STATE OF SUNNYDALE
COURT OF APPEALS

WILLOW AND ANGEL ROSENBURG
Appellants,

vs. Index No.: 2058-5147

SUNNYDALE DEPARTMENT OF
CHILD PROTECTIVE SERVICES
Appellee

APPELLANT BRIEF

ON QUESTIONS CERTIFIED BY THE SUNNYDALE, THIRD APPELLATE DIVISION

Anonymous Number: 110

QUESTIONS PRESENTED

I. Did Ms. Willow Rosenburg meet the minimum degree of care in supervising her child, when she never left her child alone, when she always provided childcare, when she never personally observed signs of pain or distress from her child?

II. Does the Sunnydale Court of Appeals have jurisdiction over Mr. Angel Rosenburg, when the Sunnydale Family Court's ruling that this Court does not have jurisdiction must be accorded deference, when Mr. Rosenburg's supervision of the child does not rise to the level of care that is functionally equivalent to that of a parent, when Mr. Rosenburg is not responsible for any parental duties?

III. Did Mr. Rosenburg neglect the child by engaging in excessive corporal punishment, when the Government failed to show by a preponderance of the evidence the child's mental and emotional condition was impaired as a direct result of Mr. Rosenburg's actions, when Mr. Rosenburg did not engage in a pattern of excessive physical punishment, when the Government failed to show by a preponderance of the evidence a direct causal link between Mr. Rosenburg's actions and the child's mental and emotional condition?

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STATEMENT OF THE CASE

Ms. Willow Rosenburg ("Mother"), a 28-year-old single mother, has raised her 6-year-old daughter, Buffy, since Buffy's birth. (R. 7). Willow's own parents passed away when she was 17 years old. Willow's sister Kendra ("Aunt"), and her 32-year-old brother, Angel ("Uncle"), have always helped Willow take care of Buffy so Willow can financially provide for her. *Id*. Willow works two jobs: one at Sunnydale High School during the weekdays, followed by another job at Sunnydale's Waffle House from Tuesday night to Saturday night (only night shifts). *Id*. Willow enjoys her quality time with Buffy on Sunday nights. *Id*. Willow's financial and childcare situation became much more difficult when her sister, Kendra, passed away in 2022, as she was Buffy's main source of childcare. Due to the loss of their sister, supervision of Buffy fell primarily on Angel so Willow could still work the hours required by her two jobs. *Id*.

After being dismissed from his job at Amazon Warehouse during the COVID Pandemic (2021), Angel moved into a friend's apartment. (R. 7). Angel has since struggled to look for employment without a driver's license and a car. (R.8) Now that he has some free time, Angel spends each day supervising Buffy at Willow's apartment. *Id*. Angel cannot bring Buffy to certain activities, such as soccer practices or play dates at a friend's house, because he does not have a driver's license. *Id.* Angel almost always walks Buffy to and from the bus stop near her house, never arriving late to drop off or pick her up from school. *Id*.

On May 21, 2023, Sunnydale County Child Protective Services ("Agency") received a phone call from Amy Madison ("Nurse"), a mandated reporter in her role as the Sunnydale Elementary School Nurse. (R. at 8). The Nurse observed that Buffy struggled to walk and had extreme soreness on her left side. *Id*. The Nurse reported seeing a bruise on the left side of Buffy's chest and torso area, with greater prominence towards the left side of her ribs. *Id*. When the Nurse

asked Buffy what happened to her side, Buffy, crying, said, “Please don’t tell my uncle or he's going to get meaner.” (R. 8) The Agency began an investigation and determined that there would be an imminent risk of harm to Buffy if she remained in the home. *Id*. After explaining the situation to the Mother, Willow, highly upset, hesitantly consented to Buffy’s temporary placement in foster care during the investigation. (R. 8-9). A neglect hearing was initiated on May 23, 2023. (R. 9).

A senior Caseworker from Child Protective Services interviewed Buffy and reported that Buffy told her that she was “terrified of the Uncle because he hated her” and felt that “he would definitely hurt her again if he got the chance, as [her] mother didn’t protect her.” (R. 9). The Caseworker also interviewed the Mother, who reported “struggling with mental health issues” and stated that she “struggled to properly take care of Buffy when she felt it was hard to even take care of herself.” *Id*. After providing referrals to the mother for mental health services, the Caseworker issued a report on her investigation, finding the Mother and Uncle’s home met the minimal standard of care for the safety of Buffy, but that the failure of the Mother to supervise Buffy, and the actions by the Uncle did not meet the minimum standard of care. *Id*.

