IN THE SUPREME COURT OF OHIO

	)	
	)	Case Nos. 2019-0420, 2019-0421
	)	
IN RE ADOPTION OF M.M.F.	)	On Appeal from the
IN RE ADOPTION OF Y.E.F.	)	Delaware County Court of Appeals,
	)	Fifth Appellate District
	)	
	)	Court of Appeals Case Nos.
	)	18 CAF 09 0069, 18 CAF 09 0070
	)	

MERIT BRIEF OF AMICI CURIAE THE LEGAL AID SOCIETY OF CLEVELAND, LEGAL AID OF WESTERN OHIO, INC., LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC, ADVOCATES OF BASIC LEGAL EQUALITY, INC., COMMUNITY LEGAL AID SERVICES, INC., NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, AND NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN IN SUPPORT OF APPELLANT E.S.

Katherine Hollingsworth (0087579)
(COUNSEL OF RECORD)
Thomas Mlakar (0059703)
Joseph Tomino (0095684)
The Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, OH 44113
Telephone: (216) 861-5260
Facsimile: (216) 861-5263
katherine.hollingsworth@lasclev.org
thomas.mlakar@lasclev.org
joseph.tomino@lasclev.org

COUNSEL FOR AMICUS CURIAE THE LEGAL AID SOCIETY OF CLEVELAND

R. Jeffrey Pollock (0018707)
(COUNSEL OF RECORD)
Amy Wojnarwsky (0090763)
McDonald Hopkins LLC
600 Superior Ave., E., Suite 2100
Cleveland, OH 44114
Telephone: (216) 348-5400
Facsimile: (216) 348-5474
jpollock@mcdonaldhopkins.com
awojnarwsky@mcdonaldhopkins.com

COUNSEL FOR AMICUS CURIAE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL AND NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Lucinda Weller (0070667)
(COUNSEL OF RECORD)
Frank Catanzariti (0030262)
Cara Williams (0085921)
Sarvani Nicolosi (0085621)
Legal Aid of Western Ohio, Inc.
525 Jefferson Ave., Ste. 400
Toledo, OH 43604
Telephone: (419) 724-0030
Facsimile: (419) 321-1582
lweller@lawolaw.org
fcatanzariti@lawolaw.org
cwilliams@lawolaw.org
snicolosi@lawolaw.org

COUNSEL FOR AMICUS CURIAE
LEGAL AID OF WESTERN OHIO,
INC.

Heather Hall (0079303)
Advocates for Basic Legal Equality, Inc.
130 West Second St., Suite 700 East
Dayton, OH 45042
Telephone: (419) 930-2383
Facsimile: (419) 259-2880
hhall@ablelaw.org

COUNSEL FOR AMICUS CURIAE
ADVOCATES FOR BASIC LEGAL
EQUALITY, INC.

John Schrider (0014967)
Legal Aid Society of Southwest
Ohio, LLC
215 East Ninth Street, Suite 500
Cincinnati, OH 45202
Telephone: (513) 362-2851
Facsimile: (513) 241-1187
jschrider@lascinti.org

COUNSEL FOR AMICUS CURIAE
LEGAL AID SOCIETY OF SOUTHWEST
OHIO, LLC

Jennifer van Dulmen (0078457)
Community Legal Aid Services, Inc.
Akron Centre Plaza
50 South Main St, Suite 800
Akron, OH 44308
Telephone: (330) 535-4191
Facsimile: (330) 535-0728
jvandulmen@communitylegalaid.org

COUNSEL FOR AMICUS CURIAE
COMMUNITY LEGAL AID SERVICES,
INC.

William H. Fraser (0023116)
(COUNSEL OF RECORD)
Legal Aid Society of Columbus
1108 City Park Ave., Second Floor
Columbus, OH 43206
Telephone: (614) 737-0156
Facsimile: (614) 224-4514
bfraser@columbuslegalaid.org

Staci K. Thomas (0072375)
Legal Aid Society of Columbus
150 Oak Street
Marion, Ohio 43302
Telephone: (740) 383-2161
Facsimile: (740) 387-1022
sthomas@columbuslegalaid.org

James M. Daniels (0012663)
Southeastern Ohio Legal Services
73 East Water Street
Chillicothe, OH 45601
Telephone: (740) 773-0012
Facsimile: (740) 994-0910
jdaniels@seols.org

Matthew P. Waigand (0087716)
Southeastern Ohio Legal Services
800 Gallia Street, Suite 700
Portsmouth, OH 45662
Telephone: (740) 354-7563
Facsimile: (740) 354-2508
mwaigand@seols.org

COUNSEL FOR APPELLANT MOTHER E.S.

Dirken Winkler (0068826)
Winkler Legal Services, LLC
490 City Park Ave.
Columbus, Ohio 43215
Telephone: (614) 461-5708
Facsimile: (614) 444-5188
dirk@dwinklerlaw.com

COUNSEL FOR APPELLEE AUNT
C.F. AND UNCLE D.F

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd.)

Page

TABLE OF AUTHORITIES

Cases Page(s)

TABLE OF AUTHORITIES (Cont'd.)

Cases (Cont'd.) Page(s)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (Cont'd.)

Statutes (Cont'd.) Page(s)

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

This case is about the fundamental rights of parents. More specifically, this case presents a parent's right to counsel when faced with the potential termination of their parental rights by adoption. In adoption cases where parents cannot afford counsel, assuring that a court will provide counsel is the only means of protecting the fundamental rights of parents.

The issues presented by the case are of importance to the undersigned amici. The Legal Aid Society of Cleveland, Legal Aid of Western Ohio, Inc., Legal Aid Society of Southwest Ohio, LLC, Advocates for Basic Legal Equality, Inc., and Community Legal Aid Services, Inc. share the goal of securing justice and resolving fundamental problems for those who are low income and vulnerable. To that end, the Ohio legal services community assists clients in addressing important legal issues, including the right to counsel for indigent parents in adoption proceedings. Relating to their missions, the undersigned legal services organizations regularly file amicus briefs in cases, such as the instant appeal, where outcomes may affect important rights or obligations of Ohioans, providing input to jurists and government officials who are addressing decisions of great public interest that affect the economic security of the vulnerable and the poor. Accordingly, the undersigned legal services organizations join this Amici Curiae brief to support the constitutional right to appointed counsel for indigent parents in adoption cases—in both juvenile and probate court contexts—a process that will aid courts in determining what is in the best interests of the children at the center of these cases.

