IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of JAMES H. BOLDT, Respondent on Review, and LIA BOLDT, Petitioner on Review.	SC No. S054714 CA No. A126175 Agency No. 98-2318-D(3)

BRIEF ON THE MERITS OF *AMICI CURIAE* AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF RESPONDENT ON REVIEW

Review of a Court of Appeals Decision Affirming a Supplemental Judgment of the Circuit Court for Jackson County, Honorable Rebecca G. Orf, Judge

Court of Appeals Opinion filed December 27, 2006
Affirmed Without Opinion
Before: Presiding Judge Edmonds and Judges Linder and Wollheim

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INTERESTS OF AMICI CURIAE

The American Jewish Congress is an organization of American Jews founded in 1918. It is dedicated to the protection of the political, economic, religious, and civil rights of American Jews and all Americans. It believes that the well-being of American Jews and other religious minorities is dependent in large measure on the protection of religious liberty. It has filed briefs in most major freedom of religion cases filed in the federal and state courts over the last half-century.

The American Jewish Committee ("AJC"), a national organization of over 175,000 members and supporters, with 31 regional chapters, including one in Portland, Oregon, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. As such, AJC has participated as *amicus* in numerous significant religious liberty cases since filing its first *amicus* brief in 1925 supporting the right of Catholic parents to send their children to parochial school. It joins here in defense of a custodial parent's right to enable his son to undergo a ritual circumcision, a fundamental and ancient precept of Judaism. It firmly believes that any diminution of this right would be a clear violation of the Free Exercise Clause, which has always allowed parents to take into account religious interests in making decisions about what is best for their children.

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the

vigorous protection of the separation of church and state and through the right to the free exercise of religion. In support of this principle, the ADL has previously filed briefs as a friend of the court in numerous cases dealing with the religious liberty clauses of the First Amendment. The ADL is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with state and federal courts in many of the important cases which affect the Jewish community and American society at large. Regarding the cases before this court, the ritual of circumcision is a foundation of our faith. Thus, this court's consideration of the arguments submitted herein is absolutely crucial to the American Orthodox Jewish community.

It is of particular importance to *amici* that American Jews be free to practice circumcision because circumcision is and has been one of the most fundamental and sacred parts of the Jewish religion. The act of circumcision is that which permits the circumcised male to enter into the covenant between God and the Jewish People. Circumcision is among the first commandments given to Abraham in the Bible (*Genesis* 17:10-14), and is commanded a second time to all Jews (*Leviticus* 12:3). For thousands of years, all Jewish males have been circumcised. Even in the face of religious

persecution, the Jewish people have historically been steadfast in maintaining their commitment to this fundamental precept.

Pursuant to traditional Jewish law, all males must be circumcised. Boys who are born to Jewish parents must be circumcised when the child is eight days old except in cases where the child has an illness that may cause circumcision to pose a danger to his life (in which case the circumcision must occur as soon as there is clearly no danger). For a male wishing to convert to Judaism, circumcision is a required part of a conversion process that includes the study and acceptance of the obligations of the Jewish people and ritual immersion. If the convert is already circumcised, then he must undergo a ceremony of taking a drop of blood from the remnant of the foreskin in order to finalize the conversion process. Children who are circumcised must re-affirm their commitment to being a Jew upon reaching the age of 13. The importance of circumcision is recognized by the largest streams of Judaism in the United States. Orthodox, Conservative, and Reform Judaism all require circumcision for male children born as Jews. Conservative Judaism (which is the stream of Judaism at issue in this case) requires circumcision for uncircumcised male converts. Jewish law does not allow forced conversions. The person who conducts the circumcision is always a trained specialist who has studied all the relevant laws and has also completed a prolonged, intensive apprenticeship. Often, these individuals are also doctors and are licensed at hospitals.

The Jewish experience with circumcision has shown that it is a safe and simple procedure with few complications. The most common complications, such as excessive

bleeding, are generally minor and easily correctable.[1] Medical evidence also indicates numerous medical benefits to male circumcision. Studies have shown that circumcised men (a) are less likely to become infected with HIV, develop penile cancer, or develop urinary tract infections; (b) show a reduction in sexually transmitted genital ulcer diseases; and (c) are correlated with lower risk of cervical cancer for female sex partners. Studies have also shown that circumcision prevents specific disorders of the penis.[2] Within the past year, new studies have corroborated the finding that male circumcision is effective in reducing the spread of HIV.[3] As a result, the WHO and UNAIDS have recommended the procedure as a method of reducing the spread of HIV.[4]

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[1] *See, e.g.,* Circumcision – Risks, *available at* http://children.webmd.com/tc/ Circumcision-Risks; Am. Acad. of Pediatrics, *Task Force on Circumcision; Circumcision policy statement.* 103 Pediatrics at 686-693 (1999); World Health Organization ("WHO"), Information Package on Male Circumcision and HIV Prevention, Insert 3 found at http://www.who.int/hiv/mediacentre/infopack _en_3.pdf.

[2] The medical information discussed here is found and summarized in numerous sources. *See, e.g.,* WHO, Information Package on Male Circumcision and HIV Prevention, Ins. 3, *available at* http:// www.who.int/hiv/mediacentre/infopack_en_3.pdf.; WHO, New Data on Male Circumcision and HIV Prevention: Policy and Programme Implications *available at* http://data.unaids.org/ pub/Report/2007/mc_ recommendations_en.pdf.; Schoen, *Ignoring Evidence of Circumcision Benefits*, 118(1) Pediatrics at 385-387 (2006), *available at* http://pediatrics.aappublications.org/cgi/ content/full/118/1/385; H.A. Weiss, S.L.Thomas S.K. Munabi, R.J. Hayes, *Male circumcision and risk of syphilis, chancroid, and genital herpes: A systematic review and meta-analysis*, 82 Sex Transm Infect. at 101–109 (2006), *available at* http:// www.ncbi. nlm.nih.gov/sites/entrez?cmd =Retrieve&db=PubMed&list_uids=16581731&dopt=AbstractPlus.

[3] *See, e.g.,* H. Gray, G. Kigozi, D. Serwadda, et al., *Male Circumcision for HIV Prevention in Young Men in Rakai, Uganda: a Randomized Trial*, 369 Lancet at 657-66 (2007).

[4] *See* WHO, WHO and UNAIDS Announce Recommendations From Expert Consultation on Male Circumcision for HIV Protection, *available at* http://www. who.int/hiv/mediacentre/ news68/en/index.html.

