STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

Appeal No. 2015 AP 219

In the Interest of P. L. L.-R.:

SUSAN R. AND CHRISTIE L.,

Joint Petitioners-Appellants,

v.

CIRCUIT COURT FOR WINNEBAGO COUNTY,
HONORABLE KAREN SEIFERT, PRESIDING,

Respondent-Respondent.

Appeal From The Order Entered January 16, 2015
By The Winnebago County Circuit Court In Case No. 2014 AD 77
The Honorable Karen Seifert Presiding

JOINT PETITIONERS-APPELLANTS' BRIEF

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CHILDREN & FAMILIES

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STATEMENT OF THE ISSUES

1. Did *Wolf v. Walker*[1] require the Circuit Court to ungender and apply Wisconsin's marital presumption of parentage statutes, Wis. Stat. §§ 891.41 and 767.803,[2] to this same-sex couple and their child in the same way the statutes would apply to a different-sex couple and their child, and to confirm/declare Christie, the spouse of the child's biological mother, a legal parent of the child?

2. Did *Wolf v. Walker* require the Circuit Court to find further support for Christie and Susan's request for a joint parentage order in the couple's equitable arguments under Wisconsin's artificial insemination statutes, Wis. Stat. §§ 891.40 and 69.14(1)(g)?

3. Did the Circuit Court err by failing to order the Wisconsin Department of Health Services, Vital Records Office, to identify Christie and Susan as "Parent" and "Parent" on the child's birth certificate, pursuant to these arguments?

4. Did the Circuit Court's denial of the Joint Petition for Determination of Parentage treat Christie and Susan's marriage as a "second-tier marriage" and therefore violate the precedent of *Wolf v. Walker* and the constitutional rights of Christie and Susan to equal protection and substantive due process as set forth in *Wolf*?

5. Did the Circuit Court's denial of the Joint Petition for Determination of Parentage violate the constitutional rights of the child to equal protection, by failing to extend to this child the benefits and protections of the marital presumption of parentage, due solely to the circumstances of his birth and/or the marital status, sexual orientation, or sex of his parents?

6. Did the Circuit Court's denial of the Joint Petition for Determination of Parentage violate the constitutional rights of the child to substantive due process, by interfering with the child's fundamental right to intimate familial association with both his parents and having his best interests promoted and protected by law?

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[1] *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 574 U.S. _____, 135 S. Ct. 316 (U.S. Oct. 6, 2014) (No. 14-278) (stay of mandate by Seventh Circuit automatically dissolved and mandate issued October 6, 2014).

[2] All references to the Wisconsin Statutes in this brief are to the 2013-14 version.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this appeal are straightforward, have already been litigated in *Wolf v. Walker*, and are fully developed herein. Therefore, oral argument is unnecessary.

Publication is appropriate in this matter, as the decision, either way, will enunciate a new rule of law or clarify an existing rule, and it is a case of substantial and continuing public interest. In addition, if the Court finds in Christie and Susan's favor, the decision will apply an established rule of law to a factual situation different from that in published opinions. Wis. Stat. § 809.23(1)(a)1., 2., and 5.

STATEMENT OF THE CASE

Dr. Christie L. ("Christie") and Dr. Susan R. ("Susan") are legal spouses who reside together in Winnebago County, Wisconsin.[3] They are both college professors. They have shared their lives in a committed relationship for five years. On June 13, 2014, seven days after the same-sex marriage decision in *Wolf v. Walker*, they were legally married in Wisconsin.[4]

In 2012, Christie and Susan decided to start a family. They decided to use assisted reproductive technology ("ART") and have a baby together by artificial insemination. They agreed that Susan would carry the child and be the genetic mother, because Susan is younger than Christie. Prior to conception, they agreed that who carried the child and who is the genetic parent would not alter their commitment to be equal co-parents of their child.

Christie and Susan decided to use an anonymous sperm donor and together selected a donor through a sperm bank. They paid for the sperm and the ART procedures together. On September 4, 2013, Susan was inseminated with the anonymous donor sperm under the supervision of Dr. Kathryn Meyer of Fox Valley Reproductive Medicine in Appleton, Wisconsin. (R.3 and R.4; P-App. 112-114.) Christie was present at and consented to the insemination. The child

[3] The facts in this matter are undisputed. All facts referenced in this brief can be found at Record Document 1 (petition), pages 1-2, and Record Document 12 (testimony), pages 9-24, unless otherwise or more specifically noted. (P-App. 103-04 and 137-152.)

[4] The legality of Christie and Susan's marriage is not at issue. Governor Scott Walker has acknowledged the validity of the marriages solemnized between June 6, 2014 (the day of the federal district court decision) and June 13, 2014 (the day the injunction and stay were issued). *See* Argument Section I, *infra*, for a detailed discussion of *Wolf v. Walker*, including citation to the Governor's statement on this issue on October 13, 2014.

was conceived as a result of the September 4, 2013 insemination, and was born on June 7, 2014, one day after the decision in *Wolf v. Walker.*

From the beginning of the process to conceive the child, Christie and Susan intended to be equal co-parents and planned to seek equal legal parentage of the child as soon as legally possible. They executed a Co-Parenting Agreement prior to the child's birth, in which they anticipated these proceedings and agreed to be equal parents to the child in every way. (R.5; P-App. 115.) Susan would not have consented to and undergone the insemination had Christie not agreed to be an equal co-parent to any child conceived. Christie would not have agreed to Susan being the one to carry, and being the genetic parent, had the parties not agreed to be equal co-parents to any child conceived. Had Wisconsin law allowed and not criminally barred it,[5] Christie and Susan would have married in 2011 when they began living together and refinanced the mortgage on their home together, and before they started their family. (R.12, p.10 and 18-19; P-App. 138 and 146-47.)

During the pregnancy, Christie supported Susan physically, emotionally, and financially. Christie attended all prenatal appointments and childbirth classes with Susan. Christie was present throughout the labor and delivery of the child. Both Christie and Susan have acted as parents to the child since he was conceived and born. They named him together, and gave him the last name, "L.-R." The parties hold themselves out to the world as the equal parents of the child.

Wolf v. Walker became final on October 6, 2014, when the U.S. Supreme Court denied certiorari.[6] On November 25, 2014, Christie and Susan filed a Joint Petition for Determination of Parentage in the Winnebago County Circuit Court, seeking to have Christie declared a legal parent of the child based on their marriage and *Wolf v. Walker*. (R.1.; P-App. 103.) A hearing was held on December 29, 2014. (R.12; P-App. 129.) The Circuit Court denied the petition, and a motion for reconsideration, suggesting Christie and Susan instead file for a step-parent adoption and undergo a step-parent screening. (R.8 and R.9.; P-App. 127-28.) Christie and Susan then made this appeal.

[5] *See* Wis. Const. Art. XIII, Sec. 13; Wis. Stat. § 765.04; Wis. Stat. § 765.30(1)(a).
[6] Again, *see* Argument Section I, *infra,* for a detailed discussion of the *Wolf v. Walker* case.

SUMMARY OF ARGUMENT

Last summer, on June 6, 2014, the U.S. District Court for the Western District of Wisconsin declared the following:

> Any Wisconsin statutory provisions, including those in Wisconsin Statutes chapter 765, that limit marriages to a "husband" and a "wife," are unconstitutional as applied to same-sex couples.

