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STATE OF MICHIGAN

IN THE SUPREME COURT

CARRIE PUEBLO,

Plaintiff-Appellant,

Supreme Court Case No. 164046

Court of Appeals Case No. 357577

v

Lower Court Case No. 2020-6382-DC

RACHEL HAAS,

Defendant-Appellee.

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF FOR LEAVE TO APPEAL

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

THIS CASE INVOLVES A CONTEST AS TO THE CUSTODY OF A MINOR CHILD.

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is an Application for Leave to Appeal from the Court of Appeals *unpublished* Order dated December 28, 2021, affirming the trial court's decision that granted Defendant-Appellee's motion for summary disposition pursuant to MCR 2.116(C)(5) and MCR 2.116(C)(8).

This Honorable Court granted Application for Leave to Appeal on or about September 23, 2022. On or about December 2, 2022, this Honorable Court granted Plaintiff-Appellant's Motion to Extend the Time for Filing her Brief; this Brief is timely filed.

This Honorable Court has jurisdiction pursuant to MCR 7.303(B)(1) and MCR 7.305(H)(1) and (4).

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STATEMENT OF QUESTIONS

1. In light of *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015), should the Equitable Parent Doctrine be extended to provide its standing to persons such as Ms. Pueblo, who, at the time of the parties' same-sex relationship was not permitted by Michigan law to legally marry the Defendant?

Trial Court and Appellate Court answered: No.

Ms. Pueblo answers: Yes.

2. What should be the parameters of extending *Obergefell v Hodges* to the Equitable Parent Doctrine?

Trial Court and Appellate Court answered: Failed to answer.

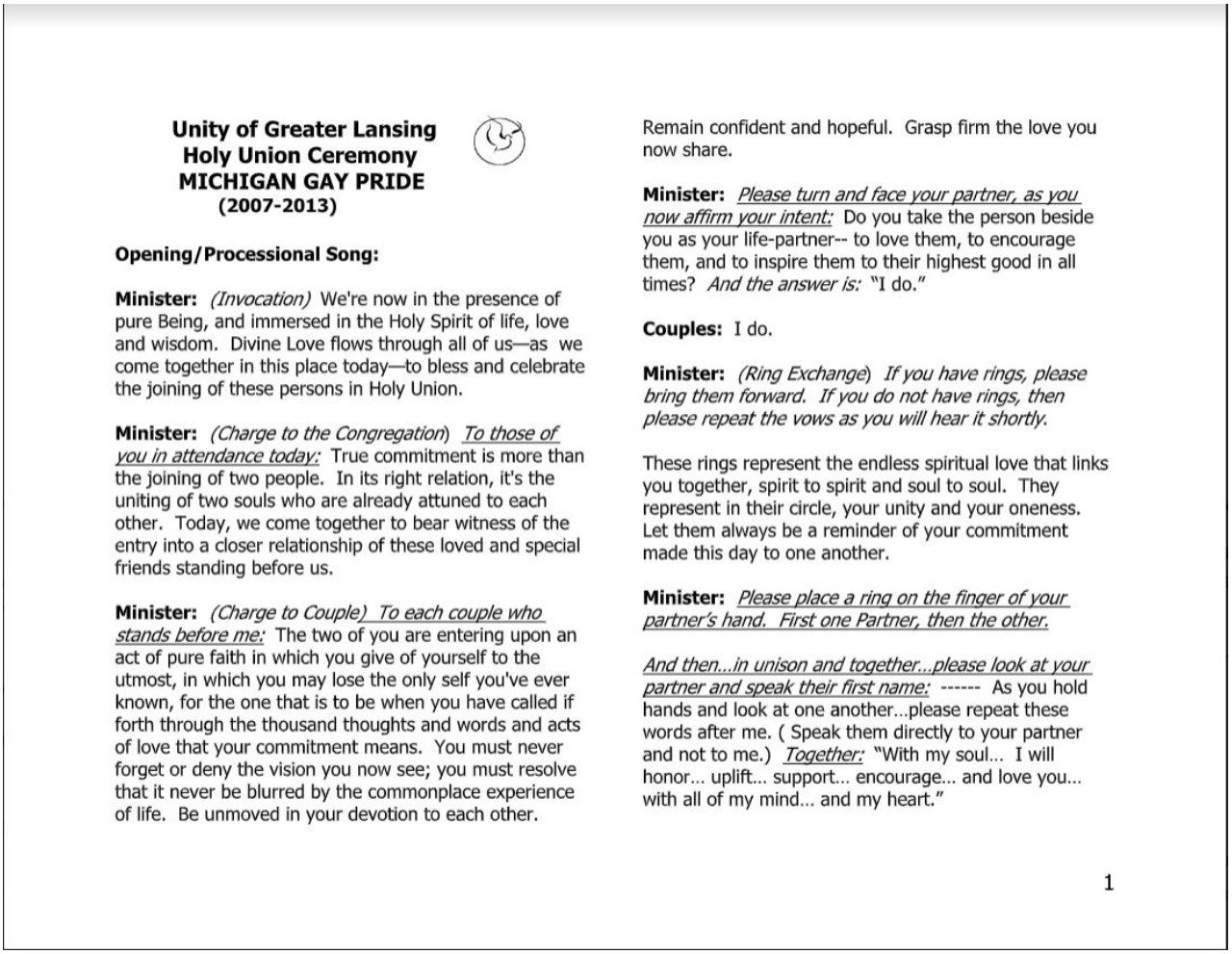
Ms. Pueblo answers: Within the context of this brief.

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STATEMENT OF FACTS

Ms. Pueblo and the Defendant-Appellee were involved in a long-term, same-sex relationship beginning near the early 2000s. (App p 27a). On or about June 30, 2007, the parties participated in a Commitment Ceremony in Lansing, Michigan.[1] Reverend Kent Lederer of Unity of Greater Lansing presided over the ceremony. This ceremony was witnessed by Amber Gonzales and her wife, Mandy Costello. Reverend Lederer called this a "Holy Union Ceremony". The ceremony would roughly go as follows:



Unity of Greater Lansing
Holy Union Ceremony
MICHIGAN GAY PRIDE
(2007-2013)

Opening/Processional Song:

Minister: *(Invocation)* We're now in the presence of pure Being, and immersed in the Holy Spirit of life, love and wisdom. Divine Love flows through all of us—as we come together in this place today—to bless and celebrate the joining of these persons in Holy Union.

Minister: *(Charge to the Congregation) To those of you in attendance today:* True commitment is more than the joining of two people. In its right relation, it's the uniting of two souls who are already attuned to each other. Today, we come together to bear witness of the entry into a closer relationship of these loved and special friends standing before us.

Minister: *(Charge to Couple) To each couple who stands before me:* The two of you are entering upon an act of pure faith in which you give of yourself to the utmost, in which you may lose the only self you've ever known, for the one that is to be when you have called if forth through the thousand thoughts and words and acts of love that your commitment means. You must never forget or deny the vision you now see; you must resolve that it never be blurred by the commonplace experience of life. Be unmoved in your devotion to each other.

