No. _____

IN THE
Supreme Court of the United States

KIMBERLY MCLAUGHLIN,
Petitioner,

v.

SUZAN MCLAUGHLIN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Tuan Anh Nguyen v. I.N.S.*, 121 S. Ct. 2053 (2001), this Court has held that a statute that differentiates based on gender will be upheld if it bears a "fair and substantial relationship to legitimate state ends." Despite finding that A.R.S. § 25-814, as written, applies exclusively to men, the Arizona Supreme Court found the statute violated the Fourteenth Amendment because it treats similarly situated people different. Did the Arizona Supreme Court err when it held that a biology-based paternity statute violates the Fourteenth Amendment and this Court's decisions in *Obergefell* and *Pavan*?

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Kimberly McLaughlin petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) is reported at 401 P.3d 492. The decision of the Arizona Court of Appeals (Pet. App. 29a) is reported at 382 P.3d 118. The decisions of the Arizona Superior Court (Pet. App. 49a and 53a) are unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on September 19, 2017. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

Arizona Revised Statute ("A.R.S.") Section 25-814 provides:

> 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 or the child is born within ten months after the marriage is terminated by death, annulment, declaration of invalidity or dissolution of marriage or after the court enters a decree of legal separation.

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.

B. If another man is presumed to be the child's father under subsection A, paragraph 1, an acknowledgment of paternity may be effected only with the written consent of the presumed father or after the presumption is rebutted. If the presumed father has died or cannot reasonably be located, paternity may be established without written consent.

C. Any presumption under this section shall be rebutted by clear and convincing evidence. If two or more presumptions apply, the presumption that the court determines, on the facts, is based on weightier considerations of policy and logic will control. A court decree establishing paternity of the child by another man rebuts the presumption.

STATEMENT OF THE CASE

This case revolves around a state legislatures' ability to write a statute wherein paternity or parentage is based solely on biology.

A. Proceedings Below

Petitioner, Kimberly McLaughlin ("Mother") and Respondent, Suzan McLaughlin ("Suzan") were married on October 20, 2008 in California. During the marriage, Mother was artificially inseminated and had a minor child, E.M. ("Child"), on June 14, 2011.

After the parties' relationship deteriorated, Suzan filed a Petition for Dissolution of Marriage and later filed a Petition for Legal Decision-Making and Parenting Time but never alleged that she was a legal parent; instead she alleged that she stood "*in loco parentis*" to the Child. Later, Suzan changed her position and claimed that she was a "parent" under the presumption made in A.R.S. § 25-814(A).

In its Minute Entry on this issue, the trial court ordered that the marital paternity presumption of A.R.S. § 25-814(C) would apply and that Suzan would be treated as a biological parent.

Suzan then filed a Motion for Declaratory Relief, requesting a ruling on whether Mother would be allowed to rebut presumption pursuant to A.R.S. § 25-814(C). The trial court ruled that Mother could not rebut the marital presumption as the Court decided that it was no longer looking at this as a paternity presumption but a "family presumption."

Mother filed a Special Action where the Arizona Court of Appeals affirmed the trial court, and held that Mother was equitably estopped from rebutting the presumption of paternity. Mother filed a Petition for Review to the Arizona Supreme Court. The Arizona Supreme Court again affirmed that A.R.S. § 25-814, the presumption of biological paternity, must be read gender neutrally, and again found that Mother was equitably estopped from rebutting the presumption of paternity.

Mother timely filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. A plain language reading of A.R.S. § 25-814 clearly establishes that the presumption of biological paternity statute does not apply to women; the Arizona Supreme Court therefore committed legal error when it interpreted a clearly gender based statute gender neutrally.

This case centers on whether the Fourteenth Amendment prohibits the State of Arizona from implementing a biology based presumption of paternity. The Arizona Legislature created A.R.S. § 25-814 the presumption of paternity. The statute provides:

> 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 or the child is born within ten months after the marriage is

> terminated by death, annulment, declaration of invalidity or dissolution of marriage or after the court enters a decree of legal separation.
>
> 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.
>
> B. If another man is presumed to be the child's father under subsection A, paragraph 1, an acknowledgment of paternity may be effected only with the written consent of the presumed father or after the presumption is rebutted. If the presumed father has died or cannot reasonably be located, paternity may be established without written consent.
>
> C. Any presumption under this section shall be rebutted by clear and convincing evidence. If two or more presumptions apply, the presumption that the court determines, on the facts, is based on weightier considerations of policy and logic will control. A court decree establishing paternity of the child by another man rebuts the presumption.

