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## I. INTRODUCTION

At issue in this case is whether Family Court – a specialized institution that focuses uniquely on relationships, families and the best interests of the child – has jurisdiction to adjudicate a mother’s child support petition, brought pursuant to the Uniform Interstate Family Support Act (“UIFSA”), notwithstanding the fact that both parties are women. The New York County Lawyers’ Association (“NYCLA”) believes that it does.

Appellant H.M., the biological mother, seeks child support from respondent E.T., her former partner. During their committed, monogamous relationship, H.M. and E.T. decided to have a child together. After numerous failed attempts, they finally conceived via artificial insemination by an unknown donor, and Baby R. was born. The couple shared all expenses associated with the conception and birth of Baby R., E.T. actively participated in the pregnancy and birthing process, and both parties shared the news of the impending birth with their families and friends. Once Baby R. was born, both women jointly nurtured and cared for him, and both women held him out as their child. However, approximately four months after his birth, E.T. left H.M. and Baby R., and E.T. now refuses to contribute to his support.

H.M., a Canadian resident, brought this proceeding pursuant to UIFSA to compel E.T. to support Baby R. Family Court correctly determined that E.T. owes child support, but a bare majority of the Appellate Division, Second Department,

dismissed H.M.'s petition and vacated the Family Court's decision. The majority held that because the parties are both women – and only for that reason – Family Court lacked jurisdiction over H.M.'s petition. NYCLA strongly disagrees. This case belongs in Family Court.

As explained in more detail below, removing from Family Court an entire category of child support cases based on nothing more than the parties' gender would defy legislative intent and ultimately frustrate UIFSA's very purpose. It would also unfairly prejudice parents and children most in need of the unique resources and services that Family Court provides. What is more, in deciding to strip Family Court of jurisdiction over H.M.'s petition, the majority relied on an unconstitutional reading of Family Court Act ("F.C.A.") Article 5, and should have applied equitable estoppel to prevent E.T. from disclaiming her support obligations. In short, the majority's ruling is neither legally sound nor in the best interests of the child. For these reasons, this Court should reverse it and should reinstate the relevant Orders of the Rockland County Family Court. *See* Br. for Pet'r at 60 (identifying orders).

## **II. INTERESTS OF AMICUS CURIAE**

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, 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 has repeatedly appeared as *amicus* in cases before this Court to endorse rights for same-sex couples. For example, in 2006, NYCLA filed an *amicus* brief in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), in which it argued that the prohibition on civil marriage between same-sex couples should be held unconstitutional. More recently, in *Debra H. v. Janice R.*, 13 N.Y. 3d 753 (2009), NYCLA joined other proposed *amici* to argue that the non-biological, non-adoptive mother of a child conceived by the mother's same-sex partner and raised jointly by both parents 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. NYCLA now submits the instant brief in further support of its 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.

### III. ARGUMENT

#### A. **Not Allowing This Case To Proceed In Family Court Would Frustrate UIFSA's Very Purpose**

Both parties agree, and the majority correctly held, that as a court of general jurisdiction, Supreme Court is empowered to adjudicate H.M.'s interstate support petition. *See Matter of H.M. v. E.T.*, 65 A.D.3d 119, 128 (2nd Dep't 2009); Br. for Resp't at 35, 58, 63 n.28. Indeed, if this Court finds that Family Court lacks jurisdiction to do so, H.M.'s petition must be transferred to Supreme Court.<sup>1</sup>

Otherwise, H.M. and others like her would be deprived entirely of a forum to seek child support from recalcitrant individuals attempting to shirk their parental obligations, and innocent children would suffer the consequences. But the fact that Supreme Court is a *possible* alternative forum does not mean that it is the most

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<sup>1</sup> For the reasons explained by H.M., even if Family Court lacks jurisdiction, this case cannot be dismissed outright. It must be transferred to Supreme Court. *See* Br. for Pet'r at 44-46 (citing Section 19(e) of Article VI of the New York State Constitution, which provides, in relevant part, that "[t]he family court shall transfer to the supreme court or the surrogate's court or the county court or the courts for the city of New York . . . any action or proceeding . . . over which the family court has no jurisdiction."). Fundamental fairness also compels that conclusion; were H.M.'s petition dismissed and she forced to file again in Supreme Court, she would risk losing all of the support to which she would be entitled retroactive to the date of filing her petition.

appropriate one. For the reasons set out below, H.M.'s petition, brought pursuant to UIFSA,<sup>2</sup> undoubtedly belongs in Family Court.

According to the plain text of both the F.C.A. and UIFSA, Family Court is the proper forum for adjudicating H.M.'s petition. *See* F.C.A. § 115(c) (“The family court has such other jurisdiction as is provided by law, including but not limited to . . . proceedings concerning the uniform interstate family support act . . . .”), § 411 (“The family court has exclusive original jurisdiction over proceedings for support or maintenance under this article and in proceedings under article five-B of this act, known as the uniform interstate family support act.”), § 580-102 (“The family court is the [UIFSA] tribunal of this state.”).

Legislative history behind New York's adoption of UIFSA further compels that conclusion. The New York State Legislature (the “Legislature”) unambiguously chose the Family Court to be the forum for adjudicating UIFSA petitions in New York State. That much is clear from the evolution of UIFSA section 102, which provides that “[t]he family court is the tribunal of this state.” F.C.A. § 580-102. The text and accompanying Comment to section 102 in the model version of UIFSA enacted in 1996 by the National Conference of Commissioners on Uniform State Laws (the “Model UIFSA”) make clear that the Legislature intended interstate support cases to proceed in Family Court. Congress

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<sup>2</sup> UIFSA is codified in Article 5-B of the F.C.A. *See* F.C.A. § 580-101 *et seq.*

mandated that every state adopt the Model UIFSA in order to remain eligible for federal funding for child support enforcement. *See* 42 U.S.C. §§ 654[20], 666[f]; 1997 Report of the Family Court Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York (“1997 Committee Report”), at 82.<sup>3</sup> Section 102 of the Model UIFSA reads verbatim, as follows:

Tribunal of State: The [court, administrative agency, quasi-judicial entity, or combination] [is the tribunal] [are the tribunals] of this state.

