In the Court of Appeals of Maryland

No. 79

September Term, 2015

MICHELLE L. CONOVER,

Petitioner,

v.

BRITTANY D. CONOVER,

Respondent.

On Writ of Certiorari to the Court of Special Appeals

Brief of *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc.

SUSAN C. SILBER
KENNETH SIGMAN
SILBER, PERLMAN, SIGMAN & TILEV, P.A.
6930 Carroll Avenue, Suite 610
Takoma Park, MD 20912-4437
t: (301) 891-2200 x 14
f: (301) 891-2206
e: silber@sp-law.com

SUSAN L. SOMMER*
OMAR GONZALEZ-PAGAN*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005-3919
t: (212) 809-8585
f: (212) 809-0055
e: ssommer@lambdalegal.org

*Motion for Special Admission pending

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INTRODUCTION

As this case demonstrates, the virtually insurmountable standard for standing of a non-genetic, non-adoptive parent to seek custody or visitation erected under the lower courts' reading of *Janice M. v. Margaret K.*, 404 Md. 661 (2008), exacts a terrible toll on children of same-sex couples. It ignores that same-sex couples share the same interest in and right to "'establish a home and bring up children' that has long been recognized to be 'a central part of the liberty protected by the Due Process Clause.'" *Obergefell v. Hodges*, 576 U.S. —, 135 S. Ct. 2584, 2600 (2015), quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal citation omitted). Outmoded assumptions about who qualifies as a "true" parent, focused on genetics and the traditional model of a different-sex couple who "procreate" within a marital unit, continue to undervalue the families formed by same-sex partners using now common forms of assisted reproductive technology. The reality is that thousands of Maryland children are raised by same-sex parents who were unmarried at the time the children entered the family;[1] many were conceived, as was Jaxon, using donor insemination with the intention that both partners would parent the resulting children.[2] Maryland's 2012 Civil Marriage Protection Act,

[1] *See* Gary J. Gates & Abigail M. Cooke, The Williams Inst., *Maryland Census Snapshot: 2010* at 1, 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Maryland_v2.pdf (according to 2010 Census, 10,217 unmarried same-sex partners resided together in Maryland, and 1,718 unmarried same-sex couples were raising their children together).

[2] *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L. Rev. 835, 846 (2000) (noting "remarkable change in parenting norms" that "has greatly expanded the number of

2012 Md. Laws ch. 2 ("CMPA") and the U.S. Supreme Court's landmark rulings in *Obergefell* and *United States v. Windsor*, 570 U.S. —, 133 S. Ct. 2675 (2013), affirmed that the families formed by lesbian and gay couples deserve the same respect and legal protections others receive. With these watershed advances, *Janice M.*'s failure fully to acknowledge and protect the parent-child relationships of a subset of these couples' children has fallen even further out of step with the legal treatment due families of same-sex partners. It enforces a legacy of inequality and stigma for children of same-sex parents.

In recent years, appellate courts in many states with statutory provisions similar to Maryland Code Annotated, Estates & Trusts ("E.T.") § 1-208(b) have recognized the standing of same-sex partners who meet comparable statutory criteria to be the parents of their children, notwithstanding that these adults lack ties to their children through adoption, genetics, or the marital presumption. Numerous other state courts have applied equitable and common law principles to recognize such parents and to accord them standing to seek custody and visitation in the best interests of their children. These appellate courts have had no difficulty establishing workable standards to safeguard a child's relationship with a second intended parent who was the same-sex partner of the child's genetic parent. This Court should bring Maryland into the mainstream in protecting children who have been reared by same-sex parents and have developed deep parent-child bonds to their non-genetic, non-adoptive parent.

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would-be parents who seek" assisted donor insemination "for reasons unrelated to infertility," including many women who "have no male partner").

