STATE OF NEW YORK
COURT OF APPEALS

SHARWLINE NICHOLSON, *et al.*,

Plaintiffs-Appellees,

Index Number
USCOA 2, 171

- against -

NAT WILLIAMS, *et al.*,

Defendants-Appellants.

On Certification from the United States
Court of Appeals for the Second Circuit

BRIEF OF PROPOSED *AMICI CURIAE* LEGAL MOMENTUM, NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, AND NEW YORK CIVIL LIBERTIES UNION

Deborah A. Widiss
Christina Brandt-Young
Jennifer K. Brown
LEGAL MOMENTUM
395 Hudson Street, 5th Floor
New York, NY 10014
212-925-6635

Attorneys for proposed Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

STATEMENTS OF INTEREST

As organizations committed to advancing women's rights, we write separately from other *amici* to bring to the Court's attention the extensive body of research and experience demonstrating that, notwithstanding considerable improvement in the past fifteen years, significant gender bias persists in courts' and agencies' decisions regarding the issues of motherhood and battering at the heart of this case.

Legal Momentum

Legal Momentum is the new name of NOW Legal Defense and Education Fund, a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. Legal Momentum is dedicated to working to end violence against women. The National Judicial Education Program (NJEP), a project of Legal Momentum in cooperation with the National Associate of Women Judges, has spearheaded a national process of establishing task forces to identify, and seek to rectify, the effects of gender bias in the courts and the legal community.

National Organization for Women Foundation

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception,

NOW Foundation's goals have included achieving fair treatment for women in the courts, including in particular family court proceedings, where women have been and continue to be disadvantaged by bias and gender stereotypes.

New York Civil Liberties Union

The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union (ACLU). The NYCLU, which has approximately 30,000 members, has long been devoted to protecting the principles of liberty and equality embodied in the Bill of Rights of the United States Constitution and in their counterpart provisions in the New York Constitution. The NYCLU has a long history of vigorously defending women's rights to full equality under the law in New York State, making it well positioned to assist the Court in its consideration of this case.

INTRODUCTION

When, or whether, a mother is fit to be a parent is a question that historically and currently has been rife with discrimination. Likewise, judgments about women who have been victims of domestic violence, particularly those who are mothers, also reflect ongoing gender bias. Sex discrimination jurisprudence establishes that permitting stereotypical assumptions about gender roles to determine government policy unlawfully discriminates against women. This brief brings to the Court's attention the extensive research documenting that gender biases and stereotypes cause courts and other institutional actors to blame battered mothers for any and all harm their children suffer. The record demonstrates that such gender-based stereotypes were allowed to

influence the decisions made by the Administration for Children's Services ("ACS") personnel at issue in this case. Women were routinely charged with neglect based on nothing more than a stereotypical assumption that a battered mother was, by definition, failing to exercise requisite care for her children.

The contradiction between the record of this case and ACS's assertions in its brief to this Court demonstrate how easy it is for stereotypes and bias to replace fact-finding. In their brief, the municipal defendants state that they agree with plaintiffs that a mother's merely "allowing" a child to witness domestic violence should not be grounds for a presumption that she is guilty of neglect (Brief for Municipal Defendants-Appellants [hereinafter "Mun. Def. Br."] at 43) and that removal can only be justified upon a particularized showing of facts (*id.* at 46), and then only if the facts establish that the victim parent has "failed to take steps that would be expected from a reasonably prudent parent whose child is at risk of harm from witnessing domestic violence" (*id.* at 27). If ACS had truly acted in accordance with these principles, it is unlikely that this case would have been brought.

The record, however, tells a very different story. ACS often brought prosecutions based on nothing more than a stereotypical assumption that being a victim of domestic violence is, in and of itself, evidence of failing to act as a "reasonable mother." In numerous cases, women in the class were charged with neglect on the ground that they were "engaging in domestic violence" simply by being victimized. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 171, 175, 179, 181, 186, 188, 191 (E.D.N.Y. 2002). Based on the extensive record in this case, the district court properly found that ACS relied on stereotypes about battered mothers rather than actual facts:

> Where a male consort has battered the mother, ACS as a matter of policy and practice does not adequately investigate whether the mother has committed any acts of neglect. Instead, *it automatically holds both the abuser and the abusee liable as a unit and relies on unfounded presumptions about the negative character and abilities of battered women.*

Id. at 250 (emphasis added).

A standard for neglect that does not require specific fact finding makes it all too easy for bias, such as that displayed by ACS, to take the place of real individualized assessment. This Court should take the long history of gender bias in decisions regarding both parenting and domestic violence into account in interpreting the "neglect" standard in the Family Court Act. To reduce the likelihood that ACS relies on pernicious stereotypes regarding battered mothers, this Court should interpret the Family Court Act to require a specific particularized inquiry into what actions, both formal and informal, were reasonably available, or could have been made reasonably available, to a non-abusive parent to evade domestic violence or limit its effects on her child; what, if any, of these actions she took; and whether those actions or inactions fell below a reasonable standard of "exercis[ing] a minimum degree of care."

POINT I.

WIDESPREAD PERSISTENT GENDER BIAS COMPROMISES GOVERNMENT'S RESPONSE TO DOMESTIC VIOLENCE, PARTICULARLY WHEN CHILDREN ARE INVOLVED

The issues of motherhood and battering at the heart of this case are areas in which gender stereotypes and biases profoundly disadvantage women. Government policy that is based on stereotypes about gender roles perpetuates illegal discrimination.

