NO ORAL ARGUMENT REQUESTED

APL-2015-00235

Court of Appeals
of the
State of New York

In the Matter of

ESTRELLITA A.,

Petitioner-Respondent,

– against –

JENNIFER D.,

Respondent-Petitioner.

BRIEF OF *AMICI CURIAE*
THE NATIONAL CENTER FOR LESBIAN RIGHTS,
THE AMERICAN CIVIL LIBERTIES UNION, AND
THE NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT

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DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), *amici curiae* hereby disclose that they do not have any corporate parents, subsidiaries, or affiliates, except as follows: *Amicus* the American Civil Liberties Union has local affiliates in many states across the country and in Washington, D.C.

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INTRODUCTION

This Court now has two opportunities to ensure that New York's family law does not fall out of step with the majority of other states, which recognize the parental rights of unmarried, non-biological parents who intentionally conceive a child through assisted reproduction and then raise the child in a shared family home with the biological parent. In this case and in *Brooke B. v. Elizabeth C.*, APL-2015-00236, the Court has been asked to recognize that parent-child relationships are built on the commitment, care, and obligations parents assume as part of their decision to raise a child and that biology, marriage, and adoption are not the only ways to establish legal parental relationships.

Provided that this Court grants leave to do so, *amici* will file a comprehensive amicus brief in *Brooke B.*, attached hereto as Exhibit A (hereinafter "Brooke B. Br."), asking the Court to bring New York law into step with the consensus that unmarried parents who conceive children through assisted reproduction may be recognized as legal parents or allowed to seek custody and visitation. *Amici* respectfully request that this Court refer to their brief in *Brooke B.*, deny Jennifer D.'s appeal in this case, and uphold the rulings of the Family Court, Suffolk County and the Second Department to protect Estrellita A.'s established parent-child relationship.

INTERESTS OF *AMICI CURIAE*

Amicus the National Center for Lesbian Rights ("NCLR") is a national legal non-profit organization founded in 1977 that is committed to advancing the civil and constitutional rights of lesbian, gay, bisexual, and transgender people and their families. For more than thirty-five years, NCLR has participated as counsel or amicus in numerous custody and visitation cases involving non-biological parents. Those cases include, among others, *Troxel v. Granville*, 530 U.S. 57 (2000); *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013); *Latham v. Schwerdtfeger*, 802 N.W.2d 66 (Neb. 2011); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012); and *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010). The doctrinal and constitutional issues raised in those cases are very similar to the issues before this Court in the instant appeal.

Amicus the American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU seeks to ensure that committed relationships between children and the adults who function as their parents, whether or not related by blood, adoption, or marriage, are protected and, thus, has filed amicus briefs in a number of cases addressing this issue, including in this Court. *See*

Debra H., 14 N.Y.3d 576; *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); and *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000). These cases, along with the ACLU's representation of the plaintiffs in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and the plaintiff in *United States v. Windsor*, 133 S. Ct. 2675 (2013), also further the goal of ensuring that the full range of family protections are available for lesbian and gay parents and their children.

Amicus the New York City Gay and Lesbian Anti-Violence Project ("AVP") is a non-profit organization founded in 1980 that empowers lesbian, gay, bisexual, transgender, queer, and HIV-affected communities and allies to end all forms of violence through organizing and education, and supports survivors through counseling, legal representation, and advocacy. AVP's Legal Services Department represents survivors of violence, some of whom are non-biological parents whose intended parental rights are being withheld from them as a means to exert power and control over the non-biological parent.

ARGUMENT

In this case, both the Family Court and the Second Department correctly found that Estrellita is a parent to her child and is therefore responsible for child support and entitled to visitation. Reversing that decision would put New York out of step with a majority of other states, which have recognized the need to protect

children's legal relationships with the people who have functioned as their parents, even if they do not have a biological or adoptive relationship to the children. *See* Brooke B. Br. 7-19; *see also, e.g.*, *Charisma R. v. Kristina S.*, 175 Cal. App. 4th 361, 387-88 (2009); *King ex rel. A.B. v. S.B.*, 837 N.E.2d 965, 967 (Ind. 2005); *Frazier*, 295 P.3d at 553; *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007); *Latham*, 802 N.W.2d 66; *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014); *T.B. v. L.R.M.*, 786 A.2d at 916-17. Reversing that decision would also leave Estrellita and her child without any legal means by which to maintain their established parent-child relationship.

Because Estrellita was adjudicated as a parent in a previous child support action brought by the birth mother, Estrellita has standing as a parent to seek visitation and custody of her child.[1] *Amici* support Petitioner-Respondent's arguments that "New York law does not distinguish between a 'support parent' and a 'visitation parent,'" Petitioner-Respondent Br. 14, and that Estrellita's status as an adjudicated parent grants her standing to seek custody and visitation under N.Y. Dom. Rel. L. § 70 ("either parent may apply" for an order of custody for their child). Nothing in New York law, or the law of any other state, supports the theory

[1] As this Court has recognized, the Family Court has jurisdiction to determine whether an unmarried, non-biological parent is a legal parent in a child support action brought by a legal parent. *See, e.g.*, *H.M. v. E.T.*, 14 N.Y.3d 521, 527 (2010).

of "partial parenthood," where adjudicated parents are liable for support but not entitled to seek custody or visitation.

