COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12018

KAREN PARTENAN,
APPELLANT,

v.

JULIE GALLAGHER,
DEFENDANT – APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE PROBATE AND FAMILY COURT

BRIEF OF 42 LAW PROFESSORS ET AL. AS AMICI CURIAE

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Law professor *amici* respectfully submit this brief pursuant to the Court's solicitation of amicus briefs issued on December 23, 2015.

Interest of Amicus Curiae

Amici are law professors with expertise in parentage law and children's rights and can provide this Court with information about the history of parentage law, how courts across the country have decided cases involving unmarried same-sex parents conceiving children through assisted reproduction, and the relevant constitutional considerations in these cases. As scholars of family law, child welfare, and constitutional law, amici have a strong interest in ensuring that the law protects the bonded parent-child relationships that children form with their parents and that the law protects all children equally. Law professor amici include:

- Libby Adler, Professor of Law, Northeastern University School of Law
- Susan Frelich Appleton, Lemma Barkeloo & Phoebe Couzins Professor of Law, Washington University School of Law
- Carlos A. Ball, Distinguished Professor of Law, Rutgers University School of Law
- Katharine T. Bartlett, A. Kenneth Pye Professor of Law, Duke University School of Law

- Cynthia G. Bowman, Professor of Law, Cornell Law School
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- Nancy E. Dowd, Professor and David Levin Chair in Family Law, University of Florida Levin College of Law
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- Julie A. Nice, Herbst Foundation Professor of Law, University of San Francisco School of Law

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- Catherine J. Ross, Professor, George Washington University Law School and Visiting Scholar, Harvard Graduate School of Education

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- Julie Shapiro, Professor of Law, Faculty Fellow, Fred T. Korematsu Center for Law and Equality, Seattle University School of Law
- Katharine Silbaugh, Professor of Law and Law Alumni Scholar, Boston University School of Law
- Deirdre M. Smith, Professor and Director of the Cumberland Legal Aid Clinic, University of Maine School of Law
- Richard F. Storrow, Professor of Law, City University of New York School of Law
- Monica Teixeira de Sousa, Professor of Law, New England Law | Boston
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- Rhonda Wasserman, Professor of Law, University of Pittsburgh School of Law
- Lois A. Weithorn, Professor of Law, University of California, Hastings College of the Law
- Barbara Bennett Woodhouse, L.Q.C. Lamar Professor of Law, Emory University School of Law
- Jennifer Wriggins, Sumner T. Bernstein Professor of Law, University of Maine School of Law

The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida promotes the highest quality teaching, research and advocacy for children and

families and supports child-centered, evidence-based policies and practices in family law, dependency and juvenile justice systems. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry, and have many decades of experience in advocacy for children and youth in a variety of settings.

Statement of Issues

The Court has solicited amicus briefs on three questions. This brief addresses the first two:

1) Whether the plaintiff, whose same-sex partner gave birth to two children by artificial insemination with the plaintiff's consent during their relationship, was entitled to assert a claim of parentage pursuant to G. L. c. 46, § 4B ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband"), even though the couple was not married.

2) Whether the plaintiff was entitled to assert a claim of parentage pursuant to G. L. c. 209C, the so-called "paternity" statute governing children born

out of wedlock, even though she had no biological connection to the children.

Statement of the Case

Karen Partanen ("Partanen") and Julie Gallagher ("Gallagher")were in a committed relationship for over twelve years. During that time, they planned for, conceived and raised two children together, Jo and Ja. Partanen and Gallagher were, in all respects, equal parents to the children and openly held themselves out as a family.

After the couple ended their relationship, when the children were seven and four, Partanen filed a complaint to establish herself as a full legal parent of Jo and Ja. The trial court dismissed her complaint finding that she did not qualify as a legal parent under G. L. c. 46, § 4B or G. L. c. 209C, after which Partanen sought Direct Appellate Review by this Court.

Summary of Argument

As more children are born through assisted reproduction to unmarried parents, courts are called upon to determine their parentage so these children can have the support and care of two legal parents. This case raises an important issue under Massachusetts law: how to determine the parentage of

children born through assisted reproduction to unmarried couples who consented to the children's conception with the intent to parent them together. Here, the trial court held that Partanen could not establish legal parentage because she and Gallagher were not married when their children were born and because Partenan is not a biological parent.

Across the country, courts have recognized families like the one in this case and have protected their established parent-child bonds. Excluding these families from legal protection would relegate children born to unmarried parents through assisted reproduction to a new class of "illegitimate" children who are denied the security and stability of having two legal parents responsible for their support and care because of their parents' marital status.

