COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12018

KAREN PARTANEN,
Plaintiff-Appellant,

v.

JULIE GALLAGHER,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF
THE PROBATE AND FAMILY COURT

BRIEF FOR AMICI CURIAE AMERICAN ACADEMY OF ASSISTED REPRODUCTIVE TECHNOLOGY ATTORNEYS, BOSTON IVF, FENWAY HEALTH, IVF NEW ENGLAND, NEW ENGLAND FERTILITY SOCIETY, PATH2PARENTHOOD, RESOLVE: THE NATIONAL INFERTILITY ASSOCIATION, AND RESOLVE NEW ENGLAND IN SUPPORT OF PLAINTIFF-APPELLANT KAREN PARTANEN

EMILY R. SCHULMAN (BBO #566374)
BROOK HOPKINS (BBO #683871)
ADAM M. CAMBIER (BBO #690525)

WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6000
emily.schulman@wilmerhale.com
brook.hopkins@wilmerhale.com
adam.cambier@wilmerhale.com

Attorneys for Amici Curiae

March 21, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Amicus IVF New England is a corporation organized under the laws of Massachusetts. Boston IVF is the parent company of IVF New England. No publicly held corporation owns more than 10% of the stock of IVF New England.

Pursuant to Supreme Judicial Court Rule 1:21, Amicus Boston IVF is a corporation organized under the laws of Massachusetts. No publicly held corporation owns more than 10% of the stock of Boston IVF.

Pursuant to Supreme Judicial Court Rule 1:21, Amici Curiae American Academy of Assisted Reproductive Technology Attorneys, Fenway Health, New England Fertility Society, Path2Parenthood, RESOLVE: The National Infertility Association, and RESOLVE New England hereby state that they have no parent corporation and that no publicly held company owns 10% or more of their stock.

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Amici curiae American Academy of Assisted Reproductive Technology Attorneys, Boston IVF, Fenway Health, IVF New England, New England Fertility Society, Path2Parenthood, RESOLVE: The National Fertility Association, and RESOLVE New England respectfully submit this brief pursuant to the Court's December 23, 2015 announcement soliciting amicus briefs in this case.

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Academy of Assisted Reproductive Technology Attorneys (AAARTA), a specialty division of the American Academy of Adoption Attorneys, is an international, not-for-profit professional organization of attorneys, law professors, and judges who have distinguished themselves in and are committed to the ethical practice of assisted reproductive technology law. AAARTA is a credentialed professional organization with a binding Code of Ethics that is dedicated to the best legal practices in the area of assisted reproduction and to the advancement and protection of the interests of all parties, including

[1] Pursuant to Aspinall v. Philip Morris Cos., 442 Mass. 381, 480 n.8 (2004), undersigned counsel state that Wilmer Cutler Pickering Hale and Dorr LLP does not represent any of the parties to this case in other litigation presenting the same issues in this case. No counsel for a party authored this brief in whole or in part, nor has any party made a monetary contribution intended to fund the preparation or submission of this brief.

children, involved in assisted reproductive technology. AAARTA attorneys are committed to ensuring that donors and gestational carriers are fully aware of their rights and responsibilities and to helping intended parents secure permanent legal relationships with the children born as a result of assisted reproduction.

Boston IVF is a leading fertility center providing reproductive technologies and exceptional patient care that has helped individuals and couples bear 50,000 babies since 1986. Boston IVF believes that parenthood is a gift everyone has the right to experience, and now many can who could not before, even if one or both parents have no genetic connection to the child. Boston IVF also believes that the courts should determine the parentage of all children, including those born through donor sperm or donor eggs, in accord with the parties' intent and conduct -- and regardless of a genetic connection to the child.

Fenway Health is a federally qualified health center that services about 26,000 patients each year. The mission of Fenway Health is to enhance the wellbeing of those who are lesbian, gay, bisexual, and transgender (LGBT), as well as people living with HIV/AIDS and the larger community. We do this through

access to the highest quality health care, education, research, and advocacy. Fenway Health believes that it is in the best interest of the child that same-sex couples who used assisted reproductive technology be granted access to the full protections of legal parenthood.

IVF New England was founded in 1988 and is one of the largest IVF centers in New England and the nation. With clinics in Massachusetts, New Hampshire, and Rhode Island, IVF New England's highly skilled fertility specialist physicians and embryology scientists have helped to conceive over 30,000 babies. IVF New England prioritizes quality clinical and personal care. IVF New England believes that when a couple endeavors to bring a child into the world, the child's interests are best served when the law recognizes the intended parents in situations where the child has been conceived with donor gametes (donor sperm or donor eggs).

The New England Fertility Society (NEFS) is an inclusive, voluntary, non-profit organization providing continuing education for all members and other infertility professionals with a special interest in the field of fertility. The Society is dedicated to promoting awareness, standards of information, and assistance to providers and

ultimately patients in the field of infertility in New England. Members must demonstrate high ethical principles in their medical profession, be invested in the field of infertility, reproductive medicine, and reproductive biology, and adhere to the bylaws of the Society.