Finally, as an adjudicated parent, Estrellita has equal constitutional rights with Jennifer. Jennifer has no constitutional right to object to the recognition of Estrellita's rights as a parent, because both Estrellita and Jennifer have equal constitutional rights to preserve and maintain their relationships with their child. *See* Brooke B. Br. 24-32; *see also Charisma R.*, 175 Cal. App. 4th at 388; *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the *Brooke B.* Amicus Brief, *amici curiae* respectfully request that the Court deny Jennifer D.'s appeal; affirm the decisions of the Second Department and Family Court, allowing Estrellita A. to assert her rights as an adjudicated legal parent; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: New York City, New York
March 15, 2016

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EXHIBIT A

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BROOKE B.,

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– against –

ELIZABETH C.,

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

Appellant.

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INTRODUCTION

This case presents this Court with the opportunity to bring New York's family law into line with other states by recognizing that parental and familial relationships are not solely based on biology, marriage, or adoption.[1] Rather, parent-child relationships are built on the commitment, care, and obligations parents assume as part of their decision to raise a child, regardless of whether they have a biological relationship with that child or parentage through marriage. Recognizing that these bonds form the basis for a legal action to seek custody or visitation is especially critical to protecting the children of non-marital relationships. Non-biological parent-child relationships often (although by no means always) arise in the context of families formed by unmarried same-sex couples. *Amici* are groups committed to protecting the needs of such families.

Bringing New York's law into line with that of many other states will, in a manner consistent with statute, common law, and constitutional requirements, advance a central goal of this state's family law: the protection of a child's best

[1] The fact that unmarried same-sex parents can obtain a second parent adoption for the non-biological parent when both parents agree does not resolve the issues presented in this case and other cases involving unmarried non-biological parents who have not adopted. The parentage statutes and parentage actions exist to provide remedies for parents and children who have not taken legal action to protect their rights before a dispute arises. Both same-sex and different-sex parents can adopt to protect their rights, but many do not or cannot. Not all unmarried parents know they can adopt, and even those that do often cannot afford the expense. Allowing parents like Brooke to assert their parentage and seek custody is necessary to avoid violating these parents' and their children's equal protection and due process rights under the United States Constitution. *See, e.g., infra* Part III.

interests. The facts of this case show just why this goal matters. Brooke B. and her former partner Elizabeth C. together decided to start a family and had a child, conceived by Elizabeth by use of assisted reproductive technology.[2] Since M.B.'s birth, and with Elizabeth's full consent and participation, Brooke has continued to care for M.B. as a loving parent, providing the emotional and financial support that being a parent entails, even after Elizabeth and Brooke's relationship ended. Not until several years after the end of their relationship did Elizabeth seek to prevent Brooke from parenting their child. Brooke now seeks standing to establish the right to continue her relationship with her child, and to assume the financial and other obligations that go along with parenthood.

The Family Court found Brooke's claim to parental rights and obligations compelling. Nonetheless, both the Family Court and the Fourth Department viewed themselves as constrained by precedent to deny her standing under this Court's prior rulings in *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010), and *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991). This Court has the opportunity to correct this situation, and make clear that all parents, regardless of the biological or marital relationships in their families, have the right—and, together with it, the obligation—to preserve their relationships with and responsibilities to their children.

[2] At the time M.B. was born, New York did not legally recognize same-sex marriages, and thus Brooke and Elizabeth were unable to marry.

Children form deep and enduring bonds with people who have acted as their parents, regardless of whether this relationship is legally recognized. All children deserve the same legal protections for their family relationships, and no child should be excluded from this protection merely because the Legislature did not explicitly contemplate their particular family situation. Courts have the power and duty to ensure that all children are protected where statutes do not provide explicit protections.

In support of that broader interest, this brief will discuss how courts in the majority of states that have considered these questions have recognized unmarried non-biological parents as legal parents, or allowed them to seek custody or visitation, even where statutes do not explicitly define or address such parents. New York has fallen out of step with this consensus by failing to recognize any legal means by which parents like Brooke can maintain their parental relationships with their children. Specifically, courts in many other states have held that parents who used assisted reproduction to conceive a child with the child's biological parent, and who have jointly raised the child, are legal parents. These courts have done so based on equitable considerations or interpretations of their existing parentage statutes. Numerous other courts have recognized that where a functional parent has developed a parent-child bond that was fostered and encouraged by the biological parent, and the functional parent has taken on all the responsibilities of a

parent, the functional parent should, at a minimum, be granted standing to seek custody or visitation.[3]

This brief will also explain why granting unmarried non-biological parents such as Brooke standing to pursue legal parentage is fully consistent with broader constitutional principles. Permitting Brooke to have custody or visitation is entirely compatible with Elizabeth's constitutional rights as a parent. Further, a ruling in favor of Brooke B. vindicates M.B.'s constitutional rights. Finally, by permitting a parent like Brooke to seek custody or visitation, this court can protect the constitutionally protected fundamental right to maintain a parent-child relationship.

For the reasons summarized above and stated below, *amici curiae* respectfully request that this Court reverse the Appellate Division's decision and order; issue an order permitting Brooke B.'s petition for custody and visitation to proceed; remand this case to the Family Court; and overrule this Court's prior holdings in *Debra H.* and *Alison D.*

[3] Courts have used the terms "functional parent," "*in loco parentis*," "*de facto* parent," and "psychological parent" to mean a person who has functioned as a parent to a child and is entitled either to recognition as a legal parent or at a minimum, standing to seek custody or visitation. *See, e.g.*, *Middleton v. Johnson*, 633 S.E.2d 162, 162, 167 (S.C. Ct. App. 2006) (holding that a person who qualifies as an *in loco, de facto*, or psychological parent has standing to seek custody or visitation).

