APL-2015-00236
Appellate Division-Fourth Department Docket No. CAF 14-01034
Family Court, Chautauqua County Docket No. V-028844-13

Court of Appeals

STATE OF NEW YORK

In the Matter of

BROOKE S. B.,

Petitioner-Respondent,

—against—

ELIZABETH A. C.C.,

Respondent-Respondent.

R. THOMAS RANKIN, ESQ., Attorney for the Child,

Appellant.

BRIEF FOR *AMICI CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EMPIRE JUSTICE CENTER, HER JUSTICE, INC., THE LEGAL AID SOCIETY, LEGAL SERVICES NYC, LEGAL SERVICES OF CENTRAL NEW YORK, INC., THE METROPOLITAN BLACK BAR ASSOCIATION, THE NATIONAL LGBT BAR ASSOCIATION, THE NEW YORK COUNTY LAWYERS ASSOCIATION, THE NEW YORK LEGAL ASSISTANCE GROUP, INC., AND THE WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK IN SUPPORT OF PETITIONER-RESPONDENT'S MOTION FOR LEAVE TO APPEAL

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March 22, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), the Association of the Bar of the City of New York, also known as the New York City Bar Association, states that it is a voluntary bar association with no parent corporation or subsidiaries. The New York City Bar Association has one affiliate, the Association of the Bar of the City of New York Fund, Inc.

Empire Justice Center states that it is a not-for-profit entity and certifies that it has no parents, subsidiaries, or affiliates.

Her Justice Inc. (formerly known as inMotion, Inc., and Network for Women's Services, Inc.) states that it is an Internal Revenue Code ("I.R.C.") 501(c)(3) charitable foundation incorporated in the State of New York, and has no parents, subsidiaries, or affiliates.

The Legal Aid Society states that it is a tax exempt, I.R.C. 501(c)(3) organization, and has been classified under I.R.C. Section 501(a) as a publicly supported charitable organization. The Society has no parent corporation or subsidiaries.

Legal Services NYC states that it is an I.R.C. 501(c)(3) non-profit organization dedicated to providing free civil legal aid for low-income New Yorkers and has no parent corporation or subsidiaries.

Legal Services of Central New York, Inc. states that it has no parents, subsidiaries, or affiliates.

The Metropolitan Black Bar Association states that it is a not-for-profit entity and certifies that it has no parents, subsidiaries or affiliates.

The National LGBT Bar Association states that it is a voluntary bar association with no parent corporation or subsidiaries. The National LGBT Bar Association has one sister organization, The National LGBT Bar Foundation, an I.R.C. 501(c)(3) corporation, and 34 affiliate organizations.[1] The National LGBT Bar Association is an affiliate of the American Bar Association.

[1] The National LGBT Bar Association's affiliates are: the LGBT Bar Association of Los Angeles; Sacramento Lawyers for the Equality of Gays and Lesbians; Tom Homann Law Association; Bay Area Lawyers for Individual Freedom; LGBT Law Section of the Sonoma County Bar Association; Colorado Gay Lesbian Bisexual Transgender Bar Association; Delaware State Bar Association LGBT Section; LGBT Bar Association of DC; Central Florida Gay & Lesbian Law Association; Stonewall Bar Association of Georgia; Hawaii LGBT Legal Association; Lesbian and Gay Bar Association of Chicago; KC Legal - Kansas City Lesbian, Gay and Allied Lawyers; Lesbian, Gay, Bisexual, and Transgender Bar Association of Maryland; Massachusetts LGBTQ Bar Association; Stonewall Bar Association of Michigan; Minnesota Lavender Bar Association; New Mexico Lesbian and Gay Lawyers Association; The LGBT Bar Association of Greater New York; LGBT Law Section of the State Bar of Nevada; North Carolina Gay Advocacy Legal Alliance; the Oregon Gay and Lesbian Law Association ("OGALLA"), The LGBT Bar Association of Oregon; Gay and Lesbian Lawyers of Philadelphia; LGBT Rights Committee of the Allegheny County Bar Association; Tennessee Stonewall Bar Association; Dallas Gay and Lesbian Bar Association; Stonewall Law Association of Greater Houston; LGBT Law (A Section of the State Bar of Texas); LGBT & Allied Lawyers of Utah; Virginia Equality Bar Association; QLaw, The GLBT Bar Association of Washington; LGBT Bar Association of Wisconsin; and International Association of Lesbian and Gay Judges.

The New York County Lawyers Association states that it has no parent corporation or subsidiaries. The New York County Lawyers Association has one affiliate named The New York County Lawyers Association, Foundation, Inc.

The New York Legal Assistance Group, Inc., states that it is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

The Women's Bar Association of the State of New York ("WBASNY") states that it is a statewide voluntary bar association incorporated in the State of New York, with no parent corporation and 27 subsidiaries and affiliates (consisting of one direct subsidiary that is an I.R.C. 501(c)(3) charitable foundation incorporated in New York; eighteen affiliated regional chapters across the state, some of which are unincorporated and others of which are incorporated in New

York; and eight I.R.C. 501(c)(3) charitable foundations or legal clinics that are subsidiaries of its chapters and incorporated in New York).[2]

[2] WBASNY's affiliates are: *Chapters* – Adirondack Women's Bar Association; The Bronx Women's Bar Association, Inc.; Brooklyn Women's Bar Association, Inc.; Capital District Women's Bar Association; Central New York Women's Bar Association; Finger Lakes Women's Bar Association; Greater Rochester Association for Women Attorneys; Mid-Hudson Women's Bar Association; Mid-York Women's Bar Association; Nassau County Women's Bar Association; New York Women's Bar Association; Queens County Women's Bar Association; Rockland County Women's Bar Association; Staten Island Women's Bar Association; The Suffolk County Women's Bar Association; Westchester Women's Bar Association; Western New York Women's Bar Association; and Women's Bar Association of Orange and Sullivan Counties. *Charitable Foundations & Legal Clinic* – Women's Bar Association of the State of New York Foundation, Inc.; Brooklyn Women's Bar Foundation, Inc.; Capital District Women's Bar Association Legal Project Inc.; Nassau County Women's Bar Association Foundation, Inc.; New York Women's Bar Association Foundation, Inc.; Queens County Women's Bar Foundation; Westchester Women's Bar Association Foundation, Inc.; and The Women's Bar Association of Orange and Sullivan Counties Foundation, Inc.

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INTRODUCTION

In *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), this Court drew a purported "bright line," refusing to recognize a lesbian mother's standing as a "parent" under N.Y. Dom. Rel. Law ("DRL") § 70 because she had no biological or adoptive tie to her child. As law and society have evolved in the intervening years, it has become clear that the standard set out in *Alison D.* violates parents' and children's constitutional rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment. Notwithstanding that the U.S. Constitution guarantees families of same-sex couples "equal dignity in the eyes of the law," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), in the twenty-five years since *Alison D.* was decided, New York courts have denied virtually all lesbian, gay, bisexual, and transgender ("LGBT") parents who were not married or in a civil union standing as "parents" to seek custody of or visitation with their non-biological and non-adoptive children, yet have in some instances granted men who are non-biological, non-adoptive, unmarried, fathers in opposite-sex relationships standing on the basis of equitable estoppel in the best interests of their children. *See, e.g.*, *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282 (2d Dep't 1998); *Christopher S. v. Ann Marie S.*, 173 Misc. 2d 824 (Fam. Ct. N.Y. Dutchess County 1997). In practice, the courts of New York have treated both men and women as "parents" in the Family Courts for *child support* purposes on the basis of estoppel,

but generally have granted only men standing as parents by estoppel to seek *custody or visitation*. *Debra H. v. Janice R.*, 14 N.Y.3d 576, 592-93 (2010).

Alison D. and its progeny's over-narrow interpretation of who is deemed a "parent" under DRL § 70 violates the rights of children to protection of their parent-child relationships under the Due Process clause of the Fourteenth Amendment; moreover, the disparate treatment of LGBT parents as compared with non-LGBT parents also violates the Equal Protection clause of the Fourteenth Amendment. New Yorkers—especially those who are members of LGBT families in which it is generally an impossibility for both parents to be the biological parents of a child—thus face violation of their fundamental right to maintain their family relationships. New York lags behind the majority of states that explicitly provide LGBT families a mechanism for recognizing that "[t]he intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

In 2010, members of this Court expressed concern that anything but a narrow reading of "parent" would be unworkable or inappropriate; their main concern was that a functional equitable standard would open the floodgates of litigation and leave children "in a limbo of doubt." *Debra H.*, 14 N.Y.3d at 595-97. Based on the experiences of courts in other jurisdictions, however, *Amici*

respectfully submit that this Court can now acknowledge that the concerns set out in *Debra H.* have proven to be unfounded. For as many as twenty years, courts in many states have applied equitable standards for determining who is a "parent," with no flood of frivolous litigation or appeals. *See infra* section IV.

