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Court of Appeals

STATE OF NEW YORK

DEBRA H.,

Petitioner-Appellant,

—against—

JANICE R.,

Respondent-Respondent.

BRIEF OF NEW YORK CITY BAR ASSOCIATION, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS - NEW YORK CHAPTER, METROPOLITAN BLACK BAR ASSOCIATION, NEW YORK COUNTY LAWYERS' ASSOCIATION, PUERTO RICAN BAR ASSOCIATION, INC., RICHMOND COUNTY BAR ASSOCIATION, AND WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK

AS PROPOSED *AMICI CURIAE*

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PRELIMINARY STATEMENT

At issue here is whether, consistent with New York's strong public policy of protecting and advancing the best interests of children, the non-biological, non-adoptive mother of a child conceived by the mother's same-sex partner through anonymous donor insemination and raised jointly by both mothers in the context of a committed relationship, has standing to seek custody or visitation rights – as well as a duty of support – as to that child upon the dissolution of the parents' relationship. Under the Decision and Order of the Appellate Division, First Department, in this case, and numerous other cases relying on this Court's decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991), such "de facto" parents have for the last eighteen years automatically been denied standing.[1] The direct result of each of these cases has been the extinguishing of an asserted loving, parent-child bond. Such devastating judicial outcomes can by no means be squared with the "best interests of the child" standard applicable in New York custody and visitation cases. Nor can they be harmonized with this Court's well-reasoned decision in the recent landmark case of *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 820 N.Y.S.2d 199 (2006), which clarified the primacy of the "best interests" test in determining the applicability of equitable estoppel doctrine to parental status determinations. The case at bar presents a unique opportunity for

[1] *See*, *e.g.*, *Janis C. v. Christine T.*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2nd Dep't 2002); *C.M. v. C.H.*, 6 Misc. 3d 361, 789 N.Y.S.2d 393 (Sup. Ct. N.Y. Co. 2004); *Speed v. Robins*, 288 A.D.2d 479, 732 N.Y.S.2d 902 (2nd Dep't 2001).

the Court to revisit *Alison D*. and reconcile these opposing aspects of a critical area of New York family law.

INTEREST OF *AMICI CURIAE*

The New York City Bar Association ("NYCBA") is 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. It was among the first bar associations to have a standing committee dealing with lesbian and gay issues. NYCBA has over 23,000 members who serve hundreds of thousands of clients, and who have a vital interest in ensuring that New York grants equal rights to people regardless of sexual orientation and sex. Many of NYCBA's members practice in the area of family law. These and other members represent clients whose very access to the courts may be affected by the resolution of this case. With respect to the particular questions raised here, NYCBA has long taken an active interest in protecting the legal rights of the diverse types of families that compose modern American society.

NYCBA submits this brief to emphasize that the categorical denial of standing to non-biological, non-adoptive parents to seek custody and visitation with the children they have reared from birth works acute and potentially devastating harms to such parents and, even more importantly, to their children.

NYCBA strongly urges the Court to review this case and, in keeping with the Court's recent precedents relating to parental status determinations and society's evolving understanding of what constitutes a "parent", reverse the decision of the court below denying standing to Debra H.[2]

The American Academy of Matrimonial Lawyers was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, with the goal of protecting the welfare of the family and society. Its members are recognized as expert practitioners in the field. The American Academy's New York Chapter ("AAML-NY") has been in existence more than thirty years and has approximately 177 members. As a leading New York matrimonial law organization, AAML-NY is deeply concerned that New York law recognize that American families have undergone major changes in structure and type, and that this evolving reality includes thousands of New York same-sex couples.[3]

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[2] This brief, submitted on behalf of NYCBA as a whole, was independently reviewed and is strongly supported by the seven NYCBA committees whose areas of interest and expertise intersect with the issues presented in this case. The reviewing committees were the Committee on Children and the Law, the Council on Children, the Family Court and Family Law Committee, the Matrimonial Law Committee, the Committee on Lesbian, Gay, Bisexual & Transgender Rights, the Sex & Law Committee, and the Civil Rights Committee.

[3] This brief represents the views of the New York Chapter of the American Academy of Matrimonial Lawyers. It does not necessarily reflect the views of the American Academy of Matrimonial Lawyers. This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The New York Chapter of the American Academy of

Founded on July 5, 1984, the Metropolitan Black Bar Association ("MBBA") was created upon the merger of two of the nation's oldest black bar organizations, the Harlem Lawyers Association (founded 1982) and the Bedford Stuyvesant Lawyers Association (founded 1933). For over seventy-five years, MBBA has continued to provide a voice for people of African ancestry in the legal profession and their communities.

Additionally, MBBA is an organization committed to the human rights of all individuals, regardless of their race, religion, ethnic background or sexual orientation. As stated in the organization's motto, from the late Dr. King, "[i]njustice anywhere is a threat to justice everywhere." MBBA joins this brief in keeping with our historical commitment to achieving for all people equal protection under the law.

