United States Court of Appeals

for the

Seventh Circuit

Case No. 17-1141

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

Plaintiffs-Appellees,

– v. –

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 IN CASE NO. 1:15-CV-00220-TWP-MJD
HONORABLE TANYA WALTON PRATT, DISTRICT COURT JUDGE

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS, GLBTQ ADVOCATES & DEFENDERS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

WALTER DELLINGER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
SHANE A. HUNT
JOHN B. HILL
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000

Attorneys for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1141

Short Caption: Henderson v. Adams

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Center for Lesbian Rights; GLBTQ Legal Advocates & Defenders; Lambda Legal Defense and Education Fund, Inc.; and, American Civil Liberties Union Foundation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Walter Dellinger Date: 4/3/2017

Attorney's Printed Name: Walter Dellinger

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 1625 Eye Street, N.W.
Washington, D.C. 20006

Phone Number: 202-383-5300 Fax Number: 202-383-5414

E-Mail Address: wdellinger@omm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1141

Short Caption: Henderson v. Adams

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Center for Lesbian Rights; GLBTQ Legal Advocates & Defenders; Lambda Legal Defense and Education Fund, Inc.; and, American Civil Liberties Union Foundation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Anton Metlitsky Date: 4/3/2017

Attorney's Printed Name: Anton Metlitsky

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 7 Times Square
New York, NY 10036

Phone Number: 212-326-2000 Fax Number: 212-326-2061

E-Mail Address: ametlitsky@omm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1141

Short Caption: Henderson v. Adams

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Center for Lesbian Rights; GLBTQ Legal Advocates & Defenders; Lambda Legal Defense and Education Fund, Inc.; and, American Civil Liberties Union Foundation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Shane A. Hunt Date: 4/3/2017

Attorney's Printed Name: Shane A. Hunt

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 7 Times Square
New York, NY 10036

Phone Number: 212-326-2000 Fax Number: 212-326-2061

E-Mail Address: shunt@omm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1141

Short Caption: Henderson v. Adams

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Center for Lesbian Rights; GLBTQ Legal Advocates & Defenders; Lambda Legal Defense and Education Fund, Inc.; and, American Civil Liberties Union Foundation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ John B. Hill Date: 4/3/2017

Attorney's Printed Name: John B. Hill

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 7 Times Square
New York, NY 10036

Phone Number: 212-326-2000 Fax Number: 212-326-2061

E-Mail Address: jhill@omm.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

INTEREST OF AMICI

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in protecting the fundamental constitutional freedom to marry, and represented the plaintiffs in numerous challenges to state laws prohibiting marriage for same-sex couples, including representing the Tennessee petitioners in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Through litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated cases representing same-sex couples seeking the freedom to marry and respect for their marriages from states and the federal government, including on behalf of a Michigan couple in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). GLAD has also represented LGBT persons and families seeking equal treatment in all manner of cases in state and federal courts.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of LGBT people and people living with HIV through

impact litigation, education, and public policy work. Lambda Legal has served as co-counsel in some of the nation's most important cases regarding the rights of LGBT people, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal also was lead counsel in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), in which this Court struck down Indiana's ban on marriage for same-sex couples. Lambda Legal also was counsel in other cases that won marriage equality in Arizona, California, Illinois, Iowa, Nevada, New Jersey, Louisiana, North Dakota, Puerto Rico, Virginia, and West Virginia. Particularly pertinent to this matter, Lambda Legal successfully represented same-sex spouses seeking birth certificates listing both spouses as parents of their marital children in *Carson v. Heigel*, No. 3:16-0045-MGL, 2017 WL 624803 (D.S.C. Feb. 15, 2017); *Torres v. Seemeyer*, No. 15-cv-288-bbc, 2016 WL 4919978 (W.D. Wis. Sept. 14, 2016); *Robicheaux v. Caldwell*, No. 13-5090, 2015 WL 4090353 (E.D. La. July 2, 2015); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584; and *Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335 (Iowa 2013).

