IN THE FOURTH DISTRICT COURT OF APPEALS
VINTON COUNTY, OHIO

IN THE ADOPTION OF
J.R.F.

JEREMY CHAD JONES

Appellant

vs.

CASE NUMBER: 16 CA 0701

ROBERT JASON FARMER

ON APPEAL FROM THE
VINTON COUNTY COURT
OF COMMON PLEAS,
PROBATE DIVISION

Appellee

BRIEF OF AMICI CURIAE FAMILY AND YOUTH LAW CENTER AT CAPITAL UNIVERSITY LAW SCHOOL AND THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL

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STATEMENT OF INTEREST

The Family and Youth Law Center at Capital University Law School ("FYLaw" or "the Center") works within child welfare, adoption, and youth-serving systems to support positive outcomes for children, youth, and families. Founded in 1998 at Capital University Law School as the National Center for Adoption Law and Policy, FYLaw is a nationally-recognized non-profit organization devoted to improving child welfare and adoption law, policies, and systems. Our primary tools are education, advocacy, and research, all utilized to make child welfare and adoption laws across the nation work in ways that will provide children the stable families they deserve as efficiently, equitably, and safely as possible. In urging reversal in this case, FYLaw advocates not only for the rights of Appellant, but for the legal and policy interests of *all* adoption stakeholders and, in particular, for the interests of members of the adoption triad – adoptive parents, birth parents, and children.

FYLaw's work is driven by its fundamental belief that all children deserve safe and permanent homes. Although FYLaw supports adoption as a proponent of sound permanency and child welfare policy, the Center does not advocate adoption in every circumstance. Instead, FYLaw believes that good laws, sound policies, and equitable decisions promote safe, permanent homes for all children, whether through reunification with parents, placement with relatives, long-term foster care, or adoption. As *amicus*, FYLaw offers a national perspective, gained through years of work on behalf of children and families, to assist in finding a just resolution in this constitutionally significant case.

Formed in January 2004, the National Coalition for a Civil Right to Counsel (NCCRC) is an unincorporated association that seeks to advance the recognition of a

right to counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety, sustenance, health, and child custody. NCCRC is comprised of nearly 300 participants from 38 states, including civil legal services attorneys, supporters from public interest law firms, and members of the private bar, academy, state/local bar associations, access to justice commissions, national organizations, and others.

NCCRC supports litigation, legislation, and other advocacy strategies seeking a civil right to counsel where basic human needs are at stake, including amicus briefing where appropriate. In this vein, NCCRC participants worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its 2006 Resolution (which passed the ABA House of Delegates on a unanimous vote) that urges federal, state and territorial governments to recognize a right to counsel in certain civil cases.[1] By promoting such a civil right to counsel, NCCRC works tirelessly to try to close the "justice gap" in the United States that has grown to the point where less than 20 percent of the legal needs of poor people are addressed.[2] Among its body of work is research into potential support for a civil right to counsel in the constitutions of each of the fifty states (and the District of Columbia), and a comparative analysis thereof.

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[1] American Bar Association, *Resolution 112A* (Aug. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

[2] Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

ARGUMENT

I. AN ADOPTION INVOLVES SUFFICIENT STATE ACTION TO TRIGGER FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS.

State action must be present in order to trigger federal and state due process and equal protection requirements. *State ex rel. Howard v. Ferreri*, 70 Ohio St. 3d 587, 591, 639 N.E.2d 1139 (1999) (finding state action where permanent custody proceedings initiated by private adoption agency, since agency was performing traditional government function. State action presents itself in numerous ways in adoption cases.

First, the U.S. Supreme Court has said that although an adoption is "initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: [the respondent] resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships." *M.L.B. v S.L.J.*, 519 U.S. 102, 116 n.8, 117 S. Ct. 555, 136 L.Ed.2d 473 (1996).

Second, courts in other jurisdictions have held the state plays a key role in adoption cases, diminishing the relevance of whether the state is technically the plaintiff. See e.g. *In re Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993) (rejecting argument that Legislature intentionally only provided counsel to those who had to "overcome the vast resources of the state," and responding, "we think this argument understates the actual involvement of the state in a stepparent adoption under the Adoption Act"); *In re S.A.J.B.*, 679 N.W.2d 645, 650 (Iowa 2004) (agreeing with conclusion in *K.A.S.*, and adding that "Even though James, a private party, brings the action, the state is an integral part of the process in a [private] termination"); *Zockert v. Fanning*, 800 P.2d 773, 777-78 (Or. 1990) ("The state is involved similarly in both proceedings. A state agency,

Children's Services Division, plays a significant role in adoptions under ORS 109.310(4) and 109.316, and also serves the juvenile court under chapter 419. No distinction may be founded upon the fact that a private person initiates an adoption"); *In re Jay R.*, 150 Cal.App. 3d 251, 262, 197 Cal.Rptr. 672 (1983) (while adoption action not brought by state, "neither is the adoption proceeding a purely private dispute. The state is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child and establish a new relationship, in accordance with an extensive statutory scheme. . . .")

