IN THE

Supreme Court of Virginia

RECORD NO. 120159

BEVERLEY MASON,

Appellant/Cross-Appellee,

v.

WILLIAM D. BREIT, *et al.*,

Appellees/Cross-Appellants.

RECORD NO. 120158

L.F., a Minor,

Appellant/Cross-Appellee,

v.

WILLIAM D. BREIT, *et al.*,

Appellees/Cross-Appellants.

BRIEF AMICUS CURIAE OF THE NEW HOPE CENTER FOR REPRODUCTIVE MEDICINE IN SUPPORT OF CROSS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 3

STANDARD OF REVIEW 4

ARGUMENT 4

I. Virginia Code § 20-158(A)(3) is constitutional under the Virginia Constitution and the Constitution of the United States. 4

A. Laws passed by the Virginia General Assembly are presumed to be constitutional. 4

B. Virginia Code § 20-158(A)(3) makes no gender-based classification triggering equal-protection analysis and is not unconstitutional by virtue of distinctions drawn on the basis of marital status. 6

C. The Due Process Clause affords a biological father no right to parental rights and does not protect any purported "liberty interest" of a child in knowing, or having a relationship with, a biological parent. 9

II. The current statutory scheme for assisted conception enacted by the General Assembly is unambiguous and in the interest of public policy. 11

A. Public policy is determined by, and the province of, the General Assembly. 12

B. Virginia Code § 20-158(A)(3) is sound public policy that encourages access to reproductive medicine 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

CASES

Armour v. City of Indianapolis, Indiana ___*U.S.* ___, 132 S. Ct. 2073 (2012) 8

Blue Cross of Virginia v. Commonwealth of Virginia, 221 Va. 349, 269 S.E.2d 827 (1980) 5

Dionne v. Southeast Foam Converting & Packaging, Inc., 240 Va. 297, 397 S.E.2d 110 (1990) 12

Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1971) 7

Jackson v. Fidelity & Deposit Co. of Md., 269 Va. 303, 608 S.E.2d 901 (2005) 12

Kummer v. Donak, 282 Va. 301, 715 S.E.2d 7 (2011) 12, 13

Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983) 9, 10

Marshall v. Northern Virginia Transp. Auth., 275 Va. 419, 657 S.E.2d 71 (2008) 5, 11

Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989) 9, 10

Montgomery County v. Virginia Dep't. of Rail and Public Transp., 282 Va. 422, 719 S.E.2d 294 (2011) 4

National Federation of Independent Businesses v. Sebelius, ___*U.S.*___, 132 S. Ct. 2566 (2012) 5

Supinger v. Stakes, 255 Va. 198, 495 S.E.2d 813 (1998) 4

Taylor v. Commonwealth, 260 Va. 683, 537 S.E.2d 592 (2000) 10

Uniwest Constr., Inc. v. Amtech Elevator Servs., Inc., 280 Va. 428, 669 S.E.2d 223 (2010) 12

CONSTITUTION

Virginia Constitution, Art. I, Sec. 15-A 8

STATUTES

Virginia Code § 20-156 ..... 1, 5, 6, 10

Virginia Code § 20-158(A) 6, 7

Virginia Code § 20-158(A)(1) 7

Virginia Code § 20-158(A)(3) ..... *passim*

Virginia Code § 32.1-257(D) 2, 6

OTHER

Centers for Disease Control and Prevention, What is Assisted Reproductive Technology? http://www.cdc.gov/art/ 1

Op. Virginia Att'y Gen. 06-003 (September 14, 2006). 9

STATEMENT OF INTEREST

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Amicus New Hope Center for Reproductive Medicine ("New Hope") is a fertility center in Virginia Beach that has, since 1997, provided a full range of services for assisted conception including *in vitro* fertilization, intrauterine insemination, cryopreservation of embryos, gestational surrogacy, embryo donation, and egg and sperm donation. Our team, including two reproductive endocrinologists, laboratory technicians and clinical support staff, has offered new hope to thousands of couples and single individuals.

