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STATE OF NEW YORK
COURT OF APPEALS

DEBRA H.,

Petitioner-Appellant,

-against-

JANICE R.,

Respondent-Appellee.

BRIEF OF THE NEW YORK STATE BAR ASSOCIATION IN SUPPORT OF PETITIONER-APPELLANT

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Corporate Disclosure Statement

Pursuant to Court of Appeals Rule 500.1(f), the New York State Bar Association states that it is a voluntary bar association with no parent corporation, subsidiaries or affiliates.

PRELIMINARY STATEMENT

Almost two decades ago, this Court decided the case of *Alison D.* v. *Virginia M.*, 77 N.Y.2d 651 (1991), holding that under New York's Domestic Relations Law ("DRL"), a non-biological parent who has helped to raise a child since birth does not have standing to seek custody or visitation with the child after separating from the biological parent, no matter how good a parent the individual is, how "close and loving" the relationship is between the non-biological parent and the child, *see* 77 N.Y. 2d at 655, or how much the child would be emotionally and psychologically damaged from the loss of the non-biological parent. When *Alison D.* was decided, then soon-to-be Chief Judge Judith S. Kaye presciently warned in her dissent that the Court had "turn[ed] its back on a tradition of reading [the DRL] so as to promote the welfare of the children," and predicted the widespread adverse impact of the Court's decision on the welfare of children in this State. *Id.* at 660 (Kaye, J., dissenting).

There can be little doubt that Chief Judge Kaye's fears in 1991 were well founded. While *amicus curiae* recognizes and appreciates the significance of *stare decisis* and does not lightly suggest overturning past precedent, it respectfully submits that, in this instance, this Court should reconsider and overturn *Alison D.* As this Court has held, "there is little reason to avoid [overturning past precedent] when persuaded by the 'lessons of experience and the force of better reasoning.'"

People v. *Bing*, 76 N.Y.2d 331, 338 (1990) (overruling cases interpreting the right to counsel provision in the New York Constitution). Although the standard is high, this is true even in cases overruling previous interpretations of statutes. *See People* v. *Epton*, 19 N.Y.2d 496, 506 (1967) (overruling past precedent and reinterpreting New York penal law statute "in accordance with modern day constitutional standards"); *see also Monell* v. *New York City Dept. of Social Servs.*, 436 U.S. 658, 695 (1978) ("[W]e have never applied stare decisis mechanically to prohibit overruling our earlier decisions determining the meaning of statutes.").

The world, of course, has changed dramatically in the nearly two decades since *Alison D.* was decided both in terms of the public perception of gay men and lesbians and how openly gay men and lesbians choose to live their lives. Throughout this State, it is not uncommon for a gay or lesbian couple to choose to have children and to start a family together. *See, e.g.*, John Blake, *'Gayby Boom': Children of Gay Couples Speak Out*, CNN.com, June 29, 2009, http://www.cnn.com/2009/LIVING/wayoflife/06/28/gayby/index.html; Barbara Kantrowitz & Megan McGuire, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, *available at* http://www.newsweek.com/id/103320. Like their "straight" counterparts, however, the relationship between the parents does not always work out as planned and the parents may later decide to separate.

For the children of "straight" parents, that separation, while surely painful and difficult for the child, rarely, if ever, means that the child is at risk of completely losing contact with one of his parents. Sadly, however, the same is not true for the children born and raised in families with gay and lesbian parents. As a result of this Court's decision in *Alison D.*, many thousands of New York children live today in a kind of legal "limbo" such that if there is a rupture in the relationship between the adult parents, and the non-biological parent has not formally adopted the child, the relationship between the parent and the child can be terminated at will by the biological parent at least until the child reaches the age of maturity.

It is therefore hardly surprising that *Alison D.* has created a great deal of uncertainty and confusion in the law as to the rights and obligations of parents (both gay and straight) who may not have a biological connection to their child. The decision also conflicts with this Court's more recent holding in *Shondel J.* v. *Mark D.*, 7 N.Y.3d 320, 328 (2006), resulting in the logical absurdity that while a non-biological parent can be required to pay child support, that same parent does not have standing to seek custody or visitation. The inherent unfairness of *Alison D.* and its obvious inconsistency with the New York Legislature's policy of protecting the best interests of children has also created a split among the lower courts, with some judges concluding that equitable estoppel applies to protect the

interests of non-biological parents, and others (like the Appellate Division below) finding themselves to be constrained by the precedent of *Alison D.* *Compare, e.g.*, *Beth R.* v. *Donna M.*, 19 Misc. 3d 724, 731-34 (Sup. Ct. N.Y. County 2008) (applying equitable estoppel and granting standing to non-biological, non-adoptive parent to seeking visitation) *with Rose* v. *Walrad*, 278 A.D.2d 537, 538 (3d Dep't 2000) (noting that, under *Alison D.*, a non-biological, non-adoptive parent has no standing to seek custody).