Third, as described by the Supreme Court of Illinois, there is U.S. Supreme Court precedent for the concept that utilization of the courts to effectuate the adoption triggers the necessary state action:

> There is ... some precedent for viewing the utilization of the judicial process by a private party to affect the constitutional rights of another as "state action." In *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), the Court held that use of the state's judicial process to enforce a racially restrictive covenant was state action violating the equal protection clause of the fourteenth amendment: "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Shelley*, 334 U.S. at 19, 68 S.Ct. at 845, 92 L.Ed. at 1183. Almost two decades after deciding *Shelley*, the Court used the same reasoning to hold that a state constitutional amendment guaranteeing property owners the absolute discretion to decline to sell or rent their property violated the equal protection clause. *Reitman v. Mulkey*, 387 U.S. 369, 381, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830, 838 (1967). Using the power of the court to encourage or enforce racial discrimination, under this view, is state action that violates equal protection. In the adoption context, the claim of state action when the court system is utilized to terminate parental rights is, perhaps, even stronger than in *Shelley*. Adoption exists only as a creature of statute. *In re M.M.*, 156 Ill.2d 53, 62, 189 Ill.Dec. 1, 619 N.E.2d 702 (1993). Prospective adoptive parents cannot achieve their goal of parenthood by contract or other private means; they must involve the court.

In re Adoption of K.L.P., 198 Ill. 2d 448, 464-465, 763 N.E.2d 741 (2002). See also *In re K.L.J.*, 813 P.2d 276, 283 (Alaska 1991) ("[a]doption, like marriage and divorce, is wholly a creature of the state" and, as a result, "[r]esort to the judicial process . . . [is] the

only way the parties c[an] accomplish their respective objectives" of seeking and objecting to an adoption"); *O.A.H. v. R.L.A.*, 712 So.2d 4, 7 (Fla.App.1998) ("[a]lthough such litigation is between private parties, the power to terminate the rights of the nonconsenting parent is vested solely in the judicial branch of the state government.")

Finally, the Supreme Court of Illinois has pointed out that a litigant raising a right to counsel claim in an adoption case is effectively challenging the statutory scheme directly, and the statutes are themselves a product of state action:

> John's equal protection claim challenges the way the Juvenile Court Act and the Adoption Act distribute the benefit of appointed counsel. John alleges the statutes denied him equal protection of the laws, not that [potential adoptive parents] Jo Ellen and Randall did so. The question whether Jo Ellen and Randall are state actors therefore does not arise. Cases such as *Lugar* and *Leesville Concrete*, which concern whether the actions of private litigants may be attributed to the state, are inapposite. For example, in *Leesville Concrete*, 500 U.S. at 619–28, 111 S.Ct. at 2082–87, 114 L.Ed.2d at 672–79, the equal protection claim was that a private litigant used its peremptory challenges to exclude jurors on the basis of race. By contrast, John does not claim Jo Ellen and Randall used the Adoption Act in a discriminatory way. Enactment of a statute is obviously state action, regardless of whether the state is responsible for a particular private litigant who relies on a statute. See *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486–87, 108 S.Ct. 1340, 1345–46, 99 L.Ed.2d 565, 576 (1988). Thus, there is sufficient state action for purposes of John's equal protection claim.

In re Adoption of L.T.M., 214 Ill. 2d 60, 74-75, 824 N.E.2d 221 (2005).

For all of these reasons, this Court should find that the requisite state action exists in the adoption context.

II. THERE IS A NATIONAL JUDICIAL CONSENSUS THAT IT IS A VIOLATION OF EQUAL PROTECTION TO PROVIDE COUNSEL FOR STATE-INITIATED TERMINATIONS BUT NOT TERMINATIONS PURSUANT TO AN ADOPTION.

Every state high court that has examined the issue has held that it violates the state or federal equal protection clause for a state to provide counsel to parents in state-initiated termination proceedings, but to deny it in private terminations. *L.T.M.*, 214 Ill.