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. For decades, the ACLU has advocated for the constitutional freedom to marry, including as counsel in *Loving v. Virginia*, 388 U.S. 1 (1967); *Baker v. Nelson*, 409 U.S. 810

(1972); *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The ACLU successfully advocated on behalf of same-sex spouses seeking to be listed on their children's birth certificates in *Roe v. Patton*, No. 2:15-cv-288, 2015 WL 4476734 (D. Utah Jul. 22, 2015), and *Brenner v. Scott*, No. 4:14-cv-107, 2016 WL 3561754 (N.D. Fla. Mar. 30, 2016). The ACLU and its members have an interest in ensuring the proper interpretation of Obergefell in this case and the full protection of the relationships between same-sex couples and their children.

Under Fed. R. App. P. 29(a), *amici* file this amicus brief with the consent of all parties. Furthermore, under Fed. R. App. P. 29(a)(4), *amici* state that *amici*'s counsel authored this brief in whole, and that no party, party's counsel, or other person, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

When a woman and her *different-sex* spouse conceive and bear a child through donor insemination, Indiana lists both spouses on their child's birth certificate. When a woman and her *same-sex* spouse conceive and bear a child in exactly the same manner, Indiana refuses to do so. The question here is whether this practice is constitutional under both the Supreme Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and this Court's decision in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied* 135 S. Ct. 316. As the district court below correctly held, the answer is no.

Obergefell held that states may not exclude same-sex couples from "civil marriage on the same terms and conditions as opposite-sex couples," 135 S. Ct. at 2605, and that states may not preclude married same-sex couples from enjoying the "governmental rights, benefits, and responsibilities" that states condition on marriage, *id.* at 2601. Here, the State has done both. For couples who form families through donor insemination, the State conditions a parent's presence on their child's birth certificate on marriage to the child's birth mother. It therefore may not selectively grant this marital right to different-sex spouses while denying it to same-sex spouses, as nearly every court to consider the issue has held.

The State assures the Court that a birth mother's same-sex spouse may *eventually* be listed on her child's birth certificate; she just has to prove to a court that she is worthy to adopt her own child in a process that the district court found cost one Appellee $4,200. Even if the spouses can afford this—which sometimes they cannot—it leaves their children vulnerable to being denied the benefit of having two recognized parents until the adoption is finalized. Identically-situated different-sex spouses and their children, of course, need not endure this. The State's sole attempt to justify this differential treatment rests on the startling assertion that biology and adoption are the only ways to become a legal parent under Indiana law. The State is wrong. Indiana's parentage laws do not reflect the State's biological explanation, and in fact recognize that all of the plaintiffs in this case are the legal parents of their children.

This Court in *Baskin* commented that "a statute that imposed a $2 tax on women but not men would be struck down unless there were a compelling reason for the discrimination." 766 F.3d at 656. Indiana has in essence imposed a ***$4,200*** tax on a woman's wife, but not her husband, in order to obtain a birth certificate acknowledging her legal parentage, without any legitimate reason, much less a compelling one. This Court should give effect to *Obergefell* and *Baskin* and affirm the judgment below.

ARGUMENT

I. *Obergefell v. Hodges* and *Baskin v. Bogan* Require The State To Grant Same-Sex Married Couples The Same Legal Rights, Benefits, And Responsibilities As Different-Sex Married Couples

Obergefell v. Hodges, 135 S. Ct. 2584 (2015), squarely holds that the Due Process and Equal Protection Clauses preclude states from denying married same-sex couples "the constellation of benefits that the States have linked to marriage." *Id.* at 2590; *see also id.* at 2604 (finding marriage laws were "in essence unequal" because "same-sex couples are denied all the benefits afforded to opposite-sex couples").[1] And this Court in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), invalidated Indiana's law prohibiting same-sex couples from marrying in part

[1] The *Obergefell* dissenters agree with this interpretation. *See* 135 S. Ct. at 2620 (Roberts, C.J., dissenting) ("[P]etitioners . . . seek public recognition of their relationships, along with corresponding government benefits."); *id.* at 2626 ("If you . . . favor expanding same-sex marriage, by all means celebrate today's decision. . . . Celebrate the availability of new benefits."); *id.* at 2640 n.1 (Alito, J., dissenting) (defining the phrase "recognize marriage" to include "issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons")

because it "impose[d] a heavy cost, financial and emotional, on them and their children." *Id.* at 669. Yet the State asks this Court to allow it to list both different-sex spouses who have children using donor insemination on their child's birth certificate, while denying the same benefit to same-sex spouses who have children using donor insemination. In doing so, it asks this Court to deny same-sex couples a critically important benefit—one with a very real legal and practical impact on same-sex spouses and their children—that the State has linked to marriage. The State's position cannot be reconciled with *Obergefell* or *Baskin* and must be rejected.