The Mother testified to having an extremely difficult time after her sister’s death, with her mental health struggles presenting a greater challenge. (R. 12). The Mother was not in the right mindset to intervene or check-in with Buffy, feeling extremely depressed and overtired with all the family losses she had faced in her lifetime. (R. 12-13). The Uncle suggested to the Mother that she should see a therapist to discuss her feelings, but the Mother could not find the time due to her overfilled work schedule. (R. 13). With the stress the Mother was facing, work helped distract her in a positive way, which is why she was always open to picking up extra shifts, and why she greatly appreciated her brother for stepping in to supervise Buffy. *Id*. The Mother is open to taking recommended mental health services to get in a better state of mind for Buffy. (R. 16).

Buffy told the Caseworker that life is harder without her Aunt, reporting that no one in the home would help with her homework, she cannot get to and from soccer practices, and she feels lonely. (R. 10). The Mother knew Buffy was undergoing sessions with a counselor in school due to her being diagnosed with "intermittent explosive disorder,"[1] because of which Buffy was prone to having angry outbursts/verbal aggressions where she would not listen to any kind of authority. (R. 13-14). The Caseworker reported that Buffy started experiencing more severe and angry outbursts after her Aunt died. Buffy had seen a counselor a couple of times but has struggled to trust others. (R. 10). Although Buffy says her Mother does not love or care for her, evidence at the neglect hearing established that Buffy deeply cares for her Mother and just wants a stable relationship with her Mother. The Mother has reciprocated the same feelings. (R. 10, 16).

The Uncle's childhood was full of abuse and physical punishment that did not even compare to what the Agency is alleging against him, according to the Uncle's testimony. (R. 14). Due to this trauma, the Uncle never wanted to have kids of his own. *Id.* Although the Uncle loved Buffy as his niece, he despised the fact that he had to take care of a child full-time. He still supervises Buffy as he would do anything to help his sister, especially when considering Willow's current emotional and psychological state. *Id*. The Uncle is not particularly close with his niece and did not view his relationship with her as resembling a parent/child relationship. *Id*. He never helps her with homework, talks to her, or plays with her much in general. (R. 11). The Uncle felt Buffy is quite a problem child because she has never been told "no" by her Mother or her Aunt.

[1] This disorder is defined by a "recurrent behavioral outburst representing a failure to control aggressive impulses as manifested by…[v]erbal aggressions or physical aggression toward[s] property, animals, or other individuals, occurring twice weekly, on average, for a period of 3 months." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013). Verbal aggression in this disorder can be seen through temper tantrums, tirades, verbal arguments, or fights. *Id*.

(R. 14). The Uncle felt he should teach Buffy to behave better and learn more proper manners, as no one else would teach her. *Id*.

The Uncle did not want his relationship with Buffy to resemble his own unhealthy relationship with his parents, so he used harsh words to discipline. (R. 15). When words did not work, he tried to discipline her without getting physical, testifying that he tried to temporarily put her in time-outs in the closet, which he would lock with the lights off so she would not escape. *Id*. The longest Buffy was put in time-out was one hour, in which Buffy urinated on herself out of fear of being put in time out again. *Id*. However, time-outs resulted in more tantrums from Buffy. *Id*.

The Uncle became physical with Buffy on two separate occasions as a form of discipline, even though he did not want to. (R. 15). The Uncle found it was the only method that worked in teaching Buffy how to behave and listen to "the adult of the house," and he "ensured that the discipline wasn't too inappropriate or excessive." *Id*. On one occasion, the Uncle allegedly yelled at Buffy after she failed her spelling test. (R. 11). In response, Buffy told her Uncle that she hated him and wished he would disappear. *Id*. Describing to the Caseworker the Uncle's response, Buffy made a closed fist and said she was hit on the cheek for talking back. *Id*. The Uncle told Buffy to say she was accidentally hit in the face playing basketball, otherwise "he would make it much worse for her next time." (R. 11-12). On a separate occasion, Buffy asked the Uncle to go to a friend's house for dinner. (R. 12). The Uncle said no because she would not listen to him. Buffy mumbled under her breath that she wished Kendra and Angel could swap places [implying that she wished the Uncle died, and not the Aunt]. *Id*. The Uncle seemed enraged and pushed Buffy to the ground and kicked her once on the side, resulting in the bruise towards her ribs. *Id*. The Uncle again told Buffy not to tell or show anyone the bruise. *Id*.

The Mother knew the Uncle had a strict authoritative method to childcare, but she was not aware of the severity of it. (R. 13) Buffy seemed different when the Uncle started supervising Buffy, but the Mother knew Buffy missed her aunt. *Id*. The Mother testified the Uncle's authoritative style could not have been that bad, since it caused Buffy to behave better. (R. 13). The Mother and her siblings' upbringing with their parents was very strict and had resulted in physical punishment many times. Although the Mother understood the need for physical discipline, she personally swore she would not repeat her parent's punishment on Buffy. *Id*. The Mother believes that the Uncle would never seriously hurt Buffy on purpose, and Buffy's overall behavior got seriously better since Angel had begun taking care of her. *Id*. The Mother had no knowledge of the infliction of harm, and if she had known Buffy was suffering or felt uncomfortable, she would have addressed the situation immediately. (R. 17).

