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MEMORANDUM OF LAW IN SUPPORT OF JUDICIAL AUTHORITY TO ISSUE SECOND PARENT ADOPTIONS FOR CHILDREN OF MARRIED SAME-SEX SPOUSES

This memorandum of law is submitted on behalf of four married female same-sex couples who petitioned this Court for second parent adoptions of children conceived using donor sperm and carried by one spouse in each couple. These Brooklyn couples have sought the security of adoption decrees legally confirming the parental status of the non-birth parents of the children each couple planned for and raise together. They do this because they want for their children, as devoted parents do, the anchor of strong, unassailable legal ties between each child and his or her intended parents. These parents understand that parentage transcends genetics and biology; each of these children has two loving, committed parents, even though only one of the two parents is genetically related to the child. As discussed in Section I, each of these petitioning couples firmly understands that whether or not the non-birth parent formally adopts the children born to the married couple, she is the legal parent of the couple's children, entitled to all the rights and responsibilities of parentage as a matter of law in New York and nationwide. There should be no mistake on this critical point: as the New York legislature through the Marriage Equality Act, the United States Supreme Court through *Obergefell v. Hodges*, and a recent Court of Appeals opinion all make clear, married same-sex parents and their children are entitled to the identical legal protections—including application of marital presumptions of parentage—on which other families can rely. *See* Marriage Equality Act, 2011 N.Y. Law ch. 95, §§ 1, 2 and 5-a (codified at N.Y. Dom. Rel. Law ("DRL") §§ 10-a and 10-b); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Brooke S.B. v. Elizabeth A. C.C.*, No. 91, 2016 WL 4507780, slip op. at 5 (N.Y. Ct. App. Aug. 30, 2016) ("*Brooke S.B.*") (Pigott, J., concurring).

But these parents nonetheless face a difficult reality. Despite hard won civil rights advances, they and their children inhabit a world in which same-sex spouses and parents still suffer discrimination and their newly-acknowledged legal rights and family structures still come under challenge. As the Supreme Court noted only last year, many generations of exclusion from the institution of marriage and its "constellation of benefits" has "consigned" same-sex couples "to an instability many opposite-sex couples would deem intolerable in their own lives." *Obergefell*, 135 S. Ct. at 2601. The Court emphasized the toll this discrimination has taken on these couples' children in particular, who "suffer the stigma of knowing their families are somehow lesser[,]… relegated through no fault of their own to a more difficult and uncertain family life." *Id.* at 2600.

These uncertainties, though significantly ameliorated through access to marriage for those who choose it, have not ended. As discussed in Section II, the petitioning parents are rightly concerned that relying solely on birth certificates naming them both based on New York's marital presumption may not afford their children the security of an adoption decree affirming joint parentage. They understand that the legal standards establishing parentage of children conceived using assisted reproductive technology vary greatly from state to state and remain unsettled in many jurisdictions. These couples recognize that, given lingering uncertainties in New York law and resistance to the rights of lesbian and gay people elsewhere in our country and the world, their children are best protected by second parent adoptions, which receive full faith and credit nationwide and respect in other countries.

Moreover, while these four families share many similarities, each also has its own added reasons (common to many other families as well) for undertaking second parent adoptions. For example, some couples used known donors and seek added legal clarity that those donors have

no parental rights or obligations. In one family, an egg from the adoptive mother was fertilized by sperm from a known donor and the resulting embryo was carried to term by the second spouse, the birth parent. Another family used an anonymous donor but performed the insemination at home, without physician assistance. Several families are especially concerned that a crisis could arise on visits to close relatives in parts of the United States where resistance to the legal rights of same-sex couples and parents persists. Others travel abroad frequently, for work and with family, and fear that countries that do not recognize their marriages will not recognize their parental status based on New York's marital presumption alone.

The families are not only wise to seek second parent adoptions, they are also well within their rights under New York adoption law. As explained in Section III, this Court has jurisdiction to grant second parent adoptions to same-sex spouses who are nonetheless recognized as the legal parents of their non-genetic or non-birth children, on the children's birth certificates and for all other reasons as well. Our State's adoption laws "must be applied in harmony with" the overriding "humanitarian principle that adoption is a means of securing the best possible home for a child." *Matter of Jacob*, 86 N.Y.2d 651, 657-58 (1995) (interpreting adoption statutes to permit second-parent adoption by intended second parent, the same-sex partner of child's biological parent). This means that married New York same-sex parents continue to have access to second parent adoption as an avenue, in addition to marriage, to provide the stability and security so long denied their families.[1]

[1] Petitioners are aware of the unreported "Decision" of Kings County Surrogate Lopez Torres in *Matter of Seb C-M*, Redacted by Court, NYLJ 1202640527093 (Surr. Ct. Kings County, decided January 6, 2014), and its conclusion that second parent adoptions by married same-sex spouses whose children are conceived using anonymous donor sperm are "neither necessary nor available." For the reasons explained in this memorandum of law, while Petitioners agree with that Decision's confirmation that, whether or not an adoption occurs, a non-genetic parent is the legal parent of the resulting child by virtue of the marital presumption, they disagree that second parent adoptions are no longer important to the welfare of the child nor available under New York law. As far as Petitioners' counsel are aware, other New York adoption courts have not followed that Decision and, like this Court, have continued to grant second parent adoptions to this day.

SUMMARY OF FACTS

Petitioners refer the Court to their Petitions for Adoption and supporting papers for more extensive information about the backgrounds and facts relating to each of the petitioning families. They offer here a brief outline of facts particularly relevant to this memorandum of law.

In the Matter of the Adoption of a Child Whose First Name Is M[2]:

M's parents were married in 2011. They conceived M in a home insemination procedure using sperm from a known donor, a family friend who agreed in writing that he would have no parental rights or responsibilities and who executed consent to the adoption by M's second, non-genetic, parent. M was born in 2014. Her parents plan to include her on regular visits with close family relatives in the southern United States. In order to pursue a job opportunity, and subsequent to completion of M's adoption, the family has moved out of state.

In the Matter of the Adoption of a Child Whose First Name Is J:

J's two mothers married in Connecticut in 2010 at a time when New York did not grant same-sex couples the freedom to marry but did recognize their marriages if entered out of state. Their first daughter, conceived using an anonymous donor, was born in 2012, and the couple obtained a second parent adoption in 2013 to give added security to the child's legal relationship to her non-genetic mother. J, their second child and the subject of this adoption petition, was born in Brooklyn in early 2016. She was conceived in an insemination procedure performed by a physician with sperm from the same anonymous donor used to conceive the couple's first child. While J's adoption petition was pending, the family planned a long-awaited trip to Italy.

[2] In the body of this memorandum, Petitioners use first initials only to identify the children and cases referenced more fully on the cover.

In the Matter of the Adoption of a Child Whose First Name Is R S:

R's two mothers married in 2015, after he was conceived and several months before his birth at the end of that year. His "adoptive" mother supplied the egg used to conceive him with sperm from a known donor, who relinquished any claim to parental rights and consented to the adoption. The resulting embryo was implanted in his second mother, who gave birth to R. This family also has relatives living elsewhere in the United States, as well as abroad.

In the Matter of the Adoption of a Child Whose First Name Is L **and**
In the Matter of the Adoption of a Child Whose First Name Is Z:

The young siblings involved in this pair of Petitions were conceived using anonymous donor sperm by their same-sex parents, who married in 2013. Each spouse is the birth parent of one of the children. L was born in 2013 in Connecticut, where L's birth parent attended graduate school, and Z was born in 2016 in Brooklyn, where the couple now lives. Each birth mother petitioned to cross-adopt her non-genetically related son, to further safeguard their children. Both women pursue professions requiring international travel and have lived and have family roots abroad.

ARGUMENT

I. Children Born To Married Same-Sex Parents Are Entitled To The Marital Presumption Of Parentage Under New York Law.

Although married same-sex parents continue to face some legal uncertainties, there should be *no* confusion on one point: under New York law, a child born to married same-sex parents is legally presumed to be the child of both parents. *Both* spouses in each of the petitioning couples must be recognized as the legal parent of the couples' children, with or without an adoption.

For at least the past eight years, married New York same-sex couples have been accorded explicit legal respect for their marriages, including application of the marital presumption of parentage and birth certificates naming both as parents. Since well before the 2011 effective date of the Marriage Equality Act, out-of-state marriages of same-sex couples were accorded legal recognition in New York. *See, e.g.*, *Windsor v. United States*, 699 F.3d 169, 177-78 (2d Cir. 2012), *aff'd* 133 S. Ct. 2675 (2013); *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dep't 2008).