Path2Parenthood (P2P) is a national non-profit organization founded in 1999 that provides information about infertility causes and treatments, and reproductive and sexual health. P2P assists people in building families, including through adoption and third party solutions, serving as a resource to hopeful parents as well as to health care professionals and public officials. This information is made available online at www.path2parenthood.org, http://www.theafa.org, and at leading-edge outreach education events across the country. Services are free of charge to consumers, and feature a daily blog, an extensive online library with articles updated weekly, high-definition videos, fact sheets, and a fertility and adoption directory. A professional network listing physicians, attorneys, psychologists, and complimentary care practitioners is also available online. All materials are fully vetted by the P2P Medical Advisory Council. When individuals or couples create families with children, P2P believes that the

law needs to protect those children by ensuring that those who planned to and will raise them are determined to be their parents, ideally before their birth.

RESOLVE: The National Infertility Association, established in 1974, is a non-profit organization of patient advocates who work to provide legal protections for infertile persons and increase access to all family building options including medical care, while also providing information, on-line support communities, and a nationwide professional resources directory for individuals and couples seeking to build a family. RESOLVE is the only organization with a nationwide network mandated to promote reproductive health and to ensure equal access to all family building options for men and women experiencing infertility or other reproductive disorders. RESOLVE's constituents and professional members reside in every state, and it has served persons from every state over many years. RESOLVE supports gestational carrier agreements in which the parties enter into a legal agreement to protect the rights of the children to be raised by their intended parents.

RESOLVE New England (RNE), established in 1974, is a non-profit organization providing infertility education, support, and advocacy throughout New

England. RNE serves as a progressive driving force connecting members of the New England community on the many paths to parenthood. For prospective parents seeking to build a family, RNE provides a network of peer support groups, an annual conference, information sharing, as well as educational seminars about topics including donor conception and adoption. When fertility treatments involve a third party, such as a sperm donor, an egg donor, or a gestational surrogate, RNE believes that the child's interests are best served when the law recognizes the parental status of the intended parents, regardless of any genetic or biological ties to the child and regardless of the marital status of those parents.

ISSUES PRESENTED

1. Where two children were born to and raised by an unmarried same-sex couple, did the Trial Court err in dismissing the parentage complaint of a mother under G. L. c. 209C because she lacks a "biological" relationship with the children?

2. Where two children were planned and born via assisted reproduction with mutual consent, did the Trial Court err in dismissing a parentage complaint under G. L. c. 46, § 4B, because the parents were a nonmarital couple?

3. Where two children were born to and raised

by an unmarried same-sex couple, did the Trial Court err in dismissing the parentage complaint rather than extending the remedy of full parentage through its equity jurisdiction pursuant to G. L. c. 215, § 6?

SUMMARY OF ARGUMENT

Nearly five percent of children born in Massachusetts -- thousands each year -- are conceived through the use of assisted reproductive technology (ART). None is conceived accidentally; each is wanted dearly. Each is the product of a deliberate, concerted, often highly emotional process that her parent (or parents) elects to undergo because of a fervent desire to be a parent.

For many of the Massachusetts residents who use ART to bring a child into their family, at least one intended parent has no genetic connection to the child. Their families are a testament to the fact that the parent-child bond does not depend on or derive from genetics. Children born as a result of ART, like all children, form strong relationships with their parents regardless of genetics or the sexual orientation or marital status of their parents. And like all children, they need the physical, emotional, and financial support that both parents provide.

While ART has expanded the means by which one may become a parent, it has not altered our fundamental

understanding of what it is to be a parent. This Court has long recognized that essential truth, and through interpretation of existing statutes and the use of its equitable powers, it has recognized and conferred much-needed legal protection to families formed through ART. And in the absence of specific statutory direction, it has been guided by an abiding concern for the intentions of parents and the best interests of the child to determine the legal rights and responsibilities of parents and children joined through ART.

The same approach should be taken here. The parents' intentions, the capaciousness of the existing statutes, and the children's overriding interest in protecting and preserving the stability and security of their existing parent-child relationship should be factored into the parentage decision. Otherwise, an entire class of families and children could be barred from straightforward access to the protections of legal parenthood. By forcing parents like Karen Partanen to rely on the de facto parentage doctrine, the lower court's decision injects a measure of instability into a class of families formed through ART and deprives children born through ART in those families of critical avenues of emotional and financial support that are reliably guaranteed only by

a legal parent-child relationship.

