**IN THE SUPREME COURT OF MISSISSIPPI**

NO. 2016-CA-01504

CHRISTINA STRICKLAND APPELLANT

v.

KIMBERLY JAYROE STRICKLAND DAY APPELLEE

---

ON APPEAL FROM THE

CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

---

# BRIEF OF APPELLANT CHRISTINA STRICKLAND

---

Dianne Herman Ellis
Miss. Bar No. 102893
Ellis Law Firm, LLC
1145 Robinson Ave.
Ocean Springs, MS 39564
(228) 215-0037
dianne@ellislawfirmms.com

Elizabeth Littrell
Georgia Bar No. 454959*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
Southern Regional Office
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
(404) 897-1880
blittrell@lambdalegal.org

Attorneys for Appellant.

**Admitted Pro Hac Vice*

## CERTIFICATE OF INTERESTED PERSONS

*Christina Strickland v. Kimberly Jayroe Strickland Day*

NO. 2016-CA-01504

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Christina Strickland, Appellant

Kimberly Jayroe Strickland Day, Appellee

Thomas Day, Litigant

Prentiss M. Grant
Attorney for Appellee
P.O. Box 5459
Brandon, Mississippi 39047

Hon. John Grant
Presiding Chancellor
P.O. Box 1437
Brandon, Mississippi 39043

Dianne Herman Ellis
ELLIS LAW FIRM, PLLC
1145 Robinson Avenue
Ocean Springs, MS 39564

Beth Littrell
Admitted *Pro Hac Vice* on behalf of Appellant
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta GA 30308

This, the 1st day of June, 2017,

/s *Dianne Ellis*
Attorney of record for Christina Strickland

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes**

**Other Authorities**

## STATEMENT OF ISSUES

1. Whether the trial court erred in holding that a child born to a married couple who achieved pregnancy via medically assisted reproductive technology ("A.R.T.") with sperm from an anonymous donor may be denied the benefit and protection of a parental relationship with both spouses.

    a. *Whether children born to married parents who give birth to a child via A.R.T. with sperm from an anonymous donor are entitled to the marital presumption that both spouses are their legal parents*.

    b. *Whether the Supreme Court's decision in* Obergefell v. Hodges *requires Mississippi to apply laws relating to the marital presumption of parentage in a gender-neutral manner so as to apply equally to married same-sex couples.*

    c. *Whether the doctrine of equitable estoppel precludes a parent from seeking to disestablish her spouse's parentage of the couple's marital child based solely on the absence of a genetic relationship, when the child was born as a result of anonymous donor insemination, to which both spouses consented.*

    d. *Whether the trial court erred in ruling that a man who contributes sperm anonymously for use in A.R.T., whose identity is not and cannot be known, constitutes the legal parent of a child born to a married woman and therefore prevents recognition of the spouse as a parent*.

    e. *Whether the trial court committed reversible error by failing to apply precedent that recognizes the parental rights of a spouse to a child born during the marriage, reared as her own from birth, with an attached parent-child relationship and where no putative father exists or seeks to displace her parental rights.*

2. Whether the trial court erred in failing to recognize the constitutionally protected liberty interests of Christina and Z.S. in their parent-child relationship that may not be disturbed absent a compelling governmental interest.

3. Whether, consistent with the U.S. Constitution, the marital presumption may denied only to same-sex couples.

## STATEMENT OF ASSIGNMENT

This case concerns whether children conceived via A.R.T are entitled to the marital presumption of parentage, which provides them with the protection and security of two legal parents from birth and whether married same-sex couples are entitled to the same protections and rules of law as apply to different-sex married couples with respect to parental rights. The court's decision below is in conflict with the following cases: *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *J.P.M. v. T.D.M.*, 932 So. 2d 760, 768, 770 (Miss. 2006); *Griffith v. Pell*, 881 So. 2d 184 (Miss. 2004); *Wells v. Wells*, 35 So. 3d 1250 (Miss. Ct. App. 2010). This case should remain in the Supreme Court because it involves major questions of first impression, fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by the Supreme Court, and substantial constitutional questions concerning the validity and application of a statute and court rules.

## STATEMENT OF THE CASE

Appellant, Christina, and Appellee, Kimberly, entered a relationship 18 years ago, at a time when same-sex couples were not permitted to marry anywhere in the country. They decided to create a family together and adopted a child, E.J. Because same-sex couples were not permitted to adopt jointly at that time in Mississippi, Kimberly alone served as E.J.'s adoptive parent, but both women cared for him equally as his parents. After same-sex couples were permitted to marry, and the couple legally wed in Massachusetts, they brought their second child into the family through medically assisted reproductive technology ("A.R.T."). The women decided that Kimberly would carry the pregnancy, and they together selected an anonymous sperm donor. Z.S. was born in 2010 and raised by the couple as equal co-parents.

The couple eventually separated and initiated divorce proceedings. Following the separation of the parties, and until such time as Christina served Kimberly with divorce pleadings, the parties

shared joint physical custody and Christina paid child support to Kimberly. Christina appeals the lower court's ruling entered in the divorce.

In the Final Order of Divorce, the court found that Christina had formed a parental relationship with both children, and ordered visitation with them both. However, the trial court ruled that Christina was not a legal parent to either child. Christina vigorously disputes this conclusion. In her eyes, and in her children's eyes, she is their parent. However, as a result of the web of discriminatory laws that constrained when Christina and Kimberly could marry, and how the couple could form a family, Mississippi law firmly supports only Christina's claim to parentage of Z.S. Accordingly, in this appeal, Christina challenges only the trial court's conclusion that she is not a legal parent to Z.S., the child who was born through anonymous donor insemination after the couple's legal marriage. Legal parentage is vital to protect the parent-child relationship in a range of ways including, for example, preventing her child from being adopted by Kimberly's future spouse, leaving her child ineligible for child welfare benefits in the event of her death or disability, and ensuring that Z.S. has a legal parent in the event of Kimberly's death or disability.

The Parties first became romantically involved in 1999. T:10. Prior to the availability of marriage for same-sex couples, the parties intentionally sought to create a family and embarked on a search to adopt a child. T:9. Finding E.J., who was born on September 14, 2000, on an adoption website, the couple jointly flew to meet with the family caring for him then flew E.J. to Mississippi, and thereafter paid for the adoption, which was finalized in 2007. *Id.*; T:28-29. Because Mississippi law at that time precluded a same-sex couple from adopting jointly, T:10, Kimberly alone served as the adoptive parent. *Id.* E.J. was brought into the parties' home in 2006 when he was six years old. T:10.

Kimberly and Christina married each other in Massachusetts on November 21, 2009. CR:32. Kimberly took her wife's last name. CR:71. In 2010, the couple decided to try to bring a child into their family through the use of reproductive technology. T:16. As with E.J., they embarked on this journey together. *Id*. Both women were tested for fertility. T:29. The fertility clinic notes that they "discussed [Christina] being the pregnant target, but she is 36 y.o." R: 56. The couple decided that Kimberly would serve as the gestational mother and that they would first attempt *in vitro* fertilization with Kimberly's ova. T:29. As a couple, they chose the sperm donor after spending "countless hours" looking. *Id*. They chose sperm from a Maryland sperm bank. T:49. The donor is known to the couple only as a number, T:22, identified on paperwork as Donor No. 2687. R:84. The agreement signed by Kimberly set out that she "will never seek to identify the donor, nor shall the donor be advised of my identity." R:100, 210. Kimberly was recognized by the fertility clinic as a married woman and Christina was recognized as her spouse. R:141. Both women signed an agreement, titled "Acknowledgement of Informed and Consent and Authorization," setting out that they were "voluntarily undergoing, individually and as a couple, treatment…in order to conceive a child through this treatment and that we will acknowledge our natural parentage of any child born to us through this technique." R:99. Christina was with Kimberly every step of the way during the conception and pregnancy; she traveled to the Louisiana fertility clinic with her spouse "a couple of times a week," was present for the retrieval of her wife's eggs and for the implantation of the fertilized embryos. T:16. After her wife became pregnant on the first attempt, Christina went to every doctor's appointment, and was present for sonograms, and their child's birth. T:16-17.

Christina and Kimberly initially sought to travel to Massachusetts for Z.S.'s birth in order to both be listed on the birth certificate. T:31. However, Kimberly was hospitalized and had to have an emergency cesarean section in a Mississippi hospital six weeks prior to her due date. *Id*.

Christina was the first to hold Z.S. after his birth on April 12, 2011. *Id*. Although Christina sought to be listed on Z.S.'s birth certificate, Mississippi did not recognize their marital relationship and would place only her wife's name on the birth certificate. T:18-19. Z.S. was given Christina's last name. *Id*. No father is listed. T:18. The women sent out birth announcements that read: "Hatched by Two Chicks. Chris and Kimberly proudly announce the birth of their son [Z.S.]" R:237.