Section 102 was accompanied by the following Comment:

The enacting State must identify the court, administrative agency, or the combination of those entities, which constitute the tribunal or tribunals authorized to deal with family support. In a particular state there may be several different such entities authorized to determine family support matters.

Comment to Model UIFSA § 102. Clearly, the Commissioners envisioned the possibility of multiple UIFSA tribunals in one state. If the Legislature wanted to designate Supreme Court as an alternate UIFSA tribunal, it easily could have. Yet it chose to make Family Court “the” UIFSA tribunal in New York.

In doing so, the Legislature did not proscribe the Supreme Court’s jurisdiction. *See* N.Y. Const. art. VI, §§ 7, 13(d); *Vazquez v. Vazquez*, 26 A.D.2d 701, 702-03 (2d Dep’t 1966) (Supreme Court has concurrent jurisdiction over support proceedings and the Legislature cannot dilute that constitutional power by

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<sup>3</sup> References to two earlier reports from the Family Court Advisory and Rules Committee (the “Committee”) use the same shorthand accompanied by the appropriate year, *i.e.*, the 1996 Committee Report and the 1995 Committee Report.

creating new proceedings in Family Court). But, consistent with UIFSA's purpose of streamlining and facilitating interstate support proceedings, the Legislature did establish an efficient and effective process for adjudicating those cases that flows through Family Court. Prohibiting petitioners like H.M. from litigating in Family Court based solely on the parties' gender undermines legislative intent.

When a parent files a support petition with an initiating tribunal or a support enforcement agency outside of New York for adjudication in New York, UIFSA requires that the petition be transferred to New York's only UIFSA tribunal: Family Court. *See* F.C.A. § 580-301(c) ("An individual petitioner or a support enforcement agency may commence a proceeding authorized under this article by filing a petition in an initiating tribunal for forwarding to a *responding tribunal* or by filing a petition or a comparable pleading directly in a *tribunal* of another state which has or can obtain personal jurisdiction over the respondent.") (emphasis added).<sup>4</sup> That makes sense given UIFSA's stated objectives: to "greatly simplify and streamline the applicable procedures [for establishing, collecting and enforcing child support obligations in interstate cases], thereby substantially improving the results for litigants and, importantly, for children in child support proceedings." 1997 Committee Report at 82; 1996 Committee Report at 90-91; 1995 Committee

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<sup>4</sup> "Responding tribunal" means the authorized tribunal in a responding state." F.C.A. §101(17). In New York's case, 'responding tribunal' means Family Court.

Report at 166; *see also* McKinney’s 1997 Session Laws of New York, ch. 398 § 1 (Legislature adopted UIFSA, and other provisions, for the “essential” purpose of “providing for the timely and efficient establishment of paternity and child support orders . . . .”); *Child Support Enforcement Unit ex rel. Judith S. v. John M.*, 183 Misc. 2d 468, 473 (Fam. Ct. Monroe County 1999) (“the focus of UIFSA is on providing out-of-State petitioners with a simplified procedure to present their case”), *aff’d as modified by*, 283 A.D.2d 40 (4th Dep’t 2001). And that is precisely what happened in this case: H.M.’s petition, filed in Canada, was sent to the New York State Interstate Central Registry’s Division of Child Support Enforcement, which transferred it to Rockland County Family Court. *See* Br. for Pet’r at 8-9.

Even were this Court to uphold the majority’s ruling that Family Court lacks subject matter jurisdiction over a class of support cases based solely on the parties’ gender, because the F.C.A. does not designate Supreme Court as an additional UIFSA tribunal, all UIFSA support petitions presumably will continue to be forwarded in the first instance to Family Court. *See* Sobie, Practice Commentaries, F.C.A. § 580-102. Again, that does not mean Supreme Court lacks jurisdiction over them. But for petitioners like H.M., it does mean introducing procedural complexity and judicial inefficiency where the Legislature explicitly sought to eliminate those problems. As a practical matter, a petition like H.M.’s would: first be sent to Family Court; then Family Court would be required to hold a hearing

and make a finding that it lacks jurisdiction; then Family Court would be required to transfer the petition to Supreme Court; then Supreme Court would be required to schedule an initial conference. That sort of circuitous and time-consuming procedure – all of which would precede any discussion of the merits of a petition – strains resources and contravenes UIFSA’s very purpose and the Legislature’s stated goal in adopting it.

**B. The Majority’s Decision Below Deprives H.M., Baby R., And Anyone Else Seeking Child Support Against A Woman, Of Family Court’s Unique Resources And Expertise**

The majority justified its decision in part by reasoning that H.M. is not bereft of a forum for adjudicating her support petition because even if Family Court cannot entertain it, Supreme Court can. While that is true, the majority ignores important distinctions between those two fora that bear on the best interests of children, especially those whose families are poor. As explained in more detail below, Family Court is a unique and specialized institution. It is by no means perfect, but Family Court does offer litigants advantages that this Court should take into account when deciding where H.M.’s petition belongs. Family Court costs nothing for litigants to file and is more accessible than Supreme Court, and it provides resources and services to litigants that Supreme Court does not. For unrepresented parties, those resources and services are often critical to initiating, maintaining and prevailing in their cases. Family Court also enjoys more robust

enforcement power with respect to support orders. In short, we urge this Court to take account of the significant practical consequences of closing the Family Court's doors to a growing class of needy children and their parents.

### **1. Family Court's Unique Expertise**

Family Court is a specialized institution. *See, e.g., Fusco v. Roth*, 100 Misc. 2d 288, 293 (Fam. Ct. Richmond County 1979) (Family Court was established as a “special agency for the care and protection of the young and the preservation of the family.”) (citing Committee Comments, Joint Legislative Committee on Court Reorganization, p. 3420); *Reid v. White*, 112 Misc. 2d 294, 295 (Fam. Ct. Onondaga County 1982) (according to the Joint Legislative Committee that prepared the Family Court Act, the purpose of giving Family Court exclusive jurisdiction over paternity proceedings was to permit the Family Court to draw upon all its resources in protecting and caring for innocent children). It was established as a problem-solving court specifically to address issues involving children, parents and their partners. Through both its design and evolution, Family Court possesses unique expertise in a variety of family-related areas, including the adjudication of support proceedings.

