Family Court, New York County Clerk's Docket No. NN-32643/13

New York Supreme Court

Appellate Division—First Department

In the Matter of Maddock E., A Child Under 18 Years of Age Alleged to be Neglected Under Article 10 of the Family Court Act.

COMMISSIONER OF THE ADMINISTRATION FOR CHILDREN'S SERVICES, CITY OF NEW YORK,

Petitioner-Respondent,

– against –

LUIS E.,

Respondent-Appellant.

STEVEN BANKS, ESQ., The Legal Aid Society, Juvenile Rights Division,

Attorney for the Child.

BRIEF FOR *AMICI CURIAE* THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, THE NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, CHILD WELFARE ORGANIZING PROJECT, LEGAL MOMENTUM, LANSNER & KUBITSCHEK, THE NEW YORK STATE CITIZEN REVIEW PANELS FOR CHILD PROTECTIVE SERVICES, NEW YORK UNIVERSITY SCHOOL OF LAW FAMILY DEFENSE CLINIC, MFY LEGAL SERVICES, INC., THE CENTER FOR REPRODUCTIVE RIGHTS, NATIONAL ADVOCATES FOR PREGNANT WOMEN, NATIONAL PERINATAL ASSOCIATION, BOOM!HEALTH, DOMESTIC VIOLENCE PROJECT AT THE URBAN JUSTICE CENTER AND NEW YORK LEGAL ASSISTANCE GROUP IN SUPPORT OF THE ATTORNEY FOR THE CHILD

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE AMICI CURIAE

Amici are organizations supporting the rights, interests, and health of pregnant women and parents through legal and political advocacy in a wide variety of settings, including the representation of parents in abuse and neglect proceedings in New York City Family Court. In light of their extensive work with parents and pregnant women and their vast experience with the child welfare system, Amici seek to prevent the imposition upon pregnant women of the unwarranted monitoring and supervision created by the Family Court's expansion of the authority of the child protection system to encompass a fetus. We submit this brief to present to this Court the perspective of advocates for pregnant women and for parents in Family Court proceedings regarding the risks posed by the Family Court's unfounded expansion of the statute to impose a new regime of improper oversight upon pregnant women.

Amicus Curiae *The Bronx Defenders ("BXD")* employs a groundbreaking system of holistic representation to provide criminal defense, family defense, immigration, civil legal services, social work support and advocacy to indigent people in the Bronx. The attorneys, social workers, and parent advocates in BXD's Family Defense Practice are funded by New York City to represent parents and caregivers in Article 10 and Termination of Parental Rights proceedings in

New York City Family Court, Bronx County. BXD has represented over 6,000 indigent parents and caregivers and represents an additional 1,000 parents each year. BXD is committed to providing quality legal representation to indigent parents accused of abuse and neglect and facing the possible termination of their parental rights, as well as to assisting families in accessing quality social services in order to keep children safe and out of state care.

As the largest Brooklyn-based legal services provider, Amicus Curiae *Brooklyn Defender Services ("BDS")* provides comprehensive legal representation to 45,000 low-income Brooklyn residents each year who are arrested, charged with abuse or neglect of their children or are in immigration detention. Funded by the City of New York, BDS's Family Defense Practice has been representing respondents in Article 10 cases in Kings County Family Court since 2007. BDS represents 1,000 new respondents each year, the vast majority of respondents in Brooklyn Family Court. Now in its eighth year, the family defense practice's interdisciplinary team of attorneys, social workers and parent advocates has served nearly 6,000 families and is currently representing over 1,900 families in Article 10 proceedings in Family Court.

Amicus Curiae *The Neighborhood Defender Service of Harlem ("NDS")* is a lead innovator in holistic public defense practice. NDS represents clients using a team-based, client-centered, holistic defense model. At the core of this model is the commitment to address the underlying issues that bring clients into contact with a multitude of systems, including criminal justice, child welfare, housing, immigration, and public benefits. NDS works with clients to help avoid or minimize future contact with each of these systems. The Family Defense Team at NDS primarily represents parents in Upper Manhattan in child welfare proceedings. The team consists of attorneys, social workers and parent advocates who work collaboratively to address the legal and social work needs of our clients. At the heart of this work is a commitment to foster and maintain family integrity throughout the entirety of the proceedings.

Amicus Curiae *Child Welfare Organizing Project ("CWOP")* was established in 1994 as an organization of parents and professionals seeking to transform the child welfare system through increased parent organizing and mobilization of community to be involved in child welfare decision-making at all levels, from case-planning to policy, budgets and legislation. Most of CWOP's staff, and CWOP's Board of Directors, are parents who have had direct, personal involvement with the child welfare system. A large part of CWOP's work

involves debunking prevailing stereotypes about child welfare-involved parents and families, and putting a human face on parents who are often unfairly and inaccurately demonized. This will result in more enlightened public policy that effectively identifies and addresses real problems and challenges that families face to having a successful family life, ultimately protecting children by helping to strengthen families with supports and preventive services in their communities.

Amicus Curiae *Legal Momentum*, founded in 1970 and the nation's oldest legal advocacy organization for women, advances the rights of all women and girls by using the power of the law and creating innovative public policy. Legal Momentum was one of the leading advocates for passage in 1994 of the landmark Violence Against Women Act, as well as its subsequent reauthorizations, all of which have sought to redress the historical inadequacy of the justice system's response to domestic and sexual violence. Legal Momentum also views reproductive rights as central to women's equality. To this end, Legal Momentum has litigated many cases involving reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). We have a deep interest in ensuring that the judicial system adequately protects the rights of pregnant women, victims of sexual and domestic violence, and their children.

Amicus Curiae *Lansner & Kubitschek* is a small public-interest law firm concentrating on Child Welfare issues. The firm and its attorneys have long been involved, through both litigation in the New York Courts and the federal courts, including the United States Supreme Court, and public policy work, including the NYS Citizen Review Panel for Child Protective Services and service as Counsel to the NYS Assembly Committee on Children and Families, to improve child protective services in New York and throughout the United States.

