

**IN THE SUPREME COURT OF THE
STATE OF OREGON**

In the Matter of V.L.M and A.R.H., Children,
STATE ex rel. DEPARTMENT OF HUMAN SERVICES,
Respondent,

v.

A.L.M., Appellant.

**EXPEDITED TERMINATION OF PARENTAL RIGHTS
CASE UNDER ORAP 10.5**

Lane County Circuit Court
08403J, 04300J

Petition Numbers
08403J02, 05300J04

A145655

**BRIEF IN SUPPORT OF PETITION FOR REVIEW AND ON THE
MERITS OF THE CASE SUBMITTED BY
AMICUS CURIAE LEGAL VOICE**

Laura R. Salerno Owens
222 SW Columbia Street
Suite 1400
Portland, Oregon 97201-6632

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**BRIEF IN SUPPORT OF PETITION FOR REVIEW AND
ON THE MERITS OF THE CASE**

I. Introduction

This case is about a woman who lost the right to parent her two small children after the circuit court considered evidence that she discussed obtaining an abortion rather than carry a pregnancy to term, that she did terminate a later pregnancy, and that she did not want to identify the father of that terminated pregnancy. This evidence, admitted over mother's objections during the course of two different trials, had nothing to do with her parenting. To the contrary, neither considering nor obtaining an abortion makes a woman an unfit parent, and the identity of the man who fathers a terminated pregnancy is not relevant to any issue in a parental rights case.

Every woman has a constitutional right to privacy in her intimate relationships and her decisions concerning whether to terminate a pregnancy. Likewise, a mother has a constitutional right to the care and custody of her children, unless the State proves – by clear and convincing evidence – that she is unfit to parent them. Each of these rights is fundamental, and they dictate that when the State moves to terminate a mother's parental rights, evidence regarding her intimate relationships and

her abortion history has no place in that proceeding unless it is directly related to her parenting.

Amicus Curiae Legal Voice urges the Court to grant review of this case in order to clarify for the lower courts the constitutional and evidentiary limitations attendant to termination proceedings.

II. Interest and Identity of Amicus Legal Voice

Legal Voice's identity and interests are set forth in detail in the Motion for Leave to File Amici Curiae Brief, filed herewith. Legal Voice is a regional non-profit public interest organization that works to advance women's legal rights through public impact litigation, legislation and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding women's reproductive rights, and has long focused on encroachments on women's procreative and reproductive decision-making. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country to help ensure that women have the right to self-determination and bodily autonomy.

III. Statement of the Case

Legal Voice draws the Court's attention to the following record facts, which demonstrate why review of this matter is necessary and a matter of

great public importance. In December 2009, the Lane County Circuit Court held a hearing to consider whether Petitioner A.L.M.'s ("Mother's") parental rights should be terminated as to two of her children (V. and A.). The ensuing trial spanned seven days, during which evidence regarding Mother's reproductive choices was repeatedly introduced over her objections.

Evidence that Mother considered terminating her pregnancy with V. During the course of the proceedings below, over Mother's objection, the trial judge allowed the introduction of the entire transcript and all evidence introduced in a *prior* termination trial as to two of Mother's other children (B. and M.). Trial Tr., *In re V.L.M.-C.*, Nos. 08-403J, 05-300J (Dec. 9, 2009), 43:9-14, 46:12-14.¹

The evidence from the prior trial included testimony by Amanda Monet, her DHS case worker. Trial Tr., *In re M.M.M.*, Nos. 05-299J-03, 07-250J-02 (Mar. 11, 2009), 217–288. Ms. Monet testified about a conversation between herself and Mother that took place on or about February 28, 2008. *Id.* at 236:2–6. The conversation apparently began with Ms. Monet telling Mother that she needed to pull herself together and then asking Mother if she was pregnant again. *Id.* at 236:8–11. In response,

¹ For ease of reference, the trial testimony is cited in the following format: transcript date, page: line (witness).

Mother said that she had recently had an abortion. *Id.* at 236:11–12. When Mother next asked what DHS would do if she was pregnant, Ms. Monet described the considerations relevant to DHS removing a newborn from its mother. Mother then corrected her prior statement, confirming that she was pregnant but had an abortion scheduled, and Ms. Monet told her to let DHS know what she ultimately decided to do about the pregnancy. *Id.* at 236:12–16.

