APL-2015-00235
Appellate Division-Second Department Docket No. 2013-10221
Family Court, Suffolk County Clerk Docket No. V-443-13

Court of Appeals

STATE OF NEW YORK

In the Matter of

ESTRELLITA A.,

Petitioner-Respondent,

—against—

JENNIFER L.D.,

Respondent-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 OPPOSITION TO THE 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.

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[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. 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).

Now before the Court are two cases, *Estrellita A. v. Jennifer L.D.* and *Brooke S. B. v. Elizabeth A. C.C.*, 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 case, Estrellita A's daughter ("H.") was born to her mothers, Petitioner-Respondent

Estrellita A. ("Estrellita") and Respondent-Appellant Jennifer D. ("Jennifer"), after Jennifer became pregnant with medical assistance using anonymous donor sperm. *Matter of Arriaga v. Dukoff*, 123 A.D.3d 1023, 1023 (2d Dep't 2014), *leave granted sub nom. Estrellita A. v. Jennifer L.D.*, 26 N.Y.3d 901 (2015). Estrellita, Jennifer, and H. lived together for years as a family and the couple shared responsibility for caring for their daughter from birth. *Id.* After Estrellita and Jennifer separated, Estrellita continued to visit with H. several days a week. *Id.*

Jennifer filed a petition in Family Court seeking child support from Estrellita; Estrellita filed a petition seeking custody or visitation. *Id.* at 1023-24. In the support proceeding, the Family Court found that, in accordance with principles of equitable estoppel, "uncontroverted facts establish[ed] that [Estrellita was] a parent" and was chargeable with H.'s support. *Id.* at 1024. Estrellita then amended her own petition, making clear that she was seeking custody or visitation as H.'s "adjudicated parent." *Id.* Jennifer moved to dismiss Estrellita's petition on the grounds that Estrellita did not have standing under DRL § 70 because she was not a biological or adoptive mother. *Id.* The Family Court denied Jennifer's motion on the basis of judicial estoppel; because Jennifer had asserted that Estrellita was a parent in the support proceeding and had secured child support on that basis, Jennifer was judicially estopped from subsequently arguing that Estrellita was not H.'s mother. *Id.*

In the present case, it is clear that the decision below holding that Jennifer should be judicially estopped from denying Estrellita's status as a parent for purposes of support, custody, and visitation should be affirmed. However, it is also time for this Court to recognize, as courts in a majority of other states have, that under principles of *equitable* estoppel "[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).

While the procedural history of this matter is admittedly unusual, *Amici* emphasize that H. 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.[3] According to one of the most recent surveys, 16% of same-sex couples in New York were raising children they considered their "own," and the majority of those couples were unmarried.[4] The impact of *Alison D*. has been to allow the dramatic removal of loving parents from vulnerable children at a critical developmental

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[3] For LGBT parents whose child was conceived using both donor sperm and a donor egg, and who have not yet 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 to whom the courts would grant standing to seek custody or visitation.

[4] 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.

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 able to avail themselves of these avenues to "legitimacy." Accordingly, if this Court were to reaffirm *Alison D.* and *Debra H.*'s rejection of parental standing by equitable estoppel under DRL § 70 (which *Amici* argue it should not do), such a decision would harm a significant number of New York families, many of whom are already marginalized, even if in this case the Court were to maintain H.'s bond with her parent Estrellita under the doctrine of judicial estoppel.

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.

Even though the Court could simply allow the holding below in this matter to stand, resting on the doctrine of judicial estoppel to recognize Estrellita as H.'s parent, this Court should instead revisit and overrule *Alison D.* to recognize standing for parents like Estrellita as a matter of equitable estoppel—not only in the present case, but in *Brooke S. B. v. Elizabeth A. C.C.* as well.

Today the Court has the opportunity to right the harm the *Alison D*. standard has caused to New York's children, to once again 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 (the "City Bar"), 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 comprised of 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[5] 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 assist 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.

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

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: 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 lesbian, gay, bisexual and transgender 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,[6] academics, and practicing attorneys in every area of the law, including constitutional and civil rights, family and matrimonial law, and

[6] 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.

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 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 to affirm the decision below, as judicial estoppel, which protects the integrity of the judicial process, was properly applied. Additionally, in keeping with society's evolving understanding of what constitutes a family, *Amici* urge the Court to reexamine *Alison D.*, as well as its discussion in *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010), in view of the harm they cause to New York families.

ARGUMENT

I. *ALISON D.* ADOPTED AN UNCONSTITUTIONAL AND UNNECESSARILY RESTRICTIVE DEFINITION OF "PARENT"

As *Amici* explain more fully in a separate brief in *In the Matter of Brooke S.B.*, the U.S. Constitution protects the integrity of the family unit and the rights of parents and children to maintain family relationships. The fundamental right of parents and children to maintain their relationships, like the right to marry, certainly extends to same-sex couples, whom the U.S. Constitution grants "equal dignity in the eyes of the law." *Obergefell*, 135 S.Ct. at 2608.

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). DRL § 70 does not specifically define the term "parent." *Debra H.*, 14 N.Y.3d at 608 (Ciparick, J., concurring in the result). It 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).

Notwithstanding New York courts' prior movement away from sex-based assumptions and towards a focus on children's best interests with respect to custody and visitation issues, *Alison D.* adopted and *Debra H.* discussed further a restrictive 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 mother 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 parents' entry into a civil union in Vermont. *Debra H.*, 14 N.Y.3d at 593, 601.

