Supreme Court of the State of New York
Appellate Division: Second Judicial Department

In the Matter of

Sapphire W.

A Child under eighteen years of age alleged to be neglected by

Kenneth L.,

Respondent.

Appellate Division
Docket Number: **2023-10606**

NOTICE OF MOTION FOR LEAVE TO FILE BY AMICUS CURIAE

Please take notice, that on the annexed affirmation of Michael Weinstein, sworn to on March 4, 2024, and all exhibits attached thereto, including a copy of the proposed brief of *Amicus Curiae*, the undersigned will move this Court, at 45 Monroe Pl, Brooklyn, NY 11201, on Monday, March 18, at 10am, or as soon thereafter as is practicable, for an order granting leave to Neighborhood Defender Service of Harlem, Columbia Law School-Family Defense Clinic, the Center for Family Representation, The Bronx Defenders, Children's Rights, and the National Association of Counsel for Children to file with this Court the attached *Amicus Brief*, in the above-captioned proceeding.

Dated: March 4, 2024
New York, NY

Michael Weinstein
Counsel with proposed *Amicus Curiae*
Neighborhood Defender Service
317 Lenox Avenue, Tenth Floor
New York, NY 10027
212-876-5500
mweinstein@ndsny.org

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ATTORNEY AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE BY AMICUS CURIAE

Michael Weinstein, an individual licensed to practice law before New York courts, affirms the following to be true under penalty of perjury:

1. I submit this affirmation in support of *Amici*'s motion seeking leave to file the attached, proposed brief in the above-captioned appeal.
2. *Amici* consist of: Neighborhood Defender Service of Harlem, Columbia Law School Family Defense Clinic-Family Defense Clinic, the Center for Family Representation, The Bronx Defenders, Children's Rights, and the National Association of Counsel for Children.
3. The Neighborhood Defender Service (NDS) is a nationwide not-for-profit public defender organization with offices in New York, Michigan, and Texas. Through its Harlem office, NDS represents indigent New Yorkers in

a variety of civil, criminal, and family court cases. The NDS Harlem Family Defense Practice represents both respondent and non-respondent parents in both New York and Bronx counties in family court proceedings, including: neglect and abuse, termination of parental rights, custody/guardianship, paternity, and other proceedings that are collateral to the family regulation system. As lead counsel, NDS Harlem have represented dozens of clients on appeals from family court orders.

4. The Center for Family Representation, Inc. ("CFR") represents indigent parents in child protective and termination of parental rights proceedings in Manhattan, Queens, and Bronx Family Courts. CFR assigns every parent an interdisciplinary family defense team comprised of an attorney, a social worker, and a parent advocate (parent advocates are trained professionals who have had direct experience being prosecuted in Family Court, losing their children to foster care, and successfully reunifying their families). Since its founding in 2002, CFR has provided high quality defense to over 10,000 indigent parents with more than 20,000 children, and has trained more than 10,000 practitioners in 19 states.
5. The Bronx Defenders is a nonprofit provider of innovative, holistic, client-centered criminal defense, family defense, immigration and civil legal services, and social work support to low-income people in the Bronx. The

attorneys, social workers, and parent advocates in BXD's Family Defense Practice represent parents and caregivers in proceedings alleging child abuse or neglect and termination of parental rights proceedings in New York City Family Court, Bronx County. BXD has represented approximately 15,000 parents and caregivers and represents an additional 1,500 parents each year.

6. Children's Rights is a national public interest organization based in New York that investigates, exposes, and combats violations of the rights of children. Through strategic advocacy and civil rights impact litigation, Children's Rights holds governments accountable for keeping children and youth safe, healthy, and free from discrimination. Since its founding in 1995, Children's Rights has achieved lasting, systemic change for hundreds of thousands of children throughout the country across over twenty jurisdictions. Our work challenges racist, discriminatory laws, policies, and practices that punish parents experiencing poverty by taking their children and unnecessarily placing them in dysfunctional foster systems. Our advocacy is centered on building solutions that will advance the rights of children for generations.

7. Founded in 1977, the National Association of Counsel for Children ("NACC"), is a 501(c)(3) non-profit child advocacy and professional membership association that advances children's and parent's rights by

supporting a diverse, inclusive community of child welfare lawyers to provide zealous legal representation and by advocating for equitable, anti-racist solutions co-designed by people with lived experience. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and an amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org.

8. The Columbia Law School Family Defense Clinic[1] represent parents who face Administration for Children's Services intervention in family court neglect or abuse cases proceedings, and in administrative proceedings in which parents seek to amend and/or seal their records on the State Central Registry.

[1] The proposed brief has been prepared in part and joined by the Family Defense Clinic, which is operated by Columbia Law School, but does not purport to present any institutional views of the school.

The Proposed Amicus Curiae Brief.

9. Appellant raises various important issues concerning non-respondent parents' rights when the State imposes itself on unaccused parents when neglect proceedings are filed against the other parent. However, Appellant does not and cannot procedurally raise the crucial issues concerning how a court must balance the rights of a non-respondent parent with the rights of a respondent parent, and a child's right to a relationship with both parents.

10. *Amici*'s brief describes the rights non-respondent *and* respondent parents both have concerning child access. If this Court were to issue an order granting all of Appellant's arguments, the unfortunate outcome is that respondent parents will be left without a mechanism for enforcing their visitation rights.

11. In addition to balancing the rights respondent and non-respondent parents have, *Amici* also discuss the rights that must be afforded to non-respondent parents concerning unlawful supervision, particularly because they have not been accused of any wrongdoing. *Amici* have reviewed caselaw from dozens of U.S. jurisdictions, including the U.S. Supreme Court, for a comprehensive synthesis concerning what due process is afforded to parents.

12. *Amici* detail the specific harms that the family regulation system has on survivors—particularly survivors of color—when they have endured

domestic violence. Our section on this topic includes leading research on the subject from various authors, well-respected in the profession for their writing concerning the aforesaid harm.

Grounds for granting status to *Amici Curiae*.

13. The proposed *amici curiae* brief invites the Court's attention to law and arguments that might otherwise not be brought to the Court's attention. This includes comprehensive research into the impact state involvement has on domestic violence survivors who, through no fault of their own, are forced to endure unlawful supervision that demoralizes, rather than rehabilitates.

