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Appellate Division–Second Department Docket Nos. 2014-00172,
2014-00173, 2014-00174, 2014-00175, 2014-00177 and 2014-04174

Court of Appeals

of the

State of New York

In the Matter of
GANIYU ADEBOLA ODUNBAKU,

Petitioner-Respondent,

– against –

DIANA ODUNBAKU,

Respondent-Appellant.

In the Matter of
DIANA ODUNBAKU,

Petitioner-Appellant,

– against –

GANIYU ADEBOLA ODUNBAKU,

Respondent-Respondent.

BRIEF OF *AMICI CURIAE* SANCTUARY FOR FAMILIES, MY SISTERS' PLACE, NEW YORK LEGAL ASSISTANCE GROUP AND HER JUSTICE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), the undersigned counsel certifies that *Amici Curiae* Sanctuary for Families, My Sisters' Place, New York Legal Assistance Group, and Her Justice are each a non-profit entity that has no parent, subsidiary, or affiliate.

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INTEREST OF THE *AMICI CURIAE*

Founded in 1984 as a small network of safe homes, Sanctuary for Families ("Sanctuary") is now a leading provider of integrated services to survivors of domestic violence, human trafficking, and related forms of gender violence, and their children, in New York City. Sanctuary's services pay special attention to the most at-risk, underserved victims of gender-based violence, and its staff is acutely attuned to a broad spectrum of inequality issues impacting these populations. Sanctuary provides clinical, legal, shelter, and economic justice and empowerment services to over 15,000 of New York City's most vulnerable abuse victims and children annually. Among those legal services, Sanctuary represents survivors of gender-based violence—the vast majority of whom are low-income—in connection with custody, visitation, child support, and family offenses cases in Family Courts throughout New York City.

My Sisters' Place ("MSP") is a multidisciplinary non-profit organization based in Westchester County, New York, that provides legal, counseling, and shelter services to survivors of domestic violence and human trafficking and their children. MSP's Center for Legal Services represents hundreds of clients every year in contested family law proceedings in Family Courts in White Plains, Yonkers, and New Rochelle involving orders of protection, custody, visitation, and child support.

Founded in 1990, the New York Legal Assistance Group ("NYLAG") is a not-for-profit organization dedicated to providing free civil legal services to New York's low-income families. NYLAG's comprehensive range of services includes direct representation, case consultation, advocacy, community education, training, financial counseling, and impact litigation. In 1994, NYLAG established its Matrimonial and Family Law Unit which prioritizes representation of domestic violence victims throughout New York City, Rockland County, and Nassau County. NYLAG represents domestic violence survivors in numerous related facets of their separation from their abusers: from obtaining orders of protection to child support, child custody, and divorce proceedings. NYLAG also collaborates with community partners in helping clients receive social work, therapeutic, housing, employment, and public-benefits assistance, especially during the critical transition time after leaving an abusive relationship.

Since 1993, Her Justice has been dedicated to making a real and lasting difference in the lives of low-income, underserved, and abused women by offering them legal services designed to foster equal access to justice and an empowered approach to life. Her Justice recruits volunteer attorneys from New York City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. Approximately 80% of the women Her Justice serves receive full

representation from a volunteer attorney, while the balance are represented by Her Justice staff attorneys. Her Justice provides legal services to over 3,000 women every year in all five boroughs of New York City. Informed by its work, Her Justice also promotes policies that make society more responsive to the legal issues confronting the women it serves.

Sanctuary, MSP, NYLAG, and Her Justice file this amicus brief to advance the interests of their clients and others like them in securing full and fair hearings on the merits before New York City's Family Courts pursuant to the best reading of the statute and rule at issue and in accordance with the strong public policy considerations of due process, right to counsel, and access to justice for New York's most vulnerable citizens.

PRELIMINARY STATEMENT

When former Chief Judge Jonathan Lippman announced the creation of the Permanent Commission on Access to Justice—which made permanent the task force he created in 2010 to highlight the unmet legal needs of low-income New Yorkers—he declared that the Permanent Commission "makes unequivocally clear that New York, as a matter of public policy and values, believes that every person who is faced with legal issues regarding the necessities of life get legal representation or effective legal assistance to deal with those issues. *We in New York do not and will not let people of modest means fall off the cliff.*" Joel Stashenko, *Lippman Makes Permanent Panel on Access to Justice*, N.Y.L.J., July 23, 2015 (emphasis added). But the Second Department does just that by interpreting New York law to allow the time period for filing objections to orders to start when the orders are mailed to the represented party only, *and not to the attorney of record*.

Diana Odunbaku is precisely the type of person for whom the Commission strives to increase access to justice, and child support is a "necessities of life" issue the Commission recognizes. Indeed, stakes are high in child support cases, especially where low-income survivors of domestic abuse struggle to support themselves and their children. As Amanda Norejko, Director of Sanctuary's Matrimonial and Economic Justice Project and an attorney with nearly

fourteen years of experience practicing in the Richmond County Family Courts, explains:

> My clients bring actions in court to seek, modify, or enforce child support due to a dire need to support their children. Having child support makes a significant difference in the lives of the client and child. It can be the difference between going on public benefits versus not having to go on benefits; having a home versus homelessness; feeding their family versus depending on food pantries; children receiving particular therapies or additional services that are necessary to address their special needs versus not receiving any of these.

For Ms. Odunbaku and many of *Amici*'s clients—indigent and working-poor abuse survivors—attorneys provide invaluable assistance in helping to navigate the Family Court system. Representation is especially crucial where these struggling individuals find themselves in the all-consuming process of rebuilding a life broken by domestic violence[1] and/or poverty. This is a reality that *Amici* see every day, having handled thousands of child support cases over several decades. It is also a reality that the Permanent Commission recognizes, one that animates the Commission's goal of supporting lawyers whose work serves to narrow the civil legal services gap.

