APPENDIX

Appendix A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

KIMBERLY MCLAUGHLIN,
Petitioner,
v.
THE HONORABLE LORI B. JONES, JUDGE PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent Judge,
SUZAN MCLAUGHLIN,
Real Party in Interest.

No. CV-16-0266-PR
Filed September 19, 2017

Appeal from the Superior Court in Pima County
The Honorable Lori B. Jones, Judge Pro Tempore
No. DC20130015
AFFIRMED
Opinion of the Court of Appeals, Division Two
240 Ariz. 560 (App. 2016)
VACATED

COUNSEL:

Keith Berkshire (argued), Erica L. Gadberry, Berkshire Law Office PLLC, Phoenix, Attorneys for Kimberly McLaughlin

Shannon Minter (argued), Emily Haan, Catherine Sakimura, National Center for Lesbian Rights, San

Francisco, CA; and Claudia D. Work, Campbell Law Group Chartered, Phoenix, Attorneys for Suzan McLaughlin

Barbara A. Atwood, Professor of Law Emerita, Director, Family and Juvenile Law Certificate Program, Paul D. Bennett, Clinical Professor and Director, Child and Family Law Clinic, Negar Katirai, Director, Community Law Group, and Jason Buckner, Natalie Cafasso, and Chris Lloyd, Rule 38(d) Certified Law Students, Child and Family Law Clinic, The University of Arizona, Tucson, for Amici Curiae Child and Family Law Clinic, The University of Arizona James E. Rogers College of Law

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Gregg R. Woodnick, Markus W. Risinger, Woodnick Law PLLC, Phoenix, Attorneys for Amicus Curiae Arizona Family Law Practitioners

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CHIEF JUSTICE BALES authored the opinion of the Court, in which JUSTICES BRUTINEL and TIMMER and JUDGE JONES joined[1] . JUSTICE LOPEZ,

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[1]Justice Andrew W. Gould recused himself. Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable Kenton D. Jones, Judge of the Arizona Court of Appeals, Division One, was designated to sit in this matter.

joined by VICE CHIEF JUSTICE PELANDER, concurred. JUSTICE BOLICK concurred in part and dissented in part.

CHIEF JUSTICE BALES, opinion of the Court:

¶1 Under A.R.S. § 25-814(A)(1), a man is presumed to be a legal parent if his wife gives birth to a child during the marriage. We here consider whether this presumption applies to similarly situated women in same-sex marriages. Because couples in same-sex marriages are constitutionally entitled to the "constellation of benefits the States have linked to marriage," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015), we hold that the statutory presumption applies. We further hold that Kimberly McLaughlin, the birth mother here, is equitably estopped from rebutting her spouse Suzan's presumptive parentage of their son.

I.

¶2 The facts are not in dispute. In October 2008, Kimberly and Suzan, a same-sex couple, legally married in California. After the couple decided to have a child through artificial insemination, Suzan unsuccessfully attempted to conceive using an anonymous sperm donor. In 2010, Kimberly underwent the same process and became pregnant.

¶3 During the pregnancy, Kimberly and Suzan moved to Arizona. In February 2011, they entered a joint parenting agreement declaring Suzan a "co-parent" of the child. The agreement specifically states that "Kimberly McLaughlin intends for Suzan McLaughlin

to be a second parent to her child, with the same rights, responsibilities, and obligations that a biological parent would have to her child" and that "[s]hould the relationship between [them] end . . . it is the parties [sic] intention that the parenting relationship between Suzan McLaughlin and the child shall continue with shared custody, regular visitation, and child support proportional to custody time and income." Kimberly and Suzan also executed wills declaring Suzan to be an equal parent.

¶4 In June 2011, Kimberly gave birth to a baby boy, E. While Kimberly worked as a physician, Suzan stayed at home to care for E. When E. was almost two years old, Kimberly and Suzan's relationship deteriorated to the point that Kimberly moved out of their home, taking E. and cutting off Suzan's contact with him.

¶5 Consequently, in 2013, Suzan filed petitions for dissolution and for legal decision-making and parenting time in loco parentis. During litigation, Suzan challenged the constitutionality of Arizona's refusal to recognize lawful same-sex marriages performed in other states, and pursuant to A.R.S. § 12-1841, provided notice to the State of her constitutional challenge. The State intervened in the litigation.

¶6 After the Supreme Court held in *Obergefell* that the Fourteenth Amendment to the United States Constitution guarantees same-sex couples the fundamental right to marry, the State withdrew as a party, and the trial court ordered the case to proceed as a dissolution of marriage action with children because Suzan was a presumptive parent under

A.R.S. § 25-814(A)(1). Based on *Obergefell*, the court reasoned that it would violate Suzan's Fourteenth Amendment rights not to afford her the same presumption of paternity that applies to a similarly situated man in an opposite-sex marriage. Additionally, the court held that Kimberly could not rebut Suzan's presumptive parentage under A.R.S. § 25-814(C) because permitting rebuttal would allow a biological mother to use the undisputed fact of a consensual, artificial insemination to force the non-biological parent to pay child support under A.R.S. § 25-501(B) while denying that same non-biological parent any parental rights. *See* A.R.S. § 25-501(B) ("A child who is born as the result of artificial insemination is entitled to support from the mother as prescribed by this section and the mother's spouse if the spouse either is the biological father of the child or agreed in writing to the insemination before or after the insemination occurred.").

¶7 Kimberly sought special action review in the court of appeals. That court accepted jurisdiction but denied Kimberly relief, concluding that, under *Obergefell*, § 25-814(A) applies to same-sex spouses and that Suzan is the presumptive parent. *McLaughlin v. Jones*, 240 Ariz. 560, 564 ¶ 14, 565–66 ¶ 19 (App. 2016). The court also reasoned that Kimberly was equitably estopped from rebutting Suzan's presumption of parentage under § 25-814(C). Id. at ¶ 20.

¶8 After the court of appeals issued its decision, another division of the court reached a contrary result in a different case. See *Turner v. Steiner*, 242 Ariz. 494 (App. 2017). A divided panel concluded that a female same-sex spouse could not be presumed a legal

parent under § 25-814(A)(1) because the presumption is based on biological differences between men and women and *Obergefell* does not require courts to interpret paternity statutes in a gender-neutral manner. *Id.* at 498–99 ¶¶ 15–18. The dissenting judge argued that *Obergefell* mandates a gender-neutral interpretation of § 25-814(A)(1) and that affording equal rights of parentage would foster, instead of disrupt, the permanency and stability important to a child's best interest. Id. at 901 ¶ 25 (Winthrop, J., dissenting).

¶9 We granted review because the application of § 25-814(A)(1) to same-sex marriages after *Obergefell* is a recurring issue of statewide importance. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24.

II.

¶10 We review the constitutionality and interpretation of statutes de novo. *State v. Stummer*, 219 Ariz. 137, 141 ¶ 7 (2008). "[T]he words of a statute are to be given their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *State v. Miller*, 100 Ariz. 288, 296 (1966).

¶11 Under Arizona law, "[a] man is presumed to be the father of the child if . . . [h]e and the mother of the child were married at any time in the ten months immediately preceding the birth or the child is born within ten months after the marriage is terminated . . . ." A.R.S. § 25-814(A)(1). The "paternity" presumed by this statute, as explained further below, refers to a

father's legal parental rights and responsibilities rather than biological paternity. Because Arizona does not have any statutes addressing parental rights—apart from financial obligations under § 25-501(B)—in cases of artificial insemination, a husband in an opposite-sex marriage whose wife is artificially inseminated by an anonymous sperm donor can establish his parental rights through § 25-814(A)(1). Kimberly argues the trial court erred when it applied this marital paternity presumption to Suzan, because the statute by its terms only applies to males and *Obergefell* does not mandate extending the presumption to females.

A.

¶12 As Kimberly correctly notes, the text of § 25-814(A)(1) clearly indicates that the legislature intended the marital paternity presumption to apply only to males. In articulating the presumption, the legislature used the words "father," "he," and "man." Although not statutorily defined, all these words refer to the male sex. *See* Black's Law Dictionary (10th ed. 2014) (defining "father" as "[a] male parent" and "man" as "[a]n adult male"). These words are contrasted with words connoting the female sex, such as "mother." *See* Webster's Third New International Dictionary 1474 (2002) (defining "mother" as "a female parent"). By its terms, the statute applies to a "man" who is married to the "mother" within ten months of the child's birth. Section 25-814(A)(1), therefore, applies to husbands in opposite-sex marriages. As written, § 25-814(A)(1) does not apply to Suzan.