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, and transgender ("LGBT") people and those with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as counsel to parties or as *amicus* in Maryland cases addressing the parenting rights of LGBT people, *see, e.g.*, *Boswell v. Boswell*, 352 Md. 204 (1998); recognition of out-of-state marriages of same-sex couples, *see, e.g.*, *Port v. Cowan*, 426 Md. 435 (2012); the freedom to marry within Maryland, *see Conaway v. Deane*, 401 Md. 219 (2007); and legal protections for transgender people, *see, e.g.*, *Doe v. Montgomery Cty. Bd. of Elections*, 406 Md. 697 (2008). Lambda Legal also served as counsel to parties and *amici* in landmark U.S. Supreme Court cases establishing the rights of LGBT people to form intimate and family relationships and to protections from discrimination, including *Obergefell*; *Windsor*; *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has appeared as well in many other cases throughout the nation addressing the parental rights of non-genetic, non-adoptive parents to secure their relationships with their children. *See, e.g.*, *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001).

Lambda Legal submits this brief to assist the Court's consideration of the issues in this case, particularly the legal trend in other states nationwide to recognize as parents those who, like Petitioner Michelle L. Conover ("Petitioner" or "Michelle"), participated

as parents in rearing children conceived using assisted reproductive technology with their same-sex partners.[3] The brief also addresses the impact of Maryland's CMPA and the Supreme Court's rulings in *Obergefell* and *Windsor*, which require enhanced legal respect for the families and parent-child relationships of LGBT people. Lambda Legal seeks to ensure that children of same-sex couples have legal protections and security for their parental relationships, regardless of whether their parents are genetically related to them, obtained adoptions, or were married at their birth.

*** * * ***

Amicus incorporates by reference the Statement of the Case, Questions Presented, and Statement of Facts as set forth in the Petitioner's brief.

ARGUMENT

To the extent *Janice M.* is deemed a barrier to according Michelle standing as Jaxon's parent to pursue custody and visitation, it should be overruled. As applied by the courts below to deny Michelle parental status and standing either under E.T. § 1-208(b) or as a common law *de facto* parent, *Janice M.* is inconsistent with principles underlying the CMPA, *Windsor*, and *Obergefell.* These principles should now inform this Court's understanding of the legal respect due to families formed by same-sex partners. *Janice*

[3] As noted in Petitioner's brief, Petitioner is a transgender man who transitioned to living as a man after the contested hearing below. *See* Brief of Petitioner at 1 n.1. Consistent with Petitioner's practice in Petitioner's brief, *amicus* refers to Petitioner as "Michelle" and uses female pronoun and other references herein. Moreover, a parent's gender identity or transgender status should have no bearing on questions of parental status, visitation, or custody. *See generally Boswell*, 352 Md. 204.

M. is also out of step with the advancing trend in state courts nationwide to afford parental rights to the same-sex partner of a child's genetic parent who, with that parent's consent, functioned fully as a second parent to the child. Maryland lags woefully behind in continuing to deny protections to children born into families that do not fit the "traditional" mold of a father and mother couple, both of whom are the genetic parents of their children.

This Court has not hesitated to depart from prior precedents that "mandate the mockery of reality and the 'cultural lag of unfairness and injustice.'" *Bozman v. Bozman*, 376 Md. 461, 493 (2003) (internal citation omitted). This is particularly so when a judicially-created common law rule, like that dictated by *Janice M.*, has grown out of step with the reasoning adopted by other courts. *See id.* at 493 (joining majority of other jurisdictions to abrogate interspousal tort immunity doctrine that had become a "vestige of the past"). This case offers a critical opportunity to right the injustice done to Maryland children whose relationships with their non-genetic, non-adoptive parents have gone unprotected, and to bring the State's jurisprudence in line with current understandings of the rights due same-sex families.

I.

This Court Should Not Adhere To Outmoded Standards That Undervalue The Families Formed By Same-Sex Couples

In recent years, Maryland, and our nation more broadly, have come to a deeper understanding of and respect for the families of same-sex couples and their roles as parents, an understanding that should today inform interpretation of Maryland's family

law. *See Windsor*, 133 S. Ct. at 2689 (noting "a new perspective, a new insight" that has come to shape standards for same-sex families in recent years). Yet persisting misconceptions and stereotypes embedded in the legal treatment of same-sex couples and their families were the backdrop on which *Janice M.* was decided in 2008. As this Court noted in *Port* in 2012, "the treatment given" same-sex relationships under Maryland law "may be characterized as a case of multiple personality disorder," 426 Md. at 438, and "mixed legal messages." *Id.* at 439. *Janice M.* and its devaluing of the parent-child relationships in same-sex families was a prime symptom of that disorder.

