No. 17-878

In the Supreme Court of the United States

KIMBERLY MCLAUGHLIN, PETITIONER

v.

SUZAN MCLAUGHLIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF OF SUZAN MCLAUGHLIN IN OPPOSITION

SHANNON MINTER
CATHERINE SAKIMURA
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street
Suite 370
San Francisco, CA 94102

CLAUDIA WORK
CAMPBELL LAW GROUP
1951 West Camelback
Suite 200
Phoenix, AZ 85015

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
MOLLY GACHIGNARD
STEFAN SCHROPP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

CHRISTOPHER THOMAS BROWN
JOSHUA GOLDSTEIN
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

QUESTION PRESENTED

In *Obergefell* v. *Hodges*, this Court held that same-sex couples have a constitutional right to marry, and that this includes the "constellation of benefits that the States have linked to marriage." 135 S. Ct. 2584, 2601 (2015). In *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017), the Court confirmed that the constitutional right of same-sex couples to marry includes equal access to parental rights a state may recognize in a birth mother's spouse as a consequence of the marital relationship. Petitioner does not ask this Court to overrule either *Obergefell* or *Pavan*. The Arizona Supreme Court held that the presumption of legal parentage afforded by state law to a birth mother's male spouse, without regard to whether he has any biological relationship to the child, is a benefit of marriage that must be equally applied to female spouses. The question presented is therefore:

Whether the Arizona Supreme Court correctly interpreted Arizona law in concluding that the State's presumption of parentage is a benefit of marriage, rather than limited to determining biological paternity, such that it must, under this Court's decisions in *Obergefell* and *Pavan*, extend equally to a birth mother's female spouse.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the Arizona Supreme Court was entered on September 19, 2017. The petition for a writ of certiorari was filed on December 18, 2017. This Court's jurisdiction is invoked under 28 U.S.C. 1257.

STATEMENT

A. Introduction

Petitioner asks the Court to consider a question that simply is not presented in the case at bar. Petitioner wishes the Court to opine on the circumstances in which

a state statute might distinguish between the rights of spouses on the ground of gender-based biological differences. But there is no such statute at issue here. The Arizona Supreme Court, which is the ultimate arbiter of state law, specifically rejected the assertion that Ariz. Rev. Stat. § 25-814(A)(1) "simply concerns identifying biological parentage," Pet. App. 12a, holding that the statute addresses "a father's legal parental rights and responsibilities rather than biological paternity." *Id.* at 6a-7a. Because the question presented by the petition proceeds on the false premise that the Arizona statute is "a biology-based paternity statute," Pet. i, but the Arizona Supreme Court has held to the contrary, this case offers no opportunity for the Court to resolve that question.

B. Factual History

Petitioner Kimberly McLaughlin and respondent Suzan McLaughlin were legally married in California in October, 2008. Pet. App. 3a. Shortly after their marriage, the two undertook efforts to conceive a child through artificial insemination using an anonymous sperm donor. *Ibid.* Although the parties initially intended that respondent would conceive and carry the child, those efforts were unsuccessful. *Ibid.* Because of these difficulties, the couple agreed that petitioner would attempt to become pregnant and give birth to their child. *Ibid.* Petitioner then became pregnant in 2010. *Ibid.*

While petitioner was pregnant, the parties moved from California to Arizona. Pet. App. 3a. In anticipation of their child's birth, the parties entered into a joint parenting agreement. *Ibid.* This agreement provided that respondent would be a "co-parent" of the child and that

petitioner "intends for [respondent] to be a second parent to her child, with the same rights, responsibilities, and obligations that a biological parent would have to her child." *Id.* at 3a-4a. In the event of a separation, petitioner explicitly "waive[d] any constitutional, federal or state laws that provide her with a greater right to custody and visitation than that enjoyed by [respondent]" and agreed that the parent-child relationship between respondent and the child would "continue with shared custody." *Id.* at 4a, 31a n.2.

During the pregnancy, the parties also executed mirror wills which declared respondent to be an equal parent. Pet. App. 4a. Additionally, each parent designated the other (and the child) as their beneficiaries. *Id.* at 47a.