Amicus Curiae *The New York State Citizen Review Panels for Child Protective Services* is comprised of citizen volunteers who are authorized by state and federal law to examine the policies, procedures and practices of the State and social services districts and, where appropriate, specific cases. The Panels evaluate the extent to which the agencies are effectively discharging their child protection responsibilities. Panels are authorized to hold public hearings, and have reasonable access to public and private facilities receiving public funds to provide child welfare services within the panel jurisdictions. There are three panels in New York State, each with 13 members. The Western panel covers the 17 counties in the western region of the state. The New York City Panel covers the five boroughs of New York City. The Eastern Panel covers the remaining 40 counties. The Panel

has a strong interest in seeing that child protective proceedings are used to properly protect children without improperly infringing on the rights of the family.

Amicus Curiae *New York University School of Law Family Defense Clinic* was established in 1990 to train students to represent parents accused of child abuse and neglect and prevent the unnecessary break-up of indigent families. A pioneer of interdisciplinary representation in the field, the clinic teaches law and graduate level social worker students to collaborate to protect family integrity and help families access services that keep children safe and out of foster care. Under supervision, clinic students represent parents in New York City family courts in child abuse and neglect and termination of parental rights proceedings. Clinic faculty teach, research, and write in the field of child welfare, advocate for policy reform, and training and provide technical support to parent advocates across the country.

Amicus Curiae *MFY Legal Services, Inc. ("MFY")* envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for over fifty years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while

simultaneously working to end the root causes of inequalities through impact litigation, law reform and policy advocacy. MFY assists more than 20,000 New Yorkers each year and operates the only legal services program in New York City dedicated to providing free assistance to low-income, kinship families within and outside the formal foster care system. We also represent individuals who face unnecessary barriers to employment due to their criminal and State Central Registry histories.

Amicus Curiae *The Center for Reproductive Rights (the "Center")* is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. It has a vital interest in ensuring that the rights of pregnant women, among others, are recognized and protected by the courts. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts. Notably, the Center's attorneys served as lead counsel for the plaintiffs in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), in which the U.S. Supreme Court held that a state hospital's policy of drug-testing pregnant patients without consent and reporting positive test results to the police violated the Fourth Amendment.

Amicus Curiae *National Advocates for Pregnant Women ("NAPW")* is dedicated to protecting and securing the rights, health, and dignity of pregnant and parenting women through legal advocacy, grassroots organizing, and public education. NAPW opposes the punishment of women for the circumstances of their pregnancies through criminal prosecution or punitive child welfare interventions.

Amicus Curiae *National Perinatal Association ("NPA")* promotes the health and well-being of mothers and infants enriching families, communities and our world. NPA is a multi-disciplinary organization comprised of doctors, nurses, midwives, social workers, administrators, parents, and those interested in collaborating to improve perinatal health.

Amicus Curiae *BOOM!Health* is a community-based organization serving some of the poorest and most marginalized people in the Bronx and other New York City boroughs, whose organizational mission to transform lives though health and wellness is achieved through a full range of prevention, syringe access, health coordination, behavioral health, housing, legal, advocacy and wellness services for the hardest to reach communities. BOOM!Health seeks to achieve health, wellness and safety for women through a variety of its programs, including the Bronx

Women's Health Collaborative, Family Justice Program, and Go Girlz! (young women's mentoring program).

The mission of Amicus Curiae *Domestic Violence Project at the Urban Justice Center* is to help victims of domestic violence and their children live free of violence and abuse. We consider domestic violence in any type of intimate relationship, regardless of gender or sexual identity, to be a human rights violation. For the past decade, we have defended the rights of women and children zealously inside and outside of the justice system through litigation and legal advocacy. As such, protecting the legal rights of all women and children against all forms of abuse and maltreatment go to the very core of our mission. We have a strong interest in ensuring that child protective proceedings are used appropriately and justly to safeguard children and not to overly or improperly infringe on the rights of the family and parents.

Founded in 1990, Amicus Curiae *New York Legal Assistance Group ("NYLAG")* is a not-for-profit organization dedicated to providing free civil legal services to New York's low income families. NYLAG's comprehensive range of services includes direct representation, case consultation, advocacy, community education, training, financial counseling, and impact litigation. NYLAG's

Matrimonial and Family Law, and Legal Health Units especially, have a particular concern for women's health. The Matrimonial & Family Law Unit provides assistance to victims of domestic violence on a priority basis on both family, matrimonial and immigration matters. Our family law practice includes representing our clients in child protective investigations and litigation. Legal Health partners with medical professionals to provide legal services to patients in a medical setting, including women's and maternal health departments of hospitals. Core objectives at NYLAG include helping clients obtain the insurance and benefits they need to access quality medical care and assist with advance planning.

PROCEDURAL HISTORY

Amici adopt and incorporate by reference the Procedural History set forth in the Brief of Attorney for the Child, filed with the Court.

PRELIMINARY STATEMENT

The Family Court erroneously expanded the Family Court Act ("FCA") by extending the child protection statute to encompass protection of a fetus. This ruling subjects pregnant women to unwarranted monitoring and supervision by the government, and gives rise to significant uncertainty about the application of the FCA to pregnant women. In light of the risks to the health and constitutional rights of pregnant women that the imposition of this new regime would create, this Court should not leave the Family Court's ruling undisturbed. Because of the significant harms the Family Court ruling is likely to create, this Court should exercise its discretion to vacate the ruling even if it determines this case is moot.

