May 8, 2017

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: *South Carolina Department of Social Services, Respondent and Sherry Powers, Edward Anthony Dalsing, and Tammy Gaye Causey Dalsing, Intervenors, Of whom Edward Anthony Dalsing and Tammy Gaye Causey Dalsing are Petitioners v. Erica Smith and Andrew Jack Myers, Respondents, In the Interest of a minor under the age of eighteen.*
Appellate Case No. 2017-000784

Dear Mr. Shearouse:

Please find enclosed for filing the original Motion for Leave to File Amicus Brief and Amicus Curiae Brief in Support of Petition for Certiorari, together with an original Certificate of Service.

Should you have any questions or concerns, please do not hesitate to contact me at 803-957-0889 or allie@harlingandwest.com.

Sincerely,
HARLING & WEST, LLC

Allison B. Bullard, Esquire
/enclosures

cc: James Fletcher Thompson, Esquire
Melinda Inman Butler, Esquire
David E. Simpson, Esquire
Nathan Sheldon, Esquire
Debra A. Matthews, Esquire
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Lindsay McCallister, Esquire
Erick Matthew Barbare, Esquire

**STATE OF SOUTH CAROLINA**

**In the Supreme Court**

**APPEAL FROM UNION COUNTY**
**FAMILY COURT**

**HONORABLE ROCHELLE Y. CONTIS, JUDGE**

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Appellate Case No. 2017-000784

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South Carolina Department of Social Services, Respondent,
and
Sherry Powers, Edward Anthony Dalsing, and Tammy Gaye Causey Dalsing,
Intervenors,
Of whom Edward Anthony Dalsing and Tammy Gaye Causey Dalsing
are Petitioners
v.
Erica Smith and Andrew Jack Myers, Respondents,
In the Interest of a minor under the age of eighteen.

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# MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

# OF AMICI CURIAE LAW PROFESSORS AND LECTURERS JAMES DWYER, PAULO BARROZO, ELIZABETH BARTHOLET, J. HERBIE DIFONZO, JENNIFER DROBAC, CRISANNE HAZEN, JENNIFER MERTUS, DEBORAH PARUCH, IRIS SUNSHINE, AND CRYSTAL WELCH IN SUPPORT OF THE PETITION FOR CERTIORARI

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## INTERESTS OF *AMICI CURIAE*

*Amici Curiae* are faculty members at American law schools and experts in child welfare law, family law, adoption law, and constitutional law. Because the Court of Appeals' interpretation of state statutory provisions governing this case was manifestly driven by an impression of federal constitutional law, and one that is mistaken, amici hereby move for leave to submit the attached brief to clarify the constitutional doctrine pertinent to this case and to assist the Supreme Court in deciding whether to grant the Petition for Certiorari.

James G. Dwyer, the Arthur B. Hanson Professor of Law at William & Mary School of Law, authored the brief. Professor Dwyer teaches Youth Law, Family Law, and other courses, and he is a nationally-renowned expert on the constitutional rights of parents and children. He has authored six books on the law of child rearing, including THE RELATIONSHIP RIGHTS OF CHILDREN (Cambridge University Press 2006), as well as a family law textbook (Wolters Kluwer 2012) and dozens of articles and book chapters on the rights of parents and children, including *A Constitutional Birthright: The State, Parentage, and Newborn Persons*, 56 U.C.L.A. LAW REVIEW 755 (2009) and *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINNESOTA LAW REVIEW 407 (2008).

The other amici curiae are as follows:

PAULO BARROZO is an Associate Professor at Boston College Law School and author of law journal articles on adoption, children's constitutional rights, and additional constitutional law topics.

ELIZABETH BARTHOLET is the Morris Wasserstein Public Interest Professor of Law and Faculty Director of the Child Advocacy Program at Harvard Law School, where she teaches Family Law; Child, Parent, and State; a course on child welfare policy called The Art of Social Change; and a Child Advocacy Clinical Seminar. Professor Bartholet is a leading national authority on child protection, foster care, and adoption law. She has published two books on those topics: NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (Beacon Press, 1999) and FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (Beacon Press, 1999). Her numerous recent law journal articles include *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLORIDA STATE UNIV. L. REV. 573 (2015); *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD & FAM. ADVOCACY 1 (2014); *Intergenerational Justice for Children: Restructuring Adoption, Reproduction & Child Welfare Policy*, 8 (1) J. LAW & ETHICS OF HUM. RIGHTS 103 (2014); and *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*," 60 BUFFALO L. REV. 1323 (2012).

J. HERBIE DIFONZO is Professor of Law at the Maurice A. Deane School of Law at Hofstra University, where he teaches Family Law, Administrative Law, and other courses. He is the author of two books on family law and dozens of book chapters and law review articles on topics such as adoption, guardianship, child custody, and the implications of parentage law for non-traditional families.

JENNIFER A. DROBAC is the R. Bruce Townsend Professor of Law at the Indiana University Robert H. McKinney School of Law, where she teaches Family Law, Juvenile

Law, and other courses. She has written many law journal articles and book chapters on various juvenile law topics, including child abuse and child custody disputes.

