyone knows not only to be untrue but also impossible.

What is more, application of the presumption under those circumstances would be inconsistent with the presumption's rebuttable nature. As described above, in the context of opposite-sex married couples, the presumption of biological fatherhood is rebuttable by clear and convincing evidence that the husband could not possibly be the child's biological father. *See, e.g.*, *Minton v. Weaver*, 697 N.E.2d 1259, 1260 (Ind. Ct. App. 1998), *trans. denied* (finding the presumption rebutted where husband presented a DNA test showing a 99.97% probability that another man was the child's father).

In the context of heterosexual married couples, that evidence generally comes in the form of a DNA test. But in the context of female same-sex married couples, no test is needed. The very fact that the mother's spouse is a woman rebuts the notion that she is the biological *father*.

2. Indiana's parentage laws apply the same way to same-sex married couples as they do to opposite-sex married couples

Plaintiffs allege that the State considers Plaintiff L.J.P-S a child born of out of wedlock "because she has two mothers." Plaintiffs' Memo., p. 16. That is untrue and as discussed in Part III.A, *supra*, Plaintiffs lack standing to challenge the "wedlock" statutes. The State considers the Children to be born out of wedlock because their biological mothers are not married to their biological fathers. This would be equally true if Plaintiffs were opposite-sex married couples in the same circumstances; Indiana law is clear that "a child born into an intact marriage but fathered by a man other than the husband is a child born out of wedlock." 5 Ind. Law Encyc. Children Born Out of Wedlock § 1 (citing *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996); *Cochran v. Cochran*, 717 N.E.2d 892 (Ind. Ct. App. 1999); *Johnson Controls, Inc. v. Forrester*, 704 N.E.2d 1082 (Ind. Ct. App. 1999); *C.J.C. v. C.B.J.*, 669 N.E.2d 197 (Ind. Ct. App. 1996)).

The Paternity Presumption Statute states that such a husband is "*presumed* to be [the] child's *biological* father[.]" Ind. Code § 31-14-7-1 (emphasis added). If such a husband is not *actually* the child's biological father, the mother would presumably disclose as much at the hospital, in which case her husband's name would not appear on the birth certificate. What is more, birth certificate aside, the husband's presumed parental rights could be extinguished at the mother's or biological father's insistence. And, if an action were brought to determine whether the child was born in wedlock and evidence showed the husband was not the child's biological father, the court would determine the child was not born in wedlock.

A hypothetical scenario demonstrates how this could occur. Consider a female same-sex married couple who conceived a child with the aid of a known sperm donor. If the birth mother spouse were married to a man instead of a woman, the law would presume that man to be the biological father of her child. But all it would take to defeat that presumption would be for the birth mother or the donor to file a paternity action. As part of that action, the court could order a DNA test, and when the results showed that the donor rather than the husband was the child's biological father, the court would issue an order establishing paternity in the donor, thereby necessarily disestablishing it in the birth mother's husband. *See, e.g.*, *K.S. v. R.S.*, 669 N.E.2d 399, 401 (Ind. 1996) (upholding a trial court order establishing paternity in a man over objections from the mother and her husband). (Or, if an action were brought to determine whether the child was born in wedlock, the court would determine the child was not born in wedlock because the birth mother was not married to the donor.)

A paternity action in that circumstance would cause pain and upheaval for the entire family. That is precisely why Indiana law vests parental rights through more permanent and substantial bonds: immutable biological relationships and court-ordered adoptions. If a

biological mother's spouse—whether man or woman—is not the biological father of her child but nonetheless wishes to be a legal parent to that child, the spouse should use the procedural mechanism the General Assembly has provided for that purpose: adoption. This is true even with respect to a husband presumed the father of his wife's child who knows he actually lacks a biological connection to the child. There, adoption would pretermit a successful paternity action.

3. Indiana's parentage laws do not discriminate based on sex or sexual orientation

Indiana parentage law, by vesting parental rights based upon biological relationships, does impact same-sex couples differently from opposite-sex couples, but that difference is an unavoidable result of biological reality. A man can be a child's biological father, but a woman cannot. That is not sex discrimination; it is a biological fact. Similarly, a man and a woman, whether married or unmarried, can both be a child's biological parents, but two women cannot. That is not sexual orientation discrimination; it is a biological fact.

