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STATE OF NEW YORK
COURT OF APPEALS

DEBRA H.,

Petitioner-Appellant,

-against-

JANICE R.,

Respondent-Respondent.

BRIEF OF *AMICI CURIAE* THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION, AND THE LESBIAN, GAY, BISEXUAL & TRANSGENDER COMMUNITY CENTER

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In this case, this Court is called upon to allow a non-biological parent a day in court to prove that she, with the consent of the child's biological parent, has played a sufficiently close, care-giving, parental role in her child's life to warrant the maintenance of a relationship with the child. The Court should allow the use of equitable powers to grant such a "*de facto* parent" the ability to make this showing for two principal reasons: first, because the parent-child relationship formed between children and *de facto* parents falls under the constitutionally protected right to familial association; and second, because New York courts have broad equitable powers to recognize such established parent-child relationships and thereby protect the best interests of children being raised by non-biological parents, who deserve the same protection of their established family relationships as other children.

The right to familial association is fundamental to our system of ordered liberty and protects the relationships that form within a family unit between parent and child. The associational right that lies at the core of this sphere of constitutional protection has always encompassed a wide range of relationships that extend beyond both the traditional family and biological relationships. For this reason, courts across the country, including in New York State, have recognized such relationships in various contexts in furtherance both of the

protected interest in maintaining established family relationships and the paramount question of the best interest of the child.

At issue in this appeal is whether a party who seeks to prove that she, with the consent and encouragement of the child's legal parent, has established a close and loving parental relationship with a child is permitted an opportunity to show that such a relationship exists, and then, if she makes such a showing, seek visitation and custody of her child. On the other hand, Respondent-Respondent seeks to erect an irrebuttable presumption against a *de facto* parent[1] maintaining a relationship with her child by denying her any opportunity to demonstrate such a relationship exists.

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States, and has more than 500,000 members nationwide. The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the ACLU and is a nonprofit, nonpartisan organization with approximately 50,000 members. Both the ACLU and the NYCLU are deeply devoted to the protection and enhancement of fundamental liberties and, collectively, have served as counsel and filed numerous *amicus curiae* briefs in parental rights cases throughout the

[1] *Amici* will use the terms "*de facto* parent" to describe individuals who, like Petitioner-Appellant argues, have, with the consent and encouragement of the child's biological parent, shared the responsibilities of raising the child and served, for all practical purposes, as a parent to that child.

state and country. The Lesbian, Gay, Bisexual & Transgender Community Center (LGBT Community Center) was established in 1983 and has grown to become the largest LGBT multi-service organization on the East Coast and second largest LGBT community center in the world. The LGBT Community Center runs many programs, including Center Kids, a model that promotes the legitimacy and visibility of LGBT families, in which more than 2,500 families in the tri-state area partake. All *amici* have experience working with non-traditional families, including LGBT families, and recognize the balancing of parental rights that courts must employ in the context of parenting cases. Notably, the ACLU filed an *amicus curiae* brief in the U.S. Supreme Court in the case of *Troxel v. Granville*, 530 U.S. 57 (2000), arguing that the Washington statute at issue there, which granted any person standing to seek visitation or custody of a child, was unconstitutionally overbroad by granting any person, regardless of their relationship with the child, standing to pursue visitation or custody without any safeguards in place to protect the biological or legal parent's constitutional rights.

Among the most basic of liberties is the right of familial association, including the right of a parent to a child to maintain that parent-child relationship—a right squarely implicated in this case. Accordingly, the ACLU, the NYCLU, and the LGBT Community Center submit this brief as *amici curiae*. In doing so, *amici* take the position that erecting an irrebuttable presumption that

would bar a *de facto* parent from ever participating in a visitation or custody proceeding would burden impermissibly the fundamental right of familial association.

This Court, however, can avoid such a constitutional confrontation by invoking equitable principles. Courts in New York and across the country can and do rely on equitable principles to protect the fundamental rights of parents and reach the paramount question of the best interests of the child. In doing so, these courts recognize that adults may become parents in ways not expressly defined under statutory regimes, but that the subsequent parent-child relationship is no less deserving of protection. The purpose of this brief is, thus, to raise the constitutional considerations that bear upon this appeal; to discuss the many cases in New York and around the country that avoid a constitutional confrontation by utilizing equitable principles to recognize the emergence of *de facto* parenting; and to demonstrate that the application of equitable principles to allow courts to recognize *de facto* parents appropriately balances both legal and non-legal parents' constitutional interests.

STATEMENT OF THE FACTS

This case involves a petition by Petitioner-Appellant, Debra H (Debra), to continue with a child, M.R., the parent-child relationship that she alleges she has developed and maintained with him since he was born nearly six years ago.