With the 2011 passage of the Marriage Equality Act, the Legislature definitively confirmed that same-sex married couples are accorded all the legal rights and protections for their families that different-sex couples enjoy. According to the Act's declared legislative intent:

> S 2. Legislative intent. Marriage is a fundamental human right. Same-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. For the welfare of the community and in fairness to all New Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex.
>
> It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.

Marriage Equality Act, ch. 95, AB 8354 (2011).

N. Y. Dom. Rel. Law § 10-a(2) expressly dictates that:

> No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy,

> common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

A prime "protection" and "responsibility relating to marriage" is application of the marital presumption establishing the parentage of children born to married parents. *See, e.g.*, *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26 (1881). A child born during a marriage is deemed the child of both spouses under this venerable "presumption . . . described as 'one of the strongest and most persuasive known to the law.'" *David L. v. Cindy Pearl L.*, 208 A.D.2d 502, 503 (2d Dep't 1994), quoting *Matter of Findlay*, 253 N.Y. 1, 7 (1930); *see also Fung v. Fung*, 238 A.D.2d 375, 375-76 (2d Dep't 1997) (marital presumption protects child's best interests).

This presumption applies regardless of whether the woman's spouse is genetically related to the child. Indeed, the presumption evolved to establish a child's "legitimacy" and rights of inheritance and to preserve the child's relationship with both spouses in a protected marital family unit precisely when the child was *not* genetically linked to both spouses. *See Michael H. v. Gerald D.*, 491 U.S. 110, 125-28 (1989) (plurality). A plurality of the Supreme Court upheld in *Michael H.* application of the marital presumption to accord the mother's biologically-unrelated spouse, rather than the child's known genetic father, the legal status of parent to the child. *Id.* New York decisional law and statutes likewise confirm that the marital presumption operates to protect a child's relationship with a non-biologically related parent, including when the couple has used anonymous donor insemination and there is no question that, at most, only one known parent is genetically connected to the child. The marital presumption nonetheless recognizes *both* spouses as legal parents, for all purposes, ranging from custody and visitation to child support and inheritance. *See, e.g.*, *Brooke S.B.*, slip op. at 5 (Pigott, J., concurring) (the

term "parent" includes, "pursuant to a statute enacted in 1974 [i.e., N.Y. Dom. Rel. Law ("DRL") § 73], the spouse of a woman to whom a child was born by artificial insemination."); *Counihan v. Bishop*, 111 A.D.3d 594 (2d Dep't 2013) (presumption applied to grant non-biologically related spouse custody and visitation rights to child conceived using anonymous donor insemination ("ADI")); *Laura WW. v. Peter WW.*, 51 A.D.3d 211 (3d Dep't 2008) (presumption applied to hold non-biological parent whose spouse conceived using ADI responsible for child support). The marital presumption, initially recognized under longstanding New York common law, has also been codified in multiple New York statutes, including N.Y. Fam. Ct. Act §§ 417, 418, and 532, as well as DRL §§ 24 and 73.

The policy imperatives underlying the marital presumption have led New York courts and the Legislature explicitly to use the presumption to enforce the parent-child relationships of children conceived by married couples using ADI. DRL § 73(1), first enacted in 1974, provides that "[a]ny child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes." When these statutory requirements are met, the presumption of parentage is irrebuttable. *See Laura WW.*, 51 A.D.3d at 214. As discussed below, even when couples using ADI do not follow such statutorily-prescribed steps as written consents and performance of the procedure by a physician—as many do not—under common law, the marital presumption still applies, albeit as a rebuttable presumption of parentage. *See id.* at 214-15; *Anonymous v. Anonymous*, 151 A.D.2d 330, 330 (1st Dep't 1989); *Wendy G-M. v. Erin G-M.*, 45 Misc. 3d 574, 581 (Sup. Ct. Monroe County 2014); *Anonymous v. Anonymous*, 1991 WL 57753, at *4, 18 (Sup. Ct. N.Y. County 1991).

In accordance with this recognition, the New State and New York City Departments of Health have for years issued birth certificates naming both same-sex spouses where one gave birth to a child.[3] These birth certificates, which reflect the marital presumption, help pave the family's way through life, for example allowing both parents to register the child in school and obtain a passport for the child. *See Henry v. Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014) ("Obtaining a birth certificate that accurately identifies both parents of a child born using [ADI] . . . is vitally important for multiple purposes"), *rev'd sub nom. Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

These families' entitlement to application of the marital presumption to secure their parent-child relationships, and to birth certificates reflecting that parentage, was a core part of the constellation of rights secured in *Obergefell*, 135 S. Ct. at 2601. But, as explained below, despite the legal recognition due these families under the marital presumption, and the birth certificates naming both spouses, Petitioners still have strong reason to obtain second parent adoptions.

II. Although Both Spouses In These Families Are Legal Parents Of Their Children Without Adoptions, Given Lingering Legal Uncertainties, The Best Interests Of The Children Are Served By The Added Security Of Adoption.

Despite the protections afforded by the marital presumption to these families, as discussed in subsection II.A. below, potential concerns remain under New York law, compelling many same-sex spouses to seek the added protection of adoptions. When these families venture beyond New York's borders, these uncertainties compound, given the great variety and unsettled

[3] *See Matter of Sebastian*, 25 Misc. 3d 567, 576 (Surr. Ct., N.Y. County 2009); Letter directives from N.Y.S. Dep't of Health to Hosp. Birth Registrar, Local Registrar, and Hosp. Admin. (Jan. 20, 2009) regarding birth certificate policy, http://www.lambdalegal.org/sites/default/files/doh_birth-certificates.pdf; *Gay Couples Gain Birth-Certificate Rights*, Wash. Times, Dec. 15, 2008, http://www.washingtontimes.com/news/2008/dec/15/gay-couples-gain-birth-certificate-rights/; Jennifer Peltz, *NYC Changes Birth Certificate Policy for Lesbians*, Assoc. Press, March 29, 2009, http://www.dallasvoice.com/nyc-changes-birth-certificate-policy-for-lesbians-1019101.html.

issues in other states' legal standards regarding children conceived using assisted reproductive technology—as well as lingering resistance to the rights of same-sex spouses. *See* II.B. Even our federal government, notably in the Social Security Administration's preferential treatment of adoption decrees over birth certificates when it comes to processing child's insurance benefits, *see* II.C., gives cause for same-sex married parents to seek the protection of a second parent adoption. Moreover, the uncertain and often hostile terrain same-sex couples and their children face in many other parts of the world in which they may travel is further impetus for New York same-sex couples—and New York courts—to protect the State's children through adoption decrees. *See* II.D. Indeed, given that adoption decrees are the surest, and in some situations potentially the only, way to secure the parent-child relationships at stake, depriving these families of access to adoptions would raise serious constitutional concerns. *See* II.E.

A. Married Same-Sex Couples May Seek Second Parent Adoptions To Avoid Potential Uncertainties Arising Under New York Law.

Notwithstanding their entitlement under New York law to the marital presumption of parentage, married same-sex couples still experience lingering vulnerability about recognition of their parental rights, even when both spouses are identified on their children's birth certificates. This is particularly the case for couples who used known sperm donors to form their families.

While a birth certificate naming both parents gives families a significant degree of protection, ultimately a birth certificate is only *evidence* of parentage; in and of itself it does not conclusively confer a legal parental status. *See* N.Y. Pub. Health Law § 4103; *Wendy G-M.*, 45 Misc.3d at 576 n.2; *Matter of Sebastian*, 25 Misc. 3d at 576. Even when the birth certificate lists both spouses, scenarios could arise—and have arisen in the past—in which the parentage of a child born to a married couple (same- or different-sex) or conceived using assisted reproductive

technology has been litigated. The insecurity and burdens such an action entails could have been avoided entirely had the couple obtained a second parent adoption early on.

For example, if all the "technical" provisions of DRL § 73 are not followed for a child conceived through ADI, such as written "acknowledged" consents by the spouses and written certification by a physician, § 73's irrebuttable presumption might well not apply, and a parent or putative parent might someday attempt to rebut the marital presumption. In such a case, courts evaluate whether both parties in fact consented to the ADI and to co-parent. *See Laura WW.*, 51 A.D.3d at 217. The possibility of such a conflict is no mere hypothetical; it has arisen in multiple New York cases, including, for example, *Matter of Kelly S. v. Farah M.*, 139 A.D.3d 90, 102-03 (2d Dep't 2016); *Laura WW.*, 51 A.D.3d at 213-15; and *Wendy G-M.*, 45 Misc. 3d at 575-77. Neglecting a statutory formality as seemingly insignificant as having the written consents notarized or "acknowledged," as specified in DRL § 73, could open the child's parentage to scrutiny and litigation. *See Wendy G-M.*, 45 Misc. 3d at 583.

