IN THE SUPREME COURT OF OHIO

IN RE: L.E.S., E.S., AND N.S. Case No. 2024-0303

On Appeal From the First District Court of Appeals, Hamilton County, Ohio Case Nos. C-220430, C-220436

BRIEF OF AMICUS CURIAE THE NATHANIEL R. JONES CENTER FOR RACE, GENDER, AND SOCIAL JUSTICE IN SUPPORT OF APPELLEE CARMEN EDMONDS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Nathaniel R. Jones Center for Race, Gender, and Social Justice ("the Jones Center") is a coalition dedicated to effectuating social change within the legal community and beyond. Established in 2010 and housed in the University of Cincinnati College of Law, the Jones Center seeks to promote collaboration between students, practitioners, scholars, and activists to ultimately address the interactions of multiple forms of oppression. The Jones Center has been extensively dedicated to bridging the gap between law and society, particularly by highlighting the salience of law for everyday people through innovative programming, volunteerism, activism, and community-based learning and research. The Jones Center is also seeking to diversify its methods of achieving this objective through engaging in policy and advocacy work, including amicus participation in litigation with a broader societal impact relevant to the Jones Center's work.

For these reasons, the Jones Center has a strong and direct interest in the outcome of this matter. The Jones Center urges this Court to adhere to

the principles of *Obergefell v. Hodges*, affirm the First District's decision, and thus to provide clarity and finality to those Ohio families whose rights were violated by the previous unconstitutional statutory regime.

I. INTRODUCTION

Prior to separating, Priya Shahani and Carmen Edmonds spent many years in a long-term, committed relationship. The couple even traveled to Massachusetts together intending to marry, only to learn their marriage would not be valid in their home state of Ohio. Upon returning to Ohio, they instead exchanged promissory pieces of jewelry to affirm their commitment to each other.

Taking the next step in their relationship, the couple intentionally used artificial insemination to conceive three children, whom they raised and parented as equal coparents. Although Ms. Edmonds did not contribute biological material to the children and did not give birth to them, she has been, and has functioned as, their mother since their birth 12 and 10 years ago, respectively. In reaching its conclusion, the trial court held that Ohio law precluded Ms. Edmonds from being recognized as the

children's parent. This decision was a constitutional violation that hurt not only Ms. Edmonds and Ms. Shahani, but also their children.

The First District remedied this violation with a limited holding: if, on remand, the trial court determines that Ms. Edmonds and Ms. Shahani would have been married prior to *Obergefell*, but for Ohio's unconstitutional ban on same-sex marriage, then Ms. Edmonds may be awarded parentage of their children. This was the correct result.

Ms. Edmonds' rights are not the only ones implicated here. The children are also entitled to the full benefit of Ms. Edmonds as their legal parent. Children intentionally conceived within same-sex relationships are no less entitled to the protections offered by having two legal parents than children born into heterosexual relationships. These protections include stability, financial support, and access to material benefits like property and inheritance. This Court should affirm the First District's decision, as well as the "would have been married" standard it enunciated, and thereby remedy the constitutional wrong perpetrated against same sex couples and their children prior to *Obergefell*. This is, in the Jones Center's view, not

only what the Constitution directs, but also the most effective remedy for the prior unconstitutional wrong same-sex couples and their children suffered.

II. STATEMENT OF THE CASE AND FACTS

The Jones Center adopts and incorporates the Statement of Facts included in Appellee Carmen Edmonds' Brief to this Court.

III. ARGUMENT

A. Supreme Court holdings, including *Obergefell*, apply retroactively.

It is the role of the judiciary to say what the law is. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The United States Supreme Court has recognized the import of applying its holdings retroactively and abandoned the concept of selective prospectivity, *i.e.*, applying a new rule of law to the case at hand but not to other cases arising before the new rule was announced. The Court has found that selective prospectivity would violate the "principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991).

