Joshua A. Block*
ACLU LGBT Project
125 Broad Street, Floor 18
New York, New York, 10004
Telephone: (212) 549-2593
Facsimile: (212) 549-2650
jblock@aclu.org

**Admitted pro hac vice*

John Mejia (Bar No. 13965)
Leah Farrell (Bar No. 13696)
ACLU of Utah
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9862
jmejia@acluutah.org
lfarrell@acluutah.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ANGELA LESLIE ROE and KAMI ROE, Plaintiffs, vs. **W. DAVID PATTON**, in his official capacity as the Executive Director of the Utah Department of Health, and **RICHARD OBORN,** in his official capacity as the Director of Utah's Office of Vital Records and Statistics, Defendants.	**REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Case No. 2:15-CV-00253-db Judge Dee V. Benson

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This case has absolutely nothing to do with presumptions of biological parentage. In every single case in which a married woman conceives with donated sperm from a third party, there is a 100% certainty that the woman's spouse is not the biological parent. That is true when different-sex couples conceive with donated sperm, and it is true when same-sex couples conceive with donated sperm.[1]

Defendants provide a list of reasons for why they believe it would be rational for Utah to make all non-biological parents go through a step-parent adoption to establish parentage and to be listed on the birth certificate. But the Utah legislature made a different policy choice when it enacted the assisted reproduction statutes regarding donated sperm. Utah Code Ann § 78B-15-701, *et seq*. Those statutes provide that if a husband of a woman who conceives with donated sperm consents to the insemination, he is automatically the parent of the child. *Id.* §§ 78B-15-703, 78B-15-704(a). And under Utah law, a "parent-child relationship" established under Utah's assisted reproduction statutes "applies for all purposes." *Id.* § 78B-15-203. Even though husbands of women who conceive through donor sperm have no biological connection to the child, Defendants do not require them to go through a step-parent adoption to establish parentage before they can be listed on a birth certificate. Rather, Defendants automatically list those husbands as parents on children's birth certificates despite the lack of biological connection.

[1] Defendants note that a husband of a wife who uses assisted reproduction may be the biological father because "a husband may provide sperm to be used for assisted reproduction by his wife." Def. Opp. 7. But, as Defendants concede, husbands who provide their own sperm for assisted reproduction are excluded from the definition of "donor." Utah Code Ann. § 78B-15-102 (10)(a). This case is about couples – whether they are same-sex or different-sex – who conceive with sperm from a donor.

Defendants offer no reason for treating the wives of women who conceive with donated sperm any differently.[2]

The few places where Defendants address the donor-sperm provisions of Utah's assisted reproduction statutes, *see id.* §§ 78B-15-703, 78B-15-704(a), they simply assert that female spouses may not establish parentage through those provisions because they are women instead of men. See Opp. 4-5; 17. Yet that restriction is precisely what Plaintiffs challenge in this case. Defendants must, at a minimum, offer some argument to support this distinction. Defendants offer none because none exists. The donor-sperm provisions of the Utah Uniform Parentage Act do not depend on any actual or presumed biological connection with the child. Indeed, the entire purpose of those provisions is to establish parentage even though there is no possibility of a biological connection. Accordingly, a man who consents to his wife conceiving with donor sperm and a woman who consents to her wife conceiving with donor sperm are identically situated. Under heightened scrutiny – or any standard of scrutiny – Defendants refusal to treat female spouses the same as identically situated male spouses violates equal protection.

I. Defendants Have Not Identified Any Reason for Treating Wives of Women Who Conceive With Donor Sperm Differently than Husbands of Women Who Conceive the Same Way.

