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RE: S. 0789 (Sen. Lynch Prata) – R.I. PARENTAGE ACT – LETTER OF SUPPORT

Dear Senator Erin Lynch Prata, Chair; Senator Stephen R. Archambault, Vice Chair; Senator Harold M. Metts, Secretary; and Members of the Senate Committee on Judiciary:

I respectfully urge your support for S. 0789, the Rhode Island Parentage Act (Sen. Lynch Prata). I urge your support both as the Reporter for the Uniform Law on which the Rhode Island Parentage Act is based, and as a Rhode Island native with a sister who still lives in Rhode Island and whose family will be better protected if this Act is signed into law.

I am a native Rhode Islander. I spent my entire childhood living in Rhode Island, primarily in Warwick. I remained in Rhode Island for college, and I returned to the State after graduating from law school to clerk on the Rhode Island Supreme Court. As noted above, my sister is still a Rhode Island resident. Her family—a same-sex parent family with a child conceived through assisted reproduction—remains vulnerable under current Rhode Island law. If enacted, the Rhode Island Parentage Act would provide her family, and countless other Rhode Island families, with the protection and security that they need and deserve.

I have particular expertise on these matters. I am currently a law professor at UC Davis School of Law where I teach a number of courses, including Family Law and Constitutional Law. My scholarship explores issues of family recognition.[1] Much of my work focuses on the particular family status of the parent-child relationship.[2] As a result of my expertise in this area, I was chosen to and did serve as the Reporter for the Uniform Parentage Act (2017).

Background about the UPA

The Uniform Parentage Act (UPA) provides states with a legal framework for establishing parent-child relationships. The UPA was originally promulgated in 1973. UPA (1973) removed the legal status of illegitimacy and provided a series of presumptions used to determine a child's legal parentage. When the UPA was revised in 2002, it augmented and streamlined UPA (1973).

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[1] *See, e.g.*, Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA LAW REVIEW __ (forthcoming 2019); Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 BOSTON UNIVERSITY LAW REVIEW 1 (2018); Courtney G. Joslin, *Marriage Equality and its Relationship to Family Law*, 129 HARVARD LAW REVIEW FORUM 197 (2016).

[2] Courtney G. Joslin, *Preface to the UPA (2017)*, __ FAMILY LAW QUARTERLY __ (forthcoming 2019); Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE LAW JOURNAL FORUM 589 (2018); Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA LAW REVIEW 1467 (2013); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 SOUTHERN CALIFORNIA LAW REVIEW 1177 (2010).

The UPA (2017) updates and modernizes the UPA in a number of important ways. It updates the parentage rules to ensure that they apply equally to children born to same-sex couples. These changes ensure that children born to same-sex parent families have the same protections that are provided to other children. These changes are necessary to comply with the U.S. Supreme Court's decisions in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017). In *Obergefell*, the Court declared that same-sex couples must be permitted to marry and must be extended the same "constellation of benefits" that are extended to other married couples. In *Pavan*, the Court clarified that this mandate of equal treatment applies to state family-law rules related to children. The UPA (2017) also extends protections to de facto parents in appropriate cases, and it updates the surrogacy provisions to reflect developments in the practice and legal regulation of surrogacy.

The UPA is a project of the Uniform Law Commission (ULC). The ULC seeks to improve the law by providing states with nonpartisan and well-drafted legislation. The ULC drafting process is careful, deliberative, and inclusive of a variety of view-points. The ULC appointed a Drafting Committee to start working on the UPA in 2015. Each of the members of the drafting committee possessed a unique and relevant form of legal and professional expertise. There were judges, practicing family law and trust and estates attorneys, law professors, and state legislators. Drafting committees are assisted by reporters, typically law professors with knowledge in the relevant area of law. I served the committee in this capacity. The committee also had the assistance of advisors from the American Bar Association Family Law Section and Real Property Trust and Estate Law Section, as well as numerous other experts. Input from these additional groups was critical. For example, the federal Office of Child Support and Enforcement (OCSE) worked with the drafting committee to ensure that the updates in UPA (2017) complied with all federal requirements and, therefore, that the state would not be at risk of losing important federal subsidies related to child-support enforcement.

Major Components of the UPA (2017)

UPA (2017) makes a number of major changes to the UPA, including:

- UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples. In *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the United States Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional. In *Pavan v. Smith*, 137 S. Ct. 2075 (2017), the Court reaffirmed that that conclusion applies to rules regarding children born to same-sex spouses. After these decisions, parentage laws that treat same-sex couples differently than different-sex couples are likely unconstitutional. *See, e.g.*, *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492 (Ariz. 2017) (holding unconstitutional Arizona's gendered marital presumption), *cert. denied sub. nom. McLaughlin v. McLaughlin*, 138 S. Ct. 1165 (2018).

  UPA (2017) updates the Act to address this constitutional infirmity by amending provisions so that they address and apply equally to same-sex couples. These amendments include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral. In addition to helping states comply with the Constitution, these updates provide clarity to these families and avoid unnecessary litigation.

- UPA (2017) includes a provision for the establishment of a de facto parent as a legal parent of a child. Most states recognize and extend at least some parental rights and obligations to people who have functioned as parents to children but who not considered legal parents. The UPA provides a statutory process for the recognition of such individuals *as parents*.

