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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Gadola, P.J., and Swartzle and Cameron, JJ.

CARRIE PUEBLO,

Plaintiff-Appellant,

v.

RACHEL HAAS,

Defendant-Appellee.

_____/

MSC Case No. 164046

COA Case No. 357577

Lower Court Case No. 2020-6382-DC

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., LGBTQA LAW SECTION OF THE STATE BAR OF MICHIGAN, AFFIRMATIONS LGBTQ+ COMMUNITY CENTER, GLBTQ LEGAL ADVOCATES & DEFENDERS, AND THE NATIONAL CENTER FOR LESBIAN RIGHTS

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union of Michigan** (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of over a million members dedicated to protecting civil rights and civil liberties. The ACLU's LGBT Project seeks to combat discrimination and protect the rights of lesbian, gay, bisexual, and transgender people in Michigan. The ACLU has been extensively involved in litigation seeking equality for LGBTQ people, including the right to marry and the right to become parents, form families, and raise children. See, e.g., *National Pride at Work v Governor*, 481 Mich 56; 748 NW2d 524 (2008); *Bassett v Snyder*, 59 F Supp 3d 837 (ED Mich, 2014); *Caspar v Snyder*, 77 F Supp 3d 616 (ED Mich, 2015); *Usitalo v Landon*, 299 Mich App 222; 829 NW2d 359 (2012). The ACLU has also been involved in cases seeking to ensure that parent-child relationships in LGBTQ families remain intact, even when the relationship between the parents breaks down, and in cases involving assisted reproductive technology. *Mabry v Mabry*, 499 Mich 997 (2016); *Lake v Putnam*, 316 Mich App 247; 894 NW2d 62 (2016); *LeFever v Matthews*, 336 Mich App 651; 971 NW2d 672 (2021) (amicus).

Lambda Legal Defense & Education Fund, Inc. (Lambda Legal), founded in 1973, is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as party counsel or as *amicus* in landmark cases establishing the rights of LGBTQ people to form intimate and family relationships, including *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015); *United States v Windsor*, 570 US 744; 133 S Ct 2675; 186 L Ed 2d 808

[1] No party or counsel for a party authored this brief either in whole or in part. No person or entity other than the amici curiae, their members or their counsel, contributed money intended to fund preparing or submitting this brief.

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(2013); and *Lawrence v Texas*, 539 US 558; 123 S Ct 2472; 156 L Ed 2d 508 (2003). Lambda Legal has appeared as well in cases across the country addressing the ongoing legacies of discriminatory marriage laws, see, *e.g.*, *Thornton v Comm'r of Social Security*, 570 F Supp 3d 1010 (WD Wash, 2020); *Ely v Saul*, 572 F Supp 3d 751 (D Ariz, 2020), including the impact of those laws on the relationships between non-genetic parents and their children. See, e.g., *Brooke SB v Elizabeth ACC*, 28 NY3d 1; 61 NE3d 488 (2016); *Conover v Conover*, 450 Md 51; 146 A3d 433 (2016).

The **LGBTQA Law Section** is a voluntary organization of attorneys, recognized by the State Bar of Michigan that educates the State Bar and the public, acts as a resource for the State Bar on LGBTQA-related issues including family law and child custody, and coordinates action with other sections and affinity bar associations. The LGBTQA Law Section's mission is to promote fair and just administration of laws and policies, including equitable parenthood, which affect the LGBTQA community, and hence has a compelling interest in this case.

Affirmations LGBTQ+ Community Center was founded in 1989 with a mission to provide a welcoming space where people of all sexual orientations, gender identities and expressions, and cultures can find support and unconditional acceptance, and where they can learn, grow, socialize, and feel safe. The Center provides support groups, educational and social activities, and food assistance. Affirmations serves LGBTQ individuals and LGBTQ families with children throughout metropolitan Detroit.

GLBTQ Legal Advocates & Defenders (GLAD) is a legal rights organization that seeks equal justice for all persons under the law regardless of their sexual orientation, gender identity, or HIV status. Since 1978, GLAD has worked in New England and nationally through strategic litigation, public policy advocacy, and education. GLAD has an enduring interest in the rights of and protections for LGBTQ families and children and has worked on litigation, legislation, and

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public education throughout New England and nationally on the topic of family protection. See, e.g., *Pavan v Smith*, ___ US ___; 137 S Ct 2075; 198 L Ed 2d 636 (2017); *Obergefell*, *supra*; *Partanen v Gallagher*, 475 Mass 632; 59 NE3d 1113 (2016); *Goodridge v Dep't of Pub Health*, 440 Mass 309; 798 NE2d 941 (2003).

The National Center for Lesbian Rights (NCLR) is a national non-profit legal organization for LGBTQ people and their families. Since its founding in 1978, NCLR has represented LGBTQ parents and their children in custody, adoption, parentage, and other family law cases, with a goal of ensuring that all children receive equal protection under the law. NCLR has litigated many family law cases across the country, including in Michigan and other states, and was counsel in *Pavan*, *supra*, which held that states must provide the same parental rights and protections to children born to married same-sex couples as they provide to children born to married different-sex couples.

Equality Michigan is Michigan's statewide LGBTQ political advocacy organization. Formerly known as the Triangle Foundation, Equality Michigan has been Michigan's anti-violence political advocacy organization for more than 25 years. Equality Michigan's Victim Services Program provides dedicated survivor services to LGBTQ persons who have experienced discrimination, violence, and harassment.

The **Out Center of Southwest Michigan**, located in Benton Harbor, provides support services and resources to LGBTQ people, their families, and allies. The Center works to create change in Southwest Michigan through initiatives based on education and strategic partnerships, including establishing the first LGBTQ-inclusive local human rights ordinance in the tri-county area, as well as working with school communities to create safe and supportive learning environments for LGBTQ students.

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Stand with Trans's mission is to provide tools needed by transgender youth so that they will be empowered, supported, and validated as they transition to their authentic lives. Since 2015, Stand with Trans has been dedicated to developing life-saving programs, educational events, and support groups for transgender youth and their families throughout Michigan and across the country, with the vision of erasing the stigma surrounding trans identities.

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE EQUITABLE PARENT DOCTRINE SHOULD BE APPLIED TO PERSONS SUCH AS THE PLAINTIFF, WHO, AT THE TIME OF THE PARTIES' SAME-SEX RELATIONSHIP AND DECISION TO HAVE A CHILD TOGETHER, WAS UNCONSTITUTIONALLY PROHIBITED FROM MARRYING?

Amici say "yes."

II. WHETHER A SAME-SEX PARTNER WHO CONSENTS TO HER PARTNER'S CONCEPTION THROUGH ASSISTED REPRODUCTION CAN ESTABLISH LEGAL PARENTAGE UNDER MICHIGAN'S ASSISTED REPRODUCTION STATUTE, MCL 333.2824(6), WHERE THE COUPLE WAS UNCONSTITUTIONALLY PROHIBITED FROM MARRYING?

Amici say "yes."

III. WHERE A SAME-SEX COUPLE BRINGS A CHILD INTO THE WORLD WITH THE INTENT TO RAISE THE CHILD TOGETHER, DOES A NON-GENETIC PARENT HAVE STANDING TO SEEK CUSTODY AND PARENTING TIME UNDER AN INTENDED PARENT DOCTRINE AS OTHER STATES' COURTS HAVE RECOGNIZED?

Amici say "yes."

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INTRODUCTION

Carrie Pueblo and Rachel Haas—partners in a committed same-sex relationship—chose to have a child together using assisted insemination, with Ms. Haas being the partner who would carry the child. When the child was born in November 2008, same-sex couples were prohibited from marrying in Michigan. The relationship between Ms. Pueblo and Ms. Haas ended before the United States Supreme Court held in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015), that Michigan's law barring marriage by same-sex couples was unconstitutional.

When parents separate, children in families created by same-sex couples, just like children in families created by different-sex couples, need legal protections that recognize the parents' and children's fundamental rights in their relationship. Custody and parenting time decisions for the children of same-sex couples should be made based on the best interests of the child, just as they are for the children of different-sex couples. MCL 722.25(1). The issue here, however, is not what is in the best interests of this child; the trial court did not reach that issue in this case, and such determinations will, of course, vary from case to case. Rather, this case squarely presents the threshold question of when a non-genetic parent in a family intentionally created through assisted reproduction by a same-sex couple, who was barred from marrying her partner but asserts that they were in a marriage-like relationship, has standing to seek custody and parenting time.

Michigan's statutory scheme and many of its judicial decisions have historically treated families created by same-sex partners unequally with respect to legal parentage. This reflects, first, that many aspects of Michigan family law have turned on marriage: certain opportunities to establish legal parentage, as well as certain presumptions related to parentage, have been available only to married parents. Until recently, Michigan law excluded same-sex couples from marriage, and therefore, until recently, non-genetic parents in families created by same-sex couples have been unable to use marriage-based opportunities to establish legal parentage. Second, there has been

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insufficient recognition of the fact that when same-sex couples have children, at least one parent may not have a genetic connection. While different-sex couples have multiple routes to establishing parentage for their children, whether based on marriage or genetics, Michigan law provides no opportunity to establish parentage for non-genetic parents in same-sex couples who do not or could not marry.

As a result, when children are born into families headed by same-sex couples who are unmarried—including those who were unconstitutionally barred from marrying like the parties here—if their parents' relationship breaks down, the child-parent bond can be severed forever because the non-genetic parent is considered a legal stranger to the child. This can cause tremendous harm to children, denying them access to the love and financial support of one of their parents. And it effectively functions as a termination of parental rights, without any of the accompanying protections.

Amici discuss three guiding principles for deciding this and future cases. First, children's relationships with their parents merit constitutional protection, whether or not the parent and child are genetically related and whether or not the parents are married. Second, families created by same-sex couples and families created by different-sex couples must be treated equally, reflecting both that Michigan statutes are interpreted in a gender-neutral way, and that unequal treatment is inequitable and unconstitutional. Third, Michigan's past unconstitutional exclusion of same-sex couples from marriage cannot be used as a basis to deny parental rights.

Applying these principles here, there are three bases for resolving this case and guiding lower courts in similar cases: (1) the equitable parent doctrine should be applied in favor of non-genetic parents in pre-*Obergefell* same-sex relationships who were unconstitutionally barred from marriage; (2) the assisted reproduction statute—which must be interpreted in a gender-neutral

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way—should be applied in favor of non-genetic parents in pre-*Obergefell* same-sex relationships who were unconstitutionally barred from marriage; and (3) an intended parent doctrine—based on the parties' intent to bring a child into the world and parent that child together—should be recognized in this state as it is in many others.

