New York County Clerk's Index No. 106569/08

COURT OF APPEALS
of the
STATE OF NEW YORK

DEBRA H.,

Petitioner-Appellant,

– against –

JANICE R.,

Respondent-Respondent.

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR LESBIAN RIGHTS, COLAGE, FAMILY EQUALITY COUNCIL, GAY & LESBIAN ADVOCATES & DEFENDERS, HUMAN RIGHTS CAMPAIGN, HUMAN RIGHTS CAMPAIGN FOUNDATION, NATIONAL GAY AND LESBIAN TASK FORCE, PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS NATIONAL, EMPIRE STATE PRIDE AGENDA, MARRIAGE EQUALITY NEW YORK, HUDSON VALLEY LGBTQ CENTER, LESBIAN AND GAY FAMILY BUILDING PROJECT, LESBIAN, GAY, BISEXUAL AND TRANSGENDER LAW ASSOCIATION OF GREATER NEW YORK, INC., THE LOFT, LONG ISLAND GAY AND LESBIAN YOUTH, LONG ISLAND GLBT COMMUNITY CENTER, NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS OF NEW YORK CITY, SERVICES AND ADVOCACY FOR GLBT ELDERS—LONG ISLAND, AND WOMEN'S BUILDING, INC.

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DISCLOSURE STATEMENT

Amicus National Center for Lesbian Rights is an affiliate of National Center for Lesbian Rights Social Justice Fund. *Amicus* Human Rights Campaign Foundation (HRC Foundation) and *amicus* the Human Rights Campaign (HRC), are affiliated organizations. *Amicus* Parents, Family and Friends of Lesbians and Gays National has affiliated chapters throughout the United States. The Ferre Institute, Inc. is the parent organization of *amicus* Lesbian and Gay Family Building Project. *Amicus* Long Island GLBT Community Center (The Center), *amicus* Services and Advocacy for GLBT Elders—Long Island (SAGE-LI), and *amicus* Long Island Gay and Lesbian Youth (LIGALY) are affiliated organizations. The remaining *amici* hereby disclose that they do not have any corporate parents, subsidiaries or affiliates.

INTRODUCTION

In this case, Debra H. seeks an opportunity to prove that she has standing to seek custody, visitation and obligations of support for M.R., based on the parental relationship she alleges she has had with him since birth.[1] Debra alleges that she and Janice R. jointly planned M.R.'s conception, intending that while Janice would carry the child, they would parent him together equally. Before his birth, they took every means possible in the United States at that time to formalize their relationship, registering as domestic partners in New York City and entering a civil union in Vermont. Since the day M.R. was born almost six years ago, Debra has cared for him as a loving parent. Nonetheless, the Appellate Division, First Department ruled in this case that Debra lacked standing to seek custody or visitation with her child.

Children form deep and enduring bonds with people who have acted as their parents, regardless of whether this relationship is legally recognized. All children deserve the same legal protections for their family relationships, and no child should be excluded from this protection merely because the Legislature did not contemplate their particular family situation. Courts have a duty to use their equitable powers to ensure that all children are protected where there are gaps in the statutory scheme. Many courts across the country have recognized that *de*

[1] Because this is an appeal of a dismissal on the pleadings as a matter of law, all of the facts alleged by Debra should be taken as true and viewed in the light most favorable to her claims.

facto parents should be granted standing to seek custody or visitation where there is a parent-child bond that was fostered and encouraged by the legal parent, and the *de facto* parent has taken on all of the responsibilities of a parent. Severing these parent-child bonds poses a serious risk to healthy development and stability in a child's life. In order to protect children from this harm, this Court should grant standing to a person who has functioned as a parent in every way, and who has developed a true parent-child bond, with the consent and encouragement of a legal parent. Under this test, Debra should be allowed to seek a determination of whether custody or visitation would be in the best interest of M.R.

Additionally, New York courts have long recognized that a person who consents to the insemination of a woman with the mutual intent to parent the resulting child is a legal parent. A portion of this presumption is currently codified in DRL § 73, but the related common-law rule, which is still in effect, predates that statute's enactment in 1974. *See Laura WW. v. Peter WW.*, 51 A.D.3d 211, 214-15 (3d Dep't 2008). The policy interests that led to the adoption of the common-law and statutory rules regarding parentage of children born using anonymous donor sperm apply with equal force to children born to unmarried couples, including two parents of the same sex, particularly when those parents have formalized their relationship by entering into a civil union. Furthermore, restricting the rule to only married, different-sex couples would violate the constitutional rights of both the child and Debra by discriminating based on the

sex, sexual orientation, and marital status of the intended parent. Therefore, this Court should hold that the presumption of parentage applies equally to all intended parents who plan to conceive a child together using anonymous donor sperm. Applying that presumption in this case, Debra must be considered M.R.'s legal parent.

INTERESTS OF *AMICI*

The *amici* submitting this brief are all advocates for lesbian, gay, bisexual and transgender ("LGBT") individuals and their families. Families headed by same-sex couples need and deserve the same legal protections that all other families receive as a matter of course. *Amici* have come together from across the country and the state to highlight for this Court the profound importance that this case holds for our community.

The National Center for Lesbian Rights ("NCLR") is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of LGBT people and their families through litigation, public policy advocacy, and public education. Each year, NCLR directly serves over 5,000 LGBT people and their families in every state. NCLR is well suited to offer *amicus* assistance to this court in this matter, as NCLR attorneys have litigated numerous cases across the country arguing for the equal application of statutory, equitable, and common-law protections for children of same-sex parents.

COLAGE is the only national youth-driven network that connects people with a lesbian, gay, bisexual, transgender or queer ("LGBTQ") parent to a community of peers. While its national headquarters is based in San Francisco, California, COLAGE has thousands of individual and household members who reside throughout the state of New York. Many of these members are organized locally within three active chapters – in Hudson Valley, New York City, and Western New York (Buffalo) – and they reflect the diversity of the state and nation. Living in a world that discriminates against and treats LGBTQ families differently can be isolating or challenging. The COLAGE network helps children of LGBTQ families gain the rights, recognition and respect that every family deserves. In its direct experience working with thousands of youth and adults with LGBTQ parents over the past 20 years, COLAGE has learned and can attest to the fact that it is imperative for children to have their relationship to whichever parents are related to them, care for them and/or take responsibility for them, recognized and respected on every level — socially, institutionally, politically, and legally.

Family Equality Council, founded in 1979, is the national organization working to achieve social and legal equality for LGBT families by providing direct support, educating the American public, and advancing policy reform that ensures full recognition and protection under the law. Family Equality Council envisions a future where all families, regardless of creation or composition, will be able to live in communities that recognize, respect, protect, and celebrate them, and in a

country that celebrates a diversity of family constellations and respects individuals for supporting one another and sustaining loving families. The organization has more than 50,000 supporters, thousands of whom are located in New York, and partnerships with over 200 local parent groups nationwide. Family Equality Council serves as the national coordinator between LGBT-headed families and the local groups that support them. As such, it has the broadest experience among national organizations with issues facing LGBT parents. Family Equality Council and its supporters are deeply concerned with protecting the rights of LGBT parents and their children in New York and across the nation, and urge this Court to ensure that children can maintain relationships with the adults who have acted as parents to them in every way.