¶13 However, in the wake of *Obergefell*, excluding Suzan from the marital paternity presumption violates the Fourteenth Amendment. In *Obergefell*, the United States Supreme Court reiterated that marriage is a fundamental right, long-protected by the Due Process Clause. 135 S. Ct. at 2598. Describing marriage as "a keystone of our social order," the Court noted that states have "made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities," such as "child custody, support, and visitation rules," further contributing to its fundamental character. *Id.* at 2601. Denying same-sex couples "the same legal treatment" in marriage, *id.* at 2602, and "all the benefits" afforded opposite-sex couples, "works a grave and continuing harm" on gays and lesbians in various ways—demeaning them, humiliating and stigmatizing their children and family units, and teaching society that they are inferior in important respects. *Id.* at 2600–02, 2604.

¶14 Denying same-sex couples the right to marry, *Obergefell* concluded, unjustifiably infringes the fundamental right to marry in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. *Id.* at 2604. Accordingly, the Court invalidated as unconstitutional state laws banning same-sex marriage "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605.

¶15 Despite *Obergefell*'s holding requiring states to provide same-sex couples "the same terms and conditions" of marriage, Kimberly urges this Court to interpret *Obergefell* narrowly. Like the Turner court,

she contends that *Obergefell* only established two points of law: that marriage is a fundamental right the states cannot deny to same-sex couples and that all states must give full faith and credit to same-sex marriages performed in other states. See *Turner*, 242 Ariz. at 498 ¶ 15. Under this reading, *Obergefell* does not require extending statutory benefits linked to marriage to include same-sex couples; rather, it only invalidates laws prohibiting same-sex marriage. *Id.*

¶16 Such a constricted reading, however, is precluded by *Obergefell* itself and the Supreme Court's recent decision in *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam). In *Obergefell*, the Court repeatedly framed both the issue and its holding in terms of whether states can deny same-sex couples the same "right" to marriage afforded opposite-sex couples. *See* 135 S. Ct. at 2601 (noting that excluding same-sex couples from marriage denies them "the constellation of benefits the States have linked to marriage"); *id.* at 2602 (noting harms that result from denying same-sex couples the "same legal treatment as opposite-sex couples"); *id.* at 2604 (noting challenged laws were unequal because "same-sex couples are denied all the benefits afforded to opposite-sex couples").

¶17 "The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Id.* at 2607. Such broad statements reflect that the plaintiffs in *Obergefell* sought more than just recognition of same-sex marriages. Indeed, two of the plaintiffs were a female same-sex couple who challenged a Michigan law permitting opposite-sex couples, but not them, to both serve as adoptive legal

parents for the same child. 135 S. Ct. at 2595. These plaintiffs, the Court observed, deserved to know "whether Michigan may continue to deny them the certainty and stability" afforded by their children having two legal parents rather than one. *Id.* at 2606. And the benefits attendant to marriage were expressly part of the Court's rationale for concluding that the Constitution does not permit states to bar same-sex couples from marriage "on the same terms." 135 S. Ct. at 2607; *see id.* at 2601. It would be inconsistent with *Obergefell* to conclude that same-sex couples can legally marry but states can then deny them the same benefits of marriage afforded opposite-sex couples.

¶18 *Pavan*, decided after *Turner*, confirms our interpretation of *Obergefell*. In *Pavan*, an Arkansas law generally required that when a married woman gives birth, the name of the mother's male spouse appear on the birth certificate, regardless of the male spouse's biological relationship to the child. 137 S. Ct. at 2077. The Arkansas Supreme Court concluded that *Obergefell* did not require the state to similarly list the name of the mother's female spouse on the child's birth certificate, in part because the state law did not involve the right to same-sex marriage or its recognition by other states. *Smith v. Pavan*, 505 S.W.3d 169, 180 (Ark. 2016), *rev'd per curiam*, 137 S. Ct. 2075 (2017). The United States Supreme Court summarily reversed, stating that such differential treatment of same-sex couples infringed "*Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" *Pavan*, 137 S. Ct. at 2077 (quoting *Obergefell*, 135 S. Ct. at 2601).

¶19 Consistent with *Obergefell* and *Pavan*, we must determine whether § 25-814(A)(1) affords a benefit linked to marriage and authorizes disparate treatment of same-sex and opposite-sex marriages. Clearly, § 25-814(A)(1) is an evidentiary benefit flowing from marriage. *See* Daniel J. McAuliffe & Shirley J. Wahl, Arizona Law of Evidence—Arizona Practice Series § 301:5(A), at 83 (4th ed. 2008) (citing § 25-814 as an example of a statutorily based evidentiary presumption). If a child is born during an opposite-sex marriage, the husband is presumed to be the child's legal parent. *See* A.R.S. §§ 25-803(C) ("When paternity is established the court may award legal decision-making and parenting time as provided in § 25- 408."), -814(A)(1) (presuming husband is a legal parent of a child born during the marriage). Legal parent status is, undoubtedly, a benefit of marriage. *See Pavan*, 137 S. Ct. at 2078 (requiring Arkansas to list a non-biological, same-sex spouse on a child's birth certificate, which establishes legal parenthood). That this evidentiary presumption is rebuttable does not alter the fact that § 25-814(A)(1) affords a benefit of marriage. See A.R.S. § 25-814(C); *cf. Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 144–45, 153 (1980) (classifying state statute as a benefit even though widowers could rebut evidentiary presumption of non-dependency).

¶20 On its face, § 25-814(A)(1) authorizes differential treatment of similarly situated same-sex couples. For instance, if a woman in an opposite-sex marriage conceives a child through an anonymous sperm donor, her husband will be presumed the father under § 25-814(A)(1) even though he is not biologically related to

the child. However, when a woman in a same-sex marriage conceives a child in a similar fashion, her female spouse will not be a presumptive parent under § 25-814(A)(1) simply because the presumption only applies to males. Consequently, a female spouse in a same-sex marriage is only afforded one route to becoming the legal parent of a child born to her marital partner—namely, adoption— whereas a male spouse in an opposite-sex marriage can either adopt or rely on the marital paternity presumption to establish his legal parentage. Thus, applying § 25-814(A)(1) as written excludes same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

¶21 Kimberly counters that § 25-814(A)(1) is constitutional despite its disparate treatment of same-sex couples because it simply concerns identifying biological parentage. However, as the previous example illustrates, the marital paternity presumption encompasses more than just rights and responsibilities attendant to biologically related fathers. When the wife in an opposite-sex couple conceives a child, her husband is presumed to be the father even when he is not biologically related to the child. Thus, the *Turner* court incorrectly concluded that "biology—the biological difference between men and women—is the very reason the [paternity] presumption statute exists." 242 Ariz. at 499 ¶ 18. Because the marital paternity presumption does more than just identify biological fathers, Arizona cannot deny same-sex spouses the benefit the presumption affords. *See Pavan*, 137 S. Ct. at 2078 (holding that Arkansas could not deny listing non-biological same-sex spouses on birth certificates because it "ma[d]e its

birth certificates more than a mere marker of biological relationships").

¶22 Like the *Turner* court, Kimberly errs in relying on *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001). See *Turner*, 242 Ariz. at 499 ¶ 18. In *Nguyen*, the United States Supreme Court held that "the imposition of different rules" on mothers and fathers for proving their biological relationship to a child was not unconstitutional because "fathers and mothers are *not similarly situated* with regard to proof of biological parenthood." 533 U.S. at 54 (emphasis added). Biological parentage is not at issue here. Although a woman, Suzan is similarly situated to a man who is presumed to be a parent even though his wife conceived a child other than by him. Because this is a case where males and females are similarly situated but treated differently, *Nguyen* is inapposite.

¶23 In sum, the presumption of paternity under § 25-814(A)(1) cannot, consistent with the Fourteenth Amendment's Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.

B.

¶24 Kimberly argues that the Court cannot interpret § 25- 814(A)(1) gender neutrally because doing so would effectively rewrite the statute, thereby invading the legislature's domain. Instead, Kimberly contends that this Court must wait for the legislature

to remedy this constitutional defect. This argument misperceives this Court's constitutional role and responsibility when faced with a statute that violates the equal protection of the laws guaranteed by the Fourteenth Amendment.