Formed in January 2004, the National Coalition for a Civil Right to Counsel (NCCRC) is an unincorporated association that advances the 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 over 300 participants from 40 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 (such as the right to parent), 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 unanimously) 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 in cases about an indigent party's fundamental rights, NCCRC works tirelessly to try to close the "justice gap" in the United States, which results in low-income Americans receiving no—or inadequate—legal help for 86% of the civil legal problems they face.[2]

Founded in 1977, the National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. NACC advocates for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the amicus curiae program. Through the amicus curiae program,

[1]American Bar Association, *Resolution 112A* (Aug. 2006), available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (accessed June 15, 2019).

[2] Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017), available at https://www.lsc.gov/mediacenter/publications/2017-justice-gap-report (accessed June 15, 2019).

NACC has filed numerous briefs involving the legal interests of children and families in state and federal appellate courts and the Supreme Court of the United States.

STATEMENT OF FACTS

Undersigned amici herby adopt the Statement of Facts included in the Merit Brief of Appellant E.S.

INTRODUCTION

It is beyond debate that parental rights are some of the most fundamental rights that exist in our society. The Supreme Court of Ohio and the Supreme Court of the United States have recognized that natural parents have a '"fundamental liberty interest' in the care, custody, management and nurture of their children." *Troxel v. Granville*, 530 U.S. 57, 62, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, 873 N.E.2d 886, ¶ 5; *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 16, *modified in* 98 Ohio St.3d 1476, 2003-Ohio-980, 784 N.E.2d 709. Both courts have also observed, "the right to raise one's children is an 'essential' and 'basic civil right.'" *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990), quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). In *Stanley*, the Supreme Court of the United States concluded that the right to nurture and have companionship with one's child is a basic civil right more precious than property rights. 405 U.S. at 651. Indeed, the "[p]ermanent 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).

Because of the importance of parental rights, this Court has stated that parents facing such severe loss "must be afforded every procedural and substantive protection the law allows."

Hayes, 79 Ohio St.3d at 48, quoting *In re Smith*, 77 Ohio App.3d at 16; *see also In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 19. Twenty-six other states protect these fundamental rights by recognizing a right to counsel for parents in adoption proceedings.[3] However, in Ohio, indigent parents in probate court adoption cases are not "afforded every procedural and substantive protection" the law allows because the courts are not appointing counsel for those parents. This Court has the power to address that injustice by reversing the Fifth Appellate District and deciding that indigent parents in probate court adoption cases have the constitutional right to appointment of counsel.

To that end, the undersigned amici present the following propositions of law for this Court's consideration: (1) counsel should be appointed for all indigent parents in adoption proceedings; (2) by requiring that indigent persons receive appointed counsel when termination of their parental rights is adjudicated in juvenile court, but not when termination of their parental rights by adoption is adjudicated in probate court, the State of Ohio denies adoption respondents equal protection of the laws; and (3) the Ohio Supreme Court need not address the due process argument where deciding the case on equal protection grounds.

ARGUMENT

<u>Amici Curiae Proposition of Law No. 1:</u> Counsel should be appointed for all indigent parents in adoption proceedings.

In adoption proceedings, a court sits as the final arbiter of the parent's fate and the child's future. Universally, the adoption process has a profound impact on the child, the birth parent and the party seeking to adopt. Appointment of counsel for indigent parents in probate

[3] National Coalition for a Civil Right to Counsel map, available at http://www.civilrighttocounsel.org/map (accessed June 21, 2019) (Right to Counsel Status—subject area is "Termination of Parental Rights (Private) – Birth Parents").

court adoptions aids the court in making its decision, reduces the risk of error in these life-altering proceedings, and increases the efficiency of this hugely important process.

A. Adoption is a complicated and life-altering event for all parties involved.

Adoption is a life-altering event for children, parents, and families. Silverstein & Kaplan, *Lifelong Issues in Adoption* 2 (1982), available at https://vanish.org.au/media/17323/lifelong-issues-in-adoption-by-silverstein-and-kaplan.pdf (accessed on June 21, 2019). To a birth parent, the loss of a child through a contested adoption is arguably greater than the loss of physical liberty. Coleman, *Lassiter v. Department of Social Services: Why Is It Such A Lousy Case?*, 12 Nev. L.J. 591, 594 (2012). In addition, adoption has a profound effect on a child's development, emotions, cultural competence, and familial identification and associations. Minzenmayer, *How Adoptees Continue to Struggle with Emotional, Behavioral, and Educational Issues Post-Adoption*, 2 Int'l J. Therapeutic Juris. 22 (2017). Adoption often results in complicated emotional responses, both for the birth parent and the child, that range from loss, rejection, and grief to guilt, shame and identity confusion. Silverstein & Kaplan at 6. These feelings are not indicative of failed adoption, but are natural emotional responses to the final loss inherent in the event. *Id*. at 2 & 6.

B. Appointment of counsel for indigent parents in probate court adoptions will aid in the court's "best interest" of the child determination and establish a balance of power.

A judge's ruling in a contested adoption 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. R.C. 3107.161. Judges in these cases must also consider, as do judges in juvenile court terminations, whether a parent's conduct provides an adequate basis for terminating his or her parental rights. *Id.* To make a fully informed "best interest" of the child determination, a

decision maker needs thorough, accurate information about all of the relevant facts that are to be considered in making such a determination. A party seeking to adopt a child will be positioned to present relevant information to the court through their attorney or agency representative. *See* R.C. 3107.011(A). However, an unrepresented parent is not likely to: (1) bring the facts needed into court; (2) know what facts are relevant to the determination; or (3) know how to introduce such facts into the record for consideration by the court. Consequently, the court is left with a one-sided presentation of the relevant facts by the party seeking to adopt the child, which hinders the court's ability to determine what truly is in the "best interest" of the child.

As the Alaska Supreme Court has noted in the adoption context:

> If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.

In re K.L.J., 813 P.2d 276, 280 (Alaska 1991), quoting *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 28, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)*; see also In re Adoption of J.E.V.*, 226 N.J. 90, 109, 141 A.3d 254 (2016) (stating that in the adoption context "factfinders benefit from probing cross-examination and careful scrutiny of the evidence. That is particularly true when it comes to expert medical testimony. An indigent parent, with no legal or medical knowledge, is unlikely to be able to help the court in that regard."). The asymmetry of representation not only improperly hinders the court's ability to appropriately decide the case, but also creates power imbalances that interfere with the fair application of the rule of law. *See* U.S. Department of Health and Human Services Administration for Children and Families Log No. ACYF-CB-IM-17-02,

Informational memorandum 5 (Jan. 1, 2017), available at https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf (accessed June 15, 2019).

