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CHILDREN'S FAST TRACK APPEAL

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 14 WAP 2024

In the Interest of S.W., a Minor

Joint Appeal of Allegheny County Office of Children
and Youth Services and S.W., Child

BRIEF OF COMMUNITY LEGAL SERVICES, JUVENILE LAW CENTER, AND SARAH KATZ, ESQ. AS AMICI CURIAE IN SUPPORT OF APPELLANTS, ALLEGHENY COUNTY CYS AND S.W., CHILD

Caroline Buck, ID No. 322699
Community Legal Services of Philadelphia
100 N. 18th St., Ste. 3400
Philadelphia, PA 19103
cbuck@clsphila.org

Sarah Katz, ID No. 92790
Temple Legal Aid Office
1719 N. Broad Street
Philadelphia, PA 19122
skatz@temple.edu

Marsha L. Levick, ID No. 22535
Riya Saha Shah, ID No. 200644
Juvenile Law Center
1800 JFK Blvd, Ste. 1900B
Philadelphia, PA 19103
215-625-0551
mlevick@jlc.org
rshah@jlc.org

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Community Legal Services of Philadelphia provides free legal assistance to low-income individuals on a broad range of civil matters, including public benefits, landlord/tenant, utilities, mortgage foreclosure, employment, and other areas of great need in Philadelphia. For more than 30 years, the Family Advocacy Unit (FAU) has provided high quality, multidisciplinary representation to hundreds of parents each year in Philadelphia dependency and termination of parental rights proceedings. As part of its mission, the FAU works to ensure that low-income families involved with the child welfare system receive the due process to which they are entitled and have meaningful access to justice in these extremely important proceedings. In addition to individual client representation, the FAU engages in policy advocacy and continuing legal education at both a statewide and local level to improve outcomes for children and families.

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive.

Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda

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[1] Pursuant to Rule 531, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential *amicus* briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

Sarah Katz, Esq. is a Clinical Professor of Law at Temple University Beasley School of Law. She directs and teaches the Family Law Litigation Clinic. She is currently a Senior Fellow with the Stoneleigh Foundation, working on a project focused on racial justice in the child welfare system. Katz has more than 20 years of experience representing parents and caregivers in Philadelphia Family Court, and researches, writes, and teaches about the child welfare system among other family law topics.

SUMMARY OF ARGUMENT

42 Pa.C.S. § 6336.1(a) clearly states that foster parents lack standing to participate in dependency matters absent an award of legal custody. As a matter of law, the legislature's enactment of this Section abrogates the judicially created "prospective adoptive parent" exception to the general prohibition against foster parent standing in dependency matters.

Further, “prospective adoptive parent” standing is contrary to sound public policy. Allowing foster parents to participate in dependency proceedings on equal footing with birth parents subverts both the constitutional right to family integrity for parents and children as well as the express purpose of the Juvenile Act to preserve the unity of the family whenever possible. Foster parent intervention results in delays to achieving permanency for children and, more troublingly, leads to increased rates of termination of parental rights and decreased rates of reunification. Considering the abundance of research that demonstrates the lifelong harm resulting from family separation as well as the benefits of maintaining family ties for children, foster parent intervention undermines child wellbeing and positive child development.

Additionally, because Black children disproportionately experience both family separation and termination of parental rights stemming from the United States’ long legacy of systematically dismantling Black families, foster parent intervention carries significant potential to further perpetuate racial disproportionality and disparity within the child welfare system.

Finally, it is beyond dispute that allowing “prospective adoptive parents” to intervene in dependency matters complicates and prolongs litigation, resulting in increased costs to the Commonwealth.

For these reasons, *Amici* ask that this Court reverse the Superior Court's decision and clarify that while foster parents enjoy a limited due process right to timely notification of court hearings and a right to be heard, foster parents do not have standing to participate as parties in dependency proceedings.

ARGUMENT

Although the Juvenile Act does not define "party," Pennsylvania case law has limited the status of party in a dependency proceeding to three classes of persons: (1) the parents of the child whose dependency status is at issue; (2) the legal custodian of the child whose dependency status is at issue, or (3) the person whose care and control of the child is in question. *In the Interest of D.K.*, 922 A.2d 929 (Pa. Super. 2007). Party status confers a right to be represented by counsel, the right to receive court-appointed counsel if necessary, and the right to fully participate in the proceedings – including the right to present evidence, call and cross-examine witnesses, and appeal decisions by which a party is aggrieved. *Interest of L.C., II*, 900 A.2d 378, 380-81 (Pa. Super. 2006).

In contrast, 42 Pa.C.S. § 6336.1(a) explicitly states that while foster parents, preadoptive parents, and relatives providing care are entitled to "timely notice" of court hearings and the "right to be heard," "[u]nless a foster parent, preadoptive parent, relative providing care or a kinship care resource for a child has been

awarded legal custody pursuant to section 6357…, **nothing in this section shall give the [foster or preadoptive] parent…. legal standing** in the matter being heard by this court." (emphasis added).

