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November 16, 2009

Via Federal Express
Hon. Stuart M. Cohen, Clerk of Court
State of New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Debra H. v. Janice R.
New York County Clerk's Index No. 106569/08

Dear Mr. Cohen:

Enclosed please find an original and twenty-six copies of the Brief of Amici Curiae Family Law Academics in Support of Petitioner-Appellant in the above-captioned matter. Amici's motion for leave to file the enclosed Brief (Mo. No. 2009-893) was granted by the Court on September 1, 2009.

We would be grateful if you could please file stamp two copies of the Brief and return them in the enclosed self-addressed Federal Express envelope.

Thank you for your attention.

Yours truly,

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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 FAMILY LAW ACADEMICS IN SUPPORT OF PETITIONER-APPELLANT

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Dated: November 16, 2009

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INTEREST OF AMICI CURIAE

Amici curiae are forty-five professors who teach and write about family law on the faculties of every law school in New York State. Their names, titles, and institutional affiliations are listed individually in an Attachment to this brief.

Amici have extensive expertise related to trends in family law in New York and throughout the country. Through their academic research, clinical work, and teaching, amici have particular insight into the harmful consequences to parents and children caused by formalistic conceptions of family.

In addition, based on their expertise, amici are able to address developments in both legal scholarship and the law more generally regarding the increasingly widespread recognition and adoption of a functional approach to families and parenting. They do so to supplement rather than duplicate the arguments presented by the parties.

SUMMARY OF ARGUMENT

Family law academics overwhelmingly endorse an approach to family law that recognizes and protects functional parent-child relationships. This approach, which accords recognition to individuals who have functioned as parents with the legal parent's consent, rejects the formalistic rule of *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991). That rule, much-criticized by scholars for its harm to both

children and their functional parents, bars legal recognition of a parent-child relationship absent a biological or adoptive tie between the child and adult in question. *Id.* at 656. By contrast, the functional approach discussed here and endorsed by both scholars and numerous courts reflects the reality of family life today and, in doing so, promotes the best interests of children in New York State.

In particular, family law scholars have identified the legal parent's consent, the functional parent's intent, and the formation of a parent-child bond as defining features of functional parenthood. These features are similarly endorsed by the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

Courts around the country have likewise embraced these criteria as they have abandoned the formalistic conception of the family reflected in *Alison D.* Importantly, these courts have exercised their well-established equitable powers to adopt these criteria, recognizing functional parent-child relationships that best serve the interests of children while protecting the interests of legal parents and fairly addressing the interests of functional parents.

The time is ripe for this Court, too, to shift away from *Alison D.* toward a jurisprudence that more closely corresponds to the reality of family life. In light of its established equitable powers and past exercise of those powers to recognize functional parents, this Court is well within its authority to grant standing to

functional parents and to protect important functional parent-child relationships that will further the child's best interests.

ARGUMENT

This Court can bring New York's family law into step with the general trend, identified and endorsed by family law academics throughout the State and country, toward adopting a functional approach to defining legal parenthood at the point of family dissolution. This functional approach best serves the interests of New York's children, consistent with New York's family law jurisprudence and this Court's equitable authority. In doing so, a functional approach corrects the widely condemned and harmful formalistic rule set out by *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), which held that a woman who had functioned in all respects as a parent to her child was nonetheless a legal stranger in the eyes of the law because she was not the biological or adoptive mother of the child. *Id.* at 657.

I. Family Law Academics Overwhelmingly Endorse a Functional Approach to Recognizing the Legal Family.

Family law academics from every law school in New York State endorse an approach that recognizes functional families and the functional parent-child relationships within those families. Families, as respected scholars have long argued, are not only groups of people who meet a formal definition of family as created by adoption or marriage, but also those that function as a family, presenting

themselves and being recognized by others as a family. *See, e.g.*, Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. Colo. L. Rev. 269, 270 (1991) (describing a functional family as one that will "share affection and resources, think of one another as family members, and present themselves as such"); *see also* Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. Sch. J. Hum. Rts. 513, 516-17 (1993) (discussing how a lesbian couple, through intent, planning, and sharing of responsibilities, functions as a family unit).

Academic scholarship uses a variety of terms to describe non-biological and non-legal parents (here amici use the term "functional parent"), but at their core, all terms stem from the same essential commitment—that adults who develop parent-child relationships with the children they are raising are parents in every respect.