C. Appointment of counsel for indigent parents in contested probate court adoptions will reduce the risk of error in these complex proceedings.

Probate court adoption cases involve many of the same challenging factors that leave other family law litigation so prone to error. These factors may include, for instance, a lack of disinterested witnesses or the need for expert testimony. *State ex rel. Cody v. Toner*, 8 Ohio St.3d 22, 24, 456 N.E.2d 813 (1983) ("Given * * * the likelihood that expert witnesses will be called to testify should blood grouping tests be ordered * * * it appears that one unknowledgeable of his rights and unskilled in the art of advocacy could easily go astray in conducting his defense."); *Kennedy v. Wood*, 439 N.E.2d 1367, 1371 (Ind.App. 1982) (risk of error is great in paternity suits when defendant is unrepresented because of unreliable, self-serving testimony of parties, no one to advise defendant about the need for expert testimony, and no one to conduct a vigorous cross-examination of opposing party witnesses).

Adoption cases may also include highly difficult factual questions such as psychological factors or a party's state of mind; thorny legal, moral, factual, cultural, and religious issues susceptible to individual bias; and devastating emotional pressure on the private litigants. *Cody*, 8 Ohio St.3d at 24; Cosby, *How Parents and Children "Disappear" in our Courts and Why It Need Not Ever Happen Again*, 53 Clev. St. L. Rev. 285, 290 (2005-06) ("[C]ases involving the parent-child relationship are particularly susceptible to inappropriate individual biases and procedural errors. Arbitrary factors, such as the socio-economic status of a family, or the individual cultural, moral or religious beliefs of any one particular parent, social worker or judge, all may alter the outcomes of cases."). Family litigation is frequently governed by imprecise standards and challenging procedural questions of individual rights that must be addressed by

someone versed in the law, if all parties are to receive a fair and meaningful hearing. *See Santosky v. Kramer*, 455 U.S. 745, 762-763, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge * * * Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups [], such proceedings are often vulnerable to judgments based on cultural or class bias.") (internal citations omitted); *see also Cody*, 8 Ohio St.3d at 24.

Only attorneys know how to address legal and procedural issues likely to arise in private adoption cases under R.C. Chapter 3107, including: (1) whether the parent has failed to provide more than *de minimus* contact with the child or provide for the maintenance and support of the child for a year prior to the initiation of the adoption; (2) whether the parent had justifiable cause for failing to provide *de minimus* contact or for failing to provide for maintenance and support of the child; (3) whether it is in the best interest of the child to be adopted by the petitioner(s); and (4) how to subpoena witnesses and documents concerning the adoption proceeding, enter evidence in court, and adequately present a defense. The New Jersey Supreme Court recently addressed the issue of how unrepresented parents are at a disadvantage in adoption proceedings:

> It is hardly remarkable to note that a parent who is a layperson faces significant challenges if she appears on her own to contest a private adoption proceeding. The issues are not simple. They may involve complicated, expert medical and psychological evidence * * * An indigent parent who has no legal training will not know how to work with a psychologist to prepare for a trial or how to cross-examine the other side's expert. She will have a hard time developing defenses, gathering evidence, presenting a case, and making arguments to address the relevant legal standard * * * A parent without a background in evidence law will also likely be unable to prevent opposing counsel from introducing hearsay or other inadmissible testimony.

In re Adoption of J.E.V., 226 N.J. 90, 109, 141 A.3d 254 (2016). And parents unskilled in the law must attempt to navigate these tricky concepts while being under extreme duress due to the threat of losing their children. *See e.g., In re K.L.J.*, 813 P.2d 276, 280 (Alaska 1991) ("A parent who is without the aid of counsel in marshalling and presenting the arguments in his favor 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."). Appointment of counsel for indigent parents in probate court adoption proceedings will reduce the risk of error in these complex cases where so is much at stake.

D. Appointment of counsel for indigent parents in probate court adoptions will result in more efficient court proceedings.

The appointment of counsel for indigent parents is also likely to reduce the number of court hearings required in contested adoptions and to promote procedural justice and fairness. The presence of trained counsel on both sides of a dispute more often promotes efficient settlement and reduces wasted time, which expedites permanent placement for the child. *See In re Adoption of Zschach*, 75 Ohio St.3d 648, 651, 665 N.E.2d 1070 (1996) ("In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home * * * and ensuring that the adoption process is completed in an expeditious manner."), citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 328, 574 N.E.2d 1055 (1991) and *Adoption of Baby Girl Hudnall*, 71 Ohio App.3d 376, 380, 594 N.E.2d 45 (10th Dist. 1991).

When all parties have attorneys, fewer fruitless arguments are raised, less irrelevant evidence is offered, and there are fewer delays and continuances of the sort that inevitably occur when one side's understanding of court procedure is limited. Empirical evidence has suggested

that legal representation facilitates the legal process and makes it more efficient, fair, and expeditious. U.S. Department of Health and Human Services Administration for Children and Families Log No. ACYF-CB-IM-17-02, Informational memorandum 5-6 (Jan. 17, 2017), available at https://www.acf.hhs.gov/cb/resource/im1702 (accessed June 20, 2019).[4] Although the judicial system is greatly affected by inefficiencies resulting from having a lawyer on only one side of a dispute, indigent parents and children bear the ultimate, life-altering costs resulting from wrong or inappropriate decisions made in these cases.

Amici Curiae Proposition of Law No. 2: By requiring that indigent persons receive appointed counsel when termination of their parental rights is adjudicated in juvenile court, but not when termination of their parental rights by adoption is adjudicated in probate court, the State of Ohio denies adoption respondents equal protection of the laws.

The Equal Protection Clauses of both the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of Ohio's Constitution "require that individuals be treated in a manner similar to others in like circumstances" by the state. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 6. The two equal protection provisions are "'functionally equivalent', necessitating the same analysis." *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 11, quoting *Am. Assn. of Univ. Professors, Cent. State. Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 59, 717 N.E.2d 286 (1999). The equal protection clauses keep "governmental decision makers from treating differently persons who are in all relevant respects alike." *Huntington Natl. Bank v. Limbach*, 71 Ohio St.3d 261, 262, 643

[4] An examination of judicial efficiency was conducted by NPC Research—*Evaluation of the Sargent Shriver Civil Counsel Act (AB590) Custody Pilot Projects*, available at www.courts.ca.gov/documents/Shriver-Custody-2017.pdf (accessed June 15, 2019). The study discussed the right to counsel relating to the number and type of hearings held in the proceedings. The study found that the right to counsel for indigent parents increases judicial efficiency and reduces costs for failing to provide counsel for unrepresented litigants. *Id.* at 146.