Defendants repeatedly invoke the lack of biological connection to distinguish between same-sex couples and different-sex couples. But these arguments are all directed to whether a presumption of parentage should apply to female spouses. None of those arguments provides

[2] Plaintiffs do not seek to establish Angie's parentage through a birth certificate. Def. Opp. 3. They seek for Defendants to recognize Angie as L.R.'s parent pursuant to Utah's assisted reproduction statutes through an injunction requiring Defendants to recognize that parental status by, *inter alia*, issuing a birth certificate listing Angie (along with Kami) as a parent.

any reason for treating the wives of women who conceive with third party donor sperm differently than how husbands are treated. [3]

Accuracy of Public Health Statistics Derived from "Parent's Worksheet"[4]

Defendants' primary argument is that wives of women who conceive with donor sperm must go through a step-parent adoption because it would be inappropriate to include their information on the "Parent's Worksheet." Defendants use that document to collect data about parents as part of the birth certificate application process and then share the data with public health researchers. Defendants contend that the "background and health history" of the wife of a woman who conceived with donated sperm is irrelevant in relation to the child because there is a 0% chance she is the biological parent. Def. Opp. 7. Defendants assert that if a female spouse of a woman who conceives with donated sperm were included in that worksheet it would make the compiled information "inaccurate, unreliable, and askew." Def. Opp. 7.

---

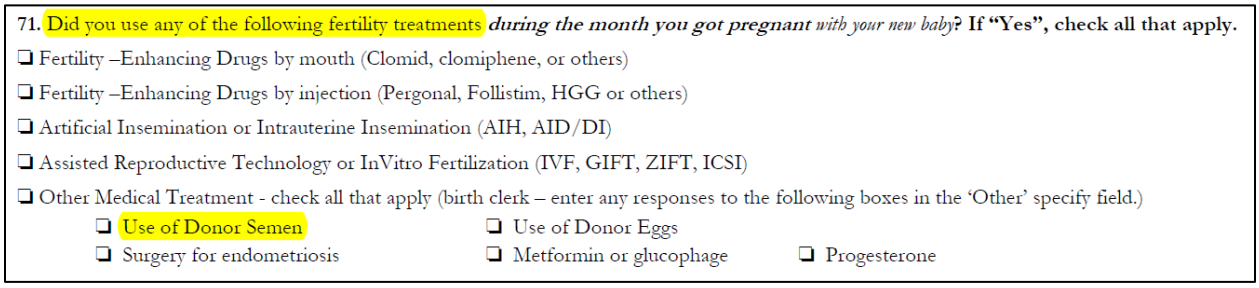
[3] Although this case does not involve the marital presumption of parentage law, Defendants are wrong about that statute too. As interpreted by Utah courts, the marital presumption is not a presumption of *biological* parentage. As the Utah Court of Appeals recently explained:

> Although legal presumptions typically operate as shortcuts to the truth, here our legislature has adopted a legal presumption that will often operate counterfactually. The UUPA in effect subordinates the judiciary's truth-seeking function to a fundamental policy concern: protecting the marriage, the child, and the relationship between the child and the presumed father from attack by outsiders to the marriage.

J.L.C. v. K.A.A., 337 P.3d 1069, 1071 (Utah Ct. App. 2014) (internal quotation marks and brackets omitted). Under the statute the *only* persons who can rebut the presumption of parentage are the spouses to the marriage. *R.P. v. K.S.W.*, 320 P.3d 1084 (Utah Ct. App. 2014). Contrary to Defendants' assertions (Def. Opp. 5), the Department of Health has no authority to rebut the presumption of parentage on its own even if there is a 100% certainty that the spouse is not the biological parent. *See id.* at 1094 (explaining that the statutory amendments supplanted the common law presumption that allowed such challenges).

[4] Defendants make various factual assertions in the "Background" section of their opposition brief regarding the "Parent's Worksheet." None of those factual assertions has been introduced into evidence by sworn declarations from persons at the Department of Health. They are assertions by counsel that, as discussed below, are sometimes directly contradicted by Defendants' own exhibits.