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protected and, thus, has filed amicus briefs in a number of cases addressing this issue, including in this Court. *See Debra H.*, 14 N.Y.3d 576; *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); and *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000). These cases, along with the ACLU's representation of the plaintiffs in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and the ACLU's and NYCLU's representation of the plaintiff in *United States v. Windsor*, 133 S. Ct. 2675 (2013), also further the goal of ensuring that the full range of family protections are available for lesbian and gay parents and their children.

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ARGUMENT

I. NEW YORK LAGS BEHIND OTHER STATES BY DENYING UNMARRIED NON-BIOLOGICAL PARENTS STANDING TO PROTECT THEIR RELATIONSHIPS WITH THEIR CHILDREN.

Courts in the majority of states have recognized the need to protect children's relationships with people who have functioned as their parents, even if they are unmarried non-biological parents. These states have done so based on the recognition that a child's relationship with such a parent is as real, enduring, and important to that child as any parent-child relationship. Many courts have held that such parents are legal parents based on either equity or interpretations of existing parentage statutes, while other courts have recognized in equity that where a parent-child bond exists, and where the biological parent fostered and encouraged that relationship, the functional parent should—at a minimum—be granted standing to seek custody or visitation.

The majority of states to consider these questions have recognized that unmarried non-biological parents must be given legal rights in order to protect children's relationships with adults who are their parents in every way. *See*, *e.g.*, *Kinnard v. Kinnard*, 43 P.3d 150, 153-54 (Alaska 2002); *Thomas v. Thomas*, 49 P.3d 306, 309 (Ariz. Ct. App. 2002); *Robinson v. Ford-Robinson*, 208 S.W.3d 140, 143-44 (Ark. 2005); *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011); *Charisma R. v. Kristina S.*, 175 Cal. App. 4th 361, 387-88 (2009); *In re E.L.M.C.*, 100 P.3d 546,

556 (Colo. Ct. App. 2004); *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840, 844 (Conn. Super. Ct. 1999); *In re T.P.S.*, 978 N.E.2d 1070, 1078 (Ill. Ct. App. 2012); *King ex rel. A.B. v. S.B.*, 837 N.E.2d 965, 967 (Ind. 2005); *Frazier*, 295 P.3d at 553; *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 & n.6 (Mass. 1999); *Latham*, 802 N.W.2d 66; *Russell v. Bridgens*, 647 N.W.2d 56, 66 (Neb. 2002) (Gerrard, J. concurring); *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014); *V.C.*, 748 A.2d at 551-52; *A.C. v. C.B.*, 829 P.2d 660, 665 (N.M. Ct. App. 1992); *Boseman v. Jarrell*, 704 S.E.2d 494, 552-53 (N.C. 2010); *Mason v. Dwinnell*, 660 S.E.2d 58, 67-69 (N.C. Ct. App. 2008); *McAllister v. McAllister*, 779 N.W.2d 652, 658 (N.D. 2010); *In re Bonfield*, 780 N.E.2d 241, 247-48 (Ohio 2002); *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015); *Eldredge v. Taylor*, 339 P.3d 888 (Okla. 2014); *Peters v. Costello*, 891 A.2d 705, 710 (Pa. 2005); *T.B.*, 786 A.2d at 916-17; *Middleton*, 633 S.E.2d at 167-68; *Clifford K.*, 619 S.E.2d at 157; *H.S.H.-K.*, 533 N.W.2d 419.

Each of these courts recognized that an unmarried non-biological parent forms a genuine and critically important bond with her child, warranting recognition of full legal parentage or, at a minimum, standing to pursue custody or visitation. "It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are

legal or de facto." *E.N.O.*, 711 N.E.2d at 891. "The attachment bonds that form between a child and a parent are formed regardless of a biological or legal connection." *Chatterjee*, 280 P.3d at 292. Consistent with this established consensus, Brooke should be entitled to petition for legal recognition as a parent.

Courts have found that parties in similar situations to Brooke should have standing to petition for legal recognition as a parent in two main ways. Some state courts have concluded that these rights flow from their existing parentage statutes. Others have invoked their equitable powers to grant parents like Brooke legal parentage rights consistent with the children's best interests. These two paths are discussed in turn.

As for statutory considerations, many courts have determined that a person who is not a child's biological parent may be recognized as the child's legal parent under existing parentage statutes. Most recently, the Supreme Court of New Hampshire held that its statutory presumption of parentage for a man who lived with and held a child out as his own must be applied equally to women even though the law uses the terms "man" and "father." *Madelyn B.*, 98 A.3d at 498-501. Under general statutory canons, the court reasoned, a law must be interpreted in a way that is consistent with legislative intent, while state law explicitly required that statutes be construed in a gender-neutral manner. *Id.* at 498-500. The court also found that the New Hampshire parentage statute's stated goal of providing

equal parentage rights to married and unmarried parents "indicates an implicit legislative preference for the recognition of two parents" when children in fact have two parents. *Id.* at 500. These "policy goals of ensuring legitimacy and support would be thwarted if our interpretation of [the holding out provision] failed to recognize that a child's second parent under that statute can be a woman." *Id.* For these reasons, the court held that when two unmarried women raise children together as parents, the non-biological mother must be allowed to establish legal parentage just as a similarly situated man would be. *Id.* at 501.