The child, E., was born in June of 2011, and respondent stayed at home to care for him while petitioner returned to work. Pet. App. 4a. The relationship deteriorated, however, and shortly before the child's second birthday, petitioner moved out of the home and cut off respondent's contact with him. *Ibid.*

C. Procedural History

After petitioner removed the child from the parties' marital home and severed respondent's contact with him, she also filed petitions for Dissolution of Marriage, for Legal Decision-Making and Parenting Time In Loco Parentis, and for Temporary Orders. Pet. App. 4a, 32a. Those proceedings were stayed, Pet. App. 32a, while awaiting the decision in *Obergefell* v. *Hodges*, wherein this Court concluded that the Constitution entitles same-sex couples to both civil marriage and the full "con-

stellation of benefits that the States have linked to marriage" on the same terms and conditions as opposite-sex couples. 135 S. Ct. 2584, 2601, 2605 (2015).

Based on that decision, the Arizona Superior Court ordered briefing on the issue of whether respondent would be presumed to be a parent and, thus, whether the dissolution proceeding involved children. Pet. App. 32a. Arizona's spousal presumption statute, Ariz. Rev. Stat. § 25-814, establishes a number of scenarios in which a man is presumed to be a child's legal father, including when the man's wife gives birth during their marriage, Ariz. Rev. Stat. § 25-814(A)(1). Petitioner effectively concedes (Pet. 9, 16) that a man whose wife has a child is the child's presumed legal father under Ariz. Rev. Stat. § 25-814(A)(1), but argues that the Constitution does not require the same rule to be applied to a similarly situated woman. In light of *Obergefell*, the Superior Court found that it would violate respondent's rights under the Fourteenth Amendment not to apply the same presumption of parentage to respondent that applies to a man and, accordingly, ordered that the case proceed as a dissolution action with children. Pet. App. 50a-51a.

Petitioner then filed a Motion for Declaratory Judgment, asking whether she would be permitted to rebut the spousal presumption under Section 25-814(C). Pet. App. 53a. The Superior Court denied that motion. *Id.* at 53a-56a.

Petitioner sought interlocutory review in the Arizona Court of Appeals. After accepting jurisdiction, that court affirmed the lower court's decision and concluded that, under *Obergefell*, Section 25-814 must extend to

same-sex spouses and that, under the statute, respondent is a presumed parent. Pet. App. 38a-39a. The Court of Appeals also affirmed the denial of petitioner's motion for summary judgment, reasoning that she was equitably estopped from rebutting respondent's presumption of parentage under Section 25-814(C). Pet. App. 42a-43a.

Petitioner then filed for review with the Arizona Supreme Court. While the appellate decision in the case at bar was awaiting review, this Court issued its decision in *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017). In *Pavan*, this Court held unconstitutional an Arkansas statutory scheme that required the state to list on the birth certificate the male spouse of a woman who gave birth during the marriage but denied the female spouse of a married woman that same benefit. *Id.* at 2078-2079. In so doing, this Court reaffirmed its holding in *Obergefell* that such state laws are "unconstitutional to the extent they treat[] same-sex couples differently from opposite-sex couples." *Id.* at 2078.

Against that backdrop, the Arizona Supreme Court undertook review of the present case. The state high court began its examination of the state statute by observing that "[t]he 'paternity' presumed by this statute * * * refers to a father's legal parental rights and responsibilities rather than biological paternity." Pet. App. 6a-7a. The court held that the statute is not limited to establishing biological paternity because a husband whose wife becomes pregnant through artificial insemination will receive the benefit of the presumption established by Ariz. Rev. Stat. § 25-814. Pet. App. 6a-7a, 11a.

Based on this reading of the state statute, the court concluded that "[c]learly, § 25-814(A)(1) is an evidentiary benefit flowing from marriage." *Id.* at 11a.

Applying *Obergefell* and *Pavan* to its interpretation of the state law, the Arizona Supreme Court then held that Ariz. Rev. Stat. § 25-814 was unconstitutional to the extent it created a presumption of parentage in favor of a birth mother's male spouse, including one who lacked any biological relationship to the child, while denying that right to similarly situated female spouses. Pet. App. 12a-13a. Because a "primary purpose of the marital paternity presumption is to ensure children have financial support from two parents," *id.* at 16a, and because Arizona's marital and domestic relations statutory scheme was designed to "promote[] the family unit" by "ensur[ing] a child has meaningful parenting time and participation from both parents," *id.* at 17a, the court remedied the defect by extending the statutory reach to cover female spouses of birth mothers rather than barring application of the statutory presumption to male spouses, *id.* at 18a.

