

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of:

LUCY KATHLEEN MULLEN
A Minor

Case No. 2010-0276

An Appeal from the First
District Court of Appeals:
Case Nos. C090285 and C090407

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STATEMENT OF FACTS

Amicus adopts the Statement of Facts contained in Appellee's Brief.

SUMMARY OF THE ARGUMENT

The straight-forward application of Ohio law dictates the conclusion that the decision to dismiss Ms. Hobbs' petition for shared custody be affirmed. All of the theories advanced by Ms. Hobbs, and that of amicus in support of Ms. Hobbs, require this Court either to ignore Ohio law or go beyond its authority to create new law. Ohio precedent fully supports the trial court's decision that Ms. Mullen did not contractually relinquish exclusive custodial care over her child where: (i) Ms. Hobbs participated in the rearing of Ms. Mullen's child along with, not to the exclusion of Ms. Mullen, (ii) all documents signed by Ms. Mullen that permitted Ms. Hobbs to participate in the child's life were fully revocable by Ms. Mullen, and (iii) it is undisputed that Ms. Mullen refused to enter into a written shared custodial agreement with Ms. Hobbs. Under these circumstances, a decision awarding Ms. Hobbs custodial rights over Ms. Mullen's objections as the fit, biological parent of the child would infringe Ms. Mullen's fundamental parental rights.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED MS. HOBBS' PETITION FOR SHARED CUSTODY BECAUSE MS. MULLEN DID NOT CONTRACTUALLY RELINQUISH CUSTODY OF HER CHILD.

The Ohio Supreme Court has repeatedly explained that "the overriding principle in custody cases between a parent and non-parent is that natural parents have a fundamental liberty interest in the care, custody, and management of their children." *In re Hockstok*, 98 Ohio St. 3d 238,

2002-Ohio-7208, 781 N.E.2d 971, at ¶ 16 (citing cases). The fundamental liberty interest is protected both by the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution. *See id.* at ¶ 16. As a result, Ohio courts “severely limit[] the circumstances under which the state may deny parents the custody of their children” to situations where the court determines that a “preponderance of the evidence shows that a parent abandoned the child; contractually relinquished custody of the child¹; that the parent has become totally incapable of supporting or caring for the child; or that an award of custody to the parent would be detrimental to the child.” *Id.* at ¶ 17. Only if one of these conditions exist can a court consider granting custody to a non-parent. The only question raised in this case is whether Ms. Mullen contractually relinquished exclusive custody of her biological child.

The courts below properly concluded that the facts in this case do not demonstrate contractual relinquishment. The three general categories in which courts have previously found, or recognized, contractual relinquishment are: (i) implied contractual relinquishment through abandonment of the child,² (ii) express contractual relinquishment by signing an agreement to give complete or primary custody to a non-parent,³ or (iii) a joint petition filed by a current lesbian couple for a shared custodial agreement.⁴ None of the cases cited by either Ms. Hobbs or the

¹ Even this contractual relinquishment theory is constitutionally suspect to the extent it purports to deprive the fit biological parent of the care, custody, and control of her child without recognition and consideration of the great “momentum for respect” due to the fundamental parental right of the natural parent. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (discussed at more length *infra* at pp. 5-7 and 14-17).

² *See, e.g., Reynolds v. Goll*, 75 Ohio St. 3d 121, 1996 Ohio 153, 661 N.E.2d 1008; *Clark v. Bayer*, 32 Ohio St. 299, 1877 WL 120 (1877); *In the Matter of Galan*, 2003-Ohio-1298, 2003 WL 1239715 (Ohio Ct. App.).

³ *See, e.g., Masitto v. Masitto*, 22 Ohio St. 3d 63, 22 O.B.R. 81, 488 N.E.2d 857; *Rowe v. Rowe*, 44 O.O. 224, 97 N.E.2d 223 (Ohio Ct. App. 1950).

⁴ *See, e.g., In the Matter of J.D.M.*, 2004-Ohio-5409, 2004 WL 2272063 (Ohio Ct. App.); *In re Bonfield*, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241.