But these arguments apply with the same force to husbands whose wives conceive with donated sperm and also have a 0% chance of being the biological parent. Defendants argue that it would be impractical to screen out husbands whose wives conceive with donor sperm from the birth certificate application process because such questions would be too intrusive and "DOH should not be required to inquire into how each child in the state is conceived." Def. Opp. 10. But that question is ***already*** contained on the form. Question 71 asks whether the woman "used any fertility treatments" during the month she got pregnant and, among a list of possible methods of conception, provides a separate box to check for "donor semen."



71. Did you use any of the following fertility treatments *during the month you got pregnant with your new baby*? **If "Yes", check all that apply.**

❑ Fertility –Enhancing Drugs by mouth (Clomid, clomiphene, or others)

❑ Fertility –Enhancing Drugs by injection (Pergonal, Follistim, HGG or others)

❑ Artificial Insemination or Intrauterine Insemination (AIH, AID/DI)

❑ Assisted Reproductive Technology or InVitro Fertilization (IVF, GIFT, ZIFT, ICSI)

❑ Other Medical Treatment - check all that apply (birth clerk – enter any responses to the following boxes in the 'Other' specify field.)

❑ Use of Donor Semen ❑ Use of Donor Eggs

❑ Surgery for endometriosis ❑ Metformin or glucophage ❑ Progesterone

Def. Opp. Ex. A at 4. If the information of a parent – whether male or female – who does not have a biological connection to the child would interfere with data analysis, the Department of Health and researchers already have the tools at their disposal to segregate such cases when the mother who gave birth indicates that donor sperm was used.[5]

[5] The entire premise of Defendants' argument that a biological father's "health history" (Def. Opp. 7) is collected by the "Parent's Worksheet" and used for research is also questionable. The "Parent's Worksheet" does not collect any "health history" about the father. The only information collected about the father is demographic information regarding his age, race, level of schooling, and primary language. All the "health history" in the worksheet is requested of the woman who gives birth. Defendants also assert that the biological father's health history is relevant for research of "congenital or inherited disorders." Def. Opp. 7. Neither the worksheet nor the statutes Defendants cite say anything about "inherited disorders." The research of congenital disorders mentioned on the "Parent's Worksheet" is research regarding "the incidence of birth defects and other birth outcomes" in relation to "fertility treatments." Def. Opp. Ex. A at 3.

In any event, this suit does not challenge the Department of Health's ability to collect (or not collect) any type of information through the "Parent's Worksheet" that it views as consistent with its mission. Plaintiff are not suing for a right to fill out the "Parent's Worksheet." They are suing for Defendants to recognize Angie as L.R.'s legal parent and to list her on L.R.'s birth certificate as such.

Accuracy of Birth Certificates

Defendants maintain that to preserve the accuracy of birth certificate records for research, the female spouse of a woman who conceived with donated sperm cannot be listed on the original birth certificate. Instead, they assert that the consenting spouse should undergo a step-parent adoption, after which a supplemental birth certificate will be issued. Defendants imply that this distinction between an original birth certificate and a supplemental birth certificate is important for public health research. But, once again, that is a reason to make *all* spouses whose wives conceive with donated sperm from a third party undertake a step-parent adoption. It does not explain why women whose wives conceive with donated sperm – but not men whose wives conceive with donated sperm – should be required to do so.

Moreover, the argument rests on a fundamentally flawed premise. As Defendants themselves note, the purpose of birth certificates is to "accurately reflect a child's legal parents," not her biological genealogy. Def. Opp. 7. None of the health and demographic information collected by the Department of Health is included on the birth certificate itself. *See* Def. Opp. Ex. A at 1 (noting that the answers to those questions will not "appear on copies of the birth certificate issued to you or your child"). And even if it were included, the original birth certificate cannot be used by researchers because that birth certificate is sealed. Def. Opp. 8; *see* Utah Code Ann. § 26-2-10(4)(6). Administrative regulations further instruct that any other

copies of the original birth certificate must be deleted or destroyed. UT ADC R436-5. The original birth certificate is not a document available for use by researchers.

