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CLERK SUPREME COURT

IN THE SUPREME COURT

STATE OF ARIZONA

MICHELLE ANNE EGAN,

Petitioner,

v.

HON. ELAINE FRIDLUND-  
HORNE, JUDGE OF THE  
SUPERIOR COURT OF THE  
STATE OF ARIZONA, IN AND  
FOR COUNTY OF COCONINO,

Respondent.

And

THERESE MARIE HOCHMUTH,

Respondent Real Party in  
Interest.

Supreme Court

No. CV-09-0133-PR

Court of Appeals

No. 1 CA-SA 08-0240

Coconino County Superior Court

No. DO 2008-0205

**BRIEF OF *AMICUS CURIAE* BY NATIONAL ASSOCIATION OF SOCIAL  
WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS ARIZONA  
CHAPTER, OUR FAMILY SERVICES, PIMA COUNTY MEDICAL SOCIETY  
AND PIMA COUNTY PEDIATRIC SOCIETY**

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July 6, 2009

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## INTEREST OF THE *AMICI CURIAE*

*Amici* National Association of Social Workers, National Association of Social Workers Arizona Chapter, Our Family Services, the Pima County Pediatric Society and the Pima County Medical Society (collectively "*Amici*") respectfully submit this brief in support of the Real Party in Interest Therese Marie Hochmuth's Petition for Review.

### INTRODUCTION

Every year more of Arizona's children are raised in homes by people other than their legally married, biological mother and father. This Court must provide guidance to lower courts struggling to interpret Arizona's custody and visitation laws in light of these ever-changing realities.

Social science research and American case law recognize that a child needs and is entitled to a relationship with both of his or her parents. Once the parent-child bond has been established, regardless of the biological or legal status of the parent, the child is severely and enduringly harmed if that relationship is diminished. In this case, the court of appeals underestimated the harm Sydney has suffered by allowing her relationship with her non-birth mother to be disrupted. Research overwhelmingly demonstrates that (1) a person other than a child's legal parent is capable of establishing a strong parent-child bond with the child, (2) non-biological parents create families as healthy and nurturing as biological parents, and (3) children with bonds to non-biological parents suffer as greatly as those

with bonds to biological parents when the established parent-child relationship is disturbed.

Preventing such harm to Arizona's children is an issue of statewide concern that will only become more urgent as the number of Arizona families that include an *in loco parentis* parent continues to grow. For that reason, *Amici* urge this Court to grant review of this matter and reverse the court of appeals.

## ARGUMENT

### I. ARIZONA COURTS SHOULD RECOGNIZE THAT A PARENT-CHILD BOND CAN BE ESTABLISHED BY AN ADULT OTHER THAN THE CHILD'S LEGAL PARENT.

#### A. Arizona Families Are Changing.

Promoting strong families is the declared public policy of the State of Arizona.<sup>1</sup> In order to achieve this goal, Arizona must respond to the increasing number of families headed by individuals other than a married biological father and mother. For example, children are increasingly being raised by a single parent, by unmarried parents, by grandparents, and by same-sex partners.

“In 2007, nearly 4 in 10 births were to unmarried women: The proportion of all births to unmarried women was 39.7%, up from 34.0% in 2002,” and more than twice the percentage in 1980.<sup>2</sup> These women are not, however, necessarily raising

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<sup>1</sup> A.R.S. § 25-103.

<sup>2</sup> Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, National Center for Health Statistics Data Brief (May 2009)

their children alone. In households of unmarried, opposite-sex partners, 44.6% were raising children under 18 years of age.<sup>3</sup>

Another change to the American family is the increased role of grandparents in childrearing. In 2004, over 6 million children, or 8.8 % of all children under the age of 18, lived in a household with at least one of their grandparents.<sup>4</sup> This represents an increase from 4 million children or 5.6 % in 1998.<sup>5</sup>

Directly relevant to the case at hand, the 2000 Census found that 34% of women and 22% of men who reported cohabitating with a same-sex partner lived with a child under 18 years old in their home.<sup>6</sup> “Census 2000 and related demographic research make it clear that parenting by same-gender couples is an established and growing part of the diverse structure of families in the United

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available at <http://www.cdc.gov/nchs/data/databriefs/db18.htm> (follow “PDF Version” hyperlink) (last viewed July 1, 2009).

<sup>3</sup> Tavia Simmons & Martin O’Connell, *Married-Couple and Unmarried-Partner Households: 2000*, at 9, Table 4 (U.S. Census Bureau 2003) available at <http://www.census.gov/prod/2003pubs/censr-5.pdf> (last viewed July 1, 2009) (hereinafter “Simmons”).

