No. 17-878

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

PETITIONER'S REPLY BRIEF

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This case presents this Court with a very simple Federal Question, does the Fourteenth Amendment of the United States Constitution mandate that state legislatures cannot write gender specific, biology based parentage statutes. Here, the Arizona Supreme Court specifically found that Arizona's paternity statute, A.R.S. § 25-814, as written, does not apply to women. But then, the Arizona Supreme Court found that under the United States Constitution, as interpreted by this Court in *Obergefell* and *Pavan,* it was required to apply the gender specific statute to women as well as to men.

The Arizona Supreme Court incorrectly found that a gender specific, biology based statute violated the Fourteenth Amendment of the United States Constitution.

I. Judicial Review Allows This Court To Review A State Interpretation Of Federal Constitutional Law.

Susan, in her Brief in Opposition, argues that this Court cannot accept jurisdiction of this issue because the Arizona Supreme Court held A.R.S. § 25-814 is not a biology-based paternity statute. B.I.O. 8. However, Susan ignores the fact that the Arizona Supreme Court first held that, as written, A.R.S. § 25-814 does not apply to women. It then held that applying the statute as written violated the Fourteenth Amendment of the United States Constitution as interpreted by this Court in *Obergefell* and *Pavan*. It is this error that Mother requests this Court to review. Review of the other findings by the Arizona Supreme Court are depend

on whether the United States Constitution, as applied by this Court in *Obergefell* and *Pavan,* prohibit gender based, biological parentage statutes. That is the issue.

From the inception of the Supreme Court of the United States, this Court has had the authority to review a State Court's interpretation of a Federal law. The applicable Federal Statute, 28 U.S.C. § 1331, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

This power to review actions arising under the Federal Constitution or the laws of the United States is referred to as judicial review. Philip J. Weiser explained this concept in his Law review article *Chevron, Cooperative Federalism, and Telecommunications Reform*. In that article he provides:

> In *Martin v. Hunter's Lessee*, Justice Story offered the path marking tribute to federal supremacy. In that case, a Virginia state court had refused to follow a ruling issued by the Supreme Court on a matter involving federal law, concluding that it was not subject to federal court review. In making clear that the Constitution grants the Supreme Court appellate jurisdiction to review state court interpretations of federal law, Justice Story stressed the importance of the uniform

> interpretation and application of federal law. Specifically, he explained that:
>
> > Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.
>
> Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, Vanderbilt Law Review, January 1999, at 6.

This Court has exercised its judicial review authority in cases where a state court applied its interpretation of the federal constitution to a state statute. Citing only domestic cases, Mother points to *Griswold v. Connecticut*, 85 S.Ct. 1678 (1965), *Wisconsin v. Yoder*, 92 S.Ct. 1526 (1972), *Troxell v. Granville*, 120 S.Ct. 2054 (2000), and *Pavan v. Smith*, 137 S.Ct. 2075 (2017). While certainly not an exhaustive list, in each of these cases this Court grated certiorari to review a state supreme court's application of the United States Constitution to a state law.

In the below case, the Arizona Supreme Court explicitly interpreted A.R.S. § 25-814 to apply only men as follows:

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

McLaughlin v. Jones, 401 P.3d 492, 496 (Ariz. 2017). (Emphasis added).

After finding that A.R.S. § 25-814, on its face, applies only to men, the Arizona Supreme Court next held as follows:

> However, in the wake of *Obergefell*, excluding Suzan from the marital paternity presumption violates the Fourteenth Amendment.

Id.

Thus, because the below case addresses a state court's application of federal law to a state statue, this Court has the authority to address the constitutionality of Arizona's gender specific, biology based parentage statute violates the Fourteenth Amendment as interpreted in *Obergefell* and *Pavan*.

II. The Arizona Supreme Court Clearly Found That, On Its Face, A.R.S. § 25-814 Applies Exclusively To Men.

Susan correctly argued that "state courts are the ultimate expositors of state law." B.I.O. 10. As stated above, the Arizona Supreme Court did interpret A.R.S. § 25-814; and it interpreted the statute to apply exclusively to men. This interpretation of A.R.S. § 25-814 is consistent with prior Arizona Court's interpretations of the words paternity and maternity.