Amici urge this Court to reverse the trial court's decision and determine the legal parentage of the children in this case based on the same principles applied to children with married parents, as numerous other states have done, consistent with constitutional, statutory, and doctrinal principles prohibiting the disparate treatment of children based on their parents' marital status. Specifically, amici

urge the Court to apply G. L. c. 46, § 4B equally to unmarried parents who conceived children through assisted reproduction with the intent to parent those children together. In addition, amici urge the Court to hold that when unmarried couples have children through assisted reproduction and then go on to live with their children and hold them out as their own, they can be legal parents under G. L. c. 209C, § 6(a)(4). Finally, amici explain that a birth parent has no constitutional right to prevent the identification of a second legal parent where the couple jointly decided to conceive a child through assisted reproduction with the intent to parent together; in such a case, the parents have equal constitutional rights that arise from their decision to procreate a child and the development of bonded parent-child relationships.[1]

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[1] Amici also support the additional arguments in Partanen's opening brief, but focus here on the application of these two statutory provisions to unmarried, same-sex parents who have intentionally conceived children through assisted reproduction, on how other states have interpreted similar statutory provisions to apply to these families, and on related constitutional issues.

Argument

I. CHILDREN BORN TO UNMARRIED COUPLES THROUGH ASSISTED REPRODUCTION SHOULD HAVE THE SAME PROTECTION AS CHILDREN BORN TO MARRIED COUPLES

A. Law and Policy Rightly Reject the Disparate Treatment of Nonmarital Children

The lower court's refusal to recognize Partanen as a parent because she and Gallagher were not married threatens to turn back the clock to the days when the law treated nonmarital children as "filius nullius": the children of no one. *See Powers v. Wilkinson*, 399 Mass. 650, 658 (1987). Upholding the lower court's decision would once again "divide[]... children into two classes, the privileged one whose parents were married and the subordinate one whose parents were not." Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 Stan. J. Civ. Rts. & Civ. Liberties 201, 212 (2009).

Before the last half century, the law treated children born to unmarried parents harshly. *See, e.g.*, Harry D. Krause, Illegitimacy: Law and Social Policy 2-5 (1971); Laurence Nolan, *Unwed Children and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in*

Constitutional Jurisprudence, 28 Cap. U. L. Rev. 1, 1 (1999). Nonmarital children generally had no right to support or inheritance from both parents, no right to bring a wrongful death suit on behalf of a deceased father, and no right to benefits provided to surviving children of married fathers. Krause, *supra*, at 3; Nolan, *supra*, at 8-9. These children were usually considered legally unrelated to their fathers, without the right to maintain a relationship with their fathers even if the fathers had lived with their children and developed a close and loving relationship with them. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 648 (1972) (striking down statutory scheme under which an unmarried father was "treated not as a parent, but as a stranger to his children").

Starting in the late 1960s, "the U.S. Supreme Court decided a series of cases on the basis of the Equal Protection Clause of the Federal Constitution which established the principle that the [nonmarital] child is entitled to legal equality with the [marital] child." Harry D. Krause, *The Uniform Parentage Act*, 8 Fam. L.Q. 1, 1 (1974). In one of these cases, the Supreme Court explained: "[I]mposing disabilities on the [nonmarital] child is contrary to the basic

concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). "Obviously, no child is responsible for his birth and penalizing [a nonmarital] child is an ineffectual - as well as an unjust - way of deterring the parent." *Id.*; *see also Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (denying nonmarital children right to recover for the wrongful death of their mother constituted invidious discrimination).

Following these Supreme Court decisions, the National Conference of Commissioners on Uniform State Laws[2] adopted the Uniform Parentage Act ("UPA") in 1973 to provide equal protections for marital and nonmarital children. Section 2 of the 1973 UPA states: "The parent and child relationship extends equally to every child and every parent, regardless of marital status of the parent." Unif. Parentage Act § 2, cmt. (1973), *available at* http://www.uniformlaws.org/shared/docs/parentage/upa73

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[2] NCCUSL has since changed its name and is now the Uniform Law Commission.

.pdf. This provision was considered one of "the major substantive sections" of the UPA. *Id.*, § 2, cmt.[3] Massachusetts embraced these changes, and the Commonwealth's law now provides that "children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children." G. L. c. 209C, § 1. "Society has come to recognize that discrimination against [nonmarital] children is not justified. . . . [T]he trend of the law has been to remove the disadvantages placed on [nonmarital] children." *C.C. v. A.B.*, 406 Mass. 679, 685 (1990).

B. The Protections in § 4B Should Be Applied Equally to Nonmarital Children Born Through Assisted Reproduction

Amici urge this Court to hold that G. L. c. 46, § 4B, ("§ 4B") applies to unmarried parents who

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[3] The UPA has "greatly influenced new laws in every state." Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 Stan. J. Civ. Rts. & Civ. Liberties 201, 211 (2009). It has been adopted in some form in twenty-one states, "stretching from Delaware to California; in addition, many other states have enacted significant portions of it." Prefatory Note, Unif. Parentage Act (2002); Legislative Fact Sheet, Unif. Parentage Act (1973); Legislative Fact Sheet, Unif. Parentage Act (2002).

jointly conceive children through assisted reproduction, or in the alternative, that the same rule in § 4B can be applied to unmarried parents and their children under courts' equitable powers to protect the welfare of nonmarital children.

