COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. NO. SJC-12018

KAREN PARTANEN,
Plaintiff-Appellant,

v.

JULIE GALLAGHER,
Defendant-Appellee.

ON DIRECT APPELLATE REVIEW OF A JUDGMENT
OF THE SUFFOLK PROBATE AND FAMILY COURT

AMICUS BRIEF OF THE ATTORNEY GENERAL

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QUESTIONS PRESENTED

This Court requested amicus briefs on three questions in this case. The Attorney General submits this amicus brief only to address the second question: 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.

INTERESTS OF AMICUS

The Attorney General is charged with defending the constitutionality of state laws and ensuring their consistent application and continued validity. *See, e.g.*, Mass. R. Civ. P. 24(d) (requiring notice to Attorney General whenever constitutionality of an act of the Legislature is "drawn in question"). This responsibility includes, where appropriate, promoting interpretations of challenged statutes so as to preserve their constitutionality. The plaintiff's claims raise a serious question as to the constitutionality of G.L. c. 46, § 4B, which affords the rights of legal parentage to children born to married parents who mutually consented to conceive

through artificial reproductive technology, but not to similarly situated children born to unmarried couples.

The Attorney General also "has a common law duty to represent the public interest and enforce public rights." *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984). The issues in this case affect children in the Commonwealth. Children are an inherently vulnerable population, often unable to advocate for themselves due to limitations in capacity and status under the law.

As such, the Attorney General has an interest in protecting children's rights and in assisting the Court in avoiding a serious constitutional question by proposing a reasonable interpretation of G.L. c. 209C, the statute that governs the establishment of parentage for children born out of wedlock.

STATEMENT OF THE CASE

The Attorney General adopts the plaintiff's statement of prior proceedings. The Attorney General does not take a position with regard to the statement of facts because she submits this brief to address the issues of constitutional avoidance and statutory interpretation generally, not the particular application of the law to the facts in this case.

SUMMARY OF ARGUMENT

To avoid a serious constitutional question with regard to G.L. c. 46, § 4B, the Court should interpret G.L. c. 209C, a related statute, to permit a nonbiological putative parent to establish legal parentage of a child conceived through artificial reproductive technology ("ART") where that person has mutually consented with the birth mother to conceive the child.

A child born to a married woman as a result of ART with the consent of her spouse is considered the legal child of both spouses at birth by virtue of G.L. c. 46, § 4B. On its face, this statute does not apply to children born out of wedlock ("nonmarital children") conceived through ART. As a result, children born within a marriage ("marital children") conceived through ART with the mutual consent of both spouses are provided a second parent from birth – and all the rights, benefits, and privileges that come along with that legal relationship – that similarly situated nonmarital children are not. This different treatment of certain nonmarital children (including those born to different-sex couples as well as same-sex couples) is subject to heightened scrutiny under

the equal protection guarantee of the United States Constitution. There is a serious constitutional question as to whether the classification created by G.L. c. 46, § 4B, is substantially related to important governmental interests. (pp. 6-24)

This question can be avoided through a reasonable interpretation of G.L. c. 209C, which was designed to provide equal rights and protections to nonmarital children and to provide processes to establish parentage for such children. Those processes can establish parentage for nonmarital children where such parentage would exist for similarly situated marital children under G.L. c. 46, § 4B. Specifically, section 11 of chapter 209C can be interpreted to allow for a voluntary acknowledgement of parentage for an unmarried couple who mutually consented to conceive a child through ART, which would establish parentage at birth just as it is established for marital children under G.L. c. 46, § 4B. Sections 5(a) and 21, which provide for claims to paternity and maternity, can be interpreted to allow claims to parentage where a nonbiological putative parent avers that he or she and the biological mother of the child mutually consented to create a child through ART. And section 6(a)(4),

which applies a presumption of parentage where the putative second parent "jointly with the mother, received the child into their home and openly held out the child as their child," can be applied to putative parents of children conceived through ART, regardless of lack of biological connection. For children conceived through sexual intercourse, this presumption can be rebutted by proof that the putative second parent lacks a biological connection to the child; for children conceived through ART, it can be rebutted through evidence that the putative second parent did not mutually consent with the birth mother to conceive the child through ART. This interpretation is consistent with the purpose of chapter 209C, its plain language (read in a gender-neutral way), previous case law, and interpretations of similar statutes in other states. (pp. 24-43)

ARGUMENT

I. The Different Treatment of Nonmarital Children Under G.L. C. 46, § 4B, Poses a Serious Constitutional Question.

A. Children Conceived Through Artificial Reproductive Technology by a Mutually Consenting, Unmarried Couple Have a Significant Interest in Having a Second Legal Parent at Birth.

Legal parentage confers important rights and benefits on children. These rights and benefits include, among other things, inheritance rights and certain government benefits; the right to care, protection, and financial support from a parent; and the availability of health insurance benefits as a dependent. *See Adoption of Tammy*, 416 Mass. 205, 214-15 (1993) (describing benefits of legal parentage and noting that having second legal parent will "serve to provide [the child at issue] with a significant legal relationship which may be important in her future"); G.L. c. 190B, § 2-114 (intestate succession for children); G.L. c. 273, §§ 1 and 15 (support obligation to marital and nonmarital children, respectively); 42 U.S.C. § 402(d) (social security benefits to parent's children). In addition to these financial benefits, legal parentage allows for the certainty and comfort of filial ties. *See In re*

Adoption of Mariano, 77 Mass. App. Ct. 656, 662 (2010) ("Massachusetts law recognizes children's interests in parental consortium as filial needs for closeness, guidance, and nurture. It consists at least of a parent's society and companionship." (internal citations and quotations omitted)).