2d 60, 824 N.E. at 77 (federal constitution); *S.A.J.B.*, 679 N.W.2d at 645 (state constitution); *In re Adoption of Meaghan*, 461 Mass. 1006, 1007, 961 N.E.2d 110 (2012) (state constitution); *A.W.S. v. A.W.*, 2014 MT 322, ¶ 26, 377 Mont. 234, 339 P.3d 414 (2014) (state constitution); *K.A.S.*, 499 N.W.2d at 564-65 (state constitution); *Zockert*, 800 P.2d at 777 (state constitution). Ohio should join this increasing chorus by declaring that it violates equal protection to provide counsel in termination proceedings, but not adoption proceedings.

The differential treatment here that violates equal protection is beyond dispute: Ohio law identifies two similar methods for terminating parental rights (state-based termination proceedings and adoption proceedings), but provides counsel only for the former. Yet "the effect of an adoption-based termination is identical to a termination based on abandonment. The result in both cases is the complete severance of the parent-child relationship." *In re K.L.J.*, 813 P.2d at 284 (citation omitted); *see also Zockert*, 800 P.2d at 777. Few consequences of judicial action are so grave as the severance of family ties. *M.L.B.*, 519 U.S. at 119; *see also Meaghan*, 461 Mass. at 1007 ("Where the petitioner is a private party, the same fundamental, constitutionally protected interests are at stake[.]") As observed by the Illinois Supreme Court:

> Generally, a person who stands to lose a right under one statute is not similarly situated to persons who face the same loss under an entirely different statute with a different legislative purpose. ... Nevertheless, a parent who stands to lose his rights under the Adoption Act if he is found unfit is in a very similar situation to a parent who stands to lose the very same constitutional right, based on the very same finding, in proceedings under the Juvenile Court Act.

In re L.T.M., 214 Ill. 2d at 75-76.

The only remaining question, therefore, is whether there is an "appropriate governmental interest suitably furthered by the differential treatment"; there is not. The

only governmental interest in not providing counsel is to spare financial resources, but courts have rejected this as a sufficient reason. See e.g. *K.A.S.*, 499 N.W.2d at 563-67 ("Although the state has a legitimate interest in its finances and there may be some fiscal impact in providing court-appointed counsel to an indigent parent in a stepparent adoption proceeding, it is not a compelling one that overrides a person's fundamental interest in the parent-child relationship."); *Lassiter v. Dept. of Social Serv.*, 452 U.S. 18, 28, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (state's pecuniary interest "is hardly significant enough to overcome private interests as important as those here . . .")

For these reasons, the Court should find, as all other states reviewing the question have done, that the provision of counsel in juvenile termination of parental rights cases, but not adoptions, offends the federal and state equal protection clauses.

III. THIS COURT SHOULD FIND THAT THE OHIO DUE PROCESS CLAUSE REQUIRES THE APPOINTMENT OF COUNSEL FOR ALL PARENTS IN ADOPTION PROCEEDINGS.

A. State Courts Have Roundly Rejected Lassiter Under Their State Constitutions With Respect to the Due Process Right to Counsel for Parents in State-Initiated Termination of Parental Rights Cases, And The Reasoning For Doing So Is Equally Applicable to Adoptions.

At least ten jurisdictions have revisited their pre-*Lassiter* caselaw recognizing a right to counsel in termination cases and reaffirmed under their state constitutions.[3] In addition, three states considered the question of a due process right to counsel in termination cases for the first time after *Lassiter* and recognized such a right under their

