No. 07-1201

In The

Supreme Court of the United States

DARYL HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition For Writ Of *Certiorari* To The Supreme Court Of The State Of Kansas

BRIEF *AMICUS CURIAE* OF KEYS FOR NETWORKING, INC. AND MILFRED DALE, PH.D. IN SUPPORT OF THE PETITIONER

WILLIAM J. MADDEN
Counsel for Amici Curiae
7501 SW 24th Terrace
Topeka, KS 66614
(785) 478-0762

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1987, Keys for Networking, Inc. (Keys) is the state-wide Kansas organization for the National Federation of Families for Children's Mental Health and serves hundreds of children and families each year. Keys' mission is to mobilize services and support for at-risk children and families through advocacy, education, systems change, and training.

Milfred Dale, Ph.D. is a licensed psychologist in Topeka, Kansas, and a law student at Washburn University School of Law in Topeka, Kansas. He has treated children and families for more than twenty years and specializes in work with children and families of divorce as well as therapy with teenage and young adult men. He was a student participant in an *Amicus Curiae* brief submitted to the Kansas Supreme Court in this case by Professor Linda Elrod and the Children and Family Law Center of Washburn University School of Law.

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[1] Counsel of record for both the Petitioner and the Respondent received notice of the *Amici's* intention to file this brief at least ten days prior to the Court's due date for the Respondent's Response (May 28, 2008). Counsel for both parties consented to this *Amicus Curiae* brief.

Neither party's counsel authored this brief in whole or in part, and neither counsel for a party, nor the parties themselves, monetarily contributed to the preparation or submission of this brief. No person other than *Amici* made any monetary contribution to the submission of this brief.

When public policy issues directly impact the quality of children's lives and place them at risk, Keys and Dale advocate that the best interests of children must be balanced and appropriately weighed in legal and legislative decision making. In seeking to promote the welfare of children and families, Keys and Dale respectfully submit this brief as *Amici Curiae*.

STATEMENT OF THE ISSUE

Whether the due process and equal protection clauses of the Fourteenth Amendment apply to protect the parent-child relationships of children born via artificial insemination and are violated when K.S.A. §38-1114(f) allows parents to bargain away the child's rights to paternity, support, and other legal benefits from their father.

SUMMARY OF ARGUMENT

K.S.A. §38-1114(f) is unconstitutional because it denies children due process and equal protection safeguards for both their parent-child relationships as well as for the support of their mother *and* father. K.M.H. and K.C.H. were born through use of artificial insemination, yet they and subsequent children born via artificial insemination are no different from children conceived naturally through heterosexual

means. All children, regardless of mode of conception or jurisdiction of birth, are entitled to due process and equal protection for their rights to paternity and the benefits thereof. Because children are not responsible for the circumstances of their births, they cannot be discriminated against on this basis. The due process and equal protection clauses of the Fourteenth Amendment preserve for children, to the maximum extent possible, the benefits of two parent-child relationships, the rights to emotional and financial support from two parents, and the benefits of two lines of heritage (e.g., family bonds, inheritance, etc.). These benefits stabilize families, serve the best interests of children, and serve the state's interests in holding those parents responsible for the birth of children accountable for these children's care.

The *Amici* assert that the two children born as a result of the parent's conduct in this case have constitutional interests in their parent-child relationships that have been ignored by the court below. In his dissent, Judge Hill agreed:

> I too agree that as applied in this case, K.S.A. 38-1114(f) is unconstitutional when applied to a known donor. . . . But I raise my hand and ask a different question. Who speaks for the children in these proceedings? As applied by the majority in this case, this generative statute of frauds slices away half of their heritage. . . . None of the elaborate and meticulous safeguards our Kansas laws afford parents *and children* in proceedings

> before our courts when confronted with questions of parentage have been extended to these children. A quick glance over our procedures dealing with the Kansas Parentage Act (K.S.A. 38-1110 *et seq*.) or our Code for Care of Children (K.S.A. 38-1501 *et seq*.) reveals the great caution we take in this state when courts must consider such relationships. While it is true that an attorney was appointed to represent the children in the original child in need of care case, the record from their point of view remains silent. *In re K.M.H.*, 169 P.3d 1025, 1051 (Kan. 2007) (Hill, J., dissent).