Thus, as several lower courts have urged, *see, e.g.*, *Anonymous* v. *Anonymous*, 20 A.D.3d 333, 333-334 (1st Dep't 2005) (Sweeney, J., concurring); *C.M.* v. *C.H.*, 6 Misc. 3d 361, 368-69 (Sup. Ct. N.Y. County 2004); *Denise B.* v. *Beatrice R.*, 2005 N.Y. Misc. LEXIS 3456, at *5 (N.Y. Fam. Ct. Sept. 19, 2005), the time has come for this Court to revisit its decision in *Alison D.*, which was based on an outmoded view of gay men and lesbians as parents that is now widely thought to be wrong. *See, e.g.*, *Alison D.*, 77 N.Y.2d at 657, 656 (describing non-biological mother as a "*nonparent*," and arguing that because the non-biological mother concedes that the biological mother is a "fit parent," she has "*no right* to . . . *displace* the choice made by th[e] *fit parent* in deciding what is in the child's best interests") (emphasis added). *See also* Charlotte Patterson, Am. Psychological Ass'n, Lesbian and Gay Parenting 15 (2005), *available at* http://www.apa.org/pi/lgbc/publications/lgpconclusion.html (last visited October

29, 2009) ("Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth."). In other words, *Alison D.*'s overly narrow reading of "parent" under DRL § 70 effectively discriminates against many thousands of children in families with gay and lesbian parents and directly prevents the courts from properly considering the best interests of the child. As noted by this Court many years ago in an analogous context involving the equality of women, "[n]o recitation of authority is needed to indicate that the court has not been backward in overturning unsound precedent . . . ." *Millington* v. *Se. Elevator*, 22 N.Y.2d 498, 508 (1968). *See also Lawrence* v. *Texas*, 539 U.S. 558, 579 (2002) (drafters of U.S. Constitution "knew" that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress").

Finally, while the legal arguments at issue in this case are weighty and warrant overturning *Alison D.*, this case is not solely or even primarily about the abstract application of statutory provisions or prior case law. Rather, it is about protecting the interests of real, live children who have no mechanism to seek redress other than through this Court. Indeed, what the permanent separation of a

parent from a child (such as the five-year old boy here) means as a practical matter from the perspective of the child is nothing less than the "death" of the non-biological parent.

Amicus curiae, the New York State Bar Association, respectfully submits that the Court's decision in *Alison D.* has been revealed to be not only manifestly unjust, but in conflict with legislative intent, sound public policy, this Court's recent precedents, and the guarantees of the Constitution. In short, the "lessons of experience and the force of better reasoning" support overturning *Alison D. People* v. *Bing*, 76 N.Y.2d at 338. For these reasons and as discussed further below, *amicus curiae* urges this Court to reverse the decision of the Appellate Division, First Department in the instant case.

INTEREST OF *AMICUS CURIAE*

The New York State Bar Association ("NYSBA") is the largest voluntary bar association in the United States, with over 76,000 members. Founded in 1876, NYSBA serves the profession and the public by, *inter alia*, promoting reform in the law and facilitating the administration of justice.

NYSBA has long had an interest in issues involving children and has worked hard to protect the interests of children. NYSBA's standing Committee on Children and the Law "is charged with the duty to study and render information and guidance on the effect of existing laws of the state and pending legislative

action relating to legal issues impacting children and to administration of juvenile justice and child welfare. It also may examine, study and prepare reports on issues related to the right and interests of children, particularly those involved in court proceedings."

NYSBA has also long supported equality for same-sex couples and has created a Special Committee on LGBT (lesbian, gay, bisexual and transgender) People and the Law to deal with lesbian and gay issues. One of NYSBA's top legislative priorities is equality for same-sex couples. The stated purpose of NYSBA's LGBT Committee is "to promote equality in the law for LGBT people; eliminate discrimination against LGBT attorneys and litigants; promote equality of opportunity for, and increase the visibility of, contributions made by LGBT attorneys; and promote diversity in the bench by inclusion of all minorities, including LGBT people."