Two months later, Mother told Ms. Monet that she was having a girl (the child V.) and that she intended to have her tubes tied after the birth. *Id.* at 240:12–19. The Judge who presided over the prior proceeding concluded from this testimony that Mother lied to DHS about her pregnancy with the child V. and then “contended that she intended to abort the pregnancy in an effort to avoid further DHS supervision and potential intervention after the child’s birth.” Judgment, *In re M.M.M.*, Nos. 05-299J-03, 07-250J-02, at 3 (April 1, 2009).

The court below incorporated this finding from the prior proceeding in its own findings of fact without comment or analysis. Judgment, *In re V.L.M.-C.*, Nos. 08-403J, 05-300J (April 23, 2010). When Ms. Monet was called to testify in the proceeding below, the court did not allow Mother’s attorney to cross-examine her. Trial Tr., *In re V.L.M.-C.*, Nos. 08-403J, 05-

300J (Dec. 15, 2009), 30:24–31:7. Another witness, Ramos Tuercios, was allowed to testify regarding V.’s father’s alleged hearsay statements about his concern that Mother would terminate her pregnancy. Trial Tr. (Dec. 17, 2009), 146:7–22. And V.’s father testified that Ms. Monet told him that DHS would wait to get involved until after Mother gave birth to V., to avoid giving Mother an incentive to terminate the pregnancy. *Id.* at 170:11–17.

Evidence concerning Mother’s abortion in September 2009. The State introduced evidence about a pregnancy that Mother aborted in September 2009, a few months prior to the termination hearing. The subject of this abortion was first raised in response to the State’s bare allegation that Mother had fraudulently obtained state medical benefits on the basis of a nonexistent pregnancy. Specifically, the State called DHS worker Robert Watermann, who testified that Mother had received state assistance in the form of food stamps and a medical card. Trial Tr. (Dec. 10, 2009), 146:22–147:12. In response to the State’s question, “Is this because she claims to be six months pregnant?,” Mr. Watermann clarified: “Her medical started when she had a proof of pregnancy, yes.” *Id.* at 147:2–5. The State’s questioning continued: “So she would be ... at the end of her second trimester now?” *Id.* at 147:9–10.

Upon cross-examination, Mr. Watermann further explained that Mother had applied for a medical card in early September 2009 and submitted proof of pregnancy at that time. *Id.* at 148:9–14. Mr. Waterman testified that he had no evidence that Mother used the medical card to obtain any services. *Id.* at 149:19–23. Further, he explained that Mother’s subsequent termination of her pregnancy would not have made her ineligible for medical coverage. *Id.* at 150:1–151:4; *see particularly* 150:15–16 (“she still would have been eligible for services because of the pregnancy [even if she terminated the pregnancy while her paperwork was being processed]”), *and* 150:17–20 (“she may have been able to get ... more or less the same medical benefits as a single adult because at one point she was pregnant”). The State then used its redirect of Mr. Watermann to suggest that if Mother had recently had dental work, such dental work would be covered for pregnant women but not single adults under the state medical card. *Id.* at 151:24–152:13.

The State then called one of Mother’s relatives to the stand and questioned him about whether Mother mentioned being pregnant in late October and early November, a time when the witness was staying with

Mother at her home. *See* Trial Tr. (Dec. 10, 2009), 190:2–14.² It then called Mother to question her about her “contention” that she had obtained an abortion in fall 2009. Trial Tr. (Dec. 11, 2009), 12:18–20 (“do I understand it to be your contention that you got an abortion?”). In response to the State’s questions, Mother confirmed that she applied for medical benefits in September 2009 and aborted a pregnancy soon thereafter. *Id.* at 12:13–25.

The State then served Mother with a subpoena for her medical records regarding the abortion while she was on the witness stand and demanded that she immediately sign a release for other medical records confirming the pregnancy. *Id.* at 13:10–20. Mother clearly objected to this treatment, stating, “I don’t want to sign it [the release], but if [the Court] makes me, I will.” *Id.* 13:21–22.³

Mother’s counsel also objected to the invasion of Mother’s privacy:

... this is a very private matter. [How] is it relevant to this trial about the details of her abortion? We conceded that she had one. They know that. And now they’re digging into what I regard as a very private matter that ordinarily would not be shared with other people ...

