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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 9 EAP 2024

CHANEL GLOVER,
***Appellant*,**

v.

NICOLE JUNIOR,
Appellee.

BRIEF OF *AMICI CURIAE* GLBTQ LEGAL ADVOCATES & DEFENDERS, NATIONAL CENTER FOR LESBIAN RIGHTS, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, FAMILY EQUALITY, MAZZONI CENTER, PHILADELPHIA FAMILY PRIDE, AND COLAGE IN SUPPORT OF APPELLEE

Appeal from Opinion of the *En Banc* Superior Court of Pennsylvania (Bowes, J.), No. 1369 EDA 2022

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INTERESTS OF AMICI

GLBTQ Legal Advocates & Defenders ("GLAD") is a legal rights organization that seeks equality for all persons under the law regardless of their sexual orientation, gender identity, or HIV status. Since 1978, GLAD has worked nationally through strategic litigation, public policy advocacy, and education. GLAD has an enduring interest in the rights of and protections for LGBTQ+ parents and their children and has worked on litigation, legislation, and public education throughout the country on the topic of family protection. *See, e.g.,* Me. Stat. tit. 19-A, §§ 1831-1939; Vt. Stat. Ann. tit. 15C, §§ 101-809; Conn. Pub. Acts No. 21-15; 15 R.I. Gen. Laws § 15-8.1; and *J.M. v. C.G.*, 212 N.E.3d 776 (Mass. 2023); *Adoption of Daphne*, 141 N.E.3d 1284, 1288 n. 8 (Mass. 2020); *Pavan v. Smith*, 137 S. Ct. 2075 (2017); *Obergefell v. Hodges*, 574 U.S. 664 (2015).

The National Center for Lesbian Rights (NCLR) is a national nonprofit legal organization dedicated to protecting the safety and equality of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country, including many about same-sex couples and non-genetic parents. In Pennsylvania, NCLR served as

counsel in *Kove v. Naumhoff*, 2002 WL 32795035 (Pa. Super. 2002); *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000), *vacated sub nom*. *In re Adoption of R.B.F.*, 803 A.2d 1195 (2002); and *J. A. L. v. E. P. H., and M.K.*, 1998 WL 34296049 (Pa. Super. 1998), and as amicus in *Devlin v. City of Philadelphia*, 809 A.2d 980 (Pa. Commw. Ct. 2002), *aff'd in part, rev'd in part*, 862 A.2d 1234 (2004).

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Pennsylvania is one of the ACLU's statewide affiliates. The ACLU has participated in many cases in Pennsylvania and across the country advocating for the rights of LGBTQ+ people to form families and raise children and have those family relationships legally recognized and protected.

Family Equality is a national organization advancing lived and legal equality for LGBTQ+ families and those who wish to form them. For over 40 years, Family Equality has worked to change attitudes, laws, and policies through advocacy and public education to ensure that all families, regardless of creation or composition, are respected, loved, and celebrated in all aspects of life. Given the profound and critical impact that parentage determinations have on a child and a family and given the prevalence of

assisted reproduction in LGBTQ+ family formation, Family Equality has an ongoing interest in ensuring that LGBTQ+ people who engage in assisted reproduction can secure a legal parent-child relationship based on a demonstrated intent to parent.

Mazzoni Center is a Philadelphia-based multi-service non-profit entity that provides health and wellness services, including legal services, targeting the needs of LGBTQ+ people. Mazzoni Center's legal services program was founded in 1996 as part of the Center for Lesbian and Gay Rights and joined Mazzoni Center's continuum of services in 2010. From its start and through the present, the legal services program has advocated for legal recognition of the rights and obligations of LGBTQ+ community members in many areas, including as parents of their children regardless of genetics.

COLAGE is a national organization that unites people with one or more lesbian, gay, bisexual, transgender, queer, intersex, and/or asexual parent into a network of peers and supports them as they nurture and empower each other to be skilled, self-confident, and just leaders in our collective communities.