The New York County Lawyers' Association ("NYCLA") is a not-for-profit membership organization of approximately 10,000 attorneys practicing primarily in New York County, founded and operating specifically for charitable and educational purposes. NYCLA's certificate of incorporation specifically provides that it is to do what it deems in the public interest and for the public good, and to seek reform in the law. Founded in 1908, NYCLA was the first major bar association in the country that admitted members without regard to race, ethnicity,

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Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as *amicus*, and has done so pro bono publico.

religion or gender and has since played a leading role in the fight against discrimination both in the profession and under local, state and federal law. NYCLA's bedrock principles have been the inclusion of all who wish to join and the active pursuit of legal system reform. Consistent with its founding and sustaining principles of non-discrimination and inclusion, NYCLA joins in this brief based on its longstanding belief that all families in New York, including families of same-sex couples and non-traditional families formed by non-biological, non-adoptive parents, should enjoy the same rights and protections under the law.

The Puerto Rican Bar Association ("PRBA") is a professional organization composed of members of the bar and law students of Latino ancestry as well as other interested persons. PRBA was founded in 1957 in New York to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional and educational advancement of Latino attorneys, the Latino Community and the administration of justice. As an advocate for the best interests of children, PBRA strongly supports the legal rights of diverse types of families.

The Richmond County Bar Association ("RCBA") was founded in 1909 for "the cultivation of the science of jurisprudence; the promotion of reforms in the law; the facilitation of the administration of justice; the elevation of the standard of integrity, honor and courtesy in the legal profession." It is in pursuit of promoting

reforms in the law that the 700 member RCBA joins this brief.

The Women's Bar Association of the State of New York ("WBASNY") is a statewide organization of attorneys, comprising eighteen chapters with more than 3,600 members throughout the State of New York. Members include jurists, academics and practicing attorneys who work in every area of the law including, but not limited to, constitutional and civil rights, children's rights, and matrimonial law.

Since its formation in 1980, WBASNY has been dedicated to the advancement of equal rights and the fair administration of justice for all persons, whether male or female. WBASNY's perspective is derived from the experiences of a membership that spans a broad cross-section of the diverse cultures in this State. WBASNY has consistently supported legislation and lawsuits ensuring the benefits of marriage for same-sex couples. WBASNY joins this brief because of our deep concern that New York law fails to afford same-sex couples and their children the rights and privileges afforded opposite-sex couples and their children.

STATEMENT OF FACTS

Amici hereby adopt the Statement of Facts contained in Debra H.'s Memorandum of Law in Support of Her Motion for Leave to Appeal, dated July 2, 2009.

STANDARD FOR GRANTING MOTION

It is well established that leave to appeal should be granted where the issues present: (1) "a conflict with prior decisions of this Court," (2) "involve a conflict among the departments of the Appellate Division," or (3) are "of novel or of public importance," such as to address outmoded precedent or the development of emerging areas of common law. 22 NYCRR § 500.22(b)(4); Stuart M. Cohen, *et al.*, *The New York Court of Appeals Civil Jurisdiction and Practice Outline* § III(C), *available at* http://www.nycourts.gov/ctapps/forms/civilpractice_05.htm (Sept. 2007). Because this case satisfies all three aspects of this standard, Debra H.'s Motion for Leave to Appeal should be granted.

ARGUMENT

I. *Alison D.* Has Been Superseded by *Shondel* and Should Now Be Reconsidered in the Interests of Consistency and Basic Fairness

Leave to appeal should be granted so that this Court can resolve the logical disjunctions and severe inequities in New York's law governing parental status determinations. Since 1991, this Court's decision in *Alison D.* has generally been construed by courts as precluding the application of equitable estoppel to confer standing on a non-biological, non-adoptive mother to seek custody of or visitation with her child, notwithstanding the closely bonded, nurturing relationship she and her child – with the active support of the de facto mother's same-sex partner, the child's biological mother – have shared from the child's birth. In an apparent sharp departure from *Alison D.*, however, in 2006 the Court held in *Shondel* that a non-biological, non-adoptive parent who had held himself out as the child's father was equitably estopped from denying his paternity and his corresponding child support obligation notwithstanding DNA evidence that he was not the child's biological father. 7 N.Y.3d at 327, 820 N.Y.S.2d at 203. In so holding, the Court explained,

> Cutting off that support, *whether emotional or financial*, may leave the child in a worse position than if that support had never been given. Situations vary, and the question whether extinguishing the relationship and its attendant obligations will disserve the child is one for [the court] based on the facts in each case. Here, Family Court found it to be in the best interests of the child that

> Mark be declared her father and the Appellate Division properly affirmed.

Id. at 330, 820 N.Y.S.2d at 204-05 (emphasis added).[4] Whether equitable estoppel confers parental duties and rights in a given case, the Court held, "*turns exclusively on the best interests of the child*." *Id*. (emphasis added).

