IN THE SUPREME COURT OF FLORIDA

D.M.T.,
Appellant,

v. Case No. SC12-261

T.M.H.,
Appellee.
_____/

On Review from the District Court of Appeal, Fifth District
State of Florida

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AND LAMBDA LEGAL IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide; the ACLU of Florida, the state affiliate of the ACLU, has over 15,000 members. The ACLU is committed to protecting the constitutional right of parental autonomy and submitted *amicus* briefs in support of parents in *Troxel v. Granville*, *infra*, and *Von Eiff v. Azicri*, *infra*. The ACLU also seeks to ensure that relationships between children and the adults who function as their parents, whether or not related by blood or adoption, are also protected and, thus, filed *amicus* briefs in several cases addressing this issue, including *V.C. v. M.J.B.*, *infra*, *T.B. v. L.R.M.*, *infra*, and *In re Parentage of L.B.*, *infra*. These cases, along with the ACLU's case *Fla. Dep't of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d DCA. 2010), further the ACLU's goal of ensuring the full range of family protections are available to lesbian and gay parents and their children.

Lambda Legal Defense and Education Fund, Inc., is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals and transgender people through impact litigation, education, and public policy work. Since its founding in 1973, Lambda Legal has handled cases in all substantive areas involving sexual orientation and

the law, including *Romer v. Evans* 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). In particular, Lambda Legal has appeared as counsel or as *amicus* in scores of cases involving the protection of parent-child bonds in families established by lesbians or gay men, including *V.C. v. M.J.B.*, *infra;* and *Kazmierazak v. Query*, *infra*.

SUMMARY OF ARGUMENT

This brief does not expand on the sound conclusion of the District Court of Appeal that T.M.H. meets the statutory definition of a parent; *Amici* agree that "parent" includes a genetic mother who did not "donate" her ova for use by another family but instead transferred her ova to her partner for the purpose of creating a child the two women intended to raise jointly as a family. *Amici* write to explain why even if T.M.H. is not deemed to be a parent by statute, this Court has the authority and duty to protect the psychological parent-child relationship that formed between T.M.H. and the child with D.M.T.'s consent and encouragement, and doing so is consistent with constitutional protections afforded parent-child relationships. Contrary to the conclusions of several of the district courts of appeal, neither Florida law nor the Constitution renders the courts powerless to protect children against the grievous loss of these important relationships. *Amici* further write to explain that if deemed applicable to this family, Florida's donor insemination statutes violate the right to equal protection.

ARGUMENT

I. EVEN IF T.M.H. IS NOT DEEMED A STATUTORY PARENT, THE COURTS HAVE THE AUTHORITY AND DUTY TO PROTECT THE PSYCHOLOGICAL PARENT- CHILD RELATIONSHIP D.M.T. CREATED BETWEEN THE CHILD AND T.M.H., AND DOING SO IS CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

Even if this Court disagrees with the court below that T.M.H. is a statutory parent, courts have the equitable authority to protect the child's relationship with T.M.H., who became her psychological parent at the behest of D.M.T.. While Florida's district courts of appeal have recognized the concept of psychological parenthood and protected such relationships in the past,[1] more recently some of these courts have misapplied the law in a manner that has largely foreclosed psychological parents' ability to maintain their relationships with the children they have raised.[2] These courts have failed to recognize their equitable authority and

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[1] *See, e.g., Sinclair v. Sinclair*, 804 So. 2d 589 (Fla. 2d DCA 2002)(upholding decision recognizing the psychological parent claim of grandmother who was awarded joint custody with her son, child's father, over child's mother); *S.G. v. C.S.G.*, 726 So. 2d 806, 808 at n3 (Fla. 1st DCA. 1999) (in certain circumstances "the custodian may become a so-called 'psychological parent'"); *Simmons v. Pinkney*, 587 So. 2d 522 (Fla. 4th DCA 1991) (upholding custody decision in favor of psychological parent, foster mother); *Wills v. Wills*, 399 So. 2d 1130 (Fla. 4th DCA 1981)(affirming order that step-mother who was found to be child's "psychological mother" can be granted visitation if in child's best interest).