Wolf v. Walker, 986 F. Supp. 2d 982, 1028 (declaratory judgment and opinion). The District Court went on to say in its injunction that state actors must now "treat same-sex couples the same as different-sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage." 2014 WL 2693963, Opinion and Order dated June 13, 2014, pg. 13, Case No. 14–CV–64 (W.D. Wis. 2014) (injunction).

The present case is about implementing *Wolf v. Walker* and applying it to a child born to a legally married same-sex couple. It is about giving to this couple what a husband gets at the hospital automatically when his wife gives birth to a child: the marital presumption of parentage.

In this appeal, Christie and Susan ask the Court of Appeals to do the following: overturn the lower court's decision denying their Joint Petition for Determination of Parentage; find that the marital presumption of parentage applies to their family; and enter the requested parentage order, which is part of the record (R.13; P-App. 160-61) (or remand the case and order the lower court to enter the order).

In this brief, Christie and Susan first discuss last summer's same-sex marriage case, *Wolf v. Walker*. Next, they apply that case to the marriage-based statutes in Wisconsin concerning legal parentage of children. They then address the constitutional problems that could arise if those statutes are not applied to their family in the same way they apply to a different-sex couple.

STANDARDS OF REVIEW

All issues presented in this appeal are questions of law, as questions of statutory construction and constitutional law. As such, the Court of Appeals should examine the issues presented in this appeal *de novo*, without deference to the decision of the Circuit Court. *State v. Vanmanivong*, 2003 WI 41, ¶ 17, 261 Wis. 2d 202, 661 N.W.2d 76.

In the questions of statutory construction, the statutes should be interpreted, if at all possible, to avoid constitutional problems. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 47, 205 N.W.2d 784 (Wis. 1973) (holding that the "cardinal rule of statutory construction is to preserve a statute and to find it constitutional if it is at all possible to do so").

There are no disputed facts in this appeal. No additional facts are needed for a full resolution of this case. The Court of Appeals can resolve this case in full, by answering the questions of law and then applying its statutory interpretation to the undisputed facts of this case with again, a *de novo* standard of review. *State v. Piddington*, 2001 WI 24, ¶ 13, 241 Wis. 2d 754, 623 N.W.2d 528.

ARGUMENT

I. *WOLF V. WALKER* CONTROLS THIS CASE.

A. The Timeline and Holding of Wolf v. Walker.

On June 6, 2014, in *Wolf v. Walker*, Judge Barbara Crabb of the U.S. District Court for the Western District of Wisconsin declared Wisconsin's same-sex marriage ban unconstitutional and held that "any Wisconsin statutory provisions … that limit marriages to a 'husband' and 'wife' are unconstitutional as applied to same-sex couples." 986 F. Supp. 2d at 1028 (declaratory judgment and opinion). She held that Wisconsin's marriage ban "violates plaintiffs' fundamental right to marry and their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution." *Id.*

Judge Crabb addressed children of same-sex couples specifically in her opinion:

> [T]he most immediate effect that the same-sex marriage ban has on children is to foster less than optimal results for children of same-sex parents by stigmatizing them and depriving them of the benefits that marriage could provide. *Goodridge*, 798 N.E.2d at 963-64 ("Excluding same-sex couples from civil marriage … prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.") (internal quotations omitted). *Cf. Windsor*, 133 S.Ct. at 2694 ([the federal Defense of Marriage Act] "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.").

Id. at 1023.

One week later, on June 13, 2014, the same court issued an injunction, ordering state actors to treat same-sex couples the same as different-sex couples with regard to ability to marry in Wisconsin, recognition of out-of-state marriages in Wisconsin, and conveying the benefits and responsibilities of marriage. *Wolf v. Walker,* 2014 WL 2693963, Opinion and Order dated June 13, 2014, pg. 12-13, Case No. 14–CV–64 (injunction). The Court ordered state actors to "treat same-sex couples the same as different-sex couples in the context of processing a marriage license *or determining the rights, protections, obligations or benefits of marriage." Id.* at pg. 13 (emphasis added).

The U.S. District Court concurrently issued a stay of the injunction pending "the conclusion of any appeals." *Id.*

On September 4, 2014, the U.S. Court of Appeals for the Seventh Circuit affirmed the lower court decision, in an opinion by Judge Richard Posner. *Wolf v. Walker,* 986 F. Supp. 2d 982 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (affirming the decision of the U.S. District Court for the Southern District of Indiana in *Baskin v. Bogan,* as well as Judge Crabb's decision in *Wolf v. Walker*). Like Judge Crabb, Judge Posner recognized that the issue of same-sex marriage is not an abstract political debate, but rather a form of discrimination that causes daily on-the-ground harm to children. The second paragraph of his 40-page opinion begins as follows: "[f]ormally these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, they are about welfare of American children." *Id.* at 654. He went on to say, "[c]ustodial rights to and child support obligations for children of the marriage" are among the "tangible … benefits of marriage, which … enure directly or indirectly to the children of the marriage." *Id.* at 658.

On September 15, 2014, the Seventh Circuit issued an order, confirming that Judge Crabb's stay would remain in place pending further appeal: "[t]he [order] in this appeal is STAYED pending final disposition of the petition for writ of certiorari. The stay will terminate automatically if the certiorari petition is denied or will terminate upon the judgment of the Supreme Court if the certiorari petition is granted." *Wolf v. Walker,* Order dated Sept. 15, 2014, Case No. 14-2526, PACER Doc. 172 (7th Cir.).

On October 6, 2014, the U.S. Supreme Court denied the State of Wisconsin's petition for writ of certiorari in *Wolf.* 986 F. Supp. 2d 982 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 574 U.S.___, 135 S. Ct. 316 (No. 14-278). As a result, on the morning of

October 6th, the stay on Judge Crabb's injunction was automatically lifted and the Seventh Circuit decision became the law of Wisconsin.

That same day, on October 6th, Attorney General J.B. Van Hollen issued a press release, stating that after the denial of certiorari, "[i]t is now our obligation to comply with [the District Court and Seventh Circuit] decisions. I encourage everyone to respect the Court's action and to administer the law fairly and impartially." Statement by Attorney General J.B. Van Hollen, Wis. Dept. of Justice, http://www.doj.state.wi.us/media-center/2014-news-releases/october-6-2014 (last visited Apr. 13, 2015).

On October 13, 2014, Governor Scott Walker issued a press release, announcing, "[p]er the guidance from the Department of Justice, state agencies will examine and update forms, manuals, and other documents consistent with the ruling, and the state will be treating licenses issued in June as valid marriage licenses." The press release could not be found on Governor Walker's website; it is discussed at Steven Verburg, *Wisconsin Governor Scott Walker Directs State to Recognize 100s of Gay Marriages*, Wis. State J. (Oct. 14, 2014), *available at* http://host.madison.com/wsj/news/local/govt-and-politics/wisconsin-gov-scott-walker-directs-state-to-recognize-s-of/article_500e4a64-2779-5ae6-ae66-dc43321ef988.html (last visited Apr. 13, 2015).