A. Family Law Academics Reject the Formalistic Rule of Alison D. *as Inconsistent with Family Realities and Embrace a Functional Family Approach to Defining Legal Parenthood.*

In formulating a functional approach to the legal family, family law academics have resoundingly rejected the approach of *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), which held that a woman who did not have biological or adoptive ties to her child could not be a parent within the meaning of New York's Domestic Relations Law § 70. *Id.* at 656-57. As one analysis observed, the Court's decision in *Alison D.* demonstrated "a glaring lack of concern for the

important interests of children living in nontraditional families." *Recent Case: Family Law—Visitation Rights—New York Court of Appeals Refuses to Adopt A Functional Analysis in Defining Family Relationships*—Alison D. v. Virginia M., *572 N.E.2d 27 (1991)*, 105 Harv. L. Rev. 941, 945 (1992); *see also* Andrew Schepard, *Revisiting* "Alison D.": *Child Visitation Rights for Domestic Partners*, N.Y.L.J., June 27, 2002, at 3 (discussing how *Alison D.* prevents courts from making an individualized assessment and visitation plan based on a child's needs).[1]

Moreover, there is consensus among academics that children benefit from continued contact with functional parents, and that the law must recognize the importance of these relationships in adjudicating familial disputes. *See, e.g.*, Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 Hastings L.J. 597, 640 (2002) ("For some time now, courts and commentators have developed the concept of functional parenthood as a way to recognize the important relationships children often forge with individuals who function as their parents but who do not have that legal status."); *see also* Gilbert A. Holmes, *The Tie That Binds: The Constitutional*

[1] For additional discussion, see, e.g., Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation*, 17 Colum. J. Gender & L. 307 (2008) (discussing impact of *Alison D. v. Virginia M.*); Martin Guggenheim, *Revisiting Third Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. Rev. L. & Soc. Change 153, 183 (2009) (observing that many commentators have criticized *Alison D.* and instead endorsed Judge Kaye's dissenting opinion in that case); Joseph G. Arsenault, *"Family" But Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 Alb. L. Rev. 813 (1995) (criticizing the formalistic approach taken by the Court in *Alison D.*).

Right of Children to Maintain Relationships with Parent-Like Individuals, 53 Md. L. Rev. 358, 389-90 (1994) (discussing how an expanded definition of "parent" allows courts to address the best interests of the child).

This consensus demonstrates that a rule granting exclusive parental authority only to legal parents and not to other adults with parent-child relationships is inadequate to address the needs of today's children and their parents. *See* Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. Am. Acad. Matrim. Law. 255, 270 (2005) (describing as problematic the limitation of legal parental status to only the biological mother in a same-sex relationship where the partners collaboratively decided to become parents); Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 Mont. L. Rev. 51, 53 (2005) (observing in context of gay and lesbian family dissolution that, in absence of adoption or other legal recognition, "countless children have been harmed by losing a relationship with their legally unrecognized parent").[2]

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[2] For additional recognition of the failings of the current rule, see Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 Fam. L.Q. 23, 48 (2006) (recognizing harm that comes from denying important relationships by treating functional parents as legal strangers); Guggenheim, *supra*, at 155 (observing that New York law "denies adults who have served as important parent-like figures the chance to demonstrate that allowing a parent to sever arbitrarily all ties between the child and the former parent-like figure is harmful to the child"); Holmes, *supra*, at 361-62 (describing jurisprudence granting exclusive parental authority to the legal parent as "particularly inadequate when the dispute is between an adult who has both a legal and an actual relationship with the child and an adult who has only an actual relationship with the child"); Julie Shapiro, *A*

A functional family approach, by contrast, meets the needs of contemporary families by ensuring that family realities are reflected in law, particularly given that many children are no longer raised by two married parents. *See* Martin Guggenheim, *Rediscovering Third Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. Rev. L. & Soc. Change 153, 153 (2009) (observing that it is no longer true that most children are raised by two married parents); *see also* Charles P. Kindregan, Jr., *Collaborative Reproduction and Rethinking Parentage,* 21 J. Am. Acad. Matrim. Law. 43, 44 (2008) ("[T]he reality of contemporary society is that family life today takes many different forms, and as part of that development, ideas about the meaning of parentage are changing.").[3]

A functional family approach acknowledges these realities and serves the best interests of children by granting parental rights to functional parents. *See*

Lesbian-Centered Critique of Second-Parent Adoptions, 14 Berkeley Women's L.J. 17, 22-23 (1999) (recognizing disadvantage that functional parents face in the inability to engage in parenting responsibilities such as consenting to medical care or representing a child's interests to government agencies).

[3] For additional discussion of the changing realities of the American family, see *Developments in the Law—Changing Realities of Parenthood*, 116 Harv. L. Rev. 2052, 2052 (2003) (recognizing the changing reality of the form of American families and that advances in reproductive technology have "challenged law's assumptions about how families come to be"); Marzano-Lesnevich & Moskowitz, *supra,* at 268 (observing that it "is well known that many same-sex couples are raising families together in the United States"); Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 Rutgers L.J. 825, 829 (2001) (noting how mainstream family law scholars, practitioners, and courts have recognized that a rigid parent-nonparent analysis does not reflect reality); Julie Shapiro, *A Lesbian Centered Critique of "Genetic Parenthood,"* 9 J. Gender Race & Just. 591 (2006) (discussing changes in the nuclear family and the diminishing importance of genetic links).

Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 Fam. L.Q. 23, 49 (2006) (advocating continued recognition of functional parents to protect the children of same-sex couples).