National Center for Lesbian Rights (NCLR) supports the proposition that the trial court committed an abuse of discretion in concluding that there was no contractual relinquishment where: (i) the biological parent permitted a third party to participate in rearing the child *along with, not to the exclusion of*, the biological parent, (ii) all documents signed by the biological parent that permitted the third party to be involved in the child's life were fully revocable by the biological parent, and (iii) the biological parent refused to consent to the third party's request to petition the court for a shared custodial agreement. The cases cited in support of Ms. Hobbs belie her position that the trial court abused its discretion in dismissing the petition for shared custody.

In *Bonfield*, two women in a lesbian relationship *jointly* filed a petition for shared parenting agreement. *In re Bonfield*, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241. Although the court held that a non-parent could not petition for a shared *parenting* plan, the non-parent and parent could jointly petition for a shared *custodial* agreement. In *Reynolds*, the parents placed their children in the care of another family while the mother was battling cancer. *Reynolds v. Goll*, 75 Ohio St. 3d 121, 1996 Ohio 153, 661 N.E.2d 1008. For three years after the mother's death, the father left the children in the care of the other family. When the father petitioned for custody, the court concluded that the best interest standard was applicable because the father had abandoned the children, having relinquished exclusive custody and care. In *Masitto*, the parent signed a written instrument consenting to the appointment of a guardian. *Masitto v. Masitto*, 22 Ohio St. 3d 63, 22 O.B.R. 81, 488 N.E.2d 857 (1986). In *Rowe*, the parents contractually relinquished custodial rights during the context of divorce litigation, which agreement was later incorporated into the divorce decree. *Rowe v. Rowe*, 44 O.O. 224, 97 N.E.2d 223 (Ohio Ct. App. 1950). In *Clark*, the court held that the parents had abandoned the children, when they transferred care and

possession of the children and wholly renounced the children. *Clark v. Bayer*, 32 Ohio St. 299, 1877 WL 120 (1877). In *JDM*, relying on *Bonfield*, the Twelfth Appellate District held that cohabiting same-sex partners had standing to *jointly* petition for a shared custodial agreement. *In the Matter of J.D.M.*, 2004-Ohio-5409, 2004 WL 2272063 (Ohio Ct. App.). In *Galan*, the Third Appellate District found contractual relinquishment where the mother agreed over the telephone with grandparents that she would leave her children in their custody forever. *In re Galan*, Seneca App. No. 13-02-44, 2003-Ohio-1298.

Two of the cases cited by Ms. Hobbs actually support Ms. Mullen's argument that Ohio law imposes a very high hurdle before a contractual relinquishment of exclusive custodial care will be found. In *Hockstock* the parents entered into a written agreement granting *temporary* legal custody to the grandparents, which was reduced to judgment. *In re Hockstock*, 98 Ohio St. 3d 238, 2002-Ohio-7208, 781 N.E.2d 971. The Court decided that the grant of temporary custody, although in writing, was not a contractual relinquishment of exclusive custodial rights and that, therefore, the best interest standard could not be used to decide grandparents' petition. In *Perales*, even though the mother executed a written statement giving custody of her child to a third party, the Court stated that the evidence was *insufficient* to find that she had relinquished exclusive custodial rights when the third party petitioned for custodial rights four years after the child was placed in her care. *In re Perales*, 52 Ohio St. 2d 89, 99, 6 O.O.3d 293, 369 N.E.2d 1047, 1052.

In an attempt to avoid the obvious results under Ohio law, Ms. Hobbs mischaracterizes the trial court's ruling. In particular, she incorrectly states that the trial court: (i) held that in the absence of a court sanctioned custody agreement a parent is entitled to unilaterally revoke an agreement to contractually relinquish exclusive custody, and (ii) the court "declined to hold that

Ms. Mullen had relinquished custody solely on the ground that Ms. Mullen had ‘refused repeatedly’ to reduce her agreement to a shared custody court order.” (App. Br. at 25-26).