Extensive education efforts, often initiated in response to the early findings of state task forces examining gender bias in the courts, have resulted in some striking advances in judges' sensitivity to domestic violence. However, battered mothers are often held accountable for any and all harm to their children. The record of this case shows that the Administration for Children Services relied on discriminatory biases rather than substantive factual findings. Women were charged with and found guilty of neglect not on the basis of their own actions or inactions, but rather on the basis of a stereotypical assumption that a battered mother is, by definition, unable to exercise requisite care for her children.

A. Sex Discrimination Jurisprudence Makes Clear the Impropriety of Basing Government Policy or Practice on Gender-Based Stereotypes

In sex discrimination cases, courts clearly reject reliance on sex stereotypes in place of individualized fact assessment. Stereotypes rely on seemingly "fixed notions concerning the roles and abilities of males and females," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), but "fostering 'old notions' of role typing" is not a permissible state purpose. *Craig v. Boren*, 429 U.S. 190, 198 (1976). "The courts have recognized that mothers and fathers should not, on the basis of gender alone, be held to different moral, behavioral, or sexual standards in evaluating their conduct vis-a-vis the children." *Linda R. v. Richard E.*, 162 A.D.2d 48, 52 (N.Y. App. Div., 2d Dep't 1990). *See also, e.g., Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.").

Sex-based classifications cannot be used in place of individualized assessment of capabilities or as a substitute for necessary fact-finding. Sex-based classifications

"rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia,* 518 U.S. 515, 533 (1996). Stereotypes are too often used "as an inaccurate proxy for other, more germane bases of classification"; government actors must instead "adopt procedures for identifying those instances where the [stereotype] actually comported with fact." *Craig,* 429 U.S. at 198-99. In fact, sex-based stereotypes can pervade thinking patterns leading to " 'cognitive biases' [that] cause people to ignore or exclude information that is inconsistent with a stereotype." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 2004 U.S. App. LEXIS 6884 at *35 n.16 (2d Cir. 2004). This Court must ensure that it interprets the Family Court Act in a manner that does not inadvertently give sex stereotypes the force of law.

B. Because of Gender Bias, Courts and Other Institutional Actors Tend to Blame Women, Particularly Battered Women, for Any Harm their Children Suffer

1. Task Forces on Gender Bias in the Courts Uniformly Reveal Widespread Gender Bias that Disadvantages Women

Legal decisions regarding an individual's ability to parent – such as those at issue in this case – are shaped by gender stereotypes and bias. During the past twenty years, the court systems in forty-five states established task forces to engage in a process of self-investigation to identify gender biases and to craft recommendations to address them. (New York was among the first. *See Report of the New York Task Force on Women in the Courts, reprinted at* 15 Fordham Urban L. J. 11 (1986-87).) The task forces are were made up of judges, lawyers, court administrators, and others in the legal community. In most cases, the task forces used a combination of surveys, hearings, and several other data gathering methods to reach their findings. When the first such studies

were undertaken, many people thought they would reveal little more than a few insensitive or sexist comments or patronizing attitudes. Instead, every study has documented pervasive bias that affects women in any and all kinds of legal proceedings. *See* Lynn Hecht Schafan, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, Trial, Feb. 1990, at 28 (reviewing results of the first nine task forces).

The task forces' investigations and other studies have determined that expectations about women's role within the family, the nature of the workforce, or the value of work performed at home have significant "substantive" effects that disadvantage women in areas such as custody, alimony, child support, abuse and neglect proceedings, and domestic violence actions. *See generally* Lynn Hecht Schafran & Elizabeth J. Vrato, *Gender, Justice and Law: From Asylum to Zygotes* 16 (2003) (reviewing specific manifestations of gender bias in numerous areas of substantive law). They have also found that society's traditional devaluation of women translates into a well-documented tendency to find women to be less credible than men. *See* Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 Fam. L. Q. 247, 253 & n. 18 (1993) ("Every study collected substantial evidence that the credibility accorded women litigants is less than that accorded men litigants."); *id. at* 249 ("The gender bias reports document that judges too often fail to listen to or believe women lawyers.").

Court systems have also established task forces charged with examining the effects of racial bias or the effects of gender and racial bias together. Such task forces typically find that for women of color, the bias faced by all women is compounded by

racial biases. At a 2001 conference addressing gender, race, and ethnic bias in New York courts, a housing court judge gave a striking example of the primacy of such assumptions:

> [W]hen a woman of color is defending an eviction notice, the first question the landlord's lawyer and some court personnel ask her is "When is welfare going to pay the rent?" But when a white woman is the defendant the question is "What has happened to you?" or other probing of why the rent was not paid.

Lynn Hecht Schafran, *Overwhelming Evidence: Gender and Race Bias in the Courts, in The Criminal Justice System and Women*, 457, 462 (Barbara Raffel Price & Natalie J. Sokoloff eds., 3d ed. 2004). Thus, although the findings of the gender, race, and ethnic bias task forces document significant progress toward fairness over the past two decades, they also document ongoing problems. The most recent task force to report, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, wrote in 2003:

> [T]he Committee's findings demonstrate that racial, ethnic, and gender bias does exist and that it infects the justice system at many key points in both overt and subtle ways. Even when controlling for other factors such as economic status, familial status and geographic diversity, the studies demonstrate that racial, ethnic and gender bias still emerge as significantly affecting the way an individual (be it a party, witness, litigant, lawyer, court employee, or potential juror) is treated.

Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System 14 (2003), *available at* http://www.courts.state.pa.us/Index/Supreme/biasreport.htm.

2. Gender Bias Continues to Result in Victim-Blaming in Actions Involving Battered Mothers

The task force findings and other studies demonstrate that gender bias results in battered mothers being blamed for the acts of their abusers in three related contexts: (1)

proceedings (like those at issue in this case) against mothers alleging neglect based on their partners' battering of the mothers themselves; (2) prosecutions or proceedings against mothers for child abuse, neglect, or endangerment, based on their battering partners' abuse of the children; and (3) custody disputes between a batterer and a victim. All of these instances reflect the fact that women are typically held to a higher standard than men as parents and blamed for any and all harm to their children. Because of this general bias, women who are victims of domestic violence, rather than the men who perpetrate it, are frequently blamed for the detrimental effects of such violence on children.

Because of the traditional understanding of the "natural" role of mothers, our legal system has historically expected far more from mothers than from fathers. For example, a mother who leaves her children's care to others to work outside the home could be deemed to have abandoned them, while a father who works the same number of hours but spends any time at all with his children could be championed for his "commitment." "[C]ourts hold mothers to higher standards of behavior than fathers . . . [and] standards often unfairly include assumptions about appropriate behavior that are stereotypically based on gender." Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. Cal. Rev. L. & Women's Stud. 1, 60 (1996).

Gender bias and stereotypes have historically played an even more devastating role in domestic violence cases. Because it affects such a high proportion of women and because it challenges traditional understandings of the proper role of authority within the family, domestic violence has been one of the substantive areas of law studied

extensively by almost every gender bias task force. The early reports uncovered system-wide and pervasive bias against women in all of the myriad legal contexts in which domestic violence can be a factor. *See generally, e.g.,* Schafran & Vrato, *Gender, Justice & Law*, at 88-92. To its credit, and largely in response to the dramatic findings in the first wave of task force reports, the legal community has made progress in improving its response to domestic violence. Particularly in "first order" domestic violence situations, such as protective orders and criminal prosecutions, there is often a greater willingness to attribute responsibility to the man who batters rather than the woman who is his victim.

However, the legal system (and our community in general) continues to display a reluctance to hold batterers accountable for their conduct in proceedings involving children. Rather, courts and other institutional actors often blame both adults equally for the "mess" of domestic violence and its impact on children, thus assigning the mother partial responsibility for abusive conduct by the father. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions,* 11 Am. U. J. Gender Soc. Pol'y & L. 657, 692-93 (2003). The heightened responsibility traditionally imposed on mothers to protect their children from all harm also comes into play. Because of mothers' perceived superiority in childrearing, in the child protection agency context they are "likely to be held primarily or even exclusively responsible for any harm [to a child]. . . . [W]omen's failure to mother makes them monsters." Elizabeth M. Schneider, *Battered Women & Feminist Lawmaking* 152-54 (2000). Thus, women often are the subject of proceedings or prosecutions alleging neglect or abuse of children based on

the violent acts of their partners, while the batterer is not held accountable at all. *See, e.g.*, *id.*, at 158-68 & notes.

Studies of custody determinations in cases involving domestic violence also reveal a strong bias against women. These findings are particularly striking because, in this context, judges are determining claims between a battering father and a victim mother, rather than between a victim mother and the (presumptively neutral) state. Nonetheless, courts routinely fail to assign responsibility to the batterer for his acts. *See, e.g.*, Meier, *supra*, at 675-714; Schneider, *supra*, at 168-77. For example, in a custody case where the mother had gotten a protective order against the father after he had choked, punched, and stabbed her, the judge regularly berated ***both*** parents for failing to work it out like "mature adults" and for subjecting their children to police involvement. *See* Meier, *supra*, at 693. A recent study in Arizona that analyzed contested custody decisions in cases involving domestic violence found that battering fathers received sole or joint custody 70% of the time. *See* Arizona Coalition Against Domestic Violence, *Battered Mother's Testimony Project* 34 (2003), *available at* http://www.azcadv.org/PDFs/FS-BMTP%20report.pdf. Recent studies in Massachusetts reported similar evidence of ongoing gender bias. *See* Domestic Violence Court Assessment Project, Administrative Office of the Trial Court, *Progress and Challenges: Viewpoints on the Trial Court's Response to Domestic Violence* 66-67 (2003), *available at* http://www.mass.gov/courts/domviolrep03.pdf; Wellesley Centers for Women, *Battered Mothers Speak Out* 59-60 (2002), *available at* http://www.wcwonline.org/wrn/batteredreport.html. Massachusetts, like New York, requires its judges to consider the (obviously detrimental) effects of domestic violence

when making custody determinations. *See* Mass. Ann. Laws ch. 208, § 31A, N.Y. Dom. Rel. Law § 240(1). Nonetheless, courts may simply refuse to accept the significance of findings of domestic violence. *See, e.g.*, *In re Custody of Zia*, 736 N.E.2d 449 (Mass. App. Ct. 2000) (upholding trial court's finding in custody case that there was "no pattern or serious incident of abuse" despite two restraining orders and multiple assault convictions against the father).