¶25 To place the remedial issue in context, it is useful to review some settled constitutional principles. The United States Supreme Court's interpretation of the Constitution is binding on state court judges, just as on other state officers. *See Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958). When the Constitution conflicts with a statute, the former prevails. *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (noting "the constitution is superior to any ordinary act of the legislature; [and] the constitution, and not such ordinary act, must govern the case to which they both apply"); The Federalist No. 78 at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). It is no answer to a constitutional violation in a pending case to assert that it could be remedied by legislative action. "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right." *Obergefell*, 135 S. Ct. at 2605.

¶26 When a statute grants benefits but violates equal protection, a court has "two remedial alternatives." *Califano v. Westcott*, 443 U.S. 76, 89 (1979). "[A] court may either declare [the statute] a nullity and order that its benefit not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J.,

concurring in result)). State court judges face the same remedial alternatives when a benefit statute violates equal protection. *See Wengler*, 446 U.S. at 153 (remanding remedial question to state court because "state judges are better positioned to choose" whether extension or nullification of a state benefit statute is more "consonant with the state legislature's overall purpose"). This remedial choice is not confined to circumstances in which the state grants monetary benefits but instead applies to other statutory classifications violative of equal protection. *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686–87 (2017) (concerning statutes conferring U.S. citizenship on children born abroad); *Welsh*, 398 U.S. at 361– 63 (Harlan, J., concurring) (concerning statute authorizing exemption from military service for conscientious objectors).

¶27 Which remedial alternative a court elects "is governed by the legislature's intent, as revealed by the statute at hand." *Morales-Santana*, 137 S. Ct. at 1699. In making this assessment, a court should "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Heckler*, 465 U.S. at 739 n.5 (quoting *Welsh*, 398 U.S. at 365 (Harlan, J., concurring in result)). Generally, the proper remedy is extension, not nullification. *Morales-Santana*, 137 S. Ct. at 1699.

¶28 Because § 25-814(A)(1) is now a constitutionally defective state-benefit statute, we must determine whether to extend the marital paternity presumption to similarly situated women such as Suzan or to

nullify it altogether. Neither party here requests that this Court strike § 25- 814(A)(1). This is unsurprising because extension, as opposed to abrogation, is more consonant with the purposes of the marital paternity presumption.

¶29 A primary purpose of the marital paternity presumption is to ensure children have financial support from two parents. The legislature originally enacted § 25-814(A)(1) in 1994 as part of sweeping changes to Arizona's child support statutes. *See* 1994 Ariz. Sess. Laws, ch. 374, § 5 (2d Reg. Sess.) (originally numbered as A.R.S. § 12-854); 1996 Ariz. Sess. Laws, ch. 192, § 14 (2d Reg. Sess.) (renumbered as § 25-814). In locating § 25-814(A)(1) under Title 25, Article 1, the legislature expressly provided that a mother or father could commence paternity proceedings "to compel support under [Title 25, Article 1]." A.R.S. § 25-803(A). A presumptive father under § 25-814(A)(1) must pay child support unless clear and convincing evidence shows "paternity was established by fraud, duress or material mistake of fact." *See* A.R.S. § 25-503(A), (F). (So too must a non-biological mother in a same-sex marriage who agreed in writing to the insemination. *See* A.R.S. § 25-501(B).) Consequently, since § 25-814(A)(1)'s enactment, we have observed that the purpose of establishing paternity is to "reduce the number of individuals forced to enter the welfare rolls." *Hall v. Lalli*, 194 Ariz. 54, 59 ¶ 14 (1999); see also *Hurt v. Superior Court*, 124 Ariz. 45, 48 (1979) (noting that the purpose of paternity statutes is "to provide financial support for the child").

¶30 To strike § 25-814(A)(1) would only undermine this important governmental objective. Because men

in opposite-sex marriages are presumed to be legal parents through the marital paternity presumption, eliminating this presumption would increase the likelihood that children born to opposite-sex parents lack financial support from two parents. Extending the presumption, on the other hand, would better ensure that all children—whether born to same-sex or opposite-sex spouses—are not impoverished.

¶31 The marital paternity presumption also promotes the family unit. The legislature declared that the general purpose of Title 25 is "[t]o promote strong families" and that it is generally in the child's best interest "[t]o have substantial, frequent, meaningful and continuing parenting time with both parents" and "[t]o have both parents participate in decision making about the child." A.R.S. § 25-103(A)(1), (B)(1)-(2). The legislature also mandated that Arizona courts "shall apply the provisions of [Title 25] in a manner that is consistent with [§ 25-103]." *Id.* at § 25-103(C). When a man is presumed to be the father of a child born during the marriage, and that presumption is not rebutted, he is entitled to legal decision-making and parenting time with the child. *See* A.R.S. § 25-803(C). Thus, the marital paternity presumption seeks to ensure a child has meaningful parenting time and participation from both parents.

¶32 Extending the marital paternity presumption to same-sex spouses also better promotes strong family units. In *Obergefell*, the Supreme Court concluded that the right to marry is fundamental in part because "it safeguards children and families." 135 S. Ct. at 2590. By denying same-sex couples "the recognition, stability, and predictability marriage offers," the

Court found that children of same-sex couples "suffer the stigma of knowing their families are somehow lesser" and "suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life." *Id.* Extending the marital paternity presumption mitigates these harms. Children born to same-sex spouses will know that they will have meaningful parenting time with both parents even in the event of a dissolution of marriage. By contrast, nullifying § 25-814(A)(1) would only impose these harms on children of opposite-sex spouses.

¶33 For these reasons, we extend § 25-814(A)(1) to same-sex spouses such as Suzan. By extending § 25-814(A)(1) to same-sex spouses, we ensure all children, and not just children born to opposite-sex spouses, have financial and emotional support from two parents and strong family units.

¶34 We are not persuaded by our dissenting colleague's argument that this relief exceeds the proper role of the courts. *Infra* ¶ 51. The partial dissent acknowledges that, under *Obergefell* and *Pavan*, a state must afford "parenting rights to members of same-sex couples on an equal basis with opposite-sex couples." *Infra* ¶ 50. We honor that constitutional requirement by holding that Suzan must enjoy the same presumption of parentage under § 25-814(A)(1) as would a husband in an opposite-sex marriage.

¶35 "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by

withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Morales-Santana*, 137 S. Ct. at 1698 (alteration in original) (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)). That courts must make such a choice does not reflect impermissible judicial "rewriting" of a statute; indeed, leaving intact a statute that violates the Equal Protection Clause would abdicate the courts' responsibility to uphold the Constitution. In deciding between remedies, however, courts give deference to the legislature by considering whether withdrawal or expansion better serves the statute's purposes. *Morales-Santana* reflects that fealty to a statute's purpose may result in eliminating a benefit. Here, as we have already explained *supra* ¶ 32, the evident purpose of the statute is better served by extending the presumption to same-sex couples.

¶36 *Obergefell* and *Pavan*, we acknowledge, will require a reassessment of various state statutes, rules, and regulations to the extent they deny same-sex spouses all the benefits afforded opposite-sex spouses. *See Obergefell*, 135 S. Ct. at 2601 (identifying the benefits of marriage affected by its holding as including: "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules"). That reassessment need not occur through case-by-case litigation.

¶37 Like the judiciary, the legislative and executive branches are obliged to follow the United States Constitution. U.S. Const. art. VI, cl. 2 (stating that the U.S. Constitution is "the supreme Law of the Land"); Ariz. Const. art. II, § 3 (same). Through legislative enactments and rulemaking, our coordinate branches of government can forestall unnecessary litigation and help ensure that Arizona law guarantees same-sex spouses the dignity and equality the Constitution requires—namely, the same benefits afforded couples in opposite-sex marriages. See *Pavan*, 137 S. Ct. at 2078; *Obergefell*, 135 S. Ct. at 2605.

III.

¶38 Because Suzan is presumed a parent under § 25-814(A)(1), Kimberly argues that she is entitled to rebut Suzan's presumptive parentage. *See* § 25-814(C) (providing that "[a]ny presumption under [§ 25-814(A)] shall be rebutted by clear and convincing evidence"). Kimberly contends that the court of appeals erroneously denied her this right when it held that she was equitably estopped from rebutting Suzan's presumptive parentage. See *McLaughlin*, 240 Ariz. at 566–67 ¶¶ 20, 27. We disagree.

¶39 Equitable estoppel "precludes a party from asserting a right inconsistent with a position previously taken to the prejudice of another acting in reliance thereon." *Unruh v. Indus. Comm'n*, 81 Ariz. 118, 120 (1956); see also *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 576–77 ¶35 (1998) ("The three elements of equitable estoppel are traditionally stated as: (1) the party to be estopped commits acts inconsistent with a position it later

adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." (footnote omitted)).