Notwithstanding the clear and unambiguous language of the statute, this Court is now being asked to evaluate a pre-existing body of case law that created an exception allowing "prospective adoptive parents" to intervene as parties in the dependency proceedings for the limited purpose of challenging the removal of a child from their care. *See In re Griffin*, 690 A.2d 1192 (Pa. Super. 1997); *In the Interest of M.R.F., III*, 182 A.3d 1050 (Pa. Super. 2018). Amici agree with appellants that as a matter of law, the enactment of 42 Pa.C.S. § 6336.1(a) by the legislature forecloses the viability of the judicially created "prospective adoptive parent" exception to the general prohibition against foster parent standing. Further, adopting a rule allowing foster parents who qualify as "prospective adoptive parents" to intervene as parties in dependency proceedings is contrary to sound public policy. It will interfere with the parent and child's constitutional right to family integrity, cause delays to permanency, which affects children's long-term well-being, exacerbate already existing racial disproportionality in the child welfare system, and result in increased costs to the Commonwealth.

I. Foster Parent Intervention in Dependency Matters Undermines Both the Parent and the Child's Constitutional Right to Family Integrity and the Stated Purpose of the Juvenile Act to Preserve the Unity of the Family Whenever Possible.

The right to family integrity is one of "the oldest of the fundamental liberty interests recognized" by the U.S. Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). As this Court has aptly noted, "[w]e cannot underestimate the importance of a child's relationship with his or her biological parent." *In re Adoption of Charles E.D.M., II*, 708 A.2d 88, 93 (Pa. 1998). An abundance of research affirms the importance of family connections for a child's present and future wellbeing, and the significant harm resulting from the permanent severance of family attachments through legal proceedings. Thus upholding "prospective adoptive parent" standing for foster parents not only undermines the parent and child's constitutional right to family integrity, but also children's wellbeing.

The fundamental right to family integrity is rooted in the U.S. Constitution and protected under the Due Process Clause of the Fourteenth Amendment. *See*, *e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The United States Supreme Court has repeatedly reiterated that the fundamental liberty interest inherent in the sanctity of the family unit is entitled to substantive and procedural due process protections and equal protection under the law. *See*, *e.g.*, *Moore v. East Cleveland*,

431 U.S. 494 (1977); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Troxel v. Granville*, 530 U.S. 57 (2000). Because dependency proceedings implicate this fundamental liberty interest—the reciprocal rights of parents and children to an ongoing relationship—courts have repeatedly found that governmental action in this area should be subjected to strict scrutiny: the action must be narrowly tailored to further a compelling government interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The United States Supreme Court has repeatedly noted that state interference with a parent's custody of their children should not proceed without utmost attention to the protection of parent's guarantee of due process under the Fourteenth Amendment, because "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *Santosky*, 455 U.S. at 789.

In contrast, foster parents have limited liberty interests as interpreted by the United States Supreme Court. While foster parents may play a significant role in the lives of foster children, the Supreme Court has explicitly indicated that foster family arrangements do not establish the same fundamental liberty interests that are recognized for natural families. *Smith v. OFFER*, 431 U.S. 816 (1977). This is primarily because the relationship between foster parents and foster children is seen as temporary and contingent upon state arrangements rather than being based on natural ties or permanent legal status such as adoption. While foster parents may have a certain expectation of continuity in their relationship with foster

children, this expectation does not constitute a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Id.* Accordingly, under the Pennsylvania Juvenile Act, foster parents enjoy a limited due process right to notice and an opportunity to be heard, but do not stand on equal footing with natural parents. 42 Pa.C.S. § 6336.1(a).

In recognition of, and in compliance with this constitutional scheme, the primary stated legislative purpose of the Pennsylvania Juvenile Act is "to preserve the unity of the family whenever possible." 42 Pa.C.S. § 6301(b). Accordingly, pursuant to the Juvenile Act, the court is only authorized to enter a disposition upon a finding by clear and convincing evidence that child meets the definition of a "dependent child." 42 Pa.C.S. §§ 6301(b), 6341(c). Further, the dispositions available to the court prioritize stabilizing and/or reunifying the family, 42 Pa.C.S. § 6351(a), and the vast majority of cases, absent a finding of aggravated circumstances or a change of goal, prioritize reunification.

A. "Prospective adoptive parent" standing undermines children's long-term wellbeing by delaying reunification and increasing the likelihood of termination of parental rights and adoption.

Upholding "prospective adoptive parent" standing for foster parents will undermine one of the overarching goals of the Juvenile Act, as compelled by federal law, which is to achieve timely "permanency" for children, whether through reunification with their family of origin, or through adoption or otherwise

permanent legal custody. The legislative scheme of the Juvenile Act prioritizes the unity of the family wherever possible, but if that cannot be achieved, one of the primary legislative purposes of the Juvenile Act is "to provide another alternative permanent family when the unity of the family cannot be maintained." 42 Pa.C.S. § 6301(b). The Juvenile Act requires that the court oversee and ensure that progress is made toward permanency at each stage of the proceedings - from initial placement decisions to ongoing permanency review hearings, to goal change proceedings. Allowing foster parents who qualify as "prospective adoptive parents" to intervene as parties in dependency proceedings will delay timely permanency for children, which has a negative effect on children's wellbeing.