B. Family Law Scholarship Recognizes the Legal Parent's Consent, the Functional Parent's Intent, and the Development of a Parent-Child Bond as Defining Features of a Functional Family.

Family law scholarship recognizes that, in defining functional families, both the legal parent's consent and the functional parent's intent to create or raise a family are of particular importance. The formation of actual bonds of attachment in a parent-child relationship is also relevant in determining who is a functional parent.

1. The Legal Parent's Consent Is Essential to Ensuring that the Legal Parent Intended to Foster the Functional Parent-Child Relationship.

The legal parent's consent to and encouragement of a functional parent-child relationship is essential to the legal recognition of that relationship. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459, 471 (1990) (noting that parental status should flow from proof that a parent-child relationship was developed with the cooperation and consent of the

legal parent); *see also* Ettelbrick, *supra*, at 548-50 (discussing requirements for functional parenthood, including agreement of both adults to be co-equal parents).

By ensuring that the legal parent intended to foster the functional parent-child relationship, the consent requirement protects the interests of legal parents. In particular, it serves to protect the legal parent from claims by individuals not functioning as parents. *See* Holmes, *supra*, at 394-95 (demonstrating how adequately defining the criteria that grants parental status to a functional parent—such as requiring that the functional parent was a participant in the decision to create a family unit—addresses concerns about expanding the category of those who may seek standing to assert parental rights); *see also* Polikoff, *This Child Does Have Two Mothers*, *supra*, at 464 (arguing that parental autonomy and a child's best interests can be served by including in the definition of a parent those who have "maintain[ed] a functional parental relationship with a child" when the legal parent "created that relationship with the intent that the relationship be parental in nature").

Legal parents can manifest their consent in various ways. As scholars have recognized, consent may be shown, for example, by a legal parent incorporating a family name of the functional parent into the child's name; making an oral or written agreement with the functional parent to jointly raise the child; engaging in joint decision-making with the functional parent regarding the child's health care,

education, and/or other basic needs; and supporting the development of relationships between the child and the functional parent's parents, siblings, and extended family members. *See* Polikoff, *This Child Does Have Two Mothers*, *supra*, at 499 (offering the following as examples of the development of a parent-child relationship that should allow the functional parent to seek parental status: treating a child as part of both mothers' extended families; giving a child the last name of both mothers; and agreeing (orally or in writing) to jointly raise the child); *see also* Ettelbrick, *supra*, at 551 (discussing indicia of consent, including: oral or written agreements; the family name of both women included in the child's name; the assumption of joint decision-making; and the child's relationships with each woman's family members).

2. *The Functional Parent's Intent to Create a Family Is Also Significant in Defining Functional Parenthood.*

The functional parent's intent ensures that he or she also planned to become a parent by participating in the decision to create a family—from conception or by forming a family unit with another adult and child. *See* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. Ill. U. L. Rev. 433 (2005) (arguing that intent should be used as a means of establishing legal parentage for a functional parent); Julie Shapiro, *A Lesbian-Centered Critique of "Genetic Parenthood,"* 9 J. Gender Race & Just. 591, 611 (2006) (identifying intent and function as alternative ways of recognizing

parenthood rather than genetics); *see also* Kindregan, *supra*, at 46 (noting that instead of through biology and genetics, parenthood should be determined in part by factors such as the intent of parties who cooperate in using reproductive technology to have a child).

By assuming parental responsibility for the child, a functional parent demonstrates that he or she has voluntarily and intentionally taken on a parental role. *See, e.g.*, Ettelbrick, *supra*, at 552 (discussing criteria for functional parenthood, including the functional parent's participation in the daily emotional and financial care of the child). The requirement that the assumption of parenting be voluntary confirms that individuals who have been paid to care for the child or otherwise have not acted as parents do not have standing to assert a claim as functional parents. *See* Holmes, *supra*, at 393 (discussing operation of voluntary assumption of responsibility as a requirement for an expanded definition of parenthood).

Echoing scholars' commitment to evaluating the functional parent's intent to parent, the jurisprudence in this area shows that acts demonstrative of intent to parent include, for example: the functional parent's taking time off of work to care for the child, providing financial support, making decisions about the child's care, participating in religious activities with the child, and going on family outings. *See, e.g., In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421-22 (Wis. 1995); *see*

also infra Part II.A.1. These and other similar actions ensure that the functional parent provided care indicative of a parent-child relationship.

3. The Development of a Parent-Child Relationship Is Also Relevant to the Functional Parent Determination.

The formation of a parent-child relationship is likewise an important feature in evaluating whether an adult has become a functional parent. *See, e.g.*, Minow, *supra*, at 270 (observing that a family can be defined in part by the sharing of affection and resources).