CRISANNE HAZEN is a Lecturer on Law at Harvard Law School and the Assistant Director of Harvard Law School's Child Advocacy Program. She previously worked as a supervising attorney at Legal Advocates for Children and Youth in California, representing youth of all ages in a variety of civil proceedings, including custody disputes, guardianships, special education, and school discipline. In addition, she created a curriculum on parentage rights, was co-founder of a pediatric medical-legal partnership clinic at Valley Medical Center in San Jose, and managed projects for youth in foster care.

JENNIFER MERTUS is a Professor of Lawyering Skills and Director of the Center for Children and Families at Whittier Law School, where she has taught courses on Children and the Law, Family Law, Adoption Law, and Children's Rights. She publishes and presents lectures principally on topics relating to adoption and legal protection of non-traditional families.

DEBORAH PARUCH is an Associate Professor of Law at the University of Detroit Mercy School of Law, where she teaches Children and the Law, Family Law, and other courses. Her publications include *Non-offending Parents, Children and the Fourteenth Amendment in Child Protection Proceedings*, 84 UMKC LAW REVIEW 97 (2015); *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children's Hearsay Statements Before and After* Michigan v. Bryant, 28 TUORO L. REV. 85 (2012); and *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J. L. & FAM. STUD. 119 (2006).

IRIS SUNSHINE is the Director of the Child Advocacy Clinic at Wake Forest University School of Law and Executive Director of the Children's Law Center of Central North Carolina.

CRYSTAL L. WELCH is Supervising Attorney and Instructor in the Adoption Legal Clinic at the Mississippi College School of Law, in which role she teaches a clinical course and represents foster parents who seek to adopt children placed in their custody. Her most recent scholarship explores the psychiatric impact on foster children when CPS disrupts their initial foster-care placement.

Respectfully submitted:

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May 8, 2017.

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# AMICUS CURIAE BRIEF OF LAW PROFESSORS AND LECTURERS JAMES DWYER, PAULO BARROZO, ELIZABETH BARTHOLET, J. HERBIE DIFONZO, JENNIFER DROBAC, CRISANNE HAZEN, JENNIFER MERTUS, DEBORAH PARUCH, IRIS SUNSHINE, AND CRYSTAL WELCH IN SUPPORT OF THE PETITION FOR CERTIORARI

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## SUMMARY OF ARGUMENT

The Court of Appeals relied on select passages from United States Supreme Court (USSC) decisions to justify a reading of S.C. Code Ann. § 63-7-2570 extraordinarily protective of biological fathers. In reality, no USSC decisions support the lower court's severe narrowing of statutory bases for termination of parental rights (TPR). The USSC has never prescribed a substantive test of parental unfitness; its decisions relating to TPR concerned only procedural rights. Moreover, USSC decisions establishing when an unwed biological father receives substantive due process protection for his desire to be a child's legal parent and to block an adoption would exclude Mr. Myers from such protection.

Conversely, Child does have substantive constitutional rights, relating to dissolution and formation of family relationships, and they constrain courts' interpretation of state TPR and adoption rules. As courts in other states have recognized, children, like adults, possess a constitutional right against the state's forcing them to remain in a legal relationship clearly contrary to their wellbeing, and they possess a presumptive right against the state's destroying a secure attachment relationship with long-term caregivers. Statements of policy in the South Carolina Code comport with that recognition.

Should this court reverse the Court of Appeals and reinstate the Family Court's TPR order as to Mr. Myers, it should also reinstate the adoption order in favor of the Dalsings, which was not predicated on the Dalsings' independent adoption petition but rather on the Family Court's review of DSS's Permanency Plan and of the provisional permanency Order issued April 23, 2015. R. pp. 42-45 and p. 49, ¶ 47. Child's constitutional right against state destruction of her family life supports this result.

## ARGUMENT

South Carolina Code § 63-7-2620 directs that in construing § 63-7-2570, courts must construe the TPR rules "liberally" in furtherance of two purposes: "prompt judicial procedures for freeing minor children from the custody and control of their parents" and ensuring that "[t]he interests of the child shall prevail if the child's interest and the parental rights conflict." The Court of Appeals nevertheless made no mention of Child's interests. Instead it rhapsodized on the supposed rights of biological fathers and then adopted an extraordinarily narrow construction of the State's TPR rules, one that makes a biological father's wishes controlling. It suggested USSC decisions support that reading. They do not.

At the same time, the Court of Appeals failed to consider whether Child, as a person under the federal Constitution, has any rights in connection with the State's decision as to whether it will force her to remain legally tied to, and vulnerable to the demands of, a man she has never met in her four years of life, a man who made no effort to establish contact with her custodians until she was nearly a year old and who could not part with a dollar from his commissary account for her support. She does have rights, just as non-autonomous adults have in connection with state decisions as to their guardianship and custody, and those rights must guide courts' interpretation of South Carolina law.

Child has an additional constitutional right, just as adults do, against the state's destroying family relationships she has developed over a long period of time that have become of fundamental importance to her wellbeing. Courts must interpret state laws governing permanency planning and adoption consistent with that right. The Court of Appeals' adult-centered interpretation of child welfare law and off-hand suggestion that a change of custody might be appropriate in this case should not stand.