Now before the Court are two cases, *Brooke S. B. v. Elizabeth A. C.C.* and *Estrellita A. v. Jennifer L.D.*, in which biological mothers seek to use *Alison D.* to sever the parent-child relationships they intentionally fostered between their former romantic partners and their biological children. In the present matter, the Appellant Child ("M.B.")[3] was born to his mothers, Petitioner-Respondent Brooke S.B. ("Brooke") and Respondent-Respondent Elizabeth A.C. ("Elizabeth"), after Elizabeth became pregnant with medical assistance using anonymous donor sperm. Brooke and Elizabeth presented Brooke to the world as M.B.'s parent; more importantly, they assured M.B. through their words and actions that he had two mothers who loved him and cared for him.[4] Yet after Brooke and Elizabeth ended

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[3] That the child, through his attorney, has standing to appeal the Family Court's decision in this case and to seek the emotional, financial, and physical support of his parents has not been disputed. As this Court understands, it "is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation." *Matter of Tropea v. Tropea*, 87 N.Y.2d 727, 729 (1996).

[4] As is required at this stage of the litigation, the Court must accept as true all facts alleged by M.B. through his attorney and by Brooke, *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366 (1998), including that: Brooke and Elizabeth intended to and did raise M.B. as their child together; Elizabeth agreed that she, Brooke, and M.B. would all use Brooke's last name after M.B.'s birth; M.B.'s birth announcement listed both Brooke and Elizabeth as his parents; Brooke was his primary caregiver when Elizabeth returned to her work,

their relationship, the Family Court dismissed Brooke's petition for visitation with and custody of M.B., citing *Alison D.* as approved in *Debra H.* as binding precedent.

This Court should not condone—let alone require—a parent to break the most important promise an adult makes to a child. It is time for this Court to recognize, as a majority of others have, that "[a biological parent's] rights . . . do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 92-93 (Super. Ct. Penn. 1996).

Amici emphasize that M.B. is by no means the only child in New York whose parent-child relationship is not or may not be protected by biological, marital, or adoptive ties.[5] According to one of the most recent surveys, 16% of same-sex couples in New York were raising children they considered their "own,"

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including after Brooke and Elizabeth separated as a couple; and Brooke was known to all of M.B.'s teachers and healthcare professionals as his mother.

[5] For LGBT parents whose child was conceived using both donor sperm and a donor egg, and who may not have completed an adoption at the time the parents separate, it is entirely possible that *neither* parent would have biological, adoptive, or marital ties to the child. Thus under the *Alison D.* standard, a child who in reality has two parents may be left with no one whom the courts would grant standing to seek custody or visitation.

and the majority of those couples were unmarried.[6] The impact of *Alison D.* has been to allow the dramatic removal of loving parents from vulnerable children at a critical developmental stage, without recourse by the non-adoptive and non-biological parent, but also without recourse by the affected and often devastated child. Moreover, while second-parent adoption, marriage equality, and the marital presumption of parenthood codified in DRL § 73 admirably provide avenues to legitimize certain children's relationships with their parents in the eyes of the law, the LGBT families who avail themselves of these privileges often (and not coincidentally) have economic or social advantages. In contrast, children belonging to less advantaged groups—for example, children born to LGBT parents who are also racial minorities, or who live in poverty, or who have limited educational opportunities, or who have limited access to legal services—are less likely to benefit from or even be able to avail themselves of these avenues to "legitimacy." Accordingly, this Court's decision will not affect only M.B. and Brooke, but also a significant number of other families, many of whom are already marginalized. The impact of *Alison D.* on such children cannot be justified by an unfounded fear that the courts cannot handle such claims appropriately, just as they do for all other children.

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[6] Gary J. Gates & Abigail M. Cooke, The Williams Institute, New York Census Snapshot: 2010 at 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_New-York_v2.pdf.

Just as Chief Judge Kaye criticized the Court for failing to uphold New York's "proud tradition of affording equal rights to all New Yorkers" in *Hernandez v. Robles*, which denied New York's LGBT community marriage equality, 7 N.Y.3d 338, 380 (2006) (Kaye, C.J., dissenting), then-Judge Kaye dissented in *Alison D.*, criticizing the Court's unnecessarily narrow and counterfactual interpretation of the term "parent" for purposes of visitation and custody. 77 N.Y.2d at 657-62 (Kaye, J., dissenting). As she predicted, *Alison D.* "has [had] impact far beyond th[at] particular controversy, one that may affect a wide spectrum of relationships." That impact has indeed "fall[en] hardest on the children of [non-heterosexual partners], limiting their opportunity to maintain bonds that may be crucial to their development." *Id.* at 657-58.

Today, the Court has the opportunity to right the harm the *Alison D.* standard has caused to New York's children and parents, to recognize DRL § 70's requirement that courts give paramount importance to the best interests of the child, to return New York to its position as a state at the forefront of equality, and to honor the memory of the late Chief Judge Kaye. This Court can now embrace an evenhanded and realistic conception of parenthood by equitable estoppel, as the majority of other states' courts have done. Consistent with the long tradition of common law that predates and continues concurrent with more modern legislation, the Court need not wait for the Legislature to act. This Court can and should now

read DRL § 70 to treat all New York families and children as equally legitimate, consistent with the protections that the U.S. Constitution guarantees all parents and children.

INTEREST OF *AMICI CURIAE*

Association of the Bar of the City of New York

The Association of the Bar of the City of New York (the "City Bar"), also known as the New York City Bar Association, is a voluntary association of more than 24,000 member lawyers and law students. One of the oldest and largest professional associations in the United States, it was founded in 1870 to improve the administration of justice, promote the rule of law, and elevate the legal profession's standards of integrity, honor, and courtesy.

With respect to the particular questions raised here, the City Bar has long taken an active interest in protecting the legal rights of the diverse types of families that compose modern American society. Many of the City Bar's members practice in the area of family law. These members serve hundreds of thousands of clients, and have a vital interest in ensuring that New York grants equal rights to all people regardless of sexual orientation and sex.

The City Bar was among the first bar associations to have a standing committee dealing with LGBT issues. The Committee on LGBT Rights addresses legal and policy issues that affect LGBT individuals. Among other projects, the

Committee authored several reports between 1999 and 2011 that supported marriage equality in the State of New York.

The Council on Children is a City Bar committee comprising individuals interested in, and active around, issues and challenges impacting children and their families. Members include: attorneys representing children, parents, and child welfare agencies; judges; private Family Court practitioners; and senior staff from the City Administration for Children's Services and from private social service agencies. Issues the Council is currently focused on include: education; immigration; raising the age of criminal responsibility; broken adoptions; and substituting judgment when representing a child.

The City Bar has appeared before the Court of Appeals in numerous cases as *amicus*, including in *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010) and *Hernandez v. Robles*, 7 N.Y.3d 338 (2006). It has also participated as *amicus* before the U.S. Supreme Court, including in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Empire Justice Center

Empire Justice Center is a statewide, not-for-profit public interest law firm in New York with offices in Rochester, Albany, White Plains, Yonkers, and Central Islip. Established in 1973, Empire Justice Center's mission is to protect and strengthen the legal rights of people in New York State who are poor, disabled or disenfranchised through systems change advocacy, direct representation, as well

as training and support to other advocates and organizations in a range of substantive law areas. Since its founding, Empire Justice Center has worked to oppose discrimination and challenge barriers to equality, including barriers based upon sexual orientation or gender identity. Among its many substantive law units, Empire Justice operates both an LGBT Rights Project and a Domestic Violence Legal Project, and both of these units have regularly encountered families similarly-situated to the parties in this action. Empire Justice Center's LGBT Rights Project is the only civil legal services unit of this nature outside of the greater New York City area and, despite the significant needs, its direct representation resources are generally geographically limited to residents of the Rochester region.

For many years, Empire Justice Center has been following the troubling case law developments in this area and has long been alarmed about their punitive, discriminatory, and long-term harmful impact on the children and their non-biological parents who are separated forever only because of their parents' sexual orientation. The LGBT community endures poverty at rates much higher than the general population and the shackles of this poverty increase this community's marginalization and lack of access to legal tools that can safeguard their parentage and child-parent relationships, such as marriage or expensive and intrusive second-parent adoptions. For the poor families Empire Justice Center serves, it has found

that the recent advent of marriage equality is of little assistance to the decades of children already born into LGBT families. As a signatory to this brief, Empire Justice is interested in helping to inform the court about the critical statewide legal policies at issue in this case, particularly as they impact LGBT people of limited means.