In addition to being recognized by scholars, a parent-child bond has been deemed relevant by a number of courts. *See infra* Part II.A; *see also V.C. v. M.J.B.*, 748 A.2d 539, 553 (N.J. 2000); *H.S.H.-K.*, 533 N.W.2d at 421. However, when the dissolution of a relationship occurs shortly after the birth or legal parent's adoption of a child, the difficulty of proving a parent-child bond should not preclude a functional parent from asserting a visitation or custody right so long as that individual, with the consent of the legal parent, planned for the child's conception or adoption into the family.

C. The American Law Institute's Principles of the Law of Family Dissolution *Confirm that Consent, Intent, and Development of a Parent-Child Bond Are Central to Defining Functional Parents.*

The American Law Institute's *Principles of Family Dissolution* (the "*Principles*"), produced by the nation's leading organization devoted to improving the law through collective contributions of scholars, also reflect and reinforce the

value of recognizing functional parents and the criteria by which functional parent claims can be evaluated by courts. *See* American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).[4] In so doing, the *Principles* confirm the widespread consensus around the defining features of a functional parent.

The *Principles*, like the academic scholarship on functional parents, recognize and address the harm that arises when courts do not appropriately respond to family realities. Specifically, they reinforce that a functional parent's "participation in the child's life is critically important to the child's welfare," and that, therefore, the law should authorize and protect a child's contact with that functional parent. *Id.* at ch. 1,1(d) (2002).

In addressing the harm to children caused by a formalistic approach, the *Principles* set out two categories of functional parents entitled to legal

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[4] For additional scholarly discussion of the *Principles*, see J. Herbie DiFonzo, *Toward a Unified Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. Rev. 923, 938 (2001) (describing aim of the *Principles* to resolve the tension between the allocation of full recognition to legal parents and the harm that results from disallowing the maintenance of bonds between children and functional parents); Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles*, 4 J.L. & Fam. Stud. 151, 165 (2002) (affirming that the *Principles* allow for a more flexible and functional definition of family). By formulating a framework for recognizing functional families in the law, the *Principles* aim to ensure that the law remains responsive to the changing realities of family evident in both society and legal institutions. *See Developments in the Law*, *supra*, at 2064 (discussing aims of the *Principles*); Goldberg, *supra*, at 338 (noting that the *Principles* provide "important authority").

recognition—de facto parents and parents by estoppel[5]—based on the same features identified in the academic literature discussed above. *Id.* at § 2.03. That is, the *Principles* look to the legal parent's consent, the functional parent's intent, and the formation of a parent-child relationship. *See* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 La. L. Rev. 1295, 1330 (2005) (observing that the *Principles'* categories require agreement of the legal parent, a conclusion that the functional parent has assumed

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[5] The defining features of the two functional parent categories are largely similar:

> (b) A *parent by estoppel* is an individual who, though not a legal parent, (i) is obligated to pay child support under Chapter 3; or (ii) lived with the child for at least two years and (A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.
>
> (c) A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

Principles, *supra*, at § 2.03(1).

parental obligations, and recognition that according legal parenthood to the functional parent is in the child's best interests).

With respect to the legal parent's consent, the *Principles* track the scholarly recommendations. For example, the legal parent must enter an agreement, oral or written, with the functional parent regarding acceptance of parental responsibilities for that functional parent to be granted status as a parent by estoppel. *Principles*, *supra*, at § 2.03(1)(b), § 2.03 Comment (b)(iii). Similarly, the legal parent must agree to an arrangement whereby a functional parent takes on a parenting role for that person to be considered a de facto parent. *Id.* § 2.03(1)(c), § 2.03 Comment (c).

The *Principles*' requirement of parental intent on the part of the functional parent likewise reflects the views of family law academics. Parents by estoppel must have held themselves out as parents and accepted full parental responsibilities, such as making decisions about and attending to the child's well-being. *Id.* § 2.03(1)(b), Comment (b)(iii), illus.9. De facto parents must have performed a majority of, or at least a large a share of, caretaking functions for the child, for reasons other than financial compensation. *Id.* at § 2.03(1)(c). Caretaking functions include, for example: attending to a child's physical and developmental needs such as nutrition and education, helping the child develop

interpersonal relationships, and providing moral and ethical guidance. *Id.* at § 2.03(5).

Also consistent with scholarly recommendations, the *Principles* recognize the importance of a parent-child bond. While they do not require a separate evaluation of that bond, they explicitly recognize that disregarding the connection a child has with a functional parent at the time of family dissolution "ignores child-parent relationships that may be fundamental to the child's sense of stability." *Id.* at ch. 1,1(d).

Affirming the *Principles*' utility, states have looked to the *Principles* in applying a functional approach to the assessment of parent-child relationships. In *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), for example, the court relied on the *Principles* in defining a de facto parent and observed that "[t]he recognition of de facto parents is in accord with notions of the modern family." *Id.* at 891; *see also In re Parentage of L.B.*, 122 P.3d 161, 176 n.24 (Wash. 2005) ("[T]he American Law Institute's recent recommendation supports the modern common law trend of recognizing the status of *de facto* parents."); *Rubano v. DiCenzo*, 759 A.2d 959, 974-75 (R.I. 2000) (observing that the decision to recognize a functional parent-child relationship was "in harmony with the principles recently adopted by the American Law Institute").