1. The history and purpose of § 4B supports equal application to nonmarital children

Massachusetts has enacted statutes that are substantially similar to key provisions of the UPA of 1973. Of particular relevance here, § 4B is similar to Section 5 of the UPA of 1973. *Compare* § 4B ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.") *with* Unif. Parentage Act § 5 (1973) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

The history and purpose of § 4B and its UPA counterpart strongly support equal treatment for nonmarital children born through assisted

reproduction. At the time the original UPA was written, state laws had not addressed the use of assisted reproduction. Section 5 addressed one of the most common situations in which assisted reproduction was used. It was not intended to cover the entire field or to preclude courts from applying similar rules to determine the parentage of children born through assisted reproduction in other circumstances.[4] The official comments to the UPA of 1973 explained: "This Act does not deal with many complex and serious legal problems raised by the practice of artificial

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[4] Since 1973, assisted reproductive technology and options for creating families have advanced significantly. In light of those changes and the constitutional requirement to treat nonmarital children equally, the UPA of 2002 and a number of states have expressly addressed the use of assisted reproduction by unmarried parents (including both same-sex and different-sex couples), applying the same rule used to determine the parentage of marital children. Unif. Parentage Act § 703 (2002); Cal. Fam. Code § 7613 (a); DC Code § 16-909 (e)(1); 13 Del.C. §§ 8-703; Nev. Rev. Stat. Ann. § 126.670; N.H. Rev. Stat. Ann. § 168-B:2; N.M. Stat. Ann. § 40-11A-703; N.D. Cent. Code Ann. § 14-20-62; Wash. Rev. Code Ann. § 26.26.710; Wyo. Stat. Ann. § 14-2-904. Like the original UPA of 1973, these statutes do not purport to anticipate every permutation of assisted reproduction, but they recognize its increasing use by unmarried couples and the importance of securing equal protection for their children.

insemination. It was thought useful, however, to single out and cover in this Act at least one fact situation that occurs frequently." Unif. Parentage Act of 1973 § 5, cmt. (1973). It would contravene a core purpose of both the UPA and Massachusetts law – to put all children on equal footing – to apply § 4B only to marital children.[5]

This Court has held that other statutes that expressly protect only marital children must be applied equally to nonmarital children. This result is mandated by G. L. c. 209C, § 1, which requires that all children have an equal right to legal recognition of their parent and child relationships regardless of

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[5] Applying §4B equally to unmarried couples is also consistent with the Model Act Governing Assisted Reproductive Technology published by the American Bar Association (ABA) in 2008. This Act provides that "[a]n individual who provides gametes for, *or consents to*, assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child." American Bar Association, Model Act Governing Assisted Reproductive Technology, § 603 (2008) (emphasis added). This section focuses on the intent of the parents, rather than their marital status. The ABA has explicitly acknowledged that "unmarried persons frequently use ART and the drafters of the Model Act made every effort to provide for that reality." Charles P. Kindregan & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 Fam. L.Q. 203, 211 (2008).

the parents' marital status. In *Smith v. McDonald*, 458 Mass. 540, 546 (2010), this Court held that nonmarital children must be given the same protections under the Massachusetts statute governing custody when parents relocate, even though the statute expressly applied only to marital children. "While a statute governing divorced children is not applicable directly to nonmarital children, the legal equality of nonmarital children pursuant to G. L. c. 209C, § 1, dictates the same rule apply for children in comparable circumstances." *Id.*; *see also Matter of Walter*, 408 Mass. 584, 588 (1990) (recognizing that the "express purpose" of Chapter 209C is to "to establish a means for children born out of wedlock to have their paternity adjudicated and to obtain orders for support, custody, and visitation"); *Wakefield v. Hegarty*, 67 Mass. App. Ct. 772, 775 (2006)(holding that even where statutory protections refer only to marital children, a nonmarital child "is entitled to the same rights and protections of the law as other children.").

This Court has already held that § 4B must be applied to situations that are not expressly addressed by the statutory language. For example, this Court

held in *Adoption of a Minor* that § 4B applies to any form of assisted reproduction although the statute only refers to "artificial insemination." 471 Mass. 373 376 (2015). And in *Hunter v.* Rose, this Court held that § 4B applies to a woman who consented to her wife's insemination notwithstanding the statute's reference only to a "husband" who consents. 463 Mass. 488, 492-493 (2012).

2. In the alternative, the same rule in § 4B should be applied to nonmarital children in equity in order to protect their welfare

In the alternative, if this Court finds that § 4B does not apply to the children of unmarried parents, it should exercise its equitable powers to apply the same rule to these children to ensure that nonmarital children have the benefit of care and support from both of their parents. G. L. c. 215, § 6 grants probate and family courts jurisdiction to determine issues of parentage in equity, *Hodas v. Morin*, 442 Mass. 544, 547 (2004), and this Court has previously used this equitable jurisdiction to protect "children of nontraditional families." *E.N.O. v. L.M.M.*, 429 Mass. 824, 829 (1999) (holding that a woman could seek visitation as a de facto parent where she raised a

child born through assisted reproduction with her female partner, lived with the child and the biological mother as a family, actively parent the child, and developed a parent-child bond with the encouragement of the biological parent). Nonmarital children born through assisted reproduction have the same need as marital children for the security of having a legally-protected relationship with their two parents.