It is apparent that under the "best interests" rule enunciated in *Shondel*, were a female de facto parent like Debra H. in the instant case to deny her maternity in a support proceeding on the basis that she and her child were biologically unrelated, she, like Mark D. in *Shondel*, would be equitably estopped from doing so.[5] For a court to hold otherwise – to conclude that equitable estoppel

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[4] This Court's emphasis in *Shondel* on preserving both the financial and the legal ties between de facto parents and their children fully accords with *Matter of Jacob and Dana*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995), where the Court recognized "second parent" adoption rights for same-sex partners. The advantages which would result from such adoptions, the Court observed in *Jacob and Dana*, include "Social Security and life insurance benefits in the event of a parent's death or disability, the right to sue for the wrongful death of a parent and the right to inherit under rules of intestacy." *Id.* at 658, 636 N.Y.S.2d at 78. "Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents. . . will continue should the coparents separate . . . . *[V]iewed from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency with both parent figures.*" *Id.* (Emphasis added.)

[5] *H.M. v. E.T.*, 881 N.Y.S.2d 113, 2009 Slip Op. 04240 (2d Dep't 2009), in which a divided panel of the Appellate Division, Second Department, recently held that Family Court lacked jurisdiction to adjudicate a lesbian de facto mother a legal parent and to require her to pay support, is inapplicable here. In *H.M.*, the Appellate Division stated that Family Court lacked the power under the Uniform Interstate Family Support Act to grant equitable relief; specifically, the power to determine whether a de facto mother should be estopped from denying her parentage or whether "estopping [her] from denying her parentage . . . would be in the child's best interests." *Id.* at 118-19. In so holding, however, the court emphasized that its decision "[did] not leave H.M. bereft of a forum for the adjudication," because the Family Court could transfer the proceeding "to the Supreme Court – *a court competent to entertain H.M.'s application*." *Id.* at

applied only to *male* or *heterosexual* de facto parents – would be manifestly irrational and would thus raise serious, potentially constitutional,[6] concerns.[7]

It would likewise be irrational to hold that a de facto mother, while obligated to pay child support, enjoyed no corresponding parental *rights*. In *Shondel*, this Court explicitly recognized the necessary and commonsensical symmetry between parental duties and parental rights, applying equitable estoppel to ensure that the de facto parent's support, "whether emotional or financial," would not be cut off. 7

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119 (emphasis added). Because the instant case originated in Supreme Court – "a court of general jurisdiction in law and equity," *id.* at 116 (citing N.Y. Const., art. VI, § 7) – the holding in *H.M.* does not preclude the application of equitable estoppel here to adjudicate Debra H.'s status as a legal parent. Indeed, *H.M.* implicitly supports the decision of the Supreme Court in this case to apply estoppel doctrine on behalf of Debra and her child.

H.M. is also distinguishable in that, unlike in *Debra H.*, the petitioner in *H.M.* was found to have failed both to preserve her constitutional arguments for appellate review and to provide the requisite notice to the Attorney General. On the basis of these perceived failures, the Appellate Division declined in *H.M.* to consider the equal protection concerns expressed by the two dissenting justices in the case. *Id.* at 119. Here, where the constitutional issues were briefed below and the Attorney General was properly notified (*see*, *e.g.*, Reply Affirmation of Bonnie E. Rabin in Further Support of Emergency Motion for Custody and Parental Access, July 3, 2008, at 22-26), the constitutional issues are properly before the Court.

[6] Fundamental principles of equal protection and due process, together with basic notions of fairness, require that government classifications of protected categories be reasonable—not capricious, arbitrary, or irrational. *See, e.g., People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 330, 333-34, 372 N.Y.S.2d 590, 593, 596-97 (1975); *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 53, 643 N.Y.S.2d 21, 28 (1996) (due process requires that government denial of a right not be arbitrary or capricious); *Abrams v. Bronstein*, 33 N.Y.2d 488, 492, 354 N.Y.S.2d 926, 929-30 (1974) ("An agency of the State denies equal protection when it treats persons similarly situated differently under the law, and this difference may be created by the grant of a preference as well as by the imposition of a burden.") (internal citation omitted).

[7] Indeed, equal protection concerns recently led the Oregon Court of Appeals, in a unanimous decision, to confer legal parentage on a lesbian de facto mother under a statute which, by its express terms, established parentage only in men whose wives, with the husbands' consent, conceived children through *in vitro* fertilization. *Shineovich v. Kemp*, No. 070363564, 2009 WL 2032113 (Or. App. July 15, 2009).

N.Y.3d at 330, 820 N.Y.S.2d at 204-05.

Even before *Shondel*, post-*Alison D.* cases repeatedly recognized that a de facto parent's support obligations coincide with parental rights. In *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 287, 676 N.Y.S.2d 677, 681 (2d Dep't 1998), for example, the Appellate Division, Second Department, applied equitable estoppel to extend visitation rights to a de facto parent. *Jean Maby* involved a married, opposite-sex couple with two children, one of whom was born prior to the marriage and was not biologically related to the de facto father. The court held in *Jean Maby* that the de facto father could invoke equitable estoppel to continue his relationship with the child, emphasizing the equal applicability of equitable estoppel to support cases and parental rights cases, and noting that it would be "*inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid supporting the child, but preclude a nonbiological father from invoking the doctrine against the biological mother in order to continue a long-standing relationship with the child*." (emphasis added). Likewise, in *Christopher S. v. Ann Marie S.*, 173 Misc. 2d 824, 829, 662 N.Y.S.2d 200, 203 (Fam. Ct. Suffolk Co. 1997), involving facts similar to those in *Jean Maby*, the court perceived "no logical reason for allowing the doctrine of equitable estoppel to be used to advance the best interests of the child in a paternity case and to disallow application of that doctrine in the context of a custody case, not involving issues of paternity."