² The State also asked V.’s father if Mother had discussed the abortion decision with him, and the Court overruled Mother’s objections to the line of questioning. Trial Tr. (Dec. 18, 2009), 42:20–25.

³ Mother continued to object to the scope of the release and the wholesale production of her OB/GYN medical records to the State. Trial Tr. (Dec. 11, 2009), 16:2–10. To this, the State responded, “This isn’t your call, and the court has ordered you to sign this.” *Id.* 16:11–12.

Id. at 14:2–10. The State’s attorney responded to the objections with assertions about Mother’s veracity and character:

Frankly, it’s our belief that the pregnancy and abortion never existed. We want to verify whether or not that’s true. If in fact she was pregnant, it would be relevant to find out who the supposed father of that child is. The records may contain that. Certainly reflects on her judgment getting pregnant again in the middle of a proceeding like this ... But I don’t think it ever took place, and I think that’s what we’re going to find.

Trial Tr. (Dec. 11, 2009), 14:11–21. The court overruled the objections (*id.* at 15:1–2), and ordered Mother to sign the release (*id.* at 13:23).

On the next hearing day, the State recalled Mother to the stand and demanded the production of documentation concerning “the abortion which you claimed to have had.” Trial Tr. (Dec. 15, 2009), 31:25–32:2. When confronted with the records that verified Mother’s testimony, the State again attempted to suggest that she had fraudulently obtained medical benefits based on a terminated pregnancy. *See id.* at 32:6–33:21 (conflating timing between pregnancy test, pre-abortion counseling, and application for medical benefits). Mother emphatically denied using the medical card for either the abortion or, as the State’s attorney alleged, her dental work. *See id.* at 34:24–35:7 (“I paid for the abortion myself.”) (“I paid that [the dental work] out of pocket. Yeah, for implants, [the] Oregon Health Plan doesn’t cover that.”). The State did not introduce evidence to support its repeated

accusations of fraud. Eventually, it conceded that there was no evidence that Mother engaged in any criminal misconduct. Trial Tr. (Dec. 15, 2009), 162:16–21 (argument on motion to dismiss).

The identity of the father. When the evidence failed to substantiate the State’s theory that Mother was fraudulently obtaining medical benefits on the basis of a fictional pregnancy, it turned to questioning her about the identity of the father of the terminated pregnancy. Trial Tr. (Dec. 17, 2009), 77:24–25. The court ordered Mother to answer this question over her attorney’s objection, and over Mother’s own objection. *Id.* at 78:1–2, 13–14. When Mother ultimately responded that she did not know who the father was, the circuit court made an immediate credibility finding, stating that it would take the response “as a lie.” *Id.* at 78:15–19. The State made no showing, nor did the court require one, of why this line of questioning was appropriate or relevant to Mother’s parenting.⁴

⁴ This was not the only time the State inquired about Mother’s intimate relationships during the trial. The State’s attorney repeatedly inquired about Mother’s previous sexual and romantic partners. See, e.g., Trial Tr. (Dec. 10, 2009), 192:1–2 (Wilson) (asking relative about “gentlemen friends”); Trial Tr. (Dec. 11, 2009), 66:18–21 (Lane) (discussing Jonathan Cardona’s alleged concern that Mother might be “pregnant again”); Trial Tr. (Dec. 16, 2009), 124:1-6 (Lipkin) (asking therapist about Mother’s “intimate friends”).

In closings, counsel for the children V. and A. explicitly “invite[d] the court to make a specific credibility finding” regarding Mother’s refusal to disclose the identity of the father, arguing that his identity “obviously isn’t anything to her credit.” Trial Tr. (Dec. 18, 2009), 77:2–3, 17. The circuit court did so. Judgment, *In re V.L.M.-C.*, Nos. 08-403J, 05-300J, at 7 (April 23, 2010) (finding that “Mother is not a credible witness” and providing failure to disclose identity of father as sole evidence of lack of credibility). The court then went on to conclude that because Mother was not credible, her children could not be integrated back into her home within a reasonable time. *Id.*

The circuit court terminated Mother’s parental rights as to both V. and A. in April 2010. The Court of Appeals affirmed the circuit court’s ruling without any analysis, and Mother has petitioned this Court for review.