Philadelphia Family Pride's mission is to build community for LGBTQ+ parents, prospective parents, grandparents and our kids of all

ages – including adults, youth, kids, toddlers and infants. Philadelphia Family Pride supports our families in the greater Philadelphia region through advocacy, education and family-centered events.

Amici have a significant, shared interest in this case as organizations dedicated to advocating for the legal rights of LGBTQ+ people, including the legal rights of LGBTQ+ people to form families, raise children, and have their parent-child relationships legally recognized. Because the ability of LGBTQ+ people to have their parental status recognized, and for their children to be secured to their parents regardless of the circumstances of the child's birth, are of paramount importance to ensuring equal dignity under the law, *amici* ask that the Pennsylvania Supreme Court affirm the Superior Court's decision.

This brief was prepared entirely by *amici* and their counsel. No one other than *amici* and their counsel paid for the preparation of this brief or authored this brief, in whole or in part.

STATEMENT OF ISSUES

Amici refer to the issues presented in the Per Curiam Docket Entry dated Mar. 5, 2024.

SUMMARY OF ARGUMENT

Each year, tens of thousands of families across the United States conceive children by assisted reproduction. Many of these families are LGBTQ+ couples, who are often reliant on assisted reproduction to start and grow their families. As reproductive science and technology has become more widely available and reliable, courts have increasingly confronted issues of first impression related to parentage and family law for children born through assisted reproduction. Pennsylvania common law has consistently evolved alongside the changing needs and realities of the Commonwealth's families, adapting and applying common law doctrines and public policy rationales to best protect the interests of children and families.

This Court should do so again in this case. Here, having heard extensive evidence and live testimony from both sides, the trial court ruled that the Glover and Junior undertook significant effort and expense, together, to conceive a child via assisted reproduction with the clear intent that *both* would be the child's parents. Both parties were deeply involved in, and signed contracts, affidavits, and other agreements related to, the assisted reproduction process that they undertook together as a married couple. Hence the trial court, and the Pennsylvania Superior Court *en*

banc, found Junior had established legal parentage of the child, and that the parties' subsequent separation and divorce after conception of the child via assisted reproduction did not change the fact that Junior is the child's intended and actual parent. The Pennsylvania Supreme Court should affirm the Superior Court's decision on three separate grounds: first, the contract-based right that is clearly established by evidence; second, by adopting the intent-based parentage doctrine in the assisted reproduction context; and third, by applying estoppel principles to preclude Glover from denying Junior's legal parentage. Such holdings are amply justified by the facts in this case and would serve to best protect the interests of children and families across this Commonwealth, and particularly LGBTQ+ couples and their children, as they seek to build loving, lasting, and stable families.

ARGUMENT

I. The Superior Court's *En Banc* Decision Should Be Affirmed.

Based on a detailed factual record, including "an examination of the documents and testimony presented during the evidentiary hearing," the trial court properly found, and the *en banc* court below affirmed, that Junior had demonstrated an enforceable contractual agreement to parent, a theory well-grounded in Pennsylvania law, including *C.G. v. J.H.*, 193 A.3d 891 (Pa. 2018). Aug. 1, 2022 Trial Ct. Op. at 9; *Glover v. Junior*, 306 A.3d

899 at 912 (Pa. Super. Ct. Dec. 11, 2023) (hereinafter ("Super. Ct.")). The Superior Court can be affirmed on this ground alone. Nonetheless, because of the importance of this issue to children and families in the Commonwealth, and especially the LGBTQ+ families whose interests *amici* represent, this Court should also adopt an intent-based parentage doctrine in the assisted reproduction context and affirm the lower court on this alternative ground. This is a vital next step in the common law development of parentage law in Pennsylvania. *See K.E.M. v. P.C.S.*, 38 A.3d 798, 807-08 (Pa. 2012) (highlighting "evolving" set of appellate court decisions on common law parentage doctrines and affirming judicial role in "modernization of [] common law" regarding parentage). Finally, this Court should affirm the decision below on equitable estoppel principles.