BACKGROUND

The facts must be viewed in the light most favorable to Ms. Pueblo, as the non-moving party. See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Ms. Pueblo alleges that she and Ms. Haas were in a long-term committed relationship which began in the early 2000s and they memorialized their commitment in a June 2007 commitment ceremony. They wore wedding bands, lived together, and shared finances. The parties chose to build a family together through assisted reproduction. Ms. Haas served as the birth parent, and the parties sought a sperm donor whose physical characteristics resembled those of Ms. Pueblo. Their child was born in November 2008, and the parties gave him the hyphenated last name Haas-Pueblo. The parties co-parented him, sharing parental responsibilities equally. Although the couple's relationship ended in 2014, they continued to share parenting responsibilities through an informal agreement, including after the child suffered a stroke in 2016. Starting in 2017, Ms. Haas prevented Ms. Pueblo from having contact with the child. See Appellant's Brief, pp 5-10.

Ms. Pueblo filed an action under the Child Custody Act seeking custody and parenting time, and Ms. Haas filed a motion for summary disposition under MCR 2.116(C)(5) and (8), arguing that Ms. Pueblo lacked standing. The trial court granted the motion, and the Court of Appeals affirmed, holding that Ms. Pueblo did not have standing under the Child Custody Act because she is not biologically related to the child and did not adopt him. *Pueblo v Haas*, 2021 WL 6130700, unpublished per curiam opinion of the Court of Appeals, issued December 28, 2021 (Docket No. 357577), pp 4-5. The court also held that Ms. Pueblo did not have standing under the

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equitable parent doctrine, concluding that pursuant to *Van v Zahorik*, 460 Mich 320, 331; 597 NW2d 15 (1999), that doctrine applies only to marital children even though the parents here could not legally wed. *Pueblo*, unpub op at 5-6. While recognizing that *Obergefell* invalidated Michigan's law that had barred Ms. Pueblo and Ms. Haas from getting married before their relationship ended, the Court of Appeals saw no constitutional problem with denying Ms. Pueblo standing because the parties had not wed. *Id*. at 6-7. This Court granted leave to appeal. *Pueblo v Haas*, 979 NW2d 335 (Mich, 2022).

The basic relevant facts—that a committed same-sex couple in a long-term relationship chose to have a child together through assisted reproduction and then co-parented their child for years—appear to be largely undisputed. There are some differences between the parties' accounts of their relationship, such as when the relationship ended. However, because the trial court dismissed the case for lack of standing at the outset based on the undisputed fact that the parties were unmarried, there was no opportunity for factual development, much less for factual findings.

The differences in the parties' accounts are not relevant to the questions before this Court, which concern whether the lower courts erred in concluding that, as a matter of law, an unmarried non-genetic parent who intentionally brought a child into the world with a same-sex partner when the couple was prohibited from marrying lacks standing to pursue custody and parenting time. Any factual disputes—if they are relevant to the bases for standing under the rules set out below—can be addressed on remand.

Similarly, "it bears emphasizing that granting plaintiff relief at this juncture does not *mandate* access to [the child]. To the contrary, the decision to grant or deny visitation is the province of the circuit court, and only after deliberate consideration of what is in the best interests of the child[]." *Van*, 460 Mich at 342 (BRICKLEY, J., dissenting) (original emphasis). Ms. Pueblo's

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complaint states that she is asking for "an appropriate parenting time schedule for reunification efforts" given how long she has been cut out of her son's life. Compl, p 4. If Ms. Pueblo has standing, the trial court can address what arrangements are in the child's best interests.

THE LEGAL FRAMEWORK

I. The Framework for Establishing Parentage in Michigan

The Child Custody Act (CCA), MCL 722.21 *et seq.*, grants standing to seek custody or parenting time to people who are not legal parents only in limited circumstances.[2] Thus, the threshold question in this case—as in many custody/parenting time cases involving families created by same-sex partners—is whether an individual who is not genetically related but in a parental relationship with a child is a legally recognized parent.

The CCA explicitly provides that it is "equitable in nature" and its provisions are to be liberally construed. MCL 722.26. The CCA defines "parent" as "the natural or adoptive parent of a child." MCL 722.22(i). That definition must be read "in conjunction" with other statutes and "interpreted in a manner that ensures [the CCA] works in harmony with the entire statutory scheme." *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009). Reading the CCA in context requires recognizing that there are other statutes and judicial decisions that set standards and procedures for who is a legal "parent." Specifically, legal parentage can be established in a variety of ways under multiple statutes and doctrines. Whether a person has standing as a "parent" under the CCA is usually predicated on whether that person has established parentage under some other statute or doctrine. In other words, it is the overall family law statutory framework and the

[2] A "third person"—defined as "an individual other than a parent," MCL 722.22(k)—can bring a custody action only in very limited circumstances, typically involving placement for adoption or death of the custodial parent. MCL 722.26c(1). In addition, a child's guardian or limited guardian has standing to seek custody. MCL 722.26b. Ms. Pueblo alleges that she is a parent, not an individual other than a parent or a guardian.

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accompanying judicial decisions that establish who is considered a legal parent in the first place, and who therefore has standing to seek custody/parenting time under the CCA.

For non-birth parents—anyone other than the person who has given birth to the child—there are a variety of ways to establish parentage, including being presumed a parent under the marital presumption, filing an acknowledgement of parentage, establishing parentage in paternity proceedings, demonstrating parentage under the assisted reproduction statute, adoption, and establishing parentage under the equitable parent doctrine.

A. Establishing Parentage Under the Marital Presumption

A "man … is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1433(e). "The name of the husband at the time of conception or, if none, the husband at birth shall be registered as the father of the child." MCL 333.2824(1). "The legitimacy of all children begotten before the commencement of any action [for divorce] shall be presumed." MCL 552.29. See also *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977) (there is a strong but rebuttable presumption that a husband is a child's father). Thus, even if a husband has no genetic connection with a child, under the marital presumption he is presumed to be the child's parent as a matter of law.[3] See *id*. at 636.

Although these statutes refer to a "man," a "father," and the "husband" of a married woman, the marital presumption applies to the spouse of a married woman regardless of the spouse's gender. This is constitutionally required after *Obergefell*, 576 US at 670, where the United States Supreme Court held that same-sex couples may not be denied "the constellation of benefits that the States have linked to marriage." See also *Pavan v Smith*, 137 S Ct 2075, 2077; 198 L Ed 2d 636 (2017) (under *Obergefell*, state could not refuse to list married same-sex parent on birth

[3] The Revocation of Paternity Act, MCL 722.1431 *et seq.*, establishes procedures to rebut that presumption.

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certificate as this is among the constellation of benefits linked to marriage). The marital presumption falls within that constellation of benefits when the spouse of a mother seeks custody, parenting time, or other benefits of parenthood linked to marriage. Moreover, interpreting the presumption statutes in a gender-neutral way accords with MCL 8.3b, which provides that in interpreting Michigan statutes, "[e]very word importing the masculine gender only may extend and be applied to females as well as males." Unsurprisingly, courts around the country have interpreted their marital presumptions to be gender neutral. See Argument I.B.2, *infra*. Lest there be any doubt, this Court should take the opportunity to make clear that the marital presumption applies equally to female spouses. That does not resolve this case, however, because the parties here were barred from marrying.

B. Establishing Parentage Under the Acknowledgment of Parentage Act

Michigan's Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*, provides that unmarried couples can establish legal parentage for the non-birth parent through completion of a simple form. Specifically, MCL 722.1003(1) provides: "If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgement of parentage." Signing the acknowledgment form establishes parentage and "may be the basis for court ordered child support, custody or parenting time." MCL 722.1004. "The child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth." *Id.*

The Acknowledgement of Parentage Act defines a "father" as "the man who signs an acknowledgment of parentage of a child." MCL 722.1002(d). Thus, the Act provides a simple mechanism to establish legal parentage for an unmarried man where he and the mother acknow-

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ledge him as a parent, and the man agrees to assume parental responsibilities. MCL 722.1003(1)-(2); MCL 722.1007(f). Along with that acknowledgment of parental responsibilities come parental rights, including the right to seek parenting time and custody. MCL 722.1004; MCL 722.1007(d).

The Court of Appeals has stated in dicta that the Acknowledgement of Parentage Act "establishes paternity (not maternity)." *LeFever v Matthews*, 336 Mich App 651, 667; 971 NW2d 672 (2021). Amici are unaware of any cases squarely grappling with the question of whether an unmarried same-sex couple could establish parentage for the non-birth parent under Michigan's Act.[4] Here, it is sufficient to know that the acknowledgement-of-parentage option has generally been understood (whether correctly or not) to be unavailable to unmarried same-sex couples in Michigan who want to establish parentage for the non-genetic parent.

C. Establishing Parentage Under the Paternity Statutes

Several other statutes allow for the establishment of paternity, including the Paternity Act, MCL 722.711 *et seq.*, the Genetic Parentage Act, MCL 722.1461 *et seq.*, the Summary Support and Paternity Act, MCL 722.1491 *et seq.*, the Uniform Interstate Family Support Act, MCL 552.2101 *et seq.*, and the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq.* Broadly speaking, these statutes allow the mother, the alleged father, or the state to file suit to determine a child's paternity. Genetic testing is either available or required. In addition, the Revocation of Paternity Act, MCL 722.1431 *et seq.*, provides an avenue to set aside prior paternity determinations, typically because of a dispute about whether the man established as the father is

[4] In some other states, similar statutes that allow for establishment of parentage by unmarried couples have been applied to unmarried same-sex couples. See, e.g., *Partanen v Gallagher*, 475 Mass 632, 639-640; 59 NE3d 1113 (2016).

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in fact the genetic father. Amici are unaware of any cases allowing these statutes to be used by same-sex couples to establish parentage for the non-genetic parent.

D. Establishing Parentage After Assisted Reproduction

Many children are conceived by way of assisted reproduction. Methods of assisted reproduction vary and include assisted insemination with donor sperm; in vitro fertilization (which involves extraction of a mother's eggs for external fertilization with either a father's sperm or donor sperm); reciprocal in vitro fertilization (where one mother gives birth using another mother's egg that was extracted and fertilized by sperm and then implanted in the first mother's uterus); and implantation of a donor egg (fertilized with either a father's sperm or donor sperm). A child born through assisted reproduction often will have a genetic connection to only one parent, and may not have a genetic connection to either parent.

