No. CAF 05-00242

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

MATTER OF BOBBIJEAN P.

MONROE COUNTY DEPARTMENT OF HUMAN AND HEALTH SERVICES, NOW KNOWN AS DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

-v-

STEPHANIE P.,
Respondent-Appellant,
and

RODNEY E.,
Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT

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PRELIMINARY STATEMENT AND INTEREST OF AMICI CURIAE

At first glance, this case appears to concern little more than a routine child protective services intervention into the family of a child, Bobbijean P.—a sad, but all too common story of a family burdened by drug dependency and poverty. In fact, this case represents an extraordinary and troubling intrusion into "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race," see Skinner v. Oklahoma, 316 U.S. 535 (1942)—the right to procreate.

In the decision underlying the appealed-from order in this child neglect proceeding, Family Court Judge Marilyn O'Connor ordered the Respondent (now Appellant) Stephanie P. [hereinafter "Respondent" or "Stephanie P."], a homeless, African-American woman struggling with drug addiction, not to become pregnant again "until she has actually obtained custody and care of [her child] Bobbijean P. and every other child of hers who is in foster care and has not been adopted or institutionalized." In re Bobbijean P., No. 03626-03, 2004 WL 834480, at *4 (Sup. Ct. Monroe Cty. Mar. 31, 2004) [hereinafter "Decision and Order"]. (The Court imposed a similar order on the child's father, Rodney E., which is not being appealed.) In so doing, the Court went beyond its mandate of protecting Bobbijean P—and indeed, far exceeded its authority as a court of law.

In effect, the Decision and Order creates a "financial means test" for parenting, requiring the Respondent to obtain prior government approval in order to procreate. By placing the burden on Stephanie P. to meet court-imposed conditions before she is "allowed" to become pregnant, the Decision and Order effectively requires that she abstain from sexual intercourse, use birth control, or undergo sterilization or

abortion. Such a requirement is unprecedented in the context of a child neglect proceeding, and there should be no question that it is impermissible, both as a matter of law and public policy.

The policy implications of such a dramatic intrusion into procreative autonomy and bodily integrity are far-reaching. The Decision and Order sets a dangerous precedent for monitoring by the courts of the sexual and procreative choices made by certain types of people—namely, people struggling with poverty and addiction. Such a precedent is all the more troubling given that it would have a particularly severe impact on racial and socioeconomic minorities, who are already disproportionately involved in the child welfare system. The reasoning of the Decision and Order also harks back to the kinds of racial, ethnic, and economic arguments commonly used to justify eugenic policies and practices, which purport to "[improve] the qualities of the human species [by] discouraging reproduction by persons having genetic defects or presumed to have inheritable undesirable traits." See Random House Unabridged Dictionary (2006). Should such state intrusion and punitive measures be countenanced by the court, this would undoubtedly deter families from seeking needed services, including prenatal care, drug treatment, and social services.

The Decision and Order relies on numerous assumptions not supported by scientific evidence regarding the impact of drugs on fetal and child health, the effects of drug use on parenting, and the availability of social services for people struggling with poverty and addiction—almost all of which were outside the record. What is even more shocking, the Family Court issued this extraordinary condition without notice to the Respondent that any such matter would be decided, and after a fact-finding hearing at

which neither Stephanie P. nor a legal representative was present. She was therefore unable to refute the factual allegations upon which the Decision and Order is based, or to challenge any of the numerous assumptions concerning poverty, neglect or drug treatment it employs in its reasoning. The no-pregnancy condition thus raises serious due process concerns because Respondent Stephanie P. had no notice—actual or constructive—that such restriction might be imposed.

Finally, the Family Court's Decision and Order blatantly contravenes long-standing state and federal constitutional protections for reproductive decisionmaking and personal autonomy. In issuing the no-pregnancy condition, the Family Court failed to recognize that fundamental rights were at stake, including the right to procreate, the right to privacy in intimate matters, and the right to determine the course of one's own medical care. As a result, the Family Court applied the wrong standard for assessing the constitutionality of the no-pregnancy condition. It therefore radically reinterpreted longstanding precedent, holding that the right to procreate only exists insofar as an individual has the financial ability to raise any potential children. The law has never been so restricted.

To allow such an order to stand would legitimize extraordinary state intrusion into private decisions concerning procreation, child rearing, and intimate relations as well as lend credence to the prejudices and false assumptions underlying the rationale of the no-pregnancy condition. Because of these disturbing and far-reaching policy implications, because the Family Court relied on flawed and incomplete factual record, and because the Decision and Order applied the wrong constitutional analysis, Amici respectfully request this Court to vacate the Decision and Order.

Descriptions of Amici Curiae

Amici's interest in this case stems from their significant expertise in the fields of child welfare, public health, reproductive health and rights, and drug addiction. Amici have specialized knowledge about the impact of punitive policies on women struggling with addiction, and about the effect of policies that permit state intrusion into women's reproductive health care decisions. Some Amici work directly with people struggling with addiction. Others work with children and families involved in the foster care system. Still others focus on reproductive health and rights, and are concerned about the punitive treatment of pregnant women who are struggling with addiction. All are deeply concerned about the potentially far-reaching and harmful implications of the Decision and Order.

Amicus Curiae American Society of Addiction Medicine (ASAM) is an association of 3,000 physicians dedicated to improving the treatment of alcoholism and other addictions, educating physicians and medical students, promoting research and prevention, and enlightening and informing the medical community and the public about these issues.

Amicus Curiae BirthNet is a nonprofit grassroots organization that seeks to educate the public about evidence-based, mother-friendly maternity care in order to improve such care for all women.

Amicus Curiae Center for Gender and Justice seeks to develop gender-responsive policies and practices for women and girls who are under criminal justice supervision. The Center for Gender and Justice is generally interested in protecting the rights of women and girls, including the right to procreate.

Amicus Curiae Center for Reproductive Rights (the Center) is a national public interest law firm dedicated to preserving and expanding reproductive rights in the United States and throughout the world. The Center's domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services. The Domestic Legal program of the Center specializes in litigating reproductive rights cases throughout the United States.

Amicus Curiae Child Welfare Organizing Project (CWOP) was founded in 1994 and is made up of New York City parents and professionals who seek reform of New York City child welfare practices through increased, meaningful parent /client involvement in child welfare decision making at all levels, from case planning to policy, budgets and legislation. CWOP has approximately 1,500 parent members. Most of CWOP's staff, and about half of CWOP's Board of Directors, are parents who have had direct, personal involvement with the Administration for Children's Services (ACS). A significant percentage of CWOP members are mothers in recovery. CWOP works to influence public policy so that systems effectively identify and address real problems and challenges to successful family life in New York City, and ultimately protect children by helping and strengthening their families and communities.

Amicus Curiae Citizens for Midwifery is a non-profit, volunteer, grassroots organization. Founded by several mothers in 1996, it is the only national consumer-based group promoting the Midwives Model of Care.

Amicus Curiae Doctors of the World-USA (DOW-USA) was founded in 1990 by a group of volunteer physicians and is an international health and human rights organization working in areas where health is diminished or endangered by violations of human rights and civil liberties. DOW-USA works within a network of twelve Médecins du Monde/ Doctors of the World delegations, and combined, DOW delegations are active in over 90 countries.

Amicus Curiae Drug Policy Alliance (the Alliance) is the nation's leading advocacy organization dedicated to broadening the public debate over drug use and regulation and to advancing pragmatic drug laws and policies, grounded in science, compassion, public health and respect for human rights. The Alliance is a non-profit, non-partisan organization with more than 25,000 members and active supporters nationwide. The Alliance has actively taken part in cases in state and federal courts across the country in an effort to bring current scientific and public health data to bear on drug-related issues, and to combat irrational fears, prejudices and misconceptions about various drug-related matters that have, with regrettable frequency, distorted sound public policies regarding drug users and their families.

Amicus Curiae The Family Defense Clinic, Washington Square Legal Services (FDC) is a multi-disciplinary legal clinic at New York University School of Law that is devoted to training future professionals to represent parents and other relatives of children involved in the foster care system. FDC focuses on preventing the unnecessary break-up of indigent families and assisting separated families in reuniting by (a) representing individual parents, relatives and foster parents of children who are in or at risk of foster care placement and by (b) undertaking projects designed to improve the

experiences of families with the foster care and family court systems.

Amicus Curiae Family Justice is an organization that draws on the unique strengths of families and neighborhoods to break cycles of involvement with the criminal justice system. Family Justice assists government and communities by providing direct services, testing methodologies that promote change, delivering training and consulting to encourage use of its methods, and serving as a resource for both the criminal justice field and the general public.

Amicus Curiae Family Planning Advocates of New York State (FPA) is a non-partisan, non-profit statewide membership organization dedicated to advancing public policies that fulfill the rights of individuals to comprehensive sexual and reproductive health services and education that are consistent with principles of justice and fairness and respect diversity, personal dignity and privacy.

Amicus Curiae Feminists Choosing Life of New York (FCLNY) is a non-sectarian pro-woman organization defined by a philosophy of feminism that opposes abortion. FCLNY believes that all people, by virtue of their human dignity, have a right to live without violence. FCLNY is one of 206 member organizations of Consistent Life, a coalition that opposes war, abortion, euthanasia, racism, the death penalty and economic injustice.

Amicus Curiae Global Lawyers and Physicians (GLP) is a non-profit non-governmental organization that was formed in 1996 to reinvigorate the collaboration of the legal and medical/public health professions to protect the human rights and dignity of all persons. GLP provides support and assistance in developing, implementing and advocating public policies and legal remedies that protect and enhance human rights in

health.

Amicus Curiae Harm Reduction Coalition (HRC) is a national advocacy and capacity-building organization that promotes the health and dignity of individuals and communities impacted by drug use. HRC advances policies and programs that help people address the adverse effects of drug use including overdose, HIV, hepatitis C, addiction, and incarceration. The organization recognizes that the structures of social inequality impact the lives and options of affected communities differently, and works to uphold every individual's right to health and well-being, as well as enhance their competence to protect themselves, their loved ones, and their communities.

Amicus Curiae Institute for Health and Recovery (IHR) is a statewide service, research, policy, and program development agency. IHR's mission is to develop a comprehensive continuum of care for individuals, youth, and families affected by alcohol, tobacco, and other drug use, mental health problems, and violence/trauma. Since its founding in 1989, the Institute for Health and Recovery has worked across systems to develop gender-specific and trauma-informed models of prevention, early identification, intervention, and treatment services.

Amicus Curiae National Association of Nurse Practitioners in Women's Heath (NPWH), was founded in 1980. The mission of NPWH is to assure the provision of quality health care to women of all ages by nurse practitioners. NPWH's mission includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

Amicus Curiae National Coalition for Child Protection Reform (NCCPR), a tax-exempt, non-profit organization founded at a 1991 meeting at Harvard Law School,

is an organization of professionals drawn from the fields of law, academia, psychology, social work and journalism, who are dedicated to improving child welfare systems through public education and advocacy.

Amicus Curiae National Council on Alcoholism and Drug Dependence (NCADD), was founded in 1944. With its nationwide network of affiliates, provides education, information, and hope in the fight against the chronic diseases of alcoholism and other drug addictions. In 1990, the NCADD Board of Directors adopted a policy statement on "Women, Alcohol, Other Drugs and Pregnancy" recommending that "[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services."

Amicus Curiae National Economic and Social Rights Initiative (NESRI) promotes a human rights vision for the United States that ensures dignity and access to the basic resources needed for human development and civic participation. NESRI is concerned with the fundamental right to bear children within the broader context of a society that systematically withholds essential health care from those suffering from the illness of addiction and fails to provide basic social protection that would ensure an adequate standard of living to a significant proportion its population—despite government access to wealth and resources.

Amicus Curiae National Institute for Reproductive Health (the Institute) is a non-profit organization that was established to examine access to reproductive health services and develop innovative, proactive approaches to expand the availability of abortion and family planning services in states all across the nation. The Institute's

mission is to work with local organizations to confront issues that are national in significance, yet are best addressed through locally managed initiatives.