(emphasis added); *see also Gilbert A. v. Laura A.*, 261 A.D.2d 886, 887, 68 N.Y.S.2d 810, 811 (4th Dep't 1999) (holding that a de facto father was entitled to present proof on the issue of whether equitable estoppel could confer standing on him to seek visitation rights with his child, even though it was clear to the court that the de facto father was not the child's biological parent); *L.S.K. v. H.A.N.*, 813 A.2d 872, 877-78 (Pa. Super. 2002) (recognizing that support obligations and custody rights go hand in hand, since parents are responsible for both the "emotional *and* financial needs" of children) (emphasis added).

This Court should grant leave to appeal in the instant case in order to confirm, consistent with *Shondel* and the other authorities cited above, that de facto parents have both a duty of support and a concomitant right to petition for custody of or visitation with the children they rear with their partners.

II. Consistent with New York's Child-Centered Public Policy and the Historical Applications of Equitable Estoppel Doctrine, Standing Should be Conferred Evenhandedly to De Facto Parents in Custody and Visitation Proceedings

A. Denying Application of Equitable Estoppel in Same-Sex De Facto Parent Cases Violates Public Policy

Courts' automatic denial of custody and visitation rights to non-biological, non-adoptive parents cannot be squared with New York's strong public policy of protecting and advancing the best interests of children. Both the Domestic Relations Law ("DRL") and the Family Court Act ("FCA") contain language

expressly incorporating this critical, child-focused policy. *See* DRL § 70 ("*[T]he court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness*, and make award accordingly.") (emphasis added); FCA § 418 (court may refuse to order a DNA test "upon a written finding by the court that [such a test] *is not in the best interests of the child"*) (emphasis added); *see also Shondel*, 7 N.Y.3d at 331, 820 N.Y.S.2d at 205 (in determining whether estoppel confers parental status, "the only interest for the court is how the interests of the child are best served").

Citing the severely restrictive definition of "parent" propounded by *Alison D.*, however, numerous courts have reluctantly refrained from applying equitable estoppel to protect the relationships between de facto parents and their children. In *Alison D.*, a non-biological, non-adoptive mother whose long-term female partner had conceived a child during their relationship using artificial insemination, was held to lack standing to seek visitation, notwithstanding the de facto mother's full involvement in the decision to have the child, her continued emotional and financial support of the child, and the parents' use of the de facto mother's surname as the child's middle name. 77 N.Y.2d at 655, 569 N.Y.S.2d at 587. Despite these and numerous similar facts, the Court held that under DRL § 70 the de facto mother was a legal stranger to her child.

For nearly two decades, *Alison D.* has clashed with New York's child-

centered public policy in the context of judicial parentage determinations. For example, in *Janis C. v. Christine T.*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002), the Appellate Division, Second Department, cited *Alison D.* in declining to extend legal recognition to the relationship between a de facto mother and her two children. In light of *Alison D.*, the Appellate Division concluded it was irrelevant that the de facto mother and the biological mother in *Janis C.* had committed themselves as life partners in a formal ceremony, that they had lived in the same household with their children, that they had jointly made the decision to conceive children through artificial insemination, that the children had formed psychological bonds of attachment to the de facto mother, and that the de facto mother had been fully involved in all decisions regarding the rearing of the children. 294 A.D.2d at 496-97, 742 N.Y.S.2d at 382-83. The court held that equitable estoppel, though a basis for conferring standing on opposite-sex de facto parents, did not apply to *same-sex* couples, stating that "[a]ny extension of visitation rights to a same-sex domestic partner who claims to be a 'parent by estoppel,' 'de facto parent,' or 'psychological parent' must come from [the Legislature] or the Court of Appeals." *Id.*

In *C.M. v. C.H.*, 6 Misc. 3d 361, 369, 789 N.Y.S.2d 393, 401 (Sup. Ct. N.Y. Co. 2004), the Supreme Court, New York County, likewise concluded that *stare decisis* prevented it from applying equitable estoppel to confer standing on a non-

biological, non-adoptive mother to seek custody or visitation. A consequence of *C.M. v. C.H.* was that the parties' later born daughter, who had not been formally adopted by the de facto mother, was held to be in a legally distinct category from her brother, whom petitioner had formally adopted. *Id.* at 362-63, 789 N.Y.S.2d at 396-97. Despite both parents' involvement in the decisions to conceive both children, the family's cohabitation for more than eight years, and the fact that a formal adoption had been completed for one of the children, the Supreme Court concluded that under *Alison D.* it had no choice but to deny recognition to the relationship between the de facto mother and daughter. *Id.*; *see also Anonymous v. Anonymous*, 20 A.D.3d 333, 334, 797 N.Y.S.2d 754, 754 (1st Dep't 2005) (holding that non-biological, non-adoptive parent lacked standing to seek visitation notwithstanding parent's "longstanding, loving and nurturing relationship with the child"); *Denise B. v. Beatrice R.*, 9/19/2005 N.Y.L.J. 21, col. 1 (Fam. Ct. N.Y. Co. 2005) (relying on *Alison D.* and denying standing to de facto mother to seek visitation rights, despite child's "close and loving relationship with [her] since infancy").