1. Allowing foster parent intervention delays permanency for children and increases the likelihood that a child will experience a termination of parental rights.

In states that permit foster parents to intervene as parties in dependency matters, there is a correlation between foster parent intervention and delayed permanency for children. For example, in Colorado, once a child has resided with foster parents for three months, foster parents may intervene in the dependency matter on equal footing to natural parents. CO Code § 19-3-507 (2022). An in-depth investigative article revealed that since 2013 when Colorado law changed to allow foster parent intervention, until 2022, at least twenty-five hundred foster parent intervenor cases were filed, representing a tenth of the state's total child

welfare cases. Eli Hager, *When Foster Parents Don't Want To Give Back the Baby,* New Yorker (Oct. 16, 2023), *available at* https://www.newyorker.com/magazine/2023/10/23/foster-family-biological-parents-adoption-intervenors. Hager found that foster parent intervenors often request an ongoing barrage of evaluations and services for the children in their care or hire independent parenting capacity and/or attachment evaluators with the goal of strengthening their case for adoption, which serves to further delay any permanency outcome for children. *Id*. And, most troublingly, court data from Colorado indicates that in cases where foster parents are permitted to intervene, the chance that the natural parents' rights will ultimately be terminated surges from 17% to 43%. *Id*.

State appellate courts have also found that foster parent intervention delays and complicates reunification and permanency. *See*, *e.g.*, *State v. Zander B.*, 474 P.3d 1153, 1163 (Alaska 2020) ("Foster parent intervention risks delay and complication, distracting from OCS's mandate of working toward family reunification."); *M.G. v. Superior Court*, 46 Cal. App. 5th 646, 659, 259 Cal. Rptr. 3d 834, 844 (Cal. 2020) ("While we sympathize with the court's need to balance timely resolution of cases with staffing needs, budgets, and other administrative issues, such lengthy delays in dependency cases runs contrary to the intent of

providing children with permanency. Simply put, children deserve the timely resolution the statute mandates.”).

Indeed, in the instant matter, permanency has been significantly delayed by the former foster parents’ motion to intervene and subsequent appeals. *In re S.W.*, 312 A.3d 345, 349-50 (Pa. Super. 2023) (noting that minor child has been placed with new pre-adoptive foster parents since September 6, 2022, and the trial court’s termination of Mother’s parental rights was affirmed on November 8, 2023).

Upholding the “prospective adoptive parent” exception could lead to similar delays in permanency and a reduced likelihood of reunification for a multitude of children across the Commonwealth. In Pennsylvania, every child in foster care with a primary goal of reunification must have a concurrent plan for permanency established within 90 days of their placement. *Concurrent Planning Policy and Implementation*, COMMW. OF PA. DEP’T OF PUB. WELFARE, OFFICE OF CHILDREN, YOUTH, AND FAMILIES, Bulletin 3130-12-03 (May 11, 2012), *available at* https://www.pacwrc.pitt.edu/Curriculum/209_CncrrntPlnnng1/PrWrk/PrWrk_CncrrntPlnBlltn.pdf. In the fiscal year of 2022, 65.1% of the children in placement in Pennsylvania had a primary permanency goal of reunification. PA. P’SHIPS FOR CHILDREN, *State of Child Welfare 2023* (Dec. 1, 2023), *available at* https://www.papartnerships.org/wp-content/uploads/2024/01/2023-SOCW-Pennsylvania.pdf. While there is no data available regarding the concurrent

permanency goals for the children in care whose primary goal is reunification, because the permanency hierarchy enshrined in the Adoption and Safe Families Act as well as the Juvenile Act prioritizes adoption over other permanency outcomes[2], including permanent legal custody and placement with a fit and willing relative, it follows that a vast number of children with a primary permanency goal of reunification have a concurrent goal of adoption. This means that many foster parents across the state can claim a legitimate and objective expectation of adoption, which could open the floodgates to intervention. *See In re Griffin*, 690 A.2d 1192 (Pa. Super. 1997) (noting that "prospective adoptive parents" differ from foster parents because they "have an expectation of permanent custody which… is genuine and reasonable."); *Interest of M.R.F., III*, 182 A.3d 1050, 1057-58 (Pa. Super. 2018) (holding that although child's permanency goal remained reunification, the trial court erred in determining appellants did not qualify as "prospective adoptive parents" where the record established that the county agency considered appellants to be a preadoptive resource should reunification fail and paid for appellants to complete the adoption training and certification program).

Further, nothing in the case law has limited "prospective adoptive parent" standing to cases where adoption is the child's primary permanency goal, or even

[2] 42 U.S.C. § 675(5)(c), 42 Pa.C.S. § 6351(f.1)

where a termination of parental rights petition has been filed by the county agency. On the contrary, the Superior Court held that the foster parents in *M.R.F., III* would have had standing to intervene pursuant to the "prospective adoptive parent" exception despite the fact that the trial court *denied* the agency's first petition for termination of parental rights, no subsequent petition for termination of parental rights had been filed or was even contemplated, and Mother's visitation had just been *increased* by the trial court indicating positive progress towards reunification. 182 A.3d 1050, 1058-59 (Pa. Super. 2018).

