INTEREST OF AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights and relationships of lesbians, gay men and their families. Lambda Legal has hundreds of Indiana members whose interests are represented by its Midwest Regional Office in Chicago. Lambda Legal works to ensure that children raised by lesbian and gay adults benefit from the same respect and protection for their primary relationships as do other children.

This case raises questions about the level of legal protections afforded to an Indiana child whose biological parent wants to end the child's fully-developed second parent-child relationship. In Indiana, as in many other states, the courts have protected children in like situations by applying equitable doctrines. Proposed *amicus* has participated in numerous Indiana custody and adoption cases, has worked throughout the country on similar cases to ensure the rights of lesbian and gay parents and their children, and believes its familiarity with the relevant legal issues will assist the Court.

SUMMARY OF ARGUMENT

The Court of Appeals held that Dawn King, who parented the minor child A.B. from birth, has stated a claim for relief against her former partner and A.B.'s biological mother, Stephanie Benham, who has attempted unilaterally to end A.B.'s lifelong relationship with Dawn. Stephanie now petitions for transfer to this Court. Her effort is supported by a brief *amicus curiae* filed by the State of Indiana.

Amicus Lambda Legal urges the Court to deny the petition for transfer as the case is not at a stage that warrants further appellate review. In overturning the dismissal order below, the Court of Appeals merely held that the well-pleaded facts establish Dawn's

right to go forward with her complaint, which states five claims for relief. There has been no answer from Stephanie, no evidentiary hearing, no trial court order resolving factual disputes and no ruling applying the law to factual findings. Because the law in this area is fact-dependent it behooves the Court to deny transfer at this stage.

Further, contrary to the protests of Stephanie and the State, the ruling below is not extraordinary. It does involve a lesbian family, but only provides the child of that family common law protections previously afforded other children by allowing her second parent's claim to go forward. Stephanie is one of many parents who determined to relinquish some or all of their otherwise exclusory parental rights in order to bring a second parental figure into her biological child's life. Her decision to do so, ratified by years of actions in keeping with that intent, caused a uniquely important relationship to form between A.B. and Dawn. It is well-settled under Indiana law that the courts may act to guard A.B. against an arbitrary ending of that relationship.

The State raises constitutional parental autonomy arguments in support of transfer that do not stand up to scrutiny and have been dismissed by many courts. These arguments, if they ever merit consideration, are particularly suited to evaluation after the facts have been finally decided and the law applied to them. The State also raises concerns about the selling of parental rights and group parenting that are not logical outgrowths of the decision below and do not merit transfer. Finally, the Court should reject the State's invitation to consider the unrelated subject of adoption or to use this case to reconsider past cases involving different parties and claims.

ARGUMENT

I. TRANSFER IS NOT APPROPRIATE AT THIS EARLY STAGE AS THE RELEVANT LEGAL PRINCIPLES ARE FACT-BOUND AND THERE HAS BEEN NO ANSWER, HEARING, FACTUAL FINDINGS OR APPLICATION OF LAW TO THOSE FACTS.

Stephanie asks this Court to grant transfer to review the Court of Appeals' reversal of the circuit court's dismissal of Dawn's verified complaint to establish her legal responsibility as A.B.'s parent, rights of custody and other claims under Indiana law. Petition to Transfer ("S.B. Br.") at 3-8. The Court of Appeals' ruling resolves one question: whether Dawn plead sufficient facts to state a legal claim for relief. *In re A.B.*, 818 N.E.2d 126, 129-30 (Ind. Ct. App. 2004). Dawn has not finally been declared A.B.'s parent, she has not been granted any rights, for example, to custody or visitation, and she has not yet been held responsible in any way for A.B.'s welfare or support. She has simply been allowed to pursue her complaint, which includes five separate claims for relief.