The *Principles* thus reinforce, along with the academic literature, the widespread view of experts that family law can and should recognize functional parent-child relationships by giving consideration to the legal parent's consent, the functional parent's intent, and the functional parent-child bond.

II. Adoption of a Functional Approach to Recognizing Parent-Child Relationships in Jurisdictions Across the Country, Including New York, Confirms the Approach's Viability and Simplicity.

In jurisdictions across the country, including New York, courts have exercised their equitable powers to grant standing to functional parents who seek to maintain parent-child relationships with the children they have been raising.

Notably, all of these courts have applied the same defining features, as discussed above, in determining who can assert parental rights and responsibilities at the point of family dissolution. *They examine whether, with the consent of the legal parent, the functional parent intended to and in fact assumed parental responsibility, and formed a parental bond with the child.* New York can—and should—do the same.

A. Numerous Other States Demonstrate the Practical Means by Which This Court Can Apply a Functional Approach.

Over the past two decades, courts across the country have rejected the formalism that characterizes *Alison D. v. Virgina M.*, 77 N.Y.2d 651 (1991), and instead have embraced a functional approach to recognizing parent-child relationships that amici advocate here. *See* Courtney G. Joslin, *The Legal*

Parentage of Children Born to Same-Sex Couples: Developments in the Law, 39 Fam. L.Q. 683, 685 (2005) ("[A] growing number of states have applied longstanding common law doctrines and equitable principles to hold that a person who has functioned as a child's parent may be entitled to seek custody or visitation with the child . . . and may be responsible for child support, even where they have not completed an adoption or are not otherwise the child's legal parent.").[6]

1. *The Basic Features of Consent, Intent, and Parent-Child Bond Have Been Applied Most Simply and Concisely by the Wisconsin Supreme Court in* In re Custody of H.S.H.-K.

The four-prong test proposed by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 420-21 (Wis. 1995), most simply and concisely applies the basic features of a functional approach to recognizing parent-child relationships. Other courts agree that the *H.S.H.-K.* test identifies those relationships where an adult actually functions as a parent, precludes standing to persons not functioning as parents, and serves the bests interests of the child.

The court required consent from the legal parent in prong one: "[T]he biological or adoptive parent [must] consent[] to, and foster[], the petitioner's

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[6] For additional discussion, see, e.g., Jacobs, *supra*, at 436 (characterizing as "positive progress" courts' increasing use of "functional parenthood principles and equitable doctrines" to determine parental rights and responsibilities); *Developments in the Law*, *supra*, at 2054 (finding that "parental rights doctrine has moved dramatically" toward recognizing as parents those who would not have been accorded parental rights under traditional law when they function as parents); Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 Santa Clara L. Rev. 999, 1021 (2008) (observing that courts are more willing than before to consider the rights of a lesbian partner after the termination of a relationship).

formation and establishment of a parent-like relationship with the child." *Id.* at 420; *see also V.C. v. M.J.B.*, 748 A.2d 539, 552 (N.J. 2000) ("Prong one [of the *H.S.H.-K.* test] is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child."). The court identified in the family at issue in *H.S.H.-K.* many of the same manifestations of the legal parent's consent identified by scholars above, including "the parties' agreement about the conception of the child, the dedication ceremony naming both parties as the child's parents, and the child's name," which was hyphenated to include the names of both mothers. *H.S.H.-K.*, 533 N.W.2d at 436 n.40; *see also supra* Part I.B.1.

As the court recognized, the consent requirement protects the legal parent against claims by individuals not functioning as parents. *See id.* at 436 (noting court's interest in protecting "parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent"); *see also Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000) (affirming *H.S.H.-K.* test's ability to "preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends" from obtaining standing); *In re Parentage of L.B.*, 122 P.3d 161, 179 (Wash. 2005) (internal quotation marks omitted) (applying consent requirement to allay concern that "teachers, nannies,

parents of best friends . . . adult siblings, aunts . . . grandparents, and every third-party . . . caregiver" could obtain standing as functional parents).

Prong two, in requiring "that the petitioner and the child lived together in the same household," provides a helpful indicator of the adults' commitment to raising the child together. *H.S.H.-K.*, 533 N.W.2d at 421.[7]

The court required, in the third prong, the functional parent's intent to assume parental responsibilities: "[T]the petitioner [must] assume[] 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." *Id.* These requirements ensure that the functional parent *function* like a parent in the most literal sense.