Her Justice

Since 1993, Her Justice has been dedicated to making quality legal representation accessible to low-income women in New York City. Her Justice believes that all women with critical safety and financial needs deserve legal representation. Its mission is to make a real and lasting difference in the lives of low-income, under-served, and abused women by offering them legal services designed to foster equal access to justice and an empowered approach to life. Her Justice recruits volunteer attorneys from the City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. Approximately 80% of the women Her Justice serves receive full representation from a volunteer attorney, while the balance is represented by Her Justice staff attorneys. Her Justice provides legal services to over 3,000 women every year in all five boroughs of New York City.

With respect to the particular issues raised in this litigation, 71% of Her Justice's clients in fiscal year 2015 were mothers, and a substantial part of its practice since its founding has consisted of family and matrimonial actions involving custody disputes. Informed by Her Justice's work, the organization promotes policies that make society more responsive to the legal issues confronting the women it serves. Her Justice has continually been on the forefront of issues involving access to justice for all, regardless of sexual orientation, and the organization and the volunteers who partner with it have a fundamental interest in ensuring that New York grants equal rights to all mothers regardless of their sexual orientation. Her Justice has appeared before the Appellate Division, the Court of Appeals, and the United States Supreme Court in numerous cases as *amicus*, including: *Souratgar v. Fair*, 720 F.3d 96 (2014); *Matter of Pei-Fong K. v. Myles M.*, 94 A.D.3d 675 (1st Dep't 2012); *Camreta v. Greene*, 563 U.S. 692 (2011); *Jordan v. Jordan*, 14 A.3d 1136 (2011); and *Valdez v. City of New York*, 74 A.D.3d 76 (2011).

The Legal Aid Society

The Legal Aid Society is a private, not-for-profit legal services organization, the oldest and largest in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It is dedicated to one simple but powerful belief: that no New Yorker should be denied access to justice because of

poverty. The Society handles 300,000 individual cases and matters annually and provides a comprehensive range of legal services in three areas: the Civil, Criminal, and Juvenile Rights Practices.

With respect to the particular questions raised here, the Society's Juvenile Rights Practice has served as attorneys for children for over 50 years. As the primary institutional provider of legal representation of children and youth in all New York City Family Courts, it serves as a national leader in securing a young person's access to justice in both child welfare and juvenile delinquency proceedings. Additionally, the Civil Practice's Family Law Unit represents parents, often victims of interpersonal violence, in matters of custody, visitation and child support.

Legal Aid has been in the forefront of educating both the legal community as well as the public about oppressive experiences of and negative legal outcomes for lesbian, gay, bisexual, transgender, and gender non-conforming ("LGBTGNC") low-income New Yorkers. In its efforts to best serve these communities, the Society established an LGBT Law and Policy Initiative, which is dedicated to ensuring that all of the Society's work has a perspective of cultural humility for the LGBTGNC communities. The Initiative also engages in policy and law reform efforts to further the civil rights of the LGBTGNC communities. Ensuring oppressed communities have equal access to civil rights is core to the mission of

The Legal Aid Society. As such, the Society's interest in this matter is to ensure that LGBT individuals and their children share the same legal rights and access to their family as heterosexual and cisgender[7] families and individuals have.

Legal Services NYC

Legal Services NYC ("LSNYC") is one of the largest law firms for low-income people in New York City, with 18 community-based offices located throughout each of the City's five boroughs. LSNYC assists thousands of New Yorkers each year with civil legal services needs, including advocacy in the intersections of family law and LGBT rights.

Legal Services of Central New York, Inc.

Legal Services of Central New York, Inc. ("LSCNY") is a not-for-profit law firm serving the civil legal needs of low-income families and individuals, as well as underserved populations and populations with special needs, in 13 counties in central New York. For 50 years, LSCNY has engaged in representing civil legal needs in the area of family law and in particular, custody.

Metropolitan Black Bar Association

The purpose of the Metropolitan Black Bar Association ("MBBA") is to provide a forum to advance diversity & inclusion in the legal community and address legal issues affecting the citywide community. Specifically, MBBA:

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[7] "Cisgender" is an adjective denoting or relating to a person whose sense of personal identity and gender corresponds with their birth sex.

advances the progress and enhancement of lawyers, with a focus on lawyers of color, and building the pipeline of talent for future lawyers; develops jurisprudence and promotes the ethical practice of law; partners with legal societies, governmental agencies, lawyers of other nations, and the public in general to advance its purpose; commits its time, talent, and resources to the community; and will do any and all things necessary and proper for the accomplishment of these purposes, to the same extent, and in the same manner as permitted by law.

Undergirding MBBA's mission and activities is a fundamental commitment to equality. The current state of the law does not promote equality of treatment. As noted by Empire Justice Center, the case law is troubling in this area—it is "punitive, discriminatory, and [has a] long-term harmful impact on the children and their non-biological parents who are separated forever only because of their parents' sexual orientation." *See supra* p. 9.

As a signatory to this brief, MBBA is supporting *Amici*'s mission to improve the administration of the law and ensure full equality for members of the LGBT community.

National LGBT Bar Association

The National LGBT Bar Association ("LGBT Bar") is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students, and affiliated LGBT legal organizations. The LGBT Bar promotes

justice in and through the legal profession for the LGBT community in all its diversity. This case stands to impact the LGBT Bar's membership both professionally and personally. A ruling in favor of the rights of non-biological, non-marital parents would greatly increase its attorneys' ability to safeguard the families and relationships they have formed in their own lives. The LGBT Bar believes that biological and non-biological parents in same-sex couples have equivalent rights with respect to children they are raising and that the doors of the courthouse should be open to adjudicate and, where it is in the best interests of the children, vindicate those rights.

New York County Lawyers Association

The New York County Lawyers Association ("NYCLA") is a not-for-profit membership organization of 8,000 members committed to applying their knowledge and experience in the field of law to the promotion of the public good and ensuring access to justice for all. Founded in 1908, NYCLA was the first major bar association in the country to admit members without regard to race, ethnicity, religion, or gender. Since its inception, NYCLA has pioneered some of the most far-reaching and tangible reforms in American jurisprudence. Among its many activities, NYCLA addresses family law and LGBT issues through its Committees on Lesbian/Gay/Bisexual/Transgender Issues and Family Court and

Child Welfare. This *amicus* brief has been approved by the NYCLA Executive Committee.

New York Legal Assistance Group

The New York Legal Assistance Group, Inc., ("NYLAG") was founded in 1990 and provides high quality, free civil legal services to low-income New Yorkers who cannot afford attorneys. NYLAG's comprehensive range of services includes direct representation, case consultation, advocacy, community education, training, financial counseling, and impact litigation. NYLAG is unique for its ability to serve not only the abject poor, but also individuals and families who earn slightly above the government-designated poverty threshold.

NYLAG is made up of several units working to address the urgent legal needs of New York's marginalized communities, including NYLAG's Matrimonial and Family Law Unit, which provides holistic and culturally competent representation to parents in custody and other family law matters, with particular expertise on survivors of domestic violence. NYLAG's LGBTQ Law Project is housed within the Family Law Unit and serves the legal needs of New York's low-income lesbian, gay, bisexual, transgender, and queer ("LGBTQ") communities in a wide variety of civil law matters, including family law. The LGBTQ Law project has strong partnerships within the LGBTQ social services communities in New York and understands the needs of the most vulnerable members of the

community.

NYLAG's attorneys provide LGBTQ parents with high quality, culturally competent, direct representation in a range of family law matters. NYLAG engages in systemic advocacy efforts to reform city and state policies, so that LGBTQ New Yorkers have equal access to critical services, benefits and legal protections. NYLAG further serves the LGBTQ community by providing technical support to attorneys representing LGBTQ individuals.

For these reasons, the issues raised in this case will have major implications for the clients of NYLAG, and NYLAG is honored to offer its aid to the Court.

Women's Bar Association of the State of New York

The Women's Bar Association of the State of New York ("WBASNY") is the second largest statewide bar association in New York, with more 4,300 members in eighteen regional chapters. WBASNY's membership includes esteemed jurists,[8] academics, and practicing attorneys in every area of the law, including constitutional and civil rights, family and matrimonial law, and children's rights.

WBASNY was established in 1980 as a full service bar association when independent women's bar associations across New York (many founded between

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[8] The Boards of Directors of WBASNY and its 18 affiliated chapters include many lawyers who are judges, court attorneys, or otherwise affiliated with courts in New York. No WBASNY members who are judges or court personnel participated in WBASNY's vote to join in this matter as *amicus* or in the drafting or review of this brief.