Comparison of the custody cases with the child endangerment cases demonstrates that the discriminatory biases against battered mothers doubly punish women. There is considerable evidence that witnessing domestic violence can have a negative impact on children. *See, e.g., Nicholson*, 203 F. Supp. 2d at 197 (citing expert reports). In the custody context, when women try to have courts acknowledge the negative impact, courts display considerable reluctance to credit the significance of such effects as a basis for limiting the visitation and custody rights of batterers. In the child protection context, by contrast, courts and institutional actors are usually willing to find that being exposed to domestic violence injures children; however, they then blame the women who are the direct victims for "allowing" their children to be exposed to violence rather than blaming the men who perpetrate it.

3. The New York State Judicial Committee on Women in the Courts Specifically Recommends Education Regarding Sex Stereotypes to Address the Demonstrated Bias Against Battered Mothers

The recent findings of the New York State Judicial Committee on Women in the Courts corroborate that in this state, as in others, there continues to be considerable bias against women who are domestic violence victims and also parents. The New York State court system first established a task force to examine gender bias in 1984. In

1986, the New York State Task Force on Women in the Courts released a report finding widespread gender bias. *See Report of the New York Task Force on Women in the Courts, supra*. Based on the "powerful findings" contained in this report, then-Chief Judge Sol Wachlter appointed a committee, now known as the New York State Judicial Committee on Women in the Courts, to implement its recommendations. New York State Judicial Committee on Women in the Courts, *15-Year Report of the Committee on Women in the Courts* 1 (2002), *available at* http://www.courts.state.ny.us/committeeonwomeninthecourts/committeeonwomeninthecourts.htm [hereinafter "*15-Year Report*"].

In 2002, upon the fifteenth anniversary of the 1986 report, the New York State Judicial Committee on Women in the Courts issued the *15-Year Report of the Committee on Women in the Courts.* The 2002 report compared the findings and recommendations from the 1986 report with evidence gathered from surveys distributed in 2000-2001 and from expert panelists who made presentations at a conference in 2001. The *15-Year Report* makes clear that gender bias regarding expectations of parents continues to be a problem; indeed, the first recommendation in the report is that court administrators hold judicial seminars to help judges understand "[t]he ways that sex-based stereotypes lead to the application of higher standards of parenting to mothers than to fathers." *Id.* at 3.

This recommendation is a response in part to the ample evidence that, although considerable progress has been made in understanding that the victim is not to blame in the protection order context, this has not translated effectively into determinations of a victim's ability to parent effectively. The 2002 report states among its findings:

- Victims of domestic violence find that often higher standards of parenting are applied to mothers than to fathers. (p. 10)
- Establishing credibility remains an issue for many victims of domestic violence, who often find themselves subjected to higher standards than their abusers. (p. 13)
- Often victims are blamed, and at times penalized, for failing to proceed with court cases despite the difficulties and even dangers of pursuing abusers through legal processes. (p. 13)
- Law guardians and forensic experts are not necessarily trained to recognize domestic violence and understand its effects on children. (p. 13)

Several of the comments submitted in the surveys are telling. For example, one attorney noted, "I still see in some judges and attorneys [the belief] that women are practically responsible for [the] inappropriate conduct of a husband, boyfriend or father of their child." *Id.* at 28 (alteration in the original). Another noted, "Women are still viewed through the stereotyped lens as inherently incredible, manipulative and hysterical. Women are pushed far harder than men (even acknowledged abusers!) to prove the truth of their allegations." *Id.* at 29.

The evident ongoing bias regarding battered women who are mothers demonstrates that education regarding domestic violence needs to be understood as ongoing process. "While society and courts have acquired a superficial understanding of the reality of domestic violence, that understanding is not sufficiently deeply integrated to survive the challenge of truly painful choices regarding families." Meier, ***supra***, at 663. There are promising developments. For example, the Massachusetts Supreme Judicial Court, relying in part on its state's gender bias study, reversed a decision awarding custody to a batterer on the grounds that the trial court failed to adequately consider domestic violence and the culpability of the batterer for the effects of the violence:

> The Gender Bias Study concludes that our courts have too often failed to appreciate the fundamental wrong and the depth of the injury inflicted by family violence. *In subtle and overt ways the decisions of courts fail to take these factors into account and have treated them with insufficient seriousness in making dispositions*, particularly in cases involving custody of children and the realignment of family relationships in divorce and related proceedings.

In re Vaughan, 664 N.E.2d 434, 437-38 (Mass. 1996) (emphasis added). There remains, however, much progress to be made.

C. ACS Improperly Substituted Gender Bias and Stereotypes for Factual Findings in its Decision Making Processes

The record in this case shows that in ACS's decision-making, gender bias and sex stereotypes often took the place of factual findings; many members of the plaintiff class were deemed neglectful based on nothing more than an assertion that, as victims of domestic violence, they were by definition failing to act as reasonable parents. This is not a new problem. In its 1986 report, the New York State gender bias task force noted it had learned that "it is not uncommon for women to have their children removed from the home when they go to court seeking protection for them from the father." *Report of the New York Task Force on Women in the Courts* 55 n.92 (1986), *reprinted in* 15 Fordham Urban L. J. 11, 94 n.100 (1986-87). Almost twenty years later, this practice remains all too common.