Remain confident and hopeful. Grasp firm the love you now share.

Minister: *Please turn and face your partner, as you now affirm your intent:* Do you take the person beside you as your life-partner-- to love them, to encourage them, and to inspire them to their highest good in all times? *And the answer is:* "I do."

Couples: I do.

Minister: *(Ring Exchange) If you have rings, please bring them forward. If you do not have rings, then please repeat the vows as you will hear it shortly.*

These rings represent the endless spiritual love that links you together, spirit to spirit and soul to soul. They represent in their circle, your unity and your oneness. Let them always be a reminder of your commitment made this day to one another.

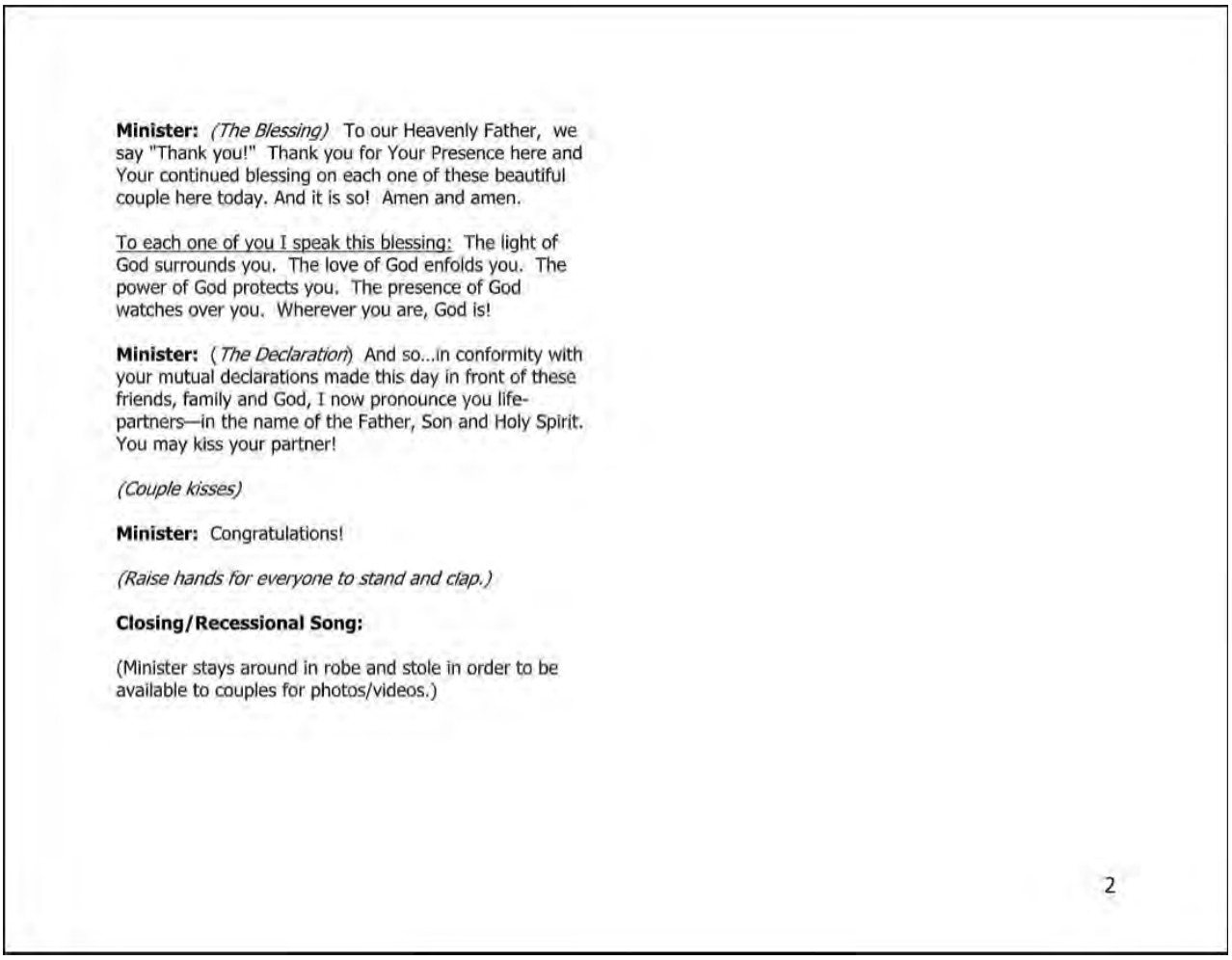
Minister: *Please place a ring on the finger of your partner's hand. First one Partner, then the other.*

And then...in unison and together...please look at your partner and speak their first name: ------ As you hold hands and look at one another...please repeat these words after me. (Speak them directly to your partner and not to me.) *Together:* "With my soul... I will honor... uplift... support... encourage... and love you... with all of my mind... and my heart."

1

[1] Same-sex marriage was not legal in Michigan until the *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015) ruling came down from the U.S. Supreme Court on June 26, 2015. Nonetheless, the parties did everything *legally* in their power in 2007 to commit as lifelong partners.

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Minister: *(The Blessing)* To our Heavenly Father, we say "Thank you!" Thank you for Your Presence here and Your continued blessing on each one of these beautiful couple here today. And it is so! Amen and amen.

To each one of you I speak this blessing: The light of God surrounds you. The love of God enfolds you. The power of God protects you. The presence of God watches over you. Wherever you are, God is!

Minister: (*The Declaration*) And so...in conformity with your mutual declarations made this day in front of these friends, family and God, I now pronounce you life-partners—in the name of the Father, Son and Holy Spirit. You may kiss your partner!

(Couple kisses)

Minister: Congratulations!

(Raise hands for everyone to stand and clap.)

Closing/Recessional Song:

(Minister stays around in robe and stole in order to be available to couples for photos/videos.)

2

(*Id* p 28a)

For all intents and purposes, from June 30, 2007, to present day, the parties were equitably, or de facto, married; it was the parties' intent to be and portray themselves as a wedded couple. The parties wore wedding bands, lived together, paid bills together, and - most importantly - *chose together* to become pregnant via in vitro fertilization ("IVF") and rear that child in the course of their equitable, de facto marriage (*Id* p 29a).

After much thought and debate, the parties agreed that Defendant-Appellee would undergo IVF. An excerpt from Appellee's Answer to Plaintiff's Summons & Complaint states as follows:

> 3. The parties were in a long-term committed relationship when they decided to use in-vitro fertilization to conceive a child.

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> ANSWER: Plaintiff lacks legal standing to file this Complaint. Notwithstanding and without waiving this defense, **admit**. (*Id* p 9a). (emphasis added).

However, Defendant-Appellee did not undergo IVF until a very careful selection process occurred; by way of further explanation, the parties sought a sperm donor who had strong physical characteristics resembling Ms. Pueblo's to ensure their child would have features resembling both parents, the parties. Ms. Pueblo assisted with the IVF process through which the child was conceived (*Id.* p 29a).

Both parties entered into the contract with the IVF clinic. Ms. Pueblo paid for the IVF procedure on her Discover credit card. The IVF procedure occurred in approximately December of 2007. IVF was successful (*Id.*).