Michigan law provides a means to secure the parentage of a child born to a married couple through assisted reproduction, specifically providing that "[a] child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife." MCL 333.2824(6). This statute acknowledges the integrity of families created using assisted reproduction, and also recognizes that both members of a couple that decide to bring a child into the world have parental rights and responsibilities, regardless of whether a parent is genetically related. As noted above, under *Obergefell*, the protections of MCL 333.2824(6) apply equally to married same-sex couples if they use assisted reproduction to have children. In addition, MCL 8.3b requires that MCL 333.2824(6) be read gender neutrally. However, because there are no post-*Obergefell* appellate decisions confirming that the statute applies equally to same-sex married couples, this Court should reaffirm that the statute's references to a "married woman" and her "husband" must be applied in a gender-neutral way.

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Here again, however, that does not resolve this case. The protection provided to spouses who use assisted reproduction to have children was not available to Ms. Pueblo because the protections are premised on being married, and she was excluded from marriage.

E. Establishing Parentage Through Adoption

Under Michigan's Adoption Code, a single person may adopt a child, a married couple may adopt a child together, or in certain circumstances, a married person may adopt a child without the other spouse. MCL 710.24(1), (2). Michigan law also allows for so-called "step-parent adoptions," traditionally used where the custodial parent marries and the new spouse seeks to adopt the child. MCL 710.51(6). However, to use this procedure, the petitioner must be married to the child's custodial parent. *Id.*

In re Adams, 189 Mich App 540, 544; 473 NW2d 712 (1991), held that two people who were married, but not to each other, could not jointly adopt. Although *In re Adams* concerned an adoption by two people who were married (albeit to other people), courts in most Michigan counties interpreted that case as barring adoptions by unmarried same-sex couples. See Michigan Judicial Institute, *Adoption Proceedings Benchbook*, § 4.2.b (3d ed, 2023). When Ms. Pueblo and Ms. Haas had their child—and throughout their relationship—they could not marry, and Ms. Pueblo therefore was not able to use adoption to establish legal parentage of the child. Indeed, in *Obergefell* the United States Supreme Court specifically recognized Michigan's exclusion of unmarried same-sex couples from adoption as one of the harmful effects of marriage bans requiring a remedy. See *Obergefell*, 576 US at 658-659, 678 (explaining that Michigan plaintiffs April DeBoer and Jayne Rowse were "den[ied] . . . the certainty and stability all mothers desire to protect their children" because their inability to marry meant they were precluded from jointly adopting their two children).

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After *Obergefell*, same-sex couples can now marry, and the spouse in a same-sex marriage can complete a stepparent adoption to secure parental rights. That entails additional work and expense that married different-sex couples need not undertake. Even more concerning, a married same-sex couple's ability to secure parental rights for the non-birth parent spouse may be delayed by local administrative rules, which commonly require spouses be married for at least a year before a petition for step-parent adoption can be filed.[5]

F. Establishing Parentage Under the Equitable Parent Doctrine

Michigan's equitable parent doctrine, which the Court of Appeals developed in *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987), and this Court endorsed in *Van*, 460 Mich at 330-331, recognizes that a person who is not genetically linked to a child may be recognized as a parent, provided that

> (1) the would-be equitable parent and the child acknowledge the parental relationship or the biological or adoptive parent has cultivated the development of a relationship over a period of time, (2) the would-be equitable parent desires to have the rights afforded a parent, and (3) the would-be equitable parent is willing to pay child support. [*Mabry v Mabry*, 499 Mich 997, 998 (2016) (MCCORMACK, J., dissenting), citing *Atkinson*, 160 Mich App at 608-609.]

In *Van*, this Court in a 4-3 decision held that a man who had been raising children with his unmarried female partner could not invoke the equitable parent doctrine. After the couple's relationship ended, blood tests revealed that the man was not the genetic father. *Van*, 460 Mich at 323-324. The majority stated that the equitable parent doctrine was rooted in marriage and

[5] See, e.g., Kalamazoo County Government, *9th Judicial Circuit: Adoptions* <https://www.kalcounty.com/courts/circuit/admin/adoption.htm> (requiring 12 months of marriage before a step-parent adoption); Wayne County Probate & Juvenile Court, *Step-Parent Adoptions* <https://www.wayneprobateandjuvenile.org/adoption/step-parent-adoption> (same); Montcalm County, *Starting a Step-Parent Adoption* <https://www.montcalm.us/610/Starting-a-Step-Parent-Adoption> (same); Michigan Legal Help, *I Want To Adopt My Step-Child* <https://michiganlegalhelp.org/self-help-tools/family/i-want-adopt-my-stepchild> (noting that although not required by statute, some local courts require marriage of at least a year before a petition for a step-parent adoption can be filed).

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speculated that "extending it to persons who were never married would have repercussions on the institution of marriage. Michigan's public policy favors marriage." *Id.* at 331-332. The dissents argued that such a limitation on equitable parenthood "elevat[es] . . . marriage as the sole relevant consideration," "penalizes children for the decision by two unmarried adults to live together without the formality of marriage," *id.* at 342 (BRICKLEY, J., dissenting), and ignores the overriding concern of custody and parenting time decisions which is "attainment of the best interests of the children," *id.* at 346 (KELLY, J., dissenting). Amici are unaware of any other state that conditions equitable parenthood or similar doctrines (e.g., *in loco parentis*, "psychological parenthood" or "de facto parenthood") on marital status. See generally Joslin & NeJaime, *How Parenthood Functions*, 122 Colum L Rev (forthcoming 2023) <https://ssrn.com/abstract=4208364>.

In *Lake v Putnam*, 316 Mich App 247; 894 NW2d 62 (2016), the Court of Appeals held that *Van*'s marriage requirement applied not just to different-sex couples who chose not to marry but also to unwed same-sex couples who could not legally marry at the time of their relationship. There, the non-genetic parent in a pre-*Obergefell* same-sex partnership sought parenting time, and the Court concluded that she could not invoke the equitable parent doctrine because the couple never married. *Id.* at 252-253. Judge SHAPIRO, concurring, noted that the facts in *Lake*—where the plaintiff could not establish that the couple would have married before the child's birth or conception but for Michigan's unconstitutional ban on their marriage—"do not fully test the scope of *Obergefell*'s application to Michigan's equitable-parent doctrine and that under different facts a different result may be required." *Id.* at 257 (SHAPIRO, J., concurring).

In Ms. Pueblo's case, the Court of Appeals, citing *Lake*, held that the equitable parent doctrine applies only if a person "was married to the child's mother at the time of the child's conception or birth, and the other requirements of the doctrine are met." *Pueblo*, unpub op at 6.

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The Court held that Ms. Pueblo did not have standing under the equitable parent doctrine because she had not married Ms. Haas, even though the couple could not have married because Michigan unconstitutionally excluded them from doing so. *Id.*

II. Michigan's Unconstitutional Bar on Same-Sex Marriage

For the entirety of the time that Ms. Pueblo and Ms. Haas had a relationship—from when they first became involved in the early 2000s, through their commitment ceremony in 2007, and until after their relationship dissolved in 2014—marriage was not a possibility for them in Michigan. Const 1963, art 1, § 25; MCL 551.1. The *Obergefell* decision, which found this prohibition unconstitutional, did not come until 2015.

Nor could Ms. Pueblo have secured parentage by marrying Ms. Haas in another jurisdiction. At the time their child was born, the only state that recognized same-sex marriage was Massachusetts, and Massachusetts barred out-of-state same-sex couples from marrying there if marriage was prohibited in their home state. See *Cote-Whitacre v Dep't of Pub Health*, 446 Mass 350; 844 NE2d 623 (2006). And even if Ms. Pueblo and Ms. Haas had been able to marry elsewhere, such a marriage would not have been recognized in Michigan. Const 1963, art 1, § 25; MCL 551.272; see *Stankevich v Milliron*, 2013 WL 5663227, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 310710) (holding that non-genetic mother lacked standing under the CCA because her out-of-jurisdiction marriage to a same-sex partner was not recognized in Michigan), vacated 498 Mich 877 (2015) (remanding for reconsideration in light of *Obergefell*). In short, even after marriage became legal in some other jurisdictions, any out-of-jurisdiction marriage would not have had the legal effect of a marriage in this state.

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III. Family Creation Under Michigan Law for Same-Sex Couples Pre- and Post-*Obergefell*

As set out above, Michigan law provides various paths by which individuals can establish legal parentage. Some paths require marriage, while others allow unmarried parents to establish parentage. Some paths require or presume a genetic connection; others do not. The chart below sets out the marriage and genetic requirements of the different paths:

Path to Legal Parenthood	**Marriage Required**	**Genetic Tie Required**
Marital Presumption	Yes	No
Acknowledgement of Parentage Act	No	Form requires affirmation that "natural parent"[6]
Paternity Statutes	No	Yes, or affirmation that "natural parent"
Assisted Reproduction	Yes	No
Adoption	Single person or married couple can adopt	No
Equitable Parenthood	Yes	No

As this chart clearly shows, Michigan's family law statutes reflect the assumption that children are either born into marital families with different-sex parents or are the product of non-marital heterosexual sex. That assumption does not reflect the diversity of families today, nor account for the needs of both parents and children in families that do not fit that mold. It also means that families created by same-sex partners—both pre- and post-*Obergefell*—face obstacles to establishing parentage that families created by different-sex partners do not.

Historically, same-sex couples could not marry in Michigan. None of the marriage-based paths for establishing parentage were available to Ms. Pueblo and Ms. Haas, who were barred from marrying at the time they decided to start a family and throughout their relationship. See *Mabry*, 499 Mich at 997 (MCCORMACK, J., dissenting) ("[B]efore the Supreme Court's decision in

[6] See Dep't of Health & Human Servs, *Affidavit of Parentage*, Form DCH-0682.

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Obergefell, a same-sex partner had no legal recourse to seek parental rights to a child born or adopted into his or her committed relationship but carried or adopted by his or her partner.").

After *Obergefell*, same-sex couples can now marry. While it should be clear under *Obergefell* and MCL 8.3b that they are entitled to the same protections as married different-sex parents, there is no Michigan case law recognizing that. As a result, family law experts advise married same-sex couples to incur the expense and hassle of a step-parent adoption to ensure legal recognition of the parental relationship in the event that the same-sex couple separates or the genetic parent dies or is incapacitated. See, e.g., Michigan Legal Help, *Growing Your Family: An Overview for Same-Sex Parents* <http://bit.ly/3kOMlPP>; Kelly et al, *Michigan Family Law*, § 2.6 (2021). It is too risky to assume that if an issue later arises, courts will find that the married non-genetic parent is a legal parent. By contrast, married parents in different-sex relationships have no reason to worry that they might lose access to their children if they do not take such extra steps to establish legal parentage. Accordingly, one of the most important things that the Court can do in this case is to make it crystal clear that, after *Obergefell* and pursuant to MCL 8.3b, Michigan's family law statutes apply equally to married same-sex and married different-sex couples.