Although the court considered these facts in reaching its conclusion, it did not rely on any one fact as conclusive evidence. These statements demonstrate Ms. Hobbs’ misunderstanding of the appropriate analysis in contractual relinquishment cases.

To determine whether Ms. Mullen contractually relinquished her right to exclusive custody, the trial court must consider all the surrounding facts and circumstances, including that: (i) there was no written agreement to contractually relinquish custody, (ii) all documents executed by Ms. Mullen were fully revocable (thus demonstrating an intent *not* to relinquish her right to exclusive custodial rights), and (iii) Ms. Mullen refused to enter into a shared custodial agreement. The trial court did *not* hold that a biological mother can unilaterally revoke a contract to relinquish custody; rather, the trial court held that the mother’s having signed only documents that were unilaterally revocable by her is one piece of evidence demonstrating the lack of any agreement to contractually relinquish custody. (A – 19, 20)

Similarly, although the trial court pointed out the evidentiary and constitutional difficulties in relying upon an oral agreement to contractually relinquish custodial rights, it did not hold that the absence of a written contract is conclusive proof that no such agreement exists. In fact, the trial court opinion specifically recognizes that “*In re Perales* does not require that a contractual relinquishment of custody be written.” (A-20). The Court of Appeals opinion similarly concluded that “the law does not require a written agreement to establish shared custody . . .” (A-7). The trial court correctly pointed out, however, that “[i]t is difficult if even possible to determine how much or what portion of custodial rights a parent would be relinquishing when an implied contract

encompasses only a share of custody and is not reduced to writing.” (*Id.*). Indeed, in the context of one’s fundamental parental rights, relying on an alleged oral agreement to contractually relinquish custody raises substantial constitutional concerns.

In essence, contractual relinquishment in this context is akin to waiver of all or a portion of one’s parental rights. Yet, the United States Supreme Court has explained that “‘courts indulge every reasonable presumption *against* waiver’ of fundamental constitutional rights” and “‘do not presume acquiescence in the loss of fundamental rights.’” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970). The Supreme Court has applied this onerous standard to waivers of various constitutional rights, including the waiver of the right to assistance of counsel, *Johnson*, 304 U.S. at 465, the right to confront an adverse witness, *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966), the Sixth Amendment right to a jury trial, *McCarthy v. United States*, 394 U.S. 459, 466 (1969), and the right to receive *Miranda* warnings. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Waiving one’s constitutional parental rights to have exclusive custodial care over one’s child is, at a minimum, of similar weight to these other rights so as to require a similar waiver standard.⁵ As such, the trial court’s reliance on the mother’s refusal to sign a shared custodial agreement as part of the totality of the circumstances was appropriate.

⁵ Given the serious constitutional implications of finding waiver of parental rights, Ms. Hobbs’ efforts to minimize the legal significance of Ms. Mullen’s refusal to sign a shared custodial agreement should be dismissed out of hand. (Appellant’s Br. at 24-27). Her argument elevates the fact that Ms. Mullen permitted Ms. Hobbs to share in parenting responsibilities for a short period of time (as parents sometimes permit nannies to do) to the status of a contractual relinquishment of custodial rights. Ohio law necessarily places a high burden on Ms. Hobbs to show contractual relinquishment in order to protect Ms. Mullen’s fundamental parental rights, and the facts in this case do not satisfy that high burden.