The parties entered into an agreement to conceive and raise their child with attendant parental rights and responsibilities. The parties/parents enjoyed prenatal visits together, the parties picked out a name for their child, together they obtained all things baby, and they even indulged in a 4D ultrasound when baby's gestational age was 28 weeks and 2 days. On that 4D ultrasound (below), we see that Defendant-Appellee continues to hold herself out as wife and lifelong partner to Ms. Pueblo by identifying herself as Rachel Haas Pueblo during prenatal medical appointments (*Id.*).

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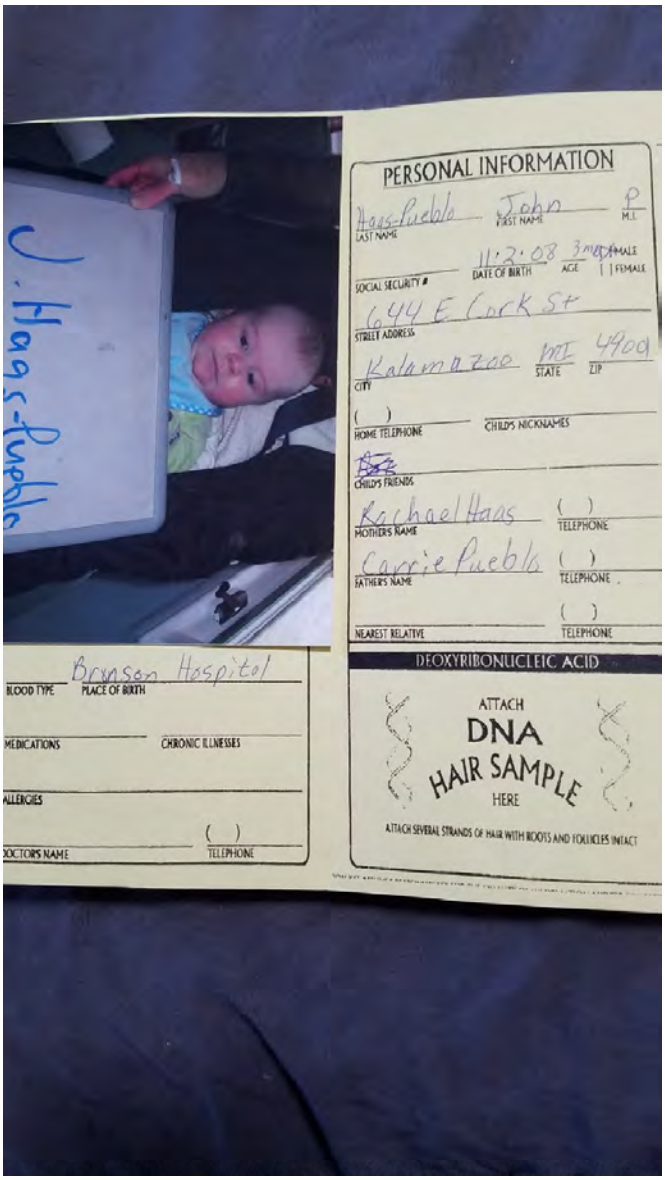


(*Id* p 30a)

John Paul Haas-Pueblo ("JPHP") was born on November 2, 2008. Ms. Pueblo was present for Defendant-Appellee's labor and JPHP's birth. JPHP's legal name includes both parties' last names, to wit: Haas and Pueblo.[2] Despite hospital staff's refusal to allow Ms. Pueblo to be listed on the birth certificate, Defendant-Appellee herself filled out an information card regarding JPHP. The information card Defendant-Appellee Haas personally filled out is seen here (*Id* p 30a):

[2] On multiple occasions in pleadings and/or responsive pleadings, Defendant-Appellee admits and/or acknowledges that the minor child shares both parties' last names: Haas-Pueblo. See also, paragraph 5 of Answer; paragraphs 2, 3, 6, 7, 8, 9, 10 of affirmative defenses; paragraphs 2 and 4 of motion for summary disposition. (*Id.* p1-2a)

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(*Id* p 31a)

Above, Defendant-Appellee specifically *Id*entifies Carrie Pueblo, Plaintiff-Appellant, as JPHP's father.[3]

Up to this point, these facts are uncontested except Defendant-Appellee contests that the parties were married or equitably married (App. p 20a, 26a). However, Defendant-Appellee does

[3] This directly refutes Defendant-Appellee's answer to paragraph 7 of Ms. Pueblo's Complaint (App p 9a). Based upon this document prepared by Defendant-Appellee in 2008, Ms. Pueblo clearly is JPHP's putative father; therefore, calling into question Defendant-Appellee's credibility.

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not contest the parties' commitment ceremony, vows exchanged, their intent to hold themselves out as a married couple, wearing wedding bands, living together, paying bills together, and - most importantly - choosing to undergo IVF to have a child as a product of their relationship.

From the date JPHP was born, Ms. Pueblo was present and active as JPHP's putative father. Defendant-Appellee did not begin contesting Ms. Pueblo's parental status in JPHP's life until the parties were no longer lifelong partners (*Id.* p 31a).

Throughout and after the parties' partnership, the parties shared parental responsibilities and duties equally. Ms. Pueblo has continuously maintained or tried to maintain a strong parental role that included bonding with JPHP (*Id.* p 32a).

In 2014, the parties ended their life-long partnership, but continued to informally share custody and parenting of JPHP (*Id.* p 32a).

On or about February 20, 2016, tragically, JPHP suffered a stroke. Ms. Pueblo continued to assist in the child rearing of JPHP including, but not limited to, being JPHP's putative father; providing love, care, affection, and guidance to JPHP; bonding with JPHP; providing food, clothing, housing, transportation, and other necessities for daily living; providing financial support for JPHP; attending JPHP's healthcare appointments; making medical decisions with Defendant-Appellee regarding JPHP's care; and more. Ms. Pueblo participated in the care and rearing of JPHP until Defendant prevented her from doing so (*Id.* p 32a).

In March of 2017, shortly after the St. Patrick's Day holiday, the Defendant-Appellee contacted Ms. Pueblo; during that contact, Defendant-Appellee aggressively, disrespectfully, and inappropriately demanded that Ms. Pueblo have no future contact with JPHP (*Id.*).

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Defendant-Appellee intercepted Ms. Pueblo's efforts to maintain contact with JPHP. As a result, Ms. Pueblo had no choice but to file a Complaint for Custody[4]. (*Id.* p 3a). In response to Ms. Pueblo's Complaint, Defendant-Appellee filed a Motion for Summary Disposition and Supporting Brief (App. P 15a, 16a).

Defendant-Appellee motioned for summary disposition on two grounds:

1. That Ms. Pueblo lacks standing (MCR 2.116(C)(5)); and

2. For Ms. Pueblo's failure to "state a claim upon which relief may be granted" and that no amendment to pleadings could cure the defect (MCR 2.116(C)(8)). (App. p 15a).