Because Indiana's parentage statutes are facially neutral, Plaintiffs' challenge is properly evaluated under the rational basis standard. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose). Strict scrutiny is unwarranted unless plaintiffs demonstrate that "a state legislature[ ] selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects [on] an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation marks omitted). Plaintiffs have not even alleged, much less proven, any such discriminatory intent.

D. Indiana's Parentage Laws Satisfy Any Level of Constitutional Review

Under the rational basis standard, the State may justify limits on government benefits and burdens by reference to whether including additional groups would accomplish the government's

underlying objectives. *Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). This framework accords with the longstanding principle that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same[,]" *Tigner v. Texas*, 310 U.S. 141, 147 (1940), and, therefore, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67 (2001) (internal quotations and citation omitted).

Here, the State has not just a legitimate interest, but a compelling interest to ensure that biological parents are vested with legal parental rights (subject to any subsequent adoption). That interest is compelling because biological parents have a constitutionally protected liberty interest in their relationships with their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' . . ."); *In re Paternity of S.R.I.*, 602 N.E.2d 1014, 1016 (Ind. 1992) ("there is a substantial public policy in correctly identifying parents and their offspring. Proper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons."); *In re Paternity of Infant T.*, 991 N.E.2d 596, 600 (Ind. Ct. App. 2013) ("establishing the biological heritage of a child is the express public policy of this State." (quoting *In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 61-62 (Ind. Ct. App. 2010) (citing Ind. Code § 31–14–4–1))); *Infant R.*, 922 N.E.2d at 60 ("it is well-settled that it is in the best interests of a child to have his or her biological parentage established."). To that

end, the State seeks to ensure that a child's biological parents are correctly identified and recorded by requesting pertinent information to complete accurate birth certificates. *See* Plaintiffs' Exhibit C. Applying a paternity presumption statute to Spouses and listing them on Children's birth certificates—in effect, changing the question on the Worksheet (Plaintiffs' Exhibit C) to "what other person would you like to be listed on the birth certificate as the other parent of your child?"—would thwart rather than advance that interest.

1. The Constitution does not require states to confer parental rights via marriage or include non-parents on birth certificates, which would undermine the fundamental rights of biological parents in many cases

The United States Supreme Court has not recognized that same sex couples are entitled to be recognized on birth certificates. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), recognized that "the States are in general free to vary the benefits they confer on all married couples" and that those benefits have in some states historically included "birth and death certificates." *Obergefell*, 135 S. Ct. at 2601. At most, *Obergefell* stands for the proposition that any benefit of marriage must now be extended to same-sex married couples just as it would be to opposite-sex married couples; for instance, if a state has traditionally listed the spouse of a child's biological parent on the child's birth certificate, regardless of whether that spouse is the child's biological or adoptive parent, the state must continue to follow that practice with regard to same-sex married couples.

Indiana has no such practice; rather, when a birth mother married to a man answers "no" to the question "are you married to the father of your child?", her husband is not listed on the child's birth certificate. Thus, if the State were to list Spouses on Children's birth certificates in this case, it would actually be treating them differently from similarly situated opposite-sex married couples. Inclusion on a child's birth certificate, however, is not a right that

"accompan[ies] marriage." Rather, it is a right that accompanies a biological or adoptive relationship. A biological relationship may be presumed in the birth mother's husband, but that presumption is rebuttable, and what ultimately counts is the husband's actual biological connection to the child (or an adjudication vesting him with parental rights), not merely his marriage to the child's mother.

Next, Plaintiffs cite Indiana cases they believe support their argument that Spouses can establish parental rights to Children through their marriages to Birth Mothers without any biological or adoptive connection. Plaintiffs' Memo., pp. 10-12. But none does; at most, they uphold support orders and custody arrangements in the dissolution context. In *Levin v. Levin*, the Indiana Supreme Court held that a husband who knowingly and voluntarily consented to the artificial insemination of his wife with donor semen, and then held the child out as his own for fifteen years, is equitably estopped from later denying his obligation to support the child. 645 N.E.2d 601, 604–05 (Ind. 1994). The *Levin* Court also stated that "[a] child conceived through artificial insemination, with the consent of both parties, is correctly classified as a child of the marriage." *Id.* at 605; *see also Engelking v. Engelking*, 982 N.E.2d 326, 328–29 (Ind. Ct. App. 2013).