The Centers for Disease Control and Prevention estimate that currently over 1% of infants born in the United States were conceived by assisted reproductive technology ("ART"), with 61,564 ART babies born in 2010.[1] The services provided by New Hope resulted in the

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[1]Centers for Disease Control and Prevention, What is Assisted Reproductive Technology? http://www.cdc.gov/art/. The CDC definition of ART includes only procedures in which ova are combined with sperm in a laboratory and not artificial insemination or intrauterine insemination, in which sperm is introduced by a catheter into a woman's body. Thus, the percentage of children conceived through any form of assisted conception, as defined by Virginia Code § 20-156, is higher than one percent.

birth of 161 infants in 2010, a mere fraction of the children conceived at the twelve fertility centers in the Commonwealth.[2]

New Hope has an interest in fostering access to assisted conception health-care services and ensuring the availability of donor sperm, eggs, and embryos for our patients. We join as *amicus curiae* in this matter to respond solely to the constitutional issues with regard to Virginia Code § 20-158(A)(3) raised in Assignment of Cross-Error 2 by cross-appellant William Breit and amicus The Center for Global Justice, Human Rights, and the Rule of Law at Regent University School of Law ("Regent amicus") and the public policy concerns asserted by the Regent amicus.[3]

Mr. Breit and the Regent amicus attempt to frame their argument as a constitutional one, which is legally flawed as discussed by New Hope in this brief. In actuality, the core issue they raise is one of public policy, focusing on sweeping presumptions that it always is in the best interest of a child to know, and to have a relationship with, both of her biological parents.

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[2] http://www.sart.org/find_frm.html (follow link over outline of Virginia on U.S. map for data by clinic).

[3] New Hope adopts the argument made by cross-appellees L.F. and Beverley Mason that cross-appellant's arguments on the constitutionality of Virginia Code § 32.1-257(D) were not raised below and, therefore, are waived.

To the extent the Court entertains this argument rather than deferring to the General Assembly, New Hope seeks to explain to the Court that the end result of the position taken by Mr. Breit and the Regent amicus would be to reduce access to and affordability of the very technology that led to L.F.'s conception and birth, and that of thousands of children in the Commonwealth.

STATEMENT OF THE CASE

New Hope agrees with the Statement of Substantial Constitutional Question and Matters of Significant Precedential Value of cross-appellee Beverley Mason, to the extent this statement addresses matters germane to Assignment of Cross-Error 2 and the associated policy arguments raised by the Regent amicus.

STATEMENT OF FACTS

New Hope agrees with the Statement of Facts of Ms. Mason and the Material Proceedings Below and Facts of L.F., to the extent these statements address facts germane to Assignment of Cross-Error 2 and the associated policy arguments raised by the Regent amicus.

STANDARD OF REVIEW

Assignment of Cross-Error 2 presents questions of statutory and constitutional interpretation that are reviewed *de novo* on appeal. *Montgomery County v. Virginia Dep't of Rail and Public Transp.*, 282 Va. 422, 435, 719 S.E.2d 294, 300 (2011).

ARGUMENT

I. Virginia Code § 20-158(A)(3) is constitutional under the Virginia Constitution and the Constitution of the United States.

A. Laws passed by the Virginia General Assembly are presumed to be constitutional.

This Court resolves "any reasonable doubt regarding a statute's constitutionality in favor of its validity." *Montgomery County*, 282 Va. at 435, 719 S.E.2d at 300, quoting *Supinger v. Stakes*, 255 Va. 198, 202, 495 S.E.2d 813, 815 (1998). Such presumption of validity sets a high burden for any party seeking to invalidate a Virginia law on constitutional grounds:

> The courts will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution. A judgment as to the wisdom and propriety of a statute is within the legislative prerogative.