Many of our members practice in the areas of family law and trusts and estates, and have seen that clients who are lesbian or gay are not accorded the same legal rights as heterosexual citizens. This case demonstrates fully and clearly one significant way in which that is so.

NYSBA submits this brief to encourage the Court to reconsider the *Alison D.* case in light of the *Shondel* case and in light of the reality that the world has changed significantly since this Court decided *Alison D.*

STATEMENT OF FACTS

In the interest of brevity and efficiency, *amicus curiae* adopts and incorporates by reference the statements of facts in petitioner-appellants' memorandum of law.

ARGUMENT

This Court should overturn the decision in *Alison D.* because it is outdated, unjust, applied inconsistently, and logically incongruent with other decisions both within and outside of this jurisdiction.

I.
The Court Is Not Constrained To Follow Past Precedent That Is Manifestly Unjust and Unsound

Although prior decisions are entitled to great weight, *stare decisis* does not require blind deference to past precedent. *See Silver* v. *Great Amer. Ins. Co.*, 29 N.Y.2d 356, 363 (1972) (overturning past precedent because *stare decisis* does not "compel us to follow blindly a court-created rule"); *Woods* v. *Lancet*, 303 N.Y. 349, 355 (1951) ("[I]t is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'") (quoting *Funk* v. *United States*, 290 U.S. 371, 382 (1933)). As this Court has held:

> [Stare decisis] was intended, not to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and

> confusion, it loses its right to survive, and no principle constrains [the Court] to follow it.

Bing v. *Thunig*, 2 N.Y.2d 656, 667 (1957). Thus, *stare decisis* permits reconsideration of prior precedents that have "lost [their] touch with reality," especially in the constitutional realm. *People* v. *Hobson*, 39 N.Y.2d 479, 487-88 (1976). "Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the lessons of experience and the force of better reasoning." *People* v. *Bing*, 76 N.Y.2d at 338. This is true even when overruling past interpretations of statutes. *See People v. Epton*, 19 N.Y.2d 496, 506 (1967) (overruling past precedent and reinterpreting New York penal law statute "in accordance with modern day constitutional standards").

Indeed, this Court has frequently overruled its precedent where it is "out of tune with the life about us, at variance with modern-day needs," *Bing* v. *Thunig*, 2 N.Y.2d at 667, and no longer "accords with the mores of our society," *Gallagher* v. *St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968). *See, e.g.*, *Caceci* v. *Di Canio Const. Corp.*, 72 N.Y.2d 52, 60 (1988); *Buckley* v. *City of New York*, 56 N.Y.2d 300, 305 (1982); *Gelbman* v. *Gelbman*, 23 N.Y.2d 434, 436 (1969); *Spano* v. *Perini Corp.*, 25 N.Y.2d 11, 15 (1969).

As noted by this Court in an analogous context involving the equality of women, "[n]o recitation of authority is needed to indicate that the court has not been backward in overturning unsound precedent . . . ." *Millington*, 22 N.Y.2d at

508; *see also Lawrence*, 539 U.S. at 578-79 (drafters of U.S. Constitution "knew" that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"). The Court also has not been reluctant to overrule a prior decision that has resulted in an inconsistent application of the law or creates a "logical gap" in the law. *See Broadnax* v. *Gonzalez*, 2 N.Y.3d 148, 154 (2004); *see also Basso* v. *Miller*, 40 N.Y.2d 233, 240-41 (1976); *Kalechman* v. *Drew Auto Rental*, 33 N.Y.2d 397, 403-05 (1973).

Amicus respectfully submits that these principles apply here. *Alison D.* has been revealed not only to be out-of-step with the realities of New York families, but in conflict with legislative intent, sound public policy, this Court's recent precedents, and the guarantees of the Constitution. *Stare decisis* may give way under such circumstances to a more reasoned and logical application of the legislative intent.[1]

II.
Alison D. Is Inconsistent with New York Cases Recognizing Out of State Same-Sex Marriage

Not only is *Alison D.* inconsistent with the best interests of New York's children, but it also creates significant constitutional concerns in light of all

[1] It is no answer that the Legislature, rather than this Court, should reconsider the definition of "parent" set out in *Alison D.* The definition of "parent" is judge-made law; therefore, the responsibility to change it lies not only with the Legislature, but with this Court.

of the rights afforded to lesbian and gay couples as a result of New York State's recent recognition of valid out-of-state marriages and civil unions between people of the same sex.