Having these rights at birth, rather than later, is significant. As this Court explained:

> Delays in establishing parentage may, among other consequences, interfere with a child's medical treatment in the event of medical complications arising during or shortly after birth; may hinder or deprive a child of inheriting from his legal parents should a legal parent die intestate before a postbirth action could determine parentage; may hinder or deprive a child from collecting Social Security benefits under 42 U.S.C. § 402(d) (Supp. 1999); and may result in undesirable support obligations as well as custody disputes (potentially more likely in situations where the child is born with congenital malformations or anomalies, or medical disorders and diseases).

Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 292 (2001). *See also Adoption of Tammy*, 416 Mass. at 214-15 & n.8 (noting that legal parentage enables child to "preserve her unique filial ties" to second parent where parents separate or one parent dies). Where there is in fact a couple who consented to the creation of a child, providing that child with two legal parents at birth also benefits society. *See*

Adoption of Mariano, 77 Mass. App. Ct. at 662 (noting that having just one parent would "heighten the risk of [the child's] need for public assistance").

The lower court's decision in this case effectively held that there was no legal way to recognize at birth the legal parentage of an unmarried, nonbiological putative parent who mutually consented with the birth mother to conceive a child through ART. This denial of rights from birth negatively affects children in Massachusetts. Though the precise number of children born to unmarried couples through the use of ART is unknown, it is known that an increasing number of children in Massachusetts, as throughout the United States, are born to unmarried couples and that an increasing and not insignificant number of children are conceived through ART. In Massachusetts, the rate of births to unmarried women has risen steadily since 1990, and in 2014, one third of all Massachusetts births were to unmarried women.[1] Nationwide, a majority of these

[1] Massachusetts Dep't of Pub. Health, Massachusetts Births 2014 9 (Sept. 2015).

births to unmarried women occur to cohabiting adults.[2] Moreover, more and more couples — both married and unmarried — are using ART to conceive children. The available data, which the Department of Public Health cautions seriously underreport ART in Massachusetts, indicate that in 2012, 4.6% of all births in Massachusetts were to women who reported using ART.[3] Nationwide, the use of ART has tripled since 1996,[4] and Massachusetts ranks fourth nationwide in the number of ART procedures.[5]

Given that some children are conceived through ART and born to unmarried couples (both same-sex and different-sex couples) in Massachusetts — and that there will continue to be such children — it is important that the law provide a mechanism for these children to have two parents where there are in fact two people who mutually consented to creating them.

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[2] Child Trends Data Bank, Births to Unmarried Women: Indicators on Child and Youth 2 (July 2014).

[3] Massachusetts Births 2014, *supra* note 1, at 16.

[4] Sunderam, Saswati, et al., Assisted Reproductive Technology Surveillance — United States, 2013, Morbidity and Mortality Weekly Report, Dec. 4, 2015, at 8.

[5] Massachusetts Dep't of Pub. Health, Massachusetts Births 2011 and 2012 16 (Aug. 2014).

B. The Classification Under G.L. C. 46, § 4B, May Not Be Substantially Related to an Important Governmental Interest.[6]

General Laws c. 46, § 4B, provides 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." This Court has read "husband" in this statute to mean "spouse" and has stated its understanding that "artificial insemination" includes "any assisted reproductive technology." *See Adoption of a Minor*, 471 Mass. 373, 376 & n.6 (2015). Thus, as interpreted, G.L. c. 46, § 4B, provides that when a birth mother and her spouse mutually consented to create a child through ART, both spouses are legal parents of the resulting child at the time of birth.[7]

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[6] The Attorney General's understanding is that to the extent the plaintiff raises a concern about the constitutionality of G.L. c. 46, § 4B, with respect to the children at issue, she does not assert their constitutional rights, but rather, she discusses their rights in the context of arguing constitutional avoidance.

[7] Although the precise statutory language of "with the consent of the husband" appears to require only one party's consent, in reality, the husband's consent is meaningless if the wife did not likewise consent to the ART with the husband. In this way, the statute in effect, if not in words, requires mutual consent.

By seemingly limiting its application to "[a]ny child born to a *married* woman" (emphasis added), G.L. c. 46, § 4B, excludes children born to an *unmarried* couple as a result of ART to which the couple mutually consented. As such, the statute creates two classes of children conceived through ART with the mutual consent of both putative parents: those born to married couples and those born to unmarried couples.

Under federal equal protection analysis, classifications based on whether children are born within a legal marriage are subject to heightened scrutiny, most recently described as intermediate scrutiny.[8] *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."); *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977) ("Despite the conclusion that classifications based on illegitimacy fall in a 'realm

[8] As to the Massachusetts Constitution, this Court has not expressly determined, and need not decide here, what level of equal protection scrutiny would apply to a classification based on whether a child's parents are married.

of less than strictest scrutiny,' … that scrutiny 'is not a toothless one ….'" (internal citations omitted)); *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 186 (1977) (quoting standard from *Trimble*); *Doe v. Roe*, 23 Mass. App. Ct. 590, 592 (1987) (recognizing federal standard of review).[9]

"To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark*, 486 U.S. at

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[9] Because "[i]llegitimacy is a legal construct, not a natural trait," *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989), the classification that is subjected to heightened scrutiny is more accurately viewed as a classification based upon whether the child is born to parents who are not married to each other. *See, e.g., Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033 (2012) (referring to the alleged class as "children of unwed parents" rather than as "illegitimate" children). In striking down legislation that distinguishes between "legitimate" and "illegitimate" children, courts were concerned with the social opprobrium or moral concerns connected with being born to parents who are not married to each other. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972).