Unlike Supreme Court Justices, Family Court Judges and Support Magistrates are specialists. Indeed, to be appointed, Support Magistrates must be knowledgeable not just in the areas of family law and procedure, but also with

respect to “Federal and State support law and programs.” 22 N.Y.C.R.R. § 205.32; *see also* F.C.A. § 439. That is because – as described in more detail below – those programs are integral to the Family Court’s work. Family Court also employs an individual assignment system that helps Judges and Support Magistrates develop case-specific knowledge. One Judge or Support Magistrate continuously supervises all proceedings involving the parties,<sup>5</sup> and where appropriate and feasible, proceedings involving members of the same family as well. *See* 22 N.Y.C.R.R. § 205.3. In doing so, Judges and Support Magistrates develop a familiarity with the parties and circumstances that allows them to make informed decisions efficiently.

In short, Family Court Judges and Support Magistrates hear cases like H.M.’s every day, and the parties benefit from their expertise.

## **2. Family Court Is Particularly Accessible To Unrepresented Litigants**

“Family Court is frequently characterized as a ‘*pro se*’ tribunal, *i.e.*, a court whose doors are open to any member of the public who believes he has a justiciable claim against any other individual.” Sobie, Practice Commentaries, F.C.A. § 216-c. Indeed, for unrepresented parents with few, if any, resources, Family Court makes bringing a claim relatively simple. Unlike Supreme Court,

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<sup>5</sup> Certain parts of New York Supreme Court also follow this practice, when feasible, including the matrimonial parts.

there are no filing fees. *See* Sobie, Practice Commentaries, F.C.A. § 216-c. And almost any action in Family Court can be brought using an official Family Court form. *See* F.C.A. § 214;

<http://www.courts.state.ny.us/forms/familycourt/index.shtml> (providing official forms for use in Family Court proceedings) (last visited December 23, 2009).

Clerks of Court are required to provide those forms to anyone who requests them, *see* F.C.A. § 216-b, and, “[b]y history and custom,” Clerks throughout New York State – often through *pro se* offices – “actually prepare or assist in the preparation of *pro se* petitions.” Sobie, Practice Commentaries, F.C.A. § 216-c. For example,

New York City Family Court operates a “Help Center” located within the courthouse, “dedicated to providing assistance to court users including the ability to file various court papers, petitions and/or motions.” *See* Web Site of the New York City Family Court, Help Center, available at

<http://www.courts.state.ny.us/courts/nyc/family/selfrepresented.shtml#s> (last

visited December 23, 2009). As the members of the NYCLA Family Court and

Child Welfare Committee are acutely aware, scores of individuals who do not have

attorneys use the resources provided by New York Family Court *pro se* offices

every day. Equivalent services are not available in Supreme Court.<sup>6</sup>

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<sup>6</sup> Although most Supreme Courts in New York also operate *pro se* offices, they are not nearly as user-friendly. Family Court is particularly good at handling unrepresented parties precisely because so many litigants in Family Court do not have an attorney.

Family Court also facilitates a party's ability to participate in certain proceedings through special procedural and evidentiary rules. For example, the Family Court rules allow a party or witness in a support proceeding to be deposed or testify by telephone, audio-visual or other electronic means if coming to the Family Court would pose an undue hardship. *See* F.C.A. § 433(c)(iii). Moreover, where a party or witness is deposed or testifies remotely, "documentary evidence referred to by a party or witness or the court may be transmitted by facsimile, telecopier, or other electronic means and may not be excluded from evidence by reason of an objection based on the means of transmission." F.C.A. § 433(d). Similar rules apply in UIFSA proceedings. F.C.A. § 580-316.<sup>7</sup> And for parties who must attend proceedings, each Family Court building in New York has a child waiting area, where children may wait while a case is being heard, and in the Bronx, Kings, New York and Queens county courthouses, there are supervised Children's Centers that provide free drop-in child care for parents attending proceedings.<sup>8</sup>

Finally, some New York State Family Courts offer assistance to unrepresented parties through *pro bono* projects. For example, the Bronx, Kings and New York County Family Courts house a clinic staffed by *pro bono* attorneys

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<sup>7</sup> Similar rules apply in Supreme Court as well.

<sup>8</sup> In New York City Family Court, a single child care center serves both functions.

who provide free advice and counsel to *pro se* litigants on matters involving child support, paternity, custody, visitation and family offenses. Although this innovative new project is not yet operational in Family Courts elsewhere in New York, as far as NYCLA is aware, there is no analogous project operating or being contemplated in any New York State Supreme Court.

### **3. Family Court Offers More Robust Enforcement Services And Possesses Greater Enforcement Power Than Supreme Court**

Allowing H.M.’s petition to proceed in Family Court is also consistent with the Legislature’s goal, in passing UIFSA, of “strengthen[ing] New York’s child support enforcement program . . . .” *Child Support Enforcement Unit ex rel. Judith S.*, 283 A.D.2d at 42 (quoting Governor’s Mem. approving L 1997, ch. 398, 1997 McKinney’s Session Laws of NY, at 1940); *see also* 1997 Committee Report at 82 (“[T]he Committee is confident that the enactment of UIFSA will significantly advance efforts to collect and enforce support obligations in interstate cases.”). That is because Family Court partners with a robust administrative enforcement structure and, with respect to support orders, “Family Court . . . has greater enforcement authority than the Supreme Court.” Sobie, Practice Commentaries, F.C.A. § 454.