STATEMENT OF THE CASE

The petitioner before this Court is Lia Boldt, who seeks either to regain custody of her child or, apparently, to have James Boldt's custody conditioned upon an order that he will not allow his son to complete his conversion to Judaism by having a circumcision as required by Jewish law.[5] She does so notwithstanding the fact that the custodial parent has affirmed and provided other affidavits affirming that the child wants to convert and be circumcised. Lia Boldt's basis for seeking this relief is her belief that circumcision – even when performed for religious reasons by a board-certified urologist who found that the procedure was "medically advisable" – is harmful to the child. In some submissions to the Court, she has also articulated a belief that the child does not really want to be circumcised. Lia Boldt appears to claim that the decision by the custodial parent to enable the circumcision of his child requires a hearing by the Court because it calls into question James Boldt's capability as a parent. Alternatively, she argues that routine circumcision has such "grave and drastic consequences" that a child has a constitutional due process right to a hearing before it may be performed, unlike all other routine medical procedures. Finally, she argues that since both federal and state law have outlawed female genital mutilation, this Court should criminalize male circumcision as well, to avoid a constitutional violation of equal protection.

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[5] Initially, Lia Boldt sought to have James Boldt's custody conditioned on only a temporary basis. Mot. for Temp. Custody Order. While these papers were never amended, later submissions seem to indicate that she believed she was seeking a permanent conditioning of James Boldt's custody as an alternative to regaining complete custody herself. *See e.g.*, L. Boldt Reply Br. in Ct. of Appeals at 78.

Lia Boldt is supported by an *amicus* brief from Doctors Opposing Circumcision ("DOC") who similarly argue that a custodial parent should not be allowed to authorize routine circumcision for his child if his motivations are religious. They argue that children possess rights to protect them from all medical intervention on the part of the parents. They argue that these rights are derived from (a) the statutes forbidding female genital mutilation, which should be extended to cover routine male circumcision so that they do not discriminate against males; (b) the International Covenant on Civil and Political Rights; (c) the guidelines of the Bioethics committee of the American Academy of Pediatrics and a Bioethics Textbook; and (d) ill-defined due process rights. They also argue that the child in this circumstance is an unreliable source for determining his own true intentions and, as a result, they request the appointment of a *guardian ad litem*.

Amici submit that the decision by a custodial parent to conduct a religiously-motivated circumcision cannot, in and of itself, be the basis for denying custody, changing a custody order, appointing a *guardian ad litem* for a child, or even holding a hearing on these issues. The record reveals that in a different proceeding not on appeal here, the Circuit Court conducted a full custody hearing where it appropriately considered the best interests of the child and determined that the father was to have sole custody. That decision was upheld on appeal. The issue of who is the more capable or fit parent, based on any consideration other than the question of the circumcision, is therefore not before this Court.[6] It is the position of *amici* that routine male circumcision is precisely

[6] To the extent the Court deems the question of who is the more appropriate parent to have custody to be at issue in this appeal, *amici* take no position on that question.

the type of religious and medical decision that is squarely within the rights of a custodial parent and that discretion to make that decision has been granted by Oregon law and by constitutional right to the custodial parent. Enabling the circumcision of a child, whether as part of a religious conversion or for medical reasons, cannot as a matter of law indicate any infirmity in a parent's ability to function as a parent. Moreover, any decision to single out circumcision as a basis for questioning the fitness of the custodial parent would violate the First Amendment's guarantee of freedom of religion. Finally, there is no analogy between male circumcision and female genital mutilation, either in terms of the type of conduct involved or the potential risks presented, to sustain an equal protection claim.

BACKGROUND

The record in this case shows that James H. Boldt and Lia Boldt were divorced in 1999. Their only son, Mikhail James Boldt, was born on March 2, 1995.[7] J. Modifying Decree 1. Following their divorce, custody of Mikhail was initially granted to Lia Boldt. Petr.'s Br. 2-3. In 2001, Mr. Boldt unsuccessfully sought to have custody transferred to him. *Id.* at 3. In 2002, Mr. Boldt was awarded "sole and legal custody" over Mikhail. J. Modifying Decree 1. The Court also required that Lia Boldt enter into and complete an evaluation and counseling program, designed so that she would "cease conveying, directly or indirectly, to [Mikhail], any belief, conclusion, or statement that [Mikhail] has

[7] Throughout the briefing in this case, the minor is referred to by different names, which include Mikhail, Misha, and Jimmy. *Amici* refer to him as Mikhail, his given name. James Boldt Aff. 2 (ER-12).

been or is being harmed by his father." *Id.* at 2.[8] Lia Boldt was also ordered to pay child support. Both the 2001 and the 2002 custody decisions were appealed and eventually affirmed. Accordingly, it is uncontested that since 2002, James Boldt has sole legal custody of Mikhail and Mikhail has lived with James Boldt. James Boldt Aff. 2

The record shows that the Boldts were formerly both members of the Russian Orthodox Christian Church. James Boldt has affirmed that he began studying about Judaism and attending synagogue in April 2002. That program of study culminated in his formal conversion in May 2004. *Id.* at 7-8. During these years, he began teaching his children, including Mikhail, about Judaism. Mikhail learned Hebrew and began attending synagogue. Eventually, he began taking classes in the Jewish School at the synagogue. *Id.* at 8-10. James Boldt affirms that Lia Boldt was aware of his conversion to Judaism; she was also aware of and did not object to the fact that Mikhail was learning about Judaism and that Mikhail intended to convert to Judaism as well. *Id.* at 11. In May 2004, James Boldt arranged for a board-certified urologist to circumcise Mikhail as the final step in his conversion to Judaism. *Id.*[9] At the time, Mikhail was nine years old.[10]

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[8] The Court specifically ordered that "[t]he counselor shall accept as a premise that [James Boldt] has not abused the child, sexually or otherwise, as the Court finds that such has not occurred." J. Modifying Decree 2.

[9] As part of his own conversion in 2004, James Boldt underwent the ritual of *hatafat dam brit,* a medical procedure of male converts who have already been circumcised, in which a drop of blood is drawn from the remnant of the foreskin. James Boldt Aff. 8. The following year, at the age of 17, Jacob Boldt, Mikhail's older half-brother, also converted and was circumcised. Mot. to Strike Amicus Curiae's Br. 4.

[10] Accordingly, the record on appeal contains only the pleadings and affidavits that reflect Mikhail's status as a nine-year-old boy.

The urologist also recommended circumcision for medical reasons because there was evidence of "glanular adhesions which should have disappeared by age three." Ellen Aff. 2.