Rights of biological fathers

Defendants assert that if female spouses were automatically recognized as parents without a second-parent adoption, there would be no formal termination of the parental rights of the "biological father." But there are no rights to be terminated when sperm from a third party donor is used. The Utah Parentage Act specifically provides that "[a] donor is not a parent of a child conceived by means of assisted reproduction." Utah Code Ann. § 78B-15-702. Whether the spouse consenting to the use of the donated sperm is a man or a woman, the donor has no parental rights to be terminated.

Ensuring Consent

Finally, Defendants contend that a second-parent adoption is necessary to ensure that the spouse consents to take on parental obligations. Otherwise, they say, "a spouse in a same-sex marriage would be able to impose parental obligations on the other spouse without any consent on her part." Def. Opp. 10. That argument is baffling, because the donor sperm provisions already require a woman who conceives with donor sperm and her spouse to consent in writing if the spouse is to be considered the parent. Utah Code Ann §§ 78B-15-703, 78B-15-704(a).

II. Plaintiffs Have Made a Strong Showing of Likelihood of Success on the Merits.

As interpreted by Defendants, Utah's assisted reproduction statutes glaringly discriminate based on sex and are therefore subject to heightened scrutiny. To Defendants, a man who consents to his wife conceiving with sperm donated by a third party is automatically a parent, while a woman who consents to her wife conceiving with donated sperm by a third party donor is not a parent until she adopts. Defendants themselves prove the point by emphasizing that

parentage "is established by the *man* having consented to assisted reproduction" and noting that "the definition of 'man' means 'a male.'" Def. Opp. 5 (emphasis in original). It is difficult to imagine a more obviously sex-based classification. Heightened scrutiny therefore applies, and Defendants have not even attempted to meet that demanding standard. *See United States v. Virginia*, 518 U.S. 515, 532 (1996).[6]

Defendants agree that, as interpreted and applied to Angie by the Office of Vital Records and Statistics, the assisted reproduction statues also discriminate based on sexual orientation. Def. Opp. 17, 20. The Tenth Circuit has not addressed the continuing vitality of *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008), which applied rational basis review to differential treatment based on sexual orientation, in light of the Supreme Court's intervening decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). As explained in Plaintiffs' opening brief, the Seventh and Ninth Circuits have read *Windsor* to require heightened scrutiny, and Plaintiffs assert that this is the appropriate test here. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014).[7] But the Court does not have to resolve that question because Defendants' refusal to recognize Angie as L.R.'s parent fails any standard of review. Discrimination between same-sex

[6] Defendants argue that there is no sex discrimination because same-sex female couples and same-sex male couples are both forced to establish parentage through adoption procedures. Def. Opp. 17. But that is the wrong comparison. Same-sex male couples who conceive with assisted reproduction do so by surrogacy agreements, which are governed by entirely separate procedures in Utah Code Ann. § 78B-15-801, *et seq*. *See also* Utah Code Ann. § 78B-15-701 (stating that the section related to parentage through sperm donation "does not apply to the birth of a child conceived by means of sexual intercourse, or as result of a gestational agreement").

[7] Contrary to Defendants' assertions, the application of heightened scrutiny in *Baskin* was not *dicta*. The court was clear that it was applying a "balancing test" and not rational-basis review. *Baskin*, 766 F.3d at 671-72. And the Ninth Circuit was not "divided" over whether sexual orientation classifications warrant heightened scrutiny in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). The concurring opinions all agreed that sexual orientation discrimination requires heightened scrutiny and simply offered *additional* reasons why heightened scrutiny was also warranted on other grounds.

couples who conceive with third-party donor sperm and different-sex couples who conceive with third-party donor sperm lacks even a rational basis.