Further, the Court held that the "principles of equality and *stare decisis*" require the retroactive application of their holdings to similarly situated litigants. *Id*. at 540. In his concurrence in *Beam*, Justice Scalia acknowledged the difficulty in applying decisions retroactively but emphasized that it is one of the "understood checks upon judicial lawmaking," and opined that "to eliminate [those checks] is to render courts substantially freer to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility hand power among the three branches." *Id.* at 549. The Court reiterated the *Beam* standard in *Harper v. Virginia Dept. of Taxation* when it noted that the "Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." 509 U.S. 86, 90, (1993).

In *Obergefell*, the Supreme Court did not identify a *new* right, but rather recognized *an existing fundamental right to marry*. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015). This right is based in "history, tradition, and other Constitutional liberties inherent in this intimate bond." *Id.* at 665. It

includes not only the protection that marriage provides to children and families under state law, but also more profound benefits. *Id.* Ohio's ban on same-sex marriage, codified at R.C. 3101.01, precluded same-sex partners from receiving the constellation of benefits detailed above. Several states have addressed *Obergefell*, its legacy, and its retroactive applicability. The First District's decision places Ohio in line with these states and corrects the constitutional harm that was done to Ms. Edmonds and her children in formerly denying her parentage rights.

Appellant's brief claims that state courts have issued 14 decisions "grappling with the interplay between *Obergefell*, retroactivity, and common-law marriage," but erroneously portrays these 14 decisions as evidence to support her argument that the First District's decision was out of step with other states. Appellant's Br. at 11. Instead, Appellant has cherry picked case law to manufacture an image of uniformity, bolstered through the selective exclusion of contrary authority.

Specifically, Appellant ignored cases like *McLaughlin v. Jones*, where the Supreme Court of Arizona decided that "in the wake of *Obergefell*,

excluding [the same-sex spouse] from the marital paternity presumption violate[d] the Fourteenth Amendment." *McLaughlin v. Jones*, 243 Ariz. 29, 33 (2017), citing *Obergefell*, 576 U.S. at 664. Arizona, like Ohio, does not recognize common law marriage. Thus, Appellant is simply wrong that only states with common law marriage have recognized or employed a standard like that set forth by the First District here. *Id.*

New York decided similarly for a non-biological parent in a same-sex couple who were not permitted to marry pre-*Obergefell* and separated after. The court stated that the non-biological parent still may have standing to petition for rights over their children if "the parties entered into a pre-conception agreement to conceive and raise a child as co-parents," which is "proved by clear and convincing evidence." *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 13 (2016). Like Arizona and Ohio, New York does not recognize common law marriage. Appellant is thus wrong that common law marriage precedent in other states applying *Obergefell* would continue to justify the denial of Ms. Edmonds' parental rights here.

Plenty of other states have held similarly.[1] There is no uniformity among states in some way that contradicts the First District's holding, as Appellant argues, but rather those states that have recognized that same-sex couple are afforded the "constellation of benefits linked to marriage" compelled by *Obergefell*, and those that have not. *Obergefell* at 646.

Additionally, the cases cited by the Appellant confuse the issue at hand. For instance, in *Anderson v. S. Dakota Retirement Sys.*, the appellant attempted to receive benefits from a partner who had passed, not parental rights. 924 N.W.2d 146 (S.D. 2019). Moreover, that same-sex couple had an opportunity to get married before splitting, unlike Ms. Shahani and Ms. Edmonds. *Id*.

This Court should disregard the argument that, in affirming the First District's decision, Ohio will fall out of line with other states. The parental

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[1] *See, e.g., LC v. MG & Child Support Enforcement Agency*, 143 Hawai'i 430 P.3d 400 (2018) (holding that marital presumption of parentage applies equally to a woman who is married to the child's natural mother); *Partanen v. Gallagher*, 475 Mass. 632, 633, 59 N.E.3d 1133 (2018) (holding that a person may establish herself as a child's presumptive parent in the absence of a biological relationship with the child). Other state courts have also held that the martial presumption applies to same-sex couples. *See Christopher YY v. Jessica ZZ.*, 69 N.Y.S. 3d 887 (App. Div. 2018); *Treto v. Treto*, 622 S.W.3d 397 (Tex. App. 2020).

custody issue in the present case is distinct from any other claim for marital benefits in other cases, like *Anderson*. It would be improper to compare these two ideas as equivalent. Thus, the First District's decision places Ohio in good company with other states, including those that do not recognize common-law marriage.