What has not changed after *Obergefell* is that at least one parent in a same-sex couple will not have a genetic connection to the child. While most different-sex couples who choose to have children without getting married can easily establish parentage under the Acknowledgement of Parentage Act or under one of the paternity statutes, same-sex couples do not currently have that option. For unmarried parents, Michigan's family law statutes are designed to establish paternity based on a genetic connection. Accordingly, there is still "no reliable way for a non-biological parent in an unmarried same-sex couple to establish parental rights." *Growing Your Family*, *supra*.

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ARGUMENT

I. GUIDING PRINCIPLES FOR DECIDING THIS CASE

Before turning to the specific legal analysis that should govern this case, amici set out three principles—derived from constitutional, legal, and equitable considerations—that should guide the Court's decision. First, parent-child relationships are constitutionally protected. Second, families created by same-sex couples and families created by different-sex couples must be treated equally. Third, the past unconstitutional exclusion of same-sex couples from marriage cannot be used as a basis to deny parental rights.

A. Parent-Child Relationships Are Constitutionally Protected.

1. Parent-Child Relationships—Whether Genetic or Non-Genetic—Merit Constitutional Protection.

Family relationships, including the parent-child relationship, have long been protected under both the United States and Michigan Constitutions. See, e.g., *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972); *Pierce v Society of Sisters*, 268 US 510, 534-535; 45 S Ct 571; 69 L Ed 1070 (1925); *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014); *Reist v Bay Co Circuit Judge*, 396 Mich 326; 241 NW2d 55 (1976).

Whether parent-child relationships merit constitutional protection should not turn on whether the child's parents were married or on genetic connections between the parent and child. See, e.g., *Troxel*, 530 US at 88-89 (Stevens, J., dissenting) (discussing child's constitutional interest in preserving established family bonds); *Stanley*, 405 US at 651, 658 (noting the law recognizes non-marital family relationships and holding that an unmarried father cannot be deprived of custody of his child without a hearing); *Lehr v Robertson*, 463 US 248, 256; 103 S Ct 2985; 77 L Ed 2d 614 (1983) ("The intangible fibers that connect parent and child have infinite

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variety . . . It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases."); *Smith v Org of Foster Families for Equal & Reform*, 431 US 816, 844; 97 S Ct 2094; 53 L Ed 2d 14 (1977) ("[T]he importance of the familial relationship ... 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 …. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in [their] care may exist even in the absence of blood relationship."), quoting *Wisconsin v Yoder*, 406 US 205, 231-233; 92 S Ct 1526; 32 L Ed 2d 15 (1972); *Caban v Mohammed*, 441 US 380, 397; 99 S Ct 1760; 60 L Ed 2d 297 (1979) (Stewart, J., concurring) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."); *Moore v City of East Cleveland*, 431 US 494, 499-506; 97 S Ct 1932; 52 L Ed 2d 531 (1977) (constitutional protection of family extends beyond the prototypical nuclear family).

2. Non-Marital Children Have the Same Rights as Marital Children.

Children cannot be penalized for the circumstances of their birth, see *Levy v Louisiana*, 391 US 68, 72; 88 S Ct 1509; 20 L Ed 2d 436 (1968), and thus must be able to secure their relationships with the parents who brought them into the world, regardless of marital ties. Accordingly, the U.S. Supreme Court, applying heightened scrutiny,[7] has repeatedly struck down laws that discriminate against non-marital children by denying them protections accorded to other children. See *Clark v Jeter*, 486 US 456, 457, 465; 108 S Ct 1910; 100 L Ed 2d 465 (1988) (child support); *New Jersey Welfare Rights Org v Cahill*, 411 US 619, 621; 93 S Ct 1700; 36 L Ed 2d 543 (1973) (state benefits); *Weber v Aetna Casualty & Surety Co*, 406 US 164; 92 S Ct 1400; 31 L Ed 2d 768

[7] Laws disadvantaging children born to unmarried parents are evaluated under heightened scrutiny. See *Mills v Habluetzel*, 456 US 91, 99; 102 S Ct 1549; 71 L Ed 2d 770 (1982); *United States v Clark*, 445 US 23, 27; 100 S Ct 895; 63 L Ed 2d 171 (1980); *Spada v Pauley*, 149 Mich App 196, 203; 385 NW2d 746 (1986).

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(1972) (workers compensation); *Levy*, 391 US 68 (right to bring wrongful death action); see also *Spada v Pauley*, 149 Mich App 196; 385 NW2d 746 (1986) (child support). These decisions reasoned that denying rights based on the marital status of the parents is unfair to the child, who is not responsible for their status. Accordingly, states may not discriminate against non-marital children "by denying them substantial benefits accorded children generally." *Gomez v Perez*, 409 US 535, 538; 93 S Ct 872; 35 L Ed 2d 56 (1973).

Applying that principle to custody disputes means recognizing that non-marital children have the same right to emotional ties and financial support from their parents as do children whose parents marry. It is the parent-child relationship, not the parent-parent relationship, that should be the focus.

B. Families Created by Same-Sex Couples and Families Created by Different-Sex Couples Must Be Treated Equally.

1. Michigan's Family Law Statutes Are and Must Be Interpreted in a Gender-Neutral Way.

Equal treatment of families created by same-sex and different-sex parents requires reading Michigan's family law statutes in a gender-neutral manner. Michigan law mandates a gender-neutral interpretation: MCL 8.3b provides that when interpreting Michigan statutes, "[e]very word importing the masculine gender only may extend and be applied to females as well as males." See *People v Gilliam*, 108 Mich App 695, 699-702; 310 NW2d 843 (1981) (interpreting a statute obligating "husband or father" to pay child support as applying to women so as to avoid an equal protection violation); *People v Barltz*, 212 Mich 580; 180 NW 423 (1920) (interpreting constitutional provision referring to male jurors as allowing for female jurors).

A gender-neutral interpretation of Michigan's family law statutes is also required as a

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matter of constitutional avoidance.[8] In *Sessions v Morales-Santana*, 582 US 47; 137 S Ct 1678; 198 L Ed 2d 150 (2017), the U.S. Supreme Court held that a law "[p]rescribing one rule for mothers, another for fathers" differentiates on the basis of sex, and therefore is subject to heightened scrutiny and "requires an 'exceedingly persuasive justification.'" *Id.* at 1683, quoting *United States v Virginia*, 518 US 515, 531; 116 S Ct 2264; 135 L Ed 2d 735 (1996). Similarly, differential treatment of people based on their sexual orientation is itself a form of discrimination based on sex. See *Bostock v Clayton Co, Ga*, __ US __; 140 S Ct 1731; 207 L Ed 2d 218 (2020); *Rouch World, LLC v Dep't of Civil Rights*, __ Mich __; __ NW2d __ (2022) (Docket No. 162482).

To avoid constitutional problems, courts have interpreted family law statutes to be gender neutral. The Court of Appeals has held that Michigan's felony child support statute applies equally to men and women, both as a matter of equal protection and as a question of statutory interpretation under MCL 8.3b and MCL 750.10 (which requires a gender-neutral reading of penal statutes). *People v Gilliam*, 108 Mich App 695; 310 NW2d 843 (1981). In other cases, courts have implicitly recognized that Michigan family law statutes and doctrines apply equally to same-sex couples. See, e.g., *Bofysil v Bofysil*, 332 Mich App 232, 250; 956 NW2d 544 (2020) (affirming divorce judgment for same-sex couple); *LeFever*, 336 Mich App at 679 (GLEICHER, J., concurring) (explaining that a married woman in a same-sex relationship should have precisely the same rights under the assisted reproduction statute as a married man; a failure to treat them equally "poses serious equal-protection problems"). And Michigan's family law forms are being revised to be

[8] Courts have upheld some gendered statutes where distinctions between men and women are rooted in the biological differences of the birth process for mothers and fathers. See, e.g., *Tuan Anh Nguyen v INS*, 533 US 53; 121 S Ct 2053; 150 L Ed 2d 115 (2001); *Grimes v Van Hook-Williams*, 302 Mich App 521, 532-537; 839 NW2d 237 (2013). Whether or not gender differences in statutes specifically designed to establish genetic parentage could withstand constitutional scrutiny, it is clear that gender differences in statutes or doctrines that are not based on genetics—e.g., the marital presumption, assisted reproduction, adoption and equitable parenthood—cannot.

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gender neutral. See, e.g., Dep't of Health & Human Servs, Form DCH-0569-BX (rev July 2021) (indicating options for "parent" in addition to mother/father).

In sum, a gender-neutral approach to Michigan's parentage statutes is required both as a matter of statutory interpretation and constitutional avoidance.

2. Unequal Treatment of Families Created By Same-Sex Couples Is Inequitable and Unconstitutional.

Whether parent-child relationships merit constitutional protection should not turn on whether the parents are in a same-sex or different-sex relationship, or whether children have a genetic link to their parents. See *Lehr*, 463 US at 261 (noting the significance of familial relationships turns on emotional attachments, not biology); *Clark v Jeter*, 486 US at 461 (emphasizing the Court's long history recognizing laws that discriminate between children based on their parents' status as constitutionally suspect); *VC v MJB*, 163 NJ 200, 221; 748 A2d 539 (2000) (holding that the emotional bonds that develop between family members as a result of shared daily life create a constitutional interest in maintaining those ties). Thus, parents in same-sex relationships and their children must be treated equally—as a matter of both equity and constitutional law—as parents in different-sex relationships and their children.

This principle is straightforward for married parents. As the U.S. Supreme Court explained in *Pavan v Smith*, 137 S Ct 2075, 2077; 198 L Ed 2d 636 (2017), under *Obergefell*, "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples.'" In *Pavan*, a married lesbian couple had a child using a sperm donor, and then sought to list the non-genetic mother on the child's birth certificate. Under Arkansas law, when a married different-sex couple conceived a child through sperm donation, the mother's husband was listed on the birth certificate. But the state refused to list married same-sex parents who conceived through sperm donation on the birth certificate. *Id.* at 2077-2078. The Court held that such

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"differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" *Id.* at 2077, quoting *Obergefell*, 576 US at 670. *Pavan* and *Obergefell* thus make clear that people in same-sex relationships may not be denied parental rights that are available to people in different-sex relationships, including marriage-based rights to be recognized as a child's parent, and marriage-based rights to seek custody/parenting time.