Indiana courts "view motions to dismiss for failure to state a claim with disfavor because such motions undermine the policy of deciding causes of action on their merits." *A.B.*, 818 N.E.2d at 129 *citing McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62 (Ind. Ct. App. 1999) *trans. denied.* A complaint is sufficient if "it states any set of allegations . . . upon which the trial court could have granted relief." *Id*. at 65. The Court of Appeals reversed because the circuit court failed to recognize that Dawn had stated a claim. *A.B.*, 818 N.E.2d at 129 (citing the trial court's dismissal order). While the Court of Appeals mostly addressed the claim that *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994) provides an avenue of relief for Dawn, other theories she asserts (e.g., claims for relief by virtue of her "custodial and parental" relationship with A.B. and by standing *in loco*

parentis to her, Complaint ¶¶ 59-68), provide additional grounds for relief under Indiana law should she be unable to prove her allegations for relief under *Levin*. *See A.B.*, 818 N.E.2d at 128 (noting alternate theories and claims for relief asserted by Dawn).

The Court of Appeals' decision to allow Dawn to proceed to the merits of her claim was unremarkable, and transfer at this stage of the proceedings would be premature as review of the proper application of relevant legal and constitutional principles is highly fact-bound. On remand, the trial court will have a chance to hear disputed evidence, determine Dawn's legal claims and Stephanie's defenses, and allocate, as appropriate, what rights and responsibilities Dawn and Stephanie will exercise vis-à-vis A.B. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 73 (2000) ("we agree with Justice KENNEDY that the construction of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are at best 'elaborated with care.'") (citation omitted).

II. THE COURT OF APPEALS APPLIED ESTABLISHED INDIANA LAW TO RECOGNIZE THAT DAWN HAS PLEAD A VALID CLAIM.

In reversing the trial court's dismissal of Dawn's petition for failure to state a claim, the Court of Appeals correctly applied Indiana law that recognizes and protects intended parent-child relationships created and maintained with the consent of a biological parent. Stephanie wrongly maintains that the Court of Appeals "acknowledged" that there was no existing legal authority for its decision, S.B. Br. at 5, but the court below did not fashion a new right or remedy out of thin air. It clearly stated it was applying this Court's ruling in *Levin*, 645 N.E.2d 601 to parallel circumstances. *A.B.*, 818 N.E.2d at 130-31. That the child in this case was raised by two women who jointly brought her into the world and parented her together does not mean A.B. should

receive less protection from the courts than other children. There is no valid reason to deny her the protections of *Levin* or recognition and protection of Dawn's parental relationship with her. This Court should deny transfer and also resist the efforts of *amicus* State of Indiana to revisit past cases and issues not raised by the case below. *See* Brief of Amicus Curiae State of Indiana in Support of the Petition to Transfer ("A.G. Br.") at 3-7.

Disputes involving minor children arise in a variety of legal and factual contexts. In each case, a court is called upon to safeguard the best interests of the particular child before it. *See, e.g., In re B.H. and S.H.*, 770 N.E.2d 283, 285-86 (Ind. 2002). "The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court confronted with the problem." *Id.* at 286. While the best interests of the minor child is the primary consideration in every case, appropriate constitutional protection also is provided to parents. *Id*; *see also* Section III, *infra*.

Indiana courts have long recognized that parents can voluntarily relinquish some or all of their parental rights, including custodial rights, to another person and that if the child then develops an unusually significant relationship with that person it must be recognized and protected:

> The principle of the welfare of the child may be applied to defeat the claims of a parent when he has voluntarily relinquished to others the custody and care of his child until the affections of the child and [another who has parented her] have become so firmly interwoven that to sunder them would seriously mar and endanger the future happiness and welfare of the child.

B.H, 770 N.E. 2d at 285 *quoting Gilmore v. Kitson*, 165 Ind. 402, 407-08, 74 N.E. 1083, 1084 (Ind. 1905).

Applying this bedrock principle to a diverse variety of families and differing legal and factual settings is the heart of the courts' work, not some novel usurpation of legislative powers as the State suggests. A.G. Br. at 3-7. Indiana courts have recognized the legal claims of persons who are not biological or adoptive parents and have no statutory claim vis-à-vis children but who have established bonded parental relationships deserving of protection. *See, e.g.*, *Collins v. Gilbreath*, 403 N.E.2d 921, 923-24 (Ind. Ct. App. 1980) (granting stepfather visitation with minor children who had lived with him despite lack of statutory claim to visitation; while Indiana's visitation statute is "silent on the existence of [visitation] rights for nonparents," equitable principles allow such claims "where the party seeking visitation has acted in a custodial and parental capacity;") *Krieg v. Glassburn*, 419 N.E.2d 1015, 1018-19 (Ind. Ct. App. 1981) (recognizing grandparents' claim for visitation prior to enactment of Indiana's Grandparent Visitation Statute); *In re G.J.*, 796 N.E.2d 756, 761 and n.6 (Ind. Ct. App. 2004) (noting that enactment of de facto custodian provisions clarifies existing rights to seek protection of established custodial relationships).[1]