The State's contrary contention fails to recognize that under *Obergefell*, marriage is not merely a status affecting the relationship between two people, but necessarily includes all marriage-related benefits and responsibilities. *See* 135 S. Ct. at 2601. The Court analyzed state laws forbidding same-sex couples from marrying under both the Due Process and Equal Protection Clauses, making clear that those two clauses are "connected in a profound way." *Id.* at 2603. But whether considered under the Due Process Clause, the Equal Protection Clause, or the "interlocking nature of these constitutional safeguards" that the Court recognized between the two, *id*. at 2604, the *Obergefell* decision expressly found that marriage encompasses any benefits, rights, or responsibilities that states offer to give that status meaning. As nearly every court to have considered the question has agreed, the State's position is wrong, and its attempt to place barriers between Appellees

and their children cannot be reconciled with the Constitution's demands,[2] as explained by *Obergefell* and *Baskin*.

A. *Obergefell* Held That The Due Process Clause Requires That Same-Sex Couples Have The Same Access To The Institution Of Marriage, Including The "Governmental Rights, Benefits, And Responsibilities" That Accompany It

Obergefell held that the Due Process Clause protects the fundamental right to marry, and that this right "appl[ies] with equal force to same-sex couples." 135 S. Ct. at 2599. The Court expressly stated that this fundamental right encompassed

---

[2] *See Brenner v. Scott*, No. 4:14-cv-107, 2016 WL 3561754, at *3 (N.D. Fla. Mar. 30, 2016) ("[I]n circumstances in which the Surgeon General lists on a birth certificate an opposite-sex spouse who is not a biological parent, the Surgeon General must list a same-sex spouse who is not a biological parent."); *Marie v. Mosier*, 196 F. Supp. 3d 1202, 1220 (D. Kan. Jul. 22, 2016) (permanently enjoining Kansas from distinguishing between married same-sex couples and married different-sex couples under birth certificate statutes, thus "ensur[ing] that defendants fully comply with *Obergefell*'s broad holding"); *Robicheaux v. Caldwell*, No. 13-cv-5090, 2015 WL 4090353, at *2 (E.D. La. July 2, 2015) (state must list same-sex spouse on child's birth certificate); *Carson v. Heigel*, No. 3:16-0045-MGL, 2017 WL 624803 (D.S.C. Feb. 15, 2017) (issuing declaratory judgment stating failure to treat same-sex spouses in the same manner as different-sex spouses in issuing birth certificates violates the Fourteenth Amendment and granting summary judgment as to constitutional claims); Order at 2, *De Leon* v. *Abbott,* SA-13-CA-00982-OLG, ECF No. 113 (W.D. Tex. Aug. 11, 2015) (ordering State of Texas to "implement[] policy guidelines recognizing same-sex marriage in death and birth certificates"); *Roe v. Patton*, No. 2:15-cv-288, 2015 WL 4476734, at *3 (D. Utah Jul. 22, 2015) (granting preliminary injunction prohibiting Utah from treating married same-sex couples differently from married different-sex couples under birth certificate statute, given *Obergefell*'s clear holding that "States must allow same-sex couples to marry 'on the same terms and conditions as opposite-sex couples'"); *Torres v. Seemeyer*, No. 15-cv-288-bbc, 2016 WL 4919978 (W.D. Wis. Sept. 14, 2016) (striking down Wisconsin's disparate treatment of same-sex couples under the state birth certificate law). *But see Smith v. Pavan*, 505 S.W.3d 169, 181 (Ark. 2016) (denying due process and equal protection challenges to Arkansas family code provisions relating to birth certificates), *petition for cert. filed* Feb. 13, 2017 (No. 16-992).

the legal rights and benefits that states link to marriage. It explained that "marriage is a keystone of our social order" because states have chosen to make it "the basis for an expanding list of governmental rights, benefits, and responsibilities." *Id.* at 2601. The Court concluded that through marital benefits, society "pledge[s] to support the couple, offering symbolic recognition and material benefits to protect and nourish the union," increasing stability to both married couples and their families and, as a result, society. *Id.* While the Court acknowledged that states could decide *which* rights it grants to married couples, *see id.* ("[T]he States are in general free to vary the benefits they confer on all married couples . . . ."), it made clear that once states grant those rights, they must extend them to *all* married couples.