Following oral argument on Defendant-Appellee's Motion for Summary Disposition, the trial court's April 29, 2021, Decision granted Defendant-Appellee's motions for the following reasons:

> Plaintiff and Defendant were never married and Plaintiff is not a legal parent of the minor child involved or related at all to the child. There was no adoption, no judicial establishment of parentage, no Affidavit of Parentage, and Plaintiff has no biological relationship with the minor child (App. p 87a).

After oral argument was heard by the trial court, the Court of Appeals issued a decision in the case of *LeFever v Matthews*, 336 Mich App 651; 971 NW2d 672 (2021). The trial court did not have *LeFever* before it to consider at the time of rendering its March 8, 2021, Decision. Nonetheless, the *LeFever* decision holds that the Child Custody Act does not define "natural parent" nor legally require a genetic connection between a parent and a child. Thus, the trial court erred in requiring adoption, judicial establishment of parentage, Affidavit of Parentage, or a biological relationship with the minor child and, therefore, erred in granting Defendant's MCR 2.116(C)(5) and MCR 2.116(C)(8) motions (App. p 38a).

[4] No evidentiary hearings have been held in this matter (*Id.* at p 90a).

Ms. Pueblo filed a Motion for Reconsideration in light of the *LeFever* decision (App. P 60a). On June 1, 2021, the trial court issued its Decision of the Court Regarding Plaintiff's Motion for Reconsideration wherein it denied Ms. Pueblo's Motion for Reconsideration (App. P 87a). Ms. Pueblo timely appealed by right to the Court of Appeals. The Court of Appeals affirmed the trial court's decision (App. P 92a). Ms. Pueblo sought leave to appeal from the Michigan Supreme Court, and this Honorable Court granted leave on September 23, 2022. In the September 23, 2022, Order, the parties were instructed to brief two issues, and those are discussed herein.

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STANDARD OF REVIEW

"Whether a party has legal standing to assert a claim constitutes a question of law that is reviewed de novo." *Heltzel v Heltzel*, 248 Mich. App. 1, 28 (2001), citing *Terry v Affum*, 233 Mich. App. 498, 501 (1999).

"[M]atters of statutory interpretation and constitutional issues" are reviewed de novo. *LeFever v Matthews*, 336 Mich. App. 651 (2021) citing *Estes v Titus*, 481 Mich 573, 578-579 (2008); *In re MKK*, 286 Mich. App. 546, 556 (2009).

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LAW AND ARGUMENT

I. IN LIGHT OF Obergefell v Hodges, 576 US 644 (2015), THE EQUITABLE PARENT DOCTRINE EXTENDS TO PROVIDE ITS STANDING TO PERSONS SUCH AS MS. PUEBLO, WHO, AT THE TIME OF THE PARTIES' SAME-SEX RELATIONSHIP WAS NOT PERMITTED BY MICHIGAN LAW TO LEGALLY MARRY DEFENDANT

A. Standing

Let us first refresh our memory regarding the concept of standing:

> [O]ne cannot rightfully invoke the jurisdiction of the Court to enforce private rights, or maintain a civil jurisdiction for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the Cause of Action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as "standing" … *Bowie v Arder*, 441 Mich. 23, 42, 43 (1992), citing *Am Jur* 2d, Parties § 30, Pg 414.

The *Bowie* court goes on to state, "to have standing, a party must have a 'legally protected interest which is in jeopardy of being adversely affected.' " *Id. at* 23, 28, citing *Solomon v Lewis*, 184 Mich. App. 819, 822 (1990). The *Bowie* Court continues in specifying requirements for third parties to have standing: "A third party does not have standing to create a custody dispute … ***unless the third party*** is a guardian of the child or ***has a substantive right of entitlement to custody of the child***." *Bowie v Arder*, 441 Mich. 23, 49.

B. Traditional v. Modern Family Compositions

Now let us turn to contemplate traditional versus modern family compositions:

"The family unit accorded traditional respect in our society, which we have referred to as the singular "unitary family" is typified, of course, by the marital family, [it] also includes the household of unmarried parents and their children." *Michael H. v. Gerald D.*, 491 US 110, 123n.3, 109 S. Ct. 2333, 2342 n. 3 105 L. Ed. 2d 91, 106 n. 3 (1989) (Scalia, J.,) (Plurality Opinion). Without explicitly stating it, the late Justice Scalia implied that a traditional family

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unit derived from a heterosexual couple. The traditional family unit is no longer the only family unit afforded protection in our nation.

"The demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville*, 530 US 57, 64; 120 S Ct 2509; L Ed 2d 55 (2000). With the growing use of adoption, IVF, and surrogates, we must now consider diverse family units. As society changes and progresses, so, too, does the composition of the family unit.

Michigan law assumes each child is born with *two* legal and biological parents. With the advancement of technology and science, this is no longer true. The process of IVF often requires sperm donors to waive parental rights thereby leaving a void to be filled; in this instance, the void will be filled by a party *intended* to be the legal and perceived biological parent to the minor child.

Our Supreme Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected..." *Id*. at 66 citing *Parham v J.R.*, 442 U.S. 584, 602 (1979). This principle is repeated throughout caselaw: "The importance of the family and the "essential," "basic," precious, "right of parents to raise their children are well-established in the United States Supreme Court juris prudence…this right is not easily relinquished." *Hunter v Hunter*, 484 Mich. 247 at 257 (2009); *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972) quoting *Meyer v Nebraska*, 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923); *Skinner v Oklahoma*, 316 US 535, 541; 62 S Ct 1110; 86 L Ed 1655 (1942); and *May v Anderson*, 345 US 528, 533; 73 S Ct 840; 97 L Ed 1221 (1953); (1953).

Succinctly put, "[i]t is well settled law that parental rights and childrearing are a fundamental right." See *Troxel* at 66. However, Michigan's laws fail to globally contemplate the rights of same-sex couples and children reared therefrom. Michigan's laws overwhelmingly

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speak to granting parental rights only to heterosexual couples. See Michigan Child Custody Act of 1970, MCL 722.21 through 722.31. Therefore, Michigan's Laws violate same-sex persons' fundamental rights of parental rights and childrearing.

C. Obergefell, 576 US 644

Oftentimes couples solidify their relationship with marital vows for the purpose of creating a family within our cultural and societal norms, to wit: a married household. Same-sex couples, prior to *Obergefell*, were prohibited from enjoying the same liberties of opposite-sex couples, such as not legally being permit to wed. *Obergefell* made right this wrong and built the foundation upon which same-sex couples can continue to seek equal protection for other fundamental constitutional rights, such as parental rights and childrearing.

Michigan's laws are antiquated; they do not consider modern family structures. Further, the laws in Michigan have failed to keep up with the demands of *Obergefell.* With the change in the definition of marriage, which *Obergefell* expanded to include same-sex couples, there also must be reconsideration given to family units and dynamics. Michigan's laws are not built in a manner that protects modern families, which is what the case at bar calls this Honorable Court to do. This proposed change is supported by *Obergefell*.