N.Ed.2d 523 (1994), quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 1201 L.Ed.2d 1 (1992).

The question before this Court is whether it is an equal protection violation for Ohio courts to appoint counsel for indigent parents in termination cases in juvenile court, pursuant to R.C. 2151.352, but refuse to appoint counsel for indigent parents in adoption cases in probate court. As discussed in detail below, before engaging in the equal protection analysis, this Court must consider whether probate court adoption cases involve sufficient state action to implicate state and federal equal protection requirements; and should find that they do. Then, the Court must determine what standard of review applies; and should find that the strict scrutiny standard applies here because fundamental parental rights are at issue. Finally, the Court must determine if the state's different treatment of similarly situated parents is narrowly tailored to serve a compelling state interest; and should determine it is not.

A. Private adoptions include sufficient state action to implicate constitutional protections.

There must be state action to trigger federal and state equal protection constitutional requirements. *See State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 591, 639 N.E.2d 1189 (1994) (finding state action where permanent custody proceedings initiated by private adoption agency, since agency was performing traditional government function). There are numerous reasons why probate court adoption cases involve state actions.

First, in *M.L.B. v S.L.J.*, the United States Supreme Court clearly stated 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." 519 U.S. 102, 116 fn.8, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). This case precedent alone is dispositive of the issue.

Second, prior to *M.L.B.*, other jurisdictions had held that because the state plays a key role in adoption cases, there is state action regardless of the fact that the state is technically not the plaintiff. *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"); *Zockert v. Fanning*, 310 Or. 514, 522, 800 P.2d 773 (1990) ("The state is involved similarly in both proceedings. A state agency, Children's Services Division, plays a significant role in adoptions * * * and also serves the juvenile court * * * 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 is 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 * * * .").

Similarly, this Court has held that "[a]doption is a function of the state which necessitates the exercise of power in determining the proper custody of a child." *State ex rel. Portage Cty Welfare Dept. v. Summers*, 38 Ohio St.2d 144, 150, 311 N.E.2d 6 (1974). More specifically, in Ohio, the state plays a key role in adoption cases in the following ways: (1) a state licensed (and sometimes state employed) assessor must "conduct a home study for the purpose of ascertaining whether a person seeking to adopt a minor is suitable to adopt" and submit a written report to the court before an adoption petition is heard (R.C. 3107.014 & 3107.031); (2) the state's

Department of Job and Family Services may provide a report from the state's central registry of abuse and neglect regarding the prospective adoptive parent (R.C. 3107.034); (3) the state's Department of Health maintains a copy of the adopted person's certificate of adoption and other relevant records (R.C. 3107.19); and (4) the state's Department of Job and Family Services keeps records and administers a process by which adopted individuals can search for social and medical information (R.C. 3107.17). These are just a few examples, among many, of how the state is involved in Ohio's probate court adoption process.

Third, as described by the Supreme Court of Illinois:

> 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 I11.2d 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 Adoption of J.E.V.*, 226 N.J. 90, 102, 141 A.3d 254 (2016) ("Although under this scenario the order of adoption is entered as part of a private adoption proceeding, the State's involvement is real. The parent's rights are terminated by 'state-authorized action.'"), quoting *In re Adoption of a Child by J.D.S.*, 176 N.J. 154, 158, 820 A.2d 1237 (2003); *In re K.L.J.*, 813 P.2d 276, 283

(Alaska 1991) ("Adoption, 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, 6 (Fla.App. 1998) ("Although 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.").

Moreover, as the Supreme Court of Illinois has discussed, 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 * * * 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 probate court adoption context to trigger federal and state constitutional protection requirements.

B. Failure to provide indigent parents with appointed counsel in adoption proceedings violates the strict scrutiny test of the Equal Protection Clauses.

"The first step in an equal-protection analysis is determining the proper standard of review. When legislation infringes upon a fundamental constitutional right or the rights of a suspect class, strict scrutiny applies." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 64. As previously discussed, both the Ohio Supreme Court and the United States Supreme Court have recognized that the interest parents have in raising their

children is a fundamental right protected under the U.S. and Ohio Constitutions. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 9, 399 N.E.2d 66 (1980) ("Within this fundamental right of personal choice in family matters is the right of a parent to his or her natural children."). Because unequal treatment by the state adversely affects these fundamental parental rights, a "strict scrutiny" analysis must be utilized to determine if there is an equal protection violation. *Arbino*, 2007-Ohio-6948, ¶ 64; *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13. Further, to survive a "strict scrutiny" analysis, "a discriminatory classification [must] be narrowly tailored to serve a compelling state interest." *Thompson*, 2002-Ohio-2124, ¶ 13. Ohio's different treatment of indigent parents in juvenile court termination proceedings versus indigent parents in probate court adoptions violates the strict scrutiny test of the Equal Protection Clauses.

1) Parents in both probate court adoptions and juvenile court termination cases are similarly situated.

In a juvenile court proceeding, pursuant to R.C. 2151.353, if the court finds a child to be abused, neglected or dependent, the remedy can range from the parent's loss of temporary custody (R.C. 2151.011(B)(55)) to loss of "permanent custody" (R.C. 2151.011(B)(31)), which "divests the natural parents * * * of all parental rights." R.C. 2151.011(B)(31). Similarly, under R.C. Chapter 3107, a final decree of adoption by a probate court operates to:

> relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities and to terminate all legal relationships between the adopted person and the adopted person's relatives, including the adopted person's biological or other legal parents, so that the adopted person thereafter is a stranger to the adopted person's former relatives for all purposes * * *.

R.C. 3107.15(A)(1). Thus, the loss of parental rights in an adoption proceeding is at least as great as the most extreme loss of parental rights in juvenile court when a child is alleged to be abused, neglected or dependent.