The law of Wisconsin is therefore *Wolf*, and the holding in *Wolf* is threefold:

- Same-sex couples must be allowed to marry in Wisconsin;
- Out-of-state marriages of same-sex couples must be respected and recognized in Wisconsin; and
- The rights, responsibilities, and benefits of marriage must be conveyed to same-sex couples in the same way they are conveyed to different-sex couples.

This third point in *Wolf* is the one at issue in the present case. In this case, the lower court recognized Christie and Susan's marriage, but it denied them a benefit of their marriage. It denied their child the status of being a marital child and therefore Christie the status of being a legal parent. This is one of the most important benefits of marriage, and perhaps one taken for granted by those to whom it applies. By denying this family this benefit, the lower court carved out an exception to *Wolf* and its command that Wisconsin law must now be applied equally to all married couples. It created a second tier of marriages in Wisconsin. That is the issue in this appeal.

B. Additional Litigation and Legislation Should Not Be Required to Implement Wolf v. Walker.

Wolf v. Walker controls this case as a full and final precedent of the U.S. Court of Appeals, Seventh Circuit. Attorney General Van Hollen was a named defendant in that case and his office acted as counsel for the State of Wisconsin throughout the trial court and appellate proceedings.

In the present appeal, the Attorney General has been noticed and has appeared. If he opposes Christie and Susan's position in this brief, the direct application of offensive collateral estoppel may not be quite appropriate, but his opposition would warrant something similarly equitable.

As explained above, *Wolf* is not just about the ability to marry; it is also about receiving the benefits of marriage. The present case is a narrow version of *Wolf*, specific to children. It is about one benefit of marriage.

Additional litigation and appeals should not be required to apply marriage equality to this couple and their child. Litigation was not necessary before couples were allowed to file joint state income tax returns this year, or before couples were allowed to legally change their names based on marriage, versus by court order.

Nor should legislation be required to give effect to *Wolf*. No legislation has passed since *Wolf* ungendering the terms "husband" and "wife" in Chapter 765 of the Wisconsin Statutes, yet marriages have been allowed.

The State made this "re-writing" argument in *Wolf*, and it was rejected. Offensive collateral estoppel should directly apply to this "re-writing" argument, if it is made. The District Court said the following in its June injunction, which injunction was upheld by the Seventh Circuit:

> Finally, defendants say that plaintiffs' proposed injunction "effectively requires a re-write of Wisconsin Statutes." I am overruling this objection as well. The proposed injunction does not require the "re-writing" of any statutes. Rather, it requires only equal treatment of same-sex couples and opposite-sex couples. If I accepted defendants' argument, it would be impossible for individuals subjected to constitutional violations to obtain relief when the violation was caused by multiple laws.

2014 WL 2693963, Opinion and Order dated June 13, 2014, pg. 10, Case No. 14–CV–64.

The State of Wisconsin by the Attorney General had its day in court in *Wolf v. Walker*, all the way up to the U.S. Supreme Court, at significant cost to the Wisconsin taxpayer.[7] The issue of marriage equality in Wisconsin has been resolved. Now, it needs to be implemented.

It would be inequitable and impractical to have to litigate or legislate every ungendering of a marriage benefit in Wisconsin. Requiring either would nullify the holding in *Wolf* and the power of the courts to pass upon the constitutionality of statutes, *i.e.*, the power of judicial review, the system of checks and balances, and the separation of powers. *Cf. Marbury v. Madison*, 5 U.S. 137 (1803). And the parties whose rights have been adjudicated as constitutionally violated, would be left waiting, while their rights continue to be violated.

Instead of additional litigation or legislation, we have a rule of construction: Wis. Stat. § 990.001(2) regarding gendered words. That is all that is necessary: ungender the relevant statute and apply the benefit or responsibility of marriage to the couple.

II. AFTER *WOLF V. WALKER*, WISCONSIN'S MARITAL PRESUMPTION OF PARENTAGE MUST BE APPLIED TO CHRISTIE AND SUSAN AND THEIR CHILD AS A BENEFIT OF THEIR MARRIAGE.

A. The Marital Presumption of Parentage Must be Ungendered and Applied to this Family.

Following the decision in *Wolf v. Walker*, Christie and Susan are entitled to the application of Wisconsin's marital presumption of parentage statute, Wis. Stat. § 891.41. That statute provides the following:

> **Presumption of paternity based on marriage of the parties.** (1) A man is presumed to be the natural father of a child if any of the following applies:
>
> (a) He and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.
>
> (b) He and the child's natural mother were married to each other after the child was born but he and the child's natural mother had a relationship with one

[7] The State of Wisconsin has been ordered to pay the fees of the ACLU in *Wolf v. Walker*. Stipulation and Agreement as to Costs and Attorneys' Fees dated March 27, 2015, Case No. 14-CV-64, PACER Doc. No. 194 (W.D. Wis.). The parties stipulated to the sum of $1,055,000.00, for the State to pay the ACLU. *Id.* This sum does not include the additional money spent by the Attorney General's Office on its own attorneys and legal expenses.

> another during the period of time within which the child was conceived and no other man has been adjudicated to be the father or presumed to be the father of the child under par. (a).
>
> (2) In a legal action or proceeding, a presumption under sub. (1) is rebutted by results of a genetic test, as defined in s. 767.001(1m), that show that a man other than the man presumed to be the father under sub. (1) is not excluded as the father of the child and that the statistical probability of the man's parentage is 99.0% or higher, even if the man presumed to be the father under sub. (1) is unavailable to submit to genetic tests, as defined in s. 767.001(1m).

Subsection (a) is the provision for children born during marriage. Subsection (b) is the provision for children born during a non-marital relationship with the parents subsequently intermarrying. The present case is a subsequent intermarriage case, although the arguments are the same for application of sub-(a) and sub-(b) to a same-sex couple.

Following *Wolf*, Wisconsin courts must now apply Wis. Stat. § 990.001(2) to ungender the language in Wis. Stat. § 891.41, and apply that statute to same-sex couples in the same way it would apply to different-sex couples. Wis. Stat. § 990.001(2) provides the following:

> **Construction of laws; rules for.** In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature: … (2) Gender. Words importing one gender extend and may be applied to any gender.

Using this rule of construction, the words "husband" and "wife" should be construed as "spouse," the words "father" and "mother" as "parent," the word "paternity" as "parentage" or "maternity," and so on. In particular, Wis. Stat. § 891.41(1) should now be read as follows, with the ungendered language in brackets:

> **Presumption of [parentage] based on marriage of the parties.** (1) [An individual] is presumed to be the [parent] of a child if any of the following applies:
>
> (a) [He or she] and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.
>
> (b) [He or she] and the child's natural mother were married to each other after the child was born but [he or she] and the child's natural mother had a relationship with one another during the period of time within which the child was conceived and no other [individual] has been adjudicated to be the [parent] or presumed to be the [parent] of the child under par. (a).

Wis. Stat. § 767.803 makes clear how the marital presumption of parentage should operate in subsequent intermarriage cases, such as the present one.[8] It provides the following, in relevant part, with the ungendered language in brackets:

> **Determination of marital children.** If the [parents] of a nonmarital child enter into a lawful marriage … the child becomes a marital child, is entitled to a change in birth certificate under s. 69.15(3)(b), and shall enjoy all the rights and privileges of a marital child as if he or she had been born during the marriage of the parents.