1918 and the 1930s) joined to form a statewide parent organization. Its primary mission is to ensure the advancement of equal rights and the fair administration of justice for all persons. It has been a vanguard for the rights of women, children, and LGBT persons for decades, and it has participated as an *amicus* in many cases supporting equal rights for all persons, regardless of gender, sexual orientation, or marital status. WBASNY joins this brief because of its deep concern that New York law currently fails to grant LGBT parents and their children the same rights, privileges, protections, and legal standards afforded to opposite-sex couples and their children.

WBASNY has appeared before the Court of Appeals in numerous cases as *amicus*, including: *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010); *Hernandez v. Robles*, 7 N.Y.3d 338 (2006); *Chen v. Fisher*, 6 N.Y.3d 94 (2005); *Hartog v. Hartog*, 85 N.Y.2d 36 (1995); *Thoreson v. Penthouse Intern., Ltd.*, 80 N.Y.2d 490 (1992); and *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y.2d 401 (1983). It has also participated as *amicus* before the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court, including in *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd sub nom. United States v. Windsor*, 133 S. Ct. 2675 (2013).

Amici submit this brief to emphasize that the categorical denial of standing to non-biological, non-adoptive, unmarried parents to seek visitation with and

custody of the children they have reared, often from birth, works acute and potentially devastating harms to such parents and, more importantly, to their children. *Amici* strongly urge the Court, in keeping with society's evolving understanding of what constitutes a family, to reverse the decision of the court below denying standing to Brooke and to overturn *Alison D.* to ensure the equal rights of the tens of thousands of similarly-situated children and parents.

ARGUMENT

I. THE CURRENT INTERPRETATION OF DRL § 70 UNDER *ALISON D.* AND ITS PROGENY HARMS PARENTS LIKE BROOKE AND CHILDREN LIKE M.B.

DRL § 70 was enacted in the context of an evolving understanding of and attitudes towards the nature of "family," gender roles, and the right of children to enjoy access to and support from their parents. The history of the statute and its interpretation make clear that *Alison D.* was wrong when it was first decided, is contrary to evolving social and legal understandings of the dignity of LGBT couples and their children, and harms those children contrary to "the supreme consideration in all custody proceedings[:] what is for the best interests of the child, and what will best promote its welfare and happiness." *People ex rel. Glendening v. Glendening*, 259 A.D. 384, 388 (1st Dep't 1940) (citing DRL § 70).

A. Prior to *Alison D.*, New York Courts Appropriately Adopted Expansive Readings of "Parent" in the Domestic Relations Law, and the Legislature Followed

DRL § 70 provides that a "parent" has standing to apply for a writ of habeas corpus to seek custody or visitation of a minor child residing within the state. The statute does not specifically define the term "parent." *Debra H.*, 14 N.Y.3d at 608 (Ciparick, J., concurring in the result). Importantly, the statute is not the "exclusive or the only authority for the exercise of the power of [courts] over the custody and possession of minor children[.]" *Ex parte People ex rel. Cox*, 124 N.Y.S.2d 511, 514 (Sup. Ct. Erie County 1953) (citation omitted). Rather, DRL § 70 partially codifies preexisting common law and courts' "broad powers of equity over infants" to entertain petitions for visitation and custody "to make such determination concerning custody as their welfare dictates." *People ex rel. Spreckels v. De Ruyter*, 150 Misc. 323, 324 (Sup. Ct. N.Y. County 1934) (citation omitted).

Until *Alison D.*, New York courts' understanding of the way in which they were to exercise these broad powers shifted in response to evolving social norms. At common law, fathers historically enjoyed superior rights to custody, *Ullman v. Ullman*, 151 A.D. 419, 421 (2nd Dep't 1912); the predecessor to DRL § 70 displaced this presumption, providing women an avenue to seek custody of their children in the face of this patriarchal tradition. *Id.*; *see also Linda R. v. Richard*

E., 162 A.D.2d 48, 53-54 (2d Dep't 1990) ("In enacting the 'best interests of the child' test, the Legislature expressly rejected the idea that either fatherhood or motherhood alone carries with it a superior right to custody. The statutory declaration that there is 'no prima facie right to the custody of the child' rejects the notion that there is an inherent custodial preference for either parent, while at the same time advancing equal protection concepts, and reducing invidious gender classifications and stereotyping of either sex. While the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law.") (citations omitted).

"[B]ringing [DRL § 70] into conformity with what the courts were already doing[,]" the Legislature amended the statute in 1964, "broaden[ing] the category of persons entitled to seek . . . relief[,]" no longer restricting it to legally married "husbands" or "wives" or to state residents, so long as the child was domiciled in New York. *Alison D.*, 77 N.Y.2d at 659 (Kaye, J., dissenting). The amendment giving standing to a "parent": (i) shifted the focus to children and their best interests; (ii) lifted punitive restrictions limiting children's access to their parents based on the parents' conduct; and (iii) eliminated sex-based assumptions. *See People ex rel. Watts v. Watts*, 77 Misc. 2d. 178, 180 (Fam. Ct. N.Y. County 1973) ("[T]he best interests of the child are served by the court's approaching the facts of the particular case before it without sex preconceptions of any kind."). In short,

the Legislature intended the changes to DRL § 70 to ensure that the courts give paramount importance to determining and achieving what is in the best interests of the child.

B. Notwithstanding Expanding Definitions and Understandings of Parenthood, *Alison D.* Refused to Recognize Parents Like Brooke

Notwithstanding courts' prior movement away from sex-based assumptions and towards a focus on children's best interests, *Alison D.* adopted and *Debra H.* affirmed a restrictive, biologically-based definition of "parent" that is out of step with contemporary understandings of the reality of parenthood. In *Alison D.*, this Court held that a non-adoptive, non-biological parent like Brooke was not a "parent" within the meaning of DRL § 70 and thus did not have standing to seek visitation with or custody of her child. *Alison D.*, 77 N.Y.2d at 655. In *Debra H.*, this Court declined to overrule *Alison D.*, but allowed that matter to proceed to a best-interest hearing in accordance with principles of comity because of the parties' entry into a civil union in Vermont. *Debra H.*, 14 N.Y.3d at 593, 601.

In *Debra H.*, the Court affirmed that it saw "no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought." 14 N.Y.3d at 593. But subsequent developments, such as those in *Estrellita A.*, have shown that it is "nonsensical to treat the two things as severable." *Id.* at 607 (Ciparick, J., concurring in result). In *Estrellita A.*, currently on appeal to this Court, the

Appellate Division affirmed application of the use of the doctrine of *judicial* estoppel after a biological mother argued, and the Family Court agreed, that the non-biological mother should be deemed a "parent" for the purpose of a support judgment. *Matter of Arriaga v. Dukoff*, 123 A.D.3d 1023, 1024-25 (2d Dep't 2014), *leave granted sub nom. Estrellita A. v. Jennifer L.D.*, 26 N.Y.3d 901 (2015). The Family Court decided, and the Appellate Division agreed, that as a result, the biological mother was judicially estopped from denying the parental status of the non-biological mother in a subsequent proceeding for custody and visitation. *Estrellita A.*, 123 A.D.3d at 1026-27. As *Amici* explain in a separate brief in *Estrellita A.*, judicial estoppel was one appropriate avenue (the other being *equitable* estoppel) to recognizing parental status in that case. More importantly, however, *Estrellita A.* makes clear that "[s]upport obligations flow from parental rights [and] the duty to support and the rights of parentage go hand in hand[.]" *Debra H.*, 14 N.Y.3d at 607 (Ciparick, J., concurring in result).

The holdings of *Alison D.* and approvals expressed in *Debra H.* are not only out of step with courts' historic practice of reading DRL § 70 and similar statutes expansively, and with a paramount focus on the best interests of children, but also with the reality of contemporary families. As the Supreme Court has explained, "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from

household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality).[9] By 2010, an estimated 48,932 same-sex couples had established households in New York; 8,025 (16%) were raising children they considered their "own," and *more than half of those couples identified as unmarried*.[10] These families raise children even though, by virtue of their very nature, both members of a same-sex couple cannot be genetic parents of the same child. *Debra H.*, 14 N.Y.3d at 612 (Smith, J., concurring). Nonetheless, the parents consider their children, and the children consider their parents, their "own."