a. <u>The Superior Court properly applied the well-established "contract-based right to parentage" in the assisted reproduction context.</u>

Pennsylvania courts have long recognized the "evolving concept of what comprises a family" and have incrementally shifted the common law to expand paths to parentage of a child. *C.G.,* 193 A.3d at 900. In addition to adoption, biology, and the marital presumption as means of forming a family with children, *see C.G.*, 193 A.3d at 906, another recognized path is an agreement to use assisted reproduction. There is "little doubt that . . .

this Commonwealth permits assumption or relinquishment of legal parental status, under the narrow circumstances of using assistive reproductive technology, and forming a binding agreement with respect thereto" under this Court's precedents. *C.G.*, 193 A.3d at 904; *see also In re Baby S.*, 128 A.3d 296, 306-07 (Pa. 2015) (finding a binding written agreement that a non-biological, intended mother was a legal co-parent of a child born through assisted reproduction using gestational surrogacy and enforcing that agreement as consistent with public policy); *Ferguson v. McKiernan*, 940 A.2d 1236, 1247-48 (Pa. 2007) (finding a binding oral agreement that a known sperm donor was not a parent of a child born to a single mother through assisted reproduction and enforcing that agreement as consistent with public policy).

The Superior Court appropriately affirmed the trial court's finding of "a contract-based right to parentage" through assisted reproduction on the facts in this case. Aug. 1, 2022 Trial Ct. Op. at 13; *see* Super. Ct. at 23. This finding was amply supported by the record, which included written agreements and conduct demonstrating the three essential elements of contract—mutual assent, consideration, and sufficiently definite terms—and should not be disturbed. The writings included the contract with the fertility clinic to provide in vitro fertilization, which both parties signed, and which

bound both Junior and Glover to pay the substantial costs of this medical care. Super. Ct. at 23-24; *see also* Reprod. Rec. at 65a-77a. In addition, the contract Glover signed with the cryobank to purchase the donor sperm, which was jointly selected by the parties, clearly identified Junior as a parent. Aug. 1, 2022 Trial Ct. Op. at 2; Super. Ct. at 24; *see also* Reprod. Rec. at 56a. Both parties signed the agreement, and shared the costs, for a doula to support birth of the child. Super. Ct. at 24; *see also* Reprod. Rec. at 118a-124a. Both parties signed a joint retainer agreement with counsel to obtain an adoption decree confirming parentage after the child's birth, which protects[1] a part of the work on the adoption process. Aug. 1, 2022 Trial Ct. Op. at 3; Super. Ct. at 29-30; *see also* Reprod. Rec. at 105a-106a. Critically, as part of that process, each party signed an affidavit indicating her intent that that the other would be an equal legal parent of the child they had agreed to bring into the world. *Id.*

The parties' conduct also evidenced their mutual assent to jointly parent. The parties married prior to beginning fertility treatments, intending and

[1] This is called a co-parent or confirmatory adoption. LGBTQ parents are advised to get an adoption decree to ensure full faith and credit of their parentage in all jurisdictions. See *V.L. v. E.L.*, 136 S. Ct. 1017 (2016). These adoptions are not intended to establish legal parentage in the child's home state but rather to confirm it as a hedge against discrimination in other states. *See, e.g.*, GLAD, LGBTQ Paths to Parentage Security, Apr. 3, 2024, https://www.glad.org/lgbtq-paths-to-parentage-security/ (last accessed May 24, 2024).

committing to a future that included joint parenting of a child.[2] Junior supported Glover throughout an exhausting IVF process, including by administering hormone shots over the course of three months and accompanying Glover to retrieval procedures and transfer procedures. Aug. 1, 2022 Trial Ct. Op. at 2; Super. Ct. at 27. When Glover became pregnant, Junior accompanied her to prenatal care visits. *Id*. Junior then frequently read to the baby while Glover was pregnant. Aug. 1, 2022 Trial Ct. Op. at 4; *see* Reprod. Rec. at 368a ("[E]very week I read a different book to M. while he is in vitro . . . After I moved out on January 1, 2022, we continued with that practice."). The parties also agreed on the baby's first, middle, and last names, and their chosen last name, which incorporated both of the parents' last names. Aug. 1, 2022 Trial Ct. Op. at 3; Super. Ct. at 2; *see also* Reprod. Rec. at 382a (testimony that text messages show Junior asked Glover after their separation whether their son's name would still be "M.M.J.G." and Glover responded "Yep."). This ongoing engagement in the many aspects involved with planning for and welcoming