Yet it is unsurprising that many families using ADI—including some party to this brief—have not followed the requirements of DRL § 73 down to the last "t." As the Appellate Division has noted, "medical personnel who conduct [ADI] procedures"—much less couples undergoing ADI—"are not always aware of statutory consent requirements." *Laura WW.*, 51 A.D.3d at 217, and quoted in *Kelly S.*, 139 A.D.3d at 103. Many couples perform the inseminations using donor sperm privately—and less expensively—at home, without a physician's participation. In such cases, the child's legally recognized parentage might someday hang in the balance while courts evaluate evidence whether both parties effectively consented to co-parent the child. A second parent adoption forestalls the possibility that questions over the child's parentage might arise in the future, sparing the family—and most importantly the child—conflict and potential heartache.

Married couples in which one is the genetic parent supplying the ovum fertilized by donor sperm and the other is the gestational parent have additional reason to seek second parent adoption to avoid questions about parentage. This was the circumstance in *Matter of Sebastian*, granting a second parent adoption to confirm the parentage of the genetic mother. The court noted in that case that "[a]t present there is no clear law in New York determining the relationship between a child and various women who may lay claim to parentage through genetic or gestational relationship. And, of special significance, no reported decision, in this or other states, has discussed or determined the parentage of a child's gestational and genetic mothers in a proceeding which involves no dispute between the parties." 25 Misc. 3d at 571 (footnote omitted).

Married same-sex couples who used known, rather than anonymous, sperm donors have especially strong reason to seek second parent adoptions. Many families take this route to spare the trouble and expense of acquiring anonymous donor sperm, foregoing a medical setting and selecting a friend or a relative of the non-genetic parent-spouse as the donor. Neither DRL § 73 nor any other New York statute *expressly* provides that an unknown donor—much less a known donor—has no parental rights to a child. Importantly, DRL § 73 implicitly leaves the donor a non-parent by making a woman's spouse irrebuttably the legal parent for all purposes. *See, e.g.*, *Matter of Michael*, 166 Misc. 2d 973, 974-75 (Surr. Ct. Bronx County 1996); DRL § 73, *reviewed by* Alan D. Scheinkman, Practice Commentaries (McKinney's Cons. Laws of N.Y. 2015).

But State law makes even less clear that a known donor lacks a legal relationship to the resulting child, particularly where DRL § 73's formalities have not been satisfied. "Same-sex couples have long been vulnerable, as have their donors, when family constellations and

expectations change." Susan L. Crockin and Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. Am. Acad. Matrim. Lawyers 289, 342 (2015). Several New York cases—albeit pre-dating marriage equality—illustrate the types of conflicts that could arise in the absence of clarity about the known donor's relationship to the child. *See, e.g.*, *Matter of Tripp v. Hinckley*, 290 A.D.2d 767 (3d Dep't 2002) (sperm donor, who had been involved in children's lives since birth, was granted visitation with children raised by lesbian co-parents); *Matter of Thomas S. v. Robin Y.*, 209 A.D.2d 298 (1st Dep't 1994), *app. dismissed*, 86 N.Y.2d 779 (1995) (granting order of filiation and visiting rights to sperm donor who had been involved since birth in life of child reared by lesbian co-parents).

Second parent adoptions make definitively clear that the known donor has no legal parental status, and that both same-sex spouses do. Without the clarity of a second parent adoption, same-sex couples may find themselves needlessly constrained in their family's relationship with the close family friend or relative who served as donor. Seeking to avoid any confusion that the donor has established parental rights—or support obligations—by virtue of visits with and acknowledgment to the child of that person's donor role, couples and donors may believe they have no choice but to maintain distance. The second parent adoption allows same-sex couples and donors to make constitutionally-protected choices to procreate, to associate together and with the couple's children, and regarding childrearing, without being unnecessarily constrained by potential legal consequences in this murky area. *See generally Obergefell*, 135 S. Ct. at 2600 (noting that longstanding fundamental rights of childrearing and procreation, as well as marriage, apply to same-sex families); *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 506 (1977) (rejecting ordinance restricting ability of extended family to reside together and holding

that "the Constitution prevents [the government] from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."); *see also* subsection II.D.

Dicta in two recent New York cases involving same-sex parents further reinforce why married same-sex couples continue to seek second parent adoptions in order to forestall possible problems down the road. In *Matter of Paczkowski v. Paczkowski*, 128 A.D.3d 968 (2d Dep't 2015), the Appellate Division denied a non-genetic parent's petition for joint custody of the child conceived by her estranged same-sex partner, whom she had married shortly *after* the birth of the child (and hence DRL § 73 evidently did not govern).[4] That fact helps explain the Appellate Division's comment (with which the petitioning couples in any event disagree) that the marital "presumption of legitimacy" created in N.Y. Fam. Ct. Act § 417 and DRL § 24 "is one of a biological relationship, not of legal status." *Paczkowski*, 128 A.D.3d at 969. Similarly disquieting words also appear in *Matter of Q.M. v. B.C.*: "the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives" and "does not preclude differentiation based on essential biology." 46 Misc. 3d 594, 599-600 (Fam. Ct. Monroe County 2014). That case held that the marital presumption did not establish the parentage of the same-sex spouse of a woman who conceived a child with the man petitioning for paternity, with whom she had been sexually involved during a separation between the spouses. While this context helps explain and take some sting out of this passage, cases like these continue to cause concern for married same-sex couples and their counsel.[5]

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[4] Although the couple's *post-birth* marriage was not mentioned in the Appellate Division opinion, it is a matter of public knowledge and presumably in the appellate record. *See* John Leland, *Parenthood Denied by Law*, N.Y. Times, Sept. 12, 2014, http://www.nytimes.com/2014/09/14/nyregion/after-a-same-sex-couples-breakup-a-custody-battle.html?_r=0.

[5] Fortunately, the Court of Appeals's recent ruling in *Brooke S.B.* now opens the door to yet other potential routes to standing of a non-genetic parent, beyond application of a marital presumption. *Brooke S.B.*, slip op. at 24-26.

Thus, even within New York, conflicts could arise sparking litigation over the parent-child bonds between married non-genetic parents and their children. While the petitioning couples would hope and expect that the parental rights of such spouses eventually would be affirmed, "[e]ven if litigation ultimately sustains the parent-child relationship created by presumption or by an assisted conception statute, protracted court cases are always unwelcome." Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 Stan. J. Civ. Rts. & Civ. Liberties 201, 264 (2009) ("Polikoff"). A decree of adoption offers these families unparalleled security and peace of mind.

B. Persisting Inequities And Variations In Other States' Application Of Marital Presumptions And ADI Legal Standards To Same-Sex Parents Justify Granting Second Parent Adoptions To New York Couples.

While *Obergefell* made clear that same-sex couples and their children are entitled nationwide to the full panoply of rights and protections afforded through marriage, 135 S. Ct. at 2605, as a practical matter significant disparities and uncertainties linger among states in application of marital presumptions to non-genetic parents in same-sex couples. Variations among states in the degree to which they define through statute or common law the legal relationships of spouses and sperm donors to children conceived using assisted reproductive technology compound the insecurities confronting New York lesbian parents contemplating travel or potential relocation to other jurisdictions. Even post-*Obergefell*, "[o]pen questions about the applicability of the marital presumption to same-sex spouses loom large . . . ." Joanna L. Grossman, *Parentage Without Gender*, 17 Cardozo J. Conflict Resol. 717, 747 (2016) ("Grossman").