The purpose of this *Amicus Curiae* brief is to speak for these two children and other potential children similarly situated whose needs and rights are similarly ignored. In this case, K.M.H. and K.C.H. were denied the legal protections for their relationship with their father that are afforded to all other children. These denials constitute violations of the due process and equal protection safeguards to which children are entitled under the Fourteenth Amendment of the Constitution as established by this Court. This case presents the Court with a much-needed opportunity to require that parent participants of artificial insemination follow the Constitution so as to best provide for the children conceived in this way.

ARGUMENT AND AUTHORITIES

I. Children possess important substantive (and perhaps even fundamental) liberty interests in their parent-child relationships and these rights are deserving of the protections of the Due Process Clause of the Fourteenth Amendment.

Analysis of the children's substantive and procedural due process claims requires first a determination of the protected liberty or property interests involved (the children's substantive rights), then a second determination of the nature and the extent of the process due. The basic elements of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965). The liberty interests that K.M.H. and K.C.H. and similarly situated children have in their parentage are deserving of due process protections and cannot be terminated without notice or an opportunity to be heard.

A. Children are rights holders whose most important and fundamental substantive rights involve establishing, to the maximum extent possible, their parent-child relationships with both parents.

Children are substantive rights holders under the United States Constitution. This Court has repeatedly held that children have constitutionally protected interests and are persons within the Bill of

Rights. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972). The most important and most fundamental of children's rights are their rights to parent-child relationships with, and to support from, both parents. While this Court has characterized parents' rights to the parent-child relationship as fundamental liberty interests, children's interests in these same relationships might also be characterized as fundamental. *See Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000). For example, in *Troxel*, Justice Stevens noted the need to balance children's interests in these same intimate relationships:

> . . . it seems to me extremely likely that, to the extent that parents and families have fundamental liberty interests in preserving such intimate relationships, so too, do children have these interests, and so, too, must their interests be balanced in the equation. *Id.* at 89, at 2072, at 71.

Other federal and state courts have identified children's interests in parent-child relationships as fundamental liberty interests. For example, a federal court found that children have fundamental liberty interests in parent-child relationships in deprivation or termination of parental rights proceedings. *Kenny A. v. Perdue*, 356 F.Supp. 2d 1353 (N.D. Ga. 2005). The court noted "a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in

having a relationship with his or her biological parents." *Id.* at 1359-60.

Similarly, in a case involving inheritance rights, the Kansas Court of Appeals held:

> **It is inconceivable to us that a child would not have a due process right in the determination of his or her parentage**. . . . The rights and interests of a child in his or her parentage are due process rights which cannot be terminated or affected without notice and an opportunity to be heard. . . . the cases have been unanimous in concluding that a parent has a fundamental liberty interest in maintaining a familial relationship with a child. [citations omitted]. By the same token, **we hold that a child has that same fundamental interest in his or her parentage**. [emphasis added]. *Ferguson v. Winston*, 27 Kan. App. 2d 34, 39, 996 P.2d 841, 846 (2000).

B. Substantive rights of Kansas children born via artificial insemination are not protected when "[t]he elaborate and meticulous safeguards" of Kansas law are not extended to them so as to provide for "predictability, clarity, and enforceability" of the parental rights of mothers unwilling to file for paternity on behalf of her children and fathers who are unwilling to provide emotional and financial support for their children.

K.M.H. and K.C.H. received none of the protections of traditional paternity law in Kansas that are afforded to all other Kansas children. In Kansas, children are independent parties in paternity actions. K.S.A. §38-1115(a). Kansas children, or someone on behalf of a Kansas child, can bring an action to determine the existence of a father and a child relationship at any time until three years after reaching the age of majority. K.S.A. §38-1115(a)(1)-(2). In addition, children in Kansas have a legal right to child support and a right to paternity. *Lawrence v. Boyd*, 207 Kan. 776, 778-79, 486 P.2d 1394, 1397 (1971). As interpreted by the court below, K.S.A. §38-1114(f) extinguishes the child's right to paternity and support, and also eliminates the child's right to assert this right through the age of twenty-one. Traditionally, these are not rights that can be "bargained away or defeated by a purported settlement between the father and the mother." *Id.* at 779, 486 P.2d at 1397; *see Thompson v. Thompson*, 205 Kan. 630, 633, 470 P.2d 787, 790 (1970). In two separate cases in 1881 that

are still considered good precedent, the Kansas Supreme Court was among the first to recognize that children should not be treated as chattel or property in matters of parental care and custody.

> [A] child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligations to support it, nor be deprived of its right to custody. In this it differs from the gift or any article which is only property.

Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321 (1881); *see also In re Bort*, 25 Kan. 308, 37 Am. Rep. 255 (1881).