The court's fourth prong requires formation of a parent-child bond: "[T]he petitioner [must have] 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.* The presence of a parent-child bond helps to confirm that harm to the child would

[7] Because the legal parent's consent to the development of the functional parent-child relationship is critical, *H.S.H.-K.*'s second prong does not "allow a person to seek custody and visitation of a boyfriend or girlfriend's child one day after they moved into the family home," as Respondent claims. Respondent's Opp. to Mot. for Leave to Appeal at 3. Instead, as other courts have recognized: "What is crucial here is not the amount of time but the nature of the relationship." *V.C.*, 748 A.2d at 553. A day in the household will not give the hypothetical boyfriend or girlfriend standing; rather, the party seeking standing for purposes of visitation or custody must have received consent to act as a parent, assumed parental responsibilities, and formed a parent-like bond with the child. Similarly, sharing physical space does not qualify one for standing if the other criteria have not been met.

result if separated from the functional parent. *See* Forman, *supra*, at 48 (recognizing harm that comes from denying important relationships by treating functional parents as legal strangers); Polikoff, *Lesbian and Gay Parenting*, *supra*, at 53 (lamenting that "countless children have been harmed by losing a relationship with their legally unrecognized parent"); Br. of Amici Curiae Citizens' Comm. for Children, Lawyers for Children and Children's Law in Supp. of Appellant at 4 ("The social science literature is replete with studies finding that children form attached relationships with non-biological non-adoptive parents and that severing such relationships is traumatic and can have long-term negative consequences for a child's development.").[8]

Nevertheless, courts have been attentive to scholars' concerns that legitimate functional parents may face an unfair evidentiary burden in proving a parent-child bond if the child is very young. *See* Part I.B.3 *supra*. Thus courts have observed that the nature of the parent-child bond assessment will vary based on the "period and stage of the child's life and development." *V.C.*, 748 A.2d at 553.

[8] The availability of second-parent adoption does not diminish the inevitable harm caused by separating a child from his or her functional parent when no adoption has taken place. *See* Br. of Amici Curiae Citizens' Comm. for Children, Lawyers for Children and Children's Law in Supp. of Appellant at 28-30.

2. *Courts in Several Jurisdictions, Exercising Well-Established Equitable Powers, Have Adopted the* H.S.H.-K. *Functional Parent Test.*

Courts in several jurisdictions have adopted the *H.S.H.-K.* test to grant standing to functional parents. These courts have praised the test as "[t]he most thoughtful and inclusive definition of *de facto* parenthood." *V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000); *see also In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (affirming that "[r]eason and common sense support recognizing the existence of *de facto* parents" using *H.S.H.-K.* test); *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000) (citing elements of *H.S.H.-K.* test, as articulated in *V.C.*, as "useful criteria"); *Middleton v. Johnson*, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006) (adopting *H.S.H.-K.* as a "good framework" for assessing functional parenthood).

While *H.S.H.-K.* dealt specifically with visitation, courts have applied its articulation of the key features of functional parenthood to the full panoply of parental rights. *See, e.g.*, *V.C.*, 748 A.2d at 553 (applying *H.S.H.-K.* to custody and visitation proceedings); *L.B.*, 122 P.3d at 173, 177 (using *H.S.H.-K.* to determine who is in "legal parity with an otherwise legal parent" with respect to "parentage, visitation, child custody, and support").

Courts adopting the *H.S.H.-K.* test have done so in the exercise of their equitable powers. Indeed, in *H.S.H.-K* itself, the Wisconsin court invoked its "long standing equitable power to protect the best interest of a child," while recognizing

that the state's custody statute did not apply to the functional parent in that case. *H.S.H.-K.*, 533 N.W.2d at 421-23 & n.3, 425. Other states have followed suit. *See, e.g.*, *L.B.*, 122 P.3d at 166 ("Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities. We have often done so in spite of legislative enactments that may have spoken to the area of law, but did so incompletely.").

This Court can benefit from the accumulated wisdom of these courts, which have found the *H.S.H.-K.* test to be a practical formulation with predictable results that protects legal parents, best serves the interests of children, and fairly assesses the interests of functional parents.

3. Other States Have Similarly Recognized Functional Parent-Child Relationships.

Although amici consider the *H.S.H.-K.* test the simplest and clearest articulation of the defining features of functional parenthood, other states' formulations similarly recognize functional parent-child relationships. This holds true across states that apply other functional parent doctrines such as *in loco parentis* and "exceptional circumstances," as well as in states that do not use a fixed term or test to assess functional parenthood.

For example, in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), Pennsylvania's high court defined the *in loco parentis* doctrine using the features amici endorse

throughout this brief. The court required consent from the legal parent: "[T]he third party in this type of relationship . . . can not place himself *in loco parentis* in defiance of the [legal] parents' wishes and the parent/child relationship." *Id.* at 917. The court also ensured that the functional parent intend to parent and assume parental responsibility by requiring "the assumption of a parental status, and . . . the discharge of parental duties." *Id.* The court required parent-child attachment, as well, in the form of "psychological bonds" between the functional parent and child. *Id.* (quoting *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1319-20 (Pa. Super. Ct. 1996)). Notably, the Pennsylvania court affirmed that these defining features of functional parenthood apply uniformly across custody, visitation, and parental support determinations. *Id.* at 917 ("The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child.").