By including the spouse of a woman who gives birth on the child's birth certificate, Indiana has extended precisely the type of "governmental right[], benefit[], and responsibilit[y]" that the Court in *Obergefell* contemplated. The State's resistance to this obvious point is particularly perplexing because several of the plaintiff couples in *Obergefell* specifically brought their suit seeking marital recognition in order to receive birth certificates for their children listing both spouses as parents. *Henry v. Himes*, 14 F. Supp. 3d 1036, 1041–42 (S.D. Ohio 2014) *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584; *Tanco v. Haslam* 7 F. Supp. 3d 764, 759 (M.D. Tenn. 2014) *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. And in case any doubt remains, *Obergefell* expressly

identified the right to appear on birth certificates as an "aspect[] of marital status." 135 S. Ct. at 2601; *see also Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]arital status often is a precondition to the receipt of . . . other, less tangible benefits (e.g., legitimation of children born out of wedlock).").

Moreover, *Obergefell* further explained that one of the central bases for protecting the right to marry "is that it safeguards children and families . . . ." *Obergefell*, 135 S. Ct. at 2600. The State's refusal to provide children of same-sex couples with birth certificates that reflect the identities of their parents forces those children to be "relegated through no fault of their own to a more difficult and uncertain family life." *Id.* Notwithstanding the State's efforts to downplay birth certificates as merely derivative instruments, birth certificates are treated nearly universally as critical evidence of the parent-child relationship. "Identification on the child's 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*, 14 F. Supp. 3d at 1050. In Indiana, these have included:

- Providing identification for obtaining a driver's license from the Indiana Bureau of Motor Vehicles, *see Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 789–90 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

- Providing proof of parentage to consent to a child's medical treatment, *see In re A.C.*, 905 N.E.2d 456, 459 (Ind. Ct. App. 2009);

- Providing identification necessary for emancipation, *see, e.g.*, Ind. Code §§ 34-28-3-2; 34-6-2-93;

- Establishing a child as a dependent on the parent's insurance plan, *see Tesfamariam v. Woldenhaimanot*, 956 N.E.2d 118, 120 (Ind. Ct. App. 2011);

- Providing proof of date of birth for registering a child in school and extracurricular activities[3];

- Establishing a child's identity to law enforcement in the event the child goes missing or is kidnapped, *see* Ind. Code § 10-13-5-11;

- Providing documentation to obtain a social security card for the child[4];

- Evidence used to establish a legal parent-child relationship for inheritance purposes in the event of a parent's death, *see Thurman v. Skinner*, 53 N.E.3d 1220, 1222 (Ind. Ct. App. 2016);

- Establishing entitlement to social security survivor benefits for the child in the event of a parent's death[5];

- Evidence used to establish a legal parent-child relationship for purposes of entitlement to child support in the event of the parents' separation, *see State ex rel. Hight v. Marion Super. Ct.*, 547 N.E.2d 267, 268 (Ind. 1989);

- Providing identification for setting up a bank or other financial account in the child's name[6]; and

- Providing identification for obtaining a passport for the child, and traveling internationally without the encumbrance of additional documentation.[7]

---

[3] Indiana Department of Education, Attendance FAQ, *available at* http://tinyurl.com/mp4f4ho (last visited April 2, 2017).

[4] *See* Social Security Administration, Application for a Social Security Card, *available at* https://www.ssa.gov/forms/ss-5.pdf (last visited April 2, 2017).

[5] *See* Social Security Administration, Survivors Benefits 5, *available at* https://www.ssa.gov/pubs/EN-05-10084.pdf (last visited April 2, 2017).

[6] *See* Indiana University Credit Union, What to Bring to Open Your Account, *available at* https://iucu.org/membership/index.html (last visited April 2, 2017).

[7] *See* U.S. Dept. of State, U.S. Passports & Int'l Travel, Apply for a Passport in Person, *available at* http://tinyurl.com/mgz5yb6 (last visited April 2, 2017).

