ARIZONA SUPREME COURT

KIMBERLY MCLAUGHLIN *Petitioner,* v. THE HONORABLE LORI B. JONES, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of PIMA. *Respondent Judge,* SUZAN MCLAUGHLIN. *Real Party in Interest*.	Supreme Court Case No. CV-16-0266-PR No. 2 CA-SA 2016-0035 Pima County Superior Court No. DC20130015

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND ACLU OF ARIZONA IN SUPPORT OF REAL PARTY IN INTEREST

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INTEREST OF *AMICI CURIAE*

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. The ACLU of Arizona is one of its affiliates. 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 protect their parent-child relationships 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 parents and their children.

SUMMARY OF ARGUMENT

This case is controlled by the plain terms of A.R.S. § 25-814 and this Court's unanimous decision in *In re Marriage of Worcester*, 192 Ariz. 24, 960 P.2d 624 (1998). Under A.R.S. § 25-814, a proof of a lack of biological relationship is not, by itself, a ground for rebutting a spouse's presumption of parentage. The only way to rebut the presumption of a married woman's spouse is

through an action seeking to establish another man as the biological father and legal parent. There is, therefore, no need to pass a new statute to cover assisted conception or to rely on equitable principles of estoppel to prevent a woman from rebutting her spouse's presumption of parentage when a child is conceived through donor sperm. A.R.S. § 25-814 already prevents her from doing so

Under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the same rule must now apply for all spouses of women who give birth with donor sperm, whether male or female. *Obergefell* required that States allow same-sex couples to marry "on the same terms and conditions as accorded to" different-sex couples and with "all the benefits afforded to" different-sex couples. *Id.* at 2604. And *Obergefell* expressly recognized that the central terms and conditions of "marital status include . . . child custody, support, and visitation rules." *Id.* at 2601. Particularly in this context—where a biological relationship is not relevant to the spouse's legal parental status—there is no basis for treating the female spouses of women who give birth with donor sperm differently from the male spouses of women who give birth with donor sperm. The only way to apply A.R.S. § 25-814 in accordance with the Constitution is to apply the same presumption of parentage to spouses of women who give birth with donor sperm, regardless of whether the spouse is male or female.

ARGUMENT

I. The Husband of a Woman Who Gives Birth with Donor Sperm Is a Presumed Parent, and the Only Way to Rebut That Presumption Is Through an Action to Establish Another Person's Parentage.

This case is controlled by the plain terms of the statute and this Court's unanimous decision in *In re Marriage of Worcester*, 192 Ariz. 24, 960 P.2d 624 (1998). Under the presumption-of-parentage statute, the spouse of a woman who gives birth is presumed to be the parent of the child. A.R.S. § 25-814. Although this presumption can be rebutted by "clear and convincing evidence," A.R.S. § 25–814(C), the only legal procedure for doing so is through "[a] court decree establishing [parentage] of the child by another man," A.R.S. § 25-814(D). As this Court explained in *Worcester*, proof that the spouse lacks a biological connection is not, by itself, "a ground justifying terminating a father-child relationship." 192 Ariz. at 27. The statute does not "permit the presumption to be rebutted unless the mother is seeking child support from another" as part of a proceeding to establish parentage by another man. *Id.* at 27.

The reason for this policy is simple and important: Allowing one spouse to disestablish the parentage of another outside the context of a suit to establish the parentage of another person would needlessly deprive the child of the protections of a second legal parent. There is, therefore, no need to expand the scope of Arizona statutes to cover assisted conception or to rely on equitable principles of

estoppel to prevent a woman from rebutting her spouse's presumption of parentage.[1] Even though the husband of a wife who conceives with donor sperm is not the biological parent, he is still entitled to the presumption of parentage under A.R.S. § 25-814. And because there is no other biological father to establish as the legal parent, she cannot rebut the husband's presumption of parentage no matter how clear and convincing the evidence of the lack of a biological relationship is. That is why there was no need for the legislature to enact a separate statute establishing that the spouse of a woman who conceives with donor sperm is the parent of the resulting child. That spouse already has the protection of a presumption of parentage, and that presumption is for all practical purposes irrebutable.

Although there was no need to pass a separate statute to protect the parental rights of a spouse whose wife conceives with donor sperm, a separate statute was necessary to protect the woman and child in the event that a husband walks out on the family and disclaims any obligations to protect the child. A.R.S. § 25-501(B). The legislature passed a separate statute to address this situation by declaring that "[a] child who is born as the result of artificial insemination is entitled to support from the mother as prescribed by this section and the mother's spouse if the spouse

[1] Although it is not necessary to evoke principles of estoppel, *amici* agree that estoppel provides an independent basis for affirming the Court of Appeals' decision.

. . . agreed in writing to the insemination before or after the insemination occurred." A.R.S. § 25-501(B). The statute addresses only support obligations because the spouse's parental rights are already protected by the presumption of parentage statute.