Similarly, and significantly, while the case law regarding the "prospective adoptive parent" exception limits foster parent intervention in Pennsylvania to cases where foster parents are seeking to challenge the removal of a child from their care, nothing in the case law has foreclosed the possibility that, should the "prospective adoptive parent" exception be upheld, foster parents could intervene as parties to prevent reunification of their foster child with his or her birth family. This clearly undermines the constitutional right to family integrity and the stated purpose of the Juvenile Act to "preserve the unity of the family whenever possible." 42 Pa.C.S. § 6301(b)(1).

2. Delayed permanency and an increased likelihood of termination of parental rights undermines children's long-term wellbeing.

The constitutional right to family integrity benefits both parents and children. A growing body of research affirms that maintaining lifelong connections to parents and other family members supports positive development and wellbeing for children. Upholding "prospective adoptive parent" standing presents an existential threat to constitutional principles and poses an immediate threat to children's long-term wellbeing by delaying or interfering with reunification.

Research consistently demonstrates that removal from family "may be 'more damaging to the child than doing nothing at all.'" *See, e.g.,* Lynn F. Beller, *When in Doubt, Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After Nicholson v. Williams*, 22 DUKE J. GENDER L. & POL'Y 205, 216 (2015) (quoting *Nicholson v. Williams*, 203 F.Supp.2d 153, 204 (E.D.N.Y. 2002)). "The act of removal is itself an extraordinarily traumatic event that has long-term emotional and psychological consequences." Kele M. Stewart, *Re-Envisioning Child Well-Being: Dismantling the Inequitable Intersections Among Child Welfare, Juvenile Justice, and Education*, 12 COLUM. J. RACE & L. 630, 639 (2022) (citing Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 531–32 (2019)); *see also* Monique B. Mitchell, *The Neglected Transition: Building a Relational Home for Children Entering Foster Care* 4-5 (2016). Being

disconnected from relationships and community "contributes to feelings of sadness, loss, isolation, and anxiety." Stewart, *supra*, at 640.

Prolonged family separation creates a remarkable risk of long-term harm for children, including chronic exposure to toxic stress, the destruction of essential attachments, grief, loss, "anxiety, emotional distress, behavioral problems, depression, and lifelong health consequences." Stewart, *supra*, at 639 (citing Trivedi, *supra*, at 549-50). Grief can further manifest in "guilt, post-traumatic stress disorder, isolation, substance abuse, anxiety, low self-esteem, and despair." Mitchell, *supra*, at 4-5.

Termination proceedings exacerbate these negative effects because the State seeks not only to temporarily disrupt a child's relationships and connections, but to end them. The severity of the loss itself is devastating; when parental rights are terminated, children lose their legally recognized relationship with their parents, siblings, and the entirety of their extended family networks. The grave impact of termination proceedings on children and families has been emphasized by social science researchers and legal professionals alike. For example, as the American Bar Association has emphasized:

> Many people with lived experience in foster care note that even in situations where they could not remain with their birth parents, a termination of parental rights carries greater consequences than the law recognizes. A TPR not only ends the relationship with birth parents, but often results in cutting connections to other family members, grandparents, cousins, aunts, uncles, even siblings.

AM. BAR ASS'N, *Resolution 606* 11-12 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf.

Psychological and sociological research reinforces "the importance of the biological parent-child relationship as a determinant of the child's personality, resilience and relationships with others, regardless of whether the child in fact lives with that parent." Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 240 (2004). During childhood, maintaining close family relationships can act as a "buffer" against developmental stress, ameliorating the impact that trauma and adversity have on long-term physical health outcomes. Edith Chen et al., *Childhood Close Family Relationships and Health*, 72 AM. PSYCH. 555, 558 (2017).

For children who have been removed from their homes, maintaining family connections supports a positive sense of identity and leads to higher self-esteem by "mitigating feelings of loss, rejection, self-blame and abandonment." Debbie B. Riley & Ellen Singer, *Connections Matter: Relationships with Birth Families are Important for Foster, Adopted Children*, THE IMPRINT (Aug. 2, 2019), *available at* https://imprintnews.org/adoption/connections-matter-relationships-with-birth-families-are-important-for-foster-adopted-children/36174. Further, multiple studies have found that children who maintain ties to their birth family, even after

adoption, experience less anxiety and feel more at ease. Vivek S. Sankaran, *Ending the Unnecessary Pain Inflicted by Federal Child Welfare Policy*, 1 FAM. INTEGRITY & JUST. Q. 26, 29 (2022) (citing Gabrielle Glazer, *American Baby: A Mother, a Child and the Shadow History of Adoption* 270 (2021)).

The positive effects of preserving family connections stretch beyond childhood. One study found that foster care alumni who reported maintaining close connections with birth parents as well as other parental figures were more likely to achieve age-appropriate employment, education, and financial security, and were less likely to suffer from mental health issues, substance abuse, homelessness, and involvement with the criminal legal system. Gretta Cushing et al., *Profiles of Relational Permanence at 22: Variability in Parental Supports and Outcomes Among Young Adults with Foster Care Histories*, 39 CHILD. AND YOUTH SERV. REV. 73, 79-80 (2014).