Lastly, the Arizona Supreme Court affirmed the court of appeals' holding that petitioner was equitably estopped from rebutting respondent's presumed parentage. Pet. App. 20a. The court noted that it "ha[d] often applied equitable estoppel in [its] family law jurisprudence, including dissolution cases" and that "other state supreme courts have applied equitable estoppel in paternity actions, including cases involving marital paternity presumption statutes similar to § 25-814(A)(1)." *Id.* at 21a. Concluding therefore that "[n]othing prohibits Arizona courts from applying equitable estoppel to preclude the rebuttal of a statutory paternity presumption

under § 25-814(A)," *ibid.*, the court engaged in a routine application of Arizona estoppel law. The court found that petitioner was not entitled to rebut Arizona's spousal presumption as applied to respondent, because "[petitioner] intended for [respondent] to be E.'s parent" and entered into a joint parenting agreement, which respondent relied on "when she formed a mother-son bond with E. and parented him from birth." *Id.* at 21a-22a.

REASONS TO DENY THE PETITION

Petitioner's entire argument is rooted in the flawed premise, set forth in the question presented and repeated throughout the petition, that Ariz. Rev. Stat. § 25-814(A)(1) is "a biology-based paternity statute." It is not. The Arizona Supreme Court held, as a matter of Arizona state law, that the spousal presumption contained in Ariz. Rev. Stat. § 25-814 concerns "legal parental rights and responsibilities *rather than biological paternity*." Pet. App. 7a (emphasis added). That determination of the Arizona Supreme Court—the ultimate expositor on matters of Arizona law—is binding on this Court in all but the most extreme circumstances, none of which are present here. The consequence of petitioner's erroneous starting point is that the petition fails to present any substantial question of federal law for this Court to review.

I. THE PETITION PROCEEDS FROM A FLAWED PREMISE OF STATE LAW AS CONSTRUED BY THE ARIZONA SUPREME COURT, WHICH THIS COURT CANNOT REVIEW

From its opening paragraph to its closing line, and repeatedly in between, the petition proceeds under the assumption that Ariz. Rev. Stat. § 25-814 is a "biology-

based" statute that cannot be applied to female spouses of birth mothers. See Pet. i. (asking whether a "biology-based paternity statute violates the Fourteenth Amendment"); *id.* at 29 (concluding that "Arizona is permitted to have a biology based presumption of paternity"); see also *id.* at 3, 4, 7, 8, 14 & n.2, 16, 25. But no matter how many times petitioner presents this assertion as fact, the Arizona Supreme Court has dispositively held to the contrary.

A. As A Matter Of State Law, Arizona's Spousal Presumption Is A Statutory Benefit Of Marriage That Applies To Both Biological And Non-Biological Parents

Contrary to the petition's faulty premise that Ariz. Rev. Stat. § 25-814 is limited to identifying biological paternity, the Arizona Supreme Court expressly considered and rejected that argument.

At the outset of its legal discussion, the Arizona Supreme Court made clear that "[t]he 'paternity' presumed by this statute * * * refers to a father's legal parental rights and responsibilities *rather than biological paternity*." Pet. App. 6a-7a (emphasis added). In response to petitioner's argument that the statute "simply concerns identifying biological parentage," the court stated plainly that Ariz. Rev. Stat. § 25-814 is not limited to establishing biological parentage and that "[b]iological parentage is not at issue here," because the presumption "encompasses more than just rights and responsibilities attendant to biologically related fathers." Pet. App. 12a-13a. In so holding, the court relied on the fact that Ariz. Rev. Stat. § 25-814(A)(1) presumes that the husband of a woman who conceives a child through anonymous

sperm donation is the child's legal parent "even though [the husband] is not biologically related to the child." *Id.* at 11a-12a. Rather than being simply about genetics, the court explained that the spousal presumption set forth in Ariz. Rev. Stat. § 25-814 "is an evidentiary benefit flowing from marriage." *Id.* at 11a.[1]

Further underscoring this holding was the Arizona Supreme Court's examination, as a matter of state law and legislative intent, of the foundation on which the spousal presumption actually rests. The court observed that the legislative history of Ariz. Rev. Stat. § 25-814 revealed that a "primary purpose of the marital paternity presumption is to ensure children have financial support from two parents." Pet. App. 16a. And Title 25 of the Arizona Revised Statutes, the court notes, was designed to "promote[] the family unit" by "ensur[ing] a child has meaningful parenting time and participation from both parents." *Id.* at 17a. Accordingly, rather than serving only to establish biological parentage, the court concluded that Ariz. Rev. Stat. § 25-814(A) is intended to "ensure all children * * * have financial and emotional support from two parents and strong family units." *Id.* at 18a.