Although *Alison D.* facially applies equally to married couples and unmarried couples, there are common law and statutory provisions that, in some instances, override *Alison D.* Thus, for example, under New York common law, the "presumption that a child born to a marriage is the legitimate child of both parents 'is one of the strongest and most persuasive known to the law.'" *Laura WW.* v. *Peter WW.*, 51 A.D.3d 211, 216 (3d Dep't 2008) (quoting *State of New York ex rel. H.* v *P.*, 90 A.D.2d 434, 437 (1st Dep't 1982)). Similarly, in 1974, the New York State legislature codified the common law rule that "[a]ny child born to a married woman by means of artificial insemination . . . 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." N.Y. Dom. Rel. Law § 73 (McKinney 2009). In addition, the Legislature has provided that paternity testing shall not be ordered "upon a written finding by the court that [paternity testing] is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman." NY Fam. Ct. Act § 418 (McKinney 2009); NY Fam. Ct. Act § 532 (McKinney 2009). Thus, many if not most heterosexual non-biological parents who are married to the

biological parent have no need to and take no steps to adopt. *See, e.g., In re Estate of Gordon*, 131 Misc. 2d 823, 825 (N.Y. Sur. Ct. 1986) (holding that despite fact children were born before enactment of § 73, a "child conceived during a marriage by artificial insemination, with the husband's consent, was the legitimate issue of the husband").

Indeed, given the increasing popularity of fertility specialists, these statutes are frequently and without controversy invoked by heterosexual parents who may not have a biological connection to their child as a result of using certain reproductive technologies. *See, e.g., State ex rel. H.* v. *P.*, 90 A.D.2d 434, 438-39 (1st Dep't 1982) (estopping wife from contesting husband's paternity in part due to use of artificial insemination with husband's consent during their marriage).

As a matter of comity and equal protection, non-biological parents in valid out-of-state same-sex marriages and their children are entitled to these same common law and statutory protections that have routinely been afforded non-biological parents and their children in opposite-sex marriages. *See In re Sebastian*, 879 N.Y.S.2d at 682 (noting that though only the gestational mother is listed on the child's birth certificate, "[the child] already has a recognized and protected child/parent relationship with [both women]"); *see also In re May*, 305

N.Y. 486, 492 (1953).[2] However, because same-sex marriage is not yet legal in New York and in light of *Alison D.*, non-biological parents in same-sex relationships in New York and their children arguably are denied these protections. The inconsistency between the treatment of heterosexual families and out-of-state same-sex families, on the one hand, and in-state same-sex families, on the other, is nothing less than irrational and raises significant constitutional concerns under both the Equal Protection and Due Process Clauses. *See, e.g., In re Jacob*, 86 N.Y.2d at 667 ("deny[ing] children . . . the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother's sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns . . .").[3]

III.
Alison D. Is Outmoded and Should Be Overturned

The narrow definition of "parent" set forth in *Alison D.* does not comport with the realities of families in New York today. It fails to protect the best interests of tens of thousands of children living in households headed by a

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[2] The status of a non-biological parent like Debra H., who was party to a valid civil union prior to the birth of her child, is an issue addressed in further detail by co-*amici*.

[3] These constitutional concerns would, of course, only be greater if New York did not recognize out-of-state marriages between same-sex couples; an issue currently being considered by this Court.

same-sex couple. This Court should overturn the decision in *Alison D.* and redefine "parent" to ensure that the best interests of these children are met.

A. The Decision in *Alison D.* Fails To Account for the Realities of Today's Families and Parent-Child Relationships

In the nearly two decades since the decision in *Alison D.*, there have been substantial increases in the number of New York's children living with gay or lesbian parents. As many as 31,000 children in New York currently live in households headed by a same-sex couple.[4]

It is upon these tens of thousands of children that the *Alison D.* decision "falls hardest" in "limiting their opportunity to maintain bonds that may be crucial to their development." *Alison D.*, 77 N.Y.2d at 658 (Kaye, J., dissenting). In effect, *Alison D.* allows a biological parent, upon separation from the other parent, to completely shut out a non-biological parent from the life of these children. No matter how longstanding or significant those relationships, the child's relationship with a non-biological parent will not be protected.