Importantly, because "illegitimacy is a legal construct," when a child is born to a married mother, whether that child is "legitimate" is based on how the child is categorized by law. Children currently covered by section 4B are "legitimate," *i.e.*, have two legal parents, whereas children not covered by section 4B solely because their biological mothers are not married are "illegitimate." Section 4B therefore discriminates against children whose biological mothers are not married (rather than between two groups of "illegitimate" children) and so is subject to heightened scrutiny, as discussed *infra*.

461. Applying heightened or intermediate scrutiny, the Supreme Court has invalidated statutes that provide certain rights only to children born to married couples. *See, e.g., Trimble*, 430 U.S. 762 (statute limiting nonmarital child's right to intestate succession unconstitutional); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972) (provision of workers compensation law denying remedy to nonmarital child unconstitutional).[10] Applying this constitutional analysis, the Appeals Court has held that nonmarital children are entitled to support through age twenty-one, just as marital children are, because an alternative interpretation would unconstitutionally discriminate against nonmarital children. *See Doe v. Roe*, 23 Mass. App. Ct. at 593.

It is questionable whether the classification created by G.L. c. 46, § 4B, is substantially related to the governmental interests it might be thought to promote, namely, administrative ease, avoiding litigation, promoting the institution of marriage, and protecting the inviolability of family relationships.

[10] *See also Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Gomez v. Perez*, 409 U.S. 535 (1973).

1. Administrative Convenience Is Not a Sufficient Justification.

A central purpose of chapter 46, of which section 4B is a part, is to provide guidance for municipal clerks regarding the administration of birth certificates.[11] *See, e.g.,* G.L. c. 46, § 1 (setting forth the duties of clerks with respect to birth certificates). The Commonwealth has a legitimate interest in the easy administration of birth certificates. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (recognizing that in some circumstances "[t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication"). Nevertheless, the Supreme Court has usually rejected administrative ease as sufficient to satisfy intermediate scrutiny. *See, e.g., Craig v. Boren*, 429 U.S. 190, 198 (1976) (noting that the Court has rejected administrative ease and convenience as justification for gender-based classifications). *See also United States v. Clark*, 445 U.S. 23, 27, 30 (1980) (noting that justification

[11] The statute also provides substantive rights, such as the right to be deemed a legitimate child under G.L. c. 46, § 4B, as discussed in this brief.

of administrative convenience with regard to illegitimacy classification "raises serious equal protection problems").[12]

Moreover, applying G.L. c. 46, § 4B, to include a nonbiological putative parent who mutually consented to create a child through ART would not seem to add any burden to the administration of birth certificates. All that would be required is that both partners in a couple be asked on the Department of Public Health's voluntary acknowledgement of parentage form ("VAP") whether they mutually consented to create the child through ART, just as the form now asks whether both partners in a couple are the biological parents of the child. *See* Commonwealth Voluntary Acknowledgement of Parentage at

[12] In the inheritance context, another interest sometimes found to justify classifications that discriminate against nonmarital children — one that G.L. c. 46, § 4B, does not appear to serve in any substantial way — is the prevention of fraud. *See, e.g., Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (distinguishing the intestate inheritance context from other illegitimacy-based classifications); *Lowell v. Kowalski*, 380 Mass. 663, 669 (1980) (upholding statute that imposed stricter standard for establishing illegitimate child's right to inherit from father "because the possibility of fraud is usually greater with respect to claims against the estate of a deceased man").

http://www.mass.gov/dor/docs/cse/parents/voluntary-ack-of-parentage-form.pdf.[13]

2. Avoidance of Litigation Does Not Justify the Classification.

The objective of avoiding litigation, though usually a worthy governmental interest, *see, e.g., Reed v. Reed*, 404 U.S. 71, 76 (1971) (recognizing that objective of avoiding litigation "is not without some legitimacy"), likewise might not, under intermediate scrutiny, justify the classification created by G.L. c. 46, § 4B. Though it could be argued that the bright-line rule of marriage set forth in G.L. c. 46, § 4B, reduces the risk of litigation by limiting the number of possible claims that could be made about lack of consent to ART, there are nevertheless lawsuits about consent even where the parties were married, *see, e.g., Okoli v. Okoli*, 81 Mass. App. Ct. 371 (2012) (husband's claim, in divorce proceeding, that he had not validly consented to wife's use of ART). Moreover, there is nothing to suggest that the fact that a couple is unmarried at the time the child

[13] A signatory to a VAP can seek to rescind the acknowledgment within 60 days and has one year to challenge the acknowledgment on the basis of fraud, duress or material mistake of fact. G.L. c. 209C, § 11.

is conceived will lead to more litigation about consent. On the other hand, the marriage requirement in the statute will continue to give rise to litigation by unmarried, nonbiological putative parents seeking quasi-parental rights, such as those afforded through *de facto* parentage, and to additional second-parent adoption proceedings.