Although Debra is not M.R.'s biological mother,[2] before M.R. was born, Debra and the child's biological mother, Respondent-Respondent, Janice R. (Janice), obtained a New York City domestic partnership and also entered into a Vermont civil union, thereby agreeing to take on all of the obligations and responsibilities of a permanent legal union.[3] As the trial court found, for more than two years after Debra and her former partner separated in February 2006,[4] Debra maintained frequent visitation and daily contact with M.R. But in March 2008, Janice sought to cut off contact between Debra and M.R., leading Debra to move by order to show cause for joint legal and physical custody of M.R. *See* Order of Sup. Ct. at 1-3. Visitation was restored by the trial court during the pendency of the proceedings. *Id.* at 3. Ruling that the facts asserted by Debra make out a prima facie showing that she stands in *loco parentis* to M.R., the trial court granted a hearing to

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[2] While Respondent-Respondent, Janice R., was the biological and gestational mother, Debra was present in the delivery room and cut M.R.'s umbilical cord, and the child-naming certificate from the family's synagogue, along with the synagogue's newsletter, identified both women as M.R.'s parents. Order of Sup. Ct. at 2.

[3] The couple registered as domestic partners in September 2003. When the couple was civilly united in November 2003, *see* Order of Sup. Ct. at 2, this was the highest form of legal recognition available to same-sex couples in the United States. Indeed, it was not until May 2004 that same-sex couples could validly marry anywhere in the United States. *See, e.g., Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 633 (Mass. 2006) ("Beginning on May 17, 2004, . . . municipal clerks in several cities and towns began to receive notices of intention of marriage from nonresident same-sex couples."). Also, while parts of Canada permitted same-sex couples to marry beginning in 2003, *see Halpern v. Att'y Gen. of Canada*, 65 O.R.3d 161 (Ontario Ct. App. 2003), it was not until 2005 that federal law in Canada uniformly defined marriage in a gender-neutral fashion, *see* Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

[4] In February 2006, the same month the couple separated, Janice executed a power of attorney designating Debra as M.R.'s guardian. Order of Sup. Ct. at 2-3.

determine whether she does indeed stand *in loco parentis*, and, if so, whether granting visitation and custody would be in M.R.'s best interests. *Id.* at 17.

In a decision and order dated April 9, 2009, the Appellate Division, First Department vacated the Supreme Court's order and dismissed the proceeding, relying upon this Court's decision in *Matter of Alison D. v. Virginia M.*, 569 N.Y.S.2d 586, 77 N.Y.2d 651 (1991). *See Debra H. v. Janice R.*, 877 N.Y.S.2d 259, 260, 61 A.D.3d 460, 461. The court held that *Alison D.* governs this case and "provides that a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law § 70, even though that party may have developed a longstanding, loving and nurturing relationship with the child and was involved in a prior relationship with the biological parent." This Court then granted Debra leave to appeal.

ARGUMENT

I. THE CONSTITUTIONAL PROTECTION OF PARENT-CHILD RELATIONSHIPS IS NOT LIMITED TO BIOLOGICAL OR FORMALLY RECOGNIZED LEGAL PARENTS.

The Due Process Clause of the U.S. Constitution protects relationships between children and the adults who play parental roles (i.e., *de facto* parents), like other parent-child relationships. Over 60 years ago, the Supreme Court, in *Prince v. Massachusetts*, 321 U.S. 158 (1944), recognized that biological or legal parents are not the only family members who have a constitutionally protected interest in

their relationships with their children. The Court treated the relationship between Sarah Prince and Betty Simmons (Sarah's "custodian" and aunt) as a constitutionally protected parent-child relationship. *Id.* at 159, 169. Similarly, in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 504 (1977), the Court recognized that a grandmother who lived with and raised her grandsons had a constitutionally protected relationship with them. *See also Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 843, n. 49 (1977) (citing *Prince* and *Moore* as examples of parental due process rights extending beyond "natural" parents). Indeed, the Court has explained:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

Smith, 431 U.S. at 844; *see also Lehr v. Robertson,* 463 U.S. 248, 261 (1983) (quoting *Smith*, *supra*). And while *Smith* involved the relationships that form between foster parents and children the state has placed in the foster parents' temporary custody, this and other *de facto* parenting cases involve an even closer familial connection because the relationship is not alleged to have formed due to the state's temporary placement of the child with the *de facto* parent, but rather with the consent and encouragement of the biological parent.

Thus, families without biological or adoptive parental connections still can

fall within the shelter that the Constitution provides for parent-child relationships. *See Smith*, 462 U.S. at 261; *see also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (permitting an adoption by stepfather with an established parent-child relationship with the child over the biological father's objection).

Despite this backdrop of case law recognizing the protection afforded by the Due Process Clause for familial association and parent-child relationships, Janice seeks to erect an irrebuttable presumption that Debra and M.R. do not share a parent-child relationship that the Constitution would recognize. However, in the context of visitation and custody decisionmaking, the U.S. Supreme Court has stated:

> Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley v. Illinois, 405 U.S. 645, 656-67 (1972). Indeed, "'permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments.'" *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644 (1974) (quoting *Vlandis v. Kline*, 412 U.S. 441, 446 (1973)); *see also E.S. v. P.D.*, 8 N.Y.3d 150, 160 (2007) (noting that, while a strong presumption exists that a fit, biological parent's wishes are in the best interests of the child, that presumption can be overcome by facts demonstrating that a non-biological, non-

legal parent has played a parental role in a child's life). The Due Process Clause forbids such a presumption when the state has a reasonable alternative means for making a crucial decision, such as in visitation or custody matters. *LaFleur*, 414 U.S. at 645. Given the constitutional significance of the parental relationships at issue in this case and the importance of protecting M.R.'s best interests, this Court should not allow the imposition of an irrebuttable presumption barring Petitioner-Appellant from being able to prove she is a *de facto* parent[5] and her continued visitation with M.R. would be in his best interests.