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[1] Domestic violence affects many New York families. In 2015, police responded to over 279,000 incidents of domestic violence in New York City. MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, 2015 Fact Sheet (2015), http://www.nyc.gov/html/ocdv/downloads/pdf/Statistics_Annual_Fact_Sheet_2015.pdf. In 2014, police responded to over 182,000 incidents of domestic violence outside of New York City. NEW YORK STATE DOMESTIC VIOLENCE DASHBOARD (Aug. 2015), http://www.opdv.ny.gov/statistics/nydata/2014/nys2014data.pdf. Given that these statistics relay only police response rates, the actual number of incidents of domestic abuse may be much higher.

The Second Department's interpretation of Section 439(e) of the Family Court Act ("Section 439(e)") and Family Court Rule 205.36(b) ("Rule 205.36") flatly ignores this reality. In their decisions denying Ms. Odunbaku's objections to the Support Magistrate's child support order, the Richmond County Family Court and the Second Department assume that mailing orders to a party alone is as effective as mailing orders to a party and the party's attorney. But this assumption does not hold true, particularly for victims of domestic abuse, who may change addresses frequently, live in substandard housing with inadequate mail systems, and/or tightly guard their addresses as a safety measure. It is not true for single parents whose jobs and parental responsibilities prevent them from checking their mail regularly, especially if their mailing address is not their residence. And it is not true for those who, because of a lack of literacy or fluency in English, cannot understand orders or notices from the court, or those who lack the means to easily notify their attorney of receipt of an order.

These are the litigants most in need of legal assistance to help them navigate a difficult and complicated legal system. Ideally, they are able to secure counsel and shift that burden to their attorneys. But the decisions below inappropriately move the burden of monitoring and understanding important Family Court case developments back on to the client. This troubling result is especially unacceptable in light of New York's clear policy of promoting

meaningful legal representation for New York's most vulnerable and marginalized individuals. *Amici* do not suggest an extraordinary or novel change, but simply advocate for the sensible requirement that an attorney of record be properly apprised of her client's legal case by receiving mailed orders from the Family Court, thus providing the attorney with the tools necessary to adequately represent her clients. This approach presents a *de minimis* burden on courts and clerks while materially benefitting litigants by promoting meaningful access to justice.

The opening brief on behalf of Ms. Odunbaku discusses the "important public-policy interests [that] compel" a fair reading of the statute and rule in accordance with New York state precedent. *Amici* urge this Court to adopt Ms. Odunbaku's interpretation of Section 439(e) and Rule 205.36, which is consistent with *Bianca v. Frank*,[2] furthers this Court's policy goal of increasing access to justice for those of modest means facing legal challenges impacting their families, and prevents procedural defects that could be easily avoided by an attorney but instead deprive litigants of their opportunity to receive a full and fair hearing on the merits.

[2] *Bianca v. Frank*, 43 N.Y.2d 168, 173 (1977).

I.
THE LOWER COURTS' MISINTERPRETATION OF SECTION 439(E) AND RULE 205.36 UNDERMINES THE RELATIONSHIP BETWEEN ATTORNEYS AND THEIR CLIENTS

In affirming the Richmond County Family Court's interpretation of Section 439(e) and Rule 205.36, the Second Department endorsed the harmful proposition that "it is the responsibility of a party to timely notify their attorney, if any, that he or she has received"[3] a support order, thereby permitting the time period for filing objections to be triggered when the court mails the order to the represented party, regardless of whether the order was mailed to the party's counsel of record.

This decision cripples counsel's ability to effectively represent clients facing an unfavorable order and a short time period within which to meaningfully respond, thus weakening the role of counsel at a critical point in a litigant's case. The negative effects of the decision are even more pronounced when applied to New York's most vulnerable populations, who do not always have safe, reliable, or easy access to their mail; may not have the necessary language skills or knowledge to understand legal documents; and may not have the time or resources needed to monitor their cases and apprise their attorneys of case developments. The attorney of record is best equipped to timely receive correspondence from the court and

[3] *Ganiyu Adebola Odunbaku v. Diana Odunbaku*, Fam Ct, Richmond County, Nov. 8, 2013, Lim, J., Docket No. F-05262-06/09D & 10E, at 4.

consider it when formulating legal strategy. Allowing cases to proceed without requiring the clerk of the court to mail orders or notices to the attorney of record impedes attorneys from representing their clients as effectively and zealously as they otherwise could and as New York's public policy goals envision.

A. Family Court Litigants Who Are of Modest Means, Single Parents, and/or Victims of Domestic Violence Frequently Encounter Difficulties with Receiving Mail

Not all litigants are equally situated. Many Family Court litigants, and particularly low-income individuals, single parents, and victims of domestic violence, face substantial obstacles which can make their timely receipt of mail difficult at best and nearly impossible at worst.

1. Unstable and/or Substandard Housing, Overwhelming Parental Obligations, and Mail Interceptions, Often by an Abuser, Create Obstacles to the Timely Receipt of Mail

First, those who leave their abusers typically enter a transitional period of time where everything in their lives, including their housing situation, is extremely volatile. Victims of domestic violence often need to remove themselves and their children from the home very quickly and with little or no planning. Many of *Amici*'s clients spend time in confidential domestic violence or homeless shelters, or stay with different friends and family for a few nights at a time.[4] For a

[4] The National Network to End Domestic Violence estimates that 38% of all victims of domestic violence become homeless at some point in their lives, with many experiencing multiple periods of homelessness as they attempt to leave abusers. NATIONAL NETWORK

long period of time they may not have a stable address at which to reliably receive mail.