[3] *K.P.B. v. D.C.A.*, 685 So. 2d 750, 752 (Ala.App.1996) (construing *Ex Parte Shuttleworth*, 410 So.2d 896 (Ala.1981), which recognized right to counsel in termination cases, as ruling under state constitution since it was decided four months after *Lassiter*); *Denise H. v. Arizona Dept. of Economic Sec.*, 193 Ariz. 257, 259 972 P.2d 241 (1998) (saying that "[a]n indigent parent against whom a petition has been filed has the right to appointed counsel, but that right is afforded by statute ... and the due process clause ....", and citing to *Arizona State Dept. of Pub. Welfare v. Barlow*, 80 Ariz. 249, 296 P.2d 298 (1956); *J.B. v. Florida Dept. of Children & Families*, 170 So.3d 780, 789-790 (Fla.2015) (noting court's recognition of right to counsel in *In Interest of D.B.*, 385 So.2d 83, 87 (Fla.1980), and stating, "Although the United States Supreme Court subsequently held in *Lassiter* ... that appointment of counsel in all TPR proceedings is not a due process requirement under the United States Constitution, that decision does not impact our Court's determination otherwise under the due process clause of Florida's constitution"); *In re Kafia M.*, 1999 ME 195, ¶ 24 n.5, 742 A.2d 919 (1999) ("In *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973), we held that the due process clause requires the appointment of counsel to indigent parents faced with the termination of their parental rights"); *In re T.B.*, 2013 ME 49, ¶ 14, 65 A.3d 1282 (2013) (stating that "A parent determined to be indigent has a due process right to appointed counsel at State expense in a child protection proceeding initiated by the State, unless the right is knowingly waived", and citing to *Danforth*); *In re Hilary*, 450 Mass. 491, 497 n.13, 880 N.E.2d 343 (2008) (stating that "In addition to the explicit right to counsel under § 29, parents facing termination of their parental rights have a right to counsel, including court-appointed counsel, pursuant to art. 10 of the Massachusetts Declaration of Rights", and citing to *Dept. of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 393 N.E.2d 406 (1979)); *In re Interest of R.R.*, 239 Neb. 250, 255, 475 N.W.2d 518 (1991) (in termination cases, court concludes that "due process prohibits proceeding without counsel", and cites to *State v. Caha*, 190 Neb. 347, 208 N.W.2d 259 (1973)); *In re Meko M.*, 272 A.D.2d 953, 954, 708 N.Y.S.2d 787 (2000) (stating that "A parent facing removal of a child from his or her home has a fundamental right to an attorney", and citing to *In re Ella B.*, 334 N.Y.S.2d 133, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972), which recognized constitutional right to counsel in child welfare cases); *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 232, 479 N.E.2d 257 (1985) (stating that "[T]his court has held that the state must appoint counsel for indigent parents at parental termination proceedings", and citing *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980)); *In re D.D.F.*, 1990 OK 89, ¶ 13, 801 P.2d 703 (1990) (stating that "We continue to adhere to the philosophy enunciated in *Chad S.* Although the federal constitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution", and citing to *In re Chad S.*, 1978 OK 94, ¶ 12, 580 P.2d 983 (1978)); *In re Lindsey C.*, 196 W.Va. 395, 407 n.12, 473 S.E.2d 110 (1995) (noting that *Lassiter* did not relieve the state "of compliance with one or more of the[] protections which have been recognized in West Virginia as constitutionally mandated. We suggest that these protections are grounded in Art. III, § 10 of the Constitution of West Virginia in addition to whatever vitality they derive from the federal Constitution", and citing to *State ex rel. LeMaster v. Oakley*, 157 W.Va. 590, 203 S.E.2d 140 (1974)).

state constitutions.[4] Finally, courts in three states have suggested post-*Lassiter* that there is or may still be a categorical due process right to counsel in termination cases.[5]

For the same reasoning articulated in Section I and II, *supra*, if there is a due process right to counsel in state-initiated termination cases, there is little reason to treat private terminations (i.e., adoptions) any differently. Thus, the weight of national opinion against following *Lassiter* with respect to state-initiated terminations is strong support for recognizing a categorical due process right to counsel in adoption cases.

B. Numerous Courts Presented With the Question Have Recognized an Absolute Due Process Right to Counsel for Parents in Adoption Actions.

Ohio would not be alone in recognizing a categorical due process right to counsel for parents in adoption proceedings; other courts have already done so. See e.g. *In re Child by J.E.V.*, 226 N.J. 90, 108, 141 A.3d 254 (2016); *In re K.L.J.*, 813 P.2d 276, 283

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[4] *V.F. v. State*, 666 P.2d 42, 44 (Alaska 1983) ("[T]he due process clause of the Alaska Constitution guarantees the right to counsel in proceedings brought to terminate parental rights"); *In re A.S.A.*, 258 Mont. 194, 198, 852 P.2d 127 (1993) ("[W]e hold, as a growing number of other jurisdictions have concluded, that the due process clause in our State Constitution guarantees an indigent parent the right to court-appointed counsel in proceedings brought to terminate parental rights"); *New Jersey Div. of Youth & Family Serv. v. B.R.*, 192 N.J. 301, 305, 929 A.2d 1034 (2007) ("we recently recognized that the due process guarantee of Article I, paragraph 1 of the New Jersey Constitution serves as a bulwark against the loss of parental rights without counsel being afforded").