Blue Cross of Virginia v. Commonwealth of Virginia, 221 Va. 349, 358, 269 S.E.2d 827, 832-33 (1980). The Supreme Court of the United States also exercises restraint in examining the constitutionality of legislative enactments. As stated by Chief Justice Roberts in announcing the judgment of the Court in *National Federation of Independent Businesses v. Sebelius*, ___U.S.___, 132 S.Ct. 2566, 2577 (2012), "[w]e do not consider whether the [law] embodies sound policies. That judgment is entrusted to the Nation's elected leaders." Further, this Court addresses issues of statutory interpretation "in a manner that avoids a constitutional question whenever possible." *Marshall v. Northern Virginia Transp. Auth.*, 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008).

Mr. Breit and the Regent amicus challenge the constitutionality of Virginia Code § 20-158(A)(3), which provides that "[a] donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother."[4] Both Mr. Breit and the Regent amicus fall far short of their burden to establish that this statute is plainly repugnant to the U.S. Constitution.

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[4] A "donor" is defined in Virginia Code § 20-156 as an individual who contributes the sperm or the egg used in assisted conception.

B. Virginia Code § 20-158(A)(3) makes no gender-based classification triggering equal-protection analysis and is not unconstitutional by virtue of distinctions drawn on the basis of marital status.

Mr. Breit asserts that Virginia Code § 20-158(A)(3) violates the Equal Protection Clause because it treats unmarried male donors differently than unmarried female donors and it treats unmarried donors differently than married donors.[5]

Virginia Code § 20-158(A)(3) does not make any distinctions between donors based on gender. The first sub-part of Virginia Code § 20-158(A) provides that the gestational mother of a child is the child's mother. Mr. Breit fails to acknowledge that the definition of "gestational mother" in Virginia Code § 20-156 does not include egg donors, only the woman who carries and gives birth to the child. Thus, neither a male donor nor a female donor is deemed to be a parent purely as a result of the donation of sperm or egg.[6]

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[5] The Regent amicus raised no arguments based in the Equal Protection Clause.

[6] Such interpretation is consistent with Virginia Code § 32.1-257(D), which states that "[d]onors of sperm or ova shall not have any parental rights or duties for any such child [resulting from assisted conception]."

A hypothetical is illustrative of the operation of the statute. "Jane" and "Joan," a lesbian couple, seek assisted conception at New Hope. Jane donates the egg, which is fertilized with sperm from a third-party donor. The embryo is implanted in Joan, who carries the baby to term and through delivery.[7] Joan, the gestational mother, is legally the child's mother under Virginia Code § 20-158(A)(1) but Jane, the egg donor, has no legal rights as a parent. Mr. Breit was situated almost exactly the same as Jane, but, unlike Jane, he had the ability to marry the gestational mother.

Virginia Code § 20-158(A) does not classify individuals based on gender. It does make distinctions based on marital status – a male donor is afforded rights as a parent only if he is married to the gestational mother. Marital status is not a suspect classification under the Equal Protection Clause; therefore, different treatment of unmarried people is analyzed under rational-basis review. *Eisenstadt v. Baird*, 405 U.S. 438, 446-47, 92 S.Ct. 1029, 1035 (1971).

"[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal

[7] Such a scenario is quite foreseeable to New Hope. Jane may be younger than Joan with more viable eggs but have a condition, such as diabetes, that places her at high risk for pregnancy complications.

Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis, Indiana* ___U.S. ___, 132 S.Ct. 2073, 2080 (2012) (citations omitted).

The Regent amicus concedes that "Virginia's assisted conception code was designed to promote sound public policy fostering strong families based on marriage." Regent amicus brief, p. 17. New Hope agrees that Virginia has a legitimate interest in protecting married couples who benefit from assisted conception from potential interference by an egg or sperm donor.

The Commonwealth's interest in encouraging marriage, and extending certain benefits only to married individuals, not only pervades the Code but is part of the Virginia Constitution. Article I, Section 15-A of the Constitution of Virginia, enacted by statewide referendum in 2006, provides, in pertinent part:

> The Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.