II. *ALISON D.* AND ITS PROGENY VIOLATE THE CONSTITUTIONAL RIGHTS OF LGBT PARENTS AND THEIR CHILDREN

Amici urge the Court to reconsider the purported "bright-line" rule set out in *Alison D.* and discussed further in *Debra H.* in view of its incompatibility with contemporary understandings of the equal dignity of LGBT couples and their children. Refusing to acknowledge the reality of how LGBT couples conceive and rear children is contrary not only to the best interests of children, but also to the constitutional rights of the families affected.

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9 The Supreme Court most recently recognized the complexity of such family relationships in *V.L. v. E.L.*, 577 U.S. ___ (Mar. 7, 2016), ruling that Alabama must recognize an adoption of a child by a non-biological LGBT parent that took place in Georgia.

10 Gary J. Gates & Abigail M. Cooke, The Williams Institute, *New York Census Snapshot: 2010* at 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_New-York_v2.pdf.

A. The U.S. Constitution Protects the Integrity of the Family Unit and the Rights of Parents and Children to Maintain Family Relationships

The U.S. Constitution guarantees children of LGBT parents, like those of non-LGBT families, Due Process protection with respect to their family relationships. The Supreme Court has "frequently emphasized the importance of the family," and noted that the rights to conceive and raise children are "essential" "basic civil rights of man," and "far more precious . . . than property rights[.]" *Stanley v. Ill.*, 405 U.S. 645, 651 (1972) (citations omitted). Because of its importance, the integrity of the family unit is protected by the Due Process clause of the Fourteenth Amendment of the U.S. Constitution. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also* U.S. Const. amend. XIV, § 1.

The fundamental right to maintain a family relationship is not exclusive to parents; it also extends to children. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."). For this reason, at least seven members of the Supreme Court affirmed that maintaining parent-child relationships is a constitutionally protected right. *Troxel*, 530 U.S. at 66, 77, 86-87, 95. Significantly, whether a family relationship exists is not merely a question of biology; "biological relationships are not [the] exclusive determination of the existence of a family." *Smith v. Org. of Foster Families. for Equality & Reform,*

431 U.S. 816, 843 (1977). As the Supreme Court recognized, "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

B. The U.S. Constitution Grants LGBT Couples, and Their Families, Equal Dignity

The fundamental right of parents and children to maintain their relationships, like the right to marry, certainly extends to LGBT couples. As the Supreme Court has explained, the fundamental right to marry is inherent in the liberty of the person under the Due Process and Equal Protection clauses of the Fourteenth Amendment, and LGBT couples cannot be deprived of it. *Obergefell*, 135 S.Ct. at 2604-05. The U.S. Constitution unequivocally grants same-sex couples "equal dignity in the eyes of the law." *Id.* at 2608. This dignity must extend to their right, and their children's right, to maintain parent-child relationships. Moreover, because gay and lesbian people "as a group have historically endured persecution and discrimination," government classifications discriminating on the basis of sexual orientation are subject to heightened scrutiny. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012); *aff'd sub nom. United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("[d]iscriminations of an unusual character especially require careful consideration") (internal quotation omitted). This heightened scrutiny applies equally to classifications regarding parenthood and family status.

C. Differential Treatment of LGBT and Non-LGBT Parents Violates LGBT Families' Constitutional Right to Equal Protection

Even if this Court's decision in *Alison D.* and its progeny did not violate the Fourteenth Amendment's guarantees of the right to integrity of New York's families—which, as explained above, *Amici* argue it does—the courts of New York have inconsistently applied the *Alison D.* standard in a way that tends to deny parent-child bonds to LGBT parents while recognizing the bonds of similarly situated non-LGBT parents; such differential application violates the Equal Protection clause of the Fourteenth Amendment. *See, e.g.*, *C.M. v. C.H.*, 6 Misc.3d 361 (2004) (denying a non-biological same-sex mother the use of equitable estoppel-based standing for custody or visitation), *but see Gilbert A. v. Laura A.*, 261 A.D.2d 886, 888 (4th Dep't 1999) (reversing Family Court's dismissal of non-biological father's petition for custody or visitation because he was "also entitled to present proof on the issue [of] whether the doctrine of equitable estoppel applies"); *Christopher S.*, 173 Misc. 2d at 833 (equitably estopping biological mother from raising father's status as non-biological parent because "[i]n dealing with real life issues, public policy is better served if the court's view is through the clear looking glass of reality rather than through the rose colored glasses of presumptive reality").

In a notable example, seven years after this Court decided *Alison D.*, the Appellate Division (Second Department) in *Jean Maby H. v. Joseph H.* reversed a

lower court's decision to sever a non-LGBT parent-child bond in light of *Alison D.* 246 A.D.2d 282. The Appellate Division instead applied the doctrine of equitable estoppel to grant the non-biological, non-adoptive father standing to seek custody of the child born to his wife before their marriage. *Id.*; *see Debra H.*, 14 N.Y.3d at 606 (Ciparick, J. concurring) ("the lower courts, constrained by the harsh rule of *Alison D.* have been forced to . . . engage in deft legal maneuvering to explain away the apparent applicability of *Alison D.*"). This Court cited *Jean Maby H.* favorably in its 2006 decision in *Matter of Shondel J. v. Mark D.*, applying the doctrine of equitable estoppel to preclude a father from challenging paternity in a support proceeding. 7 N.Y.3d 320, 326 (2006). Such differential application of the *Alison D.* standard has no sufficient justification, let alone one that is "exceedingly persuasive." *See United States v. Virginia*, 518 U.S. 518, 532-33 (1996).

D. Marriage Equality and Adoption Rights Are Not Enough to Protect LGBT Families' Constitutional Rights

As *Obergefell* recognized, "hundreds of thousands of children" throughout the country—thousands of them in New York, as explained above—are presently being raised by same-sex couples. *Obergefell*, 135 S. Ct. at 2600. The Supreme Court focused on the importance of stability for these families in explaining why the right to marry is fundamental. *Id.* "Without the recognition, stability, and predictability marriage offers, [the children of same-sex couples] suffer the stigma

of knowing their families are somehow lesser." *Id.* While *Amici* acknowledge the importance of marriage equality, it is not sufficient to protect the interests of parents like Brooke or children like M.B. or to maintain their family relationships.

First, marriage equality is of no benefit to Brooke in the present circumstances; when her child was conceived and born, marriage was not legal in New York for same-sex couples, and she was thus denied this fundamental right.[11] Brooke is not the only parent in New York whose constitutional rights were so impaired. *Alison D.* currently closes the courthouse doors to these parents, purely as a result of New York's failure over the past 25 years under *Alison D.* to afford them and their children equal dignity.[12]

Second, even after *Obergefell* and the advent of marriage equality, refusing to recognize parents like Brooke would "revive[] the discredited distinction between 'legitimate' and 'illegitimate' children, this time in the context of same-

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[11] Contemporary marriage equality throughout the United States is similarly of no benefit to families who had their children before New York recognized marriage equality, or who moved to New York after their children were born in states that did not recognize marriage equality or in any of the nearly 90% of countries where marriage equality for same-sex couples is not yet the law. David Masci, Elizabeth Sciupac & Michael Lipka, *Gay Marriage Around the World*, Pew Research Center (June 26, 2015), *available at* http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/.

[12] The Oklahoma Supreme Court, evaluating circumstances strikingly similar to Brooke's, granted a non-biological, non-adoptive mother standing to seek custody, as the "unfortunate demise of [her] . . . relationship occurred . . . three years prior to *Obergefell*. By the time the . . . Supreme Court made [its] decision[], it was too late for [her] to take advantage of the legal protections of marriage. . . . The couple's failure to marry cannot now be used as a means to further deprive the non[-]biological parent, who has acted *in loco parentis*, of a best interests of the child hearing." *Ramey v. Sutton*, 362 P.3d 217, 220-21 (Ok. 2015).

sex couples." Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 Am. Univ. Journal Gender Soc. Policy & Law 721, 722 (2012). Such differential treatment would be contrary to the Fourteenth Amendment's protection of family relationships.

