No. ____

In The
Supreme Court of the United States

LC,

Petitioner,

v.

MG,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While LC—a U.S. Navy officer—was deployed overseas, her wife MG became pregnant by assisted reproduction. MG had not sought LC's consent to having a child, or to the assisted reproduction procedure. LC was not present for the birth of the child in Hawaii. They share no biological connection. LC has never met the child. However, LC's name was included by MG on the birth certificate as "co-parent" without LC's consent. Hawaii's Uniform Parentage Act (UPA) provides that "[a] man is presumed to be the natural father of a child if . . . [h]e and the child's natural mother are or have been married to each other and the child is born during the marriage. . . ." The unanimous Hawaii Supreme Court held that under the UPA and Hawaii's marriage equality act, the term "father" includes both men and women. Because LC and MG were in a valid marriage at the time of the child's birth, LC was presumed to be the child's legal parent. But a bare majority of the court also concluded that the statute did not permit LC to rebut the presumption of paternity by introducing evidence that she did not consent to her wife having a child.

The question presented is:

Does the Fourteenth Amendment require that a spouse, who is presumed to be the parent of a child because she is married to the child's natural mother, be able to rebut that presumption with evidence she did not consent to having the child?

PARTIES TO THE PROCEEDING

LC, petitioner on review, was the petitioner-appellant below.

MG and the Child Support Enforcement Agency, State of Hawaii, were the respondents-appellees below.

CORPORATE DISCLOSURE STATEMENT

Both Petitioner LC and Respondent MG are individuals.

STATEMENT OF RELATED CASES

The following are proceedings in other courts that are directly related to this case:

- *Collins v. Gayle*, FC-P No. 16-1-6009, Family Court of the First Circuit, State of Hawaii. Decision and Order entered Nov. 1, 2018.
- *LC v. MG*, No. SCAP-16-0000837, Supreme Court of the State of Hawaii. Judgment entered on Feb. 4, 2019.

Petitioner is not aware of any other proceedings that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

LC respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Hawaii.

OPINIONS BELOW

The majority opinion of the Hawaii Supreme Court (except as to Part III(B) (App. 1-49), and the opinion of the court as to Part III(B) (App. 50-71) are reported at 430 P.3d 400. The decision and order of the Family Court of the First Circuit, State of Hawaii (App. 77) is not reported.

JURISDICTION

The Hawaii Supreme Court entered judgment on February 4, 2019. The court denied rehearing (App. 72-75) on November 2, 2018. On March 8, 2019 and May 22, 2019, Justice Kagan extended the time to file this petition until July 4, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV.

The Equal Protection Clause of the Fourteenth Amendment provides, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Section 584-4 of Hawaii's Uniform Parentage Act

provides:

> (a) A man is presumed to be the natural father of a child if:
>
> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;
>
> (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:
>
> (A) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within three hundred days after its termination by death, annulment, declaration of invalidity, or divorce; or
>
> (B) If the attempted marriage is invalid without a court order, the child is born within three hundred days after the termination of cohabitation;
>
> (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:
>
> (A) He has acknowledged his paternity of the child in writing filed with the department of health;

(B) With his consent, he is named as the child's father on the child's birth certificate; or

(C) He is obligated to support the child under a written voluntary promise or by court order;

(4) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child;

(5) Pursuant to section 584-11, he submits to court ordered genetic testing and the results, as stated in a report prepared by the testing laboratory, do not exclude the possibility of his paternity of the child; provided the testing used has a power of exclusion greater than 99.0 per cent and a minimum combined paternity index of five hundred to one; or

(6) A voluntary, written acknowledgment of paternity of the child signed by him under oath is filed with the department of health. The department of health shall prepare a new certificate of birth for the child in accordance with section 338-21. The voluntary acknowledgment of paternity by the presumed father filed with the department of health pursuant to this paragraph shall be the basis for establishing and enforcing a support obligation through a judicial proceeding.

(b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of pol-

> icy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

Haw. Rev. Stat. § 584-4 (2006). The entirety of this statute is reproduced at App. 105-107.

INTRODUCTION

The intensely personal decision to conceive and raise a child—perhaps even more than the freedom to marry the person you love—remains at the core of our fundamental liberties and humanity. Absent compelling circumstances, the law cannot force a person to become a parent. The Supreme Court of Hawaii, however—without the benefit of briefing or argument by the parties—*sua sponte* concluded that simply because two people were married, state law privileges one spouse with the power to unilaterally choose for them both whether to undertake the enormous responsibility of having a child.