Courts have regularly invalidated laws that exclude married parents in same-sex relationships from establishing parental rights on equal terms with married parents in different-sex relationships. For example, in *Stankevich v Milliron*, 498 Mich 877 (2015), this Court recognized that Michigan's equitable parent doctrine must apply equally to same-sex married couples when it vacated the lower court's decision holding otherwise, and directed the Court of Appeals to reconsider in light of *Obergefell*. In *Stankevich*, a same-sex couple married in Canada in 2007 prior to the birth of their daughter—a marriage that, under Michigan law at the time, had no legal effect. After the parties separated, the non-genetic parent petitioned for parenting time, contending that she was an equitable parent. The trial court dismissed her petition, and the Court of Appeals affirmed, citing then-current Michigan laws that prohibited recognition of the couple's Canadian marriage and reading *Van* as limiting equitable parenthood to legally married couples. *Stankevich v Milliron*, 2013 WL 5663227, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 310710)). On remand from this Court, the Court of Appeals reversed its prior decision, holding that under *Obergefell*, Michigan must recognize the parties' Canadian marriage, meaning that a same-sex married couple must be treated the same under the equitable parent doctrine as a different-sex married couple. *Stankevich v Milliron*, 313 Mich App 233; 882 NW2d 194 (2015).

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Many courts in other states have applied the marital presumption to same-sex couples. See, e.g., *McLaughlin v Jones*, 243 Ariz 29, 35; 401 P3d 492 (2017) (marital presumption is a "benefit of marriage" and, following *Obergefell*, the state "cannot deny same-sex spouses the same benefits afforded opposite-sex spouses"); *LC v MG & Child Support Enf't Agency*, 143 Hawai'i 302, 313-314; 430 P3d 400 (2018) (marital presumption applies equally to women in same-sex marriage); *Treto v Treto*, 622 SW3d 397, 402 (Tex App, 2020) ("under *Pavan*, we are to give effect to the ancillary benefits of a same–sex marriage, including the determination of maternity for the non–gestational spouse of a child born to the marriage"); *Schaberg v Schaberg*, 637 SW3d 512, 522-523 (Mo App, 2021) ("a gender-specific application of" the statutory marital presumption "would deny [the wife of a birth mother] a 'benefit' that is 'linked to marriage'"); *Henderson v Box*, 947 F3d 482, 487 (CA 7, 2020) ("after *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages"); *In re AM*, 223 A3d 691, 697; 2019 PA Super 344 (2019) ("the presumption of paternity is equally as applicable to same-sex marriages as it is to opposite-sex marriages").

In the area of assisted reproduction, numerous courts have likewise held that it is unconstitutional to grant parental rights to male spouses but not to female spouses of women who give birth through assisted reproduction. See *Roe v Patton*, 2015 WL 4476734, at *3 (D Utah, July 22, 2015) (finding it unconstitutional for state to "extend the benefits of the assisted-reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples," because there was no reason to "treat[] male spouse[s] of women who give birth through assisted reproduction involving the use of donor sperm differently than identically situated female spouse[s]"); *Gartner v Iowa Dep't of Pub Health*, 830 NW2d 335, 352 (Iowa, 2013) (holding that a statute that "treats married lesbian couples who conceive through artificial insemination using

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an anonymous sperm donor differently than married opposite-sex couples who conceive a child in the same manner" violated equal protection); *Shineovich v Kemp*, 229 Or App 670; 214 P3d 29 (2009) (holding that assisted reproduction statute establishing legal parentage for the husband of a woman who gives birth to a child conceived by assisted insemination, but not a similarly situated wife, unconstitutionally discriminates on the basis of sexual orientation).

In short, courts recognize that married same-sex and different-sex couples must be treated equally. The principle of equal treatment cannot ignore the fact that same-sex couples were long excluded from marriage. That past unconstitutional deprivation of marital rights cannot be the basis of a present deprivation of parental rights, as discussed *infra* in Section I.C. Additionally, most different-sex couples do not need to marry to establish parental rights, but unmarried same-sex couples do not have a path to establish parental rights. Yet, one "would be hard pressed to find a reason why a child would not be better off having two loving parents in her life," whether that second parent is a man or a woman. *DMT v TMH*, 129 So 3d 320, 344 (Fla, 2013) (finding assisted reproduction statute that treated same-sex couples differently from different-sex couples violated equal protection). Moreover, Michigan may not discriminate against non-marital children; they have the same rights to the love and support of both parents as marital children. See *supra* Section I.A.2.

C. The Unconstitutional Exclusion of Same-Sex Couples From Marriage Cannot Be Used as a Basis to Deprive Parents of Parental Rights.

*1. Parents Who Were in Pre-*Obergefell *Relationships Cannot Be Denied Parental Rights Under Laws or Doctrines That Require Marriage.*

Paths to establishing parenthood that turn on marriage cannot—as a matter of both equity and constitutional law—be denied to people who were unconstitutionally barred from marriage. In *Obergefell*, 576 US at 675-676, the United States Supreme Court held that same-sex couples may not be deprived of the fundamental right to marry. *Obergefell* grounded the right to marry in

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part on the role marriage plays in child rearing. *Id.* at 666. The Court cited as one of the four principles and traditions of marriage the fact that it

> safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education . . . . Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated . . . to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. [*Id.* at 668 (citations omitted).]

Thus, the *Obergefell* Court was concerned with protecting parent-child bonds formed between LGBTQ parents and their children.

In invalidating Michigan's law denying same-sex couples the right to marry, the U.S. Supreme Court also recognized that the institution of marriage is "at the center of so many facets of the legal and social order," and that laws denying LGBTQ people the right to marry also deny "the constellation of benefits that the States have linked to marriage." *Id.* at 670. The Court focused on parenthood, specifically listing "birth . . . certificates; . . . and child custody, support, and visitation" as "aspects of marital status" that must now be open to same-sex couples. *Id.* The Court thus made clear that same-sex couples' right to marriage necessarily includes the benefits and protections associated with marriage, and that state laws are invalid if they "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 675-676. Denial of such marriage-based benefits, the Court explained, consigns same-sex couples "to an instability many opposite-sex couples would deem intolerable in their own lives." *Id*. at 670.

Here, the Court of Appeals held that even though Ms. Pueblo and Ms. Haas had been unconstitutionally excluded from marriage, the fact that they did not marry could be used to deny Ms. Pueblo parental rights. *Pueblo*, unpub op at 4. The Court reached that conclusion by equating able-to-wed unmarried different-sex parents to unable-to-wed unmarried same-sex parents. *Id.* at 5. This was error for the reasons explained in Judge FORT HOOD's dissent in the earlier case of

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Sheardown v Guastella, 324 Mich App 251; 920 NW2d 172 (2018). There the majority (like the court below here) found that a non-genetic parent who was unable to wed her same-sex partner pre-*Obergefell* lacked standing to seek custody, holding that there was no constitutional violation because a non-genetic parent in a opposite sex relationship would likewise not have standing under the Child Custody Act. As Judge FORT HOOD wrote:

> [T]he majority's conclusion that the male in an opposite-sex relationship is similarly situated to plaintiff overlooks the key fact that, unlike the heterosexual male whom the majority compares plaintiff to, plaintiff was in fact legally precluded from marrying her partner. Conversely, the heterosexual male subject of the majority's comparison, if he and his female partner deemed it appropriate, could not only have legally married, but the male individual could have in turn adopted the child. [*Id.* at 271 (FORT HOOD, J., dissenting).]

Courts in other states have agreed that same-sex couples who were denied the right to marry could not be denied parental rights tied to marriage. In *Shineovich*, 229 Or App 670, the Oregon Court of Appeals held that it would be unconstitutional to deny a same-sex partner of a woman who gave birth legal parentage under the state's assisted reproduction statute establishing legal parentage for the husband of a woman who gives birth. The court said because the women could not marry at the time, this differential treatment of same-sex couples was unconstitutional. Similarly, the Oklahoma Supreme Court held that a biological mother's former same-sex partner had standing to seek custody under the state's equitable *in loco parentis* doctrine, noting that by the time *Obergefell* was decided,

> it was too late for this couple to take advantage of the legal protections of marriage. Oklahoma law deprived this couple from exercising their fundamental right and liberty to marry as guaranteed by our United States Constitution. The couple's failure to marry cannot now be used as a means to further deprive the nonbiological parent, who has acted *in loco parentis*, of a best interests of the child hearing. [*Ramey v Sutton*, 362 P3d 217, 220-221; 2015 OK 79 (Okla, 2015).]

See also *Brooke SB v Elizabeth ACC*, 28 NY3d 1, 34; 61 NE3d 488 (2016) (Pigott, J., concurring) (non-genetic parent in same-sex couple had standing because couple agreed to have children

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together "at a time when they were not allowed to marry in New York and intended to raise the child in the type of relationship the couples would have formalized by marriage had our State permitted them to exercise that fundamental human right").

Courts have reached similar conclusions regarding the denial of other marital benefits to same-sex couples prior to their ability to marry. For example, in *Thornton v Comm'r of Social Security*, 570 F Supp 3d 1010 (WD Wash, 2020), the court granted relief to a nationwide class of individuals seeking social security survivor's benefits who were barred from satisfying the marriage requirement for such benefits because of unconstitutional laws excluding same-sex couples from marriage. The class did not challenge the marriage requirement *in toto*, but rather argued that applying "this statutory scheme to deny survivor's benefits to same-sex couples who were unable to marry at the time of the decedent spouse's death based on state laws that have now been declared unconstitutional violates equal protection and due process." *Id.* at 1020. The court agreed, finding heightened scrutiny applicable, but also determining that the scheme could not survive any level of review. *Id.* at 1020-1024.

Similarly, in *Alaska Civil Liberties Union v Alaska*, 122 P3d 781 (Alas, 2005), plaintiffs challenged a public employer's program that offered benefits to married employees' different-sex spouses but not to unmarried same-sex domestic partners. There the Alaska Supreme Court explained why the relevant comparison is not between unable-to-wed unmarried people in same-sex relationships and able-to-wed unmarried people in different-sex relationships, but rather "between same-sex couples and opposite-sex couples, whether or not they are married." *Id.* at 788.

> Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law

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> from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. [*Id.*]

The exact same analysis applies to pre-*Obergefell* couples here.

For paths to parentage that are marriage-based, Michigan's exclusion of same-sex couples from marriage erected an unconstitutional barrier to asserting parental rights by conditioning those rights on a marriage requirement that parents in pre-*Obergefell* same-sex relationships could not fulfill. In short, denying access to marriage-based paths to parenthood to same-sex couples who did not marry because they were precluded from doing so by an unconstitutional law continues the constitutional injury identified in *Obergefell*, denies people who were prevented from marrying access to the constellation of benefits associated with marriage, and thus itself violates the constitutional guarantees of equal protection and due process.