New York State’s Division of Child Support Enforcement (“NYS DCSE”), through local Child Support Enforcement Units (“CSEUs”), assists custodial

parents in obtaining financial support for their children by locating parents, establishing paternity, establishing support orders, and collecting and distributing child support payments.<sup>9</sup> For example, staff at the CSEUs will “assist custodial parents to file a petition in *Family Court* to obtain a child support order,” and will assist in preparing and filing a violation petition in Family Court if administrative enforcement processes fail. Web Site of NYS DCSE, Support Services, available at [https://newyorkchildsupport.com/child\\_support\\_services.html#supportEstab](https://newyorkchildsupport.com/child_support_services.html#supportEstab) (last visited December 23, 2009) (emphasis added).<sup>10</sup> Importantly, through design and implementation, CSEUs and their counterparts, Support Collection Units (“SCUs”), operate hand in hand with Family Court. Indeed, their offices are typically housed within the Family Courts themselves.<sup>11</sup> Support orders are automatically referred to SCUs, which work with Family Court to ensure that parties comply. In the end, petitioners benefit; the agencies understand how to assist them through Family Court and Family Court Judges, Support Magistrates in particular, understand the intricacies of the administrative process.

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<sup>9</sup> Information about NYS DCSE is available on its web site at <https://newyorkchildsupport.com/home.html> (last visited December 23, 2009).

<sup>10</sup> Anyone who applies for temporary or safety net assistance automatically receives child support services. Any other parent of a child who needs support can apply for such services as well. See Web Site of NYS DCSE, Support Services, available at [https://newyorkchildsupport.com/child\\_support\\_services.html#supportEstab](https://newyorkchildsupport.com/child_support_services.html#supportEstab) (last visited December 23, 2009).

<sup>11</sup> That is true of the Rockland County Family Court, where H.M.’s petition was originally heard.

F.C.A. section 454 sets out the remedies that Family Court may impose upon finding that a respondent violated a lawful support order. In all cases, the court must enter a money judgment, and, in its discretion, may impose any one or more of the following additional enforcement measures: income deduction, an order of sequestration, requiring the respondent to post an undertaking, and suspending the respondent's driver's, professional, business or recreational licenses. *See* F.C.A. § 454(2). The most serious sanctions – including probation, requiring the respondent to participate in a rehabilitative program, and ultimately commitment to jail for up to six months – are reserved for “willful” violations. *See* F.C.A. § 454(3). Willfulness requires proof of both the ability to pay support and a failure to do so. *Powers v. Powers*, 86 N.Y.2d 63, 68 (1995) (citing F.C.A. § 455[5]). But in many cases that burden is easily satisfied:

A respondent is prima facie presumed in a hearing under section 454 to have sufficient means to support his or her spouse and children under the age of 21 (Family Ct Act § 437). For purposes of section 454, moreover, failure to pay support as ordered itself constitutes “prima facie evidence of a willful violation” (Family Ct Act § 454 [3] [a]). Thus, proof that respondent has failed to pay support as ordered alone establishes petitioner's direct case of willful violation, shifting to respondent the burden of going forward (*see*, Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 454, at 388).

*Powers*, 86 N.Y.2d at 68-69. In such circumstances, Family Court can order commitment, regardless of whether there are other ways of enforcing the support order. *See Powers*, 86 N.Y.2d at 70-71.

Those remedies are generally available in Supreme Court as well, but to a more limited extent. *See McKinney’s Domestic Relations Law (“D.R.L.”) §§ 244 - 244-d, 245.* In particular, while Supreme Court is authorized to hold in contempt a respondent who violates a support order, and to order incarceration, *see D.R.L. § 245,* the nature and scope of its power “contrast[ ]sharply” with that of Family Court. *Sobie, Practice Commentaries, F.C.A. § 454.* First, the Supreme Court’s contempt power is limited to cases in which a spouse defaulted in payments required by a court order that was entered in an action for divorce, separation, annulment or declaration of nullity of a void marriage. *See D.R.L. § 245.*<sup>12</sup> By contrast, Family Court can exercise its enforcement powers with respect to a violation of “any lawful order of support,” *F.C.A. § 454,* including imposing incarceration in UIFSA proceedings to enforce an order entered by a court outside New York State. *See Child Support Enforcement Unit ex re. Judith S., 283 A.D.2d at 42* (incarceration is an available remedy under UIFSA for willful violation of a support order).

Second, the requirements for establishing “contempt and seeking commitment under D.R.L. § 245 are far more rigorous than the requirements under [F.C.A.] § 454.” *Scheinkman, Practice Commentaries, D.R.L. § 245.* Indeed,

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<sup>12</sup> D.R.L. § 245 also applies in actions to enforce another state’s judgment or order that was rendered in an action for divorce, separation, annulment or declaration of nullity of a void marriage.

Supreme Court must consider alternative methods of enforcing a support order “before incarcerating even the most recalcitrant violator,” Sobie, Practice Commentaries, F.C.A. § 454, whereas Family Court need not. *See Powers*, 86 N.Y.2d at 71 (“[F.C.A.] § 454 explicitly allows the court a choice of probation or jail, without requiring that the court consider alternative enforcement measures.”).

Incarceration is a powerful enforcement technique; “[a]ll too often defaulting spouses and parents manage to locate resources needed to purge contempt in order to avoid incarceration.” Scheinkman, Practice Commentaries, D.R.L. § 245. Allowing petitioners like H.M. to proceed in Family Court affords them the benefit of that forum’s unique authority if enforcement of a support order becomes an issue.

### **C. The Majority’s Interpretation Of Article 5 As Applying Only To Men Renders The Statute Unconstitutional**

It is axiomatic that a law cannot constitutionally place a burden on men and relieve women in the same situation.<sup>13</sup> *Orr v. Orr*, 440 U.S. 268, 268 (1979); *Craig v. Boren*, 429 U.S. 190, 190 (1976). A statute that requires men in New

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<sup>13</sup> NYCLA fully agrees with the related points raised by H.M. – that the majority’s reading of Article 5 violates the Equal Protection Clauses of the New York and United States Constitutions because it deprives both Baby R. and H.M. of the specialized benefits of Family Court described in Section III. A., *supra* – and will not repeat them here. *See* Br. for Pet’r, at 36-44. In this section, NYCLA asserts a complementary constitutional argument that the majority’s interpretation of Article 5 unreasonably burdens men. NYCLA also fully agrees with Petitioner that, irrespective of the constitutional issues, H.M. has stated a viable claim for relief based on equitable estoppel that can be adjudicated in Family Court. *See* Section III. D., *infra*; Br. For Pet’r, at 36, 53-56. In the event that this Court determines that Family Court lacks jurisdiction to hear H.M.’s claim, it undoubtedly can, and should, be heard in Supreme Court.