The Family Court ignored the plain language of the FCA, which applies to the protection of a "child," and failed to consider the implications of its ruling, which extends well beyond the facts of this case. Instead, the Court misinterpreted the FCA's protection of the "child" to include a fetus as well, thereby authorizing child protective agencies to pursue neglect and abuse claims based solely on the actions of women while pregnant. Because many actions, inactions,

circumstances, and external factors can affect a pregnancy or pose a risk to a developing fetus, the ruling dramatically expands the government's power to second-guess and intrude upon the lives of pregnant women and their families, with significant consequences for parental rights, public health, and poor and minority communities in New York. Indeed, the ruling would deter some pregnant women from seeking prenatal care and treatment for addiction, and would exacerbate the problem of disproportionate child welfare interventions in families of color.

The variables that may affect or harm the health of a fetus are numerous and often contested, and medical experts regularly disagree about the risks of particular foods, actions, circumstances, or activities. As a result, the Court's application of the FCA to a fetus renders the statute unduly vague because it does not provide pregnant women with fair notice of which of their decisions and actions will expose them to the threat of the removal of their children once born. The ruling also interferes with pregnant women's rights to privacy and to make choices about their families, as well as their rights to bodily integrity. As the Illinois Supreme Court has recognized, "[h]olding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and

bodily autonomy." *Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Ill. 1988). Amici therefore ask this Court to vacate or reverse the Family Court's ruling.

ARGUMENT

I. EVEN IF THIS COURT DETERMINES THAT THIS APPEAL IS MOOT, THE FAMILY COURT'S RULING SHOULD BE VACATED

This Court has the opportunity and obligation to remedy the Family Court's erroneous decision and should exercise its discretion to vacate the Family Court's ruling. Courts in New York have recognized that "it would be inequitable to permit a party to benefit from an order or judgment in its favor when it has deliberately frustrated appellate review of that determination." *Ruskin v. Safir*, 257 A.D.2d 268, 274 (1st Dep't 1999); *see also Funderburke v. State Dep't of Civil Serv.*, 49 A.D.3d 809, 811 (2d Dep't 2008) ("[A] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.") (internal quotation marks omitted).[1] This is what ACS has done here in offering Respondent-Appellant father an adjournment in contemplation of dismissal soon after the Family Court

[1] The United States Supreme Court has long recognized a similar doctrine in federal cases under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), which provided that "the established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

issued its ruling; as a practical matter, ACS proposed to drop the case against the Respondent-Appellant father and the father acquiesced in that resolution.

Vacatur is "an appropriate exercise of discretion" where, as here, it is "necessary in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent." *Gonzalez v. Gonzalez*, 57 A.D.3d 896, 897-98 (2d Dep't 2008) (vacating the Family Court decision appealed from, even though intervening events rendered the appeal academic); *Funderburke*, 49 A.D.3d at 811 (vacating the lower court's orders because the orders "could be used as precedent in future cases, causing confusion of the legal issues in this area of the law"). As detailed below, the Family Court's interpretation of the FCA impermissibly expands the government's control over pregnant women and their families. The harms threatened by the ruling, which are discussed in great detail below, should not be immunized from consideration by this Court as a result of ACS's offer to effectively dismiss the charges against Respondent-Appellant. Even if this Court determines that this appeal is moot, this Court should vacate the Family Court's unsupported and expansive ruling in order to avoid these consequences.

II. THERE IS NO BASIS FOR READING THE TERM "CHILD" IN THE FCA TO INCLUDE A FETUS

The Petition brought by ACS in this case is premised entirely on events that are alleged to have occurred during pregnancy prior to the child's birth.[2] The Family Court should have dismissed the Petition for failure to state a claim because Article 10 of the FCA limits its jurisdiction to proceedings "alleging the abuse or neglect of a child." N.Y. Fam. Ct. Act § 1013(a). In turn, the statute defines an allegedly "neglected child" as "any person or persons" less than eighteen years of age. N.Y. Fam. Ct. Act § 1012(b); (f). Notwithstanding the clear language of the statute, the Family Court interpreted the term "neglected child" to include a fetus. Specifically, the Family Court determined that "the 'child' was present in the form of a nine month old viable fetus" and that "a reasonable inference can be drawn that the act of strangling the Respondent mother would place the life of the viable fetus in imminent risk." Feb. 14, 2014 Decision at 3. There is no support for the Court's interpretation of the FCA, either in the statute or elsewhere.

The New York Court of Appeals has held that a newborn child's positive toxicology for cocaine does not suffice to prove neglect. *Nassau Cnty. Dep't of Soc. Servs. on Behalf of Dante M. v. Denise J.*, 87 N.Y.2d 73, 79 (1995) (stating that "[a] report which shows only a positive toxicology for a controlled substance

[2] There were no older children in the home, so a neglect finding cannot be based on derivative neglect under FCA § 1046(a)(i).

generally does not in and of itself prove that a child has been physically, mentally or emotionally impaired, or is in imminent danger of being impaired"). The Court of Appeals explained that "[r]elying solely on a positive toxicology result for a neglect determination fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child." *Id*. Just as the prenatal cocaine use shown by a newborn's positive toxicology report cannot by itself support a neglect finding, other events that occurred before birth likewise cannot suffice to demonstrate a risk of harm to the child. Similarly, this Court has ruled that a pregnant woman's move from California to New York does not constitute an "'appropriation of the child while in utero,'" but instead "amounts to nothing more than her decision to relocate to New York during her pregnancy." *Matter of Sara Ashton McK. v Samuel Bode M.*, 111 A.D.3d 474, 475 (1st Dep't 2013). The determination that a woman moving with a fetus in utero does not constitute a parent moving with a child likewise reveals that the actions of a pregnant woman are not evidence of the treatment of a child because there is no "child" until birth.

The tools of statutory interpretation directed by the Court of Appeals all lead to the same result: a fetus is not a "child" under the FCA. Most straightforwardly, under New York law, statutes are to be given their plain meaning. *See People v*.