On June 1, 2004, before the circumcision could take place, Lia Boldt moved for a temporary restraining order to prevent the procedure from being carried out. In a telephone hearing convened the same day, the Circuit Court questioned whether it had jurisdiction even to consider the application, since James Boldt and Mikhail had been living for the previous two years in Washington State. Hr'g Tr. 18, June 1, 2004. Nevertheless, the Court granted the TRO for the purpose of preserving the status quo while it considered the issue of its own authority over the matter. TRO at 2.

On June 3, 2004, the record shows that Lia Boldt filed two motions: a Motion for an Order to Show Cause re Modification of Judgment, in which she asked to have the 2002 custody judgment amended so as permanently to change custody to her; and a Motion for a Temporary Custody Order, in which she asked the court either to award her immediate temporary physical custody of Mikhail, or to condition James Boldt's custody of Mikhail on his agreement not to have Mikhail circumcised, until both motions could be heard. In support of these motions, Lia Boldt submitted only two items: her own affidavit, in which she alleged that Mikhail told her that he did not want to be circumcised, and then argued that the planned circumcision "amounts to physical and sexual abuse of my son," Lia Boldt Aff. ¶¶ 4, 8; and an article, published in Australia, likening circumcision to criminal assault. Lia Boldt did not attach an affidavit from Mikhail.

In response, James Boldt submitted eight affidavits, including statements from family members who had spoken extensively with Mikhail about his desire to convert to Judaism and from doctors who had examined Mikhail. Cheryl Boldt, the domestic partner of James Boldt, stated that "I have heard his father ask him, several times, on different days, if he wants to have this procedure done. His answer was always the same – he wants to have it done because he wants to become an 'official Jew.'" Cheryl Boldt Aff. 4. Jacob Boldt, Mikhail's half-brother, stated that Mikhail "is real interested in Judaism" and that he has "heard [Mikhail] say lots of times that he wants to get circumcised because he wants to become an official Jew." Jacob Boldt Aff. 5-6. Dr. Michael Ellen, the board-certified urologist scheduled to perform Mikhail's circumcision, stated that Mikhail "appears to understand what circumcision is and the procedure involved. . . . [He] desire[s] to follow in the footsteps of his father who recently has converted to Judaism. The patient does not appear to have been coerced in any way." Ellen Aff. 1-2. Dr. Leonard Albert attested to the centrality of circumcision as "an important tenet of Judaism" and to the "significant medical reasons favoring the operation." Albert Aff. 2-3. Drs. Albert, Ellen, and Laurence Perrin all testified that circumcision is a safe procedure, and that circumcision results in greatly reduced rates of penile cancer and infections such as balanitis. Albert Aff. 3; Ellen Aff. 2.

After the parties submitted briefs, the Court conducted two further telephone hearings, during which it took sworn testimony from both parties. The Court decided that it did have continuing jurisdiction over the case. It concluded, however, that "the decision of whether or not a child has elective surgery, which this appears to be, is a call

that should be made and is reserved to the custodial parent." Hr'g Tr. 55, June 11, 2004. The Court reasoned that "I don't see that this is grounds for an emergency change of custody. And as I said, I firmly believe that this is one of the very types of issues, because of the controversy surrounding it, the potential for disagreement, that are given to the custodial parent." *Id.* at 56. Furthermore, "the choice of circumcision alone is not a substantial change in circumstances that would justify a hearing." Hr'g Tr. 67, July 26, 2004.

On August 19, 2004, the Court issued its written decision, denying both of Lia Boldt's motions. Supp. J. 2. The Court found that the decision whether to circumcise Mikhail was a decision properly made by the custodial parent. *Id.* at 2. Having reviewed the affidavits submitted, the Court found that the intention of the custodial parent to have his minor son circumcised is "insufficient grounds" for an order to show cause for a change of custody. *Id.* at 3. Nonetheless, because the appeals of the earlier custody decisions were still pending at that time, the Court issued a stay of the circumcision procedure until all of those appeals were resolved. *Id.* at 2.[11]

On December 27, 2006, the Oregon Court of Appeals affirmed the lower court's decision without opinion. Lia Boldt petitioned the Oregon Supreme Court for Review, and, on June 19, 2007, the Oregon Supreme Court issued an Order Allowing Review.

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[11] The 2001 decision granting Lia Boldt custody and the 2002 decision transferring custody to James Boldt were both affirmed on December 28, 2005. *Boldt & Boldt*, 2003 Or App 545, 129 P3d 280 (2005). On May 5, 2006, the Circuit Court issued a Corrected Supplemental Judgment to clarify that the stay of circumcision would remain in effect until any appeals of the 2004 judgment itself were resolved as well. Corrected Supp. J. 1.

ARGUMENT

I. THE DECISION TO CIRCUMCISE A CHILD IS A RIGHT HELD BY THE CUSTODIAL PARENT.

A. Parents Have A Constitutional Right to Make Important Life Decisions For Their Minor Children Concerning Medical and Religious Issues.

The rights of parents to direct the upbringing of their minor children and to make important decisions about their care, education, and religious instruction are among the most fundamental rights recognized by our courts. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 US 205, 232 (1972). These liberties are protected by the Bill of Rights. When parents make medical and religious decisions on behalf of their children – even ones with far-reaching effects – it is presumed that they are acting in their children's best interests. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 US 584, 602 (1979); *see also Prince v. Massachusetts*, 321 US 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents.") Indeed, the Supreme Court has recently reaffirmed that, for precisely this reason, "there will normally be no reason for the State to inject itself into the private realm of the family

to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 US 57, 68-69 (2000).

Oregon Juvenile Courts are explicitly guided by the same principles.

> "It is the policy of the State of Oregon to guard the liberty interest of parents protected by the Fourteenth Amendment to the United States Constitution and to protect the rights and interests of children.... The provisions of this chapter shall be construed and applied in compliance with federal constitutional limitations on state action established by the United States Supreme Court with respect to interference with the rights of parents to direct the upbringing of their children, including, but not limited to: (a) Guide the secular and religious education of their children; (b) Make health care decisions for their children; and (c) Discipline their children."

ORS 419B.090; *see also State ex rel. Dep't of Human Servs. v. Shugars* (*In re Shugars*), 202 Or App 302, 321, 121 P3d 702, 713 (2005) ("The Supreme Court has long held that 'the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.'") (quoting *Troxel*, 530 US at 66); *Moran v. Weldon (In re Moran)*, 184 Or App 269, 272-273, 57 P3d 898, 900 (2002) (parents have a fundamental right under the Due Process Clause to "make decisions concerning the care, custody and control of their children"). Accordingly, Oregon courts do not readily involve themselves in reviewing the propriety of parental decisions about their children's medical and religious needs. Rather, "a parent is authorized to arrange for and consent to medical and surgical treatment of his minor child .... And when a parent decides to call a physician to care for his sick child or arranges to have a surgeon remove his child's tonsils, he does not, 'normally' or

otherwise, need to seek the approval of a judge." *Stump v. Sparkman,* 435 US 349, 366 (1978).