IV. Argument

A. The State May Not Terminate a Woman’s Parental Rights Because of Her Exercise of Constitutionally Protected Choices Concerning Abortion.

Amicus Legal Voice is deeply troubled by the State’s use of evidence regarding Mother’s abortion history and the circuit court’s consideration of that evidence. The State may not predicate the termination of parental rights, even in part, on a parent’s exercise of a constitutional right unrelated

to the parent's care for the child. The constitutionally protected relationship between parent and child was one of the first liberty interests recognized by the United States Supreme Court. *Troxel v. Granville*, 530 US 57, 65, 120 S Ct 2054, 147 L Ed 2d 49 (2000). More than 75 years ago, the Court held that all parents possess the fundamental right to care and custody of their children. *Troxel*, 530 US at 65–66 (citing *Meyer v. Nebraska*, 262 US 390, 399, 401, 43 S Ct 625, 67 L Ed 1042 (1923)).

Parental rights are not absolute; under Oregon law, the State may terminate parental rights if a court finds a parent unfit by reason of statutorily prescribed conduct or conditions that are seriously detrimental to the child. ORS 419B.504; *Santosky v. Kramer*, 455 US 745, 760 n.10, 769, 102 S Ct 1388, 71 L Ed 2d 599 (1982) (recognizing the importance of a finding of parental unfitness and requiring “clear and convincing evidence” for termination of parental rights). Under the statute, the termination of parental rights may be justified by a parent's mental illness, drug use, abuse, neglect, or other conduct that seriously impairs the parent's ability to adequately care for the child. ORS 419B.504.

It is constitutionally offensive for the State to use the termination process to retaliate against a woman for the exercise of other constitutional rights unrelated to her parenting. *U.S. v. Goodwin*, 457 US 368, 372, 102 S

Ct 2485, 73 L Ed 2d 74 (1982) (stating that state may not punish individual for exercising a protected constitutional right); *Bordenkircher v. Hayes*, 434 US 357, 363, 98 S Ct 663, 54 L Ed 2d 604 (1978) (recognizing the patent unconstitutionality of penalizing a person's exercise of legal rights); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 US 563, 574, 88 S Ct 1731, 20 L Ed 2d 811 (1968) (holding that state may not terminate teacher for exercise of right to speak on issues of public importance). A woman's right to choose whether to terminate a pregnancy is one such constitutional right. *Stenberg v. Carhart*, 530 US 914, 921, 120 S Ct 2597, 147 L Ed 2d 743 (2000); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833, 845–46, 112 S Ct 2791, 120 L Ed 2d 674 (1992); *Roe v. Wade*, 410 US 113, 93 S Ct 705, 35 L Ed 2d 147 (1973).

A woman's decision to end a pregnancy does not render her an unfit parent. *Frieman v. Ashcroft*, 440 F Supp 1193, 1195 (ED Mo 1977) (Webster, J., concurring) (statute that presumes mother unfit if attempted abortion results in live birth is "patently unconstitutional"); *Charles v. Carey*, 627 F2d 772, 791 n.35 (7th Cir 1980) (quoting the *Frieman* concurrence with approval); *Jones v. Smith*, 278 So 2d 339, 343 (Fla Dist Ct App 1973) (rejecting the suggestion that a woman's desire to terminate a pregnancy reflects on her fitness as a parent). Similarly, courts have held

that the Pregnancy Discrimination Act prohibits discrimination in employment based on a woman's choice to have an abortion. *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F3d 358, 364 (3rd Cir 2008); *Turic v. Holland Hospitality, Inc.*, 85 F3d 1211, 1214 (6th Cir 1996) (holding that an employer may not take an adverse employment action against a female employee "for merely thinking about" having an abortion). All of these cases illustrate a single guiding principle: the State may not retaliate against women for obtaining or considering an abortion.

