ORIGINAL

To be argued, if permitted, by: Garth A. Johnston
Time requested: 10 minutes

Court of Appeals
STATE OF NEW YORK

In the Matter MARIAN T.

LAUREN R. et al.,

Respondents,

–against–

MARIAN T.,

Appellant.

PROPOSED BRIEF OF AUTISTIC SELF ADVOCACY NETWORK, CARDOZO BET TZEDEK LEGAL SERVICES, CENTER FOR INDEPENDENCE OF THE DISABLED IN NEW YORK, DISABILITY & AGING JUSTICE CLINIC, DISABILITY AND CIVIL RIGHTS CLINIC, SELF-ADVOCACY ASSOCIATION OF NEW YORK STATE, AND THE ARC, AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, proposed *amici curiae* Autistic Self-Advocacy Network, Brooklyn Law School's Disability and Civil Rights Clinic, Cardozo Bet Tzedek Legal Services, Center for Independence of the Disabled in New York, the Disability & Aging Justice Clinic at the City University of New York School of Law, Self-Advocacy Association of New York, and The Arc disclose that they are non-profit organizations that have no parents or subsidiaries.

Autistic Self Advocacy Network is a national grassroots disability rights organization for the autistic community, with a number local affiliates throughout the United States, a complete list of which is available here: https://autisticadvocacy.org/get-involved/affiliate-groups/.

Self-Advocacy Association of New York State (SANYS) is a non-profit organization. It is founded, and led, by people with developmental disabilities. SANYS has seven regional offices, a complete list is available here: https://sanys.org/regions/.

The Arc has a nationwide network of nearly 700 state and local chapters, a complete list of which is available here: https://thearc.org/find-a-chapter/.

Dated: December 31, 2019
Long Island City, NY

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INTEREST OF *AMICI CURIAE*

The Autistic Self Advocacy Network (ASAN) is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

Brooklyn Law School's Disability and Civil Rights Clinic (Disability and Civil Rights Clinic) represents low-income New Yorkers with intellectual and developmental disabilities and their families in a variety of civil legal matters, including access to public benefits, special education, parental rights, alternatives to guardianship and discrimination in access to programs and services, through direct legal services, public policy reform and community education. As part of this mission, the Disability and Civil Rights Clinic advocates for adults with intellectual disabilities to ensure that their rights, including the right to personhood and self-determination, are protected and enforced.

Cardozo Bet Tzedek Legal Services is a civil litigation clinic at the Benjamin N. Cardozo School of Law that represents older adults and individuals with disabilities in a wide range of civil matters. The central work of the clinic is to protect and enforce clients' civil rights as well as their rights to services and supports to live fully and independently in the community. Clinic students represent clients in administrative proceedings and in individual and class actions in federal and state court. Each year, Cardozo Bet Tzedek represents dozens of older persons and persons with disabilities seeking health, disability, and housing benefits that they could not get without Clinic assistance. Cardozo Bet Tzedek also promotes the right to legal capacity by assisting clients in finding alternatives to guardianship and by representing individuals under guardianship seeking to restore their rights.

The Center for Independence of the Disabled in New York (CIDNY) is a non-profit disability-rights organization founded in 1978. Our staff and Board consist mostly of people with disabilities. We are part of the Independent Living Centers movement: a national network of grassroots and community-based organizations that enhance opportunities for all people with disabilities to direct their own lives. CIDNY educates the public and advocates for our civil rights and a strong safety net of benefits and services through legislative and grassroots advocacy. Our goal is to ensure full integration, independence and equal opportunity for all people with

disabilities by removing barriers to the social, economic, cultural and civic life of the community.

CIDNY's advocacy goals aim to ensure that people with disabilities have the tools they need to live independently, provide for their financial needs, and enjoy equal opportunity. Through its advocacy, CIDNY makes sure that the voices of people with disabilities are heard where and when issues affecting our lives are decided. CIDNY has a vital interest in the outcome of this matter because the issues of personhood and self-determination are central to its work.

The Disability & Aging Justice Clinic (DAJC) at the City University of New York School of Law represents low-income New Yorkers throughout the state with disabilities and older adults in a variety of civil legal matters, including discrimination in access to programs and services, prisoners' rights, access to health care, alternatives to guardianship, and enhancing due process protections in areas that include guardianship. The mission of the DAJC is to promote and protect the civil rights, personhood and self-determination of individuals with disabilities and older adults. The issue on appeal is central to the mission of the DAJC as it threatens the right of intellectually disabled adults and other adults with cognitive disabilities to maintain their dignity, self-determination and personhood in decisions that most impact their lives.

The Self-Advocacy Association of New York State (SANYS) is a non-profit organization founded in 1986 by Bernard Carabello, a former resident of the Willowbrook State School. SANYS is founded, and led, by people with developmental disabilities for people with developmental disabilities. We promote the awareness and recognition of the civil rights and responsibilities which include the opportunities and choices of equal citizenship. Our goal is to help self-advocates build the skill and courage needed to speak up for themselves and others. SANYS has seven regional offices throughout New York State.

SANYS is uniquely positioned to comment on the issue on appeal. As an organization run by, and for, people with developmental disabilities, SANYS believes in a person-centered and person-directed system of supports where developmentally disabled individuals are empowered in making decisions about issues that directly impact their lives. The issues of self-determination and consent that are being considered in this case of adult adoption are central to the lives of SANYS members and is core SANYS's advocacy.