It is apparent now that the majority's decision in *Alison D.* was based on outmoded views that do not reflect the realities of families and parent-child

[4] Jay Weiser, *Foreword: The Next Normal—Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 49 (2004).

relationships that exist today.[5] Indeed, since *Alison D.*, New York courts have increasingly recognized the legitimacy of same-sex families and that protecting the parent-child bond in such families is in the best interest of children. *See, e.g., In re Jacob*, 86 N.Y.2d 651, 660 (1995) (holding that an unmarried person may adopt the child of his or her same-sex (or opposite-sex) partner); *see also Tripp* v. *Hinckley*, 290 A.D.2d 767, 767-68 (3d Dep't 2002); *Leora F.* v. *Sofia D.*, 167 Misc. 2d 840, 849 (N.Y. Fam. Ct. 1995).

These decisions reflect a growing acceptance and recognition of the rights and obligations of same-sex families by courts in this State generally. In fact, New York has made significant changes to recognize the legitimacy of same-sex partners since the time of *Alison D.* The New York Legislature has extended a variety of "spousal benefits" available to married heterosexual couples to same-sex domestic partners, notably to surviving partners of September 11 victims and partners of active-duty military personnel.[6] The Legislature has also enacted

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[5] *Cf. Braschi* v. *Stahl Assocs., Inc.*, 74 N.Y.2d 201, 211 (1989) (concluding that the term "family" for purposes of rent control law "should not be rigidly restricted . . . but instead should find its foundation in the reality of [modern] family life").

[6] *See* N.Y. Comp. Codes R. & Regs. tit. 9 § 5.113 (Executive Order No. 113.30) (2001) (benefits from the Crime Victims Board if 50% of financial support was provided by victim); N.Y. Est. Powers & Trusts Law § 11-4.7 (McKinney 2009) (September 11 Memorial Fund Awards); N.Y. Workers' Comp. Law § 4 (McKinney 2009) (workers compensation spousal death benefits); N.Y. Educ. Law § 608 (McKinney 2009) (participation in World Trade Center Memorial Scholarship Program for domestic partners and their children); N.Y. Educ. Law § 272(1)(l) (McKinney 2009) (library Internet access for military partners); N.Y. Exec. Law § 354-b(2)(b)(i) (McKinney 2009) (burial insurance for military partners); N.Y. Mil. Law § 254(2) (McKinney 2009) (videoconferencing for military partners); N.Y. Pub. Serv.

broader-reaching protections for same-sex couples, granting same-sex domestic partners credit union access, hospital visitation, and the right of control to a deceased spouse's bodily remains on the same terms as an opposite-sex spouse.[7] Similarly, the executive branch has followed this trend, culminating with Governor Paterson's recent directive to state agencies to recognize as a matter of comity same-sex marriages and civil unions validly performed out of state, building on previous executive decisions extending benefits and a line of judicial decisions.

B. Lower Courts and Legal Scholars Have Recognized that *Alison D.* Should Be Re-Examined

In light of the realities of today's parent-child relationships and the increasing acceptance of rights for same-sex couples, lower courts and legal scholars in New York have routinely criticized *Alison D.* and increasingly called for this Court to overturn that decision.

Specifically, the lower courts have repeatedly challenged the decision in *Alison D.* as failing to recognize the primacy of a child's rights. *See Anonymous*, 20 A.D.3d at 333 (Sweeney, J., concurring) ("I am compelled to voice my concern that in recognizing the primacy of the rights of the biological parent, the Court of Appeals has defined a rigid construct which concomitantly ignores the

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Law § 92(3-a) (McKinney 2009) (discounted telephone rates for military partners); N.Y. Real Prop. Tax Law § 925-d (McKinney 2009) (property tax relief for military partners).

[7] *See* N.Y. Banking Law § 451(2)(d)(1) (McKinney 2009); N.Y. Pub. Health Law § 2805-q (McKinney 2009); N.Y. Pub. Health Law § 4201 (McKinney 2009).

reality of the relationships that nurture and develop a child."); *Multari* v. *Sorrell*, 287 A.D.2d 764, 771 (3d Dep't 2001) (Peters, J., concurring) ("If in custody and visitation disputes, common sense, reason and an overriding concern for the welfare of a child are to prevail over narrow selfish proclamations of biological primacy, the assertion of equitable estoppel by a non-biological or non-adoptive parent must be given credence by the courts."); *C.M.*, 6 Misc. 3d at 370 ("[A] recurring theme throughout all of these standing cases is the injustice they work upon children."). Because the courts have found their hands to be "tied" by *Alison D.*, these lower courts have gone so far as to explicitly call upon this Court to revisit that decision. *Anonymous*, 20 A.D.3d at 333 (Sweeney, J., concurring) ("[*Alison D.*'s rigid construct of the term "parent"] is an issue which, if not reviewed by the Court of Appeals, should then be reviewed by the Legislature."); *C.M.*, 6 Misc. 3d at 369 ("Changes, if any, to the existing law must be made by either the legislature or higher courts than this one."); *Denise B.*, 2005 N.Y. Misc. LEXIS 3456, at*5 ("[P]erhaps the time has come for the Court of Appeals to revisit its ruling in *Alison D.*").