Beyond the presumption of paternity statute, the Arizona legislature has dictated that it only recognizes "biological or adoptive" parties as legal

parents in A.R.S. § 25-401(2). In the Arizona Supreme Court's interpretation of A.R.S. § 25-814 in *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017), it held that "[t]he text of A.R.S. § 25-814(A)(1) clearly indicates that the legislature intended the marital presumption to apply only to males. . . . As written § 25-814(A)(1) does not apply to [Mother's female spouse]" *Id.* at 496. Despite this finding, the Arizona Supreme Court held "[h]owever, in the wake of *Obergefell*, excluding [Mother's female spouse] from the martial paternity presumption violates the Fourteenth Amendment." *Id.*

This conclusion made by the court is not correct, as *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) does not prohibit biology based paternity statutes. This Court in *Obergefell* made two holdings 1) the Fourteenth Amendment requires states to license same-sex marriages and 2) the Fourteenth Amendment requires states to recognize same-sex marriages that were lawfully licensed and performed in another state. *Id.* at 2593-608. This Court further explained its *Obergefell* holding in *Pavan v. Smith*, 137 S.Ct. 2075 (2017). It stated that "the Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2076. Indeed, married same-sex couples must have access to the "constellation of benefits that the State has linked to marriage." *Id.* at 2077.

In *Pavan*, Arkansas enacted a statute that required a heterosexual, married woman's husband to be placed on her child's birth certificate when she

conceived her child through artificial insemination. *Id.* That same statute permitted the omission of a mother's female spouse from her child's birth certificate when the child was conceived under the same circumstances. *Id.* This Court held that this was an equal protection violation because "in listing those terms and conditions—the rights, benefits, and responsibilities to which same-sex couples, no less than opposite couples, must have access—we expressly identified "birth and death certificates." *Id.* at 2078. Thus, if the statute required adding a male spouse to the birth certificate of a child that he was clearly not biologically related to simply because he was married to the child's mother, it must also add the female spouse to the birth certificate of her spouse's child, even though she was clearly not biologically related to the child.

In his dissent, Justice Gorsich affirmed that "Obergefell addressed the question whether a State must recognize same-sex marriages." *Id.* at 2079. He then states that "nothing in Obergefell indicates that a birth registration regime based on biology, one no doubt with many analogues across the court and throughout history offends the Constitution. . . . Neither does anything in today's opinion purport to identify any constitutional problem with a biology based birth registration regime." *Id.*

The Arizona Legislature created a biology based presumption of paternity, something not prohibited by *Obergefell* or *Pavan*. As described more fully below, *Obergefell*, *Pavan*, and the Fourteenth Amendment do not prevent states from creating

biology based paternity statutes, therefore, the Arizona Supreme Court erred when it found that those cases prohibit biology based parentage statutes.

II. The Arizona Supreme Court errored when it inappropriately used the Fourteenth Amendment to circumvent the plain language of A.R.S. § 25-814.

A.R.S. § 25-814 provides the husband of a woman who gives birth to a child during the marriage a presumption of paternity.

> A "presumption" is merely an assumption that a fact exists, based on the existence of some other fact. Thus, a presumption is the proving of one fact--the presumed fact--by proving the existence of another fact--the basic fact." Said differently, by utilizing a presumption, a party may prove one fact by proving the existence of another fact. After a party establishes the presumption, the burden is then supposed to shift to the other litigant to rebut or disprove the presumed fact. A litigant is allowed an opportunity to rebut the presumption since a presumption is merely a tool designed to aid the court to determine the truth at trial.

Debi McRae, Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It Is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Patern, 5 Whittier J. Child & Fam. Advoc. 345, 354 (2006)

Males and females have biological differences. This is a fact. Females produce eggs and carry children in their womb. Males produce the sperm that fertilize the female's egg. Only one male and one female can create a child. This too is a fact. When a male and a female are married, there is a strong likelihood that the male is the biological father of his wife's child. Arizona's presumption of paternity statute acknowledges this fact, but as the Arizona Supreme Court notes, a female's husband is not always the biological father, as such, the legislature provided subsection (C), that permits the presumption of paternity to be rebut.