The Arc of the United States, founded in 1950, is the nation's largest community-based organization of and for people with intellectual and/or developmental disabilities (I/DD). The Arc promotes and protects the rights of people with I/DD and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that people with I/DD receive

the protections and supports provided by law. The Arc has long taken the position that people with I/DD have the same right to, and responsibilities that accompany, self-determination as everyone else. They are entitled to opportunities, respectful support, and the authority to exert control in their lives, to direct their services, and to act on their own behalf. With over 600 state and local chapters, The Arc is well positioned to comment on the importance of self-determination and consent in the adult adoption of people with I/DD.

PRELIMINARY STATEMENT

Amici respectfully submit this brief in support of Appellant, Marian T. In dispensing with Marian's consent to her own adoption, the lower courts embraced the outdated—and discriminatory—view that adults with intellectual disability may be treated as perpetual children under the law. Despite changes in law, policy, and societal attitudes regarding the treatment of adults with intellectual disability, outmoded stereotypes of adults with intellectual disability as lacking personhood[1] and the ability to exercise self-determination linger. The lower courts' decisions reflect those outdated views and threaten a dangerous reversal of advances made by people with intellectual disability.

Marian is a sixty-four-year-old woman with intellectual disability.[2] Though historically people with intellectual disability were treated as incapable and dependent, society has recognized that such notions of disability are constructs of a

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[1] Personhood has been defined as "depend[ing] on the ability to make choices or decisions and to have those choices or decisions recognized by others … Making choices or decisions is not enough to constitute personhood; the power to act on them is also necessary." Kristin Booth Glen, *Piloting Personhood: Reflections From the First Year of a Supported Decision-Making Project*, 39 Cardozo L. Rev. 495, 496-97 (2017).

[2] For the purposes of this amicus brief, the term "intellectual disability" will be used because it is the term applied to Marian by the Appellate Division. *See In re Marian T.*, 166 A.D.3d 1370 (3rd Dep't 2018). The Surrogate's Court refers to Marian as developmentally disabled. R. at 7-8. "Developmental Disabilities is an umbrella term that includes intellectual disability but also includes other disabilities that are apparent during childhood. Developmental disabilities are severe chronic disabilities that can be cognitive or physical or both." American Association on Intellectual and Developmental Disabilities, *Frequently Asked Questions on Intellectual Disability*, https://www.aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability.

cultural view of normalcy.[3] Marian is a multi-faceted individual, not just an adult with intellectual disability. In dispensing with Marian's consent to her own adoption, the Appellate Division failed to recognize her as an individual capable of making decisions, effectively stripping away her personhood. Although adults with intellectual disability, much like adults without disabilities, may need supports in decision-making, they have the right to a final say in decisions about their own lives.

Adult and child adoption serve distinct policy purposes and are not interchangeable. Bound by the same statute, one is rooted in concern for the wellbeing of minors while the other stems from practical concerns of property. Minors are adopted by consenting adults when *the court* finds it to be in their best interest; adults have the right to *choose* to be adopted. In consenting to Marian's adoption on her behalf, the lower courts have unconstitutionally cut an adult off from her birth family. While a *parens patriae* role and the best interests of the child standard justify the courts' right to end the constitutionally protected relationship between a minor and their natural parent, no such justification exists for the court to dissolve the constitutionally protected relationship between an adult and their natural parent.

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[3] *See, e.g.* Compendium of Cited Materials D, Annette J. Towler & David J. Schneider, *Distinctions Among Stigmatized Groups*, 35 J. Applied Soc. Psychol. 1, 1 (2005) ("Within our society, we hold notions of what it means to be normal. By normal, in this context, we mean conforming to the present standard of behavior or appearance within our society.") (citations omitted).

Although the effect of terminating an adult's relationship with their parent is different than it is for a minor, it is no less consequential. The relationship between child and parent is central to the human condition: everyone is someone's child. When an adult loses their parents, they mourn in infinitely unique ways, but they rarely go out and get new ones. When they do, they *choose* to.

The Court should reverse the Appellate Division's decision that adult adoption does not require consent.

ARGUMENT

I. Changes In Societal Attitudes And Public Policy Recognize The Dignity, Self- Determination, And Personhood of Adults With Intellectual Disability.

The last several decades have witnessed an evolution in law and public policy regarding the rights of persons with intellectual and developmental disabilities. An estimated 7.37 million people in the United States have intellectual or developmental disability.[4] Intellectual disability is "characterized by significant limitations both in intellectual functioning and in adaptive behavior."[5] According to the American Association on Intellectual and Developmental Disabilities, "[a]daptive behavior is

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[4] Sheryl Larson et. al., *In-Home and Residential Long-Term Supports and Services for Persons with Intellectual or Developmental Disabilities: Status and Trends Through 2016*, 7 (2018), https://ici-s.umn.edu/files/4pQ7Pt7HxF/risp2016_web.pdf.

[5] Compendium of Cited Materials A, American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports*, 11 (11th ed. 2010).

the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."[6] These skills include empathy, social judgment, interpersonal communication, and the ability to make and retain friendships, as well as practical skills centering on self-management in areas like personal care, work, finances, recreation, and organization.[7]

Until recently, intellectual disability was viewed as an "illness or defect that renders the person suffering it to be an object of charity and protection;"[8] disability was viewed through a medical model, seen as a biological flaw to be cured or "eradicated."[9] This view put the burden on the individual with intellectual disability to "remediate" the manifestation of their disability[10] and, in the first half of the twentieth century, led to egregious violations against the dignity and personhood of people with intellectual disability in the form of eugenics,[11] forced sterilization,[12]

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[6] *Id.* at 43.