In cases such as this one, and as discussed in section II, *infra*, courts in New York and across the country have avoided these constitutional conflicts by applying the equitable estoppel doctrine to protect existing parent-child relationships. These courts recognize as parents individuals who have established the emotional attachments that result uniquely from daily life as a family, and, in doing so, protect constitutional rights to familial association. For example, the New Jersey Supreme Court explained:

> At the heart of the psychological parent cases [like this one] is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life. *Smith v. Org. of Foster Families for Equality and Reform,* 431 U.S. 816, 844 (1977).

[5] The well-established and constitutionally balanced factors for determining whether an individual such as Debra qualifies as a *de facto* parent are set forth in section II.C, *infra*.

V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000); *see also In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005) ("if, on remand, [the petitioner] can establish standing as a *de facto* parent, [she and the biological mother] would *both* have a 'fundamental liberty interest[ ]' in the 'care, custody, and control' of L.B.") (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)), *cert. denied*, 547 U.S. 1143 (2006). See also *Kulstad v. Maniaci,* 352 Mont. 513 (2009) (Montana Supreme Court recognizing that the *children* have a constitutional right to maintain the relationship with their *de facto* parent).[6]

Accordingly, this Court can, and should, avoid a constitutional conflict in this case by looking to the growing trend in the courts of this State, and around the country, that use their equitable authority to acknowledge the deep and longstanding relationships between parents and children—regardless of their biological or formal legal status—when doing so would serve the best interests of the child.

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[6] In addition, as discussed in section II.C.2, *infra*, the standards and outcome advanced by *amici* are completely consistent with the U.S. Supreme Court's decision in *Troxel*, 530 U.S. 57. In *Troxel*, the Court only decided the narrow issue that a "breathtakingly broad" statute granting "any person" standing to pursue custody or visitation over the biological or legal parent's objections was unconstitutional. *Id.* at 67 (brackets omitted in second quotation). *Troxel* was a case about protecting parents from claims by limitless categories of outsiders. The opinion says nothing about how states should or may determine who is a parent; nor did *Troxel* address the erection of an irrebuttable presumption against *de facto* parents. By contrast, this case and the many other *de facto* parenting cases from around the country—decided both before and after *Troxel*—involve an individual who, with the biological or legal parent's own consent (or an allegation of such consent), have developed parent-child bonds with the child.

II. APPLYING EQUITABLE PRINCIPLES TO GRANT STANDING TO *DE FACTO* PARENTS AND PROTECT THE BEST INTERESTS OF THE CHILD IS CONSISTENT WITH THE BROAD EQUITABLE POWERS OF NEW YORK COURTS, DECISIONS BY OTHER STATE HIGH COURTS AND THE U.S. CONSTITUTION.

A. Courts in New York have protected family relationships and the best interests of the child by applying the doctrine of equitable estoppel to maintain the relationships that form between children and their *de facto* parents.

The Supreme Court of New York is one of "general original jurisdiction in law and equity." N.Y. Const. art. VI, § 7, subd. a.; *see also In re Steinway*, 159 N.Y. 250 (1899); *Kaminsky v. Kahn*, 23 A.D.2d 231, 236, 259 N.Y.S.2d 716, 721 (1st Dep't 1965). The Supreme Court's equitable jurisdiction is broadly exercised over all "controversies touching the custody of children, which [are] governed . . . by considerations of... expediency and equity, and, above all, the interests of the child." *People ex rel. Riesner v. New York Nursery and Child's Hospital*, 230 N.Y. 119, 124 (1920); *see also Ex parte People ex rel. Cox*, 124 N.Y.S.2d 511, 514 (Sup. Ct. Erie County 1953) ("The Court has the widest powers of interference in behalf of infants who stand in need of its protection."). Its equitable jurisdiction over the custody of minors extends to both writs of habeas corpus and petitions.[7]

These common law rights in equity were partially codified by the

[7] *See, e.g., Application of Smith*, 7 A.D.2d 344, 347, 183 N.Y.S.2d 511, 514 (3d Dep't 1959) ("The Supreme Court . . . has inherent power to decree custody in a proper case by way of habeas corpus, or even by a direct petition invoking the chancery powers of the Court.") (citations omitted).

Legislature in Domestic Relations Law section 70. *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925) ("The Domestic Relations Law [] gave the [habeas] remedy to the husband, though he already had it at common law"). Nothing in the statute, however, suggests preemption of the court's equitable jurisdiction or precludes appeals to those equitable powers. *Finlay*, 240 N.Y. at 433; *see also Sandfort v. Sandfort*, 278 A.D. 331, 335, 105 N.Y.S.2d 343, 346 (1st Dep't 1951) ("[T]he broad equitable powers of the Supreme Court regarding minor children within the state . . . are not limited by the statutes concerning habeas corpus"); *accord Ex parte People ex rel. Cox*, 124 N.Y.S.2d 511, 514 (Erie County 1953).