Courts in other jurisdictions have relied upon the identical interest at stake in both types of proceedings to establish a right to counsel in both types of cases. *E.g., In re Adoption of J.E.V.*, 226 N.J. 90, 102,141 A.3d 254 (2016) ("When parental rights are terminated, the tie between parent and child is severed completely and permanently. That is true whether the State files a petition to terminate or a prospective adoptive parent proceeds under the Adoption Act. The outcome is the same: the end of the parent/child relationship.");[5] *In re Adoption of A.W.S. & K.R.S.*, 377 Mont. 234, 238, 339 P.3d 414 (2014) ("Although the grounds for a finding of unfitness are not identical, the fundamental right to parent is equally imperiled whether the proceedings are brought by the State or by a private party. Because, in either case, a parent stands to lose the same fundamental constitutional right on a judicial determination of unfitness, we conclude that Mother is, for equal protection purposes, similarly situated to a parent in a state termination proceeding."); *In re Adoption of L.T.M.*, 214 Ill.2d 60, 76, 824 N.E.2d 221 (2005) (finding equal protection violation because parents in juvenile and adoption cases are in "very similar situation," even if purposes of the statutes are "not identical"); *In re Adoption of K.A.S.*, 499 N.W.2d 558, 563 (N.D. 1993) ("It makes no difference to parents whether their parental rights are challenged in a proceeding under the Juvenile Court Act, the Parentage Act, or the Adoption Act. Each challenge threatens presently existing parental rights; each seeks the termination of the parent-child relationship."); *Zockert v. Fanning*, 310 Or. 514, 521, 800 P.2d 773 (1990) ("That a person's parental rights are challenged in [a juvenile] proceeding, as opposed to an [adoption] proceeding, is of no practical consequence to that parent. The challenge is the same in both proceedings—a challenge to presently enjoyed parental rights.").

[5] The *J.E.V.* court ultimately relied on due process, and not equal protection, to find a categorical right to counsel for parents in adoption proceedings.

Ohio law also recognizes the similar severity of the termination of parental rights in juvenile court and in probate court adoption proceedings by requiring the same evidentiary standard of proof to terminate such rights. The Supreme Court of the United States recognizes that "[a] majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns" in juvenile proceedings. *Santosky v. Kramer*, 455 U.S. 745, 749, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). This standard is applied in Ohio juvenile courts pursuant to R.C. 2151.414. Similarly, in an adoption proceeding, the petitioner must prove by "clear and convincing evidence" the circumstances supporting an adoption without the consent of the natural parent. R.C. 3107.07. Providing counsel to indigent parents "gives substance" to these rigorous standards by helping to ensure that they are followed. *In re K.L.J.*, 813 P.2d 276, 284 (Alaska 1991).

Termination proceedings in juvenile court and adoptions in probate court also turn on many similar findings. For instance, in juvenile court, parental rights may be terminated upon a judicial finding that the child has been "neglected," meaning that the child "lacks adequate parental care" or that the parent "refuses to provide proper or necessary subsistence, education * * * or other care necessary for the child's health, morals, or well being." R.C. 2151.03(A)(3). This analysis is similar to the one conducted in probate court, where a third-party adoption may proceed and a parent's rights may be terminated involuntarily when the parent "failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree * * *." R.C. 3107.07(A).

In addition, the fact that the state is typically a party to juvenile court actions, but not probate court adoptions, does not change the "similarly situated" conclusion. In fact, R.C. 2151.27 provides that "any person" can file a complaint under the juvenile code. Therefore, it is not even a given that the state will be a party to juvenile court termination cases, yet the identity of the petitioner does not change the parent's right to appointed counsel if indigent.[6]

For all of these reasons, parents in probate court adoptions and juvenile court termination cases are similarly situated.

2) There is no compelling state interest for treating these similarly situated indigent parents differently.

To survive a challenge under strict scrutiny, the discriminatory classification must promote a compelling government interest and be narrowly tailored to achieve that interest. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-497, 105 S.Ct. 706, 102 L.Ed.2d 854 (1989). In *Fisher v. University of Texas at Austin*, the United States Supreme Court emphasized that the burden is on the state to show both that there is a compelling state interest supporting the differential treatment and that the differential treatment is narrowly drawn. 570 U.S. 297, 311, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013). The relevant inquiry here is whether the different

[6] Notably, parents in probate court adoption cases are arguably in a worse position than parents in juvenile court terminations because the latter proceedings require the state to provide reunification services to the parents prior to seeking termination of parental rights. *See e.g.,* R.C. 2151.419(A) (court in juvenile proceeding considering awarding permanent custody away from birth parents must find that state "has made reasonable efforts to prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home. The agency shall have the burden of proving that it has made those reasonable efforts."). Moreover, apart from whether the parent is in fact deprived of parental rights under R.C. 2151.353 ("Disposition of abused, neglected, or dependent child"), under R.C. 2151.352 ("Right to Counsel") the parent of such child "is entitled to representation by legal counsel at all stages of the proceedings" in juvenile court and if indigent, is also "entitled" to have counsel provided for the person pursuant to Chapter 120 of the Revised Code ("the Public Defenders Act").

treatment of similarly situated parties—namely, the failure to appoint counsel for indigent parents in probate court adoption proceedings versus providing court-appointed counsel to indigent parents in juvenile court termination proceedings—promotes a compelling state interest. It does not.

The only interest the state has in not providing counsel to indigent parents in probate court adoptions is to spare financial resources. Courts recognizing a right to counsel in adoptions have rejected that interest as not compelling. *In re Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993) ("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."). *Accord In re Adoption of L.T.M.*, 214 Ill.2d 60, 77, 824 N.E.2d 221 (2005); *In re S.A.J.B.*, 679 N.W.2d 645, 651 (Iowa 2004). Indeed, the United States Supreme Court, in declining to recognize a categorical due process right to counsel for juvenile termination of parental rights proceedings, still held that "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here * * *." *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 28, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

Further, if preserving state funds by not appointing counsel were a compelling state interest, Ohio courts would not have mandated the appointment of counsel for indigent parties in the following other instances: *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 232, 479 N.E.2d 257 (1985) (termination of parental rights trials); *State ex rel. Cody v. Toner*, 8 Ohio St.3d 22, 456 N.E.2d 813 (1983) (paternity); *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 13-14, 399 N.E.2d 66 (1980) (appeals of termination of parental rights); *In re Fisher*, 39 Ohio St.2d 71, 82, 313

N.E.2d 851 (1974) (civil commitment); and *In re D.L.*, 189 Ohio App.3d 154, 2010-Ohio-1888, 937 N.E.2d 1042, ¶ 22 (6th Dist.) (minors in protective order proceedings). For example, in *Cody*, the Ohio Supreme Court stated, "[a]lthough we understand the state's desire to proceed as economically as possible, the state's financial stake in providing appellant with court-appointed counsel during the paternity proceedings is hardly significant enough to overcome the private interests involved." 8 Ohio St.3d at 24. In short, governmental pecuniary concerns are "unimpressive" when measured against the stakes for parents facing termination proceedings. *M.L.B. v. S.L.J.*, 519 U.S. 102, 121, 117 S.Ct. 555, 136 L.Ed.2d 437 (1996).