With the instant case, this Court has the opportunity to revisit *Alison D.* and to extend to custody and visitation proceedings involving de facto parents and their children this State's policy of protecting children's best interests. Application of the "best interests" polestar should not turn on whether a child's parents are gay or

straight, married or unmarried.[8] The benefits of the policy should be universally available to children in New York.[9]

B. The Principle of Fairness Animating the Common Law Doctrine of Equitable Estoppel Compels the Doctrine's Equal Application to Non-Heterosexual Parents

Courts' refusal to apply equitable estoppel doctrine as a basis for conferring standing on non-heterosexual parents is strikingly inconsistent with the doctrine's historical emphasis on fairness and equity. The doctrine of 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." *Syracuse Orthopedic Specialists, P.C. v. Hootnick*, 42 A.D.3d 890, 893, 839 N.Y.S.2d 897, 900 (4th Dep't 2007) (citation omitted). Indeed, courts have called equitable estoppel one of the "most useful tools" at a court's disposal when,

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[8] The number of families potentially impacted by the resolution of this case has almost quadrupled since *Alison D.* was decided in 1991. A New York census shows that the number of same sex-couple households in New York increased by 238% from 13,748 in 1990 to 46,490 in 2000, and increased to 50,854 by 2005. As of 2005, at least 18,335 (and up to 31,000) children in New York lived in households headed by same-sex couples. http://www.law.ucla.edu/WilliamsInstitute/publications/NewYorkCensusSnapshot.pdf, last visited on 7/17/09.

[9] The neutral application of the best interest standard sought by Debra H. is fully supported by other areas of New York family law in which sexual orientation is deemed an impermissible consideration. *See*, *e.g.*, 18 NYCRR § 421.16(h)(2) (single lesbian and gay individuals may adopt children); *Guinan v. Guinan*, 102 A.D.2d 963, 477 N.Y.S.2d 830 (3d Dep't 1984) (whether a mother has a sexual relationship with another woman is generally not determinative in a custody dispute).

as here, "the facts cry out for relief." *Huntington TV Cable Corp. v. State of N.Y. Com'n on Cable Television*, 94 A.D.2d 816, 819, 463 N.Y.S.2d 314, 317 (3d Dep't 1983); *aff'd,* 61 N.Y.2d 926, 414 N.Y.S.2d 718 (1984). Notwithstanding the observation in *Shondel* that "[e]quitable estoppel is gender neutral," 7 N.Y.3d at 327, 820 N.Y.S.2d at 202, as discussed above, *see supra* Part I, under *Alison D.* courts have repeatedly applied the doctrine in a non-neutral way, allowing the termination of relationships between lesbian de facto mothers and their children without affording these parents the legal protections extended to heterosexual de facto parents and their offspring. The repeated denial of standing to such parents, and the resultant preclusion of any consideration by courts of the bests interests of the children involved in cases like this one, have created a condition in New York family law which, without a doubt, "cr[ies] out for relief."

Likewise, it is fundamentally unfair and unreasonable for courts routinely to apply equitable estoppel to correct injustices in a broad array of commercial and business contextss while refusing to employ it in cases such as this, where the stakes – here, the very survival of an established parent-child relationship – are so high. *See e.g., Montefiori v. Montefiori*, 96 Eng. Rep. 203 (K.B.) (1762) (reasoning that equity required the enforcement of a promissory note given without consideration because marriage was consummated based on the validity of the note); *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio 154, 157-58 (Sup. Ct. N.Y. Co.

1848) (estopping insurer from challenging validity of insurance policy on basis of misrepresentations by insured where insurer had already benefited from and collected premiums on policy); *Horn v. Cole*, 51 N.H. 287, *13 (N.H. 1868) (estopping owner of goods from asserting his ownership where he had previously falsely denied ownership in an effort to avoid attachment by creditor); *Empire Fin. Servs., Inc. v. Bellantoni*, 53 A.D.3d 1095, 1096, 861 N.Y.S.2d 898, 900 (4th Dep't 2008) (estopping plaintiffs from enforcing non-solicitation covenants against former employees, reasoning that plaintiffs had encouraged former employees to obtain competing employment).

Consistent with the equitable estoppel doctrine's roots in neutral fairness principles and its historical application at common law to a wide variety of parties, conduct and facts, this Court should confirm the doctrine's applicability to cases such as this one, in which a parent-child relationship hangs in the balance.