The 3-2 court held that the presumption of parentage in Hawaii's Uniform Parentage Act (UPA) could not be rebutted by a presumed parent by proof of her lack of consent to her wife's assisted reproduction procedure. With no meaningful way of rebutting the statutory presumption, Petitioner LC has in effect been pressed into service to parent a child she did not consent to have, has never met or held out as her own, and is being required to economically support for the indefinite future, simply by virtue of her former marital status. Although presuming a married person is the legal parent of a child is constitutional, it is another matter entirely when that presumption is impossible to rebut. Our traditions of respect for personal dignity and autonomy demand no less. This Court has consistently held irrebuttable presumptions are a violation of Due Process because they eliminate any ability to be heard on the issue and to show that the presumption should not be applied in an individual case. Irrebuttable presumptions are "cheaper and easier" but in the case of whether somebody agreed to become a parent, some

kind of individualized determination is required. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972). That includes the ability to rebut the presumption with proof that the presumed parent did not consent to becoming a parent. Moreover, the Hawaii Supreme Court's interpretation of Haw. Rev. Stat. § 584-4 violated LC's equal protection rights because it treated those who can identify a child's two parents differently from those who cannot. Thus, the law gives different treatment to classes on "the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

The Hawaii Supreme Court has in essence forced Petitioner to adopt a child she did not consent to having, and with whom she has had no contact, simply because Petitioner was married to a person who unilaterally decided to conceive. Forcing someone to become a parent simply because she was married offends the Constitution's most fundamental precepts about personal autonomy and liberty.

The Hawaii court upheld the presumption on the theory that it is better for a child to have two parents, even if one of them is being forced into the role. That difficult question is subject to debate, of course. But what cannot be disputed is that the Constitution applies in Family Court, as equally as it does elsewhere: LC did not surrender her fundamental rights and her basic human dignity simply because the State issued her a marriage certificate.

This Court should review this important case.

STATEMENT

I. FACTS

A. While LC Was Deployed And Without Obtaining Consent, Her Wife Became Pregnant By Assisted Reproduction

LC, a woman, is a career flight officer in the United States Navy. App. 80. She and MG, a woman, were legally married in October of 2013. App. 80. Her military duties eventually took LC to Hawaii, and she and MG lived in military sponsored housing on Oahu. App. 82. In January 2015 and for the next eight months, LC was deployed overseas. App. 4.

While LC was deployed, without seeking LC's consent, MG underwent assisted reproduction and became pregnant. App. 85. The Hawaii fertility facility that conducted the procedure did not obtain LC's consent despite her being MG's spouse. An anonymous sperm donor is the child's natural father, and MG is the natural mother. LC could not be the natural parent of the child. LC was not present at the child's birth. App. 93. Without LC's consent, MG named her as a co-parent on the child's birth certificate. App. 7. LC is, however, not a co-parent: she did not name the child, has never held the child out as her own, and has never met the child. App. 93.

LC contacted the Hawaii Department of Human Services to have her name removed from the birth certificate but was informed that an order disestablishing parentage was required.

B. LC's Petition To Disestablish Parentage

In January 2016, LC filed for divorce in Hawaii Family Court because MG had not respected LC's

wishes not to have a child. Along with the divorce petition, LC petitioned to disestablish parentage. App. 7. At the time of LC's petition, the child was two months old. LC's main argument for disestablishing parentage was that she did not consent to MG undergoing assisted reproduction nor had she affirmed parentage post-birth under Hawaii's UPA, and, consequently was neither the child's natural nor legal parent.

II. PROCEEDINGS BELOW

A. Hawaii Family Court: "Legal Parentage Incorporates A Rebuttable Presumption Of Consent To The Artificial Insemination"

After a two-day trial, the Family Court relying on Haw. Rev. Stat. § 584-4(a)(1), concluded that LC was the presumed "father" of the child because LC and MG were legally married at the time the child was born. App. 94. The court further concluded that LC could rebut the presumption of parentage by clear and convincing evidence that she did not consent to MG undergoing assisted reproduction. App. 96. However, the court concluded that LC had not rebutted the presumption. App. 96.

B. Hawaii Supreme Court: A Spouse Cannot Rebut The Marital Presumption Of Parentage By Proving Lack Of Consent To Assisted Reproduction

LC appealed. In the Hawaii Supreme Court, all parties and the State of Hawaii as amicus curiae accepted that the UPA entitled LC to rebut the presumption by proving lack of consent and focused their arguments on whether she had submitted sufficient proof.

App. 51. A three-Justice majority of the court, however, *sua sponte* concluded the statute does not include proof of lack of consent as a means of rebutting the marital presumption of parentage. App. 51-52. It did so without briefing or argument.

The unanimous court first concluded that the UPA does not require a biological connection to a child in order for a married person to be deemed a legal parent. App. 25 ("Both the language and the purpose of the UPA indicate that a genetic or biological connection is not required for a legal parent-child relationship to exist."). Second, the entire court also concluded that the marital presumption of paternity applies to both same-sex and opposite-sex spouses, even though the statute uses the non-gender-neutral term "father." App. 28 ("Finally, the UPA further suggests that, despite the gender-specific language in HRS § 584-4(a), the presumptions of paternity equally apply in determining the existence or nonexistence of a mother-child relationship.").