3. Incentivizing Marriage Cannot Justify Disadvantaging Nonmarital Children.

Though the government also has an interest in supporting the institution of marriage, *see*, *e.g.*, *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 322-23 (2003), courts have made clear that the governmental interest in supporting or preferring marriage cannot be the reason for disadvantaging nonmarital children. "[C]lassifications that burden illegitimate children for the sake of punishing the illicit relations of their parents" are "illogical and unjust." *Clark v. Jeter*, 486 U.S. at 461 (internal quotation and citation omitted); *see Weber*, 406 U.S. at 175-76 ("Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent.").

Moreover, providing equal rights to children conceived through ART with the mutual consent of an unmarried couple will not create disincentives to marriage. Through G.L. c. 209C, the Legislature has already provided equal rights and protections to children born out of wedlock in many contexts. *See generally* G.L. c. 209C. Providing an equal right to a second legal parent to nonmarital children conceived through ART with the mutual consent of the birth mother and nonbiological putative parent would pose no more threat to marriage than does G.L. c. 209C. It simply continues the extension of rights and protections given to nonmarital children.

4. The Goal of Protecting the Inviolability of Familial Relationships Does Not Justify the Classification.

Lastly, it is doubtful whether the state's interest in protecting the inviolability of familial relationships justifies the classification. To be sure, "[c]hoices about marriage, family life, and the upbringing of children are among associational rights … sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (internal quotation and citation

omitted). Relatedly, the Commonwealth is hesitant to impose parental responsibilities and obligations where they are unwanted. *See A.Z. v. B.Z.*, 431 Mass. 150, 162 (2000) ("We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired.").

"Parental rights are not, however, absolute." *E.N.O. v. L.M.M.*, 429 Mass. 824, 832 (1999). For example, in balancing a biological mother's interest in protecting custody of her child with the child's interest in maintaining her relationship with the child's *de facto* parent in *E.N.O.*, this Court held that "[t]he family that must be accorded respect in this case is the family formed by the plaintiff, the defendant, and the child. The defendant's parental rights do not extend to the extinguishment of the child's relationship with the plaintiff." *E.N.O.*, 429 Mass. at 833.

Accordingly, where an unmarried couple clearly and affirmatively consented to create a child together, the biological mother's personal liberty

interests in making her own decisions about parentage are tempered by the parental rights of the other member of the couple and, more importantly here, the child's rights and interests in care, protection, and support from both parents. This principle is true whether a child is conceived through sexual intercourse or through ART. "[I]f an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law." *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003)

Overall, then, there is a serious question concerning the constitutionality of G.L. c. 46, § 4B, because there does not appear to be a significant governmental interest that is substantially related to the statutory classification of children on the basis of the marital status of the putative parents who mutually consented to the child's conception.

C. The Availability of Other Options For Establishing Parenthood Does Not Avoid the Serious Constitutional Question.

None of the other options for establishing parentage outside marriage – adoption, *de facto* parentage, or guardianship – remedies the likely constitutional defect in the classification created by G.L. c. 46, § 4B. As a preliminary matter, the Supreme Court has explained that focusing on the steps the nonmarital child's parents might have taken "loses sight of the essential question: the constitutionality of discrimination against illegitimates." *Trimble*, 430 U.S. at 774. Alternatives available to parents to remedy the discriminatory effect of such statutes lack "any constitutional significance." *Id.* Nonetheless, insofar as earlier decisions sometimes looked to whether the same rights could be attained through other mechanisms, *see, e.g.*, *Labine v. Vincent*, 401 U.S. 532, 539 (1971),[14] it is worth noting that the alternatives of second-parent adoption, *de facto* parentage, and guardianship do not provide the same set of rights available through legal parentage, cannot provide rights from the moment of birth, and/or

[14] *But cf. Trimble*, 430 U.S. at 774 (describing standard upon which *Labine* relied as an "analytical anomaly").

cannot be accomplished without additional expense, time, and legal processes.

Second-parent adoption is often seen as the most viable option for establishing legal parentage for the children of unmarried, nonbiological putative parents. The second-parent adoption process, however, establishes legal parenthood only after a child is born and then only after a time-consuming, costly, and intrusive process. *See Goodridge*, 440 Mass. at 335 (describing second-parent adoption as a "sometimes lengthy and intrusive process … to establish [] joint parentage"); GLBT Law Blog, Co-Parent Adoption: A Guide for Same-Sex Couples in Massachusetts, at https://glbtlaw.wordpress.com/ 2011/01/27/291/ (estimating second-parent adoptions as requiring, on average, 3-6 months and $1,500-$3,000 for legal representation, including preparation of paperwork, filing and presentation of all motions, and attendance at final adoption hearing). Legal parentage through G.L. c. 46, § 4B, in contrast, is accomplished by operation of law after the necessary birth certificate information is provided at the time of the child's birth and a birth certificate is filed, without cost,

intrusion, or legal representation. The two options are, therefore, not comparable.

De facto parentage is likewise not comparable. Created by the courts using their authority as *parens patriae* to extend visitation rights to people who take on the role of a parent, *E.N.O.*, 429 Mass. at 827-28, *de facto* parentage does not confer all of the rights and benefits afforded to children via legal parenthood. *See* Joyce Kauffman, Protecting Parentage with Legal Connections, Fam. Advoc., Winter 2010, at 24, 26 ("Massachusetts courts do not confer full parental status on a *de facto* parent."). Having a *de facto* parent does not ensure the child's right to support and care and does not create inheritance rights for the child or access to government or health benefits. Furthermore, *de facto* parentage cannot be established at birth because the standard for establishing *de facto* parentage looks at post-birth activity. *See E.N.O.*, 429 Mass. at 829 (setting out standard). Therefore, *de facto* parentage falls short of legal parentage in terms of when the rights of parentage attach and what those rights are.