III. *Alison D.* is Outmoded, and Strict Application of the Decision Ignores the Needs of Many New York Families

The narrow, rigid conception of "parent" embodied in *Alison D.* does not square with the modern reality of many New York families. Leave should be granted in this case, and *Alison D.* should be revisited, so that the best interests of all New York children can be fully secured, irrespective of the gender, sexual

orientation, or other characteristics of their parents.[10]

i. *Courts Have Consistently Criticized or Disagreed With Alison D.*

New York's lower courts have rightly criticized *Alison D.* for producing harsh and inequitable results contrary to the best interests of children, lamenting, for example:

- "Given the frequency with which children today are being raised by and

[10] Over the last two decades, New York law has steadily evolved toward greater recognition of the rights of lesbian and gay individuals and their families. For example, under an unbroken line of recent decisions, New York courts have held that lawful out-of-state same-sex marriages are entitled to formal recognition. *See, e.g.*, *Martinez v. County of Monroe*, 50 A.D.3d 189, 192-93, 850 N.Y.S.2d 740, 743 (4th Dep't 2008) (holding that employer unlawfully discriminated against employee by refusing to recognize employee's valid Canadian same-sex marriage); *Beth R. v. Donna M.*, 19 Misc. 3d 724, 730, 853 N.Y.S.2d 501, 506 (Sup. Ct. N.Y. Co. 2008) (denying defendant's motion to dismiss divorce action and holding that the parties' Canadian marriage is valid under New York law). The Governor's Counsel in 2008 cited *Martinez* in directing executive agencies to extend recognition to out-of-state same-sex marriages. Under the directive, *inter alia*, insurers in New York must now extend spousal benefits to same-sex and opposite-sex spouses on an equal basis, *see* N.Y. State Ins. Dep't, Policy Bulletin No. 99-12, General Admin. Manual § 0212 (2008); banks are required to treat same- and opposite-sex spouses equally in the investment, lending and borrowing contexts, *see* N.Y. State Banking Dep't, *Industry Letters: Definition of "Spouse" for Purposes of the Banking Law* (2009); and same-sex spouses are entitled to the same priority in surrogate decision making as opposite-sex spouses, *see* E-mail from Tom Fisher, Director New York State Surrogate Decision Making Commission, to Staff and Coordinators (June 27, 2008).

Same-sex *domestic partners* have also been granted rights to hospital visitation, N.Y. Public Health Law § 2805-q (McKinney 2004), and to direct the disposition of their partners' remains, N.Y. Public Health Law § 4201 (McKinney 2006). Similarly, same-sex domestic partners of 9/11 survivors were eligible to receive awards from the 9/11 Victim Compensation Fund. *See* Kenneth R. Feinberg, *Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001*, Vol. I, 48-49; N.Y. Work. Comp. Law § 4 (McKinney 2002) (retroactive to September 10, 2001). Likewise, public universities have extended health benefits to the same-sex domestic partners of employees and retirees. *See*, *e.g.,* City University of New York, Information Packet for CUNY Employees and Retirees Who Have Entered into a Domestic Partnership, Same-Sex Marriage, or Civil Union (Fall 2008) (explaining how to register a same sex partner for New York city health benefits).

bonding with long-term heterosexual stepparents . . . and non-marital homosexual partners, perhaps the time has come for the Court of Appeals to revisit its ruling in *Alison D.*" *Denise B. v. Beatrice R.*, 9/19/2005 N.Y.L.J. 21, col. 1 (Fam. Ct. N.Y. Co. 2005).

- "[A] recurring theme throughout all of these standing cases is the injustice they work upon children." *C.M. v. C.H.*, 6 Misc. 3d 361, 370, 789 N.Y.S.2d 393, 402 (Sup. Ct. N.Y. Co. 2004).
- "[I]n recognizing the primacy of the rights of the biological parent, the Court of Appeals has defined a rigid construct which concomitantly ignores the reality of the relationships that nurture and develop a child." *Anonymous v. Anonymous*, 20 A.D.3d 333, 334, 797 N.Y.S.2d 754, 755 (1st Dep't 2005) (Sweeny, J., concurring).
- "If in custody and visitation disputes, common sense, reason and an overriding concern for the welfare of a child are to prevail over narrow selfish proclamations of biological primacy, the assertion of equitable estoppel by a non-biological or non-adoptive parent must be given credence by the courts." *Multari v. Sorrell*, 287 A.D.2d 764, 771, 731 N.Y.S.2d 238, 244 (3d Dep't 2001) (Peters, J., concurring).

Not surprisingly, this unsatisfactory state of affairs has prompted efforts to narrow the reach of *Alison D. See, e.g.*, *Jean Maby H.* v. Joseph H., 246 A.D.2d 282, 288-89, 676 N.Y.S.2d 677, 681-82 (2d Dep't 1998) (declining to apply *Alison D.* "blindly," and applying equitable estoppel to confer parental rights on a non-biological father consistent with the child's best interests); *Beth R. v. Donna M.*, 19 Misc. 3d 724, 734, 853 N.Y.S.2d 501, 508-09 (Sup. Ct. N.Y. Co. 2008) (In light of *Shondel*, holding that a non-biological, non-adoptive mother had standing to petition for a custody determination based on "the best interests of the children.").