The Indiana General Assembly's enactment of the de facto custodian provisions confirms that protecting a child's existing parent-like relationships is favored in Indiana law and policy. These amendments also illustrate the interplay between the judiciary and legislature in safeguarding the best interests of Indiana children. *See G.J.*, 796 N.E.2d at

[1] Stephanie's suggestion that Dawn's claim must fail because of the State's policy forbidding marriages by same-sex couples, S.B. Br. at 5, rings hollow in light of Indiana's long history of according parental and custodial rights to persons who are not married to a child's parent, according to children's best interests. Further, of course, many children have parents who have never married or have ended a prior marriage. Nothing a court does to solidify a legal relationship between a child and a person who parents her has any practical or legal effect on the relationship between the adults, and their marital status should not preempt doing what is in the child's best interests.

761, n.6 (explaining that the de facto custodian amendments codify rights that "implicitly existed before the statutes were enacted"). While the legislature may establish or clarify rights in a broad or limited range of factual settings involving minor children and their families, the courts retain their general authority at common law to protect the best interests of the specific children before them. *See, e.g., New York Life v. Bangs*, 103 U.S. 435, 438 (1880) (the general authority of the courts to exercise jurisdiction over the "estates and person" of minor children has long been established and predates and survives any statutory grant of authority by the legislature). Legislation covering some situations does not divest the courts of its common law power to act in other circumstances and as established at common law. *See, e.g., Collins, 403 N.E.2d at 923-24*; *Guardianship of L.L. and J.L.*, 745 N.E.2d 222, 229-230 (Ind. Ct. App. 2001), *trans. denied* (2001).[2]

This Court's ruling in *Levin* and the decision below fall squarely within the courts' common law authority. Faced with facts not addressed by the legislature in Indiana's family and child custody statutes, the Court in *Levin*, 645 N.E.2d at 604-05, drew upon common law equitable principles to hold a non-biological, non-adoptive father legally responsible for a minor child brought into the world through artificial insemination. In that case, as here, the parties consented to the artificial insemination and promised and expected to parent the resulting child together. The "promise to become the father of the resulting child" and subsequent conduct in "hold[ing] the child out as his

[2] Relying upon well-established rules of statutory construction, the Court of Appeals in *Guardianship of L.L. and J.L.*, 745 N.E.2d at 230, found that the de facto custodian amendments do not abrogate "long-standing feature[s] of our common law." These include the presumptive right of a biological parent, which can be rebutted by a parent's voluntary relinquishment. *See In re B.H. and S.H.*, 770 N.E.2d at 285-86.

own for fifteen years," created a legally enforceable obligation to the child. *Id*. at 604. The *Levin* ruling is consistent with Indiana law and public policy.

In this case, unlike *Levin*, the biological parent objects to court recognition of her former partner's relationship with their child. But this distinction does not make this a "case of first impression in Indiana" or warrant transfer to this Court as argued by Stephanie. Indiana has long recognized that parents can voluntarily relinquish their otherwise exclusive parental rights in favor of less exclusory rights. The facts alleged by Dawn establish that Stephanie did so here. Stephanie promised Dawn that she would be a full and equal parent to their child. As in *Levin*, this promise induced Dawn to consent to Stephanie's artificial insemination and to invest herself personally and otherwise in raising A.B. with Stephanie's encouragement. Following A.B.'s birth, Dawn acted as her parent and established a bonded relationship with A.B., who calls Dawn "Momma," all with Stephanie's knowledge and support. The Court of Appeals's application of the equitable principles enunciated in *Levin* to estop Stephanie from unilaterally severing the parent-child relationship between Dawn and A.B. is fully consistent with this Court's longstanding recognition that a biological parent's rights to paramount or exclusive control over her child may be "lost" by her voluntary relinquishment of those exclusive rights in favor of another person. *Gilmore, 74 N.E. at 1084.*