In 2006, this Court added to the body of case law applying equitable doctrines to protect the best interests of minor children. *See Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326, 820 N.Y.S.2d 199, 202 (2006).[8] In *Shondel J.*, the Court held that a nonbiological father, Mark D., who had established a parent-child relationship with the child was equitably estopped from subsequently denying paternity and the obligations attendant to it, where it was not in the child's best interests to allow such a denial. *Id.* at 324. Despite Mark D.'s paternity being determined a biological impossibility by both a DNA test and a blood genetic

[8] *See, e.g., Jean Maby H. v. Joseph H.*, 246 A.D.2d 282 (2d Dep't 1998) (cited by this Court in *Shondel J.* for the proposition that New York courts have consistently applied the doctrine of equitable estoppel in order to meet the best interests of the child); *see also Matter of Diana E. v. Angel M.*, 20 A.D.3d 370, 799 N.Y.S.2d 484 (1st Dep't 2005) (applying equitable estoppel to prevent *de facto* father from denying paternity where child viewed him as a father, father had lived with child for years, and he continued visitation after the parents separated).

marker test, the Court found application of equitable estoppel appropriate and in the best interests of the child at issue. *See id.* at 326-32.

The result in *Shondel J.*—application of the doctrine of equitable estoppel—was a permissive one that was not required by statute. Sections 418 and 532 of the Family Court Act provide that a Family Court "*may* deny [paternity] testing based on . . . equitable estoppel." *Id.* at 329 (emphasis added). The doctrine originated in the common law before it was merely "secured" by statute. *Id.* at 326. Thus, the doctrine's codification served neither to enhance nor to abrogate equitable estoppel, but to preserve the Court's already extant equitable power. *See, e.g.*, N.Y. Jur. 2d Equity § 54 ("Courts of equity exercise certain judicial powers as *parens patriae* to protect the rights of infants.").

In addition, even this Court's decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991), which limited the term "parent" in Domestic Relations Law section 70 to biological or adoptive parents, cannot be read to have squarely addressed the issue of whether the Supreme Court may exercise its equitable powers in favor of children with *de facto* parents. While *Alison D.* did state that the petitioner's claim of *de facto* parent status was "insufficient" to grant her standing to pursue visitation under section 70 of the Domestic Relations Law, *id.* at 656, the only question before this Court was "standing to seek visitation . . . under Domestic Relations Law § 70," *id.* at 655.

Thus, *Alison D.* dealt only with construction of the term "parent" within Domestic Relations Law § 70, and it did not address the general equity jurisdiction of the Supreme Court. *See generally id.; cf. Matter of Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 288-89, 676 N.Y.S.2d 677, 681-82 (2d Dep't 1998) (applying equitable estoppel to protect the child's best interest by recognizing *de facto* parent seeking parental rights, notwithstanding *Alison D.*); *see also Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 508, 19 Misc. 2d 724, 734 (Sup. Ct. N.Y. County 2008) ("[I]t is not mere coincidence that in *Shondel J.* the Court of Appeals cited to [*Jean*] *Maby H.*") If *Alison D.* does have any bearing on the courts' equitable power to recognize *de facto* parents, however, *amici* urge the Court to overrule it to that limited extent to avoid the constitutional conflict created by precluding a *de facto* parent from proving the existence of a parent-child relationship.

Here, Debra seeks an opportunity to adjudicate her role as a *de facto* parent of a child residing in the State of New York. The subject matter clearly lies within the equitable jurisdiction of the Supreme Court and the trial court has done no more than grant Debra the opportunity to demonstrate her competence to invoke that court's powers, as one standing *in loco parentis*. *See* Order of Sup. Ct. at 17. As discussed in sections II.C and II.D, *infra*, exercising such equity jurisdiction to protect the best interests of the child is consistent with constitutional principles.

B. Courts across the country protect the relationships that form between children and their *de facto* parents by allowing *de facto* parents to petition for parental rights.

Numerous other state high courts have recognized the changing face of families in determining parental rights and obligations, to act in a child's best interests.[9] These courts have rejected rigid formulations that prioritize biological or adoptive parent-child relationships to the utter exclusion of *de facto* parents, in order to protect the relationships children have with their parents, regardless of their parents' legal status.[10] This is especially true in courts of general equity jurisdiction, like New York Supreme Court, where no custody or visitation statutes preempt that jurisdiction.[11]

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[9] *See, e.g.*, *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005), *cert. denied sub nom. Britain v. Carvin*, 547 U.S. 1143 (2006); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W.Va. 2005); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass.), *cert. denied*, 528 U.S. 1005 (1999); *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840 (Conn. Super. Ct. 1999); *In re Custody of H.S.H.-K. (Holtzman v. Knott)*, 533 N.W.2d 419 (Wis. 1995); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. Ct. App. 2006); *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *Robinson v. Ford-Robinson*, 196 S.W. 3d 503 (Ark. Ct. App. 2004); *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004); *Barnae v. Barnae*, 943 P.2d 1036 (N.M. Ct. App. 1997).