Other states have similarly concluded that an unmarried, non-biological parent may be recognized as the child's legal parent under existing parentage statutes. *See, e.g.*, *Elisa B.*, 117 P.3d at 664-65 (parentage statute referencing only men applied to woman who had raised two children with their biological mother); *Frazier*, 295 P.3d at 553 (same); *Chatterjee*, 280 P.3d at 293 (parentage statute referencing men only applied to woman who had raised a child with their adoptive mother); *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 588-89 (Colo. Ct. App. 2013) (former same-sex partner had standing to bring a maternity action under Colorado's Uniform Parentage Act); *King*, 837 N.E.2d at 967 (non-biological parent may have full parental responsibilities); *Roberto d.B.*, 923 A.2d at 125 (paternity statutes apply equally to men and women); *Rubano v. DiCenzo*, 759 A.2d 959, 969-70 (R.I. 2000) (former same-sex partner of biological mother could

bring visitation claim under provisions of Rhode Island's Uniform Law on Paternity).

Animating these decisions is the idea that the relevant statutes should apply equally to all parents, even though the statutory language may refer only to men. Courts apply this reasoning to further the state's compelling interest of having both "parents physically, emotionally, and financially support the child from the time the child comes into their lives." *Chatterjee*, 280 P.3d at 293. Declaring an unmarried non-biological parent like Brooke to be a parent "is not giving parental rights to an unrelated individual; it is recognizing the parental role *that existed from birth*." *Charisma R.*, 175 Cal. App. 4th at 387-88 (emphasis added).

Many unmarried non-biological parents have already had children and formed families. These parents will continue to do so regardless of whether the legislature explicitly addresses their relationships. In short, these families exist today, and their children have the same need for protection and support as other children. As New York courts and other courts nationwide have done many times in the past when confronted by changing social circumstances, this Court must interpret its statutes consistent with their purpose to protect the children in these families.

As to equitable considerations, courts in other states have recognized that the enactment of statutes addressing parentage did not abrogate their equitable,

common law powers to protect parent-child relationships. Employing these equitable powers, many courts have concluded that functional parents who have jointly decided to conceive a child and then raised that child from birth may be recognized in equity as having all the rights and responsibilities of a parent. Courts are well within their powers to grant equitable parents standing to seek parental rights because, as the Supreme Court of Washington has explained:

> [S]imply because a statute fails to speak to a specific situation should not, and does not in our common law system, operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned. . . . [To fail to provide rights to functional parent and child] would be antagonistic to the clear legislative intent that permeates this field of law—to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state.

Parentage of L.B., 122 P.3d at 176; *see also id.* at 163 ("The equitable power of the courts to adjudicate relationships between children and families is well recognized."). This authority resides in the basic functioning of a common law system and the legislative intent of custody and visitation statutes. Thus, the court declared, "[w]e adapt our common law today to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy." *Id.* at 176.

Courts have drawn upon their equitable powers to grant unmarried non-biological parents standing to seek parental rights in at least three ways. First, they

have held that parentage protections apply to unmarried as well as married couples that have children by means of assisted reproduction. Second, courts have held that functional parents are entitled to recognition as full legal parents. Third, courts have exercised their powers in equity to allow functional parents to, at a minimum, seek custody or visitation to protect those children from the harm of severing their parent-child bonds.

First, a number of states have invoked common law principles in extending parentage protections to unmarried couples who have children through assisted reproduction, even where the relevant statutes only address married couples. For example, although Illinois' assisted reproduction statute addresses only married couples, the Illinois Supreme Court held that an unmarried male partner who consented to his female partner's insemination was responsible for supporting the resulting children under common law principles. *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) ("Regardless of the method of conception, a child is born in need of support."). The court explained that where the legislature "fails to address the full spectrum of legal problems facing children born as a result of artificial insemination and other modern methods of assisted reproduction," courts should act in equity to recognize and protect the parentage of the resulting children. *Id.* at 150. More recently, an Illinois appellate court applied this rule equally to a female unmarried partner. *T.P.S.*, 978 N.E.2d at 1078 ("Because [the

unmarried woman] participated in the decision and process of bringing [the couple's children] into this world through artificial insemination, *M.J.* establishes . . . the children's right not only to [her] monetary support but also to her physical, mental, and emotional support."). The court refused to "deny a child his or her right to the physical, mental, and emotional support of two parents merely because his or her parentage falls outside the terms of the Illinois Parentage Act," declaring such a result "diametrically opposed to Illinois's public policy with respect to minor children," and in no way foreclosed by the statute. *Id.* at 1079-80.

The South Carolina Supreme Court has held that a parent who consented to the conception of a child through assisted reproduction is a legal parent, even where the state did not have a statutory provision addressing assisted reproduction. *See, e.g.*, *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) (husband who consented to his wife's insemination could be father despite absence of statute addressing consent to insemination).

Indeed, a New York appellate court has recognized that even where parents did not comply with provisions of the Domestic Relations Law, the assisted reproduction statute should still be applied to ensure that both parents of children conceived through assisted reproduction are recognized. *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 217 (3d Dep't 2008). In *Laura WW.*, the Third Department found that even though a husband's status as father of a child conceived via artificial

donor insemination could not be established under the consent requirements of N.Y. Dom. Rel. L. § 73, "equity and reason require[d] a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child." 51 A.D.3d at 215.

Second, courts in other states have exercised their equitable powers to hold that an unmarried non-biological parent is a legal parent where that person developed a parent-child bond with the consent and encouragement of the biological parent. These courts have recognized that a functional parent in this situation should be treated as a parent on the same legal footing as a biological parent. *Parentage of L.B.*, 122 P. 3d at 177 ("recognition of a person as a child's *de facto* parent necessarily authorizes a court to consider an award of parental rights and responsibilities . . . based on its determination of the best interest of the child" because *de facto* parents have the same legal rights as a biological parent (citation omitted)); *C.E.W.*, 845 A.2d at 1151 (courts may exercise their "equitable jurisdiction to act as parens patriae" in considering "an award of parental rights and responsibilities" to a "de facto parent"); *Latham*, 802 N.W.2d at 72 ("[T]he rights, duties, and liabilities of [a functional parent] are the same as those of the lawful parent."); *Peters*, 891 A.2d at 710 ("The rights and liabilities arising out of an *in*

loco parentis relationship are, as the words imply, exactly the same as between parent and child." (citing *T.B. v. L.R.M.*, 786 A.2d at 916-17)).