Contrary to Appellant's claim, at least two states that do not recognize common-law marriage—like Ohio—have still held that *Obergefell* must apply retroactively. *See generally*, *McLaughlin,* 243 Ariz. 29; *Brooke S.B.,* 28 N.Y.3d 1. Applying *Obergefell* retroactively, as the First District has done, is in-step with other states and a proper exercise of judicial authority.

B. Federal and Ohio precedent militate in favor of retroactive application of *Obergefell* here.

i. Ohio precedent supports retroactive application of *Obergefell*.

This Court has acknowledged the retroactive application of holdings of a court of supreme jurisdiction, observing that:

> The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, *but that it never was the law*.

Peerless Elec. Co. v. Bowers, 164 Ohio St. 209, 210, (1955) (emphasis added); *see also Chicago Freight Car Leasing Co. v. Limbach*, 62 Ohio St.3d 489, 492 (1992).

Specifically, this Court has already recognized the retroactivity of *Obergefell*. In *McKettrick v. McKettrick*, the Twelfth District Court of Appeals considered whether Ohio's same-sex marriage ban violated the Fourteenth Amendment's due process or equal protection clauses. 2015-Ohio-366, ¶ 19 (12th Dist.), *appeal allowed, judgment vacated by McKettrick v. McKettrick*, 2015-Ohio-3427. The Twelfth District found that the marriage at issue in that case was void under Massachusetts law because both parties were domiciled in Ohio, and same-sex marriages were invalid in Ohio pursuant to R.C. 3101.01(C) and Ohio Const., art. XV, § 11. *McKettrick* at ¶ 1. A jurisidicitonal appeal to this Court was sought.

Shortly after the Twelfth District's opinion, the United States Supreme Court issued its opinion in *Obergefell*, which invalidated Ohio's same-sex marriage ban and held that same-sex couples have a fundamental right to marry. *Obergefell*, 576 U.S. at 644, 675-76. Two months later, this

Court issued a merit decision in *McKettrick* without a published opinion, accepting the appeal, vacating the judgment, and remanding the case to the trial court for reconsideration in light of *Obergefell*. *McKettrick*, 2015-Ohio-3427. On remand, the trial court held that the McKettricks' marriage was valid, allowed the parties to proceed with their divorce, and issued the final divorce decree in 2017. *McKettrick v. McKettrick,* Warren Co. D.R. No. 13DR36810 (Apr. 4, 2017).

McKettrick is not the only instance of this Court retroactively applying *Obergefell*. In *Beer v. Beer-Sudbrink*, the petitioners were married in Massachusetts in 2011 and sought a dissolution of marriage in 2014, but were denied by the trial court for lack of jurisdiction. *See Beer v. Beer-Sudbrink*, Case No. 2015-0333, Complaint for Writ of Procedendo at ¶¶ 7, 10; *see also Beer v. Beer-Sudbrink*, 2015-Ohio-2911. On appeal, the court vacated the trial court's decision and remanded for consideration in light of *Obergefell*. *Beer*, 2015-Ohio-2911. The trial court ultimately granted the decree of dissolution on September 30, 2015. *Beer v. Beer-Sudbrink,* Hamilton Co. C.P., D.R.Div. (Sept. 30, 2015) (No. DR140145). Ms. Edmonds

is entitled to the same retroactive application of *Obergefell* in Ohio as the McKettricks and Beers received in their respective cases.