Guardianship similarly falls short in comparison to legal parentage. Parents may appoint a guardian of

any minor child they have or may have in the future. G.L. c. 190B, § 5-202(a). Guardians hold "the powers and responsibilities of a parent regarding the [child's] support, care, education, health and welfare." G.L. c. 190B, § 5-209(a). The authority of an appointed guardian terminates, however, if the court appoints another guardian, the appointment is revoked by the appointing parent or guardian, or an objection is filed as provided in § 5-203. G.L. c. 190B, § 5-202(h). Further, guardianship does not provide children with the same right of inheritance or access to government and health insurance benefits that are provided to a child of a legal parent.

There are, however, several avenues available for establishing legal parentage under G.L. c. 209C, if applied to nonmarital children of ART, that would provide the same rights at birth as G.L. c. 46, §4B. That statute is discussed in the next section.

II. General Laws C. 209C Can Be Reasonably Interpreted To Avoid the Serious Constitutional Question.

A. Courts Interpret Laws to Avoid Serious Constitutional Questions Where "Fairly Possible."

This Court must "construe statutes so as to avoid … constitutional difficulties, if reasonable

principles of interpretation permit it.'" *Commonwealth v. Disler*, 451 Mass. 216, 228 (2008) (quoting *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 79 (1982)). "Where fairly possible, a statute must be construed so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Commonwealth v. Fremont Inv. & Loan*, 459 Mass. 209, 214 (2011) (citations and internal quotations omitted). This Court indulges every "rational presumption" to avoid concerns regarding a statute's constitutionality. *Coffin v. Superintendent, Massachusetts Treatment Ctr.*, 458 Mass. 186, 189 (2010). Chapter 209C itself has been interpreted to avoid a constitutional infirmity in another statute. *See Doe v. Roe*, 32 Mass. App Ct. 63, 69 (1992) (awarding legal fees under chapter 209C in actions seeking support for nonmarital children, where such fees can be awarded for marital children of divorced parents under chapter 208, because "serious constitutional questions would arise if we were to interpret the statutes to allow attorney's fees … for children born of divorced parents but not for those born of unmarried parents").

B. It Is Fairly Possible to Read G.L. C. 209C to Provide Rights to Nonmarital Children Conceived through Artificial Reproductive Technology.

Chapter 209C, which creates a comprehensive statutory scheme for establishing parentage of children born out of wedlock, may fairly be construed to allow for legal parentage in cases where an unmarried couple mutually consented to create a child through ART.[15] Through an interpretation that respects the legislative intent, the language of the statute, and existing case law, as discussed *infra*, chapter 209C can provide a child born to an unmarried couple who mutually consented to ART with the same rights as a similarly situated child of a married couple is provided under G.L. c. 46, § 4B.[16] Specifically, the statute would simply need to be interpreted (1) in a gender-neutral way (so that, for example, "putative father" would be read as "putative parent") and (2) with "parent" not requiring a biological

[15] As discussed *infra*, consent must be mutual between a birth mother and a nonbiological putative parent.

[16] While the process for establishing parentage for marital children and nonmarital children would not be identical, different processes are constitutionally permissible "to ensure the accurate resolution of claims of paternity" so long as the differences are substantially related to important state interests. *Lalli*, 439 U.S. at 275-76.

connection for a child conceived through ART by mutual consent of the birth mother and a nonbiological putative parent.

These interpretations would, first, permit an unmarried couple who conceived a child through ART with mutual consent to sign a voluntary acknowledgement of parentage pursuant to section 11, which would establish parentage at birth.[17] Second, sections 5(a)[18] and 21[19] would allow claims to establish parentage of a nonmarital child where a birth mother and putative second parent mutually consented to conceive the child through ART (provided all other applicable requirements to bring such an action have been met). Third, the presumption of parentage that

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[17] "A written voluntary acknowledgement of parentage executed jointly by the putative father … and the mother of the child" and provides that "no judicial proceeding shall be required or permitted to ratify an acknowledgement that has not been challenged …." G.L. c. 209C, § 11. Notably, allowing unmarried couples who mutually consented to ART to execute a VAP would serve as evidence that the signatories did in fact mutually consent to create the child through ART.

[18] "Complaints … to establish paternity … may be commenced … by a person presumed to be or alleging himself to be the father" of a child. G.L. c. 209C, § 5(a).

[19] "[A]ny interested party" may bring an action to "determine the existence of a mother and child relationship." G.L. c. 209C, § 21.

is available under section 6(a)(4)[20] (the "holding out" presumption) would include a child of ART whose birth mother and nonbiological putative parent received the child into their home and held the child out as their own.

1. Providing Equal Rights to Nonmarital Children Conceived Through Artificial Reproductive Technology Is Consistent with the Purpose of G.L. c. 209C

Using chapter 209C to equalize the rights and protections of nonmarital children is consistent with the purpose of the statute. As section 1 explains:

> 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. It is the purpose of this chapter to establish a means for such children either to be acknowledged by their parents voluntarily or, on complaint by one or the other of their parents … to have an acknowledgment or adjudication of their paternity, to have an order for their support and to have a declaration relative to their custody or visitation rights ordered by a court of competent jurisdiction.