York to be financially responsible for children they agree to parent but does not require the same of women who make an identical agreement violates the fundamental constitutional guarantee of equal protection of the laws.<sup>14</sup> Further, it ignores the best interests of the children these women agreed to parent, but then later abandoned.

“No person shall be denied the equal protection of the laws of this state or any subdivision thereof.” N.Y. Const. art. I, § 11.<sup>15</sup> Under both the state and federal constitutions, equal protection requires that any legislative classification

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<sup>14</sup> The majority ruled that the issue of the constitutionality of Article 5 was not properly before it. *See Matter of H.M.*, 65 A.D.3d at 127-28. However, neither amicus nor petitioner now claims that Article 5 is unconstitutional. Rather, the constitutional issue of equal protection is properly before this Court precisely because the majority’s reading of Article 5 as applicable only “for resolving controversies concerning a male’s fatherhood of a child,” *Matter of H.M.*, 65 A.D.3d at 124, renders the statute unconstitutional by placing an unequal burden on men in New York. *See generally People v. Felix*, 58 N.Y.2d 156, 161 (1983) (holding that though the Appellate Division avoided the “effect” of passing on a statute’s constitutionality, it nonetheless applied the statute in such a way as to make the question unavoidable.). Additionally, petitioner consistently has maintained that a restricted reading of Article 5 as applicable only to men would violate the tenets of equal protection. Br. for Pet’r-Resp’t at 28 (Appellate Division).

Further, while it is true that courts will generally not “review on appeal any points not raised in the court below,” that rule is designed to ensure efficiency at the trial level and is “not absolute.” David D. Siegel, *New York Practice* § 530 (4th. ed. 2009) (citing *Kolmer-Marcus, Inc. v. Winer*, 32 A.D.2d 763 (1st Dep’t 1969), *aff’d* 26 N.Y.2d 795 (1970)). As the Family Court read the statute in a gender-neutral, constitutionally sound manner, ignoring the constitutional implications of the Appellate Division’s decision does nothing to preserve efficiency.

<sup>15</sup> The 1938 Constitutional Convention, at which New York’s equal protection provision was approved, “more than any other before or since, was committed to ‘positive liberalism’ and to a ‘belief that the state had the obligation to promote the welfare and protect the rights of as many people as possible.’” Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & Pol’y 61, 84-85 (1999) (quoting Peter J. Galie, *The New York State Constitution*, A Reference Guide 2, 27 (1991)).

based on gender be subjected to heightened scrutiny analysis. *People v. Liberta*, 64 N.Y.2d 152 (1984); *see also, e.g., Craig*, 429 U.S. at 197. Under this analysis, gender-based classifications must serve “important governmental objectives” such that the means utilized by the statute to achieve its goal must be “substantially related to the achievement of those objectives.” *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Liberta*, 64 N.Y.2d at 168. Where one gender is unequally burdened by the application of a statute or policy, that statute or policy is violative of the constitutional promise of equal protection. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977).

E.T. is in no different a position than any of the men who have been held responsible for child support even though they were not biologically related to the child. *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 320 (2006); *Wener v. Wener*, 35 A.D.2d 50, 50 (2d Dep’t 1970) (child never adopted); *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 218 (3d Dep’t 2008) (child conceived through artificial insemination); *Anonymous v. Anonymous*, 151 A.D.2d 330, 348 (1st Dep’t 1989) (child conceived through artificial insemination); *Anonymous v. Anonymous*, 41 Misc. 2d 886, 888-89 (Sup. Ct. Suffolk County 1964) (child conceived through artificial insemination); *Gursky v. Gursky*, 39 Misc. 2d 1083, 1088-89 (Sup. Ct. Kings County 1963) (child conceived through artificial insemination).

Respondent’s claim that E.T. is not similarly situated simply because she is a

woman or not biologically related to Baby R. is a red herring. As New York courts recently have noted, “[i]f the concern of both the legislature and the Court of Appeals is what is in the child’s best interest, a formulaic approach to finding that a ‘parent’ can only mean a biologic or adoptive parent may not always be appropriate.” *Beth R. v. Donna M.*, 19 Misc. 3d 724, 734 (Sup. Ct. N.Y. County 2008); *In re Jacob*, 86 N.Y.2d 651, 658 (1995) (allowing second-parent adoption by biological mother’s same-sex partner, the court held that “our primary loyalty must be to the statute’s legislative purpose – the child’s best interest.”). Indeed, the First Department has already recognized that it is in the best interests of the children of same-sex partnerships that have dissolved to receive financial support from both parties in that former relationship. *Frazier v. Penraat*, 32 A.D.3d 772, 777 (1st Dep’t 2006).

Moreover, the Legislature’s objective in adopting the child support statutes was to ensure that the best interests of the child are met. *Hirsch v. Hirsch*, 4 A.D.3d 451, 452-453 (2d Dep’t 2004) (citing *Hampton v. Hampton*, 261 A.D.2d 362 (2d Dep’t 1999)). Time and again, courts have required the person or persons responsible for bringing a child into the world, regardless of the party’s gender, to maintain support for that child until he or she reaches the age of majority. *Greene County Dep’t of Soc. Servs. ex rel. Ward v. Ward*, 8 N.Y.3d 1007, 1010 (2007) (ordering single adoptive mother to pay support after she surrendered child to an

authorized agency); *Shondel J.*, 7 N.Y.3d at 327 (ordering man not the biological or adoptive father of a child to pay support); *Wener*, 35 A.D.2d at 52-53 (ordering former husband to pay support for child neither he nor his former wife ever legally adopted); *see also Orr*, 440 U.S. at 282-83 (imposition of alimony obligations on husbands, but not on wives, violates equal protection); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (requiring a parent to pay more child support for boys violates equal protection).