[7] *See* Compendium of Cited Materials B, American Psychiatric Association, Intellectual Disability Fact Sheet, 1 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Intellectual-Disability.pdf.

[8] Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity Guardianship, and Beyond,* 44 Colum. Hum. Rts. L. Rev. 93, 98 (2012).

[9] Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function,* 77 Wash. L. Rev. 575, 595 (2002).

[10] Bradley A. Areheart, *When Disability Isn't Just Right: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma,* 83 Ind. L. J. 181, 186 (2008).

[11] *See generally* Paul A. Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 St. Louis. U. J. Health L. & Pol'y 57, 58 (2008) ("The feebleminded were regularly described by eugenicists as a menace to society. . .").

[12] *See, e.g., Buck v. Bell*, 274 U.S. 200, 207 (1927) (opining that "three generations of imbeciles are enough" while sanctioning the sterilization of people with disabilities).

and institutionalization.[13]

Societal attitudes toward people with intellectual disability have gradually shifted toward a stronger emphasis on the "social model" of disability. This model moves away from the medicalized approach to disability and "places the responsibility squarely on society (and not on the individual with a disability) to remove the physical and attitudinal barriers that 'disable' people with various impairments, and prevent them from exercising their rights and fully integrating into society."[14]

In fact, Congress codified this shift from a medical to social model of disability in the Americans with Disabilities Act (ADA). *See generally* Americans with Disabilities Act, 42 U.S.C. § 12101 (1990). The ADA, unique among civil rights statutes, seeks to address problematic "attitudinal barriers" that underwrite disability discrimination.[15] Title II of the ADA and Section 504 of the Rehabilitation Act, *see generally* 29 U.S.C. § 701 (2014), "are legal mechanisms that draw from

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[13] "The peak of institutionalization for people with intellectual disabilities and developmental disabilities (ID/DD) was in 1967, when 194,650 people with ID/DD nationally were housed in large designated state institutions." Nat'l Council on Disability, *Institutions in Detail* 1, https://ncd.gov/rawmedia_repository/Institutions%20inDetail.pdf. Most infamously, the Willowbrook School in Staten Island inhumanely housed thousands of people, including young children, with intellectual and developmental disability until its closure in 1987. *See* Disability Justice, *The Closing of Willowbrook*, https://disabilityjustice.org/the-closing-of-willowbrook/.

[14] Arlene Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 Colum. Hum. Rts. Rev. 403, 427 (2011).

[15] *See, e.g.*, Jasmine E. Harris, *The Aesthetics of Disability*, 119 Colum. L. Rev. 895, 916-31 (2019) (discussing the evolution of integration as a central normative organizing principle in disability rights law).

the social model of disability by placing an affirmative duty on specified entities to adjust policies, procedures and physical barriers to create access and opportunity for persons with disabilities that are equal to those available to persons without disabilities."[16]

Disability rights gained legal momentum in 1999 following the landmark United States Supreme Court decision *Olmstead v. L.C.,* 527 U.S. 581 (1999). In *Olmstead,* the Supreme Court held that the unjustified segregation of people with disabilities qualifies as disability-based discrimination under Title II of the ADA. *Olmstead* shifted the framework for how people with disabilities are treated under the law and confirmed that states must follow Title II of the ADA's mandate to "administer programs and activities in the most integrated setting appropriate." *Id.* at 591-92 (citations omitted).

Largely as a result of successful *Olmstead* litigation, there is more than $19 billion dollars of federal funding committed to home and community-based supports and services for persons with intellectual and developmental disability.[17] The Home and Community Based Services (HCBS) Settings Rule[18] is a sweeping set of federal regulations with which states must comply to receive Medicaid reimbursements for

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[16] Natalie M. Chin, *Group Homes as Sex Police and the Roles of the Olmstead Integration Mandate*, 42 N.Y.U. Rev. L. & Soc. Change 379, 407 (2018).
[17] United States Profile, The State of the States in Intellectual and Developmental Disabilities, 2 (2017), http://stateofthestates.org/documents/UnitedStates.pdf.
[18] *See* 42 C.F.R. § 441.301 (2019).

administering supports and services in community-based residential settings for people with disabilities. The HCBS Settings Rule emphasizes that the setting where services are provided should enhance "individual initiative, autonomy, and independence in making life choices," reinforcing the evolved position that people with disabilities have a right to make decisions about the choices in their lives. 42 C.F.R. § 441.301(c)(4)(iv) (2019).

Recognizing the dignity, personhood, and self-determination of individuals with intellectual disability has been acknowledged as an international human right. In 2006, the United Nations adopted the Convention on the Rights of People with Disabilities (CRPD), a comprehensive international treaty which outlines foundational principles for those with disabilities, including a universal "right to recognition as persons before the law" and "legal capacity on an equal basis with others in all aspects of life." *Convention on the Rights of Persons with Disabilities,* Art. 12, Dec. 13, 2006, 2515 U.N.T.S. 3.

New York courts have utilized the language of the CRPD when making determinations about adult guardianship. *See, e.g., In re Guardian for Michelle M,* 52 Misc.3d 1211(A) (Sur. Ct., Kings County 2016) (invoking the CRPD when dismissing an Article 17-A guardianship[19] on the grounds that the person subject to

[19] Article 17-A of the Surrogate's Court Procedure Act (Article 17-A) governs guardianship proceedings for adults with intellectual and developmental disabilities.

guardianship can make their own decisions); *In re Mark C.H.*, 28 Misc.3d 765 (Sur. Ct., New York County 2010) (finding obligations under the CRPD requiring periodic review of Article 17-A guardianships to prevent abuse). *See also In re Dameris L.*, 38 Misc.3d 570, 579-81 (Sur. Ct., New York County 2012) (finding "persuasive weight" in the CRPD to terminate an Article 17-A guardianship in favor of a supported decision-making framework).