¶40 We have often applied equitable estoppel in our family law jurisprudence, including dissolution cases. See *Unruh*, 81 Ariz. at 120 (citing three decisions by this Court in which we estopped parties from challenging presumptively valid divorces). Further, other state supreme courts have applied equitable estoppel in paternity actions, including cases involving marital paternity presumption statutes similar to § 25-814(A)(1). See, e.g., *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 639–41 (Wis. 2004) (estopping a biological mother and putative father from rebutting a husband's presumptive paternity under a marital paternity presumption statute). Nothing prohibits Arizona courts from applying equitable estoppel to preclude the rebuttal of a statutory paternity presumption under § 25-814(A).

¶41 Here, Kimberly and Suzan agree that they intended for Kimberly to be artificially inseminated with an anonymous sperm donor and that Kimberly gave birth to E. during the marriage. During the pregnancy, they signed a joint parenting agreement declaring Suzan a "co-parent" of the child and their intent that the parenting relationship between Suzan McLaughlin and the child would continue if Suzan and Kimberly's relationship ended. After E.'s birth, Suzan stayed home to care for him during the first two years of his life. Thus, the undisputed facts unequivocally demonstrate that Kimberly intended for Suzan to be E.'s parent, that Kimberly conceived and gave birth to E. while married to Suzan, and that

Suzan relied on this agreement when she formed a mother-son bond with E. and parented him from birth.

¶42 In response, Kimberly counters that applying equitable estoppel here imposes an irrefutable standard that only benefits same-sex marriages. We reject this argument for two reasons. First, all presumptions under § 25-814(A) are rebuttable. *See* § 25-814(C) ("*Any* presumption under [§ 25-814] shall be rebutted by clear and convincing evidence." (emphasis added)). For example, the presumption might be rebutted by evidence that the biological mother was artificially inseminated without the consent of her spouse. But based on the facts of this case, we conclude that Kimberly is estopped from rebutting Suzan's presumptive parentage of E. As we explained, to do otherwise would be patently unfair. Second, equitable estoppel applies equally to spouses in same-sex or opposite-sex marriages. *Cf. In re Marriage of Worcester*, 192 Ariz. 24, 27 ¶¶ 7–8 (1998) (prohibiting a mother from rebutting her former husband's presumptive paternity under the marital paternity presumption "unless the mother is seeking child support from another").

¶43 For the foregoing reasons, we hold that Kimberly is equitably estopped from rebutting Suzan's presumptive parentage of E.

IV.

¶44 We vacate the court of appeals' opinion, affirm the trial court's ruling that Suzan is E.'s legal parent, and remand to the trial court for further proceedings consistent with this opinion.

LOPEZ, J., joined by PELANDER, V.C.J., concurring.

¶45 The majority correctly concludes that the Fourteenth Amendment to the United States Constitution, as interpreted by the United States Supreme Court in *Obergefell* and *Pavan,* entitles Suzan, the Real Party in Interest, to a presumption of parental status under Arizona law consonant with the rights conferred upon a husband in an opposite-sex marriage under similar circumstances. A.R.S. § 25-814(A)(1). I write separately to underscore what is at least implicit in the majority's opinion. We have not extended Obergefell; rather, the United States Supreme Court did so in *Pavan*, the recent opinion that not only expounds on Obergefell, but also forecloses debate on the breadth of that decision and dictates the outcome here. Today, we merely follow the United States Supreme Court's directive as the Supremacy Clause of the federal Constitution commands. U.S. Const. art. VI, cl. 2 (stating that the Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); *see also* Ariz. Const. art. II, § 3 (same). No more, no less.

¶46 The remedy in this case presents a more complex issue. The majority properly identifies our two imperfect remedial options: we may invalidate § 25-814(A), and jettison its sweeping applications beyond the facts of this case; or, alternatively, we may extend the statute's application, under the *Califano* rubric, to recognize Suzan's parental status as we would a similarly-situated, non-biological father. The majority properly implements the least imperfect available

remedy, because extending rather than abrogating § 25-814(A) is "more consonant with the purposes of the marital paternity presumption." ¶ 28, *supra.*

¶47 In his partial dissent, Justice Bolick declines to join the majority's analysis and conclusion regarding the appropriate remedy in this case, labeling it "unnecessary, unwise, and beyond the proper scope of judicial power." ¶ 51, *infra.* Contrary to Justice Bolick's concern, however, the Court neither rewrites the statute nor improperly assumes the legislative prerogative. Instead, faced with a statute that (after *Obergefell* and *Pavan*) no longer can be constitutionally applied to only opposite-sex marriages, the Court necessarily and reasonably extends the statute to the same-sex couple here.

¶48 Justice Bolick agrees with the result in this case and thus, like the majority, opts to affirm the family court's ruling that treats the parties' marital dissolution as one with children. But he does not convincingly explain how that result can obtain other than by extending § 25-814(A)(1)'s presumption to Suzan. Justice Bolick's primary justification for rejecting the majority's *Califano* remedy is that "the paternity statute does not offend the Constitution." ¶ 52, *infra*. This reasoning, however, misconstrues the application and scope of § 25-814(A)(1)'s presumption, which does more than just affect biological fathers, but also presumes parental rights for a man in an opposite-sex marriage whose wife conceives a child through artificial insemination by an anonymous donor. This disparate application of the paternity statute deprives this Court of the option to eschew a remedy here.

¶49 The majority's approach is consistent with the rule of law as enunciated by the United States Supreme Court, which we are bound to follow. While circumstances require us to drive a remedial square peg into a statutory round hole here, nothing in the majority opinion prevents the legislature from fashioning a broader or more suitable solution by amending or revoking § 25-814 and other statutes as they may apply to other pending or future cases.

BOLICK, J., concurring in part and dissenting in part.

¶50 I agree with the majority that the United States Supreme Court's decision in *Pavan* unequivocally forbids states from denying parenting rights to members of same-sex couples on an equal basis with opposite-sex couples. I also agree that the facts and equitable considerations make a compelling case for Suzan to have parenting rights. Suzan and Kimberly were a legally married couple when their baby was born. Not only did they execute a co-parenting agreement in times that were happier between them, but Suzan rather than Kimberly would have been the birth mother had she been able to conceive through artificial insemination, which would have reversed the present circumstances. I therefore join my colleagues in affirming the trial court's decision to proceed with this case as a marital dissolution with children.

¶51 With great respect, however, I cannot join the majority in rewriting our state's paternity statute, which is unnecessary, unwise, and beyond the proper scope of judicial power. The marital presumption that

the majority finds unconstitutional and rewrites, A.R.S. § 25-814(A)(1), is not, as the majority characterizes it, a "state-benefit statute." *Supra* ¶ 28. Rather, it is part of an integrated, comprehensive statute that serves the highly important and wholly legitimate purpose of providing a mechanism to establish a father's rights and obligations. Among other methods, it allows a person to rebut a marital presumption by evidence of biological parentage, which as the Court tacitly acknowledges, cannot apply to non-birth mothers in a same-sex marriage. A.R.S. § 25-814(C); *see also* § 25-814(A)(2) (creating a parenthood presumption when genetic testing affirms at least 95% chance of paternity). A paternity statute does not offend the Constitution because only men can be fathers. *See, e.g., Nguyen*, 533 U.S. at 63 (decision by Justice Kennedy holding that "[t]he imposition of a different set of rules . . . is neither surprising nor troublesome from a constitutional perspective" because they "are not similarly situated with regard to the proof of biological parenthood"). It is not the paternity statute that is unconstitutional, but rather the *absence* of a mechanism to provide parenthood opportunities to single-sex couples on equal terms appropriate to their circumstances. See *Pavan*, 137 S. Ct. at 2078 (guaranteeing "access" to the same rights, benefits, and responsibilities as opposite-sex couples).

¶52 Because the paternity statute does not offend the Constitution, no basis exists for the Court to "extend" the marital presumption "benefit," which has the necessary consequence of transforming the nature of the statute and rendering it incoherent. *See Morales-Santana*, 137 S. Ct. at 1689–91 (applying remedial framework from *Califano* to a statute that contained

express gender-based preferences based on "once habitual, but now untenable, assumptions" of "male dominance in marriage."); *id.* at 1700 (finding benefit extension inappropriate in light of "potential disruption of the statutory scheme"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 662 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("[W]e cannot rewrite the statute to be what it is not. Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986)) (internal quotation marks omitted)); *State ex rel. Polk v. Campbell*, 239 Ariz. 405, 408 ¶ 12 (2016) ("We decline to effectively, if not actually, rewrite [the statute], as that is the legislature's prerogative, not ours."). It is the legislature, not this or any court, that should determine how best to write or rewrite family law statutes in a constitutionally compliant manner that makes sense of the entire scheme.