In 2007, the year prior to *Janice M.*, this Court upheld under the State Constitution Maryland's restriction of marriage to a male-female couple based on the purported rationale that such "a union . . . is uniquely capable of producing offspring," and so is uniquely in need of legal stability and security for the resulting offspring. *Conaway*, 401 Md. at 317. The Court relied on such precedents as *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *summarily aff'd*, 404 U.S. 810 (1972), since discredited, that privileged "traditional" married different-sex couples whose children were conceived without assisted reproductive technologies and were the genetic offspring of both spouses.[4] *See Conaway*, 401 Md. at 318-19 ("'The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.'" *quoting Baker*, 191 N.W.2d at 186).

[4] *Baker*'s summary affirmance and precedential value were expressly overruled in *Obergefell*, 135 S. Ct. at 2605.

Coming on *Conaway*'s heels, *Janice M.* similarly undervalued the families formed by same-sex couples and their children's need for legal protections for their family relationships. *Janice M.* dismissed the intended and functional second parents to their same-sex partners' adoptive or genetic children as mere "third parties," with relationships no more deserving of legal protection than those of a grandparent, a parent's "significant other," or a babysitter. *See* 404 Md. at 686; *id.* at 698 (Raker, J., dissenting).

While also applying to non-genetic, non-adoptive parents in different-sex unmarried relationships, *Janice M.* falls particularly hard on children of same-sex parents, where at most only one partner can be the genetic parent of the child, and whose parents were denied the ability to marry in Maryland until 2013. For these children, their second parents, with whom they have formed critical bonds of parent-child attachment, are deemed mere "third parties" who can be wrenched from their lives unless exceedingly exceptional circumstances apply. The all too ordinary consequence of *Janice M.* is that these children are exposed to needless loss of their beloved second parents.

Janice M. came on the eve of great flux in the State's and nation's understanding of same-sex families. These changes expose the injustice of a legal standard that leaves children like Jaxon without legal protection for their relationships with their intended second parents. In 2012, the Maryland legislature passed and the voters ratified the CMPA, giving same-sex couples the freedom to marry in Maryland as of January 1, 2013. The effect of that statute is broad recognition of the legal equality due to same-sex couples in all spheres. *See* Brief of Petitioner at 35-37. The CMPA came as a welcome step towards equality for lesbian and gay Marylanders, and a powerful indicator of the

legislature's and voters' recognition of same-sex couples as fit, full-fledged parents whose families are entitled to the same legal stability and protections as all others. It also demonstrates the legislature's recognition that "gender-specific" assumptions that had permeated Maryland family law, such as those that gave primacy to male-female procreating couples, should no longer govern. Although the CMPA should inform the Court's consideration of who qualifies as a parent with standing, it did not remedy the dilemma for children like Jaxon, whose parents did not have the freedom to marry in Maryland or the assurance of recognition of an out-of-state marriage prior to the children's birth. Recognizing the standing of the non-genetic parents of these children under E.T. § 1-208(b) and common law would cure this dilemma.

The U.S. Supreme Court's watershed decisions in *Windsor*, striking down the barrier erected by the so-called Defense of Marriage Act ("DOMA") to federal recognition of marriages of same-sex couples, and *Obergefell*, striking down state bars to these couples' marriages, should also inform the Court's analysis. Both decisions focused on the stigma and insecurity inflicted on the many children of same-sex couples from governments' unconstitutional refusal to accord legal recognition to their families. *Obergefell*, ruling on parallel federal constitutional grounds, rejected the biological, procreation-centered argument that held sway in *Conaway*, holding instead that same-sex couples share the same fundamental right to marry long held to shelter different-sex couples and the children they parent. *See Obergefell*, 135 S. Ct. at 2600-01.