Courts have zealously protected the best interests of children facing the end of their parents' relationship because "having brought [a] child into their home, [the parties] must, of necessity, shoulder the burden of her support." *Wener*, 35 A.D.2d at 53. To allow a party to avoid financial responsibility for a child she initially chose to parent and support "may leave the child in a worse position than if that support had never been given." *Shondel J.*, 7 N.Y.3d at 330.

Respondent argues that the important governmental objective achieved by Article 5 is that "of seeing that out-of-wedlock children . . . are provided for." Br. for Resp't at 60. Yet, Respondent's argument ignores the obvious conclusion that reading Article 5 as applicable only to men clearly leaves a class of "out-of-wedlock" children without recourse to the statute to obtain support from two

parents.<sup>16</sup> There can be no legitimate governmental objective that creates two classes of children: one class with fathers that does have recourse to Article 5, and another class with two mothers that does not. Respondent misunderstands the nature of this case and misreads the application of the law: “[T]he issue does not involve the equities between the two adults; the case turns *exclusively* on the best interests of the child.”<sup>17</sup> *Shondel J.*, 7 N.Y.3d at 330 (emphasis added). Nothing in this case asks the Court to declare that same-sex couples have rights not previously acknowledged. Separate and apart from their sexual orientation, H.M. and E.T. are, unremarkably, women who chose to bring a child into this world together. The constitutional mandate of equal protection requires that they both remain responsible for that decision, just as any man would.

As explained in more detail in Section III. D., *infra*, because the best interests of the child are paramount, “New York courts have long applied the doctrine of estoppel in . . . support proceedings” and further declared that “[e]quitable estoppel is gender neutral.” *Shondel J.*, 7 N.Y.3d at 326-27. Indeed,

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<sup>16</sup> Respondent actually relies on H.M. and E.T.’s *inability* to formalize their relationship through a lawful marriage to argue that their child should now be precluded from seeking support from E.T. Br. for Resp’t at 67-68. This is bootstrapping of the worst kind. In a state that does not protect the right of same-sex couples to marry, a large portion of the state’s “out-of-wedlock” children will be without recourse to Article 5 to obtain support from two parents if the statute is applied exclusively to men.

<sup>17</sup> The reference to “the equities” in *Shondel J.* was part of a discussion about the dissenting judges’ focus on the mother’s purported misrepresentation of the child’s paternity. 7 N.Y.3d. at 330. However, the court’s statement nonetheless is applicable here: support proceedings must focus exclusively on the best interests of the child.

in *Shondel J.* this Court declared paternity “irrespective of biological fatherhood” to ensure that the best interests of the child were protected and both parties who had held themselves out as her parents remained financially responsible for her well-being. *Shondel J.*, 7 N.Y.3d at 330.

Similarly, here, in order to avoid adopting the construction that raises “constitutional doubts,” *In re Jacob*, 86 N.Y.2d at 667, this Court should read Article 5 in a gender-neutral manner. When “the language of a statute is susceptible of two constructions, the courts will adopt that which avoids . . . constitutional doubts.” *In re Jacob*, 86 N.Y.2d at 667 (quoting *H. Kauffman & Sons Saddlery Co. v. Miller*, 298 N.Y. 38, 44 (1948)). A gender-neutral construction of Article 5 would avoid placing an unequal burden on men and, also, would rightfully allow H.M. and Baby R. the opportunity to seek financial support from the other individual who chose to bring him into this world, and to do so in the proper forum: Family Court.

**D. The Court Below Should Have Applied Equitable Estoppel To Prevent E.T. From Avoiding Her Child Support Obligations To Baby R.**

Equitable estoppel is a venerable doctrine that has long been applied by New York courts charged with making decisions in the best interests of the child in child support and paternity proceedings. In view of well-established precedent, the

court below should have applied equitable estoppel to prevent E.T. from avoiding her child support obligations.

**1. Equitable Estoppel Is Routinely Applied In The Interest Of Fairness In Order To Avoid Fraud And Injustice In The Context of Child Support And Paternity Proceedings**

Equitable estoppel promotes fairness at the expense of fraud and injustice.

*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184 (1982). It requires proof of: (i) a representation or an inducement; (ii) reliance; and (iii) detriment or injury. *Shondel J.*, 7 N.Y.3d at 320; *see, e.g., Nassau Trust Co.*, 56 N.Y.2d at 184; *White v. La Due & Fitch, Inc.*, 303 N.Y. 122, 128 (1951).

New York courts are explicitly bound by statute to apply equitable estoppel in child support and paternity proceedings. F.C.A. §§ 418, 532. Specifically, both Section 418(a) (governing support proceedings) and Section 532(a) (governing paternity proceedings) of the Family Court Act state: “No such [genetic marker or DNA] test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman.”

Well before the New York State Legislature codified the doctrine, however, courts had become adept in the application of equitable estoppel to contested filial

determinations.<sup>18</sup> *See, e.g., Shondel J.*, 7 N.Y.3d at 326 (noting that “New York courts have long applied the doctrine of estoppel in paternity and support proceedings” and recognizing its “rightful place in New York law”) (citing *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 285 (2d Dep’t 1998)); *see also Ettore I. v. Angela D.*, 127 A.D.2d 6, 12 (2d Dep’t 1987); *Wener*, 35 A.D.2d at 53; *Anonymous*, 41 Misc. 2d at 888; *Gursky*, 39 Misc. 2d at 1083; *see generally* Sobie, Practice Commentaries, F.C.A. § 418 (stating that the provision, added in 1997, “codifie[d] a generation of decisions applying the ancient chancery doctrine of equitable estoppel to prevent inequitable filiation determinations (pro or con), despite the possibility, or even the certainty of, contrary scientific proof.”) (citations omitted).