A decision from the Second Appellate District is instructive on the waiver issue. *See In re Custody of Carpenter*, 41 Ohio App. 3d 182, 534 N.E.2d 1216 (1987). In *Carpenter*, the father and mother consented to an order granting custody to the child's maternal grandmother and her husband. Although nothing in the petition filed with the court or the consent forms executed by the parties indicated that the award of custody was temporary, the judgment stated that the grandmother and her husband were "granted *temporary* legal custody" of the child. Ten months later, the father moved to terminate the temporary custody. *Id.* at 183, 534 N.E.2d at 1217. Applying the best interest standard, which is appropriate under Ohio law if there were a contractual relinquishment of custody, the trial court concluded that the child should remain with the grandmother. *Id.* On appeal, however, the Second Appellate District concluded, based on *In re Perales*, that the best interest standard should *not* have been applied. The court emphasized that "[t]he parent should only be deemed to have surrendered his natural right to preferential treatment *vis-a-vis* a non-parent if he does so knowingly and intelligently. An agreement to surrender temporary custody is not a knowing and intelligent surrender of the parent's natural right to preferential treatment in a subsequent determination of custody." 41 Ohio App. 3d at 185, 534 N.E.2d at 1219. For the same reasons, any *alleged* agreement between Ms. Mullen and Ms. Hobbs that permitted Ms. Hobbs to temporarily participate in rearing Ms. Mullen's biological child should not be considered a "knowing and intelligent surrender of the parent's natural right to preferential treatment in a subsequent determination of custody."

As compared to *Carpenter*, there is even less evidence in this case of a knowing and voluntary relinquishment of exclusive custody. In fact, Ms. Mullen knowingly signed only documents that were unilaterally revocable by her, knowingly gave her child her own surname –

not a hyphenated reference to Ms. Hobbs, and knowingly refused to enter into a written shared custodial agreement. Based on these facts and circumstances, the trial court did not abuse its discretion in dismissing Ms. Hobbs' petition for shared custody.

II. THIS COURT SHOULD DECLINE THE INVITATION TO IGNORE PRECEDENT UNDER THE GUISE OF NCLR'S VISION OF WHAT IS IN THE BEST INTEREST OF MS. MULLEN'S CHILD.

A. There is a Sharp Division in the Authorities over this Issue.

Amicus NCLR dedicates the bulk of its brief attempting to persuade this Court to follow the lead of “[t]he great majority of state courts” that have found non-parents to have custodial rights because they co-parented a child with the consent of the legal parent. (NCLR Br. at 4). Amicus cites several cases that offer various theories for this Court to adopt in order to reverse the trial court decision, including in loco parentis, equitable estoppel, psychological parenthood, protecting parental autonomy, encouraging people to “live up to parental commitments,” or invoking some inherent judicial authority to determine what is in the child’s best interests, even though the best interest standard *cannot* be used in a custody contest between a parent and non-parent in the absence of a finding that: (a) the parent abandoned the child, (b) the parent contractually relinquished custody of the child, (c) the parent has become totally incapable of supporting or caring for the child, or (d) an award of custody to the parent would be detrimental to the child. None of the theories advanced by NCLR find support in Ohio law and, in fact, some have been expressly rejected. Moreover, NCLR is asking this Court to engage in policy-making, not adjudication; the fashioning of new policy is a matter reserved to the legislative, not the judicial branch. *See Meyer v. Parr*, 69 Ohio App. 344, 24 O.O. 110, 37 N.E.2d 637 (“The judicial

department is not the policy making branch of the government, and is not at liberty to usurp the function of that department”); cf. *Bonfield*, 2002-Ohio-6660, at ¶ 34 (“inappropriate to adopt appellants’ four-part test to broaden the narrow class of persons who are statutorily defined as parents”).

At the outset, it bears emphasis that the NCLR brief repeatedly refers to what the *majority* of other state courts have done, without ever citing more than a handful of cases for each proposition or attempting to explain how decisions of other states somehow give this Court authority to ignore Ohio law. This is particularly disconcerting because just as many state courts have *refused* to confer custodial rights on non-parents based on the theories espoused by NCLR in its brief.⁶

