

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ASHLEE and RUBY HENDERSON, a married couple, *et al.*,

Plaintiffs-Appellees,

v.

DR. JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:15-cv-220-TWP-MJD
The Honorable Tanya Walton Pratt, District Court Judge, Presiding

***AMICI CURIAE BRIEF OF FAMILY EQUALITY
COUNCIL AND COLAGE in Support of Plaintiffs-
Appellees and to Affirm the District Court Orders***

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FED. R. APP. P. 26.1 AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

None of the *Amici* is a corporation that issues stock or has a parent corporation that issues stock.

The names of all law firms whose partners or associates have appeared for *Amici* in the case or are expected to appear in this Court are: Bryan Cave LLP.

Dated: April 3, 2017

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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

No Counsel for a party authored this brief, in whole or in part, and no party, party's counsel, or person other than amici curiae, their members, and their counsel made any monetary contribution to fund the preparation or submission of this brief.

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STATEMENT OF IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae are organizations dedicated to promoting equality among our country's diverse families, in particular those comprised of lesbian, gay, bisexual, or transgender parents, same-sex couples, and their children. In this brief, Amici offer the stories of children of same-sex couples to convey the significance for them of having both of their parents named on their birth certificates and to underscore the importance of affirming the District Court decision, thereby protecting children born to same-sex parents.

Family Equality Council is a community of parents and children, grandparents and grandchildren that reaches across the country, connecting, supporting, and representing LGBT parents, same-sex couples and their children. Family Equality Council works extensively with the children of same-sex couples and LGBT parents, including through its Outspoken Generation program, which empowers these children to speak out about their families, share their own stories and become advocates for family equality. Family Equality Council submits this brief on behalf of all of the young people with whom it has worked.

COLAGE is the only national organization for and led by people with a lesbian, gay, bisexual, transgender, or queer parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. Based on its direct experience in working with thousands of youth over the past 26 years, COLAGE can attest to the critical importance of recognizing and respecting these families on every level – socially, institutionally, politically and legally.

SUMMARY OF ARGUMENT

This case is about Indiana’s recognition of children and their parents, especially as manifested through the issuance of birth certificates. Though children are at the heart of this case, they are notably absent from the Indiana State Health Commissioner’s brief, in which he asks this Court to reinstate the unequal treatment of families depending on whether married parents are of the same or different sexes. Amici offer this brief so that children raised by same-sex couples can help explain why these issues matter and “what the point of the presumption” of parenthood for children’s non-birth mothers is.¹

Plaintiffs-Appellees are married, same-sex couples and their children (the “Plaintiff Families”) who were denied birth certificates listing both parents’ names.² When a married woman gives birth in Indiana, she fills out a state-created form that asks whether she is “married to the father of [her] child.” If she answers “yes,” her husband is listed on the birth certificate, regardless of whether he is genetically related to the child.³ Indiana children born to different-sex married couples who conceived via donor insemination thus have both of their parents listed on their birth certificates. But until the District Court’s decision in this case, children born to same-sex married couples who conceived via donor insemination did not.

Underlying this birth certificate policy are a trio of “Parenthood Statutes,” which create a presumption of parenthood for men married to birth mothers but not for women married to birth mothers, Ind. Code § 31-14-7-1, and which provide that children born to married same-sex couples are nevertheless “born out of wedlock” under Indiana law. Ind. Code §§ 31-9-2-15, 31-

¹ Appellant’s Brief (“App. Br.”) at 36 (“it is not clear what the point of the presumption [of parenthood] would be” for the wife of a child’s birth mother).

² See Appellant’s Short Appendix (“Short App.”) at 20-24 (Entry on Cross-Motions for Summary Judgment).

³ See *id.* at 24-26.

9-2-16, and 31-14-7-1. As the District Court observed, the Parenthood Statutes are part of a body of law whose explicit “purpose” includes “recogniz[ing] the importance of family and children in our society” and “the responsibility of the state to enhance the viability of children and family,” as well as “strengthen[ing] family life by assisting parents to fulfill their parental obligations.” Ind. Code § 31-10-2-1.