¶53 While the Court properly applies *Pavan* to find unconstitutional the State's failure to provide a parenthood mechanism for same-sex couples and to sustain the trial court's order treating Suzan and Kimberly's marital dissolution as one involving children, it should continue these proceedings to determine additional appropriate remedies. The State intervened in this lawsuit, then withdrew notwithstanding the remaining challenge to the constitutionality of its statutes. The State should be made a party to the lawsuit to enable the Court to

properly evaluate and determine appropriate remedies.

Appendix B

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KIMBERLY MCLAUGHLIN,
Petitioner,
v.
HON. LORI B. JONES, JUDGE PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,
and
SUZAN MCLAUGHLIN,
Real Party in Interest.

No. 2 CA-SA 2016-0035
Filed October 11, 2016

Special Action Proceeding
Pima County Cause No. DC20130015

JURISDICTION ACCEPTED; RELIEF DENIED

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By Paul D. Bennett, a clinical professor appearing pursuant to Rule 38(d), Ariz. R. Sup. Ct., and Autumn Kycia, a student certified pursuant to Rule 38(d)

Community Law Group, Tucson By Negar Katirai, an assistant clinical professor appearing pursuant to Rule 38(d), Ariz. R. Sup. Ct.
Counsel for Amicus Curiae Child and Family Law Clinic, The University of Arizona Rogers College of Law

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OPINION

Judge Espinosa authored the opinion of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 In *Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S. Ct. 2584, 2604-05 (2015), the United States Supreme Court held "same-sex couples may exercise the fundamental right to marry." In this special action, we are asked to decide whether, in light of that decision,

the respondent judge erred by finding real-party-ininterest Suzan McLaughlin, the female spouse of petitioner Kimberly McLaughlin, is the presumptive parent of the child born to Kimberly, pursuant to A.R.S. § 25-814(A)(1), and finding Kimberly may not rebut that presumption pursuant to § 25-814(C). For the reasons that follow, we accept jurisdiction and deny relief.

Factual and Procedural Background

¶2 Kimberly and Suzan were legally married in October 2008 in California. The couple agreed to have a child through artificial insemination, using an anonymous sperm donor selected from a sperm bank. Although efforts to have Suzan conceive and give birth through this process did not prove successful, Kimberly became pregnant in 2010. Before the child was born, the couple moved to Arizona. Anticipating the birth, they entered into a joint parenting agreement and executed mirror wills, declaring they were to be equal parents of the child Kimberly was carrying.[2] After E.'s birth in June 2011, Suzan stayed at home and cared for him, while Kimberly worked as a physician. The relationship deteriorated, however, and when E. was almost two years old, Kimberly

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[2] The agreement stated the parties' intent that Suzan would "participate in a second parent adoption of the child if and when the parties reside in a jurisdiction that permits second parent adoptions," and Suzan would be a "co-parent" of the child; Kimberly "waive[d] any constitutional, federal or state laws that provide her with a greater right to custody and visitation than that enjoyed by Suzan," and the parties further agreed, "[s]hould the relationship between [them] . . . end before a second parent adoption can take place," the parent-child relationship between Suzan and the child would "continue with shared custody . . . ."

moved out of the home, taking E. with her and cutting off his contact with Suzan.

¶3 Suzan filed a Petition for Dissolution of Marriage in April 2013, as well as a Petition for Legal Decision-Making and Parenting Time In Loco Parentis and Petition for Temporary Orders. The respondent judge subsequently stayed the proceedings while Obergefell was pending before the Supreme Court. In January 2016, six months after the Court decided *Obergefell*, holding same-sex couples have the same fundamental right to marry as heterosexual couples, ___ U.S. at ___, 135 S. Ct. at 2602-03, Kimberly moved to set the case for trial. The respondent ordered briefing concerning the issue whether the case was a dissolution proceeding with or without children in view of the presumption of paternity set forth in § 25-814(A). The respondent subsequently found in her April 7, 2016 minute entry that, based on *Obergefell*, it would violate Suzan's rights under the Fourteenth Amendment not to apply to her the same presumption of parenthood that applies to a man. The respondent thus ordered that the case proceed as a dissolution action with children.

¶4 Kimberly then filed a Motion for Declaratory Judgment, asking the respondent judge to decide whether she would be permitted to rebut the presumption pursuant to § 25-814(C). In her May 2 order, the respondent ruled that Kimberly would not be permitted to rebut the presumption. The respondent reasoned that because Suzan was not basing her parenthood on a presumption of paternity, it was not an issue in the case and there was nothing for Kimberly to rebut under the statute. The

respondent added, a "family presumption applies to same sex and opposite sex non-biological spouses married to a spouse who conceived a child during the marriage via artificial insemination." The respondent also relied on A.R.S. § 25-501, a support statute applicable when a child is born as a result of artificial insemination, finding it necessarily gives rise to parental rights in the non-biological spouse. The respondent again ruled the case would proceed as a dissolution action with children. This special action followed.

Jurisdiction

¶5 This court has discretion whether to accept special-action jurisdiction. *Lincoln v. Holt*, 215 Ariz. 21, ¶ 3, 156 P.3d 438, 440 (App. 2007). In determining whether to exercise that discretion, we consider whether the petitioner has an equally plain, speedy, and adequate remedy by appeal. Ariz. R. P. Spec. Act. 1(a). Additionally, questions of law regarding the interpretation of a statute are particularly suited for special-action review, as are issues of first impression and statewide importance. See *State v. Bernini*, 230 Ariz. 223, ¶ 5, 282 P.3d 424, 426 (App. 2012).

¶6 The respondent judge's ruling could be challenged on appeal, after the case has been decided and a final decree and parenting order is entered. *See* Ariz. R. Fam. L. P. 78; *Antonsen v. Superior Court*, 186 Ariz. 1, 4, 918 P.2d 203, 206 (App. 1996) (acknowledging order regarding paternity testing could be raised on direct appeal from final custody order but finding it in child's best interest to accept special-action jurisdiction and address legal issue). But this case

raises significant legal questions of first impression and statewide importance regarding the interpretation and implications of *Obergefell*, and it involves a young child, whose best interest is at stake, compelling reasons to decide these matters now. *See Alvarado v. Thompson*, 240 Ariz. 12, ¶ 10, 375 P.3d 77, 79 (App. 2016); *see also Sheets v. Mead*, 238 Ariz. 55, ¶ 6, 356 P.3d 341, 342–43 (App. 2015) (accepting special-action jurisdiction in part because child would face prolonged period of uncertainty while appeal pending); *K.D. v. Hoffman*, 238 Ariz. 278, ¶ 4, 359 P.3d 1022, 1023 (App. 2015) (special-action jurisdiction accepted in part because issues involved welfare of child).

¶7 For all of these reasons, we accept jurisdiction of this special action.

Discussion

¶8 Kimberly does not dispute that she and Suzan agreed Kimberly would be artificially inseminated, they would both be the child's parents, and they would have equal parental rights. She nevertheless contends Suzan is not a parent as that term is defined in A.R.S. § 25-401(4). She argues that as E.'s biological mother, she is, by definition, the only parent and therefore the only person who has parental rights, which are fundamental rights. Kimberly asserts the respondent judge thus erred by construing § 25-501(B) and § 25-814(A)(1) to give Suzan the same parental rights as she possesses. Suzan responds that in light of *Obergefell*, those statutes must be applied and interpreted in a gender-neutral manner so that same-sex couples' fundamental marital rights are not

restricted and they are afforded the same benefits of marriage as heterosexual couples and on the same terms. *Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2604.

¶9 The interpretation and application of statutes involve questions of law, which we review de novo. See *Adrian E. v. Dep't of Child Safety*, 239 Ariz. 240, ¶ 8, 369 P.3d 264, 266 (App. 2016). "Our primary task in interpreting statutes is to give effect to the intent of the legislature." *State v. Lee*, 236 Ariz. 377, ¶ 16, 340 P.3d 1085, 1090 (App. 2014), quoting In re Estate of Winn, 214 Ariz. 149, ¶ 8, 150 P.3d 236, 238 (2007). The plain language of a statute is the best indicator of that intent. *Id.* Therefore, "[w]hen a statute is clear and unambiguous, we apply its plain language and need not engage in in any other means of statutory interpretation." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 14, 110 P.3d 1013, 1017 (2005). But we must also "attempt to construe and apply statutes in a manner that would render them constitutional." *Adrian E.*, 239 Ariz. 240, ¶ 21, 369 P.3d at 269; *see also Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 272–73, 872 P.2d 668, 676–77 (1994) ("[I]f possible, this court construes statutes to avoid rendering them unconstitutional.").