The Mother and Uncle filed a joint Motion to Dismiss that was heard at the neglect hearing initiated on May 23, 2023. (R. 9) In an order dated June 7, 2023, the Sunnydale Family Court granted the Mother and Uncle's Motion to Dismiss, holding that the Mother is not found to have committed child neglect, and the Uncle is found not to be a person legally responsible according to Sunnydale Family Law Act Article 10. (R. 6, 21). The Agency appealed this decision to the Third Appellate Division, which reversed the decision of the Sunnydale Family Court in an order dated August 23, 2023. (R. 22, 29). The Mother and Uncle now appeal to the Sunnydale Court of Appeals. (R. 5).

SUMMARY OF THE ARGUMENT

MS. ROSENBURG DID NOT COMMIT CHILD NEGLECT: Willow Rosenburg has met the minimum degree of care in supervising her child, Buffy. The Mother has always provided childcare to Buffy, never leaving Buffy alone or unattended. The Mother did not personally observe any signs of pain or distress from Buffy, but rather a notable improvement in her behavior since the Uncle started taking care of her. Buffy's struggles with her emotional condition are not attributed to any failings of the Mother. Therefore, this Court should reverse the Third Appellate Division's ruling and grant the motion to dismiss.

THIS COURT DOES NOT HAVE JURISDICTION OVER MR. ROSENBURG: The Sunnydale Family Court, the factfinder and only assessor of credibility in the Sunnydale legal system, found Mr. Rosenburg is not the functional equivalent of the child's parents and therefore is not a "Person Legally Responsible" under Sunnydale Family Court Act § 3523(g). The Family Court's decision must be accorded deference.

Furthermore, under this Court's seminal case *Matter of Yolanda J.,* Mr. Rosenburg's relationship with the child does not meet the necessary factors to categorize him as a "Person Legally Responsible". See *In re Yolanda D.*, 88 N.Y.2d 790 (1996).

EVEN IF THIS COURT HAS JURISDICTION OVER MR. ROSENBURG, HE DID NOT NEGLECT THE CHILD BY COMMITTING EXCESSIVE CORPORAL PUNISHMENT: The Government has failed to show by a preponderance of evidence that Mr. Rosenburg neglected the child by engaging in excessive corporal punishment. A child is considered neglected if one, their physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired; two, a "Person Legally Responsible" inflicted excessive corporal punishment upon them; and three, the child's impairment is clearly attributable to the PLR's actions. *See*

Sunnydale Fam. Ct. Act §3523(f), (h). The Government has failed to show any of these necessary elements, and therefore Mr. Rosenburg did not engage in excessive corporal punishment.

ARGUMENT

I. THIS COURT SHOULD DENY THE GOVERNMENT'S PETITION TO FIND THAT WILLOW ROSENBURG COMMITTED CHILD NEGLECT.

A. Willow Rosenburg met the minimum degree of care in supervising her child.

Under Sunnydale Family Court Act § 3523(g), a "neglected child" is a minor child "whose physical, mental or emotional condition has been impaired or is in imminent danger of being impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care… in providing the child with proper supervision or guardianship" by "unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment" or "by any other acts of a similarly serious nature requiring the aid of the court." Sunnydale Fam. Ct. Act §3523(g); *Matter of Robert W.,* 927 N.Y.S.2d 819 (N.Y. Fam. Ct., 2011). When evaluating whether a parent has met the minimum degree of care, this Court assessed whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing." *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 370–71 (2004).

To establish neglect based on a lack of supervision, the Agency must prove the child has been harmed or is threatened with imminent danger of harm as the result of the failure of the parent to properly supervise her child. *Matter of Evelyn X*, 290 A.D.2d 817, 819 (N.Y. App. Div. 2002). The danger must be "near or impending, not merely possible." *Nicholson,* 3 N.Y.3d at 369. Additionally, there must be a causal connection between the "objectionable parental behavior or omission and the imminent danger of impairment." *Id.*

In *Matter of Christopher K.,* 841 N.Y.S.2d 818 (N.Y. Fam. Ct. 2007), the Court examined whether the child's guardian failed to provide adequate supervision and guardianship by inflicting or allowing to be inflicted harm, or a substantial risk thereof. The Court analyzed situations where

the parent left their child alone or unattended, *Matter of Ishmael D.*, 202 A.D.2d 1030, 1030-31 (N.Y. App. Div. 1994), relied on an inappropriate caretaker, *Matter of Joseph DD*, 214 A.D.2d 794, 796-97 (N.Y. App. Div. 1995), and allowed potentially abusive individuals to be around the children, *Matter of Elizabeth G*, 255 A.D.2d 1010, 1012 (N.Y. App. Div. 1998).