In order to prevail on a claim of equitable estoppel in a child support or paternity proceeding brought under New York law, a party invoking the doctrine (either offensively or defensively) must demonstrate detrimental reliance on conduct that amounted to a false representation. *Shondel J.*, 7 N.Y.3d at 320; *see, e.g., Jean Maby H.*, 246 A.D.2d at 282. Moreover, “[r]egardless of the context in which it is used, in cases involving paternity, child custody, visitation and child

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<sup>18</sup> Child support and paternity matters account for a significant percentage of the cases filed in New York Family Court, and such filings have increased exponentially over time. New York Jud. Memo., 2004 Ch. 336 (stating that, in 2002, 48% of new case filings, or 343,570 out of a total of 712,726, involved child support and paternity cases, representing a 37% increase from 1990’s filings of 250,847 out of a total 540,209).

support, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child or children who are the subject of the controversy.” *Charles v. Charles*, 296 A.D.2d 547, 549 (2d Dep’t 2002); see *Shondel J.*, 7 N.Y.3d at 331 (recognizing the child’s interests as “paramount” when evaluating a claim of equitable estoppel); see also *Prowda v. Wilner*, 217 A.D.2d 287, 290 (3d Dep’t 1995) (providing that entirety of circumstances must be considered when determining child’s best interests).<sup>19</sup>

In the leading case in New York, this Court unanimously agreed on the viability of equitable estoppel in child support and paternity proceedings (though it disagreed as to the doctrine’s applicability to the facts presented). *Shondel J.*, 7 N.Y.3d at 328. The *Shondel J.* majority held that equitable estoppel prevented a child’s purported father from denying paternity even though genetic testing had conclusively ruled him out as her biological father. 7 N.Y.3d at 328. It explained:

In allowing a court to declare paternity irrespective of biological fatherhood, the Legislature made a deliberate policy choice that

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<sup>19</sup> The text of the legislation codifying equitable estoppel in paternity and child support matters attached a similarly strong significance to the child’s interests, particularly with respect to ensuring financial support: “It is essential that New York state’s child support enforcement program meet the needs of children, including providing for the timely and efficient establishment of paternity and child support orders and the collection of child support payments . . . . These changes and others contained in this legislation are intended to help families by ensuring that New York state’s children receive the child support that they deserve.” 1997 Sess. Laws of N.Y., ch. 398 (S. 5771). See also F.C.A. § 413 (“[T]he parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine.”); § 513 (“each parent of a child born out of wedlock is chargeable with the support of such child”).

speaks directly to the case before us. The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given.

*Shondel J.*, 7 N.Y.3d at 330.

Furthermore, the *Shondel J.* majority emphasized that equitable estoppel demands a certain degree of flexibility: "Situations vary, and the question whether extinguishing the relationship and its attendant obligations will disserve the child is one for Family Court based on the facts in each case." 7 N.Y.3d at 330.

Consistent with this approach, and with equitable estoppel's historical applications, courts have avoided a rigid application of the doctrine, and have instead applied it in a great variety of child support and paternity proceedings, regardless of an individual's lack of genetic connection to or established relationship with the child. *See, e.g., Beth R.*, 19 Misc. 3d at 734 (recognizing the potential for a woman to be declared a second mother by equitable estoppel and stating that "a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate") (relying on *Shondel J.*, 7 N.Y.3d at 320 and *Jean Maby H.*, 246 A.D.2d at 282); *see also Laura WW.*, 51 A.D.3d at 211 (preventing mother's former husband from denying paternity of a child conceived during the marriage as a result of artificial insemination); *Richard B. v. Sandra B.*, 209 A.D.2d 139, 142-43 (1st Dep't 1995) (refusing request for genetic testing and

enforcing support obligations); *Campbell v. Campbell*, 149 A.D.2d 866, 867 (3d Dep't 1989) (applying estoppel to prevent father from disclaiming obligations of support following discovery that he was medically incapable of fathering children); *In re Sebastian*, 25 Misc. 3d 567, 579 (N.Y. Sur. Ct. N.Y. County 2009) (recognizing that a child may have two mothers or two fathers) (citing *In re Jacob*, 86 N.Y.2d at 669); *Karin T. v. Michael T.*, 127 Misc. 2d 14 (Fam. Ct. Monroe County 1985) (finding transgender man liable for support of children conceived through donor insemination); *Gursky*, 39 Misc. 2d at 1088-89.

Moreover, courts are especially mindful of “disserving” a child’s interests when an individual appears motivated by the prospect of avoiding his or her financial support obligations. *See, e.g., Bruce W.L. v. Carol A.P.*, 46 A.D.3d 1471, 1472 (4th Dep't 2007) (noting that the “father admitted that he did not want to pay child support for the child and that he wanted to be relieved of all financial obligations with respect to her”); *Westchester County Dept. of Social Services ex rel. Melissa B. v. Robert W.R.*, 25 A.D.3d 62, 71 (2d Dep't 2005) (explaining that equitable estoppel “may be invoked to preclude a father, such as the respondent herein, from denying paternity to avoid support obligations where the invocation of the doctrine is in the best interests of the child”); *Diana E. v. Angel M.*, 20 A.D.3d 370, 371 (1st Dep't 2005) (finding that “it is clearly in the child’s best interests to estop respondent from now seeking a genetic marker test in order to contest

paternity for the first time and thereby avoid his responsibility to support her”); *Dowed v. Munna*, 306 A.D.2d 278, 279 (2d Dep’t 2003) (finding that equitable estoppel “generally is not available to a party seeking to disavow the allegation of parenthood for the purpose of avoiding child support”); *Hammack v. Hammack*, 291 A.D.2d 718, 719 (3d Dep’t 2002) (stating that “[o]ne of defendant’s avowed purposes for [moving for DNA testing] was to avoid the payment of child support”); *Ocasio v. Ocasio*, 276 A.D.2d 680, 680 (2d Dep’t 2000) (finding that “defendant was equitably estopped from challenging paternity to avoid his support obligation”); *Campbell*, 149 A.D.2d at 867 (recognizing that “respondent seeks to bastardize the children for the sole purpose of promoting his own self-interest in avoiding further support payments”).