Parental rights were not an articulated issue before the *Obergefell* Court, so this topic could not be explicitly ruled upon in that opinion. Even if there is no finding of *Obergefell* explicitly extending parental rights to same-sex couples, there is implicitly such an extension. Discrimination of a person's fundamental rights based upon their sexual preferences was deemed unconstitutional in *Obergefell* – specifically regarding marriage; thus, paving the way for discrimination of same-sex couples' constitutional rights to parenthood to also be deemed unconstitutional.

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The message of the *Obergefell* Court – which has now been bolstered by our Nation's legislation with the Respect for Marriage Act – is that same-sex couples are constitutionally permitted to act in the same fashion as opposite-sex couples.

Many of the same compelling reasons considered and articulated by the *Obergefell* Court are some of the same compelling reasons to expand parental rights to same-sex couples:

> Under the Due Process Clause of the Fourteenth Amendment no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147-149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). In addition, these liberties extend to certain personal choices central to indiv*Id*ual dignity and autonomy, including intimate choices that define personal *Id*entity and beliefs". *Obergefell*, 576 US at 663.

> Unfortunately, there is no precise method by which to interpret the Consitution so as to *Id*entify and protect fundamental rights. *Obergefell*, 576 US at 663, citing *Poe v Ullman*, 367 US 497, 542; 81 S Ct 1752; L Ed 2d 989 (1961).

> A … basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. *Id.* at 646, *See Pierce v Society of Sisters*, 268 US 510; 45 S Ct 571, 69 L Ed. 1070 (1925); [*668] *Meyer*, 262 US at 399, 43 S Ct 625, 67 L Ed 1042.

Marriage "affords the permanency and stability important to children's best interests". *Id.* at 668.

> As all parties agree, many same-sex couples provide loving and nuturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. "Most states have allowed gays and lesbians to adopt, either as indiv*Id*uals or as couples, and many adopted and foster children have same-sex parents, see, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families". *Id.*

By denying same-sex couples the same rights of natural parents, there are several aspects of parental status negatively impacted, including, but not limited to:

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> …taxation; inheritance in property rights; rules of intestate succession; …medical decision-making authority; …the rights and benefits of survivors; birth and death certificates; professional ethics; campaign finance restrictions; health insurance; and child custody, support, and visitation rules. *Id.* at 670.

Just as the marriage laws overruled by *Obergefell*, previously acted to "… harm and humiliate the children of same-sex couples," the laws requiring parents to be opposite gendered inflict that same harm and humiliation to children of same-sex couples…" *Obergefell* at 668.

Refusing to allow same-sex couples equal protection of their fundamental right to parenthood not only harms the parties in a same-sex custody action, it also harms the minor child(ren).

Society has long determined a two-parent household as the norm. Even in cases of divorce, separation, or the like, a child continues to legally have access to *both* parents, without question – so long as that child was conceived of a heterosexual relationship. Alternatively, children of same-sex couples whose relationship does not endure are not afforded that same basic, yet important, opportunity. Rather, children who are the product of same-sex relationships that have ended are legally denied access to their second parent. This isolation is harmful to the child and society alike. Depriving children of same-sex couples the right to *both* intended parents also deprive those children of: love, care, affection, financial assistance, emotional assistance, physical assistance, moral guidance, life experience, resources, etc.; in doing so, the child deprived, and society alike, are otherwise taxed and burdened as they do not have the same access to basic privileges and life experiences or functions that children conceived of same-sex relationships are accustomed to.

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In this case, JPHP should be afforded the right for *both* of his *intended* parents to be legally acknowledged as his parents. Without this liberty being extended to children who are an intended product of a same-sex relationship previously prohibited from marrying, those children are subject to "…suffer the stigma of knowing their families are somehow lesser…", just as children suffered when their same-sex parents were prohibited from marrying. *Obergefell* at 668.

D. Discussion of Other States Granting Standing

Prior to *Obergefell*, many other states found grounds to grant standing to non-biological and/or non-adoptive parents of same-sex couples' relationships from which a child or children were conceived.

1. Rhode Island

In Rhode Island, the "Family Court … has the power to determine the existence of a De Facto parent-child relationship despite the absence of any biological relationship between the putative parent and the child." *Rubano v. DiCenzo*, 759 A.2d 959, 967 (2000). The *Rubano* court opines that "… in contrast to the situation in the United States Supreme Court's recent decision of *Troxel v. Granville*, 530 US 57, 120 S. Ct. 2054, 2057, 141 L. Ed. 2d 49, 53 (2000), in which the Court invalidated a state statute allowing "any person" to petition for visitation right "at any time", here we construe … "[a]ny interested party" language much more narrowly, requiring an alleged parent-like relationship with the child before a party who is neither the child's biological parent nor a legal representative of the child can seek relief…". *Id.*

In Rubano, appellant's:

> … alleged close involvement with the child's conception and upbringing for as long as she and [appellee] cohabitated… and her alleged visitation agreement

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> with [appellee] when the couple separated endowed [appellant] with the requisite parent-like relationship and standing to obtain a judicial determination…*Id.*

The *Rubano* court found that the appellant was a De Facto parent. Similar to the facts in the case at bar, the parties were never married, the parties jointly decided to move forward with conceiving a child utilizing IVF, the insemination occurred pursuant to that joint decision, the appellant "helped to plan and arrange for… conception of the child…", and she was "…primarily responsible for the financial costs associated with the IVF procedure. *Id.* at 971. Also of note, the last name on the child's birth certificate compounded the parties' surnames, which is true in the case at bar. *Id*.

> [T]he mere fact of biological parenthood, even when coupled with the biological parent's ongoing care and nurture of the child and that parent's fundamental right "to make decisions concerning the care, custody, and control, of [his or her] children," *Rubano* citing *Troxel* 120 S Ct at 2060 does not always endow the biological parent with the absolute right to prevent all third parties from ever requiring any parental rights vis-à-vis the child. Thus, the fact that [appellee] not only gave birth to this child but also nurtured him from infancy does not mean that she can arbitrarily terminate [appellant's] de facto parental relationship with the boy, a relationship [appellee] agreed to and fostered for many years. *Id.* at 976.

> [Appellee's] constitutional rights as a biological parent to prevent third parties from exercising parental rights vis-à-vis her child are not absolute when, as here, the best interest of the child are at stake and [appellee's] conduct equitably stops her from objecting… *Id*. at 977.

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2. New Jersey

In 2000, the New Jersey Supreme Court created a 4-part test to decide if a "psychological parenthood" relationship existed between a "third party" adult and a child. That test is as follows:

> "[T]he legal parent must consent to and foster the relationship between the third-party and the child; the third party must have lived with the child; the third-party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged. *V.C. v. M.J.B.*, 163 N.J. 200; 223 748 A.2d 539 (N.J. 2000).

3. New Mexico

In a New Mexico case, one party adopted a child from Russia. *Chatterjee v. King*, 2012-NMSC-019; 280 P. 3d 283 at 285 (2012). The parties raise the adopted child together, even though appellant never adopted the minor child. After the parties' relationship soured, appellant filed a petition in the trial court alleging that appellant was:

1. The minor child's presumed natural parent;
2. An equitable parent to the minor child; and
3. A de facto parent to the minor child. *Id*.