[2] *See e.g., L.D. v. Fla. Dep't of Children & Families*, 24 So. 3d 754, 756 (Fla. 3d DCA 2009); *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. 1st DCA 2006); *Kazmierazak v. Query*, 736 So. 2d 106 (Fla. 4th DCA 1999); *Music v. Rachford*, 654 So. 2d 1234 (Fla. 1st DCA 1995); *Taylor v. Kennedy*, 649 So. 2d 270 (Fla. 5th DCA 1994); *Meeks v. Garner*, 598 So. 2d 261 (Fla. 1st DCA 1992).

obligation to protect the welfare of children. And they have misapplied the seminal constitutional rulings concerning grandparents' custodial rights to the completely different context of a parent who intentionally shared parental authority with another adult who, as a result, became a psychological parent to the child.

The trial court here recognized that denying the child the ability to continue her relationship with T.M.H. was not in her best interest but believed its hands were tied by the law and expressed its hope that the decision would be reversed. But Florida courts have the authority and duty to act to protect the welfare of children who fall between the statutory cracks and doing so comports with constitutional requirements.

A. Florida courts have the equitable authority and duty to protect children's relationships with their psychological parents.

Florida courts of general jurisdiction have inherent jurisdiction to rule in custody and visitation cases in favor of a psychological parent notwithstanding the lack of an express statutory grant. More than 60 years ago in *Pollack v. Pollack*, 31 So. 2d 253, 254 (Fla. 1947), this Court recognized that "[c]ourts of equity have inherent jurisdiction to protect infants." *See also Cone v. Cone*, 62 So. 2d 907, 908 (Fla. 1953) (acknowledging "the well-recognized principle that, independent of statute, a court of chancery has inherent jurisdiction to control and protect infants and their property" in a custody dispute between father and grandmother).

Interim legislative enactments in the area of family law do not vitiate the general principle that a court of general jurisdiction has the inherent power "to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions." *State Dep't of Health and Rehab. Servs. v. Hollis*, 439 So. 2d 947, 948-9 (Fla. 1st DCA 1983) (quoting *Rose v. Palm Beach Cnty.*, 361 So. 2d 135, 137 (Fla. 1978). In *Hollis,* the court upheld the lower court's grant of custody to an individual who was not a legal parent based on the reasoning that it "did nothing more than to exercise its inherent powers" as recognized in *Rose,* as well as "the more narrow principle as it applies to this case ... that '[t]he circuit court has the inherent jurisdiction and right to protect minors and their property." *Hollis,* 439 So. 2d at 949 (quoting *Phillips v. Nationwide Mutual Ins. Co*., 347 So. 2d 465, 466 (Fla. 2d DCA 1977).

This jurisdictional authority to determine custodial rights notwithstanding a lack of express statutory authority to grant custody to a person in the party's position is unremarkable throughout the various states.[3] *See, e.g., Koelle v. Zwiren*,

[3] As a corollary to general equitable jurisdiction in custody matters, state courts are also entitled (if not obligated) to fill in the "interstitial gaps" inevitably left in state statutes just as federal courts are so required. *See, e.g., United States v. Miami Drum Servs., Inc.*, 1986 WL 15327, *2 (S.D. Fla. 1986) (citing *United States v. Little Lake Misene Land Co*., 412 U.S. 580, 593 (1973)); *see also Ford Motor Credit Co. v. Milhollin* 444 U.S. 555, 556 (1980) ("It is a commonplace that courts

672 N.E.2d 868, 872 (Ill. App. Ct. 1st Dist. 1996) ("While it is true that these statutes do not provide the grounds for plaintiff's claim for visitation privileges in this case, Illinois case law and general principles of equity support the claim"); *Ex parte Lipscomb*, 660 So. 2d 986 (Ala. 1994). As the *Lipscomb* court noted, this equitable jurisdiction is recognized because of the vital role courts have in protecting children:

> [B]ecause the well-being of minor children is of paramount interest to the state, the circuit court also has jurisdiction to decide custody matters where non-parents are involved. The circuit court's jurisdiction to do so is derived from the principles of equity; where a child is physically present within the jurisdiction of a circuit court in this state, the court has inherent authority to act to protect the welfare and best interests of the child. A party need not specifically invoke the circuit court's inherent jurisdiction; rather, *any* pleading showing on its face that the welfare of a child requires an order with respect to its custody and support is sufficient to invoke the jurisdiction of the circuit court to settle the matter.