Moreover, the state has an interest that supports the appointment of counsel: an "interest in an accurate and just decision." *Lassiter*, 452 U.S. at 27. And as the New Jersey Supreme Court has said, "The adversary system, with an 'equal contest of opposed interests,' is designed to lead to that very outcome." *In re Adoption of J.E.V.*, 226 N.J. 90, 110, 141 A.3d 254 (2016), citing *Lassiter*, 452 U.S. at 28*; see also In re K.L.J.*, 813 P.2d 276, 280 (Alaska 1991) ("The state has no legitimate interest in terminating a parent's relationship with his child if he has not willfully neglected or abandoned that child."). Additionally, providing counsel to all indigent parents eliminates one possible reason for the trial court's decision to be reversed on appeal (i.e. the denial of counsel), which serves the state's interest in expediting permanency. *See In re Adoption of Zschach*, 75 Ohio St.3d 648, 651, 665 N.E.2d 1070 (1996).

For these reasons, the Court should find that the appointment of counsel in juvenile court termination of parental rights cases, but not in probate court adoptions, violates the federal and state Equal Protection Clauses.

C. There is a growing national consensus that it is an equal protection violation to provide counsel for state-initiated parental terminations but not for termination of parental rights through adoption.

Currently twenty-six states recognize a right to counsel in adoption cases.[7] Ohio has the opportunity to join the growing national consensus that it is an equal protection violation to provide appointed counsel for state-initiated parental terminations, but not for terminations of parental rights through adoption. Every state supreme court that has considered the question has held that granting counsel in termination proceedings but not adoptions violates equal protection. Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L. Rev. 763, 782 (Spring 2013). *Accord In re Adoption of L.T.M.*, 214 Ill.2d 60, 78, 824 N.E.2d 221 (2005) ("The enactment of a statutory scheme that provides appointed counsel for indigent parents finding termination of parental rights under the Juvenile Court Act, but not under the Adoption Act, violates the equal protection clause of the fourteenth amendment to the United States Constitution."); *In re Adoption of K.A.S.* 499 N.W.2d 558 (N.D. 1993) ("We conclude that denying an indigent parent court-appointed counsel in a stepparent-adoption proceeding under the Adoption Act * * * would deny that parent equality of the privilege of counsel which is granted, upon the same terms, to other indigent parents."); *Zockert v. Fanning*, 310 Or. 514, 523, 800 P.2d 773 (1990) ("The legislative grant of the opportunity for a parent to benefit from the privilege of assistance of counsel in one mode of termination of parental rights requires that the opportunity to exercise that privilege be extended to all similarly situated parents directly threatened with permanent loss of parental rights."); *In re Adoption of Meaghan*, 461 Mass. 1006, 1007, 961 N.E.2d 110 (2012) ("[I]ndigent

[7] National Coalition for a Civil Right to Counsel, http://www.civilrighttocounsel.org/map (accessed June 21, 2019).

parents in termination and adoption proceedings are entitled to counsel."); *In re S.A.J.B.*, 679 N.W.2d 645, 650 (Iowa 2004); *In re Adoption of A.W.S. & K.R.S.*, 377 Mont. 234, 339 P.3d 414 (2014).

The Montana Supreme Court recently addressed a termination of parental rights statutory scheme very similar to Ohio's. In *In re Adoption of A.W.S. & K.R.S.*, the court considered a statutory scheme in which the involuntary termination of parental rights can be accomplished through an abuse and neglect petition under one statute or through an adoption petition under another statute (the Montana Adoption Act). 377 Mont. at 237. Indigent parents at risk of losing their parental rights through the abuse and neglect petition were entitled to counsel. However, "[u]nder the statutory framework set out in the Adoption Act * * * an indigent parent may have her rights involuntarily terminated by a court without any right to counsel." *Id.* In considering whether the parties were similarly situated, the Montana Supreme Court reasoned:

> Montana's statutes create two similarly situated classes: indigent parents facing involuntary termination of parental rights on a petition by the state under § 41-3-422, MCA, and indigent parents facing involuntary termination of parental rights in an adoption proceeding under § 42-2-603, MCA * * * Although the grounds for a finding of unfitness are not identical, the fundamental right to parent is equally imperiled whether the proceedings are brought by the State or by a private party. Because, in either case, a parent stands to lose the same fundamental constitutional right on a judicial determination of unfitness, we conclude that Mother is for equal protection purposes, similarly situated to a parent in a state termination proceeding.

Id. at 238. Addressing whether the difference between the statutes was narrowly tailored to serve a compelling governmental interest, the Montana Supreme Court stated:

> The governmental interest identified frequently as possible justification for denial of the right to counsel to indigent parents is the State's pecuniary interest * * * The U.S. Supreme Court has observed, however, that 'though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here.' The differences between the involuntary termination provisions in the abuse and neglect statutes and in the Adoption Act are not narrowly tailored to serve a compelling government interest. The state's pecuniary interests do not justify the denial of the right to counsel to indigent parents in

> involuntary terminations under the Adoption Act, where that same right is provide to indigent parents in state-initiated involuntary terminations.

Id. at 240-241, quoting *Lassiter v. Dept. of Social Serv.*, 452 U.S. 18, 28, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). The Montana Supreme Court held that "Montana's right to equal protection requires that counsel be appointed for indigent parents in termination proceedings brought under the Adoption Act." *In re Adoption of A.W.S. & K.R.S.*, 377 Mont. at 242.