Appellee filed a Motion for Summary Disposition and, neither admitted nor denied allegations in appellant's summons and complaint. Rather, appellee only argued that appellant lacked standing. The trial court dismissed the action for failure to state a claim upon which relief can be granted. In further similarity to the case at bar, the *Chatterjee* Court of Appeals held that appellant lacked standing to seek joint custody. "The [trial court] further held that presumptions establishing a father and child relationship cannot be applied to women, and a mother and child relationship can only be established through biology or adoption." *Id.* at 285.

At issue in the *Chatterjee* case was whether appellant pleaded:

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> sufficient facts in her petition to give her standing to pursue joint custody of [the minor child] … Whether *Chatterjee* [had] standing to pursue joint custody depends on whether *Chatterjee* [pleaded] facts sufficient to establish that she [was] an interested party under the New Mexico Uniform Parentage Act. *Id*.

The *Chatterjee* Court held that Appellee had standing.

4. Missouri

Some cases granted standing to homosexual persons in parental rights cases after *Obergefell*. For example, in Missouri, the Eastern District Court of Appeals chose to analyze if there was a "significant bonded familial custody relationship." *K.M.M. v. .K.E.W.*, 539 SW 3d 722; 738 (Mo. Ct. App. 2017).

The Missouri court considered,

> [a]s a matter of course, the parent-child relationship, revered both in life and law, is considered not just a "familial relationship" but one that is "significant" and "bonded"." The significance of a bonded parent-child relationship is even more pronounced for minor children given the essential role parents or surrogate parents play in the care and nurturing of growing children. *Id*.

In the Missouri case, much like in the case at bar, "[appellee] desired and invited [appellant] to undertake an active parental role … The parties and their children operated as and presented themselves to the outside world as a family unit." *Id*. The Missouri court held:

> The evidence of a significant bonded familial custodial relationship between [Appellant] and Child is overwhelming in both quantity and quality. The evidence is such that it leads to only one sensible conclusion: This was a family under every reasonable definition aside from legal. *Id.*

Many jurisdictions granting parental rights to non-biological or non-adoptive parents whose parental role derived from a child reared during a same-sex relationship - pre and post *Obergefell*, focus on the party's relationship with the child.

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5. New York

Prior to August 30, 2016, in New York, a partner in an unmarried couple who lacked biological or adoptive connection to a child was not "that child's "parent" for purposes of standing to seek custody or visitation…" *Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 N.Y.3d 1, 13; 61 N.E.3d 488 (2016). The facts of *Matter of Brooke S.B.* are quite similar to the facts of the case at bar. In the *Matter of Brooke S.B.*, parties entered a relationship in the early 2000s. They became engaged despite not legally being allowed to marry in New York.[5] The parties were financially unable to travel to a jurisdiction that allowed same-sex marriage. Further, there was uncertainty as to whether New York would give comity to a same-sex marriage that took place in another state. *Id*. at 3.

After the couple announced their engagement, they soon decided to utilize IVF to impregnate the respondent. "During respondent's pregnancy, petitioner regularly attended prenatal doctor's appointments [and] remained involved in respondent's care …" *Id.* Petitioner was with the respondent when she went into labor, petitioner was there when the minor child was born, petitioner cut their newborn's umbilical cord, and the minor child was given the petitioner's last name. *Id.* at 3-4.

The parties resided and reared the child together, "sharing in all major parental responsibilities." … The child referred to petitioner as "Mama B." *Id*.

When the parties' romantic relationship ended, prior to *Obergefell*, the parties continued to co-parent the child, at first. However, eventually, the parties' ability to co-parent the child soured. Petitioner then sought joint custody and regular visitation with the minor child. *Id*. The

[5] In the case at bar, the parties participated in a commitment ceremony in which laws were exchanged, despite marriage between same-sex couples being illegal in Michigan.

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trial court ruled that petitioner lacked standing. The appellate division affirmed. Leave to Appeal the appellate division was granted.

As is true in the case at bar, in New York, at the time this same-sex couple was in their relationship, same-sex partners were prohibited from adopting a biological parent's child, because New York required adoption by married partners only; and at the time, New York prohibited same-sex marriage. *Id*. at 6.

> The *Brooke S.B.* court noted that the court had previously:
>
> "…gone to great lengths to escape the inequitable results dictated by a needlessly narrow interpretation of the term "parent." Now we find ourselves in a legal landscape where in a non-biological, non-adoptive "parent" may be stopped from disclaiming parentage and … denied standing to seek custody or visitation." *Id*. at 9-10.
>
> However,
>
> "… nonrecognition of same-sex couples is unsustainable, particularly in light of enactment of same-sex marriage in New York State and the United States Supreme Court's holding in *Obergefell v. Hodges*… which noted ***that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples***." *Id.* at 10 (emphasis added).
>
> Failing to extend parental rights to former partners of same-sex couples inflicts a,
>
> "… disproportionate hardship on the growing number of non-traditional families across our state." *Id*. at 10.
>
> The *Brooke S.B.* court identified a: "…growing body of social science reveals the trauma that children suffer as a result of separation from a primary attachment figure – such as a De Facto parent – regardless of that figure's biological or adoptive ties to the children..." *Id*.

The *Brooke S.B.* court contemplates *Troxel*, remembering that they must "…protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children…" *Id.* However, New York decided they will no longer engage in the "deft legal maneuvering" necessary to read fairness into an overly-restrictive definition of "parent" that sets

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too high a bar for reaching a child's best interest and does not take into account equitable principles…"*Id*. at 26.

The Brooke S.B. Court then enumerated a test for which persons who were previously in a same-sex relationship from which a child was reared can now gain standing for parental status and rights.

6. States Extending Parental Rights to Members of Same-Sex Couples – At A Glance

In extension of *Troxel*, several states have reworked the interpretation of their state laws so as to provide parental rights to non-genetic/non-biological and non-adoptive parents. Those states include, but are not limited to, the following:

A. California, *Guardianship of Z.C.W.*, 71 Cal. App. 4th 524 (1999);

B. Rhode Island, *Rubano v. DiCenzo*, 759 A.2d 959 (2000);

C. New Jersey, *V.C. v. M.J.B.*, 163 N.J. 200; 748 A.2d 539 (2000);

D. Colorado, *In the Interest of E.L.M.C.*, 100 P.3d 546 (2004);

E. North Carolina, *Mason v. Dwinnell*, 190 N.C. App. 209; 660 S.E.2d 58 (2008);

F. Kentucky, *Mullins v. Picklesimer*, 317 S.W.3d 569 (2010);

G. Ohio, *In re Lapiana*, 2010-Ohio-3606 (2010);

H. Massachusetts, *Hunter v. Rose*, 463 Mass. 488; 975 N.E.2d 857 (2012);

I. New Mexico, *Chatterjee v. King*, 2012-NMSC-019; 280 P.3d 283 (2012);

J. Louisiana, *Ferrand v. Ferrand*, 221 So. 3d 909 (2016);

K. New York, *Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 N.Y.3d 1; 61 N.E.3d 488 (2016);

New York, *Matter of Kelly S. v. Farah M.*, 139 A.D.3d 90; 28 N.Y.S.3d 714 (2016); and