Second, even if clients who have fled domestic violence find a stable place to live, it is critical that they keep their addresses secret for safety reasons.[5] Thus, *Amici* and other similar organizations routinely counsel their clients to obtain post offices boxes to keep their addresses confidential.[6] But post office boxes, while useful for safety reasons, present other challenges for *Amici*'s clients. Because access hours for post office boxes are generally limited to typical business

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TO END DOMESTIC VIOLENCE, *Domestic Violence, Housing, and Homelessness*, http://nnedv.org/downloads/Policy/NNEDV_DVHousing__factsheet.pdf. Similarly, approximately one third of the families using New York City's family shelter system are homeless due to domestic violence. NEW DESTINY HOUSING, *Homelessness and Domestic Violence in New York City: An Overview*, http://www.newdestinyhousing.org/userfiles/file/New%20Destiny%20Handouts%208%2028%2013%20FINAL%20(2).pdf.

[5] The danger of further abuse is heightened when the abuser knows the victim's address. *See* Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273, 281 (1995) ("Her greatest danger is if she is to continue living at an address known to her abuser."). Additionally, roughly 4.8 million women in the U.S. reported being stalked by their present and former partners, and about 1.45 million had their property vandalized or received unwanted letters or other items from their abusers. *See* Evan Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty*, VIOLENCE AGAINST WOMEN: COMPLEX REALITIES AND NEW ISSUES IN A CHANGING WORLD (2012), http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf.

[6] Understanding the real risk associated with abusers finding the addresses of their victims, New York State provides victims of domestic violence with a cost-free program which allows them to "shield their actual address" by re-routing mail through a central, substitute address before safely forwarding it to their real address. *See* NEW YORK DEPARTMENT OF STATE, Address Confidentiality Program, http://www.dos.ny.gov/ACP/. Additionally, other programs serving domestic violence survivors "usually rent post office boxes to receive mail [of clients] while keeping their addresses confidential." Zorza, *supra* note 5, at 286.

hours, it can be difficult to regularly check a post office box if the individual is, like Ms. Odunbaku, a single mother working multiple jobs to support a family while juggling other appointments needed to get back on her feet. This is a common situation for *Amici*'s clients, who are often navigating a combination of legal appointments, court dates, therapy, public benefits appointments, housing appointments, work (or job interviews), and childcare responsibilities. As Shira Kaufman, a family law attorney at Sanctuary, explains:

> My clients' lives are bureaucratic messes. One client comes to mind who has an unpredictable work schedule, ACS-mandated therapy, ACS childcare, is involved in at least four different court cases, has to attend meetings with NYCHA, and is trying to schedule job interviews. All while raising two children alone since their father is in jail for child sexual abuse. That she cannot regularly check her post office box is not a lack of commitment or diligence. The burdens that these indigent, single mothers struggle with are extraordinary.

Gloria Alfinez, a former client of Sanctuary and current advocate for people in low-income communities, recounted how hectic and stressful her schedule became shortly after she and her children left her abusive spouse:

> My children had psychiatry appointments. My oldest son would go to the hospital for PTSD—he had witnessed my ex-husband trying to murder me with a machete. He was mentally breaking down. My children also had school. I also regularly attended therapy sessions, and I needed it—after what I went through, I was fearful, suicidal, and emotionally disturbed. In the meantime, I was in court proceedings in Richmond County Family Court for about three years, litigating visitation rights against my mother-in-law. In those three years, I relied heavily on my Sanctuary attorney to guide me through the Family Court litigation.

> I was also keeping up with welfare appointments. With welfare, if you miss your appointment, they can close your case. Then you have no money and your case starts all over again, which means no cash or food stamps for your children in the meantime. In the beginning, my appointments were three times a month or more, depending on the needs of my children or other requirements. Sometimes there was a long wait to be seen.

Third, those who remain in their abusers' homes or otherwise cannot prevent their abusers from accessing their mail will also suffer disproportionately if the Second Department's ruling is allowed to stand. It is not uncommon for abusers, or their family and friends, to intercept the victim's mail to harass, manipulate, and keep the victim in a constant state of fear and dependence. Ms. Alfinez has also experienced this first-hand:

> I once used my best friend's address to receive mail, but I stopped because her neighbor said someone, who I later learned was my abuser's mother, my mother-in-law, was taking mail from the mailbox. Then my mother-in-law filled out a change of address form at the post office, so my mail was redirected to her house. My mother-in-law was stealing anything she could from the mail, including my cell phone bills. She would get numbers from my bill, call them, and tell people that I had kidnapped her grandchildren—which was not true. I had to call the police. I was also in litigation in Family Court with her at the time, so any court documents that would have been mailed to me she would have taken. I relied on my Sanctuary attorney to tell me if there were any new court documents in my case.

Ms. Kaufman similarly reports:

> I have a case right now where the abuser was excluded from the home under a criminal order of protection. The victim was still living at the home with their child. After some time, the abuser's mother, who owned the home, moved back in and began harassing and threatening

> my client, trying to get her to drop her child support case and order of protection against the abuser. This was so stressful for my client and difficult on her child that she was forced to leave the home. She's been living with a friend for several months and has not been able to find stable housing. If the court were to mail anything to her address at her mother-in-law's home, you can bet that the mother-in-law would just rip it up. Until my client finds stable housing and can give the court a confidential address, she will have no ability to access court documents mailed only to her.

In her practice, Ms. Norejko has counseled many victims of domestic violence whose abusers were superintendents of the buildings where they lived, or otherwise connected to the owner or management. In such instances, management often views the victim as an obstacle to the superintendent abuser's ability to live on premises if there is an order excluding him from the building. In retaliation, management may "lose" the client's mail. Maria Zhynovitch, a family law attorney at Sanctuary, described several clients with similar issues:

> I've had a couple cases where my client was married to the superintendent of the building where they lived. If there is a domestic violence incident the husband may be arrested and removed from the home, but allowed to return to the building to work. In one case, the superintendent-abuser changed the mailbox lock so the client could not get her mail. That was likely why she never received notice from the court that her case was transferred to the Integrated Domestic Violence court. Another client once told me that she was waiting for immigration notices and court documents, but her mail was disappearing. She believes that her husband came to the building around the time that the mailman was coming, and would steal her mail.