**2. This Case Mandates The Application Of Equitable Estoppel In Order To Prevent Fraud And Injustice And To Serve The Best Interests Of The Child**

In view of established precedent, the court below should have applied equitable estoppel in order to prevent a woman from denying support obligations for a child planned, conceived and born during her five-year relationship with another woman. Specifically, based on the facts alleged, the Appellate Division, Second Department, should have found, as the Family Court did, that equitable estoppel prevented E.T. from denying her child support obligations to Baby R.

H.M. made out a *prima facie* case for the invocation of equitable estoppel. According to H.M., early on in their committed, monogamous relationship, H.M. and E.T. acted upon their plans to build their family by conceiving and raising a child together. A. 104-105<sup>20</sup> (Support Application ¶¶ 5-6.) They determined that H.M. would bear the child, and that they would raise him as a sibling of E.T.’s children from a prior marriage. A. 105 (*Id.* ¶ 6). Together, they consulted different fertility clinics and, after 11 failed attempts, finally conceived via artificial insemination by an unknown donor. A. 105 (*Id.* ¶¶ 8-9). The couple shared the news of the impending birth with their families and friends. A. 105 (*Id.* ¶ 10). E.T. actively participated in the pregnancy and birthing process, and the two shared all expenses associated with the conception and birth of Baby R. A. 105-106 (*Id.* ¶¶ 11, 13). Once Baby R. was born, both women jointly nurtured and cared for him and both women held him out as their child. A. 107 (*Id.* ¶ 18). Within four months after his birth, E.T. left H.M. and Baby R.; however, at various times over the next several years, E.T. gave them money and gifts, including clothes, paid travel to New York, and savings bonds earmarked for Baby R. A. 106 (Support Application ¶¶ 14-16).

These allegations demonstrate justifiable and detrimental reliance on what amounted to E.T.’s false representation that she would support the child that she

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<sup>20</sup> Citations to Appellant’s Appendix are indicated by “A. \_\_\_.”

committed to parent and caused to be brought into the world as part of her family with H.M. It is of no consequence that E.T. no longer had a relationship with the child at the time support was sought by H.M.; as this Court recognized in *Shondel J.*, “[t]his state of affairs . . . does not preclude the application of estoppel. If it did, a [person] could defeat the statute simply by severing all ties with the child.” 7 N.Y.3d at 331; *see Richard B.*, 209 A.D.2d at 141.

H.M. asserts, correctly, that an emotional relationship is not an element of equitable estoppel. Indeed, numerous cases have applied equitable estoppel to prevent an individual from avoiding his or her support obligations without requiring an emotional relationship with the child. *See* Br. for Pet’r at 49-53 (citing cases). Should this Court determine, however, that an emotional bond is necessary to establish reliance, then the relatively brief length of time that E.T. remained a part of Baby R.’s life should not, in itself, preclude such a finding. New York courts have recognized that a strong emotional bond can attach within months. *Luis S. v. Zoraida L.*, 39 A.D.3d 377, 377 (1st Dep’t 2007) (applying equitable estoppel to prevent genetic testing requested by putative father based on child’s bonding with foster parents after six-month placement dating from when child was ten months old); *M.S. v. K.T.*, 177 Misc. 2d 772, 776 (Fam. Ct. Rockland County 1998) (recognizing that adoptive parents had “[u]ndoubtedly . . .

established a strong relationship with the child” by the time the child was four months old).

In sum, when viewed through the lens of countless decisions applying equitable estoppel in paternity and child support proceedings, the facts alleged in this case support the application of equitable estoppel. For example, E.T. was present at Baby R.’s birth and cut the umbilical cord. A. 105-106 (Support Application ¶¶ 11, 13). *See, e.g., Beth R.*, 19 Misc. 3d at 725; *Diana E.*, 20 A.D.3d at 370; *cf. Juan A. v. Rosemarie N.*, 55 A.D.3d 827, 827 (2d Dep’t 2008) (applying equitable estoppel where putative father not present during birth). Even before he was born, E.T. presented Baby R. to her family and friends as her own. A. 77, 105, 107 (Support Application ¶¶ 10, 18). *See, e.g., Sharon GG. v. Duane HH.*, 63 N.Y.2d 859, 859 (1984); *Biserka B. v. Zdenko R.*, 133 A.D.2d 728, 729 (2d Dep’t 1987). After the breakup, E.T. sent money and gifts to H.M. and Baby R. A. 106 (Support Application ¶¶ 14-16). *Cf. Ettore I.*, 127 A.D.2d at 11 (noting that petitioner putative father never sent any money other than \$25 check). Moreover, E.T. knew that H.M. would be left without recourse to a biological parent given that they decided to use an unknown donor. A. 105 (Support Application ¶ 6). *See, e.g., D.M. v. C.M.*, 17 Misc. 3d 1128, at \*2 (Sup. Ct. Bronx County 2007); *Wener*, 35 A.D.2d at 53 (stating that the parties “are the only ‘parents’ she has ever known. Having brought the child into their home, they must, of necessity, shoulder the

burden of her support.”); *see also In re Sebastian*, 25 Misc. 3d at 582 n. 44 (recognizing that anonymous donors are “both protected from claims of support and barred from establishing legal paternity”).

In view of well-established precedent, the court below should have applied equitable estoppel in order to prevent fraud and injustice and to serve the best interests of Baby R.

**E. Conclusion**

For the reasons set forth above, NYCLA respectfully urges this Court to reverse the Opinion and Order of the Appellate Division, Second Department, entered on May 26, 2009; reinstate the relevant orders of the Rockland County Family Court as identified by Petitioner-Appellant, *see* Br. for Pet’r at 60; and grant Petitioner-Appellant all such further relief as the Court deems just and proper.

December 24, 2009

Respectfully submitted,

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