Amicus Curiae National Latina Institute for Reproductive Health (NLIRH) works to ensure the fundamental human right to reproductive health care for Latinas, their families and their communities through education, policy advocacy, and community mobilization. NLIRH believes that coercive, discriminatory and/or punitive policies and practices (such as the criminalization of pregnant substance users) differentially impact Latinas and other women of color.

Amicus Curiae National Women's Health Network (NWHN) was founded in 1975 to give women a greater voice within the healthcare system. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN aspires to a health care system that is guided by social justice and reflects the needs of diverse women.

Amicus Curiae New York Friends of Midwives (NYFOM) is a statewide organization that promotes the availability of more midwives for more women in more settings throughout all stages of a woman's life.

Amicus Curiae New York State Perinatal Association (NYSPA) is a state-wide alliance of health and human service professionals and consumers concerned with perinatal health issues from preconception through early childhood. NYSPA advocates for optimal perinatal care and parenting by promoting education and research, influencing state priorities and encouraging a multi-cultural and multi-disciplinary approach to maternal and child health.

Amicus Curiae National Organization for Women-New York State

(NOW-NYS) is comprised of 23 chapters and 40,000 supporters who believe that every woman has an individual right to choose to procreate or not.

Amicus Curiae Our Bodies Ourselves (OBOS) provides clear, truthful information about health, sexuality and reproduction from a feminist and consumer perspective. OBOS vigorously advocates for women's health by challenging the institutions and systems that block women from full control over their bodies and devalue their lives.

Amicus Curiae Physicians for Reproductive Choice and Health (PRCH) seek to enable concerned physicians to take a more active and visible role in support of universal reproductive health. PRCH is dedicated to ensuring that all people have the knowledge, equal access to quality services and freedom of choice to make their own reproductive health decisions.

Amicus Curiae Planned Parenthood of the Rochester/Syracuse Region (Planned Parenthood) provides health care services at nine health centers throughout the Rochester/Syracuse area, serving 19,000 patients a year. Planned Parenthood offers this Court the unique perspective of a health and social services provider to underserved populations in the Rochester region.

Amicus Curiae SisterSong Women of Color Reproductive Health Collective is an organization dedicated to amplifying and strengthening the collective voices of Indigenous women and women of color to ensure reproductive justice through securing human rights. SisterSong educates women of color on reproductive and sexual health and rights, and works to improve access to health services, information and resources that are culturally and linguistically appropriate through the integration of the

disciplines of community organizing, self-help and human rights education.

Amicus Curiae Voices of Women Organizing Project of the Battered Women's Resource Center (VOW) is a not-for-profit organization that supports the advocacy efforts of survivors of domestic violence to improve the many systems to which battered women and their children turn for safety, assistance and justice. Since 2000, VOW members have been working to improve family courts in New York State, as well as the child welfare, homeless and welfare systems that battered women often feel fail them. VOW believes that the Appealed-from Order will have ramifications on the reproductive health rights of battered women that the organization advocates for and serves.

Amicus Curiae Katherine Arnoldi is the author of The Amazing True Story of a Teenage Single Mom (1998). She is an activist for equal access to education for pregnant and parenting students. Arnoldi has a specific interest in social policies that have a harmful impact on pregnant teens and students.

Amicus Curiae Jeffrey Blustein, Ph.D. is a Professor of Bioethics at Albert Einstein College of Medicine and clinical ethicist at Montefiore Medical Center. In the course of his ethics teaching and consultation, he has often dealt with issues related to reproductive decision making. Dr. Blustein is extremely troubled by the use of coercive state measures to restrict the reproductive liberty of women—typically low-income and disadvantaged women—or to penalize them for their reproductive decisions and behavior.

Amicus Curiae Wendy Chavkin, M.D., M.P.H., is a Professor of Clinical Public Health and Obstetrics/Gynecology at Columbia University, Mailman School of

Public Health and College of Physicians and Surgeons in New York City. She is a 2004-2005 Fulbright New Century Scholar conducting research on policies relating to fertility decline. She has written extensively about women's reproductive health issues for over two decades. She has done extensive programmatic and policy research related to illegal drug use by pregnant women, punishment and lack of care.

Amicus Curiae Ernest Drucker is Professor in the Departments of Epidemiology, Family and Social Medicine, and Psychiatry at Montefiore Medical Center/Albert Einstein College of Medicine in New York City, and Visiting Professor of Epidemiology at Columbia University's Mailman School of Public Health. Dr. Drucker is concerned about policies which hark back to a history of state control of the reproductive rights of the poor and powerless because he believes that they ultimately distract from the agenda of true child protection.

Amicus Curiae Fonda Davis Eyler, Ph.D., is a Professor in the Department of Pediatrics of the University of Florida College of Medicine in Gainesville, Florida. She is also a licensed Developmental Psychologist. Dr. Eyler is Developmental Director of Early Steps, an early intervention program for children from birth to three years of age and specializes in the study of effects of early risk factors on child development.

Amicus Curiae Barry M. Lester, Ph.D., is Professor of Psychiatry & Human Behavior and Pediatrics at Brown Medical School and a member of the National Advisory Council on Drug Abuse. He is founder and Director of the Brown Center for the Study of Children at Risk at Women & Infants Hospital and Brown Medical School. His specialty is developmental processes in infants at risk, including infants with prenatal substance exposure. Dr. Lester is also the author of more than 200 scientific publications

and 16 books.

Amicus Curiae Paul A. Lombardo, J.D., Ph.D. is a Professor of Law at Georgia State University's College of Law in the Center for Law, Health and Society. He has published extensively on topics in health law, medico-legal history, and bioethics and is particularly well known for his work on the history of the American eugenics movement. He was the last scholar to interview Carrie Buck, the petitioner in Buck v. Bell, 273 U.S. 200 (1927), the infamous case that upheld state laws mandating eugenic sterilization of the so-called "socially inadequate." Professor Lombardo has been instrumental in the movement, successful thus far in seven states, to solicit gubernatorial apologies and legislative denunciations of past state eugenic laws. His book Three Generations, No Imbeciles: Eugenics, the Supreme Court and Buck v. Bell, will be published by Johns Hopkins University Press in 2008.

Amicus Curiae Howard Minkoff, M.D., is the Chair of the Department of Obstetrics and Gynecology at Maimonides Medical Center, and a distinguished Professor of Obstetrics and Gynecology at the State University of New York Health Science Center at Brooklyn. He is a member of the Ethics Committee of the American College of Obstetricians and Gynecologists and he sits on the editorial board or is an editorial consultant to almost all of the most prominent medical journal, including JAMA, New England Journal of Medicine, Lancet, and hundreds of articles, and is internationally recognized expert on HIV disease and high risk pregnancy. Professor Minkoff has conducted years of grand scale research, supported by millions of dollars of grants, concerning the reproductive behaviors of low-income women, many with drug abuse problems. Through his work with these women, he has developed widely adopted

treatment protocols and ethical guidelines.

Amicus Curiae Daniel R. Neuspiel, M.D., M.P.H., is Associate Chairman of Pediatrics at Beth Israel Medical Center in New York City and Associate Professor of Pediatrics and of Epidemiology and Population Health at Albert Einstein College of Medicine in Bronx, New York. He is a pediatrician and epidemiologist, has cared for hundreds of drug-affected infants and children, has conducted research on the impact of maternal substance use and abuse on infants, and has lectured widely as an expert on this topic.

Amicus Curiae Robert G. Newman, M.D., is President Emeritus of Continuum Health Partners, Inc, comprising four hospitals, which houses the largest chemical dependency treatment services of any health care system in the United States. He is a Professor of Epidemiology and Population Health and Professor of Psychiatry at the Albert Einstein College of Medicine, and a former member of the Board of Commissioners of the Joint Commission of Accreditation of Health Care Organizations. Dr. Newman has very extensive experience with addiction treatment over the course of more than three decades and has played a major role in the development of addiction treatment in the U.S., Australia, Asia and Europe.

Amicus Curiae Ruth Rose-Jacobs, Sc.D., is Professor of Pediatrics and a Research Scientist at the Boston University School of Medicine. Her major research interests include the development of typical and high-risk infant/children and their families—due to biological and social factors including substance abuse, violence, maternal depression, prematurity, and food insufficiency. She has also served as co-investigator on numerous studies regarding the effects of cocaine exposure in fetuses and

has traced these individuals for years after birth.

Amicus Curiae Barbara Katz Rothman is a Professor of Sociology at the City University of New York, and author of many books and articles on issues related to motherhood, including Weaving a Family: Untangling Race and Adoption (2006); Recreating Motherhood (2000); The Tentative Pregnancy: How Amniocentesis Changes the Experience of Motherhood (1993); Laboring On: Birth in Transition in the United States (Perspectives on Gender) (2006) (with Wendy Simonds and Bari Meltzer Norman), and a work on the human genome project, The Book of Life: A Personal and Ethical Guide to Race, Normality and the Human Gene Study (2001). She is a feminist sociologist who has studied issues of eugenics in the American past and in contemporary forms.

ARGUMENT

The Family Court's Decision and Order should be vacated because of its far-reaching and dangerous policy implications, and because it was legally impermissible as a violation of the Respondent/Appellant's substantive and procedural due process rights. The Decision and Order sets a dangerous precedent for monitoring by the courts of the sexual and procreative choices made by certain types of people—namely, low-income individuals and people struggling with poverty and addiction. Moreover, the Decision constitutes an abuse of discretion, in that it (a) relies on a faulty and incomplete factual record; (b) relies on facts outside the record, violating the Appellant's rights to due process of law; (c) fails to recognize the Appellant's fundamental rights and applies the wrong constitutional standards; and (d) violates international human rights principles.

See In re Precyse T., 788 N.Y.S.2d 542, 543 (4th Dept. 2004) (conducting a searching abuse of discretion review of a Family Court's denial of a Motion to Vacate a default judgment); In re Anna B., 637 N.Y.S.2d 182, 183 (2d Dept. 1996) (reversing family court for failure to rely on a full and complete record); Pringle v. Pringle, 744 N.Y.S.2d 784, 785-86 (App. Div. 4th Dept. 2002) (reversing family court for relying on facts not properly introduced into evidence); Daghir v. Daghir, 56 N.Y.2d 938, 940 (1982) (reversing for legal error); Deborah J.B. v. Jimmie Lee E., 818 N.Y.S.2d 388, 390 (App. Div. 4th Dept. 2006) (reversing for violation of due process).

I. THE NO-PREGNANCY CONDITION HAS POTENTIALLY FAR-REACHING AND HARMFUL POLICY IMPLICATIONS.

A. THE CASE IS NOT MOOT BECAUSE THE NO-PREGNANCY CONDITION COULD BE REPEATED BY JUDGE O'CONNOR OR COPIED BY OTHER COURTS, INFRINGING THE RIGHTS OF THE APPELLANT OR OTHER INDIVIDUALS.

Amici are deeply concerned that although the no-pregnancy condition is no longer in effect, having been lifted upon the order granting permanent custody of Bobbijean to her aunt (Applnt. Br. 10), the condition could be viewed by other courts as an appropriate response to issues of poverty, pregnancy, and drug use, and thus replicated more broadly.

For the reasons discussed in the Appellant's brief, this appeal falls squarely within the exception to the mootness doctrine permitting consideration of cases that are "likely to recur, typically evade[] review, and raise[] a substantial and novel question." Saratoga County Chamber of Commerce v Pataki, 100 N.Y.2d 801, 811 (2003); accord In re Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714-15 (1980); People ex rel.

Maxian v. Brown, 77 N.Y.2d 422, 425 (1991). Unlike federal courts, New York courts have not imposed the strict a requirement that the situation must be likely to recur as to the same parties. Compare City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) ("[C]apable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality."), with In re M.B., 6 N.Y.3d 437, 447 (2006) (permitting review of case involving cessation of life-support order even though the petitioner had already passed away). Even so, given the fact that Stephanie P. has already been before the Family Court at least three times before, any allegation of abuse or neglect in the future would bring her back before the Family Court—and before Judge O'Connor—again. Hence, the controversy could even arise as between these two parties again.