Together as a family unit, Christina and Kimberly raised their two children as equal co-parents. T:11, 19-21, 48. For the first year of Z.S's life, Christina was the primary care-taker and Kimberly worked full-time. T:48. The children share a close child-parent bond with Christina, call her their "mom," T:11 and call her father their grandfather. T:65. The couple separated January 23, 2013, prior to the Supreme Court's decision in *Obergefell* requiring states to recognize the marriages of same-sex couples and to allow same-sex couples to marry. Prior to their separation, the parties planned that Christina would adopt E.J. when they were able. T:23. However, Mississippi refused to recognize their marriage and therefore would not allow Christina to adopt him as a stepparent, or otherwise. MISS. CONST. art. 14, § 263A; MISS. CODE ANN. § 93-17-3. Christina continued to visit with both of her children following the separation and until Kimberly unilaterally withheld the children from her in August of 2015. T: 14,55. Christina paid child support to Kimberly, paid medical expenses for the children, and paid daycare expenses for Z. Kimberly accepted this support. T: 12, R:123-135.

Kimberly married a second spouse on August 13, 2015, even though she was still married to Christina and had not yet filed for divorce. CR:6. Christina filed for divorce in Chancery Court of Harrison County on August 31, 2015. On November 16, 2015, Kimberly filed a Motion for Declaratory Judgment and Complaint for Divorce in Chancery Court of Rankin County. She sought a declaration that her second marriage was valid and to dissolve her first marriage. CR:4-

10. Christina filed her Answer and Counterclaim for Divorce December 6, 2015, seeking legal and physical custody of the children, with liberal visitation awarded to Kimberly, and to be named a parent of Z.S. CR:28. Christina filed a Motion to Consolidate the Harrison County and Rankin County matters on December 26, 2015. CR:60-63. An Order was entered May 17, 2016 granting the motion to consolidate and declaring Kimberly's marriage to Christina valid, and Kimberly's subsequent marriage void *ab initio*. CR:109-111. Kimberly and Christina filed a Consent and Stipulation on September 27, 2016 in which they agreed that one child, Z.S., was born during their marriage and that that they would jointly pay all school expenses for Z.S. and that Kimberly would retain physical and legal custody of E.J. CR:117. Kimberly and Christina jointly sought the court's determination as to custody, visitation and child support of Z.S., child support and visitation of E.J., and Christina's parentage of Z.S. CR:116-121. A hearing was held September 27, 2016. The Final Judgment of Divorce was entered October 18, 2016. In relevant part, the lower court ordered Christina to pay child support for both children, CR:131-132. The court also:

1) Held that Christina acted *in loco parentis* to E.J. and awarded her visitation rights; CR:127.
2) Held that Z.S. was born during a valid marriage; CR:127; T:79.
3) Held that Z.S. "was very much cared for by both parties"; CR:127; T:79.
4) Created a distinction between children born "during" a marriage and children born "of" a marriage, citing no authority for such a distinction, and held that Z.S. is "a child born during the marriage, not of the marriage," "wherein both parties are not considered parents." CR:127; T:80.
5) Held that the anonymous sperm donor constituted "an absent father." CR:128, T:81. Conceding that he "may never be known, and probably won't be, [] he is still a father,"

the court concluded, that the donor's legal parentage precluded a determination that Christina was Z.S.'s legal parent. CR:128, T:81.

6) Held that Christina acted *in loco parentis* to Z.S., and awarded her visitation rights. CR:128; T:82.

The court granted Christina's request to enjoin Kimberly from permitting another adult to adopt Z.S. pending the resolution of this appeal. T:91. Christina filed her timely notice of appeal the following day, October 19, 2016. CR:4.

## SUMMARY OF THE ARGUMENT

This case involves a same-sex married couple, but many of the issues presented apply to all married couples who turn to Assisted Reproductive Technology ("A.R.T.") to bring a child into their family. The lower court ruled that in the clinical setting of a fertility clinic the use of anonymous donor sperm to help a couple achieve pregnancy renders the resulting children "illegitimate," as having been born "out of wedlock" because they were conceived "by a man not [the wife's] husband," MISS. CODE ANN. § 93-9-7, even where, as here: 1) the sperm donor's identity is unknown and unknowable; 2) the couple signed express consents acknowledging the parentage of both spouses prior to the insemination; and 3) the birth mother agreed in writing never to seek the identity of the sperm donor. Affirmance would unnecessarily cloud the legal parentage of thousands of children born as a result of A.R.T. in this state, calling into question whether they now have only one legal parent, and requiring their families to shoulder the expense and intrusion of adopting the child they have deliberately brought into their family and raised since birth. The effect of affirmance also would impose parentage, and all of its responsibilities, on anonymous sperm donors who contributed sperm to assist families in achieving pregnancy only on condition that the donor not be identified. Further, as a practical matter, if the lower court's decision is affirmed, couples who use A.R.T. will not be able to

perform an adoption to secure the parent-child relationship of the birth mother's spouse until the couple somehow effectuates notice on a man who is only a number in a medical file, an anonymous sperm donor, in order to "terminate" his parental rights so that the child could be adopted as a stepchild. For couples whose relationships have ended, their legal parent-child relationship would also end because they would be barred from adopting unless they re-marry the birth mother. MISS. CODE ANN. § 93-17-13(2)(d). Fortunately, no such harsh and unjust result is warranted.

The ruling below is contrary to the law in Mississippi, which does not recognize as a legal father a man who contributed sperm anonymously for use in a fertility clinic, was not married to the mother at the time of the child's birth, does not appear on the birth certificate or file an affidavit acknowledging paternity, and has not been adjudicated a parent. It is also contrary to well-established Supreme Court and Mississippi precedent that does not attach parental rights based only on a biological connection, and certainly not when the putative father is an anonymous donor. Instead, Mississippi recognizes as a parent the spouse of the woman who gives birth. This marital presumption of parentage is a right, a benefit and an obligation of marriage. It attaches at birth to provide a child with two legal parents. Although the presumption is rebuttable, Mississippi statutory law bars a husband from disestablishing his paternity when his wife achieves pregnancy as a result of A.R.T. Further, where a married couple decides together to bring a child into their family through A.R.T., equitable estoppel applies to prevent the birth mother from rebutting the presumption based solely on the lack of a biological connection between her spouse and the child.

Following *Obergefell v. Hodges*, these principles must be applied to married same-sex couples in order to recognize their marriages "on the same terms and conditions to opposite-sex couples," 135 S. Ct. 2584, 2605 (2015). Dual parentage of marital children is an established

feature of marriage, *see id.*, 135 S. Ct. at 2601 ("aspects of marital status include . . .birth . . . certificates"), and consequently courts must interpret "paternity' to include "parentage" and "husband" to include "spouse." Every federal court that has considered this issue has applied the marital presumption of parentage to the marital children of same-sex spouses. Failure to do so would infringe on same-sex couples' fundamental right to marry and discriminate against same-sex couples and their children in violation of both the Due Process and Equal Protection clauses. Failure to apply the marital presumption equally to different-sex and same-sex couples whenever a child is born as a result of A.R.T. likewise would violate parents' and children's fundamental liberty interests in family association and integrity, which do not depend on whether they share a biological connection.

Although the lower court found Christina a person standing *in loco parentis*, this inferior and vulnerable legal position is inadequate to protect the parent-child relationship, and an inferior status to that which this Court provided in *J.P.M. v. T.D.M.*, 932 So. 2d 760 (Miss. 2006) and *Griffith v. Pell*, 881 So. 2d 184 (Miss. 2004) to the married men whose parental status was recognized notwithstanding a lack of genetic relationship to their marital children. The need for this Court to avoid severing Christina's parental rights is obvious from the ruling below, where Kimberly's intention to allow her child to be adopted by another adult was raised. T:91.

The lower court should have recognized that Christina is a parent of the child born during her marriage. The court below had the constitutional and statutory obligation, and the equitable authority, to hold that Christina is Z.S.'s parent. Reversal is warranted.

## ARGUMENT

### I. The Trial Court Erred in Ruling That a Child Conceived Via Assisted Reproduction With Anonymous Donor Sperm May Be Denied the Benefits of Two Legal Parents Despite Being Born Into a Marriage.