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[1] In reaching that conclusion, the Arizona Supreme Court also expressly rejected the holding of a state intermediate appellate court that was based on the same position petitioner raised below and seeks to rehash here. In *Turner* v. *Steiner* the Arizona Court of Appeals concluded that "biology—the biological difference between men and women—*is* the very reason [Ariz. Rev. Stat. § 25-814] exists." 398 P.3d 110, 115 (2017), vacated on reconsideration (Oct. 17, 2017). The Arizona Supreme Court held expressly that that conclusion was "incorrect[]." Pet. App. 12a.

Notwithstanding the petition's question presented—and the arguments advanced throughout the petition—Ariz. Rev. Stat. § 25-814(A)(1) is not, as a matter of state law, a "biology-based paternity statute." Pet. App. 11a. Rather, it affords a benefit of marriage that promotes family stability and the welfare of children born to married couples. *Id.* at 16a-17a. Accordingly, the question petitioner presents is simply not implicated here. This case affords no opportunity for the Court to address the question on which the petition seeks review because the Arizona statute is not a "biology-based paternity statute." Pet. i.

B. The Arizona Supreme Court's Determination That Ariz. Rev. Stat. § 25-814 Affords A Benefit Of Marriage Is Binding On This Court

The Arizona Supreme Court's determination as a matter of state law that the spousal presumption is not limited to establishing biological paternity is conclusive for purposes of this Court's review. As this Court has repeatedly held, "state courts are the ultimate expositors of state law," and, accordingly, this Court will not disturb an interpretation of state law by a state court "except in extreme circumstances." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). While the petition arguably[2] asks the Court to disregard that longstanding rule,

[2] Notably, the petition does not ever directly ask this Court to overrule the Arizona Supreme Court's determination that the Arizona law is not limited to identifying biological fathers; it simply presupposes the contrary. Even if there might be a conceivable basis for this Court to review that question of state law, it should not do so where the petition does not directly present the question. See S.

it offers no basis for the Court to upset the relationship between federal and state courts so dramatically.

Though this Court has, in certain "extreme circumstances," reviewed state-court rulings on issues of state law, the petition does not even acknowledge that standard, much less establish why it would be satisfied here. "On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.'" *Mullaney*, 421 U.S. at 691 n.11 (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 129 (1945)). Similarly, the Court has occasionally found that it must review an underlying state-law issue to ensure that the state is affording the full scope of the Federal Constitution's protections. See, *e.g.*, *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 726-727 (2010) (plurality opinion); *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 187-188 (1992). But the petition makes no argument that the Arizona Supreme Court's ruling in this case is such an instance, nor could it.

The Arizona Supreme Court left no doubt that Ariz. Rev. Stat. § 25-814 affords a benefit of marriage and does not merely address biological paternity, and there is no basis for this Court to revisit that determination of state law. As a consequence, as discussed below, the various arguments advanced by petitioner, which proceed from the opposite characterization of state law, do not present a genuine question for this Court to decide.

Ct. Rule 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

II. None Of The Arguments Advanced By Petitioner, All Of Which Flow From The Common Mistaken Premise That Arizona's Spousal Presumption Is Limited To Biological Paternity, Warrant This Court's Review

Because each of petitioner's arguments starts from the flawed premise that Ariz. Rev. Stat. § 25-814(A)(1) solely concerns biological paternity, rather than representing a benefit of marriage, none of those arguments present a genuine question for this Court to resolve.