Courts relying on equity to craft relief for functional parents have done so in a way that is inherently reasonable and restrained, and does not risk "opening the floodgates" to parentage claims by any adult that has a relationship with a child.[4] While courts relying on equity have described the test for equitable parentage in slightly different ways, all of them have allowed an equitable parent to be recognized *only* where that person has taken on all of the responsibilities of a parent and developed a parent-child bond with the consent and encouragement of the biological parent. These requirements appropriately establish a high threshold for equitable parentage. They exclude persons who have provided care for a child but who have not assumed a truly parental role, such as babysitters or nannies who are *employed* as caregivers, or to romantic partners whom the biological parent has merely treated as a supportive adult in the child's life. *See, e.g.*, *Parentage of L.B.*, 122 P.3d at 179 (*de facto* parent test is inherently limited by requirement of parent-

[4] Courts in other states with statutes authorizing courts to award custody to an "other person" but without providing additional guidance have applied these statutes to protect a parent-child relationship developed with the consent and encouragement of the biological parent, where the functional parent has performed parental functions. *Clifford K.*, 619 S.E.2d at 157 (holding that psychological parent may seek custody where psychological parent "fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support" for substantial duration with "consent and encouragement" of biological parent). *See also Laspina-Williams*, 742 A.2d at 844 (allowing former same-sex partner of biological mother to seek visitation where biological mother "allowed, even encouraged, the plaintiff to assume a significant role in the life of the child such that she is a party entitled to seek visitation with the child").

child relationship fostered by biological parent, which cannot be met by teachers, nannies, or caregivers who have not acted as parents). The requirement that the biological parent consent to and foster the relationship "places control within his or her hands" and allows the biological parent to determine who will function as a parent in their child's life, *V.C.*, 748 A.2d at 552, whereas the requirement that the functional parent has developed a bonded parent-child relationship ensures that only individuals who have played a truly parental role have standing. In short, standing is warranted and granted only when a person has had a truly parental role and has established a parental bond with the child that was fostered and encouraged by the biological parent.

Third, courts in still other states that have not considered whether functional parents should be recognized as legal parents have held that courts may act in equity to allow functional parents to, at a minimum, seek custody or visitation to protect those children from the harm of severing their parent-child bonds. For example, in *H.S.H.-K.*, the Wisconsin Supreme Court relied on its inherent equitable powers to establish a landmark framework to evaluate when a court may intervene to safeguard the relationship between a child and a functional parent. 533 N.W.2d at 432 (citing *Dovi v. Dovi*, 13 N.W.2d 585 (Wis. 1944)). *See also, e.g.*, *E.N.O.*, 711 N.E.2d at 890; *Robinson*, 208 S.W.3d at 143-44; *V.C.*, 748 A.2d

539, 547-48; *Bonfield*, 780 N.E. 2d at 247-48; *Middleton*, 633 S.E.2d at 167-68; *Thomas*, 49 P.3d at 309.

As these cases recognize, it is appropriate for courts to exercise their inherent equitable jurisdiction over minors to protect children whose needs the legislature has not yet expressly addressed.[5] This broad equitable power ensures that courts have the ability to adequately secure the best interests of a child. As discussed *supra*, many families have already been formed where a functional parent is raising a child and will continue to be formed regardless of whether the legislature addresses their relationships. These families exist today, and their children have the same need for protection and support as other children.

The lesson of this substantial and growing body of precedent is clear: Unmarried non-biological parents should be treated as parents under the law, with the ability to seek custody and visitation. This Court should join the consensus on

[5] Several states have enacted statutes—upheld over constitutional challenges—specifically recognizing a functional parent's right to seek custody of a child. *See, e.g.*, Colo. Rev. Stat. § 14-10-123(1)(c); Conn. Gen. Stat. § 46b-59(b); D.C. Code §§ 16-831.01-13; Ind. Code § 31-9-2-35.5; Minn. Stat §§ 257C.01-08; Mont. Code Ann. §§ 40-4-211(4)(b), 40-4-228; Or. Rev. Stat. § 109.119; S.C. Code Ann. § 63-15-60(A); S.D. Codified Laws § 25-5-29; Tex. Fam. Code Ann. § 102.003(a)(9) (West). Notably, many of these statutes merely codified or responded to previously-developed case law. *See, e.g.*, *Meldrum v. Novotny*, 640 N.W.2d 460, 468-69 (S.D. 2002) (Gilbertson, C.J., concurring); *Moore v. Moore*, 386 S.E.2d 456, 458-59 (S.C. 1989); *Wallin v. Wallin*, 187 N.W.2d 627, 630 (Minn. 1971); *Seymour v. Seymour*, 433 A.2d 1005, 1007-08 (Conn. 1980); *Dodge v. Dodge*, 505 S.E.2d 344, 350 (S.C. Ct. App. 1998); *Tubwon v. Weisberg*, 394 N.W.2d 601, 603-04 (Minn. Ct. App. 1986); *Collins v. Gilbreath*, 403 N.E.2d 921, 923-24 (Ind. Ct. App. 1980). That courts have consistently acted before legislatures manifests the clarity of the judiciary's equitable powers in this context; that the case law is then routinely codified underscores the consensus as to the question presented.

this point and find that Brooke is M.B.'s parent, with the attendant standing to seek custody and visitation of her child.