ARGUMENT

I. MASSACHUSETTS LAW EMBRACES AND PROTECTS THE DIFFERENT PATHWAYS TO PARENTHOOD AFFORDED BY ART

Advancements in ART and its increasing availability have provided many people who could not otherwise conceive a child the opportunity to become parents. ART -- a broad term encompassing artificial insemination, in vitro fertilization (IVF), gestational surrogacy, and other fertility procedures -- allows infertile and same-sex couples as well as un-partnered individuals to create families in ways that were formerly impossible.[2] As of 2013, more than five million babies across the country had been born through the assistance of ART (excluding artificial insemination).[3] In 2013, about 1.6% of all infants

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[2] ART takes many different forms and can implicate numerous different parties. Artificial insemination, for example, is the "process for achieving conception, whereby semen is inserted into a woman's vagina by some means other than intercourse." Adoption of a Minor, 471 Mass. 373, 374 n.2 (2015) (internal quotation marks omitted). In vitro fertilization (IVF) -- "[a] procedure by which an egg is fertilized outside a woman's body and then inserted into the womb for gestation," id. -- may involve the use of donor sperm or donor eggs, known or unknown. IVF may also involve a gestational surrogate, who carries the fetus for intended parents and gives birth to the child. See Black's Law Dictionary 956 (10th ed. 2014).

[3] Castillo, Report: 5 Million Babies Born Thanks to Assisted Reproductive Technologies, CBS News, Oct. 15, 2013, http://www.cbsnews.com/news/report-5-million-babies-born-thanks-to-assisted-reproductive-

born in the United States were the result of ART, with Massachusetts leading the nation in the percentage of births involving ART at 4.87% (again excluding artificial insemination).[4] Statistics for artificial insemination are more uncertain, but estimates range from 4,000 to as high as 35,000 births per year nationwide. See Krawiec, Altruism and Intermediation in the Market for Babies, 66 Wash. & Lee L. Rev. 203, 205 n.5 (2009). By creating new pathways to parenthood that do not rely on sexual reproduction, the use of ART has allowed many who would otherwise be excluded to share in the miracle of parenthood.

The Massachusetts Legislature has indicated its support for ART and for the protection of children regardless of the circumstances of their birth or their family structure. But because the variety of families formed through ART continues to proliferate, and because the relevant parentage and family law statutes were not crafted with same-sex couples and/or ART in mind, this Court has looked to the fundamental principles underlying the relevant statutes to keep pace with the evolution of family formation through

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technologies/.

[4] Sunderam et al., CDC Morbidity and Mortality Weekly Report: Assisted Reproductive Technology Surveillance — United States, 2013 (Dec. 4, 2015), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6411a1.htm.

ART. In case after case, Massachusetts courts have applied to families formed through ART the same protections afforded to all parents and children, honored the intentions of individuals who seek to become parents through ART, and acknowledged that parent-child relationships are created outside of marital and sexual contexts. The proper resolution of this case turns on application of those settled principles.

A. In Applying Parentage Statutes And Equitable Principles, This Court Has Consistently Sought To Effectuate The Intent Of Individuals Using ART And Further The Best Interests Of The Child

As this Court has noted, the Massachusetts Legislature "affirmatively support[s] . . . assistive reproductive technologies." Woodward v. Commissioner of Social Sec., 435 Mass. 536, 546-547 (2002). Among other interventions, the Legislature has mandated insurance coverage for infertility treatments, including ART, signaling the Legislature's affirmative support for citizens of the Commonwealth who choose to form a family in this way. See G. L. c. 175, § 47H; G. L. c. 176A, § 8K; G. L. c. 176B, § 4J; G. L. c. 176G, §4(e).

The Legislature has legislated specifically with respect to assisted reproduction in G. L. c. 46, § 4B, which states that "[a]ny 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." Massachusetts courts have interpreted the plain language of that provision to encompass a range of ART and families created through ART. This approach ensures that the fundamental directives of family law -- notably, that family and parenting arrangements of those who brought a child into the world serve the best interests of that child -- be honored.

Thus, while the statute expressly covers only children conceived through "artificial insemination," this Court has interpreted it broadly "to include parentage of a child born through the use of any assisted reproductive technology." Adoption of a Minor, 471 Mass. 373, 376 (2015), citing Okoli v. Okoli, 81 Mass. App. Ct. 371, 377 (2012) (concluding that G. L. c. 46, § 4B applies to IVF procedures). That conclusion is mandated in part by "the public policy underlying the statute, which looks principally to the interests of the child." Okoli, 81 Mass. App. Ct. at 377. Put differently, from the perspective of the interested child, it matters not whether he was conceived through ART. The "principal purpose underlying the statute" -- protecting the child -- remains the same in each case.

For the same reason, this Court interprets the statutory term "husband" to include both wives and domestic partners. In Hunter v. Rose, the term "husband" was held to include the nongenetic mother of a child born through artificial insemination of her partner with whom she had entered a domestic partnership under California law. 463 Mass. 488, 493 (2012). And in Adoption of a Minor, this Court held that the term "husband" in section 4B applied to the mother's female spouse. 471 Mass. at 376 & n.6; see also Della Corte v. Ramirez, 81 Mass. App. Ct. 906, 907 (2012), citing Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 343 n. 34 (2003) ("We do not read 'husband' to exclude same-sex married couples, but determine that same-sex married partners are similarly situated to heterosexual couples in these circumstances."). As this Court explained in Goodridge, it has long "repudiated" the provision of "varying levels of protection . . . based on the circumstances of birth." 440 Mass. at 334.