ACS's claim that mothers who are victims of domestic violence can be charged with child neglect based on an allegation that they are "engaging in domestic violence," *Nicholson v. Williams*, 203 F. Supp. 2d 153, 171, 175, 179, 181, 186, 188, 191 (E.D.N.Y. 2002), is the most obvious expression of a failure to differentiate between the acts of the abuser and the acts of the victim or to assess culpability within the relationship appropriately. Victims do not *choose* to "engage" in domestic violence.

ACS itself has admitted the inappropriateness of this phraseology, in that it "'misstates the nature of the victim's role in the violence and relieves the primary aggressor of his/her responsibility for the violence.'" *Id.* at 210 (quoting ACS memorandum, exhibit MMM). Nonetheless, as the district court pointed out, ACS's memorandum on this point only addresses the appropriateness of the language itself; it entirely avoids the broader questions of the policy that permitted this approach and the inappropriate assignment of blame to a victim/mother that underlies it. *Id.*

Other comments and attitudes expressed by ACS personnel quoted in the district court decision also make abundantly clear that many of ACS's decisions were based on stereotypes or unfair assumptions that mothers should be held accountable for anything that happened in their homes, including violence of which they were a victim. As one plaintiffs' expert testified, there is a long history of child protective services being "set up to view mothers as the focal point" of actions. *Id.* at 211. The results of this "focus" were significant. The record demonstrated that ACS frequently brought neglect proceedings against a battered mother without any consideration of whether it could instead protect children by taking actions to exclude the batterer from the home. *Id.* at 211. ACS also often acted as though it were reasonable to place the burden of addressing domestic violence and related issues solely on the mothers' shoulders. For example, Jane Doe's case supervisor required her to "get her husband help," indicating that failing to do so would be grounds for a finding of "neglect on her part." *Id.* at 190. This was typical. The record demonstrated that ACS referred mothers who were victims to "services intended to address the domestic violence" in 43.7% of all cases in which

domestic violence was identified; it referred the batterers to such services in only 21.1% of the cases. *Id.* at 212.

Many ACS caseworkers also indicated a belief that simply being a victim of domestic violence – even if the individual involved had voluntarily separated herself from the abuser – was evidence of poor judgment or a sickness that, in and of itself, could compromise her parenting ability. For example, although Michele Garcia moved and contacted the police when attacked, she was prosecuted by ACS for neglect because she, by allowing her children's fathers some visitation, had "let the batterers back into her life" and "did not 'see herself as a victim of domestic violence.'" *Id.* at 184. Sharlene Tillett likewise directed her abuser to move out of their home and, as soon as she was financially able, found a new residence in her own name that ACS deemed "suitable." Nonetheless, ACS refused to return her children to her until she underwent a psychological evaluation to prove that she did not have a "syndrome" that would cause her to "replace one batterer for another." *Id.* at 182.

ACS's practice of charging victims with neglect based on "engaging" in domestic violence or failing to address the violence adequately seriously undermines the agency's efforts to "protect" children from being exposed to domestic violence. Rather, it has the perverse effect of exposing women and their children to more violence. Women who are victims of domestic violence know that they cannot control their partners' violent acts. They also know that simply being a victim of domestic violence can be grounds for ACS taking their children. The combination of these facts creates a strong disincentive to contact the police, seek a protective order, contact a victim services agency, or take any of a variety of other proactive steps, because any

such steps that involve government agencies or other mandatory reporters of suspected child abuse or neglect can bring their children to the attention of ACS. Indeed, the record contains cases in which ACS learned of the violence – and subsequently moved to take the children – only when victims took steps to address the violence by seeking a protective order or contacting victim services agencies. *See, e.g.*, *Nicholson*, 203 F. Supp. 2d at 173 (Ms. Rodriguez reported her former partner's violence to the police, who apparently contacted ACS, and Ms. Rodriguez subsequently became the subject of an investigation); *id.* at 182 (Ms. Garcia's counselor at a victim services agency made a report of suspected abuse against her child's father based on his violence against Ms. Garcia, but Ms. Garcia became the subject of an investigation based on neglect).

Because the effects of gender bias are so apparent in the record of this case, it is frequently cited by commentators as a prime example of gender bias in the child protective sphere. *See, e.g.*, Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 Am. U. J. Gender Soc. Pol'y & L. 657, 661 (2003) (citing *Nicholson* as demonstrating that in the "child protection arena, … state policies have been either untouched by domestic violence awareness or [are] blatantly victim blaming"); Justine A. Dunlap, *Symposium: The 'Pitiless Double Abuse' of Battered Mothers: Nicholson v. Williams*, 11 Am. U. J. Gender Soc. Pol'y & L. 523 (2003) (identifying the facts in the record as prime examples of blaming mothers for harm occasioned by acts of others); Heidi A. White, *Refusing to Blame the Victim for the Aftermath of Domestic Violence: Nicholson v. Williams Is a Step in the Right Direction*, 41 Fam. Ct. Rev. 527 (2003) (similar).