Especially in light of this statutory purpose, and “[g]iven Indiana’s long-articulated interest in doing what is in the best interest of the child,” the District Court concluded that “there is no conceivable important governmental interest that would justify the different treatment of female spouses of artificially-inseminated birth mothers from the male spouses of artificially-inseminated birth mothers.”⁴ Indiana “created a benefit for married women ... which allows them to name their husband on their child’s birth certificate even when the husband is not the biological father,” and “this benefit – which is directly tied to marriage – must now be afforded to women married to women” under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).⁵ Accordingly, the District Court declared the Parenthood Statutes unconstitutional as applied to female, same-sex married couples who have children during their marriage and required the State to identify both mothers as parents on their children’s birth certificates.⁶

The Indiana State Health Commissioner now urges this Court to reverse so that the State can deny birth certificates that list both parents’ names to the children of married, same-sex couples, despite the mandates of *Obergefell* and *Baskin* and the resulting harm to families. This Court should reject the invitation to undermine marriage equality and its attendant benefits. In

⁴ Short App. at 46.

⁵ Short App. at 41-42.

⁶ *Id.* at 7, 47-48.

support of the Plaintiff Families, Amici offer the perspectives of children raised by same-sex couples, individuals uniquely positioned to explain how children are harmed when their families are treated as different and inferior. Their experiences will help the Court understand what the District Court decision means and why this Court should affirm it.

ARGUMENT

I. Children of Same-Sex Parents Need Birth Certificates that List Both Parents for the Same Reasons Children of Different-Sex Parents Do.

[In Wisconsin] there is a determination for next of kin, and you go down the line of choices and for our family, we don't fit in that list. We do not have a document that includes all of our names, that identifies us as a family.

Anna Frackman, raised by two mothers in Wisconsin⁷

She brought me to the hospital, and the doctors wouldn't treat me because they couldn't prove she was my "real" mom because she wasn't on my birth certificate.

Kinsey Morrison, raised by two mothers in Kentucky⁸

Birth certificates serve important legal and practical functions. A birth certificate is “the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts.”

Henry v. Himes, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), *rev'd sub nom.*, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

According to the Indiana State Department of Health, a birth certificate is “used by [a] child throughout his/her life for legal purposes to prove age, citizenship, and parentage.”⁹ As such, it is a critical document affecting the child’s legal rights and benefits from early childhood on, including the child’s schooling, medical care, right to state and federal benefits, right to care for his or her parent, inheritance rights, and death benefits.

A birth certificate can affect who may enroll a child in school, who may pick the child up from school, who may be listed as an emergency contact, and who, in general, may make educational decisions. As Elliott Emfinger, a young woman raised by two mothers in

⁷ Statement from Anna Frackman to Family Equality Council (Feb. 24, 2017). All statements cited in this brief are on file with amicus Family Equality Council.

⁸ Statement from Kinsey Morrison to Family Equality Council (Feb. 23, 2017).

⁹ See Appellant’s Appendix (“App.”) at 22-33 (Certificate of Live Birth Worksheet).

Birmingham, Alabama, remembers: “[W]hen I first started kindergarten, Sibbie wasn’t allowed to sign me out of school. It was ridiculous – she’s my *mom*.”¹⁰ Many Indiana children are in the same position Elliot was. In addition, like many other states, Indiana requires a birth certificate to enroll children in daycare or school.¹¹

Even more critically, a child whose parent is not listed on a birth certificate may face delay in emergency medical care as doctors determine whether a parent has authority to consent to the child’s treatment. Unfortunately, this risk is not hypothetical. Kinsey Morrison, a young woman raised in Kentucky by her two mothers, had a life-threatening reaction to a vaccine when she was just a week old. But the mother who brought Kinsey to the hospital was not listed on Kinsey’s birth certificate. Because hospital staff “couldn’t prove she was [Kinsey’s] ‘real’ mom,” they would not begin medical care:

My [birth] mom Karen had to get to the hospital before they would treat me, and she had to check me in and sign the insurance paperwork.¹²

To add insult to injury, Kinsey’s other mother, Audrey, had to wait in the hall, as doctors worked on her infant daughter.¹³

¹⁰ Elliott Emfinger, “I Helped My Moms (Finally) Get Married!” SEVENTEEN (June/July 2015), *available at* <http://www.seventeen.com/life/real-girl-stories/a31943/i-helped-my-moms-finally-get-married/>; Statement from Elliott Emfinger to Family Equality Council (Nov. 3, 2015).