In sum, parental rights are one benefit in the "constellation of benefits" that comes with marriage. Denying such marriage-based benefits to people who could not get married violates equal protection and due process.[9]

*2. Where Laws or Doctrines Require Marriage, the Court Can Set Parameters to Identify Parents in Pre-*Obergefell *Families Who Qualify.*

Once one recognizes that pre-*Obergefell* couples cannot constitutionally be denied marriage-based paths to parenthood—whether that is under the marital presumption, assisted reproduction, adoption, or equitable parenthood—then the question becomes how to determine

[9] Appellee argues that if the Court accounts here for the fact that Ms. Pueblo and Ms. Haas were barred from marriage, that would raise questions about how to handle other issues—like tort consortium damages, spousal retirement benefits, and probate claims. Appellee's Brief, pp 21-26. As the cases around social security and other benefits show, courts are already grappling with these questions, which arise primarily in situations where the prior inability to wed results in continued unequal treatment (e.g., denial of benefits or parental rights *today*), rather than in the reopening of long-closed matters. Moreover, the fact that Michigan's unconstitutional ban on marriage also created unequal treatment in other areas of the law is no reason not to rectify the unequal treatment in custody law, which is what is at issue here.

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which pre-*Obergefell* couples qualify. Or, to paraphrase this Court's order granting leave to appeal, what the parameters should be for extending standing under marriage-based paths to parenthood to persons who, at the time of the parties' same-sex relationship, were not permitted by Michigan law to legally marry. See *Pueblo v Haas*, 979 NW2d 335 (Mich, 2022).

The Court of Appeals refused to consider whether the parties had been in a marriage-like relationship, incorrectly assuming that this would amount to "'retroactively transform[ing] an unmarried couple's past relationship into a marriage for the purpose of custody proceedings.'" *Pueblo*, unpub op at 6, quoting *Lake*, 316 Mich App at 252-253. Not so. Ms. Pueblo is not asking a court to declare that she was previously married. Rather, she is asking that a court find her eligible for a marriage-based benefit because she was in a marriage-like relationship at a time when she was unconstitutionally prohibited from marrying. A judicial determination that a couple once had a marriage-like relationship is not a pronouncement that they were once married. No divorce proceedings are needed.

In the years since *Obergefell*, courts have been able to develop workable tests to determine which pre-*Obergefell* couples qualify for marriage-based benefits from which they had been unconstitutionally excluded.[10] For example, in *Thornton*, the court, in finding class certification proper, explained that the common question was not whether a person was entitled to benefits—since that could turn on individual facts about whether the person's same-sex relationship resembled marriage—but rather was whether the government had "erected an unconstitutional

[10] If there are disputed facts about the nature of a couple's relationship, circuit courts—which routinely make factual determinations in custody and parenting time disputes—are well equipped to make similar determinations under whatever test the Court might set to determine whether a relationship was marriage-like. See *Mabry*, 499 Mich at 1001 (MCCORMACK, J., dissenting) ("Michigan's trial courts are capable of evaluating the parties' relationship to determine whether the parties would have married.").

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barrier to survivor's benefits by conditioning those benefits on the marriage requirement" that same-sex partners could not fulfill. *Thornton*, 570 F Supp 3d at 1027. Once that unconstitutional barrier was removed, each individual could make the case that, had there been no law barring their marriage, they would have been married and otherwise qualified for survivor's benefits. *Id.* The Social Security Administration has now developed detailed guidance for how to determine which surviving members of pre-*Obergefell* same-sex couples qualify for survivor benefits by looking at "whether the couple would have married … but for an unconstitutional State law that prohibited same-sex marriage…." Social Security Admin, Thornton *District Court Decision: Claims, Appeals, and Reopening Requests - One-Time Instruction*, EM-21007 REV 2 (setting out factors to consider in determining whether couple would have married).[11] Cf. *Ely v Saul*, 572 F Supp 3d 751 (D Ariz, 2020); US Dep't of Veterans Affairs, *VA Closes Gap in Benefits for LGBTQ+ Veterans and Their Survivors* (October 13, 2022).[12]

In *Lake*, Judge SHAPIRO proposed a test based on "whether the parties would have married before the child's birth or conception but did not because of the unconstitutional laws preventing them from doing so." *Lake*, 316 Mich App at 260 (SHAPIRO, J., concurring). Although Judge SHAPIRO did not believe on the facts in *Lake* that the parties there would have married, he would have held that a party is entitled to seek parental rights—in that case equitable parenthood—arising out of a same-sex marital relationship "when a preponderance of the evidence shows that but for the ban on same-sex marriage in a parties' state of residency, they would have married before the birth of the child." *Id.* at 262-263.

[11] See <https://secure.ssa.gov/apps10/reference.nsf/links/02122021073459AM>.

[12] See <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5832>.

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A "would have married" test should not look simply to post-hoc self-interested assertions by the parties about whether they would have married, but rather must look at what the parties did in practice. Alternately, this Court could adopt a test focused on whether the parties were in a marriage-like relationship. Such a test would focus on the nature of the relationship, rather than evaluating the question of whether a couple that could not get married would have gotten married if they could have gotten married.[13] Either way, the Court should set a standard under which non-genetic parents in pre-*Obergefell* couples can establish standing for marriage-based paths to parenthood. Either test should require trial courts to take a holistic approach, considering facts such as whether the couple held a commitment ceremony, lived together, shared finances, and raised children together. By looking at the totality of the facts and circumstances about a couple's past relationship, trial courts can assess whether a person in a pre-*Obergefell* couple qualifies for a marriage-based path to parenthood.

II. THIS CASE AND CASES LIKE IT SHOULD BE DECIDED IN A WAY THAT REFLECTS THE GUIDING PRINCIPLES.

Same-sex couples persistently encounter barriers to and continuing uncertainty around legal parentage. Applying the guiding principles above, amici urge the Court to issue a decision in this case that protects children born to such couples, and therefore propose three rules of decision to resolve this case and guide lower courts: (1) the equitable parent doctrine should be applied to non-genetic parents in pre-*Obergefell* same-sex relationships; (2) the assisted reproduction statute should be applied to non-genetic parents in pre-*Obergefell* same-sex relationships; and (3) an intended parent doctrine should be recognized in Michigan as it is in other states.

[13] Here, for example, Ms. Haas disputes that the couple would have married, though she does not appear to dispute that they were in a marriage-like relationship. Appellee's Brief, p 3.

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A. The Equitable Parent Doctrine Should Be Applied in Favor of Non-Genetic Parents Who Were Unconstitutionally Barred from Getting Married.

Despite alleging that she meets the criteria for equitable parenthood,[14] Ms. Pueblo has been denied the opportunity to establish parentage under that doctrine solely because she was unable to marry. The Court of Appeals mechanically read *Van* as always requiring marriage, even though Ms. Pueblo was precluded from marrying under an unconstitutional law.[15] As a matter of equity and constitutional law, *Van* should not be read to require a couple to have married in circumstances where marriage was unavailable due to a state law that is now recognized as unconstitutional.

*1. Equity Demands that Parents from Pre-*Obergefell *Relationships Can Invoke the Equitable Parent Doctrine.*

First, equity demands that unmarried parents from pre-*Obergefell* relationships be able to invoke the equitable parent doctrine.[16] Central to the *Van* majority's reasoning was that the couple there had enjoyed the option to marry, yet "deliberately" chose not to do so:

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[14] It appears to be undisputed that Ms. Pueblo meets the other criteria for equitable parenthood. If there is a dispute, that would be for the trial court to decide on remand. See *Stankevich*, 313 Mich App at 242 (holding that married non-genetic parent had standing under the equitable parent doctrine, and remanding to the trial court for an evidentiary hearing to determine whether the plaintiff met the other equitable parenthood criteria).

[15] The Court of Appeals also noted that Ms. Pueblo had not adopted the child, ignoring the fact that it was not possible for her to adopt given the inability to marry. *Pueblo*, unpub op at 6-7.

[16] As noted above, amici are not aware of any other state that conditions the equitable parent doctrine on marriage. A number of states have adopted a version of the Wisconsin Supreme Court's test in *In re Custody of HSH-K*, 193 Wis 2d 649, 694-695; 533 NW2d 419 (1995), which looks to whether (1) the biological/adoptive parent consented to, and fostered, a parent-like relationship between the petitioner and the child; (2) the petitioner and the child lived together in the same household; (3) 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; and (4) 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. See also *In re Parentage of LB*, 155 Wash 2d 679, 683; 122 P3d 161 (2005); *Conover v Conover*, 450 Md 51, 85; 146 A3d 433 (2016). To avoid unconstitutional interference with the fundamental parental rights of the child's biological parent, courts have focused on whether the biological parent intended for the second parent to be a full co-parent, and whether there is a strong parent-child

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> Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by *those who deliberately choose* to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and *weaken marriage* as the foundation of our family-based society? [*Van*, 460 Mich at 332 (emphasis added).]

Van's reasoning—that because Michigan's public policy favors marriage, the benefits and protections afforded by the equitable parent doctrine should not flow to a couple who have *deliberately eschewed* marriage—simply does not apply here. "When the parents themselves did not choose not to marry, but instead had that choice made for them by our state's laws, and the parents otherwise demonstrated the same commitment and legitimacy as married parents, their children should not be barred from the potential benefits of our common-law rule." *Mabry*, 499 Mich at 999-1001 (MCCORMACK, J., dissenting) (noting that custody cases involving children of same-sex couples are "of course distinguishable from our decision in *Van*").

The purpose of *Van*'s marriage restriction was to avoid rewarding a couple who had deliberately opted not to marry in order to leave in place incentives to marry. As *Obergefell* made clear, it is Michigan's former prohibition on marriage of same-sex couples that contravenes the values articulated in *Van*, not the couple's unavoidable failure to wed. Denying equitable parenthood to people who wanted to but could not wed does nothing to further *Van*'s values. As a matter of equity, Michigan's equitable parent doctrine must apply where a couple decided to have and raise

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bond. Courts have described the *HSH-K* test as setting "a high bar for establishing *de facto* parent status, which cannot be achieved without knowing participation of the biological parent," and noted that under the first factor—the biological parent's decision to bring another person into the child's life as a full co-parent—third parties do not have standing, even if they have a bond with the child. *Conover*, 450 Md at 74 (collecting cases). While there is reason to question whether Michigan should maintain its outlier position, or whether it should instead adopt a non-marriage-based equitable parenthood test that more closely resembles that of other states, the Court need not reach that issue here. Even under a marriage-based test, it would be both inequitable and unconstitutional to deny Ms. Pueblo standing when she could not marry under Michigan's past discriminatory and unconstitutional ban on marriage for same-sex couples.