The present case satisfies all three criteria for the mootness exception. First, it is clear that the situation is likely to reoccur because both Judge O'Connor and her former law clerk, Patricia Gallaher, now a Family Court judge, have overtly signaled their willingness to impose such orders on future litigants. See Decision and Order at *5; 2006 Voter Guide: Candidate Biography, http://www.courts.state.ny.us/vote/2006/bios/Patricia_Gallaher.shtml (personal statement of Gallaher boasting that she had authored several "newsmaker" opinions for Judge O'Connor, among them "two ordering drug-addicted parents to stop conceiving children until they could get current children out of foster care"). In fact, shortly after the Decision and Order was entered in the instant case, Judge O'Connor issued an identical order in In re Anna E., 800 N.Y.S.2d 358 (Monroe Cty. Fam. Ct. 2004) (cited in In re

Bobbijean P., No. NN03626-03, slip op. at 7 (Mar. 31, 2004) [hereinafter Decision and Order on Motion to Vacate])

Further, Amici fear that if the Decision and Order is left standing, judges in other courtrooms or venues will follow suit. Indeed, criminal courts across the country have already instituted procreation bans in various types of cases. See generally, Rachel Roth, "No New Babies?": Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems, 12(3) J. Gender, Social Policy & Law 391 (2004) (describing no procreation orders in cases from 1967-2002); Jeanne Flavin, Our Bodies, Our Crimes (NYU Press forthcoming) (describing the imposition of no procreation orders in criminal cases) (on file with NYCLU); Alyson Raletz, No More Children, Judge Orders: Probation Hinges on Not Giving Birth, St. Joseph News-Press, Oct. 18, 2006, available at http://www.stjoenews-press.com/main.asp?Search=1&ArticleID=85488&SectionID=81&SubSectionID=272&S=1 (discussing an order prohibiting a woman who pled guilty to forgery from becoming pregnant again as a condition of her probation).

Second, given the typical time period that elapses between the time that an order is issued and an appeal can be perfected (not to mention the time-limited nature of the condition which would give rise to a violation of the order—a nine-month pregnancy) the chances of an appeal reaching an appellate court before the underlying order is lifted are slim, making review of such orders unlikely. See In re Kevin R., 674 N.Y.S.2d 226 (App. Div. 4th Dept. 1998) (reversing Family Court even though protection order had expired in light of the fact that father would be unlikely to obtain expedited review of a six-month extension of child custody placement order because he lacked the financial

means to do so). Courts have also considered the lasting consequences that an order which no longer technically applies may have on the appellant's life. See, e.g., Cindy L.S. v. David L.S., 669 N.Y.S.2d 306 (App. Div. 2d Dept. 1998) (reversing Family Court even though protection order had expired, in light of the order's "enduring consequences" on the respondent husband).

Third, as the Decision and Order itself acknowledges, the decision clearly raises novel questions of law and important issues of public policy. See Decision & Order at *3. Indeed, amici's involvement in this case stems from their concern that such orders will be repeated, setting novel and damaging legal precedent, with troubling implications for public policy and public health. Therefore, because this case meets all of the requirements of the mootness doctrine, and because of the extraordinary nature of the no-pregnancy condition, the court should reach the legal issues presented here on appeal.

B. BROADER APPLICATION OF THE NO-PREGNANCY CONDITION WOULD DISPROPORTIONATELY HARM VULNERABLE POPULATIONS, PARTICULARLY LOW-INCOME FAMILIES AND COMMUNITIES OF COLOR.

Amici are deeply concerned by the potential acceptance of the no-pregnancy condition, because were such conditions to become regularly imposed in the context of family or criminal court proceedings, low-income people and people of color would be disproportionately impacted.

Children raised in poverty are more likely than other children to be reported to child protective services and to be placed in substitute care. See Susan L. Brooks & Dorothy E. Roberts, Social Justice and Family Court Reform, 40 Fam. Ct. Rev. 453, 453 (2002). See also generally Nina Bernstein, The Lost Children of Wilder (2001); Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002); Leroy H. Pelton,

For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in America (1989). Indeed, nationally, poverty level is the most accurate predictor of foster care placement and duration of a child's foster care placement. Pelton, supra, at 63; Brooks & Roberts, supra, at 453. In addition, black children constitute almost half of the national foster care population, although they represent less than one-fifth of the nation's children. Id. at 63. A study by the United States Department of Health and Human Services found that black children are placed in foster care at twice the rate of white children. U.S. Dep't Health & Human Servs., Children's Bureau, National Study of Protective, Preventive and Reunification Services Delivered to Children and Their Families (1997). Latino and Native American children are disproportionately represented in the foster care system as well. Brooks & Roberts, supra, at 453.

Similar patterns existed with regard to both poverty and foster care placement in Monroe County at around the time the Decision and Order in the instant case was imposed. According to the County's own statistics, non-white children in Monroe County were far more likely to live in poverty than white children. Monroe County Dep't of Human Servs., 2007-2009 Child and Family Services Plan—Strategic Component 30 (2006), available at http://www.monroecounty.gov/hs-index.php (last visited July 16, 2007) (follow "2007-2009 Child and Family Services Plan—Strategic Component" hyperlink). African-American children represented over 35% of the 1017 children in foster care, id. at 49, although African Americans constitute only 14% of Monroe County's residents, see id. at 21. Non-white families are thus far more likely than white families to be reported to child protective services, putting non-white and low-

income parents at much higher risk of being subjected to family court-ordered restrictions on procreation than middle class and wealthy white parents.

This does not mean, however, that non-white or low-income parents actually neglect or abuse their children at rates higher than white parents or parents who are financially secure. In 1996 the Department of Health and Human Services published the Third National Incidence Study of Child Abuse and Neglect (NIS-3), finding "no significant race differences in the incidence of maltreatment or maltreatment-related injuries uncovered in either the NIS-2 or the NIS-3." Instead,

> [t]he NIS findings suggest that the different races receive differential attention somewhere during the process of referral, investigation, and service allocation, and that the differential representation of minorities in the child welfare population does not derive from inherent differences in the rates at which they are abused or neglected.

Andrea J. Sedlak and Diane D. Broadhurst, U.S. Dep't of Health and Human Servs., Third National Incidence Study of Child Abuse and Neglect, Executive Summary (1996), available at http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm#family.

As a homeless African American woman, Stephanie P. has been subjected, like other low-income women of color, to discriminatory practices by other service providers, that subject them to heightened intervention by the state. For example, "doctors tend to communicate with their private white patients when conflict arises during treatment, but are more inclined to use the courts for treatment conflicts when dealing with poor patients, patients of color and/or patients with language barriers." Cheryl E. Amana, Drugs, AIDS, and Reproductive Choice: Maternal-State Conflict Continues into the Millennium, 28 N.C. Cent. L.J. 32, 34 (2005) (citing Veronika E.B. Kolder et al., Court Ordered Obstetrical Intervention, 316 New Eng. J. Med. 1192, 1193-

94 (1987)). In a national survey, 81% of the women who were referred for court-ordered obstetrical intervention were African American, Asian or Hispanic. See id.

Finally, "[s]elective testing of pregnant women for drug use and heightened surveillance of low-income mothers of color in the context of policing child abuse and neglect exacerbate these racial disparities for women." ACLU et al., Caught in the Net: The Impact of Drug Policies on Women and Families, Executive Summary at 3 (2005), available at http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf. For example, many hospital policies flag women for drug testing if they have not received prenatal care or received only limited care (and indeed, the record here reflects that Stephanie P. received only limited prenatal care, see Decision & Order at *2). But lack of prenatal care is not an indication of drug use. Rather, like the lack of healthcare in general, it is influenced by a number of factors including poverty and discrimination. See, e.g., Mary Ann Curry, Factors Associated with Inadequate Prenatal Care, 7(4) J. of Community Health Nursing 245, 245-46 (1990) (discussing poverty as one of the primary reasons that women fail to obtain prenatal care).

Discrimination based on race and gender also influences access to health care generally. See Rob Stein, In Healthcare, a Race Gap Persists; Blacks Get Tests and Therapy Less Often, Wash. Post, Aug. 18, 2005, at A1 (citing three major studies showing that "Black Americans still get far fewer operations, tests, medicines and other lifesaving treatments than whites despite years of efforts to erase racial disparities in health care"); Michael B. Losow, Symposium, Engineering Eden: Investigating the Legal and Ethical Dilemmas of Modern Biotechnology: Personalized Medicine & Race-Based Drug Development, 20 St. John's J. Legal Comment. 15, 25 (2005). And, as explained

more fully in Section I.D., women who are subject to punitive sanctions are often deterred from seeking the care that they, and their children, need.

All of these factors contribute to an environment in which low-income families and families of color are more likely to be involved in the foster care and child protection systems, and therefore are more likely to be subject to punitive and invasive state interventions like the no-pregnancy condition challenged here. Indeed, it is likely that Stephanie P.'s race, poverty and lack of prenatal care contributed to the fact that her case ever came before the Family Court.

C. THE REASONING OF THE DECISION AND ORDER CREATES A "FINANCIAL MEANS TEST" FOR PARENTING AND HARKS BACK TO JUSTIFICATIONS FOR EUGENICS LAWS.

1. The No-Pregnancy Condition Relies on the Same Rationale as Now-Discredited Eugenics Laws.

In justifying the no-pregnancy condition, the Family Court emphasized the cost to society and the parents' presumed inability to care for any future children, stating,

> Constitutional rights provide protection of basic rights but there is no basic right to be protected when the potential "right to have a child" would equal the right to neglect a child and commit a crime against that child, or force others to raise it, both physically and at public expense.

Decision and Order at *8. Such reasoning not only places the reproductive rights of vulnerable and marginalized individuals at particular risk, it also harks back to the shameful role that our government has played in advancing population control measures whereby many individuals of color, low-income people, and disabled people were sterilized against their will.

In 1907 Indiana passed the first laws allowing sterilization of the mentally ill and criminally insane, and by the late 1920s, twenty-eight states had followed suit, enacting legislation that resulted in the sterilization of some 15,000 individuals before

1930. By 1939 more than 30,000 people in twenty-nine states had been sterilized on the grounds that doing so would save costs to society. See Dorothy Roberts, Killing the Black Body: Race Reproduction and the Meaning of Liberty 69-71 (1997); Robert N. Proctor, Racial Hygiene: Medicine Under the Nazis 97 (1988).

In justifying the no-pregnancy condition, the Family Court relied heavily on data regarding the cost to the state of raising a child in foster care, concluding that "[t]he generosity and kindness of society has been abused enough." Decision & Order at *5. The court's reliance on selective, and often inaccurate, economic claims regarding the largesse of, and burden on, society are frighteningly reminiscent of the arguments used to justify eugenic sterilization. See, e.g., Arthur H. Estabrook's The Jukes in 1915 78 (1916) (decrying "the loss to society caused by mental deficiency, crime, prostitution, syphilis, and pauperism," and estimating that care of a single family had cost the taxpayers a total of $2.5 million in 1916 dollars [about $48.3 million 2006 dollars]). While the Decision does not make genetic-based claims, the central premise is the same: that current complex economic and social problems can be blamed primarily on individual decisions regarding procreation. See Lisa Powell, Note: Eugenics and Equality, 20 Yale L. & Soc. Policy Rev. 481 (2002).

2. The No-Pregnancy Condition Creates an Impermissible "Financial Means Test" for Parenting.

The reasoning used by the Family Court could potentially be applied far beyond the context of abusive or neglectful parents. It essentially creates a "financial means test" for parenting, and could reach loving, responsible parents who lose their jobs, incur catastrophic medical or other expenses, or for any other reason need public assistance. The reasoning could also be used against parents whose children suffer from

disabilities and health problems that the family simply cannot afford to treat. See, e.g., Judith G. McMullen, Family Support of the Disabled: A Legislative Proposal to Create Incentives to Support Disabled Family Members, 23 U. Mich. J. L. Reform 439 (1990) (describing as "astronomical" the costs of raising a severely disabled child). At the same time, the standard and rationale adopted in the Decision would permit neglectful, but financially secure, parents who can afford to hire full-time childcare to remain untouched by the Decision's ruling.