Lia Boldt acknowledges that the "Supreme Court has granted parents great authority over children to make medical decisions for them." Petr.'s Br. 1. But she argues that routine circumcision by a board-certified urologist is similar to committing a child to a mental institution, *see Parham v. J.R.,* 442 US 584 (1979), and therefore should be subject to the same procedural requirements. There is no basis for this comparison. The *Parham* Court that addressed civil commitment was clear that it was not discussing routine medical procedures. Indeed, the Court noted that "[t]he fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child." *Id.* at 604. For that reason, no court has ever extended the holding of *Parham* to other routine medical procedures like cosmetic surgery or circumcision. It was only the extreme deprivation of liberty involved in civil commitment (both in terms of freedom from bodily restraint and freedom from psychic harm) that led the Court to hold that while parents retained a substantial role in the decision to commit a child, an independent evaluation from a physician (not an evidentiary hearing) was required before the child could be committed. There is no basis for extending this holding to circumcision which involves no comparably severe deprivation of liberty.

B. As the Custodial Parent, James Boldt Has the Right to Make Important Decisions For His Son, Including Medical and Religious Decisions.

It is uncontested that only 21 months before the filing of the underlying action, James Boldt was granted "sole and legal custody" of Mikhail. J. Modifying Decree 1. A custody determination is a determination of the best interests of the child. ORS 107.137. In this case, the Circuit Court determined after a full hearing that it was in Mikhail's best interests for his father to have custody over him. At the same time, the Court granted Lia Boldt *no* rights regarding Mikhail other than supervised visitation time. These determinations have been upheld in a separate appeal and are not at issue in this case.

By statute, the only rights a non-custodial parent retains are as follows:

> (1) To inspect and receive school records and to consult with school staff concerning the child's welfare and education, to the same extent as the custodial parent may inspect and receive such records and consult with such staff;
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> (2) To inspect and receive governmental agency and law enforcement records concerning the child to the same extent as the custodial parent may inspect and receive such records;
>
> (3) To consult with any person who may provide care or treatment for the child and to inspect and receive the child's medical, dental and psychological records, to the same extent as the custodial parent may consult with such person and inspect and receive such records;
>
> (4) To authorize emergency medical, dental, psychological, psychiatric or other health care for the child *if the custodial parent is, for practical purposes, unavailable*; or
>
> (5) To apply to be the child's conservator, guardian ad litem or both.

ORS 107.154 (emphasis added). Thus, it is clear that the parent with legal custody has the sole authority to make all major decisions concerning the child, including decisions

regarding the child's education, health care, and religious training. *In re Marriage of Ortiz*, 310 Or 644, 649, 801 P2d 767, 770 (1990) (the legal custodian is granted "the *primary* rights and responsibilities to supervise, care for, and educate the child") (emphasis in original). By contrast, only an order of joint custody – which the Circuit Court did *not* impose here – would give both parents a role in these important decisions. *See* ORS 107.169 ("joint custody" means an arrangement where the parents both are responsible for major decisions including "the child's residence, education, health care and religious training"). The logic behind the division of authority in a sole custody case is evident. The parent who bears responsibility for the day-to-day upbringing of the child is naturally the parent who is in the best position to make important decisions that will affect the child's life. Furthermore, in situations where the parents are unlikely to be able to work amicably together, awarding one sole authority for these types of decisions promotes stability and avoids the necessity of litigation.

C. To Challenge Custody, One Must Show That There Has Been A "Substantial Change in Circumstances" Rendering The Custodial Parent Unfit.

A petitioner seeking a change of custody must show that circumstances relevant to the capacity of the legal custodian to properly take care of the child have significantly changed before the Court may even reach the question of the best interests of the child. *Dep't of Human Res. ex rel. Johnson v. Bail*, 325 Or 392, 396-397, 938 P2d 209, 212 (1997) (citing *Ortiz*, 310 Or at 649, 801 P2d at 770); *In re Marriage of Greisamer,* 276

Or 397, 400, 555 P2d 28, 30 (1976).[12] This is a substantial burden, not easily met. *In re Marriage of Niedert*, 28 Or App 309, 314, 559 P2d 515, 519 (1977). Examples of such a substantial change of circumstances include the custodial parent's instability or neglect of the child, such as that caused by alcoholism where the physical welfare of the child is threatened, *May & May*, 136 Or App 481, 485-486, 901 P2d 938, 940 (1995), or by a newly-developed personality disorder of the custodian, *DeWolfe v. Miller,* 208 Or App 726, 746-747, 145 P3d 338, 340 (2006). On the other hand, even occasional corporal punishment does not qualify as such a substantial change in the parent's fitness as to warrant a change in custody. *Collins & Collins,* 183 Or App 354, 358, 51 P3d 691, 693 (2002).

Without a finding of a substantial change in circumstances, "the prior adjudication is preclusive with respect to the issue of the best interests of the child under the extant facts." *Bail*, 325 Or at 398, 928 P2d at 212; *see also Henrickson v. Henrickson,* 225 Or 398, 402, 358 P2d 507, 509 (1961) ("The net effect of our earlier decisions is to render every prior custody order *res judicata* in any later modification matter."). Occasional mistakes or isolated instances of misconduct will not be considered a change in circumstances. *May,* 136 Or App at 485-86, 901 P2d at 940. Instead, such "events must be of a nature or number that reflect a course of conduct or pattern of inadequate care

[12] Lia Boldt tries to avoid this requirement by recasting the decision to be made here as an alteration to a "parenting plan." But it is clear that neither changing nor conditioning custody is a "parenting plan."

which has had or threatens to have a discernable adverse effect upon the child." *Niedert,* 28 Or App at 314, 559 P2d at 519.

The requirement to show a substantial change in circumstances prior to considering the best interests of the child serves two crucial functions. First, it "avoid[s] repeated litigation over custody." *Ortiz,* 310 Or at 649, 801 P2d at 770. If the non-custodial parent were free to revisit the custody determination any time an event of significance took place in the child's (or the custodial parent's) life or circumstances, there would be no end to litigation, with its attendant costs on the parties and the judicial system. Second, the rule serves to "provide a stable environment for children." *Id.* Requiring children to participate in repeated hearings – or merely subjecting them to prolonged uncertainty about their family arrangements – would have deleterious effects on their well-being. *See, e.g., In re Marriage of Morton*, 53 Or App 301, 307, 632 P2d 1, 4 (1981) ("The change in circumstances must be quite real if the benefits from a change are to overcome the damage done to a child who is exposed to shifting parental figures.") (quoting *Mackey v. Mackey*, 9 Or App 113 (1972)); *see also In re Marriage of Smith*, 36 Or App 461, 464, 584 P2d 780, 782 (1978) ("The law does not contemplate shifting children between parents every time the children pass through a different stage of their physical and emotional development."). Indeed, for this very reason, when a motion for modification of custody is made within a short time after the last custody decision, as here, the severity of the change of circumstances and harm to the child must meet an even higher standard. *Colson & Peil,* 183 Or App 12, 51 P3d 607 (2002).