¹¹ See 470 Ind. Admin. Code 3-4.7-36 (“a written application for admission of each child [to a child care center] shall include...a copy of the child’s birth certificate or other legal proof of age”); Ind. Code § 20-33-2-10(a) (“Each public school shall...require a student who initially enrolls in the school to provide...a certified copy of the student’s birth certificate or other reliable proof of the student’s date of birth”); Ohio Rev. Code Ann. § 3313.672(A)(1) (birth certificate among documents to be presented upon entry to school); La. Rev. Stat. § 17:167 (“All children upon entering a parish or city school system or private school in the state of Louisiana for the first time shall be required to present a copy of their official birth record to the school principal”).

¹² Kinsey Morrison, *supra* n. 8.

Kinsey's mothers have since married, and both of their names now appear on the birth certificates of their three children. Kinsey, now a college student, recounts that just a few weeks ago, Audrey was required to "show 'proof of parenthood'" to take Kinsey's younger sister to the doctor. "[I]f she hadn't had [my sister's] birth certificate, they would have been turned away."¹⁴

Unfortunately, what happened when Kinsey was a baby is not unusual. Eleven-year-old K.S. has been raised by two mothers in Mobile, Alabama. He knows them as equal parents: "We play games, watch movies, go to the beach and have fun. My Mommo picks me up from school every day, and my Mommy makes the best fried chicken."¹⁵ But when K.S. was just three months old, a heart condition required open-heart surgery, and his non-birth mother was not permitted to assist in his hospital care because she did not have paperwork proving she was his parent.¹⁶

Birth certificates also impact other important areas of children's lives. These include obtaining survivor benefits through social security,¹⁷ enrolling a new child in a parent's health insurance plan, verifying parental relationship under various federal statutes,¹⁸ and establishing

¹³ Statement from Kinsey Morrison to Family Equality Council (Feb. 27, 2015).

¹⁴ Kinsey Morrison, *supra* n. 8.

¹⁵ Statement from K.S. to Family Equality Council (Nov. 2, 2015). Minor children quoted in this brief do not seek anonymity. However, initials are used for minors pursuant to Fed. R. App. P. 25(a)(5) (noting that Fed. R. Civ. P. 5.2 applies in appeals, pursuant to which names of minor children may include only the minor's initials).

¹⁶ Statement from Cari S. to Family Equality Council (Nov. 3, 2015).

¹⁷ See *Survivors Benefits*, Social Security Administration, available at <https://www.ssa.gov/pubs/EN-05-10084.pdf> at 5; see also *Information You Need To Apply for Child's Benefits – Form SSA-4*, Social Security Administration, available at <https://www.ssa.gov/forms/ssa-4.html>.

¹⁸ See, e.g., 20 C.F.R. § 401.45(b)(6) (allowing birth certificate to verify relationship in connection with a request to the Social Security Administration on behalf of a minor); 31 C.F.R. § 1.34 (birth certificate can establish parentage for a minor declared incompetent under Treasury Department regulations); 45 C.F.R. § 5b.5(b)(2)(iii) (birth certificate can establish relationship to

entitlement to other state benefits.¹⁹

A birth certificate is generally required to obtain a passport for a minor child,²⁰ which can present particular challenges if the non-birth parent who is not on the birth certificate is the only U.S. citizen parent. A child's ability to travel alone with the parent not listed on the birth certificate can also be impeded, as some countries require a birth certificate when one parent travels alone with a child.²¹ The U.S. Department of State recommends that LGBT parents traveling outside the country "consider carrying documents regarding parentage and/or custody for accompanying minor children."²²

In *Obergefell*, this Court recognized that "birth and death certificates" are among the "aspects of marital status" that were denied to same-sex couples who were barred from marrying. 135 S. Ct. at 2601. Affirming the District Court's decision will preclude the State from denying this critical benefit to the families of same-sex married couples, "saddl[ing]" their children "with the life-long disability of a government identity document that does not reflect the child[ren]'s parentage and burdens the ability of the child[ren]'s parents to exercise their parental rights and responsibilities." *Henry*, 14 F. Supp. 3d at 1050 (emphasis omitted).

minor for in connection with public welfare records); 29 C.F.R. § 825.122 (birth certificate as evidence of relationship to care for parent or child under Family and Medical Leave Act).

¹⁹ See, e.g., 35 Ind. Admin. Code 14-6-9(b) (requiring birth certificate to apply for survivor benefits for dependents of certain public officers and employees).

²⁰ See 22 C.F.R. §§ 51.28(a)(2), (3)(ii)(A); *Passports & International Travel*, U.S. Department of State, Bureau of Consular Affairs, available at <https://travel.state.gov/content/passports/en/passports/under-16.html>.