[5] *In re Trowbridge*, 155 Mich.App. 785, 786, 401 N.W.2d 65 (1986) (stating that "The right to appointed counsel at such proceedings is also a fundamental constitutional right guaranteed by the equal protection clauses of the United States and Michigan Constitutions", and relying on *Reist v. Bay Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976), which found state constitutional right but which was nonbinding plurality decision); *In re Adoption of T.M.F*, 392 Pa.Super. 598, 629, 573 A.2d 1035 (1990) (Beck, J., concurring) (noting decision in *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973), which established right to counsel in terminations, and commenting that while *Lassiter* undermined federal constitutional holding of *Adoption of R.I.* "it is unclear ... whether *Adoption of R.I.* was decided solely on federal grounds"); *Corra v. Coll*, 305 Pa.Super. 179, 187 n.7, 451 A.2d 480 (1982) ("Although the [*R.I.*] court based its opinion on the due process clause, and cited federal law, it is unclear whether its final disposition was on state or federal grounds"); *In re Adoption of L.J.B.*, 606 Pa. 193, ¶ 1, 995 A.2d 1182 (2010) (remanding to trial court to determine if mother in termination case was "eligible" for appointed counsel, and citing *R.I.*); *In re Marriage of King*, 162 Wn.2d 378, 383-384, 174 P.3d 659 (2007) (noting that federal underpinnings of court's right to counsel decision in *In re Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974), may have been eroded, but that *Luscier* had been cited to favorably by the court since *Lassiter*); *Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (stating that "In civil cases, the constitutional right to legal representation is presumed to be limited to those cases ... where a fundamental liberty interest, similar to the parent-child relationship, is at risk", and citing *In re Luscier).*

(Alaska 1991); *In re Adoption of Meaghan*, 461 Mass. 1006, 1007, 961 N.E.2d 110 (2012); *O.A.H. v. R.L.A.*, 712 So.2d 4, 7 (Fla. App. 1998); *G.C. v. W.J.*, 917 So.2d 998, 999 (Fla. App. 2005); *M.E.K. v. R.L.K.*, 921 So. 2d 787 (Fla. App. 2006); *In re Jay R.*, 150 Cal.App. 3d 251, 262, 197 Cal.Rptr. 672 (1983).

In *In re Jay R.*, the court observed that in adoptions, the private interest involved was "the complete and permanent termination of one of the most compelling and fundamental rights of our citizens, that of a parent." *Id.* at 262. It then explained some of the reasons why the risk of error is high if parents are denied counsel:

> A parent who contests allegations of wilful neglect may have to sustain a heavy burden of proof. The petitioner need show only that the noncustodial parent failed to provide for and communicate with the child for a year to establish a prima facie case of wilful neglect without lawful excuse. The burden then shifts to the parent to prove he did not wilfully fail to provide for or communicate with the child, or was unable to do so. Legal concepts of "willfulness" and "lawful excuse," though perhaps simple to the attorney, may not be simple to an indigent parent with a ninth grade education. Nor may an indigent be aware that the "year" in question is not limited to the year immediately preceding the filing of the petition, or what factors, such as imprisonment, may obviate a finding of willful neglect. An uneducated indigent can easily become overwhelmed by such a proceeding without the assistance of counsel.

Id. at 263.

The *In re Jay R.* court further explained that in contrast to the parents' fundamental rights, the state's interest was largely financial. While legitimate, it was "hardly significant enough to overcome the private interests as important" as those at issue. *Id.* at 264. And "[t]he state has no legitimate interest in terminating a parent's relationship with his child if [the parent] has not wilfully neglected or abandoned that child. Appointment of counsel will make the fact finding process more accurate, hereby *furthering* the state's interest in terminating the rights of parents who do in fact neglect or abandon their children." *Id.* at 264-65 (emphasis in original).

Pointing to *In re Jay R.*, the Alaska Supreme Court similarly concluded that counsel is required for adoptions. *In re K.L.J.*, 813 P.2d at 276. After first noting that Alaska (like California) has rejected the *Lassiter* presumption against appointing counsel where physical liberty is not at stake, the court explained that an unrepresented parent will be "at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught." *Id.* at 280. The disadvantage also arises because the crucial determination of what is in the best interests of the child "can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case." *Id.*

The *K.L.J.* court also pointed out that a self-represented litigant is faced with the difficulty of interpreting legal phrasing that is likely not ascertainable to a layperson. For example, "a phrase like 'period of at least one year,'. . . includes time not immediately preceding the filing of the adoption petition ... Moreover, the need for the adopting parents to prove lack of justifiable cause by 'clear and convincing evidence' has a legal significance not readily ascertainable by a lay person." *Id.* at 280-81.