In addition to frequent relocations, incredibly busy schedules, and mail interception by abusers, landlords, and other hostile parties, Sonia Mansoor,

whose responsibilities as Manager of Public Benefits Legal Advocacy at Sanctuary include assisting some of Sanctuary's lowest income clients in obtaining public benefits, stresses that poor mailbox conditions and human error also make mail an unreliable means of communication for victims of domestic violence and low-income individuals living in substandard housing:

> Mail delivery issues are a systemic problem among our clients, whether they live in shelters, public housing, or even private homes. I have seen issues with our clients' mail getting lost or placed in the boxes of neighbors who might not check mail regularly. There are mailboxes with broken doors or locks.[7] Sometimes there are multiple residents receiving mail in the same mailbox or in an open mailbox, and mail gets lost or taken. Other times, important mail is delivered too late, or just thrown on the floor. Because of these delivery issues my clients are missing important notices for critical appointment dates for reasons that are out of their control. I spend a lot of time talking to the USPS tracking lost mail, filing mail complaints, and getting documentation that my low-income clients have problems receiving mail.

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[7] Broken and vandalized mailboxes are a widespread problem among public housing residents, who constitute a significant percentage of *Amici*'s clients. Recent news articles report that NYCHA tenants—including those who work during the limited mail pick-up hours at the post office, the elderly, and those with limited physical mobility—become "trapped in a bureaucratic swamp…fall[ing] behind on bills, miss[ing] appointments…and wast[ing] entire afternoons picking up mail." Greg B. Smith, *NYCHA Residents on LES—Some Elderly and Disabled—Must Go Miles to Post Office as Mailboxes Remain Busted for Months*, NY DAILY NEWS, June 5, 2015, http://www.nydailynews.com/new-york/exclusive-nycha-residents-les-miles-mail-article-1.2247326. It may be a matter of months, or even years, before the mailboxes are repaired. *See Id.*; *see also*, Maghee Hickey, *NYCHA Residents Demand Answers After Mailboxes Remain Broken, Vandalized for Three Years*, NY PIX 11 NEWS, November 2, 2014, http://pix11.com/2014/11/02/nycha-residents-demand-answers-after-mailboxes-remain-brokenvandalized-for-three-years/.

Pamela Howard, Managing Attorney of MSP's Family Law Practice, echoed these issues facing her clients:

> Many of our clients are low-income and live in under-resourced areas or in multiple-family dwellings where their mail is not secure. I remember one case in which my client was not receiving her child support payments, which she desperately needed. At first we thought the abuser was not paying but it turned out that someone was stealing the checks from her mailbox.

The experience of Kelly Grace Price, a current Sanctuary client, is a concrete example of how difficult it is for *Amici*'s clients to receive mail:

> I was forced to flee my apartment because of domestic violence. I had to live in a hotel for four months because I had a dog and I didn't want to give her up to move into a shelter. I had no way to receive mail. I had to use the general post office address at Penn Station. I would wait in line for hours and then had to beg the teller to go dig around for mail sent to me at the general post office address. Often that mail was lost and I failed to get important HRA and hearing notices. I had such trouble finding an apartment because I had terrible credit and an eviction on my record. When I finally found housing, there were so many problems with the building, including a mailbox that didn't lock. So much of my mail got lost at that apartment, including more important HRA and court notices.

These challenges surface again and again among *Amici*'s clients. This is one of the many reasons why *Amici*'s clients, rightly, rely so heavily on their counsel—to have someone with the training and expertise to handle the daily affairs of their matter, including the receipt of important orders and notices, and respond appropriately. The women and men *Amici* represent expect this, and New York public policy encourages it. Busy single parents, victims of domestic

violence, and low-income persons already face tremendous obstacles in and out of the court system. New York Courts need not stack the deck further against them by affirming a ruling which deprives them of a principal benefit of being represented by an attorney.

2. Even if Litigants Have a Reliable Mail System They Can Check Regularly, They May Be Unable to Promptly Notify Their Attorney of Correspondence from the Court, Through No Fault of Their Own

Even if an individual timely receives an order from the court that triggers a time limit for a response, for various reasons she may be unable to promptly notify her attorney—a major disadvantage in cases like this one, where, up against tight deadlines, clients face procedural default on filing objections to orders. First, many of *Amici*'s clients do not have ready access to e-mail, scanners, or fax machines, and it can be difficult to quickly forward correspondence to their attorney. Some may not be able to call their lawyers right away because an abuser has removed the victim from his phone plan, destroyed her phone, or otherwise limited her access. Or the victim, who was previously financially dependent on her abuser, might lack sufficient funds to pay her own bill.[8]

[8] Indeed, abusers frequently "prevent[t] victims from earning money and control[] their access to money the family has earned." Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. Pa. L. Rev. 363, 374 (2013).

Second, as discussed above, pressing family, work, and personal obligations, as well as planning for safety measures, often leave no time for a client to visit their attorney to drop off paperwork, particularly during business hours. As Ms. Alfinez explains, "It is no easy task for these litigants to visit their attorneys. Having children doesn't make it easy to just hop on the train."

Third, the clients *Amici* work with rely heavily on their attorneys to interpret and explain the court documents they receive. A significant number of *Amici*'s clients are non- or limited-English speakers, are immigrants with little understanding of the American court system, or have low literacy and education levels. They may not understand a document at all, yet alone understand its importance and the need to get it to their attorney as quickly as possible. For these clients representation would be more seamless and effective if they were able to rely on their attorney of record to receive all correspondence from the court, interpret that correspondence, and take timely action—not the other way around.