Arizona's statutory scheme is consistent with the laws of other States, which also recognize a woman's husband as the parent of child conceived with donor sperm, even without a specific statute addressing assisted conception. *See, e.g.*, *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987); *People v. Sorensen*, 68 Cal. 2d 280 (1968).

Adopting Petitioner's argument would distort the plain text of A.R.S. § 25-814, overrule this Court's precedent in *Worcester*, depart from settled principles of family law that prevail throughout the rest of the country, and leave countless Arizona children without the protection and security of two legal parents.

II. Under *Obergefell*, the Presumption-of-Parentage Statute Must Apply to All Spouses, Regardless of Whether They Are Male or Female.

Arizona's presumption-of-parentage statute establishes presumptive parentage for a spouse of a married woman who gives birth, regardless of whether that spouse is male or female. The statute provides that "[a] man is presumed to be the father of the child if . . . . [h]e and the mother of the child were married at any time in the ten months immediately preceding the birth." A.R.S. § 25-814. Although the statute refers to "man," "father," and "paternity," the legislature has

instructed that, when interpreting its statutes, "[w]ords of the masculine gender include the feminine and the neuter," and "[w]ords of the feminine gender include the masculine and the neuter." A.R.S. § 1-214(C)-(D).

Thus, when two women are married, a "[woman] is presumed to be the [mother] of the child if . . . [she] and the mother of the child were married at any time in the ten months before the preceding birth." A.R.S. § 25-814. And, as discussed above, unless the woman who gave birth seeks to establish that another person is the biological father and legal parent, she cannot rebut the presumption that her spouse is a legal parent.

Any other interpretation would render the statute unconstitutional under *Obergefell*, which requires that States allow same-sex couples to marry "on the same terms and conditions as accorded to" different-sex couples and with "all the benefits afforded to" different-sex couples. 135 S. Ct. at 2604. *Obergefell* explained that "the fundamental character of the marriage right" under the Constitution includes equal access to the "symbolic recognition and material benefits to protect and nourish the union." *Id.* at 2601. The Supreme Court, therefore, expressly declined to "stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples." *Id.* at 2606.

Obergefell expressly recognized that the central terms and conditions of "marital status include . . . child custody, support, and visitation rules." *Id.* at 2601. The plaintiffs in *Obergefell* included a same-sex couple—April DeBoer and Jayne Rowse—who sought to legally marry in order to provide their children with the protection of two legal parents. *See id.* at 2595. When it ruled in their favor, the *Obergefell* Court specifically noted that one of the primary functions of civil marriage is to "safeguard[] children and families" by providing them "the recognition, stability, and predictability" of two legal parents. *Id.* at 2590. *See Marie v. Mosier*, 196 F. Supp. 3d 1202, 1219 (D. Kan. 2016) ("*Obergefell* requires every state to treat same-sex married couples the same way it treats opposite-sex married couples. This includes the marital benefits of raising children together, with the same certainty and stability given opposite-sex couples.") (citation omitted).

In the wake of *Obergefell*, court after court has held that that the decision prohibits States from treating married same-sex couples differently from married different-sex couples with respect to legal parentage.[2] In this case, even Petitioner

[2] *See Henderson v. Adams*, 209 F. Supp. 3d 1059 (S.D. Ind. 2016), *appeal docketed*, No. 17-1141 (7th Cir. Jan. 23, 2017) (applying presumption of parentage to female spouses of women who give birth); *Roe v. Patton*, No. 2:15-cv-288, 2015 WL 4476734, at *3 (D. Utah Jul. 22, 2015) (granting preliminary injunction requiring Utah to recognize legal parentage of female spouse of woman who gives birth); *see also 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

concedes that there is no basis for treating the male spouses of women who give birth with donor sperm differently from the female spouses of women who give birth with donor sperm. *See* Pet. for Rev. at 7. In both instances, the spouse's parental status is not based on a biological connection to the child. As the U.S. District Court in Utah recognized in *Roe v. Patton*, there is simply no "rational basis for the different treatment of male and female spouses of women who give birth through assisted reproduction involving the use of donor sperm." No. 2:15-CV-00253-DB, 2015 WL 4476734, at *3 (D. Utah July 22, 2015).

Because *Obergefell* requires equal treatment for married same-sex couples and married different-sex couples, the only way to apply A.R.S. § 25-814 in

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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); *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"); *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) (rejecting 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).

accordance with the Constitution is to apply the same presumption of parentage to *all* spouses of women who give birth with donor sperm, regardless of whether the spouse is male or female. "Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result)). In most cases, "extension, rather than nullification, is the proper course." *Califano*, 443 U.S. at 89; *accord Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984). There can be little doubt that the appropriate remedy in this case is to extend the protections of the statute to female spouses instead of nullifying the protections that currently exist for male spouses and their children. *Cf. Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) ("[I]nstead of striking [birth certificate statute] from the Code, we will preserve it as to married opposite-sex couples and require the Department to apply the statute to married lesbian couples.").

CONCLUSION

For the reasons set forth above, the Court of Appeals' decision should be affirmed.

Respectfully submitted, this 17th day of May, 2017.

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