Amici posit that the risk of error in Ohio proceedings is no less than that observed by the California and Alaska courts. Regardless, no matter how small the risk of error, "the cost of erroneously terminating a parent's rights remains too high to require an indigent parent to risk it without counsel." *Meaghan*, 461 Mass. at 1007. Therefore, this Court should hold that all parents are entitled to counsel pursuant to the Ohio Constitution's due process clause.

C. The Due Process Clause of the Ohio Constitution Should Be Construed to Require the Appointment of Counsel for All Parents in Adoption Proceedings.

Caselaw from the Supreme Court of Ohio holding that all parents are constitutionally entitled to counsel in appeals of termination of parental rights proceedings continues to be good law, has been extended to the trial court level, and is justifiably extendable to terminations conducted in the context of an adoption.

In *State ex rel. Heller v. Miller*, the Supreme Court of Ohio held, "in actions instituted by the state to force the permanent, involuntary termination of parental rights, the United States and Ohio Constitutions' guarantee[] of due process ... require[s] that indigent parents be provided with counsel ... at public expense for appeals as of right." 61 Ohio St. 2d 6, 13-14, 399 N.E.2d 66 (1980). While *Heller* preceded the U.S. Supreme Court's ruling in *Lassiter* that federal due process does not require counsel in all termination cases, *Heller* did not rely on federal due process alone, but also on Art. I, § 16 of the Ohio Constitution. And while Ohio courts generally interpret the federal and state due process clauses similarly, they are only "substantially equivalent", *Heller*, 61 Ohio St. 2d at 8; they are not "identical", and nothing precludes an independent interpretation of the state provision.[6]

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[6] Earlier this year, the Supreme Court of Ohio said the following with respect to equal protection:

> Although this court previously recognized that the Equal Protection Clauses of the United States Constitution and the Ohio Constitution are substantively equivalent, and that the same review is required, *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60, 1999-Ohio-248, 717 N.E.2d 286 (1999) ("the federal and Ohio Equal Protection Clauses are to be construed and analyzed identically"), we also have made clear that the Ohio Constitution is a document of independent force ... We once again reaffirm that this court, the ultimate arbiter of the meaning of the Ohio Constitution, can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the framers. We also reaffirm that we are not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined by other states' high courts' interpretations of similar provisions in their states' constitutions.

Such an independent path appears to have been taken with the handling of *Heller*. As explained earlier this year by the Tenth District, the Supreme Court of Ohio and other courts have suggested since *Lassiter* that *Heller* still provides a constitutional right to counsel for parents in state-initiated termination proceedings, and even at the trial level:

> The Supreme Court of Ohio discussed *Lassiter* in the context of determining whether an indigent parent had a constitutional right to counsel at all meaningful stages of parental neglect proceedings. *In re Miller*, 12 Ohio St.3d 40, 12 Ohio B. 35, 465 N.E.2d 397 (1984). The court affirmed that "the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding, although [it recognized] that such appointment was required in certain states, including Ohio." *Id.* at 41-42. Nevertheless, in *Miller*, the Supreme Court of Ohio appeared to continue to recognize the validity of the rule announced in *Heller* in proceedings involving the permanent termination of parental rights. *Miller* at 42 ("Appellant was represented by counsel at the permanent termination hearing, as required by *Heller*, supra. Having been represented by counsel, there is no reason why she should not have been aware of her right to an appeal."). See also I*n re Baby Girl Baxter*, 17 Ohio St.3d 229, 232, 17 Ohio B. 469, 479 N.E.2d 257 (1985), citing *Heller* ("Furthermore, this court has held that the state must appoint counsel for indigent parents at parental termination proceedings.").