Gay & Lesbian Advocates & Defenders ("GLAD") is a New England-wide legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has participated as counsel or *amicus* in a wide variety of cases seeking to protect families of intent and function who may not fit within more traditional legal measures marking a family. *See, e.g.*, *A.H. v. M.P.*, 857 N.E.2d 1061 (Mass. 2006); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass.), *cert. denied*, 528 U.S. 1005 (1999). GLAD has seen time and again the critical importance of securing in law a child's

relationship with a parent in fact, and the harm that flows to the child when that relationship is jeopardized.

Human Rights Campaign ("HRC"), the largest national LGBT political organization, envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. LGBT families often include parents whose relationships with their children, while loving and committed, are not fully recognized by state law. HRC believes that the rights of such a parent should be protected and that he or she should have the ability to seek custody and visitation, as determined to be in the best interests of the child, when his or her relationship with the biological or legal parent ends. HRC has over 750,000 members and supporters, including nearly 70,000 in the state of New York, all committed to making fair treatment in parenting laws a reality.

Human Rights Campaign Foundation (the "Foundation") is an affiliated organization of the Human Rights Campaign. The Foundation's cutting-edge programs develop innovative educational resources on the many issues facing LGBT individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity or expression. The Foundation's Family Project is the most comprehensive and up-to-date resource for and about LGBT families. It provides legal and policy advice to families, including about how to become a

parent and how to protect the parent-child relationship, and provides public education in a range of areas including adoption and foster care.

National Gay and Lesbian Task Force (the "Task Force") was founded in 1973 and its mission is to build the grassroots power of the LGBT community. The Task Force does this by training activists, equipping state and local organizations with the skills needed to organize broad-based campaigns to defeat anti-LGBT referenda and advance pro-LGBT legislation, and building the organizational capacity of our movement. As part of a broader social justice movement, the Task Force works to create a nation that respects the diversity of human expression and identity and creates opportunity for all. The Task Force recognizes that LGBT individuals pursue different paths to parenthood and believes that LGBT families deserve the same legal protections and social support granted to married opposite-sex couples and their children.

Parents, Families and Friends of Lesbians and Gays National ("PFLAG National") is a non-profit organization founded in 1973 with over 200,000 members and supporters and affiliated chapters in all 50 states. PFLAG National promotes the health and well-being of LGBT persons, their families and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights. PFLAG National and its 500 affiliated chapters across the country work to

ensure that LGBT-headed families are afforded the same dignity, respect and legal protections as opposite-sex families.

The Empire State Pride Agenda (the "Pride Agenda") is New York's statewide civil rights and advocacy organization committed to winning equality and justice for LGBT New Yorkers and their families. The Pride Agenda has offices in New York City and Albany and is one of the largest statewide LGBT organizations in the country. The Pride Agenda is dedicated to ensuring that all New Yorkers are protected from discrimination and that all New York families are supported by their government. The organization is a leader in working to achieve equity for LGBT families in such areas as child custody and visitation, medical decision making, adoption, insurance, taxation and inheritance, and as such has a significant interest in the legal protections afforded to New York's same-sex couples and their families by all three branches of New York State government.

Marriage Equality New York ("MENY") is a grassroots, all-volunteer organization with over 3,000 members and supporters, and the oldest organization in the state of New York to advocate full and equal marriage for same-sex couples. MENY and its dedicated volunteers are devoted to ending discrimination in civil marriage through education, awareness and media campaigns, political actions, and coalition building. Since marriage equality is not yet universal in the United States, MENY is concerned with the implications this case has on the rights of same-sex couples with civil unions from other states, as well as the detrimental

impacts on children of precluding *de facto* parents from having standing to pursue visitation or custody of their children.

The Hudson Valley LGBTQ Community Center (the "Center") was founded in October 2005 to create a better future for the LGBTQ community through education, advocacy, cultural awareness, and support services aimed at advancing understanding and unity within the community at large. The Center now represents the largest constituency of LGBTQ individuals and families in the Hudson Valley. The Board and membership of the Hudson Valley LGBTQ Community Center strongly believe that LGBTQ families deserve the same legal protections granted to married opposite-sex couples and their children.

The Lesbian and Gay Family Building Project (www.PrideAndJoyFamilies.org) is dedicated to helping LGBTQ people in upstate New York achieve their goals of building and sustaining healthy families. We do this by providing support, advocacy, information, and access to community and sensitive healthcare and services. Founded in 2000 with a grant from the New York State Health Department to the Ferre Institute, Inc., the Project offers provider trainings, educational programs, information and referral services, a directory of welcoming health and human service providers, and support groups for LGBTQ parents and prospective parents. Its network of Pride and Joy Families provides social and educational activities and a sense of community to LGBTQ parents and their children. It is headquartered in Binghamton, NY and is a

longstanding member of the New York State LGBT Health and Human Services Network of the Empire State Pride Agenda Foundation.

The Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York, Inc. ("LeGaL") is an association of the LGBT legal community in the New York metropolitan area. Established in 1978 and incorporated in 1981, LeGaL is one of the largest and most active bar associations of its kind in the country. In addition to promoting the expertise and advancement of LGBT legal professionals and educating the public on legal issues facing LGBT people, LeGaL is committed to achieving equal rights for all people, including LGBT individuals and their families and eliminating homophobia and transphobia in the justice system.

Located in White Plains (Westchester County), New York, The LOFT is a not-for-profit, community-based organization serving the LGBT community of the lower Hudson Valley. Founded in October 1983 as a meeting place for gay and lesbian groups and organizations, The LOFT has continued to grow and serve the LGBT community through outreach, support, programming, and services and has furthered the cause for inclusion, diversity and pride through education, advocacy and celebration. Numerous LGBT families in Westchester County have children and need to know that their families have legal protection. Accordingly, The LOFT joins this brief in support of reversing the decision of the Appellate

Division, First Department, which will serve to provide peace of mind to many Westchester families and other families throughout the State.

Long Island Gay and Lesbian Youth ("LIGALY") is a bi-county (Nassau and Suffolk) not-for-profit organization providing education, advocacy, and social support services to Long Island's LGBT youth and young adults, and all youth, young adults, and their families for whom sexuality, sexual identity, gender identity, and HIV/AIDS are an issue. Our goals are to empower LGBT youth, advocate for their diverse interests, and to educate society about them. We believe that recognition of LGBT families is central to the development of a healthy positive self-image among the young people we serve.

The Long Island GLBT Community Center (the "Center") provides a home for the birth, nurture and celebration of the LGBT community; cares for individuals and groups in need; educates the public about the LGBT community; and empowers LGBT individuals and groups to achieve their fullest potential. The Center's goals are to address health disparities, build community, and empower LGBT adults and families, particularly for those most underserved. The Center views addressing heterosexism, homophobia and transphobia as central to its work in meeting its mission. The Center has worked and continues to work with many LGBT parents and families who have expended a significant amount of time and resources to ensure that their rights are protected.