The potentially disproportionate impact such restrictions can have on certain classes of people is one of the central reasons that the Supreme Court has held that government restrictions on the right to procreate must be subject to the highest judicial scrutiny. See Skinner, 316 U.S. at 541; see also infra Section V (discussing constitutional issues raised by the Decision and Order). The Supreme Court's jurisprudence in this area clearly emphasizes how such restrictions have been intertwined with racist and classist notions about the biological and socio-cultural inferiority of low-income people and people of color. As the Supreme Court observed in Skinner, searching scrutiny of such conditions is "essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." Id. Indeed, the Court recognized that "[i]n evil or reckless hands," the power to restrict procreation "can cause races or types which are inimical to the dominant group to wither and disappear." Id.

That such reasoning is impermissible is not undermined by Buck v. Bell, 274 U.S. 200 (1927), in which the Supreme Court upheld a Virginia statute permitting sterilization of "feeble-minded" persons. That decision was issued prior to the court's

jurisprudence recognizing the right to procreate as fundamental. See infra Section V. Subsequent decisions, therefore, significantly undermine the holding in that case, despite the fact that it has never been formally overruled. In addition, the case has been widely repudiated as bad law. See, e.g., In re Romero, 790 P.2d 819, 821 (Colo. 1990) (recognizing Buck as all but overruled). Indeed, on the seventy-fifth anniversary of Buck v. Bell's holding, the State of Virginia formally apologized for its role in sterilizing over 8,000 people under the law, which the State acknowledged was based on a model eugenical sterilization law that had also served as the basis of the Nazi eugenics experiments. See William Branigin, Va. Apologizes to the Victims of Sterilizations, Wash. Post, May 3, 2002, at B1. And as the Supreme Court warned in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 859 (1992): "If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in Roe v. Wade, 410 U.S. 113 (1973) the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted interests in population control, or eugenics, for example." It is precisely the type of reasoning employed by the lower court in this case that the Supreme Court has warned against.

D. WIDESPREAD IMPLEMENTATION OF SIMILAR CONDITIONS WOULD DETER FAMILIES FROM SEEKING NECESSARY MEDICAL CARE AND SOCIAL SERVICES.

The disparate impact of heightened state involvement in the private lives of vulnerable and marginalized populations not only perpetuates racial and socioeconomic prejudices, but also detrimentally impacts maternal and fetal health. The threat of criminal sanctions for choices that women make vis-à-vis pregnancy functions to deter pregnant women from seeking critical healthcare services.

Medical and public health groups are unanimous in condemning punitive state interventions in a woman's pregnancy because, as one public health expert observed two decades ago in the New England Journal of Medicine:

> [M]arriage of the state and medicine is likely to harm more fetuses than it helps, since many women will quite reasonably avoid physicians altogether during pregnancy if failure to follow medical advice can result in . . . involuntary confinement, or criminal charges. By protecting . . . the integrity of a voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses.

George J. Annas, Protecting the Liberty of Pregnant Patients, 316 New Eng. J. Med. 1213, 1214 (1987); see also Report of American Medical Ass'n Board of Trustees, Legal Interventions During Pregnancy, 264 JAMA 2663, 2667 (1990) (cautioning that "pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment"); American Medical Ass'n, Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy, Resolution 131 (1990) (resolving "that the AMA oppose[s] legislation which criminalizes maternal drug addiction"). This sentiment is echoed today in the recent American College of Obstetricians & Gynecologists ethics statement on this issue, which provides that

> [p]regnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.

American College of Obstetricians and Gynecologists Committee Opinion 321 (Nov. 2005).

These leading professional institutions and professional organizations are concerned that women will be deterred from seeking care, whether it is prenatal care, drug treatment, or other health care, where there is the threat or likelihood of state intervention, such as the imposition of sanctions. In this case, however, there is more than a threat of sanctions. According to the terms of the Decision and Order, if Stephanie P. were to become pregnant again before her children were out of foster care and no longer being cared for by the state, she would be in violation of the Decision and Order. Decision and Order at *4. A Family Court can punish a violation of its court order with either imprisonment or the imposition of a fine. See N.Y. Judiciary Ct. Acts § 750(7) (McKinney 2003); N.Y. Family Court Act § 156 (McKinney 1999). Therefore, in this case, the deterrent effect of state intrusion is at its most potent, because the state itself has already explicitly authorized a penalty if Stephanie P. becomes pregnant and seeks care, thereby exposing herself to the scrutiny of the state. Such punitive measures place healthcare providers in an adversarial position with their patients, and push women outside the public health sphere, and underground, where they forgo vital health services.

The danger of deterring women from seeking necessary healthcare is grave, because the evidence shows that there are significant potential benefits to medical interventions for pregnant, drug-dependent women, and serious consequences for foregoing such care. Prenatal care has been found to be strongly associated with improved outcomes for children exposed to drugs in utero. Andrew Racine et al., The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City, 270 JAMA 1581, 1585-85 (1993); Edward F. Funai et al., Compliance with Prenatal Care in Substance Abusers, 14(5) J. Maternal Fetal Neonatal

Med. 329, 329 (2003); Cynthia Chazotte et al., Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment, 19(4) Seminars in Perinatology 293, 293 (1995). The research also shows that drug treatment can be effective for pregnant women and can itself produce beneficial pregnancy outcomes. See Patrick J. Sweeney et al., The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes, 20(4) J. Perinatology 219, 219 (2000) (finding that neonatal outcome "is significantly improved for infants born to substance abusers who receive[d] drug treatment concurrent with prenatal care compared with those who received [prenatal care but] . . . treatment postpartum").

Conversely, lack of prenatal care is associated with poor health outcomes for mothers and newborns. See Anthony M. Vintzileos et al., The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions, 186(5) Am. J. of Obstetrics & Gynecology 1011, 1013 (2002); Vivian B. Faden et al., The Relationship of Drinking and Birth Outcome in a U.S. National Sample of Expectant Mothers, 11 Pediatric & Perinatal Epidemiology 167, 171 (1997) (finding "increased risk of adverse outcomes among mothers who had no prenatal care"). Adopting a punitive approach to maternal drug use or poverty does not advance maternal or child health, but rather, places both in jeopardy. Appropriate medical interventions can dramatically improve health outcomes: drug treatment can be effective for pregnant women, and the adverse effects associated with drug, alcohol, tobacco use and other conditions, such as poverty, that raise pregnancy risks are substantially mitigated when women receive treatment and regular prenatal care.

Amici thus urge this court to take into account these policy considerations, including the disparate impact of no-pregnancy conditions on low-income women and women of color, the disturbing heritage of state interventions into procreative decisionmaking of target populations, and the harmful impact of deterring individuals from seeking prenatal care.

II. THE FAMILY COURT ABUSED ITS DISCRETION BY RELYING ON A FAULTY AND INCOMPLETE FACTUAL RECORD.

The Family Court here abused its discretion by relying on an incomplete, and therefore faulty, factual record. Without input from any experts in the field of drug treatment, drug addiction or the effects of prenatal exposure to cocaine, the Family Court found that evidence of past and ongoing drug dependency provided an additional basis for the neglect determination and the ultimate extraordinary no-pregnancy order. Specifically, the Decision and Order makes repeated references to Stephanie P.'s alleged use of cocaine, her alleged history of giving birth to "cocaine babies," the added financial cost of providing services to "[c]ocaine addicted children," and the presumed past and future neglectfulness of the children's parents. Decision and Order at *2, *3, *7, *8. However, the reasoning the court employed relies upon unfounded assumptions concerning (a) the effect of drugs on a fetus, (b) the impact drug dependency may have on parenting ability, and (c) the availability and accessibility of appropriate social services support, including substance abuse treatment. Because these factual assumptions were either disputed, or in fact, erroneous, the Family Court abused its discretion by relying on them in issuing the Decision and Order.

A. MEDICAL AND SCIENTIFIC EVIDENCE HAS FAILED TO SUBSTANTIATE A CAUSAL LINK BETWEEN DRUG USE AND THE ALLEGED HARMS THE NO-PREGNANCY CONDITION PURPORTS TO ADDRESS.

The Decision's apparent concern with the effects of substance use on child development is based on a number of fallacious assumptions that are not borne out by either the record evidence or medical evidence.

In 2001, the Journal of the American Medical Association ("JAMA") published a comprehensive, systematic and authoritative analysis of all seventy-five English-language medical research studies assessing the relationship between maternal cocaine use during pregnancy and adverse developmental consequences for the fetus and child. See Deborah Frank et al., Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review, 285 JAMA 1613 (2001). The review found that when studies are controlled for prenatal exposure to tobacco and alcohol, (1) prenatal cocaine exposure is not associated with physical growth retardation, id. at 1613; (2) there is little or no impact of prenatal cocaine exposure on children's scores on assessments of cognitive development, id.; (3) "[p]roblem-solving abilities [do] not differ between cocaine-exposed and unexposed preschoolers," id. at 1617; and finally, cocaine exposure does not impact standardized language measures, id. at 1620. In fact, the oldest group of children studied to date registered no effect from in utero cocaine exposure on any IQ scales or academic achievement. Id. at 1616 (citing Gale Richardson et al., Prenatal Cocaine Exposure: Effect on the Development of School Age Children 18 Neurotoxicology & Teratology 627 (1996)). The analysis concluded that:

> [T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae of many other risk factors. Many findings once thought to be specific findings of in utero cocaine exposure can be

> explained in whole or in part by other factors, including prenatal exposure to tobacco, marijuana, or alcohol and the quality of the child's environment.

Id. at 1621, 1624. See also Gail A. Wasserman et al., Prenatal Cocaine Exposure and School Age Intelligence, 50 Drug & Alcohol Dependence 203, 209 (1998) ("Prenatal cocaine exposure does not seem to confer an additional risk for adverse developmental outcome."); Hallam Hurt et al., Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects On Intelligence Testing, 151 Pediatric & Adolescent Med. 1237 (1997); Daniel S. Messinger et al., The Maternal Lifestyle Study: Cognitive, Motor, and Behavioral Outcomes of Cocaine-Exposed and Opiate-Exposed Infants Through Three Years of Age, 113(6) Pediatrics 1677, 1683 (2004) (describing findings from a study showing "no significant association between cocaine exposure and psychomotor performance" nor any difficulties in central nervous system functioning or attention or affective regulation). The lack of scientific evidence linking cocaine use with harm to a woman's fetus or child recently led thirty leading American and Canadian medical doctors, scientists and psychological researchers to issue an open letter calling upon the media to stop the use of such terms as "crack baby" and "crack addicted baby." Robert E. Erendt et al., Open Letter to the Media, Join Together, Feb. 25, 2004, http://www.jointogether.org/news/yourturn/announcements/2004/physicians-scientists-to-stop.html. The Decision and Order on Motion to Vacate ignores this overwhelming evidence.

The Decision's apparent reliance on Appellant Stephanie P.'s drug dependency as a basis for the no-pregnancy condition is particularly troubling given the greater magnitude of risk to fetal and child development posed by many legal substances

and everyday circumstances. For example, as the JAMA study points out, prenatal exposure to tobacco is "the major predicator" of abnormalities in infants, including low birth weight, abnormal muscle tone, Sudden Infant Death Syndrome, spontaneous abortion, premature rupture of the membranes, and abnormal placentation. See Frank et al., supra, at 1615 (citing Delia A. Dempsey et al., Tone Abnormalities are Associated with Maternal Cigarette Smoking During Pregnancy in In Utero Cocaine Exposed Infants, 106 Pediatrics 79 (2000)); Theodore A. Slotkin, Nicotine or Cocaine Exposure: Which One is Worse?, 285(3) J. Pharmacology & Experimental Therapeutics 931, 941 (1998) ("[F]rom a public health perspective, cigarette smoking, and hence nicotine exposure, remains by far the larger problem.").