L. Missouri, *K.M.M. v. K.E.W.*, 539 S.W.3d 722 (2017).

The map below illustrates states in which a non-gestational and non-genetic parent can and cannot be considered a legal parent when having used assisted reproductive technologies to conceive a child:

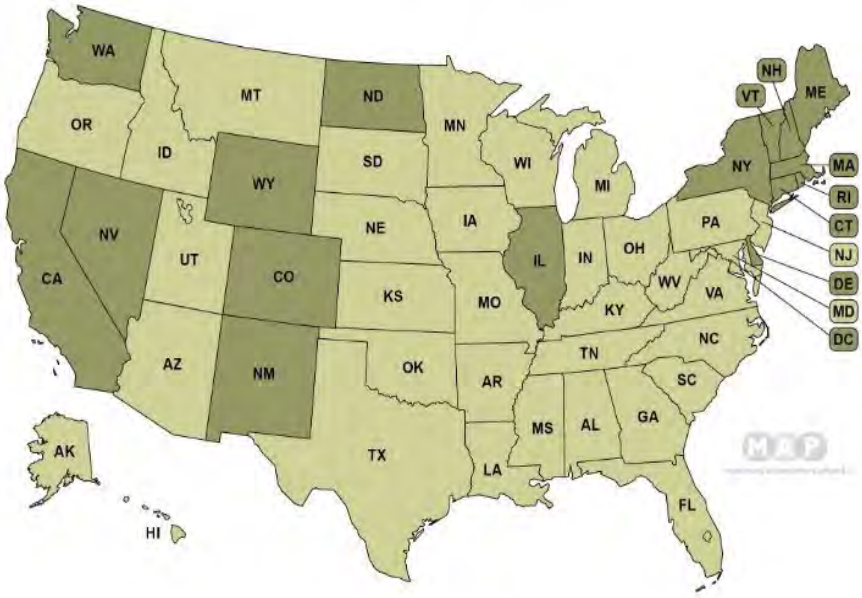
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ASSISTED REPRODUCTION | DE FACTO PARENT RECOGNITION

This map shows the states in which a non-gestational and non-genetic parent can be considered a legal parent by the state. For example, when a woman consents to have a child with her wife through donor insemination, the non-gestational mother is a legal parent (just as a woman's husband would be a legal parent of a child they have using donor insemination, even though he is not the biological father). In some states, being married is not a requirement for parental recognition for a non-gestational and non-genetic parent. The process of "consenting to insemination" allows parents in some states a way to establish a legal relationship to the child irrespective of the parents' marital status. **Note that even if assisted reproduction laws do not exist or apply, other laws may protect married or unmarried parents, depending on the state.**



State recognizes the non-gestational parent as a legal parent, regardless of marital status, if the non-gestational parent consents to the conception of a child born using assisted reproduction *(16 states + D.C.)*

State recognizes the non-gestational parent as a legal parent if the couple is married*, but state lacks clear and direct statute or case law for couples who are not married *(34 states, 5 territories)*

State does not recognize non-gestational parent as a legal parent* *(0 states)*

Citations & More Information

U.S. Territories



* Because of several U.S. Supreme Court cases including *Obergefell* and *Pavan*, all states must extend the same rights and benefits to same-sex married couples that are extended to different-sex married couples, including recognizing a non-gestational parent as a legal parent. Therefore, consent to inseminate is not necessary to establish a legal relationship to a child.

This map was developed in collaboration with the National Center for Lesbian Rights (NCLR). For more information about these topics and active litigation, visit NCLR.

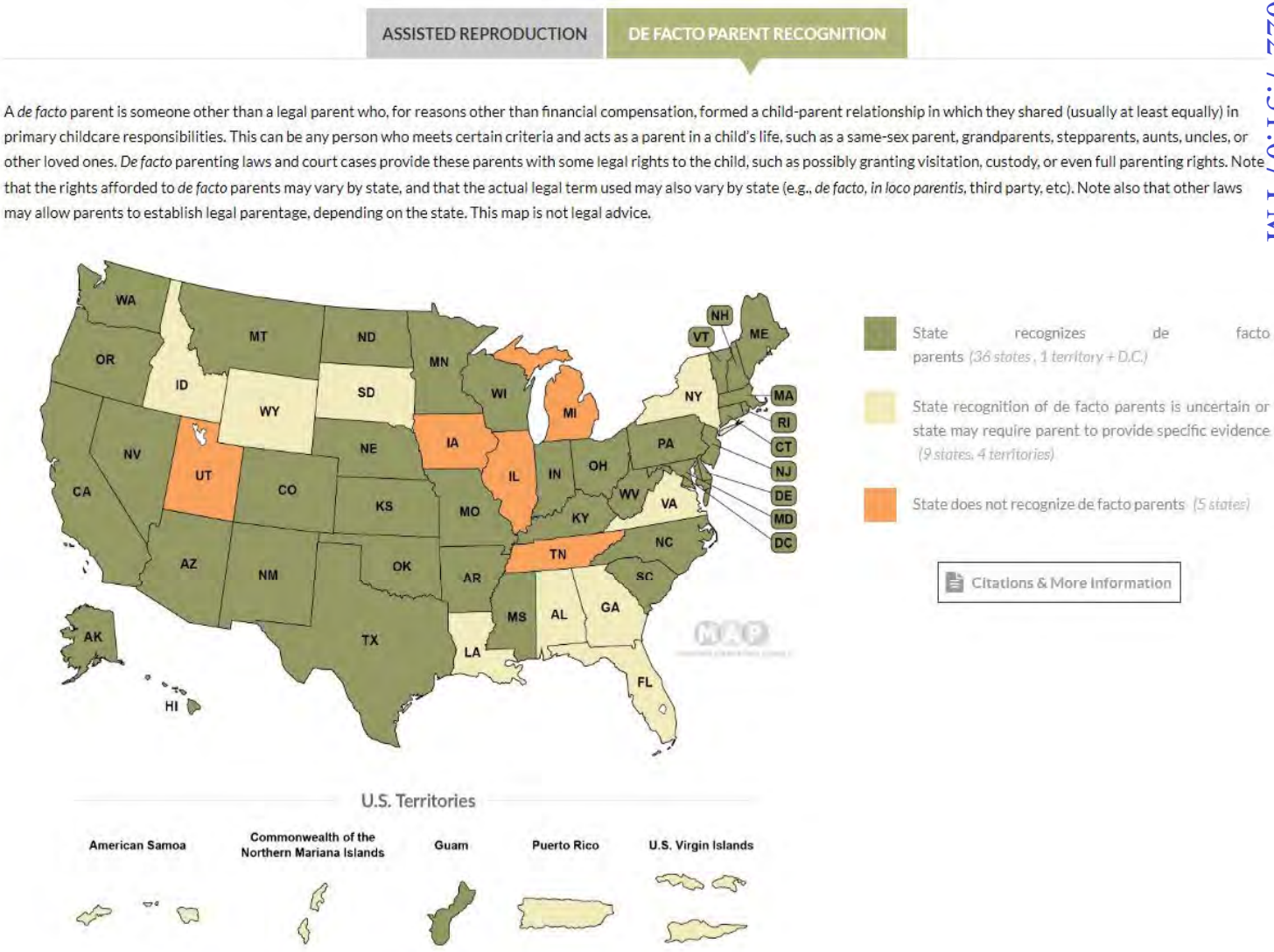
Recommended citation:
Movement Advancement Project. "Equality Maps: Other Parental Recognition Laws." https://www.lgbtmap.org/equality-maps/other_parenting_laws. Accessed 12/16/2022.