¶ 10 Section 25–401(4) defines "legal parent" for purposes of marital dissolution proceedings under Title 25, as the "biological or adoptive parent."[3] The statute adds, "Legal parent does not include a person

[3] Although Kimberly also refers to a similar definition of parent in A.R.S. § 1-602(E), which is part of Arizona's Parents' Bill of Rights, A.R.S. §§ 1-601 to 1-602, we confine our discussion to the issue before us, which is whether Suzan is a parent for purposes of a marital dissolution proceeding under Title 25 and the definition of parent in § 25-401(4).

whose paternity has not been established pursuant to [A.R.S.] § 25–812 [acknowledgment of paternity] or 25–814 [presumptions of paternity]." Thus, "legal parent" includes a person whose paternity is established under § 25–814.

¶ 11 Section 25–814(A) provides, in relevant part, as follows:

> A. A man is presumed to be the father of the child if:
>
> 1. He and the mother of the child were married at any time in the ten months immediately preceding the birth....
>
> 2. Genetic testing affirms at least a ninety-five per cent probability of paternity.
>
> 3. A birth certificate is signed by the mother and father of a child born out of wedlock.
>
> 4. A notarized or witnessed statement is signed by both parents acknowledging paternity or separate substantially similar notarized or witnessed statements are signed by both parents acknowledging paternity.

Enacted well before the Supreme Court decided *Obergefell*, this statute was written with gender-specific language at a time when the marriage referred to in subsection (A)(1) could only be between a man and a woman.[4] *See* Ariz. Const. art. XXX, § 1 (only union of one man and one woman valid or

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[4] Initially enacted as A.R.S. § 12-854 in 1994 as part of comprehensive child-support legislation, the legislature renumbered the statute as § 25-814 in 1996. See 1994 Ariz. Sess. Laws, ch. 374, § 5; 1996 Ariz. Sess. Laws, ch. 192, § 14.

recognized as marriage); A.R.S. § 25–101(C) (prohibiting marriage between persons of same sex).

¶ 12 Kimberly first contends the respondent judge erred by relying on § 25–501 to imply a "family presumption" in § 25–814. We agree. Section 25–501 is a support statute; it requires the spouse of a woman who bears a child as a result of artificial insemination to pay child support when that spouse is the biological parent or agreed to the insemination in writing. § 25–501(B). The plain language of the statute does not create "legal parent" status in a person who agreed to the insemination or give that person parental rights. Had the legislature intended to confer those rights, it could have done so when it enacted § 25–401(4) and defined "legal parent." *See* 2012 Ariz. Sess. Laws, ch. 309, § 4.[5] We disagree with Kimberly, however, that it would be impossible and absurd to apply § 25–814(A)(1) in a gender-neutral manner to give rise to presumptive parenthood in Suzan. Indeed, *Obergefell* mandates that we do so and the plain language of the statute, as well as the purpose and policy behind it, are not in conflict with that application.

¶ 13 In *Obergefell*, the Supreme Court held that state statutes that do not permit and will not recognize same-sex marriages deny same-sex couples the

[5] Other states have specifically addressed parentage in the context of assisted reproduction and have adopted the Uniform Parentage Act (UPA), which recognizes a parent-child relationship under those circumstances. See Unif. Parentage Act §§ 703, 704 (Unif. Law Comm'n 2002). Although our courts have found the policies of the UPA "persuasive," Hall v. Lalli, 194 Ariz. 54, ¶ 22, 977 P.2d 776, 783 (1999), our legislature has not adopted it, see *Stephenson v. Nastro*, 192 Ariz. 475, ¶ 16, 967 P.2d 616, 621-22 (App. 1998), and it is not for us to do so.

liberty-based, fundamental right to marry, thereby violating the Due Process and Equal Protection Clauses of the Constitution. —— U.S. ——, 135 S.Ct. at 2602–03, 2604–05. The Court expressly stated that same-sex couples "may not be deprived" of the fundamental right to marry and state laws that "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" are invalid. *Id.* at ——, 135 S.Ct. at 2604–05. Relying, in part, on its previous decision in *Zablocki v. Redhail*, 434 U.S. 374, 384, 386, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), in which it had reaffirmed the holding in *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), that the right to marry is fundamental, the Court identified liberty-based, constitutionally protected rights that are related to the right to marry, including the right to procreate, raise children and make decisions relating to family relationships. *Obergefell*, —— U.S. ——, 135 S.Ct. at 2598–600.[6]

¶ 14 Under § 25–814(A)(1), the male spouse of a woman who delivers a child is the presumptive parent, and, therefore, a "legal parent" for purposes of § 25–401(4). If the female spouse of the birth mother of a child born to a same-sex couple is not afforded the same presumption of parenthood as a husband in a heterosexual marriage, then the same-sex couple is effectively deprived of "civil marriage on the same

[6] In *Obergefell*, the Court also held "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." ___ U.S. at ___, 135 S. Ct. at 2607-08. Kimberly and Suzan were legally married in California in 2008. Following *Obergefell*, Arizona must recognize their marriage.

terms and conditions as opposite-sex couples," particularly in terms of "safeguard[ing] children and families." *Obergefell*, —— U.S. ——, 135 S.Ct. at 2600, 2605.[7] We therefore must reject Kimberly's rigid interpretation of § 25–814. Mindful of our obligation to find statutes constitutional if possible, *Adrian E.*, 239 Ariz. 240, ¶ 21, 369 P.3d at 269, and given the language and purpose of § 25–814, we find it accommodates a gender-neutral application and *Obergefell* requires us to apply it in this manner.

¶ 15 Notwithstanding the use of male-specific terms such as "man," "paternity" and "father," a man's paternity under the statute and, therefore, his status as a legal parent under § 25–401(4) is not necessarily biologically based. Indeed, of the four circumstances specified in § 25–814(A) that give rise to the presumption of paternity, only subsection (A)(2) is based on the establishment of a biological connection between the man and the child through scientific testing. Section 25–814(A)(1) presumes paternity if the child is born during the marriage or within ten months thereafter. It does not require a biological connection between the father and child. The mere fact that the child was born during the marriage or

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[7] That Arizona's adoption statutes, post-*Obergefell*, permit same-sex couples to adopt a child, and allow a birth mother's female spouse to adopt her child, does not place same-sex and heterosexual couples on equal footing. *See* A.R.S. § 8-103(A) (defining who may adopt a child in Arizona); A.R.S. § 8-117(C) (effect of adoption order when spouse of parent adopts); Ariz. R. P. Juv. Ct. 79 (setting forth procedures for adoption, including mandatory content of petition). Aside from the fact that adoption of E. was not a viable option for Suzan in Arizona before *Obergefell*, the adoption process is not comparable to presumptive parenthood based on marriage.

shortly thereafter gives rise to the presumption of the husband's paternity, without regard to whether the husband is the biological parent. Similarly, neither subsection (A)(3), the father's signature on the birth certificate, nor (A)(4), acknowledgment of paternity, requires a biological link with the child. Both are based, instead, on the presumed father's declared intent to be the child's parent and thereby assume the responsibility of supporting the child.

¶ 16 The word "paternity" therefore signifies more than biologically established paternity. It encompasses the notion of parenthood, including parenthood voluntarily established without regard to biology. As our supreme court observed decades ago, the purpose of paternity statutes "appears to be to provide financial support for the child from the natural parent." *Hurt v. Superior Court*, 124 Ariz. 45, 48, 601 P.2d 1329, 1332 (1979). Indeed, initially enacted as A.R.S. § 12–854 in 1994, the statute was part of sweeping changes to Arizona's child support statutes. *See* 1994 Ariz. Sess. Laws, ch. 374, § 5; 1996 Ariz. Sess. Laws, ch. 192, § 14 (renumbered as § 25–814). The marital presumption is intended to assure that two parents will be required to provide support for a child born during the marriage. *See* A.R.S. § 25–503(A), (F) (requiring presumed parent under § 25–814(A) to pay child support unless clear and convincing evidence shows "paternity was established by fraud, duress or material mistake of fact").