A chancellor's findings will not be disturbed on review unless he abused his discretion, was manifestly wrong, or made a finding which was clearly erroneous. *Bank of Miss. v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992). A chancellor's conclusions of law are reviewed *de novo. Consolidated Pipe & Supply Co. v. Colter*, 735 So. 2d 958, 961 (Miss. 1999). The trial court's ruling that children born to married couples who achieve pregnancy via assisted reproduction with anonymous donor sperm are not children "of the marriage" and therefore not entitled to the benefits and protections of two legal parents was reversible error. The marital presumption of parentage that provides a child born into a marriage with a parent-child relationship to both spouses ("marital presumption") attaches at birth, *Boone v. State*, 51 So. 2d 473, 475 (Miss. 1951), applies to all children born to married parents, *see* MISS. CODE ANN. § 41-57-14(1), including children whose married parents achieved pregnancy via A.R.T., MISS. CODE ANN. § 93-9-10(2)(d), and those born to married same-sex parents. *Obergefell*, 135 S. Ct. 2584. An anonymous sperm donor is not an "absent father" whose rights prevent a court from applying the marital presumption. *J.P.M.*, 932 So. 2d at 768, 770. Although the marital presumption can be overcome in an appropriate proceeding by proof that the spouse is not biologically related to the child, in the context of a child born during the marriage via A.R.T. with anonymous donor sperm and the consent of both spouses, disestablishing the spouse as a parent is contrary to statutory authority precedent, justice and the welfare of children. *See* Sec II, *infra.*

### A. The presumption of parentage attaches at birth to all children born to married parents.

The presumption that a child born in wedlock is the legal child of both parents is one of the most robust presumptions in the law. *See, e.g.*, *Madden v. Madden*, 338 So. 2d 1000 (Miss. 1976); *Karenina v. Presley*, 526 So. 2d 518, 523 (Miss. 1988) ("The presumption of legitimacy is one of the strongest known to our law."). Application of the marital presumption to children born to married parents has long been the law in Mississippi. As a result, the birth certificate statute *requires* the State to issue a birth certificate listing the husband as the child's father without regard to whether the child and husband share a biological link. MISS. CODE ANN. § 41-57-14. Because the presumption "is primarily for the benefit of the child," *Madden*, 338 So. 2d at 1002, exceptions to its application require proof beyond a reasonable doubt and are narrowly applied. The mother, father, child or any public authority chargeable by law with the support of the child may seek a "determination" or *establishment* of paternity. MISS. CODE ANN. § 93-9-9. However, only certain parties, or the court in certain circumstances, may raise challenges to disestablish paternity. MISS. CODE ANN. § 93-9-21. For example, there is no statutory mechanism whereby any party, other than "a legal father," may order genetic testing in order to disestablish paternity. MISS. CODE ANN. § 93-9-10 ("Disestablishment Statute"); MISS. CODE ANN. § 93-9-1 *et. seq.* ("Mississippi Uniform Law on Paternity"). Where paternity has been established, a court is limited by the Disestablishment Statute as to the circumstances that allow it to order blood tests to show that a lack of a genetic relationship relieves a parent of support obligations. MISS. CODE ANN. § 93-9-21. And the father cannot seek to disestablish parentage when the child was born via A.R.T. during a marriage to the child's mother. MISS. CODE ANN § 93-9-10(2)(d).

The marital presumption "obtains from the birth of a child during marriage, subject to rebuttal." *Boone*, 51 So. 2d at 475). Consideration of whether evidence effectively rebuts the

presumption necessarily recognizes that the presumption attaches from the moment of the child's birth. *See, e.g., W.H.W. v. J.J. ex rel. Povall*, 735 So. 2d 990, 992 (Miss. 1999) (recognizing the putative father "has the legal right to attempt to *overcome* the rebuttable presumption" that the ex-husband is the child's legal father) (citing *Ivy v. Harrington*, 644 So. 2d 1218, 1221 (Miss. 1994)) (emphasis added); *see also* MISS. CODE ANN. § 41-57-14(1) (requiring spouse of the mother to be listed on the birth certificate of child born during the marriage). Once the parentage of a spouse attaches to a child born during the marriage, it must be disestablished in an appropriate proceeding.

### B. In order to comply with the U.S. Constitution, application of law relating to parental rights established by marriage must be applied in a gender-neutral manner and equally to same-sex couples.

In *Obergefell*, the Supreme Court ruled that states must recognize married same-sex couples "on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605; *see also Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015) (requiring Mississippi to recognize marriages of same-sex couples). As set out below, not only was the question of whether same-sex married couples are entitled to the marital presumption under state laws squarely decided in *Obergefell*, the Supreme Court relied, in part, on its previous decisions in *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) and *Loving v. Virginia*, 388 U.S. 1, 12 (1967) to find that the right to marry is fundamental, and identified liberty-based, constitutionally protected rights that are related to the right to marry, including the right to procreate, raise children and make decisions relating to family relationships. 135 S. Ct. at 2598-2600.

The requirement for states to recognize the joint parentage of same-sex spouses of marital children as a benefit and obligation of marriage was squarely decided in *Henry v. Himes*, one of the consolidated cases resolved in *Obergerfell*. *See Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio), *rev'd. sub nom*. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom*.

*Obergefell v. Hodges*, 135 S. Ct. 1039 (Jan. 16, 2015), *rev'd.* 135 S. Ct. 2584 (2015). In *Henry*, three of the four married same-sex couple plaintiffs who challenged Ohio's refusal to recognize their marriage and extend them marriage rights explicitly sought application of the marital presumption of parentage in order to be listed on their children's birth certificates. 14 F. Supp. 3d at 1041 (listing as harms alleged by three plaintiff couples that "[w]ithout action by this Court, Defendants Jones and Himes will list only one of these Plaintiffs as their [children]'s parent on [the] birth certificate"), *id*. at 1062 (striking down marriage ban and ordering that "Defendants shall issue birth certificates to Plaintiffs for their children listing both same-sex parents."). In reversing the Sixth Circuit's decision, the Supreme Court resolved the question before this Court, and the couples were permitted to keep the two-parent birth certificates for their marital children granted to them by the district court in reliance on their marriage. *See also Marie v. Mosier*, 196 F. Supp. 3d 1202, 1219 (D. Kan., 2016) ("*Obergefell* certainly recognized the importance of parental rights for same-sex couples."); *Henderson v. Adams*, 209 F. Supp. 3d 1059, 1076 (S.D. Ind. June 30, 2016) (same), *amended by* No. 1:15-cv-00220, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016) ("When the State Defendant created and utilized the Indiana Birth Worksheet, which asks 'are you married to the father of your child,' the State created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father. Because of *Baskin* and *Obergefell*, this benefit—which is directly tied to marriage—must now be afforded to women married to women.").

Courts construing paternity statutes in the wake of marriage equality recognize their obligation to apply the plain language of a statute when it is clear and unambiguous and to "also 'attempt to construe and apply statutes in a manner that would render them constitutional.'" *McLaughlin v. Jones*, 382 P.3d 118, 121-22 (Ariz. Ct. App. 2016) ("We disagree … that it would

be impossible and absurd to apply [Marital Presumption Statute] in a gender-neutral manner to give rise to presumptive parenthood in Suzan. Indeed, *Obergefell* mandates that we do so and the plain language of the statute, as well as the purpose and policy behind it, are not in conflict with that application."); *Richmond v. City of Corinth*, 816 So. 2d 373, 375 (Miss. 2002) (ruling that wherever possible courts should construe statutes so as to render them constitutional rather than unconstitutional) (quoting *Jones v. State*, 710 So.2d 870, 877 (Miss.1998)). The analysis applied and conclusion reached in *McLaughlin* is particularly instructive here:

> Under [Marital Presumption Statue], the male spouse of a woman who delivers a child is the presumptive parent, and, therefore, a "legal parent" … If the female spouse of the birth mother of a child born to a same-sex couple is not afforded the same presumption of parenthood as a husband in a heterosexual marriage, then the same-sex couple is effectively deprived of "civil marriage on the same terms and conditions as opposite-sex couples," particularly in terms of "safeguard[ing] children and families." We therefore must reject Kimberly's rigid interpretation of [Marital Presumption Statue]… and given the language and purpose of [Marital Presumption Statue], we find it accommodates a gender-neutral application and *Obergefell* requires us to apply it in this manner.

382 P.3d at 122 (quoting *Obergefell*, 135 S. Ct. at 2600, 2605).

Following *Obergefell*, Mississippi courts must interpret laws regarding marriage rights in a gender-neutral manner,[1] including laws establishing the parentage of marital children in order to avoid rendering them unconstitutional. In nearly every instance, the court need only interpret "paternity" to include "parentage" and "husband" or "wife" to include "spouse." In particular, here, MISS. CODE ANN. § 41-57-14(1), setting out that "[i]f the mother was married at the time of

[1] Gender-neutral application of existing statutes following *Obergefell* means that, for example, where the law that allows "husbands and wives" to sue each other, MISS. CODE ANN. § 93-3-3, courts must interpreted it allow "husbands and *spouses*" and "*spouses* and wives" to sue each other; where "head of household" is defined as "[a] husband living apart from his wife," MISS. CODE ANN. § 27-33-13(c), in application to same-sex couples it must be interpreted to include a husband living apart from his *spouse*; and where the law obligates a "husband" for the debts of his "wife," MISS. CODE ANN. § 93-3-13, the law's gender-specific language does not exempt married same-sex couples from spousal obligations but must be interpreted to ensure that a spouse is the debtor to his/her *spouse*.

either conception or birth, or at any time between conception and birth, the name of the husband shall be entered on the certificate of birth as the father of the child," must be applied to a married female couple so that where the mother was "married at the time of either conception or birth, or at any time between conception and birth" the name of the spouse shall be entered as a parent on the birth certificate. Indeed, every federal court that has applied *Obergefell* to determine whether the female spouse of a married woman who gives birth as a result of A.R.T. must be recognized as a parent on the birth certificate, and for similar purposes, has ruled that she must. *See Torres v. Seemeyer*, 207 F. Supp. 3d 905, 911 (W.D. Wis. 2016) (applying gender-neutral interpretation of statute requiring "husband" to be listed on birth certificates to same-sex couples); *Carson v. Heigel*, No. 3:16-0045, 2017 WL 624803, at *1 (D. S.C. Feb. 15, 2017) (same); *Henderson*, 2016 WL 3548645, at *11 (same). *And see McLaughlin, supra* (state court interpreted federal law to require gender neutral application of marital presumption statute).