The New York City Gay and Lesbian Anti-Violence Project ("AVP") is a nonprofit direct service and public policy organization. Founded in 1980, AVP's mission is to eliminate hate violence, sexual assault, stalking, and domestic violence in LGBT communities through counseling, advocacy, organizing, and public education. AVP is the largest LGBT anti-violence organization in the United States providing services to LGBT survivors of domestic violence and coordinates the New York State LGBT Domestic Violence Network, supported with funding from the New York State Senate, which is a coalition of service providers working with LGBT domestic violence survivors throughout New York State. AVP serves thousands of LGBT survivors of violence and provides hundreds of domestic violence-related training and education to the courts, law enforcement, social service providers and community-based organizations annually. AVP has created and implemented best practice models for working with LGBT victims and perpetrators of domestic violence. Because the decision below directly implicates these important rights impacting many LGBT victims of domestic violence, this Court should act to protect the rights of all LGBT parents, including those who are victims or survivors of domestic violence.

Parents, Families and Friends of Lesbians and Gays of New York City ("PFLAG NYC") is a partnership of parents, allies, and LGBT people working to make a better future for LGBT youth and adults. PFLAG NYC is the New York City chapter of PFLAG, a nationwide, non-profit, family organization, founded in

New York in 1973, with a grassroots network of over 200,000 members and supporters, including more than 3,000 in New York City. Although PFLAG NYC's members and supporters are predominantly heterosexual, PFLAG NYC promotes the health and well-being of LGBT persons, their families, and friends through, among other things, public education and advocacy to end discrimination and to secure equal civil rights. PFLAG NYC provides an opportunity for dialogue about sexual orientation and gender identity, and acts to create a society that is healthy and respectful of human diversity. As a family-based organization, PFLAG NYC supports full equality for our family members who are LGBT. One in three families has a family member who is LGBT, and PFLAG NYC represents parents, grandparents, siblings, aunts, uncles, and others family members of LGBT people. Our children and loved ones who are in same-sex relationships are discriminated against because their families are treated differently than families headed by opposite-sex couples. As part of the extended families, PFLAG NYC's members and supporters also suffer from discrimination when the parental rights of our LGBT relatives are denied.

Services and Advocacy for GLBT Elders—Long Island ("SAGE-LI") is a bi-county (Nassau and Suffolk) not-for-profit organization dedicated to meeting the unique needs of the Long Island LGBT senior community by providing education, advocacy, and social support services. It is committed to providing high quality, life enriching programs that value age, gender, racial, ethnic, religious, and

economic diversity and is further committed to fostering greater understanding, support and advocacy for the rights of LGBT seniors in the Long Island. As the legal relationship of senior parents to their adult children plays a significant role in financial and medical decision-making, SAGE-LI affirms the importance of equal recognition for *de facto* parents.

The Women's Building, Inc. ("WB") is the women's community center of New York's Capital Region providing space for women's work, programs benefiting women and girls and referral services to the community for over 30 years. Our mission is to provide an affirming space for diverse women to gather to organize, socialize and work together. The WB's policies, programs, and dialogue reflect a commitment to ending oppression in all its forms. In 2009, the WB established the Family Ties LGBT Mediation Project, the only program of its kind in New York State outside of New York City. The project specifically seeks to alleviate the growing problems faced by LGBT families who have limited access to Family Court for resolving disputes. The WB believes that *de facto* parents should have the right to seek custody and visitation.

ARGUMENT

I. NUMEROUS STATES HAVE RECOGNIZED THAT A NON-LEGAL PARENT MAY SEEK CUSTODY OR VISITATION WHERE THERE IS A PARENT-CHILD RELATIONSHIP THAT WAS FOSTERED BY THE LEGAL PARENT.

Nationally, courts in numerous states have recognized the need to protect children's relationships with adults who function as their parents in every way, but who are not legal parents.[2] They have done so based on a recognition that a child's relationship with such a *de facto* parent is as real, enduring, and important to the child as a relationship with a legal parent.[3] As the Massachusetts Supreme Judicial Court has explained: "It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those

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[2] *See, e.g., In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *In re Bonfield,* 780 N.E.2d 241, 247-48 (Ohio 2002); *Russell v. Bridgens*, 647 N.W.2d 56, 66 (Neb. 2002) (Gerrad, J., concurring); *Kinnard v. Kinnard*, 43 P.3d 150, 153-54 (Alaska 2002); *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959, 974-75 (R.I. 2000); *V.C. v. M.J.B.*, 748 A.2d 539, 551-52 (N.J. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 & n.6 (Mass. 1999); *Mason v. Dwinnell*, 660 S.E.2d 58, 67-69 (N.C. Ct. App. 2008); *In re E.L.M.C.*, 100 P.3d 546, 556 (Colo. Ct. App. 2004); *Robinson v. Ford-Robinson*, 208 S.W.3d 140, 143-44 (Ark. 2005); *Thomas v. Thomas*, 49 P.3d 306, 309 (Ariz. Ct. App. 2002); *A.C. v. C.B.*, 829 P.2d 660, 665 (N.M. Ct. App. 1992). Other states have also recognized that statutes granting courts jurisdiction to award custody to an "other person" empower courts to recognize *de facto* parents where there is a parent-child relationship. *In re Clifford K.*, 619 S.E.2d 138, 157 (W. Va. 2005). *See also C.E.W. v. D.E.W.,* 845 A.2d 1146, 1152 (Me. 2004); *Middleton v. Johnson*, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006); *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840, 844 (Conn. Super. Ct. 1999).

[3] As several courts have expressly noted, courts have used the terms "*in loco parentis*," "*de facto* parent," and "psychological parent," but these terms are essentially interchangeable. *See, e.g., Middleton*, 633 S.E.2d at 162 (holding that a person who qualifies as an in loco, *de facto* or psychological parent has standing to seek custody or visitation); *V.C. v. M.J.B.*, 725 A.2d at 546 n.3 ("The terms psychological parent, *de facto* parent, and functional parent are used interchangeably...."). For consistency, *amici* here use the term "*de facto* parent."

parents are legal or de facto." *E.N.O. v. L.M.M.*, 711 N.E.2d at 891. "[C]hildren 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." *V.C. v. M.J.B.*, 748 A.2d at 550. This court should follow this emerging consensus and allow Debra the opportunity to demonstrate that she is a *de facto* parent entitled to seek custody, visitation, and support obligations.

A. Courts May Act in Equity to Protect Relationships Between Children and Their Non-Legal Parents Where the Legislature Has Not Addressed These Issues.

Courts have inherent equitable powers to address custody and visitation issues. As courts in many states have explicitly recognized, when the legislature has not addressed the custody of children raised by non-biological parents, courts may act in equity to protect those children from being separated from their *de facto* parents.[4] For example, the Supreme Court of Washington held in *In re Parentage of L.B.* that although Washington statutes did not grant *de facto* parents standing to seek custody or visitation, the Court could grant *de facto* parents standing because "[t]he equitable power of the courts to adjudicate relationships between children

[4] Janice erroneously argues that most cases allowing a *de facto* parent to seek custody or visitation did not rely on the equitable powers of the courts. (Opp. to Mot. for Leave to Appeal at pp. 56-57.) As more fully explained below, many courts have recognized that statutory schemes addressing parentage and custody inevitably have gaps that require courts to exercise their inherent equitable jurisdiction to protect children from losing established parent-child bonds. Contrary to Janice's assertions, the mere fact that some of these cases discussed the general powers granted to the courts by statute does not stand for the proposition that courts cannot act in equity to determine custody and visitation issues not addressed by statutes.

and families is well recognized." 122 P.3d 161, 163, 176 (Wash. 2005) ("We adapt our common law today to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy.").