In *Levy v. Louisiana,* the Supreme Court held that a state wrongful death statute that did not authorize actions on behalf of "illegitimate children" amounted to "invidious discrimination" against them. 391 U.S. 68, 71 (1968). It explained, "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers . . . in her death they suffered in the sense that any dependent would." *Id.* at 72. Subsequently, the Supreme Court held that a law excluding unwed fathers from the definition of "parent" violated the Due Process clause. *Stanley*, 405 U.S. 645, 562-63 (1972). These and subsequent cases, as well as the Uniform Parentage Act, explicitly shifted away from reliance on marital status as a proxy for determining parentage.[13]

Alison D. and *Debra H.* unconscionably re-inject the concept of legitimacy into LGBT families. They provide, for example, that a non-biological mother may be recognized as a "parent" only if (i) she is married to the biological mother at the

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[13] *See* Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 Am. U. J. Gender Soc. Pol'y & L. 671, 701-02 (2012).

time a child is born or (ii) she obtains a second-parent adoption. As one scholar has explained, "[T]he biological mother alone can decide whether to permit her female partner to adopt, whether to enter into a marriage or civil union that might result in joint parentage, or whether to consent to shared custody or visitation after a break-up. Yet the couple's decision as to which partner will bear the child may rest on many considerations—such as fertility, age, and health—that have nothing to do with which of the two would be a better parent, let alone the only parent. . . . There is no exact parallel to this situation in the world of heterosexual childbearing."[14]

In many instances, opposite-sex couples may *both* be found to be parents of a child simply by virtue of biology, without reference to adoption or marriage. However, "pending . . . technological developments . . . it is not possible for both members of a same sex couple to become biological parents of the same child." *Debra H.*, 14 N.Y.3d at 612 (Smith, J., concurring). This fundamental reality is intrinsic to parenting by same-sex couples. Yet *Alison D.* and *Debra H.* make the marital status of LGBT parents relevant in a way it is not for most opposite-sex couples; the result is a classification on the basis of sexual orientation. Classifications based on legitimacy are unconstitutional unless they are substantially related to a legitimate state interest. *Pickett v. Brown*, 462 U.S. 1, 8

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[14] *Id.* at 703-04.

(1983). While it is certainly understandable for courts to prefer what they see as a "bright-line" rule to promote certainty in the wake of domestic breakups, that interest in judicial efficiency (i) is not substantial or persuasive enough to justify upholding *Alison D.* and *Debra H.*, and (ii) is based on a speculative concerns about a "flood" of litigation that has not materialized in states that have adopted flexible and more realistic rules. *See infra* section IV.

III. EQUITY DEMANDS THAT BROOKE, AND THOSE LIKE HER, BE RECOGNIZED AS PARENTS

As noted above, DRL § 70 is not the "exclusive or the only authority for the exercise of the power of [courts] over the custody and possession of minor children[.]" *Ex parte People ex rel. Cox*, 124 N.Y.S.2d at 514. Accordingly, even if "parent" in DRL § 70 applies only to those with a genetic, marital, or adoptive relationship, which *Amici* dispute, New York courts can and should use their equitable powers—which are broader than and have always complemented their statutory powers—to honor the rights of children like M.B. and parents like Brooke. Courts should not ignore the realities of LGBT families such as this one, in which the non-biological, non-adoptive, non-marital parent was involved in the conception and birth of the child; the child called her his mother; the family used her family name; she was the child's primary caregiver; families, community members, and health and education professionals all knew her as an equal parent;

and the biological parent facilitated, accepted, and publicly announced the non-biological mother's role as a parent.

A. The Courts' Equitable Powers Promote Fairness and Prevent Injustice

As a matter of equity, courts in appropriate circumstances have the power to estop parties from asserting self-serving positions that are at odds with their past conduct. Specifically, equitable estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." *Nassau Trust Co. v. Montrose Concrete Prods. Corp*., 56 N.Y.2d 175, 184 (1982); *see Metro. Life Ins. Co. v. Childs Co*., 230 N.Y. 285, 292-93 (1921); *Triple Cities Const. Co. v. Maryland Cas. Co*., 4 N.Y.2d 443, 448 (1958); 57 N.Y. Jur. 2d Estoppel § 3.

Because equitable estoppel is based upon principles such as honesty and fair dealing, "[a] party may not, even innocently, mislead an opponent and then claim the benefit of his deception." *Romano v. Metropolitan Life Ins. Co*., 271 N.Y. 288, 293 (1936); *see also Rothschild v. Title Guar. & Trust Co.*, 204 N.Y. 458, 464 (1912). In his commentary on common law in the seventeenth century, Sir Edward Coke stated: "'[i]t is called . . . estoppel . . . because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.'" *White v.*

La Due & Fitch, 303 N.Y. 122, 128 (1951) (quoting 2 COKE ON LITTLETON, 352a). As Lord Chief Justice Kenyon further explained at the end of the eighteenth century, "a man [or woman] should not be permitted to 'blow hot and cold' with reference to the same [facts], or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his [or her] private interests." T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 Rev. Litig. 377, 386 (2008) (quoting *Smith v. Hodson*, 4 T.R. 211, 217 (King's Bench 1791)).

B. DRL § 70 Leaves Intact Courts' Common Law Powers to Recognize the Standing of Parents Like Brooke

As explained above, DRL § 70 codified preexisting common law only in part. *See* N.Y. Statute § 301(b) ("[R]ules of common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires."). In other words, DRL § 70 is not the "exclusive or the only authority for the exercise of the power of [courts] over the custody and possession of minor children[.]" *Ex parte People ex rel. Cox*, 124 N.Y.S.2d at 514; *see Sandfort v. Sandfort*, 278 A.D. 311, 335 (1st Dep't 1951) ("[T]he broad equitable powers of the Supreme Court regarding minor children within the state . . . are not limited by the statutes concerning habeas corpus"). As Judge Cardozo explained, "Nothing in [DRL § 70] affects [the] jurisdiction[] inherent in courts of equity, or changes or diminishes the remedy available[.]" *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925).

Accordingly, New York courts have used their equitable powers to consider custody and visitation claims by various parties, including unmarried, non-resident, and divorced persons, long before DRL § 70's 1964 amendment explicitly addressed them. *See Ex parte People ex rel. Cox*, 124 N.Y.S.2d at 514; *Finlay*, 240 N.Y. at 423-43, (1925); *In re Application of Rich*, 254 A.D. 6, 8 (1st Dep't 1938). New York courts have also "long applied" equitable estoppel in paternity and support proceedings, an application that originated in case law prior to partial codification of the doctrine into statute. *See, e.g., Shondel J.*, 7 N.Y.3d at 326.

C. Equitable Estoppel Must Apply Equally in Defining a "Parent" for Support, Visitation, and Custody Purposes

New York courts have repeatedly used the doctrine of equitable estoppel to prevent the denial of standing to parents, including non-biological parents, who seek custody after they have been held out as and acted as a parent.[15] As described

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[15] *Boyles v. Boyles*, 95 A.D.2d 95, 97-98, (1983) (respondent estopped from asserting petitioner's lack of paternity after she held petitioner out as father of the child, listed petitioner as the child's father on the birth certificate, lived with the petitioner and the child without claiming that petitioner was not the father, and encouraged a father-son relationship between the petitioner and the child); *Sharon GG. v. Duane HH.*, 95 A.D.2d 466, 468 (3d Dep't 1983) (affirming application of equitable estoppel to dismiss mother's petition contesting paternity of man she held out as child's father and encouraged to form bonds of attachment with); *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 283-84 (2d Dep't 1998) (mother estopped from contesting parenthood because notwithstanding absence of a genetic tie, mother held father out as parent, allowed him to assume parenting responsibilities, and allowed the child to form a bonded parent-child relationship with the father); *Matter of Antonio H. v Angelic W.*, 51 A.D.3d 1022 (2008) (petitioner non-biological father adjudicated father of the child after he formed strong father-daughter relationship with child, had been the primary caretaker for most of the child's life, child had formed emotional and psychological bonds to petitioner's family, petitioner had been held out to public as child's father, and appellant made no efforts to

above, the Appellate Division affirmed in *Estrellita A.* the application of the use of the doctrine of *judicial* estoppel after a biological mother argued, and the family court agreed, that the non-biological mother should be deemed a "parent" for the purpose of a support judgment. *See Estrellita A.*, 123 A.D.3d at 1024. The biological mother was judicially estopped from denying the parental status of the non-biological mother in a subsequent proceeding for custody and visitation. *Estrellita A.*, 123 A.D.3d at 1026.