State courts applying state constitutional provisions to married same-sex couples have likewise held that rules governing the parentage of marital children must be applied in a gender neutral manner to recognize as a parent the female spouses of wives who give birth. *See Gartner v. Iowa Dept. of Public Health*, 830 N.W.2d 335, 354 (Iowa 2013) (ruling that "application [of statute] allowing for only 'the name of the husband' to appear on the birth certificate is unconstitutional as applied to a married lesbian couple who has a child born to them during their marriage."); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006) (relying on marital presumption cases to hold same-sex couple in legal union both parents). *But see Smith v. Pavan*, 505 S.W.3d 169, 178, (Ark. 2016) *petition for cert. filed*. 2016 Ark. 437 (Feb. 13, 2017) (No. 16-992) (where statute specifically provided for exemptions to listing husband on birth certificate where lack of biology is alleged by wife); *contra id*. at 190 (Danielson, J. dissenting) ("[T]here can be no reasonable dispute that the inclusion of a parent's name on a child's birth certificate is

a benefit associated with and flowing from marriage. *Obergefell* requires that this benefit be accorded to same-sex spouses and opposite-sex spouses with equal force.")

In addition to reliance on substantive Due Process, the Supreme Court also invoked the Equal Protection Clause in striking down marriage laws that discriminated against same-sex couples. *Obergefell*, 135 S. Ct. at 2602 ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."). The Equal Protection Clause provides that "[n]o State … shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Equal protection ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of Cleburne, Tex. v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."). Failure to apply the marital presumption only to married same-sex couples but not to different-sex couples who conceive in the same way is a classification based on sex and sexual orientation. Such a classification is not justified by a legitimate governmental interest. *See* Sec. IV, *infra*.

As with statutory law, common law rules that identify a derivative right of marriage must be applied in a gender-neutral manner, including the well-settled rule "that children born within wedlock are legally presumed to be the natural children of the husband of the mother." *Stone v. Stone*, 210 So. 2d 672 (Miss. 1968). Mississippi requires that "[w]ords in the masculine gender shall embrace a female as well as a male, unless a contrary intention may be manifest." MISS. CODE ANN. § 1-3-17. Post *Obergefell*, no such contrary intention is permissible in the context of marriage rights and obligations. Thus, in order to comply with the U.S. Constitution, when applying this rule to a married female couple, children born within wedlock are legally presumed to be the natural children of the spouse of the mother and provided the benefit of a legal

relationship to two parents at birth until and unless the presumption is overcome in a subsequent proceeding. Although the presumption is at times rebuttable, in the case of a child born to a married couple who achieved pregnancy via A.R.T., the spouse is prevented from disestablishing parentage and the birth mother is estopped from doing so. *See* Sec. II, *infra*.

Where, as here, a child is born during a marriage but not acknowledged as a marital child and as having two parents on the birth certificate, not only statutory law but the court's equitable authority allows a court to recognize a marital child's right to a legal parent-child relationship with both spouses. MISS. CODE ANN. § 93-17-1 (allowing the court to "make the child legitimate" and to decree a child "to be an heir of the petitioner"); *Latham v. Latha*m, 78 So. 2d 147, 151 (Miss. 1955) ("'The principle underlying jurisdiction of the subject matter in child custody cases is the welfare of society, primarily as evidenced by the welfare of the child, but involving also the right, and, for that matter, the duty, of a state, being the relatively independent sovereign that it is, to look after the welfare of individuals within its borders….") (quoting *Wicks v. Cox*, 208 S.W.2d 876, 878 (Tex. 1948)). MISS. CODE ANN. § 93-5-23 (granting court broad equitable authority in divorce action to "make all orders touching the care, custody and maintenance of the children of the marriage"); *Wansley v. Schmidt*, 186 So. 2d 462, 465 (Miss. 1966) ("chancery court has the inherent power, and it is its duty…to make such orders and decrees from time to time as will protect and promote the best interests of minor children."). In addition, courts have the equitable authority to uphold the marital presumption despite evidence that the spouse is not biologically related to the child in certain circumstances. *See*, *e.g*., *J.P.M.*., 932 So. 2d at 768, 770 (ruling that because spouse, although not biologically related to child, had been child's "'legal father' since her birth [] he has existing legal rights and obligations" and upholding finding that because he was the child's "father in fact [he] is thus entitled to rights of custody, visitation, and the like.").

### C. Child-centered public policy considerations underlying the marital presumption apply equally to married same-sex and different-sex couples who give birth to children via A.R.T. and anonymous donor sperm.

The presumption that children born to married parents have two legal parents from birth is grounded in important child-centered public policy considerations. This Court identified some of those vital concerns as protecting children from the opprobrium of so-called "illegitimacy," and ensuring that parents' relationships to their children are secured. *See, e.g., Madden*, 338 So. 2d at 1002. As in most states, the marital presumption in Mississippi is grounded in policies ensuring stable families, and that both parents are financially responsible for their marital children. Jennifer L. Rosato, *Children Of Same-Sex Parents Deserve The Security Blanket Of The Parentage Presumption*, 44 Fam. Ct. Rev. 74, 82 (2006). *And see In re A.A.*, 114 Cal. App. 4th 771, 781 (Cal. Ct. App. 2003) ("[t]he paternity presumptions are driven by state interest in preserving the integrity of the family and legitimate concern for the welfare of the child."); *Gartner, supra*, 830 N.W.2d at 347 (among the public policy bases for the marital presumption are to ensure that "the family relationship is kept sacred and the peace and harmony thereof preserved" and to avoid interference with "the harmony of the family relationship and [] the sanctity of the home."). These public policy bases apply equally to all marital children born via assisted reproduction with anonymous donor sperm regardless of whether their parents are same-sex or different-sex parents.

Children born to all married parents who conceive via A.R.T. with anonymous sperm have the same bonding, emotional development and financial needs as any other child. *See, e.g., Obergefell,* 135 S. Ct. at 2600 (recognizing that "that gays and lesbians can create loving, supportive families"); *De Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) ("Homosexual couples are as capable as other couples of raising well-adjusted children.") (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (making factual findings

after trial that "Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted") and *Varnum v. Brien,* 763 N.W.2d 862, 899 (Iowa 2009) ("Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents."); *Logan v. Logan,* 730 So. 2d 1124 (Miss. 1998) (recognizing importance of father-daughter bond notwithstanding that father was not daughter's biological father); *Griffith,* 881 So. 2d at 187 (agreeing that no purpose is served by using genetic testing to defeat an existing father-child relationship when no biological father sought to displace presumed father.). Accordingly, the State's responsibility to protect all children includes the children born to married parents via A.R.T. Failing to do so exposes children to significant detrimental harms, including loss of the primary caregiver, loss of child support, loss of inheritance rights, loss of worker's compensation benefits, and loss of other government benefits for which all other marital children are eligible from both parents.

### D. An anonymous sperm donor in the context of a child born via A.R.T. to a married couple is not a legal father whose singular act of donating sperm to a fertility clinic prevents application of the marital presumption.

The trial court's finding that there is a legal "father" whose existence bars application of the marital presumption in the context of a child born to a married couple is not supported by the evidence and is an erroneous conclusion of law. The undisputed evidence shows that the child was conceived at a fertility clinic via sperm donated by a man whose identity is not, and cannot, be known. R:21, 84, 99, 100, 141, 210, 233; T:22. The record is replete with evidence and testimony showing that the parties used a fertility clinic in Louisiana and anonymous donor sperm, identified only as a number, from a Maryland sperm bank. Id. The evidence shows that as part of the contract to receive the sperm, the parties agreed to displace him as the legal and natural parents. R:233. The undisputed testimony is that the donor was "just an ID number" and

"there is no chance" that he will be identified or be a parent to the child. T:22 The agreement signed by Kimberly set out that she "will never seek to identify the donor, nor shall the donor be advised of my identity." R:100, 210.

The trial court's finding that where a married couple uses A.R.T. to achieve pregnancy, the State will consider the sperm donor a legal parent until his rights are terminated is not supported in law. There is no basis to find that Donor No. 2687, the anonymous sperm donor here, is a legal parent. Donor No. 2687 is not listed on the child's birth certificate. He was not married to the mother at the time of Z.S.'s conception or birth. He has not executed a voluntary acknowledgement of paternity. MISS. CODE ANN. § 93-9-28. Accordingly, under Mississippi law, contrary to the lower court's ruling, Donor No. 2687 has not been adjudicated to be the child's "natural" father and is not—cannot be—the child's legal father. The lower court's finding that the unknown and unknowable sperm donor is entitled to protection of his parental rights as an "absent father" is contrary to the great weight of undisputed evidence and is therefore clearly erroneous.[2]

Mississippi law is crystal clear as to the parental rights of the spouse whose child is born during a lawful marriage: "If the mother was married at the time of either conception or birth, or at any time between conception and birth, the name of the husband *shall* be entered on the certificate of birth as the father of the child." MISS. CODE ANN. § 41-57-14(1) (emphasis added). In the one published decision in which a married couple used A.R.T to with anonymous donor sperm to give birth to a child, *Wells v. Wells*, 35 So. 3d 1250 (Miss. Ct. App. 2010), the court did not render the children so conceived to have been "born out of wedlock" as is the result of the

[2] Maryland, where the sperm was anonymously donated, does not recognize an anonymous donor as a parent, and applies the presumption of parentage to a married couple who achieves pregnancy through A.R.T. with donor sperm *See Sieglein v. Schmidt*, 136 A.3d 751, 763 (Md. Ct. App. 2016).

lower court's ruling. MISS. CODE ANN. § 93-9-7 ("A child born out of lawful matrimony also includes a child born to a married woman by a man other than her lawful husband."). Instead, it upheld the custody award to the spouse as the father notwithstanding that the children were genetically related only to the mother and an anonymous sperm donor. *Id*. at 1253.