Many other states also have exercised the well-established equitable and common law powers of courts to act as *parens patriae* to children in similar cases to prevent disgruntled parents from arbitrarily ending a child's second, lifelong parental relationship merely because the parents' adult relationship has ended. For example, the Court of Appeals cites *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) in which the Pennsylvania

Supreme Court held that common law protections used by other parental figures, both relatives and non-relatives, also operate to secure the parental bonds of lesbian and gay parents who have no biological or adoptive ties to their children. In *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004), the Supreme Judicial Court of Maine applied longstanding equitable powers to hold that a lesbian de facto parent could rightfully pursue a claim for parental rights and responsibilities vis-a-vis the child she and her partner jointly raised. In *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass.1999). *cert. denied* 528 U.S. 1005 (1999), the Supreme Judicial Court of Massachusetts also extended equitable parenting rights applied to aunts and others to de facto lesbian and gay parents. In *In re H.S.H.-K.*, 533 N.W.2d 419 (Wisc.1995), *cert. denied sub nom. Knott v. Holtzman*, 516 U.S. 975 (1995), the court recognized the standing of de facto lesbian and gay parents under its longstanding equitable power to protect children whose situations are not covered by statute.[3]

III. THE COURT OF APPEALS' DECISION DOES NOT RAISE ANY CONSTITUTIONAL ISSUES MERITING TRANSFER, NOR WILL IT CAUSE THE HARMS POSITED BY THE STATE.

The State's slippery slope arguments and constitutional concerns should not give the Court pause and do not merit transfer.[4] The elevated requirements for standing here

[3] *See also Rubano v. DiCenzo*, 759 A.2d 959, 974-75 (R.I. 2000); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), *cert. denied* 531 U.S. 926 (2000); *Gestl v. Frederick*, 754 A.2d 1087 (Md. Ct. Spec. App. 2000); *Buness v. Gillen*, 781 P.2d 985 (Alaska 1989); *A.C. v. C.B.*, 829 P.2d 660 (N.M. 1992); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002).

[4] As *amicus* Indiana Civil Liberties Union points out, the Court should reject the State's attempt as *amicus curiae* to inject issues that the parties have not themselves raised, including those relating to two second-parent adoption cases and to statutory construction of the adoption laws. This is not an adoption case. The remedy invoked here stands alongside other statutory and common law remedies.

It should also be noted that, contrary to the State's characterization, A.G. Br. at 5, the Court of Appeals' use of common law in *Adoption of M.M.G.C.*, 785 N.E.2d 267, 270-71

and the traditional protections of the best interests test insulate children and legal parents against these phantoms. The State expresses concern about future cases involving a "committee of parents," AG Br. at 11, but strict standing requirements make this concern unrealistic. Further, best interests analyses – be they done in grandparent visitation cases, stepparent cases or other contexts – routinely account for the downsides of multiple demands on a child's time and affection. Nor does this case truly trigger any concern about the sale of parental rights or children, or leave the courts less equipped to respond to such acts. The Court of Appeals decision in no way facilitates or signals approval of such unscrupulous conduct. The reality is that under the decision below only a very small group of people, individuals who are critically important to particular children's welfare, will be able to establish equitable parental standing and continue on as the parents their children know them to be.

There is no abuse of Stephanie's constitutional rights in the Court of Appeals' ruling that Dawn's complaint states a legal claim. Many courts have reached similar conclusions. Dawn's standing here essentially turns on a finding that Stephanie, as A.B.'s biological parent, *voluntarily exercised her parental autonomy* to encourage a second parent-child relationship to form between A.B. and Dawn, and then fostered and deepened the importance of that relationship to A.B., because Stephanie believed it to be in A.B.'s best interests. The facts alleged, if proven, make this abundantly clear. The

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(Ind. Ct. App. 2003) was limited to confirming that there was no common law impediment to the second-parent adoption granted. The court already had determined that the petition was statutorily permissible. In *Adoption of K.S.P.*, 804 N.E.2d 1253, 1257-60 (Ind. Ct. App. 2004), the court did not enter uncharted territory "based on its own views of the purposes of the divesting statute," as the State suggests, A.G. Br. at 6, but applied well-established policy and Indiana rules of statutory construction to avoid an absurd and destructive result, as many other state courts have done. *Id.* at 1258 (citing cases).