Ex parte Lipscomb, 660 So. 2d at 989 (citations omitted).

The reasoning applied by the Washington Supreme Court in *In re Parentage of L.B.*, 122 P.3d 161, 165 (Wash. 2005), is instructive and equally applicable here. The facts in *L.B*, as here, involved a woman who sought parentage of the child

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will further legislative goals by filling the interstitial silences within a statute or a regulation. Because legislators cannot foresee all eventualities, judges must decide unanticipated cases by extrapolating from related statutes or administrative provisions.").

born to her ex-partner, planned for and raised by both women from birth. The court allowed her petition to be heard, explaining:

> Our state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations. Yet, simply because a statute fails to speak to a specific situation should not, and does not in our common law system, operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned. . . . While the legislature may eventually choose to enact differing standards than those recognized here today, and to do so would be within its province, until that time, it is the duty of this court to "endeavor to administer justice according to the promptings of reason and common sense."

Id. at 176 (internal citations omitted).

Numerous state appellate courts have likewise exercised their equitable authority to protect the interests of children by allowing visitation or custody to be awarded to psychological parents.[4] *See, e.g.*, *Latham v. Schwerdtfege*r, 802 N.W.2d 66 (Neb. 2011); *Bethany v. Jones*, 2011 WL 553923 (Ark. Feb. 17, 2011); *Middleton v. Johnson*, 633 S.E.2d 162 (S.C.App. 2006); C.*E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). These courts recognized that their duty to protect the interest of children

[4] Some courts have used alternative terms such as *de facto* parent or *in loco parentis* to refer to the same concept. For convenience, *amici* will use the term "psychological parent" to refer to such individuals unless quoting court decisions.

includes protecting a child against the emotional harm of losing a parental relationship. *V.C.*, 748 A2d. at 550 ("At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them").

These courts have adopted criteria to establish whether a party is a psychological parent entitled to seek custodial rights, among them a four-prong test created by the Wisconsin Supreme Court, which requires the petitioner to show:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

H.S.H-K, 533 N.W.2d at 435-36; *see e.g.*, *Middleton*, 633 S.E.2d 162 (applying Wisconsin test); *V.C.*, 748 A.2d 539 (same). Such rigorous tests serve to protect children's significant interest in parental relationships while ensuring that legal parents' constitutional rights are respected by screening out caregivers such as nannies whom the parent never intended to assume a parental role. *See, e.g.*, *Bethany*, 2011 WL 553923 at *13.

B. Allowing psychological parents like T.M.H. to be granted custodial rights comports with the constitutional protections afforded parent-child relationships

As discussed above, courts have the power under Florida law to act to protect children's relationships with their psychological parents. Exercising that power is consistent with constitutional requirements. The relationship between parent and child is perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998). However, the right to parental autonomy does not entitle a parent to invite another adult to fully share the parental role, and then, after the child has become bonded with and dependent upon that person as a psychological parent, sever the parent-child relationship that she intentionally created. *Troxel* does not bar courts from protecting children's right to the continued love and support of their psychological parents. Nor do this Court's rulings in *Von Eiff* and its other grandparent cases compel such a cruel result. Additionally, children and their psychological parents have relationships that fall within the protection of the Constitution.

1. It does not violate D.M.T.'s parental autonomy right to recognize and protect the psychological parent-child relationship between the child and T.M.H. formed as a direct result of D.M.T.'s conduct.

This Court's decision in *Von Eiff*, 720 So. 2d 510, and its other grandparent custody and visitation cases (*Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), and

Richardson v. Richardson, 766 So. 2d 1036 (Fla. 2000)), as well as the United States Supreme Court's decision in *Troxel*, 530 U.S. 57, held that granting custody or visitation to grandparents over the objection of a fit parent violated the parent's constitutional rights. While several district courts of appeal interpreted these cases as precluding the granting of custodial rights to psychological parents (*see, e.g.*, *Wakeman*, 921 So. 2d 669; *Kazmierazak*, 736 So. 2d 106), neither the Supreme Court's nor this Court's rulings in the grandparent cases support those results or sweep so broadly.