Until every state's laws and policies catch up to the obligation to give full recognition to these families, and same-sex couples can rely on uniform standards nationwide, second parent adoption remains the surest way to safeguard children of married same-sex parents. A decree of adoption, ensured full faith and credit throughout the land, provides the security these families otherwise lack. *See V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (*per curiam*) (holding Alabama obligated to grant full faith and credit to Georgia second parent adoption decree affirming parental rights of lesbian co-parent to child born using assisted reproductive technology). The Constitution requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., art. IV, § 1. But under settled interpretations of the Full Faith and Credit Clause, public acts, records, and judicial proceedings are not each entitled to the same degree of recognition among states. Instead, the full faith and credit requirement is at its strongest when it comes to enforcing the judgment of another state. *See V.L.*, 136 S. Ct. at 1019; *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998); *Finstuen v. Crutcher*, 496 F.3d 1139, 1153–54 (10th Cir. 2007). By contrast, full faith and credit may not necessarily, in and of itself, require one state to substitute its own statutory standards—such as marital presumptions—for those arising under another state's statutes. *See Baker*, 522 U.S. at 232. And since, even within New York, a New York-issued birth certificate identifying parentage based on the marital presumption provides evidence, but not invariably conclusive proof, of parentage, questions about a child's parentage could conceivably arise in other states notwithstanding a certificate identifying both same-sex spouses as parents. *See* 28 U.S.C. § 1738 (another state's records "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). Therefore, while a judgment of adoption obtained in one state must be

given full faith and credit nationwide regardless of whether it could have been obtained in a sister state, the same is not necessarily true of a parental status obtained in one state by operation of a statutory or common law standard.[6]

Legal standards in this country for determining parental status of children conceived using assisted reproductive technologies notoriously lag behind the reality that ever increasing numbers of children come into the world with the help of these techniques. An estimated thirty to forty thousand children are born every year conceived from donated sperm. Colleen Carroll Campbell, Editorial, *Children's Rights Often Overlooked in Today's Brave New World*, St. Louis Post-Dispatch, Apr. 16, 2009, http://www.stltoday.com/news/opinion/editorial/children-s-rights-often-overlooked-in-today-s-brave-new/article_32ae17a0-303f-5c74-a509-6905bbc37af3.html. An estimated one million such children currently live throughout this country. *Id.*; Ross Douthat, Op-Ed, *The Birds and the Bees (via the Fertility Clinic)*, N.Y. Times, May 30, 2010, http://www.nytimes.com/2010/05/31/opinion/31douthat.html. Yet "states have been slow to adopt" legislation clarifying the parentage of children conceived via assisted reproductive technology, "leaving most parents of such children without a clear path to obtain legal parentage." Mary Patricia Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test to Determine Parentage in Assisted Reproductive Technology Cases*, 50 Hous. L. Rev. 1295, 1296 (2013). Of course, even where no explicit ADI statute exists, general statutory and common law marital presumptions of parentage—albeit potentially rebuttable—should nonetheless apply. *See, e.g.*, Haw. Rev. Stat. Ann. § 584-4; Ind. Code Ann. § 31-14-7-1. When

[6] Of course, even if full faith and credit might not compel interstate recognition of marital presumption-based parentage of children of same-sex spouses, other constitutional doctrines, including equal protection and due process guarantees, should. *See Obergefell*, 135 S. Ct. 2584; Polikoff at 264. But same-sex parents and their children should not have to live with insecurity on this question of constitutional law that could be remedied through adoption.

conflicts have arisen in some states, it has fallen to the courts to interpret these more general parentage statutes, adapt common law standards, and fill gaps left in ADI laws. *See, e.g.*, *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335 (Iowa 2013); *In re Baby Doe*, 353 S.E.2d 877 (S.C. 1987). While these additional authorities are important sources of rights for same-sex couples using ADI, they fall short of the certainty and security of an adoption decree that must be respected in *every* state.

Moreover, those states that do have statutes explicitly addressing ADI in some fashion are, proverbially, "all over the map" with respect to whether and how they address significant legal questions about the parentage of children conceived this way. The attached Appendix compiling many of the relevant state statutes and summarizing some key common variations among their provisions demonstrates the uneven state-by-state patchwork of standards applying to children conceived using ADI.[7] This disparity among legal standards leaves New York same-sex spouses and donors unable to rely with confidence on a consistent, universal rule of law securing children's parent-child relationships in all jurisdictions with which the family members might interact.

Only approximately three-quarters of the states have *any* statutory provisions explicitly addressing in any way parental statuses of participants in ADI. *See* Appendix ("App.). And only about half the states' statutes explicitly address the status of sperm donors in some fashion. *See* App., column 1. Furthermore, statutes in more than half the states, including New York, employ expressly gendered terms, like "husband," "man," and "father," in specifying who may be recognized as a second, albeit non-genetic, parent to a child conceived using ADI. *See* App.,

[7] The Appendix, compiled by Lambda Legal, is a general 50-state overview of donor insemination statutes in a rapidly evolving area of law. Additional statutory provisions not noted in the Appendix, as well as state judicial rulings, may also be relevant to this topic, and the Appendix does not purport to offer a definitive assessment of other states' laws.

column 2; *see, e.g.*, N.J. Stat. Ann. § 9:17-44(a) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

About twenty of the state statutes, New York's among them, explicitly call for some degree of medical involvement in the ADI process, leaving open to potential question how parental relationships would be evaluated for those whose parents did not use physician or medical technology in the conception process. *See* Appendix, column 4. Indeed, Georgia's ADI statute goes so far as to purport to make it a felony for anyone *but* "physicians and surgeons licensed to practice medicine" to "perform artificial insemination upon any female human being." Ga. Code Ann. § 43-34-37(a).

Many, but not all, of the state statutes require some form of written consent or acknowledgment by the spouses, and potentially the participating medical professional, though the formal requirements vary among this subset of states as well. Several even require filing of consents with state courts or agencies. *See* Appendix, column 5; *see, e.g.*, Conn. Gen. Stat. Ann. § 45a-773 (written consents and physician statement required to be filed in probate court); Mo. Ann. Stat. § 210.824 (written consents of parents must be signed, and physician must certify consents and file with vital records bureau).[8]

Simply understanding the legal issues and their rights and risks in each state in which they might travel, visit, or relocate would require New York same-sex couples to retain a nationwide fleet of family law attorneys with special expertise in standards applying to assisted

[8] Added questions could arise under other states' evolving and as yet unsettled laws for couples in which one is the genetic parent via ovum donation and the other is the gestational parent. *See, e.g.*, *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

reproductive technology, same-sex parenting, and marital presumptions. In short, "[t]he lack of statutory clarity on when, by whom, and on what basis the parentage presumption can be rebutted results in an unacceptable level of uncertainty threatening the stability of a child's family." Polikoff at 225-26.

The potential pitfalls for same-sex parents are highlighted by recent and pending cases in a number of states seeking enforcement of *Obergefell* with respect to the parenting rights of married same-sex spouses. These cases also demonstrate the lingering resistance in some parts of the country to treating same-sex families with legal equality and respect. For example, many state governments have resisted—wrongly—applying the marital presumption to children conceived using ADI by same-sex spouses for purposes of issuing birth certificates naming both parents. *See, e.g.*, *Brenner v. Scott*, No. 4:14CV107-RH/CAS, 2016 WL 3561754, at *3 (N.D. Fla. Mar. 30, 2016) ("According to the [Florida] Surgeon General . . . [the] still-extant statute" using gendered terms to confirm parental status of "husband" "precludes some same-sex parents from being listed on the birth certificate."); *Roe v. Patton*, 2:15-CV-00253-DB, 2015 WL 4476734 (D. Utah July 22, 2015); *Gartner*, 830 N.W.2d 335. Indeed, well over a year after *Obergefell*, cases on this issue are still being actively litigated. *See, e.g.*, *Marie v. Mosier*, No. 14-CV-02518-DDC-TJJ, 2016 WL 3951744, at *10 (D. Kan. July 22, 2016) ("the facts before the court create uncertainty whether [Kansas Department of Health and Environment] will treat all same-sex spouses who give birth through artificial insemination the same as it treats opposite-sex spouses"); *Carson v. Heigel*, No. 3:16-cv-00045-MGL (D. S.C. July 18, 2016) (challenging South Carolina's denial of birth certificates naming both married mothers of children born using ADI); *Torres v. Seemeyer*, No. 15-CV-288-BBC (W.D. Wis. Sept. 14, 2016) (challenging

Wisconsin's denial of birth certificates) (decision and additional information available at http://www.lambdalegal.org/in-court/cases/torres-v-rhoades).

Sadly, even genetic same-sex parents, estranged from their same-sex spouses, have claimed in custody and visitation disputes that the marital presumption does not confer parental rights on their children's second parents. *See, e.g.*, Jamie Satterfield, *Parenting Rights in Same-Sex Divorces Headed to a Tennessee Appellate Court*, Knoxville New Sentinel (June 24, 2016), http://www.knoxnews.com/news/crime-courts/parenting-rights-in-same-sex-divorces-headed-to-a-tennessee-appellate-court-36046f02-b742-54df-e053--384279061.html (reporting holding of Tennessee 4th Circuit Judge in divorce action that same-sex spouse of woman who conceived using ADI does not qualify as a parent given gendered terminology of Tennessee's ADI statute); *see also* Tenn. Code Ann § 68-3-306 ("A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife").