In the case before this Court, the Mother always provided childcare so that Buffy never had to be unattended. (R. 17). The Mother's sister, the Aunt, was Buffy's main source of childcare until the Aunt passed away in 2022. (R. 7). The childcare has since fallen primarily on the Mother's brother, the Uncle, who devotes a lot of his time to supervise Buffy at the Mother's apartment. (R. 8). The Uncle almost always walks Buffy to and from the bus stop near her house, never arriving late to drop off or pick her up from school. *Id*. Both the Aunt and the Uncle, as the Mother's siblings, are individuals expected to be appropriate caretakers and guardians for when the Mother was not present. The Mother grew up with the Uncle and the Aunt, and the Uncle had cared for Buffy for "extended periods of time" while the Mother worked. *Matter of Joseph DD*, 214 A.D.2d at 796.

Although the Mother knew that the Uncle had a strict authoritative method to childcare, she did not "personally observe" the Uncle's physical discipline of Buffy, nor did she observe any bruising on Buffy. *Id*. at 795. The Mother did not observe any visible signs of "pain or distress" from Buffy when she interacted with her. *In re Lucien*, 155 A.D.3d 1347, 1351 (N.Y. App. Div. 2017). The Mother did not "notice anything unusual or concerning" regarding Buffy. *Id*. at 1350. While the Uncle used physical discipline with Buffy, the Mother had no knowledge of the infliction of harm, and her attorney shared that if she had known the child was suffering or felt uncomfortable, she would have addressed the situation immediately. (R. 17). In fact, the Mother testified that Buffy's overall behavior "had gotten seriously better since Angel had begun taking

care of her." (R. 13). Ever since the Uncle started taking care of her, Buffy has experienced "significantly less outbursts" in relation to her intermittent explosive disorder. (R. 14).

In *Matter of Alachi I.*, 215 A.D.3d 1014 (N.Y. App. Div. 2023), the Court weighed a child's emotional condition with a lower court finding of neglect by the mother. In that case, the oldest child "struggled with extreme emotional dysregulation and often experienced violent outbursts." *Id*. at 1016. The Court determined that "as the oldest child's emotional difficulties are, at least to some great extent, properly attributed to the trauma he experienced, rather than any failing of the mother, his condition does not support the neglect finding." *Id*. at 1017. The Court, in reversing the Family Court's finding of neglect by the mother, reasoned "most critical to our review and determination… is the fact that the mother was at all times actively acknowledging the difficulties posed by her circumstances and seeking aid." *Id*. at 1018.

Matter of Alachi I. mirrors the matter before this Court in multiple respects. In both cases, the child struggled with his or her emotional condition. Specifically, the oldest child in *Matter of Alachi I.* frequently experienced violent outbursts, which were not attributed to any failing of the mother. 215 A.D.3d at 1017. Similarly, Buffy, diagnosed with intermittent explosive disorder, experiences behavioral outbursts where she fails to control aggressive impulses as manifested by verbal or physical aggressions. (R. 14). In contrast, while the child in *Matter of Alachi I.* did not receive any counseling, Buffy underwent sessions with a school counselor to better manage her emotional state, which her Mother knew about. (R. 13-14).

Additionally, the mothers in both cases actively acknowledged and sought aid for their situations due to their difficult circumstances. The mother in *Matter of Alachi I.* testified that although she reached out for help, she did not receive meaningful assistance. 215 A.D.3d at 1016. The Mother in the present case stated that she would absolutely consider and be open to taking the

recommended mental health services to get in a better state of mind for Buffy. (R. 16). The Mother has struggled to initiate any appointments with a therapist due to her overfilled work schedule, which she takes on so that Buffy will not experience the financial struggles her Mother has personally dealt with throughout her life. (R. 16). Buffy deeply cares for her Mother and just wants a stable relationship with the Mother – who has reciprocated the same feelings. (R. 16).

In *Matter of Alachi I.* the Court acknowledged that "the testimony revealed that any parent would have struggled to meet the needs of these... young children." 215 A.D.3d at 1018. These similarities and distinctions compel the Court to reverse the Third Appellate Division's ruling.

II. THIS COURT SHOULD DENY THE GOVERNMENT'S PETITION FOR AN ORDER OF PROTECTION AGAINST MR. ROSENBURG

A. This Court does not have jurisdiction over Mr. Rosenburg because he is not a "Person Legally Responsible" as defined by Sunnydale Family Court Act § 3523(g).