Children themselves also describe ongoing family relationships as essential to their wellbeing. Youth with lived experience in foster care "have called for the rejection of traditional notions of permanency, which requires the severance of relationships, and have instead demanded **relational permanency**, the nurturing and preservation of *all relationships* that matter to a child." Sankaran, *supra*, at 29 (emphasis added) (citing Nancy Rolock & Alfred G. Pérez, *Three Sides to a Foster Care Story: An Examination of the Lived Experiences of Young Adults, Their*

Foster Care Case Record, and The Space in Between, 17 QUALITATIVE SOC. WORK 195, 198 (2018)). Youth value relational permanency far more than the legal permanency that is prioritized by courts and child welfare professionals. Randi Mandelbaum, *Re-Examining and Re-Defining Permanency from a Youth's Perspective*, 43 CAP. U. L. REV. 259, 277-79 (2015). As one youth described, "[l]egal permanence could be taken off the list and I wouldn't miss it. You can have legal permanency—but without relational or physical permanency, what's the point? . . . Without the last two, the first is not important." *Id*. at 279 (alteration in original) (quoting Reina M. Sanchez, *Youth Perspectives on Permanency* 10 (2004)).

The U.S. Department of Health and Human Services Children's Bureau also emphasizes the critical importance of "relational permanency" for children, observing that "[c]hildren have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible," and "[w]hen these relationships are prioritized, protective factors are increased, which promotes current and future well-being." CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *Achieving Permanency for the Well-Being of Children and Youth* 2, 10 (2021), *available at* https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf. The Children's Bureau has thus instructed courts and child welfare professionals that "[c]hildren in foster care

should not have to choose between families." *Id.* at 10. Rather, children should be offered "the opportunity to *expand* family relationships, not replace or sever them." *Id.* (emphasis added).

Because "prospective adoptive parent" standing poses a threat to reunification and creates barriers to achieving permanency within a child's extended family if reunification does not occur, it undermines children's long-term wellbeing.

II. Allowing "Prospective Adoptive Parent" Standing in Dependency Matters Perpetuates the Deeply Entrenched Racial and Class Biases in Dependency Proceedings.

The child welfare system is marked by stark racial inequity, an inevitable outcome of policies and practices originally designed to separate Black families for profit evolving into seemingly neutral laws "that obfuscate the role of race and class and operate in particularly pernicious ways in the same poor communities of color." Stewart, *supra*, at 632. "Almost every policy pillar of the current family regulation system has been theorized to drive disproportionality and the destruction of Black families." *Id*. at 638. This is readily apparent in the data at both the state and national level.

A. Black Children Experience Disproportionate Rates of Family Separation and Experience Termination of Parental Rights at More Than Twice the Rate of White Children Both in Pennsylvania and Nationally.

Both in Pennsylvania and nationally, Black children continue to be overrepresented in the foster care population, and racial disproportionality permeates every stage of decision-making. *See* CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH & HUM. SERVS., *Child Welfare Practice to Address Racial Disproportionality and Disparity* 3 (2021), www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf (summarizing national data regarding racial disproportionality at various decision-making points in child welfare intervention); PA. DEP'T OF HUM. SERVS., *Racial Equity Report* 12-13 (2021), https://www.dhs.pa.gov/about/Documents/2021%20DHS%20Racial%20Equity%20Report%20final.pdf.

Black children are "77 percent more likely than white children to be removed from their homes following a substantiated maltreatment investigation, even after controlling for factors such as poverty and related risks." Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can be Done to Address Them?* 692(1) AM. ACAD. OF POLITICAL AND SOC. SCIENCE 253, 256 (2020) (citation omitted). Black families are also less likely to be offered in-home family preservation services as an alternative to child removal, even when they exhibit the same characteristics

and even when the alleged maltreatment is the same. AM. BAR ASS'N COMM'N ON YOUTH AT RISK, RESOLUTION 606 at 1 (Aug. 2022), *available at* www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf (internal citation omitted); E. Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20(1) CUNY L. REV. 68, 76 (2017) (internal citation omitted); Theresa Knott & Kirsten Donovan, *Disproportionate Representation of African-American Children in Foster Care: Secondary Analysis of the National Child Abuse and Neglect Data System 2005*, 32 CHILD. AND YOUTH SERV. REV. 679 (2010) (finding that after controlling for child, caregiver, household and abuse characteristics, Black children had 44% higher odds of foster care placement when compared with white children).

In Pennsylvania, Black children are represented in the foster care population at a rate more than double their representation in the general population. PA. P'SHIP FOR CHILDREN, *2023 State of Child Welfare*, *supra*. Although Black children represent only 14 percent of the child population, they represent 35 percent of the foster care population, and 42 percent of children who have been in foster care for two years or more. PA. DEPT. OF HUMAN SERV., *Racial Equity Report 2021*, *supra*, at 12-13.

Most troublingly, on a national level, **one in forty-one** Black children will experience a termination of parental rights, which is **more than double** the rate of

the general population. *See* CHILDREN'S RIGHTS, *Racial (In)justice in the U.S. Child Welfare System* 6 (2022) https://www.childrensrights.org/wp-content/uploads/imported-files/Childrens-Rights-2022-UN-CERD-Report-FINAL.pdf.