Where a couple used a known donor, issues about the donor's parental status have arisen not only under New York's law, but also in other states as well, reinforcing the importance of second parent adoptions to forestall conflicts that could arise in other jurisdictions. For example, cases in a number of states have held that non-paternity provisions in ADI statutes will not necessarily preclude parentage of a known donor if the parties neglected to comply with medical professional participation provisions. *See, e.g.*, *Bruce v. Boardwine*, 770 S.E.2d 774 (Va. Ct. App. 2015) (donor non-paternity statute held inapplicable because home procedure did not comply with statutory requirement of insemination through "medical technology"; donor awarded joint custody and visitation); *E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. Ct. Ch. Div. 2011); *Mintz v. Zoerning*, 198 P.3d 861 (N.M. Ct. App. 2008); *C.O. v. W.S.*, 639 N.E.2d 523

(Ohio Ct. C.P. 1994). In a notorious Kansas case, the state government sought child support from the known donor of a child conceived by a same-sex couple, where donor and parents alike never claimed that the man was intended to have parental responsibilities or rights. *See* Grossman at 721; Steve Fry, *Marotta Is a Father, Not Merely a Sperm Donor*, cjonline.com (Jan. 22, 2014), http://cjonline.com/news/2014-01-22/court-marotta-father-not-merely-sperm-donor.

In other cases, lack of strict compliance with statutory requirements, or lack of any statutory non-paternity guidance at all, has not prevented disqualifying known donors from parentage; yet that the issue has been litigated in multiple cases demonstrates the potential conflicts and lawsuits same-sex parents may face without the clarity of an adoption decree. *See generally, e.g.*, *A.A.B. v. B.O.C.*, 112 So. 3d 761 (Fla. Dist. Ct. App. 2d Dist. 2013); *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010); *In re K.M.H.*, 285 Kan. 53 (2007); *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007); *see also Adoption of a Minor*, 29 N.E.3d 830 (Mass. 2015) (holding known donor not entitled to notice of second parent adoption by same-sex spouse of birth mother).

In *Obergefell* the Supreme Court emphasized the "instability and uncertainty" same-sex couples should not have to face because their marriages and spousal statuses did not receive uniform recognition in every state. 135 S. Ct. at 2607. The Court noted that "even an ordinary drive into a neighboring [s]tate to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines." *Id.* Petitioners continue to fear that "severe hardship" could similarly befall them or their children as they cross state lines if they are unable readily and conclusively to establish who they are: the mothers of their children.

C. An Adoption Provides Added Protection In The Event A Child Should Need Federal Social Security Insurance Benefits.

Married same-sex parents may seek a second parent adoption for added protection should tragedy strike and their child someday needs to access child's Social Security insurance benefits based on the child's relationship with a disabled or deceased non-genetic parent. The Social Security Act defines a "child" to include "the child" or "legally adopted child of an individual." 42 U.S.C. § 416(e)(1). The Act further provides that the status of "child" is determined based on the laws for the "devolution of intestate property" of the parent's domicile at the time the application for benefits is filed if the parent is living, or at the time of death if the parent is deceased. *Id.* at § 416(h)(2)(A). Thus, for Social Security purposes, absent a second parent adoption, the status of the relationship of a child conceived using donor gametes to that child's non-genetic intended parent depends on the law of the state where that parent was domiciled when the triggering Social Security event occurred. The uncertainties and discrimination persisting in many jurisdictions, described above, can be compounded in the federal arena when a child, coping with the hardship of a parent's disability or death, needs access to the safety net of Social Security benefits.

Moreover, even if the non-genetic parent's name is on the birth certificate and the domicile state's settled law would seem to establish the parentage of the child, current Social Security policies still require added steps—with attendant delays—to confirm that status for Social Security purposes. A state-issued birth certificate naming both parents may not, in and of itself, suffice as proof of parent-child status. The Social Security Administration ("SSA") Program Operations Manual System ("POMS")—the detailed system of procedures followed by SSA staff to process Social Security benefits applications—poses special requirements for benefits applications based on the Social Security record of an individual "not the biological or

adoptive parent," where instead "the parental relationship alleged is based on a same-sex marriage . . . ." SSA POMS GN 00306.001.C.1.d. *Determining Status as Child* (Effective Dates: 8/30/2016-Present), available at https://secure.ssa.gov/poms.nsf/lnx/0200306001. In such circumstances, the application must receive further SSA assessment to determine if the relevant state's marital presumption is satisfied under the facts of the particular family's situation. This could lead to the requirement of a legal opinion from a separate SSA Regional Chief Counsel's office. *Id.*

As recent Regional Chief Counsel's opinions make clear, for SSA purposes, presentation of a birth certificate naming a non-adoptive, non-genetic parent has not sufficed as a substitute for the commonly lengthy and fact-specific process of submission for a legal opinion confirming parental status under the relevant domicile state's law. *See, e.g.*, SSA POMS PR 00905.032 New Hampshire (A. PR (June 3, 2015)), available at https://secure.ssa.gov/poms.Nsf/lnx/1500905032 (concluding that child born to married same-sex parents, with birth certificate naming both parents, is entitled to child's insurance benefits because marital presumption of domicile state New Hampshire would not be rebutted under facts of that case); SSA POMS PR 00905.006 California (E. PR 15-187 (Aug. 31, 2015)), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/1500905006 (concluding that child born to married same-sex parents using anonymous donor sperm, with birth certificate naming both parents, is entitled to child's insurance benefits because California's marital presumption would not be rebutted under facts of that case); SSA PR 00905.024 Massachusetts (B. PR 15-046 (Dec. 11, 2014)), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/1500905024.

Thus for children of same-sex parents, when it comes to accessing critical Social Security benefits, adoption decrees and birth certificates are not treated equally. Applications for SSA

child's insurance submitted with adoption decrees receive straightforward processing; applications based only on birth certificates may be routed to Regional Counsel's Office for investigation, analysis, and legal opinion as to whether the marital presumption applies in the particular case. That generally is a lengthy rabbit hole of delay, commonly adding months or years to the time to process the application for sorely needed child's benefits after a parent becomes disabled or dies. As the New Jersey Supreme Court held in assessing the constitutionality of relegating same-sex couples to civil unions, a status that disadvantaged same-sex couples in their access to federal benefits: "[F]ederal agencies … now provide various benefits to married same-sex couples. Because State law offers same-sex couples civil unions but not the option of marriage, same-sex couples in New Jersey are now being deprived of the full rights and benefits the State Constitution guarantees." *Garden State Equal. v. Dow*, 79 A.3d 1036, 1042 (N.J. 2013). The same holds true for families subject to added delays and burdens that could be avoided through access to adoption.

D. Married Same-Sex Couples And Their Children Face Tremendous Uncertainty And Discrimination Under The Laws Of Foreign Jurisdictions.

Same-sex spouses traveling, working, or residing abroad face great insecurity about whether not only their parent-child relationships, but also their marriages, will be respected, adding more reason for them to seek the protection of widely-recognized and familiar adoption decrees for their children. Currently, same-sex couples can marry in only twenty-one other nations,[9] with an additional twenty offering some lesser degree of relationship status, such as

[9] As of June 2016, the foreign nations granting marriage licenses to same-sex couples were Argentina, Belgium, Brazil, Canada, Colombia, Denmark, Finland, France, Iceland, Ireland, Luxembourg, some jurisdictions within Mexico, The Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom, and Uruguay. *See* Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* ("Carroll"), 50-51 (2016), http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf; *see also* Massimo Fichera, *Same-Sex Marriage and the Role of Transnational Law: Changes in the European Landscape*

civil union or domestic partnership.[10] This leaves more than three-quarters of the world's countries without nationwide legal protections for the relationships of same-sex couples.

Even within those countries that grant marriages to same-sex couples, several, at least initially, did not accord parental rights to same-sex couples through their marital presumption, instead requiring adoptions—if available—to establish parentage.[11] Therefore, even in nations that have accorded or in the future will accord marriage rights to same-sex partners, married couples relying solely on New York's marital presumption might be denied recognition of their parent-child relationships even though their marriages and spousal relationships would be recognized.

In the nations that deny recognition to marriages of same-sex couples and the presumptions of parentage and other rights that flow from that status, absent an adoption, these couples could find themselves without any legal protections for their families. Although there may be anxiety about whether nations particularly hostile to lesbian, gay, and bisexual individuals would recognize even an adoption,[12] having a decree of adoption no doubt offers same-sex parents and their children a greater degree of security traveling abroad. Such a decree

("Fichera"), 17 German L.J. 383, 387 (June 1, 2016) (listing 13 European countries which grant marriage licenses to same-sex couples).