Courts in other states have used their equitable powers to apply assisted reproduction laws equally to nonmarital children so that these children can have the same rights as marital children to care and support from both of their parents. For example, the Illinois Supreme Court held that an unmarried man who consented to conception of a child through assisted reproduction was liable for the child's support even though no Illinois statute addressed this family structure because "[r]egardless of the method of conception, a child is born in need of support." *In re Parentage of M.J.*, 203 Ill. 2d 526, 541 (2003); *see also In re T.P.S.*, 978 N.E.2d 1070, 1079-80 (Ill. Ct. App. 2012) (holding that an unmarried woman who consented to her female partner's insemination was a

parent); *Dunkin v. Boskey*, 82 Cal. App. 4th 171, 188 (2000) (noting the legislature's "preference for the extension of parent and child relationship[s] equally to married and unmarried parties"); *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005) (holding that an unmarried couple who used assisted reproduction to have triplets were both legal parents).

Courts have long exercised equitable powers to protect children through assisted reproduction; indeed, across the country, assisted reproduction statutes largely codified common law and equitable decisions. For example, long before any state had enacted a statute addressing children born through assisted reproduction, courts applied equitable principles to hold that a husband who consented to his wife's insemination is a legal parent to ensure that parents conceiving children through assisted reproduction could be held responsible for their support. *People v. Sorensen*, 68 Cal. 2d 280, 285 (1968) ("One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly

responsible."). "Almost exclusively, courts which have addressed this issue have assigned paternal responsibility to the husband based on conduct evidencing his consent to the artificial insemination." *In re Baby Doe*, 291 S.C. 389, 392 (1987). And many states that statutorily protect children born to married couples through assisted reproduction initially protected such children through common law or equity. *Compare, e.g.*, Wis. Stat. Ann. § 891.40 *with L.M.S. v. S.L.S.*, 105 Wis.2d 118 (Ct. App. 1981); N.J. Stat. Ann. § 9:17-44 *with K.S. v. G.S.*, 182 N.J.Super. 102 (1981); N.Y. Dom. Rel. Law § 73 *with Adoption of Anonymous*, 74 Misc.2d 99 (Sur. Ct. 1973).[6]

Massachusetts should likewise recognize that the rule in § 4B can be applied to unmarried parents in equity if this Court finds that the statute itself does not apply. From the moment a child is born, parents may face difficult decisions with respect to who can act for the newborn infant, authorize medical

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[6] Massachusetts itself initially recognized a common law marital presumption of parentage, which was later codified. *C.C. v. A.B.*, 406 Mass. 679, 684 (1990).

treatment, consent to release from the hospital, and take other similar actions. In the event that the birth mother dies or is incapacitated during childbirth, the other parent's legal status and ability to make decisions for the child must be clear. Legal parentage is also necessary to ensure that the child can obtain health and survivorship benefits from both parents. *See, e.g., Culliton v. Beth Israel Deaconess Medical Center*, 435 Mass. 285, 292 (2001) (recognizing "the importance of establishing the rights and responsibilities of parents as soon as is practically possible"). Applying § 4B equally to marital and nonmarital children provides protections to all children from the moment of their birth.

The law fully protects children conceived by unmarried parents without assisted reproduction, recognizing that any parent who causes the conception of that child should be responsible for that child's care and support. Likewise, the law should fully protect nonmarital children whose parents intentionally caused their conception through assisted reproduction. Amici urge the Court to affirm the

Commonwealth's longstanding commitment to the welfare and equal protection of nonmarital children[7] by holding that their parentage must be determined based on the same rule applied to marital children in § 4B.

C. Denying Nonmarital Children the Protection of § 4B Would Be Unconstitutional

Denying the protections of § 4B to nonmarital children born through assisted reproduction would violate these children's equal protection rights. Laws discriminating between children born to married and unmarried parents are subject to heightened scrutiny; such laws are presumptively invalid and must be struck down unless the distinction is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). *See also, e.g., R.R.K. v. S.G.P.*, 400 Mass 12, 16 n. 2 (1987); *C.C. v. A.B.*, 406 Mass. 679, 685 (1990). Denying equal parentage rights to children born to unmarried parents through assisted reproduction cannot pass this test.

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[7] *See, e.g., Goodridge v. Dep't of Public Health*, 440 Mass. 309 (2003); *Lowell v. Kowalski*, 380 Mass. 663 (1980); *Culliton v. Beth Israel Deaconess Medical Center*, 435 Mass. 285 (2001); *Woodward v. Commissioner of Social Sec.*, 435 Mass. 536 (2002).