B. Racial Disproportionality in Family Separation Stems from the United States' Long Legacy of Systematically Devaluing and Dismantling Black Families.

"Ahistorical conceptualizations of disproportionality and disparity are fundamentally flawed because they fail to take into account historical events, policies, social dynamics, and economic influences that occurred in the past but continue to shape current determinants of health for Black families." Dettlaff & Boyd, *supra*, at 258. "Since its inception, the United States has wielded child removal to terrorize, control, and disintegrate racialized populations . . . ." Dorothy E. Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families – And How Abolition Can Build a Safer World* 88 (2022) [hereinafter *Torn Apart*]. For more than 200 years, Black enslaved families lived under the constant threat of being violently separated by their white enslavers. "Slavery institutionalized the forced separation of Black families as a means of maintaining power and control by a system of White supremacy that is foundational to our country's origins." Alan J. Dettlaff, *To Address the Racist Inequities in Child Welfare Systems, Abolition is the Only Solution*, 1 CW360° 7, 7 (2021), https://cascw.umn.edu/wp-

content/uploads/2021/08/360WEB_2021_508rev.pdf.

Even after slavery was abolished, "family separations between Black children and parents continued with frequency under the color of new laws." AM. BAR ASS'N, Resolution 606, *supra*, at 5. Vagrancy laws criminalized unemployment, which resulted in Black families being separated by reason of parental imprisonment. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 15, 2015), www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/. Similarly, apprenticeship laws allowed the children of free Black parents to be "bound out" to work in white homes, often to the very people who had previously enslaved them, without the consent of their parents. *Torn Apart*, *supra*, at 97. In many states, Black children could be taken from their families and forced into an apprenticeship upon a finding of parental unfitness, destitution, or imprisonment. *Id*. at 96-102.

Additional laws and regulations further stripped Black families of wealth and opportunity, enabling the economic pathologizing of poor Black motherhood and the conflation of poverty with neglect. One of the earliest forms of public aid, mothers' aid, was intended to prevent "deserving" single mothers from falling into poverty after the loss of a male breadwinner by reason of death, abandonment, or illness. Ife Floyd et al., CTR ON BUDGET & POL'Y PRIORITIES, *TANF Policies Reflect Racist Legacy of Cash Assistance* 9 (2021),

https://www.cbpp.org/sites/default/files/8-4-21tanf.pdf. This support was effectively unavailable to Black single mothers, as administrators either failed to establish programs in locations with large Black populations or adopted eligibility criteria that disqualified Black mothers. *Id*. at 10 (finding that only 3 percent of families receiving aid in 1931 whose race was reported were headed by a Black mother). This trend continued when the Aid to Dependent Children program was established; even when Black families did qualify, they received lesser stipends. *Torn Apart*, *supra*, at 115.

In the 1950s, many states passed laws conditioning continued eligibility for public aid on a family's maintenance of a "suitable home," which allowed states to deny aid based on moral determinations of a home's fitness for children. Floyd et al., *supra*, at 13. The definition of "suitability" was left to the discretion of state legislatures, and often these laws targeted Black mothers. *Id*. After the enactment of these "suitability" laws, "tens of thousands of children were cut from public aid, almost all of them Black." AM. BAR ASS'N, Resolution 606, *supra*, at 6.

In 1961, the federal government issued an administrative rule (the Flemming Rule) prohibiting states from denying aid to families based on "unsuitability" unless the child was removed from the home. Laura Briggs, *Twentieth Century Black and Native Activism Against the Child Taking System: Lessons for the Present*, 11 Colum. J. Race & L. 611, 626 (2021). "The Flemming Rule . . . transformed [Aid to

Dependent Children] and foster care from a system that ignored Black children to one that acted vigorously to take them." *Id.* at 626-27. When federal matching funds were made available to states to reimburse for the cost of foster care, *Id*., the foster care population increased by 67 percent in **one year**. AM. BAR ASS'N, Resolution 606, *supra*, at 7. The racial composition of the foster care population also changed dramatically—Black children, who had thus far been mostly excluded from foster care services, were removed from their homes at an alarming rate. Briggs, *supra*, at 626-27.

"Welfare reform" legislation in the 1990s continued to cut financial assistance to Black families living in poverty and drive Black children into foster care. Chris Gottlieb, *Black Families are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021), https://time.com/5946929/child-welfare-black-families/. In 1999, shortly after welfare reform was enacted, the foster care population hit an all-time high of 567,000 – an increase of more than 570 percent since 1950. AM. BAR ASS'N, Resolution 606, *supra*, at 11.

"As opposed to any other racial group, it is far more likely that child removals for Black mothers resulted from poverty than maltreatment." Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471, 498 (2021) (citing Hyunil Kim & Brett Drake, *Child Maltreatment Risk as a*

Function of Poverty and Race/Ethnicity in the USA, 47 INT'L. J. EPIDEMIOLOGY 780 (2018)); Stewart, *supra*, at 632. Of all Black children removed from their families, 63% were removed for poverty related "neglect" – despite representing only approximately 14% of the entire population. Children's Rights, *Fighting Institutional Racism at the Front End of Child Welfare Systems* (2021), pg. 4, *at* https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf?utm_source=dailykos&utm_medium=email&utm_campaign=ciofr (citing AFCARS 2019 Data Set).