This Court has likewise extended certain protections and privileges to the parents and children in families formed through ART even when not explicitly granted by statute. The resulting body of law provides ART practitioners and family lawyers with some measure of clarity as they attempt to facilitate

family creation and maintain existing parent-child bonds in ways that reflect the intentions of prospective parents and safeguard the interests of children conceived through ART.

For example, in Culliton v. Beth Israel Deaconess Medical Center, 435 Mass. 285 (2001), this Court sanctioned a pathway to parenthood through gestational surrogacy despite the absence of statutory guidance on the issue. In Culliton, the genetic and intended mother and father of a child who was being carried by a gestational surrogate sought a prebirth declaration of parentage and an order designating them as parents on the birth certificate. Id. at 287. The Court noted that the paternity statute and the adoption statute were "inadequate and inappropriate" to resolve the issue, but it concluded that it was within the Probate and Family Court's general equity jurisdiction under G. L. c. 215, § 6 to determine parentage upon birth in gestational surrogacy situations. Id. at 290-292. Again, that conclusion was mandated by the court's role in "protecting the best interests of children," including by facilitating the "establish[ment of] the rights and responsibilities of parents as soon as is practically possible." Id. at 292 (internal quotation marks omitted); see also Hodas v. Morin, 442 Mass. 544, 533 n.16 (2004) ("[U]ntil and

unless the Legislature speaks to the contrary, the Commonwealth's paramount concern to protect the best interests of children requires that parties seeking prebirth declarations of parentage or a prebirth order follow the procedures set out in Culliton.").

Similarly, in Woodward, this Court held that children born to a woman who was artificially inseminated with the preserved sperm of her late husband could be eligible for inheritance rights, employing a three-part test that relied heavily on proof of his intent (which the Court called "consent") to parent and support any resulting children. 435 Mass. at 552-553. In the absence of direct guidance from the Legislature, the Court interpreted the intestacy laws broadly "to effectuate the Legislature's overriding purpose to promote the welfare of all children, notwithstanding restrictive common-law rules to the contrary." Id. at 547. It also gave weight to the Legislature's support for ART and rejected "the inherently irrational conclusion that assistive reproductive technologies are to be encouraged while a class of children who are the fruit of that technology are to have fewer rights and protections than other children." Id.; see also E.N.O. v. L.M.M., 429 Mass. 824, 827-828 (1999), cert. denied, 528 U.S. 1005 (1999) (upholding order granting

visitation rights notwithstanding that "no statute expressly permit[ted]" visitation, on the ground that the courts have a "duty as parens patriae" to "protect[] the best interests of [the] child[]" "even if the Legislature has not determined what the best interests require in a particular situation").

B. Massachusetts Has Recognized The Many Ways In Which Parent-Child Relationships Are Created Apart From Marital Or Genetic Ties

As cases involving families created using ART have arisen, this Court has taken a measured approach to questions about what makes a family and who is a parent of a particular child. This approach considers more than marital status and genetics; it also takes into account the intentions of parties, the importance of existing parent-child relationships, and the wellbeing of the child. In doing so, it ensures that children are attached to their intended parents.

With respect to genetics, the Court has generally recognized both that genetic ties do not necessarily establish parentage, and that an individual with no genetic ties to a child can be a parent. For example, in Paternity of Cheryl, 434 Mass. 23 (2001), the Court denied the plaintiff's request for relief from a paternity judgment after genetic tests established that he was not the genetic father. The Court noted that the plaintiff and the child had "a substantial

parent-child relationship" and that he had provided the child "with consistent emotional and financial support" and explained that "consideration of what is in a child's best interests will often weigh more heavily than the genetic link between parent and child." Id. at 31-32; see also Matter of Walter, 408 Mass. 584, 589 (1990) (affirming dismissal of action brought by adoption agency to challenge paternity of presumptive father through genetic testing because "adjudication of paternity in favor of the parent not asserting the claim, with no apparent interest in the child . . . is not in the best interest of the child where the presumptive father is willing and able to raise and support the child").

Likewise, in a case involving ART, this Court held that a known sperm donor is not a "lawful parent" for purposes of G. L. c. 210 §§ 2, 4, which govern the notice requirements of an adoption petition. Adoption of a Minor, 471 Mass. at 376-379. The Court explained that "[t]he reality today is that families take many different forms, and we recognize that a genetic connection 'between parent and child can no longer be the exclusive basis for imposing the rights or duties of parenthood.'" Id. at 378 n.8, quoting Kindregan, Collaborative Reproduction and Rethinking Parentage, 21 J. Am. Acad. Matrimonial Lawyers 43, 60 (2008).

Similarly, in Goodridge, this Court emphasized that parenthood is not defined by marital status. In holding that marriage was not at its core an institution based on child-rearing, the Court stated that the law does not "privilege procreative heterosexual intercourse between married people above every other . . . means of creating a family." 440 Mass. at 331. Indeed, not only does the Commonwealth not privilege any particular means of family creation, it "affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual." Id. at 332-333.