- UPA (2017) updates the surrogacy provisions to reflect developments in that area, making them more consistent with current surrogacy practice and recently adopted statutes in several states. These provisions provide clarity to courts and to parties utilizing the process of surrogacy and establish important safeguards for all of the parties involved in the arrangement.

Why Rhode Island should enact the UPA (2017)

Rhode Island's current parentage laws are based on the Uniform Law on Paternity. The Uniform Law on Paternity, which is also a product of the ULC, was promulgated in 1960. In the almost 60 years since then, it was enacted by only five states—Kentucky, Maine, Mississippi, New Hampshire, and Rhode Island.[3] Maine[4] and New Hampshire[5] have since updated their parentage statutes. Maine's current parentage scheme is very similar to the UPA (2017). In 1973, the ULC replaced the Uniform Law on Paternity with the original version of the Uniform Parentage Act.

The Rhode Island statutes and the Uniform Law on Paternity on which they are based are seriously out-of-date in a number of critical respects.

First, the provisions presume that all couples, including all married couples, consist of one man and one woman. This is evidenced by the name of the scheme itself—Uniform Law on Paternity. Paternity is a term that typically refers to the parental status of a father. In addition, the individual provisions speak only of men's parentage and refer only to different-sex couples. For example, the "presumption of paternity"—provides that "(a) A man is presumed to be the natural father of a child if: (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court." 15 R.I. GEN. LAWS ANN. § 15-8-3.

As a matter of statutory[6] and constitutional law,[7] these provisions must be applied equally to same-sex couples. Nonetheless, the gendered language of the existing Rhode Island parentage statutes leaves same-sex parent families vulnerable. At best, they may be required to litigate on a case-by-case basis whether particular provisions apply equally to their family. Requiring same-sex parent families to endure this uncertainty and to require them to litigate their family status when other families are not required to do so, raises serious constitutional questions.[8]

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[3] *See, e.g.*, Refs. & Annos., Unif. Act on Paternity (noting the following enactment years: Kentucky (1964); Maine (1967); Mississippi (1962); New Hampshire (1971); and Rhode Island (1979)).

[4] *See, e.g.*, ME. REV. STAT. tit. 19A, §§ 1831 *et seq.* (effective July 1, 2016).

[5] *See, e.g.*, N.H. REV. STAT. ANN. §§ 168-B:2 *et seq.* (effective 2014).

[6] *See, e.g.*, 15 R.I. GEN. LAWS ANN. § 15-8-26 (West) ("Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. The provisions of this chapter applicable to the father and child relationship shall apply as far as practicable.").

[7] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2071 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017).

[8] I also urge your support for S. 0497/H. 5706—An Act Related to Domestic Relations—Adoption of Children.

The enactment of the Rhode Island Parentage Act will extend critically needed equal recognition and protection to these families while they remain within the state's borders. Until all states enact similar legislation, however, couples will still be encouraged to obtain adoptions or other judgments of parentage to ensure that their parental status will be recognized and respected when they cross the state's border. Having to take these steps is a burden that many other similarly situated families do not need to undertake. S. 0497/H. 5706 will

In addition, the law has failed to keep pace with changes in family formation. Although increasing numbers of families are created through the use of assisted reproductive technology (ART), there are no Rhode Island statutes governing the parentage of children conceived through these means. This puts Rhode Island out-of-step with almost all other states. The vast majority of states have statutes addressing at least some forms of assisted reproductive technologies.[9] By contrast, Rhode Island lacks even statutes governing the most common types of assisted reproductive technology – nonsurrogacy forms of ART. The absence of express statutory provisions leaves children conceived through these means and their families vulnerable. It also leaves courts without clear guidance when these cases come before them.

Rhode Island also has no statutes governing surrogacy. Here, too, this absence leaves the children conceived under such arrangements and their families vulnerable. The lack of express statutory provisions also means that the State lacks basic safeguards for protecting people serving as surrogates and the other parties utilizing these arrangements.

The Rhode Island Parentage Act would address all of these gaps.

What other states have done – particularly New England states

The UPA has been quite influential. Laws in roughly half of the statutes are based on one of three versions of the UPA. Nineteen states enacted the 1973 version, 11 states enacted the 2002 version, and within its first year of promulgation, three states—California, Washington, and Vermont—enacted the 2017 version. There are a cluster of states in the northeastern U.S. that either have already enacted the UPA (2017) or are working towards enactment. Vermont enacted the UPA (2017) in 2018. The current parentage scheme in Maine is already very similar to the UPA (2017) and there is a pending bill that would make it even more consistent. This year, the Act was introduced in Rhode Island, Massachusetts, Connecticut, and Pennsylvania. A number of other states have plans to follow suit in 2020 and will be looking to states like Rhode Island for leadership.

For all these reasons, I urge your support for S. 0789 (Sen. Lynch Prata). Please do not hesitate to contact me if you have any questions.

Sincerely,

Courtney G. Joslin
Professor of Law and Martin Luther King Jr. Research Scholar
UC Davis School of Law

simplify this onerous and expensive process for same-sex parent couples. For these reasons, again, I also urge your support for S. 0497/H. 5706.

[9] *See, e.g.*, Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1184-85 (2010).