A. Petitioner Does Not Dispute That Benefits Of Marriage, Which Includes The Presumption Of Parentage Under Arizona Law, Must Be Extended Equally To Same-Sex Spouses

Given the Arizona Supreme Court's interpretation that, as a matter of state law, Ariz. Rev. Stat. § 25-814 concerns a benefit of marriage and is not limited to biological parentage, petitioner's arguments that the Fourteenth Amendment permits the state to make biology-based distinctions between same-sex and opposite-sex spouses is simply irrelevant to the case at bar. Petitioner does not dispute that *Pavan* has already held that marriage benefits must be extended equally to same-sex spouses, and petitioner does not ask the Court to revisit *Pavan.*

This Court's decision in *Obergefell* v. *Hodges* requires that the right to marry be extended to same-sex couples "on the same terms and conditions as opposite-sex couples." 135 S. Ct. 2584, 2605 (2015). As the Court made clear, the Fourteenth Amendment will not permit

a state law regime that subjects same-sex couples to disparate treatment with regard to the "rights, benefits, and responsibilities" afforded to opposite-sex couples. *Id.* at 2601.

If *Obergefell* left any doubt whether its ruling applied to rights of parentage that the state extends based on marital status, *Pavan* resolved it. In *Pavan* v. *Smith*, petitioners were same-sex couples who conceived through anonymous sperm donation. 137 S. Ct. 2075, 2077 (2017). Arkansas law required—with few exceptions—that a married woman's husband appear on the birth certificate of a child born during the marriage, regardless of whether the husband was the child's biological father. *Ibid.* The state refused, however, to extend that benefit to the female spouse of the birth mother. *Ibid.*

In defending its law, Arkansas argued that its birth certificate statute was not a benefit attending marriage but, rather, a simple device for recording biological parentage. *Pavan*, 137 S. Ct. at 2078. This Court rejected Arkansas' defense of the statute because the law applied to both non-biological and biological fathers. *Ibid.* ("Arkansas law makes birth certificates about more than just genetics."). Thus this Court held that listing a birth mother's spouse on a child's birth certificate was a benefit of marriage provided by the state that could not be denied to female spouses. *Id.* at 2079.

The same analysis applies here. A state that enacts a statutory scheme concerning "more than just genetics" cannot then shield itself behind an argument that the law is exclusively concerned with biological relationships. See *Pavan*, 137 S. Ct. at 2078-2079 ("Arkansas has thus

chosen to make its birth certificates more than a mere marker of biological relationships * * *. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition."). Petitioner acknowledges that *Pavan* held that "if the statute require[s] 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." Pet. 7. As discussed above, the Arizona Supreme Court conclusively construed its state law as providing a birth mother's husband a presumption of parentage simply because he was married to the child's mother, Pet. App. 11a; thus, the state must also extend this same benefit to a woman married to the child's mother. Petitioner does not ask the Court to overrule *Pavan*, so there is no substantial federal question for the Court to address that was not already resolved in *Pavan*.

B. The Remedy Adopted By The Arizona Supreme Court Is Also An Issue Of State Law Not Subject To This Court's Review

Having determined that the spousal presumption affords a benefit of marriage on an unequal basis, and that, under *Pavan*, doing so violates the Fourteenth Amendment, the Arizona Supreme Court was required to determine whether to extend the statute to cover individuals like respondent or to nullify the law altogether. Given that neither party argued in favor of nullification below, it is unsurprising that the court chose instead to extend the law to cover respondent and others similarly situated. Nonetheless, the petition takes issue with the

remedy crafted by the Arizona Supreme Court. This Court should decline to review the choice of remedy for the same reason it should decline review of the previous issues: namely, it presents an issue of state law, and petitioner's arguments are, again, based on a mistaken premise.[3]

The remedy issue presents a question of state law. In *Wengler* v. *Druggists Mutual Insurance*, the Court confronted a Missouri statute that distributed workers compensation payments on a discriminatory basis. 446 U.S. 142, 147 (1980). Because it was discriminatory, this Court reversed a decision of the Missouri Supreme Court and found that the statutory scheme violated the Equal Protection Clause. *Id.* at 149. That left the question—similar to the one faced by the Arizona Supreme Court—"whether the defect should be cured by extending the presumption * * * or by eliminating it." *Id.* at 152. Rather than answer that question on behalf of the Missouri courts, the Court remanded to the state courts to resolve that question: "Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose

[3] The petition's remedy arguments proceed from the same mistaken premise as the remainder of its analysis. Specifically, petitioner argues that the Arizona Supreme Court erred in crafting a remedy because "[t]he State of Arizona has declined to acknowledge parenthood beyond biology and adoption." Pet. 17. Petitioner's reading of the relevant Arizona statutes is simply incorrect and was rejected by the Arizona Supreme Court in this case. Pet. App. 6a-7a.

an appropriate method of remedying the constitutional violation." *Id.* at 152-153.