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).[7] 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*.[8] These families raise children even though, by virtue of their very nature, both members of a same-sex

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[7] 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.

[8] 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.

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. EQUITY DEMANDS THAT ESTRELLITA BE RECOGNIZED AS A PARENT

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 511, 514 (Sup. Ct. Erie County 1953) (citation omitted). Even if "parent" in DRL § 70 only applies to those with a genetic, marital, or adoptive relationship, which *Amici* dispute, New York courts can and should use their equitable powers to honor the rights of children like H. and parents like Estrellita.

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. 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)). Where, as here, a party has insisted on the truth of a matter before a court, the party should not be permitted to assert the opposite in a later proceeding.

B. DRL § 70 Leaves Intact Courts' Common Law Equitable Powers

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, 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; *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. *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 (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., Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006).

C. Jennifer is Judicially Estopped From Challenging Estrellita's Status as a Parent

Judicial estoppel applies "where a party to an action has secured a judgment in . . . her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because [her] interests have changed." *Anonymous v. Anonymous*, 137 A.D.2d 739, 741 (2d Dep't 1988). The doctrine "protect[s] the integrity of the judicial process and . . . protect[s] judicial integrity by avoiding the risk of inconsistent results in two proceedings." *Davis v. Citibank, N.A.*, 116 A.D.3d 819, 821 (2d Dep't 2014) (internal citation marks and quotation marks omitted). New York courts have applied the doctrine of judicial estoppel in the context of petitions for visitation. *Matter of Mukuralinda v. Kingombe*, 100

A.D.3d 1431, 1432 (4th Dep't 2012). In other areas of family law, this Court has held that parties are estopped from taking positions in litigation contrary to those they have taken in other sufficiently serious contexts. *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009) (husband estopped from claiming funds were separate property when he previously represented them as business income on tax returns).

In the support proceeding, Jennifer testified that Estrellita was H.'s mother and sought relief on that basis. She obtained the relief she sought. In this proceeding, Jennifer now claims exactly the opposite. Jennifer secured a judgment in her favor by adopting one position and is now adopting a directly contrary position because her interests—although certainly not the interests of Jennifer and Estrellita's daughter H.—have changed. *Anonymous*, 137 A.D.2d at 741. Application of the doctrine of judicial estoppel not only protects the integrity of the judicial system and avoids the risk of inconsistent results in two proceedings; it protects the integrity of H.'s bond with her mother, Estrellita, provides H. with Estrellita's physical and emotional support in addition to financial support, and provides a coherent result with respect to her family.

D. Judicial Estoppel Applies Even if the Court Declines to Overrule *Debra H.* and *Alison D.*

Alison D. and *Debra H.* did not concern and do not appear to address the unique procedural posture of this case. Estrellita seeks visitation on the grounds

that she was adjudicated to be H.'s parent in a prior legal proceeding. Estrellita thus has a "legally-recognized parental relationship" with H. *See Debra H.*, 14 N.Y.3d at 601 (Graffeo, J., concurring). Accordingly, it is within the Court's power to affirm the decisions below without disturbing the holdings of *Alison D.* and *Debra H.* As discussed further below, however, simply affirming the lower court's decision would still leave a broad swath of New York children in danger of losing the economic and emotional support of a loving and willing parent at the sole discretion of the biological parent if the parents end their relationship with one another.

E. The Present Matter Demonstrates That *Alison D.* and *Debra H.* Should Be Overruled

In *Debra H.*, the Court explained in dictum 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, including the present matter, make clear 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).

As it stands, a non-biological, non-adoptive parent can be ordered to pay financial support based on principles of equitable 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. Should this Court simply affirm the decision below while leaving *Alison D.* and *Debra H.* undisturbed, such parents would be required to wait, as Estrellita essentially did, for their former partners to institute and prevail in support proceedings prior to seeking visitation or custody pursuant to DRL § 70.

Amici urge the Court to consider the perverse incentives and inefficiency that affirming the decision below, without more, would create.[9] "[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 Estrellita *as parents* must be recognized and children like H. must be treated no differently from the children of opposite-sex parents. The integrity of their bond should not depend on former partners instituting support proceedings—the assurances that parents give to children that they have two parents who love and support them are no less

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[9] For example, a parent without biological, marital, 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 such 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 as 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. It would indeed be a perverse result if a child like H. would receive the emotional support of her life-long parent Estrellita only because her other parent Jennifer were unable or unwilling to forego Estrellita's financial support.

deserving of respect than representations made to a court in support proceedings. *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).

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

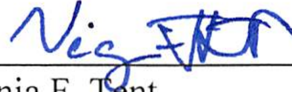
The four factor test developed by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (1995), provides a fair, flexible, workable approach to protecting the dignity of LGBT families. *Amici* respectfully refer the Court to their arguments on these points in Section IV of their brief in *In the Matter of Brooke S. B.*, which have equal importance in the present matter as the Court reconsiders the purported "bright-line" rule set out in *Alison D.* and discussed further in *Debra H.*

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the Decision and Order of the Appellate Division, Second Department, on judicial estoppel grounds; overturn *Alison D.* and its progeny; and allow standing and equitable estoppel to be applied under DRL § 70 to ensure that the relationships of parents like Estrellita and children like H. are recognized.

Dated: March 22, 2016
New York, New York

Respectfully submitted,



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