Legal scholars have similarly criticized the decision for failing to protect the best interests of children and for having adopted an outmoded view of the family. *See* Martin Guggenheim, *Rediscovering Third Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. REV. OF L.

& SOC. CHANGE 153, 155 (2009) (arguing that *Alison D.* is inapposite to the court's equitable power under common law to consider the best interests of child); Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 SYR. L. REV. 481, 485 (2006) (the failure to recognize rights of functional parents is "detrimental to the best interests of the child and the family unit, and in practical, everyday application, the courts are recognizing this fact"); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 75 (2006) (same).

Given the realities of modern-day parenting, it is no surprise that the majority of states to have considered the issue in the last decade have rejected the reasoning of *Alison D.* and have instead granted standing to non-biological, non-adoptive parents. Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 Colum. J. Gender & L. 307, 336-37 (2008); *see, e.g.*, *Miller-Jenkins* v. *Miller-Jenkins*, 912 A.2d 951, 969 (Vt. 2006) (declining to interpret statute's use of "natural parent" as legislative intent to limit parental status to biologic parents); *C.E.W.* v. *D.E.W.*, 845 A.2d 1146, 1148-51 (Me. 2004) (rejecting argument that statutory scheme prevented non-biological, non-adoptive parents from seeking parental rights as contrary to courts' codified duty to assure best interest of child);

E.N.O. v. *L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (upholding judicial recognition of *de facto* parents as an appropriate extension of the court's equitable powers to protect best interests of child where the legislature has not determined what the best interests require in a particular situation).[8]

As these courts and the scholarly commentary have recognized, a child's best interest is and must be the touchstone of determining parentage as required by New York DLR. *Alison D.*—a decision based on outdated norms of parent-child relationships—fails to protect those best interests. The decision

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[8] *See also V.C.* v. *M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (biological mother's former same-sex partner has standing to seek custody and visitation); *Kristine H.* v. *Lisa R.*, 117 P.3d 690 (Cal. 2005) (biological mother estopped from attacking validity of order granting legal parent status to former same-sex partner); *In re E.L.M.C.*, 100 P.3d 546, 562 (Colo. Ct. App. 2004) (granting biological mother's former same-sex partner joint parenting time and decision-making authority), *cert. denied*, 545 U.S. 1111; *In re Parentage of A.B.*, 837 N.E.2d 965, 967 (Ind. 2005) (conferring standing to non-adoptive, non-biological parent); *In re Parentage of A.B.*, 818 N.E.2d 126, 131-33 (Ind. Ct. App. 2004) (holding common law permits recognition of former same-sex partner of biological mother as legal co-parent of child); *Soohoo* v. *Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (granting visitation privileges to adoptive mother's former domestic partner); *V.C.* v. *M.J.B.*, 748 A.2d 539, 554 (N.J. 2000) (biological mother's same-sex partner has standing to seek custody and visitation); *A.C.* v. *C.B.*, 829 P.2d 660, 663-64 (N.M. Ct. App. 1992) (coparenting agreement between biological mother and former same-sex partner enforceable); *Mason* v. *Dwinnell*, 660 S.E.2d 58, 64 (N.C. Ct. App. 2008) (biological mother's same-sex partner has standing to bring action for custody); *T.B.* v. *L.R.M.*, 786 A.2d 913 (Pa. 2001) (same-sex partner has standing to bring action for partial custody and visitation); *Rubano* v. *DiCenzo*, 759 A.2d 959, 975 (R.I. 2000) (former same-sex partner of biological mother entitled to seek remedy under Uniform Law on Paternity for mother's alleged refusal to provide visitation with child born during couple's relationship); *In re Parentage of L.B.*, 122 P.3d 161, 174 (Wash. 2005) (granting standing to non-biological, non-adoptive parent; noting that "[n]umerous other jurisdictions have recognized common law rights on behalf of de facto parents"); *Carvin* v. *Britain*, 122 P.3d 161, 177 (Wash. 2005) (biological mother's same-sex parner has standing to petition courts for determination of coparentage); *Clifford K.* v. *Paul S. ex rel Z.B.S.*, 619 S.E.2d 138, 156-58, 160 (W.Va. 2005) (granting custody to same-sex partner of deceased biological mother over biological father).