Plaintiffs read *Levin* and *Engelking* to mean that such children are "born in wedlock." Plaintiffs' Memo., p. 10. That is not so; "child of the marriage" is not the same as "child born in wedlock." The *Levin* Court recognized the difference, reading the statutory definition of "child born in wedlock" to "*include*[ ]children born out of wedlock to the parties" and "children born or adopted during the marriage of the parties." *Levin*, 645 N.E.2d at 605 (emphasis added). Thus, a child may be a "child of the marriage" for custody and support determinations regardless

whether the child is "born in wedlock" (*i.e.* the biological child of both spouses) or "born out of wedlock" (*i.e.* not the biological child of both spouses).

b. Plaintiffs' extra-jurisdictional authority is inapplicable

Plaintiffs also cite a case from Utah where it has taken a different approach to parental rights in the context of same-sex marriages. Plaintiffs' Memo., pp. 7-8. The case is inapposite, however, because the parentage laws are materially different.

In Utah, the State agreed to the entry of a permanent injunction requiring the State to treat spouses of women who conceive children using donor sperm the same way regardless of whether those spouses are men or women. *Roe v. Patton*, No. 2:15-cv-253 (D. Utah Oct. 20, 2015) (order granting permanent injunction). But the statutes at issue in that case conferred parentage based not on biological relationship but on marital relationship and consent to assisted reproduction. Utah Code Ann. §§ 78B-15-201(2) ("The father-child relationship is established between a man and a child by: . . . (e) the man having consented to assisted reproduction by a woman . . . which resulted in the birth of the child[.]"); 78B-15-703 ("If a husband provides sperm for, or consents to, assisted reproduction by his wife as provided in Section 78B-15-704, he is the father of a resulting child born to his wife."); 78B-15-704 (providing that a spouse's consent to assisted reproduction must be in a signed writing and that failure of such consent does not preclude a finding of parenthood if both spouses "openly treat the child as their own.").

Indiana has no such statutes and no clear authority whether sperm donors are legal parents under Indiana law. *See Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 598 (Ind. 1994) (finding sperm donation a contract "void and unenforceable" where no doctor involved and the contract was rudimentary); *but see In re Paternity of M.F.*, 938 N.E.2d 1256, 1260–61 (Ind. Ct.

App. 2010) (finding a contract for sperm donation enforceable where doctor involved and the writing was formal). Accordingly, the cases Plaintiffs cite from other states are inapposite here.

c. The challenged statutes serve a compelling public interest—identifying and recording a child's biological parents—and are neither over- nor underinclusive

Rational basis review does not require drafting with surgical precision. *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required") (internal citations and quotations omitted)).

Plaintiffs' proposed relief would transgress long-respected privacy interests that simply do not exist with same-sex couples. In the context of an opposite-sex marriage, a question regarding the paternity of the wife's child "would be destructive of family integrity and privacy." *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989). Indeed, one of the primary purposes of the common-law presumption was to protect the marital relationship, which could be irretrievably damaged by suspicions or discoveries of infidelity. *Id.* at 125. The presumption still serves that interest with respect to opposite-sex married couples, where in all cases, and without more, both spouses may plausibly be biologically related to children born to the marriage. It would *not* serve such an interest for same-sex couples, where questions of biological parentage must *always* arise for children born to the marriage. Accordingly, with opposite-sex couples, but not same-sex couples, the paternity presumption serves Indiana's compelling interest in identifying the two biological parents of each child with the greatest practicable accuracy, efficiency, cost-effectiveness, and privacy protection. There is no significant gap, therefore, between the State's means and its ends, and, if necessary, the statutes meet the narrow tailoring required by strict

scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Narrow tailoring does not require exhaustion of every conceivable [non-discriminatory] alternative."). Here, there is no alternative that would serve the State's interest "about as well." *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986)).