14. Neither the Appellant, a non-respondent parent, or Petitioner-Respondent Administration for Children's Services, or even the Attorney for the Child, are likely to raise issues concerning how a court should accord the rights of a non-respondent parent with those of a respondent. Appellant's brief does not limit itself to arguments concerning Ms. W., but rather demands that this Court enter specific orders concerning the statutory interpretation and application of Family Court Act § 1017. Those arguments, if accepted as true, would eliminate the rights respondent parents have to access their children and achieve family unity when Article 10 orders are necessary to compel non-respondent parents to make children available for visits and other services with respondent parents.

15. The issues present in this appeal have the potential to set precedent governing a wide range of cases involving non-respondent and respondent parents. It is essential that this Court be able to consider *amici's* arguments about how to respect non-respondent parents' right to be free of unlawful state supervision while also maintaining family courts' ability to enter lawful orders to protect respondent parents' rights.

16. *Amici*'s myriad experiences have enabled them to present the information and arguments contained in its proposed Brief before this Court. *Amici* have and continue to represent thousands of parents, including both respondents and non-respondents, in a wide range of factual situations. Collectively, *Amici* recognize and wish to highlight that this proceeding presents serious questions concerning the Family Court Act. In advocating based on experience and knowledge from all of our clients through our proposed brief, *Amici* believe that the Court can achieve the most precise interpretation that will itself benefit *all* families who have matters in Family Court.

17. Therefore, Amici are able to contribute meaningfully to this proceeding because they can present information concerning the rights of both respondent and non-respondent parents, have detailed and cited to specific research regarding the harms of unlawful state supervision, and to ensure

that any decision that benefits Ms. W. does not have the unwanted, collateral consequence of harming all respondents seeking family unity.

Wherefore, on behalf of the *Amici Curiae*, I respectfully request that this Court grant Amici their motion for leave to file their brief.

I affirm this 4th day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: March 4, 2024
New York, NY

Michael Weinstein
Counsel with proposed *Amicus Curiae*
Neighborhood Defender Service
317 Lenox Avenue, Tenth Floor
New York, NY 10027
212-876-5500
mweinstein@ndsny.org

Kings County Family Court Docket: NN-17879-23
Appellate Docket: 2023-10606

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of:

Sapphire W.

A Child Under Eighteen Years of Age Alleged to be Neglected by:

Kenneth L.,
Respondent,
New York City Administration for Children's Services
Petitioner-Appellant.
Sharneka W.
Nonparty-Appellant.

The Legal Aid Society, Attorney for the Child

BRIEF OF AMICUS CURIAE, COLUMBIA LAW SCHOOL-MORNINGSIDE HEIGHT'S LEGAL SERVICES, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, CENTER FOR FAMILY REPRESENTATION, THE BRONX DEFENDERS, CHILDREN'S RIGHTS AND THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Josh Gupta-Kagan
COLUMBIA LAW SCHOOL
FAMILY DEFENSE CLINIC
MORNINGSIDE HEIGHTS
LEGAL SERVICES
435 West 116th Street, 8th Fl.
New York, NY 10027
(212) 853-4021
jgupta-kagan@law.columbia.edu

Michael Weinstein
Neighborhood Defender Service of Harlem
317 Lenox Avenue, Tenth Floor
New York, NY 10027
212-876-5500
mweinstein@ndsny.org

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Preliminary Statement

The family court must respect the rights of non-respondent parents, respondent parents, and children in Article 10 proceedings. Non-respondent parents are not accused of any neglect or abuse, and are therefore entitled to the full panoply of parents' constitutional rights. Respondent parents, constitutionally and under the Family Court Act, are entitled to a legal process designed to preserve and strengthen their relationship with their children. Children have a right to their relationship with both parents. The family court's order imposing unlimited "supervision" on Ms. W and Sapphire infringed on their constitutional rights and must be overturned.[1]

In overturning this order, the Court must interpret Family Court Act section 1017 consistent with other provisions of the Act and in a manner that appropriately enforces the constitutional rights of non-respondent and respondent parents. Section 1017 applies to this case because the order of protection issued against Mr. L amounts to a removal under binding precedent. But section 1017(3) only permits the family court to order to the non-respondent parent to take action necessary to preserve the respondent parent's rights, such as an order to make the

[1] This brief will focus on rights under the Due Process Clauses of the United States and New York constitutions. *Amici* endorse Appellant's argument that the order violates her rights under the Fourth Amendment of the U.S. Constitution, but this brief will not retread those points.

child available for visits with the respondent parent, and does not permit the family court to subject a non-respondent parent to supervision. *Amici* therefore agree with Ms. W that the order subjecting her to supervision under 1017 exceeds the family court's authority and violates her constitutional rights. However, Ms. W's argument that section 1017 does not apply at all incorrectly interprets the statute and asks that the Court leave a respondent parent and child without any effective remedy to seek and ensure visits with one another when the child is in the care of the non-respondent parent.

Legal Argument

I. In cases involving one respondent and one non-respondent parent, family courts frequently fail to respect the rights of both parents.

This case presents the common scenario of an Article 10 case involving one respondent parent accused of neglect or abuse and one non-respondent parent who faces no such allegation.[2] In *Amici's* experience, these cases all-too-frequently lead to family court practices that impose significant harms on both categories of parents, and on their children.

[2] Family Court Act section 1012(a) defines "respondent" to mean a parent "alleged to have abused or neglected" the child. The statute does not define "non-respondent," but its meaning is apparent from the definition of "respondent": a non-respondent is a parent not alleged to have abused or neglected the child.

A. Harms imposed on non-respondent parents.

In *Amici's* experience, non-respondent parents are frequently subject to unlawful supervision orders, which impose invasive and harmful surveillance and which raise particular concerns in cases involving domestic violence allegations.

1. Harms of unlawful supervision.

The family court order commanding Ms. W. to subject herself, Sapphire, and her home to ACS supervision and surveillance violates both Ms. W.'s and Sapphire's legal rights, threatening actual and significant harm. These unwanted home entries have lasting psychological consequences on the children and the parent-child relationship, as a growing set of research demonstrates.[3] This invasive surveillance – a stranger and state official enters a home, interrogates parent and child, opens drawers and cupboards, inspects children's bodies, and more – causes fear among both parents and children and causes children to witness parents' fear and powerlessness to stop this state invasion, thereby undermining parental authority and thus the parent-child relationship.