This Court has acknowledged that if the law "recognizes the right of an individual to make decisions about life out of respect for the dignity and autonomy of the individual," that recognition must extend to people with disabilities. *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986), quoting *Matter of K. K. B.*, 609 P.2d 747, 752 (Okla. 1980).

II. The Appellate Division Infantilized Marian Because Of Her Intellectual Disability In Its Decision To Dispense With Her Consent To Adoption.

Adult and child adoption serve distinct policy purposes and are not interchangeable. Absent from the common law, the historical purpose of adoption in New York was as "a means of establishing a real home for a child" with its goal "almost uniformly seen as promoting the welfare of children." *In re Malpica-Orsini*, 36 N.Y.2d 568, 572 (1975), *abrogated on other grounds by Caban v. Mohammed*, 441. U.S. 380 (1979) (citations omitted). Because adult adoption definitionally does not involve children it cannot fulfil that goal, particularly "as parents have no legal

right to control their adult child's activities." *Hartsock v. Hartsock*, 189 A.D.2d 993, 994 (3rd Dep't 1993).

A. Marian's Is An Atypical Adult Adoption.

The practice of an adult taking another into their family as a "child" dates back to antiquity, where it was used to maintain and pass on property, family names, and even imperial titles.[20] It is used the same way today. Adult adoptions are distinct from minor adoptions in that adults typically[21] adopt one another for strictly practical reasons of property and financial security.[22] *See e.g., 333 East 53rd Street Associates v. Mann*, 121 A.D.2d 289 (1st Dep't 1986), *aff'd* 70 N.Y.2d 660 (1987) (finding adoption of an adult to confer the economic benefit of a rent-controlled apartment was not fraud); *In re Mazzeo*, 95 A.D.2d 91 (3rd Dep't 1983) (holding adult adoptee whose adoptor died before signing adoption papers could raise claim of equitable adoption to secure financial inheritances). Adults have even been adopted as a means to allegedly perpetuate fraud. *See, e.g., McSpedon v. Levine,* 158 A.D.3d 618, 619 (2nd Dep't 2018).

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[20] *See generally* John Francis Brosnan, *The Law of Adoption*, 22 Colum. L. Rev. 332 (1922) (providing a history of adoption).

[21] *See generally* Tamar Lewin, *It's a Boy: 228 Pounds and 6-Foot-3*, N.Y. Times, April 21, 2005, at G2 (describing the difficulty in gathering data on adult adoptions and how they can be used to formalize existing family-like structures like foster and stepfamilies).

[22] *See generally* Walter Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 Cornell L. Rev. 566 (1968-1969) (describing the differences between adult and minor adoption).

Prior to *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015), in which the Supreme Court found a constitutional right to same-sex marriage, couples attempted to formalize existing relationships through adoption. *See, e.g., In re Robert Paul P.*, 63 N.Y.2d 233, 235 (1984) (rejecting adoption for "social, financial, and emotional reasons" between same-sex partners as incompatible with public policy of creating parent-child relationships)

The adoption of Marian mirrors the adoption of a minor rather than an adult. Although Marian is sixty-four, her adoption does not rise from the practical concerns of other adult adoptions, nor does it rise from a mutual expression of all parties to formalize an existing family unit. Marian's expressed desire for the adoption is unknown. Whereas Respondents' intent in adopting Marian is explicitly a "desire to provide a home for her … to care for her as a member of their family," as if she were a child. R. at 6.

B. The Primary Emphasis On The Emotional Bond Between Marian And Respondents Is Wholly Insufficient To Establish The Right To Dispense With Marian's Consent.

Society has a "tendency to conflate adult incapacity and infancy,"[23] treating adults with intellectual disability as perpetual children. Researchers have found evidence that many have "infantilizing attitudes" about disability,[24] including a

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[23] Ralph C. Brashier, *Incapacity and the Infancy Illation*, 71 Ark. L. Rev 1, 6 (2018).
[24] Compendium of Cited Materials C, Kenneth L. Robey et. al., *Implicit Infantilizing Attitudes About Disability*, 18 no. 4 Journal of Developmental and Physical Disabilities 441, 444 (2006).

likelihood of associating intellectual disability with "childhood or child-like features."[25] The likelihood that an adult with intellectual disability will be treated as "a young child" only increases with age.[26] "When a person is elderly *and* has a cognitive disability" there is an "even greater likelihood that … substitute decision-makers will treat [them] as a young child."[27]

The Appellate Division's primary emphasis of the emotional bond between Marian and Respondents is wholly insufficient to establish the right to dispense with Marian's consent and demonstrates how the Appellate Division not only sees Marian as child-like but also treats her as a child. People regularly have emotional connections with others without wanting to be adopted by them – yet both lower courts highlight that bond throughout their decisions. *See In re Marian T.*, 166 A.D.3d at 1372; R. at 4, 5, 9.