Alison D. is also increasingly at odds with a growing body of decisional law across the country. Its restrictive approach to statutory interpretation and stringent

application of equitable and common law doctrines have been routinely rejected in favor of an approach that allows non-adoptive, non-biological parents, whether in same-sex or opposite-sex relationships, to maintain claims for child custody. For example, in *T.B. v. L.R.M.*, a case with striking factual similarities to *Debra H.*, the Supreme Court of Pennsylvania held that a non-biological mother had standing because prior to the dissolution of her relationship with the child's biological mother, she had "assumed a parental status and discharged parental duties with the consent of the [biological mother]." *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001). The Court remarked in *T.B.* that:

> the nature of the relationship between Appellant and Appellee has no legal significance to the determination of whether Appellee stands *in loco parentis* to A.M. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.

Id. at 918-19.

Likewise, in *In re Parentage of L.B.*, the Supreme Court of Washington granted standing to a non-biological, non-adoptive parent and noted that "[n]umerous other jurisdictions have recognized common law rights on behalf of de facto parents." *In re Parentage of L.B.*, 122 P.3d 161, 174-75 (Wash. 2005). *See also, e.g., In re Parentage of A.B.*, 837 N.E.2d 965, 967 (Ind. 2005) (conferring standing on a non-adoptive, non-biological parent); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (holding that a non-biological parent had standing to seek custody,

reasoning that "[o]nce the parent-child bond is forged, the rights and duties of the parties should be crafted to reflect that reality").

In a recent unanimous Oregon Court of Appeals decision, a lesbian de facto mother whose partner had conceived their child via artificial insemination successfully challenged, on equal protection grounds, a statute which by its express terms extended legal parentage only to men whose wives, with the husbands' consent, conceived children via artificial insemination. *Shineovich v. Kemp*, No. 070363564, 2009 WL 2032113 (Or. App. July 15, 2009). The court observed in *Shineovich* that the privilege enjoyed by husbands – legal parentage without having to adopt and without regard to whether the husband and child were biologically related – was not available to unmarried parents. *Id.* at *5. Because same-sex couples cannot marry in Oregon, the court pointed out, the privilege afforded to husbands under the relevant statute was not available to such couples. *Id*. at *9. The court rightly concluded in *Shineovich* there could be "no justification for denying that privilege on the basis of sexual orientation." *Id*. In order to avoid striking the provision down as unconstitutional, the court construed the provision to apply equally to husbands and to de facto mothers in same-sex relationships. In so holding, the court explained that construing the law in this way would not only enable it to withstand constitutional scrutiny, but would also advance an important legislative objective – by "providing the same protection for a greater number of

children." *Id.*

Underlying the decisions above and others like them from different jurisdictions is a policy of ensuring that courts advance the best interests of children in resolving parental status disputes.[11] In New York, we respectfully submit, the realization of that important policy in cases like the present one will require this Court to reconsider *Alison D.*

ii. *Legal Scholars Have Strenuously Criticized* Alison D. *and Identified a Need for Reform*

Legal commentators also have taken issue with *Alison D.* for propounding an outmoded and overly restrictive view of the family. *See*, *e.g.*, Leonard G. Florescue, *'Just Plain Wrong' Not to Secure Both Partners' Futures?*, 236 N.Y.L.J. 3 (2006) (arguing that *Alison D.* should be revisited because it clashes with *Shondel*, reaching opposite results regarding the same underlying equitable principles); Andrew Schepard, *Revisiting 'Alison D.': Child Visitation Rights for Domestic Partners*, 227 N.Y.L.J. 3 (2002) (arguing that courts should protect

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[11] *See, e.g., SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (recognizing that the state "has a compelling interest in promoting relationships among those in recognized family units (for example, the relationship between a child and someone in loco parentis to that child) in order to protect the welfare of children"); *see also C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149-51 (Me. 2004) (recognizing that the "best interest of the child standard . . . stands as the cornerstone of the parens patriae doctrine" and that "to determine a child's best interest and award parental rights and responsibilities, it may, in limited circumstances, entertain an award of parental rights and responsibilities to a de facto parent"); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999) (recognizing that the court's duty as *parens patriae* "necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a situation"); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435 (Wis. 1995) (noting that "the public policy of the state directs the court to . . . serve the best interest of the child").

meaningful adult-child relationships regardless of formal marital status or sexual orientation); Joseph G. Arsenault, Comment, *"Family" But Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 Alb. L. Rev. 813 (1995) (criticizing *Alison D.* and contrasting it to the landmark decision in *Braschi v. Stahl Assocs. Co*., 74 N.Y.2d 201 (1989)); Kimberly P. Carr, Comment, *'Alison D. v. Virginia M.': Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 Brook. L. Rev. 1021 (1992) (arguing that *Alison D.* was "tragic" and wrongly decided).