Iowa's experience with addressing the constitutional right to appointed counsel for indigent parents in adoption proceedings is also instructive here. In 2004, in *In re S.A.J.B.*, the Supreme Court of Iowa held that "the Iowa Equal Protection Clause guarantees an indigent parent the right to counsel in an involuntary termination of parental rights" in an adoption proceeding. 679 N.W.2d 645, 651 (Iowa 2004). In response to *In re S.A.J.B*, the Iowa Legislature enacted a statute authorizing discretionary appointment of counsel in adoptions. *Crowell v. State Pub. Defender*, 845 N.W.2d 676, 688 (Iowa 2014). In 2014, in *Crowell*, the Iowa Supreme Court considered that statute in the context of *In re S.A.J.B.* and acknowledged that, "in *In re S.A.J.B.* there was no provision for appointment of counsel for indigent parents under chapter 600A, while in this case counsel may be available to some indigents on a case-by-case basis." *Id.* at 690. However, in determining that a case-by-case approach did not meet the requirements of equal protection, the Iowa Supreme Court further explained:

> [I]n *In re S.A.J.B.* we applied categorical equal protection principles in holding that a distinction between chapter 232 proceedings and chapter 600A proceedings for purpose of providing counsel to indigents could not be sustained. While due process principles under the United States Constitution may involve highly fact-specific analyses and balancing tests * * * *In re S.A.J.B.* applied categorical equal protection principles and did not employ the case-by-case approach embraced by the *Lassiter* majority * * *.

Id. at 690-691 (internal citations omitted). The Iowa Supreme Court also declined the state's invitation to overturn its ruling in *In re S.A.J.B.*, instead holding that "indigent parents facing

termination of parental rights under chapter 600A cannot be treated differently than indigent parents facing termination of parental rights under chapter 232 when it comes to appointment of counsel." *Id.* at 691.

Undersigned amici urge this Court to join the groundswell of states (indeed, every state that has considered the question) in holding that the Equal Protection Clauses of the United States and Ohio Constitutions require the categorical appointment of counsel for indigent parents in probate court adoption cases.

Amici Curiae Proposition of Law No. 3: The Ohio Supreme Court need not address the due process argument where deciding the case on equal protection grounds.

The Merit Brief for Appellant E.S. includes a thorough analysis regarding why the failure to appoint counsel in this case was a due process violation. However, this Court should decide this case based on equal protection grounds, rather than due process grounds, because doing so will be more efficient and economical and because there is no need to address the due process question when a decision on equal protection is dispositive.

A. Establishing a categorical right to appointed of counsel for indigent parents in probate court adoption proceedings under an equal protection analysis will be more efficient and economical than engaging in a due process case-by-case analysis.

The Ohio Supreme Court favors application of the law that promotes judicial efficiency, adheres to common sense, and preserves the resources of both litigants and the courts. *See e.g., Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶¶ 24-26; *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 319, 667 N.E.2d 949 (1996) (deciding issue in part because it "promote[s] judicial economy and avoid[s] confusion" and the "multitude of unnecessary litigation * * * [that would result] in the absence of the clear rule * * *."); *State v. Mapson*, 1 Ohio St.3d 217, 219, 438 N.E.2d 910 (1982) (noting that "[i]mportant policy considerations also underlie this decision" and that "[a] holding to the contrary * * *

would also serve to increase the workload of the already overburdened and overcrowded courts * * * further tax the already scarce state resources * * * [and] deter judicial economy * * *.").

This Court has the opportunity to establish a categorical right to appointed counsel for indigent parents in probate court adoption proceedings under an equal protection analysis, which would promote these principles of judicial efficiency and preservation of resources. While a due process analysis should result in appointment of counsel in this particular case, due process case-by-case determinations are unduly burdensome on the courts and litigants and yield inconsistent results. *See In re K.L.J.*, 813 P.2d 276, 282 fn.6 (Alaska 1991) ("[W]e reject the case-by-case approach set out by the Supreme Court in *Lassiter* * * * '[T]he case-by-case approach adopted by the majority does not lend itself practically to judicial review * * * A case-by-case approach is also time consuming and burdensome on the trial court.'") (internal citations omitted). Moreover, as noted by the dissent in *Lassiter*:

> The case-by-case approach announced by the Court today places an even heavier burden on the trial court, which will be required to determine in advance what difference legal representation might make. A trial judge will be obligated to examine the State's documentary and testimonial evidence well before the hearing so as to reach an informed decision about the need for counsel in time to allow adequate preparation of the parent's case.

452 U.S. 18, fn.19, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (Blackmun, J., dissenting). Moreover, a categorical ruling will spare the appellate courts from having to review individual denials of appointed counsel.

Therefore, undersigned amici urge this Court to engage in an equal protection analysis and establish a categorical right to appointed counsel for indigent parents in probate court adoptions.

B. Because the question of appointment of counsel can be answered dispositively through an equal protection analysis, this Court need not reach the issue of whether Ohio's statutory scheme violates federal due process protections.

This Court can decide the case on equal protection grounds—a simple and dispositive issue—therefore, the Court need not address the separate and more nuanced due process argument. Other state supreme courts have taken exactly that approach—namely, establishing a categorical right to appointment of counsel for indigent parents in adoption cases on equal protection grounds and declining to address the separate due process argument. *E.g.*, *In re Adoption of A.W.S. & K.R.S.*, 377 Mont. 234, 242-243, 339 P.3d 414 (2014) ("Although Mother raises a separate due process argument, we need not address whether due process considerations alone would require a right to counsel under these circumstances * * * Because we have decided this case on independent and adequate State grounds under Montana's equal protection clause * * * we do not address Mother's due process arguments."); *In re Adoption of L.T.M.*, 214 Ill.2d 60, 74-75, 824 N.E.2d 221 (2005) ("John claims he was entitled to appointed counsel under both the due process and equal protection clauses of the fourteenth amendment to the United State Constitution * * * [W]e find John's equal protection claim to be dispositive."); *In re Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993) ("It is unnecessary for us to determine whether Tom's federal due process rights were violated in this case * * * We believe that a construction of NDCC § 14-15-19(6) that would allow, through an adoption proceeding, termination of the parental rights of an indigent parent who has been denied appointment of counsel would run afoul of the equal protection provision of our state constitution."). The undersigned amici urge this Court to decide this case on equal protection grounds and refrain from engaging in the case specific due process analysis.

CONCLUSION

Parental rights are among the most fundamental personal rights. Yet without any justifiable reason, Ohio statutes provide a higher level of protection—the right to appointed counsel—for parental rights in termination cases in juvenile court than for adoption proceedings in probate court. This difference in protection for parental rights exists despite the fact that the best interests of the child analysis is conducted and parents can lose all parental rights in both types of cases. An indigent parent should not face a significantly higher risk of permanently losing all parental rights just because the dispute is pending in probate court rather than in juvenile court.