The fact there is affection between Respondents and Marian is not, in and of itself, indicative of Marian's desires or best interests. The Appellate Court's misperception of Marian as child-like is apparent in in its citation of juvenile adoption cases to connect her "best interest" to her relationship with Respondents. *In re Marian T.*, 166 A.D. 3d at 1372. *See, e.g., In re Haylee RR.*, 47 A.D.3d 1093 (3rd Dep't 2008) (finding a four-year-old's best interests served by maintaining her

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[25] *Id.* at 447.
[26] Brashier, *supra* note 23, at 13.
[27] *Id.*

placement with a foster family she had grown attached to); *In re Dessa F.*, 35 A.D.3d 1096, 1098 (3rd Dep't 2006) (affirming petition to terminate mother's parental rights over preteen children because "adoption by their foster parents was in their best interests"); *In re George L. v. Commissioner of Fulton County Dept. of Social Servs.*, 194 A.D.2d 955 (3rd Dep't 1993) (granting adoption of a six-year-old child to the foster parents she had psychologically bonded with).

The Appellate Division further infantilizes Marian by conflating her interests with Respondents'. Analyzing whether *Marian* feels "loved, safe, happy and content" with Respondents, *In re Marian T.,* 166 A.D.3d at 1373, the court focuses on the "great love and affection" which *Respondents* have for Marian, noting how one "even became visibly emotional when describing his relationship with" her. *Id.* at 1372. This analysis is flawed as Respondents' emotions do not necessarily equate to Marian's.

The Appellate Division consistently focuses on Respondents' feelings, disregarding or substituting Marian's personhood for that of Respondents in the process. The court saw "no reason to conclude" that Marian's "cognitive limitations" might prevent her from desiring a "deep and emotional attachment to a family." *Id.* at 1373. It is unclear, however, why the court sees a reason to even consider disability – in this instance Marian's cognitive limitations – as a possible barrier to

Marian's ability to experience "a deep and emotional attachment to a family." *Id.* . Marian is a sixty-four-year-old woman. She must be treated as such.

III. Dispensing With Marian's Consent To Adoption Violates Her Constitutional Right To Due Process And Personal Choice In Matters of Family.

Courts have an obligation under substantive due process to utilize the least restrictive alternative to a deprivation of a fundamental right, where one is available. *See e.g. Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 165 (1973) ("To subject a person to a greater deprivation of his personal liberty than necessary to achieve the purpose for which he is being confined is, it is clear, violative of due process"); *In re Dameris L.*, 38 Misc.3d at 580 ("the internationally recognized right of legal capacity through supported decision making can and should inform our understanding and application of the constitutional imperative of least restrictive alternative."); *In re Andrea B.*, 94 Misc.2d 919, 925 (Fam. Ct., New York County 1978) ("[S]ubstantive due process requires adherence to the principle of least restrictive alternative.").

A. A Supported Decision-Making Model Should Be Utilized When Informed Consent Cannot Be Established Through Traditional Means In Cases Of Adult Adoption.

When a person is deemed unable to consent under traditional competence or capacity evaluations, the court cannot simply waive their right to consent if consent can be obtained through less restrictive means, such as supported decision-making.

See, e.g., In re Dameris L., 38 Misc.3d at 580 ("[W]here a person with an intellectual disability has the 'other resource' of decision making support, that resource/network constitutes the least restrictive alternative."). Supported decision-making is an alternative to substituted decision-making paradigms – such as the "best interests" test used by the lower courts – wherein a person makes decisions with supports from trusted family, friends, and other loved ones.[28]

Supported decision-making has been codified by eight states and the District of Columbia,[29] with another four states in the process of enacting similar statutes,[30] and is rooted in the CRPD's declaration that individuals with disabilities have a right of legal capacity. *See Convention on the Rights of Persons with Disabilities, art. 12, Dec. 13, 2006, 2515 U.N.T.S. 3.*

In New York, supported decision-making is judicially recognized as an alternative to guardianship proceedings *See, e.g., In re D.D.,* 50 Misc.3d 666 (Sur. Ct., Kings County 2015) (denying 17-A guardianship because supported decision-making is the least restrictive means to address needs); *see also In re Capurso*, 63

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[28] *See* Supported Decision Making New York, *What is Supported Decision Making?* https://sdmny.org/about-sdmny/about-sdm/ (explaining the origins of supported decision-making and the general process of using supports in making decisions).
[29] *See* Supported Decision Making New York, *Supported Decision-Making Laws*, https://sdmny.org/sdm-laws/ ("As of August 23, 2019, eight states – Alaska, Delaware, Indiana, Nevada, North Dakota, Rhode Island, Texas, and Wisconsin – and the District of Columbia have enacted statutes that recognize supported decision-making agreements.")
[30] Statutes recognizing supported decision-making agreements are pending in Connecticut, Kansas, Kentucky, and Massachusetts. *Id.*

Misc.3d 725, 730 (Sur. Ct., Westchester County 2019) (when there is "a system of supported decision-making in place that constitutes a less restrictive alternative to 17-A guardianship, the guardianship is no longer warranted.").

For the past twelve years, Marian and Respondents have engaged in supported decision-making practices with Marian. Respondents have ensured that Marian's desires concerning where to live are met and have worked with her to make other decisions throughout her life. Throughout the record, Respondents describe the ways in which Marian can make decisions and the supports she has to assist her in making them, and emphasize her existing decision-making support network. *See* R. at 63, 89, 107.

As discussed in further detail below, there is a substantive due process right to participate in decisions about family relationships to the maximum extent possible. *See Santosky v. Kramer*, 455 U.S. 745 (1982). By applying the "best interests" analysis without addressing whether Marian can express her wishes through supported decision-making practices, the lower courts failed to honor her constitutional right to make decisions regarding her own family relationships. With an already available network of trusted friends and supporters to help her make decisions, supported decision-making should have been considered as a means to support Marian in making a decision that impacts this fundamental right.