In fact, under this post-*Wolf* interpretation of the law, Christie is already a legal parent of the child, just like a husband automatically becomes a legal parent of his wife's child at the hospital after the child's birth (or upon subsequent intermarriage to the child's mother, if the child was conceived during the relationship). It is an automatic operation of law, retroactive to the child's birth. In this sense, Christie and Susan's Joint Petition sought from the lower court a *confirmation* of parentage that should have already been conveyed by automatic operation of law at the time of their marriage.[9]

This ungendering of the marital presumption of parentage statutes is the same ungendering (from "husband" to "spouse") that now allows courts in Wisconsin to grant same-sex joint and step-parent adoptions. *See* Wis. Stat. § 48.82(1)(a) (listing who may adopt a child as "a husband and wife jointly, or either the husband or wife if the other spouse is a parent of the minor"). This is also the mechanism that allows other state actors to apply the law equally when confronted with the words, "husband" and "wife," in the statutes. *See, e.g.*, Wis. Stat. § 71.03(2)(d) (allowing a "husband and wife" to file their state income tax return jointly). It appears that after *Wolf*, this ungendering is happening for some benefits without thought to the actual mechanism for doing it: the gender rule of construction.

Already, since October 6, 2014, at least eight courts in Rock, Milwaukee, Dane, and La Crosse County have granted parentage orders based on the marital presumption, and the Wisconsin Vital Records Office is respecting and

[8] *See also State v. Robin M.W. and John D.C. (In re the Paternity of T.J.D.C.),* 2008 WI App 60, 750 N.W.2d 957 (2008) (discussing the operation of the marital presumption as applied to a different-sex subsequent intermarriage).

[9] Christie and Susan also sought confirmation from a court, in order to reduce the operation of law to court order, so that their family could enjoy the protection of the Full Faith and Credit Clause of the U.S. Constitution.

recognizing these orders by issuing revised birth certificates without delay or fuss.[10]

Circuit courts, and other state actors in Wisconsin, cannot pick and choose which benefits of marriage they will apply equally. They must apply all benefits of marriage equally; otherwise, a tiered system of marriage will be created, which is forbidden by *Wolf* and its equal protection holding.[11]

B. The Public Policies of the Marital Presumption of Parentage Support its Application to this Family.

The Wisconsin Supreme Court has made clear that the marital presumption of parentage is not about genetics alone. It is about the best interests of the child

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[10] Wisconsin law permits citation to circuit court cases. *Brandt v. Wis. Labor and Indus. Review Comm'n*, 160 Wis. 2d 353, 358-66, 466 N.W.2d 673 (Wis. Ct. App. 1991).

[11] The lower court in this case seemed concerned about the letters, "AD," in the case caption of the Joint Petition for Determination of Parentage, even though the nine-page petition made clear it was seeking parentage, a new form of relief after *Wolf v. Walker*, not adoption. (R.1; P-App. 103.) The cover letter with the initial filing also made this clear. (R.13; P-App. 158.) This detail is irrelevant in this appeal, as the lower court said it would lack the authority to grant the parentage order no matter which case caption was used. (R.12, p. 3, lines 12-16; P-App. 131.) (R.12, p. 7, lines 8-9; P-App. 135.) (R.12, p. 26, lines 2-5; P-App. 154.) Christie and Susan raise this issue here, because they seek procedural clarification if they prevail on substance.

The Joint Petition was filed on November 25, 2014, shortly after *Wolf* became final. (R.1; P-App. 103.) At the time, it was not yet clear how to file these parentage actions. It remains unclear. There is no parentage case caption or case classification code.

Christie and Susan filed their petition as an "AD" (adoption) matter. An AD action was a reasonable option to file, as such actions pertain to children, concern parental rights, contain sensitive information, are closed and confidential with sealed records, and have no filing fee. Other options for filing may include the following: as a "paternity" action pursuant to Wis. Stat. § 767.80(1)(b), (c), (d), and/or (f); as a family law action; as a juvenile (Chapter 48, Wis. Stat.) action similar to a termination of parental rights or minor guardianship; or as a request for a declaratory judgment under Wis. Stat. § 806.04. There may be other options, too.

To Christie and Susan, this procedural detail feels small when compared to the enormity of having their child's legal status be uncertain or trying to implement one of the largest constitutional law cases in Wisconsin's history.

In this appeal, if the Court of Appeals finds the marital presumption of parentage to apply to all marriages, it would be helpful to clarify this procedural issue of what case caption and classification code to use when filing. While this may seem minor when compared to the substantive issues, Christie and Susan request clarification.

and protecting the historical sanctity of marriage and the status of being a "marital child."

In *Randy A.J. v. Norma I.J.*, the Wisconsin Supreme Court denied a putative father's attempt to rebut the marital presumption of parentage with a genetic test finding him to be the genetic father. 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630. The putative father was trying to take custody and placement of the child from the husband of the genetic mother. The husband had believed he was the genetic father and had been raising the child for three years, since the child's birth. *Id.* at ¶ 30. The Court upheld the lower court order, finding the husband to be the legal parent of the child. *Id.* at ¶ 2.

In its decision, the *Randy A.J.* Court discussed the roots of the marital presumption with reverence, citing to the landmark U.S. Supreme Court decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989):

> *Michael H.* explained that a child's position in a lawful marriage warranted protection because it rests upon "the historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the relationships that develop within the unitary family." Additionally, the presumption of legitimacy is a fundamental principle of common law that courts are reluctant to overturn.

2004 WI 41, ¶ 17 (citations omitted).

The *Randy A.J.* Court pointed out the particular strength of Wisconsin's marital presumption by noting that "Wisconsin favors preserving the status of marital children, even when it can be positively shown that the husband of the mother could not have been the father of the child," citing the artificial insemination statute, Wis. Stat. § 891.40. *Id.* at ¶ 31. The Court described that statute as "unqualifiedly according the status of 'natural father' to the husband of the mother when children are conceived by artificial insemination." *Id.* at ¶ 31, n.14.[12]

Another principle relied on by the Court in *Randy A.J.* is important to note here. The Court found that the putative father did not have a constitutionally protected liberty interest in parental rights to the child based on genetics alone. Instead, the Court said that such a liberty interest is "dependent upon an actual relationship with the child where the parent assumes responsibility for the child's emotional and financial needs." *Id.* at ¶ 16. For this proposition, the Wisconsin Supreme Court cited the landmark U.S. Supreme Court cases of *Lehr v.*

[12] The artificial insemination statute, Wis. Stat. § 891.40, is discussed in Section IV, *infra.*

Robertson, 463 U.S. 248, 257 (1983), and *Caban v. Mohammed,* 441 U.S. 380, 397 (1979):

> As the Supreme Court has explained, the "paramount interest" is in the welfare of children so that the "rights of the parents are a counterpart of the responsibilities they have assumed." … "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."

Randy A.J., 2004 WI 41, ¶ 16. This holding also shows how parental rights in Wisconsin require more than just genetics. Parental rights require an assumption of responsibility and a relationship with the child such that the exercise of parental rights is in the best interests of the child.