¶ 17 The marital presumption of paternity serves the additional purpose of preserving the family unit. *See Ban v. Quigley*, 168 Ariz. 196, 199, 812 P.2d 1014, 1017 (App. 1990); *see also Partanen v. Gallagher*, 475

Mass. 632, 59 N.E.3d 1133, 1141 (2016) (finding that presumptions of paternity " 'are driven, not by biological paternity, but by the [S]tate's interest in the welfare of the child and the integrity of the family' "), *quoting In re Guardianship of Madelyn B.*, 166 N.H. 453, 98 A.3d 494, 500 (2014)(alteration in *Partanen*); *CW v. LV*, 788 A.2d 1002, 1005 (Pa. Super. Ct. 2001) (public policy behind presumption of paternity is preservation of families). These purposes and policies are equally served whether the child is born during the marriage of a heterosexual couple or to a couple of the same sex. *See Obergefell*, ——U.S. ——, 135 S.Ct. at 2600 (safeguarding children and families, which is among bases for protecting right to marriage, applies equally to same-sex as opposite-sex couples).[8]

¶ 18 Kimberly maintains that § 25–814 pertains to paternity and fatherhood, and is a "biological paternity statute" that cannot apply to Suzan because she cannot possibly be E.'s father and has no biological connection to him. And, she argues, it is constitutionally permissible to treat men and women differently in this context, based on biological distinctions, relying on *Nguyen v. I.N.S.*, 533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001). There, the Court found constitutional a federal statute that determines the citizenship of a child born out of the

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[8] Section 25-103(B), A.R.S., provides: "It . . . is the declared public policy of this state and the general purpose of this title that. . . it is in a child's best interest: 1. To have substantial, frequent, meaningful and continuing parenting time with both parents[;] 2. To have both parents participate in decision-making about the child." Subsection (C) of the statute further provides: "A court shall apply the provisions of [Title 25] in a manner that is consistent with this section."

country and out of wedlock differently if the mother is a citizen than if the purported father is a citizen. *Id.* at 70–71, 121 S.Ct. 2053. The Court concluded the gender-based classification had a biological basis and the government has an important interest in verifying that a biological parent-child relationship exists before a child born out of the country and out of wedlock may be regarded as an American citizen. *Id.* at 71–72, 121 S.Ct. 2053. No such reasons for treating men and women differently exist here, where the issue is parenthood of a child born during a marriage.

]¶ 19 The respondent judge thus correctly found that Suzan is presumptively E.'s parent. She erred, however, when she concluded that only a presumption of paternity is rebuttable under § 25–814(C). *See* § 25–814(C) ("Any presumption under [§ 25–814(A)] shall be rebutted by clear and convincing evidence."). By doing so, the respondent applied portions of § 25–814 in a gender-neutral manner but not others. The marital presumption of parenthood cannot constitutionally be rebuttable when the presumed parent is a man, the husband in a heterosexual marriage, but not when the spouse of the birth mother is a woman. *Cf. Soos v. Superior Court*, 182 Ariz. 470, 474–75, 897 P.2d 1356, 1360–61 (App. 1994) (finding A.R.S. § 25–218, which prohibits surrogate parentage contracts, violated equal protection principles insofar as it allowed men to rebut presumption of paternity but did not permit a woman, whose egg had been implanted in the surrogate, to rebut the presumption of maternity).

¶ 20 Here, however, we need not decide how the rebuttal provision in § 25–814(C) applies in a same-

sex marriage because we determine Kimberly is estopped from rebutting the presumption. *See Calderon–Palomino v. Nichols*, 201 Ariz. 419, ¶ 3, 36 P.3d 767, 769 (App. 2001) (appellate court will not grant special-action relief if respondent reaches right result for wrong reason). Equitable estoppel applies when a party engages in acts inconsistent with a position later adopted and the other party justifiably relies on those acts, resulting in injury. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 28, 156 P.3d 1149, 1155 (App. 2007).

¶ 21 The parties do not dispute that they were lawfully married when Kimberly became pregnant as a result of artificial insemination the parties agreed should be undertaken, and E. was born. Nor does Kimberly dispute that Suzan stayed home to care for E. during the first two years of his life, until Kimberly left the home with him. Additionally, Kimberly and Suzan entered into an express agreement contemplating E.'s birth and agreed unequivocally that both would be E.'s parents, with equal rights in every respect. In fact, Kimberly specifically "waive[d] any constitutional, federal or state laws that provide her with a greater right to custody and visitation than that enjoyed by Suzan." The parties even agreed that, "[s]hould the relationship between [them] end before a second parent adoption can take place," the parent-child relationship between Suzan and the child would "continue with shared custody...." Finally, the couple agreed Suzan would "participate in a second parent adoption of the child if and when the parties reside in a jurisdiction that permits second parent adoptions," but Kimberly left the home and separated from Suzan before *Obergefell* was decided and adoption was

possible.

¶ 22 The doctrine of equitable estoppel is not a stranger to family law jurisprudence in Arizona. *See Fenn v. Fenn*, 174 Ariz. 84, 89–90, 847 P.2d 129, 134–35 (App. 1993) (fundamental estoppel elements of representation and detrimental reliance considered in determining child support obligations, though ultimately not relied upon); *see also Unruh v. Indus. Comm'n*, 81 Ariz. 118, 120, 301 P.2d 1029, 1031 (1956) (rejecting dissolution litigant's claim where "conscience of the court" repelled by assertion of rights inconsistent with litigant's past conduct). Although no Arizona case has, until now, addressed a situation such as the one before us, we find helpful and persuasive a Wisconsin decision, *Randy A.J. v. Norma I.J.*, 270 Wis.2d 384, 677 N.W.2d 630 (2004).

¶ 23 In that case, the Wisconsin Supreme Court found the biological mother of a child born during her marriage and the child's putative father equitably estopped from rebutting the statutory presumption that the mother's husband was the child's father. *Id.* at 640–41. The husband, who had no idea another man could be the child's biological father, had supported the child and acted as her father in every respect for years before the mother was convicted of embezzlement and incarcerated, and divorce proceedings began. *Id.* at 633–34. During those proceedings, the mother questioned her husband's paternity for the first time and the putative father then filed a paternity action. *Id.* at 634.

¶ 24 The Wisconsin court identified the issue as "whether the actions and inactions of [the mother] and

[the putative father] were so unfair as to preclude them from overcoming the public's interest in the marital presumption" under the Wisconsin statute, which is similar to § 25–814(A)(1). *Id.* at 640–41. The court concluded that all elements of equitable estoppel existed: action or inaction that induces reliance by another to that person's detriment. *Id.* It noted the arguments of the child and the father that the "uncontradicted evidence" showed the mother and the putative father had done nothing to assert his paternity, had permitted the husband to pay all birthing expenses and meet her financial needs, even after genetic testing, and had allowed the husband and the child "to develop deep emotional ties with each other." *Id.* at 641. It noted the following additional factors: "breaking those ties would be very harmful to [the child], as [the husband] is the only father she has ever known," and, the husband was "fully committed" to acting as the child's father and had done so throughout her life, providing for her emotional and financial needs for six years. *Id.* "In contrast," the court observed, the mother and the putative father had "asserted nothing" but biological test results and the resulting presumption of paternity to counter the arguments of the child and the father and the trial court's findings, which included a determination that it was in the child's best interest to adjudicate the husband as the child's father. *Id.*

¶ 25 The Wisconsin court also concluded that the mother and putative father's "actions and lack of action, which were relied on by both [the child] and [the husband], [were] so unfair, that when combined with the state's interest in preserving [the child's]

status as a marital child, they outbalance the public's interest in a purely biological approach to parenthood." *Id.* The court found them "equitably estopped from rebutting the marital presumption" establishing the husband's paternity of the child. *Id.*

¶ 26 Other courts have applied the principle of equitable estoppel in the same manner under similar circumstances. *See Van Weelde v. Van Weelde*, 110 So.3d 918, 921–22 (Fla. Dist. Ct. App. 2013) (wife equitably estopped from challenging husband's status as legal father, given his name on birth certificate, mutual written acknowledgment of paternity, husband held child out as his own, and provided care and support); *Hinshaw v. Hinshaw*, 237 S.W.3d 170, 172–73 (Ky. 2007) (wife in custody dispute precluded from using genetic test results to show husband who believed he was father of child born during marriage was not biological father); *S.R.D. v. T.L.B.*, 174 S.W.3d 502, 510 (Ky. Ct. App. 2005) (in post-dissolution action, husband estopped from disclaiming paternity and financial obligations to children born during marriage and treated as own for years); *Riddle v. Riddle*, 63 Ohio Misc.2d 43, 619 N.E.2d 1201, 1204, 1211–12 (Ohio Ct. Com. Pl. 1992) (mother estopped from challenging husband's paternity of child born during marriage after she had permitted him to believe he was father and he had relied on that representation); *Clark v. Edens*, 254 P.3d 672, ¶¶ 15–16 (Okla. 2011) (same); *Pettinato v. Pettinato*, 582 A.2d 909, 912–13 (R.I. 1990) (same).