The trial court's ruling that the parental rights of a man who donated his sperm anonymously for use in A.R.T., and who has never met, let alone formed a relationship with the child, are superior to spouses whose wives give birth during the marriage and who thereafter parent the child is in contradiction to the well-established principle that "the mere existence of a biological link does not merit equivalent constitutional protection," *Lehr v. Robertson*, 463 U.S. 248, 261 (1983), and that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id*. at 260; *see also Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2345 (1989). Indeed, this Court has cited with approval a case decided by the Supreme Court of Wisconsin, because it "held that, even when a third party to a marriage is the biological father of a child of the marriage, the biological father does not have any paternity rights if he fails to establish that he had a substantial relationship with the child." *Griffith*, 881 So. 2d at 186 (citing *A.J. v. I.J.*, 677 N.W.2d 630, 642 (Wis. 2004)).

Yet, the trial court's sole basis for refusing to find Christina a parent of the child born during her marriage is that an anonymous sperm donor is a "father" whose parental rights must be terminated before hers could be recognized. Affirmance would result in a ruling that all children conceived via A.R.T. with donated sperm are "born to a married woman by a man other than her lawful husband" and therefore are "born out of lawful matrimony." MISS. CODE ANN. § 93-9-7. Such a ruling is not supported by affirmative law.

Several sister state court decisions, and scholars, have unanimously and unsurprisingly concluded that sperm donors under these circumstances are not parents. For example, in deciding

whether an anonymous sperm donor was required to receive notice in a guardianship proceeding, the Maine Supreme Judicial Court pointed out the obvious: "[D]onors, who donate sperm to a sperm bank that promises confidentiality, do so with the intention of remaining anonymous and unconnected to the child conceived," which "intention is generally recognized in commentary and cases." *In re Guardianship of I.H.*, 834 A.2d 922, 926-27 (Me. 2003) (citing Richard F. Storrow, *Parenthood By Pure Intention: Assisted reproduction with anonymous sperm and the Functional Approach to Parentage*, 53 Hastings L.J. 597, 628 (2002); *People v. Sorensen*, 437 P.2d 495, 498 (Cal. 1968); *In re Adoption of Michael*, 636 N.Y.S.2d 608 (N.Y. Sur. Ct. 1996)); *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994) ("A child conceived through artificial insemination [with donor sperm], with the consent of both parties, is correctly classified as a child of the marriage."). The Maine court in *In re I.H* concluded with the common sense recognition that "[b]y anonymously donating sperm, the donor has signified his wish to remain unknown and to forego any claim to parenthood of a child conceived by his sperm." 834 A.2d at 926-27. *See also People v. Shreve*, 756 N.E.2d 422, 429 (Ill. Ct. App. 2001) (holding that service need not be attempted on an anonymous sperm donor). In an analogous situation as presented here, an Ohio appellate court ruled that in the "unusual case" of a child born into a marriage who was conceived using an anonymous sperm donor, the mother could not seek to disestablish paternity by using the fact of assisted reproduction. *Brooks v. Fair*, 532 N.E.2d 208, 212 (Ohio Ct. App. 1988) ("In most situations the biological father of a child may be identified if the husband in a relationship is not the biological father. In this case the biological father could never be determined because he is an unknown third-party donor."); *Sieglein v. Schmidt*, 136 A.3d 751, 763 (Md. Ct. App. 2016) (presumption of parentage applies to a married couple who achieved pregnancy through A.R.T. with donor sperm). That a sperm donor should not be

recognized as a parent is likewise recognized in the Uniform Parentage Act.[3] Unif. Parentage Act, §702 (Nat'l Conf. of Comm'r on Unif. State Laws 2002).

The lower court's concern for "absent fathers" and the need for their rights to be protected is misplaced. Any such consideration may be relevant in an adoption proceeding, MISS. CODE ANN. §93-15-101 *et seq*., but not in a divorce proceeding where a child is born to a married couple and no putative father is identified or seeks to displace a parent. The illogic of requiring termination of an anonymous sperm donor's parental rights under these circumstances is reflected in the context of an adoption proceeding, where the unidentifiable "natural father" would be merely a number on a form who cannot be noticed and where a "diligent search" would be only and obviously futile. "The law does not require the doing of a futile act." *Knight v. McCain*, 531 So. 2d 590, 597 (Miss. 1988). To require such efforts "would be to require a foolish and futile gesture. There is no justification for such a requirement." *Mississippi Employment Sec. Com'n v. Berry*, 811 So. 2d 298, 303 (Miss. Ct. App. 2001). The lower court's conclusion that use of an anonymous sperm donor justifies denying the marital child a legal relationship with the person who has in fact raised him as her child since birth and who seeks to be obligated to support him as his legal parent. The ruling is not supported in law and is a blatant derogation of the court's obligation to "protect and promote the best interests of minor children," *Wansley*, 186 So. 2d at 465, and should be reversed.

[3] Where a state's law is silent and the court is called upon to apply equitable principles to achieve a just result, reference to the Uniform Act on Paternity, adopted by the National Conference of Commissioners on Uniform State Laws, related to the determination of parentage provides guidance lacking in Mississippi law. Section 702 sets out that "[a] donor is not a parent of a child conceived by means of assisted reproduction." Unif. Parentage Act § 702 (Nat'l Conf. of Comm'r on Unif. State Laws 2002).

## II. The Trial Court Committed Reversible Error In Refusing to Recognize, and Otherwise Disestablishing, the Parentage of a Marital Child Born Via A.R.T. Based on Lack of Genetic Relationship.

Although the marital presumption may bend to evidence that the "husband is incapable of procreation or that he had no access to the wife at times when biology tells the child must have been conceived," *Baker ex rel. Williams v. Williams*, 503 So. 2d 249, 253 (Miss. 1987) (citations omitted), in the circumstances of a child born to married parents who achieved pregnancy via "artificial insemination," the law protects the child's relationship to both spouses. *See* MISS. CODE ANN. § 93-9-10(d) (denying husbands whose wife conceives via A.R.T. the ability to disestablish paternity). Actions to *establish* paternity may be brought "upon the petition of the mother, or father, the child or any public authority chargeable by law with the support of the child," MISS. CODE ANN. § 93-9-9(1), but where a child is born via A.R.T. with anonymous donor sperm, an action under statutory law is inapplicable because paternity cannot be *established*, it can only be disestablished. MISS. CODE ANN. § 93-9-9. Disestablishment of paternity is limited to actions brought by "a legal father" and then only in limited situations. MISS. CODE ANN. § 93-9-10. Statutory law does not recognize a cause of action for a mother who seeks only to disestablish a legal parent where the child has no putative father, as in the case of a child born as a result of the use of anonymous donor sperm with the consent of both spouses.

As reflected in the Disestablishment Statute, Mississippi's public policy is to ensure that children born to married parents who achieve pregnancy by A.R.T. enjoy the vital benefits of two legal parents regardless of biology. Thus, even if the statutory mandate were not clear, and it is, as a court of equity, a chancery court has the authority to recognize the parentage of a marital child conceived with A.R.T. and to avoid terminating a parent's legal relationship to a child so conceived based on the known lack of a genetic relationship. Just as the appellate court may grant a new trial "if manifest injustice, to a reasonable certainty, has been done, or the verdict of

the jury is unreasonable and unjust," *Joslin v. Caughlin*, 26 Miss. 134, 137 (Miss. Ct. App 1853), so too should trial courts *avoid* a manifestly unjust ruling.

### A. A court's equitable authority and obligation to protect children prevents disestablishing the parentage of a marital child born via A.R.T. with anonymous donor sperm with the consent of both spouses.

Chancery courts are courts of equity and as such should not rule in such a way as would undermine their obligation to protect and guard the best interest of children. *See Natural Father v. United Methodist Children's Home*, 418 So. 2d 807, 809 (Miss. 1982) (allowing an exception to a general rule as "consistent with the fundamental concept of this state as *parens patriae* over an infant. It is this basic concept, derived from a fundamental concern over the protection and guardianship of the interests of minors, which has given rise to certain parallel exceptions formulated for the protection of the minor's interest.").