[10] *See* Caroll at 51-52, http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf.

[11] *See* Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 Buff. L. Rev. 291, 357 n.174 (2014) ("[M]any of the foreign countries that now recognize same-sex marriage have been more hesitant to extend the presumption of parentage along with it."); Macarena Sáez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different* ("Sáez"), 19 Am. U.J. Gender Soc. Pol'y & L. 1, 4-6 (2011) (describing prior inapplicability of marital presumptions to same-sex couples in Belgium and Spain, and to female couples using known donors in the Netherlands). These standards appear to have become more inclusive of same-sex parenting couples in some places in recent years. *See, e.g.*, Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, *Acknowledgment of parentage*, http://diplomatie.belgium.be/en/services/services_abroad/registry/acknowledgement_of_parentage.

[12] Indeed, many nations continue to criminalize same-sex sexual conduct. *See, e.g.*, Carroll at 55-139. http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf. Criminal sanction for such conduct was declared unconstitutional in the United States only as recently as 2003, in *Lawrence v. Texas*, 539 U.S. 558 (2003).

establishes the relationship between the adoptive parent and child, not between the two parents, and thus recognizing the decree does not necessarily require giving official recognition to a same-sex relationship, which may be forbidden under the nation's laws.

Furthermore, while twenty-one other nations have marriage rights for same-sex couples, a number more, such as Australia, Germany, Israel, and Italy, permit such couples to enter into joint or second parent adoptions, making more likely that a New York adoption decree would be accorded respect in those jurisdictions.[13] An adoption decree would also avoid any need in the foreign country to delve into the particulars of New York's ADI standards, its marital presumption, and whether the presumption might be subject to rebuttal in an individual case, should questions arise about the legal status of a child's parents.[14]

For example, Italy, a nation several of Petitioner families, as well as many other New Yorkers, visit for work, tourism, and family reunions, has a marital presumption of paternity for husbands whose wives have a child.[15] However, Italy defines marriage as the union of a man and a woman.[16] Therefore, same-sex couples likely do not have access to the marital presumption of parentage there. Notably, however, an Italian court recently upheld a second parent adoption granted by a French court to the same-sex spouse of the child's mother.[17] An adoption order from a New York court presumably would receive the same recognition in Italy.

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[13] *See* Int'l Lesbian, Gay, Bisexual, Trans & Intersex Ass'n, *Sexual Orientation Laws in the World – Recognition* (June 2016), http://ilga.org/downloads/06_ILGA_WorldMap_ENGLISH_Recognition_May2016.pdf.

[14] For example, while it appears that Tasmania would "presume" an adult named on a U.S. birth certificate to be a parent, *see* Family Law Act 1975 (Cth) s 69R (Austl.), the presumption is rebuttable under Tasmanian law. *See* Status of Children Act 1974 (TAS) s 8B (Austl.). In contrast, a person is conclusively presumed to be a parent of a child if a prescribed court has expressly found the person to be a parent. *Id.*

[15] Under Italian law, the husband is deemed the father of a child conceived during the marriage. *See* Il Codice Civile art. 231 (It).

[16] *See* Sáez at 33; *see also* Fichera at 387; Sabrina Ragone & Valentia Volpe, *An Emerging Right to a "Gay" Family Life? The Case Oliari v. Italy in a Comparative Perspective*, 17 German L.J. 451, 453 (June 1, 2016).

[17] *See* Press Release, NELFA, *Victory for Rainbow Families: The Naples, Italy, Court of Appeal Orders Full Recognition of Two Second-Parent Adoptions* (April 5, 2016), http://nelfa.org/wp-content/uploads/2016/06/PR-ITStepadoption06232016.pdf.

Slovenia similarly does not accord marriage rights to same-sex couples but does allow second parent adoptions by the female partner of a woman who conceives using donor insemination.[18]

For same-sex parents and their children, a trip abroad exposes the family to a minefield of potential hazards. Although they may hope and expect none to come to pass, prudent parents like the petitioning couples justifiably want the added insurance for their children of an order of adoption.

E. The Ongoing Burdens Faced By Same-Sex Spouses And Their Children Deny Them Equality Of Treatment And Impair Their Constitutional Liberties, Problems Ameliorated By Adoption.

As the Supreme Court recognized in *Obergefell*, denying same-sex couples security for their parent-child relationships has a constitutional dimension that should not be overlooked in construing New York adoption and other legal standards. The surest route to security for married same-sex couples and their children conceived with assisted reproductive technology, whether with a known or unknown donor, is through an adoption judgment confirming who is—and is not—a parent. Only the courts of this State can give children of same-sex parents this security, which children of different-sex married parents can largely take for granted. Denying these families this security would unduly burden their protected constitutional rights.

The Supreme Court reaffirmed in *Obergefell* that the "'right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause." 135 S. Ct. at 2600 (quoting *Zablocki v. Turner*, 434 U.S. 374, 384 (1978) (additional internal quotations omitted)). Moreover, the Court emphasized that these rights are interconnected, forming "a unified whole." 135 S. Ct. at 2600. Central to the Court's holding in *Obergefell* was recognition

[18] *See* Neža K. Šalamon, *Traits of Homophobia in Slovenian Law: From Ignorance towards Recognition?, in Confronting Homophobia in Europe: Social and Legal Perspectives*, 198-99 (Luca Trappolin, Alessandro Gasparini, and Robert Wintemute eds., 2012), http://www.egyenlobanasmod.hu/tanulmanyok/en/Confronting_Homophobia_in_Europe-the_book.pdf..

that these unified rights require according same-sex couples "the recognition, stability, and predictability marriage offers," in order to ensure that their children are no longer "relegated through no fault of their own to a more difficult and uncertain family life." *Id.*

Notwithstanding their freedom to marry in New York, given the reality of the world these families continue to inhabit, denying them access to adoption would unconstitutionally perpetuate a "more difficult and uncertain family life," impairing their constitutional rights. The children of these families would remain less secure in their parent-child bonds, in violation of rights to substantive due process. *See Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). As discussed in subsection II.A., denying same-sex couples and their children legal clarity about the relationship of known donors to children conceived using assisted reproduction further impairs rights of procreation, association, and childrearing. Moreover, were married same-sex couples denied second parent adoptions, their fundamental right to marry, recognized in *Obergefell*, would also be seriously impaired, since some couples would feel coerced into having their children *without* marrying so as to ensure access to the security of adoptions.

They would likewise be denied the right to equal treatment, protected under the equal protection guarantee as well as the Marriage Equality Act. *See, e.g.*, *Stanley*, 405 U.S. at 652. Forcing same-sex couples and their children to face uncertainty, and potential litigation to access benefits and fend off challenges to their parent-child relationships, "is inconsistent with the equality of benefits" guaranteed to different-sex spouses and their children. *Garden State Equal. v. Dow*, 82 A.3d 336, 366 (N.J. Super. 2013) (noting that "litigation burden" and possibility of "lawsuits with uncertain outcomes" for same-sex couples seeking federal recognition of civil union status imposed inequality); *see also Obergefell*, 135 S. Ct. at 2606 ("Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific

public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage").

Denial of access to second parent adoptions for married same-sex spouses also implicates their fundamental right to travel. An adoption decree remains the best means to ensure the portability across state and national lines of the parentage of children born to these families. The fundamental right to travel constitutes a "virtually unconditional personal right, guaranteed by the Constitution to us all" to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz v. Roe*, 526 U.S. 489, 498-99 (1999) (internal quotation marks omitted). Placing their parent-child relationships in jeopardy when they travel through sister states is a high price to pay as a condition to exercise of the right to travel, a price avoided by an adoption decree. When it comes to recognition of their families, an adoption order ensures they will "be treated as . . . welcome visitor[s]," without risk they instead will be treated as "unfriendly alien[s]." *Id.* at 500.