Notably, the Supreme Court decisions regarded *both* members of same-sex couples as "parents" to their children, without reference to whether the parents and

children had genetic or adoptive ties. The Supreme Court did not call only those partners with genetic or adoptive links the children's "parents" and relegate the other partners to a "third party," non-parent status. In *Windsor*, the Court emphasized that DOMA "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S. Ct. at 2694. And in *Obergefell* the Court wrote that marriage "affords the permanency and stability important to children's best interests. . . . The marriage laws at issue . . . harm and humiliate the children of same-sex couples." 135 S. Ct. at 2600-01.

Significantly, the Supreme Court featured in its *Obergefell* opinion the plight of Michigan plaintiffs April DeBoer and Jayne Rowse, each of whom had adopted children from the foster care system but were barred under Michigan law from marrying and entering into second parent adoptions for their children. The Court felt particular urgency to address their children's needs, noting that the state's disrespect denied "them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon." *Obergefell*, 135 S. Ct. at 2606. The Court described them as a "family" and condemned Michigan for treating the children "*as if* they had only one parent." *Obergefell*, 135 S. Ct. at 2595 (emphasis added). Yet that is precisely how this Court's obsolete *Janice M.* standard treats Jaxon. As with the children in *Obergefell*, Jaxon was first denied "the recognition, stability, and predictability" that marriage prior to his birth would have ensured his family, and Jaxon

continues to be denied those protections because his relationship with his second parent is disrespected. *Id.* at 2600. Because of *Janice M.*, he must "suffer the stigma of knowing" his family is "somehow lesser," and his primary relationships more precarious. *Id.* His childhood should not pass without the stability and love that come from his relationship with his second parent.

II.

The Timing Of The Parties' Out-Of-State Marriage Soon After The Birth Of Their Son, Far From Being A Reason To Penalize Petitioner And Her Son, Establishes Petitioner's Parental Rights

The court below, as well as Respondent, treat the parties' District of Columbia marriage just months after Jaxon was born as a strike *against* Michelle's claim to standing as a parent, as opposed to the decisive proof it should be of her standing as a parent. *See Conover v. Conover*, 224 Md. App. 366, 369 (2015); Brief of Respondent at 3-4. This Court should not condone a standard that penalizes same-sex couples for not having married outside of Maryland, at any point in time, especially while the State unconstitutionally denied them the right to marry at home. *See Gaines v. Canada*, 305 U.S. 337, 350 (1938) (availability to Black student of law school admission in neighboring state did not mitigate constitutional injury inflicted by Missouri's denial of admission to public university; "no State can be excused from performance [of a constitutional mandate] by what another State may do or fail to do."); *see also Ramey v. Sutton*, 362 P.3d 217, 220-21 (Okla. 2015) ("Oklahoma law deprived this [same-sex couple] from exercising their fundamental right and liberty to marry. . . . 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 standing to seek custody and visitation).

It would be particularly unjust to apply such a standard given the unsettled status of Maryland law on the legal recognition out-of-state marriages would receive for parentage and other purposes throughout the time the parties were a couple. Maryland denied Michelle and Brittany the ability to marry in their home state when they were conceiving Jaxon, living together as a family, and separating as a couple. The District of Columbia did not even permit marriage of same-sex couples until March 2010, just weeks before Jaxon was born. *See* Brief of Petitioner at 4-7. Although the couple married in the District of Columbia soon after Jaxon's April 2010 birth in Maryland, the legal recognition such an out-of-state a marriage would receive and the security it would offer children of the marriage was far from certain. Only in late February 2010 did the Attorney General of Maryland issue a then groundbreaking opinion asserting that, "*[w]hile the matter is not free from all doubt*, in our view, the Court [of Appeals] is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction." *Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland*, 95 Op. Att'y Gen. Md. 3, 54 (2010) (emphasis added). Not until 2011 did the Maryland Department of Health and Mental Hygiene change its procedure to allow a same-sex spouse of the gestational parent to be listed from birth as a parent on the birth certificate of the couple's child. *See* Letter from Geneva G. Sparks, State Registrar and Deputy Director, Vital Statistics Admin., to Birth Registrar (Feb. 10, 2011), *available at*