Finally, lawyers who represent low-income clients, including pro bono counsel who volunteer their time and juggle Family Court cases with billable matters, often carry heavy caseloads. Requiring them to check in with the courts to see if orders have issued would be impractical and detract from their work representing these clients. Ms. Norejko explained that "I have a huge case load, and I do not have the time to keep checking for orders that the court may not have

mailed to me." The time an attorney might have to spend checking on orders with the Family Court would better be spent preparing legal strategy or meeting with their clients to discuss their case.

B. Requiring Parties to Monitor Their Own Case and Notify Their Attorney of Developments Upends the Attorney-Client Relationship, to the Client's Detriment

Without a doubt, Family Court litigants can benefit greatly from legal representation. But the benefits are lost if lawyers cannot rely on the court to notify them directly about its decisions. When Chief Judge Lippman launched the Task Force to Expand Access to Civil Legal Services in New York in 2010, he framed his vision as follows:

> No issue is more fundamental to our constitutional mandate of providing equal justice under law than ensuring adequate legal representation. . .[T]o meet our constitutional and ethical mandates, the Judiciary of this State is determined to bring us closer to the ideal of equal access to civil justice. . . [I]t is my fervent hope. . .that it will be an obvious truth to all that those litigants faced with losing the roof over their heads, suffering the breakup of their families, or having their very livelihood threatened *cannot meaningfully pursue their rights in the courts of New York without legal counsel*. . . (emphasis added).[9]

There can be no *meaningful* access to justice if the courts effectively remove the attorney from the legal process by leaving the attorney unaware of orders affecting her clients' proceedings and, ultimately, daily lives. The Court

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[9] TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, Report to the Chief Judge of the State of New York, at 7 (2010) (citing Chief Judge Jonathan Lippman, Law Day, May 3, 2010 at 3, 7).

should interpret the statute and rule at issue in the manner which, at a nominal cost, leads to the fulfilment of Chief Judge Lippman's aspiration to "bring [New York] closer to the ideal of equal access to civil justice."

1. Meaningful Legal Representation is Necessary to Bring New York Closer to the Ideal of Equal Access to Civil Justice, Particularly for Victims of Domestic Violence and Low-Income Individuals

As discussed above, many of the litigants appearing in Family Court, like those seeking child support, are already under a significant amount of emotional, financial, physical, and mental stress. Much of their time is spent supporting themselves and their children—which is precisely why they rely on their attorneys to help them navigate the Family Court process. *Amici* are well aware of how dependent their clients are on them and pro bono counsel obtained through their programs. "That's why we exist as attorneys," Lindsey Wallace, a family law attorney with Sanctuary, explains, "to help litigants who don't understand what's happening in their cases. My clients look to me to explain every step of their legal case—the process, the courtroom, the legal documents—they rely on me to guide them through all of it." Jennifer Friedman, an attorney who for a decade managed Sanctuary's Courtroom Advocates Project and who now serves as Managing Director of MSP's Center for Legal Services, echoes this sentiment: "It is a truism" that litigants who would otherwise be *pro se* would be

disadvantaged without our representation; "this is why there are lawyers."[10] Mailing court orders solely to litigants unnecessarily excises attorneys from the litigation process and, without good reason, subverts their ability to represent their clients.

First, represented litigants would not, and should not, expect that their attorneys will not receive important court documents. Neither should they expect to be the ones to decipher what each piece of correspondence means, or which ones must be forwarded to their attorney immediately because of pending deadlines. Ms. Norejko discusses her experience:

> My clients expect me to receive the orders before they receive them themselves—which makes sense. If any order comes, I know how to analyze the order and determine the extent of my clients' right to object and appeal. My clients don't know how to do that. If they did get the order themselves, they would not even notify me because they

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[10] It is clear that access to an attorney is often critical to litigants' ability to navigate the legal process and attain successful outcomes in legal proceedings. Represented parties enjoy statistically more favorable results in all manner of civil proceedings, as compared to those without representation. *See* COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, *Equal Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases*, at 2-3 (July 2014), http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf. The Family Court itself recommends that individuals seek legal representation to aid them in Family Court proceedings. *See* NEW YORK CITY BAR COMMITTEE ON FAMILY LAW & FAMILY COURT, *Introductory Guide to the New York City Family Court*, at 6 (Feb. 2012), http://www.nycourts.gov/courts/nyc/family/IntroductoryGuidetoNYCFamilyCourt.pdf. ("[A] party is better off being represented by a lawyer when appearing in Family Court than appearing without one. . . A party not entitled to have a free lawyer should consider hiring one."). Additionally, pro bono private attorneys can fill gaps where legal services organizations are unable to provide representation due to limitations in capacity, conflicts of interest, or the unavailability of court-appointed counsel, including in child support cases.

> would think that I also got the order and was proceeding appropriately.

Second, even if *Amici*'s clients are somehow aware the attorney did not receive the document, which is rarely the case, many understandably cannot adequately interpret legal documents on their own, and would not know whether the document requires discussion with counsel. Thus, an interpretation of the rules that requires litigants to continuously and promptly update counsel of each court document received is nonsensical and leads to major inefficiencies in representation. Worse, it hobbles timely and effective representation. Ms. Norejko explains:

> Clients have nothing to do with objections to an order. If a client is represented, they're never going to write an objection themselves, because it's purely a legal argument. Mailing the order only to the client makes a lawyer's job more difficult because of the inevitable delays involved in clients receiving the order, and then trying to pass the orders on to their attorneys. By the time an order mailed only to my client finally gets to me, I'm under the gun to draft an objection before time runs out, if it hasn't already.

Ms. Zhynovitch elaborates:

> I have a client who receives mail from different city agencies in connection with various matters and applications for public assistance. For every single paper she receives, she calls me to ask what the paper says. For example, she'll tell me about an appointment she has and often it's for her public assistance case, but she thinks that because it looks like an official paper that it's related to her court dates. She just doesn't understand the difference between a court notice and a notice from a different agency.