Ohio has also retroactively addressed the issue of gendered statutes following *Obergefell*, ordering:

> Effective immediately, pursuant to Article IV, Section 5 of the Ohio Constitution and Rule 84 of the Ohio Rules of Civil Procedure, that all references to husband, wife, father, mother, parent, spouse, and other terms that express familial relationships contained in [Ohio court rules] and the Uniform Domestic Relations Forms . . . be construed as gender neutral where appropriate to comply with the decision of the United States Supreme Court in *Obergefell v. Hodges*, case No. 14-556, 135 S. Ct. 2584, 192 L. Ed. 2d 609, 2015 U.S. LEXIS 4250 . . . .

In re Adm. Actions, 2015-Ohio-2568. *See also Estate of Johnson v. Randall Smith, Inc.*, 2013-Ohio-1507, ¶ 19 (despite precipitating events occurring before statute's enactment, statute still applied because parties filed suit post-enactment). This holding by the Court demonstrated unequivocal recognition of the importance of applying *Obergefell* retroactively to Ohio statutes. There is no limitation, either by case law or statute, to retroactive application of *Obergefell*. *McKetterick*, *Beer*, and this Court's administrative decision demonstrate as much.

ii. Other states have applied a marital presumption after *Obergefell*.

Several states after *Obergefell* have held that the marital presumption applies to same-sex couples who have children through artificial insemination and who would have married had it been legal in their state at the time. In *In re Madrone*, 271 Or. App. 116 (2015), the Court of Appeals of Oregon held that, when determining whether the marital presumption statute applied, "the salient question [was] whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to." (Emphasis in original.) *Id.* at 128. The court emphasized that the marital presumption statute applied to opposite-sex couples who chose to be married, but because same-sex couples could not choose to be married, the court would need to look to other factors, including "whether the parties . . . considered themselves to be spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; . . . or attempted unsuccessfully to get married." *Id.* at 128-29.

Similarly, in *Ramey v. Sutton*, the Supreme Court of Oklahoma held that, following *Obergefell*'s emphasis on the "constellation of benefits that States link to marriage," especially regarding children and families, a non-biological mother who was unable to legally marry prior to the dissolution of her same-sex relationship had standing to pursue a best interests of the child hearing. 2015 OK 79, ¶ 11 (2015); *see id.* at ¶ 17 (noting that child was "entitled to the love, protection and support from the only parents the child has known").

These solutions by other states support applying *Obergefell* to ensure that a fair and constitutional result can be achieved in this case. The First District's remedy is consistent with the decisions in both *Madrone* and *Ramey*: remand of this factual issue to the trial court to determine if the couple would have been married but for Ohio's unconstitutional law prohibiting same-sex marriages. The benefits of marriage and duties of parentage can—and should—be applied to all those who are entitled to them.

C. The First District's solution does not create common-law marriage.

Contrary to Appellant's contention, retroactive application of *Obergefell* does not create common law marriage. *See* Appellant's Br. at 1-2. In Ohio, new common law marriages have not been allowed since 1991. R.C. 3105.12(B)(1). When common law marriage was allowed in this state, it offered common-law spouses the full benefits of conventional marriage. *Nestor v. Nestor*, 15 Ohio St.3d 143 (1984).

But the parties here do not ask this Court for the full rights of marriage as if common law marriage had applied to their relationship at the time they were together. Instead, the First District appropriately limited the "would have been married" test to the issue of parental rights and was primarily concerned with the best interests of the child, rather than the full scope of potential marital benefits for Ms. Edmonds and Ms. Shahani. *In re L.E.S.*, 2024-Ohio-165, ¶ 29 (1st Dist.). As "the parent and child relationship is of fundamental importance to the welfare of a child, and . . . the relationship between a child and each parent should be fostered unless inconsistent with the child's best interests," both parents should be

awarded the same right to the parent-child relationship, just as an opposite-sex couple would have. R.C. 3109.401(A)(1)-(3). Recognizing this right for Ms. Edmonds does not create a common-law marriage between her and Ms. Shahani, nor does it violate Ohio's prohibition on common law marriage.