The circuit court's ruling in the present case raises tangible concerns of impropriety because of the court's explicit consideration of the fact that Mother had one abortion and previously considered obtaining another. As evidence of Mother's unfitness to parent her children, the court pointed to Mother's statement to DHS personnel that she intended to have an abortion while she was pregnant with V. Judgment, *In re V.L.M.-C.*, Nos. 08-403J, 05-300J, at 4 (April 23, 2010). The court also observed, after noting that Mother "allowed herself to become pregnant in late June of 2009," that Mother underwent an elective abortion. *Id.*, at 5. The court's reference to these facts in the ruling terminating Mother's parental rights raises the inescapable conclusion that the court considered Mother's abortion history in determining her fitness as a parent. This is unjustifiable. To the extent

that the court predicated its termination of Mother's parental rights on her consideration of, and subsequent choice to have, an abortion, the court's judgment is unlawful.

B. A Woman's Constitutional Rights to Privacy and Intimate Association Are Violated By State Inquiries Into Her Sexual History.

At trial, the circuit court allowed the State to introduce evidence and question Mother about her sexual partners, particularly regarding the identity of the father of the terminated pregnancy. The State's questioning impermissibly intruded upon Mother's constitutional rights to association and privacy, and was wholly unrelated to Mother's ability to parent her children. These lines of questioning were improper and violated Mother's rights.

The federal Constitution prevents the State from using a woman's sexual history against her in a termination proceeding in two ways.⁵ First, the right of intimate association protects "choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the State." *IDK, Inc. v. Clark County*, 836 F2d 1185, 1191 (9th Cir 1988). The relationships protected by the right include those involving procreation,

⁵ To date this Court has not ruled on whether either of these privacy rights is independently protected under the Oregon Constitution.

raising and educating children, cohabitation, and other activities of family life. *Id.*; see also *Wilson v. Taylor*, 733 F2d 1539, 1543 & n.2 (11th Cir 1984) (holding that right of association shielded police officer's private relationships). Second, the constitutional right to privacy protects a woman's "interest in avoiding disclosure of personal matters." *Eastwood v. Dep't of Corr. Of Okla.*, 846 F2d 627, 631 (10th Cir 1988) (citing *Whalen v. Roe*, 429 US 589, 599 (1977)). This includes protection from disclosure of an individual's private, sexual activities and associations. *Id.* at 631; *Thorne v. City of El Segundo*, 726 F2d 459, 468 (9th Cir 1983). A woman does not lose the protection of these constitutional rights merely because the State alleges that she is an unfit parent and initiates proceedings to terminate her parental rights.

Indeed, the rights of privacy and intimate association are fundamental rights. *E.g.*, *Planned Parenthood of S. Penn. v. Casey*, 505 US 833, 927 (1992) (Blackmun, J., concurring). Because these rights are fundamental, the court applies strict scrutiny in its review of state conduct alleged to have infringed upon those rights. *See, e.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 US 307, 312–13, 96 S Ct 2562, 49 L Ed 2d 520 (1976); *Fields v. Palmdale Sch. Dist.*, 427 F3d 1197, 1208 (9th Cir 2005). Under the strict scrutiny test, government action must be overturned unless it is narrowly tailored to a

compelling government interest. *Mullins v. Oregon*, 57 F3d 789, 793 (9th Cir 1995); *see also Ali v. INS*, 661 F Supp 1234, 1245 (D Mass 1986) (holding that intrusion on “highly intimate matters” requires a “compelling justification”) (citing *Griswold v. Connecticut*, 381 US 479 (1965)).⁶

The State’s questioning of a woman in a termination proceeding about her sexual history and the identity of a sexual partner is unconstitutional unless it is directly tied to her ability to parent her child. Absent a direct connection to her parenting, the State has no compelling interest in a woman’s sexual history or the identity of her partners. Even assuming that the State has a compelling interest in the welfare of children—and thus in the termination of parental rights under the appropriate circumstances—the State’s questioning here was not narrowly tailored to address that interest.