Other scholars, while not specifically singling out *Alison D.*, have taken issue with the narrow understanding of family which it embodies, arguing instead for a scheme which recognizes the rights of same-sex de facto parents and the changing nature of the modern-day family. *See, e.g.,* Stefan H. Black, *A Step Forward: Lesbian Parentage After Elisa B. v. Superior Court*, 17 Geo. Mason U. Civ. Rts. L. J. 237, 255-56 (2006) (arguing against unjustly distinguishing between separated biological fathers and non-biological lesbian mothers); Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 Mich. J. Gender & L. 261, 311-12 (2003) (faulting courts for tying legal constructions of motherhood to traditional constructions of the family – a practice seen as increasingly burdensome given "new reproductive scenarios and imaginatively different family constellations emerg[ing] in today's

society”); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 Buff. L. Rev. 341, 343, 350, 375 (2002) (criticizing courts’ failure to “preserve the integrity of a relationship between a lesbian co-parent and her child,” and arguing that instead of treating lesbian co-parents as “other than” or “less than,” courts should confer upon them the same rights and privileges as those enjoyed by other parents); Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 Willamette L. Rev. 769, 773 (1999) (noting that the unwillingness of courts to expand the definition of parenthood beyond the adoptive or biological relationship has led to decisions that fail to recognize the best interests of children and the complexities of modern life); Desiree Sierens, *Protecting the Parent-Child Relationship: The Need for Illinois Courts to Extend Standing to Non-Biological Parents in Regard to Visitation Proceedings*, 25 N. Ill. U. L. Rev. 483, 484 (2005) (observing that a new definition of “family” has emerged throughout the United States which includes “homosexual couple[s] who cannot be married under most states’ laws.”).

Together, the large body of legal scholarship critical of the case’s underpinnings and courts’ increasing reluctance to follow it as precedent constitute a compelling basis for revisiting *Alison D.*

iii. *The Availability of Second-Parent Adoption Does Not Obviate the Need to Extend to De Facto Parents Standing to Pursue the Rights and Duties of Legal Parentage*

Respondent-Respondent argues that non-biologically related parents already have a legal mechanism for asserting their parental rights – second-parent adoption – and that same-sex partners who fail to pursue adoption should not be permitted a "second bite at the apple" via a petition for custody or visitation filed after the couple separates. Although in 1995 this Court held in *Matter of Jacob and Dana* that non-biologically related second parents – including same-sex parents – may secure parent-child bonds through adoption, 86 N.Y.2d at 656, 636 N.Y.S.2d at 717, for a variety of reasons adoption may be an unavailable or, at the very least, unattractive option for non-biological parents.

Foremost, the adoption process is expensive, with legal fees, court fees and other associated costs most often running into the thousands of dollars. Many would-be adoptive parents cannot afford such sums, and are, as a result, foreclosed from acquiring legal protection of their parental status. Potential adoptive parents also may lack the legal sophistication necessary to understand the significance of the right to second-parent adoption, or even that it exists as a mechanism for them to secure protection for their relationship with their children. In many cases, non-biological parents discover only after the relationship with their partner has deteriorated that they should have previously pursued a second-parent adoption.

By then, of course, it is generally too late. In such cases, de facto children should not be forced to suffer potentially devastating emotional and economic injuries as a consequence of their parents' lack of foresight and resultant failure to pursue second-parent adoption.

Moreover, because the private-placement adoption process typically takes between six and twelve months, prospective second parents face a significant risk that intervening events will prevent the finalization of their adoptions.[12] If, for example, a couple separates and the biological parent subsequently rescinds her consent for an adoption, or if the biological mother dies before the adoption decree is signed, under *Alison D.* and its progeny cases discussed above, the non-biological parent would be left with no basis on which to assert his or her parental rights.

The very existence of this case and numerous others in New York demonstrates that the right to second parent adoption established in *Matter of Jacob and Dana* has not been – and will never be – a cure-all for non-biological

[12] There are multiple statutory requirements and administrative reasons that explain why an adoption may take many months to complete. For example, New York courts typically require a six-month waiting period as part of the private-placement adoption process. *See* DRL § 116(1). Notably, this period begins to run upon the filing of the adoption petition, not when the child is first placed with the adoptive parent. After the waiting period has expired and all required documentation has been filed, courts will also order an investigation of the proposed adoptive family. *See* DRL § 116(2). The investigator has thirty days to file a report after his or her investigation is completed. *See* DRL § 116(3). Additionally, courts often hold a final hearing on the adoption, which may not be held until months after the completion of all required filings, investigations and expiration of the waiting period. Finally, scheduling delays, filing issues and other administrative hold-ups must be taken into account.

parents faced with the rule of *Alison D. See, e.g., Behrens v. Rimland*, 32 A.D.3d 929, 822 N.Y.S.2d 285 (2d Dep't 2006); *Janis C. v. Christine T.*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002); *Speed v. Robins*, 288 A.D.2d 479, 732 N.Y.S.2d 902 (2d Dep't 2001); *Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dep't 1998). The availability of second-parent adoption does not justify categorically denying standing to the de facto parent who seeks, following the dissolution of her relationship with the child's biological mother, to preserve her relationship with the child.

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to (i) grant the motion of NYCBA, AAML-NY, MBBA, NYCLA, PRBA, RCBA, and WBASNY for leave to appear as *amici curiae*, and (ii) Petitioner-Appellant Debra H.'s motion for leave to appeal.

July 31, 2009

Respectfully submitted,

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