This Court has held that it does not violate the Fourteenth Amendment to treat men and women differently based on those biological differences in some situations. In explaining this legal concept, this Court has held:

> [b]ecause the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require " 'things which are different in fact . . . to be treated in law as though they were the same,' " *Rinaldi v. Yeager*, 86 S.Ct. 1497 (1966), quoting *Tigner v. Texas*, 60 S.Ct. 879 (1940), this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. *Parham v. Hughes*, supra; *Califano v. Webster*, 97 S.Ct. 1192, (1977);

> *Schlesinger v. Ballard*, 95 S.Ct. 572 (1975); *Kahn v. Shevin*, 94 S.Ct. 1734 (1974)."

Michael M. v. Super. Ct. of Sonoma Cty., 101 S. Ct. 1200 (1981).

This Court identified intermediate scrutiny as the appropriate scrutiny when a court analyzes gender and biology based statute and laws. Under this scrutiny, a statute that differentiates based on gender will be upheld if it bears a "fair and substantial relationship to legitimate state ends." R*eed v. Reed*, 92 S.Ct. 251; *Michael M.*, 101 S. Ct. at 1201–02. For example, in *Michael M.* the State of California created a statutory rape statute that treated similarly situated men and women different based upon their biological differences. *Id.* at 1201. That statute defined "unlawful sexual intercourse as an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." *Id.* The statute therefore, made "men alone criminally liable for the act of sexual intercourse." *Id.* at 1203.

A man charged under the statute challenged the same arguing that it violated the Fourteenth Amendment. *Id.* at 1201. This Court declined to find an equal protection violation because the statute bore a fair and substantial relationship to a legitimate state end. *Id.* at 1204. In so holding, this Court explained that while the legislative intent was unclear, "some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of "chastity," and still others about

promoting various religious and moral attitudes towards premarital sex." *Id.* This Court then found that the prevention of illegitimate pregnancy was at least one of the "purposes" of the statute, and that the State has a strong interest in preventing such pregnancy. *Id.* at 1205. This purpose allowed the statute to withstand intermediate scrutiny even though it treated men different than similarly situated women.

In *Tuan Anh Nguyen v. I.N.S.*, 121 S.Ct. 2053 (2001), this Court again affirmed a statute that recognized the biological differences between males and females was constitutional. In *Tuan Anh Nguyen*, a statute that granted United States citizenship to children born abroad to American citizens was challenged as an equal protection violation because it treated males and females different. Specifically, 8 U.S.C. § 1409(c) provided that if the citizen parent was a woman who met certain residency requirements, then her child born abroad acquired her American nationality at birth. *Id.* at 53. In contrast, 8 U.S.C. § 1409(a)(4) provided that if the citizen parent was a man, then his child would only acquire his American nationality after he took one of three affirmative steps before the child turned 18 years old.

This Court applied intermediate scrutiny review to the challenged statute and ruled that the government has an important interest in verifying that a biological parent-child relationship exists before extending citizenship to the child of an American citizenship. *Id.* It explained that the

mother's relation is verifiable from the birth itself and is documented by the birth certificate or hospital records and the witnesses to the birth. However, a father need not be present at the birth, and his presence is not incontrovertible proof of fatherhood. See *Lehr v. Robertson*, 103 S.Ct. 2985 (1983). Because fathers and mothers are not similarly situated with regard to proof of biological parenthood, the imposition of different rules for each is neither surprising nor troublesome from a constitutional perspective. Section 1409(a)(4)'s provision of three options is designed to ensure acceptable documentation of paternity.

The Arizona Supreme Court acknowledged that Arizona's presumption of paternity statute, A.R.S. § 25-814, applies specifically to men. The Arizona Court of Appeals also held that the statue applies exclusively to men, and went a step further to explain that the statute applies to men who could be biologically related to the child.