1. The Sunnydale Family Court's determination that Mr. Rosenburg is not a "Person Legally Responsible" requires deference by this Court.

Determining whether an adult is a "Person Legally Responsible" (PLR) is a fact-intensive and discretionary inquiry. See *Matter of Elijah AA.,* 189 N.Y.S.3d 812, 814 (N.Y.A.D. 3 Dept., 2023). This determination depends on factors such as the substantive nature of each contact between the adult and the child, the frequency of this contact, and the extent of control the adult had over the child during each contact. See *In re Yolanda D.,* 88 N.Y.2d 790. The common thread running through each PLR factor is the determination of each requires thorough investigation of the factual record and direct observation of witness testimony. Indeed, if the factfinders are unable to gain an intimate fact-based picture of the relationship between the adult and the child in question, the courts cannot make a PLR determination at all. See *Matter of Trenasia J.,* 10 N.Y.S.3d 162 (2015) (Rivera, J., concurring).

Therefore, this Court must accord "great deference" to the Sunnydale Family Court's factual findings and credibility determinations. *Matter of Elijah AA.,* 189 N.Y.S.3d at 814. The judges of Sunnydale Family Court, as trial level factfinders, have direct access to the party testimony, and here those judges ruled Mr. Rosenburg is not a PLR. This decision must be "upheld unless [it] lack[s] sound and substantial basis in the record." *Id*. The Sunnydale Family Court in this case completely relied on the record, citing directly to party and witness testimony in their testimony.[2]

Of course, the Appellate Divisions of the Supreme Court exercise de novo review over Family Court decisions and therefore may make factual determinations as well. However, this Court must still give deference to the Family Court due to the advantages they possess, in that they "see and hear the witnesses at first hand and are thus better able to pass upon their credibility, intelligence, bias, and other qualities tending to affect the wight and value of their testimony." 4 N.Y. Jur. 2d Appellate review § 637. The Family Court's determination may only be disturbed when the "proofs so clearly preponderate in favor of a contrary result," and here, neither the Government nor the Third Appellate Division have argued or shown that the "proofs" from the record do so. *Id.*

2. Mr. Rosenburg is not a "Person Legally Responsible" as defined by *Matter of Yolanda D.*

Sunnydale Family Court Act § 3523(g) states a PLR must be the "child's custodian, guardian, or any other person responsible for the child's care" at the time of the alleged neglect. Sunnydale Fam. Ct Act § 3523(g). As Mr. Rosenburg is not the child's guardian, this Court must conduct an

[2] The Sunnydale Family Court conducted a fact-finding hearing that lasted four days The Family Court directly relied on both the Government testimony and the testimony of Ms. And Mr. Rosenburg. The Family Court also heard directly from witnesses such as a Senior Caseworker and the school nurse. The Family Court judges cited directly to the fact-finding hearing, the neglect hearing, and all testimony, and based their opinion on their in-person observations. (R. 6-21).

analysis under the seminal case *Matter of Yolanda D.* to determine if Mr. Rosenburg is a custodian and PLR.

This Court ruled in *Yolanda* an adult is only a PLR if they serve as the functional equivalent of the child's parent. *In re Yolanda D.,* 88 N.Y.2d at 795. ("The common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents.") Whether Mr. Rosenburg is the functional equivalent of the child's parent depends on the following non-dispositive factors; 1. The frequency and nature of the contact between the adult and the child; 2. The nature and extent of the control exercised by the respondent over the child's environment; 3. The duration of the respondent's contact with the child; and 4. The respondent's relationship to the child's parents. *Id.* at 796. Determining whether Mr. Rosenburg is the functional equivalent of the child's parent is a "fact-intensive inquiry," and the factual record here shows Mr. Rosenburg's relationship with the child fails to rise to the level of PLR. *Id.*

MR. ROSENBURG DOES NOT LIVE WITH THE CHILD. Under *Yolanda* factors one and three, the frequency and nature of Mr. Rosenburg's contact with the child, as well as the duration of his contact with the child, is insufficient to categorize him as a PLR because he does not spend the night with the child and her mother.

This Court in *Yolanda* ruled the child's uncle in that case was a PLR because the child slept overnight at the uncle's home on multiple occasions without the mother's presence, requiring the uncle to act as the parent both day and night in an area "geographically distant from the mother." *In re Yolanda,* 88 N.Y.2d at 797. This Court in *Matter of Trenasia J.,* extended the *Yolanda* ruling, emphasizing the child's uncle in that case was a PLR because the child spent multiple nights at the uncle's house in a location away from the mother. See *In re Trenasia,* N.Y.3d at

1004. This Court argued that "providing shelter" was essential to transforming an uncle/nephew relationship into a relationship in which the uncle was the functional equivalent to the child's mother. *Id.* at 1005.