Although the marital presumption has its roots in the probability that the husband was the biological father of a child born during the marriage, *Herring v. Goodson*, 43 Miss. 392 (1870), the public policies advanced by the presumption must be applied to account for current realities, namely that some married couples—same-sex and different-sex—achieve pregnancy via A.R.T. According to the latest data by the Centers for Disease Control provided by the three fertility clinics in Mississippi, 135 children were born via some form of A.R.T. in 2015.[4] The Louisiana clinic used by the parties here, one of five in the state, reported that 219 children were born as a result of some form of A.R.T. provided by them in 2015.[5] These one year totals show that there

[4] Center for Disease Control, *Assisted Reproductive Technology (ART) Data*, MS. Links for the latest data at each Mississippi fertility clinic, https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicsList&State=MS (last visited Apr. 30, 2017).

[5] Center for Disease Control, *Assisted Reproductive Technology (ART) Data*, LA. Links for each Louisiana fertility clinic,

are likely thousands of children in Mississippi born through the use of A.R.T. In addition, there were 3,484 same-sex couples living in Mississippi according to the 2010 U.S. Census.[6] Given these realities, the "foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage …, 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." *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498 (N.Y. 2016) (citations omitted).

As the Illinois Supreme Court recognized, "cases involving assisted reproduction must be decided based on the particular circumstances presented." *In re Parentage of M.J.*, 787 N.E.2d 144, 151 (Ill. 2003) (noting that public policy considerations required application of equitable principles to hold a man to his promises to be financially responsible for a child born to his girlfriend through anonymous donor sperm and A.R.T.). *And see Johnson v. Calvert*, 5 Cal. 4th 84, 89 (Cal. 1993) (in considering circumstance of child born via A.R.T. not expressly addressed in statutory law "courts must construe statutes in factual settings not contemplated by the enacting legislature.").

Just as courts should not "interpret [a] statute in such a way as to cause absurd results," *Dawson v. Townsend & Sons Inc.*, 735 So. 2d 1131, 1140 (Miss. Ct. App. 1999) (citing *Sheffield v. Reece*, 28 So. 2d 745, 749 (Miss. 1947)), neither should it apply a common law doctrine to do so. As this Court has recognized, "blind allegiance to previous decisions in some instances leads

---

https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicsList&State=LA (last visited Apr. 30, 2017).

[6] See Gary J. Gates, *Same-sex Couples in Mississippi: A demographic summary* (December 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/MI-same-sex-couples-demo-dec-2014.pdf.

to absurd results." *Reynolds v. Riddell*, 253 So. 2d 834, 837 (Miss. 1971). Especially where "it appears to the court in the exercise of its sound discretion" that "the best interest of the children [would be] served or promoted," *id*., courts should apply precedent based on the facts and circumstances before it and avoid the absurd result of disestablishing a vital parent-child relationship based solely on the absence of a biological relationship where a married couple used anonymous donor sperm to achieve pregnancy.

This Court has not had occasion to squarely rule on the rights of marital children conceived by A.R.T. However, in the one custody case in which an appellate court considered such facts, it upheld the custody award to the non-biological father of the marital children conceived with anonymous donor sperm. *Wells*, *supra*, 35 So. 3d at 1253. In upholding the custody award, the court necessarily recognized that the husband was a parent by operation of the marital presumption and did not reach out to disestablish his paternity based on this undisputed fact. *Id*. In addition, this Court has recognized the parental rights and obligations of spouses who raise non-biological children born during the marriage, *see, e.g.*, *Logan supra*, 730 So. 2d at 1124, and refused to terminate parental rights secured by the marital presumption after genetic testing disproved the husbands as the children's biological fathers in circumstances, unlike here, where a putative father could be identified. *J.P.M. supra*, 932 So. 2d at 768; *Griffith*, *supra*, 881 So. 2d 186.

As a case of first impression, this Court should take guidance from sister states who have issued decisions in analogous situations, and use as its polestar the public policy and child-centered concerns underlying the marital presumption. In case after case, courts find that where married parties consent to A.R.T. with anonymous donor sperm they are both legal parents obligated to support the children born during the marriage. *See*, *e.g.*, *Brooks*, 532 N.E.2d at 212-13 (public policy disallows wife from denying paternity of husband where parties agreed during

marriage to conceive via means of artificial insemination); *People v. Sorensen*, 437 P.2d 495, 498-500 (Cal. 1968) (upholding criminal conviction of husband for nonsupport after husband found to be the lawful father of marital child conceived through A.R.T.); *Matter of Anonymous*, 345 N.Y.S.2d 430 (N.Y. Sur. Ct. 1973) (finding child, conceived with husband's consent via A.R.T., was legitimate and that husband, who was subsequently divorced, is a "parent," and his consent was necessary for any adoption); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) ("We hold that a husband who consents for his wife to conceive a child through artificial insemination, with the understanding that the child will be treated as their own, is the legal father of the child born as a result of the artificial insemination and will be charged with all the legal responsibilities of paternity, including support."); *Sieglein*, 136 A.3d 751 (holding that husband was the legal father of child born during marriage as a result of assisted reproductive procedure to which he consented).

These cases reflect a nearly unanimous recognition that courts must exercise their equitable authority to advance, as opposed to thwart, the public good by avoiding the adverse consequences of leaving a marital child without a parent despite the clear intention of the parties. As eloquently stated by the Superior Court of New Jersey in considering a case involving "artificial insemination by donor" (AID) of a child born during the parties marriage:

> Insofar as this is the case, the best interests of the child, the mother, the family unit and society are served by recognizing that the law surrounding AID insemination deals with the creation of a family unit and more particularly with the creation of parent-child relationships. Thus viewed, the public policy objectives served by legitimacy laws should similarly and consistently be applied in dealing with closely related problems presented by the use of AID techniques.

*K. S. v. G. S.*, 440 A.2d 64, 68 (N.J. Super. Ct., 1981). The Ohio appellate court in *Brooks* supported its ruling that mother was estopped from disestablishing husband as father of child conceived via A.R.T. with anonymous donor sperm by quoting *Johnson v. Adams*, 479 N.E.2d

866, 869 (Ohio 1985), which held: "[A] child should not be made a 'ward of the state' when some individual, other than the state, justifiably is responsible for that child's welfare." *Brooks,* 532 N.E.2d at 212-13. Mississippi law likewise recognizes the need to protect the relationships of marital children born via A.R.T. to both legal parents despite the lack of a genetic connection, MISS. CODE ANN. § 93-9-10(d), and seeks to hold those adults responsible for the needs of the child. *Forrest v. McCoy*, 941 So. 2d 889, 891 (Miss. Ct. App. 2006) ("Both parents are obligated to provide financially for their children.").

### B. Equitable estoppel applies to prevent spouses from disestablishing parentage where a marital child is conceived via A.R.T. with anonymous donor sperm and the consent of both spouses.

The lower court erred in failing to apply equitable estoppel or quasi-estoppel as a bar to Kimberly's argument that her spouse was not the child's legal parent. Equitable estoppel applies when a party engages in acts inconsistent with a position later adopted and the other party justifiably relies on those acts, resulting in injury. *See Home Base Litter Control, LLC v. Claiborne Cty*, 183 So. 3d 94, 101-02 (Miss. Ct. App. 2015) (citations omitted). The similar doctrine of quasi-estoppel likewise "'precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken,' and 'applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.'" *Id*. Here, allowing Kimberly to raise the known fact that her female spouse lacks a biological relationship to the child conceived by A.R.T. should not provide grounds for her, or any other similarly situated mother, to gain advantage in a custody action against her estranged spouse to the profound detriment of the child. Courts should not allow parties to game the judicial system, use children as pawns or otherwise undermine the important child-centered considerations underlying the presumption that provides marital children with two legal parents from birth. *See, e.g.*, *Myers v. Myers*, 814

So. 2d 833, 835 (Miss. Ct. App. 2002) ("Custody battles are not competitions as children are not pawns within a game. The best interest of the child or children in question is always the polestar consideration in questions of custody.").

Equitable estoppel and quasi-estoppel apply here. The evidence showed that Christina relied on her wife's representation that she would be an equal co-parent of the child born during the marriage, *see* R:100, resulting in Christina's acceptance of the obligations and responsibilities of a parent including giving him her last name, being the child's primary caretaker, supporting him financially and emotionally and creating with him a powerful and enduring parent-child bond. Both Christina and Z.S. would be profoundly prejudiced and otherwise adversely affected by her former wife's change of position denying her parentage. Kimberly should be estopped from asserting biological impossibility to disestablish parentage to Christina's and Z.S's profound disadvantage as wholly inconsistent with her earlier position to which she consistently accepted the benefit. Indeed, Kimberly continues to accept the benefit of Christina's payment of child support and other financial support of the children they jointly raised. T:85-87. As this Court noted in ruling that a spouse was the "father in fact" obligated to support his non-biological child, "with the burden should go the benefit." *Logan*, 730 So. 2d at 1126.

Estoppel has frequently been recognized by courts in similar circumstances across the country to prevent husbands from disestablishing the parentage of the children they have with their spouses via consensual A.R.T. For example, in *Levin*, 645 N.E.2d at 604-05, the court held that the husband who orally consented to artificial insemination of wife was estopped from denying fatherhood of child *Accord R.S. v. R.S.*, 670 P.2d 923, 928 (Kan. Ct. App. 1983) (husband who agreed to artificial insemination of wife estopped from denying fatherhood); *Brown v. Brown*, 83 125 S.W.3d 840, 844 (Ark. Ct. App. 2003) (husband estopped from denying

child support where husband knew wife was using artificial insemination to have child); *In re Parentage of M.J.* 787 N.E.2d at 151 (same).