Appellant falters in her attempt to broaden the scope of this case, implying that the "would have been married" test developed by the First District extends marital rights beyond the limited issue of parentage. Appellant's Br. at 7-8. Not so. The First District explicitly limited the "would have been married" test to determining parentage to rectify the specific constitutional wrong done to Ms. Edmonds and her children, and to comport with *Obergefell*. *In re L.E.S.* at ¶ 29 ("We emphasize that this opinion does not decide any question beyond the narrow issue before this court or make any determination that this same question can or should be utilized when deciding any other rights and liabilities relating to marriage or children in Ohio.").

Based on the court's express words, no other court could utilize the First District's holding to apply a "would have been married" standard in some larger common-law scheme to alter other rights or relationships—to do so would be in direction violation of the First District's holding. Appellant's reliance on an argument about the interplay between this case and common-law marriage indicates a fundamental misunderstanding of the import and application of the First District's opinion. A decision by this Court affirming the First District's holding should be similarly limited.

Appellant erroneously contends that *Candelaria v. Kelly*, 535 P.3d 234 (Nev. 2023) applies, even though the First District has already distinguished the Nevada Supreme Court's discussion of common-law marriage from the situation in this case. *In re L.E.S.*, 2024-Ohio-165, ¶¶ 30-31 (1st Dist.). As the First District stated, *Candelaria* examined common-law marriage and retroactivity in the context of property division in a divorce, not parentage. *Id.* at ¶ 31. Further, the logic in *Candelaria* does not apply here and is ultimately unpersuasive. *Id*. That there are other cases that determined the issue of property division or other marital benefits

similarly to *Candelaria* does not make it any more persuasive, as the underlying reasoning of *Candelaria* still does not apply. Appellant's Br. at 11-12; *but see Candelaria*, 535 P.3d at 240 (court appropriately created equitable remedy where the underlying unconstitutional statute did not expressly provide relief).

As the parties here do not seek the full benefits of common-law marriage, there is also no usurpation of legislative authority under R.C. 3105.12. However, it is worth noting that the legislature has yet to update the Ohio Revised Code to reflect the changes constitutionally mandated by *Obergefell*: R.C. 3101.01(B)(1) still states that "any marriage between persons of the same sex is against the strong public policy of this state," and that "[a]ny marriage between persons of the same sex shall have no legal force or effect in this state." Ohio is thus necessarily relying on the judiciary to apply R.C. 3101.01 according to *Obergefell,* rather than by the literal language of the statute. It is improper to suggest that the First District's decision "rewrites" R.C. 3105.12: not only is the "would have been married" test unrelated to R.C. 3105.12, but because the legislature has

refused to repeal an unconstitutional statute, it falls to the judiciary to properly apply the constitutional principles elucidated by *Obergefell.*

The parties in this case do not seek the benefits of common-law marriage, nor did the First District's solution improperly impose a common-law marriage upon them. As such, R.C. 3105.12 is not impacted or even implicated by this case and should have no bearing on the decision of this Court. The supposedly comparable cases Appellant cites are readily distinguishable and are unpersuasive in deciding the parentage question at issue here.

D. Same-sex couples are as equally entitled to Ohio's statutory parentage rights as opposite-sex couples.

In Ohio, the parent and child relationship is a statutorily recognized legal relationship between mother and child and between father and child, regardless of the parents' marital status. R.C. 3111.01(A)(2) (the "parent and child relationship extends equally to . . . all parents, regardless of the marital status of the parents"). Opposite-sex couples establish parentage rights through paternity tests (R.C. 3111.23), or through the martial presumption (R.C. 3111.03). However, for same-sex couples and their

children who were ineligible for parentage rights prior to 2015, the only way to provide that legal relationship is through retroactive application of *Obergefell*. This aligns with Ohio's statutory goals for parentage, particularly the best interest of the children.

i. Allowing same-sex parents to establish parentage in pre-*Obergefell* relationships corresponds with the best interest of the children.

The interests of the child and the interests of the state are coordinating factors that favor allowing same-sex couples who would have married pre-*Obergefell* to establish parentage. As mentioned by the lower court, "one of the bases for protecting the right to marriage is that it safeguards children and families." *In re L.E.S.*, 2024-Ohio-165 at ¶17 (1st Dist.), citing *Obergefell*, 576 U.S. at 667. More specifically, "by giving recognition and legal structure to their parents' relationship, marriage allows 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.*, citing *Obergefell* at 668.