⁶ See, e.g., *Kazmierazak v. Query*, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) (denying non-parent in same-sex relationship parental rights because “psychological parent” lacked parental status equivalent to biological mother); *Clark v. Wade*, 544 S.E.2d 99, 108 (Ga. 2001) (holding that a biological parent may not lose custody to a non-parent without clear and convincing evidence that the biological parent is unfit or the parental custody would cause harm to the child); *In re Marriage of Simmons*, 825 N.E.2d 303, 307-08, 312-13 (Ill. App. Ct. 2005) (refusing to recognize a de facto parent even when child called the non-parent “Daddy” and non-parent co-parented the child since birth); *In re Visitation with C.B.L.*, 723 N.E.2d 316, 320-21 (Ill. App. Ct. 1999) (refusing to award visitation to former same-sex partner due to lack of standing); *In re Ash*, 507 N.W.2d 400, 404 (Iowa 1993) (refusing to grant visitation to former boyfriend of biological mother); *McGuffin v. Overton*, 542 N.W.2d 288, 292 (Mich. Ct. App. 1995) (refusing to allow deceased mother’s former same-sex partner to challenge biological father’s custody rights or gain visitation rights); *Brewer v. Brewer*, 533 S.E.2d 541, 548 (N.C. Ct. App. 2000) (upholding a biological parent’s objection to a de facto parent’s visitation claim where parent voluntarily relinquished custody to other biological parent); *In re Nelson*, 825 A.2d 501, 504 (N.H. 2003) (upholding objection of biological parent over non-parent’s claim to parental rights); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (rejecting former same-sex partner’s claim to visitation over objection of biological parent); *White v. Thompson*, 11 S.W.3d 913, 919 (Tenn. Ct. App. 1999) (rejecting biological mothers’ former same-sex partners’ claims to visitation and concluding that Tennessee law does not provide for award of custody or visitation to non-parent except as provided by its legislature); *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 635-36 (Tex. App. 2003) (rejecting same-sex partner’s claim for visitation because in loco parentis is temporary and ends when the child is no longer under the care of the person in loco parentis); *Jones v. Barlow*, 154 P.3d 808, 813 (Utah 2007) (holding that “a legal parent may freely terminate in loco parentis status by removing her child from the relationship, thereby extinguishing all parent-like

B. The Question of the Best Interests of the Child Should not even be Reached Here Because Ms. Mullen never Contractually Relinquished Her Fundamental Right to Exclusive Custodial Care of the Child.

In re Bonfield dictates that this Court should reject all of NCLR's arguments because they rest on the argument that Ms. Hobbs should be treated as a parent because she "actively encouraged a parent-child bond to develop between her child and another adult." (NCLR Br. at 2, 7, 10). The *Bonfield* Court specifically rejected the invitation to adopt a parentage test that rests on consideration of (i) whether the legal parent consented to and fostered a relationship between the partner and the child, (ii) whether the third party has lived with the child, (iii) whether the third party performs parental functions, and (iv) whether a parent-child bond has been forged. 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241, ¶¶ 31, 34.

The suggestion that Ms. Hobbs should be given custodial rights in order to preserve any bond that may have formed between her and Ms. Mullen's child puts the cart before the horse. The question of what custodial arrangement is in the child's best interest only becomes a question for the Court *if* it is first determined that Ms. Mullen contractually relinquished her fundamental right to exclusive custodial care of her child. Therefore, the cases cited by NCLR that rely on a party's de facto, psychological parent, or in loco parentis status (or on factors traditionally used to establish de facto, psychological parent, or in loco parentis status) are irrelevant to this case.⁷ The

rights . . . vested in the former surrogate parent"); *Stadter v. Siperko*, 661 S.E.2d 494, 498, 501 (Va. Ct. App. 2008) (affirming lower court's holding that former co-habitant failed to prove by clear and convincing evidence that denial of visitation would harm child).

⁷ These include: *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005); *Elisa B. v. Superior Court* (Cal. 2005); *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004); *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840 (Conn. Super. Ct. 1999); *Mullins v. Picklesimer*, No. 2008-SC-000484-DGE, 2010 WL 246063 (Ky. Jan. 21, 2010); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Maine 2004); *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *Marquez v. Caudill*, 656 S.E.2d 737

remaining cases cited by NCLR are similarly irrelevant to this Court's decision because they involved distinguishable facts.⁸

C. Contary to NCLR's Contention, the United States Supreme Court has not Recognized Parental Rights in Third Parties Absent Extraordinary Circumstances not Present Here.