In re W.W.E., 10th Dist. Franklin No. 15AP-167, 2016-Ohio-4552, ¶ 30. Numerous other districts have cited to *Heller* since *Lassiter* for the principle that indigent parents have a constitutional right to counsel in state-initiated termination proceedings. See e.g. *In re Nevelos*, 11th Dist. Geauga No. 2007-G-2804, 2008-Ohio-3606, ¶ 16 (adding that "[P]arents' rights to appointed counsel in 'juvenile court proceedings that do *not* involve termination of parental rights is statutory, and is not derived from the United States or

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State v. Mole, 2016-Ohio-5124, ¶14 (adding that "even if we have erred in our understanding of the federal Constitution's Equal Protection Clause, we find that the guarantees of equal protection in the Ohio Constitution independently forbid" disparate treatment accorded by statute in question). It is unclear whether *Mole*'s discussion about independent state constitutional interpretation is binding precedent, since only 3 judges joined the opinion. While Justice Lanzinger concurred in the result only, her separate concurrence indicated possible support for the portion of the opinion relating to independent analysis of the Ohio Constitution.

Ohio Constitutions'" (emphasis added)); *In re P.M.*, 179 Ohio App. 3d 413, 414, 2008-Ohio-6041, 902 N.E.2d 74, ¶ 14 (2nd Dist.); *In re J.M.*, 1st Dist. Hamilton No. C-130643, 2013-Ohio-5896, ¶ 18.

The logic underlying *Heller*'s recognition of a constitutional right to counsel in juvenile court terminations is no less applicable to adoptions. The *Heller* court reasoned that "the right of personal choice in family matters, including the right to live as a family unit, is a fundamental due process right." 61 Ohio St. 2d at 13, 399 N.E.2d 66. The court continued that being represented by counsel was essential to protecting this right, because the litigant "cannot effectively appeal without . . . counsel." *Id.* at 7. To deny litigants an effective right of appeal by denying them counsel "when other [i.e., non-indigent] parents are given such a right impinges on both their own and the child's fundamental interests under the ... due process clause[]." *Id.* at 13. All of these factors are equally true for indigent parents in adoption proceedings: they have a fundamental right at risk of permanent loss, they cannot effectively litigate their cases without counsel, and the denial of counsel to them while providing it to parents in juvenile cases impinges upon their due process rights. It therefore would be logical to extend *Heller* to adoption proceedings.

IV. PUBLIC POLICY SUPPORTS THE APPOINTMENT OF COUNSEL FOR ALL INDIGENT BIRTH PARENTS IN ADOPTION PROCEEDINGS.

Adoption is a life-altering event for children, parents, and families, in which a court sits as the final arbiter of the parent's fate and the child's future. A judge's ruling in such a case is based in great part on the child's "best interest" – i.e., whether a child will benefit from or be harmed by separation from a birth parent. Judges in contested private adoptions must also consider, as do judges in abuse and neglect proceedings, whether a parent's conduct provides an adequate basis for terminating his or her parental

rights. A basic understanding of child development and attachment theories and the public policies underlying best practice recommendations can assist in these decisions.

Adoption has a profound effect on a child's development, emotions, cultural competence, and familial identification and associations. Adoption often results in emotional responses, both for the birth parent and the child, that range from loss, rejection, and grief to guilt, shame and identity confusion. These feelings are not indicative of failed adoption, but are natural emotional responses to the final loss inherent in the event. Sharon Kaplan & Deborah Silverstein, *Seven Core Issues in Adoption,* 2 (1982); *see also* David M. Brodzinsky & Marshall D. Schechter, *The Psychology of Adoption*, 72 (1990). To a birth parent, this loss is likely even more significant than the loss of physical liberty. That reality is, in great part, the impetus for expanding the right to counsel under the federal constitution in felony cases to include categorical appointment of counsel in appropriate civil cases.

The history and analysis of the seminal case of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), in which the Court held that the Sixth Amendment to the United States Constitution requires appointment of counsel in all felony cases, is instructive for arguments seeking to advance the categorical expansion of the right to appointed counsel in the civil context. *Gideon* reversed the earlier case of *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), which, similar to *Lassiter*, held that whether counsel should be appointed in criminal cases must be determined by the facts of the particular case. Commentators critical of *Lassiter* predict that it is likely to be similarly overruled by a Court that extends the requirement of appointed counsel to certain categories of civil cases. *See* Laura Abel, *A Right to*

Counsel in Civil Cases: Lessons from Gideon v. Wainwright, Temple Political and Civil Rights Law Review (2006).[7] These experts note that many of the conditions leading to the *Betts'* reversal exist now in the civil appointment context.