A three-Justice majority, however, in an opinion by Justice McKenna (joined by Justices Pollack and Wilson) concluded that "based on fundamental principles of statutory interpretation, lack of consent to artificial insemination is not a method of rebutting the marital presumption of parentage under HRS § 584-4(a)." App. 62. The majority referenced the UPA's history, and noted that the Hawaii legislature omitted section 5 of the 1973 Uniform Parentage Act (the form of UPA adopted by the Hawaii legislature) when it adopted the model statute. App. 56-58. Because section 5 addressed consent to artificial insemination and the legislature excised that provision, the majority

concluded, "judicial recognition of this method of rebutting parentage would constitute adoption of a method expressly rejected by the Legislature[.]" App. 60.

However, the majority also concluded that even if section 5 had been adopted, the purpose of that provision "was not to provide a method of rebutting or *disestablishing* the presumption of parentage under section 4(a)(1). Rather, the purpose of section 5 of the 1973 UPA was to provide another method of *establishing* paternity when no presumption under section 4 existed to provide a father to a child." App. 62-63 (emphasis in original). The court also concluded: (1) allowing consent to rebut the presumption in assisted reproduction cases would essentially open the floodgates to parties asserting lack of consent in other cases; (2) a consent rule would raise spousal privilege issues; and (3) a consent rule is not in the best interests of the child. App. 64-71. The majority concluded the overarching purposes of the UPA is "'to ensure that every child, to the extent possible,' has another parent to provide the child with these financial benefits." App. 62.

Under the majority's ruling, "the only specific methods for rebutting a parentage presumption delineated by HRS § 584-4(b) involve a parent under one presumption being replaced by a parent under another presumption or as determined by court decree." App. 61. In other words, if there is no other presumed parent—which here there is not—the presumption cannot be overcome.

Two Justices dissented. Chief Justice Recktenwald (joined by Justice Nakayama) concluded that "[b]oth parties agree that one way in which a party

may rebut the presumption of parentage is to demonstrate, by clear and convincing evidence, that he or she did not consent to the spouse's artificial insemination procedure, and operated under that assumption in the family court and on appeal." App. 34. The dissent pointed out that the three-Justice majority's conclusion that the presumption cannot be rebutted by evidence of the lack of consent should not have been decided without argument and briefing:

> However, the Majority holds that a spouse cannot rebut the marital presumption of parentage through demonstrating by clear and convincing evidence a lack of consent to the artificial insemination procedure that led to the birth of the child. Majority at 1. To the extent that this position was not argued or briefed by the parties at any point in these proceedings, the Majority errs in raising *sua sponte* the validity of this method of rebuttal on appeal. Moreover, as I interpret the statutory language of the UPA, I conclude that the UPA does not bar a party from attempting to rebut the presumption of parentage in an artificial insemination case by proving that he or she did not consent to the artificial insemination procedure.

App. 35 (citation omitted). The dissent concluded it was not necessary for the majority to have determined that the statute does not recognize a spouse's ability to rebut the presumption of parentage by evidence of a lack of consent to assisted reproduction. App. 45. Instead, the dissenting Justices concluded LC had not introduced clear and convincing evidence to rebut the presumption. App. 45-46.

The majority opinion, by contrast, expressly de-

clined to address that question. App. 62. Thus, the majority never reached the issue of whether LC had rebutted the presumption.

C. The Same 3-2 Majority Declined Briefing On The Federal Issues

Because the court had not had the benefit of briefing or argument regarding the federal constitutional issues which the majority's ruling raised, LC asked the court to reconsider, or at the very least accept briefing on whether it is constitutional to prohibit a presumed parent from rebutting a presumption with evidence she did not consent to having a child.

But the same three-Justice majority, over the same dissent, rejected that request. *See* App. 72-76.[1]

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[1] Shortly after the Hawaii Supreme Court issued the opinions, the Hawaii legislature responded to majority's ruling. Amending a different section of the UPA, the legislature determined, "the court's majority overreached in its conclusion that the legislature's removal of this provision in its initial adoption of the Uniform Parentage Act indicates express legislative intent to preclude any evidence of non-consent to an artificial insemination procedure as a rebuttal to the presumption of parentage." App. 101-102. Although the legislature thoroughly rejected the court majority's statutory analysis, this amendment did not affect this case, and thus did not remedy the constitutional problems which resulted.

The Legislature did not amend Haw. Rev. Stat. § 584-4 (the section applicable to LC which the Hawaii court had interpreted), but instead amended Haw. Rev. Stat. § 584-12, the section governing "[e]vidence relating to paternity." The legislature concluded, "[t]he purpose of this Act is to clarify that evidence of an alleged parent's non-consent to an artificial insemination procedure that resulted in the birth of a child may be considered as evidence relating to paternity in an action regarding the parentage of a that child." App. 102. In other words, the amendment

REASONS FOR GRANTING THE PETITION

It should not be surprising that due to changes in science and society, courts nationwide have been struggling to adapt traditional legal rules to scenarios that may have been unthinkable a mere generation ago.[2] Questions about whether and how newly recognized relationships fit into existing rules are, without question, difficult ones, often with few legal antecedents. *See*, *e.g.*, *Henderson v. Adams*, No. 17-1141 (7th Cir. 2017) (questioning whether a state may, consistent with substantive due process and equal protection, presume the biological fatherhood of a birth mother's husband without also automatically conferring parental status on a birth mother's wife). *Brinkley v. King*, 701 A.2d 176, 180-81 (Pa. 1997) (declining to