Amici do not mean to suggest that the ACS personnel involved in these actions necessarily harbored conscious discriminatory intent or biases. In commenting on a study of pregnant women in Florida that found that 26% of pregnant women who abused drugs were black but that 90% of pregnant women who were prosecuted for abuse of drugs were black, Dorothy Roberts observed:

> It is unlikely that any of these individualized actors [government officials, hospital staff, prosecutors, legislators] intentionally singled out Black women for punishment based on a conscious devaluation of their motherhood. The disproportionate impact of the prosecutions on poor Black women does not result from such isolated, individualized decisions. Rather, it is a result of two centuries of systematic exclusion of Black women from tangible and intangible benefits enjoyed by white society.

Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 101 Harv. L. Rev. 1419, 1454-55 (1991). The same is likely true here. Certainly, many of the individuals within ACS were acting according to their sincere belief as to what was in the best interests of the child. But the nature of stereotypes is such that they play an invisible role, substituting unfounded assumptions for facts and incorporating biases into decision making so that the ultimate result is founded on nothing.

POINT II.

THIS COURT SHOULD INTERPRET THE FAMILY COURT ACT TO REQUIRE A PARTICULARIZED SHOWING OF ACTIONS (OR INACTIONS) THAT CONSTITUTE A FAILURE TO EXERCISE A MINIMUM DEGREE OF CARE

A. The Family Court Act Requires a Showing that a Child's Injury Is Attributable to an Individual Parent's Failure to Exercise a Minimum Degree of Care

Because this is an area where stereotypes have traditionally played such a pernicious role, this Court should interpret the Family Court Act to require a particularized showing of a failure to exercise a minimum degree of care. A mere promise by ACS to perform a particularized analysis is clearly insufficient. The contradiction between the record of this case and ACS's assertions that it *already* performs such a particularized analysis demonstrates that leaving such determinations to the agency's discretion makes it too easy for stereotypes and bias to replace fact-finding. Thus, this Court's interpretation of the statute should make clear that two elements are required: a particularized showing of harm to the child, and, equally importantly, a particularized showing that such harm is properly attributed to the *non-offending parent's* failure to exercise a minimum degree of care.[1]

As no doubt plaintiffs and numerous other *amici* will write, requiring a showing that the non-offending parent is truly accountable for the harm suffered is essential to

[1] In their brief to this Court, the Municipal Defendants suggest that that "[r]ules circumscribing child neglect proceedings against victims of domestic violence for failing to protect their children could have unintended consequences … [because they could] prevent actions against batterers, too." (Mun. Def. Br. at 22.) This is a red herring, but the fact that the defendants even suggest it is indicative of the extent to which they continue inappropriately to view the batterer and the victim as a single unit rather than distinct individuals. The appropriate distinction between the culpability of batterers and that of their victims turns *not* on the harm suffered by the child but rather on whether each individual parent is properly deemed responsible for that harm. This Court could – and we believe should – issue rules circumscribing findings of neglect against a non-offending parent whose actions cannot reasonably be deemed to have caused the injury without in any way preventing actions against batterers.

adequately protect a non-offending parent's due process rights and makes good policy sense. It also is essential to gender equality. The "engaging in domestic violence" standard or the countless examples in which ACS's findings implicitly held women responsible for the acts of their batterers entirely obliterates the personal identity and responsibility of the mother. *Cf.* Dorothy Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95, 109 (1993) ("The starkest example of criminal law's suppression of a mother's personal identity is the prosecution of women for failing to protect their children from another's abuse."). It gives state sanction to (and therefore furthers) the noxious notion that women are responsible by proxy for everything that occurs in the home.

We have moved far beyond the historical conception that the actions of a man can be understood to represent his entire family in the outside world or that a woman's place is only in the home. "[N]o statutory scheme may be upheld on the basis of the State's preference for an allocation of family responsibility under which the wife plays merely a submissive, dependent role." *Childs v. Childs*, 69 A.D.2d 406, 416 (N.Y. App. Div. 1979); *see also Nicholson*, 203 F. Supp. 2d at 248 (holding discrimination against women demonstrated by the record in this case implicates the Thirteenth and Nineteenth Amendments and their implicit condemnation of the subjugation of women). Just as a mother cannot be relegated to the home, a mother cannot be deemed to bear responsibility for the actions of her partner within the home. Fundamental to equality is the recognition that every man and woman has both individual autonomy and individual responsibility. The Family Court Act should be interpreted accordingly.

B. A Determination of "Failure to Exercise a Minimum Degree of Care" Must Include an Honest Non-Biased Consideration of the Full Range of Reasonable Responses that a Non-Abusive Parent Can Take to Protect Herself and Her Children From Injury

The "failure to exercise a minimum degree of care" standard should be interpreted to require a detailed, truly particularized showing of facts that properly assesses the non-abusive parent's individual responsibility for any harm to her children; this is an important means of diminishing the role that gender stereotypes and biases play in determining the outcome of cases. One of the most carefully considered analyses of the intersection of child welfare and domestic violence is found in a detailed manual of research and best practices developed over two years by child welfare advocates and domestic violence advocates. *See* National Council of Juvenile and Family Court Judges Family Violence Department, *Effective Intervention in Woman Battering and Child Maltreatment Cases: Guidelines for Policy and Practice* (1999) [hereinafter the "National Council Guidelines"]. The persuasiveness of this resource was recognized by the district court. *See Nicholson*, 203 F. Supp. 2d at 200 ("The court's understanding of best practices … gives particular weight to findings of the National Council of Juvenile & Family Court Judges Family Violence Department as set out in [this] comprehensive 1999 report.")