In effect, an adoption decree provides married same-sex New York couples and their children a unique path for safeguarding their relationships and concomitant constitutional rights.[19] These families seek to "invok[e] the State's judicial machinery" to secure these rights. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (holding state violated right to due process by unduly burdening access to divorce, the sole means to dissolve a marriage and exercise the

[19] A New York Family Court theoretically could also issue judgments of parentage to respond to the needs of same-sex couples and their children for greater security. *Matter of Sebastian*, 25 Misc. 3d at 586-87 (noting that both Surrogate's Court and Family Court have jurisdiction to issue adoptions for married same-sex parents, but only the latter has jurisdiction under the DRL to issue declarations of parentage in proceedings other than adoptions). Petitioners remain concerned that, in the absence of clearer legislative or appellate authority on the subject, parentage judgments issued by only a smattering of New York courts might be received as less familiar confirmation of parental rights and could raise more questions in other states and nations than adoption decrees. *See* Polikoff at 265 ("Court orders of parentage should be equally unassailable, although they have been tested in fewer circumstances and have not yet been the subject of extensive scholarly attention.").

fundamental right to remarry). New York's adoption courts hold an effective "monopoly" over the unparalleled means by which same-sex couples and their children can realize the promise of the Marriage Equality Act and constitutional guarantees. *Id.* at 375.

III. The DRL And Precedent Authorize The Second Parent Adoptions Petitioners Seek, Which Are In The Best Interests Of Their Children.

There can be no doubt that second parent adoptions are in the best interests of children conceived using assisted reproductive technology by same-sex spouses, even though these children already receive and deserve recognition of their parent-child relationships through the marital presumption. These adoptions are also fully authorized under DRL § 110 and the adoption laws' paramount purpose to give children secure families, as well as the Marriage Equality Act's requirement that all New York laws be construed to ensure equality for same-sex spouses.

First, by its plain terms, DRL § 110 permits adoptions in these circumstances. It expressly provides that "[a]n adult . . . married couple together may adopt a child of either of them born in or out of wedlock . . . ." On its face, this provision permits both members of a married couple to adopt a child of "*either*" of them. And when spouses adopt the child "*together*," by definition at least one parent is participating in adoption of that adult's own child. This provision obviously contemplates that a person may adopt a child over whom that person has already acquired the rights and responsibilities of a parent. Far from prohibiting an adult from adopting his or her own child, DRL § 110 expressly contemplates it.

To construe DRL § 110 to withhold adoptions for children of married same-sex parents would not only harm these families, it would also conflict with the canons of construction dictated under controlling precedent and the Marriage Equality Act. In its landmark ruling in *Matter of Jacob*, the Court of Appeals ensured that same-sex couples, though still denied their

constitutional right to marry, nonetheless had access to second parent adoptions to secure their children's relationships with non-biological parents. The Court recognized that to leave children of these families vulnerable to "discrimination or hardship," 86 N.Y.2d at 668, "would not only be unjust . . . but also might raise constitutional concerns in light of the adoption statute's historically consistent purpose—the best interests of the child." *Id.* at 667. The Court explained the overriding canon of interpretation that must guide this issue today: since adoption is "the creature of … statute" . . . the adoption statute must be strictly construed. What is to be construed strictly and applied rigorously in this sensitive area of the law, however, is legislative purpose as well as legislative language. Thus, the adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child." *Jacob*, 86 N.Y.2d at 657-58. In other words, "in strictly construing the adoption statute, our primary loyalty must be to the statute's legislative purpose—the child's best interest." *Id.* at 658.

These principles continue to require interpreting the DRL, as did the Court in *Jacob*, to afford children of same-sex couples, whether married or not, the security of second parent adoptions. Exposing children of same-sex parents to "discrimination or hardship" in the future simply because their parents were finally able to obtain long denied legal protections through marriage would be the height of irony—as well as injustice. It would also undermine the core purpose of the Marriage Equality Act, that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage." Marriage Equality Act, ch. 95, AB 8354 (2011). That Act requires "that all provisions of law … which in any … way may be inconsistent with this act, be construed … in any way necessary to effectuate the intent of this act." *Id.* The Marriage Equality Act thus requires construing the

adoption laws as necessary to ensure that same-sex spouses have access to all the protections, for them and their children, that should flow from civil marriage. Given the un-level playing field that persists for married same-sex spouses and their children in our world, this must include access to adoption to reinforce the marital presumption also protecting these children.

Jacob and adoption precedents following it have demonstrated time and again that DRL § 110 must be construed to promote the legislative purpose of advancing the best interests of children by securing their parent-child relationships in evolving family settings. Thus, in *Jacob*, the Court construed the DRL § 110 provision then in force, that "[a]n adult unmarried person" or "an adult husband and his adult wife together may adopt another person," to permit adoption by the unmarried same-sex partner of the genetic parent of a child conceived using ADI, without terminating the genetic parent's parental rights under DRL § 117.

In support of its reading of the adoption laws, the Court emphasized the continuing statutory expansion in the past half century of the categories of those eligible to adopt. *Jacob*, 86 N.Y.2d at 661. Confirming the Court's interpretation and the paramount child-centered purpose of the adoption laws, the Legislature continued in the years following *Jacob* to clarify that adoption should be available to an expanding, not contracting, set of parents. In 1999, the Legislature amended DRL § 110 to make unlawful preventing an adoption solely because the prospective parent had cancer or another disease. The legislative findings emphasized that "each adoption should be judged upon the best interest of the child based upon the totality of the circumstances." N.Y. L. 1999, ch. 522, § 1 [legislative intent]. In 2010, the Legislature again amended § 110 to codify that "any two unmarried adult intimate partners together may adopt another person."

Jacob established that, so long as the DRL "poses no statutory impediment" prohibiting an adoption in the best interests of the child, the courts will advance that overriding purpose and grant the adoption. *Jacob*, 86 N.Y.2d at 660. Many lower courts since, extending the adoption laws to apply to family constellations not necessarily contemplated when the Legislature first enacted the provisions, have applied that principle.

In *Matter of Carolyn B.*, noting that "no statutory impediment" barred the way, the Appellate Division held that an unmarried same-sex couple could *jointly* adopt the child they were fostering, avoiding a two-step process in which first one obtained the adoption and then the other followed with a second parent adoption. 6 A.D.3d 67, 69 (4th Dep't 2004). At stake were the best interests of the child in legally securing her relationship with *both* her parents, without delay or exposure to precisely the types of instability and risks that still arise for children of married same-sex parents. DRL § 110 did not "expressly permit[] them to" adopt jointly, but nor did it "expressly prohibit[] petitioners" from doing so. *Id.*; *see also Matter of Emilio R.*, 293 A.D.2d 27, 29 (1st Dep't 2002) (holding unmarried couple who provided nurturing home to child were entitled to adopt under DRL § 110, which "contains no prohibition against" the adoption, and noting that "application of the statute must be harmonized with the overarching principle of securing the best possible home for the child"); *Matter of Carl*, 184 Misc. 2d 646, 652 (Fam. Ct. Queens County 2000) (granting joint adoption of foster child by unmarried couple because "[t]he adoption statute does not expressly prohibit this proposed adoption," which would provide child "with a stable and permanent home" in "his best interests[,] . . . the determinative factor in deciding whether to grant an adoption petition").

In *Matter of Chan*, the Surrogate's Court applied these principles to permit adoption of a child by the *former* intimate partner of the child's mother, who had functioned as the child's

second parent. The court noted that the "plain language of" DRL § 110 "does not mandate the existence of a spousal-type relationship between the adoptive parents." 37 Misc. 3d 358, 368 (Surr. Ct. N.Y. County 2012). The adoption furthered the best interests of the child in "stability of family life," comporting with the overriding purpose of the adoption laws. *Id.* The following year, in *Matter of G.*, another Surrogate's Court granted adoption by a man who had never been the intimate partner nor lived with the child's mother, but who was committed to co-parenting the child in the adults' homes in neighboring boroughs. The court noted that, "[a]cknowledging their obligation to interpret the statute with the child's best interests in mind, courts have consistently read DRL § 110 in an expansive manner with respect to the class of persons that may adopt." 42 Misc. 3d 812, 819 (Surr. Ct. N.Y. County 2013). *See also Matter of A.*, 27 Misc. 3d 304 (Fam. Ct. Queens County 2010) (approving joint adoption of three children by their grandmother and their aunt, who intended to co-parent the children together).

The Court of Appeals's recent *Brooke S.B.* ruling provides added reinforcement for a straightforward interpretation of DRL § 110 to permit adoptions confirming the parentage of those also entitled on other legal bases to recognition as parents. *Brooke S.B.* held that where a "partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive parent has standing" as a "parent" under DRL § 70 to seek visitation and custody. *Brooke S.B.*, slip op. at 2. An adult would be the "parent" under this standard from the birth of a child conceived with ADI, and may also go on to confirm that status in a second parent adoption. As the Court of Appeals confirmed, a person thus may be recognized as a "parent" through multiple overlapping paths, none of which is mutually exclusive.