<sup>4</sup> Rose Kreider, *Living Arrangement of Children: 2004*, at 15, Table 8 (U.S. Census Bureau 2008) available at <http://www.census.gov/prod/2008pubs/70-114.pdf> (last visited July 1, 2009).

<sup>5</sup> U.S. Dep’t of Commerce, Bureau of Census, *Current Population Reports: Marital Status and Living Arrangements: March 1998 (Update)*, at 26, Table 4 available at <http://www.census.gov/population/www/socdemo/ms-la.html> (follow “P20-514 - Marital Status and Living Arrangements: March 1998 (Detailed Tables)” hyperlink) (last viewed July 1, 2009).

<sup>6</sup> Simmons at 4, Table 4.

States.”<sup>7</sup> Meanwhile, in Arizona, from 2000 to 2005 the number of same-sex couples increased by 37% to 16,931.<sup>8</sup>

All of this leads to the conclusion noted by the United States Supreme Court that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”<sup>9</sup> Thus, as expressed in a policy statement from the National Association of Social Workers, “[s]trengthening families . . . necessitates the creation of policies that recognize the family as an intergenerational system that includes biological, social, and psychological ties.”<sup>10</sup>

#### **B. Children Form Parent-Child Bonds with Those Who Act as Their Parents.**

An “attachment relationship” is defined as a “reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver” through which “children form their concepts of self, others and the world.”<sup>11</sup> When they are young, children form attachment relationships, and as they get older these

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<sup>7</sup> James G. Pawelski, et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 349, 351 (July 2006) (hereinafter “Pawelski”).

<sup>8</sup> Adam P. Romero, et al., *Census Snapshot*, at 1 (2008) available at <http://repositories.cdlib.org/uclalaw/williams/census/> (follow “Census Snapshot: Arizona” hyperlink) (last viewed July 1, 2009).

<sup>9</sup> *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

<sup>10</sup> Nat’l Ass’n of Social Workers, *Family Policy*, in *Social Work Speaks* 134, 137 (2009); *id.* at 138-39 (supporting “same-sex marriage and second-parent adoption for gay- and lesbian-headed families” as providing strong families).

<sup>11</sup> Beverly James, *Handbook for Treatment of Attachment-Trauma Problems in Children* 1-3 (1994).

relationships become stronger.<sup>12</sup> Aside from facilitating foundational development accomplishments, these attachment relationships “buffer young children against the development of serious behavior problems, in part by strengthening the human connections.”<sup>13</sup>

“[T]he child’s primary caregivers—be they parents or grandparents or foster parents—structure the experiences and shape the environment within which early development unfolds.”<sup>14</sup> Children develop attachments within this environment, regardless of whether parents and the child are biologically or legally linked.<sup>15</sup> For example, a study sponsored by the American Academy of Pediatrics investigating attachment relationships of young children in foster care found that “[a] child develops attachments and recognizes as parents adults who provide ‘day-to-day attention to his needs for physical care, nourishment, comfort, affection, and

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<sup>12</sup> See, e.g., Paulette A. Flores, et al., *Promoting Mother-Child Attachment: Review of the Past and Recommendations for Future Intervention*, NHSA Dialog: A Research-to-Practice Journal for the Early Intervention Field (Dec. 21, 2007); MELVIN KONNER, *CHILDHOOD* 84-87 (1991).

<sup>13</sup> Nat’l Research Council & Inst. of Med., *From Neurons to Neighbors: The Science of Early Childhood Development* 265 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

<sup>14</sup> *Id.* at 226.

<sup>15</sup> See Pawelski at 359-60 (summarizing the “considerable research literature that has accumulated” that “has generally revealed that children of divorced lesbian mothers grow up in ways that are very similar to children of divorced heterosexual mothers”); see also JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 27 (2d ed. 1979) (concluding the parent-child relationship can develop without reference to biology or formal adoption).

stimulation.”<sup>16</sup> A recent study comparing adolescents living with same-sex and opposite-sex couples found that the quality of the adult-child attachment relationship determined positive outcomes, rather than the sexual orientation of the parents, stating “[r]egardless of family type, adolescents were more likely to show favorable adjustment when they perceived more caring from adults and when parents described close relationships with them.”<sup>17</sup>

**C. This Court Should Clarify That Non-biological Parents Can Stand *In Loco Parentis*.**

In passing A.R.S. § 25-415, which *inter alia* allows a court to grant visitation to a person who stands *in loco parentis*, the Arizona Legislature recognized that persons other than the legal parents can develop child-parent bonds with children. Most Arizona courts, including the court of appeals in this case, have recognized that a determination of *in loco parentis* is not tied to the gender of the non-biological parent or to the number of parents. *See Egan v. Fridlund-Horne*, 2009 WL 995794, \*3 (Ariz. Ct. App. Apr. 14, 2009) (“Based on the parties’ stipulation, the superior court determined that Hochmuth stands in loco

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<sup>16</sup> Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 (Nov. 2000) (“The emotional consequences of multiple placements or disruptions are likely to be harmful at any age . . . .”) available at <http://pediatrics.aappublications.org/cgi/content/abstract/106/5/1145> (follow “Full Text (PDF)” hyperlink) (last viewed July 1, 2009).