[2] Both Glover and Junior are attorneys and can be presumed to understand that the marital presumption of parentage is one of the key rights in the constellation of benefits associated with marriage. *See Obergefell v. Hodges*, 576 U.S. 644 (2015); *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

a child was persuasive evidence of mutual agreement that amply supports the trial court's decision.

Junior also did her part to complete the agreement to parent. Junior equally shared the costs associated with in vitro fertilization,[3] hiring a doula to support childbirth and hiring an attorney to complete an adoption to secure a confirmatory decree. Aug. 1, 2022 Trial Ct. Op. at 3; Super. Ct. at 24-25. This also readily demonstrates consideration for the parties' agreement. Without Junior participating in the many steps and sharing the many costs associated with bringing a child into their world – the medical costs, the childbirth costs, the legal costs – their child would not have been born. *See Ferguson*, 940 A.2d at 12347 ("Absent the parties' agreement . . . the twins would not have been born at all"); *see also C.G.*, 193 A.3d at 902 ("We found it noteworthy that but for the agreement . . . the children at the center of the issue would not have come into being."). All the foregoing supplied ample evidentiary support for the trial court's determination that Glover and Junior had agreed that Junior would be the legal parent of the child, a ruling which should again be affirmed. *Contra C.G.*, 193 A.3d at

[3] The average cost of an IVF cycle in the United States is $12,400. *See* Peipert et al., Impact of in vitro fertilization state mandates for third party insurance coverage in the United States: a review and critical assessment. Reprod. Biol Endocrinol., 2 (Aug. 4, 2022).

896, 904 (where the trial court found that a non-marital, non-birth parent "did not agree to have a child" and where there was "no dispute" that C.G. was not a party to a contract or identified as an intended parent through assisted reproduction).

b. This Court should adopt the intent-based parentage doctrine in the assisted reproduction context and affirm the Superior Court on this alternative ground.

Amici urge this Court to take the opportunity to affirm the intent-based parentage doctrine, which provides security and certainty for children born through assisted reproduction. Under this doctrine, a person who consents to assisted reproduction with the intent to be a parent of the resulting child is a legal parent of that child, regardless of genetic connection or marital status. *C.G.*, 193 A.3d at 905. This basis for parentage operates to protect children born through assisted reproduction in numerous states and has been incorporated into the model recommended to states by the Uniform Law Commission via the Uniform Parentage Act.[4] Adopting the intent-based parentage doctrine in Pennsylvania is the right next step in the evolution of the law in this area and would reap numerous benefits for the many Pennsylvanians beginning families via assisted reproduction, especially for LGBTQ+ families. Overwhelming consensus in the states

[4] *See* UPA (2017), Article 7.

and over fifty years of legal history support that this Court should adopt an intent-based parentage doctrine in the assisted reproduction context and recognize this doctrine as a basis to support Junior's parentage claims in this case.[5]

Over the decades, as the common law and the Uniform Parentage Act (UPA) have evolved to recognize and protect children born through assisted reproduction and to ensure that individuals who use assisted reproduction to have a child are held legally responsible as parents, it has maintained this central premise: mutual consent to assisted reproduction