Owusu, 93 N.Y.2d 398, 401 (1999). The term "child" should therefore be understood to apply to someone who has been born less than eighteen years ago.

Confirming this reading, the Court of Appeals has held that when there is no legislative declaration that a fetus is a person, neither the federal or state constitution "confer[s] or require[s] legal personality for the unborn." *Bryn v. New York City Health and Hosps. Corp.*, 31 N.Y.2d 194, 203 (1972). This directive confirms that the term "child" includes only people who have been born. Nothing in Article 10 of the FCA indicates that the definition of "child" was intended to include a fetus.

Indeed, New York courts have regularly determined that the word "person" refers to a person who has been born, and not a fetus. *See, e.g.*, *In re Klein*, 538 N.Y.S.2d 274, 275 (2d Dep't 1989) (holding that non-viable fetus is not a legally recognized "person" requiring appointment of a guardian for the purposes of proceedings to determine medical treatment of a comatose pregnant woman); *In re Tanya P.*, N.Y.L.J. Feb. 28, 1995, at 26 (Sup. Ct., N.Y. Cnty. 1995) (attached in Addendum) (finding that section 9.13(b) of Mental Hygiene Law does not permit involuntary retention of a person for purposes of protecting the welfare of a fetus because there was no indication of legislative intent to include fetuses as "'persons'"); *Wilner v. Prowda*, 601 N.Y.S.2d 518, 519, 521 (Sup. Ct., N.Y. Cnty. 1993) (dismissing custody petition and noting that the court was unable to locate

any New York case which held the fetus to be a person under N.Y. C.P.L.R. 7002); *People v. Morabito,* 580 N.Y.S.2d 843 (Geneva City Ct. 1992) (dismissing child endangerment charges against woman who used cocaine while pregnant on the ground that a fetus is not a "child" for purposes of that criminal provision), *aff'd slip op*. (Otn. Cnty. Ct., Sept. 24, 1992).[3]

Other canons of statutory interpretation yield the same result. The Court of Appeals has directed that the "failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended." *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (1982). The Family Court's finding that "under the Family Court Act's definition of a child as 'a person under eighteen years of age', a viable fetus could be included," ignores this directive. Feb. 14, 2014 Decision at 3.

[3] None of the four decisions relied upon by the Family Court can support its ruling. Two of the decisions are prior to, and superseded by, the Court of Appeals decision in *Dante M*., insofar as they base a neglect finding on drug or alcohol use during a pregnancy. *See In re Mark S*., 144 Misc. 2d 169, 170 (Fam. Ct. Nassau Cty. 1989) (child born with positive toxicology for cocaine); *In the Matter of Danielle Smith*, 128 Misc. 2d 976 (Fam. Ct. Monroe Cnty. 1985) (child born with symptoms consistent with fetal alcohol syndrome). Another case involved a finding of derivative neglect, which is not an available holding in the absence of another child, as well as allegations of drug use, in contradiction to the holding of *Dante M*. *See In the Matter of Unborn Child*, 179 Misc. 2d 1 (Fam. Ct. Suffolk Cnty. 1998). The fourth decision relied upon by the Family Court involved a case under Article 8 of the FCA, rather than Article 10, and therefore does not encompass child protective proceedings. *In the Matter of Gloria C*., 124 Misc. 2d 313 (Fam. Ct. Richmond Cnty. 1984) (issuing order of protection under Article 8 of the FCA to pregnant mother and unborn child based on father's alleged physical abuse and noting that no court had ever found a fetus was a person for purposes of proceedings under Article 10 of the FCA). Accordingly, none of these decisions provides good authority for the Family Court's ruling here.

Where the New York legislature has intended statutes to attach liability to acts resulting in harm to a fetus, it has done so in specific and unambiguous terms. For example, as the Family Court notes, §125.00 of the New York Penal Law defines Homicide as "conduct which causes the death of a person or an *unborn child with which a female has been pregnant for more than twenty-four weeks* under circumstances constituting . . . abortion." N.Y. Penal Law § 125.00 (McKinney 2004) (emphasis added); *see also* N.Y. Penal Law § 125.05 (McKinney 2004) (defining an "abortional act" as "an act committed upon or with respect to a female . . . with intent to cause a miscarriage of such female" and a "justifiable abortional act" as an abortion that occurs within 24 weeks from the commencement of pregnancy or after that point when, in the reasonable belief of a physician, the act is necessary to preserve the woman's life); N.Y. Penal Law §§ 125.40, 125.45 (McKinney 2004) (defining crimes of abortion in the first and second degrees). The plain language of the FCA demonstrates that the Act is not intended to apply to a fetus.

The Family Court's interpretation likewise makes no sense within the context of the statute, which is focused entirely on the protection of the child. Article 10 provides for removal of the child from the home if the child is in imminent risk of serious harm and placement in foster care upon findings of neglect or abuse. Under the Family Court's interpretation, ACS would be able to

allege that a fetus is at imminent risk of serious harm, but the statute provides no means of addressing this allegation, as the fetus cannot be removed from the pregnant woman. Indeed, in interpreting the word "child" to include a viable fetus, the Family Court has expanded the statute to encompass pregnancy as a basis for child welfare investigation and judicial intervention. The foregoing example highlights the incompatibility of the Family Court's interpretation with the actual structure and operation of the FCA.

In disregarding the tools of statutory interpretation directed by the New York Court of Appeals, the Family Court distorts Article 10 and dramatically and improperly expands the Family Court's jurisdiction under the FCA. This Court should reject the Family Court's interpretation of the statute.