The same principles apply to bar married mothers from disestablishing the parentage of their spouses who consent to conceive a child during the marriage via A.R.T. In *State ex rel. H. v. P.*, 457 N.Y.S.2d 488, 492 (App. Div. 1st Dept. 1982), for example, the court held that the wife was estopped from denying husband's parentage where she engaged in A.R.T. with anonymous donor sperm and thereafter fostered a parent-child relationship between spouse and child. *See also People ex rel. Abajian v Dennett*, 184 N.Y.S.2d 178 (Sup. Ct. N.Y. County 1958) (in a custody and visitation rights proceeding, the court held the mother of the children was estopped from asserting for the first time that the children were born of artificial insemination to deny her former husband custody or visitation rights.).

In an analogous case decide by an Arizona appellate court, the court denied the birth mother whose child was conceived via A.R.T. with anonymous donor sperm and born into a marriage between a same-sex couple from rebutting the marital presumption to sever the parental relationship based on equitable estoppel principles. *McLaughlin*, *supra*, 382 P.3d at 124 ("we need not decide how the rebuttal provision in § 25-814(C) applies in a same-sex marriage because we determine Kimberly is estopped from rebutting the presumption."). The court in *McLaughlin* relied upon the following undisputed facts in support of its application of estoppel, all of which apply here: a) the parties were lawfully married when one of the spouses became pregnant as a result of artificial insemination the parties agreed should be undertaken, 382 P.3d at 124, T:79; b) the child was born during the marriage 382 P.3d at 124, R:201-209; c) the non-genetic spouse stayed home to care for the child during the early years of his life, 382 P.3d at 124, CR:127; and d) the parties entered into an express agreement contemplating Z.S.'s birth and agreed unequivocally that both would be Z.S.'s parents, with equal rights in every respect. 382

P.3d at 124; R:237. *See also Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 4570772, at *9 (Conn. Super. Ct. June 29, 2015) (holding birth mom equitably estopped from rebutting presumption of her same-sex spouse's parentage for child born through A.R.T.).

Because the circumstances warrant operation of the equitable-estoppel doctrine, consideration of Christina's absence of a genetic relationship to Z.S. to refute the marital presumption is improper in a divorce proceeding "wherein the basic issue is the termination of the marriage bond—not the paternity of a child." *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990) ("[T]he law will not permit a person in these situations to challenge the status which he or she has previously accepted [or created].") (quoting *John M. v. Paula T.*, 524 Pa. 306, 318 (1990)). In considering whether the marital presumption was rebutted, under the circumstances here, the trial court erred in allowing Kimberly to disestablish the parentage that attached when Z.S. was born during a marriage. *See, e.g.*, *State ex rel. H. v. P.*, 457 N.Y.S.2d at 491 ("not even the husband's sterility will disturb the presumption of legitimacy since the wife concededly received donor sperm by means of artificial insemination on at least ten occasions prior to conception.").

The trial court's denial of Christina's request to recognize her as a parent to the child and otherwise consider whether the child born during her marriage was biologically related to her should be reversed.

### C. The trial court erred in failing to apply the holding of *Griffith v. Pell*, and similar authority which support a finding that Christina is a legal parent.

Even if this Court does not find that Christina is a parent based on the marital presumption, the trial court's failure to find that Christina possessed parental rights as a legal parent was error.[7] Mississippi law requires courts to elevate children's needs over biology where children are raised in a two-parent household from birth. *J.P.M.*, 932 So. 2d at 768; *Griffith*, 881 So. 2d at 184.

In *Logan v. Logan*, this Court held that where a stepparent agrees to support the children of a previous marriage, or where he does so over a period of time and the mother and the children rely to their detriment on that support, he is liable for child support. This Court also held that the stepparent had standing to seek custody of the stepchild over a fit parent because "with the burden should go the benefit." 730 So. 2d at 1126. In *Griffith*, where the husband had raised a daughter born during the marriage for four years, this Court refused to disestablish his parentage and reversed the finding that husband had "no legal standing in law or fact on the issue of custody" explaining that "[m]erely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship." 881 So. 2d at 185-86. The court pointed with approval to *In re Raphael P.*, 97 Cal. App. 4th 716 (Cal. 2002), where a California Court of Appeal "stated that '[w]hatever role genetic testing may play in resolving disputes between competing would-be fathers, ... we fail to see what purpose is served by using genetic testing to defeat an existing father-child relationship when there is no biological

[7] As set out above, *in loco parentis* is an inferior and vulnerable legal position inadequate to protect the parent-child relationship, and an inferior status to that which this Court provided in *Griffith* and *J.P.M.* to the married men whose parental status was recognized notwithstanding a lack of genetic relationship to their marital children. The need for this Court to avoid severing Christina's parental rights is obvious from the ruling below to avoid allowing Z.S. to be adopted. T:91.

father seeking to assume care, support and nurturance of the child.' We agree wholeheartedly." 881 So. 2d at 187.

Finally, and most recently, in *J.P.M..,* this Court held that a stepfather of a 6 year-old child had standing to seek custody against a fit parent where he had raised her as his own since birth. 932 So. 2d at 770. The court noted this is especially fitting in cases in which no biological father exists. This Court affirmed the lower court's finding that the husband was the child's "father-in-fact" and the custody awarded to him. There is no distinction here, save gender. Here, as in *J.P.M.*, "[b]ecause [Z.S.]'s biological father has not been conclusively established and no man is seeking to fill [Christina]'s role as [Z.S]'s [parent], disestablishing [Christina] as [Z.S.]'s [parent] would require [Kimberly], DHS, and the court system to expend additional time and resources in an effort to establish another man as [Z.S]'s father, without any guarantee that such an individual would pay child support or attempt to establish a father-daughter relationship with [child]. Such a result is not likely to be in [Z.S.]'s best interests." *Id*. Importantly, while not embracing the lower court's reasoning that the husband was legal father based on "equitable fatherhood," this Court affirmed the lower court's decision that retained the father's legal parental status.

Because these principles apply equally to protect the children of married same-sex couples, the lower court erred in failing to find Christina a legal parent of Z.S.

## III. Refusal to Recognize Non-Biological Spouses Parents of Their Marital Children Conceived Via A.R.T. Violates Family Members' Rights to Due Process.

The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1, and protects individuals from arbitrary governmental intrusion into fundamental rights, including each person's fundamental right to marry and to receive respect for an existing valid

marriage, *Obergefell*, 135 S. Ct. 2584, and each parent's protected liberty interest in parental autonomy, *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Equally fundamental is the right of a child "to be raised and nurtured by his parents," *Doe v. Heck*, 327 F.3d 492, 517-18 (7th Cir. 2003) (citations omitted), and to be supported by both parents. *Calton v. Calton*, 485 So. 2d 309, 310 (Miss. 1986) ("[t]he duty to support children is a continuing duty on both parents and is a vested right of the child.").

Numerous precedents establish that parentage and the liberty interest in parental autonomy and familial association do not turn on a biological parent-child relationship. *See Michael H*., 491 U.S. at 126-27 (plurality opinion) (noting distinction between biological fatherhood and determination that one is a parent); *Prince v. Massachusetts*, 321 U.S. 158 (1994) (aunt and legal guardian enjoyed parental autonomy rights); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring") (Stewart, J., concurring); *Lehr*, 463 U.S. at 260 (citing same). Further, the right to marry and the mutual rights of parents and children to family association and integrity are mutually reinforcing and often intertwined. *Id*. at 517-18, citing *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 921-22 n.38 (5th Cir. 2000) (the familial expectations giving rise to constitutional protection may arise between an unrelated adult and child through the "'intimacy of daily association' and the resulting emotional attachments," and those relationships may enjoy due process guarantees even if not sanctioned by state law) (citing *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816 (1977)). In *Lehr*, the Supreme Court held that a parent's commitment to the responsibilities of parenthood, not the biological link alone, is what gives the relationship constitutional protection. 463 U.S. 248. This Court likewise has acknowledged that the Constitution protects familial relationships regardless of biology. *J.P.M.*, 932 So. 2d at 783

("The United States Supreme Court has emphasized the importance of the family unit and granted individuals due process rights in preserving the continuation thereof.") (citing *Stanley v. Illinois*, 405 U.S. 645, 651, (1972)). The facts here support that Christina, who continues to pay child support and uphold her obligations as a parent, has a familial parental relationship with both children and the failure to declare that she is a parent infringes that right.

Children also have their own protected liberty interests in maintaining their parent-child relationships. It is well-settled that "[m]inors, as well as adults, possess constitutional rights." *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 658 (Miss. 1998). Children have a core, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures as well as siblings from shared daily life. *Smith*, 431 U.S. at 844, ("No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship). The lower court's complete failure to consider Z.S's familial bonds infringed upon his fundamental liberty interests in family integrity and association. Z.S. did not choose how to structure his family. Yet his familial relationships with Christina is no less real or important to him—and its importance to him is in no way diminished—because he was born to married same-sex parents and at a time when the State unconstitutionally deprived the couple jointly raising them with legal protections for their marriage.