Similarly, the Supreme Judicial Court of Massachusetts held that the Probate Court had equity jurisdiction to grant visitation to the former same-sex partner of the biological mother even though no statute specifically allowed a *de facto* parent to seek custody or visitation. *E.N.O. v. L.M.M.*, 711 N.E.2d at 890 ("The Probate Court's equity jurisdiction is broad, extending to the right to authorize visitation with a child."). *See also Robinson v. Ford-Robinson*, 208 S.W.3d at 143-44 (holding that case law allowed stepparents who stand *in loco parentis* to seek custody or visitation); *T.B. v. L.R.M.*, 786 A.2d at 917-18 (recognizing that custody statutes did not grant standing to the former partner of a biological parent but holding that a person *in loco parentis* could seek visitation under common law); *V.C. v. M.J.B.*, 748 A.2d at 547-48 (holding that although New Jersey statutes did not specifically address whether a former same-sex partner of a biological parent could seek custody or visitation, the statutes did not preclude courts from granting standing to non-legal parents); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (holding that courts had equitable powers to grant visitation to the former same-sex partner of a biological parent because "the legislature did not intend that [the visitation statute] . . . supplant or preempt the courts' long

recognized equitable power to protect the best interest of a child by ordering visitation under circumstances not included in the statute").

Courts in other states have also recognized that statutes generally allowing courts to determine matters involving the custody of children give courts the power to determine custody and visitation issues that have not been specifically addressed in the statute. *C.E.W. v. D.E.W.*, 845 A.2d at 1151 (explaining that courts may allow *de facto* parents to seek custody under the statutes addressing parental rights and responsibilities because the legislature intended to allow courts to exercise their "equitable jurisdiction to act as parens patriae" in cases involving custody and visitation); *In re Bonfield,* 780 N.E.2d at 247-48 (holding that the custody statutes did not grant standing to a biological mother's same-sex partner but concluding that the juvenile court could consider a petition for shared custody between a legal parent and a non-legal parent under its general jurisdictional powers to determine custody issues involving children who are not wards of another court); *Rubano*, 759 A.2d at 966 (holding that the statutorily-created Family Court had jurisdiction to hear a visitation claim brought by the former same-sex partner of the biological mother under the statute granting the Family Court jurisdiction over "matters relating to adults who shall be involved with paternity of children born out of wedlock"); *Middleton*, 633 S.E.2d at 167-68 (holding that a non-legal parent who qualifies as a "psychological parent" under South Carolina case law to seek custody or visitation); *Thomas*, 49 P.3d at 309 (holding that although the statute

did not authorize courts to grant joint custody to a legal parent and a non-legal parent, trial courts have the power to grant reasonable visitation to non-legal parents).

As these cases recognized, it is appropriate for courts to exercise their inherent equitable jurisdiction over minors to protect children with same-sex parents when the legislature has not yet addressed the needs of these children. Courts have broad equitable powers in matters relating to child custody precisely because of the paramount importance of securing the best interest of children. Many alternative families already have been formed and will continue to be formed regardless of whether the legislature addresses their relationships. These families exist, and their children have the same need for protection and support as other children. As New York courts have done many times in the past when confronted by changing social circumstances, courts must exercise their equitable powers to protect the children in these families.

B. Courts Across the Country Have Allowed Non-Legal Parents to Seek Custody or Visitation Where the Legal Parent Fostered a Parent-Child Bond and the Non-Legal Parent Has Performed Significant Parental Functions.

In order to protect these parent-child bonds, many states have applied equitable doctrines to allow a psychological parent, person *in loco parentis,* or a *de facto* parent to seek custody or visitation.[5] Although states have used different

[5] In California, rather than applying an equitable doctrine, courts have held that a same-sex partner who agrees to have a child through assisted reproduction and then functions as the child's

terminology to describe these relationships, the tests courts have applied share the same essential components of protecting a parent-child bond that was fostered and encouraged by the legal parent where the non-legal parent has taken on all of the responsibilities of a parent.

The most widely-adopted version of this test is that established by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, which held that the former same-sex partner of a child's biological parent could seek visitation where the partner had a parental relationship with the child, and where the biological parent had attempted to sever that relationship. 533 N.W.2d at 435. Under this test, a protected parental relationship requires 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 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.

Id. at 435-36. The contribution to support "need not be monetary." *Id.* at 436 n.39. Once these elements are established, the *de facto* parent has standing to seek a determination of whether visitation would be in the best interests of the child. *Id.*

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parent is a legal parent under the applicable parentage statutes. *See, e.g., Elisa B. v. Super. Ct.*, 117 P.3d 660 (Cal. 2005) (both partners in a lesbian couple who have a child together through artificial insemination are legal parents under the California Uniform Parentage Act).

at 421.

The test explained in *H.S.H.-K.* provides a reasoned approach that protects established parent-child relationships while appropriately limiting who has standing to seek custody or visitation.[6] The first factor—that the legal parent consent to and foster the relationship—"places control within his or her hands" and allows the legal parent to determine who will function as a parent in their child's life. *V.C. v. M.J.B.*, 748 A.2d at 552. The requirements that the *de facto* parent has taken on parental responsibilities for a period of time sufficient to develop a bonded parent-child relationship ensure that only individuals who have played a truly parental role have standing. Finally, the requirement that the *de facto* parent has lived with the child in the same household provides an additional indicator that the *de facto* parent has established a genuine familial relationship with the child, with the consent of the legal parent.

Courts in South Carolina, Washington, New Jersey, and Rhode Island have adopted the test set forth in *H.S.H.-K.* to determine when a non-legal parent has standing to seek custody or visitation. *See, e.g., In re Parentage of L.B.*, 122 P.3d at 176 (adopting the test in *H.S.H.-K.* and recognizing that de facto parents have the rights and responsibilities of a parent); *V.C. v. M.J.B.*, 748 A.2d at 551-52

[6] Although *H.S.H.-K.* involved a visitation claim, other states have recognized that it is appropriate to grant the full range of parental rights and responsibilities to *de facto* parents who meet this test. *See, e.g., In re Parentage of L.B.*, 122 P.3d at 177 (a *de facto* parent who meets the test set forth in *H.S.H.-K.* may seek full "parental rights and responsibilities").

(adopting the test in *H.S.H.-K.* and recognizing that a psychological parent may seek visitation); *Rubano*, 759 A.2d at 974-75 (adopting the test in *H.S.H.-K.* as quoted by the court in *V.C. v. M.J.B.*); *Middleton*, 633 S.E.2d at 168 (adopting the test in *H.S.H.-K.* and applying it where the court had jurisdiction to award custody to "any other proper person or institution").