In 1991, the Wisconsin Supreme Court addressed the public significance of this best interests component of the marital presumption of parentage. *W.W.W. v. M.C.S. (In re the Paternity of C.A.S. and C.D.S.),* 161 Wis. 2d 1015, 468 N.W.2d 719 (1991). In that case, a man claiming to be the father of children born during a marriage, but not the husband of the genetic mother, was denied a genetic test in paternity proceedings based on the best interests of the children. *Id.* at 1033. The denial affirmed the husband as the legal parent of the children. *Id.* at 1021-22. While noting that the marital presumption is not inviolable, the Court said, "[u]ltimately, it is the manner in which the [marital] unit contributes to the best interests of the children that renders it significant. The best interests of the children are the ultimate and paramount considerations in this case, and reflect a strong public policy of this state." *Id.* at 1036.

This public interest in the marital presumption reaches far back into the history of our state. In 1932, the Wisconsin Supreme Court described it as follows: "[t]he law is well established in this state that every child born or conceived in wedlock is presumed to be legitimate. This presumption is generally held to be one of the strongest presumptions known to the law." *Johnson v. Metcalf (In re Lewis' Estate),* 207 Wis. 155, 240 N.W. 818, 819 (Wis. 1932) (citations omitted).[13]

[13] The Court in *In re Lewis' Estate* went on to list specific circumstances that may overcome the presumption (examples all addressing non-access of the husband to the wife during the presumed conceptive period). *Id.* The usefulness, or even the validity, of this list today is questionable for a few reasons. First, this case predates genetic testing and our paternity statutes. Second, it predates *Randy A.J.,* which its list seems to contradict. Third, even if this portion of the decision is still good law, it is inapplicable in the present matter, as no one is attempting to rebut the marital presumption in this case. The *application* of the presumption is at issue, not someone trying to *rebut* it. It is unclear who would even have standing to rebut in this matter, when anonymous donor sperm was used.

In the present case, it is obvious that Christie is not a genetic parent of the child. Christie and Susan admit that Susan is the genetic parent. (R.1, p. 2; P-App. 104.) However, that fact does not preclude application of the marital presumption in this case. The various public policies of Wisconsin's marital presumption are promoted here. The parties are married. Christie has assumed full parental responsibility for the child. Equal legal parentage is in the child's best interests. No one is disputing best interests or trying to rebut the presumption with genetic tests or other evidence.

C. Out-of-State Authority Supports the Equal Application of the Marital Presumption of Parentage to Same- and Different-Sex Couples.

Christie and Susan's position in this case is consistent with post-marriage equality parentage cases in other states. In 2013, in *Gartner v. Iowa Department of Public Health*, the Iowa Supreme Court ordered the Iowa Department of Public Health to include the name of the female spouse of the child's biological mother on their child's birth certificate. 830 N.W.2d 335, 354 (Iowa 2013). The Court found that a narrow construction of Iowa's marital presumption statute to exclude married same-sex couples violated the couple's right to equal protection.

Similarly, in 2012, in *Della Corte v. Ramirez*, the Appeals Court of Massachusetts held that a child born to a married same-sex couple is the legal child of both women and stated that "it follows that when there is a marriage between same-sex couples, the need for [a] second-parent adoption to … confer legal parentage on the non-biological parent is eliminated when the child is born of the marriage." 961 N.E.2d 601, 603 (Mass. App. Ct. 2012).

See also Wendy G.-M. v. Erin G.-M., 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014) (holding that both members of a married same-sex couple were the legal parents of a child born to one of them through ART, under an equal application of the marital presumption); *Hunter v. Rose*, 975 N.E.2d 857, 861 (Mass. 2012) (finding that children born to a same-sex couple during their California registered domestic partnership were the legal children of both women, as Massachusetts recognizes the domestic partnership as a marriage, and that under Massachusetts law children born to a married woman are presumed to be the legal children of her spouse, and "that any child born as a result of artificial insemination with spousal consent is considered to be the child of the consenting spouse"); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (declaring the non-biological co-parent to be a legal parent of the child, pursuant to Vermont's marital presumption, based on the same-sex couple's Vermont civil union); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) (finding applicable to same-sex partners in a civil

union the statute creating a presumption of parentage when "the child is born while the husband and wife are legally married to each other"); *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005) (finding that the non-biological co-parent is presumed to be the "natural mother" of the children born to her same-sex domestic partner, under a statute using male pronouns).

D. This Family Satisfies the Requirements of the Marital Presumption of Parentage.

If the marital presumption of parentage is found to apply to all married couples, Christie and Susan would satisfy its requirements, specifically the subsequent intermarriage provision. Wis. Stat. § 891.41(1)(b). All of the necessary facts are in the record and undisputed.[14]

Christie and Susan have been a committed couple in a marriage-like relationship since 2010. (R.12, p. 10; P-App. 138.) The child was conceived on September 4, 2013. The child was born on June 7, 2014. The parties married on June 13, 2014.

No man or other individual has been adjudicated the second legal parent of the child. (R.12, p. 23-24; P-App. 151-52.) No man or other individual is presumed to be the second legal parent of the child under Wis. Stat. § 891.41(1)(a). (R.12, p. 10, lines 23-25; P-App. 138.) No one is seeking to rebut the presumption. (R.12, p. 23-24; P-App. 151-52.) No one besides Christie has ever claimed to be the second parent of the child, no man has ever claimed to be the genetic parent of the child, and no genetic test has ever been completed on the child. *Id.*

As such, Christie should be presumed and declared/confirmed to be a legal parent of the child.

III. STEP-PARENT ADOPTION IS NOT THE APPROPRIATE REMEDY IN THIS CASE.

Christie and Susan do not wish to file for step-parent adoption, as the lower court repeatedly suggested they should. (R.12, p. 3, lines 5-6 and 21-22; P-App. 131.) (R.12, p. 4, lines 5-8; P-App. 132.) (R.12, p. 7, lines 9-13; P-App. 135.) (R.12, p. 25, lines 22-25; P-App. 153.)

[14] All facts referred to in this section are found at Record Document 1 (petition), pages 1-2, unless otherwise or more specifically noted. (P-App. 103-04.)

Christie is not the child's "step-parent." She is his parent. "Step-parent" is defined as "the mother or father of a child born during a previous marriage of the other parent." *Black's Law Dictionary* 1414 (6th ed. 1990). Christie is not raising her spouse's child from a previous relationship. This is a child of *this* relationship, of *this* marriage. Christie helped to conceive the child. (R.1, p. 1-2; P-App. 103-04.) Christie took care of her wife through the pregnancy. *Id. See also* (R.12, p. 12; P-App. 140.) She was there for the very difficult and scary birth. (R.12, p. 16-18; P-App. 144-45.) But for her actions, along with Susan's, the child would not exist. Christie should not be required to adopt the child as a step-parent, where a husband would not have the same requirement.