C. Other States And Model Parentage Laws Have Applied All Of These Principles To The Question Of Legal Parentage Of Children Born Through ART

Massachusetts is in good company in its recognition of and support for the diverse array of parent-child relationships enabled by ART. Indeed, family law's gradual and sequential embrace of unmarried genetic fathers, married nongenetic parents (including those using ART), and unmarried and married same-sex couples in states around the country may hint at a broader reconceptualization of parenthood as

being rooted in intention and function. See NeJaime, Marriage Equality and the New Parenthood, 129 Harv. L. Rev. 1185 (forthcoming 2016), available at http://cdn.harvardlawreview.org/wp-content/uploads/2016/03/1185-1266-Online.pdf (arguing that marriage equality is both a culmination of earlier decisions and statutes broadening access to the institution of the family as well as a stepping stone for further embrace of parent-child relationships formed outside marital and sexual contexts); see also Joslin, Marriage Equality and its Relationship to Family Law, 129 Harv. L. Rev. F. 197 (forthcoming 2016), available at http://cdn.harvardlawreview.org/wp-content/uploads/2016/03/vol1129_Joslin_3_11.pdf (responding to the NeJaime article and suggesting that this shift in notions of parentage may affect understandings of nonmarital adult relationships as well).

More than thirty-five states confer parentage on spouses consenting to ART.[5] Seven of those states and

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[5] See Ala. Code § 26-17-702; Alaska Stat. Ann. § 25.20.045; Ariz. Rev. Stat. Ann. § 25-501(B); Ark. Code Ann. § 9-10-201(a); Cal. Fam. Code § 7613(a); Colo. Rev. Stat. Ann. § 19-4-106(1); Conn. Gen. Stat. Ann. §§ 45a-771, 45a-774; Fla. Stat. Ann. § 742.11; Ga. Code Ann. § 19-7-21; Idaho Code Ann. § 39-5405(3); 750 Ill. Comp. Stat. 40/3(a) (conferring parentage on the consenting husband of a woman who uses artificial insemination, extended to heterosexual nonmarital couples in In re Parentage of M.J., 203 Ill. 2d 526, 540 (2003), and to same-sex couples in In re T.P.S. and K.M.S., 2012 Ill. App. (5th) 120176, ¶ 16 (App.

the District of Columbia confer legal parentage on the person who consents to the ART procedure with the intent to parent the resulting child, regardless of marital status. See D.C. Code § 16-909(e)(1) ("A person who consents to the artificial insemination of a woman . . . with the intent to be the parent of her child, is conclusively established as a parent of the resulting child."); see also Del. Code Ann. tit. 13, § 8-703; Nev. Rev. Stat. Ann. § 126.670; N.H. Rev. Stat. Ann. § 168-B:2(II); N.M. Stat. Ann. § 40-11A-703; N.D. Cent. Code Ann. § 14-20-61 (703); Wash. Rev. Code § 26.26.710; Wyo. Stat. Ann. § 14-2-903.

Model acts also support the notion that both marital and nonmarital children conceived through ART should be similarly protected by having parentage vest in the consenting, intended nongenetic parent. See Polikoff, A Mother Should Not Have To Adopt Her Own

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Ct. 5th Dist. 2012)); La. Civ. Code Ann. art. 188; Md. Code Ann., Est. & Trusts § 1-206(b); G. L. c. 46, § 4B; Mich. Comp. Laws Ann. § 333.2824(6); Minn. Stat. Ann. § 257.56(1); Mo. Ann. Stat. § 210.824(1); Mont. Code Ann. § 40-6-106(1); N.C. Gen. Stat. Ann. § 49A-1; N.J. Stat. Ann. § 9:17-44(a); N.Y. Dom. Rel. Law § 73(1); Ohio Rev. Code Ann. § 3111.95(A); Okla. Stat. Ann. tit. 10, § 553; Or. Rev. Stat. § 109.243 (held unconstitutional as applied to same-sex couples who could not then legally marry in Shineovich v. Shineovich, 229 Ore. App. 670, 686 (Ct. App. 2009) (extending the marital presumption to a consenting same-sex partner)); Tenn. Code Ann. § 68-3-306; Tex. Fam. Code Ann. § 160.703; Utah Code Ann. § 78B-15-703; Va. Code Ann. § 20-158(A)(2); and Wis. Stat. § 891.40(1).

Child: Parentage Laws for Children of Lesbian Couples, 5 Stan. J. Civ. Rts. & Civ. Liberties 201, 235-237 (2009). The Uniform Parentage Act, for example, protects both marital and nonmarital children conceived via ART with mutual consent. Uniform Parentage Act § 703 (2002) ("A man who . . . consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is a parent of the resulting child"). As the comment to § 703 explains, "[t]his provision reflects the concern for the best interests of nonmarital as well as marital children of assisted reproduction."