III. THE FAMILY COURT'S DECISION IMPERMISSIBLY EXPANDS THE GOVERNMENT'S CONTROL OVER THE LIVES OF PREGNANT WOMEN AND THEIR FAMILIES

The Court's misapplication of the FCA is not only wrong as a matter of statutory interpretation, but also significantly harms pregnant women and their families. By dramatically expanding the oversight of the child protective system without defined limitations, the Court permits ACS to second-guess the legal and constitutionally protected choices of pregnant woman regarding their bodies and well-being. A large body of research demonstrates that the imposition of such

oversight disproportionately harms low-income and minority individuals and deters pregnant women from receiving the healthcare they need. The Family Court did not take any of these harms into account when interpreting the statute.

A. The Family Court's Decision Provides The Government With Unwarranted Control Over The Lives Of Pregnant Women And Their Families With Potentially Devastating Consequences To Maternal And Fetal Health And Well-Being

As noted, the Family Court's misinterpretation of the FCA is not limited to the facts of this case: instead, the Family Court applied all of child neglect and abuse law to a fetus still in utero. Section 1012(f) of the FCA lists the acts that constitute neglect of a child, and, for the Family Court, a fetus:

> [F]ailure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education . . . or medical, dental, optometrical or surgical care . . .; or (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . . .

The statute's provision that a child is "neglected" when the parent fails to provide the child "with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm" grants ACS and other child protective

agencies, as well as the Family Court, substantial discretion in determining when a child is neglected. *Id*. Reading the term "child" to include a fetus, as the Family Court directed, dramatically expands the government's power, without legislative guidance or authority, to investigate and monitor the lives of pregnant women and their families.

This concern is magnified because in the child protective context there is no intent or *mens rea* requirement, unlike in the criminal law context in which similar questions about the statutory definition of "person" or "child" have arisen in other states. To obtain a finding of neglect under the FCA, the government need not show that a pregnant woman knew anything about the nature of the risk or had any intent to impose the risk. The Family Court's ruling may therefore subject to neglect charges a pregnant woman who innocently takes actions that ACS believes may be harmful to the fetus.

In fact, numerous behaviors, conditions, and external factors may affect the outcome of a woman's pregnancy or pose risks to the health of the fetus.[4] The Family Court's interpretation of Article 10 provides that any of these may serve as

[4] The combined effect of these factors is often unclear. *See*, *e.g*., Tara Parker-Pope, *Should Pregnant Women Eat More Tuna?*, New York Times Well Blog (March 2, 2015) (noting study which found "that for each weekly serving of fish the mother ate while pregnant, her baby's score on visual recognition memory tests increased an average of four points," but "[a]t the same time, a baby's score dropped by 7.5 points for every one part per million increase in mercury found in the mother's hair sample"), *available at* http://well.blogs.nytimes.com/2015/03/02/should-pregnant-women-eat-more-tuna/.

a basis for a finding of neglect. To illustrate the range of actions that may give rise to neglect allegations under the Court's misapplication of the FCA, the following are some of the behaviors and foods that the popular pregnancy advice book, *What to Expect When You're Expecting*, warns women to avoid: consuming sushi, unpasteurized cheese, deli meats, undercooked meats, certain types of fish that contain a high mercury content, raw shellfish, and alcohol, changing a cat litter box, gardening without gloves, inhaling household cleaning products, smoking, city air pollution, and ingesting too much caffeine. Heidi Murkoff et al., *What to Expect When You're Expecting*, 69-73, 76, 79-84, 110, 113-117 (4th ed. 2008) (excerpt attached in Addendum).[5] Countless other behaviors and circumstances can affect a woman's pregnancy, including becoming pregnant after the age of 35, poor nutrition, substandard housing, a lack of social support, and exposure to second hand smoke and pollution. *See* Ruth C. Fretts et al., *Increased Maternal Age and the Risk of Fetal Death*, 333 New Eng. J. Med. 953, 956 (1995) (attached in Addendum); Suzanne M. Mone et al., *Effects of Environmental Exposures on the Cardiovascular System: Prenatal Period Through Adolescence*, 113 Pediatrics 1058 (2004) (attached in Addendum); *Health Pregnancy Fact Sheet*, New York State Department of Health, *available at*

[5] *See also Foods to Avoid During Pregnancy*, The American Pregnancy Association, *available at* http://americanpregnancy.org/pregnancy-health/foods-to-avoid-during-pregnancy/.

www.health.ny.gov/community/pregnancy/health_care/healthy_pregnancy_fact_sheet.htm; *see also* Frank Bove et al., *Drinking Water Contaminants and Adverse Pregnancy Outcomes: A Review*, 110 Envtl. Health Persp. 61 (2002), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241148/pdf/ehp110s-000061.pdf.

The Family Court's ruling positions the fetus as a protected subject under the FCA and, in doing so, improperly imposes ACS as a monitor of pregnant women. In light of the wide range of actions that pregnant women have been urged to avoid, the ruling gives ACS enormous discretion over the lives of pregnant women. Under the Court's new child protection regime, ACS may file neglect charges against pregnant women for smoking, for living with someone who smokes, for not taking prenatal vitamins, for working in a job that poses a risk to her pregnancy, for taking medication for depression, or for terminating or refusing medication for depression. It will be impossible to know in advance which actions ACS will decide justify neglect charges in any particular case. The unconstitutional consequences of this scheme are addressed below, but the costs to the lives and well-being of pregnant women extend far beyond the constitutional harms.

Because the Family Court's interpretation of the FCA would subject to neglect charges every pregnant woman who takes actions that the state disapproves of, the vast majority of state courts have refused to interpret analogous statutes in

this expansive manner. For example, in *Kilmon v. State*, 905 A.2d 306 (Md. 2006), the Maryland Court of Appeals considered the risks of applying a reckless endangerment statute to women based on their ingestion of drugs during pregnancy and explained:

> [I]f . . . the statute is read to apply to the effect of a pregnant woman's conduct on the child she is carrying, it could well be construed to include not just the ingestion of unlawful controlled substances but . . . [also] everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that may be contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seatbelt while driving to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child.