In Ohio, when allocating parental rights and responsibilities for the care of children, determining the arrangement in the best interest of the children is paramount. The trial court must consider all relevant factors, including but not limited to: "[t]he wishes of the children's parents"; "the wishes and concerns of the child[ren]" (as expressed to the trial court); the children's "interaction and interrelationship with [their] parents, siblings," and others who may affect their best interest; the children's "adjustment" to "home, school, and community"; "[t]he mental and physical health of all persons involved in the situation"; and "[t]he parent more likely to honor and facilitate" parenting time or visitation and companionship rights. R.C. 3109.04(F)(1).

When same-sex parents intentionally conceive and raise children together, it is against the state's interest to base legal parentage solely on biology or marital status because it delegitimizes those children and increases the risk of the children becoming wards of the state. *Brooks v. Fair*, 40 Ohio App.3d 202, 207 (3d Dist. 1988) (holding that "a child should not be made a 'ward of the state' when some individual, other than the state,

justifiably is responsible for that child's welfare," and determining that it was against public policy to de-establish paternity); s*ee also Wolf v. Walker*, 986 F. Supp. 2d 982, 1024 (W.D. Wis. 2014) (it is not preferable for children to become wards of the state rather than be raised by same-sex parents); *Baker v. State*, 170 Vt. 194, 218-19 (1999) (finding that "the state's purpose in licensing civil marriage was . . . to legitimize children and provide for their security," and that exclusion of same-sex couples from legal protections exposed their children to risks the laws were designed to prevent). Providing children with a legal connection to the parents who intend to raise them, regardless of their sexual orientation or gender, protects both the interests of the state and the interests of the child. *Brooks* at 207.

Thus, basing legal parentage in pre-*Obergefell* relationships solely on biology or marital status is against the best interest of the children of same-sex couples because such an interpretation fails to address the significance of both parents to the children, the children's understanding of their

community, and the children's emotions regarding their parental relationships.[2]

In circumstances where a non-biological parent seeks parentage, courts must focus on "what, if any, bond has been formed between the child and the non-[biological] parent." *Bethany*, 78 S.W.3d at 737. The best interests of children cannot be fully considered when courts fail to allow same-sex couples avenues to demonstrate parenthood. *Id.* This failure can have immensely detrimental effects on the children involved. *See Mabry v. Mabry*, 882 N.W.2d 539 (Mich. 2016) (McCormack, J., dissenting) (noting that "as a result of the Court of Appeals' order, the parties' children would be unable to seek the love and guidance of the plaintiff, have access to her healthcare benefits, social security benefits, and death benefits, or inherit from her if she dies intestate").

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[2] *See also*, *Brooke S.B.*, 28 N.Y.3d at 15-16 (noting that "[a] growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children,"); *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011) ("[O]ur law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary.").

Ohio's parentage statutes and case law focus on the best interest of the child. This Court should do the same by affirming the decision of the First District to allow the trial court to make its fact-informed determination of Ms. Edmond's eligibility for parentage.

ii. *Obergefell* requires a different view of Ohio's parentage precedent.

Previously, this Court has declined to adopt a test used in other states to grant parentage for a "second" or "psychological" parent for shared parentage agreements because it would have broadened the then-existing narrow definition of who can be a parent. *In re Bonfield*, 2002-Ohio-6660, ¶ 30. Importantly, the First District's ruling in the instant case does not contravene *Bonfield*. The *Bonfield* court simply applied several statutes pre-*Obergefell*, addressing the "other legal means" to confer parental rights based on a strict reading of the statutory language at the time. *Id.* at ¶ 28, 30, 34. However, as the First District noted, *Bonfield* "never rejected the general claim that [the statute] created other legal means by which parental rights may be conferred under Ohio law." *In re L.E.S.*, 2024-Ohio-165, at ¶ 26. Thus, the requirement to apply *Obergefell* as the supreme law of the

land "compels" that legal recognition as a parent is equally extended to same-sex spouses. *Id.* at ¶ 27.