https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/exec_md_20110210_ss-spouse-instructions-to-facilities.pdf. In 2010 and 2011, Maryland circuit courts issued conflicting rulings on whether out-of-state marriages of same-sex couples could be recognized for purposes of obtaining a Maryland divorce. *See Port*, 426 Md. at 443-44 (discussing conflicting cases). Not until May 2012 did this Court finally settle the question, ruling in a divorce proceeding in *Port* that out-of-state marriages of same-sex couples were entitled under common law comity principles to legal recognition in Maryland. *Id.* at 455.

By that time, the parties in this case had separated. Neither Michelle nor Jaxon should be penalized because Jaxon's parents did not leave their state to marry, without even assurance that their marriage would be recognized in Maryland, until a few months after his birth. Maryland's legal standard for parentage should not demand that Marylanders have accepted the added expense and indignity of being forced to leave their home state to evade its unconstitutional laws and marry outside their community, uncertain about whether their marriage would be given legal respect when they returned home. The State should not penalize lesbian, gay, and bisexual Marylanders because they had not consigned themselves to what for many felt like "a second-tier marriage." *Windsor*, 133 S. Ct. at 2694. "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell*, 135 S. Ct. at 2600.[5]

[5] *Amicus* concurs in and does not reiterate here the arguments made by Petitioner and in other *amicus* briefs that children of same-sex parents likewise should not be penalized as so-called "illegitimate" children because their parents could not or chose not to marry, nor be denied legal protections because their parents did not obtain second-parent

Having denied Jaxon's parents the freedom to marry in their home state while they were a couple planning for and raising him together, Maryland should not now deny him the legal protections that should flow from his parents having left the State to marry in the District of Columbia just months after his birth. As Petitioner's brief argues, Michelle qualifies as a legal parent under E.T. § 1-208(b)(4) and should be accorded standing to pursue visitation with her child.

III.

This Court Should Align Itself With The Many Courts Throughout The Nation That Have Interpreted Statutory And Common Law Standards To Recognize The Parental Rights Of A Same-Sex Partner Who Is The Intended, Functional Second Parent Of The Couple's Child

As many other state appellate courts have done, this Court should apply a standard recognizing the reality of the lives of the Maryland children whose second parents, on whom they rely for emotional and material support, are unrelated to them by genetics or adoption. Such a standard would provide children and their parents the stability and security of a legally-recognized parent-child relationship which, once formed with the consent of both parents and vital to the child's best interests, cannot be disrupted based on one parent's whim. It would bring Maryland into the mainstream, joining the many states that have interpreted parallel statutory schemes or common law standards to afford standing to a parent in Michelle's shoes.

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adoptions. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 220 (1982) ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (law denying right to parental support to children born outside of marriage violated equal protection guarantee).

A. Courts Apply Statutory Provisions Strikingly Similar To Maryland's To Recognize The Parental Rights Of A Child's Second Mother.

In recent years other courts whose states share statutory provisions and public policy very similar to Maryland's have interpreted provisions parallel to E.T. § 1-208(b) to apply to same-sex partners of women who used donor insemination to conceive with the intent that both partners would function and be recognized as full parents. These courts have understood that two women who together bring children into their family should both be regarded as parents, not as one biological or adoptive parent and another mere "third party," expendable from the child's life. Giving their statutes the gender-neutral interpretations Maryland's should be accorded as well, *see* Brief of Petitioner at 27-38, these courts have granted standing to such functional parents, notwithstanding their lack of a genetic or adoptive connection to their children, to seek ongoing custody and visitation in the children's best interests. These courts have rejected claims that a biological or adoptive parent's constitutional rights trump the countervailing rights of the second parent and child to sustain their relationship. Courts have likewise refused to regard the same-sex couples' lack of a recognized marital status at the time the children entered the family as a reason to devalue the parent-child relationships binding the children to both adults.