The Appellate Divisions of the Supreme Court of New York have since strengthened the *Yolanda* and *In re Trenasia* rulings, repeatedly holding throughout the divisions that the categorization of an adult as a PLR strongly depends on whether the child lives in the same household as the adult. See *Matter of Serenity R.,* 187 N.Y.S.3d 738 (N.Y.A.D. 2 Dept., 2023) (The boyfriend of the child's mother was a PLR because he lived in the same household as the child for two months); *Matter of Kavon,* 145 N.Y.S.3d 115 (N.Y.A.D. 2 Dept., 2021) (The children's grandmother was a PLR because she lived with the children for many months at a time); *In re Nichole SS,* 745 N.Y.S.2d 128 (N.Y.A.D. 3 Dept., 2002) (The child's mother's boyfriend was a PLR because he lived with the children for approximately five years and was regularly present in their household); *In re Dayquon G.,* 803 N.Y.S.2d 510 (N.Y.A.D. 1 Dept., 2005) (The child's uncle was a PLR because he lived in the same household as the child).

The current case is easily distinguished from established case law, and indeed the case law illustrates the impossibility of categorizing Mr. Rosenburg as the child's PLR. The record does not indicate that Mr. Rosenburg lives with the child or spends the night with the child, whether at Ms. Rosenburg's home or another location. Rather, the record indicates Angel "spends a great deal of time at Willow's apartment," but still lives at "his friend's" apartment. (R. 7-8). In no instance has Mr. Rosenburg been required to care for the child as a parent both day and night in his own apartment. This illustrates Mr. Rosenburg is akin to the child's babysitter or supervisor, rather than the functional equivalent of her parent. See *In re Trenasia J.,* 10 N.Y.S.3d at 165.

([A]rticle 10 should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor.")

MR. ROSENBURG IS NOT RESPONSIBLE FOR FEEDING OR CLOTHING THE CHILD. Under *Yolanda* factors one and two, the nature of Mr. Rosenburg's contact with the child and his control over her environment is insufficient to categorize him as a PLR. The first reason for this is Mr. Rosenburg is not responsible for feeding the child. In *In re Nichole SS,* the Appellate Division of the Supreme Court ruled the categorization of PLR largely depended on whether the adult in question regularly purchased food for the children and ate meals with them. See *In re Nichole SS.,* 745 NY.S.2d at 129. (The adult in question was "regularly present in their home [and] purchased food for the household.") And in *Matter of Kavon,* the Appellate Division of the Supreme Court ruled the children's grandmother was a PLR largely because she purchased groceries for the entire family and was responsible for feeding the children. See *Matter of Kavon,* 145 N.Y.S.3d at 117. ([D]uring which time she purchased food and clothes for the children.) In the current case, Mr. Rosenburg was not responsible for feeding or clothing the child and he has never sat down to eat a meal with the child, illustrating the impossibility of categorizing him as a PLR.[3]

The second reason Mr. Rosenburg has no control over the child's environment is he is not responsible for purchasing clothing or doing laundry for the child, even though any parent would be responsible for these basic tasks. In *Matter of Kavon,* the Appellate Division emphasized the child's grandmother was a PLR largely because she regularly purchased clothing for the children and spent time doing their laundry. See *Matter of Kavon,* 145 N.Y.S.3d at 117. And *In re*

[3] The factual record fails to state that the uncle feeds the child, does groceries, cooks, or buys clothes or does laundry. (R. 6-12).

Nichole SS, the Appellate Division further extends this concept, stating the adult in question was a PLR partially because he would regularly give the children gifts. See *In re Nichole SS.,* 745 NY.S.2d at 129. Here, not only does Mr. Rosenburg not purchase clothing the child needs to live in society, but the record also fails to show Mr. Rosenburg buys her any gifts, illustrating he is not a PLR. Because the current case is easily distinguishable from case law, Mr. Rosenburg is not the functional equivalent of a parent and is not a PLR.

MR. ROSENBURG IS NOT RESPONSIBLE FOR THE CHILD'S TRANSPORTATION.

Under *Yolanda* factor two, the factual record also fails to establish Mr. Rosenburg had the control necessary over the child's environment to function as the equivalent of her parent because he did not transport the child to and from school, extracurricular activities, friends' houses, and the home. In *Matter of Kavon,* the Appellate Division ruled the child's grandmother was a PLR because she regularly escorted the children to and from church and to and from all their extracurricular activities, therefore exercising the same control over the children's transportation a parent would. See *Matter of Kavon*, 145 N.Y.S.3d at 117.