[5] *See Brown* v. Brown, 125 S.W.3d 840, 844 (Ark. 2003) (holding that the husband was estopped from denying child support for child born to his wife through alternative insemination); *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994) (holding that husband was equitably estopped from denying parentage of child born to his wife through alternative insemination where he orally consented to her insemination); *K. S. v. G. S.*, 440 A.2d 64, 68 (N.J. Ch. 1981) (holding that husband was the lawful father of child born to wife through alternative insemination because husband failed to offer clear and convincing evidence that he had withdrawn his consent to procedure); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) (holding that the husband's knowledge of and assistance in his wife's efforts to conceive constituted "consent" to procedure rendering him legal father with all legal responsibilities); *Gursky v. Gursky*, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963) (holding that the husband's consent to his wife's artificial insemination warranted application of equitable estoppel requiring him to support the child); *see also In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 4th Dist. 1998) ("Almost exclusively, courts which have addressed this issue have assigned parental responsibility to the husband based on conduct evidencing his consent to the artificial insemination.").

leads to conclusive legal parentage.[6] This is the overwhelming consensus across the states.[7]

The marital presumption of parentage has applied to spouses who consent to the use of assisted reproduction to have a child for over fifty years. In 1973, the first UPA provided that a husband who consented to the use of assisted reproduction by his wife was the legal parent of the child.[8] This provision ensured that, regardless of genetic connection with the husband, his consent to assisted reproduction established his legal parentage, thus ensuring a host of rights to the child as well as clarifying that a sperm donor was not a parent. Twenty-two states maintain some variation of this UPA provision.[9]

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[6] UPA (2017), Section 704.

[7] *See* Joslin et al., Lesbian, Gay, Bisexual and Transgender Family Law, § 3:3 (2018), citing states with intent-based parentage provisions: CA, CO, CT, DE, IL, ME, MD, NV, NH, NM, NY, ND, RI, VT, WA, WY, and states with assisted reproductive parentage provisions: AK, AZ, AR, FL, GA, ID, KS, LA, MA, MI, MN, MO, MT, NC, NJ, OH, TN, VA, and WI. In the minority of states without statutes regarding assisted reproduction, the marital presumption operates as a backstop for marital children to ensure both spouses are parents of the child. *But see Gatsby v. Gatsby,* 495 P.3d 996, 999 (2021) (finding that because spouse did not follow the terms of the assisted reproduction statute that the marital presumption had been rebutted).

[8] UPA (1973), Section 5.

[9] *See* Texas (160.703); Massachusetts (GL c. 46, section 4B); *see also* Joslin et al., Lesbian, Gay, Bisexual and Transgender Family Law, § 3:3 (2018), citing to 1973-like states MN, MO, MT, NJ, WI, and to those that have a similar statute but not exactly like UPA 1973 including AL, AR, AK, FL, GA, ID, KS, LA, MA, MI, NC, OH, OK, OR, TN, VA. Even in the absence of a statute, courts conclude that a spouse who consents to assisted reproduction is the legal parent of the resulting child. *See, e.g.,* I*n re Baby Doe*, 291 S.C. 389, 392 (1987) (holding that a husband who consents for his wife to conceive a child through artificial insemination, with the understanding that the child will

The 2000/2002 UPA expanded these critical protections in significant ways, including protecting nonmarital children born through assisted reproduction and expanding the ways in which consent to assisted reproduction, and thus legal parentage, can be established.[10] For example, this UPA clarified that: egg donors as well as sperm donors are not legal parents; a doctor is not required to document evidence of intent; consent to assisted reproduction can be evidenced by a writing signed by the person who intends to be the child's parent; and in the absence of a writing signed by the intended father before or after birth, a court can find him to be a parent through evidence of holding out.[11] This iteration of the UPA also strictly limited when a husband can challenge parentage, thus ensuring greater stability and protection for children.[12]

Since it was first promulgated in 1973, the UPA has included a provision stating that where applicable its provisions relating to determinations of paternity apply equally to determinations of maternity.[13] This mandate of gender neutrality is especially important for children of

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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.).

[10] *See* UPA (2000), Article 7; UPA (2002), Article 7.

[11] *See* UPA (2000), Article 7; UPA (2002), Article 7.

[12] *See* UPA (2000), Section 705; UPA (2002) Section 705.

[13] UPA (1973), Section 2.