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adds an additional method of *establishing* paternity. Thus, although the amendment was an attempt to include consent as a means of rebutting the presumption of parentage in assisted reproduction cases, the amendment unfortunately did not do so. The Hawaii Supreme Court majority concluded that under section 5 of the UPA, proof of a lack of consent is not admissible to rebut the presumption of parentage because the "purpose of Section 5 of the 1973 UPA was to provide another method of *establishing* paternity when no presumption under Section 4 existed to provide a father to a child." App. 63. Thus, like section 5, the legislature's amendment of chapter 584 simply provides *another* method of establishing paternity and did not amend Haw. Rev. Stat. § 584-4 to recognize a presumed parent's right to introduce evidence to rebut the presumption.

[2] *See*, *e.g.*, Joyce A. Martin, *et al.*, *Births: Final Data for 2017, National Vital Statistics Reports*, Vol. 67, No. 8. at 5 (https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf) ("The percentage of all births to unmarried women was 39.8% in 2017, unchanged from 2016 and the lowest level since 2007. The percentage of all births to unmarried women peaked in 2009 at 41.0%").

apply the marital presumption of paternity—which was adopted to foster the preservation of marriages—to cases in which the marriage is already broken "because the nature of male-female relationships appears to have changed dramatically since the presumption was created").[3]

Consequently, despite having a uniform national rule under the Fourteenth Amendment requiring same-sex marriage, the rights and resultant responsibilities and burdens of same-sex spouses—particularly regarding children of these relationships—remain subject to a mix of decisions which vary from state-to-state. *See* Leslie Joan Harris, Obergefell*'s Ambiguous Impact on Legal Parentage*, 92 Chicago-Kent L. Rev. 55, 56 (2017) (*United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 133 S. Ct. 2675 (2015) "also have the potential to affect the law of parent-child relations more broadly, particularly the law that determines who is a legal parent. However, how the cases will affect this area of the law is at best ambiguous."). The lower courts have adopted rules described as "complex" and "doctrinal chaos," in which "dramatically different substantive and procedural law appl[y] . . . in different states." Michael S. DePrince, Note, *Same-Sex Marriage and Disestablishing Parentage: Reconceptualizing Legal Parenthood Through Surrogacy*, 100 Minn. L. Rev. 797, 805-806 (2015) (citing Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102

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[3] *See also* Gretchen Livingston, *The Changing Profile of Unmarried Parents*, Pew Research Center, Apr. 25, 2018 (https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/) ("One-in-four parents living with a child in the United States today are unmarried.").

W. Va. L. Rev. 547, 548–566 (2000)). "Not only are jurisdictions irreconcilably divided in their approach to parentage, decisions under settled law in a given county may not necessarily come out the same way." June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 La. L. Rev. 1295, 1295 (2005).

This case presents the unanswered question from *Michael H. v. Gerald G.*, 491 U.S. 110, 120 (1989): does due process require consent before a person is presumed to have parented a child? There, the Court concluded a presumption that a husband was the child's natural father did not deny due process to the child's actual natural father, a stranger to the marriage. *Id.* at 120-21. The Court narrowly upheld the presumption, relying on historical traditions of denying adulterous third-parties paternity rights, emphasizing the "historic respect" "traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123-28.

The presumption recognized by the Hawaii Supreme Court, by contrast, upends that respect by prohibiting a person from introducing evidence of her lack of consent to becoming a parent, simply because she is married. The court never undertook the analysis which *Michael H.* and the Due Process and Equal Protection Clauses require. *See Michael H.*, 491 U.S. at 120-21 ("'irrebuttable presumption cases must ultimately be analyzed as calling into question not the adequacy of procedures but—like our cases involving classifications framed in other terms, the adequacy of the 'fit' between the classification and the policy the classification serves."). Presumptions of parentage keyed to marital status may serve an important func-

tion. But when a person gets married, she does not surrender her fundamental right to decide whether to become a parent and all that this entails.

I. IRREBUTTABLE PRESUMPTIONS "HAVE LONG BEEN DISFAVORED"

The common law held to "the notion that 'a parent owes a duty of support only to his or her natural or legally adopted child[.]'" DePrince, *Disestablishing Parentage*, 100 Minn. L. Rev. at 805. *See*, *e.g.*, *NPA v. WBA*, 380 S.E.2d 178 (Va. Ct. App. 1989) (husband who was not the biological father of his wife's child cannot be required to support the child after divorce because he reared and supported the child since birth under the false belief that he was the father). Traditionally, legislatures and courts adopted presumptions of parentage to overcome the stigmas associated with "legitimacy" by presuming that a child born during a valid marriage is the child of both spouses, to provide two sources of financial support for a child, and to promote two-parent nuclear families. Raymond C. O'Brien, Obergefell*'s Impact on Functional Families*, 66 Cath. U. L. Rev. 363, 431 (2017) ("The UPA is meant to assist putative parents, men and women, seeking to establish parentage in the context of functional families, often utilizing assisted reproductive technology. In addition, the UPA seeks to serve the best interests of children involved.") (footnote omitted). More recently (including in this case), the presumption is employed to promote marriage equality. *See*, *e.g.*, *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017) ("The marital paternity presumption is a benefit of marriage, and [under the Fourteenth Amendment . . . the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses."). The fit, however, has not been precise. "When most children