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a child together, the couple could not marry because of an unconstitutional state law, and there were no other legal avenues for the non-genetic parent to establish parentage. Imposing a marriage requirement in order to establish equitable parentage on parties that were unconstitutionally barred from marriage is inherently inequitable, and this Court has the authority to define equitable parentage to protect the parent-child relationships formed in families like this one. This Court could easily "fashion a rule to ensure that the plaintiff's and the child[]'s constitutional rights are protected without opening the doctrine to any third party seeking parental rights." *Mabry*, 499 Mich at 1000 (MCCORMACK, J., dissenting).

2. Denying Ms. Pueblo the Opportunity to Invoke the Equitable Parent Doctrine Because She Was Unmarried When State Law Precluded Her from Marrying Violates the Constitutional Guarantees of Due Process and Equal Protection.

If this Court, in equity, interprets *Van* as requiring marriage in order to invoke the equitable parent doctrine—even under these circumstances—then the question becomes a constitutional one. Because equitable parenthood is one of the "constellation of benefits" associated with marriage, *Obergefell*, 576 US at 670, denying Ms. Pueblo the opportunity to invoke the doctrine because she was unmarried when state law precluded her from marrying violates the constitutional guarantees of due process and equal protection. Under *Obergefell* and *Pavan*, it is unconstitutional to deny same-sex couples marriage-based benefits and parental protections. That includes equitable parenthood. Under the reasoning of *Obergefell* and *Pavan*, a person cannot be denied a marriage-based benefit, i.e., equitable parenthood, where the person did not marry because she was unconstitutionally barred from getting married. It was precisely because Michigan law prohibited Ms. Pueblo from marrying her partner that she was unable to establish legal parentage. And it is precisely that constitutional injury, that denial of due process and equal protection in denying her the right to marry, that is now causing further constitutional injury by depriving her of the ability

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to seek a legal parental connection to the child born during a relationship that was marriage-like, but that Michigan would not allow to be a marriage. See *Mabry*, 499 Mich at 998 (MCCORMACK, J., dissenting) (arguing Court should consider whether "*Obergefell* compels us to apply the equitable-parent doctrine to same-sex couples who had children conceived or adopted by one party during their relationship but were unconstitutionally prohibited from marrying under this state's law"); *Lake*, 316 Mich App at 260 (SHAPIRO, J., concurring) ("*Obergefell* demands extension of the equitable-parent doctrine.").

The Court of Appeals concluded that Ms. Pueblo "was not subjected to dissimilar treatment under the statute as compared to a heterosexual unmarried individual," *Pueblo*, unpub op at 7, but in fact, she was. If Ms. Pueblo had been in a different-sex relationship, she would have had the choice to get married, which would then have allowed her to invoke the equitable parent doctrine (as well as providing her with other options to establish legal parentage). But Ms. Pueblo was unconstitutionally precluded from making that choice. The state does not have a legitimate interest in denying a child the right to a relationship with and support from a second parent because the child was born to unmarried parents as a result of the state's unconstitutional prohibition on their marriage. Any interests that the state might assert in cases where the child's parents choose not to wed—such as the interest in promoting marriage identified in *Van*, 460 Mich at 332—do not apply here. Treating marital children differently under the equitable parent doctrine from the non-marital children of unable-to-wed same-sex couples does not survive heightened scrutiny.

Here, as a result of the fact that two women who chose to bring a child into the world were prevented from marrying, the child was born to unmarried parents, and that fact is now being used to justify depriving the child of a relationship with Ms. Pueblo. In other words, "[i]f not for this state's unconstitutional prohibition on their parents' right to marry," the children of same-sex

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couples "would be entitled to all the benefits conferred on children of opposite-sex couples by the equitable parent doctrine." *Mabry*, 499 Mich at 999 (MCCORMACK, J., dissenting). Simply because this child was born to parents who were not allowed to marry, he "will be unable to seek the love and guidance of the plaintiff, have access to her healthcare benefits, social security benefits, and death benefits, or inherit from her if she dies intestate." *Id.*

In sum, this Court should recognize as a matter of both equity and constitutional law—that parents who were unconstitutionally prevented from marrying cannot be denied standing under the equitable parent doctrine. Because such a ruling would protect only the relatively small, and ever decreasing, number of families that were created and then split up before the *Obergefell* decision in 2015, amici urge the Court, in applying the guiding principles outlined above, to also issue its decision based on the assisted reproduction statute and an intended parent doctrine, as described below.

B. Michigan's Assisted Reproduction Statute Should Be Applied to Non-Birth Parents Who Were Unconstitutionally Barred from Marriage.

This Court should also decide that Ms. Pueblo has standing under the assisted reproduction statute, which provides: "A child conceived by a married woman with consent of her husband following the utilization of reproductive technology is considered to be the legitimate child of the husband and wife."[17] MCL 333.2824(6). Under the principles above: (1) the statute must be inter-

[17] When Ms. Haas raised standing as an affirmative defense in her Answer and her Motion for Summary Disposition below, Ms. Pueblo did not expressly state that MCL 333.2824(6) gave her standing as a parent. However, the argument that Ms. Pueblo has standing under the assisted reproduction statute is not a separate legal claim; it is simply an alternative argument supporting the position that Ms. Pueblo has taken since the start of this case in responding to the Defendant's affirmative standing defense. Ms. Pueblo has consistently asserted that she has standing to pursue custody and parenting time. Once an issue has been properly presented, the court may consider "any argument in support of that claim" and is "not limited to the precise arguments [the parties] made below." *Yee v City of Escondido*, 503 US 519, 534; 112 S Ct 1522; 118 L Ed 2d 153 (1992); see also *Johnson v VanderKooi*, 509 Mich 524, 537 n 5; 983 NW2d 779 (2022). Here, the equitable-parent argument and the assisted reproduction statute argument are separate arguments

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preted in a gender-neutral manner and must apply equally to same-sex and different-sex couples; and (2) because the law confers a marriage-based protection—legal parentage—that protection cannot be denied to pre-*Obergefell* couples who were unconstitutionally barred from marriage.

1. The Assisted Reproduction Statute Must Be Read in a Gender-Neutral Way.

The gender of a non-genetic parent who decides to have a child using assisted reproductive technology does not determine whether the non-genetic parent can establish parentage. Although the text of the assisted reproduction statute refers to a "married woman" and "her husband," MCL 333.2824(6), the statute must be read in a gender-neutral manner to apply equally to same-sex couples. See MCL 8.3b. A gender-neutral interpretation of MCL 333.2824(6) is also constitutionally required as a matter of constitutional avoidance. If MCL 333.2824(6) is not read as gender-neutral, it would exclude post-*Obergefell* same-sex couples who, even if they marry, would not be considered parents under the statute because their relationship is not between "a married woman" and her "husband." Such a reading would unconstitutionally discriminate between a man in a different-sex marriage whose wife gives birth through donor insemination and a woman in a same-sex marriage whose wife does the same. The state would need, but does not have, an "exceedingly persuasive justification," *Virginia*, 518 US at 531, for treating men and women differently under the assisted reproduction statute. See *LeFever*, 336 Mich App at 679 (GLEICHER, J., concurring) ("a married woman in a same-sex relationship should have precisely the same right" as a man to establish parentage of a child born to her wife through assisted reproductive technology).

Numerous courts have held either that such statutes must be read in a gender-neutral manner, or that it is unconstitutional to grant parental rights under such laws to male spouses but

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in support of Ms. Pueblo's consistent position that she has standing. Because proper interpretation of the assisted reproduction statute is of major significance to the state's jurisprudence and has important consequences for families headed by same-sex couples, the Court should consider the statute as an alternative basis under which Ms. Pueblo has standing.

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not to female spouses of women who give birth through assisted reproduction. See *Shineovich*, 229 Or App 670 (holding that an assisted reproduction statute establishing legal parentage for the husband of a woman who gives birth to a child conceived by assisted insemination, but not a similarly situated wife, unconstitutionally discriminates on the basis of sexual orientation); *Roe*, 2015 WL 4476734, at *3 (finding it unconstitutional for state to "extend the benefits of the assisted-reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples," because there was no reason to "treat[] male spouse[s] of women who give birth through assisted reproduction involving the use of donor sperm differently than identically situated female spouse[s]"); *Gartner*, 830 NW2d at 352 (holding that a statute that "treats married lesbian couples who conceive through artificial insemination using an anonymous sperm donor differently than married opposite-sex couples who conceive a child in the same manner" violated equal protection); *DMT*, 129 So 3d at 344 (finding assisted reproduction statute that treated same-sex couples differently from different-sex couples violated equal protection); *Gatsby v Gatsby*, 169 Idaho 308, 314-315; 495 P3d 996 (2021) (holding that after *Obergefell*, Idaho's assisted reproduction statute, which used terms like "mother" and "mother's husband," "must be read in a gender-neutral manner" so as to apply equally to same-sex and different-sex couples and avoid equal protection problems); *Della Corte v Ramirez*, 81 Mass App Ct 906, 907; 961 NE2d 601 (2012) (interpreting term "husband" in assisted reproduction statute to apply to wife in a same-sex couple); *Wendy G-M v Erin G-M*, 985 NYS 2d 845, 860; 45 Misc 3d 574 (NY Sup, 2014) (under a gender-neutral approach, presumptions around assisted reproduction apply equally to those same-sex and heterosexual marriages).

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In sum, Michigan's assisted reproduction statute must be interpreted to allow women, not just men, to establish parentage when they consent to a spouse's use of assisted reproduction to conceive a child. Any other interpretation would be unconstitutional.

2. Ms. Pueblo Has Standing Under the Assisted Reproduction Statute Even Though She Was Not Married.

On its face, Michigan's assisted reproduction statute applies only where a couple is married. MCL 333.2824(6). Thus, the opportunity to establish legal parentage under the assisted reproduction statute is one of the "constellation of benefits" associated with marriage. As discussed above with respect to equitable parenthood, denying such a benefit to people who were in marriage-like same-sex relationships but were unconstitutionally barred from getting married perpetuates the harm identified in *Obergefell*, and is itself a constitutional violation.