The process of supported decision-making is starkly different from that of a psychological expert or judge asking questions to ascertain whether Marian understands the meaning of adoption, which is what occurred in the trial court, without success. *See* R. at 20-27; *See also* R. at 4-5. Supported decision-making involves a supporter – someone who the person with intellectual disability knows and trusts – listening, reviewing and simplifying information, encouraging conversation, and identifying possibilities and alternatives.[31] Through supported decision-making, the adult with intellectual disability is the decision-maker; they are respected and listened to throughout the process.

Marian has demonstrated decision-making capabilities. During his testimony, Respondent Gregg testified concerning his belief that Marian was capable of engaging in a self-determination program and could avail herself of these services with supports. R. at 63-64. He explained that these services allow people with intellectual disability to "determine the services that they want, determine who works with them, what staff works with them, what they do during their day." R. at 63.

Respondents' testimony confirms that if placed in the appropriate program or otherwise given the appropriate supports, Marian can "determine" things for herself.

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[31] *See* Supported Decision Making New York, *How to Provide Support*, https://sdmny.org/for-parents/how-to-provide-support/ (describing the supported decision-making process).

Put differently, Respondent Gregg's testimony suggests that Marian is capable of making decisions with some supports. Supported decision-making can continue to enhance Marian's capacity and self-determination to make decisions around her living situation, up to and including the potential for adoption. When discussing Marian's treatment team, Respondent Gregg testified that, with regard to how decisions are made, "it's a team decision but Marian is, you know, part of that decision-making." R. at 89.

There is little in the Record on Appeal, *see* R. at 104, to indicate that time was taken to explain the impact of adoption to Marian — to discuss what benefits it could and could not have in her life, and work with her toward an understanding of adoption whereby she could make this decision with the supports of her trusted community of friends and supporters. In this sense, Marian was treated as child-like, given no opportunity to participate in this deeply personal decision of adoption.

It is a deprivation of Marian's right to choice in family to dispense with her consent to adoption without first exploring whether the support networks she has in place can work effectively with her to explain the adoption process. Through a supported decision-making plan, Marian's supports can assist her in understanding the adoption process and help her make the decision as to whether she wants to be adopted by Respondents.

B. The Appellate Division Terminated Marian's Constitutionally-Protected Family Relationship And Violated Her Due Process Rights When It Improperly Dispensed With Her Consent to Adoption.

The lower court's interpretation of Domestic Relations Law § 111(1)(a) inappropriately dispenses with Marian's consent to adoption without adequate due process protections. The relationship between parent and child is sacrosanct. *Cleveland Bd. of Educ. v. Lafleur*, 414 U.S. 632, 639-40 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."). The Supreme Court has made clear that "before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Santosky*, 455 U.S. at 747-48. It is axiomatic that the same be true when the State moves to sever the rights a child has to their natural parent and family.

After an adoption, "[f]or all practical purposes, the [birth] parent no longer exists." *In re Ricky Ralph M.*, 56 N.Y.2d 77, 80 (1982). In consenting to Marian's adoption on her behalf the lower courts have unconstitutionally cut an adult off from her birth family. While a *parens patriae* role and the best interests of the child standard justify the State's right to end the constitutionally protected relationship between a *minor* and their natural parent, no such justification exists for the State to

dissolve the constitutionally protected relationship between an *adult* and their natural parent.

By law, adoption creates rights and obligations between persons where none existed. Upon completion of an adoption, adoptors and "adoptive child shall sustain toward each other the legal relation of parent and child and shall have *all the rights* and be subject to the duties of that relation." DRL § 117(1)(c) (emphasis added). With the exception of adoptions by stepparents and within families, adoption law in New York also terminates rights, obligations, and legal relationship between an adoptee and their birth family.

After an adoption is complete, the adoptees "and their issue thereafter are strangers to any birth relatives for the purpose of the interpretation or construction of a disposition of any instrument." DRL § 117(2)(a). This permanent severance is purposeful. In its adoption procedures, the New York Legislature "clearly intended that the adopted child be severed from the biological family tree and be engrafted upon new parentage." *In re Best*, 66 N.Y.2d 151, 155 (1985).

That Marian's birth family is unaccounted for is irrelevant. R. at 5. Whether or not a person's parent is living, the dismantling of a family constitutes significant State action. For a child of any age "the consequences of termination of [their] natural parents' rights may well be far-reaching … some losses cannot be measured." *Santosky*, 455 U.S. at 761 n.11. In the absence of Marian's ability to

object to her adoption, the court is cutting her from her family tree solely because of her disability, implementing a substituted judgment of her constitutionally protected right to personal choice in matters of family.

C. Dispensing With Marian's Consent Based On Her "Moral And Temporal" Best Interests Is An Inappropriate Overreach Of Judicial Discretion.

In dispensing with Marian's consent to adoption based on a best interest analysis, the Appellate Division inappropriately extends the State's *parens patriae* role to an entire class of adults with intellectual disability. The Appellate Division interprets DRL § 111(1)(a) to create a class of adoptees who are over the age of fourteen whose consent can be dispensed with by judicial discretion. But in doing so the court fails to distinguish between those adults who would consent to adoption were they able and those who would not.

It is well-established that courts can make decisions on behalf of minors, including consenting to their adoption. Courts "in the fulfillment of the *parens patriae* responsibility of the State, should, as a general operating principle, have an appropriately broad range of power to act in the best interests" of minors. *In re Michael B.*, 80 N.Y.2d 299, 319 (1992, Bellacosa, J., concurring); *See also People v. Ewer*, 141 N.Y. 129 (1894) (finding it within the State's power to restrict child labor to that which is proper and safe); *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976)

(holding the State's power to deprive a natural parent of their child extends only to extraordinary circumstances).