The over-representation of Black children in poverty-related "neglect" removals is unsurprising and inevitable – Black communities have been systemically under-resourced for decades. Enduring consequences of racism, including residential segregation, discrimination in labor markets, unequal access to quality education, and implicit and explicit biases perpetuate the disproportionate concentration of Black families among the poor. *See* Emma P. Williams, *Regulating Families: How the Family Policing System Devastates Black, Indigenous, and Latinx Families and Upholds White Supremacy*, upEND, p. 7-10, https://upendmovement.org/wp-content/uploads/2022/06/upEND-Regulation.pdf.

The laws, policies, and practices that created racially disproportionate rates of family separation have also resulted in racially disproportionate rates of termination

of parental rights. As national and international bodies have recognized, the legal profession has an obligation to address and dismantle racism in our laws and policies. A recent resolution adopted by the American Bar Association explains that "legal professionals have a responsibility to untangle the child welfare field from [the] foundation rooted in racism by challenging laws, policies and practices that have the impact of devaluing Black parent and child bonds." AM. BAR ASS'N, Resolution 606, *supra,* at 7-8. The resolution calls for "federal, state, local, territorial, and tribal **governments and courts, as well as attorneys, judges, legislatures, governmental agencies, and policymakers**" to:

> (1) Recognize implicit and explicit bias and acknowledge collective responsibility for challenging laws, policies, and practices that devalue Black families and normalize systemic racism and family separation;
>
> (2) Ensure all legal decisions, policies, and practices regarding children's wellbeing respect the value of Black children and families' racial, cultural, and ethnic identities and the connections, needs, and strengths that arise from those identities; and
>
> (3) Consult, listen to, and be led by Black parents, children, and kin with lived experience in child welfare to learn how to support constructive steps to end the legacy of Black family separation under the law.

Id. at 1.

The United Nations, too, has called on the United States to take action to eliminate racial disparity and disproportionality in the child welfare system, including the amendment or repeal of laws that have a disparate impact on families

of racial and ethnic minorities. UNITED NATIONS COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, *Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America* 10 (2022), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_10-12_49769_E.pdf.

Because "prospective adoptive parent" intervention is correlated with an increased likelihood of termination of parental rights, it would only continue the systemic dismantling of Black families in Pennsylvania.

C. Foster Parent Intervention Exacerbates Racial and Economic Disparities by Allowing Foster Parents to Stand on Equal Footing with Birth Families to Compete for Custody.

Allowing foster parents to intervene as parties in dependency matters creates a legal paradigm that is ripe for bias. As discussed *supra*, Black children are overrepresented in the foster care population. Additionally, children in foster care are largely removed from low-income families.

Today, "[i]nadequacy of income, more than any other factor, constitutes the reason that children are removed." Trivedi, *supra,* at 536 (quoting Duncan Lindsey, *The Welfare of Children* 175 (2004)). Nationally, of the 250,000 children removed from their homes in 2020, approximately 70% were removed from their families for poverty-related "neglect." Adoption & Foster Care Analysis & Reporting System ("AFCARS") 2020 Data Set (with analysis by Children's Rights' Advocacy and

Policy Department). Issues like "inadequate housing" or failure to provide "adequate nutrition" were the among the most cited sources of "neglect." *Civil Legal Advocacy to Promote Child and Family Well-Being, Address the Social Determinants of Health, and Enhance Community Resilience*, CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMILIES, DEP'T OF HEALTH & HUM. SERVS. https://www.acf.hhs.gov/sites/default/files/documents/cb/im2102.pdf.

Allowing foster parents to intervene as parties in dependency matters invites typically more well-resourced individuals to complete on equal footing with biological parents and family members for custody of their children, which creates opportunities to further disadvantage already marginalized families in the litigation process. While "[i]t's not acceptable in most family courts to explicitly argue that, if you have more material advantages to provide a child, you should get to adopt him or her, [o]utside the courtroom... intervenors are sometimes less discreet." Hager, *supra*, Section I.A.1. For example, Colorado has seen cases where foster parents, in support of their bid to adopt rather than allowing a child to reunify or move to family members, have argued that a child is "…used to being raised by a maternal figure who stays home," and comparing the foster family's "…1.5 acres for [the child] to run around" to the birth family's "apartment." *Id.* Similarly, another Colorado foster parent intervenor argued that "reuniting a baby girl with her birth mother would mean transitioning her from a 'personalized nanny' to a 'day care center with, you

know, 50 kids running around, and sleeping on a little cot.'" *Id.*

In addition, allowing foster parents to participate as parties can create imbalances in the dependency litigation to further tip the scales against birth parents and relatives who may not have the means to retain independent experts to testify on their behalf. For example, in one foster parent intervenor case, the foster parents paid more than $32,000 in legal fees in support of their adoption efforts. Hager, *supra*, Section I.A.1. In another, the foster parents' counsel retained a licensed clinical social worker with more than 35 years of experience who worked in private practice almost exclusively with families who have adopted children with significant trauma to testify as an attachment and bonding expert in support of their bid to adopt. Sara Tiano, *Fighting for Kin: She's a Social Worker and Foster Parent — But a Court Won't Let Her Adopt Her Nephews*, THE IMPRINT (Oct. 15, 2023), *available at*: https://imprintnews.org/top-stories/fighting-for-kin-shes-a-social-worker-and-foster-parent-but-a-court-wont-let-her-adopt-her-nephews/245106.