In addition, in the context of traditional paternity law, the rights of the minor to child support cannot be waived by inaction or passive acquiescence on the part of the mother, nor may a father deny his obligations or invoke a defense of laches as a bar to enforcement of moral and legal obligations to minor children. *Strecker v. Wilkinson*, 220 Kan. 292, 552 P.2d 979 (1976). *See also Peters v. Weber*, 175 Kan. 838, 267 P.2d 481 (1954). Traditional Kansas paternity law also supports maximizing children's opportunities to their fathers by allowing a man to notoriously or in writing acknowledge his paternity, and to require rebuttal only by either clear and convincing evidence of non-paternity or a court decree establishing paternity in another man. *In the Matter of the Parentage of Shade*, 34 Kan. App. 2d 895, 126

P.3d 445 (2006). And finally, K.S.A. §21-3605 criminalizes non-support of a child, regardless of whether the child is born to a married or unmarried woman.

The Kansas Supreme Court had also previously noted that "termination of parental rights is an extremely serious matter and may only be accomplished in a manner which assures maximum protection to all of the rights of the natural parents and of the child involved." *In the Interest of A.W.*, 241 Kan. 810, 814, 740 P.2d 82, 86 (1987). The Kansas Supreme Court had also previously held that it is correct to construe the Kansas Parentage Act to recognize that "every child has an interest not only in obtaining support, but also in inheritance rights, family bonds, and accurate identification in his parentage." *In re Marriage of Ross*, 245 Kan. 591, 597, 783 P.2d 331, 336 (1989).

If the decision of the court below stands, all Kansas children, except those like K.M.H. and K.C.H. born via artificial insemination, will continue to enjoy these protections. What were once the problems to which paternity law applied (e.g., namely, mothers unwilling to file for paternity on behalf of her children and fathers unwilling to provide emotional and financial support for their children), are dubiously recast as important or legitimate state interests. This is inconsistent with the children's constitutional rights as well as the state's *parens patriae* obligations to protect children.

C. Children's rights must be considered separate from parental rights, particularly when the children's interests and the interests of their parents are not aligned.

Children's rights need legal protection when their interests and those of their parents are not aligned. Although this by definition calls for court assignment of a guardian ad litem (GAL), the GAL stood silent throughout this case, at least in part because, when the court denied the father standing, it appeared that this in effect denied the children an "interested party" through which to place their interests before the court.

But parents do not possess absolute and unreviewable discretion with respect to their children. *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, L.Ed. 2d 101 (1979) (holding that consideration of a child's right limits parents from exercising absolute and unreviewable discretion). The Constitution's protections for parents' fundamental liberty interests in the care, custody, and control of their children carry great weight, but the Supreme Court has never held that the parents' interests should act as a rigid constitutional shield, protecting every arbitrary parental decision from challenge. *Troxel*, 530 U.S. at 88, 120 S.Ct. at 2072.

In cases involving children, children's interests and rights must be placed before the court by an advocate on their behalf. Linda D. Elrod, *Client-Directed*

Lawyers for Children: It is the "Right" Thing to Do, 27(4) Pace Law Review 101 (2007). The guardian ad litem's task is to represent the child's interests and rights, a task that may or may not include deference to the rights of the parents. Quite simply, the Constitution does not allow a fit mother the right to deny her child access to a fit father. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972); *see also In re Hood*, 930 S.W.2d 575 (Tenn. Ct. App. 1996) (citing Supreme Court cases establishing parental rights as fundamental liberty interests in overturning a statute that prohibited the father from executing a voluntary acknowledgement of paternity without the consent of the mother); *In re Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (striking down as unconstitutional a statutory scheme that allowed a mother to preclude a father from achieving a status necessary for him to gain custody of his child); *In the Matter of Raquel Marie X.*, 559 N.E.2d 418 (1990) (holding a father's rights cannot be conditioned upon a statutory requirement that he live with the child's mother continuously for six months). The *Amici* view this brief and its outline of the rights of children as particularly important given the absence of the children's perspective in the record of this case.

D. Children's procedural due process rights to paternity are violated when a state action allows parents to barter away many of the children's substantive rights before the child is born, in effect providing children absolutely no opportunity to establish their paternity.

Children's due process guarantees are violated by K.S.A. §38-1114(f) in this case when the statute allows parents to contract away the children's rights to support. The children's constitutional interests in parent-child relationships and support from both parents must be afforded adequate procedural due process. Justice Rehnquist succinctly articulated what is proposed as the children's due process argument for the Court in *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982) (deciding on equal protection grounds that illegitimate children and legitimate children must have the same opportunities to obtain parental support and not reaching the due process issue, but using procedural due process language):

> A state that grants opportunity for legitimate children to obtain parental support must also grant that opportunity to illegitimate children, and this opportunity must be more than illusory. *Id.* at 91, at 1550.