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[3] *See* Tarek Ismail, Family Policing and the Fourth Amendment, 111 CALIF. L. REV. 1485, 1535 (2023) (summarizing research); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 626 (2020) (detailing the fear and anxiety fostered by CPS surveillance); Rise, *Surveillance Isn't Safety – How over-reporting and CPS' monitoring stress families and weaken communities*, RISE, Sept. 17, 2019 (describing how CPS surveillance harms families); Kristen A Campbell, et al., *Household, family, and child risk factors after an investigation for suspected child maltreatment: a missed opportunity for prevention*, 164 ARCH. PEDIATR. ADOLESC. MED.943, 944 (October 2018) (describing how mothers of investigated subjects have increased depressive symptoms).

2. Particular harms in the context of domestic violence.

State supervision and surveillance pose a particular risk of harm to this family and others similarly situated. Mr. L is alleged to have committed acts of domestic violence against Ms. W. The family court's order on appeal suggests a distrust of intimate partner violence survivors, or even a belief that Ms. W.'s victimhood somehow renders her a threat to Sapphire. These perspectives were why the Court of Appeals held that being a domestic violence victim does not render a parent neglectful. *Nicholson v. Scoppetta,* 3 N.Y. 3d 357, 367-72 (2004). Therefore, a parent's suffering domestic violence does not require state intervention into that parent's relationship with their child.

The order in this case is not an isolated incident. Family courts and local departments of social services routinely intervene into the lives of domestic violence survivors.[4] Intervention often begins when a survivor seeks help from a mandated reporter, who then contacts a child protection hotline.[5] This is precisely

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[4] Shanta Trivedi, *Mandating Support for Survivors*, VIRGINIA J. SOC. POL'Y & L. Vol. 30.1, No. 85, at 86-88 (2023); S. Lisa Washington, *Survived & Coerced*, 122 COLUM. L. REV. 1097, 1099-97 (2022); Tina Lee, *Child Welfare Practice in Domestic Violence Cases in New York City: Problems for Poor Women of Color,* 3 WOMEN, GENDER, AND FAMILIES OF COLOR 58 (2015); Jaime Perrone, *Failing to Realize Nicholson's Vision: How New York's Child Welfare System Continues to Punish Battered Mothers*, Brooklyn law School 20 J. L. & POL'Y (2012) (One study of mandatory arrest policies in New York City found that 27 percent of women who called a criminal justice hotline had been arrested when they called police to report experiencing violence, even though 85 percent of them had been injured.)

[5] Abigail Kramer, *Backfire: When Reporting Domestic Violence Means You Get Investigated For Abuse*, The New School Center for New York City Affairs 1 (2020).

what happened in this case: Ms. W. discussed Mr. L's alleged abuse with her therapist who then called the State Central Register. Appellant's Brief at 6. In 2021, child protection agencies reported that 28% of the over two million neglect or abuse allegations involved a caregiver with a domestic violence "risk factor."[6] Many survivors are then coerced into submitting to a family court's jurisdiction to avoid separation from their children despite never being accused of neglect or abuse.

Unlawful family court supervision harms domestic violence survivors. Intrusive "supervision," the term at issue in the family court order on appeal, unjustifiably risks subjecting survivors to "double abuse."[7] Granting caseworkers authority over survivors' lives triggers feelings of helplessness, loss of control, and poor self-image, reminiscent of the impact of domestic violence itself. For this reason, partners and ex-partners often use the family regulation system to maintain control over their victims,[8] and some survivors come to view the state as another source of control in their lives. For Black, Brown, and low-income survivors, who

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[6] Child.'s Bureau, HHS, Child Maltreatment 2021, at 25 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf.

[7] *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002); s*ee also Nicholson v. Scoppetta,* 344 F.3d 154 (2d Cir. 2003); *Green v. Mattingly*, No. 07-CV-1790 (ENV) (CLP), 2010 U.S. Dist. LEXIS 99864 (E.D.N.Y. Sept. 22, 2010).

[8] N.Y. Office for the Prevention of Domestic Violence, Survivor Listening Sessions, OPDV Listening Sessions Preliminary Findings, 2021, Page 7, *available at*, https://opdv.ny.gov/system/files/documents/2022/02/sls-report.pdf ("How does he get away with multiple false reports to child welfare, police reports, keep me in court for 8 years?").

already live in fear of unwarranted state intervention into their lives and are at higher risk of becoming a party to coercive proceedings, feelings of helplessness are exacerbated when child welfare involvement meets intimate partner violence.[9]

Despite *Nicholson's* transformation of the standard for neglect and child removal in New York, similar instances of "double abuse" continue.[10] One parent described the harm ACS's intervention caused after her child's father attacked her with a knife: caseworkers arrived at her home unannounced, inspected her child's body, searched her apartment, and interviewed her neighbors about her parenting.[11] She explained, "they checked the refrigerator, checked [the baby's] crib, checked the cupboards . . . It felt very invasive and insulting."[12] This supervision can continue for months if not years as an Article 10 case proceeds through the family court.[13] Other survivors have described their interactions with family courts and ACS as no less harmful than physical assaults they have suffered: "I'd rather take a

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[9] S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J.F. 163, 181-82 (2023) (discussing the perceived unavoidability of child welfare involvement in marginalized communities).
[10] *See* Kathleen A. Copps, *The Good, the Bad, and the Future of Nicholson v. Scoppetta: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALBANY L. REV. 497, 512-16 (2009).
[11] Abigail Kramer, *Backfire: When Reporting Domestic Violence Means You Get Investigated For Abuse*, The New School Center for New York City Affairs 1 (2020).
[12] *Id.* at 1-2.
[13] *To conduct oversight of the Family Court throughout the State, including its resources, operations, and outcomes*, *Joint Public Hearing before S. Standing Committee on Judiciary and S. Standing Committee on Children and Families*, 2023-2024 N.Y. Legislative Section (Statement of the New York City Bar Association).

beating than catch a case."[14] "It feels like we are going from one abusive situation to another, and both threaten to take our kids."[15] "All I did was try to protect myself and my baby, and it feels like we're being punished. I hope my case can change how ACS deals with families like mine. Parents experiencing domestic violence should know they can seek help without being treated as if they are criminals."[16]

Orders like the one on appeal arise within the larger context of gendered and racialized depictions of victimhood and parental ability. One prominent stereotype is that survivors are bad mothers, incapable of protecting their children from harm;[17] or that they favor their partner over their children.[18] This false assessment is particularly common for survivors of color.[19] The family court explicitly invoked this stereotype to justify ordering ACS "supervision," stating "sometimes people, including the victims, sometimes change their mind and then the orders get violated." Appellant's Brief, at 8.