## I. The Court of Appeals Mischaracterized and Misapplied Constitutional Doctrine on the Rights of Biological Fathers.

The Court of Appeals analyzed the petition for TPR as to Mr. Myers under South Carolina Code § 63-7-2620 within constraints it discerned from USSC doctrine on the rights of biological fathers and of legal parents. The lower court correctly observed that South Carolina's TPR rule, like that of other states in this country, has two prongs. A court must first find by clear and convincing evidence a parental act or omission that can serve as a predicate for conducting a best-interests assessment of a child's family relationships. The court was wrong, though to treat the first prong as a protection of a biological parent's rights *as against the welfare of the child*, and to suggest that the USSC's decision in *Quilloin v. Walcott*, 434 U.S. 246 (1978), supports such an interpretation of state law.

In actuality, the first prong of the statutory rule protects both parents and children in society against rampant, unwarranted state scrutiny of, and threat to disrupt, family relationships. TPR statutes essentially identify situations in which there is sufficient cause for the legal system to reexamine the state's initial conferral of legal parenthood on biological parents through its maternity and paternity statues, to determine whether continuing that legal relationship is contrary to the child's welfare. Cf. *In re Jayden G.*, 70 A.3d 276, 303 n.32 (Md. Ct. App. 2013) ("[P]arental fitness, exceptional circumstances, and the child's best interests considerations are not different and separate analyses. The three concepts are fused together, culminating in the ultimate conclusion of whether terminating parental rights is in a given child's best interests."). There is no plausible basis for denying that Child's is one of those situations.

The passage the Court of Appeals quoted from *Quilloin* is consistent with this understanding of TPR rules. It does not speak of parental entitlement. Rather, it suggests

that *breakup* of *an existing family life* (which Child has never had with Mr. Myers) might violate the Due Process Clause if it is over the objections of parents *and their children* and without any finding of unfitness. Child has not objected to severance of her legal tie to Mr. Myers. The larger passage in *Quilloin* from which the lower court quoted reads:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the *breakup* of a natural family, over the objections of the parents *and their children*, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." (citation omitted). But *this is not a case in which the unwed father at any time had, or sought, actual or legal custody* of his child. *Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived.* Rather, the result of the *adoption in this case is to give full recognition to a family unit already in existence*, a result desired by all concerned, except appellant. Whatever might be required in other situations, *we cannot say that the State was required* in this situation *to find anything more than that the adoption*, and denial of legitimation, *were in the "best interests of the child." Quilloin*, 434 U.S. at 255 (1978) (emphasis added).

*See also Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (plurality opinion) (interpreting prior decisions regarding rights of unwed biological fathers as respecting "the relationships that develop within the unitary family" and rejecting a biological father's claim to constitutional protection even though he had established a relationship with the child, because it would interfere with the child's ongoing family life with other caregivers).

The foregoing passage from *Quilloin* perfectly fits the present case. The USSC has thus declared that in a situation like Child's, state courts may establish a permanent parent-child relationship between adoptive parents and a child, to the exclusion and over the objection of a biological father, whose desires *qua* biological parent are to receive no constitutional protection. Cf. *Guardianship of Ann S.*, 45 Cal. 4th 1110, 1129 (2009) ("*Quilloin* demonstrates that the best interest of the child is a constitutionally permissible

basis for terminating parental rights in some circumstances."). *Quilloin* therefore provides no support for the Court of Appeals' decision.

More generally, the USSC's four holdings on the substantive constitutional rights of unwed biological fathers established a test Mr. Myers cannot meet. Three involved a situation similar to the present one, insofar as a biological father was attempting to block adoption of a child by a biologically-unrelated person (a step-father in each case). In addition to having a genetic connection, the Court said, the biological father must have established a substantial social parent-child relationship or demonstrated full commitment to the responsibilities of parenthood, in order to receive any constitutional protection.

Thus, in the single USSC decision in which the biological father succeeded in blocking an adoption, *Caban v. Mohammed*, 441 U.S. 380 (1979), the biological father had had a substantial relationship with the child and was seeking to assume custody himself, rather than simply wishing to dictate who else might raise the child. And his fitness had not been challenged. The Court emphasized "the importance in cases of this kind of the relationship that in fact exists between the parent and child." 441 U.S. at 382, 393 n.14; *see also id.* at 397 ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."); *cf. Stanley v. Illinois,* 405 U.S. 645 (1972) (ascribing to an unwed father, who had participated in raising his children for many years and who wished to continue having custody of his children, a constitutional right to prove his fitness and thereby acquire legal parent status).

In the other two USSC cases assessing whether an unwed biological father as such has a constitutional right to claim legal parenthood for himself, as against a potential adoptive parent, *Quilloin* and *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court concluded

that the biological fathers had no such right. They had not demonstrated sufficient commitment to the responsibilities of child rearing and did not have a substantial relationship with the children at issue. In addition to the passage above from *Quilloin*, consider this from the Court's last majority opinion on the topic, in *Lehr*:

> The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a *full commitment* to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban*, 441 U.S., at 392, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." Id., at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[*T]he importance of the familial relationship*, to the individuals involved and to the society, *stems from the emotional attachments* that derive from the *intimacy of daily association*, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship." (citation omitted). 463 U.S. at 261 (emphasis added).

See also *id.* at 257 ("the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed"); 257 ("this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child"); 261 n.17 (acknowledging "the constitutional importance of the distinction between an inchoate and a fully developed relationship").