were born to married women, this rule served to identify as the legal father the man who was most likely to be a child's biological and social father. However, as non-marital childbearing increased dramatically, relying primarily on marriage to determine legal paternity became unsustainable." Harris, Obergefell*'s Ambiguous Impact on Legal Parentage*, 92 Chicago-Kent L. Rev. at 57 (footnote omitted).

No doubt these are all legitimate state interests. But these interests do not exist in a void, and "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (where a statute provided a presumption of fault for class of uninsured motorists "due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective"). That is because "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1974) (citation omitted). Which an irrebuttable presumption by definition fails.

Consequently, where a child is conceived through assisted reproduction, some states require a possible biological connection before the presumption arises. *See Shineovich v. Shineovich*, 214 P.3d 29, 36 (Or. Ct. App. 2009) ("By the very terms of the statute, for the presumption of parentage to apply, it must be at least possible that the person is the biological parent of the child."). Many other jurisdictions do not mandate a bi-

ological connection but do require—by statute or common law—either express consent of the spouse to the procedure, or that a court at least consider proof of lack of consent, to rebut a presumption of parentage. *See*, *e.g.*, *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014) (both same-sex spouses consented to artificial insemination procedure; "The spouse paid for the sperm donation and executed a consent form that allowed the purchased sperm to be used for the artificial insemination of the birth-mother."). [4]

[4] *See also* Code of Ala. § 26-7-7(a) ("Consent by a married woman to assisted reproduction for herself must be in a record signed by the woman and her husband and maintained by the assisting licensed physician."); Ariz. Rev. Stat. § 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."); Ark.Code Ann. § 28-9-209(c) ("Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence."); Cal. Fam. Code § 7613 ("If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived. The other intended parent's consent shall be in writing and signed by the other intended parent and the woman conceiving through assisted reproduction."); Colo Rev. Stat. Ann. § 19-4-106(1) ("If, under the supervision of a licensed physician or advanced practice nurse and with the consent of her husband, a wife consents to assisted reproduction with sperm donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."); 13 Del. C. § 8-704(a) ("Consent by a woman and an intended parent of a child conceived via assisted reproduction must be in a record signed by the woman and the

This rule recognizes and protects the putative parent's autonomy and liberty interests in not having a child by affirming his or her right to present evidence of lack of consent to the artificial insemination procedure. *See*, *e.g.*, Nancy D. Polikoff, *A Mother Should Not*

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intended parent."); Fla. Stat. § 742.11(1) ("Except in the case of gestational surrogacy, any child born within wedlock who has been conceived by the means of artificial or in vitro insemination is irrebuttably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination."); Idaho Code § 39-5403(1) ("Artificial insemination shall not be performed upon a woman without her prior written request and consent and the prior written request and consent of her husband."); Kan. Stat. Ann. § 23-2301 ("The technique of heterologous artificial insemination may be performed in this state at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children."); Ann. L. Mass. GL § 4B ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."); *see also Laura WW. v. Peter WW.*, 51 A.D.3d 211, 217 (N.Y App. Div. 2008) ("Consistent with our State's strong presumption of legitimacy, as well as the compelling public policy of protecting children conceived via AID, we follow the lead of other jurisdictions that impose a rebuttable presumption of consent by the husband of a woman who conceives by AID, shifting the burden to the husband to rebut the presumption by clear and convincing evidence."); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) ("We hold that a husband who consents for his wife to conceive a child through artificial insemination, with the understanding that the child will be treated as their own, is the legal father of the child born as a result of artificial insemination and will be charged with all the legal responsibilities of paternity, including support."); *In re Marriage of L.M.S. v. S.L.S.*, 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) ("We hold that a husband who, because of his sterile condition, consents to his wife's impregnation, with the understanding that a child will be created whom they will treat as their own, has the legal duties and responsibilities of fatherhood, including support.").

Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century, 2 Stan. J. Civ. Rts & Civ. Liberties, 201, 233 (2009) ("When a lesbian couple decides to have a child, one woman commonly conceives using donor semen. A statute delineating that her *consenting partner* is also the child's parent is a simple means of establishing her parentage[.]") (emphasis added). Consent may not necessarily overcome a marital presumption, but it is at the very least constitutionally relevant.