A line of questioning is narrowly tailored if it “targets . . . no more than the exact source of the ‘evil’ it seeks to remedy.” *See, e.g., Frisby v.*

⁶ Even if the rights of privacy and intimate association weren’t fundamental rights, the state’s questions would still be impermissible. Where the state’s questions “directly intrude on the core of [Mother’s] constitutionally protected privacy and associational interests,” *Thorne*, 726 F2d at 470, the questions are prohibited unless they “would advance a legitimate state interest and . . . are narrowly tailored to meet the legitimate interest.” *In re Crawford*, 194 F3d 954, 959 (9th Cir 1999). Because the narrowly tailored requirement applies equally under the strict and intermediate scrutiny standards, the analysis set out above is equally applicable to an intermediate scrutiny analysis.

Schultz, 487 US 474 (1988). In a termination proceeding, the ‘evil’ sought to be remedied is conduct that renders the parent unfit and puts the child at risk. Therefore, the State is free to ask questions that go straight to the Mother’s fitness as a parent. For example, the State can question the woman regarding her emotional or mental illness, abusive conduct toward the child, substance abuse, or physical neglect of the child. ORS 419B.502, .504. Here, the State’s questions regarding Mother’s sexual history and the identity of the father of the aborted fetus went beyond those issues and were not narrowly tailored.

The Ninth Circuit addressed a similar line of questioning in *Thorne v. City of El Segundo* and held that the woman’s constitutional rights were violated. In *Thorne*, a police officer candidate was questioned during a polygraph examination about a reported miscarriage. 726 F2d at 462. The polygraph examiner asked the candidate about her alleged miscarriage and the identity of the father. *Id.* When it was revealed that the father was a police officer already on the force, the examiner went on to ask the candidate about possible relationships with other department personnel.⁷ *Id.* The Ninth Circuit held that the plaintiff’s constitutional rights were violated

⁷ The examiner also asked the candidate whether the miscarriage was actually an abortion. *Id.* at 470.

because there was no evidence that the candidate's private, off-duty sexual activities would have an impact upon her on-the-job performance. *Id.* at 471.

Just like the job candidate in *Thorne*, Mother was questioned about her sexual history, including the identity of a sexual partner. Underlying the State's theory appears to be the assumption that Mother was unfit because she was promiscuous and/or because of her judgment about men. The court explicitly relied on these perceived characteristics when it described Mother's "series of liaisons and pregnancies starting at the age of 16, with five different men who have significant criminal histories and were abusive to her" in concluding that there was no possibility of reunifying Mother with her daughters. Judgment, *In re V.L.M.-C.*, at 9. But neither the number of sexual partners a woman has nor the identity of those sexual partners, without more, has any bearing on her ability to parent her children. Moreover, to the extent that the court's decision was based on what it perceived as Mother's lack of "honesty and veracity," "[i]ndications of a [woman's alleged] promiscuity are not probative of ... credibility." *Eastwood*, 846 F2d at 631 (citing *Doe v. United States*, 666 F2d 43, 48 (4th Cir 1981)) (official violated sexual assault victim's constitutional right to privacy by questioning her about sexual history).

Similarly, the identity of a woman’s sexual partners generally has no bearing on her ability to parent her children. That general rule applies to this termination proceeding. The State’s original stated reason for questioning Mother about the pregnancy—the wholly unsupported contention that she fraudulently obtained medical benefits on the basis of a fictional pregnancy—was not relevant to the termination proceeding. Although a parent can be found unfit because he or she engaged in criminal conduct, the criminal conduct must have impaired the parent’s ability to care for the child in order to be the basis for termination. ORS 419B.504(6). Even assuming that Mother had fraudulently obtained state health benefits, doing so did not impair her ability to care for her children in any way. Accordingly, it could not have been a basis for termination.⁸

The State’s questioning of Mother about the pregnancy she terminated was invasive and unrelated to the issues properly before the circuit court. The questioning violated Mother’s rights and was improper.

⁸ In this case the alleged fraud was even further removed from the issues properly before the court, as the termination proceeding was brought under the provisions for termination for “extreme conduct”—specifically, failure to ameliorate the conditions leading to termination of parental rights as to her other children – not the general statute on unfitness.