> biology—the biological difference between men and women—is the very reason the presumption statute exists. A child's mother is usually readily determined by a woman's biological act of giving birth. See *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1059 (Ind. 1992) ("Because it is generally not difficult to determine the biological mother of a child, a mother's legal obligations to her child arise when she gives birth."). Thus, Arizona does not need, and does not have, a "presumption of maternity"

> statute. But the act of birth reveals nothing about the identity of the child's biological father. See *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001) (noting that "fathers and mothers are not similarly situated with regard to proof of biological parenthood"). Consequently, to help determine whether a particular man is a child's father, the Legislature enacted the presumption of paternity statute. Given the statute's purpose, its limited application to men is not remarkable or constitutionally infirm. See id. (stating that imposing "a different set of rules for making [a] legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective"). Because the biological difference between men and women is the reason for the statute, and biology is used specifically to determine paternity, A.R.S. § 25–814(A) cannot be read gender-neutrally as a presumption of parentage statute.

Turner v. Steiner, 398 P.3d 110, 115–16 (App. 2017), abrogated by *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492 (2017).[1]

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[1] This case and Opinion was vacated on a Motion for Reconsideration following issuance of *McLaughlin* by the Arizona Supreme Court. It is being cited solely for the purpose of demonstrating another Arizona Court's interpretation of the statute.

Despite the above law, the Arizona Supreme Court still found that a biology based presumption of paternity was unconstitutional. Based on the above law, this was error for two reasons. First, the male spouse of a woman and the female spouse of a woman are not similarly situated with regard to parentage. Specifically, when a woman is married to a man and becomes pregnant, it is not only possible, but also likely that her husband is the biological father of her child. When a woman is married to another woman, it is impossible for both women to be biologically related to the child. Thus, the presumption of paternity acknowledges the fact that there is the possibility and, frankly, likelihood that the husband is the father of the child.[2] If the

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[2] In its' discussion about the constellation of benefits associated with marriage, the Arizona Supreme Court states that "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 martial paternity presumption to establish his legal parentage." *McLaughin*, 401 P.3d at 497-98. This statement fails to acknowledge that the presumption of paternity is biology based. Furthermore, the Arizona Supreme Court's interpretation of the statute now treats similarly situated male same sex couples different than same-sex female couples. For example, if two men in a same-sex marriage hire a surrogate mother to carry one man's biological child, the biological father's husband will not be given the presumption of parentage based upon his status as husband. His only option for legal parentage is adoption. Thus, the Arizona Supreme Court's interpretation of the statute still treats similarly situated people differently; same-sex married men who have children during the marriage. While it is true that this is somewhat removed from the issue at bar; however, it does demonstrate that each time a statute is

presumption proves to be false, that presumption is rebuttable. A statute that acknowledges this biological fact does not violate the Fourteenth Amendment.

To be sure, the Arizona Supreme Court justified its finding that a male spouse and a female spouse are similarly situated by noting that:

> 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

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redefined in the name of equality, it leads to more and more scenarios where a possible "equal protection" violation can be argued.

> civil marriage on the same terms and conditions as opposite-sex couples.

McLaughlin, 401 P.3d at 497–98.

Even if the Arizona Supreme Court is correct that the male and female spouse of a woman are similarly situated, the act of treating them different does not create an equal protection violation because Arizona's purpose in the presumption of paternity, as described by the Arizona Court of Appeals, is to identify parents who could be biologically related to the child. This is a legitimate state purpose.

The Arizona Supreme Court has identified scenarios such as an affair or IVF, where a woman's husband will not be the biological father of her child; however, these possibilities are not enough to render the statute invalid. Even in *Michael M.*, one can find scenarios where the purpose behind the statute might not be applicable. For example, a girl might be on birth control or medically unable to have children. These outliers do not render the statute invalid. The fact that a statute is not 100% effective 100% of the time, is not enough to create an equal protection violation.

The legislative intent is clearly to identify the biological father of a child. The fact that there are some outliers where a woman's husband will not be the biological father of her child does not create an equal protection violation. As stated in *Nguyen*, "Because fathers and mothers are not similarly situated with regard to proof of biological parenthood, the imposition of different rules for each is neither surprising nor troublesome from a

constitutional perspective. It is therefore neither surprising nor troublesome that the State of Arizona choose to limit the presumption of paternity to men because of the likelihood that the husband would be the biological father of the child carried by his wife. As such, the Arizona Supreme Court errored when it found that applying the statute as written created an equal protection violation.