II. AS INFRINGEMENTS ON FUNDAMENTAL LIBERTY, IRREBUTTABLE PRESUMPTIONS ARE VIEWED WITH STRICT SCRUTINY

The Hawaii court's majority, by contrast, interpreted the UPA to adopt what is, in our case, an irrebuttable presumption. Under the court's interpretation of Haw. Rev. Stat. § 584-4, the only way to rebut the presumption of paternity is by replacing the presumed parent with another, or by a court decree. *See* App. 61. On its face, the majority's interpretation of section 584-4 acknowledged situations where a presumed parent might overcome the presumption: (1) if a non-spouse third-party receives the child into his or her home and holds the child out as their own; (2) where a third party has executed a voluntary written acknowledgment of paternity; or (3) if a court orders genetic testing which reveals the biological father. *See* Haw. Rev. Stat. §§ 584-4(a)(4), (6), (5).

But in LC's case, each of these theoretical possibilities is illusory. Because this is a same-sex marriage and the child's natural father is anonymous and cannot be determined, LC's only way to avoid the presumption that she is the child's legal parent would be

to have a third-party consider child as theirs, a situation not presented here. Where, as here, a child is conceived by assisted reproduction, and where the presumed parent attempts to disestablish parentage before or soon after birth and the biological father is an anonymous donor who cannot legally be deemed the father, there is no way to rebut the presumption of parentage. But the majority determined that consent is not relevant, stripping LC of her constitutional rights.

A fundamental constitutional right is one that is "explicitly or implicitly guaranteed by the Constitution" and strict scrutiny applies where a fundamental right is at stake. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33, 38 (1973). Under strict scrutiny, a law is unconstitutional unless it is "narrowly tailored" to achieve a "compelling governmental interest." *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). LC possesses a fundamental right to her liberty interest in privacy, and to make her own personal decisions about procreation and family relationships. *Obergefell*, 135 S. Ct. at 2599 ("choices concerning contraception, family relationships, procreation, and childrearing" are protected by the constitution); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."). This Court's "precedents 'have respected the private realm of family life which the state cannot enter.'" *Id.* (citation omitted). LC did not surrender—either to her spouse or especially to the State of Hawaii—"matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment," simply by

virtue of her choice to get married. *Id.*; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy[.]"). Nor by her compulsory military assignment to a jurisdiction that does not permit rebuttal of the presumption by proof of a lack of consent. If being a parent is a fundamental right, *see Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court"), then LC cannot be forced by the State of Hawaii to involuntarily adopt a child, and for the next two decades bear the financial responsibility which that entails simply by virtue of her now-ended marriage and her inability to point to a third party.

The Hawaii Supreme Court majority opinion provides that the purpose of the UPA is "'to ensure that every child, to the extent possible,' has another parent to provide the child with these financial benefits." App. 61. Certainly, no one would argue that providing financial support for a child is an unworthy governmental interest. However, the Hawaii court's majority simply assumed that this interest outweighed any interests which LC and other married persons possess, expressly rejecting briefing and argument on the question. Thus, it avoided analyzing whether rendering irrebuttable the presumption of paternity in this case is narrowly tailored to avoid unnecessary abridgments of LC's fundamental constitutional rights.

Although it is certainly an appropriate state interest to ensure that a parental presumption applicable to opposite-sex marriages applies with equal force to

same-sex marriages,[5] a same-sex spouse's fundamental right to choose whether to become a parent cannot be sacrificed, even to further as important an interest as marriage equality. Neither same-sex nor opposite-sex spouses may be forced to become parents without their consent.

Relatedly, the State of Hawaii may not condition the benefits of marriage on spouses surrendering their constitutional right to liberty and autonomy. *See*, *e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (teachers may not be compelled to relinquish their First Amendment rights as a condition of employment); *Branti v. Finkel*, 445 U.S. 507, 514-15 (1980) ("the Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even thought the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."); *Bd. of*

[5] *See*, *e.g.*, *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (non-married partner affirmatively consented to the insemination; court concluded that had the parties been married, the consenting partner would be presumed to be the child's legal parent).

Cty. of Comm'rs v. Umbehr, 518 U.S. 668, 674-75 (1996) ("our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit") (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

Marriage, as this Court has held, is not simply a governmental benefit, but is a fundamental right. Thus, at the very least, the court below was obligated to weigh LC's constitutional liberty and autonomy interests, against the policy of two people being financially obligated to provide for a child, and not consider only the interests of the state, the child, and the spouse who unilaterally made the decision to conceive. Were it subject to the required strict scrutiny, the Hawaii Supreme Court majority's analysis of the marital presumption could not pass muster, because LC's constitutional rights to privacy and the ability to determine who her family is and when and how she will raise children far outweighs any state interest in having two people be financially obligated to pay for a child, or in the preservation of marriage.