LGBTQ+ parents. In 2017, following the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Uniform Law Commission updated the UPA to use gender-neutral language more comprehensively in Article 7, addressing parentage through consent to assisted reproduction, to ensure application to children born to LGBTQ+ parents. Although state law post *Obergefell* must ensure equal access to legal parentage for children of LGBTQ+ parents, eighteen states and the District of Columbia have expressly adopted or updated their assisted reproduction statutes to reflect this constitutional mandate.[14] States are decisively moving to adopt the intended parent doctrine to protect children born through assisted reproduction.

Pennsylvania should join the many states recognizing the intended parent doctrine as a basis for parentage to more comprehensively protect children born through assisted reproduction. Not only would the adoption of the intended parent doctrine align Pennsylvania with many other states and the UPA, but the doctrine is an incremental next step in the development of the common law that offers a number of important benefits for children and families in the Commonwealth. First, the intended parent

[14] *See* Joslin et al. at § 3:3 (2018), citing states with equal access assisted reproductive statutes: CA, CO, CT, DE, IL, ME, MD, NV, NH, NM, NY, ND, RI, VT, WA, WY, and the District of Columbia.

doctrine will protect more children by filling a gap in the common law. Not all hopeful parents have a written agreement or other evidence of contract-based parentage. Indeed, many couples who use assisted reproduction to have a child do not enter into signed agreements saying they will parent together. Some see no need for an agreement, especially where donor gametes such as sperm are acquired through a cryobank, making the donor's nonparentage clear. Others lack access to the funds to hire counsel. Still other couples may feel that having to prepare and sign a "contract" to parent through assisted reproduction—a document that couples who conceive without assistance never even have to consider—diminishes the dignity and rights of the couple and the child and the importance of the decision to bring a child into the world. An intent-based test—where there is evidence that both the birth and non-birth parent intended to be parents through assisted reproduction—more accurately reflects modern life, ensures the security of more children, and ensures that adults who enter into assisted reproduction jointly are held responsible for the resulting children.

Second, an intent-based parentage doctrine is easier for courts, lawyers, and parties to understand and apply. This doctrine has a straightforward standard: a person who consents to assisted reproduction

with the intent to be a parent is a parent of the resulting child.[15] The standard does not "open the floodgates" based solely on emails or witness testimony, *see* Opp. Br. at 38, because establishing intent requires sufficient evidence that demonstrates a party had requisite intent to be a parent, as Junior provided below. Such evidence (by either side) may take the form of authenticated emails or witness testimony, or it may be supplemented by contracts, affidavits, legal documents, expenditures, or communications to the extent such evidence demonstrates intent to be a parent. An intent-based standard also accounts for the intentions of *all* parties involved in the assisted reproduction process, as opposed to Glover's proposal to leave wholly unaddressed harms to parents who expend time, money, and effort to conceive a child with a partner, even if they are not the parent who actually carries the child. Far from being the "nebulous" standard that Glover claims, intent-based standards are clear and applied by courts around the United States on a regular basis. *See, e.g.*, *Partanen v. Gallagher*, 59 N.E.3d 1133, 1142-43 (Mass. 2016) (finding non-biological parent adequately "shared intention that [the defendant and plaintiff] would both be parents" based on evidence, such as presence in the delivery room and involvement, participation, and consent to assisted

[15] UPA (2017) Section 703.

reproduction pregnancies); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 500 (N.H. 2014) (holding both parents' intent to conceive a child, evidenced in part by preparation of a nursery, participation in birth announcements, and presence in the delivery room, as sufficient to support claim of presumed parentage). A clear standard for couples in similar circumstances as Glover and Junior will produce more consistency in results and therefore more stability for children and families.

Finally, this doctrine is important for protecting the children of LGBTQ+ families who are found in communities across the Commonwealth. According to the Williams Institute at UCLA Law School, 5.8% of Pennsylvanians identify as LGBT, and 27% have children.[16] Nationally, the data show that assisted reproduction is a vital way that LGBTQ+ people plan to welcome children into their families.[17] This part of the community depends heavily on assisted reproduction, and it is vital that the common law provides an avenue for protecting these families and their children.