Mr. Myers obviously has developed no relationship with Child, and no court could plausibly perceive a "full commitment to the responsibilities of parenthood" in the record. This is especially so given the timing of Mr. Myers' acts, as detailed in the Family Court's decision; Mr. Myers attempted no communication with Child's custodians until she was nearly a year old, five months after receiving notice of the Dalsings' adoption petition. R., pp. 24-28. *Cf. S.C. Dep't of Soc. Servs. v. Ledford,* 357 S.C. 371, 376–77, 593 S.E.2d 175, 177 (Ct. App. 2004) (upholding TPR as to a biological father who made a similarly

"miniscule attempt to remain a part of his daughter's life while in prison," stating "Father was required to take the necessary steps to assure that his daughter was being continually cared for" and to "make adequate arrangements for the child's continuing care").

Thus, Mr. Myers has no constitutional right at stake in this matter *qua* biological father. The USSC decisions described above actually support the conclusion that where the biological father has not established a social parent-relationship with the child, states may approve an adoption by biologically-unrelated persons, over the biological father's objection, based solely on the child's best interests.

Mr. Myers, though, is already a nominal legal parent to Child, as a result of court-ordered paternity testing in 2013. Therefore, the further questions arise a) whether there is greater constitutional protection against termination of such legal status once one has it and b) whether that legal status, prior to termination, gives rise to any constitutional entitlement to dictate that someone else the legal father prefers should raise Child instead of him and instead of the social parents who have raised her for virtually all her four years of life.

## II. Constitutional Doctrine Relating to TPR Proceedings Confers No Right to Any Particular Interpretation of South Carolina TPR Statutes.

In addition to misusing *Quilloin*, the Court of Appeals misapplied the U.S. Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982). The lower court properly noted that *Santosky* established, as a matter of procedural due process, an evidentiary standard of clear and convincing evidence for finding a state's parental-conduct predicate satisfied. The lower court went on, however, to imply that *Santosky* also established a *substantive* constitutional right that dictates a particular standard of unfitness or that limits the substantive bases states can have for terminating someone's legal-parent status. *Santosky* did nothing of the sort. *Santosky*, like *Lassiter v. Dep't of Soc. Servs. Of Durham*

*Cty., N.C.*, 452 U.S. 18 (1981) before it, concerned solely *procedural* protections persons with legal-parent status should receive in connection with a TPR decision. They manifest no inclination on the Court's part to tell states which acts or omissions by legal parents are appropriate substantive bases for terminating parental rights. That remains left to state legislatures, who are accountable to voters (which includes parents but not children).

*Santosky*, moreover, involved parents who, unlike Mr. Myers, had been raising the children in question before the state removed the children from the parents' custody on account of maltreatment. That fact played a role in the Court's analysis. See *Santosky*, 455 U.S. at 753 ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable *destruction of their family life*.") (emphasis added), 766-67 ("while there is still reason to believe that *positive, nurturing parent-child relationships* exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds. `[T]he State registers no gain towards its declared goals when it *separates* children *from the custody* of fit parents.' *Stanley v. Illinois*, 405 U.S., at 652.") (emphasis added). *Lassiter* likewise involved a parent who had been raising a child before being charged with maltreatment, and in any event that parent lost on her constitutional challenge to termination of her parental status. 452 U.S at 20, 34.

The Court of Appeals attempted to assimilate the present case to *Santosky*, and to make its decision appear driven by South Carolina public policy, by characterizing the TPR proceeding against Mr. Myers as raising the question whether there would be "reunification of biological families." Opinion, Appendix p. 15. *See also id.* (quoting from S.C. Code Ann. § 63-1-20(D) the "policy of this State to reunite the child with his family"). This is fanciful. Child has never been in the same room with Mr. Myers. There is no reunification

to be had. The question this case actually presents is whether the courts will protect an actual family against state destruction, pursuant to the State's policies: to "insure that [children] are protected against any harmful effects resulting from the temporary or permanent inability of [biological] parents to provide care and protection for their children," S.C. Code Ann. § 63-1-20(D), to "ensure permanency on a timely basis for children when removal from their homes is necessary," S.C. Code Ann. § 63-7-10(B)(3), to ensure that "[a]ll child welfare intervention by the State has as its primary goal the welfare and safety of the child," S.C. Code Ann. § 63-7-10(A)(5), "to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship," S.C. Code Ann. § 63-7-2620, to make sure that "interests of the child shall prevail if the child's interest and the parental rights conflict," id., to see to it that "when the interests of a child and an adult are in conflict, the conflict must be resolved in favor of the child," S.C. Code Ann. § 63-9-20, and "to protect the health and welfare of these children [who are abused, neglected, or abandoned] and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life," S.C. Code Ann. § 63-7-2510. *See also* S.C. Code Ann. 63-9-810 (The State has a compelling interest in promptly providing stable and permanent homes for adoptive children and in preventing the disruption of adoptive placements."). *Cf. In re S.M.*, 985 A.2d 413, 419 (D.C. 2009) ("To be sure, at the end of the day, the paramount consideration must of course be the best interest of the child. The rights of even fit parents 'are not absolute, and must give way before the child's best interests.'") (citations omitted).