In *Michael H.*, this Court in a series of opinions concluded that a presumption that a husband was the child's natural father did not deny due process to the child's actual natural father even though he could not rebut the presumption. *Michael H.*, 491 U.S. at 120-21.[6] The Court's majority noted, "'irrebuttable presumption cases must ultimately be analyzed as calling

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[6] *See id*. at 136 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ) ("In a case that has yielded so many opinions as

into question not the adequacy of procedures but—like our cases involving classifications framed in other terms, the adequacy of the 'fit' between the classification and the policy the classification serves." *Id.*

There, Michael—the child's natural father who conceived the child during an extramarital affair with Gerald's wife—filed an action to establish paternity, which was rejected because Gerald was presumed by law to be the child's father. *Id.* at 114-15. A California statute adopted a rebuttable marital presumption that could only be overcome *by spouses*, and not by someone such as Michael. *Id.* at 113. Gerald asserted he should be able to overcome the statutory presumption to show that he, not Michael, was the child's natural father. The statute did not allow Michael to overcome the presumption. The Court narrowly upheld the presumption as applied to Michael, relying on historical traditions of not providing adulterous parties paternity rights, emphasizing the "historic respect" "traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123-28. Here, however, LC's interest is not in preserving the unitary family (which plainly does not exist here). Rather, it is the recognition and protection of her right of privacy and autonomy in making decisions regarding the creation of a child. A decision in which she plainly possesses a critical interest. The majority's analysis did not consider—much less give any weight to—LC's fundamental constitutional rights, nor did it weigh those interests against the state's professed interests.

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has this one, it is fruitful to begin by emphasizing the common ground shared by a majority of this Court.").

In the family law context, this Court has admonished irrebuttable presumptions. In *Stanley v. Illinois*, the issue before the Court was whether the Illinois law that presumed unwed fathers to be unfit parents unconstitutional. 405 U.S. 645, 649 (1972). This Court concluded, "[p]rocedure by presumption is always cheaper and easier than individualized determination. But when as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Id.* at 656. Further, the State in that case insisted "on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658.

The Hawaii Supreme Court's creation of an irrebuttable presumption of parentage violated LC's right to due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews*, 424 U.S. at 335. Some form of hearing is required before an individual is finally deprived of a liberty or property interest. *Id.* at 333. The importance of LC's private interest of deciding when and with whom she will have children and whether she is financially responsible for such children, is a fundamental liberty interest protected by due process. *Obergefell*, 135 S. Ct. at 2597 (The fundamental liberties protected by the due process clause

extend to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

Here, creating an irrebuttable presumption of parentage violates LC's due process rights, as she has no opportunity for a hearing to rebut the marital presumption even though she did not consent to the assisted reproduction procedure and thus had no choice in whether she would become a parent. The Hawaii Supreme Court disregarded LC's liberty interests and only concentrated on the state's interest to ensure children have a stable upbringing and do not become wards of the state. App. 61. However, to force someone to become a parent against their will because their spouse underwent a procedure that was out of their control, is, like in *Stanley*, the cheaper and easier path rather than an individualized determination. Notably, a person is not required to be married (and thus provide two parents) when deciding to undergo assisted reproduction; but the Hawaii Supreme Court's decision punishes those who are married and did not consent.

The Pennsylvania Supreme Court's decision in *Brinkley v. King*, 701 A.2d 176 (Pa. 1997), is an example of a court requiring an individualized determination and refusing to apply a blanket one-size-fits-all rule. *Id.* at 180 ("Thus, the essential legal analysis in these cases is twofold: first, one considers whether the presumption of paternity applies to a particular case. If it does, one then considers whether the presumption has been rebutted."). The court acknowledged that the marital presumption of paternity was designed to "promote the policy behind the presumption: the preservation of marriages." *Id.* at 181. However, the court also

recognized that the presumption could not be blindly applied to every situation:

> We now question the wisdom of this application of the presumption because the nature of male-female relationships appears to have changed dramatically since the presumption was created. There was a time when divorce was relatively uncommon and marriages tended to remain intact. Applying the presumption whenever the child was conceived or born during the marriage, therefore, tended to promote the policy behind the presumption: the preservation of marriages. Today, however, separation, divorce, and children born during marriage to third party fathers is relatively common, and it is considerably less apparent that application of the presumption to all cases in which the child was conceived or born during the marriage is fair. Accordingly, consistent with the ever-present guiding principle of our law, *cessante ratione legis cessat et ipsa lex*, we hold that the presumption of paternity applies in any case where the policies which underlie the presumption, stated above, would be advanced by its application, and in other cases, it does not apply.

Id. at 180-81. The court held that because the spouses had already separated at the time of the complaint, the "presumption of paternity, therefore, has no application to this case, for the purpose of the presumption, to protect the institution of marriage, cannot be fulfilled." *Id*. at 181.

The Hawaii court's majority, by contrast, did not ask that same question. It did not consider whether

the state's interest in promoting marriage and in children not becoming financial wards of the public apply here, or even is substantially undermined by a court considering evidence that the non-birth spouse did not consent to an assisted reproduction procedure. Rather, by determining that consent is not a factor in these cases, the Hawaii Supreme Court stripped a presumed parent who did not consent to the assisted reproduction procedure of their due process right to an individualized determination and the opportunity to rebut the presumption.