C. Information Regarding A Woman’s Abortions and Sexual History Is Almost Always Irrelevant and Highly Prejudicial.

In addition to violating Mother’s constitutional rights, the introduction of evidence regarding Mother’s abortion and sexual history was contrary to basic evidentiary principles. The court’s admission of evidence regarding Mother’s sexual history, including her terminated pregnancy, was unfairly prejudicial and not relevant to prove any element at issue. The admission of this evidence was not harmless; to the contrary, it tainted the entire proceeding. For example, the court specifically found that Mother’s “series of liaisons” with five different men in the nine years since she turned 16 indicated her “reckless and chaotic lifestyle.” Judgment, *In re V.L.M.-C.*, at 9. The court found her untrustworthy because she would not disclose the paternity of a terminated pregnancy. *Id.* at 6. Further, the court found that she “allowed herself to become pregnant” in June 2009, a pregnancy that, according to the court’s findings, was motivated by her desire to apply for medical benefits. *Id.* at 5.⁹ The court concluded that, based on mother’s lifestyle, the best interests of the children required terminating her parental rights. *Id.* at 10.

⁹ As noted above, the court also looked unfavorably on the fact that Mother told a DHS worker that she intended to abort the pregnancy that resulted in the birth of her youngest daughter. Judgment, *In re V.L.M.-C.* at 4; *id.* at 9.

1. Evidence of a parent's sexual history and past abortions is not relevant to proving parental unfitness.

A parent's sexual history and prior abortions are not relevant to prove any necessary element in a parental rights termination case. To terminate parental rights, the State must meet the high burden of establishing that: (1) the parent has engaged in some conduct or is characterized by some condition and (2) the conduct or condition is seriously detrimental to the child. *State ex rel. State Office for Servs. to Children & Families v. Stillman*, 333 Or 135, 145–46, 36 P3d 490 (2001). Further, if the State establishes the foregoing criteria, the court must also find that “the integration of the child into the home of the parent ... is improbable within a reasonable time due to conduct or conditions not likely to change.” *Id.*

Courts in Oregon and other states routinely have rejected finding any relationship between sexual history and parenting ability. *See, e.g., State ex rel. State Office for Servs. to Children & Families v. Burke*, 164 Or App 178, 187, 990 P2d 922, 926-27 (1999). “Concern for a child’s well-being or best interests [should not] provide the court *carte blanche* to judge the rights and lifestyles of parents by nonstatutory codes of moral or social values.” *Rowe v. Franklin*, 105 Ohio App 3d 176, 179 663 NE2d 955, 956 (1995). Thus, Oregon courts have held that a parent’s sexual history is not sufficient to terminate parental rights unless it has a direct effect on the child or

children. *Burke*, 164 Or App at 187. For example, in *Burke*, the court reversed the termination of Burke's parental rights, even though Burke, a convicted sex offender, failed to get treatment and violated his parole. *Id.* at 184. The court reasoned that evidence of the parent's sexual conduct with minors did not prove propensity to abuse his children. *Id.* at 188.

Likewise, in child custody matters, Oregon courts have recognized that a parent's abortions or sexual lifestyle cannot be used against the parent, unless the behavior is directly harming the child. *See In re Marriage of Collins*, 183 Or App 354, 358, 51 P.3d 691, 693 (2002) (citing *In re Marriage of Neidert*, 28 Or App 309, 314, 559 P.2d 515 (1977) (nonexhibitionist sexual intimacy between unmarried adults does not justify change in custody)). Generally, the best interests of the child govern custody determinations. ORS 107.137, *amended by* Or. Laws ch. 438, S.B. 522 (2011). Given that the standard for termination of parental rights is much higher than that for custody, and the effects more permanent, courts should apply a similarly stringent test before admitting such evidence in cases such as the present one.

Even the State concedes that at most, the identity of the father of the terminated pregnancy was "marginally relevant." State's Ct. App. Brief, 22 (Nov. 22, 2010). Indeed, the State's characterization of the relevance of the

mother's sexual and abortion history highlights precisely why this information was not relevant: in the State's words, "the inference that mother had unprotected sexual intercourse with more than one individual and the conduct led to a pregnancy was relevant ... in the context of the allegation that mother had not ... changed her unstable lifestyle in any significant way." *Id.* at 24 n.2. Linking a mere history of sexual activity and pregnancy to an "unstable lifestyle" is simply untenable. In an analogous situation, a Texas court held in a parental rights termination case that evidence mother had an abortion could not even be used to prove she had lied under oath about having the abortion. *Piatt v. Schultz*, 1998 Tex App LEXIS 5024 at *6-7 (1998) (unpublished). As the Texas court held, evidence of a woman's abortions has minimal relevance to the issue of her child's best interests and is unfairly prejudicial. *Id.* at *7.