G.L. c. 209C, § 1. Given this stated purpose, this Court has interpreted the statute to provide rights to nonmarital children equal to those provided to marital

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[20] "In all actions under this chapter 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. G.L. c. 209C, § 6(a)(4).

children under other statutes, even where chapter 209C does not explicitly address the rights at issue. *See, e.g., Smith v. McDonald*, 458 Mass. 540, 546 (2010) ("While [chapter 208] 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.").

Accordingly, section 1 supports the proposition that the same rule should apply in establishing parentage of marital and nonmarital children who are conceived through ART.

2. Chapter 209C Can Be Read in a Gender-Neutral Way.

This Court has already read at least part of chapter 209C in a gender-neutral way. Specifically, the Court has held that section 6(a)(1), which applies a presumption of parentage for a man whose wife gives birth to a child, applies equally to a woman whose wife gives birth to a child. *Hunter v. Rose*, 463 Mass. 488, 493 (2012). In *Hunter*, G.L. c. 46, § 4B, was also interpreted in a gender-neutral way to establish actual parentage for a same-sex spouse. *Id.; see also Della Corte v. Ramirez*, 81 Mass. App.

Ct. 906, 907 (2012) (applying G.L. c. 46, § 4B, in a gender-neutral way).

A gender-neutral reading is consistent with the intent of the chapter, which provides for actions "to determine the existence of a mother and child relationship," in which,"[i]nsofar as practicable, the provisions of this chapter applicable to establishing paternity shall apply." G.L. c. 209C, § 21. *See also* G.L. c. 4, § 6 (Fourth) ("words of one gender may be construed to include the other gender" unless such construction would be "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute").

3. The Plain Language of G.L. C. 209C Allows a Construction that Includes Nonbiological Parents.

Nothing in chapter 209C limits its provisions to biological parents. The absence of a definition of the words "parent" or "born to," the application of presumptions of parentage without evidence of a biological connection, and judicial interpretations permitting legal parentage for nonbiological parents all show that it is fairly possible interpret the statute as including nonbiological parents.

Chapter 209C does not define "parent," leaving the word open to interpretation. In contrast, the Uniform Parentage Act of 1973 ("1973 UPA"), from which many key aspects of G.L. c. 209C were derived,[21] limits the definition of "parents" to those who are "natural or adoptive." Uniform Parentage Act § 1 (1973).[22] The omission of comparable language from chapter 209C suggests that the Legislature did not necessarily intend the term "parent" to be limited to biological or adoptive parents.

Relatedly, although the statute defines "child born out of wedlock" as any child "born to" a man and woman who are not married to each other, there is no reason "born to" necessarily refers only to parents who are biologically connected to a child. It is certainly fairly possible to conclude that a child is "born to" a same-sex or different-sex couple if both partners mutually consented to conceive a child

[21] For example, the presumptions of parentage in section 6(a) of chapter 209C track the presumptions of parentage spelled out in section 4(a) of the 1973 UPA. *See* 9B Uniform Laws Annotated 393 (Master Ed. 2001) (setting forth text of section 4 of 1973 UPA).

[22] Similarly, the 1973 UPA includes the term "natural parent" in the sections that correspond with G.L. c. 209C, §§ 5(a) and 6(a)(4), Uniform Parentage Act §§ 6(a), 4(a)(1973), but there is no mention of "natural" parenthood in the Massachusetts statute.

together through ART, [23] particularly when the statute is read in a gender-neutral way, as discussed *supra*. *See Hunter*, 463 Mass. at 493 (treating child "born into" a spousal relationship through ART as being legal child of both parents despite lack of biological connection with one parent).

Further, section 6(a) applies presumptions of parentage based on relationships other than biology.[24] For example, the "marital presumption" in sections 6(a)(1), (2), and (3) creates legal parentage if it is not rebutted, and it presumes, without any showing of biological connection, that a man is the father of a child if he married or attempted to marry the mother before (or in some cases after) the birth of the child. G.L. c. 209C, §§ 6(a)(1-3).[25] Similarly,

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[23] Notably, the UPA was revised in 2000 specifically to recognize this conclusion by providing that a man who consented to ART by a woman with "the intent to be the parent of her child … is the parent of the resulting child." Uniform Parentage Act § 703 (2000) (amended 2002).

[24] Persons who are "presumed to be" parents are explicitly allowed to bring complaints to establish parentage under section 5(a) (and, presumably, section 21).

[25] "In all actions under this chapter a man is presumed to be the father of a child … if:

(1) he is or has been married to the mother and the child was born during the marriage, or within

(footnote continued…)

section 6(a)(4) presumes that a man is the parent of a child where he "jointly with the mother, received the child into their home and openly held out the child as their child." G.L. c. 209C, § 6(a)(4).