Allowing foster parents to intervene as parties carries the potential to subvert not only a parent and child's constitutional right to family integrity, but also to undermine Pennsylvania's preference for children who cannot reunify with his or her birth parents to achieve permanency within their extended family and kin network where possible.

III. Allowing Prospective Adoptive Parent Intervention in Dependency Matters Will Lead to Increased Costs Associated with Prolonged Litigation.

Upholding "prospective adoptive parent" standing for foster parents will not only delay finality for children, but it will also lead to increased costs in resolving dependency proceedings due to several factors including heightened legal complexity and extended legal battles, and the need for increased legal representation.

When foster parents are granted (or denied) standing, they become active participants in the case, which can lead to additional legal motions, hearings, and potentially appeals, such as the instant matter. This involvement not only prolongs the process but also requires more resources from the legal system, including court time and the involvement of multiple attorneys. In the Colorado case discussed in the Eli Hager article, *supra*, Section I.A.1, the Colorado Office of Respondent Parents Counsel reported the parents' legal fees were upwards of $137,000 and the costs to the Washington County court system were at least $144,000, not to mention the monthly payment to the foster family and court-mandated therapy costs. Anna Hewson, *Family fights for 3 years for custody of their own child*, NBC 9 News (May 26, 2023), *available at*, https://www.9news.com/article/news/investigations/washington-county-child-custody-fight/73-dd78d12c-01ea-4e40-a989-3d21e38f9050.

Additionally, the mere determination of whether a foster parent qualifies as a "prospective adoptive parent" and would thus be entitled to intervene requires an evidentiary hearing, the results of which are likely to be appealed by an aggrieved party, thus suspending other more urgent matters from being addressed until the court can resolve that question. And once a foster parent is determined to be a "prospective adoptive parent," each party, not only the prospective adoptive parent, must be given the opportunity to present their case, respond to others' claims, and potentially appeal decisions. This can significantly slow down the resolution of the case. Furthermore, the legal system must allocate more time and resources to manage and resolve these extended disputes, as well as fund court-appointed attorneys for indigent parties, which can strain court resources and increase overall costs associated with the proceedings.

CONCLUSION

WHEREFORE, for the foregoing reasons, we urge this Court to reverse the Superior Courts's decision and hold that the enactment of 42 Pa.C.S. § 6336.1(a) abrogated the judicially created doctrine of "prospective adoptive parent" standing in Pennsylvania.

Respectfully submitted,

Date: June 21, 2024

/s/

____

Caroline Buck, ID No. 322699
COMMUNITY LEGAL SERVICES
100 N. 18th St, Ste. 3400
Philadelphia, PA 19103
(215) 981-3733
cbuck@clsphila.org

____

Sarah Katz, ID No. 92790
TEMPLE LEGAL AID OFFICE
1719 N. Broad Street
Philadelphia, PA 19122

____

Marsha L. Levick, ID No. 22535

____

Riya Saha Shah, ID No. 200644
JUVENILE LAW CENTER
1800 JFK Blvd, Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org
rshah@jlc.org

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 531 and 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 6,763 words. In preparing this certificate, I relied on the word count feature of Microsoft Word. I further certify that this filing complies with Pa.R.A.P. 127 and the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that requires filing confidential information and documents differently than non-confidential information and documents.

Dated: June 21, 2024

/s/
____
Caroline Buck, Esq.

CERTIFICATION OF SERVICE

Caroline Buck, Esq., hereby certifies that she served the foregoing *Brief for Amici Curiae*, on this date, by first class mail and electronic delivery via PacFile, to the following persons:

Rosalyn Guy
Alexandria Stryker
Allegheny County Law Department
445 Fort Pitt Blvd Ste 300
Pittsburgh, PA 15219

Andrea Groh
Juvenile Court Project
436 Seventh Ave Fl 11
Pittsburgh, PA 15219

Catherine Volponi
Koppers Bldg. 11th Floor
436 7TH Ave
Pittsburgh, PA 15219-1826

Thomas Welshonce
Marcus Spisso
437 Grant St Ste 700
Pittsburgh, PA 15219-6009

Brooke McMorrow
McMorrow Law LLC
10475 Perry Hwy Ste 204
Wexford, PA 15090-9213

Ilana Ehrlich
Kit Ivimey-Allen
Miriam Laver
Defender Association of Philadelphia
1441 Sansom St
Philadelphia, PA 19102

/s/
____
Caroline Buck, ID No. 322699
Community Legal Services

Date: June 21, 2024