State took no action to terminate Stephanie's rights, deny her custody or force her to create this unusually significant second parental relationship in A.B.'s life. But now that the latter exists because of Stephanie's decisions and Dawn's follow-through, it is appropriate for the court, on behalf of the child, to look behind any presumption – or claim by Stephanie – that unilaterally ending the relationship after four years is truly in A.B.'s best interests rather than merely in Stephanie's own self-interest.[5]

The Court of Appeals' standing decision is consistent with *Troxel v. Granville* for the reasons expressed by the lower court, *A.B.*, 818 N.E.2d at 132-33, and in prior Indiana cases. The opinion in *Crafton v. Gibson*, 752 N.E.2d 78, 83-88 (Ind. Ct. App. 2001) provides a thorough analysis of *Troxel*'s commands -- including that the courts give "special weight" to a fit parent's view of where a child's best interests lie, *id*. at 85 – and the limits of its holdings. *Id*. at 86-7. In the vast majority of circumstances the State will have no basis to second-guess a parent's views and the presumption that a fit parent acts in a child's best interests, *id*. at 85, will not be overcome. But a legal parent does not

[5] The State agrees that the courts' concern should be the welfare of children, but draws a faulty analogy between the circumstances here and the rule that a parent cannot contract to release another from child support obligations. A.G. Br. at 13-14. A decision by a parent that it is in a child's best interests to have a second parent in the child's daily life is different in kind from an agreement to give up the child's right to financial support. Likewise, the State relies on the inapposite case of *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004), which held that *nonparents* have no obligation of child support by statute or common law, to support its argument that only those custody and parenting issues specifically addressed by statute can be adjudicated by courts. Other cases have reached the opposite conclusion than *T.F.*. *See, e.g.*, *Parentage of M.J.*, 787 N.E.2d 144 (Ill. 2002); *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002). Moreover, of course, involves a claim of equitable *parent*hood by a person who has voluntarily paid child support. More fundamentally, the State's effort to circumscribe rights in this area reflects a misguided view that adhering to bright line rules is advisable. This would sacrifice the needs of many children that neither the legislature nor anyone else can be presumed to have intended to harm. The courts cannot abdicate their *parens patriae* responsibility to individual children merely to achieve a false sense of certainty.

have absolute authority and the presumption that she acts in her child's best interests "is rebuttable." *Id.* at 96; *Guardianship of L.L.*, 745 N.E.2d at 230. The court below was correct to hold that the facts as alleged, if proven, establish that Stephanie intended Dawn to be a parent and would rebut the presumption that Stephanie's attempted termination of Dawn's relationship with A.B. is in her best interests.

The Attorney General misreads the lower court's constitutional holding, focusing the Court only on the conclusion that Dawn should be viewed as having parental standing as if that conclusion stood alone, and ignoring the immediately following constitutional analysis relevant to *Troxel*. AG Br. at 18. Far from engaging in mere *ipse dixit* declarations, *id*. at 19, the court clearly explained that it was relying on specific factual allegations — particularly those evidencing Stephanie's consent to and fostering of Dawn's parental bond with A.B. and the parties' intentional planning of their family and joint parenting roles — to find that Dawn has stated a constitutionally permissible claim. The court's decision was not made "simply because the mother at one time consented to [Dawn's] participation." AG Br. at 3. Stephanie's actions were deliberate and reinforced over many years. The court also cited to *T.B.* and to *Parentage of L.B.*, 89 P.3d 271, 283 (Wash. App. 2004), *review granted* (2004) each of which properly held that parental standing could be established in parallel circumstances without running afoul of the Fourteenth Amendment as interpreted in *Troxel*. *See also In re E.L.M.C.*, 100 P.3d 546, 556-61 (Colo. App. 2004) (and cases cited therein); *Rubano*, 759 A.2d at 972-76.

CONCLUSION

For all the reasons stated above, *amicus curiae* Lambda Legal respectfully asks the Court to deny the petition to transfer or, if transfer is granted, to affirm the decision of the Court of Appeals.

January 12, 2005 Respectfully Submitted,