Adverse pregnancy outcomes are also associated with alcohol intake, see, e.g., Loretta P. Finnegan & Stephen R. Kandall, Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse: A Comprehensive Textbook 513, 529 (J.H. Lowinson et al. eds., 3d ed. 1997 (stating that Fetal Alcohol Syndrome is the leading cause of mental retardation in the United States), as well as a wide variety of commonly prescribed medications including anticonvulsants, psychotropic drugs, and anti-hypertensives. See, e.g., The Merck Manual of Diagnosis and Therapy 1859 (R. Berkow ed., 16th ed. 1992) (listing fetal abnormalities associated with these medications). Even circumstances that have nothing to do with ingesting harmful substances, such as becoming pregnant after age thirty-five, can lead to adverse pregnancy outcomes. See Suzanne C. Tough et al., Delayed Childbearing and Its Impact on Population Rate, Changes in Lower Birthweight, Multiple Birth, and Preterm Delivery, 109(3) Pediatrics 399, 400 (2002); March of Dimes, Quick Reference: Pregnancy After 35,

http://www.marchofdimes.com/professionals/14332_1155.asp (last visited July 17, 2007).

In bringing these examples to the Court's attention, Amici do not suggest that child neglect proceedings or that no-pregnancy conditions should be applied to pregnant women who use tobacco, alcohol, or prescription medications, or those who become pregnant later in life. Rather, Amici seek to dispel myths and misinformation particularly associated with prenatal exposure to cocaine that appear to have played a role in the extraordinary decision reached in this case. Because the court's factual assumptions regarding the risks of cocaine use during pregnancy are unfounded, the Decision and Order should be reversed.

B. SCIENTIFIC EVIDENCE DOES NOT SUPPORT A LINK BETWEEN COCAINE USE AND POOR PARENTING IN ALL CASES.

In addition to the lack of scientific support for a "cocaine baby" syndrome, there also is no scientific support for the proposition that drug use necessarily leads to poor parenting. The American Bar Association has concluded that "many people in our society suffer from drug or alcohol dependence yet remain fit to care for a child." American Bar Ass'n et al., Foster Children in the Courts 206 (Mark Hardin ed., 1983). See also Nat'l Council of Juvenile and Family Ct. Judges, Permanency Planning for Children Project, Protocol for Making Reasonable Efforts to Preserve Families in Drug-Related Dependency Cases 17 (1992) (concluding that "[j]uvenile and family court proceedings are not necessary, and probably not desirable, in most situations involving substance-exposed infants").

Indeed, the laws of New York State reflect this recognition. Under New York law, a parent's drug use is considered neglect only when the child's "physical,

mental or emotional condition has been impaired or is in imminent danger of becoming impaired." N.Y. Fam. Ct. Act § 1012(f)(i)(B) (McKinney 2006). If the legislature had intended to equate drug use with child neglect, it would have done so explicitly. In fact, the New York Legislature has considered, but declined to enact, legislation that would do just that for at least the past three legislative sessions. See A. 4424, 2007 Leg., 230th Sess. (N.Y.); A. 5103, 2005 Leg., 228th Sess. (N.Y.); A. 4839, 2003 Leg., 226th Sess. (N.Y.); S. 2040, 2007 Leg., 230th Sess. (N.Y.); S. 490, 2005 Leg., 228th Sess. (N.Y.); S. 1014, 2003 Leg., 226th Sess. (N.Y.).

Drug dependency may be a contributing factor in predicting whether a child will be neglected or abused, but if so, it is only one of many. See Dina J. Wilke et al., Modeling Treatment Motivation in Substance-Abusing Women with Children, 29(11) Child Abuse & Neglect 1313, 1314 (2005) (discussing the influence of sexual abuse as a child and difficulties of finding child care as predictors of child abuse); see also Paula Kienberger Jaudes et al., Association of Drug Abuse and Child Abuse, 19(9) Child Abuse & Neglect 1065, 1072 (1995) (cautioning against "generalizations about association of parental drug use and child maltreatment . . . [without] full cognizance of the influence other variables may also exert"). Many drug using parents are simply financially unable to provide for their children. The lack of access to "housing, employment, education, recreation, and transportation" is prevalent in the "highly stressful environments plagued by poverty, family and community violence, substance use and abuse . . . . " Martha Morrison Dore & Judy M. Lee, The Role of Parent Training with Abusive and Neglectful Parents, 48(3) Fam. Rel. 313, 313 (1999).

Finally, despite the prevalent idea that mothers who use drugs ignore their children's needs and may actively jeopardize their children, numerous research studies have shown that many women struggling with addiction make great efforts to care for their children. See, e.g., Margaret H. Kearney et al., Mothering on Crack Cocaine, 38(2) Soc. Sci. & Med. 351, 354 (1994); Duncan Stewart et al., Drug Dependent Parents: Childcare Responsibilities, Involvement with Treatment Services, and Treatment Outcomes, 32(8) Addictive Behaviors 1657, 1658 (2007). Many mothers strive to protect their children from the drug environment. They are conscious of their "children's ability to recognize illicit behavior" and concertedly engage in "defensive compensation . . . [which] involve[s] defending children from drugs and the drug life, shielding one's identity as a mother and trying to make up for crack's negative effects on mothering." Kearney, supra, at 355.

In short, research fails to support the assumption that a parent who uses or is addicted to an illegal drug will necessarily harm his or her children or be unable to provide them with a loving home. See Susan C. Boyd, Mothers and Illicit Drugs: Transcending the Myths 14-16 (1999) (identifying numerous studies comparing parenting practices of mothers who abuse alcohol or drugs, including cocaine, and non-substance abuser mothers, and concluding that individuals struggling with drug and alcohol addiction can be adequate parents); Mary Ellen Colten, Attitudes, Experiences, and Self-Perceptions of Heroin Addicted Mothers, 38 J. Soc. Issues 77, 78-79 (1982) (finding generally that heroin addicted and non-addicted mothers share similar concerns for their children, and that problems with addicted mothers' ability to parent are mostly attributable to treatable social problems). Thus, the presumption that women who suffer

from addiction cannot be good parents is false, and the Family Court's reliance on this as a basis to deprive Stephanie P. of her right to procreate was an abuse of discretion.

C. THE COURT'S ASSUMPTIONS ABOUT THE AVAILABILITY OF SOCIAL SERVICES WERE ERRONEOUS.

The Family Court rested the issuance of the Decision and Order in part on the claim that "generosity and kindness of society has been abused enough." Decision & Order at *5. This suggests a level of government support for families that simply does not exist. The cost of foster care, also cited by the Family Court, and attributed to irresponsible parents, can be far better understood as a reflection of the policy choice to allocate large amounts of money to remove children from their parents but relatively little for services that would help families stay together.

In 2004, the entire Monroe County budget for "preventive services," both to help keep children out of foster care and shorten their stay, was all of $1.26 million, less than two tenths of one percent of the county's total budget of nearly $1 billion. Similarly, the entire budget for all drug treatment programs—not just those for parents who have or are at risk of losing children to foster care—was approximately $9.3 million, less than one percent of the county budget. In contrast, investigating and monitoring families was allocated just over $11 million. Monroe County 2004 Budget, 290, 341 (on file with NYCLU).

These funding decisions leave many needs of Monroe County residents unmet. The New York State Office of Alcoholism and Substance Abuse Services estimated in 1999 that about one-third—approximately 123,000—of the 381,000 adults in Monroe County needing treatment remained unserved. See Institute for Local Governance & Regional Growth, State Univ. of N.Y. at Buffalo, State of the Region

Baseline Report § 8.6 (1999), http://www.regional-institute.buffalo.edu/sotr (follow "8 Human Resources" hyperlink, then "8.6 Alcohol and Drug Treatment" hyperlink). Furthermore, women, particularly pregnant women and women with children, have been and continue to be especially underserved in the alcohol and drug treatment system. See generally Drug Strategies, Keeping Score: Women and Drugs: Looking at the Federal Drug Control Budget 32 (1998), http://www.drugstrategies.org/acrobat/ks_1998.pdf ("Only a small fraction of the estimated nine million women with serious alcohol and other drug problems are able to get treatment, unless they can afford to pay."); Dorothy Roberts, The Challenge of Substance Abuse for Family Preservation Policy, 3 J. Health Care L. & Pol'y 72, 78 (1999) ("Government officials have largely ignored the burgeoning need for comprehensive, long-term treatment for women."). Meaningful substance abuse treatment for parents is poorly funded, not widely available or accessible, and unlikely to be customized to fit the needs of individual clients—thus making failure a likely outcome. The Decision and Order's discussion of Stephanie P.'s alleged failed drug treatment ignores these factors, assuming instead that her failure was hers alone, and not due to the fact that the treatment programs may have been inappropriate or inaccessible.

Moreover, the problems that low-income women like Stephanie P. face go beyond drug addiction and lack of preventative services. A confluence of structural societal problems, including lack of unskilled manufacturing jobs, affordable housing, health insurance, paid parental leave, or adequate childcare for working families, make it impossible for large numbers of perfectly adequate parents to support their children financially. See generally Barbara Ehrenreich, Nickled and Dimed: On (Not) Getting by

in America (2001) (documenting undercover journalist's experiences in low-wage jobs; David K. Shipler, The Working Poor: Invisible in America (2004) (describing conditions of poverty for those who are employed full-time in low-paying jobs); Families USA, One in Three: Non-Elderly Americans Without Health Insurance, 2002-2003 (2004) ("[A]pproximately 81.8 million people—one out of three (32.2 percent) of those under the age of 65—were without health insurance for all or part of 2002 and 2003, and of those, two-thirds (65.3 percent) were uninsured for six months or more."). Indeed, the National Low Income Housing Coalition has estimated that in Monroe County in 2003, a worker earning the minimum wage (then $5.15 per hour) "must work 95 hours per week in order to afford a two-bedroom unit in the area's Fair Market rent." National Low Income Housing Coalition, Out of Reach 2003: America's Housing Wage Climbs (Monroe County) (2003) http://www.nlihc.org/oor/oor2003 (follow "view data" hyperlink for New York, then "Monroe County" hyperlink). This suggests that despite society's "generosity and kindness," many basic needs remain unmet.

The Decision and Order issued by the court below creates the false impression that services that might actually benefit the family are widely available and easily accessible when they are not. The Family Court relied on the flawed assumption that the system has plenty to offer troubled parents and settled on a seemingly quick fix solution—stop certain people from procreating. See, e.g., Linda C. McClain, "Irresponsible" Reproduction, 47 Hastings L. J. 339, 410 (1996) (criticizing the "rhetoric of reproductive irresponsibility" which fails to inquire "whether . . . poverty and welfare 'dependency' derive not from 'bad behavior,' but from economic inequality rooted in

structures of sex, race, and class"). Such reasoning is dangerous as a matter of public policy and, as discussed below, impermissible as a matter of law.

III. THE COURT ABUSED ITS DISCRETION BY IMPROPERLY TAKING JUDICIAL NOTICE OF FACTS NOT IN EVIDENCE, AND BY VIOLATING STEPHANIE P.'S DUE PROCESS RIGHTS.

A. THE FAMILY COURT TOOK IMPROPER NOTICE OF DISPUTED FACTS OUTSIDE THE RECORD.

The factual premises underlying the Family Court's assumptions were not based on evidence introduced by either Stephanie P. or by the County, but rather were considered by the Court sua sponte. However, as demonstrated in the preceding sections, many of the factual assumptions underlying the Family Court's Decision and Order were either subject to serious dispute, or clearly erroneous. As such, they were not proper subjects of judicial notice, which is generally reserved for facts that are either verifiable through public documents or "so widely accepted and unimpeachable that [they] need not be evidentiarily proven." Ptasznik v. Schultz, 247 A.D.2d 197, 198 (N.Y. App. Div. 2d Dept. 1998) (citing Hunter v. N.Y. O. & W. R.R. Co., 116 N.Y. 615 (1889)).