These legal effects have very real consequences for families, and the denial of birth certificates listing both parents can destabilize same-sex spouses' ability to provide a stable environment for their children. In one case, same-sex parents who did not have a birth certificate reflecting their child's parentage were "told by both an ambulance crew and emergency room personnel that only 'the mother' could accompany [the child] and thus initially faced a barrier to being with their child in a medical emergency." *Finstuen v. Crutcher*, 496 F.3d 1139, 1142, 1145 (10th Cir. 2007). And as another court described, absent a listing on a birth certificate, non-biological mothers have been deprived of "the right [to] . . . make medical decisions regarding the medical care provided to their bab[ies] in the event that [a biological parent] is unable to make those decisions." *Tanco*, 7 F. Supp. 3d at 764; s*ee also In re A.C.*, 905 N.E.2d at 459 (step mother informed by local health department that she would be unable to get child's immunizations without a birth certificate).

It gets worse. By denying one parent in a same-sex couple recognition of her parental status unless, and until, she adopts a child to whom she has been committed since before that child's birth, Indiana jeopardizes their children's "understand[ing of] the integrity and closeness of their own family and its concord with other families in their community and in their daily lives," which *Obergefell* plainly singled out for protection. 135 S. Ct. at 2600 (quoting *Windsor*, 133 S. Ct. at 2694–95). Once a child learns to read, she may find out that in the eyes of the State she has only one parent instead of the two who have lovingly raised her for her entire life. The child will be reminded of this every time she is asked to produce the

birth certificate for school, work, or other purposes. *See Henry*, 14 F. Supp. 3d at 1050 ("The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities."). While the State insists that this may be avoided through adoption, the substantial costs of and time it takes to obtain an adoption may delay the inclusion of both parents on a birth certificate or place this completely out of reach for many families.

By adding additional hurdles and costs to same-sex couples and their children's ability to be recognized as families, the State has "lock[ed] them out of a central institution of the Nation's society," and "consigned [them] to an instability many opposite-sex couples would deem intolerable in their own lives." *Obergefell*, 135 S. Ct. at 2601–02. And it forces their children to "suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600. Thus, *Obergefell* squarely precludes the State's attempt to bifurcate marriage from its associated benefits. The fact that "same-sex couples may exercise the fundamental right to marry" necessarily means that same-sex couples must be afforded access to the rights, benefits, and responsibilities that the state has decided come with marriage, including those at issue here. *Id.* at 2605.

B. *Obergefell*'s Equal Protection Holding And *Baskin* Rejected States' Attempt To Differentiate Between Same-Sex And Different-Sex Couples With Regard To Distribution Of Marital Rights

Obergefell's Equal Protection holding, like its Due Process holding, likewise compels the conclusion that same-sex couples and their marital children cannot be deprived of marriage benefits. Indeed, the Court squarely ruled that one of the principal constitutional defects in the states' attempts to deprive same-sex couples of the right to marriage was that "same-sex couples are denied all the benefits afforded to opposite-sex couples." *Id.* at 2604. The Court made clear that once a state decides to extend benefits to different-sex couples, it must treat same-sex couples with "equal dignity in the eyes of the law" and grant them equal benefits. *Id.* at 2608. Indiana's disparate grant of rights and benefits "works a grave and continuing harm" on same-sex couples that "disrespect[s] and subordinate[s] them." *Id.* at 2604. It reinstates a regime of inequality that cannot be justified under the Equal Protection Clause and flies directly in the face of *Obergefell*. *Id.*

When this Court held that Indiana's ban on marriage for same-sex couples violated the Equal Protection Clause in *Baskin*, it emphasized that the case was fundamentally "about the welfare of American children." 766 F.3d at 654. For both same-sex and different-sex couples, marriage "enhanc[es] child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together." *Id.* at 661. This Court criticized Wisconsin for doing very much the same thing as the State tries to accomplish here. There, Wisconsin restricted same-sex couples to domestic partnerships that did not encompass "the rights and

many of the benefits of marriage." *Id.* In fact, one of the rights that Wisconsin refused to grant was recognizing same-sex parents as legal parents to their marital children. *See id.* at 670 (citing *Appling v. Doyle*, 826 N.W.2d 666, 684 (Wis. Ct. App. 2012) (identifying Wisconsin paternity presumption statute as one not included in the rights provided to same-sex couples) *aff'd sub nom. Appling v. Walker*, 853 N.W.2d 888 (Wis. 2014)). Like the Wisconsin domestic partnership law at issue in *Baskin*, the State's refusal to name married same-sex parents on their children's birth certificate "harms the children, by telling them they don't have two parents." *Id.* at 670–71.