The outcome of *Estrellita A.* is consistent with the notion that "the duty to support and the rights of parentage go hand-in-hand, and it is nonsensical to treat the two things as severable." *Debra H.*, 14 N.Y.3d at 607 (Ciparick, J., concurring). Yet *Alison D.* and *Debra H.* explicitly adopt this "nonsensical" approach. As it stands, a non-biological, non-adoptive parent can be ordered to pay financial support based on principles of estoppel in proceedings initiated by a biological parent. At the same time, however, that same non-biological, non-adoptive parent cannot *initiate* proceedings seeking to be deemed a parent for the purposes of providing ongoing financial and emotional support. This striking

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establish father-daughter relationship despite believing himself to be the biological father); *see also Sarah S. v. James T.*, 299 A.D.2d 785 (3rd Dep't 2002) ("courts are more inclined to impose equitable estoppel to protect the status of a child in an already recognized and operative parent-child relationship").

inequity can no longer be countenanced.[16] It is now clear, if it were not when it was decided, that *Alison D.* "creates more questions than it resolves" and "no longer serves the ends of justice or withstands the cold light of logic and experience;" it should be overruled. *See People v. Peque*, 22 N.Y.3d 168, 194 (2013) (plurality) (internal quotation, citation, and alteration omitted).[17]

"[T]he first principle of equity is justice." *Tompers v. Bank of Am.*, 217 A.D. 691, 694 (1st Dep't 1926). Justice demands that recognition of parental status not be dependent on contorted litigation practices. The status of parents like

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[16] Moreover, such a rule has the potential to create perverse incentives. Under the logic of *Alison D.* and its progeny, a parent without biological or adoptive ties to a child who wanted to continue a relationship of financial and emotional support with the child would have a strong disincentive to provide voluntary financial support for the child: by withholding financial support in this way, the non-biological and non-adoptive parent could put pressure on the biological parent to initiate support proceedings in which the Family Court would adjudicate the non-biological and non-adoptive parent a "parent" for support purposes; the Family Court could then judicially estop the biological parent from challenging the non-biological and non-adoptive parent's standing to seek custody or visitation.

[17] As this Court has recognized, the doctrine of *stare decisis* is not absolute; when it becomes clear, as in this case, that a precedent is at odds with reality, the courts should not hesitate to overrule it. *See, e.g.*, *People v. Bing*, 76 N.Y.2d 331, 338 (1990) ("Precedents remain precedents, however, not because they are established but because they serve the underlying nature and object of the law itself, reason and the power to advance justice. As Justice Frankfurter observed, stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable. Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the lessons of experience and the force of better reasoning[.]") (internal quotations and citations omitted).

Brooke *as parents* must be recognized, and children like M.B. must be treated no differently from the children of opposite-sex parents.[18]

IV. THE *H.S.H.-K.* TEST PROVIDES A MODEL FOR ASSESSING THE CLAIMS OF PARENTS LIKE BROOKE

In dicta in *Debra H.*, 14 N.Y.3d at 595 n.3, this Court discussed but declined to approve the standard established by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). *Amici* urge the Court to consider this test again in light of the fact that the *H.S.H.-K.* test provides a "better, more flexible, multi-factored" and, most importantly, *workable* approach to determining whether a parent-child relationship exists that will protect the best interests of children and the rights of parents like Brooke. *Debra H.*. 14 N.Y.3d at 608-09 (Ciparick, J., concurring).

A. *H.S.H.-K* Assesses Parenthood Based on Four Straightforward Factors

The Wisconsin Supreme Court developed the *H.S.H.-K.* test more than twenty years ago. To demonstrate standing, a former partner seeking custody or visitation must establish: (i) that the biological or adoptive parent consented to, and fostered, his or her formation and establishment of a parent-like relationship with the child; (ii) that he or she lived together with the child in the same

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[18] If the Court were to affirm the purported "bright-line" rule in *Alison D.* to deny parents like Brooke standing to initiate proceedings to seek custody or visitation (which *Amici* emphatically argue it should not do), it should nevertheless recognize that children through their attorneys, like Appellant Child in this case, have standing to seek visitation or custody with their non-biological, non-adoptive, non-marital parents.

household; (iii) that he or she assumed the obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; and (iv) that he or she has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship that is parental in nature. *In re Custody of H.S.H.-K.*, 533 N.W.2d. at 435-36.

In dicta, members of this Court previously described the *H.S.H.-K.* test and others like it as "complicated and nonobjective," "inherently unpredictable," encouraging of "contentious, costly, and lengthy" litigation that "threatens to trap single biological and adoptive parents and their children in a limbo of doubt" resulting in "endless misery for children and adults alike." *Debra H.*, 14 N.Y.3d at 594-96, 610. However, the Court in *Debra H.* did not cite any cases from Wisconsin, or other jurisdictions that applied similar tests in the fifteen years between *H.S.H.-K.* and *Debra H.*, to provide factual support for these dire predictions. Furthermore, the *Debra H*. Court was able to sidestep meaningful consideration of adopting a parenthood test by embracing the pre-existing Vermont civil union of the parents in that case to conclude that their child indeed had two mothers.[19]

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[19] The Child-Parent Security Act (A.4319/Paulin) (S.2765/Hoylman), currently in committee before the New York Assembly and Senate, includes, among other things, a procedure for parents like Brooke to be recognized pursuant to factors that substantially

B. In Application, the *H.S.H.-K.* Parent Test Is Workable

Contrary to the fears expressed in *Debra H.*, there is in fact no evidence that application of *H.S.H.-K.* and similar tests has resulted in uncertainty and unpredictability in the states where it has been applied. Two scholars who have empirically reviewed application of the *H.S.H.-K.* and similar tests found that the Court's earlier concerns have not been borne out:

> [A] study of Wisconsin appellate opinions shows that there has been very little appellate litigation since 1995 involving the application of [the] test. Indeed, I have been unable to find a single post-*H.S.H.-K.* appellate ruling in Wisconsin raising the issue of whether the four-part test was properly applied or whether any given individual qualified (or not) for standing under that standard[.] . . . A review of New Jersey appellate opinions since then suggests that New Jersey courts have not experienced undue difficulty in determining whether a particular petitioner satisfies the functional parent criteria.[20]

> Several states permit anyone to file for custody of a child. . . . A review of the case law reveals no evidence that these states have seen an influx of clearly meritless third party custody cases[.] . . . Contrary [to] critics [claims], the factual record shows that third parties with attenuated connections to children simply are not inclined to seek the awesome responsibility of raising those children.[21]

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resemble the *H.S.H.-K.* test. The City Bar and numerous other *Amici* support the legislature taking steps to mitigate the harm *Alison D.* causes LGBT families. However, this Court need not, and should not, wait for the Legislature to act, if and when it ever does. Moreover, as explained above, such action is not necessary in view of New York courts' already-existing powers to recognize parents like Brooke (notwithstanding *Alison D.* and *Debra H.*'s statements to the contrary).

[20] Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind The Facade Of Certainty*, 20 Am. U. J. Gender Soc. Pol'y & L. 623, 653-54 (2012).

[21] Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. Legis. & Pub. Pol'y 43, 88-89 (2008).

Similarly, another scholar examined the American Law Institute's Principles of the Law of Family Dissolution: Analysis and Recommendations (2002), which have been adopted and applied in certain jurisdictions in ways that protect the parent-child relationships of mothers like Brooke and children like M.B. That scholar found that there is no support in social science research for the proposition that proceedings like those in *H.S.H.-K.* that would establish the rights of parents like Brooke are harmful to children.[22]

At least eight jurisdictions have adopted, judicially or otherwise, the four-prong *H.S.H.-K.* test or another multi-factor test considering similar factors.[23]

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[22] Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 Va. J. Soc. Pol'y & L. 5, 51 (2002). In contrast, those who write to oppose the implementation of frameworks like the *H.S.H.-K.* test make extravagant and baseless predictions: for example, that such tests may recognize the claims of parents who "are as likely to resemble Count Olaf in A Series of Unfortunate Events as the unmarried version of Ozzie and Harriett (or Harriett and Harriett)[,]" or that such tests would have harmful effects on children. *See, e.g.*, William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. Legis. 263, 267-68 (2010). These authors provide no empirical basis for their arguments, and *Amici* could find no cases or studies that support their conclusions. In any event, there are no such allegations in this case, and at this stage the facts as articulated by Brooke and the Attorney for the Child must be taken as true. *Cron*, 91 N.Y.2d at 366.

[23] *See V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (approvingly citing *H.S.H.-K.* and granting non-biological, non-adoptive mother standing to seek visitation pursuant to psychological parent doctrine); *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wa. 2005) (adopting *H.S.H.-K.* test notwithstanding that "current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations"); D.C. Code. §§ 16-831.01 *et seq*. (providing that a "de facto parent" has standing to seek custody or visitation); *Hickey v. Hickey*, No. FA000162519S, 2008 Conn. Super. LEXIS 2975 (Conn. Sup. Ct. Nov. 18, 2008) (approvingly citing *H.S.H.-K.* and outlining six factor test);13 Del. C. § 8-201(c) (providing three factor test for de facto parent status); *Smith v. Guest*, 16 A.3d 920 (De.