In applying section 6(a)(1) to a same-sex spouse in *Hunter,* this Court has presumed parentage for an indisputably nonbiological parent. 463 Mass. at 493. *Hunter* is particularly significant in that the "marital presumption" of section 6(a)(1) parallels the "holding out" presumption of section 6(a)(4). Given that the Court has already construed the marital presumption to apply to a nonbiological putative parent, the holding out presumption may also be

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(…footnote continued)

> three hundred days after the marriage was terminated by death, annulment or divorce; or
> (2) before the child's birth, he married or attempted to marry the mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the child was born during the attempted marriage or within three hundred days after its termination; or
> (3) after the child's birth, he married or attempted to marry the mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and
>
> > (i) he agreed to support the child under a written voluntary promise, or
> > (ii) he has engaged in any other conduct which can be construed as an acknowledgment of paternity."

construed to apply to a nonbiological putative parent if he or she "jointly with the mother, received the child into their home and openly held out the child as their child." G.L. c. 209C, § 6(a)(4)).[26] For nonbiological putative parents of children conceived through ART, the "holding out" presumption can be rebutted through evidence that the putative second parent did not mutually consent with the birth mother to create the child just as this presumption can be rebutted as to biological putative parents through evidence that the second parent is not biologically connected.

Lastly, Massachusetts courts have interpreted chapter 209C to allow for actual legal parentage for nonbiological parents in some cases. For example, a substantial parent-child relationship is required when a putative biological father seeks to overcome the

[26] Appellate courts in several other states have used similar "holding out" provisions to establish parentage of a nonmarital child conceived through ART with the mutual consent of the birth mother and the putative second parent. *See Elisa B. v. Superior Court*, 117 P.3d 660, 666-667 (Cal. 2005); *Frazier v. Goudschaal*, 295 P.3d 542, 553 (Kan. 2013); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 501 (N.H. 2014); *Chatterjee v. King*, 280 P.3d 283, 285-286 (N.M. 2012); *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 582, 584 (Col. App. 2013).

presumption that a birth mother's husband is the father of her child, so as to avoid unnecessary "strain on a unitary family." *M.J.C. v. D.J.*, 410 Mass. 389, 393 (1991); *C.C. v. A.B.*, 406 Mass. 679, 689-91 (1990). If no such relationship exists, the paternity presumably rests in the mother's spouse, regardless of biology. Moreover, once paternity has been established, it cannot be challenged after a "reasonable time" has passed, even if the putative father is not a biological parent, because "consideration of the child's best interests will often weigh more heavily than the genetic link between parent and child." *Paternity of Cheryl*, 434 Mass. 23 (2001).[27]

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[27] *See also, e.g.,* the Rule 1:28 decisions in *L.T. v. J.T.*, 85 Mass. App. Ct. 1119 (2014); *Department of Revenue v. Mueller*, 79 Mass. App. Ct. 1120 (2011); *Department of Revenue v. Coull*, 67 Mass. App. Ct. 1102 (2006); *J.M. v. S.M.*, 52 Mass. App. Ct. 1102 (2001).

Note that the Legislature amended G.L. c. 209C, § 11, in 1998 to limit permissible challenges to acknowledgments of parentage to one year from the date of the acknowledgment. St. 1998, c. 64, § 227. The Court in *Paternity of Cheryl* found no need to determine whether this amendment should be applied retroactively in that case because the Court held that relief from the obligations of paternity is in any event not automatically available to any father who establishes, after the passage of substantial time, that he is not the child's biological parent. 434 Mass. at 24.

4. Previous Cases Do Not Dictate a Contrary Result.

The trial court in this case held that actions under chapter 209C by a nonbiological putative parent are foreclosed by *R.D. v. A.H.*, 454 Mass. 706 (2009), and *C.M. v. P.R.*, 420 Mass 220 (1995). These previous cases do not, however, answer the question of whether a nonbiological putative parent who mutually consented with a birth mother to conceive a child through ART is entitled to assert a claim of parentage pursuant to chapter 209C.

In *R.D.*, the Court concluded that the plaintiff, R.D., could not obtain custody because she was not the legal parent of the child and the legal parents had neither consented to custody nor been determined to be unfit, as G.L. c. 209C, § 10(d), requires before a judge may order custody for a nonparent. 454 Mass. at 714-15. In that case, the plaintiff had lived for a period of time with the child and his biological father, A.H., and had become the child's *de facto parent*, as determined by the Probate and Family Court. *Id.* at 707-10. After R.D. and A.H. separated, R.D. filed a petition for guardianship under G.L. c. 201, § 5, and specifically requested custody under G.L. c.

209C, § 10. *Id.* at 708. The court concluded that R.D. could not obtain custody. *Id.* at 710-15. *R.D.* is distinguishable from this case in that the child in *R.D.* was not "born to" R.D. under any definition of that term. R.D. had nothing to do with the conception of the child and did not live with the child until more than a year after the child's birth. As such, *R.D.* does not stand for the broad proposition that a biological connection is required for legal parentage under G.L. c. 209C.

Neither does *C.M.* answer the question of whether a nonbiological putative parent can ever establish paternity under G.L. c. 209C. In *C.M.*, the Court found that a man, C.M., who moved in with a woman after she had become pregnant and then lived with the woman and her child as a family could not be the father of the child because he admitted that he was not the biological father of the child. 420 Mass. at 222-23. As in *R.D.*, C.M. did not in any way participate with the birth mother in the conception of the child. *Id.* at 220-21. Instead, C.M. made a decision to care for the child after the child was conceived by the birth mother and another man.

Importantly, neither *R.D.* nor *C.M.* addressed the constitutional question at issue in this case because in neither case was the child treated differently from a similarly situated marital child. That is, in neither case did the nonbiological putative parent mutually consent with the birth mother to conceive the child through ART. Therefore, G.L. c. 46, § 4B, would not have applied to either R.D. or C.M. if the plaintiff in either case had been married to the respective birth mother.