First, like *Betts*, *Lassiter* has been routinely criticized by academics and practitioners alike.[8] Law scholar Colene Flynn argues that women and the indigent are especially disadvantaged by the unequal balance of power in the courtroom.[9] According to Flynn, *Lassiter's* prioritization of interests, which subordinates the loss of the relationship to a child to the loss of physical liberty, requires that women be afforded additional procedural protections to guarantee them full participation in proceedings involving their children.[10]

Second, critics contend that, as the *Lassiter* dissent outlines, case-by-case determinations in such cases are unduly burdensome on the courts and on litigants, and yield inconsistent results. It was for this reason that Alaska's Supreme Court rejected *Lassiter* and instead adopted a bright-line rule requiring appointment of counsel in termination of parental rights cases. *In re K.L.J.,* 813 P.2d at 282 n.6.

Finally, when *Lassiter* was decided, thirty-three states and the District of Columbia had already provided for the appointment of counsel in parental termination cases by statute. *Lassiter,* 452 U.S. at 33-34. Although at the time the Supreme Court

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[7] *Citing* Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: the Continuing Scourge of Lassiter v. Department of Social Services v. Durham*, 36 Loy. U. Chi. L.J. 363, 380-81 (2005); Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation,* 79 Wash. U. L. Q. 317, 341 (2001).

[8] *See, e.g.,* Boyer, *supra* at 380-81.

[9] Colene Flynn, *In Search of Greater Procedural Justice: Rethinking Lassiter v. Department of Social Services*, 11 Wis. Women's L.J. 327, 332 (1996),

[10] *Id.*

considered *Gideon* the number of states that had determined, either judicially or by statute, that criminal defendants are categorically entitled to counsel as a matter of right was comparable to that number, the *Lassiter* Court nevertheless held that issue must be decided on a case-by-case basis. Abel, *supra,* at 272. It is that constitutional failing that the vast majority of states have addressed by requiring a right to counsel by statute and/or constitutional decision.[11]

Gideon has had a wide-ranging impact on the representation of low-income criminal defendants, and a profound effect on the civil side as well. For example, the American Bar Association has adopted a recommendation urging federal, state, and territorial governments to provide legal counsel to low income persons in civil cases involving basic human needs – a recommendation based in great part on the inherently adversarial nature of our court systems. American Bar Association, *Resolution 112A* (Aug. 2006). As the ABA argues, the adversarial system is ineffective and court outcomes are unjust when parties cannot effectively navigate the legal system. The need for the recommendations is underscored by a 1993 ABA national study that found 70% of indigent persons with serious legal problems could not obtain assistance with their cases. Current figures on unmet representation needs are even more startling.[12] In 2009, the Legal Services Corporation reported that less than 20% of low-income American's legal needs were being met. *Documenting the Justice Gap in America, the Current Unmet Civil*

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[11] John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L.J. 763, 781 (Spring 2013) ("At the time of *Lassiter*, thirty three states and the District of Columbia provided for a categorical right to counsel in [termination] proceedings (either by legislative act or court decision); now it is forty-four and D.C.") Since this article was written, Hawaii became the forty-fifth state. *In re T.M.*, 131 Haw. 419, 319 P.3d 338 (2014).

[12] American Bar Association, *Resolution 112A* at 4.

Legal Needs of Low-Income Americans, an Updated Report of the Legal Services Corporation, Sept. 2009.

CONCLUSION

"Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.'" *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997), quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991). Such a consequence justifies the provision of counsel as a matter of right. The American Bar Association has recognized as much, as ABA Resolution 112A was co-signed by thirteen state and local bar associations, and the principles articulated in in the Resolution have subsequently been supported by another six state and local bar associations.[13] Amici urge this Court to join the increasing national consensus and find that as a matter of equal protection and/or due process, parents must be afforded counsel in adoption cases in order to protect their fundamental rights.

Respectfully submitted,

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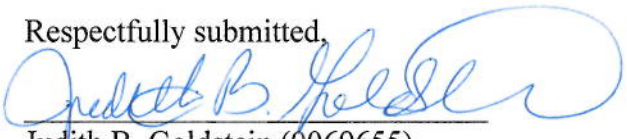
[13] National Coalition for a Civil right to Counsel, *Bibliography* at http://civilrighttocounsel.org/bibliography/sections/12 (last accessed Oct. 13, 2016) (showing that bar associations in Alaska, California, Chicago, Massachusetts, Pennsylvania, and San Francisco have all supported the concept of civil right to counsel for basic human needs cases).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was sent by regular U.S. mail, postage prepaid on this 26th day of October 2016, to Lori L. Silcott-Ousley, 20 N. Ohio Avenue, Wellstone, Ohio 45692, attorney for Appellee Robert Jason Farmer.

Respectfully submitted,



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