Moreover, even jurisdictions that have not adopted the *H.S.H.-K.* factors or a similar test have addressed the parental status of LGBT individuals like Brooke in ways that do not leave them without standing to seek custody and visitation.[24] For

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2011) (affirming constitutionality of same and granting non-biological, non-adoptive mother standing to pursue joint legal and physical custody); *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. 2006) (adopting *H.S.H.-K.* test); *E.N.O. v. L.M.M.*, 429 Mass. 824, 829 (Mass. 1999) (affirming judgment granting non-adoptive, non-biological mother visitation with child, emphasizing that recognition of such parenthood "is in accord with notions of the modern family").

[24] *See, e.g. Egan v. Fridlund-Horne*, 211 P.3d 1213, 1224 (AZ. Ct. App. 2009) ("Whether the person seeking visitation under *in loco parentis* status is . . . [a] same-sex partner does not change the statutory mandate that the court consider the best interests of the child); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004) (awarding joint parental responsibility to non-biological, non-adoptive mother); *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011) (applying doctrine of *in loco parentis* and finding that non-adoptive, non-biological mother was a parent); *In re T.P.S.*, 978 N.E.2d 1070, 1084 (Ill. App. Ct. 2012) (reversing order denying standing to non-biological, non-adoptive mother, explaining, "If an unmarried person causes the birth of a child by the deliberate, premeditated conduct of artificial insemination under the express agreement with the mother to serve as coequal parent, that person should receive the same treatment in the eyes of the law as a person who biologically causes conception"); *In re A.B.*, 837 N.E.2d 965 (Ind. 2005) (former domestic partner not precluded from bringing action for parenting rights and responsibilities in view of child's best interests); *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010) (holding that a same-sex partner who was not biologically related to the child had standing to seek custody when the couple had planned the pregnancy by artificial insemination and had raised the child together); *In re L.F.A.*, 220 P.3d 391 (Mont. 2009) (affirming a joint parenting plan for same-sex partners and holding that the same-sex partner who was not biologically related to the child had standing to bring an action for a parenting plan and that she did not need to prove that the biological parent was unfit); *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009) (affirming decision to award parental interest to non-adoptive mother); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (explaining that courts may award parental rights to non-biological, non-adoptive parents in view of their equitable powers); *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (granting visitation to non-biological, non-adoptive mother where other mother had adopted child during the mothers' 22-year relationship); *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010) (affirming grant of custody to non-adoptive, non-biological mother); *Latham v. Schwerdtfeger*, 802 N.W.2d 66 (Neb. 2011) (holding that non-biological, non-adoptive mother had standing to seek custody and/or visitation under *in loco parentis* doctrine); *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014) (recognizing claim for presumed parentage by non-adoptive, non-biological mother); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012) (non-biological, non-adoptive mother had standing to

example, California recognizes the claims of parents like Brooke pursuant to the Uniform Parentage Act's presumption of parentage provisions. *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005); *see L.M. v. M.G.*, 208 Cal. App. 4th 133, 145 (Cal. App. 2012) (the family code "should not be applied to rebut a presumption of [parentage] . . . where the result would be to leave children with fewer than two parents.") (internal quotation and citation omitted). New York is one of only a minority of jurisdictions that have not recognized the standing of parents like Brooke in any capacity.

Courts applying the *H.S.H.-K.* test have demonstrated that they are capable of weeding out claims for custody or visitation from "unwanted . . . third part[ies]." *See Debra H.*, 14 N.Y.3d at 595. As the scholar who recently reviewed Wisconsin appellate opinions since the state adopted the test nearly twenty years earlier found, not "a single post-*H.S.H.-K.* appellate ruling in Wisconsin rais[ed] the issue of whether the four-part test was properly applied or whether any given individual

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pursue joint custody pursuant to parental presumption provisions of Uniform Parentage Act); *Ramey v. Sutton*, 362 P.3d 217, 221 (Ok. 2015) (recognizing that non-adoptive, non-biological mother stood *in loco parentis* to child and explicitly recognizing families similar to Brooke's); *Shineovich v. Shineovich*, 214 P.3d 29, 32 (Or. Ct. App. 2009) (extending presumption of parentage under artificial insemination statute to same-sex couples when biological mother consents to artificial insemination); *T.B. v. L.R.M.*, 567 Pa. 222 (Pa. 2001) (former same-sex partner who had not adopted her non-biological child nonetheless had standing to seek partial custody pursuant to doctrine of *in loco parentis*); *Rubano v. DiCenzo*, 759 A.2d 959, 966 (R.I. 2000) (holding the family court had jurisdiction to determine whether non-biological, non-adoptive ex-partner was a de facto parent of child born during the relationship); *Clifford K. v. Paul S. ex rel. Z.B.S.*, 619 S.E.2d 138 (W. Va. 2005) (finding that non-adoptive, non-biological mother was psychological parent and reversing lower court judgment denying her standing to seek custody).

qualified (or not) for standing under that standard."[25] To the contrary, the decisions under this test show that its application is straightforward.

Demonstrating the ability of courts to draw appropriate distinctions, a New Jersey court denied a great aunt who temporarily cared for a child standing because none of the parties intended her to form a parent-child relationship with the child. *J.W. v. R.J.R.*, No. A-4440-08T1, 2010 N.J. Super. Unpub. LEXIS 311 (N.J. Super. Ct. Feb. 16, 2010) (unpublished). A Pennsylvania court denied grandparents who housed their daughter and her children for four years standing, because the mother had never given permission to the grandparents to assume a parental role with respect to the children. *In the Interest of N.T.*, No. 1174 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 2355 (Pa. Super. Ct. Jan. 10, 2013) (unpublished). A Massachusetts court denied standing to a close family friend who was the trustee for a large amount of money left to a child under the mother's will and spent a considerable amount of time with the child and family, because "devotion to [a] child does not, without more, permit an adjudication of . . . visitation privileges." *Sayre v. Aisner*, 51 Mass. App. Ct. 794, 801 (Mass. App. 2001) (internal quotation omitted). These cases demonstrate that courts are capable of applying the *H.S.H.*-

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[25] Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind The Facade Of Certainty*, 20 Am. U.J. Gender Soc. Pol'y & L. 623, 651-56 (2012).

K. test and others like it in a way that does not unduly interfere with the rights of parents and in accordance with the best interests of children.

Furthermore, *Amici* are especially mindful of the ways in which abusive partners have used the courts to harass or intimidate former partners, particularly former partners with limited means. Whether dealing with an abusive non-biological and non-adoptive parent partner who seeks visitation or custody of children, or with an abusive biological or adoptive parent partner who seeks to harm the non-biological and non-adoptive parent by denying access to children, application of a test in the vein of *H.S.H.-K.* guards against abuse and harm to the victimized parent and child.[26] In addition, the theoretical possibility that individuals may attempt to misuse the judicial process does not justify disregarding the rights of many who have legitimate claims.[27] All forms of judicial process are

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[26] One way in which the Court may mandate that lower courts be attentive to such risks would be by requiring clear and convincing evidence of the parties' intent to co-parent a child.

[27] It is almost axiomatic "that the law will never suffer an injury and a damage without a remedy." *See, e.g., Kujek v. Goldman,* 150 N.Y. 176, 178 (N.Y. 1896) (internal quotation and citation omitted). However, courts in New York can as a matter of equity enjoin parties from abusing the judicial process. *See, e.g., Matter of Molinari v. Tuthill*, 59 A.D.3d 722, 723 (2d Dep't 2009) ("while public policy generally mandates free access to the courts, a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will. Here, the Family Court providently exercised its discretion in granting that branch of the mother's motion which was to require that the father seek permission of the court before filing future custody or visitation applications.") (citations omitted); *Matter of Shreve v. Shreve*, 229 A.D.2d 1005, 1006 (4th Dep't 1996) ("[W]hen a litigant is 'abusing the judicial process by hagriding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation'") (internal quotation and citation omitted).

subject to attempted manipulation, to "disruptive . . . battles . . . as a prelude to further potential combat[.]" *See Debra H.*, 14 N.Y.3d at 594. That does not mean that they should be abolished or foreclosed, particularly when a preexisting parent-child relationship is at stake and when the loss of a parent (biological, marital, adoptive, or other) can cause significant psychological harm to children and to the parents who love them.[28]

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the Decision and Order of the Appellate Division, Fourth Department; overturn *Alison D.* and its progeny; and affirmatively permit standing for Brooke and other non-biological, non-adoptive parents under DRL § 70 to ensure that the relationships of parents like Brooke with children like M.B. are recognized.

[28] Rebecca L. Scharf, *Psychological Parentage,* Troxel*, and the Best Interests of the Child*, 13 Geo. J. Gender. & L. 615, 634 (2012).

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