Children conceived by unmarried and married parents through assisted reproduction have the same need for security and depend upon their parents in the same way as marital children. Recognizing the legal status of both parents also vests the child with numerous financial, legal and emotional benefits that can only be secured by recognizing a legal parent-child relationship, which protects the child by requiring both parents to be legally responsible for the child's care and well-being. *See, e.g., Woodward v. Commissioner of Social Sec.*, 435 Mass. 536, 545-46 (2002) (enumerating the rights and benefits children receive from having recognized legal parents).

There is no legitimate reason for denying these protections to children born to unmarried parents, let alone an important reason. Limiting the protections of § 4B to married parents who conceive through assisted reproduction is not necessary for any evidentiary purpose because the statute already requires proof that the non-birth parent consented to the insemination with the intent to parent the child. The only apparent reason for limiting these parentage claims to married couples - preferring marital over nonmarital families - is not a constitutionally

permissible purpose. *See Weber*, 406 U.S. at 176 (discriminating against children in an attempt to encourage their parents to marry is "ineffectual . . . as well as . . . unjust" and is therefore unconstitutional). Creating a distinction that serves only to disadvantage children born to unmarried parents is precisely the type of disparate negative treatment that the United States Supreme Court recognized must be eradicated.

"[W]here a statute may be construed as either constitutional or unconstitutional, a construction will be adopted which avoids an unconstitutional interpretation." *Demetropolos v. Commonwealth*, 342 Mass. 658, 660 (1961). In order to avoid these serious constitutional concerns, this Court should interpret § 4B to apply equally to establish the parentage of children born to both married and unmarried parents.

II. AN UNMARRIED PARENT WHO CONSENTS TO HAVE A CHILD THROUGH ASSISTED REPRODUCTION AND THEN LIVES WITH AND HOLDS THE CHILD OUT AS HER OWN IS A LEGAL PARENT UNDER THE HOLDING OUT PROVISION IN CHAPTER 209C

Amici also urge this Court to hold that the presumption of legal parentage under the holding out provision in Chapter 209C § 6 (a)(4) ("Chapter 209C")

provides an additional avenue for recognizing the parentage of an unmarried partner who consents to have a child through assisted reproduction and then lives with and holds the child out as her own.[8] Amici ask this Court to clarify that this provision applies equally to both men and women, and that the absence of a biological connection to the child does not necessarily rebut the presumption.[9]

A. Many Other Courts Have Applied Holding out Provisions to Same-Sex Parents who Conceive Children Through Assisted Reproduction

Chapter 209C provides that "a man is presumed to be the father of a child . . . if while the child is under the age of majority, he, jointly with the mother, received the child into their home and openly held out the child as their child." Often referred to as the "holding out" provision, this type of provision

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[8] Amici urge this Court to treat nonmarital children equally by applying § 4B to these children that they can be protected from the moment of birth, just as marital children are.

[9] Any person who intentionally conceives a child through assisted reproduction and then goes on to live with the child and hold themselves out as a parent should be recognized as a legal parent. The Probate & Family Court then must determine the custody arrangement that serves the best interests of the child, including awarding joint or sole custody where appropriate.

first appeared in the Uniform Parentage Act of 1973 and was retained in the revised UPA of 2002.[10] It plays a critical role in the UPA's overarching goal of achieving parity for marital and nonmarital children. The comments to the revised UPA of 2002 note: "To more fully serve the goal of treating non-marital and marital children equally, the 'holding out' presumption is restored . . . . This mirrors the presumption applied to a married man . . . ." Unif. Parentage Act § 204, cmt. (2002) Just as a husband is presumed to be the legal father of a child born to a married woman, the holding out provision establishes a parallel presumption for children born to unmarried couples, providing that a man who has lived with a child and raised the child as his own is likewise presumed to be the child's legal father.

Many state courts have applied their holding out provisions to determine the parentage of children born to unmarried female couples through assisted

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[10] The holding out provision in the UPA of 1973 provided that a man was presumed to be a father if "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child." Unif. Parentage Act § 5 (1973).

reproduction. *See, e.g., Elisa B. v. Superior Court*, 37 Cal.4th 108, 125 (2005) (holding that a woman who consented to have twins through assisted reproduction with another woman was a legal parent); *Frazier v. Goudschaal*, 296 Kan. 730, 746-47(2013). *Accord Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283, 293 (N.M. 2012) (woman who raised a child adopted as a newborn by her female partner was a legal parent under New Mexico's holding out law); *In re Parental Responsibilities of A.R.L.*, 2013 COA 170, ¶ 20, 318 P.3d 581 (Colo. Ct. App. 2013).

For example, in *Elisa B.*, a female couple had twins using assisted reproduction, including one child with serious disabilities. 37 Cal.4th at 114. After the parents separated, the non-biological mother sought to avoid her obligation to support the children. *Id.* at 115. The California Supreme Court held that Cal. Fam. Code § 7611(d), which provided that "[a] man is presumed to be the natural father of a child if . . . [h]e receives the child into his home and openly holds out the child as his natural child," applied to a woman who had raised two children with their biological mother. *Id.* at 119. Massachusetts'

holding out provision is nearly identical to the California statute. *See* G. L. c. 209C, § 6.