Simply put, attorneys are, as recognized by the Commission, crucial to ensuring that New York City's most vulnerable and marginalized litigants have the opportunity to be fully and fairly heard. Ms. Alfinez can also attest to the integral and powerful role of her attorney:

> There are women walking around who don't have the college education and the experience that I had, people who can't read or write, or who are too intimidated to ask questions. They might not understand the words in the documents. I needed a lawyer. They need lawyers. Lawyers provide representation and a path to justice for those who are broken and whose voices are unheard.

The Second Department's ruling is at odds with the goals of the Commission, which are to identify the troubling representation gap in family law cases and support civil legal aid providers and pro bono attorneys working to close that gap. By removing the attorney from a crucial aspect of the legal process—receipt of court documents—the court prevents these public interest and pro bono attorneys from being able to effectively do their job and zealously advocate for their clients. Not only does this thwart the client's right to effective counsel, but it eviscerates the purpose of many grant-funded positions designed to help protect disadvantaged litigants. The Second Department's ruling turns on its head the public policy goals of the State of New York, needlessly adding an obstacle to the legal process for underserved Family Court litigants and, in essence, disavowing the importance of the very attorneys whose function the State purports to encourage.

Further, *Amici* point out two specific scenarios which illustrate how the Second Department's ruling would adversely and disproportionately affect low-income individuals and survivors of domestic abuse: (1) where a child support case is transferred to the Integrated Domestic Violence ("IDV") court; or (2) where the opposing party engages in litigation abuse.

2. The Second Department's Ruling Disadvantages Low-Income Individuals and Victims of Domestic Violence Whose Cases Are Frequently Transferred to IDV

The Integrated Domestic Violence court exists to "to handle all related cases pertaining to a single family where the underlying issue is domestic violence. The Court seeks to promote justice and protect the rights of all litigants while providing a comprehensive approach to case resolution, increasing offender accountability, ensuring victim safety, integrating the delivery of social services, and eliminating inconsistent and conflicting judicial orders."[11] IDV is critically valuable to victims of domestic abuse hoping to efficiently find justice and order from the New York Courts.

The primary way a court notifies parties that a case has been transferred to IDV is by mail. Because there is no way of knowing in advance whether or when a case will be transferred, receiving the notice is critically

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[11] *See* NEW YORK STATE UNIFIED COURT SYSTEM, *Integrated Domestic Violence Part Mission Statement*, Supreme Court, Criminal Branch, New York County, https://www.nycourts.gov/courts/1jd/criminal/IDV.shtml.

important. For this reason, mailing the notice to only the victim-litigant, and not her attorney, is unsound and potentially calamitous. First, as discussed above, victims of domestic violence face substantial hurdles to the timely receipt of mail. *See* Section I.A., *supra.* Second, removing the attorney from the litigation process by mailing orders solely to the litigant disadvantages litigants and disavows New York's public policy goals. *See* Section I.B.1., *supra*.

These issues are particularly acute in cases transferred to IDV. Sadie Diaz, a family law attorney with Sanctuary who works with many monolingual Spanish-speaking clients, recounted one client whose family offense case was transferred:

> I did not receive official notice that my client's case was being transferred to IDV in advance of the new court date. While my client had received the notice, she does not speak English and did not realize the notice was related to our Family Court case or that she would have to attend the IDV court date. At the last minute, I learned from a colleague who happened to see the IDV case list for the day that my case was on that list. Neither I nor my client was able to attend. A colleague appeared in our stead to prevent the case from being dismissed, but due to our absence was unable to advocate for a modification of the existing temporary order of protection that my client urgently needed.

Missing an IDV appearance can have serious consequences for these litigants. As Ms. Zhynovitch explains, "if my client is the petitioner and misses the court date, the court has the right to dismiss the petition altogether, at which point my client is forced to start all over again." Interpreting the relevant statutes to

require the court to mail notice to the attorney of record, who would immediately be able to alert her client to the changes, helps avoid these risks.

3. The Second Department's Ruling Adversely Impacts Victims of Domestic Violence Who Face Retaliation and Harassment through Litigation Abuse

The Second Department's ruling makes *Amici*'s clients—particularly victims of domestic violence—even more vulnerable to procedural default resulting from litigation abuse. It has been *Amici*'s experience in their many combined decades of working with domestic violence victims that some abusers initiate litigation as a means of retaliation, continued control, and harassment.[12] *Amici* have battled countless baseless claims brought by domestic violence perpetrators against their victims, including meritless family offense petitions, custody petitions, and repeated requests for downward modification of child support without justification, as well as false criminal allegations. Abusers who engage in retaliatory litigation often initiate multiple legal cases against their victims in multiple legal fora. This can create a bewildering onslaught of notices and orders. Keeping track of this increased volume of court activity would be

[12] *See, e.g.,* Lawyer's Manual on Domestic Violence 92 (Mary Rothwell Davis, Dorechen A. Leidholdt, & Charlotte A. Watson eds., 2015), https://www.nycourts.gov/ip/womeninthecourts/pdfs/DV-Lawyers-Manual-Book.pdf (discussing litigation abuse as a form of domestic violence); *see also*, Kara Bellew, *Silent Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities*, 26 Women's Rts. L. Rep. 39, 45 (2005) ("[T]here is ample evidence" that domestic violence abusers commit litigation abuse.).

overwhelming for any lay person, but is even more so for low-income clients or clients fleeing domestic violence, for all of the reasons described above. *See* Section I.A.1, *supra*.

Where there is retaliatory litigation, effective legal representation is key to being able to appropriately respond to the increased volume of court documents—but representation is only effective if counsel is promptly provided all notices and orders by the Family Court.