III. The Arizona Supreme Court committed legal error when it essentially adopted the UPA, something that the Arizona legislature has declined to do.

The State of Arizona has declined to acknowledge parenthood beyond biology and adoption, with the statute specifically stating that legal parents are "biological or adoptive."[3] While many other states have adopted the Uniform Parentage Act ("UPA"), an act that confers parentage in IVF scenarios, Arizona has declined to do so. The Arizona Supreme Court's holding in *McLaughlin* essentially circumvented the Legislature and adopted the UPA; but this is not this Court's role.

By way of background, the UPA was promulgated by the National Conference of Commissions of

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[3] A.R.S. § 25-401(4) is very clear that only a biological or adoptive parent is a "legal parent." The statute states:

"Legal parent" means a biological or adoptive parent whose parental rights have not been terminated. Legal parent does not include a person whose paternity has not been established pursuant to section 25-812 or 25-814."

Uniform State Laws ("NCCUS") in 2000 and amended in 2002. (http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage Act). The UPA provides a statutory framework for states to determine parentage, including in circumstances beyond adoption or biological grounds. *Id.* UPA § 703 specifically provides,

> A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.

Many states that have enacted statutes similar to § 703 that specifically address the parentage of a husband who consents to the artificial insemination of his wife, as opposed to simply an unspecified man who consent to an unspecified woman's artificial insemination. These states are applying their statutes to both heterosexual and homosexual couples alike such that a non-biological spouse is extended parentage.

For example:

Oregon

O.R.S. § 109.243. Relationship of mother's husband to child resulting from artificial insemination.

The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother

and the mother's husband if the husband consented to the performance of artificial insemination.

In re Madrone, 271 Or. App. 116, 118 (2015) held "[W]e extended the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination."

New Jersey

N.J.S.A. § 9:17-44 Artificial insemination.

a. If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

See *In re Parentage of Robinson*, 383 N.J. Super. 165, 176 (Ch. Div. 2005) ("It is hereby ordered pursuant to the authority of the Artificial Insemination statute, N.J.S.A. 9:17–44(a), and within the confines of these factual findings, [same sex spouse] is presumed to be the parent [of spouse's biological child].") See also *In re T.J.S.*, 16 A.3d at 392 (the court did not extend N.J.S.A. § 9:17-44 to grant parentage to a woman who consented to the conception of a child using her husband's sperm and a donor ovum that was carried by a surrogate, reasoning that another statute provided for the declaration of maternity only to a biologically- or gestationally-related female.)

Massachusetts

M.G.L.A. 46 §4B. Artificial insemination.

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 *Della Corte v. Ramirez*, 81 Mass. App. Ct. 906, 907 (Mass. App. 2012) ("Pursuant to G.L. c. 46, § 4B…we do not read 'husband' to exclude same-sex married couples, but determine that same-sex married partners are similarly situated to heterosexual couples in these circumstances.")

New York

D.R.L. § 73. Legitimacy of children born by artificial insemination.

1. Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.

Q.M. v. B.C., 995 N.Y.S.2d 470, 473-74 (N.Y. Fam. Ct. 2014) ("Pursuant to Domestic Relations Law § 73 with the written acknowledged consent of both spouses a child born of artificial insemination is deemed the legitimate child of the marriage. In the case of same-sex female spouses, the child is generally fathered by an anonymous sperm donor and there is no legal father. Under those circumstances, the statute may easily be applied in a gender neutral manner.")

States that are granting parentage to spouses of artificially inseminated women are doing so

pursuant to the state's artificial insemination statute. Arizona does not have an artificial insemination statute, and Arizona is not required to enact one.

The importance of legislatures keeping step with advancing technology is eloquently explained in *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410, 1428-29 (1998), which states:

> Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.
>
> Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or

> the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. As jurists, we recognize the traditional role of the common (i.e., judge-formulated) law in applying old legal principles to new technology. (See, e.g., *Hurtado v. State of California* (1884) 110 U.S. 516, 530, 4 S.Ct. 111, 118, 28 L.Ed. 232 ["This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."]; *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394, 115 Cal.Rptr. 765, 525 P.2d 669 ["in the common law system the primary instruments of evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them"].) However, we still believe it is the Legislature, with its ability to formulate general rules based on input from all its constituencies, which is the more desirable forum for lawmaking.