Jurisdictions applying an "exceptional circumstances" doctrine have also employed the basic features of a functional approach to guide their inquiry. For example, the South Carolina Court of Appeals applied the *H.S.H.-K.* test to confirm the petitioner in the case was a functional parent, eligible for standing to seek visitation under the state's exceptional circumstances test. *Middleton*, 633 S.E.2d at 168. The court found the functional parent-child relationship so

"compelling" as to require legal recognition of the relationship, even though the biological parent was fit and available. *Middleton*, 633 S.E.2d at 172.

Similarly, Maryland's high court weighed the same defining features of functional parenthood in describing that state's exceptional circumstances doctrine. The court considered "a finding that one meets the requirements that would give that person *de facto* parent status . . . a strong factor to be considered in assessing whether exceptional circumstances exist." *Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008). Further clarifying Maryland's exceptional circumstances test in its remand order to the state Circuit Court, the Maryland Court of Appeals included "the psychological bond between a child and a third party" among the factors to be considered. *Id.*[9]

North Carolina's appellate court also applied the same basic features in *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008). Although it did not articulate a specific test, the court accorded a functional parent standing to seek custody, looking to (1) the couple's agreement to share in "all major decisions regarding their child"; (2) the functional parent's deliberate assumption of "emotional and financial care and support, guidance and decision-making" to the

[9] The court articulated these equitable powers despite the limited category of persons allowed to petition for parental rights under Maryland's family law code. Md. Code Ann. Fam. Law § 9-102 (1984). Thus even under the most narrow statutory provisions, courts have not relinquished their equitable powers to grant standing to functional parents. This court likewise retains its equitable authority no matter how narrowly DRL § 70 is construed. *See infra* Part II.B.

point of "equal participation"; and (3) the functional parent's "psychological parenting relationship" with the child. *Dwinnell*, 660 S.E.2d at 65, 67.

Thus while some states call mothers like Debra H. a de facto or psychological parent, some find that she stands *in loco parentis* or that exceptional circumstances warrant standing, and some prefer not to rely on strict terms or tests, one fact about these states' approaches is clear: all grant standing.[10] Amidst minor variations in language, these states confirm the decisive trend toward use of a functional approach to recognizing parent-child relationships.

B. This Court's Decisions, as well as Lower Courts' Decisions, Demonstrate This Court's Authority to Recognize Functional Parent-Child Relationships.

This Court has repeatedly affirmed its authority to reexamine "rules long settled but not recently revisited . . . if there is some evidence that the policy

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[10] *See, e.g., In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995) (parent-like relationship); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (de facto parent); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (same); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (psychological parent); *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004) (same); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (*in loco parentis*); *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. Ct. App. 2006) (exceptional circumstances); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005) (same); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008) (discussed *supra*); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) (emphasizing that functional parent "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"); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (mixing terminology of de facto parents and psychological parents while applying *H.S.H.-K.*).

Recently, Montana's high court confirmed its state's commitment to a functional approach. *Kulstad v. Maniaci*, 352 Mont. 513 (2009). Delaware also has joined the ranks of states employing a functional approach in a decisive reversal of the state Supreme Court, which had failed to utilize its equitable powers to protect children's best interests vis-à-vis their functional parents. *See* Del. Code Ann. tit. 13 § 8-201(c) (2009) (overruling *Smith v. Gordon*, 968 A.2d 1 (Del. 2009), by recognizing de facto parenthood).

concerns underlying them are outdated or if they have proved unworkable." *People v. Damiano*, 87 N.Y.2d 477, 489 (1996) (Simons, J., concurring). In particular, this Court has long observed that courts are justified in rejecting an "archaic and obsolete doctrine which has lost its touch with reality" despite the doctrine of stare decisis. *People v. Hobson*, 39 N.Y.2d 479, 487-88 (1976); *see also People v. Taylor*, 9 N.Y.3d 129, 149 (2007) ("[A] holding that leads to an unworkable rule, or that creates more questions than it resolves, may ultimately be better served by a new rule."); *People v. Bing*, 76 N.Y.2d 331, 338 (1990) ("Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the 'lessons of experience and the force of better reasoning.'") (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)); *Simonson v. Cahn*, 27 N.Y.2d 1, 3 (1970) ("The doctrine of *stare decisis* does not enjoin departure from precedent or preclude the overruling of earlier decisions . . . [if] the principles announced prove unworkable or 'out of tune with the life about us, at variance with modern-day needs and with concepts of justice.'") (quoting *Bing v. Thunig*, 2 N.Y.2d 656, 667 (1957)).