After a New Yorker reaches maturity, the State's *parens patriae* role diminishes and may only be exercised as a last resort to protect against harm and then only when there is a carefully crafted process designed to preserve as much autonomy as possible for the individual. *See* Mental Hygiene Law § 81.01.[32] In disregarding Marian's choice in family, the courts below infantilize a class of adults with intellectual disability, inappropriately extending the State's *parens patriae* powers to allow for the dispensation of their consent.

The Appellate Division dismisses any concerns this extension might raise by arguing that adult adoptee consent is not waived automatically, since such dispensations are "sui generis" and based on "the *same best interest analysis* that a judge or surrogate must undertake when making the determination of whether to approve the adoption." *In re Marian T.,* 166 A.D.3d at 1372 (emphasis added).

Best interest analyses are generally inconsistent and often vague – the Appellate Division itself recognized that there are "no specific guidelines regarding best interests in an adoption proceeding" – making their application all the more dangerous in cases of adult adoptions. *Id.* at 1373. To determine best interests, the

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[32] *But see, generally, Disability Rights New York v. New York*, 916 F.3d 129 (2nd Cir. 2019); A5840, 2017-2018 Reg. Sess., S5842, 2017-2018 Reg. Sess. (N.Y. 2017) for developments that challenge the limited due process protections afforded under Article 17-A.

lower courts rely on a 1917 case which found adult adoptions to be a contract between two adults that should be honored so long as "the moral and temporal interests of the person to be adopted will be promoted." *Stevens v. Halstead*, 181 A.D. at 200. Both the Appellate Division and the Surrogate's Court cite to this amorphous standard in *In re Adult Anonymous II,* 88 A.D.2d 30, 32-33 (2nd Dep't 1982) and *In re Anonymous*, 106 Misc.2d 792, 795 (Fam. Ct. Kings County 1981), respectively, to support the decision to dispense with Marian's consent to adoption.

Additionally, as discussed above, the Appellate Division relies on intangible and highly subjective factors, including "whether the person feels loved, safe, happy and content" to determine best interest. *In re Marian T.,* 166 A.D.3d at 1373. What the lower courts overlook is that Marian's ability to feel love and emotional attachment to Respondents can be independent from a desire to enter into a new adoptive family. There is nothing to support the conclusion that Marian's intellectual disability would prevent her from wanting to maintain her existing relationship with Respondents and not be adopted. The emotionally-driven motives of Respondents and a presumption of what relationship Marian might or might not desire is not conclusive evidence of whether it in Marian's best interest, let alone her "moral and temporal interests," to consent to adoption.

D. The Right To Family Is Protected By The Fourteenth Amendment And Requires "Clear And Convincing" Evidence To Be Dissolved.

To the extent that the Court determines that an adult with a disability does not have any discernible expressed wishes to be adopted, the standard for review must be one of clear and convincing evidence to ensure that the fundamental right of the person with a disability to preserve family relationships is protected. When courts extinguish a parent-child relationship without consent, due process requires that they do so with "clear and convincing proof" of specific allegations of one of the five reasons listed in Social Services Law § 384b(4). Soc. Serv. Law § 384b(3)(g)(i); *In re Ricky Ralph M*, 56 N.Y.2d at 85 n.7.

Cutting an adult off from their biological family and grafting them onto a new family tree based on a judge's subjective interpretation of their "moral and temporal interests," rather than clear and convincing evidence that the adult in question has provided consent, violates the adoptee's constitutional right to personal choice in family matters. New York must afford adults the same right to their family as parents are afforded their children. An adult orphan is still a part of their greater family – they can, for example, still receive a bequest from a long-lost relative. Unless, as in the instant case, the court ends that relationship.

In determining that termination of parental rights required "clear and convincing" evidence in *Santosky,* the Supreme Court weighed the three factors specified in *Matthews v. Eldridge,* 424 U.S. 319, 335 (1976): (i) the private interests

affected by the proceeding; (ii) the risk of error created by the State's chosen procedure; and (iii) the countervailing governmental interest supporting use of the challenged procedure.

Applying the *Eldridge* factors to the instant termination of Marian's relation to her birth family leads to the same conclusion the Supreme Court came to in *Santosky*: that "clear and convincing" evidence is required. First, the private interests affected in terminating a familial relationship are commanding. *Santosky*, 455 U.S. at 758. A person only gets one birth family and the judiciary and Legislature have repeatedly highlighted its importance. Just as a "parent's interest in the accuracy and justice of the decision to terminate his or her parental status is … a commanding one" so too it must be for an adult child's interest in the same. *Lassiter v. Dep't of Soc. Serves.*, 452 U.S. 18, 27 (1981).

Also significant are the financial risks inherent in being cut off from one's family without consent. A scheming family member looking to increase their share in an expected family windfall might now adopt-out an incapacitated relative into a new family, or an incapacitated person without a will might be adopted by someone, such as a caretaker, seeking to inherit via intestacy. *See cf. O'Connor v. President & Dirs. of the Manhattan Co.*, 278 A.D. 862 (2nd Dep't 1951) (finding jurisdiction to determine if a caretaker unjustly enriched themselves by unduly influencing their charge into adopting them). The financial consequences of dispensing with consent

in adult guardianships have already proven to be potentially devastating[33] – and similar consequences are equally foreseeable in adult adoptions without consent.