should be overturned and "parent" redefined so it comports with how that term is actually used and widely understood in today's world in accord with the best interests of children. *See, e.g.*, *Broadnax*, 2 N.Y.3d at 155 n.4 (overruling past precedent, noting that significant number of other jurisdictions followed a different rule); *Millington*, 22 N.Y.2d at 501 (overruling precedent that did not comport with mores of society).

C. The Availability of Second-Parent Adoption Does Not Remedy the Failings of *Alison D.*

Although the availability of second-parent adoption was surely an important step forward, the mere fact that second-parent adoption is now available in New York as a result of this Court's decision in *Matter of Jacob* does not change this analysis. *In re Jacob*, 86 N.Y.2d 651, 660 (1995). The reality is that second-parent adoption is, at best, a time-consuming, expensive and intrusive process. "The legal process of adopting, from application to finalization, can be a lengthy one," taking nine months at the very least to greater than eighteen months. *See* New York State Adoption Service, "Frequently Asked Questions," http://www.ocfs.state.ny.us/adopt/adopt_faq.asp (last visited October 29, 2009). The process involves expensive legal fees for court filings and lawyers amounting to thousands of dollars that may not be available to all couples, especially if a child was recently born and family expenses are high. *See, e.g.*, *In re Sebastian*, 879 N.Y.S.2d 677, 688 n.40 (N.Y. Sur. Ct. 2009). It also involves intrusive home

interviews by social workers, which at times awkwardly or uncomfortably impose upon an already-existing family unit particularly where, as here, the non-biological parent has known and raised the child since birth. *See, e.g.*, *id.* ("Adoption requires an intrusive, and often, expensive professional 'home study' involving intimate details of a couple's relationship, finances, family and living situation, as well as fingerprinting and a mandatory check for criminal record and any prior reported child abuse or neglect."). Moreover, many same-sex couples do not understand that second-parent adoption is an option. And many lesbian or gay parents do not believe that it is necessary in order to protect their relationships with their children in part due to the split among the lower courts discussed above as well as the fact that the same-sex couples were legally married or civil unioned to each other in another state.

As a result, the practical reality is that many LGBT co-parents do not adopt for reasons having to do with what they perceive to be the obvious nature of the parent-child relationship and the expense, intrusiveness and complexity of the formal adoption process. That does not mean, of course, that those parents love their children any less or that the parent-child bond that is formed is any less significant. Moreover, even for non-biological parents who go forward with a formal adoption, there is typically a very lengthy delay between the time the child is born and when the adoption petition is finally approved and finalized by a judge

or surrogate and, at a minimum, the children of these non-biological, non-adoptive parents remain vulnerable to being emotionally damaged by separation before the adoption petition is filed or while it is pending.

In addition, because of lingering bias and homophobia, many states and foreign countries do not allow two women or two men to adopt a child together as a couple, and, even in a jurisdiction where such adoption is permitted, it is at times made impossible by adoption agencies. *See, e.g.*, Pamela Paul, *The Battle Over a Baby*, N.Y. TIMES, July 22, 2009, *available at* http://www.nytimes.com/2009/07/26/magazine/26lesbian-t.html (last visited October 29, 2009). To get around this problem, it is not uncommon for one of the two parents to go forward alone with the adoption. *Id.* As a result, many children being raised in same-sex families have formally been adopted by only one of their two parents simply because the parents were not permitted to adopt together as a couple. Again, nothing could be farther from promoting the best interests of these adopted children than allowing only one of the two non-biological parents to continue as the parent if the parents separate.

By restricting the definition of "parent" to biological and adoptive parents, *Alison D.* prevents courts from determining whether a relationship with a non-biological, non-adoptive, psychological parent is in the best interests of a particular child, and focuses its inquiry on formal definitions, rather than the

emotional well-being of the children the law purports to protect. Where, as here, a prior decision is "at variance with modern-day needs," reconsideration of that decision is warranted. *See Bing* v. *Thunig*, 2 N.Y.2d at 667.