Furthermore, a finding that Z.S. is a child born out of wedlock because he was conceived by a "man not her husband" and ineligible to be recognized as a child of his married parents violates his rights to equal protection under the federal and state constitutions. Laws discriminating between children born to married and unmarried parents are unconstitutional unless the distinction is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Repeatedly, the Supreme Court has struck down state laws that

burdened or disadvantaged children born out of wedlock. *See, e.g., Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

The lower court's refusal to recognize Christina's legal parentage of Z.S. unconstitutionally infringes on these liberty interests. Christina and Z.S. share a constitutionally protected fundamental liberty interest in their family integrity, and association, which includes the right to security and recognition for their legal parent-child bond. Their parent-child relationship is entitled to constitutional protection by the liberty interests protected by substantive due process regardless of the circumstances leading to Z.S.'s birth, a lack of genetic connection and transcend the traditional family structure of married, biological, or adoptive parents. *See Prince*, 321 U.S. 158; *Michael H.*, 491 U.S. at 124 n.3 (plurality) ("The family unit accorded traditional respect in our society . . . also includes the household of unmarried parents and their children."); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 504-05 (1977) (constitutional protections for familial relationships are not limited to biological or adoptive parents); *Wooley*, 211 F.3d at 921-22 n.38. In addition, Christina enjoys a fundamental right to receive respect from her government for her valid marriage which necessarily includes recognition of her parentage. *Obergefell*, *supra*, *Zablocki*, 434 U.S. at 384; *Loving*, 388 U.S. at 12. Z.S. was born to a married couple and he has a constitutional right to a legal relationship to both parents. Married couples who give birth via A.R.T. with anonymous donor sperm should not have their fundamental right to a familial relationship abridged on the sole basis of a lack of biological connection. *Caban*, 441 U.S. at 397.

Imposing a requirement on married couples who give birth to children through use of A.R.T. with anonymous donor sperm to disestablish the donor and adopt their children in order to be recognized as dual parents would discriminate against the couple–who would be forced to incur the expense of adoption to secure rights–and violate the constitutional rights of the couple

and the child without a countervailing governmental purpose. As a practical matter, the process of adoption is intrusive, expensive, and time-consuming. It opens the marital home to "an investigation and report" MISS. CODE ANN. § 93-17-11. It also involves the expenses of court fees and attorney fees that not all parents can afford. *See* Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, 5 Pierce Law Review 1, 11 (2006) ("[C]ourt-determined methods [of establishing legal parentage], including step-parent adoption, require the passage of time and the interference of others to make the determination"); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty–First Century*, 5 Stan. J. C.R. & C.L., 201, 247 (2009). It is especially egregious to apply an adoption requirement here, where laws since struck down as unconstitutional prevented Christina from adopting her son prior to her separation from her wife. *See* MISS. CONST. art. 14, § 263A; MISS. CODE ANN. § 93-17-3.

Recognizing the parental rights of a non-biological parent who has raised her marital child protects the child by providing another adult legally responsible for the child's care and well-being, and by sheltering the child from the serious psychological harm of being separated from a person they have always known as their parent. Affirming the decision below based on a blanket rule that the marital presumption does not apply in all cases in which a marital child is born as a result of A.R.T. with anonymous donor sperm would be contrary to the constitutional rights of familial association that all families enjoy under the Due Process Clause, including Christina and Z.S. Absent a compelling governmental interest in denying married couples the benefit of the marital presumption, failure to do so violates the fundamental right to marry and to familial association. There is not even a legitimate reason, let alone compelling, governmental

interest for denying these protections and benefits to children born to married parents based on the fact that their parents' used A.R.T. to achieve pregnancy.

## IV. Denial of the Marital Presumption Only to Same-Sex Couples Who Give Birth to a Marital Child Via A.R.T. With Anonymous Donor Sperm Violates the Equal Protection Clause.

To the extent that the decision of the court below can be interpreted as applying solely to the marital children of same-sex couples, but not those of different-sex couples, it impermissibly discriminates against same-sex couples on the basis of sex and sexual orientation, and against their children on the basis of the status of their parents as members of same-sex couples.

In *Obergefell*, the Supreme Court noted that "the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples." *Id*. at 2604. A requirement that only female spouses of married women who give birth are required to locate and disestablish the parentage of anonymous sperm donors to adopt their children in order to create a legal parent-child relationship would violate Equal Protection. Consider the situation in which a birth mother dies during childbirth. Children of married different-sex couples have a legal parent to take them home, while children of married same-sex couples become wards of the state. The only difference between the two classes is the sex of the birth mother's spouse. There is no important, let rational reason, to allow children intentionally conceived by married parents to become wards of the state, or otherwise be relegated to the insecurity of only one legal parent from birth, based on the sex of the mother's spouse. The only purpose for denying recognition of the relationships between parents and their children is to single out same-sex couples and their children for lesser treatment, which is not a constitutionally permissible purpose. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

The question of whether a state could deny married same-sex couples the marital presumption without violating the constitutional right to equal protection was first considered in *Gartner*, 830 N.W.2d 335. In *Gartner*, where married same-sex couples challenged the state's refusal to recognize the marital presumption under the Iowa Constitution's guarantee of equal protection, the state's high court agreed that "with respect to the government's purpose of identifying a child as part of their family and providing a basis for verifying the birth of a child, married lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage." 830 N.W.2d at 351. In striking down unequal treatment of same-sex couples by requiring only the same-sex spouses who have children during marriage to adopt in order to be recognized as a parent, the court applied the same level of scrutiny required by the U.S. Constitution, requiring "the State to show the statutory classification is substantially related to an important governmental objective." 830 N.W.2d at 352; *cf. Craig v. Boren*, 429 U.S. 190, 197 (1976) ("to withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

The *Gartner* court rejected every justification offered by Defendants to support their position requiring female spouses to adopt their children in order to be recognized as parents on birth certificates, which justifications were described as: 1) an interest in the accuracy of birth certificates; 2) the efficiency and effectiveness of government administration; and 3) the determination of paternity. As to ensuring the accuracy of birth records for identification of biological parents, the court recognized it as "a laudable goal. However, the present system does not always accurately identify the biological father." *Id.* at 351-352. The justification not to "apply the presumption of parentage to nonbirthing spouses in lesbian marriages" in order to serve "administrative efficiency and effectiveness" was rejected because "when couples use an

anonymous sperm donor, there will be no rebuttal of paternity. *Id.* at 353. Finally, as to "the government's interest in establishing paternity to ensure financial support of the child and the fundamental legal rights of the father. When a lesbian couple is married, it is just as important to establish who is financially responsible for the child and the legal rights of the nonbirthing spouse." *Id*. at 352-353. Given the sex-based classification that would be applied if this Court were to rule that only female spouses in same-sex couples must adopt in order to be recognized, the analysis should be the same. So should the result.

Finally, in another analogous, and recently decided, case, *Torres v. Seemeyer*, *supra*, the federal court cited *Heckler v. Mathews*, 465 U.S. 728, 740 (1984), in ruling that "the appropriate remedy [for an equal protection violation] is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." 207 F. Supp. 3d at 912. Here, the constitutional analysis and the result should be the same as the cases cited above. Married same-sex couples are similarly situated to married different-sex couples. Their need, and their children's need, for parental recognition from birth are equally important. To the extent the lower court's refusal to find Christina was the legal parent of Z.S. from the moment of his birth was based on her sex or sexual orientation, it violated both her, and his, constitutional rights to equal protection.

## CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded with instructions to recognize Christina as a legal parent of the child born during her marriage.

This the 1st day of June, 2017.

Respectfully submitted,

/s Dianne Ellis
Dianne Herman Ellis
Miss. Bar No. 102893
Ellis Law Firm, LLC
1145 Robinson Ave.
Ocean Springs, MS 39564
(228) 215-0037 Telephone
(228) 447-4118 Facsimile
dianne@ellislawfirmms.com

Elizabeth Littrell
Georgia Bar No. 454959*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
Southern Regional Office
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
(404) 897-1880 Telephone
(404) 897-1884 Facsimile
blittrell@lambdalegal.org

Attorneys for Appellant.

*Admitted *Pro Hac Vice*

## CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 1st day of June, 2017 have served a copy of this BRIEF OF APPELLANT CHRISTINA STRICKLAND by properly filing herein and by United States Mail with postage prepaid on the following persons at these addresses:

Prentiss M. Grant
Attorney for Appellee
P.O. Box 5459
Brandon, Mississippi 39047

Hon. John Grant
Chancellor
P.O. Box 1437
Brandon, Mississippi 39043

Due McKinion
Court Reporter for Judge Grant
P.O. Box 1437
Brandon, Mississippi 39043

/s *Dianne Herman Ellis*
Dianne Herman Ellis
ELLIS LAW FIRM, PLLC
1145 Robinson Avenue
Ocean Springs, MS
228-215-0037-Office
662-607-8576-Cellular
228-284-1189-Facsimile
Dianne@EllisLawFirmMS.com

Attorney for Appellant.