For example, the Supreme Court of Kansas recently interpreted a provision of Kansas's parentage law very similar to E.T. § 1-208(b)(3), which provides for parentage of a child born to an unmarried couple if the father "[h]as openly and notoriously recognized the child to be his child." The Kansas provision provides for parentage of a

"man" who "notoriously or in writing recognizes the paternity of the child." K.S.A. § 38-1114(a)(4), *transferred to* K.S.A. § 23-2208(a)(4). The Kansas Supreme Court held in *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013), that this provision must be interpreted gender-neutrally to apply to a mother's same-sex partner who, like Michelle, was intended to and did recognize as her own the children conceived by the partners using donor insemination. According to the court,

> We are not presented with a circumstance where an unrelated third party wants to become involved with a child who commenced life with two biological parents. The situation presented here is an agreement between two adults to utilize artificial insemination to bring children into the world to be raised and nurtured by the both of them. The biological mother is not abdicating her duties and responsibilities as a parent; she is sharing them.

Id. at 556. The court further held that denying the family's children the opportunity to have two recognized parents, "the same as children of a traditional marriage, impinges upon the children's constitutional rights." *Id.* at 557.

The contrary interpretation of Maryland's statutory scheme by the lower courts in this case leaves Maryland lagging behind not only Kansas in the respect afforded same-sex parents and their children, but also other states, including New Hampshire, New Mexico, Colorado, and California. Appellate courts in these states have likewise given gender-neutral interpretations to statutes establishing the parentage of a man who "openly" holds out a child as his own, applying their statutes to afford standing to the non-genetic, non-adoptive parent in a same-sex couple over the wishes of the other parent. *See Madelyn B.*, 98 A.3d at 498, 500 (N.H. 2014) (construing provision

establishing parentage of man who "openly holds out" child as his own to permit recognition of same-sex partner's parentage of child conceived using donor insemination; "[t]he policy goals of ensuring legitimacy and support would be thwarted if our interpretation . . . failed to recognize that a child's second parent under that statute can be a woman."); *Chatterjee v. King*, 280 P.3d 283, 286 (N.M. 2012) (provision presuming "man" to be "father of a child if . . . he openly holds out the child as his natural child" applies to woman in same-sex relationship with child's mother; gender-neutral construction recognizing partner's parentage advanced public policy goals and avoided unconstitutional result); *In re A.R.L.*, 318 P.3d 581, 587 (Colo. Ct. App. Div. IV 2013) (construing "holding out" provision gender-neutrally to apply to same-sex partner of child's mother, a construction that avoided equal protection infringement while advancing "compelling interest children have in the love, care, and support of two parents, rather than one, whenever possible. . . . The prerogative of a child to claim the love and support of two parents does not evaporate simply because the parents are the same sex."); *S.Y. v. S.B.*, 201 Cal. App. 4th 1023, 1036 (Ct. App. 2011) (same-sex partner of child's parent, who was intended second parent, could be legally recognized as a parent under "holding out" parentage provision, without violating constitutional rights of other parent). These and other states' courts construe state statutes equitably to afford standing to same-sex partners of a child's legal parent, in recognition of the reality that many children are parented by two people of the same sex and that these children deserve security and protections for their parent-child relationships even after the adults separate.[6]

[6] *See, e.g.*, *Hunter v. Rose*, 975 N.E.2d 857 (Mass. 2012); *C.E.W. v. D.E.W.*, 845 A.2d

This Court should construe E.T. § 1-208(b)'s parentage provisions, as have courts from New Hampshire to Kansas to California, to afford standing to petitioners like Michelle seeking to enforce their parental rights to the children they have reared with their same-sex partners.

B. Numerous Courts Around The Nation Exercise Equitable, Common Law Powers To Accord Standing To Non-Genetic, Non-Adoptive *De Facto* Parents To Seek Custody And Visitation.