D. A Decision by the Custodial Parent to Have A Child Circumcised By a Competent Professional for Medical and Religious Reasons Cannot Be Considered a Change of Circumstances.

After reviewing the pleadings and affidavits, and holding several telephonic hearings that included live testimony from the parents, the lower court ruled that the decision to allow the circumcision of Mikhail was one reserved to James Boldt and was not a substantial change in circumstances that would justify a hearing. Hr'g Tr. 67, July 26, 2004. Indeed, the Court concluded that "the decision of whether or not a child has elective surgery, which this appears to be, is a call that should be made and is reserved to the custodial parent." Hr'g Tr. 57, June 11, 2004. Lia Boldt here appeals that decision and claims that the mere decision to allow the circumcision of a child can create a substantial change in circumstances sufficient to warrant a hearing to determine whether there should be a change in custody.

The simple answer to this argument is that it cannot possibly constitute a "change in circumstances" for a custodial parent to exercise a right that is clearly granted to him by a custodial order, itself affirmed on appeal. As the custodial parent, James Boldt was granted the full authority to make all important decisions on behalf of Mikhail, including ones with a medical or religious component. These decisions extend from his education, language spoken in the house, and religious upbringing to the question of whether he should have braces put on or wisdom teeth removed. Many if not all of these decisions are serious and may have a significant impact on the child. The fact that a circumcision is irreversible does not distinguish it from other medical procedures that are similarly irreversible, or even basic educational and lifestyle choices whose effects are long-lasting

and profound. Nor does it matter that the medical procedure in this case is elective. Surely a parent has the same authority to have a child's vision corrected or a birthmark on his face removed even if those procedures are also elective and even if the other parent objects. All of these decisions fall within the custodial parent's right and duty to care for his child, and they are not open to challenge by the non-custodial parent.

As explained above, without the showing of a substantial change in circumstances in the capability of a parent, Oregon law does not require an evidentiary hearing to determine the best interests of the child. In any event, it is not apparent what a hearing would have accomplished in developing the record that was not apparent from the pleadings filed on both sides. Circumcision is a familiar and routine procedure that even Lia Boldt's *amicus* recognizes is performed on over half of all males born in the United States. DOC Br. 13. As described above, there are few medical complications and considerable evidence that it carries significant benefits. And, of course, circumcision is a sacred religious obligation of Jews that has been performed for thousands of years. Petitioner and her *amicus* may have different views on some of these issues, but an evidentiary hearing is unlikely to shed much new light on such an extremely common procedure.

Nor was a hearing necessary to advance Mikhail's best interests. James Boldt has been determined to possess the "maturity, experience, and [a] capacity for judgment" that his son, as a minor, lacks, and it is presumed that the "natural bonds of affection lead [him] to act in the best interests" of Mikhail. *Parham v. J.R.*, 442 US 584, 602 (1979). That is the whole premise of assigning a parent custody in the first place. Lia Boldt

herself concedes that "[t]he child is not old enough to make such a decision for himself; *that is what parents are for.*" Pet. for Rev. at 12 (emphasis added).[13] In any event, James Boldt has presented evidence in the form of numerous affidavits showing that Mikhail wanted to be circumcised; that a qualified medical professional would be performing the circumcision; and that the circumcision was medically advisable and was religiously necessary. Without a showing of some substantial change of circumstances in the ability of the custodial parent to care for the child, there was no basis for the Court to question on its own whether circumcision is in Mikhail's best interests.[14]

If the Court decides that routine circumcision requires a hearing to determine whether it is in the best interests of the child, it will open the door to endless litigation about every medical or religious decision on which the divorced parents disagree. Assigning a parent custody is intended to vest decision-making power in the person who is most responsible for the child's upbringing. To allow the non-custodial parent to question every significant decision of the custodial parent would be to undermine, not

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[13] DOC also states that the Court should give no credence to the articulated testimony of the child even were there to be an *in camera* proceeding. DOC Pet. for Review at 20.

[14] Oregon does allow minors unilaterally to consent on their own to certain medical procedures at certain ages. But there is no statute that would require the consent of a nine-year-old, twelve-year-old, or even a fourteen-year-old for routine circumcision. *See, e.g.,* ORS 109.640 (allowing minors 15 and over to consent to medial diagnosis or treatment with several narrow exceptions); ORS 109.610 (allowing minors of any age to consent to treatment for venereal disease); ORS 109.640 (allowing minors of any age to receive birth control information and services without parental consent); ORS 109.675 (allowing minors 14 or older to obtain outpatient diagnosis or treatment of mental or emotional disorders or chemical dependency without parental consent). Since this case does not deal with a fifteen-year-old, *amici* take no position on how, if at all, these statutes interact with Oregon custody law.

serve, the child's best interests, and subject all concerned to the specter of endless litigation.[15]

Here, where the non-custodial parent challenged the original custody order solely on the basis of the decision to perform a circumcision for medical reasons and as a necessary part of a conversion (to which the non-custodial parent does not otherwise object), the lower Court did not abuse its discretion or make a mistake in determining that this is a decision that should be made by the custodial parent. Hence, there was no basis to find that a substantial change had taken place in the custodial parent's ability to care for the child. Under these circumstances, conducting a hearing about the best interests of the child would be both unnecessary and improper. Further, holding such a hearing would run counter to the courts' stated goals in this area, namely, respect for finality and creating a stable environment for the child. Under Oregon law, the best interests of the

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[15] Contrary to Lia Boldt's contention, it does not follow from the Supreme Court's invalidation of blanket provisions requiring parental consent as a condition for a minor to obtain an abortion that she is entitled to an evidentiary hearing to determine whether circumcision might be harmful to Mikhail or against his best interests. Petr.'s Br. 1, 10 (citing *Bellotti v. Baird*, 443 US 622 (1979), and *Planned Parenthood v. Danforth*, 428 US 52 (1976)). The decision of whether to bear a child – or conversely, whether to terminate a pregnancy – is of an utterly different order of magnitude from the decision about whether to undergo a routine circumcision. As the Supreme Court itself has noted: "Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted." *Planned Parenthood v. Casey,* 505 US 833, 852 (1992). The parental veto invalidated by the Supreme Court had made it possible for parents to force their daughters to become parents themselves by preventing them from terminating their pregnancies. No such fundamental liberty interest is remotely at issue here.

child are determined at the custody hearing and can only be revisited with a substantial showing of changed circumstances in the ability of one or both custodial parents to care for the child. That showing was not, and could not, be made here.