²¹ See, e.g., *Minor Children Travelling to Canada*, Government of Canada, available at <http://www.cic.gc.ca/english/visit/minors.asp> (minors travelling to Canada with only one parent should present, *inter alia*, the child's birth certificate as well as a letter of authorization from the non-travelling parent).

²² See *LGBT Travel Information*, U.S. Department of State, Bureau of Consular Affairs, available at <https://travel.state.gov/content/dam/students-abroad/pdfs/LGBTIflyer.pdf>.

II. As Recognized in *Baskin*, *Windsor*, and *Obergefell*, Treating Families Differently Because They Are Headed by Same-Sex Parents Harms Children.

When we hear the term “paperwork” our minds jump to boring things. But ... a lot of the issues we are discussing revolve around paperwork and the power that it gives you. As an adopted child, and as a foster child, that paperwork means more to me than you will ever know.

Anthony Hynes, raised by two mothers in Washington, D.C.²³

For me it’s more an issue of respect and legitimacy. These are my parents who raised me. They got up at four in the morning to drive me to volleyball tournaments. I can’t believe what they did for me.

Anna Frackman, raised by two mothers in Wisconsin²⁴

In *Obergefell*, the Supreme Court rejected marriage laws that “harm[ed] and humiliate[d] the children of same-sex couples.” 135 S. Ct. at 2590. Before that, the Court rejected the Defense of Marriage Act, which had made it more difficult for “tens of thousands of children ... being raised by same-sex couples ... to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives.” *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013); *see also Baskin*, 766 F.3d at 553-64 (“Children, being natural conformists, tend to be upset upon discovering that they’re not in step with their peers.”).

“In Indiana, spouses who knowingly and voluntarily consent to artificial insemination are the legal parents of the resulting child.” *Gardenour v. Bondelie*, 60 N.E.3d 1109, 1120-21 (Ind. Ct. App. 2016); *accord Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994). Inexplicably, the State insists that it should nevertheless refuse to name both parents on the birth certificate. Doing so serves no valid purpose while causing children to “suffer the stigma of knowing their families are somehow lesser.” *Obergefell*, 135 S. Ct. at 2600.

²³ Statement from Anthony Hynes to Family Equality Council (Feb. 24, 2017).

²⁴ Anna Frackman, *supra* n. 7.

Spencer Lucker, who grew up in Arkansas with his two mothers, knows exactly what this means for children born to same-sex parents:

Despite my parents having lived together and pursued thirteen artificial insemination procedures together as a couple (I was conceived on the thirteenth try), when I was born my [birth] mother was the only one allowed to be listed on my birth certificate.²⁵

According to Spencer, now 29, “the parent on the [birth certificate] was something that would always come up.” He explains that:

When you have to present your [birth certificate] it’s a strong reminder, when only one of your parents is on the document, your family is different than everyone else’s. Beyond the legal, it has an emotional and psychological element that is always underpinned for a kid growing up in the South.²⁶

Denying same-sex spouses the full benefits of marriage – including listing both parents’ names on their children’s birth certificates – is a stark message to children that the government does not consider their parents’ marriage to be the same as the marriages of different-sex couples. According to seventeen-year-old J.M from Kentucky: “Having both of my parents on my birth certificate validated the love my moms have for me. And without both parents being on there, that legitimacy would’ve been threatened daily.”²⁷

Anna Frackman, whose non-birth mother’s name is missing from Anna’s birth certificate, acknowledges that the incomplete document still creates complications from time to time. It came up, for example, when she was renewing her driver’s license recently. But for Anna, “it’s more an issue of respect and legitimacy.”²⁸ Anthony Hynes, 27, echoes this sentiment:

²⁵ Statement from Spencer Lucker to Family Equality Council (Feb. 24, 2017).

²⁶ *Id.*

²⁷ Statement from J.M. to Family Equality Council (Feb. 24, 2017).

²⁸ Anna Frackman, *supra* n. 7.

I did not have one mom growing up – I had two, both of whom deserved full recognition on my birth certificate.²⁹

Anthony stresses that although having both parents on a birth certificate makes life easier “for a host of reasons,” something also “needs to be said for the psychological impact having both parents on a birth certificate can have on a child.” According to Anthony:

From a psychological standpoint, the ability to have the same paperwork as other families is an affirmation of who – of what – we are: a family.