Based on such declarations of State policy, one could also challenge the Court of Appeals' reliance on terms such as "fundamental liberty" and "fundamental interests" in reference to parents facing a TPR, along with the Court of Appeals' complete silence regarding Child's interests. From any objective perspective, satisfaction of a desire to keep a child legally tied to one's biological kin is not a fundamental interest – that is, an interest so basic and vital that one cannot pursue any other aims in life without it. That Mr. Myers spent $557 on phone calls and none of it to inquire about Child's welfare confirms that having a relationship with her was not a fundamental interest for him, that he was able to pursue other aims in life quite well without being a father in any real sense. Even for progenitors who manifest a determination to establish a relationship with a child, it is inapt to characterize the interest as a "liberty." Certainly this case is not about Mr. Myers' freedom; it is about his power to claim ownership of Child and extinguish her existing family life. The *Lassiter* Court explicitly treated an interest in avoiding termination of legal-parent status as less weighty than an interest in avoiding deprivation of physical liberty. Rather than "fundamental," it characterized even the interest a once-custodial parent had in regaining custody as simply "an important interest." *Lassiter*, 452 U.S. at 27. Conversely, a child's interest in not having her secure attachment relationship disrupted is profound; as the uncontroverted evidence established, Child "is securely bonded, closely attached" to the Dalsings, R., p. 22, and "removal from the Dalsing home would be emotionally and developmentally devastating for the child." R., p. 52. Appreciation of the fundamental importance of secure attachment to any child's life prospects is essential to appropriate child-welfare decision making, and the Court of Appeals manifested none.

## III. Constitutional Doctrine Relating to Parental Decision-Making Authority Confers on Mr. Myers No Right to Dictate Who Will Adopt Child.

The case as it arrived to the Court of Appeals presented competing permanency plans. Mr. Myers, rather than seeking to preserve his own parental status, supported a plan of placement with his mother. Lest there be uncertainty about this, *Amici* here clarify that Mr. Myers has no constitutional right to dictate who should replace him as a legal parent.

The Supreme Court has decided several cases attributing to legal parents a limited constitutional right to some authority over certain aspects of children's upbringing. Importantly, all involved fit legal parents whose children lived with them in intact families. None extended the parental control right to a decision remotely like choosing substitute parents. Further, in all cases, the Court confirmed the authority, responsibility, and compelling interest of the state to protect and promote children's wellbeing. Cf. *Whitner v. State,* 328 S.C. 1, 17, 492 S.E.2d 777, 785 (1997) (nothing that "the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling.").

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court overturned private-school regulations, but it applied rational basis review and simply found that neither prohibition served any legitimate state interest. *See Meyer*, 262 U.S. at 403 (finding "no adequate foundation for the suggestion that the purpose was to protect the child's health"); *Pierce*, 268 U.S. at 534 (noting nothing in the record indicated any educational deprivation of private school students). The Court emphasized that states are free to oversee children's upbringing to protect developmental interests. *Id.* ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils.").

Two later cases, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding an ordinance prohibiting children's involvement in distributing religious pamphlets in public at night) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding Amish parents are constitutionally entitled to exemption from compulsory schooling laws after eighth grade), applied heightened constitutional scrutiny to state restrictions on parents, but only because the parents in those cases asserted a First Amendment right to free exercise of religion as well as a Fourteenth Amendment right to parental "liberty." The Court indicated that non-religious parental child-rearing preferences by themselves give rise to no constitutional right to resist reasonable state efforts to protect children's welfare. See *Prince*, 321 U.S. at 165 ("Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved."), 166 ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control."); *Yoder*, 406 U.S. at 215–16 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. ... Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction."). Indeed, even when religious belief is at stake, the state constitutionally may act contrary to parents' wishes if necessary to protect children's wellbeing. Id. at 233–34 ("To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation...if it appears that parental decisions will jeopardize the health or safety of the child.").

A more recent plurality decision of the Court, not involving religion, appeared to establish that the state must start with a modest presumption that what *fit custodial* parents wish for their child is in the child's best interests. *Troxel v. Granville*, 530 U.S. 57 (2000), addressed a situation somewhat akin to this case, just insofar as it involved a legal parent asserting a constitutional right to control her child's relationship with third parties. The plurality decision determined that a state court went too far in ordering substantial grandparent visitation without according any deference to the custodial mother's view that less visitation time would be best for the children. However, Justice O'Connor's plurality opinion emphasized that the mother was a custodial parent whose fitness was not in doubt. *Id.* at 68-69 ("*so long as a parent adequately cares for his or her children* (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children") (emphasis added). *See also id.* at 100-101 (Kennedy, J., dissenting) ("a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a de facto parent may be another.").

Mr. Myers has been entirely uninvolved in Child's upbringing, and his fitness to parent is very much in doubt. South Carolina courts in this case are free as a matter of federal constitutional law to choose between the competing permanency plans solely on the basis of what would be in Child's best interests, taking fully into account the life-long harm likely to result from destroying her secure attachment relationship with the Dalsings.