II. TO SINGLE OUT CIRCUMCISION AMONG ELECTIVE SURGERY DECISIONS FOR THE IMPOSITION OF SPECIAL AND UNIQUE BURDENS WOULD VIOLATE THE FREE EXERCISE CLAUSE.

An additional and equally important reason why this decision is within the custodial parent's rights is that it is an exercise of his religious freedom. *See Zakhartchenko v. Weinberger,* 159 Misc 2d 411 (NY Sup Ct 1993) (noting that circumcision is both a religious and medical procedure). In order to complete Mikhail's conversion process to Judaism – a process to which his education has been devoted for several years – he needs to be circumcised according to Jewish tradition. Conservative Judaism, to which James Boldt and his family now belong, requires circumcision for conversions. Isaac Klein, *A Guide to Jewish Religious Practice* at 442 (1992) ("A male [convert] must be circumcised."). "The ritual of circumcision is a token of the covenant between God and Abraham. Its observance is divinely commanded in Genesis." *Kalina v. Gen. Hosp. of Syracuse,* 18 AD2d 757, 760 (4th Dep't 1962). Without the right to circumcise his child, James Boldt could not raise his son in the religion that he follows.

The record shows that Lia Boldt has not raised any objection to her son's religious conversion outside of the act of circumcision. She does, however, repeatedly claim that James Boldt's reliance on "religious reasons" to justify the circumcision, among other considerations, triggers the need for an evidentiary hearing. *See* Petr.'s Br. 1 (describing the issue presented in her appeal as whether where the "custodial parent is seeking to

have the child circumcised for religious reasons and the non-custodial parent objects . . . the court [must] grant an evidentiary hearing"); *see also id.* at 4, 5, 14.[16] Among all other forms of elective surgery that are not medically necessary, Lia Boldt would single out circumcision for special judicial oversight, and impose significant obstacles in the way of a custodial parent seeking to have it performed for his son, simply because its motivation is at least partly religious.

The United States and Oregon Constitutions do not permit conduct to be targeted and burdened simply because it is motivated by religious belief. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 US 520, 532 (1993). Indeed, the Free Exercise Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *School Dist. v. Schempp,* 374 US 203, 222-23 (1963). Accordingly, there can be no basis for requiring an evidentiary hearing for circumcision alone – but not corrective orthodontia or plastic surgery – merely because its performance rests wholly or partly on religious reasons.

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[16] In his affidavit, James Boldt explained that the *principal* reason for Mikhail's planned circumcision was religious, but he expressly stated that, in reliance on his doctors, he believed it medically advisable in any event. Lia Boldt acknowledges that James Boldt's reasons were not exclusively religious. Petr.'s Br. at 4.

III. THE EQUAL PROTECTION CHALLENGE TO STATUTES PROHIBITING FEMALE GENITAL MUTILATION IS WHOLLY MERITLESS.

Lia Boldt and her *amicus* argue that the fact that removal of a minor's foreskin is *not* a felony violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Art. 1, § 20 of the Oregon Constitution, because there are both federal and state laws outlawing female genital mutilation, which they claim is somehow analogous to male circumcision. Female genital mutilation (FGM) is the practice of excising the external female sexual organs including, in its most common form, the clitoris and the labia minora. The practice works drastic changes to the female body and reproductive system, carries a high risk of infection and death, and offers no medical benefits whatsoever. Federal and Oregon law make it a crime to perform FGM on a child. 18 USC § 116; ORS 163.207.

Their argument is, on its face, absurd. There is no analogy between male circumcision and FGM.[17] Unlike FGM, male circumcision is a familiar, relatively minor procedure that poses dramatically less risk than a tonsillectomy,[18] and there is considerable evidence that it offers substantial health benefits. In one fell swoop, Lia

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[17] Indeed, the very term "female genital mutilation" adopted by the legislatures underscores the severity of the procedure and its fundamental difference from male circumcision.

[18] The Academy of Family Physicians has noted that the death rate associated with male circumcision is about 1 in 500,000. Circumcision: Position Paper on Neonatal Circumcision, 2007, available at http://www.aafp.org/online/en/home/clinical/clinicalrecs/circumcision.html (last visited 8/19/07). By contrast, mortality rates for removal of the tonsils ranges from 1 in 16,000 to 1 in 35,000. *See* David A. Randall & Michael E. Hoffer, *Complications of Tonsillectomy and Adenoidectomy*, 118 Otolaryngology Head and Neck Surgery 61-8 (1998).

Boldt and her *amicus* would have this Court criminalize a procedure that doctors perform tens of thousands of times each year in every major hospital in Oregon; that is central to two of the world's major religions; and that neither Congress nor the Oregon legislature ever prohibited or intended to prohibit.

Doctrinally, as well, the equal protection argument is fatally flawed. The equal protection guarantees of the United States and Oregon Constitutions do not prohibit sex-based classifications that reflect real differences between the sexes, especially biological and anatomical differences. Even if there were a violation of equal protection, the remedy would not be to completely re-write these statutes against the legislative will and thereby create a new criminal prohibition. Moreover, this argument was not raised below and therefore is waived.

A. Statutes Prohibiting Female Genital Mutilation Do Not Deprive Boys of the Equal Protection of the Laws.

The Equal Protection Clause of the Fourteenth Amendment does not require that male and female persons be treated alike when they are not similarly situated with respect to the object of the classification at issue. The Supreme Court has consistently upheld statutes where "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 US 464, 469 (1981) (upholding the constitutionality of a state statutory rape law that exposed male, but not female, persons to criminal liability, on the grounds that the law was designed to prevent teenage-pregnancies, the risk of which disproportionately burdened girls) (citing *Parham v.*

Hughes, 441 US 347 (1979)). In *Tuan Anh Nguyen v. INS*, 533 US 53 (2001), for example, the Court upheld the constitutionality of a federal statute that required foreign-born children of unwed American fathers to take affirmative steps to prove the father's paternity, while not requiring foreign-born children of unwed American mothers to take any steps to prove mother's maternity. The Court observed that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. Therefore, "[t]he imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective." *Id. See also United States v. Biocic,* 928 F2d 112 (4th Cir 1991) (upholding regulation that prohibited female, but not male, exposure of the breasts at a national wildlife refuge).