Troxel and this Court's grandparent cases reiterate that parents' child-rearing decisions are constitutionally protected from *interference*. They do not define, or limit the definition of, parenthood, psychological or otherwise. And they do not address circumstances like those here, where the legal parent exercised her parental autonomy by intentionally sharing her exclusive parental rights[5] with another adult who, as a result, became a psychological parent to the child.[6] In such situations, a

[5] Of course, even constitutional rights are subject to a knowing waiver. *See, e.g.*, *Gessa v. Manor Care of Fla., Inc.*, 2011 WL 5864823 (Fla. Nov. 23, 2011).

[6] In *Richardson*, 766 So. 2d at 1038, the invalidated statute allowed custody to be awarded to grandparents "where the child is actually residing with a grandparent in a stable relationship." The problem with the statute is that it did not respect the decision of the parent. Accordingly, because the mother there agreed to let her child reside with grandparents on a temporary basis while she worked and obtained a college degree, such an arrangement was not "an indication that the mother waived her interest in the child." *Id.* at 1043. Here, of course, the facts reveal that

parent who otherwise would have exclusive parental rights has acted inconsistent with, or waived, that exclusivity.[7]

Numerous courts that have considered arguments based on *Troxel* in psychological parent cases have held that it does not infringe parental autonomy to protect a psychological parent-child relationship that a legal parent *voluntarily chose to create and foster* between another adult and her child. In such cases, the courts have reasoned that the legal parent ceded or shared her exclusive parental rights. For example, in *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000), the Rhode Island Supreme Court held that when a legal parent "agree[s] to and foster[s]" a psychological parent-child relationship and allows that person to "assume an equal role as one of the child's two parents," she renders her own parental rights with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been. As the New Jersey Supreme Court explained in *V.C.*, 748 A.2d at 552,

> That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that

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the legal parent invited another adult to be a second permanent parent to the child and waived her exclusive parental rights.

[7] It is not only parental misconduct such as abuse or neglect that can constitute an act inconsistent with exclusive parental authority. *See, e.g., Mason v. Dwinnell*, 660 S.E.2d 58, 70 (N.C. Ct. App. 2008)(the issue is not whether conduct consists of "good acts" or "bad acts" but rather, "the gravamen of 'inconsistent acts' is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.").

> zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.

See also Middleton, 633 S.E.2d at 169 ("The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child."); *Bethany*, 2011 WL 553923; *Mason*, 660 S.E.2d at 66-69 ; *T.B.*, 786 A.2d at 919-920.[8]

The powerful reasoning of cases such as *Middleton* and *V.C.* should guide this Court in drafting an opinion that will respect legal parents' constitutional rights while upholding courts' responsibilities to protect children's interests:

> [W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced . . . . Where a legal parent encourages a parent-like relationship between a child and a third party, the right of the legal parent does not extend to erasing a relationship between [the third party] and her child which [the legal parent] voluntarily created and actively fostered.

Middleton, 633 S.E.2d at 169.

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[8] These courts also recognized the qualitative difference between psychological parents and third parties who are not in a parental role. *See, e.g.*, *L.B.*, 122 P.3d at 178 (rejecting argument that *Troxel* bars recognition of *de facto* parents because "*Troxel* did not address the issue of state law determinations of 'parents' and 'families'"); *Bethany*, 2011 WL 553923 at *9 (rejecting argument that *Troxel* overturned *in loco parentis* cases on the basis that "*in loco parentis* relationship is different from the grandparent relationships found in *Troxel* ... because it concerns a person who, in all practical respects, was a parent.").

> What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day- to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited the third party into their lives, Most important, where that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation.

V.C., 748 A.2d at 553-54.

In this case, D.M.T. exercised her parental autonomy to establish a two-parent family. She invited T.M.H. to assume an equal parental role from the child's birth until she was four years old, ceding her exclusive parental authority. Having established and encouraged that relationship for several years, neither the state nor federal constitution gives her the right to cut it off at will. *See T.B.*, 786 A.2d at 919 ("[A] biological parent's rights do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so")(internal citations omitted).