3. Conferring parental rights upon spouses through marital relationships to birth mothers does not respect the rights of biological fathers or children and even undermines the interests of other same-sex couples

Like every State—if not the entire world—Indiana holds that, in the main, it is best for children to be raised by their biological parents. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))); *In re Guardianship of L.L.*, 745 N.E.2d 222, 230 (Ind. Ct. App. 2001) ("there is a presumption in all cases that the natural parent should have custody of his or her child."). To protect biological parents' rights and the best interests of children, Indiana requires adjudication of any knowing departure from the biological-parent standard. *See generally* Ind. Code art. 31-19 (governing adoption). Often, the best interests of the child will be clear, and the adoption may even be uncontested. But in contested or other difficult cases, the adoption process ensures protection of everyone's fundamental constitutional rights and provides certainty as to the identity of the legal parents. Plaintiffs' desire for Spouses to be "presumed parents" ignores two important fundamental constitutional rights: Biological fathers' rights to their Children, and Children's rights to their biological fathers. *In re B.W.*, 908 N.E.2d 586, 593 (Ind. 2009) (noting that a biological father's parental rights are "constitutionally protected"); *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("While this Court has not yet had occasion to elucidate the nature of a

child's liberty interests in preserving established familial or family-like bonds, . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.").

It is unclear, in any event, what effect under Indiana law, any purported waiver would have on a biological father's parental rights and obligations. A biological parent's rights can be terminated only through adoption by another person, Ind. Code § 31-19-15-1, or when a court determines that the child's parents have failed to meet their parental obligations, Ind. Code § 31–35–2–4; *C.A. v. Ind. Dep't of Child Services*, 15 N.E.3d 85, 92 (Ind. Ct. App. 2014) ("although parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities."). Further, children have a non-waivable right to support from their parents, which includes biological parents at birth. Ind. Code § 31-16-6-6. On top of that, while one Indiana intermediate appellate case has enforced a donor's waiver where a doctor was involved and the writing was formal, *In re Paternity of M.F.*, 938 N.E.2d 1256, 1260–61 (Ind. Ct. App. 2010), the Indiana Supreme Court has invalidated a waiver where no doctor was involved and the contract was rudimentary. *Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 598 (Ind. 1994).

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

Another critical problem for Plaintiffs is that a presumption of parentage disconnected from biological relationships would implicitly be *irrebuttable*. Again, the Paternity Presumption Statute creates a presumption of *biological fatherhood* rebuttable by biological evidence. That is, under current law as applied to an opposite-sex married couple, a child born to the marriage and the child's mother and biological father all may challenge husband's presumed biological paternity. Ind. Code § 31-14-4-1. In contrast, Plaintiffs wish to presume *legal parenthood*, which could apparently not be rebutted, even where the biological father has not released his rights. So for example, if a woman were to conceive a child via secret extramarital affair, her female spouse would be presumed a parent of the child, with no apparent way to account for the rights of the biological father—precisely because a biological connection would not be relevant to parental rights. Surely that would transgress the father's fundamental constitutional rights, to say nothing of the child's rights.

An irrebuttable presumption could also create problems for well-intentioned parties. Situations may plausibly arise where a child's biological mother is married to a person other than the biological father, yet desires that the biological father be the child's legal parent, perhaps to confer financial or social advantages upon the child. As the law now stands, the child's two biological parents could file a paternity action and obtain a court order stating they are the child's legal parents. Ind. Code § 31-14-4-1. Plaintiffs' desired irrebuttable presumption of parenthood would foreclose that option, regardless whether all concerned wanted the spouse, who has no biological connection to the child, to become a legal parent.

Rewriting the Paternity Presumption Statute to create automatic legal parenthood for a biological parent's spouse carries still *other* shortcomings for other contexts. Were a male same-sex married couple to conceive a child using one spouse's sperm and a surrogate's egg, the

resulting child would seemingly have *three* legal parents: (1) the birth mother, who cannot disestablish her own presumed maternity without establishing it in another woman, (2) the biological father, who could assert rights through paternity affidavit or paternity action, and (3) the biological father's spouse, who under Plaintiffs' logic would be the "presumed second father." Similarly confusing scenarios would arise in the cases of female same-sex spouses who become pregnant using donor eggs or have a surrogate carry a child for them (or both). In these cases, the married couple would surely need to seek judicial relief to clarify parental rights.