In 2011, the Court again declined to extend a same-sex partner parental rights without marriage. *In re Mullen*, 2011-Ohio-3361, ¶ 23. However, as the First District noted, the specific issue examined in that case was "whether a parent, by her conduct with a nonparent, entered into an agreement through which the parent permanently relinquished sole custody of the parent's child in favor of shared custody with the nonparent." *In re L.E.S*. at ¶ 25. At no point was there a determination of who may be recognized as a parent pursuant to a statute like R.C. 3111.95(A). *Id.*

While a specific test for parentage was not addressed in *Bonfield* and *Mullen*, these cases do not preclude the Court from considering the intent of the parties and the interests of the children when recognizing parentage in Ohio. *Obergefell* mandates that consideration in cases such as this one.

In the present case, Ohio's same-sex marriage ban prevented Ms. Shahani and Ms. Edmonds from legitimizing their children. Refusing the

non-biological mother her full parenting rights increases the risk of the children becoming wards of the state, regardless of their parents' marital status. When parties in a relationship mutually consent to artificial insemination, the failure to recognize the resulting reliance interests creates unnecessary and unfair risk for the intentionally conceived children by denying protections usually afforded by having two parents.

Further, shifting all burden to the biological parent discharges all duties and financial obligations for which the non-child-bearing partner would otherwise be responsible. This, too, is unfair to both the biological parent and the children, and it potentially deprives the children of substantial emotional and material support for the remainder of their childhood. Moreover, failing to recognize non-biological parenthood could deprive children of inheritance in situations where the non-biological parent dies intestate. The narrow definitions of parenthood at the time of *Bonfield* ruling have necessarily been expanded by *Obergefell*. Now, this Court need only recognize that expanded definition.

Pre-*Obergefell*, there was no process in Ohio for same-sex partners to establish parentage relationships because of their inability to marry. Even though Ohio recognized that it had to prioritize child welfare and look to the intent of the parties when determining parentage, marriage remained the ultimate barrier for same-sex couples and prevented courts from being able to adequately consider the best interests of the child.

However, *Obergefell* presents significant Equal Protection challenges to *Bonfield* and *Mullen*. The present case offers this Court the opportunity to correct the constitutional errors of *Bonfield* and *Mullen*, ensuring that parentage is available to a couple that would have been married but for the unconstitutional barrier created by Ohio law. Not only is this the correct and constitutional outcome, but such a holding would also consider the best interests of the children and allow for both parents to enjoy the parental rights they intended to create when bringing children into the world.

IV. CONCLUSION

Ms. Edmonds had no way of establishing parentage under the law when her children with Ms. Shahani were born, despite the ample evidence that she intended to, and did, parent the children. The couple could not get married in Ohio at the time, and Ms. Edmonds could not have claimed parentage through marital presumption, intent, or adoption. But Ms. Shahani and Ms. Edmonds formed a family nonetheless and committed to raising their children as a couple.

Denying Ms. Edmonds an equitable avenue to parenthood of the children impaired the best interests of their children. It also has now been recognized as unconstitutional. Retroactively applying *Obergefell*, as the First District did, is the only way that this Court can effectuate both the explicit holding of *Obergefell* and its promise of equality to same-sex couples. Specifically, by holding that either member of a pre-*Obergefell* same-sex partnership has the opportunity to demonstrate the couple's prior intention to marry (had the right been available to them), this Court

would allow Ms. Edmonds a chance to enjoy the constitutionally protected parental rights she sought to create in raising children with Ms. Shahani.

Ohio families are neither monolithic nor homogenous, and this Court should address their differing circumstances to ensure equal constitutional protections for Ms. Edmonds, Ms. Shahani, their children, and all other similarly situated families in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11(C)(1), I hereby certify that a copy of the foregoing was served upon all counsel of record via electronic mail on September 13, 2024.

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