With respect to neglect allegations, the National Council Guidelines recommend that courts should "insist" that an agency attempting to prove neglect on the part of a mother who is a victim of domestic violence must "also allege efforts that the mother made to protect the children; the ways in which the mother failed to protect, and the reasons why; and should identify any perpetrator who may have prevented or impeded her from carrying out her parental duties." National Council Guidelines,

Recommendation No. 58 at 109. "[T]he court should remove a child from the non-abusive parent's care only if it is proven by clear and convincing evidence that the caretaking parent is unable to protect the child, even with the assistance of social and child protection services." *Id.*, Recommendation No. 59.

The standard urged by the National Council Guidelines includes three important elements: (1) an honest assessment of all measures, both formal and informal, a mother is taking to protect her children; (2) an honest assessment of the range of options *actually* available to her, including recognition of the batterer's likely response to certain actions; and (3) an expectation that the agency, ACS in this case, is responsible for making services available to her but is not permitted to coerce her into a single plan of action. It is only within such a framework that a determination can be made that adequately assesses a battered mother's *own* culpability for failing to protect her child from potential harm, rather than the culpability of the man who chooses to beat her or the system that fails to provide her with resources to protect herself and her children. And, significantly, the particularity required by such a framework helps guard against the possibility that gender bias and stereotypes stand in for facts in making such determinations.

The particularized showing of actions or inactions by the non-offending parent should be responsive to the range of reasonable means that a parent can use to protect herself and her child. Fleeing from one's home is *not* the only active (or appropriate) action a woman may take. Rather, women reasonably use a variety of tactics to evade and halt violence, including:

1) legal strategies (calling the police, seeking legal services, or obtaining a protection order);

2) formal help-seeking strategies (such as going to a shelter, clergy, or social service [agency]);
3) informal help-seeking strategies (*i.e.*, telling others, asking others to intervene);
4) escape or avoidance behaviors (*e.g.*, barricading self in room, leaving);
5) separation or divorce;
6) hiding or disguising one's whereabouts, place of employment or location of children's schools;
7) coerced compliance with and/or anticipation of the batterer's requests or desires;
8) acts of self-defense (physically resisting or blocking, striking, using weapons);
9) relying on children to seek help or protect against the abuse (asking children to call the police or help to fight back); and
10) individualized, unique behaviors used as strategies to respond to violence or abuse (*e.g.*, a mother putting her children on a couch away from her, so that if her husband fired a gunshot at her the children would be further away).

Mary Ann Dutton *et al.*, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. Poverty L. & Pol'y 245, 248 (2000) (citing Mary Ann Dutton, *Empowering and Healing the Battered Woman: A Model for Assessment and Intervention* 41 (1992)).

The range of responses to domestic violence available to a given woman varies according to her particular social, legal, and financial situation, her neighborhood, and the vagaries of her abuser. Domestic violence often reaches its peak lethality when the victim attempts to leave the abuser. *See, e.g.*, Jennifer Hardesty, *Separation Assault in the Context of Post-Divorce Parenting: An Integrative Review of the Literature*, 8 Violence Against Women 597 (2002). Therefore, it is reasonable to say that in certain circumstances, responses other than leaving—including legal strategies, formal and informal help-seeking, temporary escape behaviors, compliance with the batterer's requests, and/or acts of self-defense—may be the safest course of action for a victim and her children. The key to this interpretation is a recognition that women who

employ such strategies *are* acting; they are taking the steps reasonably available to them to keep themselves and their children away from a harm which they did not create and for which they should not be blamed.

The "reasonableness" standard must be responsive to the options actually available to an individual mother at the time. For example, ACS routinely demanded that mothers leave their homes so that batterers could not locate them. Given the realities of the New York City housing market and the extremely limited capacity of New York's domestic violence shelters, this is not a realistic option for many members of the class. Half of all applicants to the City's domestic violence shelters are turned away for lack of space. Leslie Kaufman, *Abused Mothers Keep Children in a Test of Rights and Safety*, N. Y. Times, Nov. 28, 2003, at A1. *See also Nicholson*, 203 F. Supp. 2d at 194. Even women able to secure a shelter bed have no guarantee that they will subsequently be able to find permanent safe housing. In fact, for all too many victims, the choice is remaining with a batterer or facing homelessness. *Id*. Identifying ways in which a batterer has prevented a mother from exercising the range of options otherwise available to her to protect her children is also extremely important, because domestic violence encompasses activities intended to control the victim that stretch far beyond the moments of physical abuse that are most likely to come to the attention of child protection authorities. A batterer typically purposefully cuts off his partner from family and friends to isolate her; subjects her to regular emotional abuse, including threats of future violence, and sexual violence or abuse; and exercises control over her finances so that she is completely dependent on him for money. He may also stalk her, particularly if and when she seeks to separate herself from him. *See, e.g.,* Evan Stark,

Re-Presenting Women Battering: From Battered Woman Syndrome to Coercive Control, 58 Albany L. Rev. 973 (1995). The domestic violence victim's actions regarding her children must be understood within the complete context of her individual situation in order properly to assess her culpability for any harm they experience.