In other words, Plaintiffs' alternative parental rights presumption would apparently account for their own circumstances, but not many other plausible family configurations and preferences. And again, notwithstanding Plaintiffs' own irrefutable presumption of parenthood, opposite-sex married couples would presumably still need to contend with biological refutability, though same-sex married couples would not. Plaintiffs' plan accordingly would not only erase the connection between biology and presumed parentage for themselves, but it would also introduce inequality in the bestowal of parental rights that does not currently exist. Thus would Plaintiffs' alternative method of determining parental rights detached from a biological or adoptive connection impose unpredictable and undesirable outcomes on untold family configurations.

4. Simply including Spouses on Children's birth certificates would not confer parental rights upon Spouses

Parental rights in Indiana have two sources: biology and adoption. Birth certificates are not a source of parental rights; rather, birth certificates are designed to be a reflection of those rights. "[T]he mere issuance of the birth certificate" is "[a]t best . . . a ministerial act by and on behalf of the State Board of Health" and "by no means constitutes a judicial proceeding[.]" *Burnett v. Camden*, 254 N.E.2d 199, 201 (Ind. 1970). Parental rights exist apart from, and

generally dictate, birth certificate data. *Johnson v. Ross*, 405 N.E.2d 569, 573 n.7 (Ind. Ct. App. 1980) ("the issue in this case is not whether a birth certificate was properly altered, but rather whether Johnson admitted his paternity of the child."); s*ee also Steele v. Campbell*, 82 N.E.2d 274, 275 (Ind. Ct. App. 1948) (finding birth certificate not admissible to prove paternity).

Therefore, merely listing Spouses on Children's birth certificates would not dictate Spouses' parental rights. Such spouses would still have to go through the adoption process—just as any non-biologically-related person who wanted parental rights would be required to do.

***

In sum, Indiana law recognizes biological and adoptive parental rights. The Spouses in this case currently have neither. This is not a function of their sex, for a man whose wife is artificially inseminated by a third-party donor has no definitive parental rights to the child produced thereby, only a presumption of paternity. Nor is it a function of their sexual orientation, for a heterosexual married woman has no parental rights to the biological child of her husband and another woman. Thus, there is no discrimination here, and in any event the parentage statutes as written advance the compelling state interest of identifying both biological parents through an efficient, accurate means that, to the extent reasonably possible, respects marital privacy interests unique to opposite-sex couples. Under Plaintiffs' constitutional theory, that objective would necessarily be cast aside. If Plaintiffs wish to create a third path to legal parenthood, whether through marriage or any other means, they should seek relief from the General Assembly—not this Court.

IV. The Plaintiffs are unable to show any irreparable harm.

"Irreparable harm is a type of injury that 'cannot be repaired, retrieved, put down again, atoned for. . .' and is not compensable in monetary terms." *River of Life Kingdom Ministries v.*

Village of Hazel Crest, 585 F.3d 364, 375 (7th Cir. 2009) (quoting *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997)). "An injury is irreparable for purposes of granting preliminary injunctive relief only if it cannot be remedied through a monetary award after trial." *East St. Louis Laborers Local 100 v. Bellon Wrecking & Salvage Company*, 414 F.3d 700, 703-704 (7th Cir. 2005). "The likelihood of injury must be real, not speculative." *Young v. Ballis*, 762 F.Supp. 823, 827 (S.D. Ind. 1990) (citing *Outboard Marine Corp. v. Liberty Mutual Insurance*, 536 F.2d 730 (7th Cir. 1976)). "Speculative injuries do not justify this extraordinary remedy [a preliminary injunction]." *White Eagle Co-op. Ass'n v. Johanns*, 396 F.Supp.2d 954, 961 (N.D. Ind. 2005) (quoting *East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage, Co.*, 414 F.3d 700, 704 (7th Cir. 2005)).

First, the names of Crystal Allen and Lisa Phillips-Stackman will appear on the birth certificates of their respective children. (Depo. of Crystal Allen, 6:21-25; Depo. of Lisa Phillips-Stackman, 7:5-7.) Thus, they do not have any actual injury and are not entitled to an injunction, preliminary or otherwise.