There is other precedent as well for the availability of adoption by a person already the parent of a child. Subdivision 8 of DRL § 115-a expressly provides for "readoption" of a child previously adopted in a foreign country.[20] The readoption serves essentially the same purpose as a second parent adoption by a non-genetic parent already entitled to legal recognition as a parent: "A readoption is, in effect, a declaratory judgment that a legal parent-child relationship exists. The order or certificate that results from the proceeding can be used to satisfy third persons, such as governmental agencies, that the child is the legal child of the adoptive parents." DRL § 115-a *reviewed by* Alan D. Scheinkman, Practice Commentaries (McKinney's Cons. Laws of N.Y. 2011). Similarly, in *Matter of A.J.J.*, the Surrogate's Court permitted the unmarried genetic father, without terminating the parental rights of the consenting mother, to adopt his own child so as "to remove the stigma of . . . illegitimacy and to permit the child to inherit . . . from his father's ancestors, whose wills and trusts benefit adopted descendants but not illegitimate descendants." 108 Misc. 2d 657, 658 (Surr. Ct. N.Y. County 1981).

The plain text of DRL § 110, "strictly construed" on its face and with "primary loyalty . . . to the statute's legislative purpose—the child's best interest," *Jacob*, 86 N.Y.2d at 657-58, authorizes second parent adoptions by non-genetic spouses in married same-sex couples who already are the legal parents of their children. Until the world these children inhabit lives up to the ideals of equality and respect for their families, married same-sex New Yorkers are wise to seek second parent adoptions. They are also fully within their rights.

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[20] Subdivision 8 of DRL § 115-a provides:

> Notwithstanding any provision of law to the contrary, where a child is placed with a couple or individual in New York state for the purpose of adoption, and where said adoption has theretofore been finalized in the country of birth, outside the United States, the couple or person may petition the court in their county of residence in New York state, for the readoption of said child in accordance with the provisions of this chapter, providing for adoptions originally commenced in this state. . . .

CONCLUSION

Petitioners' children are entitled to all the legal protections for their families our State can provide. Like all New York children, in a sense, they are the children not only of their parents, but also, more broadly, of our State. They should not be made to shoulder added burdens our State's courts are empowered to lift from them. In *United States v. Windsor*, striking down the federal so-called "Defense of Marriage Act" in a challenge by a New York widow, the U.S. Supreme Court paid homage to our State's commitment to the dignity and legal rights of same-sex families. Describing New York's proud extension of marriage rights to same-sex couples, the Court wrote that this was "a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *United States v. Windsor*, 133 S. Ct. 2675, 2692-93 (2013). But New York's work to bring full equality to same-sex couples did not end there. Our commitment to children with same-sex parents means that, through second parent adoptions, we continue to safeguard these children of New York from obstacles still in their families' paths.

Dated: New York, New York

September 16, 2016

Respectfully submitted,

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Appendix Summary of State Statutes on Parentage of Children Conceived with Donor Insemination						
State	**Donor Insemination Statutes**	**1. Explicit Donor Provision**	**2. Gendered Terminology**	**3. Non-Gendered Terminology**	**4. Medical Participation Provision**	**5. Written Consent, Certification, and/or Filing Provision**
Alabama	Ala. Code § 26-17-702 Ala. Code § 26-17-703 Ala. Code § 26-17-704	x	x		x	x
Alaska	Alaska Stat. Ann. § 25.20.045			x	x	x
Arizona						
Arkansas	Ark. Code Ann. § 9-10-201 Ark. Code Ann. § 9-10-202	x	x		x	x
California	Cal. Fam. Code § 7613	x		x	x	x
Colorado	Colo. Rev. Stat. Ann. § 19-4-106		x		x	x

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Connecticut	Conn. Gen. Stat. Ann. § 45a-772 Conn. Gen. Stat. Ann. § 45a-773 Conn. Gen. Stat. Ann. § 45a-774 Conn. Gen. Stat. Ann. § 45a-775		x		x	x
Delaware	Del. Code Ann. tit. 13, § 8-702 Del. Code Ann. tit. 13, § 8-703 Del. Code Ann. tit. 13, § 8-704	x		x		x
Florida	Fla. Stat. Ann. § 742.11 Fla. Stat. Ann. § 742.14	x	x			x
Georgia	Ga. Code Ann. § 19-7-21 Ga. Code Ann. § 43-34-37		x	x	x	x

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Hawaii						
Idaho	Idaho Code Ann. § 39-5405	x	x		x	x
Illinois	Pre 1/1/16: 750 Ill. Comp. Stat. Ann. 40/2 750 Ill. Comp. Stat. Ann. 40/3		x		x	x
	[Post 1/1/16: 750 Ill. Comp. Stat. Ann. 46/702 750 Ill. Comp. Stat. Ann. 46/703 *Enacted in* S.H.A. 750 ILCS 46/702-703]	[x]		[x]	[x]	[x]
Indiana						

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Iowa						
Kansas	Kan. Stat. Ann. § 23-2208(f) Kan. Stat. Ann. § 23-2301 Kan. Stat. Ann. § 23-2302 Kan. Stat. Ann. § 23-2303		x		x	x
Kentucky						
Louisiana	La. Stat. Ann. § 40:1121.3 La. Civ. Code Ann. art. 188				x	
Maine	Me. Rev. Stat. tit. § 1922 Me. Rev. Stat. tit. § 1924	x		x		x
Maryland	Md. Code Ann., Est. & Trusts § 1-206(b)		x			

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Massachusetts	Mass. Gen. Laws Ann. ch. 46, § 4B		x			
Michigan	Mich. Comp. Laws Ann. § 333.2824.6		x			
Minnesota	Minn. Stat. Ann. § 524.2-120	x	x			x
Mississippi						
Missouri	Mo. Ann. Stat. § 210.824	x	x		x	x
Montana	Mont. Code Ann. § 40-6-106	x	x		x	x
Nebraska						

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Nevada	Nev. Rev. Stat. Ann. § 126.660 Nev. Rev. Stat. Ann. § 126.670 Nev. Rev. Stat. Ann. § 126.680	x		x		x
New Hampshire	N.H. Rev. Stat. Ann. § 5-C:30 N.H. Rev. Stat. Ann. § 168-B:2	x	x	x		
New Jersey	N.J. Stat. Ann. § 9:17-44	x	x		x	x
New Mexico	N.M. Stat. Ann. § 40-11A-702 N.M. Stat. Ann. § 40-11A-703 N.M. Stat. Ann. § 40-11A-704	x		x		x
New York	N.Y. Dom. Rel. Law § 73		x		x	x
North Carolina	N.C. Gen. Stat. Ann. § 49A-1		x			x

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North Dakota	N.D. Cent. Code Ann. § 14-20-60 N.D. Cent. Code Ann. § 14-20-61 N.D. Cent. Code Ann. § 14-20-62	x	x			x
Ohio	Ohio Rev. Code Ann. § 3111.90 Ohio Rev. Code Ann. § 3111.92 Ohio Rev. Code Ann. § 3111.95	x	x		x	x
Oklahoma	Okla. Stat. Ann. tit. 10, § 551 Okla. Stat. Ann. tit. 10, § 552 Okla. Stat. Ann. tit. 10, § 553		x		x	x

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Oregon	Or. Rev. Stat. Ann. § 109.239 Or. Rev. Stat. Ann. § 109.243 Or. Rev. Stat. Ann. § 677.360 Or. Rev. Stat. Ann. § 677.365	x	x		x	x
Pennsylvania						
Rhode Island						
South Carolina						
South Dakota						
Tennessee	Tenn. Code Ann. § 68-3-306		x			

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Texas	Tex. Fam. Code Ann. § 160.702 Tex. Fam. Code Ann. § 160.703 Tex. Fam. Code Ann. § 160.704	x	x		x	x
Utah	Utah Code Ann. § 78B-15-702 Utah Code Ann. § 78B-15-703 Utah Code Ann. § 78B-15-704	x	x			x
Vermont						
Virginia	Va. Code Ann. § 20-158	x	x			

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Washington	Wash. Rev. Code Ann. § 26.26.705 Wash. Rev. Code Ann. § 26.26.710	x		x		x
West Virginia						
Wisconsin	Wis. Stat. Ann. § 891.40	x	x		x	x
Wyoming	Wyo. Stat. Ann. § 14-2-902 Wyo. Stat. Ann. § 14-2-903 Wyo. Stat. Ann. § 14-2-904	x	x			x
Totals	37	23	29	9	20	30

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