Id. at 311-312; *see also Reinesto v. Superior Court of State In & For Cnty. of Navajo*, 894 P.2d 733, 736-37 (Ariz. Ct. App. 1995) (recognizing that "[m]any types of prenatal conduct can harm a fetus" and concluding that "[a]llowing the state to define the crime of child abuse according to the health or condition of the newborn child would subject many mothers to criminal liability for engaging in all sorts of legal and illegal activities during pregnancy"); *In re Valerie D.*, 613 A.2d

748, 765 (Conn. 1992) (refusing to apply termination of parental rights statute to cocaine use during pregnancy, and explaining that such an interpretation would have "sweeping consequences" for other maternal conduct); *Stallman*, 531 N.E.2d at 360 (refusing to recognize a tort of maternal prenatal negligence and noting that "the mother's every waking and sleeping moment . . . for better or worse, shapes the prenatal environment which forms the developing fetus"); *Cochran v. Commonwealth*, 315 S.W.3d 325, 328 (Ky. 2010) (ruling that Kentucky's child endangerment law did not apply to a woman who tested positive for cocaine during pregnancy and discussing the many actions and inactions that may affect pregnancy outcomes).

As these courts have recognized, the Family Court's expansion of the FCA to include a fetus within the definition of "child" would make many actions by pregnant women potential grounds for a neglect finding. The judicial expansion of the statute, without any consideration or even acknowledgement of these concerns, is entirely improper.

B. The Family Court's Interpretation Of The FCA Is Likely To Deter Pregnant Women From Seeking Beneficial Services And Healthcare

Because of the lack of clarity regarding the actions, inactions, or circumstances during pregnancy that could lead to a neglect charge, as well as the tremendous discretion given ACS to determine when to file charges against

pregnant women, the Family Court's ruling may deter pregnant women from seeking the services and medical care that are necessary for a healthy pregnancy and birth, for both mother and child. Numerous studies have found that pregnant women are deterred from seeking prenatal care and drug treatment if doing so will raise the possibility or increase the likelihood that they will lose custody of a child.[6] According to a report published by the National Center on Substance Abuse and Child Welfare:

> One key reason for this lack of prenatal care is fear on the part of the pregnant women of punitive action and/or the possible loss of custody of the child as a result of her drug use. Because quality prenatal care is such a critical factor in increasing the likelihood of good birth outcomes, everything possible should be done to ensure that the physician's office is seen as a safe and supportive resource to all pregnant women.[7]

The American College of Obstetricians and Gynecologists has also discouraged legislation that exposes a woman to criminal or civil penalties, such as loss of child

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[6] *See, e.g.*, Sarah C.M. Roberts & Amani Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 Women's Health Issues 193 (2010) (attached in Addendum); Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 J. Maternal & Child Health 333 (2010) (attached in Addendum); Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003) (attached in Addendum).

[7] Nancy K. Young et al., *Screening & Assessment for Family Engagement, Retention and Recovery (SAFERR)*, U.S. Dep't Health & Human Serv., Nat'l Ctr. Substance Abuse & Child Welfare at C-8 (2006) (citing B.M. Lester et al., *Substance Use During Pregnancy: Time for Policy to Catch Up With Research*, 1 Harm Reduction J. 1477 (2004)), *available at* http://www.ncsacw.samhsa.gov/files/SAFERR.pdf.

custody or incarceration, because these measures have proved to be "ineffective in reducing the incidence of alcohol or drug abuse" and instead "puts the therapeutic relationship between the obstetrician-gynecologist and the patient at risk."[8] The Family Court's ruling allows ACS to impose punitive measures upon pregnant women who fail to seek prenatal medical care during their pregnancies. Such punitive measures give credence to a pregnant woman's fear of loss of custody and this fear in turn operates as a deterrent to pursuing prenatal care, assistance in dealing with domestic violence, and labor and delivery care, and discourages the disclosure of critical medical information to health professionals.

C. The Family Court's Interpretation Of The FCA Will Disproportionately Harm Low-Income Communities And Communities Of Color

The Family Court's ruling also increases the potential for discriminatory application of the child welfare laws and risks the unnecessary separation of children from poor and minority parents. Social science and medical research reveal a disturbing prevalence of race and class disproportionality with respect to when and how alleged child abuse and neglect claims are reported to and handled by child welfare authorities. One comprehensive review of studies addressing race

[8] *Substance Abuse Reporting and Pregnancy: The Role of The Obstetrician-Gynecologist*, The American College of Obstetricians and Gynecologists, Committee Opinion No. 473 (2011), *available at* http://acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist.

and class disproportionality in the child welfare system from 2006 revealed that race alone or race interacting with other factors is regularly found to be strongly related to the rate of child welfare investigations and that child maltreatment is reported more often for low-income than middle- and upper-income families with similar presenting circumstances.[9] These findings were confirmed in an updated review in 2011, which found, among other things, that "[w]ith respect to racial bias and discrimination, some data do suggest that community reporters are more likely to report families of color, and several studies indicate that families of color are more likely to be investigated and placed, and less likely to be reunified."[10]

African-American women, in particular, are disproportionately poor and lacking in access to maternal health services, leading to greater rates of health problems among African-American infants.[11] The Family Court's dramatic and

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[9] Robert B. Hill, *Synthesis of Research on Disproportionality in Chile Welfare: An Update*, Casey-CSSP Alliance for Racial Equity in the Child Welfare System at 18, 20 (2006), *available at* http://www.cssp.org/reform/child-welfare/other-resources/synthesis-of-research-on-disproportionality-robert-hill.pdf. *See also* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 New England J. Med. 1202, 1205 (1990) (attached in Addendum) (comparing results of universal testing with the number of cases reported to child welfare authorities and concluding that pursuant to discretionary testing "a significantly higher proportion of black women than white women were reported, even though we found that the rates of substance abuse during pregnancy were similar.").