[10] *Cf. Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (rejecting irrebuttable presumption in parental rights context where such a presumption "explicitly disdains present realities in deference to past formalities").

[11] *See, e.g.*, *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (recognizing common law right of *de facto* parents, independent of statutory scheme); *In re the Matter of the Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (recognizing common law right of *de facto* parents, who may not have legal parental status); *In re the Custody of H.S.H.-K.*, 533 N.W.2d 419 (recognizing equitable jurisdiction over parent-like relationship, despite statutory scheme); *cf., e.g.*, *E.N.O. v. L.M.M.*,

In the seminal case of *H.S.H.-K.*, 533 N.W.2d 419, the Wisconsin Supreme Court recognized a *de facto* parent's "parent-like relationship" with a child whom the *de facto* parent had raised since birth with her former partner. There, the *de facto* parent filed a petition under a visitation statute that the court determined did not grant her standing. However, the Wisconsin Supreme Court went on to conclude that the statute was not exclusive with respect to visitation, and did not "supplant or preempt the court's long-standing equitable power to protect the best interest[s] of [the] child by ordering visitation in circumstances not included in the statute." *Id.* at 425. The court thus recognized the petitioner's standing under the court's broader equitable jurisdiction and set forth the standards articulated in section II.C, *infra*, for establishing a "parent-like" relationship that has become the foundation for several later decisions. *Id.* at 435-36.

Similarly, the Pennsylvania Supreme Court, in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), affirmed the right of a woman standing *in loco parentis* to seek visitation with her former same-sex partner's child, whom the parties had raised for three years as a couple. While the Pennsylvania Supreme Court acknowledged that the petitioner lacked standing under the visitation statute, it rejected that fact as "irrelevant," as the petitioner had invoked "the common law doctrine of *in loco*

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711 N.E.2d 886 (Mass. 1999) (recognizing equity jurisdiction over *de facto* parents, despite statutory silence).

parentis." *Id.* at 918. The court also held that "[t]he mere fact that the statute does not reference the doctrine" would not repeal the common law doctrine. *Id.*

Recently, the Washington Supreme Court squarely addressed the issue of "whether . . . the equitable power of our courts in domestic matters permits a remedy *outside* of the statutory scheme, or conversely, whether our state's relevant statutes provide the exclusive means of obtaining parental rights and responsibilities." *In re Parentage of L.B.*, 122 P.3d 161, 166 (Wash. 2005) (emphasis in original), *cert. denied sub nom. Britain v. Carvin*, 547 U.S. 1143 (2006).[12] Since Washington courts had "often used their equitable powers within [domestic matters] and expanded the common law accordingly to address the changing needs of families," the Washington Supreme Court affirmed use of the *de facto* parenthood doctrine. *Id.* at 166, n. 6. The court found that the petitioner, the former same-sex partner of the biological mother, was a *de facto* parent, explicitly adopting the test set forth by the Wisconsin Supreme Court in *In re Custody of H.S.K.-H. See In re Parentage of L.B.*, 122 P.3d at 176.

While some courts have denied a putative *de facto* parent standing to pursue custody or visitation, many of those decisions rest on grounds that would be

[12] In Massachusetts, where no statutory scheme exists, *i.e.*, where a nonbiological, nonadoptive parent would necessarily lack statutory relief, the Massachusetts Supreme Judicial Court also examined the issue through the lens of equity jurisdiction. It affirmed an award of visitation to a former same-sex partner, who had standing as a *de facto* parent, even though "no statute expressly permit[s] the order of visitation to one . . . in a parent-like position]." *See E.N.O. v. L.M.M.*, 711 N.E.2d 886, 889 (Mass. 1999).

inapplicable in New York, such as that the putative *de facto* parent did not meet the requirements established for a *de facto* parent under state statute.[13] By way of contrast, the Domestic Relations Law does not expressly address this situation, and has never been found to preempt the broad equitable jurisdiction of the Supreme Court.

Accordingly, many other states—notably, states with jurisprudential and statutory frameworks like New York's (as discussed in section II.A, *supra*)—recognize that a child's needs are best met by preserving the close and intimate relationships with those who have served as the child's parents.

C. There are well-established and constitutionally balanced standards for courts to apply in determining whether an individual qualifies as a *de facto* parent.