Although the first sentence of Section 15-A addresses only same-sex marriage, the second sentence, above, applies equally to same-sex

or opposite-sex couples. In the opinion of then-Attorney General McDonnell, it covers "the enumerated rights and obligations included in Title 20 of the Code of Virginia regarding marriage, divorce, and custody matters."[8] Not only does Virginia have a legitimate state interest in encouraging marriage, it is constitutionally protected.

C. The Due Process Clause affords a biological father no right to parental rights and does not protect any purported "liberty interest" of a child in knowing, or having a relationship with, a biological parent.

"The mere existence of a biological link does not merit equivalent constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S.Ct. 2985, 2993 (1983). Shortly after the decision in *Lehr*, the Supreme Court of the United States rejected a claim that a biological father has a liberty interest or any right in a relationship with his biological child. *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333 (1989). The reason Michael H. had no rights, according to the plurality of the Court, is that the historic practices of society did not consider individuals such as Michael H., who conceived the child through an adulterous relationship, to be "accorded special protection." *Id.* at 124, 109 S.Ct. at 2342.

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[8] Op. Virginia Att'y Gen. 06-003 (September 14, 2006).

This Court has recognized that rights of parents "do not spring full-blown from the biological connection between parent and child." *Taylor v. Commonwealth*, 260 Va. 683, 690, 537 S.E.2d 592, 596 (2000), citing *Lehr*, 463 U.S. at 260. Mr. Breit offers no controlling authority, or historic protection, to support a fundamental constitutional right of an unmarried sperm donor to legal parental rights with his child under even limited circumstances.

The Court in *Michael H.* also addressed, as a matter of first impression, "whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." *Id.* at 130, 109 S.Ct. at 2346. Such claim too was resoundingly rejected. *Id.* at 130-31, 109 S.Ct. at 2346.

The Regent amicus concedes that a child does not have a right under the U.S. Constitution in knowing or having a relationship with her biological parent (Regent amicus brief, p. 8), but claims that a child has a protected liberty interest in such a relationship.[9] No authority is offered, or exists, to support this theory.

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[9] The Regent amicus characterizes Mr. Breit is an "intended parent," warranting different treatment. Mr. Breit does not meet the definition of "intended parent" in Virginia Code § 20-156, which is limited to a married couple who enter a surrogacy agreement.

Virginia Code § 20-158(A)(3) is not plainly repugnant to any provision of the U.S. Constitution. In the absence of any precedential authority to support their constitutional claims, and clear authority to support rejection of such claims, Mr. Breit and the Regent amicus have not met their burden to prove this statute is unconstitutional. This Court must resolve any reasonable doubt regarding the constitutionality of Virginia Code § 20-158(A)(3) in favor of its validity. *See*, *Marshall*, 275 Va. at 428, 657 S.E.2d at 75.

II. The current statutory scheme for assisted conception enacted by the General Assembly is unambiguous and in the interest of public policy.

The primary argument of the Regent amicus is based in the Commonwealth's duty to protect the best interests of a child and an opinion that the best interest of a child is to know and to have a relationship with her parent, even if that parent is a sperm donor. Regent amicus brief, p. 4, 8-18. It is unclear if, in the view of the Regent amicus, this duty derives from the U.S. Constitution. If this is the position advocated, no authority is cited to support it. The "best interest of the child" argument of the Regent amicus is, in reality, one based in notions of public policy.

A. Public policy is determined by, and the province of, the General Assembly.

"[I]t is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests . . ." *Dionne v. Southeast Foam Converting & Packaging, Inc.*, 240 Va. 297, 304, 397 S.E.2d 110, 114 (1990). Quite simply, "the public policy of the Commonwealth is determined by the General Assembly." *Kummer v. Donak*, 282 Va. 301, 306, 715 S.E.2d 7, 10 (2011), quoting *Uniwest Constr., Inc. v. Amtech Elevator Servs., Inc.*, 280 Va. 428, 440, 669 S.E.2d 223, 229 (2010).