This Court should likewise recognize that the holding out provision must be applied to women even though it uses the terms "man" and "father." This result is mandated by G. L. c. 209C, § 21, which provides that: "Insofar as practicable, the provisions of [Chapter 209C] applicable to establishing paternity shall apply." Other states have applied holding out provisions equally to women based on statutory language virtually identical to § 21. *Elisa B.*, 37 Cal. 4th at 119 (holding that Cal. Fam. Code § 7650, which provides that "[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship apply" to the "mother and child relationship" means that the holding out provision must be applied equally to women); *Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283, 287; *Frazier v. Goudschaal*, 296 Kan. 730, 735 (2013); *In re Parental Responsibilities of A.R.L.*, 2013 COA 170, ¶ 20, 318 P.3d 581, 584-85. *Accord In Re Guardianship of Madelyn B.*, 166 N.H. 453, 462 (2014) (holding out provision applied to women under general principles of statutory interpretation requiring gender-neutral reading of

statutes). This Court has already held that another provision in Chapter 209C - § 6 (a)(1) - must be applied to wives even though its language refers only to husbands. *Hunter v. Rose*, 463 Mass. 488, 491 (2012).

This Court should also hold that the absence of a biological connection does not necessarily rebut the presumption of parentage under the holding out provision. The absence of a biological tie does not necessarily rebut the marital presumption, particularly where a parent has lived with a child and established a parent-child bond. *Id.* (applying marital presumption equally to same-sex female couples where one spouse was not biologically related to the child); *see also Ex parte Presse*, 554 SO.2d 406 (Ala. 1989) (man claiming to be biological father of child born during marriage of mother to another man did not have standing to initiate parentage action or to rebut paternity of mother's husband); *Dawn D. v. Superior Court*, 17 Cal. 4th 932 (1998) (same). The holding out provision, which provides parallel protection for nonmarital children, should likewise not necessarily be rebutted merely because a presumed parent is not biologically related to the child.

Other courts have rejected arguments that a holding out parent must be biologically related to a child. The New Hampshire Supreme Court explained in *Madelyn B.*: "The familial relationship between a nonbiological [parent] and an older child [over two years of age], resulting from years of living together in a purported parent/child relationship . . . should not be lightly dissolved." 166 N.H. at 461. For this reason, "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family." *Id.* (internal citations omitted); *see also In re Paternity of Cheryl*, 434 Mass. 23, 31 (2001) ("consideration of what is in a child's best interests will often weigh more heavily than the genetic link between parent and child"); *Frazier v. Goudschaal*, 296 Kan. 730, 746 (2013) (noting numerous circumstances under which "the parental relationship for a father can be legally established . . . without the father actually being a biological or adoptive parent"); *Chatterjee v. King*, 280 P.3d at 293; *In re Parental Responsibilities of A.R.L.*, 2013 COA 170, ¶ 20, 318 P.3d at 584; *St. Mary v. Damon*, 309 P.3d, 1027 1032 (Nev. 2013) (explaining that "a determination of

parentage rests upon a wide array of considerations rather than genetics alone").

Finally, this Court should follow the reasoning of other states and recognize that unmarried parents who conceived children through assisted reproduction should not be required to adopt in order to protect the children's rights. The children in this case and others like them had no choice about the circumstance of their birth, and they should not be penalized for having unmarried parents or parents who did not take steps to adopt them before a dispute arose. *See Stanley v. Illinois*, 405 U.S. at 648 (holding that children of unmarried father should not be punished by their father's "failure to petition for adoption"). In a case applying New Mexico's holding out provision to an unmarried same-sex couple, the New Mexico Supreme Court explained that the very purpose of parentage presumptions is to ensure that parent-child relationships are protected even when a parent "has not taken any steps to legalize that relationship." *Chatterjee*, 280 P.3d at 296.

Holding that nonmarital children conceived through assisted reproduction can have two parents only if their parents adopted them also contradicts

the Commonwealth's policy that children should be supported and cared for by both of their parents where possible. The people who bring children into the world, rather than taxpayers, should be primarily responsible for their children's care and support. Chapter 209C was enacted to improve the collection of child support from parents and to "provide economic justice for vulnerable families." Office of Governor Michael S. Dukakis, News Release: Dukakis Signs Sweeping Child Support Legislation; Says New Law Will Provide Economic Justice for Vulnerable Families, (July 22, 1986). This was based, in part, on findings that "the emotional and economic costs of divorce, separation and single parenthood are high for all parties involved and no party pays a higher price than the innocent child." Governor's Office of Human Resources, *Fact Sheet: Recommendations of the Governor's Commission on Child Support*, 2 (Oct. 30, 1985). Severing "a substantial parent-child relationship" where the parent "has provided the child with consistent and emotional and financial support," and has sought to protect the "financial security and other legal rights" of the child has a "devastating"

effect on a child. *In re Paternity of Cheryl*, 434 Mass. 23, 32, 38 (2001).

This Court should follow the decisions of other states and hold that an unmarried woman like Partanen who consented to the conception of children through assisted reproduction and then lived with her children and held herself out as the children's parent can be a parent under Chapter 209C.