Courts that have not specifically adopted the precise test in *H.S.H.-K.* have applied very similar tests to protect parent-child bonds where the non-legal parent performed the functions of a parent and the bond developed with the consent and encouragement of the legal parent. For example, the Massachusetts Supreme Judicial Court held that a *de facto* parent must live with the child and act as a parent to the child by performing an equal or greater share of the parental caretaking functions "for reasons primarily other than financial compensation" with the "consent and encouragement" of the legal parent. *E.N.O. v. L.M.M.*, 711 N.E.2d at 891 & n.6. Similarly, the Pennsylvania Supreme Court held that a non-legal parent who stands *in loco parentis* may seek custody where he or she has "assumed a parental status and discharged parental duties with the consent of the biological parent" and "the child has established strong psychological bonds" with the non-legal parent. *T.B. v. L.R.M.*, 786 A.2d at 914, 917 (quoting *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1319-20 (Pa. Super. 1996)). *See also Mason v. Dwinnell*, 660 S.E.2d at 67-69 (not adopting a specific test but allowing the former same-sex partner of a biological parent to seek custody because the biological mother

"intentionally took steps to identify [the non-legal parent] as a parent of the child," the parties lived together as a family unit, the non-legal parent performed the functions of a parent for many years, and a strong parent-child bond existed); *In re E.L.M.C.*, 100 P.3d at 556 (allowing the legal mother's former same-sex partner to seek custody where she was a "psychological parent from birth, a relationship [the biological mother] consented to and encouraged but then sought to restrict significantly").[7]

Allowing a child's functional parent to seek custody where these factors are met appropriately establishes a high threshold, excluding persons who have provided care for a child, but who have not assumed a truly parental role. This test does not grant standing to babysitters or nannies, who are *employed* as caregivers, or to boyfriends or girlfriends whom the biological parent has treated as a supportive adult in the child's life rather than as a parent of the child. *See, e.g., In re Parentage of L.B.*, 122 P.3d at 179 (explaining that the *de facto* parent test is

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[7] Courts in other states with statutes authorizing courts to award custody to an "other person" have applied these statutes where there is a parent-child relationship developed with the consent and encouragement of the legal parent and the non-legal parent has performed parental functions. *In re Clifford K.*, 619 S.E.2d at 157 (holding that a psychological parent may seek custody where the psychological parent "fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support" for a substantial duration with the "consent and encouragement" of the legal parent). *See also C.E.W. v. D.E.W.*, 845 A.2d at 1152 (declining to adopt a specific test for a *de facto* parent because the parties did not dispute the issue but noting that "it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life"); *Laspina-Williams*, 742 A.2d at 844 (allowing the former same-sex partner of the biological mother to seek visitation where the biological mother "allowed, even encouraged, the plaintiff to assume a significant role in the life of the child such that she is a party entitled to seek visitation with the child").

inherently limited by the requirement of a parent-child relationship that is fostered by the legal parent, which cannot be met by teachers, nannies, or caregivers who have not acted as parents); *Rubano*, 759 A.2d at 975 ("[these] 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"). Standing is warranted only when a person has lived with the child, played a truly parental role, and an established parental bond exists that was fostered and encouraged by a legal parent.

C. The *De Facto* Parent Doctrine Protects Children From the Harm of Severing a Parent-Child Bond.

The most important purpose of recognizing that *de facto* parents may seek custody or visitation is to protect children from the harm caused by severing an established parent-child bond.[8] When only one parent in a couple has a legal tie to a child the couple has raised together, and the couple separates, the child is acutely vulnerable. In addition to dealing with the disruption suffered by any child whose parents separate, a child in this situation may also have to confront the much more potentially damaging possibility of losing contact with one of his or her parents altogether. Where statutory schemes do not address every circumstance in which a

[8] An individual showing of harm is not required to establish a *de facto* parent relationship because courts have recognized that if a parent-child relationship exists, severing that relationship will always pose a serious risk of harm to the child. *See In re E.L.M.C.*, 100 P.3d at 561.

child is at risk of losing a parent-child bond, courts must exercise their responsibility to shelter children from this serious, and entirely preventable, harm.

The bonds that a child forms with two same-sex parents are just as loving, real, and critical to the child's well-being as the bonds formed between children and two heterosexual parents. The American Academy of Pediatrics has advised that children of gays and lesbians need and deserve the same permanence and security in parental relationships as children of heterosexual parents. *See* Ellen C. Perrin, M.D. & The Am. Acad. of Pediatrics: Comm. on Psychosocial Aspects of Child and Family Health, *Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339 (Feb. 2002), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/339.pdf. Likewise, in its position statement on this issue, the American Psychoanalytic Association concluded that gay and lesbian parents are capable of meeting the best interest of the child and should be afforded the same rights and accept the same responsibilities as heterosexual parents. *See* Am. Psychoanalytic Ass'n, *Position Statement on Gay and Lesbian Parenting* (May 16, 2002), *available at* http://www.apsa.org/About_APsaA/Position_Statements/Gay_and_Lesbian_Parenting.aspx. The National Association of Social Workers has similarly issued a policy statement recommending that gays and lesbians should "be granted all rights, privileges, and responsibilities that are granted to heterosexual people,

including but not limited to...child custody." *See* Nat'l Ass'n of Social Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues*, lines 143-45 (2005).

As courts across the country have recognized, a child's ability to maintain contact with a person the child has come to know and depend upon as a parent is generally essential to a child's healthy development and well-being. "The cessation of contact with a [person] whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being." *Rideout v. Riendeau*, 761 A.2d 291, 301 (Me. 2000).

As a Colorado court has usefully explained, once a court determines that a person has established a parental bond with a child, as a general rule, it would be redundant to require an independent determination that severing that bond places the child at risk of serious emotional harm before granting the *de facto* or psychological parent standing. *In re E.L.M.C.*, 100 P.3d at 560-561. This is so because, by their very nature, stability and continuity in parental relationships are critical to a child's sense of security and healthy development; conversely, the severance of those relationships is inherently destabilizing and damaging to the child. *Id.* at 561 (holding that "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term"). Accordingly, "proof of the close and substantial relationship between [the psychological parent and the child] and proof of threatened emotional harm to the child should parental

responsibilities be denied to [the psychological parent] are, in effect, two sides of the same coin." *Id.* at 562. Therefore, when a parent-child relationship has been established, the *de facto* parent should be granted standing to seek a determination of whether custody or visitation is in the best interest of the child.

Preserving children's relationships with the adults who have provided them with parental love and care is one of the most important responsibilities of family law. No child should be excluded from that protection merely because the Legislature did not contemplate their particular family situation. Children who are born to same-sex parents need legal protection when their parents separate, just as other children do, and the harm they experience when denied that protection is just as real. New York courts should not leave such children wholly unprotected.

D. This Court Should Allow Debra the Opportunity to Show that She Is a *De Facto* Parent Entitled to Seek Custody, Visitation, and Support Obligations.