In deference to the General Assembly, courts "cannot add language to the statute the General Assembly has not seen fit to include . . . [n]or are they permitted to accomplish the same result by judicial interpretation." *Jackson v. Fidelity & Deposit Co. of Md.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (internal citations omitted). The Regent amicus encourages the Court to depart from these long-standing principles to extend to sperm and egg donors parental rights that the General Assembly did not see fit to include.

The legislative history of Virginia Code § 20-158(A)(3) reveals that in 1997 the General Assembly revised the statute to extend parental rights to a certain class of donors: men who are married to

the gestational mother.[10] The General Assembly could have included in this group men who cohabitate with the gestational mother, for example, but chose not to do so.

Finally, the Regent amicus contends that notions of public policy mandate that a child should have a connection with her biological parent, and the statute should be so interpreted. This Court addressed a similar claim in the context of adopted children and intestate succession, concluding that "consanguinity ceases to be paramount where the legislature expresses an intention to the contrary." *Kummer*, 282 Va. at 306, 715 S.E.2d at 7-8.

B. Virginia Code § 20-158(A)(3) is sound public policy that encourages access to reproductive medicine.

Any recognition by the Court of a child's liberty interest to know and to have a relationship with a donor, by virtue of constitutional protections or a public-policy goal, would necessarily apply to all children of assisted conception and all donors, not just those similar to Mr. Breit. The consequences would be disastrous for New Hope and other providers of assisted conception.

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[10] New Hope disputes the assertion of the Regent amicus on p. 13 and p. 17 of the brief that the statute is silent as to unmarried donors. By granting parental rights only to male donors who are married to the gestational mother, the General Assembly spoke to its intent to exclude unmarried donors.

Our patients use donor eggs, donor sperm and, on rare occasions, a donor embryo. The overwhelming majority of these donors desire to remain anonymous.[11] Obligations for the upbringing of a child would accompany the expansion of rights advocated by the Regent amicus, a responsibility extremely few donors desire. This prospect of financial, familial or other duty would drastically diminish the incentive for individuals to donate eggs or sperm, resulting in reduced access to the ingredients that are essential to bring a child into the lives of those who struggle with infertility.

The Regent amicus claims that a child born from assisted conception has an ongoing interest in connecting with her donor, and the donor in connecting with the child. What assurance would this provide families who are raising a child conceived through assisted conception? Would an egg donor who, ten years after her donation, discovers she is infertile be able to establish a relationship with the child conceived with use of her donor eggs? Would the presumption asserted by the Regent amicus in favor of two-parent families permit a sperm donor and his wife to usurp the relationship of a single mother and her child conceived from his sperm?

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[11] Some donors agree to be contacted by a child conceived from their sperm or egg, but only after the child reaches age 18.

The General Assembly weighed the competing policy interests in enacting Virginia Code § 20-158(A)(3), as is its role, and established a bright-line rule for parental rights in the setting of assisted conception. Such certainty is essential to promote the availability and affordability of assisted conception options and opportunities for the citizens of Virginia.

CONCLUSION

For the reasons set forth above, New Hope asks that the Court reject the challenge by Mr. Breit and the Regent amicus to the constitutionality of Virginia Code § 20-158(A)(3) and decline the invitation of the Regent amicus to decide the issues raised by Assignment of Cross-Error 2 on public-policy grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, counsel for *amicus curiae* New Hope Center for Reproductive Medicine certifies that this 28th day of August, 2012, fifteen (15) copies of this Brief *Amicus Curiae* were filed by hand in the office of the Clerk of this Court and that three (3) copies were sent by first class mail, postage prepaid, to the following:

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E. I further certify, pursuant to Rule 5:30(b) and 5:30(c), that written consent of counsel for cross-appellee Beverley Mason and cross-appellee L.F. to filing of this Brief *Amicus Curiae* and a Motion for Leave of Court to File a Brief *Amicus Curiae*, in the absence of consent from cross-appellant, was filed with the Clerk of this Court simultaneously with this brief.

Elizabeth Griffin Robertson