However, if this Court finds that Chapter 209C § 6(a)(4) does not apply to Partanen, this Court is empowered to apply the same rule in this provision to Partanen by exercising its equitable powers to protect the welfare of children. *See* G. L. c. 215, § 6; *Hodas v. Morin*, 442 Mass. 544, 547 (2004) (explaining that Massachusetts courts have equitable powers to determine questions of parentage where statutes do not apply).[11] Amici urge this Court to hold that the

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[11] Other states have likewise recognized that, where statutes do not apply, equity can recognize as a legal parent a person who consents to the conception of a child through assisted reproduction and then parents the child with the encouragement of the biological parent. *See In re Parentage of L.B.*, 155 Wash. 2d 679, 683 (2005) ("Washington's common law recognizes the status of *de facto* parents and grants them standing to petition for a determination of the rights and responsibilities that accompany legal

presumption of legal parentage under the holding out provision in Chapter 209C applies to a woman who lives with a child where both parents held her out as a parent, either through statutory interpretation or in equity, and that the absence of a biological connection to the child does not rebut the presumption.

B. Application of the Holding out Provision in These Circumstances is Constitutionally Required

Refusing to apply Chapter 209C to women would violate their right to equal protection under the state and federal Constitutions. Under Article 106 of the Amendments to the Massachusetts Constitution (amending Article I to the Declaration of Rights), statutes that discriminate based on sex are subject to the strictest judicial scrutiny and "are permissible only if they further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose."

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parentage in this state."); *C.E.W. v. D.E.W.*, 2004 ME 43 (2004), 845 A.2d 1146; *T.B. v. L.R.M.*, 567 Pa. 222, 228-29 (2001); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *Latham v. Schwerdtfeger*, 282 Neb. 121 (2011).

See Commonwealth v. King, 374 Mass. 5, 21, (1977) (holding that "the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic, and religious discrimination."). Sex-based classifications are subject to heightened scrutiny under the federal Constitution as well, which requires that they must be supported by "an exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Here, applying the holding out presumption only to men would create a sex-based classification by providing men a means of establishing legal parentage that is closed off to all women. Persons of either gender can receive a child into their home and hold a child out as their own, and both women and men have an equally strong interest in protecting the resulting parent-child bonds.[12]

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[12] As explained above, when assisted reproduction is used to conceive a child, the holding out presumption should not be rebutted based on the child's lack of biological connection to the second parent, regardless of the gender of the parent.

This Court should apply the same analysis it applied in *Hunter v. Rose*, where it held that the marital presumption of parentage in G. L. c. 209C, § 6 and the recognition of spouses who consent to assisted reproduction as parents in § 4B must be applied equally to male and female spouses of birth mothers. 463 Mass. 488, 493. As explained above in Section II, G. L. c. 209C, § 6(a)(4) is intended as a corollary to the marital presumption of parentage and affords nonmarital children the equivalent protections of G. L. c. 209C, § 6(a)(1). There is no important or compelling reason why statutes providing parentage protections to married couples should be applied gender-neutrally, as this Court did in *Hunter*, while the parentage protections afforded to unmarried couples, like the holding out provision, are limited to men.

III. BOTH PARENTS WHO CONCEIVE A CHILD THROUGH ASSISTED REPRODUCTION HAVE EQUAL CONSTITUTIONAL RIGHTS TO PRESERVE THEIR RELATIONSHIP WITH THEIR CHILDREN

When two people jointly decide to conceive children through assisted reproduction with the intent to parent the child together, the biological parent has no constitutional right to prevent the other

parent from being legally recognized as a parent. Both parents have equal constitutional rights to maintain and preserve their relationship with their children. The core of the parent-child relationship protected by the Due Process Clause derives not from biology, but rather from the "emotional bonds that develop between family members as a result of shared daily life." *V.C. v. M.J.B.*, 163 N.J. 200, 221 (2000) citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). In *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977), the U.S. Supreme Court explained:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

Accordingly, biology alone is neither necessary nor sufficient to establish this constitutionally protected parental relationship. In *Michael H. v. Gerald D.*, 491 U.S. 110, 119-30 (1989), the Supreme held that even where a child's biological parent is known and that person seeks to establish his legal parentage, the child's established relationship with a

non-biological parent can be protected. The Court held that California could prevent a biological father from bringing a paternity case when the child already had an established relationship with a presumed father. *Id.* at 124; *see also C.C. v. A.B.*, 406 Mass. at 691 (holding that a husband who has an established parent-child relationship has a protected constitutional interest against the claims of a putative biological father where the putative father has no substantial parent-child relationship with the child). This Court has also recognized that adoptive parents have the same protected constitutional rights as biological parents, despite their obvious lack of a genetic connection to their children. *See In re Adoption of Vito*, 431 Mass. 550, 562 (2000).