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[14] Jasmine Wali, *I'd Rather Take a Beating Then Catch a Case,* THE NATION (April 5, 2023).
[15] *Id*.
[16] *Id.*
[17] The Court of Appeals rejected this stereotype as a matter of law. *Nicholson*, 3 N.Y.3d at 367-72.
[18] Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 OHIO ST. L.J. 733, 738 (2017) ("essentializ[ing] battered women as helpless, passive and powerless . . . perpetuates the victimization of domestic violence survivors.").
[19] S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COL. L. REV. 1097, 1121 (2022).

Moreover, subjecting non-respondent parent survivors to "supervision" makes them and their children less safe by disincentivizing them from seeking support. Survivors fear the potential consequences of state intervention, including harm to their finances, housing, safety,[20] and ability to live free from state surveillance.[21] These fears lead some survivors to avoid disclosing their abuse.[22]

B. Harms imposed on respondent parents.

In *Amici's* experience, respondent parents are often denied a meaningful opportunity to visit with their children, especially when non-respondent parents refuse to make children available for visits.

Amici have observed multiple non-respondent parents refuse to make children available for visitation with respondent parents. When family courts are willing to issue and enforce orders requiring non-respondent parents to produce children for visits, courts can eventually resolve problems created by non-respondent parent resistance. But *Amici* have also observed the family courts refuse to order non-respondents parent to comply with its visitation orders that afford the respondent parents visits with their children. Family courts often blame ACS for not transporting children, but transportation does not address the need for

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[20] *Id.* at 1128-31.
[21] Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314, 316 (2016).
[22] Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1786 (2019).

non-respondent parents with legal custody to produce their children to visits with the respondent parent. The unfortunate result of family courts refusing to issue or enforce orders is that respondent parents and their children go without seeing each other for months. In one New York County case handled by one *amicus*, the respondent father died after a prolonged heart illness without having seen his child for over two years because the family court resisted enforcing his visitation rights, despite multiple motions to enforce court-ordered visitation.

Amici's experience shows that family courts must issue and enforce orders requiring non-respondent parents to make children available for visitation to vindicate respondent parents' and their children's right to visitation.

II. Both non-respondent and respondent parents have important Due Process rights which must be respected.

Non-respondent parents are not accused of any neglect or abuse. Courts must therefore treat them as fit parents entitled to care, custody, and control of their children free of unwarranted state interference. Respondent parents also have fundamental rights to their familial relationship with their children, including access to legal process and procedure that encourages respondents to engage in any rehabilitative steps a court deems necessary, while maintaining and strengthening their relationship with their children. The only constitutionally permissible orders against non-respondent parents are those which protect the rights of respondent

parents and their children to family integrity, not the order on appeal which permits overbroad, unwarranted state supervision and surveillance of families.

A. Non-respondent parents and children have the right to be free of unwanted state intervention, including the supervision ordered in this case.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects parents' fundamental liberty interest in the "care, custody, and control" of their children. *Troxel v. Granville*, 430 U.S. 57, 65 (2000); U.S. Const. Amend. XIV § 1. The Due Process Clause also protects children's reciprocal right to family integrity. *Rivera v. Marcus*, 696 F.2d 1016, 1026 (2d Cir. 1982); Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 556 HARV. C.R.-CIV. LIB. L. REV. 267, 282 (2021).

In *Troxel,* the Supreme Court overturned a trial court order which attempted to supersede the parent's decision about how much access her children should have to third parties, their grandparents. *Troxel*, 530 U.S. at 60-61. The Court explained that, when fit parents make decisions about what is best for their children, "there will normally be no reason for the State to inject itself into the private realm of the family." *Troxel*, 530 U.S. at 68-69. Indeed, the Supreme Court has long cast grave doubt on any effort to invade the constitutional liberties of a fit parent simply because others are unfit. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (affirming parental authority to make mental health treatment decisions for

children); *see also, Troxel*, 530 U.S. at 65 (describing the rights at issue as "perhaps the oldest of the fundamental liberty interests recognized by this Court").

These same presumptions apply in Family Court Act, Article 10 cases to parents who are not accused of neglect or abuse. *Stanley v. Illinois* involved an unwed father who had neither been alleged or proven to be unfit – the functional equivalent of a non-respondent parent under New York law. 405 U.S. 645, 646-47 (1972); N.Y. Fam. Ct. Act § 1012(a). The United States Supreme Court in that case rejected the state's scheme of denying Stanley custody based on his marital status alone, holding that parental fitness is the lynchpin for state intervention in families: "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him." *Stanley,* 405 U.S. at 649. Fit parents' power to decide most matters for their children "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651. Without proof of unfitness, invasions of family integrity "register[] no gain towards [the state's] declared goals" and indeed "spite[]" those goals. *Id.* at 652-53.

Like the unconstitutional trial court orders in *Troxel* and *Stanley*, the order on appeal in this case unlawfully invades Ms. W. and Sapphire's right to family integrity. Following *Troxel*, there is therefore "no reason for the State to inject itself into the private realm of the family" or supervise Ms. W.'s ability to take care

of her child. *Troxel*, 530 U.S. at 68-69. Yet that is precisely what the family court did here. Without any allegation of unfitness, the family court required Ms. W. to admit the state into her home to have access to her children and to subject her to "supervision," over her objection, contrary to her judgment as to what is best for her children. This requirement is even more egregious than the unconstitutional order in *Troxel*. There, the children at least had a pre-existing relationship with the third parties, who were their grandparents. Here, the third parties are state agents who would enter the family's home through announced and unannounced visits.