IV.
Alison D. Is Inconsistent With This Court's More Recent Decision in *Matter of Shondel*

The Court also should also overturn *Alison D.* and redefine the term "parent" to comport with its more recent decision in *Matter of Shondel J.* v. *Mark D.*, 7 N.Y.3d 320 (2006) (hereinafter, *Shondel*). In *Shondel*, this Court, focusing on the best interests of the child, applied the doctrine of equitable estoppel to prohibit a man who had held himself out to be the father of the child from denying paternity for purposes of paying child support. *Id.* at 328; *see also Jose F. R.* v. *Reina C. A.*, 46 A.D.3d 564, 564-65 (2d Dep't 2007) (following *Shondel* and estopping non-biological father from challenging his paternity to 10-year-old girl who viewed herself as his daughter and developed relationships with members of his family); *Louise P.* v. *Thomas R.*, 223 A.D.2d 592, 593 (2d Dep't 1996) (noting that where it is in the best interests of the child, the doctrine of equitable estoppel may preclude a parent from challenging a filiation order). In so holding, the Court reasoned:

> The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether

> emotional or financial, may leave the child in a worse position than if that support had never been given.

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

However, while the *Shondel* court held that equitable estoppel applies to prohibit a non-biological father from denying paternity for purposes of support, lower courts (including, in the instant case, the First Department) have interpreted *Alison D.* as barring the application of the doctrine in cases involving custody or visitation. Therefore, reading *Alison D.* and *Shondel* together, a non-biological parent can be forced into the absurd situation of being denied the right to see a child with whom she has a significant parental relationship, while simultaneously being directed to economically support that child as a parent. Such an incongruity—which runs contrary to the express language in *Shondel*—is fundamentally inconsistent, unfair and mandates that this Court revisit *Alison D.* *See Kalechman*, 33 N.Y.2d at 404 (holding that courts should consider the formal symmetry and fairness of a decision in the context of varying scenarios in deciding whether a past precedent is entitled to *stare decisis*).[9]

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[9] The unfairness of this contradiction and its negative impact on the emotional well-being of children has not gone unnoticed by legal scholars. *See, e.g.*, Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 7 (2009) (citing *Alison D.* as a case exemplifying the ever-increasing disjunction between the new reality of people's lives and the dominant legal norms that cease to protect the meaningful relationships shared by children and adults); Carla S. Johnson, Note, *Family Law - Application of Equitable Estoppel in Paternity and Visitation Cases - Mommy's Baby, Mama's Maybe: A New York Court's Decision To Hold a Same-Sex Partner Financially Responsible for a Non-Biological and Non-Adoptive Child*, 31 U. ARK. LITTLE ROCK L. REV.

Finally, the Court's decision in *Shondel* has only exacerbated the inconsistencies between the decisions of the lower courts as to the applicability and reach of *Alison D.* The lower courts, in particular, have struggled to determine whether the doctrine of equitable estoppel can be applied to estop a party from denying that a *de facto* parent has standing to seek custody or visitation. *Compare Anonymous*, 20 A.D.3d at 333 (relying on *Alison D.* and denying standing to *de facto* parent); *Janis C.* v. *Christine T.*, 94 A.D.2d 496, 487 (2d Dep't 2002) (same); and *Cindy P.* v. *Danny P.*, 206 A.D.2d 615, 616 (3d Dep't 1994) (same) *with Jean Maby H.* v. *Joseph H.*, 246 A.D.2d 282, 289 (2d Dep't 1998) (applying equitable estoppel and granting standing to non-biological parent to seek visitation); *Christopher S.* v. *Ann Marie S.*, 173 Misc. 2d 824, 831-32 (N.Y. Fam. Ct. 1997) (same); *Gilbert A.* v. *Laura A.*, 261 A.D.2d 886, 887-88 (4th Dep't 1997) (non-biological parent entitled to invoke equitable estoppel); and *Beth R.*, 19 Misc. 3d at 731-34 (applying equitable estoppel and granting standing to non-biological parent to seek visitation in reliance on *Shondel*).

This conflict must be resolved in a manner that is consistent with the legislative intent and public policy to make the best interests of the child paramount. *See Bing* v. *Thunig*, 2 N.Y.2d at 664 (overturning past precedent

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543, 565 (2009) ("It is illogical to continue this one-sided application of the [estoppel] doctrine.").

because of, among other things, the instances of the Court of Appeals's and lower courts' inconsistent application of the law).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court grant Debra H.'s petition and reverse the decision of the Appellant Division, First Department.

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Respectfully submitted,

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