The State has responded to *Baskin* and *Obergefell* by allowing Appellees to marry (as it no doubt must), and even concedes that they "should[] ultimately have joint parentage of the children born to their marriages." Appellant Br. at 24. But Indiana still insists that these couples must face hurdles that different-sex couples do not face in order to be recognized as parents on their children's birth certificates: the requirement and associated costs of adoption. Unlike Appellees' different-sex counterparts, who are listed on birth certificates regardless of whether they are biological parents,[8] Indiana requires Appellees to go through an adoption proceeding "so that a court may account for the rights of others and determine the best interests of the child." *Id.* at 24. The court below found that the cost for one

[8] Despite the State's protest that it "has no law, policy or practice of putting the names of people on birth certificates who are not biological or adoptive parents," Appellant Br. at 31, there is no question on the Birth Information Worksheet asking about whether a birth mother's husband is a biological father and no requirement of genetic testing. *See* Appellant App. at 25.

Appellee's adoption was $4,200. *Henderson v. Adams*, --- F. Supp. 3d ---, 2016 WL 3548645, at *2 (S.D. Ind. June 30, 2016), *order clarified*, No. 1:15-cv-00220, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016). This, even though the State's supposed purpose of providing marriage is to "strengthen family life by assisting parents to fulfill their parental obligations." Ind. Code § 31-10-2-1. In other words, even after conceding that these Appellees *can and should* be parents, *and* that the purpose of marriage is to support children, the State has placed a significant legal hurdle and a $4,200 tax on same-sex married couples who have children through donor insemination that it simply does not for different-sex married couples who have children the same way.

The same result follows from the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). There, the Court invalidated on equal protection grounds the federal Defense of Marriage Act ("DOMA"), which withheld all federal benefits from validly married same-sex couples. The Court was particularly troubled by the fact that DOMA "reject[ed] the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary . . . from one State to the next." *Id.* at 2692. The "creat[ion of] two contradictory marriage regimes within the same State" impermissibly "place[d] same-sex couples in an unstable position of being in a second-tier marriage" and "wr[o]te[] inequality into the entire United States Code." *Id.* at 2694. Appellant's attempt to preclude same-sex couples from the same rights

to which different-sex couples are entitled would have the same effect and is unconstitutional for the same reason.

II. Appellant's Attempt To Condition Birth Certificates On Biology Fails

The State focuses on a lone interest to justify its birth certificate practice: that it is useful for maintaining a system that only recognizes biological parenthood and parenthood by adoption. The State argues that its policy of naming husbands, but not wives, of women who give birth on the child's birth certificate is a purely administrative measure that is a "highly accurate and low-cost way to determine a child's biological father in the first instance," Appellant Br. at 45. This argument fails.

As an initial matter, the State is simply wrong to claim that Indiana only recognizes parenthood through biology and adoption, and that a same-sex spouse will *never* be recognized as a parent short of adoption. *See id.* at 30. Indiana law already recognizes that both spouses who use donor insemination to have a child are legal parents, *see Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994) (recognizing parental relationship by husband of mother when birth accomplished by artificial insemination with consent of both marital partners), and just last year, the Court of Appeals affirmed that this applies to children of married same-sex couples,[9] *see*

[9] The State itself acknowledged the significance of *Gardenour* when unsuccessfully seeking review of that decision in the Indiana Supreme Court. *See* Br. of the State of Indiana as Amicus Curiae in Support of Neither Party, *Gardenour v. Bondelie*, No. 32A01-1601-DR-00082 (Ind. Dec. 9, 2016) ("The opinion below purports to confer full legal parental rights on the wife of the birth mother—i.e., a person with no biological or adoptive relationship to the child—based only on her spousal status.")

Gardenour v. Bondelie, 60 N.E.3d 1109 (Ind. Ct. App. 2016) (*Levin* applies to same-sex spouses, and recognizing a California Domestic Partnership, which has all the rights of marriage under California law, as a marriage in Indiana) *trans. denied* 3/2/2017. This alone defeats the State's argument.