The New York Constitution provides similar protections for non-respondent parents' and their children's right to family integrity. The New York Constitution explicitly protects due process rights. N.Y. Const. Art. 1, § 6; *see also* N.Y. Const. Art. 1, § 1 ("No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land . . . ."). These clauses provide at least as much protection as the federal Due Process Clause. *People v. Isaacson*, 44 N.Y.2d 511, 519 (1978). The Court of Appeals recognized in *Matter of Marie B.*, that "[f]undamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity." *Matter of Marie B.,* 62 N.Y.2d 352, 358 (1984) (*citing Santosky* v. *Kramer*, 455 US 745, 753 (1982); *Wisconsin v. Yoder*, 406 US 205,

232 (1972); *Stanley v. Illinois*, 405 U.S. at 651; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)).

In a range of analogous situations, courts properly reject claims infringing on the parental rights of parents who, like Ms. W., are not even alleged to have neglected their child. In particular, various states' courts have applied *Stanley's* fitness principle to vindicate non-respondent parents' right to the care, custody, and control of their children. These decisions reject arguments that one parent's maltreatment authorizes courts and agencies to invade the rights of the other parent—what was known as the "one parent doctrine." In the leading case on that topic, the Michigan Supreme Court held that the one-parent doctrine was unconstitutional and that "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *Matter of Sanders,* 852 N.W.2d 524, 537 (Mich. 2014); *Id.* at 527. The *Sanders* Court criticized the one-parent doctrine for "essentially impos[ing] joint and several liability on both parents," *Id.* at 527, and holding that "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *Id.* at 535. Similarly, the family court's order directed against the non-respondent parent, Ms. W., invades her parental rights without any allegation, let alone adjudication, of unfitness.

New York courts have also protected the rights of non-respondent parents. The Third Department, has found that the trial court did not have the authority to remove children from a non-respondent mother without naming her as a respondent in an Article 10 Proceeding. *Matter of Telsa Z.,* 71 A.D.3d 1246, 1250-51 (3d Dept. 2010).

Other jurisdictions have ruled similarly. The Colorado Court of Appeals ruled that maltreatment findings against one parent could not then be used to require the other parent to comply with a treatment plan. *People ex rel. U.S.,* 121 P.3d 326 (Colo. App. 2005). The Nevada Supreme Court held that a court could not require a non-respondent father to comply with a case plan and accept services in order to reunify with his child. *In re Parental Rights as to A.G.,* 295 P.3d 589, 596 (Nev. 2013) (citing *Troxel*, 530 U.S. at 65). The D.C. Court of Appeals found that a non-respondent parent was presumptively entitled to custody under the Constitution, even when that parent had not been the primary caretaker prior to the family court's intervention. *In re D.S.,* 88 A.3d 678, 681-89 (D.C. 2014).

Courts—including the Court of Appeals in 2022—have also held that the Interstate Compact on the Placement of Children (ICPC) does not apply to non-respondent parents who live across state lines. The ICPC prescribes procedures before the state can place a child across state lines, including a state agent's determination that such a placement is in a child's interests, with no provisions

ensuring adequate deference to a fit parent's constitutional rights. N.Y. Soc. Serv. L. § 374-A, art. III(d). The ICPC cannot lawfully apply to these non-respondent parents. *D.L. v. S.B.*, 39 N.Y.3d 81, 84 (2022). While the Court of Appeals based its decision on statutory grounds, the First Department correctly recognized the constitutional problems with applying the ICPC to non-respondent parents absent any allegation or evidence of that parent's unfitness. *In re Emmanuel B.*, 175 A.D.3d 49, 59 (1st Dep't 2019) (citing *Matter of Marie B.*, 62 N.Y.2d 352, 358 (1984); *Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 544 (1976)). Similarly, the Maryland Court of Appeals explained that any rule to the contrary regarding the ICPC would interfere with the non-respondent parent's "fundamental right to parent" under the Constitution. *In re R.S.,* 235 A.3d 914, 933-35 (Md. 2020). Broadly, the courts of various states and jurisdictions are aligned with *D.L.*, *Emmanuel B.*, and *R.S.*[23]

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[23] *A.G. v. Cabinet for Health and Family Services*, 621 S.W.3d 424 (Ky. 2021); *In re J.B.*, 310 Or. App. 729 (Or. Ct. App. 2021); *Donald W. v. Dep't of Child Safety*, 444 P.3d 258 (Ariz. 2019); *In re C.R.-A.A.*, 521 S.W.3d 893 (Tex. App. 2017); *In re Courtney R.*, 2017 Tenn. App. LEXIS 263 (Tn. Ct. App. 2017); *In re S.R.C.-Q.*, 52 Kan. App. 2d 454 (Kan. Ct. App. 2016); *D. B. v. Ind. Dep't of Child Servs.*, 43 N.E.3d 599 (Ind. Ct. App. 2015); *In re Emoni W.*, 48 A.3d 1 (Conn. 2012); *In re D.F.-M.*, 236 P.3d 961 (Wash. Ct. App. 2010); *In re A.X.W.*, 2011 Mich. App. LEXIS 983 (2011) (unpublished); *In re C.B.*, 116 Cal. Rptr. 3d 294 (Cal. App. 2010) (citing various other California cases); *In re Alexis O.*, 959 A.2d 176 (N.H. 2008); *In re Rholetter*, 592 S.E.2d 237 (N.C. App. 2004); *Ark. DHS v. Huff*, 65 S.W.3d 880 (Ark. 2002); *State v. K.F.*, 803 A.2d 721 (N.J. Sup. Ct. App. Div. 2002); *DCFS v. L.G.*, 801 So.2d 1047 (Fla. Ct. App. 2001); *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991); *In re Mary L.*, 778 P.2d 449 (N.M. 1989). A smaller number of state courts have ruled that the ICPC applies to parents. *E.g. Adoption of Warren*, 693 N.E.2d 1021 (Mass. 1998). Several of those cases have been overturned or narrowed by more recent decisions. *E.g. In re Tumari W.*, 65 A.D.3d 1375 (2d

Just as efforts to limit the rights of unwed fathers, in-state non-respondent parents, or out-of-state non-respondent parents are constitutionally unjustifiable, so is the family court's order treating Ms. W. as less than a fit parent by subjecting her to invasive and unwarranted ACS supervision and surveillance. Subject to the limited exception discussed in Part II.b, family courts and child protection agencies may not treat non-respondent parents as if they present a threat to their children, and they cannot constitutionally overrule non-respondent parents' exercise of judgment about what serves their children's best interest.