Defendants note that the text of the assisted reproduction provisions "only contemplate a non-same sex couple situation." Def. Opp. 17. Of course they do. No one disputes that the Utah legislature that passed the Utah Uniform Parentage Act did not contemplate female spouses establishing parentage through the assisted reproduction statutes. Until recently, Utah had statutory prohibitions and a constitutional amendment banning same-sex couples from marrying and denying legal recognition to their marriages from other jurisdictions. *See generally Kitchen*, 755 F.3d 1193 (striking down those marriage exclusions as unconstitutional). Now that same-sex couples may marry under Utah law, however, the Equal Protection Clause requires that the statute be extended to provide automatic parentage for male spouses of women who conceive through donor sperm *and* female spouses of women who conceive the same way.

As noted above, Defendants have not even attempted to justify a distinction between male spouses whose wives conceive with donor sperm and female spouses whose wives conceive with donor sperm. And there is no conceivable rationale for the unequal treatment. It may (or may not) be rational to treat spouses who have no biological connection to a child conceived with donor sperm differently than spouses of women who conceive through sexual intercourse. But having passed a statute that establishes automatic parentage for male spouses of women who conceive through donor sperm, Utah cannot withhold that same automatic parentage from female spouses of women who conceive the same way and, thus, are identically situated in all relevant respects. Equal protection requires that the statute must either be struck down for different-sex couples who conceive through donor sperm or that the benefits of automatic parentage be extended to same-sex couples who conceive the same way. *See Califano v.*

Westcott, 443 U.S. 76, 89 (1979). As in most cases, "extension, rather than nullification" is the proper course here. *Id.*

III. Plaintiffs Will Suffer Irreparable Injury If the Injunction Does Not Issue

Plaintiffs will suffer irreparable harm if an injunction is not issued. As Defendants concede "[a] birth certificate which accurately reflects a child's legal parents is important both to the child, his or her parents . . . and to third parties." Def. Opp. 6. Although a birth certificate does not itself confer parental rights, it is the document that Angie must use when interacting with third parties to prove that she is L.R.'s parent. Without that document, Angie's ability to function as L.R.'s parent is severely impaired, as is L.R.'s ability to prove that Angie is her legal mother. *See* Def. Opp. Ex. A at 1 ("The birth certificate is a document that will be used for legal purposes to prove your child's age, citizenship and parentage. This document will be used by your child throughout his/her life.")

Moreover, as noted in Plaintiffs' opening submission, until Angie's parental status is recognized and the cloud of uncertainty over her parental status caused by Defendants' conduct is lifted, L.R. will be placed in the unstable position of having just one legal parent until the step-parent adoption is complete. If L.R. needs emergency medical care, Angie would not be automatically authorized to give permission for that care and could even be excluded from her child's side in the hospital. If something were to happen to Angie before the adoption is finalized, L.R. could be deprived of critical economic benefits as her surviving child. Defendants ignore all of this.

Finally, as noted in Plaintiffs' opening submission, the denial of constitutional rights for any period of time constitutes irreparable harm as a matter of law. *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012).

IV. The Balance of Harms and Public Interest Favor an Injunction

Plaintiffs have outlined the tangible harms they will suffer without an injunction. In contrast, Utah argues that it suffers an intangible harm whenever it is enjoined from enforcing a statute. But Utah offers no explanation for why recognizing Angie Roe as a parent and issuing a birth certificate naming her as a parent would create irreparable harm for the vital records system. In any event, because Plaintiffs are likely to prevail on the merits, the balance of harms necessarily tips in their favor. "When a law is likely unconstitutional, the interest of those the government represents, such as voters, do not outweigh a plaintiff's interest in having its constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d. 1114, 1145 (10th Cir. 2013) (en banc) (plurality) (alterations incorporated).

Similarly, in light of Plaintiffs' likelihood of success on the merits, an injunction is also in the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132. In this case, moreover, an injunction is also necessary to prevent the legal uncertainty about the parental rights of same-sex spouses that has been caused by the Office of Vital Records and Statistics' policy

CONCLUSION

For all these reasons, the motion for preliminary injunction should be granted.

DATED this 30th day of April, 2015.

/s/ Leah Farrell

ACLU of Utah
Counsel for Plaintiffs