II.
ADOPTING APPELLANT'S POSITION WOULD PROMOTE UNIFORM APPLICATION THROUGHOUT NEW YORK FAMILY COURTS OF AN INTERPRETATION OF SECTION 439(E) AND RULE 205.36 THAT FURTHERS NEW YORK'S PUBLIC POLICY INTERESTS

The Court should decide this case in a manner that is consistent with and promotes the Commission's objectives. The New York State Courts' Access to Justice Program recognizes the "chronic lack of civil legal assistance for people of low-income and modest means in New York," and aims to "analyz[e], recommend[] and promot[e] proposed legislation, court rules, codes of conduct, policies and systemic changes that will open greater access to the courts."[13] These goals acknowledge that the system is imperfect, but that New York should strive to improve equal access to justice whenever possible and encourage these

[13] NEW YORK STATE UNIFIED COURT SYSTEM, *About Us, New York State Courts Access to Justice Program Goals,* N.Y. State Courts Access to Justice Program, http://www.nycourts.gov/ip/nya2j/ourgoals.shtml.

improvements as they take place. By adopting Ms. Odunbaku's argument, the Court will support recent developments in Ms. Odunbaku's home borough of Staten Island that are aimed at enhancing access to justice for vulnerable individuals, particularly victims of domestic violence, and would bring Richmond County Family Court's practices into greater uniformity with those of its sister boroughs.

First, Richmond County is on a path to improving its services for victims of domestic violence, including legal services. For example, Staten Island recently opened a Family Justice Center, in June 2016.[14] Family Justice Centers provide criminal justice, legal, and social services to victims of domestic violence, elder abuse, and sex trafficking, all in one convenient location. This is an important step given the staggering rise in incidents of domestic violence in that borough.[15] The Staten Island Family Justice Center is working hard to increase access to justice for victims of abuse in that borough. Allowing the problematic

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[14] The Brooklyn FJC opened in 2005. The Queens FJC opened in 2008. The Bronx FJC opened in 2010. And the Manhattan FJC opened in 2013. MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, NYC Family Justice Center FAQs, http://www.nyc.gov/html/ocdv/html/faq/fjc.shtml.

[15] From 2009 to 2014, Staten Island reported an astounding 64 percent increase in the number of domestic violence victims, by far the most of any other borough. The second highest borough was Queens, which increased by 36 percent. *See* Letter from Richmond County District Attorney, Michael E. McMahon, to New York City Mayor, Honorable Bill de Blasio, September 28, 2015, http://rcda.nyc.gov/press/2016-37.pdf. Moreover, the incidents of domestic violence would have increased at least as much, if not more, given the likelihood of victims who suffer repeated abuse.

practice of mailing court documents only to litigants and not their counsels of record will impede this progress by creating an additional hurdle to access to justice for victims of abuse, particularly low-income victims.

Second, while its new Family Justice Center better aligns Richmond County's facilities with those of its sister counties, Richmond County Family Court's practices with regard to mailing orders, in *Amici*'s experience, are not always consistent with those of New York City's other counties. Ms. Norejko, who regularly practices in all five boroughs of New York City, observes, "While the Family Courts in other counties generally send child support orders to me in the mail, Richmond County has not done so." This creates substantial inefficiencies and makes advocacy more difficult, as Ms. Norejko discussed:

> There's no way of knowing if magistrates will issue a written order, even if they say something on the record. It's really frustrating. If my clients do receive an order, I have no way of knowing that they received it. I do not get any kind of alert that they will or did receive it.

Several attorneys from Sanctuary and MSP echoed that the Family Courts of New York City's other counties mail orders to the attorney of record, in addition to the client, as a matter of practice. Ms. Friedman agreed with this sensible approach: "The best way to contact someone represented by counsel, is by contacting their counsel." Given the predictability of this common-sense practice in other boroughs, attorneys practicing in Richmond County Family Court,

particularly those who do not practice in Richmond County regularly, would expect to directly receive any orders by mail. Richmond County's practice, which is out of step with the rest of New York City, serves to disadvantage the very individuals the Access to Justice Program seeks to serve.

As a result of this practice, attorneys and clients in Richmond County spend an inordinate amount of time checking for support orders, which Ms. Norejko relays is a "humongous waste of resources" for both of them:

> Some of my clients will go to the courthouse unless and until they get an order. They want the order because they're feeling a high level of urgency. They are in desperate financial situations. They have to take time off from work or go during work hours. Sometimes they go to court on their one day off a week. If I were in Richmond County every day, I could stop at the court and check for the order. But I have clients with cases in other boroughs, and I don't have time to go and check up at the court. So my clients keep doing it themselves. It's definitely a problem.

Mailing orders to attorneys incurs almost no additional burden and demonstrates New York's commitment to access to justice in avoiding unnecessary delays in communication with attorneys and preventing potential procedural default.

As discussed above, the Second Department's ruling harms victims of domestic violence, single parents, and litigants of modest means. It also creates unnecessary complications for lawyers who are not physically based in Staten Island and increases, avoidably, the potential for procedural default. This Court

can and should read the statute and rule at issue in a manner to bring Richmond County's practice into conformity with the rest of New York City and into compliance with the efforts of the Commission to provide meaningful access to justice for the most disadvantaged litigants.

III.
CONSISTENT WITH FEDERAL CIVIL, CRIMINAL, AND IMMIGRATION PROCEEDINGS, AND MANY STATES' FAMILY COURT AND CIVIL RULES, THE BEST READING OF SECTION 439(E) AND RULE 205.36 REQUIRES THE CLERK TO SERVE A REPRESENTED INDIVIDUAL'S ATTORNEY

Many legislatures and courts across the country have implemented strict attorney-service requirements to safeguard the interests of vulnerable individuals in need of legal protection. This Court should interpret Section 439(e) and Rule 205.36 in a way that ensures vulnerable New Yorkers receive the same protection when seeking justice in New York's Family Courts.