In addition, Christie and Susan should not be made to go through the intrusion, cost, and time of a step-parent screening. Step-parent screenings are required in step-parent adoptions by Wis. Stat. § 48.88(2)(c). The requirements are burdensome and invasive. A social worker licensed by the state, acting pursuant to statutes and regulations – *i.e.*, a state actor – comes into your home, checks your fire detectors, has you fingerprinted, examines your medical records, and delves into your personal background and upbringing. (R.7; P-App. 125.)[15]

Husbands are not made to undergo any such thing. They are not made to adopt the children of their wives when they are born during the marriage, during the relationship when there is a subsequent intermarriage, or even when donor sperm was used to conceive the child.[16]

Christie and Susan and their child must be treated the same. *Wolf v. Walker* demands it. This is a marital child. Step-parent adoption is not the appropriate remedy, as an emotional, conceptual, or legal matter.

IV. AFTER *WOLF V. WALKER*, WISCONSIN'S ARTIFICIAL INSEMINATION STATUTE SHOULD ALSO BE APPLIED TO CHRISTIE AND SUSAN AND THEIR CHILD AS A BENEFIT OF MARRIAGE AND AS A MATTER OF EQUITY.

A. The Artificial Insemination Statute Should Also be Ungendered and Applied to this Family.

The child at issue was conceived via physician-supervised artificial insemination, using anonymous donor sperm. (R.3 and R.4; P-App. 112-14.) Following the decision in *Wolf v. Walker*, the lower court should have also found

[15] This citation refers to the Affidavit of Claire Schulz Bergman, Executive Director of Adoptions of Wisconsin, summarizing what a step-parent screening involves.
[16] *See* Section IV, *infra*, for more on the artificial insemination statute's application in this case.

support for the requested parentage order in Wisconsin's artificial insemination statutes, Wis. Stat. §§ 891.40 and 69.14(1)(g).

Again using Wis. Stat. § 990.001(2) to implement *Wolf* and ungender the language, Wis. Stat. §§ 891.40 should now be read as follows, with the ungendered language in brackets:

> **Artificial insemination.** (1) If, under the supervision of a licensed physician and with the consent of her [spouse], a wife is inseminated artificially with semen donated by [an individual] not her [spouse], the [spouse] of the mother at the time of the conception of the child shall be the [legal parent] of a child conceived. The [spouse]'s consent must be in writing and signed by [him or her] and [the] wife. The physician shall certify their signatures and the date of the insemination, and shall file the [spouse]'s consent with the department of health and family services, where it shall be kept confidential and in a sealed file except as provided in s. 46.03(7)(bm). However, the physician's failure to file the consent form does not affect the legal status of [parent] and child [as to the spouse]. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, may be inspected only upon an order of the court for good cause shown.
>
> (2) The donor of semen provided to a licensed physician for the use of artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child.

Wis. Stat. § 69.14(1)(g) should be read as follows, with the ungendered language in brackets:

> **Birth by artificial insemination.** If the registrant of a birth certificate under this section is born as a result of artificial insemination under the requirements of s. 891.40, the [spouse] of the woman shall be considered the [legal parent] of the registrant on the birth certificate.

Together, these statutes convey three important benefits by automatic operation of law to spouses who use ART to build their families: first, they make the spouse the legal parent of the child; second, they confirm the sperm donor is not a parent and bears no responsibilities for the child; and third, they require production of a birth certificate for the child consistent with these provisions.

For the same reasons set forth above, these statutes should now be applied equally to all married couples in Wisconsin, including this family.

B. The Public Policies of the Artificial Insemination Statute Support its Application to this Family.

The face of the artificial insemination statute belies its policies: it is a marriage-based exception to the general rule of parentage being based on genetics. It expressly makes a man who is not the genetic father of a child, a legal parent. And it expressly makes the genetic father, not a legal parent. As such, this statute is solely about marriage and the intent of the parties in an ART arrangement, *i.e.*, the intended parentage doctrine.[17]

The intended parentage doctrine was recently used by the Wisconsin Supreme Court, albeit not by name, in its first surrogacy case. *Rosecky v. Schissel (In re the Paternity of F.T.R.)*, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634. The Court held that surrogacy contracts are enforceable in Wisconsin, unless enforcement is contrary to the best interests of the child. *Id.* at ¶ 3. It held that freedom of contract (and therefore, the intent of the parties) should govern. *Id.* at ¶¶ 56-61. It explained its decision as follows:

> We conclude that the interests supporting enforcement of the [surrogacy agreement] are more compelling than the interests against enforcement. Enforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement and reduces contentious litigation that could drag on for the first several years of the child's life.

Id. at ¶¶ 61 and 69.

Rosecky is analogous to the present matter, and not just because Christie and Susan had a Co-Parenting Agreement, with the same expressions of intent and reliance as in *Rosecky*. (R.5; P-App. 115-24.) In *Rosecky*, the Court was presented with an issue involving ART. There, the Court had to interpret outdated statutes to confront a modern issue of medical science and law. There, the Court

[17] The doctrine has been best defined by the California Supreme Court in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993), *cert. dismissed sub. nom. Baby Boy J. v. Johnson*, 510 U.S. 938 (1993). In that case, the Court identified a gender-neutral, intention-based standard for establishing the parentage of children conceived through ART. The Court ruled that those who make use of ART to bring a child into the world are the "prime movers" of the child's conception and birth and should be assigned the rights and responsibilities that go along with that action. *Id.* at 782. The Court reasoned that, in such circumstances, the intended parents' "mental concept of the child" is a "but for" condition of birth, and as such, legitimately gives rise to "expectations in society for adequate performance on the part of the initiators as parents of the child." *Id*. at 783.

had to balance the rights of the parties, the best interests of the child, and the public interest. The difference in the present matter, however, is that there is controlling federal case law, namely *Wolf v. Walker.*

With the advances in ART, courts can no longer rely on genetics alone to determine legal parentage; courts must look at who was involved in the child's conception and their intent as to who would parent any child conceived. Justice Annette Ziegler said in the *Rosecky* opinion, ART "has created ways for people to have children regardless of their reproductive capacity …. 'ART … forces us to confront deeply held beliefs about what makes a 'mother' or a 'father,' … and perhaps most fundamentally, what makes a 'family.'" 2013 WI 66, ¶ 33 (citations omitted).

Christie and Susan were the "prime movers" in the conception of the child at issue. But for both of their actions, the child would not exist. Both parents should bear the rights and responsibilities of their actions. Wis. Stat. § 891.40 – and through it, the intended parentage doctrine – should apply to all married couples and all children in Wisconsin.

C. It was Legally Impossible for this Couple to Satisfy All of the Requirements of the Artificial Insemination Statute, But It Should Still Apply.

If the artificial insemination statute is found to apply to this family, Christie and Susan would satisfy all of its requirements except one: the requirement that they be married at the time of the conception. All of the necessary facts are in the record and undisputed.[18]

Under the supervision of Dr. Kathryn Meyer of Fox Valley Reproductive Medicine in Appleton, Wisconsin, Susan was artificially inseminated with anonymous donor sperm on September 4, 2013. Christie consented to the insemination in writing. The physician certified their signatures and the date of insemination. (R.3 and R.4; P-App. 112-14.)[19]

While Christie and Susan were not married at the time of the insemination, they were in a long-term marriage-like relationship. They married seven days after it became legally possible to do so in Wisconsin, just days after having a

[18] All facts referred to in this section are found at Record Document 1 (petition), pages 1-2, unless otherwise or more specifically noted. (P-App. 103-04.)