Mr. Rosenburg, however, did not take the child to any extracurricular activities, including the child's soccer practices. He also never took the child to her friends' houses for play dates, or even to school. (R. 8). Rather, Mr. Rosenburg would only walk the child to and from the bus stop and would spend the rest of the day simply supervising the child in her home. *Id.* This illustrates Mr. Rosenburg had no control of the child's transportation. The safe transportation of a child between their school, extracurricular activities, and the home is an important parental duty that any person acting as the functional equivalent of a parent would engage in, and Mr. Rosenburg is not the functional equivalent of a parent.

MR. ROSENBURG IS NOT RESPONSIBLE FOR ANY PARENTAL DUTIES. The Appellate Divisions of the Supreme Court have listed the essential duties an adult must undertake to be categorized as a PLR. Mr. Rosenburg fails to meet each essential duty. He does not tuck Buffy into bed and stay with her to talk at night[4], he does not help her with homework[5], and he does not eat meals with her or give her gifts.[6] Indeed, his only duty is to supervise the child while at her mother's home, just as a supervisor or babysitter would be required to do. Therefore, Mr. Rosenburg is not a PLR.

MR. ROSENBURG DOES NOT CONSIDER HIMSELF TO BE A PARENTAL FIGURE. Under *Yolanda* factor one, the nature of the contact between Mr. Rosenburg and the child does not rise to the level of a relationship between a PLR and a child because Mr. Rosenburg does not consider himself a parental figure and indeed, he never provided the child with a loving parental relationship or affection. (R. 20). Instead, Mr. Rosenburg testified he "despised the fact he had to take care of [the child] full-time", and he did not view her as his daughter but rather as his niece. (R. 14).

This Court in *Yolanda* emphasized the necessity of a close parental bond between the PLR and the child when categorizing an adult as a PLR. See *In re Yolanda D.,* 88 N.Y.2d at 790 (The child's uncle categorized his relationship with his niece as "pretty close, you know, as family.") And this Court in *In re Trenasia J.* ruled that although the existence of a familial relationship between the adult and the child should be considered, such a relationship is not dispositive of PLR categorization. *Matter of Trenasia J.,* 25 N.Y.3d at 1006. ([T]he existence of a familial

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[4] See *In re Mikayla U.* 699 N.Y.S.3d 145 (N.Y.A.D. 3 Dept., 1999).
[5] (R. 10)
[6] See *In re Nichole SS.,* 745 NY.S.2d at 129.

relationship is not dispositive.") Rather, what must matter when categorizing an adult as a PLR is whether the adult and the child have a parent/daughter relationship. And here, Mr. Rosenburg does not have a close bond or parental relationship with the child as shown in the record.

B. Even if this Court has jurisdiction, the Government has failed to prove by a preponderance of the evidence that Mr. Rosenburg inflicted excessive corporal punishment under Sunnydale Family Court Act § 3523(f).

A child is considered "neglected" in relevant part if, one, their physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired; two, a PLR inflicted excessive corporal punishment upon them, and three, the child's impairment is clearly attributable to the PLR's actions. *See* Sunnydale Fam. Ct. Act §3523 (f), (h). The Government, as the party seeking to show neglect, bears the burden of establishing all three elements with a preponderance of the evidence. See *Matter of Elijah AA.,* 189 N.Y.S.3d at 814. The Government has failed to do so in this case.

1. The Government has failed to establish that the child suffered serious impairment to their mental or emotional condition.

The Government has failed to show that impairment to the child's mental or emotional condition rose to the level required in Sunnydale Family Court Act §3523(h). To satisfy statutory requirements, the child must experience substantially diminished psychological or intellectual functioning in relation to but not limited to factors such as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including ungovernability or habitual truancy. *See* Sunnydale Fam. Ct. Act § 3523(h).

The factual record does not include the facts necessary to satisfy these statutory requirements. The record states the child experienced severe and angry outbursts after her aunt died. (R. 10). However, the record does not state these outbursts were self-destructive in any way. The record states the child felt lonely and stopped going to soccer practice. *Id.* However, the

record does not state this caused her to fail to thrive in academic or social school settings or affected her so terribly that she was no longer able to think or reason. The record also states the child had no one to help her with her homework after her aunt passed away. *Id.* However, the record again does not show the child has lost an ability to think or reason as a result.

Determining whether the child suffered mental or emotional impairment is a fact intensive inquiry, and the factual record does not contain the information necessary to show the child has suffered sufficient mental or emotional impairment under Sunnydale Family Court Act §3523(h). Rather, the facts are vague and insufficient.

2. The Government failed to show Mr. Rosenburg inflicted excessive corporal punishment.

To prove excessive corporal punishment, the Government has the burden of showing, by a preponderance of the evidence, a PLR engaged in a pattern of excessive physical punishment. [7] A single incident of excessive physical punishment only reaches the level of excessive corporal punishment under Sunnydale Family Court Act §3523(f) if it is severe enough.