As demonstrated by the discussion in section II.B, *supra*, for over a decade, different states' highest courts have articulated and applied constitutionally balanced standards in recognizing *de facto* parents' standing to pursue visitation or custody of their children. Far from presenting an unconstitutional infringement on the biological parent's rights, these standards balance the biological or legal parent's rights and the child's right to maintain his or her familial relationships, with the need to protect the best interests of the child. These standards require

[13] *See, e.g., B.F. v. T.D.*, 194 S.W.3d 310, 312 (Ky. 2006) (declining to exercise equitable jurisdiction where statute already gave standing to "de facto custodian," whose requirements petitioner did not meet).

proof of the biological or legal parent's consent to the *de facto* parent's formation of a parent-child relationship with the child before the *de facto* parent may seek court action to continue his or her role in the child's life. A court does not infringe on parental autonomy by recognizing a *de facto* parent-child relationship that a legal parent *voluntarily chose to create and foster* between another adult and her child. This requirement not only avoids constitutional infirmity, compare *Troxel v. Granville*, 530 U.S. 57 (2000), but also avoids the practical problem of a myriad of non-parents seeking custody and visitation of a child.[14]

1. *The standards for determining whether an individual is a de facto parent are well-established and require, inter alia, the biological or legal parent's consent to the formation of a parent-child relationship between the child and de facto parent.*

In its seminal, 1995 *H.S.H.-K.* decision, the Wisconsin Supreme Court set forth a set of factors that are often used as a template or starting point for other jurisdictions to determine when an individual qualifies as a *de facto* parent:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing

[14] As discussed below, contrary to Janice's assertions, the U.S. Supreme Court's decision in *Troxel*, 530 U.S. 57, does not impact the constitutional analysis in deciding whether to recognize a *de facto* parent because that decision was narrow and only concerned a "breathtakingly broad" statute permitting "any person" standing to pursue visitation or custody.

> towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

In re Custody of H.S.H.-K., 533 N.W.2d 419, 435-436 (Wis. 1995).

Since 1995, the *H.S.H.-K.* standard has been invoked by multiple high courts throughout the country in *de facto* parenting cases. *See, e.g., V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000), *cert. denied sub nom. M. J. B. v. V.C.*, 531 U.S. 926 (Oct. 10, 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999). In *V.C.*, 748 A.2d at 550-51, the Supreme Court of New Jersey adopted the "thoughtful and inclusive" test for determining *de facto* parenthood set forth in *H.S.H.-K.* The court highlighted the significance of the consent prong of the *H.S.H.-K.* standard in balancing the various interests at stake:

> [T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.
>
> . . .
>
> Prong one [of the *H.S.H.-K.* standard] is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. Without such a requirement, a paid nanny or babysitter could theoretically qualify for parental status. To avoid that result, in order for a third party to be deemed a psychological parent, the legal parent must have fostered the formation of the parental relationship between the third party and the child. By fostered is meant that the legal parent ceded over to the third party a measure of parental authority and autonomy and granted

> to that third party rights and duties vis-a-vis the child that the third party's status would not otherwise warrant. . . .
>
> The requirement of cooperation by the legal parent is critical because it places control within his or her hands. That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.

Id. at 551-52. The New Jersey high court concluded:

> This opinion should not be viewed as an incursion on the general right of a fit legal parent to raise his or her child without outside interference. What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited the third party into their lives. Most important, where that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation.

Id. at 553-54. Likewise, in the 2000 *Rubano* decision, 759 A.2d 959, 976 (Sep. 25, 2000), the Rhode Island Supreme Court held that when a legal parent "agree[s] to and foster[s]" a *de facto* parental relationship and allows that person to "assume an equal role as one of the child's two parents," she renders her own parental rights

with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been. *See also Kulstad v. Maniaci*, 352 Mont. 513, 543 (2009) (noting that "Montana's nonparental statutes avoid constitutional infirmity . . . through the twin thresholds of *consideration of the wishes of the natural parent* and the need to first establish a child-parent relationship.") (emphasis added).

In essence, while a parent's initial decision about whether to permit another person to develop a parent-child relationship with her child must be respected, once a parent has made that decision and encouraged a parental bond to form, there is a compelling interest in maintaining that constitutionally-protected relationship. Acknowledging both of these interests serves to protect the child from the "emotional harm . . . intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent." *In the Interest of E.L.M.C.*, 100 P.3d 546, 561 (Colo. App. 2004).

For example, in 2005, the Supreme Court of Washington held that a *de facto* parent had standing to petition for parenting rights, acknowledging that the biological parent's rights are considered in deciding to recognize a *de facto* parent:

> Critical to our constitutional analysis here, a threshold requirement for the status of the *de facto* parent is a showing that the legal parent "consented to and fostered" the parent-child relationship. The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively

> establishing a family unit with the *de facto* parent and child or children that accompany the family.

In re Parentage of L.B., 122 P.3d 161, 179 (Wash. 2005) (quoting *H.S.H.-K.*, *supra*); *see also Middleton v. Johnson*, 633 S.E.2d 162, 169 (S.C. App. 2006) ("The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child.").

Similarly, the North Carolina Court of Appeals ruled in 2008 that the actions by the biological parent holding the *de facto* parent out as a parent altered the biological parent's constitutional rights to "care, custody, and control" of a child. The court reasoned that, "after choosing to forego as to [the *de facto* parent] her constitutionally-protected parental rights, [the biological parent] cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." *Mason v. Dwinnell*, 660 S.E.2d 58, 70 (N.C. App. 2008). The court therefore held that the biological parent "gave up her right to unilaterally exclude [the *de facto* parent] (or unilaterally limit contact with [the *de facto* parent]) by choosing to cede to [the *de facto* parent] a sufficiently significant amount of parent responsibility and decision-making authority to create a permanent parent-like relationship with her child." *Id.* at 69.