B. Respondent parents have the right to visit with their children and otherwise engage in a process towards reunification.

Mr. L. is also Sapphire's parent and he and Sapphire enjoy a right to family integrity. Mr. L.'s and Sapphire's rights to their relationship are particularly plain in this case because, at the time of the order on appeal, there was no adjudication of his fitness.[24] This order on appeal was issued at the very first appearance in the Article 10 case, when the family court can only enter temporary orders and generally only has the agency's allegations against the parent. The statutory scheme reflects this posture, providing that the order of protection issued against

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Dep't 2009), *rev'd by D.L.*, 39 N.Y.3d at 84; *Ariz. Dep't of Econ. Sec. v. Leonardo*, 22 P.3d 513 (Ariz. App. 2001), *limited* by *Donald W.*, 444 P.3d 258 (Ariz. App. 2019).

[24] Amici make no claims regarding the truth of the allegations against Mr. L.

Mr. L. is "*not* a finding of wrongdoing." N.Y. Fam. Ct. Act § 1029(b) (emphasis added).

Even if Mr. L. is unfit, he and Sapphire are entitled to a legal process that emphasizes his rehabilitation and maintains his relationship with his child, consistent with child safety. When parents have temporarily lost their legal right to live with their children, they still maintain important constitutional rights. As Justice Blackmun wrote for the Supreme Court, parents' rights "do[] not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky*, 455 U.S. at 753. These principles apply to respondent parents regardless of whether they live with their children; constitutionally, the only exception is for unwed fathers who have not "accepted some measure of responsibility for the child's future." *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

Consistent with these constitutional principles, Article 10 is built to respect respondent parents' rights and preserve and strengthen respondent parents' relationships with their children. Parents and children who have been separated via an order issued in an Article 10 case have the right to "reasonable and regularly scheduled visitation" with each other. N.Y. Fam. Ct. Act § 1030(c). These orders both enforce visitation rights and assist the family court in determining how to rehabilitate this family. *Matter of Leenasia C.*, 154 A.D.3d 1, 7 (1st Dep't 2017).

When parents are adjudicated unfit, it is the duty of the local department of social services work to reunify parents and children. N.Y. Fam. Ct. Act § 1035, Prof. Merril Sobie Practice Commentaries. The Court of Appeals has written that the State vis-à-vis ACS's obligation in family court proceedings is to promote reunification between parents and their child, not dissolution. *Matter of Michael B.,* 80 N.Y.2d 299, 310 (1992).

A comprehensive description of the Act is unnecessary to establish the fundamental point: the law respects Mr. L. and Sapphire's right to their family integrity and relationship with each other, and the legal system is intended to maintain and strengthen it. Any intervention must therefore respect the rights of not only Ms. W., but also Mr. L, and Sapphire's rights to both parents.

C. This Court must respect the constitutional rights of respondent and non-respondent parents.

Constitutionally, state intervention in the present case and similar cases involving one non-respondent and one respondent parent must respect the rights of both: the family court may constitutionally assert limited jurisdiction over non-respondent parents *only* to the extent that its orders will further protect the constitutional rights of the respondent parent. Professor Vivek Sankaran has suggested that "the only authority the court could exert over the nonoffending parent would be to compel him[/her] to cooperate with reunification efforts, since the offending parent maintains residual rights to the child," and that the "court

would have the authority, even without an unfitness finding, to issue orders to ensure that the nonoffending parent did not undermine the offending parent's ability to reunify with [his/]her child." Vivek Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents,* 82 TEMP. L. REV. 55, 85 (2009). *Accord* Josh Gupta-Kagan, *The Strange Life of* Stanley v. Illinois: *A Case Study in Parent Representation and Law Reform*, 41 N.Y.U. REV. OF L. & SOC. CH. 569, 592-93 (2017). Professor Sankraran has offered a balanced solution: A family court must be able to take jurisdiction over a child based on findings of maltreatment against one parent, and issue orders to remedy that maltreatment. But, to respect non-respondent parents' constitutional rights, family courts can only compel them to cooperate with reunification efforts, by, for instance, making the child available for visits with the respondent parent.[25] *Id.* at 84-85. That approach ensures family court intervention can satisfy due process.

III. The Family Court Act authorizes jurisdiction over but not supervision of Ms. W.

Family Court Act section 1017 codifies the balanced approach that due process demands: it permits the family court to take jurisdiction over a child living

[25] It will typically be appropriate for ACS to transport the child for visits, but the non-respondent parent cannot unilaterally prevent visits and must be subject to orders to make the child available for visits.

with a non-respondent parent, but limits the orders the court may impose on a non-respondent parent to those which protect the respondent parent and child's right to maintain and strengthen their relationship.

To the extent any ambiguity exists in the statute, this Court should apply the canon of constitutional avoidance and interpret it to respect the constitutional rights of non-respondent and respondent parents and their children. N.Y. Stat. Law § 150. The interpretation which avoids constitutional issues must be reasonably found within the plain language of the text. *People v. Viviani*, 36 N.Y.3d 564, 580 (2021).

Applied to the present case, section 1017 does not empower family courts to authorize local departments of social services to subject non-respondent parents to wide supervision and surveillance. To rule otherwise would violate the constitutional rights of non-respondent parents and their children. In addition, an interpretation which prohibits visitation orders to maintain and strengthen respondent parents' relationships with their children would lead to violations of those parents' rights and the statutory scheme's focus on respondent parents' relationships with their children.

A. Section 1017 applies because the order of protection issued against the respondent parent is a "removal."

Family Court Act section 1017 is applicable to cases, such as the instant one, where an order or protection has been issued against a respondent parent. Section

1017 applies when the family court "determines that a child must be removed from his or her home." N.Y. Fam. Ct. Act § 1017(1). This Court's own interpretation of "removed" in Article 10 establishes that it encompasses orders of protection directed at respondent parents, even when, as in this case, the child lives at home with the non-respondent parent. This understanding is essential to respecting the due process rights of respondent parents and their children.