<sup>17</sup> Jennifer L. Wainright, et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 Child Dev. 1886, 1895 (Dec. 2004).

parentis to the child.”); *Riepe v. Riepe*, 208 Ariz. 90, 93, 91 P.3d 312, 315 (Ct. App. 2004) (“[T]he superior court can grant in loco parentis visitation to a petitioning party even if the child maintains a meaningful parental relationship with his or her legal parents.”); *Thomas v. Thomas*, 203 Ariz. 34, 35, 49 P.3d 306, 307 (Ct. App. 2002) (“Thomas and Nielson have raised the child since birth. It is undisputed that Nielson is ‘in loco parentis’ to the child, has been acting as a parent, and is regarded as such by the child.”).

Despite these findings by the court of appeals that the statute permits non-biological parents to stand *in loco parentis*, there have been strongly worded dissents challenging these conclusions and showing contempt for granting custody or visitation to same-sex partners, step parents, and unmarried couples where one adult is not biologically related to the child. *See Egan*, 2009 WL 995794, \*13 (Barker, J., specially concurring) (writing that he would have rejected the parents’ stipulation that the non-biological mother stood *in loco parentis* to the child); *Riepe*, 208 Ariz. at 96, 91 P.3d at 318 (Barker, J., dissenting) (“The majority misconstrues the in loco parentis statute . . . by utilizing an alternative definition of ‘parent’ that judicially unhinges the ties of number and gender that pertain to that term.”); *Higgins v. Higgins*, 194 Ariz. 266, 273, 981 P.2d 134, 141 (Ct. App. 1999) (Thomas, J., dissenting) (excoriating the majority opinion as “espous[ing] a hedonistic ethic that is at odds with the declared law of this state” when it

concluded that mother was not seriously harming her children as a result of her adulterous cohabitation). This Court should clarify for the lower courts that these dissenting and concurring opinions are incorrect and that the statute allows non-biological parents to stand *in loco parentis*.

Section 25-415 was amended in 1997 because the previous “statute’s premising of the word ‘parent’ almost exclusively on biology . . . prevented [courts] from applying the traditional ‘best interest’ test in cases where a child is essentially raised by a non-biological parent.”<sup>18</sup> The statute, therefore, was intended to provide Arizona courts with sufficient flexibility to address the changing face of Arizona’s families, and given that this Court has yet to consider a case analyzing A.R.S. § 25-415 as it was amended in 1997, *Amici* respectfully request that this Court provide the lower courts with guidance to ensure that the statute is properly applied.

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<sup>18</sup> Fact Sheet for H.B. 2470 (March 27, 1997) available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1r/summary/s.2470r.fs.htm> (last viewed July 1, 2009); see also Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights—and Shifting the Balance Back Again*, 47 Ariz. L. Rev. 719, 771 (Fall 2005) (noting that A.R.S. § 25-415 “allows courts greater flexibility in protecting the children’s interest in retaining meaningful and sustained adult relationship through nonparent custody”).

**II. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' FAILURE TO RECOGNIZE THE SEVERE AND ENDURING HARM CHILDREN ARE EXPOSED TO WHEN AN ESTABLISHED PARENT-CHILD BOND IS DISRUPTED.**

**A. Social Science Research Shows It Is in the Child's Best Interest to Maintain Established Attachment Relationships.**

Research supports the conventional wisdom that children benefit when they are able to maintain the relationships they establish with both of their parents, and conversely, children of divorced parents are psychologically harmed when they are separated from a parent with whom they have developed an attachment relationship.<sup>19</sup> Children assume that their relationships with their parents will remain constant, and thus disturbing the parent-child bond can be "a particularly devastating experience."<sup>20</sup>

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<sup>19</sup> See, e.g., Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangement Improve Parent-Child Relationship?*, 54 J. Marriage and the Family 837, 838 (1992) (noting that "one of the most important predictors of child adjustment following divorce appears to be the amount of contact the child has with the out-of-home parents"); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1989) (concluding that children must maintain contact with the out-of-home parent to avoid a continuing sense of loss and sadness); JUDITH WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 307 (1980) (stressing that the mental health of children of divorce is "firmly tied to their relationship with both parents").