Pursuant to established Arizona case law the word "paternity" has a very specific meaning, which has been upheld by the Arizona Supreme Court to apply only to men. For example, in *Sheldrick v. Maricopa Cty. Super. Ct.*, 666 P.2d 74, 76 (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 different and specific meanings. In explaining its holding, the Arizona Supreme Court held:

> 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 has been upheld multiple times the Arizona Supreme Court and the Arizona Court of Appeals. See *Traphagan v. Super. Ct.*, 666 P.2d 76 (1983), *Thornsberry v. Super. Ct.*, 707 P.2d 315 (1985), and *Ban v. Quigley*, 812 O.2d 1014, 1016-17 (Ariz. App. 1990). In *Ban*, the Arizona Court of Appeals even recognized that the legislature eventually changed the paternity statute to allow either party to file an action, given the prior distinction that men could not file for "paternity" and instead had to file for "maternity." Thus, Arizona has always upheld that it does not violate state law to have gender specific statutes.

Thus, pursuant to *Mullaney v. Wilbur*, 95 S.Ct. 1881 (1975) this Court should give deference to the Arizona Supreme Court's interpretation that A.R.S. § 25-814 applies exclusively to men and thus should grant review of this issue to determine if the Fourteenth Amendment of the United States' Constitution, as interpreted by this Court in *Obergefell*, and *Pavan*, prohibit states from implementing a gender specific, biology based parentage statute.

III. A.R.S. § 25-814 Only Extends The Presumption Of Paternity To Those Men Who Could Be The Biological Father Of The Child, Thus It Is A Gender Specific, Biology Based Statute.

Susan argues that "[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." B.I.O. 13. It is Mother's position that this Court can decide the merits of this case based upon the Arizona Supreme Court's interpretation of the plain language of A.R.S. § 25-814; that the statute applies exclusively to men. However, as Mother argued in her Petition for Certiorari, A.R.S. § 25-814 is a gender specific, biology based statue. The statute's language only extends the presumption of paternity to those who could be the biological parent of the child.

Additionally, Arizona's Parental Bill of Rights, codified as A.R.S. § 1-602 defines parent as "natural or adoptive parent", which corresponds with the definition in A.R.S. § 25-401(2) of legal parent as the "biological or adoptive parent." The Arizona Legislature chose to use a male biological definition of paternity, which should not be prohibited under *Obergefell* and *Pavan*.

IV. The Remedy Adopted By The Arizona Supreme Court Exceeded The Authority Of The Judicial Branch Of The Government.

Susan argues that the Arizona Supreme Court correctly extended the statute to apply to women as well as to men. B.I.O. 15. However, as is fully briefed in Mother's Petition for Certiorari, this remedy effectively adopted the UPA, something that the Arizona Legislature has declined to do, and something that the judicial branch lacks the authority to do. The remedy was not a state court issue, but rather a misapplication of the Constitution in prohibiting state legislatures from utilizing gender specific, biological statutes for parentage.

V. Mother Did Not Waive Her Right To Argue Her Fundamental Right To Parent Her Child.

Suzan argues that Mother waived her right to state that she has a fundamental right to her child. B.I.O. 17. As shown by Mother's Petition for Review to the Arizona Supreme Court, Mother specifically raised the issue in her Petition, alleging that Suzan does not have a fundamental right to parent Mother's child because she is not the parent. Pet. 15.

Petitioner also raised in her Petition for Review the issue of Arizona's Parental Bill of Rights, A.R.S. § 1-601, and how the application of the paternity statute, gender neutrally, was an end run around Arizona's statute. Furthermore, Susan is only a parent because of the Arizona Supreme Court's application of federal law to A.R.S. § 25-814.

Additionally, the application of equitable estoppel only can occur if the paternity statute first applies to women. Here, as argued, the Arizona Supreme Court erred when it applied a gender specific, biologically based paternity statute to female spouses. And without applying that statute to women, the issue of equitable estoppel need not be determined.

CONCLUSION

For the reasons stated above, Mother's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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