Even though courts have somewhat greater latitude in taking judicial notice of "legislative facts," or those facts that comprise "the perceived social, political, economic and scientific realities that courts act upon in formulating judge-made rules of law," 5 N.Y. Prac., Evidence in New York State and Federal Courts § 2:1 (quoting McCormick on Evidence (5 ed. 1999)), courts should still refrain from relying extensively on disputed policy assumptions. See People v. Gonzalez, 193 Misc.2d 17, 20 (Sup. Ct. Bronx Cty. 2002). As Judge Weinstein has cautioned, "[j]udges should proceed cautiously in taking judicial notice of legislative facts. The court should at least, in

accordance with our adversary requirements for the proof of controverted adjudicative facts, inform the parties of its intention to consider extra-record information so that they may have an opportunity to present rebutting information." Weinstein's Federal Evidence §201.51; see also Oneida Indian Nation v. State of New York, 691 F.2d 1070, 1086 (2d Cir. 1982) (reversing district court's dismissal based on disputed factual evidence contained in historical records); People v. Jones, 47 N.Y.2d 409, 415 (1979) (reversing defendant's conviction where judge took judicial notice of hazards of undercover police work in deciding to close the courtroom during witness's testimony, thus violating defendant's constitutional Sixth Amendment and due process rights).

Because many of the facts on which the Family Court relied are clearly subject to reasonable dispute, it was an abuse of discretion for the Court to consider them, at least in the absence of a hearing with adequate notice to the Appellant that such facts would be relied upon. See Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1328-29 (E.D.N.Y. 1981) (noting importance of providing parties opportunity to be heard before taking judicial notice, in order to "reduce[e] the possibility of egregious errors by the court"); DeMatteo v. DeMatteo, 749 N.Y.S.2d 671, 678-79 (Sup. Ct. Oneida Cty. 2002) (relying extensively on medical literature supporting the proposition that second-hand smoke is hazardous to health, but providing the parties the opportunity to dispute or supplement those facts at a further hearing).

Here, Stephanie P. lacked proper notice that the hearing would include the no-pregnancy condition. The only matter Appellant had proper notice of was the placement of Bobbijean P. in foster care—a condition to which she had already indicated her lack of opposition at the initial hearing. May 21, 2004 Tr. at 5. Had Stephanie P. had

proper notice that the court might issue an order prohibiting her from having any more children, she would have had an opportunity to dispute the factual assumptions on which the no-pregnancy condition was based. Because she was unaware that such a condition could issue, she was deprived of that opportunity. The Court's consideration of these disputable facts was therefore improper.

B. THE FAMILY COURT'S RELIANCE ON DISPUTED FACTS VIOLATED STEPHANIE P.'S DUE PROCESS RIGHTS.

Because Stephanie P. had no notice that the Family Court might impose a restriction on her right to procreate, the Family Court's issuance of the Decision and Order also violated her due process rights. As the Supreme Court has held, "elementary notions of fairness enshrined in [due process] jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996). Not only did Stephanie P. lack actual notice of the potential conditions to which she might be subject, she also had no reason to suspect such a possibility. As the Decision and Order itself acknowledges, the Monroe County Department of Human and Health Services had not requested the condition in its petition or its proposed dispositional plan—a document that would have provider her such notice. See Decision and Order at *4. And although Article 10 of the Family Court Act empowers the court with "broad equity jurisdiction to issue . . . orders in the nature of a mandatory injunction requiring various acts to be done," In re Burnett, 112 Misc.2d 318, 319 (Fam. Ct. Dutchess Cty. 1982), this clearly falls beyond such equitable power. Imposition of a no-pregnancy condition in the context of a child neglect proceeding is, in fact, unprecedented.

The Family Court's issuance of the no-pregnancy condition on the Appellant's default therefore fails the requirements of due process because Appellant Stephanie P. did not have fair notice that the action being adjudicated, the placement of her child, could subject her to a restriction on her fundamental right to procreate. See Deborah J.B., 818 N.Y.S.2d at 390 (holding petitioner lacked adequate notice of issues to be decided at hearing where order to show cause listed only issue of attorney withdrawal, not extraordinary conditions meriting possible termination of parental rights); Pringle v. Pringle, 744 N.Y.S.2d at 785 (holding that Family Court's modification of child support order was abuse of discretion, as "colloquy among counsel and the Hearing Examiner was not a proper substitute for testimony"); see also Chamberlin v. Chamberlin, 99 N.Y.2d 328, 338 (2003) (finding no due process violation in family court proceeding for COLA adjustment in child support where "the [Family Court Act] itself notifies the parties that there will be a hearing in the event of an objection, what will be reviewed at the hearing and the possible outcomes" (emphasis added)).

IV. THE NO-PREGNANCY CONDITION UNCONSTITUTIONALLY INFRINGES ON STEPHANIE P.'S FUNDAMENTAL RIGHTS TO PRIVACY AND BODILY INTEGRITY.

A. STEPHANIE P. HAS A FUNDAMENTAL RIGHT TO PRIVACY IN MATTERS INVOLVING PROCREATION AND INTIMATE RELATIONS, AS WELL AS A RIGHT TO REFUSE MEDICAL TREATMENT.

An unbroken line of Supreme Court cases has firmly established that certain rights are so important to our individual liberties as to be deemed fundamental under the due process clause of the Federal Constitution. See Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965). Among these firmly established fundamental rights are the right to make decisions regarding childbearing and procreation, the right to engage in

private intimate relations, and the right to be free from forced medical treatments. All three rights are implicated here.

As the Supreme Court stated over thirty-five years ago, "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); see also Skinner, 316 U.S. at 541 (invalidating a law mandating sterilization of habitual criminals, and distinguishing procreation as "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race"); Carey v. Population Servs., Int'l, 431 U.S. 678, 685 (1977) ("[D]ecisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'") (citations omitted). Decisions regarding procreation thus lie "at the very heart of . . . [these] constitutionally protected choices." Carey, 431 U.S. at 685. Because due process rights protected under the New York Constitution are "at least as extensive" as those under the Federal Constitution, Hope v. Perales, 83 N.Y.2d 563, 575 (1994), both the United States and the New York Constitutions protect decisions regarding childbearing against unjustified government interference. See also L. Pamela P. v. Frank S., 59 N.Y.2d 1, 6 (1983) (recognizing a clear constitutionally protected right to decide for oneself whether to conceive a child).

The Decision and Order erroneously concludes that Stephanie P. does not have a constitutionally protected right to become pregnant or to bear children, and despite its passing recognition of the fundamental nature of Stephanie P.'s right to procreate in its

Decision and Order on Motion to Vacate, fails to correct this error. See Decision and Order on Motion to Vacate at 6. The error of the Decision and Order lies in its conclusion that Stephanie P. enjoys the right to procreate only when coupled with the ability to economically support and raise any children she may have. See Decision and Order at *5 (stating that Stanley [v. Illinois, 405 U.S. 645 (1972)] "does not say that the right to conceive a child is essential, but the rights to conceive and to raise one's children have been deemed 'essential.'" (emphasis in original)).

This analytic leap distorts the holding of Stanley v. Illinois, 405 U.S. 645, which held unconstitutional a law prohibiting a father from having custody of his children because he had not been married to his children's mother. See Stanley, 405 U.S. at 649. Indeed, the Decision and Order cites, but then puzzlingly ignores, the Supreme Court's explanation in Stanley: "The Court has frequently emphasized the importance of family. The rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man' and 'rights far more precious . . . than property rights.'" Id. at 651 (citations omitted); see Decision and Order at *3-*4. Whenever the Supreme Court has delineated the personal decisions protected as fundamental, it has consistently identified procreative autonomy as a separate right that is related to, but distinct from, those related to child-rearing and family relationships. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."); Carey, 431 U.S. at 685 ("[D]ecisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage; procreation; contraception; family relationships; and child rearing and education.'")

(citations omitted). Thus, the Decision and Order ignores well-settled Supreme Court precedent by attempting to tie the right to child-bearing to the ability to support a child financially. This right has never been so constricted.

In addition to failing to recognize Stephanie P.'s fundamental right to procreative autonomy and distorting Supreme Court precedent, the Family Court also ignored other fundamental rights implicated by the no-pregnancy condition. As the Supreme Court has recently recognized, the Federal Constitution also protects privacy in intimate relations. In Lawrence v. Texas, 539 U.S. 558 (2003), the Supreme Court struck down a Texas statute criminalizing sexual acts between consenting adults of the same sex. Recognizing that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," id. at 562, the Supreme Court admonished the State for "seek[ing] to control a personal relationship that . . . is within the liberty of persons to choose without being punished." Id. at 567. Thus, the constitution sets limits on governmental intervention in decisions regarding intimate matters, including "the most private human conduct, sexual behavior," and "in the most private of places, the home." Id.; see also People v. Onofre, 51 N.Y.2d 476, 488-92 (1980) (recognizing fundamental right in intimate sexual relationships within the home and striking down New York State law prohibiting "consensual sodomy").

Finally, under both the Federal Constitution and the New York State Constitution, an individual has a fundamental right to determine the course of his or her own medical treatment, including the right to refuse medical interventions. See Blouin ex rel. Estate of Pouliot v. Spitzer, 356 F.3d 348, 359 (2d Cir. 2004) ("[T]he Constitution supports a right to reject life-sustaining medical treatment as a function of the

fundamental right to bodily integrity under the Due Process Clause.") (citing Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278 (1990)); Rivers v. Katz, 67 N.Y.2d 485, 493 (1986) ("[The] fundamental common-law right [to refuse medical treatment] is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution."); cf. In re Storar, 52 N.Y.2d 363, 376 (1981), superceded on other grounds by statute (recognizing common-law right to determine the course of one's medical treatment). The Family Court erred in failing to recognize these rights, and abused its discretion in failing to vacate the Decision and Order when this error was presented for reconsideration.

B. THE NO-PREGNANCY CONDITION INFRINGES ON STEPHANIE P.'S PRIVACY RIGHTS.

The Decision and Order imposes a no-pregnancy condition that prohibits the Appellant from becoming pregnant until she gained custody of all her children in foster care. See Decision and Order at *4. Under the terms of the Decision and Order, Stephanie P. must therefore, at risk of fine or criminal sanctions, (a) use birth control, (b) attempt to refrain from sex altogether, (c) undergo sterilization, and/or presumably (d) have an abortion should she become pregnant. Under the circumstances, each of these options infringes Stephanie P.'s constitutional rights.

As a threshold matter, in constructing a situation in which Stephanie P. is technically prohibited from "becoming" pregnant, the order assumes that pregnancy prevention is entirely within her control, when it is clearly not. Unintended pregnancy occurs quite commonly, despite women's best efforts, in part due to the likelihood of contraceptive failure. See Rachel K. Jones et al., Contraceptive Use Among U.S. Women Having Abortions, 2000-2001, 34(6) Persp. on Sexual & Reprod. Health 294, 296 (2002)

(finding that over half the women who experience unintended pregnancies are using contraceptives when they become pregnant); Stanley K. Henshaw, Unintended Pregnancy in the United States, 30 Fam. Plan. Persp. 24, 26-27 (1998) (same); The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families 31-32 (1995) (same); see also Trammell v. State, 751 N.E.2d 283, 290 (Ind. App. Ct. 2001) (finding no-procreation order as condition of probation unconstitutional in part because "[t]he State should not have the power to penalize [defendant] if she uses contraceptives which for some reason fail to prevent pregnancy").