Lower court decisions in other jurisdictions in similar proceedings comport with this limitation of parental control rights. See, e.g., *In re Ta.L.*, 149 A.3d 1060, 1087 (D.C. 2016) (upholding an order of adoption in favor of foster parents, as against a competing

petition by a biological aunt that was supported by both biological parents, after finding the expert testimony uniformly supported a conclusion that "disruption of the children's attachments with the [foster parents] would pose `unacceptably grave' risks to the children's short- and long-term psychological, intellectual, and social development"); *Guardian ad Litem Program v. R.A.*, 995 So.2d 1083, 1084 (Fla. 5th Dist. Ct. App. 2008) (rejecting father's motion to transfer daughter from foster parents to paternal grandmother, stating "where a child has been declared dependent, it is the trial court, not the parents whose child has been declared dependent, who must decide what is in the best interest of the child."); *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002) ("Most other jurisdictions addressing this issue have largely concluded that the superior rights doctrine is not applicable when a natural parent seeks to modify a custody arrangement [with a non-parent] established by a valid order. Instead, these courts focus upon whether the change in custody would be in the best interests of the child."); *C.R.B. v. C.C.*, 959 P.2d 375, 380 (Alaska 1998) ("Having once protected the parent's right to custody [in initial proceeding to transfer custody to a non-parent], at the risk of sacrificing the child's best interests, we should not then sacrifice the child's need for stability in its care and living arrangements by modifying those arrangements more readily than in a parent-parent case.").

## IV. Child is a Person Under the United States Constitution and Thus Possesses Constitutional Rights Constraining the Courts' Decisions.

Court decisions regarding TPR, permanency, and adoption clearly constitute state action that dramatically impacts an objectively fundamental aspect of a child's life. Obviously, Child must have some constitutional rights that constrain the South Carolina courts' decisions as to her parentage and custody. Similarly, when courts and agencies

appoint or remove a guardian for an incompetent adult, the ward has constitutional rights that protect him or her against harmful state choices.

Before articulating the content of Child's constitutional rights in this matter, *amici* note that the Court of Appeals seemed to harbor a particular view of foster care – that is, as always inherently temporary, that is antiquated and out of step with current best-practices for child welfare agencies. Federal law now mandates that states seek foster-care placements that are pre-adoption or "fost-to-adopt" homes and that states authorize agencies supervising foster care to engage in "concurrent planning." DSS legally must focus on permanence and stability for children, and with newborns in particular they must seek foster-care placements that will transition to adoptive homes if safe transfer of custody to biological parents cannot occur within a relatively short time (as reflected in rules for permanency hearings and mandatory TPR petitioning). Adoptions and Safe Families Act of 1997, Pub. L. No. 105-89, § 473A(i)(2)(B), 111 Stat. 2115, 2124 (1997).

Beyond policy, it stands to reason that under certain conditions, dictated by a child's developmental needs, the child's relationship with foster parents who wish to adopt *at some point* must receive constitutional protection. Of course this does not occur immediately after placement; *amici* are not at all suggesting that every foster-care relationship is constitutionally protected. Existence of a secure attachment relationship with foster parents is a good marker for when the protection arises. Nor is the protection absolute; it simply requires the state to have a legitimate and compelling reason to sever the child's relationship with foster parents, which in some cases might be supplied by a genuine counter-vailing interest of the child (but not by the desires or interests of other persons).

In this case, at the time of the Family Court's decision, Child was two and a half years old, past the crucial window for attachment formation. See Vivien Prior & Danya Glaser, UNDERSTANDING ATTACHMENT AND ATTACHMENT DISORDERS: THEORY, EVIDENCE AND PRACTICE (2006) at 19-20. She had been part of the Dalsing family since she was three weeks old, and she had in fact formed a secure attachment relationship with the Dalsings. R, p. 22. They were, and remain now as she turns four, her parents from her perspective and from the perspective of any child-development expert.

Importantly, in terms of Child's constitutional right against state destruction of her attachment relationship and family life, it is irrelevant whether the relationship and family life Child now has with the Dalsings would not have developed if courts, agencies, or adults had acted differently in the past. Any concerns about how events transpired – for example, court delays, the legislature must address by means that do not entails sacrificing the basic welfare of a child. After placing newborn Child in the Dalsing home and repeatedly deciding to keep her there, fully aware that she likely would over time form an attachment relationship with and therefore psychological dependency on the Dalsings, South Carolina's agencies and courts may not now treat that attachment and dependency as legally irrelevant to momentous decisions determining her future family life. Nor may it balance her welfare against any adults' desires; her welfare alone *must* now be controlling. And the record does not suggest any weighty counter-vailing interest that could override her fundamental interest in preservation of her existing family relationships and home life.

The Constitutional basis for the foregoing is as follows: *All* persons have a fundamental constitutional right of intimate association. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) ("the Bill of Rights… must afford the formation and preservation of

certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."). This right protects *all* of us against state disruption of our established family relationships and home life. *Santosky,* 455 U.S. at 754, n.7 ("important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding."); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) ("*OFFER*") ("At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals."); *Troxel,* 530 U.S. at 88-89 (Stevens, J., dissenting) ("it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests") *id.* ("At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel."). *See also Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality decision) (invalidating as a violation of substantive due process a zoning provision that would cause the breakup of a household that did not match a traditional conception of family).

The right also guards against the state's forcing us into intimate associations we do not wish to have. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."). Correspondingly, we cannot insist on having a family relationship with someone who does not reciprocate

our wish; they also have a right against being forced into an unwanted association. Thus, the state would infringe this fundamental constitutional right not only by forcibly separating two people who are in a healthy cohabiting relationship together and want to continue, but also by forcing a person into an intimate association she does not want.