Similarly, under Oregon constitutional law, a gender-based classification will be upheld if the reason for the classification "reflects specific biological differences between men and women." *Hewitt v. State Accident Ins. Fund Corp. (In re Williams)*, 294 Or 33, 653 P2d 970 (1982). Indeed, in such circumstances, the classification need only be "rationally related" to the purposes of the statute to survive an equal protection challenge. *McIntyre v. Crouch*, 98 Or App 462, 469, 780 P2d 239, 244 (1989) (upholding constitutionality of a state statute that denied parental rights to donors whose semen was used to conceive a child, on the grounds that men and women are differently situated with respect to their roles in, and contribution to, reproduction).[19]

[19] One may even argue that where the classification at issue reflects the fact that males and females are different in fundamental biological ways, the guarantee of equal

Laws prohibiting female genital mutilation easily meet this test of constitutional validity. Congress and the states that followed its lead in passing anti-FGM statutes understood that as a result of biological and anatomical differences, girls and women are uniquely at risk for suffering the kinds of severe, often life-threatening injuries caused by FGM, including greatly elevated risks of infection, childbirth complications, and even death.[20] To address this extremely important governmental objective, Congress and the

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protection is not implicated at all, because it requires only that similarly situated persons be treated alike. *See, e.g., Nordlinger v. Hahn*, 505 US 1, 10 (1992) ("[M]ost laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.") (citing *F.S. Royster Guano Co. v. Virginia*, 253 US 412, 415 (1920)). It does not require that differently-situated persons be treated alike. *See, e.g., Tigner v. Texas*, 310 US 141, 147 (1940) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.") *See also State ex rel. Upham v. Bonebrake*, 303 Or 361, 366, 736 P2d 1020, 1023 (1987) (construing Art. I, §20 of the Oregon Constitution to require equal treatment of those "similarly situated").

[20] In the case of the federal ban on FGM, the legislative history unambiguously reveals that Congress understood that girls and women were uniquely at risk of suffering various kinds of harms, and that it was imperative to prevent those harms. Thus, for example, in his discussion of the proposed bill on the Senate floor, one of the statute's sponsors, Senator Wellstone, observed:

> "[FGM] is sometimes euphemistically referred to as 'female circumcision,' a dangerously misleading label which encourages us to think of the procedure as nothing more significant than the culturally required removal of a piece of skin. A closer examination of the issue makes it clear that female genital mutilation is in fact the ritual torture of young girls. . . . Aside from the obvious emotional and physical trauma which are caused by this procedure, *it has been estimated that 15 percent of all circumcised females die as a result of the ritual.* The long term effects dealt with by American doctors who treat mutilated women and girls are listed by the New England Journal of Medicine as including chronic pelvic infections, infertility, chronic urinary tract infections, dermoid cysts (which may grow to the size of a grapefruit), and chronic anxiety or depression."

states enacted the statutes that prohibit the practice of FGM. Plainly, 18 U.S.C. § 116 and its state counterparts are narrowly tailored to the ends of preventing these harms that for biological and social reasons afflict only girls. There is no reason why those laws should have been extended, or other laws passed, to prohibit a completely different medical procedure that is safely performed hundreds of thousands of times each year in this country on boys. Equal protection is not violated when legislatures "provide for the special problems of women." *Michael M.*, 450 US at 469.

In particular, there are at least three distinct respects in which FGM differs markedly from the practice of male circumcision – respects of which a legislature can take cognizance.

First, the invasiveness and severity of FGM is of a completely different order of magnitude from male circumcision. As FGM is practiced in the vast majority of cases, it involves the complete removal of many of a girl's sexual organs. According to the World Health Organization ("WHO"), "[t]he most common type of female genital mutilation is

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141 Cong. Rec. S9911-12 (daily ed. July 13, 1995) (emphasis added). Another sponsor of the federal statute, Senator Moseley-Braun, noted that "[t]he procedure known as female circumcision is not at all benign. It is mutilation. . . . [T]here are very serious health risks associated with the practice of female genital mutilation that do not exist with male circumcision. . . . At child birth, circumcised women have double the risk of maternal death, and the risk of a still birth increases several fold." *Id.* at S9912-13. And, in comments addressed to the House of Representatives on the proposed legislation, a long-time advocate of the bill, Representative Pat Schroeder, noted that "FGM is not comparable to male circumcision, unless one considers circumcision amputation. FGM causes serious health problems – bleeding, chronic urinary tract and pelvic infections, build-up of scar tissue, and infertility. Women who have been genitally mutilated suffer severe trauma, painful intercourse, higher risk of AIDS, and childbirth complications." 141 Cong. Rec. H1695 (daily ed. Feb. 14, 1995).

excision of the clitoris and the labia minora, accounting for up to 80% of all cases; the most extreme form is infibulation, which constitutes about 15% of all procedures" and "involves excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening" leaving only a small opening for urine and menstrual flow. WHO Fact Sheet No. 241 (June 2000), *available at* http://www.who.int/mediacentre/factsheets/fs241/ en/ (last visited 8/18/07). The male equivalent to even the less extreme form of these procedures would be the complete amputation of the penis. By contrast, removal of the foreskin is a relatively simple procedure that leaves the penis almost entirely intact.

Second, FGM exposes a girl to serious, and often life-threatening, risks to her health and well-being for the rest of her life. The practice of FGM often involves extensive bleeding, requires months of wound care, and leads to complications later in life. As the WHO details:

> "Immediate complications include severe pain, shock, hemorrhage, urine retention, ulceration of the genital region and injury to adjacent tissue. Hemorrhage and infection can cause death. . . . . Long-term consequences include cysts and abscesses, keloid scar formation, damage to the urethra resulting in urinary incontinence, dyspareunia (painful sexual intercourse) and sexual dysfunction and difficulties with childbirth."

WHO Fact Sheet No. 241. FGM not only exposes *women* to much higher risks of complications and death during childbirth, it also exposes the *babies* born to women who have had FGM to much higher risks of death – between 15% and 55% higher – even when women give birth in hospitals where the obstetrics staff are used to dealing with women who have undergone FGM. New Study Shows Female Genital Mutilation

Exposes Women and Babies to Significant Risk at Childbirth (June 2006), *available at* http://www.who.int/mediacentre/news/releases/2006/pr30/ en/index.html (last visited 8/20/07). By comparison, the health risks associated with male circumcision are *de minimus*, no greater than those associated with many other kinds of elective surgery, and in most cases considerably lower. Nor does male circumcision cause any long-term health problems or interfere with reproductive ability.