Based on the facts alleged by Debra, from M.R.'s perspective, he has two parents, Debra and Janice. He recognizes Debra "as a parent from whom [he] receive[d] daily guidance and nurturance," "independent of the legal form of the relationship." *In re E.L.M.C.*, 100 P.3d at 559. This Court should recognize that Debra has standing as a *de facto* parent under the test explained in *H.S.H.-K.* or a similar test and allow Debra an opportunity to demonstrate that custody or visitation would be in M.R.'s best interest. Debra clearly qualifies as a *de facto* parent under *H.S.H.-K.* or any other case recognizing that non-legal parents may

seek custody or visitation. Since birth, Janice encouraged M.R. to love and depend on Debra as parent. Debra lived with Janice and M.R. and took on the obligations of parenthood by feeding him, diapering him, bathing him, playing with him, and performing all other day-to-day parenting responsibilities. Debra, Janice, and M.R. lived together for over two years as a family, and after the couple separated, Debra had frequent, regular visitation and continued to provide extensive physical and emotional care to M.R. as his parent until Janice prevented her from doing so. In order to protect M.R. from the harm he would suffer if his relationship with Debra were severed, this Court should hold that Debra has standing to seek custody, visitation and obligations of support in this case, so that the trial court can determine and protect M.R.'s best interests, just as it would do with respect to any other child whose parents have separated.

II. THE PRESUMPTION OF PARENTAGE FOR CHILDREN BORN THROUGH DONOR INSEMINATION MUST APPLY TO UNMARRIED COUPLES AS WELL AS MARRIED COUPLES.

A. This Court Should Apply the Presumption of Parentage to Same-Sex Unmarried Couples When One Partner Conceives Using Donor Sperm with the Other Partner's Assistance and Consent.

New York's DRL § 73 partially codifies the common-law presumption that when a couple relies on donor insemination to have a child with the mutual intent to parent, both adults will be considered legal parents of that child, including the person who lacks a biological connection to the child. Historically, the rule has

been applied primarily to heterosexual married couples; however, there is no reason in law or policy to limit the application of the common-law rule to this context. As it has done many times in the past, the common law must respond to changing social circumstances – in this case, the increasing use of reproductive technology by unmarried and same-sex couples, including those who have married or entered in a comparable legal relationship such as a civil union, to have children. The policy justifications for the rule's existence – protecting the best interest of the child and seeking to provide every child with two legal parents, where appropriate – require that the presumption be extended to all committed couples who use anonymous donor sperm to bring a child into the world with the intention of parenting the child, regardless of the parents' gender or sexual orientation, especially where the parents have taken all possible steps to formalize their legal relationship.

1. The common-law rule that a person who consents to the insemination of a woman is a presumed parent is not limited to the specific factual situations addressed by DRL § 73.

In the most recent decision of the Appellate Department addressing the scope of the presumption, the Third Department reaffirmed the continuing validity of the common-law rule, and held that it is not limited to the specific situation addressed in DRL § 73. In *Laura WW. v. Peter WW.*, 51 A.D.3d 211 (3d Dep't 2008), the Court found that a man who assisted with his wife's attempts to become

pregnant through donor insemination was a legal parent, despite the fact that his consent to the insemination had not been given in writing as required by the literal terms of DRL § 73. The Court noted that the statute's language merely "covers one specific situation," namely, that where the intended parents are married, the procedure is performed by a licensed physician, and the biological mother and her spouse consent in writing to the procedure. *Id.* at 215.

The Court held that the presumption of parentage under New York law could not be limited to the narrow circumstances addressed by the statute because "situations will arise where not all of these statutory conditions are present, yet equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child." *Id.* Noting that "'an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child,'" the Court concluded that "'the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law.'" *Id.* (quoting *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003)).

Since it held that the terms of the statute did not apply to the circumstance at hand, the Court looked instead to the common law for a solution. The Court began by noting New York's strong presumption "that a child born to a marriage is the legitimate child of both parents." *Id.* at 216 (quoting *State of New York ex rel. H.*

v. P., 90 A.D.2d 434, 437 (1st Dep't 1982)). Applying the presumption to situations not addressed by the statute serves the "compelling public policy of protecting children conceived via AID [artificial insemination by donor]." *Id.* at 217. In accordance with those weighty goals, the Court held that under the common law, the husband of a woman who conceives a child by donor insemination need not consent in writing to be deemed a legal parent. *Id.* There will be a rebuttable presumption that he consented to the procedure, and if the husband seeks to deny paternity, the burden shifts to him to prove that he did not in fact consent. *Id.*

2. The presumption applies equally to same-sex couples and unmarried couples.

The legal and policy interests identified by the Court in *Laura WW.* that favor a broad application of the common-law rules defining parentage are persuasive and should be adopted by this Court. Those interests apply with equal force to same-sex and unmarried couples. The fact that the presumption of parentage for children born via donor sperm was originally formulated in the context of children born to married heterosexual couples does not prevent the rule from being extended to cover additional situations that further the intent of the rule to protect children and provide for their support. *See Laura WW.*, 51 A.D.3d at 215. Indeed, the justifications for that rule apply with particular force to a same-sex couple, like the parties in this case, who took all available steps to formalize

their relationship before their child was born, and who then parented the child together for a substantial period of time.

The few New York cases that have addressed the legal parentage of children born to unmarried parents via donor sperm have generally held that a person who plans the child's conception with the biological mother with the mutual intent of being a parent should be recognized by the law as a parent. *See K.B. v. J.R.*, --- N.Y.S.2d ----, 2009 WL 3337592, at *8 (Sup. Ct. Kings County 2009) (non-biological father whose marriage to mother was void granted custody under exceptional circumstances theory, in part because the parties "agreed and collaborated freely . . . in the decision to have a child by artificial insemination"); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 688-90 (Sur. Ct. N.Y. County 2009) (even if the intended parents' marriage in the Netherlands were not recognized, female second parent who donated genetic material must be permitted to use paternity proceeding to assert parentage rights); *Karin T. v. Michael T.*, 127 Misc.2d 14, 19 (Fam. Ct. Monroe County 1985) (non-biological parent in void marriage to biological mother liable for child support for two children conceived via donor insemination).

In *Karin T.*, the court reported that Black's Law Dictionary (5th ed., 1979) defines "parent" as "one who procreates, begets or brings forth offspring." 127 Misc.2d at 19. The court held that, by participating actively in the decision to have the children using donor insemination, the mother's partner "certainly brought

forth these offspring as if done biologically," and therefore that person "is indeed a 'parent' to whom [parental] responsibility attaches." *Id.* The court in *Sebastian* focused on the policy interests behind the creation of procedures for establishing paternity, and concluded that "given the undeniable legislative purpose . . . to provide two parents, and two sources of support for children born out of wedlock – it is inconceivable that the legislature would decline to provide those same protections just because the second, genetically related parent is a woman, not a man." 879 N.Y.S.2d at 690.

Additionally, several decisions by New York courts have recognized that it is appropriate to go beyond the literal terms of statutes to provide the fullest possible protection for children born into new types of families. For instance, in *In re Jacob*, 86 N.Y.2d 651 (1995), this Court went beyond the strict meaning of the terms used in the adoption statute, DRL § 110, and held that the unmarried partner of the child's mother can become a legal second parent through adoption without terminating the original mother's parental rights. The Court acknowledged that "the Legislature . . . may never have envisioned families that 'include[ ] two adult lifetime partners whose relationship is . . . characterized by an emotional and financial commitment and interdependence." *Id.* at 668-69 (quoting *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211 (1989)). "Nonetheless, it is clear that" the statutory language permitting adoptions by single adults or married couples together was "never intended . . . to prohibit otherwise beneficial intrafamily

adoptions by second parents." *Id.* at 669. Therefore, the Court held that the state's adoption statutes must be interpreted to permit second-parent adoptions by the biological mother's unmarried partner. *Id.* at 662. Similarly, here, there can be no suggestion that the enactment of a statute designating the husband of a woman who conceives a child using anonymous donor sperm was intended to affirmatively bar the recognition of other intended parents in less traditional family arrangements, based on longstanding common-law principles that seek to protect children and to hold adults responsible for the children they bring into the world.