This right of intimate association is among the strongest of constitutional rights; state aims short of preventing material harm to others cannot justify compromising our absolute right to choose what is best for us in terms of our intimate relationships, subject of course to a condition of reciprocal choice by others with whom we wish to associate. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating a state's anti-sodomy law as a violation of Fourteenth Amendment substantive due process rights, finding the proscribed intimate relations harmed no one); *Roberts*, 468 U.S. at 617-18 (stating that the right of intimate association, protecting "choices to enter into and maintain certain intimate human relationships," is even stronger than the First Amendment right of expressive association), 623 (stating that even the weaker right of expressive association required the state to present a compelling state interest in support of applying an anti-discrimination law to a business- networking organization). Of course, another person's disappointment at not being able to have a relationship, no matter how intense, is not a material harm and cannot justify the state in overruling our choices.

We adults thus have the luxury of taking for granted that no state actor could order us to end one personal relationship and form another, regardless of how we came to know the persons with whom we choose to share a life. Even if we met and formed a relationship with another adult only as a result of the state's having placed us involuntarily in a common

living situation, the relationship would be constitutionally protected. *Cf. Turner v. Safley*, 482 U.S. 78 (1987) (holding that prison inmates have a constitutional right to marry).

The Supreme Court has clearly predicated this right of intimate association on the importance of psychological and emotional bonds that form during daily association. *See e.g.*, *Roberts*, 468 U.S. at 619 ("the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others."), 619 (stating that the "personal affiliations" warranting the highest constitutional protection "are those that attend the creation and sustenance of a family," including "the raising and education of children."), 619–20 (interpreting "family" as a social relationship, a sharing of home and daily life: "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."); *Lehr* at 463 U.S. 261 ("'the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association'" (*quoting OFFER*, 431 U.S. at 844)); *OFFER*, 431 U.S. at 843 ("A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation.").

As it applies to relationships between children and their caregivers, the interests the right of intimate association protects are typically *greater* for the children than they are for any adults, because for children they include fundamental aspects of development. An understanding of child attachment is essential to sound and constitutionally valid decision

making about children's family lives. In such cases, the court effectively acts as agent for the child, rendering for the child choices regarding family relationships the child would make for herself if able, but cannot. A court would therefore need truly extraordinary justification for severing a long-term attachment relationship like the one Child has formed and solidified over four years in the nurturing care of the Dalsings, because it is quite safe to assume that if Child were able to choose for herself, she would choose to remain with them as a permanent member of their family and household. Gratifying biological parents whose inability to care for their offspring caused the children to end up and remain for years in foster care cannot possibly constitute the requisite justification.

Courts in other states have acknowledged that children in foster care possess a constitutional right in relation to the intimate family relationships they have formed. *See, e.g., In re Jasmon O.*, 8 Cal. 4th 398, 419 (1994) ("Children, too, have fundamental rights-including the fundamental right to be protected from neglect and to 'have a placement that is stable [and] permanent.' (citations omitted) Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent."); *N.J. Div. of Youth & Family Servs. v. C.S.*, 367 N.J. Super 76, 118 (2004) (holding in TPR proceeding that trial court "erred by focusing almost solely upon the parental rights of C.S. and failed to properly weigh and consider the rights of M.S. independent of her biological mother," which included protection of her relationship with the foster parent who had become her "psychological parent"); *N.J. Div. of Youth & Family Servs. v. S.F.*, 392 N.J. Super 201, 209-10 (App. Div.) ("A child cannot be held prisoner of the rights of others, even those of his or her parents. Children have their own rights, including the right to a permanent, safe and stable placement."), *cert. denied*, 192 N.J. 293

(2007). *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (holding that states must recognize same-sex marriages, in part because marriage (like adoption) "allows children `to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'" (citation omitted); *id.* (noting as a further reason that permanency and stability are important to children's welfare).

Courts in other jurisdictions accordingly routinely consider the harm of removing children from long-term foster parents, both in cases of competing permanency plans or adoption petitions and in deciding whether to terminate parental rights, and some give categorical preference to long-term caregivers over others seeking guardianship or adoption, including relatives. *See, e.g.*, *In re S.G.*, 828 N.W.2d 118, 125 (Minn. 2013) (upholding trial court selection of foster parents rather than paternal grandparents for adoption, because statutory requirement to consider relatives for adoption placement was subordinate to the overarching statutory purpose to safeguard children's best interests, which requires taking into account harm from removing them from long-term caregivers); *In re C.L.O.*, 41 A.3d 502, 513 (D.C. 2012) ("E.P. argues that the evidence shows `he would provide a stable, loving home for A.H.' This may be true, but his contention neglects to consider the child's need for `continuity of care' and `timely integration' into a home that is not only `stable' but also `permanent.'"); *In re Sarah S.*, 43 Cal. App. 4th 274, 285 (Cal.App. 2 Dist.,1996) (applying a statutory preference for non-parent caregivers over relatives who have not been caregivers, in choice between competing adoption petitions); *In re L.L.*, 653 A.2d 873, 883 (D.C.1995) ("[I]t would be 'ruthless beyond description' to take a child out of a loving home, when she had lived at that home for a substantial period of time as a result of her biological parents' inability or unwillingness to care for her.").

In many contexts, of course, young children's constitutional rights must take a different form than those of adults. Because they are not yet capable of self-determination, very young children have rights that are interest-protecting rather than choice-protecting, and the rights must be given effect by a surrogate or proxy. This has been implicit in Supreme Court decisions enforcing young children's constitutional rights, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (equal protection right of illegitimate children to wrongful parental death action). The same is true for mentally incompetent adults; they possess constitutional rights that protect their interests when they are incapable of making autonomous choices. Their lack of autonomy does not mean a lack of constitutional rights, but rather merely that an agent must enforce their rights in their behalf. *Cf. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280-81, 286-87 (1990) (assessing the appropriateness of a state's procedures for making a substituted judgment to effectuate the constitutional right of a person in a persistent vegetative state with respect to her medical treatment).