Third, and most importantly, FGM *never* carries any medical benefits. WHO, New Data on Male Circumcision and HIV Prevention: Policy and Programme Implications, *available at* http://data.unaids.org/pub/Report/2007/mc_ recommendations_en.pdf. Indeed, if a situation arose in which a surgical operation on the genitalia were necessary for the girl's or woman's health, it would be specifically permitted under the law. See 18 USC § 116(b); ORS 163.207(3)(a). By contrast, many pediatricians recommend male circumcision. As discussed above, its advantages have been extensively documented.

The laws that ban FGM thus protect against harms that are unique – in their likelihood and their severity – to girls. No constitutional provision requires those legislatures to prohibit a completely different procedure performed on boys, which not only causes no such harms, but even provides substantial medical benefits.[21]

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[21] DOC's references to the Canadian Charter of Rights and Freedoms (Canadian Charter) (DOC Br. at 9), to the International Covenant on Civil and Political Rights (ICCPR) (*id.* at 4, 10, 20, 21), and to a decision of the Supreme Court of Canada (*id.* at 10) as authority for some right against circumcision are, for obvious reasons, grossly misplaced. First, the Canadian Charter bears no relationship to the laws of any State. Second, nothing in the ICCPR prohibits male circumcision – indeed, like all foundational legal texts, the ICCPR

B. The Remedy For Holding Laws Prohibiting FGM Unconstitutional Would Not Be To Extend Them.

Even if this Court were to hold that laws prohibiting FGM were based on an unconstitutional gender classification, the remedy would not be to expand their reach to include a group to which they were never meant to apply. Indeed, the remedy proposed by Lia Boldt and her *amicus* would yield a radical and unprecedented result. We are not aware of any court that has ever created an entirely new criminal prohibition to redress a constitutional problem of underinclusiveness.

First, expanding the reach of these laws would impermissibly circumvent the clear intent of the legislatures that enacted them, which consciously limited their application to FGM. *See, e.g., Heckler v. Mathews*, 465 US 728, 739 (1984) ("[T]he court should not, of course, use its remedial powers to circumvent the intent of the legislature, and should therefore measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.") (internal quotation marks and citations omitted). As noted above, the enactment of statutes prohibiting FGM was guided by the legislative understanding that male circumcision is simply not analogous to FGM; it does not cause similar injuries, or even expose boys to similar risks. The legislative history of 18 U.S.C.

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is drafted at a level of abstraction that is capacious enough to admit of any number of interpretations. Finally, DOC's reliance on a decision of the Supreme Court of Canada about the right of children not to be prevented by their parents from requiring life-saving medical treatment (*id.* at 10) reveals nothing about the legal issue before this Court, which involves a parent seeking to *provide* medically beneficial care.

§ 116 reveals that Congress did not intend to ban male circumcision.[22] The Oregon legislature evidently intended the same.[23]

Moreover, expanding the reach of the Oregon statute to include male circumcision would require this Court to engage in a purely legislative act, for the Court would literally have to rewrite the law. As it stands, ORS 163.207 prohibits the "circumcis[ion], excis[ion] or infibulat[ion]" of the "labia majora, labia minora or clitoris." To extend this law to male circumcision, the Court would need to add language of its own invention defining which precise acts, on which precise parts of the male genitalia, are now prohibited. This would be a violation of fundamental canons of Oregon statutory construction that define the role of the judiciary as simply to ascertain and declare the law, "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Indeed, "to insert by judicial fiat language into a statute that has not been subjected to the legislative process implicates serious separation of powers concerns." *Fernandez v. Board of Parole & Post-Prison Supervision,* 137 Or App 247, 252 n.2

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[22] For example, Senator Moseley-Braun stated: "[T]here are very serious health risks associated with the practice of female genital mutilation that do not exist with male circumcision." 141 Cong. Rec. S9913 (daily ed. July 13, 1995). Representative Schroeder also stated explicitly: "FGM is not comparable to male circumcision, unless one considers circumcision amputation." 141 Cong. Rec. M1695 (daily ed. Feb. 14, 1995).

[23] While no legislative history is available for ORS 163.207, it is highly significant that the Oregon legislature banned FGM when performed on a non-gender-specific "child," ORS 163.207, rather than on a "girl." It thereby indicated that for *all* children, girls and boys, it intended *only* these specific practices to be prohibited.

(1995) (citing Or Const, Art III, § 1). Plainly, the proper result, should the Court find a constitutional infirmity, would not be to extend the law.[24]

C. This Challenge Was Raised For the First Time on Appeal and is Therefore Not Properly Before This Court.

The equal protection challenge raised by Lia Boldt to the federal and state statutes prohibiting FGM is not properly before this Court. "Generally, before an appellate court may address whether a trial court committed an error in any of the particulars of the trial of a case, the adversely affected party must have preserved the alleged error in the trial court and raised the issue on appeal by an assignment of error in its opening brief." *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 380, 823 P2d 956, 958 (1991) (citing ORAP 5.45(2)). Lia Boldt did not raise her equal protection challenge in her opening brief – indeed, in any brief – in her appeal from the trial court's judgment or even in her petition for this Court's review of the Court of Appeal's decision affirming that judgment. Instead, she raised her equal protection challenge for the first time in her brief on the merits before this Court – and even then the issue did not appear as an assignment of error. *See* Petr.'s Br. at 16-20. Indeed, the only "issue presented" by Lia Boldt makes no mention of the question of the constitutional validity of laws prohibiting FGM. Moreover, no constitutional issue, let alone an error of law, is "apparent on the face of the

[24] In *Hewitt v. State Accident Ins. Fund Corp. (In re Williams)*, 294 Or 33, 653 P2d 970 (1982), the Court extended a law that limited workers' compensation benefits to women and their children who cohabited with workers injured in an accident, so as to include similarly-situated men as well. In that case, however, the judicial amendment was quite straightforward and did not require the Court to make any substantive policy decisions comparable to the ones at stake here. Furthermore, that statute was not criminal in nature.

record." ORAP 5.45(1). Therefore, the issue of the constitutional validity of laws prohibiting FGM is not properly before this Court and should not be considered.

CONCLUSION

For the reasons above, the decision of the Court of Appeals should be affirmed.

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Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing **BRIEF ON THE MERITS OF *AMICI CURIAE* AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF RESPONDENT ON REVIEW** on September 11, 2007, by mailing the original and 12 copies thereof to:

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I further certify that I served the foregoing Merits Brief on September 11, 2007, by mailing two true copies thereof to each of the following persons:

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