The ABA Model Act Governing Assisted Reproductive Technology also protects nonmarital children. ABA Model Act Governing Assisted Reproductive Tech. § 603 (2008) ("An individual who . . . consents to, assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child."). This Act was drafted under the leadership of Charles Kindregan specifically to create parentage in the female partner of a woman who gives birth. See Polikoff, supra at 236; see also Kindregan & Snyder, Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology, 42 Fam. L. Q. 203 (2008).

Courts in California have put these principles

into action, affirming that nonmarital, nongenetic parents in same-sex partnered households have the rights and responsibilities of legal parentage under a statute that is in all relevant respects functionally identical to the one at issue here.[6] In Elisa B. v. Superior Court, the California Supreme Court was asked to determine whether a woman was required to pay child support for twins born to her former same-sex partner using artificial insemination. 37 Cal.4th 108 (2005). Interpreting California's "hold[ing] out" provision, the court stated that the disputed parent's lack of genetic ties to the children in question "does not necessarily mean that she did not hold out the twins as her 'natural' children." Id. at 120. Moreover, the court ultimately ruled that given the circumstances of the artificial insemination and the woman's actions immediately after the children's birth, it would actually be an abuse of discretion for the lower courts to allow her lack of genetic links to the children to rebut the presumption of parenthood

[6] In Massachusetts, "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"; similarly, under California law, "[a] person is presumed to be the natural parent of a child if . . . [t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child." Compare G. L. c. 209C, § 6(a)(4), with West's Ann. Cal. Fam. Code § 7611(d).

and to deprive the children of the support of one of the only two parents they had ever known. Id. at 122; see also S.Y. v. S.B., 201 Cal. App. 4th 1023, 1035-1036 (Ct. App. 2011), quoting In re T.R., 132 Cal. App. 4th 1202, 1211-1212 (Ct. App. 2005) (granting nongenetic, nonmarital mother legal parentage of her former same-sex partner's genetic child because she had "demonstrated a commitment to the child and the child's welfare," notwithstanding lack of genetic link) (internal quotation marks omitted).

II. GRANTING PARTANEN LEGAL PARENT STATUS IS CONSISTENT WITH THE GOALS AND VALUES THAT HAVE GUIDED THE COURTS IN ART CASES

A common thread throughout this Court's ART jurisprudence is an unwavering concern for children born through the use of ART. To deny Partanen legal parentage, however, would be to ignore this lodestar in favor of a limited set of identifiers of family status at the expense of the child's best interests. Denying legal parentage to parents like Partanen and forcing them to rely instead on the discretionary doctrine of de facto parentage would bring uncertainty to children and their parents, and deprive their children of protections that only a legal parent can offer. Such a result would be particularly egregious on the facts of this case, where the life-long parental bond between Partanen and her seven- and

four-year-old children is so clear.

A. In Developing The Growing Body Of Law Governing Families Created Through ART, Massachusetts Courts Have Looked To The Interest Of The Child In Having Secure Support From Both Parents In A Wide Variety Of Families

Since this Court first began to examine how families created through ART fit into existing doctrine nearly two decades ago, the impact -- both financial and psychological -- that its decisions would have on the children of those families has been of paramount importance. In Culliton, for example, the Court underscored "the importance of establishing the rights and responsibilities of parents as soon as practically possible" in order to "furnish[] a measure of stability and protection to children born through . . . gestational surrogacy arrangements. 435 Mass. at 292. And in Woodward, the Court looked to the "overriding legislative concern to protect the best interests of children." 435 Mass. at 545. It noted that "[r]epeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be 'entitled to the same rights and protections of the law' regardless of the accidents of their birth." Id. at 546, quoting G. L. c. 209C, § 1.

In determining how to best protect children, the Court has looked to both the financial and the psychological aspects of a child's wellbeing. This is

because "a child's welfare is promoted by ensuring that she has two parents to provide, inter alia, financial and emotional support." Hunter, 463 Mass. at 493; see also Woodward, 435 Mass. at 546 ("Among the many rights and protections vouchsafed to all children are rights to financial support from their parents and their parents' estates."); cf. Paternity of Cheryl, 434 Mass. at 31, 36 (noting, in a case where a nonbiological father sought to disavow parentage of a child he formerly thought was biologically his, that the "stability and continuity of support, both emotional and financial, are essential to a child's welfare," and ultimately framing the Court's holding as an attempt to "protect [the child's] financial security and other legal rights").[7]

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[7] This Court's holding in T.F. v. B.L., 442 Mass. 522 (2004), does nothing to undermine the primacy of the "best interests of the children" standard. There, the genetic mother of a child born using artificial insemination sought support from her former same-sex partner under a theory of implied contract. Adhering to prior precedent, the Court held that parenthood by contract was void as contrary to public policy. Id. at 529-530, quoting A.Z. v. B.Z., 431 Mass. 150, 162 (2000) (enforcement of contracts to "'enter into familial relationships,'" including parenthood, "'against individuals who subsequently reconsider their decision'" is against public policy). Thus, the Court in T.F. held, "[a]part from the unenforceable contractual obligation" the defendant was "legally a stranger to the child," and the best interests of the child could not independently create a legal

B. De Facto Parentage Does Not Protect The Best Interests Of Children Created Using ART

Denying Partanen legal parentage of the children -- and leaving her with no other option besides de facto parentage to protect the undisputed relationship they share -- would do real harm to her children and would have troubling implications for similarly situated parents who deliberately create families together using ART.