ACS has a role to play in providing options to victims and access to resources. The district court made several findings that ACS's provision of services was inadequate as to both batterers and their families. The court found "no indication that ACS effectively and systematically pursues removal of the abuser before seeking removal of the battered victim's child" despite having the power to do so. *Nicholson*, 203 F. Supp. 2d at 211; *see* N.Y. Fam. Ct. Act §§ 1027(b)(iv), 1028(f). Additionally, the district court found that ACS can provide or guide families to a wide variety of services, such as individual counseling or therapy, parenting skills training, homemaking skills training, and employment and housing assistance, yet these services "are not utilized as a substitute for removal in many instances when they could be accepted by mothers to avoid separation from their children." *Id.* at 211. Alarmingly, the district court found that ACS provided mothers with safety planning "as a proscriptive process," an "ultimatum" enforced by removal of the children. *Id.* at 212. The National Council Guidelines are clear that child protective services should seek to hold batterers responsible for their behavior, help to change that behavior, and assist families in avoiding that behavior. National Council Guidelines at 77-89. Wherever possible, all of these means should be exhausted before removal of children from their non-violent parents.

Finally, it is essential that the standard be enunciated in such a fashion that ACS cannot coerce mothers to comply with its demands. Perhaps the most basic—but also quite often true— stereotype about motherhood is that a mother will do almost anything for her children. In this case, ACS admitted that, in contravention of its own policy and relevant law, caseworkers commonly delayed court hearings after removing a child from his or her mother, relying on their awareness that "after a few days of the children being in foster care, the mother will usually agree to ACS's conditions for their return without the matter ever going to court" at all. *Nicholson*, 203 F. Supp. 2d at 170; *see also, e.g., id.* at 176 (ACS required April Rodriguez to enter a shelter before her children would be returned). Often, mothers complied immediately with whatever ACS required. The fact that a parent was willing to accede to coercive tactics exercised by ACS is not evidence that such a parent was neglectful. Quite the contrary: the fact that a large number of the mothers in the class were willing to permit the government to intrude into their lives in such an extreme fashion so that they could remain with their children is telling evidence of their commitment as parents. The Act is intended to be a means of protecting children when their parents have ***demonstrated*** a failure to take reasonable steps to protect them from harm. It is not intended to be a means of social control based on nothing more than outdated assumptions about women and their role within the family.

POINT III.

THIS COURT SHOULD RESPOND TO THE CERTIFIED QUESTIONS WITH GUIDELINES THAT DETER RELIANCE ON GENDER-BASED STEREOTYPES

This Court's interpretation of the neglect standard under the Family Court Act should emphasize the need for particularized specific guidelines, comparable to those found in Recommendations 58 and 59 of the National Council Guidelines, for assessing whether a victim caretaker has failed to exercise reasonable precautions to protect herself and her children. This is necessary to deter the reliance on impermissible stereotypes about women as mothers and as victims of domestic violence that has previously played a central role in many such determinations.

Certified Question 1. In response to the first certified question, ***amici*** strongly urge the Court to hold that the definition of a "neglected child" under the New York Family Court Act § 1012(f) should never be satisfied solely by an allegation that his or her caretaker "allows the child to witness domestic abuse against the caretaker." First, if a child is harmed as the result of witnessing such abuse, it occurs primarily "as a result" of the actions of the abuser, not the victim. N.Y. Fam. Ct. Act § 1012(f). Accordingly, the primary focus of child welfare proceedings should be on the abuser, not the victim. Second, although we are not prepared to say that a victim-caretaker could never be found to have neglected a child by failing to take particular steps to avoid abuse and/or to prevent the child from witnessing such abuse, a bare allegation that a victim caretaker "allowed" a child to witness such abuse should never be sufficient. Courts and ACS should be required to inquire specifically into what, if any, acts a caretaker

performed to limit a child's exposure to abuse and determine specifically whether those actions or inactions fall below the "exercis[ing] a minimum degree of care" standard.

Certified Question 2. *Amici* take no position on the second certified question.

Certified Question 3. In response to the third certified question, *amici* strongly urge this Court to hold that "the fact that [a] child witnessed such abuse" should never "suffice to demonstrate that 'removal is necessary'" or that "'removal was in the child's interests.'" For the reasons stated above, such a holding would simply ratify the noxious stereotype that mothers can and should be held responsible for any injury that happens in their homes, when the legal question at issue is whether the caretaker exercised a "minimum degree of care" for her child. N.Y. Fam. Ct. Act § 1012(f). As recommended in the National Council Guidelines' Recommendations 58 and 59, the "minimum degree of care" assessment should be based on particularized factual evidence concerning (1) all actions, formal and informal, that were reasonably available to a given mother to evade or halt domestic violence and/or protect a child from its effects; (2) all actions that a mother actually took; (3) ways in which a perpetrator impeded or prevented her from taking additional actions; and (4) whether that mother, given appropriate assistance from social and child protection services, would be able to protect her children adequately. National Council Guidelines at 109.

CONCLUSION

For the reasons stated above, *Amici* urge the Court to respond to the certified questions as set forth herein.

DATED: May ___, 2004

Respectfully submitted,

LEGAL MOMENTUM

By: _____

Deborah A. Widiss
Christina Brandt-Young
Jennifer K. Brown
395 Hudson Street, 5th Floor
New York, NY 10014
212-925-6635