III. AN IRREBUTTABLE PRESUMPTION OF PARENTAGE DENIES EQUAL PROTECTION

Similar reasons animate equal protection concerns. LC was denied equal protection because she does not have the same opportunity to rebut the marital presumption as another presumptively legal parent who has the ability to identify another father who is not married to the mother. Nor does the statutory presumption apply at all to couples who are not married. *See*, *e.g.*, *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (non-married partner was not presumed to be the child's parent, despite affirmatively consenting to her partner's artificial insemination). The Equal Protection Clause of the Fourteenth Amendment denies the States "the power to legislate that different treatment be accorded to persons placed by a statue into different classes the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)). This Court has held in a case in which the state did not grant to unmarried fathers the same hearing which state law granted married divorced par-

ents and unmarried mothers that doing so "inescapably" violates equal protection:

> We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.

Stanley v. Illinois, 405 U.S. 645, 658 (1972). As fewer families with children are centered on a married couple, this disparity will only become more pronounced.[7] "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Id.*; *Mathews v. Lucas*, 427 U.S. 495, 511 (1976) ("[T]o conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment."). The same holds true for treating parentage differently based on whether a person was married at the time. *See Eisenstadt*, 405 U.S. at 454 ("On the other hand, if *Griswold* is no bar to a prohibition on

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[7] "The share of U.S. children living with an unmarried parent has more than doubled since 1968, jumping from 13% to 32% in 2017. That trend has been accompanied by a drop in the share of children living with two married parents, down from 85% in 1968 to 65%." Gretchen Livingston, *About one-third of U.S. children are living with an unmarried parent*, Pew Research Center, Apr. 27, 2018 (https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/).

the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.").

The Hawaii Supreme Court concluded that the State has an interest in providing financial support for children. However, those interests are not furthered by making a distinction between those spouses that can identify a third-party father and those who cannot. As stated above, the only way for LC to rebut the marital presumption was if there was another known father claiming paternity, creating a weightier presumption. However, here, the law is not applied equally because another father cannot be identified as the natural father is anonymous (and likely could not claim paternity anyway by virtue of his contractual agreement). The law bars certain individuals from exercising their fundamental rights as to how and when they will form their family. Therefore, LC is among a subclass of spouses that cannot rebut the presumption of paternity.

IV. THE HAWAII COURT DEPRIVED PETITIONER OF THE OPPORTUNITY TO PRESENT HER CONSTITUTIONAL ARGUMENTS

A final word on why this Court should consider this case, even though it may not obviously exhibit the usual indicia which compel discretionary review. The court below—although over dissent—refused to consider Petitioner's constitutional arguments; and the lower courts generally have not presented a classic "split," even though their rulings on parentage are confusing and not consistent.

But that does not mean the issue which this case presents is isolated. Indeed, a cursory review of the headlines reveals that this and similar issues are becoming more common, not less. *See*, *e.g.*, Jennifer Sroka, Note, *A Mother Yesterday, but Not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships*, 47 Valparaiso U. L. Rev. 537, 539 (2013) ("Jurisdictions are greatly divided in the treatment of non-biological parents, which results in a lack of uniformity among the states for individuals wishing to establish legal parental status."). Because of advances in science and society, the circumstances in these cases are ever-developing and may be subject to endless permutation, even where the particular cases are often by their nature *sui generis*.

The existing body of law is of little help. For example, in cases like *Michael H.* where a biological parent seeks a role in a his or her child's life, many legislatures and courts have made the policy choice of discounting that person's rights in favor of the marital family. But does that rationale hold up in a society where the marital family is subject to evolving mores, and is not as important as it once was? And is preservation of the marital family today such a compelling interest that it demands forcing a person to serve as a parent, even though she never agreed to? *See*, *e.g.*, *Brinkley*, 701 A.2d at 181 (declining to apply the marital presumption of paternity because the purpose behind the statute would not be fulfilled by applying the presumption). And the analysis surely is different in a case such as this one where instead of seeking to establish parental rights, a spouse is trying to disclaim them. It is one thing to employ the presumption of paternity to *grant* what could be seen as a benefit of marriage, but another entirely to use it to *force* it. LC was

deprived of the opportunity to make her case that the balance tips in favor of her rights to liberty and autonomy, because the Hawaii Supreme Court never applied the required analysis.

Finally, absent this Court's review, Petitioner has nowhere else to go to vindicate her constitutional rights because the Hawaii Supreme Court's majority, by rejecting her request for briefing and argument on the constitutional issues, denied her a forum. In limited circumstances such as these, this Court has reviewed a state supreme court's judgment for constitutional error. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (reviewing under the Court's appellate jurisdiction, the California Supreme Court's ruling which was alleged to violate the Takings Clause).

This is an appropriate case to revisit the fractured plurality opinions in *Michael H.*, and recognize LC's fundamental right to decide for herself whether to have a child.

CONCLUSION

Now that this Court has recognized same-sex marriage as a constitutionally-required national rule, the Fourteenth Amendment requires that the rights, burdens, and responsibilities of marriage must also be uniform nationwide, and not subject to different rules in different jurisdictions. A person's right to liberty and autonomy do not depend on her marital status, nor the state in which she resides.

The Court should grant certiorari to review the judgment of the Hawaii Supreme Court.

Respectfully submitted.

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