Additionally, providing counsel in juvenile court cases, but not probate court adoptions, potentially incentivizes both the state and prospective adoptive parents to avoid the juvenile code, and all of its procedural protections, including right to counsel under R.C. 2151.352. This should be of concern to this Court. In *In re Adoption of K.L.P.*, the Supreme Court of Illinois observed that after the state declined to file for termination of parental rights and the juvenile petition was dismissed upon resolving custody issues, the adoptive parents did not petition for termination under the juvenile code (which would have entitled birth parents to appointed counsel) "although the statute would have permitted [the adoptive parents] to do so." 198 Ill. 2d 448, 468, 763 N.E.2d 741 (2002). The court ultimately held "[D]ismissing a case initially brought under the Juvenile Court Act so that the prospective adoptive parents may file a petition under the Adoption Act saves the State the cost of providing counsel for the indigent parent and the services of the State's Attorney to prosecute the case. This cannot be deemed a compelling state interest." *Id.* This Court should recognize the same risk exists in Ohio.

This Court has the power to extend the right to appointed counsel to indigent parents in probate court adoption proceedings. The fact that Ohio courts have not previously found a categorial right to appointment of counsel for indigent parents in probate court proceedings on equal protection grounds should not be a deterrent to doing so here. As the United States Supreme Court has stated, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602, 192 L.Ed.2d 609 (2015). Past practices do not define rights today, and in spite of past practices, today the unequal treatment afforded indigent parents in adoption proceedings denies those parents equal protection under our laws. Consequently, undersigned amici request that this Court reverse the Fifth Appellate District and hold that as a matter of equal protection, indigent parents must be afforded counsel in adoption cases in order to protect their fundamental rights.

Respectfully submitted,

/s Katherine B. Hollingsworth
Katherine Hollingsworth (0087579)
(COUNSEL OF RECORD)
Thomas Mlakar (0059703)
The Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, OH 44113
Telephone: (216) 861-5260
Facsimile: (216) 861-5263
thomas.mlakar@lasclev.org
katherine.hollingsworth@lasclev.org

COUNSEL FOR AMICUS CURIAE THE LEGAL AID SOCIETY OF CLEVELAND

/s Jeffrey Pollock (via electronic consent)
R. Jeffrey Pollock (0018707)
(COUNSEL OF RECORD)
Amy Wojnarwsky (0090763)
McDonald Hopkins LLC
600 Superior Ave., E., Suite 2100
Cleveland, OH 44114
Telephone: (216) 348-5400
Facsimile: (216) 348-5474
jpollock@mcdonaldhopkins.com
awojnarwsky@mcdonaldhopkins.com

COUNSEL FOR AMICUS CURIAE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL AND NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

/s Lucinda Weller (via electronic consent)
Lucinda Weller (0070667)
(COUNSEL OF RECORD)
Frank Catanzariti (0030262)
Cara Williams (0085921)
Sarvani Nicolosi (0085621)
Legal Aid of Western Ohio, Inc.
525 Jefferson Ave., Ste. 400
Toledo, OH 43604
Telephone: (419) 724-0030
Facsimile: (419) 321-1582
lweller@lawolaw.org
fcatanzariti@lawolaw.org
cwilliams@lawolaw.org
snicolosi@lawolaw.org

COUNSEL FOR AMICUS CURIAE
LEGAL AID OF WESTERN OHIO,
INC.

/s Heather Hall (via electronic consent)
Heather Hall (0079303)
Advocates for Basic Legal Equality, Inc.
130 West Second St., Suite 700 East
Dayton, OH 45042
Telephone: (419) 930-2383
Facsimile: (419) 259-2880
hhall@ablelaw.org

COUNSEL FOR AMICUS CURIAE
ADVOCATES FOR BASIC LEGAL
EQUALITY, INC.

/s John Schrider (via electronic consent)
John Schrider (0014967)
Legal Aid Society of Southwest
Ohio, LLC
215 East Ninth Street, Suite 500
Cincinnati, OH 45202
Telephone: 513.362.2851
Facsimile: 513.241.1187
jschrider@lascinti.org

COUNSEL FOR AMICUS CURIAE
LEGAL AID SOCIETY OF SOUTHWEST
OHIO, LLC

/s Jennifer van Dulmen (via electronic consent)
Jennifer van Dulmen (0078457)
Community Legal Aid Services, Inc.
Akron Centre Plaza
50 South Main St, Suite 800
Akron, OH 44308
Telephone: (330) 535-4191
Facsimile: (330) 535-0728
jvandulmen@communitylegalaid.org

COUNSEL FOR AMICUS CURIAE
COMMUNITY LEGAL AID SERVICES,
INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Amici Curiae was served via regular U.S. Mail on June 27, 2019, upon the following:

William H. Fraser (0023116)
(COUNSEL OF RECORD)
Legal Aid Society of Columbus
1108 City Park Ave., Second Floor
Columbus, OH 43206
Telephone: (614) 737-0156
Facsimile: (614) 224-4514
bfraser@columbuslegalaid.org

Staci K. Thomas (0072375)
Legal Aid Society of Columbus
150 Oak Street
Marion, Ohio 43302
Telephone: (740) 383-2161
Facsimile: (740) 387-1022
sthomas@columbuslegalaid.org

James M. Daniels (0012663)
Southeastern Ohio Legal Services
73 East Water Street
Chillicothe, OH 45601
Telephone: (740) 773-0012
Facsimile: (740) 994-0910
jdaniels@seols.org

Matthew P. Waigand (0087716)
Southeastern Ohio Legal Services
800 Gallia Street, Suite 700
Portsmouth, OH 45662
Telephone: (740) 354-7563
Facsimile: (740) 354-2508
mwaigand@seols.org

COUNSEL FOR APPELLANT MOTHER E.S.

Dirken Winkler (0068826)
Winkler Legal Services, LLC
490 City Park Ave.
Columbus, Ohio 43215
Telephone: (614) 461-5708
Facsimile: (614) 444-5188
dirk@dwinklerlaw.com

COUNSEL FOR APPELLEE AUNT
C.F. AND UNCLE D.F

/s *Katherine B. Hollingsworth*
Katherine B. Hollingworth (0087579)
COUNSEL FOR AMICUS CURIAE THE LEGAL AID SOCIETY OF CLEVELAND on behalf of all Amici Curiae