Regardless of whether this Court concludes (as it should) that E.T. § 1-208(b) settles the question in favor of Petitioner's parentage and standing, it can and should still exercise its common law, equitable powers to deem Petitioner a parent with standing to pursue visitation. Many other courts around the nation, responding to the needs of children whose families do not fit "traditional" molds, have exercised their *parens patriae* responsibility for the best interests of children in need of a judicial remedy and have developed workable standards to determine parentage. Using rubrics like "*de facto* parent," "*in loco parentis*," and "psychological parent," many states' courts have granted standing to a person unrelated to a child by genetics, adoption, or marriage who has nonetheless formed a bonded parent-child relationship with the consent of the child's legal parent. *See, e.g.*, *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. Div. V 2004); *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010); *A.B. v. S.B.*, 837 N.E.2d 965 (Ind. 2005); *C.E.W.*, 845 A.2d 1146 (Me. 2004);

1146 (Me. 2004); *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007); *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009); *Shineovich v. Shineovich*, 214 P.3d 29 (Or. Ct. App. 2009); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); *Latham v. Schwerdtfeger*, 802 N.W.2d 66 (Neb. 2011); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Ramey*, 362 P.3d 217 (Okla. 2015); *T.B.*, 786 A.2d 913 (Pa. 2001); *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. Ct. App. 2006); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *Matter of Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). In the words of the Washington Supreme Court, "Our state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations. . . . We cannot read the legislature's pronouncements on this subject to preclude any potential redress to" the parent and child. *L.B.*, 122 P.3d at 176.

One of the leading particularized standards for determining parental status in this context was first adopted by the Wisconsin Supreme Court over twenty years ago in *H.S.H.-K.*, 533 N.W.2d 419.[7] That test has since been praised and followed by a number of other jurisdictions. *See, e.g.*, *L.B.*, 122 P.3d at 176 (affirming that "[r]eason and common sense support recognizing the existence of *de facto* parents," using *H.S.H.-K.* test); *Rubano*, 759 A.2d at 974 (citing elements of test as "useful criteria"); *V.C.*, 748 A.2d at 551 (praising test as "most thoughtful and inclusive definition of *de facto*

[7] Notably, the Wisconsin court's exercise of its common law powers in *H.S.H.-K.* came after a precedent just four years earlier had declined to allow non-biological parental standing and the legislature had taken no intervening steps to amend the statute. *See H.S.H.-K.*, 533 N.W.2d at 430-31, 434 (overruling *In re Interest of Z.J.H.*, 471 N.W.2d 202 (Wis. 1991), which had held that courts lack equitable powers to grant visitation in circumstances not specified in state visitation statute).

parenthood"); *Middleton*, 633 S.E.2d at 168 (following test as "good framework" for assessing parenthood). This standard was adopted—wisely—in *S.F. v. M.D.*, 132 Md. App. 99 (2000), approved by the *Janice M.* dissent, 404 Md. at 696-99 (Raker, J., dissenting), but unfortunately abandoned by the *Janice M.* majority. That decision should be reconsidered now.

The *H.S.H.-K.* test initially requires a person who is not a biological or adoptive parent but who is asserting parental status to demonstrate four factors establishing the formation of parent-child bonds. Specifically, the putative parent must demonstrate:

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

533 N.W.2d at 435-36 (footnote omitted).

Only if an adult can satisfy all these elements does the court then turn to the final requirement: that an ongoing relationship between the parent and child is in the best interests of the child. *See id.* at 421. The test ultimately centers on the welfare of the child. It also gives a biological parent ample opportunity to defeat a claim, even by a person who can establish they are a parent, if an ongoing relationship would not be in the child's best interests.

All four factors work to screen out the "third-parties" of concern to the Court in *Janice M.*, including a person who may have had a close relationship with a child, such as a grandparent, babysitter, or parent's "significant other," but who was not fostered as a second parent by the child's biological parent. *See, e.g.*, *L.B.*, 122 P.3d at 179; *Rubano*, 759 A.2d at 974; *V.C.*, 748 A.2d at 552; *E.L.M.C.*, 100 P.3d at 560. But most significantly, the test estops a parent who has fostered her child's formation of a parent-child relationship from unilaterally severing those bonds if that would not be in her child's best interests.