Under Massachusetts law, the declaration of de facto parentage -- unlike the declaration of legal parentage -- is always a matter of discretion. Until there has been a conclusive adjudication of de facto parent status, with any appeals resolved, both the parent and the child are in legal limbo. An adult must earn de facto parent status to a child with whom she has no genetic or marital ties over time: she must "reside[] with the child . . . , perform[] a share of caretaking functions at least as great as the legal parent[,] . . . shape[] the child's daily routine, address[] his developmental needs, discipline[] the child, provide[] for his education and medical care, and serve[] as a moral guide." E.N.O., 429 Mass. at 829. Only after a parent has served in this role for

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obligation of support. Id. at 533-534. T.F. has no application to the case at hand because the Court in T.F. had no cause to interpret the family law statutes at issue here.

a meaningful amount of time -- often years -- may she obtain visitation and custody rights and incur the obligations of support that can, at the court's discretion, accompany de facto parentage. See, e.g., A.H. v. M.P., 447 Mass. 828, 838 n. 13 (2006) (citing ALI Principles of Family Dissolution's two-year requirement for de facto parentage but declining to express an opinion on it). In short, the de facto parentage test is not a good fit for parents who deliberately choose to start a family through ART and intend to parent the resulting children from the beginning.

Partanen was able to meet the de facto parent standard because she was fortunate to have spent a great deal of time parenting the children before her status was adjudicated. But other putative parents who use ART to have a child may not be so lucky. Such parents participate in the decision to have their children as much as any other parent who would be accorded legal parent status as a matter of course. If anything, more participation is required for ART conception than for sexual conception given the planning and medical procedures involved, and sometimes cost as well. Yet de facto parenthood would hold those parents to a higher standard of conduct just to receive a second-class set of rights with

respect to their children. Compare A.H., 447 Mass. at 840-842 (denying de facto parentage because the nonbiological parent's relationship with the child was not particularly strong), with R.D. v. A.H., 454 Mass. 706, 710-712 (2009) (stating that a legal parent's rights cannot be terminated in the absence of clear and convincing evidence of unfitness).

Additionally, by requiring that the putative parent perform at least as many of the caregiving functions as the legal parent, the de facto parentage test privileges caregiving parents over breadwinning parents and thereby risks depriving of financial support children in ART families. Particularly given that many one-income households decide which parent works out of the house based on respective earning potential, a standard that could sever a child's link with the primary wage earner simply because that parent is less involved in the child's daily activities would systematically disadvantage children in unmarried, nonadoptive same-sex ART families. See Joslin, Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology, 83 S. Cal. L. Rev. 1177, 1205-1210 (2010) [hereinafter "Joslin, Protecting Children"] (noting that when a higher earner supports the family outside the house, "the child will be left in extremely difficult financial

circumstances if the nonbirth partner has no legal obligation to support the family she created"). In contrast, legal parents do not have to worry that time spent working outside of the house to support their families can be used to undermine their parental status. And the children of legal parents will not be denied the financial support of their wage-earning parent should their parents break up. Compare A.H., 447 Mass. at 838-841 (denying de facto parent status to breadwinning, same-sex partner of genetic mother because she did not perform as many caregiving functions as the genetic mother).

The consequences of the delay and uncertainty inherent in the establishment of de facto parentage may be felt immediately upon the birth of the child. Without legal parent status, a parent may be denied input into a "child's medical treatment in the event of medical complications arising during or shortly after birth." Culliton, 435 Mass. at 292. This is especially significant for parents of children born through ART, who are at an increased risk of prematurity and low birth weight, which can result in the need for medical care.[8]

Even when a child's nongenetic, nonmarital parent is granted de facto parentage (as Partanen was), that

[8] Sunderam note 4, supra.

child still misses out on a raft of benefits that are available only from a child's legal parent. The rights and privileges of legal parentage are long-settled and clear, but not so for de facto parentage. For example, it is unclear whether a child may receive Social Security benefits from a nonadoptive, nongenetic parent who does not enjoy legal parent status. See Social Security Administration, Program Operations Manual System: RS 00203.001 Child's Benefits for Entitlement and Non-Entitlement Provisions (effective Feb. 14, 2013-present), https://secure.ssa.gov/poms.nsf/lnx/030020300; Joslin, Protecting Children, supra at 1209-1217; see also Culliton, 435 Mass. at 292. The children of legal parents face no such disadvantage because they automatically receive Social Security benefits. This financial detriment may be particularly consequential given that unmarried couples and same-sex couples -- that is to say, the kinds of families that are most at risk of being denied legal parentage when conceiving a child through ART -- statistically have lower average incomes than their married and heterosexual counterparts. See Smith, Equal Protection for Children of Same-Sex Parents, 90 Wash. U. L. Rev. 1589, 1593 (2013); Avellar & Smock, The Economic Consequences of the Dissolution of Cohabiting Unions,

67 J. Marriage & Family, No. 2, 315, 323-325 (2005).

In short, Partanen's children would be at a real disadvantage if Partanen is deemed merely a de facto parent and not a legal parent. Such a result would thwart this Court's oft-repeated goal of serving the interests of children in interpreting the rules governing legal parentage.