I wanted a birth certificate that had both of my moms’ names on it because I knew other kids had their parents’ names on their birth certificates. I wanted my moms’ names on my birth certificate so I could look back one day and show my own children a birth certificate representing an integral part of our family history.³⁰

Molly Goren-Watts was raised by two mothers, first in New York and then in Vermont, and shares a similar perspective. For the first twelve years of her life, only Molly’s birth mother was listed on her birth certificate. As Molly recalls: “My birth certificate was just one piece of the entire picture of not being recognized as a family by most of the world around us.”

When Molly’s non-birth mother adopted her, her parents were able to obtain a new birth certificate listing both names, but only after “a pretty arduous process” as New York officials struggled to figure out how to “change the form,” and with one of Molly’s mothers listed as her “father.” As Molly explains:

We were able to be validated and recognized in some way, but the experience also showed that they were trying to find a workaround to get our family to fit into their system – into their boxes.³¹

Now 37, Molly lives in Massachusetts with a wife and two children of her own. She is struck by the contrast between her childhood experience and that of her children:

²⁹ Anthony Hynes, *supra* n. 23.

³⁰ *Id.*

³¹ Statement from Molly Goren-Watts to Family Equality Council (Feb. 28, 2017).

I was automatically on my children's birth certificates. We were always recognized as a family by the hospital and town clerks. The fact that they knew how to treat me and us – we were immediately legitimized.

I think back on my experiences as a child of not fitting into the boxes or definitions that society had for us and my family not being validated – feeling like I had to always explain my family.... [Now] as the non-bio parent, I'm on the paperwork, on the birth certificate, there's never a question and either one of us can go into school and to the doctor and sign paperwork. To go into the clerk's office and ... [be] able to get copies of birth certificates when we need them – it blows my mind because of how easy it is. Being part of the system, being recognized, makes us feel like part of the community.³²

Spencer Lucker notes that when his mothers were finally able to marry, adding his non-birth mother to Spencer's birth certificate “was the first thought that we had as a family.” This, Spencer points out:

says a lot about what it means, and how important a birth certificate is, in the eyes of the law, what it means for one's self-identity. Changing my [birth certificate] is symbolic for us as a family but it legitimizes my family in the same way [my mothers'] marriage certificate legitimizes their relationship.³³

Spencer emphasizes that his non-birth mother, Mary, “spent 29 years raising [him] and investing in [him].” He explains:

She's just as much my parent. The significance of finally being able to confirm that all of the sacrifices she made, my parents made, and that I have made are worth it and are legitimate speaks to the psychological impacts of documentation that confirms your family structure, your history.³⁴

And now that Spencer is looking forward to having children of his own, he is struck by the importance of a birth certificate that “further confirms [his] children's lineage and will

³² *Id.*

³³ Spencer Lucker, *supra* n. 25.

³⁴ *Id.*

connect Mary to her grandkids.”³⁵

Anna Frackman will soon be adopted by her non-birth mother and may then finally obtain a birth certificate that identifies both her parents. But she admits to some ambivalence about destroying what she sees as evidence of a time she hopes has passed forever:

The whole progression of same-sex marriage rights is part of my story, and my birth certificate without my second mom’s name on it is part of my story. ... I lived through this time where my family didn’t have legal recognition, and I want that to remain part of my narrative – I wish it wasn’t, but it is.

But now we are in a different world – kids born now don’t need it to be part of their story. They don’t have to experience what I did. This was something I and my family fought for so that future generations could have it.³⁶

³⁵ *Id.*

³⁶ Anna Frackman, *supra* n. 7.

CONCLUSION

Recognizing that “[w]hat Plaintiffs seek is for their families to be respected in their dignity and treated with consideration,” the District Court properly determined that the best interests of children brought into the world through donor insemination are served by recognizing both their parents.³⁷ Amici urge this Court to affirm that decision, “providing stability for children and families,”³⁸ and fulfilling the promise of *Baskin* and *Obergefell*.

Dated: April 3, 2017

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³⁷ Short App. at 44, 46.

³⁸ *Id.* at 46.

**CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(g)(1) & CIRCUIT RULE 29**

The undersigned counsel of record hereby certifies that the foregoing brief was prepared using Microsoft Word 2010, in 12-point Times New Roman font and that it contains 3,865 words from the Statement of Identity and Interests of Amici Curiae through the Conclusion, as determined by the Microsoft Word word counting system. The undersigned further certifies that the electronic copies of the Brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

/s/ S. Patrick McKey

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Counsel of Record for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ S. Patrick McKey

S. Patrick McKey
Counsel of Record for Amici Curiae