2. The relationship between T.M.H. and the child also falls within the protection of the Constitution.

As set forth above, courts may recognize relationships between children and their psychological parents without offending the constitutional protections articulated in *Troxel* and *Von Eiff*. In addition, although the Court need not reach this question in order to affirm, protecting such relationships is also constitutionally required. Relationships between children and their psychological parents, like other parent-child relationships, are protected by the Constitution. Over 60 years ago, the Supreme Court, in *Prince*, 321 U.S. 158, recognized that it is not just biological parents who have a constitutionally protected interest in their relationships with their children. The Court treated the relationship between Sarah Prince and Betty Simmons (Sarah's "custodian" and aunt) as a constitutionally protected parent-child relationship. *Id.*, at 159, 169. Similarly, in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), the Court recognized that a grandmother who lived with and raised her grandsons had a constitutionally protected relationship with them. *See Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 843, n. 49 (1977)(citing *Prince* and *Moore* as examples of parental due process rights extending beyond "natural parents"). And in *Smith*, 431 U.S. 816, the Court held that a foster child who has no legal parents may, under some circumstances, have a constitutionally protected relationship with his foster parents.

The Supreme Court has explained that the Due Process Clause protects parent-child relationships because of the important bonds that form between parents and children as a result of their daily life together as a family.[9] *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

Smith, 431 U.S. at 844 (internal citations omitted). This Court has agreed that it is not the "mere existence of a biological link [that] merit[s] constitutional protection" of the relationship of parent and child. *In re Adoption of E.A.W.*, 658 So. 2d 961, 966-67 (Fla. 1995), quoting *Lehr*, 463 U.S. at 261. Rather, "it is the assumption of the parental responsibilities which is of constitutional significance." *Matter of Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989).

Thus, courts across the country have recognized that there are circumstances in which families with neither biological nor adoptive parental connections fall within the shelter the Constitution provides for parent-child relationships. *See, e.g.*, *Alber v. Ill. Dep't of Mental Health and Developmental Disability*, 786 F. Supp.

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[9] The constitutional rights that protect families safeguard the interests of the child as well as the parent. *See, e.g.*, *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

1340, 1366-75 (N.D. Ill. 1992)(a couple who cared for developmentally disabled adults for several years established that they had constitutionally protected family relationships); *In Interest of R.K.W.*, 689 S.W.2d 647, 650-651 (Mo. Ct. App. 1985)(couple who raised a child, without biological or legal connection, had a constitutionally-protected interest in the parent-child relationship that developed).

A psychological parent has likewise established the emotional attachments resulting from daily life together as a family that entitle the relationship to the protection of the Constitution. *See L.B.*, 122 P.3d at 178 ("if, on remand, [the petitioner] can establish standing as a *de facto* parent, [she and the biological mother] would *both* have a 'fundamental liberty interest[ ]' in the 'care, custody, and control' of L.B.")(quoting *Troxel*, 530 U.S. at 65). The New Jersey Supreme Court explained:

> At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.

V.C., 748 A.2d at 550, citing *Smith*, 431 U.S. at 844.

It is a well-established rule of constitutional law that a classification that creates differential access to a fundamental right is subject to strict scrutiny and can be upheld only if it is narrowly tailored to achieve a compelling interest. *See, e.g. Shapiro v. Thompson*, 394 U.S. 618 (1969) (differential burden on right to

travel subjected to strict scrutiny). It would constitute differential access to the fundamental right to the "companionship, care, custody and management" of children, *Stanley*, 405 U.S. at 651, to deny individuals who are deemed to be psychological parents the ability other parents have to seek court-ordered visitation or custody. Because excluding psychological parents and their children from accessing the State's system for preserving parent-child relationships would serve no legitimate interest, let alone a compelling one, the Constitution forbids such treatment.

II. IF DEEMED APPLICABLE TO FAMILIES LIKE THE ONE HERE, THE DONOR INSEMINATION STATUTES WOULD VIOLATE EQUAL PROTECTION BY DISCRIMINATING BASED ON SEX AND SEXUAL ORIENTATION WITHOUT A LEGITIMATE, LET ALONE COMPELLING, JUSTIFICATION.

Florida's donor insemination statutes discriminate based on sex and sexual orientation by treating women who provide genetic material to their female partners for purpose of creating a child they intend to raise together differently from men who provide genetic material to their female partners for the same purpose. Fla. Stat. § 742.14 provides:

> The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father . . . , shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.