Children born via artificial insemination to unmarried parents are in a precarious position. Their interests may not be congruent with those of either parent. When a mother is unwilling to file a paternity

action on behalf of her child to exercise the child's rights to his or her second parent, the mother's and the child's interests are no longer congruent. *Id.* Similarly, this Court has also held that a putative father "has no legitimate [protectable] right and certainly no liberty interest in avoiding financial obligations to his natural child that are imposed by state law." *Rivera v. Minnich*, 483 U.S. 574, 107 S.Ct. 3001, 97 L.Ed. 2d 473 (1987). Whereas the father in the present case wishes to establish paternity and to meet his parental duties and obligations to the children, the rights of future children born via artificial insemination will be ignored if the decision of the court below is affirmed.

II. The Equal Protection Clause of the Fourteenth Amendment applies to children born to unmarried parents via artificial insemination, who are no different from all other children and must be afforded the benefits to paternity enjoyed by all other children.

A. By preventing K.M.H. and K.C.H. from enjoying the benefits of paternity that are afforded to all other children, including children of artificial insemination born to married parents, the court below violated the children's rights to Equal Protection.

In 1973, this Court established children's rights to support from their fathers in addition to that received from their mothers, ending once and for all the legal distinctions between the rights of legitimate

and illegitimate children. *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed. 2d 56 (1973). The *Gomez* Court established that there was "no constitutionally sufficient justification" for denying illegitimate children support from their fathers when the state assured legitimate children this support. *Id.* at 538, at 875, at 56. The Court found that children's equal protection rights under the Fourteenth Amendment were violated by such "illogical" and "unjust" distinctions. *Id.* Since the *Gomez* holding protects children whose parents have never married, it should also protect children of artificial insemination whose parents have never married.

Similarly, this Court has also found that, because children were not responsible for the circumstances of their births, discrimination because of the circumstances of their births violated the Equal Protection Clause of the Fourteenth Amendment. *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1972). Children are children. Children born via artificial insemination to unmarried parents are no different from children born via artificial insemination to married parents or to children conceived naturally by heterosexual means. Denying K.M.H. and K.C.H. their rights to support from their father violates the children's equal protection rights as established in *Gomez* and *Weber*.

In addition, in two unanimous decisions, this Court extended the above equal protection rights to paternity cases and established that the child is an independent party in paternity proceedings whose rights to determine the existence of a father-child

relationship cannot be unreasonably limited by state action. *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988); *Pickett v. Brown*, 461 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983). In *Clark*, Justice O'Connor wrote for the Court that, while legitimate children may seek support from their parents at any time until the age of majority, a six-year statute of limitations imposed by the state (Pennsylvania) on illegitimate children:

> . . . violates the Equal Protection Clause [of the Fourteenth Amendment]. Under the heightened scrutiny analysis used in evaluating equal protection challenges to statutes of limitations that apply to illegitimate children's paternity suits, the period for obtaining support must be sufficiently long to present a reasonable opportunity for those with an interest in illegitimate children to assert claims on their behalf, and any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. *Clark*, at 456-7.

While the *Clark* Court found the state statute to be unconstitutional on equal protection grounds and did not reach the due process issues, the implications for children's due process rights were clearly stated, "any time limitation on that opportunity must be substantially related to the State's interest in avoiding litigation of stale or fraudulent claims." *Id.*

The harm from failure to establish paternity is not inconsequential. Once paternity is established, children of unmarried parents can obtain numerous benefits through their father: wrongful death benefits upon the death of a parent, *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed. 2d 436 (1968); social security benefits upon the death or disability of a parent, *Griffin v. Richardson*, 409 U.S. 1069, 92 S.Ct. 689, 34 L.Ed. 2d 660 (1972); and, inheriting by intestate succession from both their mothers and fathers, *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977). By denying the children the opportunity to establish paternity, the decision below unconstitutionally denies K.M.H. and K.C.H. as well as future children born via artificial insemination to unmarried parents these important benefits.

B. State courts have begun to extend equal protection under the Fourteenth Amendment to children of artificial insemination (and other assisted reproductive technologies).