Second, Noell Allen testified that she would like her name on her children's birth certificates because she would like closure, she is tired of fighting, it is a connection to her children, and she does not want her children to be stigmatized. (Depo. of Noell Allen, 22:24-25-24:14.) Defendant does not contend these are invalid reasons; however, there is nothing irreparable in the delay in determining the merits of this case and before potentially providing Plaintiff Noell Allen with birth certificates with her name on them. Any delay in receiving birth certificates, assuming the Plaintiffs prevail, could potentially be compensated by monetary relief

for any additional emotional injury suffered by the Plaintiff.[4] Thus, a preliminary injunction should not be issued for Plaintiff Noell Allen.

Third, Jacqueline Phillips-Stackman testified that she would like her name on her child's birth certificate because she is concerned that her child will not receive benefits if she is killed in the line of duty, she is concerned that her child will not have health insurance if something happens to her wife, Lisa Phillips-Stackman, and she is concerned that she will not be recognized as a parent able to make medical decisions at doctor's appointments or in the event of a medical emergency. (Depo. of Jacqueline Phillips-Stackman, 8:22-25-11:15.) Taking each of these reasons in order, in the event of Jacqueline Phillips-Stackman's death in the line of duty, her spouse and children may be eligible for survivor benefits. Ind. Code § 36-8-6-10.1 Any decisions regarding benefits would be subjected to review under the Administrative Orders and Procedures Act, Indiana Code 4-21.5 *et seq.* *See Linthecome v. Board of Trustees of the Public Employees' Retirement Fund*, 585 N.E.2d 651 (Ind. Ct. App. 1991) (court lacked jurisdiction over declaratory action seeking declaration that proper recipient of pension fund because cannot circumvent administrative process). Thus, there is a remedy available to the Plaintiffs in the event that Jacqueline Phillips-Stackman is killed in the line of duty. There is no evidence that Lisa Phillips-Stackman is ill or suffering from any chronic condition. (Depo. of Lisa Phillips-Stackman, 8:4-7.) Therefore, it is pure speculation at this point that something could possibly happen to Lisa Phillips-Stackman that would cause the child to lose health insurance benefits carried by Jacqueline Phillips-Stackman. This speculation is insufficient to meet the Plaintiffs' burden of showing irreparable harm. It is also speculation that Jacqueline Phillips-Stackman will be unable to make medical decisions for the child. She has attended all medical appointments

[4] Defendants do not concede Plaintiff Noell Allen is entitled to any monetary relief.

for the child. (Depo. of Jacqueline Phillips-Stackman, 17:12-22.) As of now, the child is doing well. (Depo. of Jacqueline Phillips-Stackman, 12:19-22.)

Because the Plaintiffs have only alleged speculative injuries – or no injury at all – they are not entitled to a preliminary injunction.

V. The Plaintiffs have an adequate remedy at law.

Injunctive relief is not appropriate here because there are adequate remedies at law. The Plaintiffs cannot show that they will suffer immediate harm. As set forth above, Plaintiffs have an adequate remedy at law. Crystal Allen and Lisa Phillips-Stackman have not suffered any injury because their names will be placed on the birth certificates of their respective children. Any injury for Noell Allen can be remedy by the payment of monetary damages for pain and suffering in the event Plaintiffs prevail. Finally, there is an administrative procedure for challenging the denial of any survivor benefits in the event of Jacqueline Phillips-Stackman's death in the line of duty.

Thus, the extreme remedy of a preliminary injunction is not appropriate or necessary based on the safeguards they would be afforded if their allegations came to fruition.

VI. The public interest will not be served by the entry of an injunction.

The public interest would be disserved by a preliminary injunction. As explained above, the rebuttable presumption regarding paternity is an important public policy. *See* Part III.D., *supra.*

VII. Conclusion

Fore the foregoing reasons, the Plaintiffs' motion for preliminary injunction should be denied. Plaintiffs do not have a likelihood of succeeding on the merits, are unable to show any

irreparable harm, have an adequate remedy at law, and the public interest will not be served by the entry of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

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