Wengler therefore highlights the two reasons that petitioner's remedy arguments raise no issue for this Court to review. First, as *Wengler* notes, the question of the proper remedy for a state statute's equal protection violation belongs, in the first instance, to the state courts. Arizona's Supreme Court has already made its choice of remedies[4] and this Court should not disturb that decision.

In any event, petitioner's assertion that the Arizona Supreme Court performed an impermissible super-legislative function in extending the spousal presumption to cover same-sex parents, is contrary to this Court's own precedent when addressing similar questions in the federal context. When confronted with an unconstitutional statute, *Wengler* is but one of a number of decisions standing for the proposition that courts may exercise one of two options: either extend the benefit to all who are similarly situated or strike the law as a nullity. See, *e.g.*, *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1701 (2017); *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979). This Court has, in fact, suggested that extension, rather than

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[4] The Arizona Supreme Court specifically focused its analysis, as was proper, on the question of whether the Arizona legislature would have preferred to extend the spousal presumption rather than strike it completely. Pet. App. 16a-18a. This is entirely consistent with this Court's approach to crafting remedies regarding federal statutes. See, *e.g.*, *Wengler*, 446 U.S. at 153 ("[A] remedial outcome consonant with the state legislature's overall purpose is preferable."); *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) ("[W]e must adopt the remedial course Congress likely would have chosen.").

nullification, is usually "the proper course" when faced with an underinclusive statute. *Califano*, 443 U.S. at 90; see also *Morales-Santana*, 137 S. Ct. at 1701 ("[T]he preferred rule in the typical case is to extend favorable treatment."). Thus, the Arizona Supreme Court engaged in a proper exercise of the judicial function and selected the traditionally proper course in choosing to extend the presumption of parentage to all similarly situated spouses of married birth mothers.

C. As Legal Parents Under State Law, Both Petitioner And Respondent Have A Fundamental Interest In The Care, Custody, And Control Of Their Child

Petitioner's argument (Pet. 25) that recognizing respondent as a parent infringes on her "fundamental right to the care, custody, and control of [her] child[]" is also an impermissible request for this Court to review a state Supreme Court's interpretation of its own state's laws. Petitioner's argument rests on the mistaken premise that respondent is "a non parent." *Id.* at 28. Because, as a matter of state law, respondent is also the child's legal parent, the question petitioner asks the Court to consider is not genuinely presented.

As an initial matter, petitioner did not raise the argument in the Arizona Supreme Court that prohibiting her from rebutting the presumption of respondent's parentage would infringe petitioner's own fundamental right to care for their child. As a result, that court did not address it in its opinion. Although petitioner had raised this argument at the intermediate Court of Appeals, she did not renew it when requesting review from

the Arizona Supreme Court, as is required for preservation under Arizona Court rules. Ariz. R. Civ. App. P. 23(d)(1); see also *Fitzgerald* v. *Myers*, 402 P.3d 442, 446 n.2 (Ariz. 2017) ("Issues and arguments not raised in briefs * * *, including constitutional issues, generally are deemed waived."). Thus, petitioner forfeited the right to review of that issue in the State's highest court. Because there is no decision from the highest state court on the question due to petitioner's procedural default, petitioner has failed to preserve the issue for this Court's review. See *Webb* v. *Webb*, 451 U.S. 493, 495-496 (1981).

But even if the issue were not waived, this case affords the Court no opportunity to consider the circumstances in which a state may be precluded from diminishing a parent's rights vis-a-vis her child in favor of a non-parent. Because, as a matter of Arizona state law, respondent is a parent (a question of state law already resolved by the State's highest court), this case does not present a conflict between a parent and a non-parent.