State courts have utilized equal protection principles to establish the paternity of children born via artificial means to unmarried parents. For example, the Washington Supreme Court assigned legal parentage to the biological father of two children born using in vitro fertilization after he claimed his consent to the inseminations should be invalid because they were not written down as required by statute. *In the Matter of the Parentage of J.M.K. and D.R.K.*, 119

P.3d 840 (Wash. 2005) (citing *Gomez* and *Weber* as equal protection precedents). The Washington court noted that the purpose of the Washington Parentage Act was "to encourage parental responsibility for married and unmarried parents" and that the "Act's purpose is to give full equality to all children by recognizing their right to parental support and their legal relationship with both parents." *Id.* at 848. The Kansas Parentage Act is no different in its intent.

In addition, the Illinois Supreme Court has also established paternity in a father sperm donor based upon the state's "strong interest in protecting and promoting the welfare of its children" and the court's "duty to ensure that the rights of children are adequately protected." *In the Parentage of M.J.*, 787 N.E.2d 144, 151 (Ill. 2003). The court noted:

> . . . if an unmarried man who biologically causes conception through sexual relations without premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law. Regardless of the method of conception, a child is born in need of support . . . [T]o hold otherwise would deprive children of financial support. *Id.* at 152.

III. Failing to support to the maximum extent possible children's interests and rights to their fathers and the benefits of established paternity is not only unconstitutional, as a matter of public policy, it is not "wise."

Doing what is best for children in disputes regarding custody and parenting is both a moral objective and a legal task. Robert H. Mnookin, *Child-custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (1975). Consideration of the best interests of the child has traditionally been made on a case-by-case basis rather than as a class or homogeneous grouping with identical needs and situations. *See also* Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35(4) Fam. & Conciliation Cts. Rev. 377 (1997). In *Stanley* this Court established the parental rights and obligations of unwed fathers and noted that,

> [T]he Constitution recognizes higher values than speed and efficiency. [citations omitted] . . . Procedure by presumption is always cheaper and easier than individualized determinations. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 U.S. at 656-57, at 1215, at 562.

Failing to adequately protect the children's interests and rights to two parents was accurately identified as "not wise" by the majority opinion in the present case. *In re K.M.H.*, 169 P.3d at 1041 (noting that "we cannot close our discussion of the constitutionality of K.S.A. §38-1114(f) without observing that all that is constitutional is not necessarily wise. [emphasis added] We are mindful of, and moved by, the [Washburn University Children and Family Law] Center's advocacy for public policy to maximize the chance of the availability of two parents – and two parents' resources to Kansas children.").

A. Money matters – a statutory scheme that terminates the children's rights to establish paternity and to obtain financial support from their fathers places them at greater risk for numerous problems.

Money matters in the lives of children. This Court has previously held that the state shares the interest of the child and the father in an accurate and just determination of paternity for both economic reasons as well as reasons pertaining to the state's *parens patriae* responsibilities with respect to the child. *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed. 2d 627 (1981). Specifically, this Court has previously upheld requirements that mothers did not have good cause for refusing to cooperate with the state's efforts to correctly identify putative fathers under standards taking into account the best

interests of the child. *Maher v. Doe*, 432 U.S. 526, 97 S.Ct. 2474, 53 L.Ed. 2d 534 (1977); *see also Roe v. Norton*, 422 U.S. 391, 95 S.Ct. 2221, 45 L.Ed. 2d 268 (1975). This Court has also defined the state's *parens patriae* interest as in the preservation, not the severance of natural family bonds. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982).

A state's interest in holding persons economically responsible for the birth of children they conceived, whether by artificial insemination or natural means, is both constitutionally sound and makes good sense. The enormity of legislative actions, mandates, and policies enforcing the financial obligations of parents to their children defies any kind of detailed description within the space limitations of this brief. States began adopting child support guidelines through legislation, court rule, and administrative action in the 1970s. In 1984, the Child Support Enforcement Act passed by Congress required states to adopt advisory guidelines for judges concerning child support. In 1988, Congress passed the Family Support Act that, *inter alia*, required states to make child support guidelines presumptively binding on courts.

Single unmarried women seek an exception to these mechanisms and ask the state to instead transform their promise to not pursue the semen donor for child support into a form of currency to be used to bargain for semen. This is inconsistent with several legal precedents taking into account the best interests of the child. It is also "not wise" for children.

Money (e.g., child support from fathers) matters. Economic differences between one-parent and two-parent homes have also been empirically connected to differences in the adjustment and well-being of children. Up to fifty percent of the disparities researchers have found in child outcome between one-parent and two-parent families are due to income and economic resource differences. Sara S. McLanahan & Gary Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS (1994).