At least three recent New York decisions have held that the marital parentage presumption should apply equally to same-sex married couples. *See Sebastian*, 879 N.Y.S.2d at 682 & 683 n.15 (where two women married in the Netherlands, "the marital presumption" ensures that their son, "as the child of a married couple, . . . already has a recognized and protected child/parent relationship with both" women); *In re Donna S.*, 23 Misc.3d 338, 340 (Fam. Ct. Monroe County 2009) (under DRL § 73, two women married in Canada would both be legal parents of the child they conceived through donor insemination); *Beth R. v. Donna M.*, 19 Misc.3d 724, 734 (Sup. Ct. N.Y. County 2008) (same). *See generally, e.g., Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dep't 2008). Although the intended parents in this case were not married, as there was no jurisdiction in the United States where they could marry at the time of M.R.'s birth in 2003, they formalized their relationship in the strongest way available to

them at the time by entering a civil union in Vermont. Under Vermont law, the parties to a civil union have all of the rights and obligations of married spouses, including the presumption that both partners are the legal parents of a child born into a civil union. *See* Vt. Stat. Ann. tit. 15, §§ 1204(f); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) (holding that a woman was the legal parent of her same-sex partner's biological child for several reasons "including, first and foremost, that [the partners] were in a valid legal union at the time of the child's birth"). *Cf. Laura WW.*, 51 A.D.3d at 216 (favorably citing the decision of the Vermont Supreme Court in *Miller-Jenkins*).

Following the New York courts' recognition of out-of-state marriages of same-sex couples for purposes of parentage, it is only logical to recognize that the same presumption of parentage applies to children born into civil unions. To hold otherwise would punish children based on arbitrary factors such as whether their parents were able to marry or to enter into a civil union. It would also dangerously undermine the stability of parentage and the important legal and social expectation that a couple who is legally united and who has a child together will both be held permanently accountable for the child. In contrast, refusing to recognize a presumption of parentage under these circumstances would serve no legitimate purpose.

Courts in other states have also concluded that a person who jointly consents and plans for a female partner to conceive a child using anonymous donor sperm

should be considered a legal parent, even if the parents are not married.[9] Other decisions have found that an unmarried couple's joint decision to use donor insemination to have a child is a significant factor in determining that the adult without a biological tie is nonetheless a legal parent.[10] Some of these decisions also recognize – as this Court should as well – that applying a rule holding both intended parents legally responsible for children born through donor insemination

[9] *See, e.g., Shineovich v. Kemp*, 214 P.3d 29, 40 (Or. Ct. App. 2009) (petition for cert. pending) (terms of donor insemination statute must be extended to grant legal parentage to unmarried same-sex partner of biological mother); *In re Parentage of Robinson*, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005) (same); *In Re Parentage of A.B.*, 818 N.E.2d 126, 131-32 (Ind. Ct. App. 2004) (extending common-law presumption to hold that "when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child"), *holding aff'd and decision vacated on procedural grounds*, 837 N.E.2d 965 (Ind. 2005); *M.J.*, 787 N.E.2d at 152 (unmarried partner of woman who became pregnant using anonymous donor sperm could be liable for child support where he engaged in "a deliberate course of conduct with the precise goal of causing the birth of these children").

[10] *See, e.g., Miller-Jenkins*, 912 A.2d at 970 ("Many factors are present here that support a conclusion that" the non-biological mother "is a parent," including the fact that the parents were in a civil union at the time of the child's birth and the fact that the non-biological mother "participated in the decision that [the biological mother] would be artificially inseminated to bear a child and participated actively in the prenatal care and birth"); *Elisa B.*, 117 P.3d at 670 (same-sex partner of mother who conceived using donor insemination held a legal parent "because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent"); *Rubano*, 759 A.2d at 971 (same-sex partner of biological mother had standing to bring action to determine parentage where she had "helped to plan and arrange for [the] conception of the child via artificial insemination from an anonymous donor"); *Charisma R. v. Kristina S.*, 175 Cal.App.4th 361, 378-80 (2009) (finding biological mother's female domestic partner a legal parent in part because she "'actively assisted [the biological mother] in becoming pregnant with the expressed intention of . . . parenting the resulting' child"); *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002) (applying equitable principles, finding co-parent responsible for child support where she and biological mother jointly planned for the children's conception through donor insemination and she parented the children for several years after their birth).

is especially applicable when the parents have taken all the steps available to them to formalize their relationship.

For example, a New Jersey court held that two women who used donor insemination to conceive were both legal parents to the resulting child pursuant to that state's statute donor insemination statute, which is analogous to DRL § 73. *Robinson*, 890 A.2d at 1042. Although the intended parents had been married in Canada and registered as domestic partners in New York, all the parties agreed that the marriage was irrelevant for purposes of the statute because New Jersey does not recognize marriages between same-sex couples. *Id.* at 1041. Nonetheless, the court found it significant that the parents had "availed themselves of every legal opportunity open to them to declare they are committed domestic partners, a married couple and a dedicated family" *id.*, just as Debra alleges that she and Janice did in this case.

The court held that the statute should not be limited to its literal terms, and must be extended to any person who demonstrates "indicia of commitment to be a spouse and to be a parent to the child." *Id.* at 1042. That holding furthered the state's "strong public policy" establishing an "unequivocal[ ] . . . focus on the best interests of children." *Id.* Granting legal responsibility to a willing second parent would also shield the state from the financial burden of caring for the child. *Id.* The Court ultimately held that it was "unable to discern any State's interest that would preclude [the intended parent] from the protection of the statute." *Id.*

3. Applying the parentage presumption to same-sex, unmarried partners furthers the policy interests behind the presumption.

The policy interests behind DRL § 73 and the common-law parentage presumption would only be furthered by a holding that a same-sex unmarried partner can also be found a parent if she and her partner mutually agree to the partner's conception of a child using donor sperm with the intent to parent the resulting child – particularly where, as here, the couple has made their intent to parent jointly unmistakable by entering a civil union prior to the child's birth. The equal application of the presumption would further the state's compelling interest in "serving children's best interests by providing them with two responsible parents, rather than one," *Sebastian*, 879 N.Y.S.2d at 690. The parentage presumption ensures that there will be "two sources of support," rather than only one, "for children born out of wedlock." *Sebastian*, 879 N.Y.S.2d at 690. More specifically, the presumption "protect[s] children conceived by artificial insemination from being denied the right to support by the mother's husband or to inherit from the husband." *Shineovich*, 214 P.3d at 40. That guarantee of support helps to ensure that children will not become a financial burden on the state. *See, e.g.*, *Robinson*, 890 A.2d at 1042 (finding that mother's partner is a parent "eliminat[es] the State from having financial responsibility for the care of the child"); *M.J.*, 787 N.E.2d at 151 (presumption that mother's unmarried partner has

parental responsibility furthers state interest in "prevent[ing] children born as a result of assisted reproductive technology from becoming public charges").