Another factor that distinguishes the present case from cases like *R.D.* and *C.M.* is the absence of any potential for a third-party claim to legal parentage. In both *R.D.* and *C.M.*, there were two biological parents who were — or could have been determined to be — the legal parents of the children. In contrast, when a couple conceives a child through sperm donation, the sperm donor is not the legal parent of the child. *Adoption of a Minor*, 471 Mass. at 377 (known sperm donor was not a legal parent where a married couple who mutually consented to ART were legal parents); *Adoption of Tammy*, 416 Mass. at 213 n.5 (sperm donor was not required to consent to adoption by unmarried couple because he was not a

legal parent of the child). As such, when a child is conceived through ART that involves sperm donation, there is no real or potential claim to legal parentage that would compete with that of the nonbiological putative parent.[28]

T.F. v. B.L., 442 Mass. 522 (2004), and *A.H. v. M.P.*, 447 Mass 828 (2006), likewise do not govern this case. Although those decisions address the parental rights and responsibilities of a person who is not biologically related to a child conceived through ART, they do so in the context of whether to apply estoppel principles to enforce agreements to become parents rather than in actions for legal parentage under G.L. c. 209C. These cases do not consider the potential constitutional question raised by denying such an action for a nonmarital child, when compared to the rights and benefits bestowed on marital children under G.L. c. 46, § 4B. This Court has yet to address whether G.L. c. 209C could allow a claim to parentage for a nonbiological putative parent who mutually

[28] Sperm donors have no claim to legal parentage under Florida law. Fla. Stat. § 742.14; *D.M.T. v. T.M.H.*, 129 S.3d 320, 333 (Fla. 2013).

consented with the birth mother to conceive a child through ART.

In fact, this Court recently suggested that it might be willing to "revisit case law to broaden a putative parent's standing in an equity suit to establish parenthood without alleging a biological relationship to the child." *D.H. v. R.R.*, 461 Mass. 756, 763 (2011). If there is no public policy reason to prohibit a determination of parentage in equity absent a biological connection, then presumably there is no public policy reason to prohibit such a determination under G.L. c. 209C.

5. Courts In Other States Have Established Legal Parentage Consistent with the Proposed Interpretation of G.L. C. 209C.

Courts in several other states have interpreted statutes that similarly do not explicitly address the parentage of nonmarital ART children to establish parentage for nonbiological putative parents where two people mutually consented to create a child through ART. *See, e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (action to establish parentage successful where the nonbiological parent "actively participated in causing the children to be conceived

with the understanding that she would raise the children as her own together with the birth mother"). And courts have allowed some claims for nonbiological children conceived through ART under common law where specific legislative language did not allow such an action under the relevant parentage statute. *See Parentage of M.J.*, 787 N.E.2d 144 (unmarried birth mother could not establish parentage of nonbiological putative father under statute governing children conceived through ART because the statute required written consent, but mother could obtain child support under common law).

6. There Is No Constitutional Problem with Interpreting G.L. C. 209C as Proposed.

There should be no real concern that the proposed statutory construction risks invading the birth mother's autonomy and thus violating the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). This concern is minimal because the consent must be mutual between the birth mother and the nonbiological intended parent, just as it impliedly is in G.L. c. 46, § 4B. As noted in section I(B)(4), *supra*, a parent's

autonomy may be limited by her own actions, and "parental rights … are not absolute." *E.N.O.*, 429 Mass. at 832. If one act of sexual intercourse can require two individuals — who may or may not have any type of ongoing relationship and who may or may not have intended to consent to the creation of a child — to share legal parentage of the resulting child without unconstitutionally infringing on either of their individual's rights, then affirmative consent to conceive a child through ART with another person – and the intentionality that is inherent in creating a children through ART — can surely do the same. Such consent can override any countervailing interest in maintaining sole parental rights for a biological parent.

Other jurisdictions have found this reasoning compelling. For example, the Kansas Supreme Court concluded that the constitutionally protected liberty interests of the birth mother were not violated where the parent "asserted her preference as a parent when she entered into a coparenting agreement" but later sought to renege on that agreement "without regard to the rights of or harm to the children." *Frazier,* 295 P.3d at 556-57. The court concluded that, as to the

biological parent, "[s]urely her constitutional rights do not stretch that far." *Id.* Similarly, this Court has decisively determined that where it is in the best interests of the child to maintain a relationship with a *de facto* parent, "[t]he defendant's parental rights do not extend to the extinguishment of the child's relationship with the plaintiff." *E.N.O.*, 429 Mass. at 833.

Requiring mutual consent of the birth mother and second putative parent addresses concerns about infringing on the rights to private decision-making in parenting. Emphasizing the requirement of mutual consent situates the analysis on familiar ground, because the courts already have tools at their disposal to address the factual question of consent. *See, e.g., Okoli*, 81 Mass. App. Ct. at 376-77 (interpreting "consent" for purposes of G.L. c. 46, § 4B, as "consent to create a child," which can be evidenced through verbal, written or other "volitional actions that result in the creation of a child." (quoting *Parentage of M.J.*, 787 N.E.2d at 152)).

CONCLUSION

For the foregoing reasons, the Court should interpret G.L. c. 209C to permit claims of legal

parentage where a nonbiological putative parent alleges to have mutually consented with the birth mother to conceive a child through ART.

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was served upon all parties by mailing two (2) copies first class, postage prepaid to

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March 21, 2016