The Oregon Court of Appeals confronted just this question in *In re Madrone*, 271 Or App 116; 350 P3d 495 (2015). Oregon's assisted reproduction statute requires marriage, and the court there had previously found that the statute applied where a same-sex couple had married, but their marriage had been declared void because it was between two women. *Shineovich*, 229 Or App at 670. The question in *In re Madrone* was how the statute applied where a same-sex couple had never attempted to wed. The court focused on the *choice* not to marry, noting that the law did not cover unwed different-sex couples who choose not to marry, but that same-sex couples did not have that same choice.

> [T]hat choice determines whether [the assisted reproduction statute] applies. Given that same-sex couples were until recently prohibited from choosing to be married, the test for whether a same-sex couple is similarly situated to the married opposite sex couple contemplated in [the assisted reproduction statute] cannot be whether the same-sex couple chose to marry or not. Rather, the salient question is whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to. [*In re Madrone*, 271 Or App at 128.]

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Here, Ms. Pueblo should not be barred from establishing parentage under the assisted reproduction statute because Michigan unconstitutionally barred her from getting married. This Court should make clear not only that the assisted reproduction statute is gender-neutral, but also the state's prior unconstitutional exclusion of same-sex couples from marriage cannot be used to deprive a non-genetic parent in a pre-*Obergefell* couple from establishing parentage under the assisted reproduction statute. In this case, the child was conceived following the utilization of reproductive technology by Ms. Haas with the consent of Ms. Pueblo—who could not be Ms. Haas' wife due to Michigan's past unconstitutional ban on same-sex marriage.

In sum, amici urge the Court to decide standing in this case based also on the assisted reproduction statute, remedying the inequality created by Michigan's former ban on same-sex marriage while also providing security to married same-sex couples who are creating families today.

C. The Court Should Join Other States in Recognizing an Intended Parent Doctrine Based on the Parties' Intent to Bring a Child into the World and Raise the Child Together.

1. Unmarried Same-Sex Couples Can Establish Parentage in Many Other States Under Doctrines That Look to the Intent to Bring a Child into the World and Co-Parent.

Courts in other states have concluded that unmarried, non-genetic parents who intended to create families together while in same-sex relationships have standing to seek custody and parenting time. The exact contours of other states' doctrines vary, but none turn on marital status. And they do not turn on whether the couple met the requirements of establishing parentage through an assisted conception statute. The question in such cases "is not whether courts may impose a second parent onto a single-parent family, but whether this was, in fact, a single-parent family in the first place." *Partanen*, 475 Mass at 641-642 (non-genetic mother in a former same-sex relationship was

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a parent where the children were born to her and genetic mother and were openly held out as the couple's children).

For example, in *Brooke SB*, the New York Court of Appeals held that where two unmarried women agreed to conceive and raise a child together, the non-genetic parent had standing to seek visitation/custody. The court focused on identifying a rule that recognizes the needs of parents and children in families created by same-sex couples:

> Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child. By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents. [28 NY3d at 25 (citation omitted).]

The court recognized the fundamental right of biological and adoptive parents to control the upbringing of their children, explaining that the question was not whether to allow a third party to infringe on those rights, but rather "who qualifies as a 'parent' with coequal rights" in the first place. *Id.* at 26. The court was clear that it was not saying that that merely being the same-sex partner of someone who gives birth establishes standing; rather, the court ruled that "where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody." *Id.* at 14.

Similarly, in *Mullins v Picklesimer*, 317 SW3d 569, 575 (Ky, 2010), the Kentucky Supreme Court held that a non-genetic parent who decided to have a baby with her former same-sex partner had standing to seek custody, noting that sister states had found standing "when the child was conceived by artificial insemination with the intent that the child would be co-parented by the parent and her partner, and the parent and her partner had thereafter co-parented the child for a

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period of time." This test does not confer standing on "a grandparent, a babysitter, or a boyfriend or girlfriend of the parent, who watched the child for the parent, but was never intended by the parent to be doing so in the capacity of another parent." *Id.* at 577. Rather, the non-genetic parent's standing is based on the fact that the child was "brought into the world upon the agreement of the parties to parent the child together." *Id.* at 576.

Numerous other courts have similarly found standing for the non-genetic parent where a same-sex couple intentionally brought a child into the world and then co-parented that child. See, e.g., *Ramey*, 362 P3d at 218 (birth mother's former same-sex partner had standing to seek custody where couple "engaged in intentional family planning to have a child and to co-parent," and birth parent encouraged same-sex partner's parental role following child's birth); *Boseman v Jarrell*, 364 NC 537, 550-552; 704 SE2d 494 (2010) (where birth-mother had intentionally and voluntarily created family unit by deciding to have a child with her same-sex partner, couple shared parental responsibilities, and genetic parent created expectation that the arrangement was permanent, partner could pursue custody and visitation).

Recognizing parentage of unmarried partners who decide to have children together through assisted reproduction has also been applied to different-sex partners. In *In re Parentage of MJ*, 203 Ill 2d 526, 541; 787 NE2d 144 (2003), the Illinois Supreme Court held that unmarried birth mother could assert a common law claim for child support against former male partner who had agreed to have child with her by assisted insemination:

> [I]f an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law. Regardless of the method of conception, a child is born in need of support.

Michigan law holds both parents accountable when they conceive a child through sexual intercourse, recognizing the child's need for support and guidance regardless of the parents'

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marital status. The same should be true when an unmarried couple decides to bring a child into the world through assisted reproduction. Indeed, the Court of Appeals has held that where Michigan's statutory scheme unreasonably restricted a non-marital child's right to obtain parental support, the court's equitable jurisdiction could be invoked to allow for a paternity action, even though no such action was available under the Paternity Act. *Spada*, 149 Mich App at 200; see also *Phinisee v Rogers*, 229 Mich App 547, 556-558; 582 NW 2d 852 (1998) (non-marital child could bring common-law claim to establish parentage and obtain support).

Here, too, the Court should exercise its equitable jurisdiction to ensure that children intentionally born into families created by unmarried couples have the same right to the support and guidance of both parents as other children.[18] Non-marital children conceived through assisted reproduction are no different from and have the same rights as marital children conceived through assisted reproduction. All of these children were intentionally conceived by their parents, and whether the parents are married has no bearing on the children's need for a protected legal relationship with both parents. Establishing legal parentage for the non-genetic/non-birth parent of a child conceived through assisted reproduction protects the child by requiring both parents to be legally responsible for the child's care and well-being, and by sheltering the child from the serious psychological harms of being separated from a parent. Recognizing the legal status of both parents also vests the child with numerous financial, legal, and emotional benefits which can only be secured

[18] Many other courts have found that the parentage of children conceived through assisted reproduction can be established under the common law even where there is no statute providing for parentage or where the statutory requirements have not been met. See, e.g., *In re Parentage of MJ*, 203 Ill 2d at 540 (parentage statutes did not prevent a common law claim that man who consented to the insemination of unmarried woman was a father); *In re TPS*, 2012 IL App (5th) 120176; 978 NE2d 1070 (2012) (woman who consented to her same-sex partner's insemination could be a parent under common law); *Dunkin v Boskey*, 82 Cal App 4th 171, 188; 98 Cal Rptr 2d 44 (2000) (same).

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by recognizing a legal parent-child relationship. The state has no valid interest, let alone an important one, in denying the protections and benefits of a second parent to children born to unmarried parents via assisted reproduction. That is particularly true, where, as here, the parents were unconstitutionally barred from getting married.

*2. The Intended Parent Doctrine Protects Parent-Child Relationships in Families Formed Both Pre- and Post-*Obergefell*.*

Like courts in other states, this Court should recognize the parentage of an unmarried partner who is not genetically related to the child where a couple together decides to bring the child into the world with the intent to raise the child together. Different-sex couples who decide to create a child together through sexual activity will each have a genetic link to the child and can easily establish parentage for the non-birth parent. Same-sex couples who decide to bring a child into the world use some form of assisted reproduction, and at most one parent will have a genetic link. Like different-sex couples who decide to procreate and establish families, same-sex couples who do so need to be recognized as parents to ensure that their children have the protections of legal parent-child relationships with both parents. The intended parent doctrine provides that.

Establishing parentage based on intended parentage does not turn on marriage and does not require a court to determine whether the couple would have married or had a marriage-like relationship. Rather, it looks to the parties' intent to bring a child into the world and co-parent that child to ensure that such children are not denied the support and guidance of those individuals. The doctrine is not limited to pre-*Obergefell* couples; it would protect parent-child relationships for children born both before and after that decision. And it would apply to unmarried different-sex couples who used assisted conception to have a child together. Adopting this doctrine would ensure that when two people choose to bring a child into the world, that child will have the security

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of legal ties with both parents and, thus, continued support and care from those parents, regardless of their marital status, sex, or means of conception.

An intended parent test is an equitable approach to ensuring that both parents in same-sex relationships (whether married or unmarried) who jointly choose to bring a child into the world have parental rights and responsibilities. Parents in same-sex relationships do not enjoy comparable paths to establishing parentage that are available to most unmarried parents in different-sex relationships. An intended parent test recognizes that children created through assisted reproduction have the same right to support from and relationships with both parents as children created through sex. And parents in same-sex relationships who bring their children into the world through assisted reproduction have the same right to maintain their relationship with their children as parents in different-sex relationships who conceive children without assisted reproduction.

CONCLUSION

Just like with different-sex couples, not all same-sex couples' relationships last. And just like the children of different-sex couples, the children of same-sex couples should be able to maintain their relationships with their parents regardless of whether the parents remain together. Yet Michigan family law treats families created by same-sex couples inequitably. Michigan family law has not caught up with the changing constitutional landscape post-*Obergefell* and continues to treat families created by same-sex couples differently from families created by different-sex couples. The Court should take this opportunity to ensure that the rights of parents and children to maintain relationships do not turn on whether a child was born into a family with parents of the same or different sexes.

As set out above, the equitable parent doctrine should be applied in favor of non-genetic parents who were unconstitutionally barred from marriage prior to *Obergefell*. Likewise, Michigan's assisted reproduction statute should be applied in favor of non-genetic parents who

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were unconstitutionally barred from marriage. The Court should also recognize an intended parent doctrine to protect the relationship between children and non-genetic parents, whether those parents are married or unmarried, where two people planned to build a family through assisted reproduction and jointly parented the resulting child. Finally, the Court should reaffirm the guiding principles set out above, and make crystal clear that Michigan family law statutes must be read in a gender-neutral manner.

Some of the most important civil rights of LGBTQ people in Michigan are at stake in this case: the rights to become parents, to form families, to raise children, and to maintain relationships with those children. The Court should act to protect those rights, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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WORD-COUNT CERTIFICATION

I hereby certify that this brief contains 15,066 words in the sections covered by MCR 7.212(C)(6)-(8).

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