[16] Williams Institute, LGBT Data & Demographics: LGBT Proportion of Population (2019); Williams Institute, Adult LGBT Population in the United States (2023).
[17] Goldberg et al., Research Report on LGB-Parent Families, Williams Institute, 5 (July 2014).

For these reasons, *amici* urge this court to adopt an intent-based parentage doctrine in affirming the Superior Court's decision.

c. <u>The Superior Court's decision can also be affirmed on equitable estoppel grounds.</u>

Independent of whether the marital presumption is applicable in this case,[18] principles of equitable estoppel bar Glover from denying Junior's

[18] This brief assumes, *arguendo*, that the marital presumption is inapplicable here due to the Pennsylvania courts having narrowed the application of the marital presumption to promote the goal of preserving intact marriages. *B.C. v. C.P.*, 310 A.3d. 721, 735 (Pa. 2024). Yet the goal of protecting children's parentage remains. *See id*. at 723 (noting the "strong presumption in Pennsylvania jurisprudence that a child conceived or born in a marriage is a child of the marriage"). The "profound commitment" of marriage plays a vital role in safeguarding children by ensuring material and non-material benefits. *Obergefell v. Hodges*, 576 U.S. 644, 658, 667-668 (2015). Originally, the marital presumption doctrine operated in Pennsylvania to shield children from the "legal and social discrimination" associated with illegitimacy. *B.C.*, 310 A.3d at 6. The marital presumption maintains an enduring importance for children born of assisted reproduction, many of whom are LGBTQ+ families in which one parent lacks a genetic connection with the child. Without the marital presumption, a child born through gamete donation and assisted reproduction to two intended parents instead may be left with one parent, because a donor is not a parent, and may lose the many material and non-material benefits associated with the second parent. *See Obergefell*, 576 U.S. at 667-668.

Were the Court to revisit the application of the marital presumption to provide protection to children, in addition to preserving the adult relationship, the marital presumption should apply here to secure the parentage of this child to both parents. The parties planned carefully to build a family and to bring this child into the world. Super. Ct. at 26. The parties researched and obtained donor gametes, and they went through considerable medical monitoring and procedures. Together, they took on the financial and emotional responsibilities of welcoming a child through assisted reproduction. As the parties used a sperm donor to conceive a child, there is no other party with a claim of parentage to the child. The child faces losing one of her parents – and the accompanying rights to child support, health insurance, social security benefits, inheritance and beyond – simply because of the timing of Glover's complaint for divorce.

parentage. *See B.C. v. C.P.*, 310 A.3d 721, 731 (Pa. 2024); *Fish v. Behers*, 741 A.2d 721, 722-23 (Pa. 1999). "Equitable estoppel applies to prevent a party from assuming a position or asserting a right inconsistent with a position previously taken." *L.S.K. v. H.A.N.*, 813 A.2d 872, 878 (Pa. 2002). Estoppel principles apply in a number of family law contexts, including for children born through assisted reproduction. *See id.* In the context of parentage, equitable estoppel dictates that a person cannot deny parentage if such actions are inconsistent with that person's prior conduct. *Fish*, 741 A.2d at 723. Therefore, the doctrine "is aimed at achieving fairness as between the parents by holding them . . . to their prior conduct" regarding parentage of the child. *Id*. The consequence of applying the equitable estoppel doctrine in family law cases is that a court determines whether it is in the best interests of the child to continue to recognize the spouse as the parent of the child. *See K.E.M.*, 38 A.3d at 807. This result is supported by public policy, because children should be secure in knowing the identity of their parents. *Brinkley v. King*, 701 A.2d 176, 180 (Pa. 1997).

This child should not be penalized for the actions of an adult and circumstances beyond her control. *Stanley v. Illinois*, 405 U.S. 645, 648 (1972) (holding that children of unmarried father should not be punished by their father's "failure to petition for adoption").