Petitioner does not challenge the constitutionality of parental presumption statutes based on marriage, and doing so would require the Court to overturn established precedent, which petitioner has not asked the Court to do. This Court has already upheld the right of a state to determine who is and who is not the legal parent of a child, and to rely on statutory presumptions based in marriage in doing so. For example, in *Michael H.* v. *Gerald D.*, this Court held that states may constitutionally recognize that a man who is married to a child's mother is the child's legal parent, even when another man is known to be the child's biological father. 491 U.S. 110 (1989). Specifically, the Court considered whether the state of California's decision to prevent a

child's biological father from asserting a paternity right was constitutionally permissible. Finding that it was, this Court held that the structuring of legal parent status is "a question of legislative policy and not constitutional law." *Id.* at 129-130. Petitioner does not even acknowledge *Michael H.*, much less provide a basis for the Court to revisit it.

Likewise, the state courts' application of state law principles of estoppel to foreclose petitioner from rebutting that state law presumption presents no federal question for this Court's review. Although Ariz. Rev. Stat. § 25-814 provides that a presumption of parentage may be rebutted, both the Arizona Court of Appeals and the Arizona Supreme Court held—in a decision petitioner has not challenged here—that petitioner is equitably estopped from doing so. Pet. App. 20a-22a, 42a-47a. As with each of the petition's previous arguments, that decision involves pure issues of state law and was, in any event, correct.

An interpretation of Arizona's equitable estoppel doctrine and its application to issues of Arizona family law is precisely the type of question on which this Court has routinely deferred to state courts. See pp. 10-11, *supra*. Whether petitioner should be denied an opportunity to rebut a presumption created by a state statute on the basis of an equitable state doctrine involves no question of federal law that would warrant this Court's review. Notably, the Arizona Supreme Court observed that principles of estoppel are routinely applied in the context of state family law determinations to preclude a party from denying the existence or non-existence of a familial relationship, including the existence of a marriage or divorce, or parentage. See Pet. App. 21a-22a

(citing *Randy A.J.* v. *Norma I.J.*, 677 N.W.2d 630, 639-641 (Wis. 2004); *In re Marriage of Worcester*, 960 P.2d 624, 627 (Ariz. 1998)).

Moreover, the Arizona Supreme Court's treatment of the equitable estoppel claim was sound. Under Arizona law, equitable estoppel "precludes a party from asserting a right inconsistent with a position previously taken to the prejudice of another acting in reliance thereon." *Unruh* v. *Indus. Comm'n*, 301 P.2d 1029, 1031 (Ariz. 1956). That petitioner has taken a series of positions inconsistent with her argument that respondent is not a mother to their child—or not entitled to equal parenting rights—is beyond dispute: petitioner entered a joint parenting agreement declaring her intent that respondent should "be a second parent" with the "same rights, responsibilities, and obligations that a biological parent would have to her child;" petitioner and respondent executed mirror wills declaring that they were to be equal parents of their child; and petitioner held respondent out to be the child's mother for nearly two years prior to their separation. Pet. App. 3a-4a, 31a. Respondent relied on those representations and, for nearly two years, was primarily responsible for raising the child and built a parental relationship with him while petitioner served as the primary bread-winner. *Id.* at 4a. Having made those representations and having allowed respondent to rely on them, petitioner may not now take a wholly inconsistent position in order to attempt to rebut the presumption of parentage.

The result of the Arizona Supreme Court's application of state law to these facts was its determination that respondent is deemed, as a matter of state law, a legal

parent of the child born during the marriage of petitioner and respondent. Because respondent *is* a parent, this case affords no opportunity for the Court to consider under what circumstances a "non parent" can be afforded rights of custody or visitation that would interfere with a parent's similar rights. Petitioner's reliance on this Court's decision in *Troxel* v. *Granville*, 530 U.S. 57 (2000), and the Idaho Supreme Court's decision in *Doe* v. *Doe*, 395 P.3d 1287 (2017), as addressing that latter issue is thus inapposite. In both of those cases, the party seeking parental rights was not a legal parent under state law. On the contrary, here—as with the non-biological party in *Michael H.*—respondent *is* a parent under state law, and the question on which petitioner seeks this Court's review is thus not presented on the facts of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
CHRISTOPHER THOMAS BROWN
JOSHUA GOLDSTEIN
MOLLY GACHIGNARD
STEFAN SCHROPP
ROPES & GRAY LLP

SHANNON MINTER
CATHERINE SAKIMURA
NATIONAL CENTER FOR LESBIAN RIGHTS

CLAUDIA WORK
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