II. RECOGNIZING THE STANDING OF UNMARRIED NON-BIOLOGICAL PARENTS TO SEEK CUSTODY OR VISITATION RIGHTS WOULD NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF BIOLOGICAL PARENTS.

Holding that Brooke has standing to seek custody and visitation would not not infringe upon Elizabeth's constitutional rights. The United States Supreme Court's decision in *Troxel* does not prevent Brooke from bringing custody and visitation claims. *Troxel* does not bar claims by people who have parental relationships with children; rather, *Troxel* only applies only to a request for custody or visitation by a third party who—unlike Brooke—does not have a parental relationship with the child.[6]

In *Troxel*, the Court invalidated a statute providing that "[a]ny person may petition the court for visitation rights at any time," and that "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child." 530 U.S. at 61 (citation and quotation marks omitted). The trial judge had applied the statute to order visitation with the child's grandparents over the objections of the child's mother based on the judge's conclusion that such

[6] As discussed in Part III, *infra*, because Brooke and M.B. have a constitutionally protected parent-child relationship that developed as a result of their shared family life, Brooke has the same fundamental right to the care and custody of M.B. that Elizabeth has. However, even if this Court does not find that Brooke and M.B.'s relationship is constitutionally protected, *Troxel* does not preclude allowing Brooke to seek custody or visitation because *Troxel* does not apply to claims by people with an established parental relationship.

visitation was in the child's best interest. *Id.* The Supreme Court held that the statute was unconstitutional as applied to the mother because it infringed on her fundamental parental right to the care, custody, and control of her children. However, seven justices in *Troxel* indicated that, in contrast to the grandparents' claim before them, they would look favorably at a visitation or custody claim from a functional parent or person with a substantial relationship to the child, such as Brooke. *Id.* at 85 (Stevens, J. dissenting) (discussing potential claims by a "once-custodial caregiver" or an "intimate relation"); *id.* at 77 (Souter, J. concurring) (criticizing Washington's lack of a threshold showing of a "substantial relationship") (internal quotation marks and citation omitted); *id.* at 98-99, 100-01 (Kennedy, J., dissenting) (favoring the use of a continuum that would apply a best interests test for former caregivers and *de facto* parents).

Courts that have considered the implications of *Troxel* in cases involving unmarried non-biological parents have concluded that *Troxel* does not bar courts from recognizing and protecting these parent-child relationships. For example, in *Bethany*, the Arkansas Supreme Court differentiated grandparent visitation cases from equitable parentage cases, reasoning that a parent-child relationship is "different from the grandparent relationships found in *Troxel* . . . because it concerns a person who, in all practical respects, was a parent. Thus, any argument that [an equitable parent] cannot seek visitation because to do so would interfere

with [a legal parent's] right to parent is unavailing." *Bethany*, 378 S.W.3d at 736 (citation omitted). *See also Charisma R.*, 175 Cal. App. 4th at 387-88 (presumed parent has liberty interest in her parental relationship with child that is co-equal to liberty interest of biological parent); *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011) (same); *King*, 837 N.E.2d at 967 (biological mother's rights not violated by allowing non-biological mother to bring action to determine her parentage); *Middleton*, 633 S.E.2d at 169 (enforcement of equitable parental rights to avoid significant harm to child constituted compelling circumstances that overcame legal parent's constitutional rights); *Rubano*, 759 A.2d at 976 (when parent "agreed to and fostered" development of parent-child bond with non-biological parent, *Troxel* does not allow parent to "arbitrarily terminate" that relationship). As discussed more fully below in Part III, all parents, even if not related to their children through blood or marriage, have constitutional liberty interests in their relationships with their children.

In cases such as Brooke's, where a biological parent has allowed, encouraged, and fostered the development of a parent-child relationship, *Troxel* creates no bar to a court's giving force and effect to that relationship; rather it is consistent with the biological parent's decision to share her parental authority over the upbringing of their children with another person. Allowing an unmarried non-biological parent to seek custody or visitation supports the decision the other

parent made and had the right to make as the children's parent to invite the non-biological parent into the child's life as a second parent. For this reason, many courts in other jurisdictions have recognized that a court does not infringe parental authority by providing protection for a parent-child relationship that a parent *voluntarily chose to create and foster* between another adult and his or her child. As the Supreme Court of Kansas explained:

> If a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference, then that parent should have the right to enter into a coparenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children.

Frazier, 295 P.3d at 557. *See also Boseman*, 704 S.E.2d at 552-53 (where biological parent "shared parental responsibilities with [former partner] and, when occurring in the family unit [biological parent] created without any expectation of termination," she waived her "her paramount parental status"); *Mullins*, 317 S.W.3d at 579 (birth mother who co-parented her child with her same-sex partner "waived . . . her right to be the sole decision-maker regarding her child and the right to sole physical possession of the child"); *Mason*, 660 S.E.2d at 73 ("Courts do not violate a parent's constitutionally-protected interest by respecting the parent-child relationships that the legal parent—in accordance with her constitutional rights—voluntarily chose to create."); *Middleton*, 633 S.E.2d at 169 ("The legal parent's active fostering of the psychological parent-child relationship

is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child."); *Rubano*, 759 A.2d at 976 (when legal parent fosters *de facto* parent-child relationship, she renders her own parental rights "less exclusive and less exclusory" than they otherwise would have been); *V.C.*, 748 A.2d at 552 (if parent wishes to maintain his or her zone of privacy to exclusion of others, he or she cannot invite another person to function as parent and create bond with child). Similarly, the Supreme Court of Pennsylvania in *T.B.* found persuasive the fact that the non-biological parent gained parental authority through the biological parent, noting that "a biological parent's rights do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." 786 A.2d at 919 (citation and quotation marks omitted).