In addition, abstinence itself is not always a choice for women. Sexual assault, including rape and coerced sex as a result of domestic or intimate partner violence, are common and can result in pregnancy. See Best Intentions, supra, at 203-05 (discussing relationship between unintended pregnancy and rape/sexual assault); Jonathan A. Gottschall and Tiffani A. Gottschall, Are Per Incident Rape-Pregnancy Rates Higher than Per-Incident Consensual Pregnancy Rates, 14(1) Human Nature 1, 4-5 (2003) (finding that rate of pregnancy due to rape was significantly higher than rate due to consensual sexual activity, even controlling for birth control use). Indeed, the record evidence suggests that Stephanie P. may have suffered domestic violence at the hands of Rodney E. Sr., who was ordered to receive domestic violence education. See June 23, 2004 Tr. 20. In treating the no-pregnancy condition purely as an issue of personal responsibility, the Court's order thus places Stephanie P. in a position in which she could face contempt for circumstances beyond her control.

Thus, despite the Court's insistence that the no-pregnancy condition would not require the Respondent to undergo an abortion, see Decision and Order at *8,

abortion might ultimately be her only option to avoid contempt sanctions should she in fact become pregnant. Forcing or coercing a woman to have an abortion unquestionably infringes on the fundamental right to bear children. See People v. Pointer, 199 Cal. Rptr. 357, 366 (Cal. Ct. App. 1984) (finding imposition of prison for violation of no-pregnancy condition of probation improper because it would be "coercive of abortion"); Arnold v. Bd. of Educ. of Escambia County, 880 F.2d 305, 312 (11th Cir. 1989), overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (stating that "state coercion to abort a child constitutes impermissible intrusion on this constitutionally guaranteed freedom of choice."); cf. Casey, 505 U.S. at 859 ("If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized . . . the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted interests in population control, or eugenics, for example.").

Regardless of whether the Appellant should ultimately need an abortion, ordering Stephanie P. to prevent pregnancy, on threat of fine or imprisonment, clearly restricts her fundamental rights. Requiring her to use birth control, abstain from sex, or undergo sterilization in order to avoid contempt sanctions infringes her fundamental right to procreative decisionmaking. See Trammell, 751 N.E.2d at 290-91 (no-pregnancy condition of probation impinged on privacy right of procreation); Pointer, 199 Cal. Rptr. at 364 (holding that there was "no question" that a probation condition prohibiting conception infringed on a fundamental right protected by the constitution). The likelihood that she will be forced to use birth control, undergo abortion, or get sterilized, further infringes on her right to determine her own medical treatment. See Rivers, 67

N.Y.2d at 493. And requiring her to abstain from sex—to the extent possible—infringes her right to be free from government intrusion in matters of intimate relations. See Lawrence, 539 U.S. at 567. Stephanie P.'s "freedom" to choose among the various options for preventing pregnancy or childbirth is thus irrelevant, as each of them violates her rights when chosen under threat of state sanctions.

C. THE NO-PREGNANCY CONDITION VIOLATES FUNDAMENTAL RIGHTS AND IS THEREFORE SUBJECT TO HEIGHTENED SCRUTINY.

Where fundamental rights are at stake, a reviewing court is required to subject the state interest to "critical examination." See Zablocki, 434 U.S. at 383. The state cannot infringe Stephanie P.'s fundamental right to procreate unless the restriction meets the searching analysis of the Supreme Court's most demanding level of scrutiny, strict scrutiny. See Carey, 431 U.S. at 686; Skinner, 316 U.S at 541. The Family Court therefore abused its discretion in its Decision on Motion to Vacate when it acknowledged the right to procreation as a fundamental right, but then failed to analyze the Decision and Order's restriction on Stephanie P.'s procreation rights under that standard. See Decision on Motion to Vacate at *6.

Under strict scrutiny, "where a decision as fundamental as whether to bear or beget a child is involved, [the state restriction] imposing a burden on it may be justified only by compelling state interests and must be narrowly drawn to express only those interests." Carey, 431 U.S. at 686. Although the Supreme Court's more recent jurisprudence has affected the standard of scrutiny courts must use to determine whether or not and in what manner a woman's right to obtain an abortion can be restricted by the state, see, e.g., Casey, 505 U.S. at 876 (announcing an "undue burden" test for evaluating whether restrictions the right to abortion are permissible), this has not altered the

principle that decisions related to pregnancy and childbearing are fundamental rights. See Roe v. Wade, 410 U.S. 113, 152-53 (1973). Thus, while the Court now applies the "undue burden" test to decisions regarding abortion, decisions regarding whether or not to become pregnant in the first instance are still subject to strict scrutiny, because the countervailing state interest in protecting "potential life" is not present prior to conception. Casey, 505 U.S. at 859 (noting that "Roe's scope is confined by the fact of its concern with postconception potential life") (emphasis added); Carey, 431 U.S. at 690 (finding that "the interest in protecting potential life [is not] implicated in state regulation of contraceptives" and applying strict scrutiny to restriction on contraceptive sales).

The same test is used to evaluate infringements on the right to refuse medical treatment under the New York Constitution. See Rivers, 67 N.Y.2d at 495 (holding that nothing short of a compelling state interest will override an individual's fundamental liberty interest to reject medical treatment). Moreover, the Supreme Court's decision in Lawrence made clear that substantive due process rights to privacy in intimate matters are also sufficiently important to merit a more searching level of review. See Lawrence 539 U.S. at 561-67; see also Onofre, 51 N.Y.2d at 488-92 recognizing fundamental right of privacy in intimate sexual relations, and noting that restrictions on fundamental rights should be subject to strict scrutiny, but striking down penal law prohibiting consensual sodomy because it failed to meet even rational basis standard). Thus, each of the separate violations of Stephanie P.'s rights implicated by the decision and order are subject to heightened scrutiny

In its Decision and Order, the Family Court avoided any mention of required strict (or even heightened) scrutiny for restrictions on fundamental rights.

Rather than subject the no-pregnancy condition to strict scrutiny, the Family Court engaged in a balancing test, unsupported by precedent. See Decision and Order at *7-*8. Under this balancing test, the Family Court merely weighed Stephanie P.'s privacy rights against the purported state interests involved. See id. Thus, the Decision and Order's analysis of the no-pregnancy condition was incorrect as a matter of law. And once the Family Court recognized Stephanie P.'s fundamental right in its Decision on the Motion to Vacate, its failure to remedy its error was an abuse of discretion.

D. THE NO-PREGNANCY CONDITION FAILS TO SATISFY STRICT SCRUTINY BECAUSE FINANCIAL CONCERNS ARE NOT A COMPELLING STATE INTEREST.

Because the rights at stake here are deemed fundamental, the court was required to advance a compelling interest to justify the no-pregnancy condition. The interest justifying the no-pregnancy condition—saving taxpayer dollars—is not sufficiently compelling to justify infringement on Stephanie P.'s fundamental privacy rights.

As the language of the Decision and Order makes clear, the interest advanced by the Family Court is primarily economic. The Decision and Order imposes the no-pregnancy condition until Stephanie P.'s children are "being raised by a natural parent or no longer being cared for at the expense of the public." See Decision and Order at *4. In support of the no-pregnancy condition, the Decision and Order is replete with references to financial and other costs to taxpayers, the state and the community for children in foster care. And the Decision and Order concludes that Stephanie P.'s "right to have children" is outweighed when "society must bear the financial and everyday actual burden of care." See Decision and Order at *8. Thus, the Family Court's concern is the economic burden imposed on the taxpayers by children under the State's care.

As discussed above, this purported economic interest is based on the Family Court's flawed fact finding, which suggests a level of government financial support and foster care spending that does not exist. See supra at *4. But beyond the factual inaccuracies upon which the Family Court relied, the state's financial concerns do not serve as a compelling reason to infringe on a fundamental right. See Saenz v. Roe, 526 U.S. 489, 507 (1999) (holding that a state's legitimate interest in saving money provided no justification for a state statute infringing on fundamental right to travel); Cooper v. Morin, 49 N.Y.2d 69, 82-83 (1979) (holding that economic considerations and budgetary limitations did not justify jail rules infringing on prisoners' fundamental rights to marriage and procreation); State v. Livingston, 53 Ohio App. 2d 195, 197 (Ohio Ct. App. 1976) (holding no-pregnancy probation condition unconstitutional, and noting that the "court cannot use its awesome power in imposing conditions [that prohibit bearing children who might become public charges] to vindicate the public interest in reducing the welfare rolls") (citation omitted). As the New York Court of Appeals has cautioned, "to exalt economic considerations over the rights of our citizens is nothing more than abdication of this court's constitutional responsibility." Cooper, 49 N.Y.2d at 82-83.

Courts across the nation have, since 1896, recognized that poverty alone is not a justification for denying someone the right to bear and raise children. Deciding an early custody dispute, an Ohio court reasoned that:

> [T]he poor have as much love, as much ambition, as much morality as the richest, and American history teaches us that our best men and those who have attained the greatest eminence, have sprung from the severest poverty.

In re Olson, 3 Ohio Dec. 668, 1896 WL 1498, at *4 (Ohio Prob. Ct. 1896) (grandmother of child had sought to adopt without the mother's consent, court could not find that mother had either abandoned the child, or that she was unfit for reasons other than poverty to care for her child).

Indeed as a court in 1915 noted: "the greatest characters in history have been those who have been born in the manger and in the log cabin, rather than in the palace." Ex parte Sidle, 154 N.W. 277, 281 (Sup. Ct. N.D. 1915) (child custody proceeding brought by indigent parents). A long line of cases has held fast to this principle. See, e.g., In re Matthews, 164 P. 8, 9 (Cal. 1917) (affirming a grant of custody of child to biological mother who was determined by the court not to have the financial means to care for the child); C.B. v. State Dept. of Human Res., 782 So. 2d 781, 785 (Ala. Civ. App. 1998) (termination of parental rights reversed despite the fact that trial court had found that mother could not maintain employment or provide a stable home for her children); In re A.H., 842 A.2d 674, 687 (D.C. 2004) ("[W]hen it is poverty alone that causes an otherwise fit parent to be unable to care for her child, adequate public or private benefits should and will be made available to the family—benefits that the parent can be counted on to put to good use to remedy the child's deprivation").

New York State, like many other states, has made it a priority to provide state aid to needy families. See, e.g., N.Y. Soc. Serv. Law § 384-b(1)(a)(iii) ("[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."). In fact, New York State guarantees aid to the poor in its state constitution. N.Y. Const. Art. 17, § 1. The duty to preserve family integrity is heightened when poverty threatens to separate children from their parents.

See N.Y. Soc. Servs. Law § 397(1)(a), (b). For example, N.Y. Social Services law explicitly provides that "[a]s far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life." N.Y. Soc. Serv. Law § 131(3); see also Martin v. Gross, 546 N.Y.S.2d 75, 77 (App. Div. 1989) (Social Services Law imposes an unequivocal duty on child welfare officials to preserve family integrity).

Thus, clear state and federal precedent precludes the Family Court's reliance on the financial burden imposed on the state and tax payers as a compelling interest justifying restrictions on Stephanie P.'s fundamental right to procreation. See e.g., Saenz, 526 U.S. at 507 (holding unconstitutional California's residency requirement for public benefits); Zablocki, 434 U.S. at 387-91 (holding unconstitutional a state law prohibiting individuals legally obligated to pay child support from marrying without court approval, and noting that some affected individuals would be "absolutely prevented" from marrying due to lack of financial means and inability to "prove that their children will not become public charges").

E. THE NO-PREGNANCY CONDITION FAILS STRICT SCRUTINY BECAUSE IT FAILS TO ADVANCE THE STATE'S INTEREST IN PROTECTING CHILDREN AT ALL, LET ALONE IN THE LEAST RESTRICTIVE MANNER.

In addition to the economic concerns that clearly motivated the Court, the Decision and Order also mentions, albeit in passing, a concern for the welfare of Stephanie P.'s existing children. See Decision and Order at *6 (noting the state's "interest in protecting children") and *8 (stating that the no-pregnancy condition will enable Appellant to become a "capable parent[] for [her] . . . children"). Both state and federal courts, as well as the New York State Legislature, have recognized the safety and

welfare of minors is an important state interest. See Stanley, 405 U.S. at 652; Zablocki, 434 U.S. at 388; N.Y. Soc. Servs. Law § 384-b(1) (characterizing health and safety of children as a matter of "paramount importance"); In re Joyce T., 65 N.Y.2d 39, 50 (1985) (rejecting argument that legislature did not have a compelling interest in protecting the best interests of the child under Family Court Act). Nevertheless, even assuming that protecting Stephanie P.'s current children were the true purpose of the Decision and Order—which does not appear to be the case, given the Family Court's far greater emphasis on economic considerations—the no-pregnancy condition must still be narrowly targeted to achieve the interest of protecting children. The no-pregnancy condition fails to satisfy that test.