Again, the Arizona Legislature has declined to recognize parentage by artificial insemination. It has, however, prescribed an "[obligation] to provide maintenance and support for the child [born via assisted reproduction]" upon someone "other than the taxpayer." See A.R.S. § 25-501(B). The legislature has done its job. If this Court or constituents are dissatisfied with the state of our current laws, the proper forum to advocate for

change is in the legislature, not the courtroom. The Arizona Supreme Court errored when it interpreted A.R.S. § 25-814 to extend to parentage beyond the definitions already listed by Arizona law.

IV. The Arizona Supreme Court erred when it invaded the realm of the legislator by rewriting the statute to include women in the presumption of paternity.

After finding that A.R.S. § 25-814 applies exclusively to men, the Arizona Supreme Court essentially rewrote the statute in order to extend the presumption of paternity to the same-sex spouse of a woman.

This Court has provided:

> [T]o the legislative department of the government has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the court, and the general rule is that neither department may invade the province of another, or control, direct, or restrain its action.

Commw. of Massachusetts v. Mellon, 43 S. Ct. 597 (1923) This Court further provided that:

> [T]he responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

Evans v. Abney, 90 S. Ct. 628, 635 (1970).

Thus, it is for the Legislature to write statutes, and it is for the Courts to interpret them appropriately and accurately.

The Arizona Legislature has distinguished between the word maternity and paternity in its legislation. A.R.S. § 25-806 differentiates between maternity and paternity. Specifically, the term "*maternity*" refers to women and the term "*paternity*" refers to fathers. This differentiation again clearly establishes that the legislature intended the term "*paternity*" to be gender specific in A.R.S. § 25-814. See *Baker v. Univ. Physicians Healthcare*, 296 P.3d 42 (Ariz. 2013)(holding the court's primary goal in interpreting a statute is to give effect to legislative intent, focusing on the plain language as the best indicator of that intent.)

Arizona Courts have also found that there is an actual distinction between the word "maternity" and the word "paternity." In *Sheldrick v. Maricopa Cty. Super. Ct.*, 666 P.2d 74, 75-76 (Ariz. 1983) the Arizona Supreme Court dismissed a petition for "paternity" filed by the father when it found that the difference in the terms "man", "woman", "paternity" and "maternity" all had meaning, despite the statutory construction argument of gender neutrality. The Court specifically held that:

> [a] plain reading of this statute indicates that the state, a mother, guardian or best friend may bring a paternity action against the father . . . and that the state, a father, guardian, or best friend may bring a maternity

> action against a mother . . . The statute does not provide for the bringing of a paternity action against the mother nor a maternity action against the father. *Id.*

This non gender neutral distinction was upheld by other Arizona Courts. See *Traphagan v. Super. Ct.*, 666 P.2d 76 (Ariz. 1983), *Thornsberry v. Super. Ct.*, 707 P.2d 315 (Ariz. 1985), and *Ban v. Quigley*, 812 P.2d 1014, 016-017 (Ariz. App. 1990). Specifically in *Ban*, the Arizona Supreme Court recognized that the legislature eventually changed the paternity statute to allow either a mother or a father to file an action, given the prior distinction that men could not file for "paternity" and instead had to file for "maternity." *Id.* If these terms had the same meaning, then there would was no need for the legislature to change the statute.

Despite case law from this Court and Arizona Courts and the plain language of the statute, the Arizona Supreme Court found, pursuant to *Obergefell*, *Pavan*, and the equal protection clause of the Fourteenth Amendment required the clearly biology based statute to be read and interpreted gender neutrally. It was therefore beyond the Arizona Supreme Court's domain to rewrite the statute in order to conform with any perceived public policy.

V. Mother has a fundamental interest in the care, custody, and control of her child.

A legal parents has a fundamental right to the care, custody, and control of their children under the Fourteenth Amendment. When the state recognizes

a non-biological non adoptive person as a de facto or legal parent it is essentially diminishing the existing parents fundamental right under the Fourteenth Amendment to the care, custody, and control of their child.

This Court, albeit in dicta, when discussing a foster parents right to a child over a biological parents right, stated:

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right . . . .

Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816 (1977).