Additionally, this Court, and the Supreme Court, rejected the biology defense in *Baskin* and *Obergefell* precisely because of its harm to same-sex couples' non-biological children. In the midst of marriage litigation that swept through the nation in the years leading up to *Obergefell*, the State pitched a remarkably similar "biology" argument to courts throughout the country, arguing that marriage and family exist to encourage heterosexuals to remain in stable relationships to raise their biological children. For instance, in *Hollingsworth v. Perry*, Indiana argued as an *amicus* to the Supreme Court, "Marriage is how the state promotes a particular family structure, where *biological parents* care for their children in one household . . . provid[ing] the greatest likelihood that both *biological parents* will nurture and raise *the children they beget*, which is optimal for children and society at large." Br. of Indiana et al. as Amici Curiae Supporting Petitioners, 17–18, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (emphasis added). And while making the same argument to this Court in *Baskin*, it explained that "the point of marriage's associated benefits and protections is to encourage child-rearing environments where *parents care for their biological children* in tandem." *See* Br. of Appellants,

Baskin v. Bogan, No. 14-2386 Doc. 45, 13 (7th Cir. July 15, 2014) (emphasis added).[10]

This Court correctly rejected the State's limited view of family, finding the argument "so full of holes that it cannot be taken seriously." 766 F.3d at 656. It particularly faulted the State's view that marriage's purpose is limited to raising "biological" children: "[F]amily," the Court found, "is about raising children and not just about producing them." *Id.* at 663; *cf. Moore v. City of E. Cleveland*, 431 U.S. 494, 505 (1977) ("Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family."). The Supreme Court agreed, *see Obergefell*, 135 S. Ct. at 2606–07, concluding that excluding same-sex couples from the protections of marriage would hinder a state's interest in childrearing, procreation, and education, *see id.* at 2600–01 ("Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. . . . The marriage laws at issue here thus harm and

[10] *See also* Br. of Indiana et al. as Amici Curiae Supporting Respondents, 17, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) ("[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." (internal quotation marks and citations omitted)); Br. of Indiana et al. as Amici Curiae Supporting Appellees, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Nos. 14-1167, 14-1169, 14-1173); Br. of Indiana et al. as Amici Curiae Supporting Appellee, *De Leon v. Perry*, 791 F.3d 619 (5th Cir. 2015) (No. 14-50196); Br. of Indiana et al. as Amici Curiae Supporting Respondents, *Sevcik v. Sandoval*, 771 F.3d 456 (9th Cir. 2014) (No. 12-17668); Br. of Indiana et al. as Amici Curiae Supporting Appellants, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178).

humiliate the children of same-sex couples."); *see also Windsor*, 133 S. Ct. at 2695 ("DOMA also brings financial harm to children of same-sex couples."). Neither the Supreme Court nor this Court, in short, found the State's attempt to collapse marriage into "biology" compelling in *Baskin* and *Obergefell*, and this Court should not find it compelling here.

Ultimately, the State falls back on the argument that its birth certificate regime is a shortcut administrative measure that cuts costs for the State at the unfortunate expense of same-sex spouses and their children. Appellant Br. at 45 ("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, and cost-effectiveness."). But under both the Due Process Clause and the heightened equal protection scrutiny that applies to this case, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (administrative convenience insufficient to support irrebuttable presumption that unmarried father unfit to be a parent under Due Process Clause); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.").

The State's arguments, in short, are nothing more than an effort to relitigate *Obergefell* and *Baskin*. That effort must necessarily fail.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's decision.

Respectfully submitted,

/s/ Walter Dellinger
Walter Dellinger
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383-5300
Fax: (202) 383-5414

Anton Metlitksy
Shane A. Hunt
John B. Hill
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Tel.: (212) 326-2000
Fax: (212) 326-2061

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(4) because the brief contains 5,334 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 12-point Century Schoolbook font.

/s/ Walter Dellinger
Walter Dellinger
O'Melveny & Myers LLP
Attorneys for Amici Curiae

Dated: April 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Walter Dellinger
Walter Dellinger
O'Melveny & Myers LLP
Attorneys for Amici Curiae

Dated: April 3, 2017