Movement Advancement Project, *Other Parental Recognition Laws*, <http://www.lgbtmap.org> (accessed December 16, 2022).

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This map goes on to list thirty-four (34) states and five (5) territories that lack clear and direct laws for parental rights to be obtained if a same-sex couple is *not* wed. Michigan is one of those thirty-four (34) states. *Id*.

The map below illustrates De Facto parent recognition, which indicates states acknowledging formation of a parent-child relationship with someone other than a legal parent:



MAP relied on the research conducted by the National Center for Lesbian Rights (NCLR) for this map. For more information on LGBTQ-related parenting and relationship law, please consult NCLR's resources.

Recommended citation:
Movement Advancement Project. "Equality Maps: Other Parental Recognition Laws." https://www.lgbtmap.org/equality-maps/other_parenting_laws. Accessed 12/16/2022.

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Thirty-six (36) states and one (1) territory – Washington D.C. – explicitly recognize De Facto parents. There are five (5) states in which De Facto parents are explicitly *not* recognized- Michigan, Utah, Iowa, Illinois, and Tennessee. *Id*.

This information is important for us to consider, because it acknowledges and demonstrates the growing trend by states to grant persons previously of same-sex couples parental rights when a child was reared therefrom.

E. Harmonious Reading of *Troxel* and *Obergefell*

Obergefell now unequivocally creates the platform for same-sex couples to seek out their Equal Protection guarantees of parental rights:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning". *Obergefell* at 663.

"The nature of injustice is that we may not always see it in our own times". *Obergefell* at 664. "…[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v Granville*, 530 US 57, 66; 120 S. Ct. 2054; 147 L Ed. 2d 49 (2000).

> [I]n *Meyer v Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the due process clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." *Troxel*, 530 US at 65 (2000). "Two years later, in *Pierce v Society of Sisters*, 268 U.S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right to "direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; ***those that nurture him and direct his destiny, have the right*** coupled with the high duty, to recognize and prepare him for additional obligations." *Id. at* 535 (*emphasis added*).

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"[T]he interest of parents in the care, custody, and control of their children…is perhaps the oldest of the fundamental liberty interests..." *Troxel v. Granville*, 530 US at 64-65.

It is not prudent to put *Troxel* at odds with *Obergefell*. Rather, the two cases must be read in harmony – and that should have been true from the time *Obergefell* was published. Declining to read *Troxel* in harmony with *Obergefell* violates the Equal Protection Clause. Reading *Troxel* and *Obergefell* in harmony grants standing to intended parents from same-sex couples to seek parental rights pursuant to the Equitable Parent Doctrine.

Recall that the *Bowie* Court specified requirements for third parties to have standing: "A third party does not have standing to create a custody dispute … ***unless the third party*** is a guardian of the child or ***has a substantive right of entitlement to custody of the child***." *Bowie* 441 Mich. at 49 (*emphasis added*).

Appellant has a substantive right of entitlement to the parties' minor child. Appellant exchanged vows with Appellee; held herself out as the spouse of Appellee; made an explicit decision with Appellee to conceive a child via IVF; accompanied Appellee for prenatal medical appointments; was present for the labor and delivery of the child; maintained a home and familial bond with the child; and was a strong presence and hand in childrearing. Appellant has a constitutional right to be legally recognized as the parent of the child.

Thus, *Obergefell* grants standing to persons such as Ms. Pueblo, who, at the time of the parties' same-sex relationship was not permitted by Michigan law to legally marry the defendant-appellee. Therefore, the Equitable Parent Doctrine should be extended to persons, such as Ms. Pueblo, who have the standing *Obergefell* grants.

II. WHAT SHOULD BE THE PARAMETERS OF EXTENDING *Obergefell v Hodges* TO THE EQUITABLE PARENT DOCTRINE?

To answer this question, we must first consider the fundamental rights of parents.

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The 14th Amendment of the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Planned Parenthood of SE Pennsylvania v Casey*, 505 US 833, 851 (1992), citing *Carey v Population Serv Int'l*, 431 US 678, 685 (1977). The decision of whether or not to procreate, and how, is a protected fundamental liberty interest. *Eisenstadt, Sheriff v Baird*, 405 US 438, 453 (1972). Constitutional rights connected to our liberty to procreate and to bodily autonomy are not limited by the method chosen to procreate (i.e., ART). *DMT v TMH*, 129 So 3d 320, 338 (FLA 2013).

Our Supreme Court recognizes that the relationship between a parent and child is a fundamental right and "that the relationship between parent and child is constitutionally protected." *Quillion v Walcott*, 434 US 246, 255 (1978).

It is well-settled law that a classification creating unequal access to a fundamental right is subject to strict scrutiny. *Zablocki v Redhail*, 434 US 374, 381-390 (1978).

New York's Court of Appeals has stated, and we accept, and offer here, "because of the fundamental rights to which biological and adoptive parents are undeniably entitled, …any test to expand who is a parent…must be…appropriately narrow." *Matter of Brooke S.B.* 28 N.Y. 3d at 27.

After considering the multiple various remedies other states have adopted to extend standing and parental rights to persons who were a part of a same-sex couple from which a child was reared, it is apparent that New York's Court of Appeals adopted and implemented the most relevant and appropriate burden and test:

> …[W]here a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child…*Id.* at 28.

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It is appropriate for Michigan to adopt and implement the same test set forth in *Matter of Brooke S.B.*

CONCLUSION AND RELIEF REQUESTED

Therefore, we pray this Honorable Court grants leave to appeal and finds the following:

A. *Obergefell* grants standing to Appellant.

B. Because *Obergefell* grants standing to Appellant, the Equitable Parent Doctrine is extended to Appellant.

C. Michigan adopts the test as set forth in *Matter of Brooke S.B.*

D. Appellant must prove, by clear and convincing evidence, that she agreed with the biological parent of the child to conceive and raise the child as co-parents.

E. Lake v. Putnam is vacated.

F. This case is reversed and remanded for proceedings consistent with these findings.

G. Any/all other relief this Honorable Court deems just, fit, and in the minor child's best interests.

Respectfully submitted,

STARKS LAW, PLC Attorney for Plaintiff-Appellant

Dated: December 16, 2022

By: */s/ Reh Starks*
Reh Starks (P76689)