[19] This citation refers to the document entitled "Consent to Insemination and Physician's Certification."

baby. They would have married years ago, prior to their child's conception and birth, had Wisconsin law allowed and not criminally barred it. (R.12, p. 10 and 19; P-App. 138 and 147.)[20] Those laws have since been found unconstitutional in *Wolf* and are enjoined from being enforced. Christie and Susan were following the law by conceiving their child out of wedlock.

Joint legal parentage of the child at issue for Christie and Susan is clearly in the child's best interests. No one has disputed this assertion in this case. The record is ample in this regard, through the testimony of Christie and Susan, the factual stipulations in their Joint Petition, and the promises made in their Co-Parenting Agreement. (R.12, R.1, and R.5, respectively; P-App. 129, P-App. 103, and P-App. 115, respectively.) In addition to the financial and legal benefits to the child of joint legal parentage, this child would receive emotional and psychological benefits from being raised in a secure family unit with two legally recognized parents.[21]

Joint legal parentage is also in the public's interest. The child at issue is lucky: he is being raised in a stable family with two responsible, devoted parents. When a child is being raised in such an environment, it is in his best interests – and society's – to have his family relationships legally recognized and protected.

After *Wolf*, Wisconsin courts should now help mitigate the effects that these laws have had and continue to have on same-sex couples and their children. Fairness seems to require that the artificial insemination statute at least provides equitable, if not direct, support for the requested parentage order.

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[20] *See* Wis. Const. Art. XIII, Sec. 13; Wis. Stat. § 765.04; Wis. Stat. § 765.30(1)(a).

[21] In the event this assertion requires citation, Christie and Susan cite the highly publicized case of *Perry v. Schwarzenegger*, also known as the "Proposition 8" or "Prop 8" case. In that case, a federal district court declared California's constitutional amendment banning same-sex marriage unconstitutional, while also finding it to be fact, based on expert testimony and several scientific studies presented at the almost three-week-long trial, that the "gender of a child's parent is not a factor in a child's adjustment." 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (finding California's marriage ban amendment unconstitutional as a violation of equal protection because citizens cannot employ initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry), *cert. granted sub nom. Hollingsworth v. Perry*, 570 U.S.___, 133 S. Ct. 2652 (2013), *appeal dismissed for lack of standing and remanded to district court*. The district court also found that there is no evidence to-date that different-sex parents are better than same-sex parents; "indeed," the district court said, "the evidence shows beyond any doubt that parents' genders are irrelevant to children's development outcomes." *Id.* at 1000.

D. The Artificial Insemination Case of Christian R.H. *is No Longer Good Law for Married Same-Sex Couples After* Wolf v. Walker.

In their Joint Petition for Determination of Parentage, Christie and Susan brought to the lower court's attention the case of *Dustardy H. v. Bethany H. (In re the Paternity of Christian R.H.),* 2011 WI App 2, 331 Wis. 2d 158, 794 N.W.2d 230 ("*Christian R.H.*"). They argued that it is no longer good law after *Wolf v. Walker,* or is at least distinguishable. In the hearing, the lower court relied upon *Christian R.H.* for its denial of the petition. (R.12, p. 25, lines 6-17; P-App. 153.)[22]

In *Christian R.H.,* based on finality of judgment, the Wisconsin Court of Appeals refused to allow the biological mother of the child to invalidate a parentage order based on Wis. Stat. § 891.40. The biological mother, Bethany, had petitioned for and obtained the order for her former same-sex partner and the non-biological parent of the child, Dustardy, four years earlier while the couple was still together. As in the present case, the child was conceived in a long-term relationship via artificial insemination with donor sperm, with the intent that both women would parent. They obtained the parentage order together, both participating in the proceedings. They co-parented for years. Then they broke up. *Id.* at ¶¶ 4-5. The Court of Appeals did not allow Bethany to undo the order years later. However, going forward, it said that the artificial insemination statute should not be applied by courts to confer parentage in similar cases. The reasons stated for this conclusion were the male-gendered words used in the statute ("husband" and "father") and because "same-sex couples can never satisfy the marital relationship described by the statute," citing Wisconsin's marriage ban amendment. *Id.* at ¶ 10.

After *Wolf,* neither is an acceptable reason to withhold from a married same-sex couple and their child the significant marriage benefit in this statute. Furthermore, even if *Christian R.H.* is considered good law after *Wolf,* it is distinguishable from the present matter in two ways. First, the couple in *Christian R.H.* was not married under any law and could not marry under Wisconsin law. The parties in the present matter are married under Wisconsin, federal, and other law. Second, *Christian R.H.* addressed the application of the artificial insemination statute, not the marital presumption of parentage statute, which was not even mentioned in *Christian R.H.* So even if *Christian R.H.* is still considered good law, and even if it is found to apply and preclude application of the artificial

[22] It is unclear whether the lower court relied on *Christian R.H.* for denying application of the artificial insemination statute or the marital presumption statute or both. Only the artificial insemination statute was at issue, or mentioned, in the *Christian R.H.* case.

insemination statute to Christie and Susan, it is not dispositive of their marital presumption of parentage claim, as the lower court seemed to think.

Another example of how *Christian R.H.* is outdated after *Wolf* is the decision's list of three ways to establish parentage in Wisconsin: by paternity; by adoption; or through the artificial insemination statute if you are a man married to a woman. *Id.* at ¶ 13. The marital presumption was entirely overlooked, or taken for granted, in that list. It also overlooked the surrogacy statute, Wis. Stat. § 69.14(1)(h).

At a minimum, *Christian R.H.* is distinguishable from the present case, as the couple in *Christian R.H.* was unmarried and the present couple is married.

V. A NARROW, GENDERED READING OF THE STATUTES IN THIS CASE WOULD RAISE CONSTITUTIONAL QUESTIONS AND NULLIFY *WOLF V. WALKER.*

A. The Constitutional Rights of Christie and Susan.

The lower court's denial of the Joint Petition for Determination of Parentage violated the controlling precedent of *Wolf v. Walker*, thereby violating the equal protection and substantive due process rights of this couple, as they are enumerated and protected in that case. Those rights were litigated exhaustively and enumerated clearly in that case.

In *Wolf*, the Seventh Circuit found that the State of Wisconsin had no reasonable basis for restricting marriage to different-sex couples, and that more than a reasonable basis was necessary for discrimination against a minority based on an immutable characteristic, such as sexual orientation. 766 F.3d at 654 and 656. By finding a violation of equal protection under even rational basis review, the Seventh Circuit avoided reaching the substantive due process issue. It implied, however, that because an immutable characteristic was involved, intermediate, if not heightened, scrutiny should apply to classifications on the basis of sexual orientation. *Id.* at 656-57.[23]

On the other hand, the U.S. District Court in *Wolf* did address the substantive due process issue. 986 F. Supp. 2d at 997-1006. The Court found that

[23] The lower court's denial also violated the equal protection rights of the parties as set forth in the U.S. Supreme Court case of *United States v. Windsor*, 570 U.S. ____, 133 S. Ct. 2675 (2013), which case was cited and relied upon, in part, in *Wolf v. Walker*. 766 F.3d at 659. *Windsor* is the case that invalidated part of the federal Defense of Marriage Act ("DOMA") in the summer of 2013 and held unconstitutional DOMA's creation of "second-tier marriages" by its denial of federal spousal benefits to same-sex couples married under state law.

the fundamental right to marry and receive its benefits applies to same-sex couples and that the State of Wisconsin failed to show a sufficiently important state interest closely tailored to effectuate only that interest. *Id.* at 1006 and 1016. Receiving the marital presumption of parentage in the present matter is therefore a component of a fundamental right.