Based on this authority, this Court has replaced outdated, unworkable rules with new rules in many different instances. *See, e.g.*, *People v. Bing*, 76 N.Y.2d at 347 (overruling *People v. Bartolomeo*, 53 N.Y.2d 225 (1981), as unworkable

because the *Bartolomeo* rule, which concerned suspects' waiver of rights absent counsel, was an "unacceptable obstruction to law enforcement"); *Hobson*, 39 N.Y.2d at 486-91 (overruling three earlier cases as unsound deviations from established constitutional right to counsel for criminal defendants); *Babcock v. Jackson*, 12 N.Y.2d 473, 484 (1963) (departing from traditional choice of law rule, which had generated "unjust and anomalous results").

For similar reasons, the interpretation of *Alison D.* adopted by some lower courts as precluding their authority to exercise equitable powers warrants reexamination. The consequence of this unduly narrow interpretation—the barring of legal recognition of functional parents—is "at variance with modern-day needs and with concepts of justice." *Thunig*, 2 N.Y.2d at 667; *see also supra* Part I.A.

Numerous lower courts have expressed the same concern about the unworkable rule that results from interpreting *Alison D.* to preclude courts from exercising their equitable powers to recognize functional parent-child relationships. *See, e.g., Anonymous v. Anonymous*, 20 A.D.3d 333, 333 (1st Dep't 2005) (Sweeny, J., concurring) ("I am compelled to voice my concern that in recognizing the primacy of the rights of the biological parent, the Court of Appeals has defined a rigid construct which concomitantly ignores the reality of the relationships that nurture and develop a child."); *Multari v. Sorrell*, 287 A.D.2d 764, 771 (3d Dep't 2001) (Peters, J., concurring) ("If in custody and visitation disputes, common

sense, reason and an overriding concern for the welfare of a child are to prevail over narrow selfish proclamations of biological primacy, the assertion of equitable estoppel by a nonbiological or nonadoptive parent must be given credence by the courts."); *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 289 (2d Dep't 1998) ("[W]e are of the opinion that the best interests of the child will not be served in this case if . . . *Alison D.* [is] blindly applied."); *Beth R. v. Donna M.*, 19 Misc.3d 724, 733-34 (N.Y. Sup. Ct. 2008) ("If the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate.").

Indeed, this Court has already exercised its equitable powers to recognize functional parents and promote the best interests of the child on many different occasions. In the recent case of *Shondel J. v. Mark D.*, 7 N.Y.3d 320 (2006), for example, this Court, based on the principle of equitable estoppel, held that a non-biologically related adult who had functioned as a parent was indeed a parent of the child for paternity and support purposes. *See also Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976) (exercising common-law authority to permit functional parent to seek custody consistent with the child's best interests); *Finlay v. Finlay*, 240

N.Y. 429, 432 (1925) (recognizing court's "jurisdiction to determine the custody of infants as it exists at law and in equity irrespective of the statute").[11]

Lower courts in the State have similarly exercised their equitable powers to recognize functional parents in order to promote the best interests of the child. *See, e.g.*, *Charles v. Charles*, 296 A.D.2d 547, 549 (2d Dep't 2002) (observing that in "cases involving paternity, child custody, visitation and support, the doctrine of equitable estoppel will be applied [] where its use furthers the best interests of the child or children who are the subject of the controversy"); *Gilbert A. v. Laura A.*, 261 A.D.2d 886, 887 (4th Dep't 1999) (granting a custody and visitation hearing to non-biological father for consideration of evidence regarding the biological mother's "alleged role in creating and encouraging a father-child relationship" and a "psychological bond" between the non-biological father and child); *Jean Maby H.*, 246 A.D.2d at 283, 289 (recognizing that the equitable estoppel doctrine can properly be invoked "to preclude the biological parent from cutting off [a functional parent's] custody or visitation with the child" consistent with this Court's decisions treating children's interests "as the determinative or prevailing concern").

[11] Importantly, New York's common law did not historically distinguish the concept of custody from visitation. Indeed, "[o]ne of the core common law principles . . . was the symmetry with which the law treated efforts to secure custody and efforts to secure visitation." Guggenheim, *supra*, at 169.

CONCLUSION

For the foregoing reasons, amici urge the Court to bring New York law into step with the beneficial trend, recognized by scholars and courts throughout the country as well as in this State, toward protecting both children and parents at the point of family dissolution by recognizing functional parent-child relationships.

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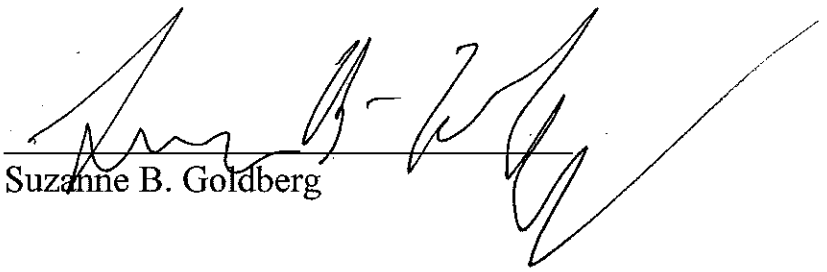

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