Estoppel bars Glover from challenging Junior's parentage of their child. The parties began their joint planning to have a child together in 2020, even before they married. Aug. 1, 2022 Trial Ct. Op. at 1; Super Ct. at 1. Junior made the first outreach to the fertility clinic in January 2021. *Id.*; Reprod. Rec. at 032a. Together, the Glover and Junior attended a consultation at the clinic to learn about in vitro fertilization versus insemination, and the parties chose to pursue in vitro fertilization. *Id.*; Reprod. Rec. at 348a. The IVF process was expensive and time intensive. For example, the process required hormone shots in Glover's abdomen and buttocks for three months, and Junior administered those shots herself. Aug. 1, 2022 Trial Ct. Op. at 2; Reprod. Rec. at 349a. Glover signed paperwork with the fertility clinic to undergo IVF alongside Junior. Aug. 1, 2022 Trial Ct. Op. at 2; Super. Ct. at 2. Glover jointly chose donor sperm with Junior. Aug. 1, 2022 Trial Ct. Op. at 3; Reprod. Rec. at 355a. The parties specifically selected a sperm donor with characteristics resembling Junior so that the child had a chance to resemble both parents. Super. Ct. at 34.

Once pregnant, Glover and Junior attended Glover's obstetric appointments together. Reprod. Rec. at 350a. Glover also signed the adoption representation agreement with Junior. *Id*. In December 2021,

Glover executed an affidavit during the adoption process stating her intent that Junior is an equal legal parent and should be recognized as such. Aug. 1, 2022 Trial Ct. Op. at 9; Super. Ct. at 2. In January 2022, Glover and Junior signed a joint agreement with a doula to support the birthing process. Aug. 1, 2022 Trial Ct. Op. at 9; Super. Ct. at 3. Glover and Junior also agreed on a name for the child, including a hyphenated last name that included both of their last names. Aug. 1, 2022 Trial Ct. Op. at 3; Reprod. Rec. at 382a.

For over a year, in all relevant ways, Glover treated Junior like her co-parent and with the understanding that they would parent the child together. When the parties hit marital difficulties, Glover filed for divorce. Junior immediately filed a petition to establish parentage to enforce their agreement to parent. Aug. 1, 2022 Trial Ct. Op. at 4; Reprod. Rec. at 008a-030a. Rather than abide by their agreement, Glover contested Junior's parentage.

Junior should be estopped from denying Junior parentage of their child. As set out above, Glover agreed with Junior to bring a child into the world together through assisted reproduction and that they would both be parents. Junior invested substantial time, money, and emotional energy as the two worked to establish a family together. Glover should not be able to

preclude Junior from being a parent to this child now. *See Strickland v. Day*, 239 So. 3d 486, 494 (Miss. 2018) (holding that the doctrine of equitable estoppel precluded a birth mother from challenging the non-birth mother's parentage where there was ample evidence the then-married couple jointly and intentionally agreed to have [a child] through the use of [assisted reproduction]).

Further, Glover should not be able to strip Junior of legal parentage as that would be contrary to the child's best interests. The parties planned for the child to have two parents – Glover and Junior. Should Glover succeed in denying parentage, their child will suffer a tremendous loss of rights and benefits, including emotional support and the many financial benefits that arise from a parent-child relationship, including child support and health insurance. Failing to apply estoppel in this matter would lead to illogical and inequitable results, contrary to the child's best interests. "[I]n the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children apart from whatever rights the adults may have vis a vis each other." *L.S.K.*, 813 A.2d at 878. The child-centered solution here is to estop Glover from denying Junior's parentage of the child and to reaffirm Junior as a parent here.

CONCLUSION

The decision of the Superior Court should be affirmed.

May 24, 2024

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

In accordance with Pa.R.A.P. 2135(d), I hereby certify that this brief does not exceed 7,000 words in compliance with Pa.R.A.P. 531(b)(3), excluding the supplementary matter exempted by Pa.R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief.

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I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2024, two true and correct copies of the foregoing Brief of *Amici Curiae* were served on the following persons via email and priority mail:

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