While a parent's decision about whether to permit another person to develop a parent-child relationship with her child must be respected, once a parent has made that decision and encouraged a parental bond to form, there is a compelling interest in protecting the child from the "emotional harm . . . intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent." *E.L.M.C.*, 100 P.3d at 561; *see also Rideout v. Riendeau*, 761 A.2d 291, 301 (Me. 2000) ("The cessation of contact with a [person] whom

the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being."). "[C]hildren have a strong interest in maintaining the ties that connect them to adults who love and provide for them." *V.C.*, 748 A.2d at 550. The South Carolina Court of Appeals likewise relied on this principle:

> [W]hen a legal parent invites [another parent] into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced.

Middleton, 633 S.E.2d at 169.

Here, as alleged in the complaint, Elizabeth, by her actions and statements, voluntarily chose to foster Brooke's bonded relationship with M.B., and only later decided to act inconsistently with that decision. Allowing Brooke to seek custody or visitation respects the co-equal constitutional rights of both Brooke and Elizabeth, and protects M.B. from the harm of losing his relationship with a woman he has always known as his mother.

III. GRANTING UNMARRIED NON-BIOLOGICAL PARENTS THE RIGHT TO SEEK CUSTODY AND VISITATION IS NECESSARY TO PROTECT THE RIGHTS OF SUCH PARENTS AND THEIR CHILDREN UNDER THE UNITED STATES CONSTITUTION.

Granting an unmarried non-biological parent like Brooke the right to establish her parentage and to seek custody and visitation is also necessary to avoid violating her rights and M.B.'s rights to substantive due process and equal protection under the United States Constitution. U.S. Const. amend. V, XIV.

First, unmarried non-biological parents like Brooke have a fundamental right to the care and custody of their children because the U.S. Supreme Court has long recognized that this liberty interest arises from the creation of the parent-child relationship through shared family life, rather than mere biological ties. Denying Brooke (and unmarried non-biological parents like her) the ability to establish parentage and seek custody through the courts also violates her equal protection rights by excluding her and M.B. from the protections of a system that is open to those who can establish parentage based on biology, adoption, voluntary acknowledgements of paternity, or marriage. Such an interpretation would exclude unmarried non-biological parents who use assisted reproduction, which necessarily excludes virtually all unmarried same-sex parents from these protections, discriminating against Brooke based on both method of conception and sexual orientation. *See infra* Section III.A. Second, M.B. has his own independent liberty interest in maintaining his parent-child relationship with Brooke that requires protection. Excluding Brooke and M.B. from these protections would also deny M.B. the guarantee of equal protection, in violation of decades of U.S. Supreme Court precedent prohibiting discrimination against children merely because of the circumstances of their birth. *See infra* Section III.B.

A. Recognizing Brooke as a Parent Is Necessary to Avoid Violating Her Equal Protection and Due Process Rights.

Parents like Brooke have a fundamental right to maintain their parent-child relationships with their children regardless of the lack of a biological connection. The United States Supreme Court has held that the core of the parent-child relationship protected by the Due Process Clause derives not from biology, but rather from the emotional bonds that develop between family members as a result of shared daily life. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *see also Robert O. v. Russell K.*, 80 N.Y.2d 254, 262 (1992) (noting constitutional due process interest in child-parent relationship and emphasizing "guiding principle" that "the biological connection between [parent] and child is not sufficient, in and of itself, to create a protected interest"). As the Court explained in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977):

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

Accordingly, biology alone is neither necessary nor sufficient to establish this constitutionally protected familial relationship. *See Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989) (biological father's substantive due process right to maintain

connection with child was insufficient to overcome California's presumption that husband of child's mother was child's father where husband was raising child). Likewise, numerous state appellate courts have recognized the constitutional rights of non-biological parents. *See Charisma R.*, 175 Cal. App. 4th at 387-88 (non-biological mother has liberty interest in her parental relationship with child that is co-equal to liberty interest of biological mother); *Smith*, 16 A.3d at 931 (*de facto* parent has same constitutional rights to care and custody of her child as biological parent); *Parentage of L.B.*, 122 P.3d at 178 (explaining that biological and *de facto* parents "both have a 'fundamental liberty interest[]' in the 'care, custody, and control'" of the child); *V.C.*, 748 A.2d at 550 (explaining that "strong interest" both child and psychological parent have in their parent-child relationship "for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life"). Here, Brooke has been one of M.B.'s two parents in every way since the day he was born. As a result, she and her son have a constitutionally protected relationship that Brooke has a fundamental right to maintain. Denying her that right would violate her Due Process rights in that relationship.