NCLR similarly argues that this Court should respect parent-child bonds formed with non-parents based on "equitable doctrines . . . such as in loco parentis and estoppel . . ." (NCLR Br. at 9). Although NCLR states that the doctrines are "longstanding" and "applied by courts in many states for hundreds of years," the brief cites only an 1815 Massachusetts decision and two readily distinguishable U.S. Supreme Court cases. NCLR incorrectly states that "the first United States Supreme Court cases to establish the fundamental rights of parents involved families

(S.C. 2008); *Middleton v. Johnson*, 633 S.E.2d 162 (Tenn. 2006); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005); *In re the Custody of H.S.H.K.*, 533 N.W.2d 419 (Wis. 1995).

⁸ For example, statute specifically granting third party standing upon showing by clear and convincing evidence that it is not in child's best interest to be placed in custody of legal parent, *Thomas v. Thomas*, 49 P.3d 306 (Ariz. Ct. App. 2002); grandparents sought visitation pursuant to grandparent visitation statute after having raised the children for significant periods of time, *Rideout v. Riendeau*, 761 A.2d 291 (Maine 2000); a stipulated judgment for joint custodial rights, *Johnson-Smolak v. Fink*, 703 N.W.2d 588 (Minn. App. 2005); a written co-parenting agreement, *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); aunt was guardian of a child and raised her for first ten years, *Youmans v. Ramos*, 711 N.E.2d (Mass. 1999); where biological mother was deemed unfit and biological father had yet to be located, trial court had jurisdiction to award custody to step-father, *Logan v. Logan*, 730 So. 2d 1124 (Miss. 1998); statute granting standing incorporated factors that considered third party's having cared and provided for the child, third party's relationship with the child, *Kulstad v. Maniaci*, 352 Mon. 513 (Mt. 2009); an alleged oral co-parenting agreement upon which the non-parent relied to dismiss with prejudice her petition for custodial rights, *A.C. v. C.B.*, 829 P.2d 660 (N.M. 1992); declaration by court that parentage presumption for children born by artificial insemination to husband and wife constitutionally must be applied to same-sex couples, *Shineovich v. Kemp*, 214 P.3d 29 (Or. Ct. App. 2009); rights of a woman who had donated eggs implanted in her, carried the babies to term, and was the intended mother, *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005).

comprised of an aunt raising her niece and a grandmother raising grandsons” to support its proposition that the U.S. Supreme Court has long respected the parent-child bond regardless of whether that bond is based on a legal parent-child relationship. (NCLR Br. at 9) (citing *Prince v. Commonwealth of Mass.*, 321 U.S. 158 (1944) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)). Not only were the two cases cited by NCLR *not* the first parental rights cases, but NCLR also overstates their holdings. Both of the cases cited by NCLR cite two other cases decided decades earlier, both of which firmly rested on the right of natural parents to raise their children without government intervention in their schooling decisions. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). More importantly, NCLR’s cases do not support its proposition that the U.S. Supreme Court has recognized parental rights in third parties regardless of a legal parent-child relationship.

In *Prince*, for example, the Court treated the aunt as a parental figure because she had been awarded custody of her niece. *Prince v. Commonwealth of Mass.*, 321 U.S. 158 (1944). In *Moore*, the Court did not treat the grandmother as a parent figure for purposes of the constitutional analysis, but recognized that there are limits on the state’s authority to enforce zoning regulations that would prohibit a grandmother from permitting both of her grandsons to live with her because of a city’s very narrow definition of family. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The Court’s decision did not turn on the grandmother’s status as a parent figure but on the historical understanding of family, which included members of the extended *nuclear* family (e.g., aunts, cousins, grandparents) living together. *Id.* at 504. There simply is no U.S. Supreme Court controlling precedent that provides support for NCLR’s theory that there is any protectable interest on the part of a non-parent because an alleged parent-child bond has been formed.