The best reading of Section 439(e) and Rule 205.36 requires the clerk of the Family Court to serve a represented party's attorney, as is the practice in many states' Family Courts. For example, Pennsylvania's Family Court Rules require service on counsel for represented parties.[16] Additionally, New Jersey Court Rules mandate service of any notices on an attorney of record in Family

[16] Pa. R.C.P. No. 1931(c)(3) ("[I]n any matter brought under these Family Court Rules, a decision by a conference officer, master or judge shall be entered, filed and served upon counsel for the parties, or any party not represented by counsel…").

Actions.[17] Moreover, Delaware Family Court Rule 5(c) requires service on the attorney in all circumstances where service is required, unless ordered otherwise by the court.[18] Similarly, Michigan mandates service on an attorney in domestic relations cases absent a few limited circumstances.[19] The Illinois state legislature further emphasized the importance of service on an attorney in domestic violence cases with the Illinois Domestic Violence Act of 1986, which requires service on a client's attorney.[20]

Beyond the Family Court context, the concept that a client's attorney must be served permeates federal and state civil procedure. In New York, the Supreme Court directs litigants in civil actions to serve papers, other than those initiating an action, upon the attorney rather than the party.[21] In the federal

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17 NJ Ct. R. 5:5-4(d), which governs motions in Family Actions, states, "Any papers you send to the court must be sent to the opposing side, either to the attorney if the opposing party is represented by one, or to the other party if they represent themselves."

18 Del. Fam. Ct. R. 5(c) ("Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the Court.").

19 Mich. Ct. R. 3.203; Mich. Ct. R. 2.107(B) (stating "[s]ervice required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney…").

20 750 Ill. Comp. Stat. 60/201 (2004); Ill. Sup. Ct. R. 11(a) ("If a party is represented by an attorney of record, service shall be made upon the attorney.").

21 *See* NEW YORK STATE UNIFIED COURT SYSTEM, *How to Serve Legal Papers*, Supreme Court, Civil Branch, at 5, https://www.nycourts.gov/courts/1jd/supctmanh/Self-Rep%20Forms/How%20to%20Serve.pdf ("Subsequent papers should not be served upon a party who is represented by an attorney, but on the attorney.").

context, Federal Rule of Civil Procedure 5(b)(1) mandates that "[i]f a party is represented by an attorney, service . . . must be made on the attorney unless the court orders service on the party."[22] The Southern District of New York has interpreted this language to require that "[a]ll papers . . . that must be served upon a party, must be served upon the attorney."[23]

The requirement of service on an attorney is similarly clear in New Jersey's Rules of Court, which require service of all court papers in all civil actions on all attorneys of record.[24] In explaining the reasoning behind the Ohio Rules of Civil Procedure's default procedure of requiring service upon the attorney of record, the Ohio Court of Appeals explained that "an attorney of record is in a better position to understand the legal import of documents to be served on his or her client and the nature of the action to be taken."[25] Indeed, this bedrock principle of civil procedure has persisted in federal and state laws for decades for these very

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22 Fed. R. Civ. P. 5(b)(1).

23 *Kiki Undies Corp. v. Promenade Hosiery Mills, Inc.*, 308 F.Supp. 489, 495 (S.D.N.Y. 1969).

24 N.J. Ct. R. Part 1:5-1(a) ("In all civil actions, unless otherwise provided by rule or court order, orders, judgments, pleadings subsequent to the original complaint, written motions (not made ex parte), briefs, appendices, petitions and other papers except a judgment signed by the clerk shall be served upon all attorneys of record in the action and upon parties appearing pro se.").

25 *Steiner v. Steiner*, 620 N.E.2d 152, 157 (Ohio Ct. App. 1993); Ohio Civ. R. 5(A)-(B).

reasons. There is no reason that service in the context of New York Family Court orders should be any different.

Courts also require notice on a party's attorney in most criminal and immigration cases—two types of cases where parties typically face limited access to resources and high stakes similar to domestic violence victims in Family Court cases. In the federal criminal context, service must be made on an attorney if a party is represented, an approach which provides the best means for defendants to fairly and adequately prepare their defense.[26] In the immigration context, Courts of Appeals have consistently held that service must be on an attorney of record.[27] For example, the Third Circuit found a violation of due process rights of an alien subject to deportation proceedings when the immigration court failed to take the "reasonable step of mailing notice to [his attorney of record]."[28] The court reasoned that "[t]his additional step requires *de minimis* effort by the government, and is balanced against the significant interest an alien facing removal has in being able to continue his professional and familial life in this country."[29] This Court should similarly balance the *de minimis* effort required by Family Court clerks to

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26 Fed. R. Crim. P. 49(b); *see, e.g. Hawk v. U.S.*, 340 F.2d 792, 795 (D.C. Cir. 1964).

27 *See e.g., Hamazaspyan v. Holder*, 590 F.3d 744 (9th Cir. 2009).

28 *Perez-Alevante v. Gonzales*, 197 F. App'x 191, 195-196 (3d Cir. 2006) (interpreting 8 C.F.R. § 1292.5(a)).

29 *Id.* at 196.

mail orders to attorneys of record with the significant interest of Family Court litigants facing matters that affect critical personal issues—their safety, their access to their children, and their ability to support their children.

Given New York's commitment to providing equal access to justice for all individuals through meaningful legal representation, New York should resist a ruling whereby Family Court clerks mail orders solely to litigants while leaving their attorneys of record, those in the best position to understand and interpret the legal documents, in the shadows of the legal process.

IV.
CONCLUSION

For the foregoing reasons, and in the interest of furthering New York's public policy goal of meaningful access to justice for the underserved, the Court should read the statue and rule at issue to require service of court orders on attorneys of record in the New York Family Courts and thereby allow Ms. Odunbaku to plead the merits of her appeal of the Richmond County Family Court's order for downward modification.

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Respectfully submitted,

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