In this case, Debra alleges that Janice permitted and encouraged her to form a parent-child relationship with M.R. The effect of the Appellate Division's ruling,

however, was to foreclose the trial court from finding whether, in fact, Debra is a *de facto* parent under factors akin to the *H.S.H.-K.* standard. The *H.S.H.-K.* standard and subsequent decisions from multiple state appellate and high courts demonstrate that the standards for determining whether an individual is a *de facto* parent are constitutionally balanced because, *inter alia*, those standards take into account the "threshold" inquiry, *see Parentage of L.B.*, 122 P.3d at 179, of whether the biological or legal parent consented to the formation of a parent-child relationship between the child and *de facto* parent. Therefore, this Court should adopt the well-established *H.S.H.-K.* standard to balance the competing constitutional considerations and protect the best interests of M.R.

2. *The Courts' recognition of de facto parents is consistent with the U.S. Constitution, under the Supreme Court's decision in Troxel v. Granville.*

As demonstrated by the number of state high court decisions recognizing *de facto* parent standing since the U.S. Supreme Court issued its decision in *Troxel v. Granville*, 530 U.S. 57 (2000), that case does not preclude *de facto* parent standing. In *Troxel*, the Supreme Court held that a "breathtakingly broad" state statute according courts unlimited discretion to award visitation rights to "[a]ny person . . . at any time" violated parents' constitutional right to rear their children. *Id.* at 67. Justice O'Connor's plurality opinion in *Troxel* has no bearing on the equitable

principles governing the relationship between the *de facto* parents and children at issue here.

In *Troxel*, the Court reviewed a Washington statute that permitted "[a]ny person" to petition for visitation rights "at any time." *Id.* at 61. The Court invalidated the statute but was unable to issue an opinion that commanded a majority of the Justices. A plurality opinion written by Justice O'Connor and joined only by Chief Justice Rehnquist and Justices Ginsburg and Breyer supported the decision on several grounds. First, Justice O'Connor observed that the Washington statute at issue was "breathtakingly broad," inviting, as it did, "[a]ny person" at "any time" to create a contest over visitation. *Id.* at 67 (brackets in original). Second, Justice O'Connor observed that, under Washington law, "a parent's decision that visitation would not be in the child's best interest is accorded no deference." *Id.* In this regard, Justice O'Connor noted that the plurality for whom she spoke "do[es] not, and need not, define today the precise scope of the parental due process right in the visitation context" and thus explicitly limited the scope of the ruling, stating that "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73.

The concurring opinions in *Troxel* also present no prohibition to a state's recognition of *de facto* parents. Indeed, Justice Kennedy noted in his concurrence that while "a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a ***de facto* parent** may be another." *Id.* at 100-01 (emphasis added). Justice Souter's concurring opinion rested only on the open-ended nature of the Washington statute. *See id.* at 75-79. And Justice Thomas's concurring opinion rested upon a somewhat different ground, namely, the application of "strict scrutiny" in evaluating the constitutionality of the statute. *See id.* at 80.

Given that *Troxel* did not address *de facto* parents and only considered a "breathtakingly broad" statute, courts have found that *Troxel* imposes no restrictions on states' ability to recognize *de facto* parents as parents who are entitled to parental rights and responsibilities. State appellate courts that have considered the implications of *Troxel* in cases involving *de facto* parents agree that recognizing and protecting relationships between children and their *de facto* parents does not violate the constitutional parental autonomy rights of biological parents. *See, e.g., In re Parentage of L.B.*, 122 P.3d at 178 (rejecting argument that *Troxel* bars recognition of *de facto* parents because "*Troxel* did not address the issue of state law determinations of 'parents' and 'families'"); *Rubano*, 759 A.2d at 967, 972-76 (distinguishing *de facto* parent's petition for visitation from *Troxel*

because of the parent-like relationship); *Robinson*, 196 S.W. 3d at 506-07 (rejecting argument that *Troxel* overturned *in loco parentis* cases on the basis that "the finding of an *in loco parentis* relationship is different from the grandparent relationships found in *Troxel* . . . because it concerns a person who in all practical respects was a parent."); *T.B. v. L.R.M.*, 786 A.2d 913, 919-20 (Pa. 2001); *E.N.O.*, 711 N.E.2d 886; *Middleton*, 633 S.E.2d at 171-72; *In the Interest of E.L.M.C.*, 100 P.3d 546. *See also Kulstad v. Maniaci*, 352 Mont. 513, 530 (2009) (noting that proof of the biological or legal parent's consent to the formation of a *de facto* child-parent relationship avoids a problem under *Troxel* and stating that the legal parent "has failed to carry her burden of proving beyond a reasonable doubt that the statutes she challenges [granting *de facto* parents standing] impermissibly infringe on her constitutional right to parent her children.").