Moreover, the modern trend, which should be followed in Maryland, is to recognize this second parent fully as a parent, with all the rights and obligations of a genetic parent. *See, e.g.*, *C.E.W.*, 845 A.2d 1146 ¶ 15; *T.B.*, 786 A.2d at 916-17; *Rubano*, 759 A.2d at 962; *L.B.*, 122 P.3d at 708; *Ramey*, 362 P.3d at 221. This approach best accords with the principles underlying the CMPA, *Obergefell*, and *Windsor* recognizing fully the families formed by same-sex couples and the parent-child bonds that do not hinge on a genetic or adoptive relationship.

The Wisconsin test now has a lengthy track record putting to rest any concerns that it is unduly difficult to apply or injurious to children and their already legally recognized parents. Wisconsin courts have been using the *H.S.H.-K.* test for more than two decades. Yet, according to a family law scholar who has studied the issue in depth, Wisconsin case law over the decades demonstrates that, "far from instilling confusion and years of court proceedings," the test has functioned well and the state's courts "seem to have had little difficulty applying" it. Carlos A. Ball, *The New 'Illegitimacy':*

Revisiting Why Parentage Should Not Depend on Marriage: Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty, 20 Am. U. J. Gender Soc. Pol'y & L. 623, 656 (2012); *see also id.* at 654 (likewise noting that analysis of New Jersey appellate opinions since that state's 2000 adoption of the Wisconsin test similarly "suggests that New Jersey courts have not experienced undue difficulty in determining whether a particular petitioner satisfies the functional parent criteria").

Courts around the country have also repeatedly held that this and similar standards strike an appropriate balance between the constitutional rights of the genetic parent and the countervailing rights of the *de facto* parent and child. These courts have concluded that *Troxel v. Granville*, 530 U.S. 57 (2000), is not a bar to recognizing the parental rights of a person who, like Michelle, functioned as a child's parent with the full consent and fostering of the child's legal parent. These decisions have concluded that courts pay due deference to the judgment of a parent who has already acquiesced in the formation of the parent-child relationship when a *de facto* parent is accorded standing to demonstrate that an ongoing relationship serves the child's best interests.[8]

[8] *See, e.g.*, *L.B.*, 122 P.3d at 178 (rejecting argument that *Troxel* bars recognition of *de facto* parents because "*Troxel* did not address the issue of state law determinations of 'parents' and 'families'"); *Rubano*, 759 A.2d at 967, 972-76 (distinguishing petition of same-sex partner *de facto* parent from *Troxel* because of parent-child relationship); *Robinson v. Ford-Robinson*, 208 S.W.3d 140, 143-44 (Ark. 2005) (rejecting argument that *Troxel* bars standing of non-biological, non-adoptive parent; "critical to our review in this case, the party awarded visitation . . . was found by the circuit court to stand *in loco parentis* to the child"); *T.B.*, 786 A.2d at 919-20; *Middleton*, 633 S.E.2d at 171-72.

These cases have not demanded the exceedingly "exceptional" circumstances *Janice M.* has been interpreted to require in order for a *de facto* parent to maintain parent-child bonds in the best interests of her child. As the Oklahoma Supreme Court recently asserted, a second intended same-sex parent "is not a mere 'third party' like a nanny, friend or relative." *Ramey*, 362 P.3d at 221. Instead, the Oklahoma court and other states' courts give appropriate recognition to the families formed by same-sex couples and extend protections to children who would otherwise face the devastating loss of their second parent. *Amicus* urges this Court to do no less.

CONCLUSION

For the foregoing reasons, and those asserted by Petitioner, the decision of the Court of Special Appeals should be reversed.

Respectfully submitted,

Susan L. Sommer*
Omar Gonzalez-Pagan*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005-3919
*Motion for Special Admission pending

Susan C. Silber
Kenneth Sigman
SILBER, PERLMAN, SIGMAN & TILEV, P.A.
6930 Carroll Avenue, Suite 610
Takoma Park, MD 20912-4437

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