C. Denying Partanen Legal Parentage Here Would Close Off Avenues To Legal Parentage For A Whole Category Of Nonmarital Families

As discussed above, this Court has considered factors in addition to marriage and genetics in defining what it means to be a parent. To limit the inquiry to solely marriage and genetics here would have the effect of excluding an entire class of nonmarital, nonadoptive children conceived through ART from the life-altering benefit of having two legal parents.

By definition, any child of a same-sex couple will have at most one genetic parent in her family. Thus, under the Probate and Family Court's ruling, a child born through ART to an unmarried same-sex couple will be penalized if her nongenetic parent did not adopt her -- a process that cannot be accomplished until after birth and is difficult if not impossible without the consent of the genetic parent. Both this Court and the Legislature have made clear their desire

to extend equal protection to the children of unmarried couples, see, e.g., G. L. c. 209C, and same-sex couples, see, e.g., Goodridge, 440 Mass. at 312. Yet denying Partanen legal parentage would have the opposite effect. It would impose an entirely different regime on the families of unmarried, same-sex couples simply because, by their very nature, such families will always have at least one parent with no genetic tie with the child.

Privileging genetics and marital status without regard to the best interests of the child when two parents deliberately bring that child into the world creates uncertainty for individuals who want to become parents through ART. It disadvantages parents who, because of limited financial means, fear of the court system, or lack of knowledge, fail to marry each other or adopt their children born as a result of ART. And it penalizes children who happen to be born through ART to nonmarital, nonadoptive parents.

Instead, this Court should continue its practice of fostering stable and predictable parental relationships regardless of genetics. Amici, prospective parents, and their children benefit when section 4B applies to all children born through ART and when all parents who brought a child into the world together may also rely on the protections of

chapter 209C to establish custody, visitation, and support for their children. Such a regime serves not only the interests of those families, but also society as a whole, which is better off when the law works in support of the full range of families.

This approach is also consistent with the will of the Legislature. As noted above, the Legislature has indicated its broad support for family formation through ART. But denying Partanen legal parentage would undermine that support by creating "a class of children who are the fruit of that technology [but] have fewer rights and protections than other children." Woodward, 435 Mass. at 547. On the other hand, reading the parentage statutes to bestow legal parentage on nonmarital, nongenetic parents who have created their families through ART honors the goals of the Legislature, harmonizes the statute with this Court's own protection of the full range of families, and -- most importantly -- serves the best interests of children like Partanen's.

CONCLUSION

For the above reasons, and the reasons set forth in brief of the appellant Karen Partanen, the Trial Court should be reversed and the case remanded for adjudication of Partanen as a legal parent.

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Respectfully submitted,

EMILY R. SCHULMAN (BBO #566374)
BROOK HOPKINS (BBO #683871)
ADAM M. CAMBIER (BBO #690525)

WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6000
emily.schulman@wilmerhale.com
brook.hopkins@wilmerhale.com
adam.cambier@wilmerhale.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, Emily R. Schulman, hereby certify that on March 21, 2016, I caused true and accurate copies of the foregoing to be filed in the office of the clerk of the Supreme Judicial Court and served upon the following counsel by electronic and overnight mail:

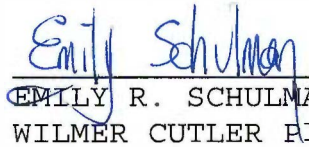
Mary Lisa Bonauto
GLBTQ Legal Advocates & Defenders
30 Winter St., Ste. 800
Boston, MA 02108
mbonauto@glad.org

Teresa Harkins La Vita
La Vita Law Center
1 Webb St.
Danvers, MA 01923
tlavitalaw@lavitalaw.com

Elizabeth A. Roberts
Todd & Weld LLP
One Federal St., 27th Flr.
Boston, MA 02110
eroberts@toddweld.com

Patience Crozier
Kauffman Crozier LLP
231 Third St.
Cambridge, MA 02142
polly@kauffmancrozier.com

Jennifer M. Lamanna
Lamanna Law Offices
40 Warren St., 3rd Flr.
Charlestown, MA 02129



EMILY R. SCHULMAN (BBO #566374)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6000
emily.schulman@wilmerhale.com

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.

EMILY R. SCHULMAN (BBO #566374)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6000
emily.schulman@wilmerhale.com