These interests all spring from the paramount concern of New York courts with protecting "the best interests of the child." *Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006) (citing *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 285 (2d Dep't 1998)). *See also Laura WW.*, 51 A.D.3d at 218 (noting that the "'child['s] . . . best interest is paramount'") (quoting *Mancinelli v. Mancinelli*, 203 A.D.2d 634, 635 (3d Dep't 1994)). Extending the rule's coverage to include children born to unmarried mothers in same-sex relationships, or mothers in same-sex civil unions, could not conceivably undermine those interests, but rather "advances the legislative objective by providing the same protection for a greater number of children." *See Shineovich*, 214 P.3d at 40. That extension would also further the "particularly weighty" concern that a child not "be irrevocably deprived of the benefits and entitlements of having as her legal parents the two individuals who have already assumed that role in her life, simply as a consequence of her mother's sexual orientation." *See In re Jacob*, 86 N.Y.2d at 668. Therefore, this Court should hold that the presumption of parentage that applies to a man who consents to his wife's insemination by an anonymous donor also applies to the unmarried same-sex partner of a woman when the couple jointly plans the birth of a child using anonymous donor insemination.

B. Failure to Apply the Presumption Equally Would Violate the Constitutional Rights of Unmarried Couples and Their Children.

This Court should also extend the presumption of parentage equally to unmarried and same-sex partners, including those in a civil union, of women who conceive using donor sperm, in order to avoid the significant constitutional concerns that would otherwise arise. A rule that is only available to establish the legal parentage of married, different-sex couples who have children through donor insemination would discriminate against same-sex and unmarried couples and their children in violation of state and federal constitutional prohibitions on discrimination based on sex, sexual orientation, and marital status.

In *In re Jacob*, this Court held that New York's adoption statutes must be read to permit an adult to adopt the child of his or her unmarried partner without terminating the parental rights of the original parent, just as spouses may do. 86 N.Y.2d at 667-68. The Court held that denying a subset of children a legal relationship with their two functional parents, "based solely on their biological mother's sexual orientation or marital status, would not only be unjust . . . , but also might raise constitutional concerns." *Id.* at 667. The Court cited several state and federal cases finding government discrimination based on sex and legitimacy to be unconstitutional, including *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (state may not discriminate against children on the basis that their parents are unmarried); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (government action "directing

the onus of a parent's misconduct against his children" is impermissible); *Matter of Burns v. Miller Constr.*, 55 N.Y.2d 501, 507-10 (1982) (New York law imposing unique burden on children born out of wedlock violated equal protection); and *Matter of Best*, 66 N.Y.2d 151, 160 n.4 (1985) (Jasen, J., dissenting) (constitution requires that children born out of wedlock be treated equally).[11]

A New York Surrogate's Court earlier this year applied similar reasoning to find that the state's procedures for establishing paternity must be available to determine the legal parentage of genetically related second parents regardless of gender – including, in that case, a gestational mother's same-sex partner whose fertilized ova were implanted in her partner's womb. *Sebastian*, 879 N.Y.S.2d at 688-90. That court noted that both the New York and United States Constitutions forbid gender-based classifications unless justified by an important governmental interest, *id.* at 688 (citing, among others, *People v. Liberta*, 64 N.Y.2d 152, 168 (1984) and *United States v. Virginia*, 518 U.S. 515, 533 (1996)), and found that prohibiting same-sex parents from using paternity procedures would impede rather than further the statutory purpose of finding two legal parents to provide support for children. Because treating intended parents differently based on sex would be unconstitutional, the court held that the paternity statutes must be interpreted to

[11] *See also M.J.*, 787 N.E.2d at 152 (cited in *Laura WW.*, 51 A.D.3d at 215) (holding that presumption of parentage must apply equally to unmarried intended parents who use donor insemination to conceive a child, in part because "a state may not discriminate against a child based on the marital status of the parties at the time of the child's birth").

extend to a mother's same-sex partner who is genetically related to the child. *Id.* at 689-90.

In another recent decision, the Oregon Court of Appeals held that Oregon's statute recognizing as a parent a man whose wife conceives a child using anonymous donor insemination by its terms could not be extended to same-sex or unmarried couples. *Shineovich*, 214 P.3d at 36-37. For that reason, however, the court held that the statute discriminated based on sexual orientation. *Id.* at 37. Because the court could find "no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so," the court concluded that the statute violated the Oregon Constitution. *Id.* at 40. The court did not invalidate the entire statute, because to do so would negate the statute's purpose of protecting the interests of children. *Id.* Instead, to save the statute from failure due to its constitutional infirmity, the court "conclude[d] that the appropriate remedy is to extend the statute" to apply equally to an unmarried same-sex partner who consents to her partner's insemination. *Id.* Here, the Court likewise could extend DRL § 73 or simply hold that the common-law rule partially codified in the statute must be applied equally to unmarried partners as well.

The common-law presumption, codified in part in DRL § 73, that a man who consents to his wife's use of anonymous donor sperm to conceive a child is a legal parent, raises similar constitutional concerns if interpreted narrowly. Like the

adoption statutes at issue in *In re Jacob*, DRL § 73 and the related common-law rule appear to discriminate against same-sex and unmarried parents, and the children of such parents, solely on the basis of sex, marital status, or sexual orientation, without any rational justification. Therefore, this Court should adopt an interpretation that "'avoids injustice, hardship, constitutional doubts or other objectionable results'" by recognizing that any person who jointly consents to and plans for the conception of a child using anonymous donor sperm is a presumed parent. *See In re Jacob*, 86 N.Y.2d at 667 (quoting *Kauffman & Sons Saddlery Co. v. Miller*, 298 N.Y. 38, 44 (1948)).

C. Debra Qualifies as M.R.'s Legal Parent Because She Consented to Her Partner's Insemination and Intended to Be a Parent.

Applying the presumption regarding parentage of a child conceived using donor sperm, it is plain under the facts alleged by Debra that she must be considered a legal parent of M.R. She jointly planned his conception and birth along with Janice, and they intended to function as his parents together. The two women took every step possible in the United States at that time to make their relationship official, registering as domestic partners with New York City and entering a civil union in Vermont. Debra manifested her consent to her partner's conception of M.R. by, among other things, helping to select the anonymous sperm donor, attending medical appointments with Janice throughout her pregnancy, and attending Janice in the hospital room when she gave birth to M.R. After M.R.'s

birth Debra continued to act in accordance with her intention to be his parent, caring for him for the past nearly six years as a loving mother. Janice likewise consented to Debra's status as M.R.'s second parent, fostering the parent-child relationship in numerous ways both before M.R.'s birth and for years afterward. Because both parties intended and reasonably expected Debra to take on all the responsibilities of a parent when they agreed that Janice would use anonymous donor sperm to become pregnant, this Court should hold that Debra is M.R.'s legal parent.

CONCLUSION

For the foregoing reasons, *amici* LGBT advocacy organizations respectfully urge this Court to grant Debra H.'s petition and reverse the decision of the Appellate Division, First Department.

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Respectfully Submitted,

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