"Commissioning couple" is defined as "the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents." Fla. Stat. §742.13(2).[10] Under these statutes, a man who contributes sperm to a female partner (whether or not married) for use in assisted reproduction for purposes of bringing a child into the world that both partners intend to raise together can do so and retain his parental rights. This is true if the woman who carries the child uses donated ova. In contrast, a woman who contributes ova to a female partner to create (with donor sperm) a child that the couple intends to raise together does not retain her parental rights. Her parental rights are relinquished by statute.

This statutory scheme disadvantages women like T.M.H. who create families with same-sex partners through this form of assisted reproduction. It also disadvantages children like the child in this case who, unlike children born into similarly situated male-female parent families, cannot have legally recognized parent-child relationships with both of their parents. This denies them access to multiple material resources (e.g. health insurance through the parent's employer or social security, right to child support if the parents separate) and leaves them

[10] "Assisted reproductive technology" is defined as "those procreative procedures which involve the laboratory handling of human eggs or preembryos, including, but not limited to, in vitro fertilization embryo transfer, gamete intrafallopian transfer, pronuclear stage transfer, tubal embryo transfer, and zygote intrafallopian transfer." Fla. Stat. §742.13(1).

vulnerable to the emotional harm of being cut off from one of their parents as happened to the child here.[11]

Equal protection challenges to laws that burden a fundamental right or suspect class warrant strict scrutiny; otherwise, rational basis review applies. *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1095 (Fla. 2005). Although it cannot withstand even rational basis review because there is no conceivable basis for depriving children of a legal relationship with and emotional and financial support of a genetic parent just because that parent is a woman (rather than a man) who contributed genetic material to her partner to help conceive a child into the family,[12] this statutory scheme warrants heightened

[11] D.M.T.'s argument that the decision below "creates an unequal status of the female donor of an ova and the male donor of sperm" (at p. 18) is backwards. She argues that this is differential treatment because the unknown sperm donor waived parental rights. But the statutes draw the line at "intended" parents. Fla. Stat. §742.13(2). The unknown donor is not an intended parent. The intended parents were T.M.H. and D.M.T.. If T.M.H. had been a male who provided genetic material, she would have retained parental rights.

[12] D.M.T. argues (at p. 13) that it is a "unique and unsupportable legal fiction that a child may have two mothers (and by implication), two fathers." The case she cites, *Daniels v. Greenfield*, 15 So. 3d 908, 911 (Fla. 4th DCA 2009), which said "Florida does not recognize dual fathership," addressed the issue of determining paternity when a married woman gives birth to a child whose biological father is not her husband. It did not concern two people raising a child together within a family. In *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005), a case factually similar to this one, the court acknowledged similar prior case law stating that "for any child California law recognizes only one natural mother." But the court explained that this statement "must be understood in light of the issue presented in that case; 'our

scrutiny because it discriminates on the basis of sex. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996)(sex classifications require "exceedingly persuasive" justification).[13] Moreover, strict scrutiny applies because the statutes unequally burden the fundamental privacy rights to procreate and maintain a parent-child relationship. *See In re T.W.*, 551 So. 2d 1186 (Fla. 1989); *Von Eiff*, 720 So. 2d 51.

As the court below recognized, requiring T.M.H. to relinquish her parental rights to the child despite being her genetic parent intruded on these fundamental rights. Whether or not the government has a sufficient interest in regulating certain forms of assisted reproduction, there can be no question the statues here implicate the fundamental right to procreate and raise children and they treat women and men differently with respect to this form of procreation. As the Supreme Court has recognized, differential access to parental rights based on gender violates equal protection. *Stanley*, 405 U.S. 645 (different standard for termination of parental rights applied to mothers and fathers); *Caban v. Mohammed*, 441 U.S. 380 (1979) (allowing unwed mother, but not unwed father, to prevent adoption of one's child).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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decision in [the cited case] does not preclude a child from having two parents both of whom are women.'" *Id* (internal citation omitted).

[13] Neither the Supreme Court nor this Court has addressed the level of scrutiny applicable to sexual orientation classifications. Because strict scrutiny is warranted on other grounds, there is no need to reach this question in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to File Brief as Amici Curiae has been furnished by U.S. mail to

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point type.

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