Parents have the fundamental right to make decisions regarding the care, custody, and control of their children. See, e.g., *Troxel v. Granville*, 120 S.Ct. 2054 (2000); *Washington v. Glucksberg*, 117 S.Ct. 2258, 2276 (1997); *Stanley v. Illinois*, 92 S. Ct. 1208, 1214 (1972). The U.S. Supreme Court has also long recognized a fit parent's interest in the care, custody, and control of their children as ". . .perhaps the oldest recognized fundamental liberty interests." See, e.g., *Troxel*, 120 S.Ct. at 2059; *Santosky v. Kramer*, 102 S.Ct. 940, 954 (1982) (recognizing a

'fundamental liberty interest of natural parents in the care, custody and management of their child'); *Wisconsin v. Yoder*, 92 S.Ct. 1526, 1542 (1972) (holding that parents have a right to direct the upbringing of their children); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (stating that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Pierce v. Soc'y of Sisters*, 88 S.Ct. 1274, 1280 (1925) (holding that compulsory public school attendance unreasonably interferes with the parents' right to direct the education of children); *Meyer v. Nebraska*, 43 S.Ct. 625 (1923) (recognizing the right of parents to control their child's education); *McGovern v. McGovern*, 33 P.3d 506, 509 (Ariz. App. 2001); *Graville v. Dodge*, 985 P.2d 604 (Ariz. App. 1999); *Lulay v. Lulay*, 193 Ill.2d 455 473-74 (2000)("Encompassed within the well-established fundamental right of parents to raise their children is the right to determine with whom their children should associate.")

Parents have a fundamental right to the care, custody, and control of their children, including the right to determine with whom their children should associate with.

The Idaho Supreme Court affirmed this theory in its recent *Doe v. Doe*, 395 P.3d 1287 (Idaho 2017) Opinion where it held that the biological mother's constitutional rights cannot be relinquished based solely on the functional parenting by a partner, even if done with the biological mother's consent. *Id.* at

1291. In *Doe*, a woman conceived and bore a child while in a same-sex relationship. *Id.* at 1288. The two women raised the child together. *Id.* When the relationship deteriorated, the biological mother refused to allow her former partner to have access to the child. *Id.* at 1288-89. The former partner filed a petition for Adoption, Guardianship, and Visitation. *Id.* at 1289. The Idaho Supreme Court held that Idaho law does not permit a custody proceeding to be brought by a non-parent except in the narrow circumstances delineated by the legislature. *Id.* at 1289-90. Because Partner did not satisfy any of those circumstances, she could not seek custody of Mother's child. *Id.* The court relied heavily, if not exclusively, on Mother's constitutional parental rights to reach its conclusion. *Id.* at 1291. As the court explained:

> Mother made the decision to terminate the relationship between Child and Partner. She had the right, and while there may be a temptation to second-guess that decision, courts cannot do so. Parents have a constitutional right to care, custody, and control of their children.

Id.

Because States cannot increase or grant rights to a third party without eroding the rights of the first legal parent, the Arizona Supreme Court's act of awarding full, equal parental rights to Suzan, a non parent, significantly detracts from Kim's fundamental right to the care, custody, and control of her child. Specifically, Suzan can object to Mother's

relocation from the State of Arizona. If Mother dies before the child reached the age of majority, Suzan, and not a person appointed by Mother will get full custody of the child. Furthermore, she has significantly less access to the child, as Suzan receives 50/50 parenting time. These greatly exceed the factors in *Troxel* that were seen as an unconstitutional infringement of the rights. For these reasons, the Arizona Supreme Court violated Mother's fundamental right to parent when it found Suzan was a legal parent based upon the presumption of paternity statute.

CONCLUSION

Because the Arizona Supreme Court incorrectly found that Arizona's biology based presumption of paternity statute violated the Fourteenth Amendment of the Constitution. However, as demonstrated above, this Court has already found that statutes that differentiate between people based o biology are permissible if it bears a fair and substantial relationship to legitimate state ends. As the purpose behind the statute is to determine the biological father of a child, it has a legitimate purpose.

Furthermore, the Arizona Supreme Court erred in essentially rewriting A.R.S. § 25-814 to include the UPA, something the Arizona Legislature has declined to do. For these reasons, this Court must overturn *McLaughlin v. Jones*, and find that Arizona is permitted to have a biology based presumption of paternity.

Respectfully submitted,

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