[10] *Disparities and Disproportionality in Child Welfare: Analysis of the Research*, Center for the Study of Social Policy and The Annie E. Casey Foundation at 64 (2011), *available at* http://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf.

[11] *See Prenatal Care in New York State*, New York State Department of Health ("Several major risk factors are associated with poor pregnancy outcomes, including low birth weight and infant

legislatively unauthorized decision to treat a fetus as a "child" under the FCA is therefore likely to exacerbate the already existing biases in how neglect claims are reported and pursued, further burdening already vulnerable communities.

The Court's misinterpretation of the statute would thus entail significant harmful effects, none of which were considered by the Family Court in its ruling. This Court should ensure that these harms do not come to pass by vacating or reversing this ruling.

IV. THE FAMILY COURT'S MISINTERPRETATION OF THE FCA RENDERS THE STATUTE UNCONSTITUTIONAL

The Court's expansion of Article 10 of the FCA to protect fetuses is not only harmful to pregnant women, but raises serious constitutional concerns as well. The New York Court of Appeals has directed that "'[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results.'" *Matter of Jacob*, 86 N.Y.2d 651, 667 (1995) (*quoting Kauffman & Sons Saddlery Co. v. Miller*, 298

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mortality (deaths). Some of these risk factors include late or no prenatal care, cigarette smoking, alcohol and other drug use, being HIV positive, spacing of pregnancies, maternal age, poor nutrition and socieconomic status. Minority women are more likely to have poorer birth outcomes than the general population."), *available at* http://www.health.ny.gov/community/pregnancy/health_care/prenatal/; *Deadly Delivery: The Maternal Health Crisis in the United States*, Amnesty International, 19-20, 25-26 (2010), *available at* http://www.amnestyusa.org/sites/default/files/pdfs/deadlydelivery.pdf.

N.Y. 38, 44 (1948)). Accordingly, the FCA should be construed to apply only to children, defined as people who have been born less than 18 years ago.

A. The Family Court's Ruling Renders The FCA Unconstitutionally Vague

Fundamental principles of due process guarantee citizens a right to notice as to what actions are proscribed by law. *U.S. v. Harriss*, 347 U.S. 612, 617 (1954) ("The underlying principle is that no man shall be held . . . responsible for conduct which he could not reasonably understand to be proscribed."). A statute violates this right and is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or if it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).[12]

The concern underlying the void for vagueness doctrine is that if a statute is vague as to the conduct it prohibits, the statute may be enforced by the government according to policies that were not specifically endorsed by the legislature and in a manner that is capricious and discriminatory, precluding individuals from conforming their conduct to clear requirements of law and impeding meaningful and consistent judicial review. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984)

[12] The void for vagueness constitutional doctrine applies equally to civil and criminal provisions where there is a deprivation of guaranteed rights. *See Hayes v. New York Attorney Grievance Comm. of the Eight Judicial Dist.*, 672 F.3d 158, 168 (2d Cir. 2012).

(explaining that the requirement that the government articulate "its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review").

Courts have recognized that "[t]he danger of arbitrary enforcement is especially grave in the highly subjective context of determining an approved mode of child rearing"; as a result, courts have invalidated child welfare laws that fail to put parents on notice of the types of prohibited conduct. *Gov't of Virgin Islands v. Ayala*, 853 F. Supp. 160, 162, 164 (D.V.I. 1993) (holding that child abuse statute was void for vagueness because "it fails to delineate the degree of risk, and of injury, sufficient to trigger the imposition of criminal penalties" and "grants law enforcement an unrestricted license to intervene in the family sphere"); *see also Alsager v. Dist. Court of Polk Cnty.*, 406 F. Supp. 10, 21 (S.D. Iowa 1975) (holding Iowa parental termination standards unconstitutionally vague because "(1) they do not . . . give fair warning of what parental conduct is proscribed, (2) they permit . . . arbitrary and discriminatory terminations, [and] (3) they inhibit . . . the exercise of the fundamental right to family integrity").

As interpreted by the Family Court, Article 10 of the FCA is unduly vague and provides no notice to pregnant women of what actions or non-actions during pregnancy could potentially be found to constitute neglect and lead to state-imposed separation from a child when the child is born—the determination is left to ACS and the Family Court after the fact. A pregnant woman in New York will not know whether smoking or living with a smoker, ingesting any amount of alcohol, or eating sushi will subject her to a neglect claim. Because many factors may contribute to the risk of a fetus being harmed, the extent of acts that will be considered to constitute neglect is unknown and cannot provide notice of the possibility of state action. Indeed, the variables involved are so numerous and imprecise that leading medical experts would likely not agree in many particular cases whether certain conduct by parents-to-be is or could be harmful to a fetus. And yet, the Family Court's ruling permits ACS and the courts to make those determinations on an ad hoc basis.

Providing the state with such unbounded discretion to proscribe and regulate pregnant women's lives without any discernible guideline will likely result in a high risk of arbitrary and discriminatory enforcement of the FCA. For the reasons described above, numerous courts have rejected interpretations similar to that of the Family Court as unduly vague. *See, e.g.*, *Morabito*, 580 N.Y.S.2d at 843 (dismissing indictment charging defendant with endangering welfare of child when

indictment was based upon actions prior to birth); *State v. Martinez*, 137 P.3d 1195, 1197 (N.M. Ct. App. 2006) (holding that the state's interpretation of a statute to include a "fetus" within the definition of a "child" would violate due process rights by denying fair notice and is void for vagueness); *Reinesto*, 894 P.2d at 736 ("Because the statutory reference to 'child' does not include a fetus, petitioner could not reasonably have known she could be prosecuted for child abuse because of her prenatal conduct. Accepting the state's interpretation also would render the statute vague.") (internal citations omitted).

As interpreted by the Family Court, the FCA gives no notice to pregnant women regarding the actions that might lead to charges of neglect after the child is born. The Family Court's order should be vacated or reversed in order to prevent this unconstitutional result.