<sup>20</sup> WILLIAM HODGES, *INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY* 8-9 (2d. ed. 1991).

This is true when the parents are not both biological parents, such as foster parents<sup>21</sup> or same-sex couples.<sup>22</sup> Indeed, the American Academy of Pediatrics recognizes that children of same-sex parents need and deserve the same permanence and security in their families as children of heterosexual parents.<sup>23</sup> Significant research supports the Academy's position; regardless of the biological connection, or lack thereof, children experience "extreme distress" upon termination of an attachment figure's regular and customary role as a parent.<sup>24</sup>

**B. Other Courts Have Recognized the Devastating Effects of Disrupting These Bonds and Have Therefore Considered the Best Interest of the Child in Setting Visitation.**

In *Rideout v. Riendeau*, Maine's Supreme Court considered the case of a grandmother who had acted as the minor's parent for extended periods of time.

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<sup>21</sup> Am. Academy of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 (Nov. 2000) ("The emotional consequences of multiple placements or disruptions are likely to be harmful at any age . . . .") available at <http://pediatrics.aappublications.org/cgi/content/abstract/106/5/1145> (follow "Full Text (PDF)" hyperlink) (last viewed July 1, 2009).

<sup>22</sup> Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025, 1037 (1992).

<sup>23</sup> Am. Acad. of Pediatrics, *Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339 (Feb. 2002) available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339> (follow "Full Text (PDF)" hyperlink) (last viewed July 1, 2009).

<sup>24</sup> FIONA TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY: EFFECTS ON FAMILY DEVELOPMENT 12 (1997); see also Yvon Gauthier, et al., *Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care*, 25 Infant Mental Health J. 379, 394 (2004) (explaining that children suffer greatly when separated from non-biological parent figures).

761 A.2d 291 (Me. 2000). The court first explained that “the State has a broad[] *parens patriae* interest in the well-being of children” and then noted that

The cessation of contact with a grandparent whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child’s well-being. The State, therefore, has an urgent, or compelling, interest in providing a forum for those grandparents having such a “sufficient existing relationship” with their grandchildren.

*Id.* at 300-01 (citation omitted); *see also Davis v. Anderson*, 953 A.2d 1166, 1172 (Me. 2008). Similarly, the New Jersey Supreme Court found that expert testimony, which corroborated the harm suffered by children when a long-standing relationship with their grandparents was disrupted, was sufficient to allow the court to use the best interest of the child analysis in establishing visitation. *Moriarty v. Bradt*, 827 A.2d 203, 222 (N.J. 2003). As a final example, the Supreme Judicial Court of Massachusetts upheld a lower court finding that it was in the best interest of a girl to grant visitation to her aunt “[i]n light of the role of caregiver and guardian that [the aunt] has played in the first eleven years” of the girl’s life. *Youmans v. Ramos*, 711 N.E.2d 165, 169 (Mass. 1998) (quoting lower court decision).

Other courts have recognized that interfering with the relationship between the non-biological parent and the child is a source of potential harm, and therefore, the harm is present even when the biological parent is a fit parent. *See, e.g., In re R.A.*, 891 A.2d 564, 580 (N.H. 2005); *In re E.L.M.C.*, 100 P.3d 546, 557 (Colo. Ct.

App. 2004) (“A number of jurisdictions considering nonparents’ assertions of parental rights, including Colorado, reject a requirement that a parent be found unfit before interfering with the parent’s parenting plan.”).

Here, the court of appeals erred in failing to recognize the devastating impact on children when an established parent-child bond is broken. The child’s harm is in no way mitigated because the child lacks a legal or biological link to the parent.

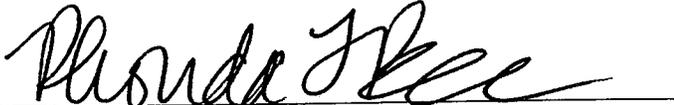
### CONCLUSION

*Amici* respectfully urge this Court to take review of this case and protect the psychological and emotional health of Arizona’s children by clearly affirming the rights of non-biological parents as provided for in A.R.S. § 25-415.

July 6, 2009

Respectfully submitted,

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### **Certificate Of Compliance**

Pursuant to Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, I certify that the body of the attached Brief appears in proportionally spaced type of 14 points, is double-spaced using a Roman font, and contains 2,839 words.

A handwritten signature in black ink, appearing to read "Rhonda Lee". The signature is written in a cursive style with a horizontal line underneath the name.

## CERTIFICATE OF SERVICE

I certify that an original and seven copies of this Brief of *Amicus Curiae* were filed on July 6, 2009 with the following:

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