This Department's interpretation of the term "removed" in Family Court Act section 1028 provides insight into the meaning of that term throughout Article 10, and in section 1017 specifically. In *Matter of Elizabeth C.,* this Court reversed the family court's denial of a father the right to a section 1028 hearing after he was ordered removed from the familial home. 156 A.D.3d 193 (2d Dep't 2017). The family court reasoned that the order of protection against the father did not constitute a removal of the child, but, in reversing, this Court explained that "the removal of a child from the family home and the exclusion of a parent from the same home . . . both result in similar infringements on the constitutionally protected parent-child relationship…[so] both trigger the same due process protections." *Id* at 207. The "interference with the parent's constitutional right to the care and custody of the child" triggers Article 10's procedural protections. *Id.*, *citing Matter of Lucinda R. (Tabitha L.)*, 85 A.D.3d 78, 87 (2d Dep't 2011). The result is consistent regardless of whether a respondent parent lives with the child;

so long as respondent parents have constitutional rights (and, as discussed *supra*, they do absent the narrow circumstances of *Lehr v. Robertson*), they must have the ability to challenge orders imposed against them. As *Elizabeth C.* made emphatically clear, "it is the severance of contact between the child and the alleged offending parent" that "triggers" this right, regardless of the exact living arrangement. 156 A.D.3d at 206.[26]

Here, Mr. L.'s constitutional rights have been identically disrupted by a full stay-away order as they would be had Sapphire been removed from both parents' custody. Like the overturned order in *Elizabeth C.*, Appellant argues that there is no removal when the child remains in the non-respondent parent's home, where the child has been living. This Court rejected that interpretation in *Elizabeth C.*, and should do so in the present case as well.

Basic tenets of statutory interpretation require interpreting the term "removed" consistent with *Elizabeth C.* Section 1017's own terms make clear that it must work in tandem with Part 2 of the Article 10, which was at issue in

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[26] Accordingly, the recent suggestion by one family court judge that section 1017 does not apply unless a respondent parent has lived with the child is without merit. *Matter of Danna T.*, 2024 N.Y. Slip Op. 24008 (Kings C'nty Fam. Ct. Jan. 11, 2024). That reading would suggest that such respondent parents also cannot seek emergency hearings to seek redress for orders prohibiting contact with their children. *Id.* at *3. This would be a significant legal regression if adopted by this Court. Once the state imposes a "severance of contact" between parent and child, *Elizabeth C.*, 156 A.D.3d at 206, it cannot and should not leave a parent and child bereft of a due process right to contest that intervention.

Elizabeth C. N.Y. Fam. Ct. Act § 1017(1) (stating that section's application "in any proceeding under this article, when the court determines that a child must be removed from his or her home, *pursuant to part two of this article*" (emphasis added). A consistent interpretation is mandated by the canon of consistent usage. N.Y. Stat. Law § 97; s*ee also id.*, Commentary.

Section 1017's application to this and similar cases ensures family courts have the tools necessary to respect respondent parents' rights, especially the power to order non-respondent parents to make the child available for visitation with the respondent parent.[27] This is why section 1017(3) mandates cooperation with court-ordered visitation with respondent parents, who maintain due process rights to such visitation. Section 1017 also permits respondent parents to seek visitation orders on an emergency basis, including orders that non-respondent parents make children available for visitation. It is common practice for respondent parents to do so via notice of motion or orders to show cause in family court and have such requests resolved within days or weeks. In contrast, if section 1017 were understood to make non-respondent parents wholly unreachable by family court orders, that

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[27] Notably, an order authorizing Mr. L. to have supervised visits with the child was entered in this case. If the non-respondent parent objected, effectuating that order would necessarily involve an order requiring her to make the child available for such visits, and order that would have to be issued pursuant to section 1017. Perhaps ironically, given Appellant's argument that 1017 does not apply, Appellant notes that she does not challenge the order authorizing Mr. L. to have visits with the child. Appellants Brief at 9 n.2.

would result in respondent parents' inability to protect their rights via promptly-resolved visitation requests.

Moreover, holding that section 1017 does not apply would create an absurd result. A respondent parent would have to file a visitation petition in every case where the child is released to a non-respondent parent prior to disposition when an order is necessary to facilitate visits. Yet the legislature made clear that no such petition is necessary when a family court releases a child to the non-respondent parent at disposition: then, the Article 10 court can issue a visitation order. N.Y. Fam. Ct. Act § 1054(b). There is no logic in denying the court that power pre-adjudication while granting it post-adjudication.

B. Section 1017 protects non-respondent parents from supervision orders like the one on appeal.

The Legislature amended Section 1017 of the Family Court Act in 2015, clarifying that supervision of non-respondent parents is beyond the family court's authority. The amendments explicitly added non-respondent parents to the list of individuals to whom section 1017(3), which had previously only governed releases of children to a "relative or other suitable caregiver," could apply. 2015 Sess. Law News of N.Y. Ch. 567 (A.6715-A) §3 (McKinney's). The amendments protected against unconstitutional violations of non-respondent parents' rights via orders for supervision. The statute clarifies that the non-respondent parent submits to the family court's jurisdiction only "with respect to the child" and for the purpose of

facilitating the relationship between the child and the respondent parent over the course of any Article 10 adjudication. *Id.*

Moreover, the amendment clarifies that non-respondent parents have more rights than "relative[s] or other suitable caregiver[s]" and that family courts' authority to issue orders over non-respondent parents is relatively small. The amendment pointedly used different terminology to refer to living arrangements with non-respondent parents and kinship caregivers. 2015 Sess. Law News of N.Y. Ch. 567 (A.6715-A) §3. The legislative history makes plain that this difference in terminology "is significant" because non-respondent parents have more significant and constitutional rights than kinship caregivers. A.6715A, Memorandum in Support of Legislation (2015). Following the canon of constitutional avoidance, the Court must interpret the "terms and conditions applicable to *such person or persons*" consistent with the constitutional status of the person at issue. N.Y. Stat. Law § 150; N.Y. Fam. Ct. Act § 1017(3) (emphasis added). When it is a kinship caregiver, who lacks the constitutional rights and presumptions discussed in Part II, the statute permits supervision (though courts should not order it without some basis). When it is a non-respondent parent, the statute only permits terms and conditions necessary to respect the respondent parent's rights.