Some have argued that finding a non-biological parent to be a legal parent interferes with a biological parent's due process rights, citing the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). However, *Troxel* is not relevant to determinations of parentage; rather, *Troxel* applies only to a request for custody or visitation by a third party who does not have an established parental relationship and who was not involved in the decision

to conceive the child. In *Troxel*, the Court held that allowing grandparents who did not have a bonded parent-child relationship to seek visitation without placing any special weight on the wishes of the legal parent infringed upon the constitutional rights of the child's legal parent. In contrast, this case involves the right of a parent to seek custody and other parental rights with regards to her own children. *Troxel* reaffirmed the Supreme Court's longstanding recognition of parents' fundamental right to the care and custody of their children as superior to that of third parties who do not have a parental relationship with their child. As explained above, longstanding Supreme Court precedent also provides this protection equally to parents regardless of biological ties, so both Gallagher and Partanen have the same fundamental right to the care and custody of their children under *Troxel*.

Other states have held that *Troxel* does not apply to parentage determinations. For example, in *Charisma R. v. Kristina S.*, the former same-sex partner of a biological parent sought to establish her rights as a parent under California parentage statutes. 175 Cal. App. 4th 361, 387-88 (2009). The biological parent

argued that, pursuant to the Supreme Court's holding in *Troxel*, a finding that Charisma was a parent of the children would violate her fundamental right as a parent to care and control of her child. *Id.* at 386. The California Court of Appeals found that *Troxel* was "inapposite," explaining that in *Troxel* "the court considered a nonparental visitation statute," whereas "declaring [Charisma] a parent is not giving parental rights to an unrelated individual; it is recognizing the parental role that existed from birth." *Id.* at 387-88. *See also, e.g., Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011) (no violation of adoptive mother's constitutional rights as a parent where former same-sex partner was held to be a co-equal legal parent); *In re Parentage of A.B.*, 837 N.E.2d 965, 967 (Ind. 2005) (biological mother's rights were not violated by allowing non-biological mother to bring an action to determine her parentage); *Frazier v. Goudschaal*, 296 Kan. 730, 753 (2013) (same); *T.B. v. L.R.M.*, 567 Pa. 222, 233 (2001) (same); *In re Parentage of L.B.*, 155 Wash. 2d 679, 712 (2005) (same); *In re T.P.S.*, 978 N.E.2d 1070, 1084-85 (biological mother had no constitutional right to object to determination that non-biological mother's parentage where they had both

agreed to have children through assisted reproduction).

Amici urge this Court to follow sister state decisions that have recognized that an existing parent has no constitutional right to object to the identification of a second legal parent where the children were conceived through assisted reproduction and both parents intended to parent the children together.

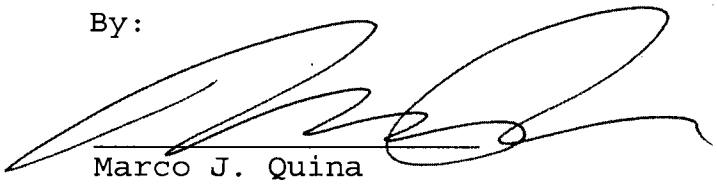
Conclusion

For the foregoing reasons, amici request that this Court reverse the trial court order and remand the case so that Partanen may be adjudicated as a legal parent.

Dated: March 11, 2016

Respectfully submitted,

By:



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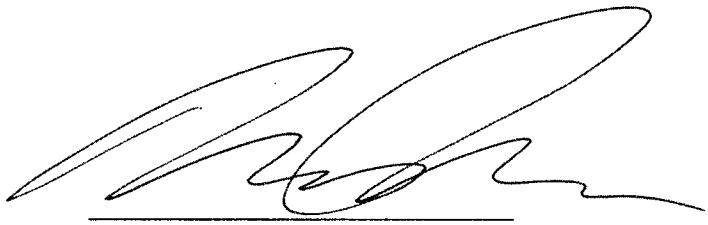
Certification of Compliance With Massachusetts Rules of Appellate Procedure

As required by Mass. R.A.P. 16(k), Counsel certifies that this Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6); Mass. R.A.P. 16(e); Mass. R.A.P. 16(f); Mass. R.A.P. 16(h); Mass. R.A.P. 18; and Mass. R.A.P. 20.



March 11, 2016 Marco J. Quina

Certificate of Service

The undersigned hereby certifies under the penalties of perjury that two copies of the foregoing Brief of 42 Law Professors Et Al. as Amici Curiae, were served on the 11th day of March, 2016 via U.S. First Class Mail, postage prepaid, upon each of the parties noted below:

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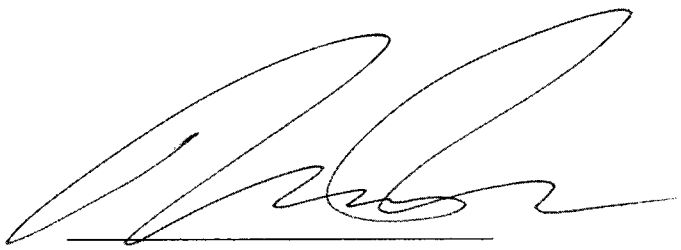

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