NCLR's in loco parentis argument fares no better. The fact is, the few courts that have applied the in loco parentis doctrine to these types of third party custody claims have reached differing results. In particular, states disagree whether the doctrine contemplates perpetuating parent-like rights and obligations after a legal parent has ended the in loco parentis relationship and, if it does, what legal standard should apply to custody disputes arising from that relationship. In a recent case discussing the question in detail, the Utah Supreme Court explained that "a legal parent may freely terminate the in loco parentis status by removing her child from the relationship . . . [with the] surrogate parent." *Jones v. Barlow*, 154 P.3d 808 (Utah 2007). Thus, once the legal parent terminates her relationship with the third party, the third party ceases to stand in loco parentis and, therefore, has no claim to parentage or custodial rights. Even if the third party once stood in loco parentis – based on some equitable parenthood doctrine – upon the termination of her relationship with the natural parent, she stands as a legal stranger to the child. *Id.* at 813; *see also In re Agnes P.*, 800 P.2d 202, 205 (N.M. Ct. App. 1990); *McDonald v. Tex. Employers' Ins. Ass'n*, 267 S.W. 1074, 1076 (Tex. Civ. App. 1924); *Harmon v. Dep't of Soc. & Health Servs.*, 951 P.2d 770, 775 (Wash. 1998) (en banc); *cf. Jones v. Jones*, 2005 PA Super. 337, ¶ 10 (one who stood in loco parentis has standing to seek custody but will be awarded custody only upon a showing by clear and convincing evidence that it is in the best interests of the child to maintain a parental relationship).

In any event, under Ohio law third parties do not gain custodial rights simply by acting in a parental role to another person's child. Rather, under Ohio law third parties gain custodial rights only if they have been appointed guardian or the parents contractually relinquished custody of the child. *See Ohio Jurisprudence, Creation of Parent and Child Relationship: Persons in Loco*

Parentis, § 869 (3rd ed. 2009) (collecting cases).

D. This Court’s Equity Powers do not Extend to the Making of New Policy.

Nor can this Court invoke its equitable powers, as suggested by Ms. Hobbs and NCLR, to create new rights in Ms. Hobbs’ favor under the guise of doing what Ms. Hobbs or this Court perceives to be in the child’s best interests. The *Bonfield* Court recognized this limitation when it held that it was “inappropriate to adopt appellants’ four-part test [to determine whether the former same-sex partner was a psychological parent] to broaden the narrow class of persons who are statutorily defined as parents” 97 Ohio St. 3d at ¶ 34. A decision by the Massachusetts Supreme Judicial Court echoes this sentiment: “The equity powers conferred by the Legislature . . . are intended to enable that court to provide remedies to enforce existing obligations; they are not intended to empower the court to create new obligations.” *T.F. v. B.L.*, 813 N.E.2d 1244, 1252 (Mass. 2004) (dismissing biological mother’s petition for child support from former same-sex partner who had promised the mother she would help raise and support the child born by artificial insemination). The Utah Supreme Court similarly explained, in a custody dispute between a biological mother and her former same-sex partner, that “[w]hile the distinction between applying the law to unique situations and engaging in legislation is not always clear, by asking us to recognize a new class of parents, . . . this court [is invited] to overstep its bounds and invade the purview of the legislature.” *Jones*, 2007 UT 20, ¶ 35.

III. GRANTING MS. HOBBS CUSTODIAL RIGHTS INFRINGES MS. MULLEN’S FUNDAMENTAL PARENTAL RIGHTS UNDER THE FEDERAL CONSTITUTION.

As Ohio law recognizes, an order granting custodial rights to a third party over the objections of a fit, biological parent infringes the biological parents’ fundamental parental rights

under the United States Constitution absent extraordinary circumstances . *See Hockstock*, 98 Ohio St. 3d 238, 2002-Ohio-7208, 781 N.E.2d 971, at ¶ 16. In Ohio, a parent’s right to exclusive custodial control can only be infringed if a court determines that the “preponderance of the evidence shows that a parent abandoned the child; contractually relinquished custody of the child; that the parent has become totally incapable of supporting or caring for the child; or that an award of custody to the parent would be detrimental to the child.” *Id.* at ¶ 17.