The *Amici* concur with the words of Judge Hill in his dissent when he quoted from the Ohio Court of Common Pleas:

> A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action. A statute which absolutely extinguishes a father's efforts to assert the rights and responsibility of being a father, in a case with such facts as those *sub judice*, runs contrary to due process safeguards. [citations omitted]. *In re K.M.H.*, at 1051.

B. The unique, varied, and valuable contributions fathers can make in the lives of their children should not be presumptively denied to children.

Volumes of social science research can be summoned to demonstrate why a statutory scheme that renders children fatherless and limits them to one legal parent is "not wise." Research on father-child

relationships has repeatedly demonstrated the unique, varied, and valuable emotional and psychological contributions fathers can make in the lives of their children.

Cultural and familial ideologies inform the roles fathers play and undoubtedly shape the absolute amounts of time fathers, particularly non-custodial fathers, spend with their children as well as the activities they share with them and the quality of the father-child relationships. Michael E. Lamb & Catherine S. Tamis-Lemonda, *The Role of the Father: An Introduction*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (Michael E. Lamb, ed., 2003). Indeed, the father-ideal has gone through different historical phases, emerging from moral teacher and disciplinarian, through breadwinner and later gender-role model and 'buddy', to the ideal of new nurturing, co-parenting father. Sarkadi et al., *Fathers' Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 Acta Paediatrica, 153 (2008). Warm, involved fathers provide their children advantages in several areas of psychological development including: academic motivation and achievement, empathy, psychological autonomy, and self-control. *See* Richard A. Warshak, THE CUSTODY REVOLUTION: THE FATHER FACTOR AND MOTHERHOOD MYSTIQUE, 1992.

Research on families also buttresses the common sense notion that parental involvement and supervision of children is more frequent and stronger when children have two parents.

> We suspect that parental involvement and supervision are weaker in one-parent families than in two-parent families. In one sense, this advantage is simply a matter of numbers: one parent has less time and authority than two parents who can share responsibility and cooperate with each other. In another sense, however, it is due to the fact that single-parent families and stepfamilies are less stable in terms of personnel (grandmothers, mothers' boyfriends, and stepfathers are more likely to move in and out), which creates uncertainty about household rules and parental responsibilities. Irwin Garfinkel & Sara S. McLanahan, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA (1986).

When there are two involved parents, there is someone to help out with child care, perhaps participate in tough decisions, and perhaps take over when one parent needs a break from the demands of child care. E. Mavis Hetheringon & John Kelly, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED, 2002.

In addition, research has clearly demonstrated that children who grow up apart from one of their parents are often disadvantaged:

> [O]n almost any measure of child well-being that you look at, these children . . . are more likely to drop out of school, they have lower grade point averages, they are more likely to become a teen mother, or to have a child outside of marriage, and, if they do marry, they

> are more likely to divorce. So almost any outcome that you look at you see this gap between the performances of children who live with both parents for eighteen years and the other children. And this occurs regardless of the social class background of the child. It occurs regardless of the race of the child. It is there regardless of the sex of the child. This differential, which is an increase in risk between two and three times greater than the risk [of negative outcomes in intact families], . . . occurs across all these outcomes. *Frontline* (Public Broadcasting System): *The Vanishing Father* (1995; documentary), DeWitt Sage, producer (Alexandria, Va.: PBS Video, 1995.

Would the father in this case be a warm, involved father? The trial court chose not to look. The GAL also did not look. In denying the father standing, first the trial court then the Kansas Supreme Court interpreted K.S.A. §38-1114(f) as presuming the father passively relinquished his parental rights when he did not know the law required him to preserve these rights in writing. *In re K.M.H.* at 1049. *Compare Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (holding that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights . . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" that must result from a free and conscious choice.). Because it was the father who attempted to assert the children's rights and because of the inaction of the GAL, the

children's rights and interests to their father-child relationship were also passively terminated.

Keys and Dale respectfully assert that, when K.S.A. §38-1114(f) results in the "elaborate and meticulous safeguards" of the law being denied to children born via artificial insemination and in significant increases in the risks these children must face in their lives, this statutory scheme is unconstitutional and "not wise."

CONCLUSION

Amici respectfully request that this Court grant Petitioner's request for a writ of certiorari.

Respectfully submitted,

WILLIAM J. MADDEN
Counsel for Amici Curiae
7501 SW 24th Terrace
Topeka, KS 66614
(785) 478-0762