2. Evidence relating to sexual history and abortion history is unfairly prejudicial and inflammatory.

Where the danger of unfair prejudice or confusion of the issues outweighs the relevance of evidence, the court should exclude the evidence. ORS 40.160 (2010); *State v. Kelley*, 29 Or App 321, 325, 563 P2d 749, 752 (1977). In a termination case, any remote relevance of the mother's sexual history and abortion history is far outweighed by the danger of unfair prejudice or confusion of the issues. *Id.* Thus, even if tangentially relevant,

evidence of sexual history and abortions is too prejudicial to warrant admission in a typical termination case.

Courts have recognized that admitting evidence of a woman's prior abortions presents "the danger of provoking 'the fierce emotional reaction that is engendered in many people when the subject of abortion surfaces in any manner.'" *Nichols v. Am. Nat'l Ins. Co.*, 154 F3d 875, 885 (8th Cir. 1998) (admission of evidence of abortion in sexual harassment lawsuit was abuse of discretion) (quoting *Nickerson v. G.D. Searle & Co.*, 900 F2d 412, 418 (1st Cir. 1990)). As the court in *Nichols* noted, such evidence exposes a "very private area" of a person's life "and a type of experience which frequently involves a conflict in conscience." *Id.* The *Nichols* court's concern that the factfinder would view a woman with a history of terminating a pregnancy as "immoral and not worthy of trust," *id.*, was borne out in this case; the court explicitly found the mother not credible and described her sexual history and prior abortions in a derogatory manner.

Likewise, in *Garcia v. Providence Med. Ctr.*, 60 Wash App 635, 806 P2d 766 (1991), when plaintiff sued for medical malpractice relating to the death of her baby soon after cesarean section, the appellate court found that evidence of her prior abortions should have been excluded because the evidence was not relevant to the medical procedure, and only remotely

related to her emotional distress, and highly prejudicial. *Garcia*, 60 Wash App at 644; *see also Kirk v. Washington State Univ.*, 155 Ariz. 284, 746 P2d 28 (1987) (no abuse of discretion to exclude evidence of prior abortions in action against university for injury during practice); *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W Va 624, 499 SE2d 846 (1997) (holding new trial not warranted in medical malpractice suit; trial court properly excluded evidence of past abortion). As these cases demonstrate, the circuit courts should view with extreme caution the introduction of abortion evidence that is unrelated to the issues before the court. The danger of unfair prejudice that such evidence poses will almost always outweigh any vague probative value it may have as to veracity or character. That danger was realized in this case.

V. Conclusion

The constitutional and evidentiary problems in the record of the proceeding below raise serious questions about the circuit court's ruling in this case. Amicus Legal Voice urges the Court to grant review and to clarify for the lower courts that a woman's sexual history and decisions concerning abortion may not be used as evidence in a parental rights termination proceeding unless they are directly related to her parenting.

Respectfully submitted this 20th day of July, 2011.

K&L Gates LLP

By _____
Laura R. Salerno Owens, OSB #076230
Email: laura.salerno@klgates.com
Tel. (503) 228-3200
Attorney for Amicus Curiae Legal Voice

CERTIFICATE OF SERVICE

I certify that on July 20, 2011, I served or caused to be served two true and complete copies of the foregoing **BRIEF IN SUPPORT OF PETITION FOR REVIEW AND ON THE MERITS OF THE CASE** on the parties listed below via Overnight Delivery:

Mary H. Williams Oregon Department of Justice Appellate Division 1162 Court Street NE Salem, Oregon 97301	Margaret McWilliams Law Office of Margaret McWilliams PO Box 64 Sisters, Oregon 97759
Diane M. DePaolis DePaolis & Shepard 767 Willamette Street, Suite 302 Eugene, Oregon 97401	Michael D. Vergamini Attorney at Law 399 E. 10 th Avenue, Suite 205 Eugene, Oregon 97401

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5580 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Laura R. Salerno Owens
 Attorney for Amicus Curiae Legal Voice