A long line of decisions by the United States Supreme Court protects Ms. Mullen’s liberty interest as a fit biological parent to make decisions concerning her child’s upbringing. The U.S. Supreme Court has described a parent’s fundamental right as “perhaps the oldest of the fundamental liberty interests.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). “It is cardinal . . . that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince*, 321 U.S. at 166. “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see* Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to be a Parent Over the Objections of the Child’s Biological Parent*, 21 Regent U. L. Rev. 1 (2009) (discussing in detail third party visitation and custody cases).

In subsequent cases, the United States Supreme Court has also recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children, and that the parent-child relationship is a higher priority than any other party’s relationship to the child. “It is plain that the interest of a parent in the companionship, care, custody, and management of his

or her children ‘come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’” *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (dealing with rights of an unwed father). “Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranged as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” *MLB v. SLJ*, 519 U.S. 102, 116 (1996). The State’s interest in caring for the child of a natural or adoptive parent is, therefore, de minimis if that parent is shown to be a fit parent. *Stanley*, 405 U.S. at 657-58.

The importance placed upon the relationship between the child and a fit, legal parent, has been reflected by the higher standard of proof required before the State can substantially interfere with the parent’s constitutional rights. *See Santosky II v. Kramer*, 455 U.S. 745, 766-67 (1982) (a “clear and convincing evidence” standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); *Garcia v. Rubio*, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) (“A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have the child custody or has legally lost the parental superior right in a child.”); *see also Troxel*, 530 U.S. at 68-69 (“so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”). The due process clause of the Fourteenth Amendment provides heightened protection against government interference with certain fundamental rights and liberty interests, including the right to have children and to direct

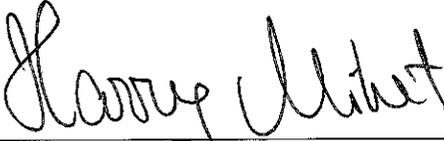
the education and upbringing of one's children. See *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997). As Justice Stevens observed in his concurring opinion in *Troxel*, “The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. . . . It would be anomalous . . . to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.” 530 U.S. at 78-79. The trial court, therefore, properly recognized that “[n]othing can be more important than the custodial rights in a child” (A-20). It is Ms. Mullen, as a fit parent, *not* the government, who has the right to decide with whom her child associates. As such, it was not an abuse of discretion for the court to determine, after looking at all the surrounding facts and circumstances, including Ms. Mullen’s refusal to enter into a written shared custody agreement, that Ms. Mullen had not knowingly and intentionally relinquished exclusive custodial care for her child. Any contrary conclusion would infringe Ms. Mullen’s fundamental parental rights.

CONCLUSION

Appellant’s Brief on the Merits and NCLR’s Amicus Curiae Brief both ask this Court to do exactly what this Court refused to do in *Bonfield*—find a third party to be a parent based on factors traditionally used by some courts to declare third parties to be de facto or psychological parents. Whether Appellant characterizes her request as a finding of an implied contractual agreement to relinquish exclusive custody or de facto parenthood, the constitutional infringement is the same. This Court, therefore, should affirm the decision to dismiss Ms. Hobbs’ petition for shared custody of Ms. Mullen’s child, and reaffirm the fundamental rights of a fit biological parent to the care,

custody, and control of her child.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **BRIEF OF AMICUS CURIAE LIBERTY COUNSEL** was served via regular U.S. mail, postage prepaid, this 29th day of July 2010, upon the following:

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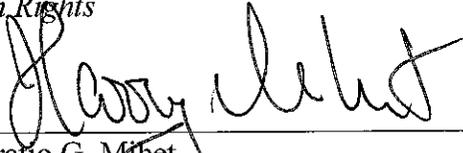
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