As the Washington Supreme Court emphasized, "[t]he State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family." *In re Parentage of L.B.*, 122 P.3d at 179. The court concluded "that the rights and responsibilities which we recognize as

attaching to *de facto* parents do not infringe on the fundamental liberty interests of the other legal parent in the family unit." *Id.* The court also stated:

> *Troxel* does not imply any constitutional infirmity in our holding today, and importantly, nor does it place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family. Neither the United States Supreme Court nor this court has ever held that "family" or "parents" are terms limited in their definition by a strict biological prerequisite.

Id. at 178.

The requirements of *de facto* parenthood easily satisfy the specific safeguards on parental rights that were articulated in *Troxel*. First, the existence of a *de facto* parent-child relationship constitutes a "special factor" that justifies a court's interference with a legal parent's child-rearing decision. *See Troxel*, 530 U.S. at 68. And, under any of the criteria for *de facto* parenthood described above, an individual cannot pursue custody, visitation, or any other parenting rights unless the legal parent consented to and fostered the creation of that *de facto* parent-child relationship, as Petitioner-Appellant alleges occurred here. As several courts have recognized, this high bar screens out other individuals who may have close relationships with children, such as nannies, babysitters and other paid-caregivers, or family friends and relatives, who are not parents. *See, e.g.*, *In re Parentage of L.B.*, 122 P.3d at 179 (noting that the "threshold" requirement of consent by the biological or legal parent eliminates fears that "teachers, nannies, parents of best friends, ... adult siblings, aunts, [ ] grandparents, and every third-party ... caregiver

will now become *de facto* parents") (alteration in original; internal quotes omitted).[15] Additionally, as discussed in section II.C.1, *supra*, the requirement that the legal parent consent to and foster the *de facto* parent-child relationship ensures that "material weight" is given to her wishes. *See Troxel*, 530 U.S. at 71.

Finally, this Court recently has upheld the rights of a grandparent to seek visitation over the biological parent's wishes, rejecting the biological parent's *Troxel*-based facial and as-applied challenges to permitting grandparents standing to seek visitation. *E.S. v. P.D.*, 8 N.Y.3d 150 (2007). Specifically, this Court noted that "*Troxel* does not prohibit judicial intervention when a fit parent refuses visitation, but only requires that a court accord some special weight to the parent's own determination when applying a nonparental visitation statute." *Id.* at 160 (citations and internal quotations omitted).[16] Thus, this Court has recognized that *Troxel* is not an absolute prohibition to recognizing the parent-child relationship that develops between children and adults other than a biological or legal parent.

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[15] See also *Rubano*, 759 A.2d at 974 ("Thus, the New Jersey court's criteria preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends from satisfying these standards."); *V.C. v. M.J.B.*, 748 A.2d 539, 552 (N.J. 2000) (noting that without the consent prong, "a paid nanny or babysitter could theoretically qualify for parental status"); *In the Interest of E.L.M.C.*, 100 P.3d at 560 ("The additional elements further protect the legal parent against claims by neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends.").

[16] Here, special weight is given to the legal parent's wishes by ensuring that only individuals who have formed a parent-child relationship with the consent and encouragement of the legal parent can seek visitation or custody as *de facto* parents. But a legal parent cannot choose to foster a parent-child relationship and then, after that familial bond has formed, later decide unilaterally to sever the relationship.

See id. at 160-61 (noting that the grandparent overcame "the strong presumption that the [biological] parent's wishes represent the child's best interests" because, *inter alia*, "from the time the child was almost four until he was seven, grandmother was his surrogate, live-in mother.").

In sum, the U.S. Supreme Court's narrow holding in *Troxel* cannot be read in opposition to the position advanced here by *amici*. First and foremost, *Troxel* involved a statute that opened the door too broadly to participation in a visitation proceeding and not a balanced standard permitting *de facto* parents standing to pursue visitation. The only proposition that can be said to have commanded five votes in *Troxel* is the narrow holding that the statute was overly broad as applied. Moreover, Justice O'Connor's plurality opinion, by its terms, did not reach beyond the Washington statute and the facts presented in that case, and Justice Kennedy's concurring opinion explicitly noted that *de facto* parents would present a completely different situation. On the other hand, Janice's claim in this case would close the door entirely and irrebuttably to all but biological or legal parents.

Accordingly, this Court should permit a factual hearing in which Debra may seek to prove her status as a *de facto* parent, pursuant to a standard requiring the biological or legal parent's consent to the formation of the *de facto* parent-child relationship, because doing so in no way infringes on Janice's constitutional rights and will, in fact, lead to the best protection of M.R.'s best interests.

CONCLUSION

For all of the reasons discussed above, as well as in the Petitioner-Appellant's papers, *amici* the NYCLU, the ACLU and the LGBT Community Center respectfully request that the Court reverse the Appellate Division's April 9, 2009 decision and order and affirm the Supreme Court's October 2, 2008 order calling for a factual hearing to determine whether Debra stands *in loco parentis* to M.R.

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing along with a copy of the Notice of Motion for Permission to File the *Amicus Curiae* Brief and Affirmation in support thereof was sent Federal Express overnight delivery on November 13, 2009 to:

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