Second, the risk of error is substantial. While the court might "correctly" dispense with the consent of an adoptee, it just as likely might not. Particularly when dispensation is based on an adoptee's "moral and temporal interests." This risk is magnified both by the difficulty in determining whether an adoptee would consent, and the burden of nullifying a mistaken adoption.

Third, without guidance from the Legislature, there is no governmental interest in allowing judicial discretion to waive adult consent rather than simply barring such adoptions. Although it would not cost the government much to allow the odd adult adoption without the consent of the adoptee, it would cost the government even less to not allow them at all. And the cost of adoptions without consent could soon increase as those with intellectual disability are living longer.[34] With judicial precedent stating that they can be adopted without their consent, this issue is likely to arise more often.

Because (i) the personal interest involved in terminating a person's right to family is commanding and carries (ii) a substantial risk of error while (iii) the

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[33] *See, e.g.,* Rachel Aviv, *The Takeover*, New Yorker, October 9, 2017, 48 (detailing how senior citizens in Nevada had their assets and autonomy stripped by unscrupulous guardians that were assigned temporarily without their consent), https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights.

[34] Matthew M. Brault, U.S. Department of Commerce, *Current Population Reports,* 79 (2012).

government interest in dispensing with consent in adult adoptions is low, due process demands "clear and convincing" evidence supporting such dispensations. The current standard of judicial discretion for adult adoptee consent based on the "moral and temporal interests" of the adoptee is insufficient. Without a stricter standard, or specific guidance from the Legislature, judicial discretion in such matters should not be used.

IV. Adult Adoptee Consent Should Be Addressed By The Legislature

Absent explicit legislation, DRL § 111(1)(a) should not be construed to allow for the dispensation of an adult adoptee's consent. This Court has found that any legislation authorizing the severing of a relationship between parent and child without "extraordinary circumstances constitutes an impermissible abridgement of fundamental parental rights." *In re Marie B*, 62 N.Y.2d 352, 358 (1984). By the same logic an adult adoption without mutual consent, terminating as it does the adoptee's relationship with their birth family and depriving them of their natural right to their parent, should also be done only under extraordinary circumstances.

Adoption law is "solely the creature of … statute" and must be "construed strictly and applied rigorously" as towards "legislative purpose as well as legislative language." *In re Jacob,* 86 N.Y.2d 651, 657 (1995) (citations omitted). While the policy and legislative purpose of adoption of minors as a means to protect and benefit their welfare is without doubt, no such clear purpose or policy exists for adult

adoptions beyond the practical and financial reasons discussed above – none of which rise to the level of the extraordinary.

There is not a single reported case in New York State of adult adoptions granted without the adoptee's consent and there is no evidence that the Legislature contemplated the lower courts' application of adoption law, as other states have. *See, e.g.,* Ala. Code § 26-10A-6 (reserving adult adoption to specific classes including those determined to have intellectual disability). If it did, it would mean that the Legislature intended the most vulnerable New Yorkers – those with disabilities that impeded their ability to express consent – to be the beneficiaries of adult adoption and that the dispensation of their consent did not require due process considerations. Neither case law nor legislative history support this outcome.

In finding the issue of disposing of adult adoptee consent to be purely a matter of judicial discretion, the lower courts mistake an adult with intellectual disability for a child, misapplying an insufficient best interest analysis based on the "moral and temporal" interests of the adoptee in the process. Absent explicit Legislative guidance, this Court should not allow for judicial dispensation of consent in adult adoptions without clear and convincing evidence supporting such a fundamental change to an adoptee's family tree.

V. The Infantilizing Analysis Applied By The Lower Courts To Adult Adoption Sets A Dangerous Precedent For New Yorkers With Disabilities.

The Appellate Division's holding will have an impact on a wide range of New Yorkers with disabilities who may not have the ability to consent without supports and/or are given limited traditional competence or capacity assessments without consideration of decision-making supports. Those most impacted may include New Yorkers with a range of cognitive disabilities, including persistent mental illness, traumatic brain injury, stroke, Alzheimer's disease, and dementia. Enshrining an infantilization-driven analysis of people with intellectual disability by upholding Marian's adoption is dangerous and discriminatory against adults with disabilities.

By dispensing with the requirement that a disabled adult consent to his or her own adoption, the lower court inadvertently creates a *de facto* right for a non-family caregiver to adopt a cognitively disabled adult who is under their care, without regard to the adult's actual expressed wishes. Any cognitively disabled adult New Yorker living with a non-family caregiver is at risk of being the subject of an adoption by their caretaker based on a minimal showing that there is a loving bond between them and the disabled person.

Dispensing with consent reinforces the assumption that adults with disabilities wish to relate to their caregivers as a child relates to a parent – an assumption that courts would never make with respect to nondisabled adults. It also unfairly

dispenses with disabled adults' right to decide whether they wish to permanently alter their legal relationship with their loved ones

CONCLUSION

Marian is not a child; she is an adult with an intellectual disability who has the right to determine whether she wants to be adopted into a new family. Yet the lower courts, in their interpretation of DRL §111(1)(a), disregarded Marian's personhood and ability to exercise self-determination and instead viewed Marian as child-like because of her intellectual disability.

The relationship between parent and child is deeply personal and protected by the Constitution. All adults have a right to choice in matters of family. Consenting to adoption, which legally terminates an adoptee's previous family relationships as it binds a new family, is no small choice. Adult adoptions without the adoptee's consent are unconstitutional and will disproportionately impact adults with disabilities. For the foregoing reasons, *Amici* urge the Court to reverse the decision of the Appellate Division.

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. § 500.13(c)(1), that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

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