The New York Office of Children and Family Services (OCFS) recognized how the 2015 amendment narrowed the scope of intervention into the life of a non-respondent parent caring for a subject child. OFCS issued guidance providing multiple times that "a Family Court may no longer place a non-respondent parent under supervision." *Changes to the Family Court Act Regarding Child Protective and Permanency Hearings, Including Changes Affecting the Rights of Non-Respondent Parents,* 17-OCFS-ADM-02-R1 *Revised February 28, 2023*, at 6; *id.* at 3-4 (providing same). The order on appeal violates the Legislature's precise mandate: it subjects a non-respondent parent to supervision. A family court does not have blanket jurisdiction over a non-respondent parent. Instead, it can only issue orders with respect to the child, consistent with the non-respondent parent's constitutional rights.

Removing the State's supervisory authority from section 1017 makes sense in the broader statutory scheme, because any narrow circumstances in which a local department of social services would need to investigate or supervise a parent are already enshrined within other Family Court Act sections. Section 1034 authorizes a family court judge to order ACS to enter a home based on probable cause of maltreatment. N.Y. Fam. Ct. Act § 1034(2). *See e.g., Matter of Telsa Z.*, 81 A.D.3d at 1131. Crucially, any such order authorizing an ACS agent to enter a person's home must follow the due process limitations on criminal search

warrants. N.Y. Fam. Ct. Act § 1034(2)(f). It would be anomalous for the family court to be able to issue a wide ranging home entry and supervision order under section 1017 against a parent who is not even suspected of having done anything wrong, while a parent against whom there is some allegation and even evidence of maltreatment gets more protection under section 1034. This Court should not permit this absurd result.

C. Section 1017 authorizes orders necessary to protect respondent parents' rights.

When an Article 10 petition is filed, a court must consider and respect the parental rights of the respondent and non-respondent parent—especially through orders that the non-respondent parent make the child available for visitation with the respondent parent. Section 1017(3)'s requirement that non-respondent parents submit to the jurisdiction of the Court with respect to the child facilitates the management of such concerns and does not authorize the unlimited surveillance and supervision at issue in the order on appeal.

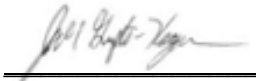
This Court explained the threat to the respondent parent *if* section 1017 were understood to prevent such orders: relinquishing jurisdiction over the non-respondent parent would "also relinquish any rights the respondent parent may have to return of the child, in the event that the neglect charges were not sustained, or were found insufficient to justify removal." *In re Tumari W.*, 65 A.D.3d at 1360, rev'd on other grounds by *D.L. v. S.B.*, 181 N.Y.S.3d at 154. Section

1017(3) prevents such relinquishment by ensuring that a family court can order the non-respondent parent to respect the parental rights of the respondent parent through, for instance, visitation. N.Y. Fam. Ct. Act § 1017(3). That conclusion is in line with Article 10's commitment to maintaining and strengthening family relationships between respondent parents and children, discussed above. N.Y. Stat. Law § 98 (instructing that statutory provisions must be "harmonized" "with the general intent of the whole statute"); *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979) (cleaned up).

Conclusion

The order on appeal violates the non-respondent parent and child's right to family integrity and exceeds the family court's power under Family Court Act section 1017(3). The order must be reversed.

Respectfully Submitted,



Josh Gupta-Kagan
jgupta-kagan@law.columbia.edu
COLUMBIA LAW SCHOOL
FAMILY DEFENSE CLINIC
MORNINGSIDE HEIGHTS LEGAL SERVICES
435 West 116th Street, 8th Fl.
New York, NY 10027
(212) 853-4021

Michael Weinstein
mweinstein@ndsny.org

NEIGHBORHOOD DEFENDER SERVICE OF HARLEM
317 Lenox Avenue, Tenth Floor
New York, NY 10027
(212) 876-5500

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Dated: March 4, 2024
New York, NY

Michael Weinstein
Counsel with proposed *Amicus Curiae*
Neighborhood Defender Service
317 Lenox Avenue, Tenth Floor
New York, NY 10027
212-876-5500
mweinstein@ndsny.org

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

In the Matter of

Sapphire W.

A Child under eighteen years of age alleged to be neglected by

Kenneth L.,

Respondent.

Appellate Division
Docket Number: **2023-10606**

AFFIRMATION OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

I, Michael Weinstein, an individual licensed to practice law in the State of New York, under the penalty of perjury, affirm as follows:

1. I am an attorney with the Amicus Curiae in this proceeding. I am over eighteen years of age, and am employed by the Neighborhood Defender Service of Harlem, 317 Lenox Ave, New York NY 10027.

2. I served a true copy, by email, on the Appellant, Petitioner-Respondent Administration for Children's Services, Kenneth L.'s counsel, and the Attorney for the Child, of the foregoing: Motion for Leave to File as Amicus Curiae and any attachments, including Proposed Brief of Amicus Curiae, on:

   Christine Gottlieb
   Appellant's Counsel
   NYU School of Law
   Family Defense Clinic

Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
gottlieb@mercury.law.nyu.edu

David Shalleck-Klein
Appellant's Counsel
Family Justice Law Center
Urban Justice Center
40 Rector Street, 9th Floor
New York, NY 10006
dshalleckklein@urbanjustice.org

Naomi J. Scotten
Counsel to Family Justice Law Center
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
nscotten@orrick.com

Joshua Liebman
New York City Law Department
Attorneys for Petitioner-Respondent
100 Church Street, 6th Floor
New York, NY 10007
jliebman@law.nyc.gov

Abigail Finkelman
Attorney for the Subject Child
The Legal Aid Society-JRP
111 Livingston Street, Eighth Floor
Brooklyn, NY 11201
(646) 648-2628
afinkelman@legal-aid.org

Dated: March 4, 2024
New York, NY

I affirm this 4th day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Michael Weinstein
mweinstein@ndsny.org
Counsel with Proposed *Amicus Curiae*
Neighborhood Defender Service of Harlem
317 Lenox Avenue, Tenth Floor
New York, New York 10027
(212) 876-5500