Denying Brooke (and parents similarly situated to her) the ability to seek custody or visitation would also violate her equal protection rights. New York law protects parent-child relationships when families break up by providing parents

access to the courts to petition for custody and visitation and evaluating those claims based on the best interests of the child. This system allows parents to seek custody where their parentage can be established by biology, adoption, voluntary acknowledgements of paternity, or marriage. Denying Brooke access to the system the State has created to protect and maintain family relationships merely because she is an unmarried non-biological parent constitutes differential access to a fundamental right, *see M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996) (calling parental relationships a "fundamental interest"), and thus is subjected to heightened equal protection scrutiny.[7] *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-90 (1978) (since right to marry is fundamental right, state law that limits ability of "deadbeat dads" to remarry is subject to close scrutiny); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (differential burden on right to travel subject to strict scrutiny), *overruled on other grounds by Edelman v. Jordan*, 415 U.S 651 (1974). The State cannot create an exclusive system for getting access to certain fundamental rights, including the right to maintain parent-child relationships, and then bar someone who is entitled to those rights from using the system without a compelling reason. In *M.L.B.*, the Supreme Court held in a termination of parental rights case that the

[7] As mentioned *supra* note 2, the parties to this case were unable to marry in New York before M.B. was born, and were thus unable to access the automatic protections that New York law afforded to married spouses. Unmarried non-biological parents nevertheless have a constitutional right to maintain relationships with their children, and children have a constitutional right to have their relationships with such parents legally recognized.

"State must provide access to its judicial processes" because "a fundamental interest is at stake"—maintaining a parent-child relationship. 519 U.S. at 113; *see also Little v. Streater*, 452 U.S. 1, 13-17 (1981) (state must pay for blood test sought by indigent defendant contesting paternity suit because creation of parent-child relationship was at issue). It would similarly constitute differential access to the fundamental right to the "companionship, care, custody and management" of children, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), to deny individuals like Brooke the ability to seek a determination in a court that they are parents, and if so deemed, court-ordered custody or visitation if found to be in the best interests of the child.

Denying Brooke the ability to assert her parentage and seek custody would also deny her equal access to her fundamental rights as a parent because of her sexual orientation. Unmarried different-sex parents can establish parentage based on genetic testing when they are biological parents, and both biological and non-biological different-sex parents can sign voluntary acknowledgements of paternity, which have the force of a court order. *See* N.Y. Fam. Ct. Act § 516-a; N.Y. Pub. Health Law § 4135-b. These acknowledgements can only be set aside in limited circumstances, *see* N.Y. Fam. Ct. Act § 516-a(b)(v), resulting in many non-biological fathers in different-sex relationships being established as legal fathers. There is no equivalent process for unmarried same-sex parents.

In *Obergefell*, the Supreme Court held that statutes and state constitutional provisions excluding same-sex couples from marriage denied same-sex couples the fundamental right to marry and thus violated the Due Process and Equal Protection Clauses of the federal Constitution. 135 S. Ct. at 2602-03. Although *Obergefell* addressed the right to marry, which is not at issue in this case, the constitutional rulings in *Obergefell* are directly relevant to this case because a parent's right to the care and custody of his or her children is, like marriage, a fundamental right. Moreover, the Court explained that one of the bases "for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id.* at 2600; *see also id.* at 2599 (explaining that "choices concerning contraception, family relationships, procreation, and childrearing," like marriage, are protected by Constitution). Refusing to allow Brooke to assert her parental rights would violate equal protection and substantive due process for the same reasons that the U.S. Supreme Court required states to allow same-sex couples to marry and required states and the federal government to recognize their marriages: It would discriminate against those families and deny the couples and their children important protections.

B. Recognizing Brooke as a Parent Is Necessary to Avoid Violating M.B.'s Equal Protection and Due Process Rights.

Children also "possess constitutional rights," including their own protected liberty interest in their parent-child relationships. *Planned Parenthood of Cent.*

Mo. v. Danforth, 428 U.S. 52, 74 (1976); U.S. Const. amend. XIV, § 1. Children have a core, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life. *Smith*, 431 U.S. at 854; U.S. Const. amend. XIV, § 1. As the Kansas Supreme Court explained, denying children with same-sex parents the right to have both of these parents recognized "impinges upon the children's constitutional rights." *Frazier*, 295 P.3d at 557-58. M.B. did not choose how to structure his family. Yet his relationship with Brooke is no less real or important—and its reality and importance to him is in no way diminished—because Brooke is not his biological parent or because his parents never married.

This unequal treatment also violates the child's equal protection rights. The United States Supreme Court has long recognized that laws discriminating between children based on the status of their parents are unconstitutional unless the distinction is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see also, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down statute that prohibited non-marital children from inheriting from their father unless their parents had married); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972) (striking down workmen's compensation statute that denied benefits to unacknowledged non-marital children); *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down statute that prevented non-marital children from

bringing a wrongful death tort action); *Plyler v. Doe*, 457 U.S. 202 (1982) (excluding undocumented immigrant children from public education violated the children's equal protection rights). This Court has likewise recognized that children must not be penalized for circumstances beyond their control. *See Clara C. v. William L.*, 96 N.Y.2d 244, 255 (2001) (non-marital children must have access to the same process and protections for seeking child support).

There is no legitimate reason, let alone a substantial or compelling reason, for the state to exclude parents like Brooke from accessing the system in place for protecting parent-child relationships. The relationships that children with unmarried non-biological parents have with their parents are no less important than the relationships formed between other children and their parents. The state has no less of an interest in protecting these relationships than it does in protecting all parent-child relationships, and it is constitutionally-required to provide children with unmarried, non-biological parents with the same protections given to other children. Recognizing that Brooke, and other parents in similar situations, may seek custody and visitation either by statute or in equity would avoid these constitutional concerns.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court reverse the Fourth Department's decision and order; issue an order permitting Brooke B.'s petition for custody and visitation to proceed; remand this case to the Family Court for further proceedings consistent with this Court's order; overrule this Court's prior holdings in *Debra H.*, 14 N.Y.3d 576, and *Alison D.*, 77 N.Y.2d 651; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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