In the present context, where the ultimate question is who will be Child's legal parents henceforth, a court acting on its *parens patriae* authority must serve as the proxy decision maker, as courts do in post-divorce child custody disputes. The only reason the state may involve itself in a decision of this kind — that is, who a person's family members will be, a kind of decision the state ordinarily would not and may not make — is that young children, like incompetent adults, need a proxy decision maker to effectuate their constitutional right of intimate association, and the state is in the best position to do that. Obviously, if Child were now over eighteen, there could not properly be any court involvement in the decision whether she stayed with the Dalsings after having lived with

them for four years or instead left to live with someone else. It is solely her need as a four-year old that someone choose for her what is best for her, and nothing else, that justifies the legislature's and the court's assumption of authority over her family life, and that power extends no further than that justification warrants. The Court of Appeals' suggestion that the trial court should have exerted this extraordinary power over Child's life in order to guarantee that biological father gets whatever it is his "settled purpose" to get, is utterly unsupportable and incompatible with Child's personhood and constitutional right to a decision that is in *her* behalf and not someone else's. *Cf. Cruzan*, 497 U.S. at 286-87 (rejecting contention of parents that they possessed a right that should influence how the state makes surrogate medical care decisions for incapacitated adult daughter). *Cf. In re R.*, 174 N.J.Super. 211, 416 A.2d 62, 68 (Ct. App. Div. 1980) ( "Where courts are forced to choose between a parent's right and a child's welfare, they choose the child by virtue of their responsibility as *parens patriae* of all minor children, to protect them from harm.").

For South Carolina courts or agencies to force Child to sacrifice her basic welfare, by suffering the psychological damage of attachment disruption, for the sake of gratifying someone she does not even know (the biological father), when it could never force any adults to sacrifice their welfare to gratify others in a relationship-choice context, would amount to treating Child as less than an equal person. It would demean and insult her, treating her as a thing rather than a fully human individual. It would be morally unprincipled and in direct conflict with the broad purpose of the Fifth and Fourteenth Amendments' Due Process Clause "'to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

* * *

It is entirely possible to interpret applicable South Carolina statutes consistent with the foregoing constitutional principles, especially as the legislature has repeatedly stated in Title 63 of the Code that the child's welfare is to be paramount. *Cf. Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (courts must consider "the purpose of the whole statute and the policy of the law"). As noted above, the parental-conduct predicates for TPR should not be read to protect supposed biological-parent rights *as against* the welfare of children. Rather, they protect both children and parents from rampant and unwarranted state intrusion into family lives. They do this by requiring that there be something unusual in a child's situation that gives the state good reason to believe it would clearly be in a child's interests to have different legal parents – that is, sufficient justification for initiating a TPR proceeding and putting the question of a child's best interests before a court. There can be no question that plenty of reason exists in Child's situation for the state to believe it might be clearly in her best interests to terminate the biological father's legal status. What supplies that reason are facts the Family Court cited as the basis for finding abandonment, non-contact, and non-support. The statutory language is broad and to be "liberally construed" in favor of protecting children's welfare. S.C. Code Ann. § 63-7-6620. The Court of Appeals' construal of statutory language was itself quite free-wheeling, but for contrary purposes at odds with the legislature's many statements of policy and with Child's constitutional rights and fundamental interests. It must not stand.

## CONCLUSION

Neither Mr. Myers nor Ms. Powers can plausibly claim any constitutional right to the results they prefer in this case. Child, on the other hand, has a constitutional right that presumptively precludes South Carolina from forcing her to remain legally tied to a

biological father she does not know and thereby putting at risk the attachment relationship she has formed over four years with the Dalsings. This Court should reverse the Court of Appeals and reinstate the Family Court's decision to terminate Mr. Myers' status as a legal parent, both to respect Child's rights and to correct the Court of Appeals' unwarranted and extraordinarily parent-protective interpretation of the statutes. This court should also then reinstate the permanency plan in favor of adoption by the Dalsings, which was based on its uncontroverted determination that adoption by the Dalsings is in Child's best interests.

Respectfully submitted:

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May 8, 2017.

**STATE OF SOUTH CAROLINA**

**In the Supreme Court**

**APPEAL FROM UNION COUNTY**
**FAMILY COURT**

**HONORABLE ROCHELLE Y. CONTIS, JUDGE**

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Appellate Case No. 2017-000784

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South Carolina Department of Social Services, Respondent,
and
Sherry Powers, Edward Anthony Dalsing, and Tammy Gaye Causey Dalsing, Intervenors,
Of whom Edward Anthony Dalsing and Tammy Gaye Causey Dalsing
are Petitioners
v.
Erica Smith and Andrew Jack Myers, Respondents,
In the Interest of a minor under the age of eighteen.

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## CERTIFICATE OF SERVICE

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I certify I have served the Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief In Support of the Petition for Certiorari, on May 8, 2017, on the following attorneys of record by depositing a copy of the same in the United States mail, postage prepaid:

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