Sunnydale courts have ruled that a single physical strike using the body does not rise to the level of severe corporal punishment. See *Matter of Grayson,* 175 N.Y.S.3d at 827. (The court determined that when the father struck his child with his hand once, it was not excessive corporal

[7] See *In re Jerrica,* 770 N.Y.S.2d 171 (N.Y.A.D. 3 Dept., 2003). (The single physical incident was not enough to rise to a level of child neglect.); See *In re Stephanie K.,* 767 N.Y.S.2d 756 (N.Y.A.D. 4 Dept., 2003). (The petitioner "presented no proof of a pattern of excessive force by the father; indeed, the proof establishes that this was a single, isolated incident."); *Matter of In re Anastasia L.D.,* 978 NY.S.2d 347, 349 (N.Y.A.D. 2 Dept., 2014). (Although a single incident of excessive corporal punishment may suffice to support a finding of neglect, there are instances where the record will not support such a finding, even where the parent's use of physical force was inappropriate.")

punishment.) Rather, physical punishment is considered severe when an object such as a belt or bat is used, and/or the PLR strikes the child multiple times in one incident.[8]

In the current case, Mr. Rosenburg engaged in two instances of physical punishment for the child. In the first incident, Mr. Rosenburg hit the child once on the face. (R. 11) This is not severe because it does not involve repeated strikes and it does not involve the use of a weapon or object. Furthermore, courts have held that physical punishment such as slapping or spanking is not excessive corporal punishment, and here, Mr. Rosenburg's first instance of physical punishment is akin to slapping or spanking because he used his hand to hit the child. See *In re Alexander J.S.,* 899 N.Y.S.D. 281 (N.Y.A.D. 2 Dept., 2010). Therefore, this first instance does not rise to the level of statutory excessive corporal punishment. In the second incident, Mr. Rosenburg kicked the child once. (R. 12) While inappropriate, this behavior does not rise to the level of severe corporal punishment because he did not strike the child more than once and he did not use an object or weapon.

Because neither incident Mr. Rosenburg engaged in was severe, to satisfy §3523 (f) and (h), the Government must show Mr. Rosenburg engaged in a pattern of excessive physical punishment. And the Government has failed to show Mr. Rosenburg engaged in a pattern of excessive physical punishment because according to the factual record, Mr. Rosenburg physically punished the child twice, and the first incident, because it was akin to slapping or spanking, was not even enough to qualify as excessive corporal punishment, and the second incident was not severe because Mr. Rosenburg did not repeatedly hit the child or use physical

[8] See *Matter of Alena O.,* 633 N.Y.S.2d 127, 129 (N.Y.A.D. 1 Dept., 1995). (The court ruled it was excessive corporal punishment when the mother hit her daughter with a belt.); *In re Steven L.,* 813 N.Y.S.2d 627 (N.Y.A.D. 4 Dept., 2006). (The court ruled it was excessive corporal punishment when the respondent hit the child repeatedly with a yardstick.)

weapons. Therefore, the Government has failed to show by a preponderance of the evidence Mr. Rosenburg engaged in excessive corporal punishment.

3. The Government failed to show a causal link between Mr. Rosenburg's actions and the mental and emotional changes in the child's condition.

To show neglect based on excessive corporal punishment, the Government must show a causal connection between Mr. Rosenburg's physical punishments and "the child's impairment or imminent danger of impairment." *Nicholson v. Scoppetta*, 3 N.Y.3d at 369. It is acknowledged that there is a direct causal link between Mr. Rosenburg's actions and the child's physical impairments. However, the Government has failed to show any causal link between Mr. Rosenburg's actions and changes in the child's mental or emotional condition.

The record states the child feels very lonely, experiences severe and angry outbursts, has a hard time trusting anyone, and does not have any adults to help her with her homework. (R. 10-11). All of this is attributable to the death of her aunt, and therefore there is no direct causal link between Mr. Rosenburg's actions and the child's emotional or mental condition. The record also states the child urinated on herself in the closet, but the record does not state this was due to any physical punishment Mr. Rosenburg inflicted. Rather, it was due to a non-physical punishment, putting this incident outside the scope of this issue. (R. 11). The record further states the child has cried, but this is all attributable to incidents that did not involve any physical punishment. (R. 11-12) Therefore, there is no causal link between Mr. Rosenburg's actions and the child's mental and emotional condition.

CONCLUSION

For the foregoing reason, Ms. Rosenburg and Mr. Rosenburg respectfully request this Honorable Court to reverse the decision of the Sunnydale Third Appellate Division and rule Ms. Rosenburg did not commit child neglect, Mr. Rosenburg is not a “Person Legally Responsible”, and Mr. Rosenburg did not commit child neglect through excessive corporal punishment.