¶ 27 The reasoning of these cases applies equally here, compelling us to reach the same conclusion. Suzan entered into an agreement that guaranteed her equal

parental rights with Kimberly. And by agreeing to Kimberly's artificial insemination, she thereby bound herself under § 25–501 to provide support for E. It is of no moment that during oral argument before this court, Kimberly stated she would not be seeking to enforce Suzan's support obligation, since the duty is owed to E. Significantly, Suzan executed a will designating Kimberly and E. as beneficiaries, stayed home and cared for E. for the first two years of his life, and was his de facto parent. In addition, there is no other person asserting presumptive parentage of E. and expressing a willingness to care for and support him. *Cf. In re Marriage of Worcester*, 192 Ariz. 24, ¶ 7, 960 P.2d 624, 627 (1998) (stating, "we find no suggestion in the statutes that the court must or may permit the presumption [of parenthood] to be rebutted unless the mother is seeking child support from another"). Suzan is the only parent other than Kimberly, and having two parents to love and support E. is in his best interest. Under these circumstances, Kimberly is estopped from rebutting the presumption of parenthood pursuant to § 25–814(C).

Conclusion

¶ 28 Albeit for the different reasons discussed in this opinion, the respondent judge correctly found Suzan to be E.'s legal parent and ordered this matter to proceed as a dissolution action with children. Accordingly, Kimberly's petition for special-action relief is denied. Both parties have requested an award of attorney fees pursuant to A.R.S. § 25–324 which, based on the limited record in this regard, we deny. As the prevailing party in this special action, however, Suzan is granted her taxable costs upon compliance

with Rule 21, Ariz. R. Civ. App. P. *See* Ariz. R.P. Spec. Act. 4(g).

Appendix C

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. LORI B. JONES — CASE NO. DC20130015
DATE: April 07, 2016

COURT REPORTER: — Digitally Recorded
Courtroom – 763

KIMBERLY DANYEL MCLAUGHLIN
Petitioner

Lisa C McNorton, Esq. counsel for Petitioner
(appearing telephonically)

and

SUZAN ELIZABETH MCLAUGHLIN
Respondent

Claudia D. Work, Esq. counsel for Respondent
(appearing telephonically)

M I N U T E E N T R Y

STATUS CONFERENCE

Both parties are present, appearing telephonically.

The Court notes that following a Status Conference on February 4, 2016, the Court requested counsel to brief the issue as to whether the marital presumption will apply in this particular case.

The Court further notes that the issue boils down to whether a person lawfully married to a biological mother, when the biological mother conceives, delivers and raises a child is entitled to the marital presumption concerning legal decision-making and parenting time.

Following the review of the briefs, case law and history,

THE COURT FINDS that Arizona law requires that the marital presumption be extended to the spouse of the biological mother.

THE COURT FINDS as follows:

1. In Arizona, pursuant to A.R.S. §25-415, a man married to a biological mother is presumed to be the parent of a child, if he is married to the biological mother at the time the child is born.
2. This is true even if it is uncontested that the man is not the biological father of the child as when, for example, the biological mother used an anonymous sperm donor and artificial insemination.
3. Thus, Arizona law strongly reflects the widely accepted Family Law concept that the person married to a biological mother when the child is born is the parent of that child regardless of

whether that person is biologically related to the child.

4. The presumption reflected in A.R.S. §25-415 promotes a "unitary family" consisting of both spouses and the child, regardless of biological connection.

THE COURT FURTHER FINDS as follows:

1. Given that a man married to the biological mother, in this case, would be presumed the parent of the child, it would be a violation of the Fourteenth Amendment of the United States Constitution were Arizona to not extend this well-recognized Family Law presumption to the woman lawfully married to the biological mother in this case.

2. If *Obergefell v. Hodges* is to have any meaning at all, it is that the United States Constitution prohibits treating the spouses in a same-sex marriage as inferior in any way to spouses in an opposite-sex marriage.

3. To fail to extend the marriage presumption to a woman married to the biological mother in the face of a statutory requirement that it be given to a man married to the biological mother would do just that.

Therefore,

IT IS ORDERED that the case shall proceed as a dissolution of marriage with children.

Upon inquiry of the Court, counsel makes statements regarding a petition for dissolution of marriage.

The Court signs the Minute Entry in lieu of a more formal order.

/s/ Lori B. Jones
HON. LORI B. JONES

cc: Hon. Lori B. Jones
Claudia D. Work, Esq.
Lisa C McNorton, Esq.

Appendix D

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. LORI B. JONES CASE NO. DC20130015
DATE: May 02, 2016

KIMBERLY DANYEL MCLAUGHLIN
Petitioner

and

SUZAN ELIZABETH MCLAUGHLIN
Respondent

RULING

IN CHAMBERS

Petitioner, the biological mother, seeks declaratory judgment enabling her to attempt to rebut the presumption that the respondent, who was lawfully married to the biological mother when the child was conceived via artificial insemination, is a parent of the child. The court finds that the biological mother is not permitted to rebut the presumption.

THE COURT FINDS as follows:

1. The facts present a biological mother seeking to establish that parental rights do NOT exist for the non-biological parent even though the non-biological parent was legally married to the biological mother when the child was conceived

via artificial insemination, and both spouses consented to, planned and participated in the artificial insemination, and both spouses entered into written agreements concerning the conception by artificial insemination with the understanding that the child would be a child of the marriage.

2. This Court previously concluded that because A.R.S. § 25-814 mandates that the non-biological spouse in an opposite sex marriage would be presumed to be the parent of the child, it would be a violation of equal protection and due process guarantees in the U.S. Constitution to fail to grant the same presumption to the non-biological spouse in a same sex marriage. The non-biological mother is entitled to that presumption not because she is the presumptive father of the child. As a matter of common sense and biology, the non-biological parent is not asserting paternity. Instead, the family presumption applies to same sex and opposite sex non-biological spouses married to a spouse who conceived a child during the marriage via artificial insemination. Paternity is simply not at issue in this case.
3. If the same facts as this case were present in an opposite sex marriage, a husband would not be permitted to rebut paternity to avoid parental responsibilities of support. See A.R.S. § 25-501, which establishes that "a child who is born as the result of artificial insemination is entitled to support from . . . the mother's spouse if the spouse either is the biological father of the child or agreed in writing to the insemination before

or after the insemination occurred." (Suzan's participation in the insemination process and signing of a joint parenting agreement identifying Suzan as a parent easily satisfies the purpose of the statutory requirement of agreement to the insemination.) The identical result must apply to same-sex marriages, not only as a matter of constitutional law, but also as a matter of statutory interpretation. (A.R.S. § 25-501 refers not exclusively to fathers, instead using the word "spouse".) Thus, Arizona law unambiguously imposes by statute parental responsibilities on non-biological spouses in situations in which paternity is not in dispute.

4. The opportunity to rebut that petitioner seeks to assert, pursuant to A.R.S. § 25–814.C pertains only to rebutting on the basis of a challenge to paternity. It is inapplicable to the present situation, which does not use paternity as the basis for presuming parental status. Petitioner, seeking to rebut paternity in a situation in which paternity is not in dispute, would have this Court conclude that a biological mother is entitled by Arizona law to use the fact of undisputed and consented-to artificial insemination to both force the non-biological parent to pay child support and to deny the non-biological spouse any parental rights. This is not a sensible reading of Arizona law. No biological mother, in an opposite sex or same sex marriage, is permitted to have it both ways. The only sensible conclusion is that Arizona law in this situation requires the non-biological spouse to support the child, thereby

establishing parental rights in the non-biological parent not on the basis of paternity, a result comfortably applicable to opposite sex and same sex marriages alike.

5. Because paternity is not in dispute and is not the basis for the family presumption, the provision in A.R.S. § 25-814.C enabling a mother to rebut the presumption, is inapplicable in this situation.

cc: Claudia D. Work, Esq.
Lisa C McNorton, Esq.