By failing to apply the statutes at issue to this married couple, the lower court treated their marriage differently, as a second-class marriage. It also treated Christie differently from a similarly situated male spouse. It purports to leave Christie with no choice but to take on the expense and intrusion of a step-parent screening and adoption, steps a male spouse in Christie's situation would not have to take, whether he was the actual genetic parent or not. (And this alternative assumes that one, the lower court would ungender the step-parent adoption statutes, and two, that it would find the adoption in the child's best interests and grant it.) The lower court also treated Susan differently from a similarly situated wife who had just given birth. It denied her the legal and emotional comfort that her spouse would be held responsible for the child they just had together.

That unequal treatment on the basis of sexual orientation has been litigated to the U.S. Supreme Court in *Wolf* and *Windsor*. Additional litigation should not be required of Christie and Susan. Christie and Susan are now entitled to marry and receive the rights and responsibilities of marriage, just like any other couple. And their marriage is entitled to the same automatic sanctity given to different-sex marriages by the marital presumption.

B. The Constitutional Rights of the Child.

The lower court's denial in this case also violated the equal protection and substantive due process rights of the child under the Fourteenth Amendment to the U.S. Constitution. The statutory interpretation set forth by Christie and Susan is necessary in order to extend to *all* children the benefits and protections created by the statutes at issue in this case, no matter the circumstances of their birth or the sex, sexual orientation, or marital status of their parents.

As discussed, the statutes at issue were designed to protect the sanctity of marriage and the status of being a marital child. And the strength of this protection is great, as it operates automatically. *All* marital children deserve this type of automatic protection and stability, not just the children of married different-sex couples or the children of married same-sex couples who know about and can afford a step-parent screening and adoption.

The U.S. Supreme Court has repeatedly held that the Equal Protection Clause of the Fourteenth Amendment prohibits laws that punish or disadvantage children based solely on the circumstances of their birth or the marital status of their parents. *See Reed v. Campbell*, 476 U.S. 852 (1986) (finding unconstitutional a Texas law that prohibited a non-marital child from inheriting unless the parents subsequently intermarried); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (reversing a Florida court decision which had changed custody of a child from the mother to the father because the mother had married an African American man); *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a Texas law that allowed schools to deny public education to children based on their parents' immigration status); *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down the Illinois statute that prevented non-marital children from inheriting from their fathers); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (striking down a New Jersey statute that denied benefits to non-marital children); *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that children of unmarried parents may not be denied benefits accorded other children); *Weber v. Aetna Cas. & Sur. Co*., 406 U.S. 164 (1972) (ruling that disallowing non-marital children equal recovery under Louisiana's Worker's Compensation laws denied equal protection); *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down the Louisiana wrongful death statute that authorized wrongful death actions on behalf of marital, while denying that right to non-marital, children).

Like the statutes held unconstitutional by the U.S. Supreme Court in those cases, if the statutes at issue in this case are interpreted post-*Wolf* to exclude the present child from their automatic protection, due to his parents' marital status, sex, or sexual orientation, the Equal Protection Clause would be violated. In *Trimble*, the Supreme Court explained that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for her birth and penalizing the illegitimate child is an ineffectual as well as unjust way of deterring the parent." *Trimble,* 430 U.S. at 769-70 (citations omitted). The same reasoning applies here. The *Weber* court stated the issue succinctly:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by the hapless child, but the Equal Protection Clause does enable us to

> strike down discriminatory laws relating to status of birth where – in this case – the classification is justified by no legitimate state interest, compelling or otherwise.

Weber, 406 U.S. at 175-76. To find that the statutes at issue in this case do not apply to the present child would make him illegitimate. He would be a non-marital child. He would remain a child with only one legal parent, unless Christie and Susan took the costly and invasive step of a step-parent screening and adoption, assuming the adoption was approved by a court. And to what end? What behavior would be deterred or penalized?

The present child is not responsible for the circumstances of his birth. Penalizing him will harm him, without serving any legitimate governmental purpose. Indeed, the Wisconsin Supreme Court has described such harm to a potential marital child as "irreparable," and the act of not applying Wisconsin's marital presumption as "in effect bastardiz[ing] the child and rupture[ing] the existing father/child relationship." *W.W.W.*, 161 Wis. 2d at 1033.

Refusing to ungender the statutes at issue in this case would also raise substantive due process issues as to the child. If the lower court thought it could not ungender the marital presumption or artificial insemination statute, then it is unclear how it thought it could ungender the adoption statutes to allow a same-sex step-parent adoption. That would jeopardize the child's right to intimate familial association with both his parents, in other words, to have his best interests promoted and protected by law. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (finding a fundamental right protected by Fourteenth Amendment substantive due process to maintain and pursue intimate familial associations).

It is well-established that "freedom of choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974). The family unit and the right to intimate familial association garners considerable constitutional protection precisely because the institution of the family is "deeply rooted" in our history and tradition. *Moore*, 431 U.S. at 503-04. Moreover, as the U.S. Supreme Court noted in *Smith v. Organization of Foster Families for Equality and Reform*, the importance of the family "stems from the *emotional attachments* that derive from the intimacy of daily association," 431 U.S. 816, 844 (1977) (emphasis added), not necessarily from any genetic relationship. That is why the right to maintain and pursue these intimate familial associations is a fundamental right in our society, protected by Fourteenth Amendment substantive due process. *Moore*, 431 U.S. at 503.

This child has a fundamental right to maintain the associations and attachments he has made to both his parents. He needs his parents to both have parental rights for his daily caretaking, for his medical decision-making, for management of his education, for conveying employee benefits to him such health insurance and family leave, and for securing his financial support and inheritance rights.

As a marital child, this right should not be conditioned upon the availability and completion of a step-parent screening and adoption.

CONCLUSION

For the reasons set forth above, Christie and Susan request that the Court of Appeals do the following:

- Overturn the Circuit Court's Order Denying Joint Petition for Determination of Parentage dated January 16, 2015.
- Find that, pursuant to *Wolf v. Walker*, the marital presumption of parentage must be applied to this couple in the same way it would be applied to a different-sex couple.
- Find that, pursuant to *Wolf v. Walker*, the artificial insemination statute provides additional support for this family's petition, in equity.
- Enter the requested parentage order (or order the lower court on remand to enter the requested order), confirming and/or declaring Christie to be a legal parent of the child as of the child's date of birth and ordering the Wisconsin Department of Health Services, Vital Records Office, to amend the child's birth certificate listing both parents thereon as "Parent" and "Parent." The requested order is part of the record. (R.13; P-App. 160-61.)
- Order that the record in the lower court be closed and confidential and sealed, except upon court order for good cause shown, pursuant to Wis. Stat. §§ 48.93, 767.853, and/or 891.40(1).

Dated: April 17, 2015.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 32 pages and 10,943 words.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)
(Electronic Brief Certification)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: April 17, 2015.

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