B. The Family Court's Decision Violates The Fundamental Rights To Privacy, Liberty, And Bodily Integrity

The right to privacy, liberty, and bodily integrity are well-established as fundamental rights under the United States Constitution. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."). The Family Court's expansion of the FCA infringes upon these rights in a number of ways, including by intruding into the realm of decision-making about pregnancy-related

medical care and the activities of pregnant women. This new FCA would subject pregnant women to an unprecedented level of government control over every facet of their lives, including where and with whom they live, where they work, what they eat, how often they go to the doctor, the extent to which they follow their doctor's advice, and more. In light of the serious constitutional problems it would raise, the Family Court's ruling should be vacated or reversed.

1. The Family Court's Decision Interferes With Pregnant Women's Fundamental Rights To Make Decisions Concerning Conception, Childbearing, and Family Relationships

The fundamental right to privacy protects decisions in "matters relating to marriage, procreation, conception, family relationships, and child rearing and education," such that there are "limitations on the States' power to substantively regulate [this] conduct." *Paul v. Davis*, 424 U.S. 693, 713 (1976); *see also Carey v. Population Servs., Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of . . . the right of privacy."); *U.S. v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128 n.4 (1973) (the right to privacy "encompasses the intimate medical problems of family, marriage, and motherhood"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (reiterating "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether

to bear or beget a child"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing that there is a "private realm of family life which the state cannot enter"); *Gottlieb v. Cnty. of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) ("It is established that parents have a fundamental, constitutionally protected liberty interest in the custody of their children."). The New York State Constitution protects an analogous privacy right. *See Hope v. Perales*, 83 N.Y.2d 563, 575 (1994) (noting as undisputed that "the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by [the New York] State Constitution, is at least as extensive as the Federal constitutional right").

Women do not surrender this fundamental privacy right upon becoming pregnant. To the contrary, this fundamental privacy right protects women from measures that have the effect of penalizing them for their pregnancies. In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Supreme Court held that a rule requiring pregnant school teachers to take unpaid maternity leave at arbitrarily-defined times prior to childbirth was unconstitutional. The Court emphasized that "freedom of personal choice in matters of marriage and family life is one of the [long-recognized] liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id*. at 639-40.

Like the mandatory leave rule struck down in *LaFleur*, the Family Court's rewriting of the FCA imposes novel restrictions on legal acts by pregnant women,

subjecting these women to the threat of a neglect claim based on the arbitrary determination of ACS officials about which prenatal behaviors constitute risks. Granting the government such expansive control over the intimate decisions of pregnant women is a dramatic intrusion upon their fundamental privacy rights. This interpretation of the FCA creates serious constitutional concerns, and the doctrine of constitutional avoidance demands its rejection.

2. The Family Court's Decision Interferes With Pregnant Women's Fundamental Rights To Bodily Integrity

The United States Constitution likewise guarantees the right to be free from bodily restraints and physical confinement. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). This protection extends to an individual's decision regarding medical treatment. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) ("The Fourteenth Amendment provides that . . . a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) (recognizing the "substantial liberty interest in not being confined unnecessarily for medical treatment"). A woman does not give up these constitutional rights simply by becoming pregnant. *See Ferguson v. City of Charleston*, 532 U.S. at 85-86 (holding that women do not lose their Fourth

Amendment rights against unreasonable searches and seizure as a result of pregnancy and those rights cannot be overridden to further an alleged state interest in fetal health); *Wilner*, 601 N.Y.S.2d at 521 ("Clearly women do not lose their constitutionally protected liberty when they marry or when they are pregnant.") (citation and quotation marks omitted).

A pregnant woman's right to make her own medical decisions is well-illustrated by the case of *In re A.C.*, 573 A.2d 1235 (D.C. 1990), where the D.C. Court of Appeals held that the lower court erred in permitting a caesarean section to be performed on a dying pregnant woman without her consent in an attempt to save her fetus. "[C]ourts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health," as "the right to accept or forego medical treatment is of constitutional magnitude." *Id*. at 1243-44. Moreover, "a fetus cannot have rights in this respect superior to those of a person who has already been born." *Id*. at 1244.

The Family Court's interpretation of the FCA infringes upon this right. If a pregnant woman's acts and omissions during pregnancy can form the basis of a neglect proceeding, a woman who is battling depression prior to and during her pregnancy may be charged with child neglect whether she exercises her fundamental right to refuse medication for her condition during pregnancy or instead chooses to continue taking anti-depressants and it is determined that the

medication is harmful to the fetus. Women who battle other conditions, such as heart disease, diabetes, arthritis, and any number of other chronic conditions, would likewise be subject to a neglect proceeding if they exercised their right to accept or reject medical treatment for these conditions during pregnancy.

The Family Court's interpretation of the FCA may therefore operate to deny pregnant women their rights to choose or refuse medical treatment and reduce them to mere carriers of their unborn children. Because the statute need not be read as the Family Court did, and is, in fact, more plausibly read to protect only children, meaning those who have been born, there is no need to inflict these constitutional and other harms and this Court should therefore vacate or reverse the Family Court's ruling.

CONCLUSION

The Family Court improperly read the FCA to include a fetus within its application to a "child." This ruling is incorrect as a matter of statutory interpretation, threatens significant harms to pregnant women and their families, and renders the FCA unconstitutional. As a result, Amici respectfully request that the Family Court's ruling be vacated or reversed.

Dated: New York, New York
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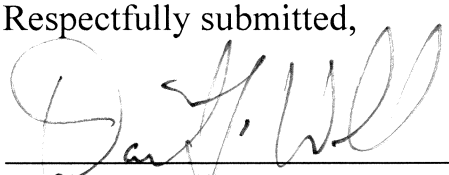
Respectfully submitted,



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