The evidentiary record fails to establish that the pregnancy restriction would further the state's interest in protecting Stephanie P.'s existing children in any way whatsoever. Although the Family Court relied on testimony of a caseworker as to Stephanie P.'s history of substance abuse and concerns about Stephanie P.'s parenting skills, see Decision and Order at *2, no testimony was presented concerning whether additional children would actually be detrimental to Stephanie P.'s existing children. Moreover, as explained above, issuance of the no-pregnancy condition was based on faulty factual assumptions regarding the effects of drugs on parenting ability. There was thus no evidence that the condition addresses either Stephannie P.'s drug addiction or her parenting abilities.

Thus, the Family Court's conclusion as to any connection between the no-pregnancy condition and protecting Appellant's existing children is based on pure speculation. A speculative benefit is not a legitimate justification to restrict a

fundamental right. See Trammell, 751 N.E.2d at 288-91 (holding that the court's order that probationer not become pregnant excessively impinged on her privacy right to procreation, served no rehabilitative purpose, and did nothing to improve her parenting skills or educate her regarding child development).

Nor does the no-pregnancy condition advance the state's interest in protecting Stephanie P.'s potential, as-yet unconceived children, from harm, as the Court suggests. Decision and Order at *7 ("Parents who have more children when there has already been clear and convincing proof that those parents could not raise any children they now have, and that any new children, if not removed would be victims of neglect and/or abuse." [sic]). Besides being beyond the jurisdiction of the Family Court, see Appllnt. Br. at 30, an interest in children that are not yet conceived cannot justify state intrusion into Stephanie P.'s decisional and procreative autonomy. See Carey, 431 U.S at 690 (rejecting argument that state "interest in protecting potential life is implicated in state regulation of contraceptives").

Moreover, even if such an interest did exist, which it does not, the no-pregnancy condition would not advance that interest: The state cannot legitimately claim to protect potential life by preventing that life from coming into being. In the words of the New York Court of Appeals,

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.

Becker v. Schwartz, 46 N.Y.2d 401, 411 (1978) (denying tort claim for "wrongful life" brought on behalf of infant born with malformities). The presumption that the state

should be trusted in this case to make the determination that it would be better for Stephanie P.'s future children not to be born than to be born into her family "depend[s] upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make." Id. at 412. It also smacks of the type of eugenic arguments that have been broadly discredited by commentators and disapproved by the Supreme Court. See supra Section I.C; Casey, 505 U.S at 859. Therefore, the Court's assertion that the no-pregnancy condition will serve to prevent any as-yet-unborn children from harm is untenable.

Finally, the imposition of the no-pregnancy condition is not narrowly tailored to further the interest in protecting Stephanie P.'s existing children. For example, the Family Court eschewed less intrusive and arguably more beneficial measures aimed at improving Stephanie P.'s capacity to care for her children, arguing that it was "not proven that respondent was in need of referrals to either a family planning or parental skills program." Decision and Order on Motion to Vacate at 5. Instead, the Family Court imposed the extraordinary condition of prohibiting procreation, which bears little, if any, relation to protecting Stephanie P.'s existing children. See e.g., Trammell, 751 N.E.2d at 289 (holding that the state's interests could be adequately served by a less restrictive alternative than no-pregnancy probation condition, and these alternatives might include periodic pregnancy testing, intensive prenatal treatment, and if necessary, removal of the children to foster care); Pointer, , 199 Cal. Rptr. at 366 (finding no-pregnancy probation condition imposed after conviction for child endangerment and violating custody order an overbroad infringement on the exercise of fundamental rights, because less restrictive

alternatives were available that would feasibly provide the protections the court deemed necessary).

The Family Court could have made a more searching inquiry with child protection workers about their efforts to assist Stephanie P. with obtaining suitable housing for her and her children, and indeed, could have ordered the agency to make more diligent efforts to do so. In fact, stable housing has been shown to increase the likelihood of success in substance abuse treatment. See Jesse B. Milby et al., To House or Not to House: The Effects of Providing Housing to Homeless Substance Abusers in Treatment, 95(7) Am. J. of Pub. Health 1259, 1263 (2005). The record is replete with reference to Stephanie P.'s lack of suitable housing, including noting that she could not be found in order to serve her with notice of the proceedings, see March 31, 2003, Tr. 10; April 29, 2004, Tr. 9-10; May 25, 2004, Tr. 18; June 23, 2004, Tr. 8, 12; and acknowledging that the shelter she was living in was not appropriate for a child, see March 31, 2003, Tr. 11; June 17, 2003, Tr. 11, 12, 13, 15; June 23, 2004, Tr. 30. See also March 31, 2003, Tr. 13, 14 (noting that she had no place to live); May 21, Tr. 3 (noting transient living); June 17, 2003, Tr. 3 (noting that she had been evicted), Tr. 11, 12 (noting that she had no place to live); May 25, 2004, Tr. 12, 13, 17, 22 (noting her inability to maintain suitable housing; June 23, 2004, Tr. 23, 26, (noting her inability to comply with order to get stable housing, Tr. 25 (noting her transient housing); Oct. 20, 2004, Tr. 39 (same). Ensuring that supportive housing services were being provided in an effective way would certainly have been a less restrictive alternative that would have addressed the court's professed concerns about the suitability of Stephanie P.'s living situation for her children.

On the other hand, the no-pregnancy condition could have a very real negative impact on Stephanie P.'s children. First, should she become pregnant, the no-pregnancy condition would discourage her from seeking prenatal medical care during her pregnancy, because doing so would risk being reported for violating the Decision and Order and might result in her being sent to jail. Not obtaining prenatal care would adversely impact the health of her fetus and the child she may bear. See supra Section I.D; see also Trammell, 751 N.E.2d at 290 (holding as to a no-pregnancy probation condition that "'[t]here would be significant enforcement problems should [defendant] become pregnant, forcing her to choose among concealing her pregnancy (thus denying her child adequate medical care), abortion, or incarceration.'") (quoting State v. Mosburg, 768 P.2d 313, 315 (Kansas Ct. App. 1989)).

Moreover, imposing a prison term on Stephanie P. for violating the no-pregnancy condition would run counter to the state's interest of having her develop into a responsible parent who supports her own children. See United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) (holding probation decision prohibiting conception unworkable because violation of the condition would result in the probationer's return to prison, which would not serve the district court's interest of adequately sustaining the probationer's children).

Thus, the no-pregnancy condition cannot be deemed sufficiently narrow to further the state's interest in protecting children. See Trammell, 751 N.E.2d at 291; Pointer, 151 Cal. App. at 1141, 199 Cal. Rptr. at 366; People v. Zaring, 10 Cal. Rptr. 2d 263, 269 (Cal. Ct. App. 1992) (holding no-pregnancy probation condition impermissibly overbroad).

V. THE ORDER VIOLATES PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW.

The no-pregnancy condition is also incompatible with several fundamental rights protected under international human rights law and specifically guaranteed under treaties ratified by the United States, to which it is therefore legally bound as a party. Specifically, the Decision and Order violates the right to found a family, the right to privacy, and the right to be free from degrading or humiliating treatment.

The right to procreate—to found a family—is recognized as a fundamental right under international law, not only in the Universal Declaration of Human Rights, G.A. Res. 217A, art. 16 (Dec. 10, 1948), but also in Article 23 (2) of the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N.T.S. 171 (Mar. 23, 1976). The state must therefore refrain from interfering with the right of men and women to procreate, and if the state adopts family planning policies, the policies should be compatible with the other rights in the ICCPR, and should not be compulsory. See U.N. Human Rights Committee, General Comment No. 19: Article 23 (39th Sess. 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 28 (1994). Controlling procreation by imposing punitive sanctions on those who fail to comply, as the Family Court has done in this case, is incompatible with that right.

Underscoring the fundamental nature of this right, the United Nations High Commissioner for Refugees recognizes that coercive family planning laws or policies that violate the human right of individuals to found a family can give rise to

justified claims for refugee status. See UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (August 2005), available at http://www.unhrc.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=4301a9184. Indeed, at least three U.S. courts have granted asylum to citizens of China who were either forced to undergo sterilization procedures, abortion, or otherwise prevented from bearing children under that government's policies—implemented in the interest of controlling that nation's unquestionably large population—limiting couples to only one child. See, e.g., Qu v. Gonzalez, 399 F.3d 1195, 1203 (9th Cir. 2005) ("Involuntary sterilization irrevocably strips persons of one of the important liberties we possess as humans: our reproductive freedom."); see also In re C.Y.Z., Applicant, 21 I. & N. Dec. 915, Interim Decision (BIA) 3319, 1997 WL 353222 (BIA), June 4, 1997 (holding that an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee for immigration and naturalization purposes); Lin v. Ashcroft, 385 F.3d 748, 751 (7th Cir. 2004) (citing a 1996 amendment to the statutory definition of a refugee eligible for asylum in the United States which defined a refugee as one who suffers from persecution based on coercive family planning policies, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (1996), codified as amended at 8 U.S.C. § 1101(a)(42)(B)).

The no-pregnancy condition is also incompatible with the right to protection against arbitrary or unlawful interference with privacy and family, under Article 17 of the ICCPR, which covers rights of autonomy, including sexual autonomy. In the case Toonen v. Australia, Communication No. 488/1992, U.N. Doc

CCPR/C/50/D/488/1992 (1994), the United Nations Human Rights Committee confirmed that adult consensual sexual activity in private is covered by Article 17. Issues relating to a woman's decisions on sexual activity, family planning, use of contraception and reproductive choices, and whether to become or to continue with a pregnancy all fall within the protected sphere of privacy and private life under Article 17. The no-pregnancy condition constitutes an interference with this right, and therefore is only legitimate if it is reasonable—i.e. that it is necessary and proportional to a legitimate end sought. See Human Rights Committee, General Comment 16: Article 17 (23rd Sess., 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), at ¶ 4; Toonen, at ¶ 8.3).

Just as the no-pregnancy condition fails to satisfy strict scrutiny under United States Constitutional analysis, so too does it fail to meet the test of reasonableness under human rights jurisprudence. The decision, which would potentially lead to the imprisonment of Stephanie P. were she to become pregnant, and subjects her to state supervision of her most private choices relating to sexual activity, use of contraception, procreation and abortion, represents such an intrusion into her private life that it may also amount to degrading or humiliating treatment, which is absolutely prohibited under Article 7 of the ICCPR ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"). The Decision therefore violates several fundamental rights protected under international human rights law and is incompatible with the United States' obligations under the ICCPR.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request this Court to vacate the Decision and Order of December, 2004.

Dated: July 17, 2007

Respectfully submitted,

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APPELLATE DIVISION: FOURTH DEPARTMENT

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MATTER OF BOBBIJEAN P.

MONROE COUNTY DEPARTMENT OF HUMAN AND HEALTH SERVICES, NOW KNOWN AS DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

App. Div. Docket No

-v-

CAF 05-00242

STEPHANIE P.,
Respondent-Appellant,

and

RODNEY E.,
Respondent.

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AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS OVERNIGHT DELIVERY

Galen Sherwin, Esq., hereby subscribes and affirms under penalty of perjury that she is not a party to this action, is over the age of eighteen years, is an employee of the New York Civil Liberties Union, and is an attorney admitted to practice in New York, and that on July 17, 2007, she served two copies of the annexed Brief Amicus Curiae in Support of Appellant by Federal Express overnight delivery upon the following counsel for the parties in the above-referenced matter:

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