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En Banc Brief of Amici Curiae Law Professors James G. Dwyer, J. Herbie Difonzo, Jennifer A. Drobac, Deborah L. Forman, Marsha Freeman, William Ladd, Ellen Marrus, John E.B. Myers, and Deborah Paruch in Support of the Appellees

James G. Dwyer
William & Mary Law School, jgdwye@wm.edu

J. Herbie DiFonzo

Jennifer A. Drobac

Deborah L. Forman

Marsha Freeman

See next page for additional authors

Authors
James G. Dwyer, J. Herbie DiFonzo, Jennifer A. Drobac, Deborah L. Forman, Marsha Freeman, William Ladd, Ellen Marrus, John E.B. Myers, and Deborah Paruch

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DISTRICT OF COLUMBIA COURT OF APPEALS

IN RE TA.L.
IN RE A.L.
IN RE PETITION OF R.W. & A.W.
IN RE PETITION OF E.A.

ON APPEAL FROM THE DISTRICT OF COLUMBIA SUPERIOR COURT
FAMILY COURT, DOMESTIC RELATIONS BRANCH

EN BANC BRIEF OF *AMICI CURIAE* LAW PROFESSORS JAMES G. DWYER, J. HERBIE DIFONZO, JENNIFER A. DROBAC, DEBORAH L. FORMAN, MARSHA FREEMAN, WILLIAM LADD, ELLEN MARRUS, JOHN E.B. MYERS, AND DEBORAH PARUCH IN SUPPORT OF APPELLEES

ROPES & GRAY LLP
Douglas H. Hallward-Dreimeier
(No. 994052)
One Metro Center
700 12th Street Northwest
Washington, DC 20005-3948
(202) 508-4776
douglas.hallward-driemeier@ropesgray.com
Counsel for Amici Curiae

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Amici Curiae are law professors at universities across the United States and are experts in family law, adoption law, and constitutional law. James G. Dwyer, the Arthur B. Hanson Professor of Law at William & Mary School of Law, drafted the brief. Professor Dwyer is a nationally-renowned expert on the constitutional rights of parents and children. He has authored four books on the law of child rearing, including THE RELATIONSHIP RIGHTS OF CHILDREN (Cambridge University Press 2006); a family law textbook; and dozens of articles and book chapters on the rights of parents and children, including *A Constitutional Birthright: The State, Parentage, and Newborn Persons*, 56 U.C.L.A. LAW REVIEW 755 (2009) and *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINNESOTA LAW REVIEW 407 (2008).

The other signatories are J. Herbie DiFonzo, Professor of Law at the Maurice A. Deane School of Law, Hofstra University; Jennifer A. Drobac, Professor of Law at the Robert H. McKinney School of Law, Indiana University – Indianapolis; Deborah L. Forman, Professor of Law and J. Allan Cook & Mary Schalling Cook Children's Law Scholar at Whittier Law School; Marsha Freeman, Professor of Law at the Dwayne O. Andreas School of Law, Barry University; Ellen Marrus, George Butler Research Professor of Law and Director of the Center for Children, Law & Policy at the University of Houston Law Center; John E.B. Myers, Professor of Law at the McGeorge School of Law, University of the Pacific; and Professors Deborah Paruch and William Ladd of the Juvenile Appellate Clinic at the University of Detroit Mercy School of Law.

SUMMARY OF ARGUMENT

The Court of Appeals panel (hereafter "the division"), in its now-vacated decision of August 22, 2013, invoked *Santosky v. Kramer* in support of an assumption that legal parents

facing termination have a "fundamental right" at stake in a trial court's decision between competing adoption petitions. On the basis of that assumption, the division concluded that the trial court must decide in accordance with parents' wishes unless adoption by the applicant whom the parents prefer would inherently be detrimental to the child. The division appeared also to conclude, based on the same assumption, that the family court should have disregarded the impact on the children of disrupting their attachment relationship with the persons who have raised them for the past six years. That assumption and those two conclusions are mistaken.

Santosky does not support the division's assumption about parental rights, nor does any other Supreme Court decision. Neither the specific holdings nor the underlying premises of the Court's various strands of parents' rights jurisprudence support attributing to parents whose children are in foster care any right in connection with selection among adoption applicants. As a matter of policy, the District might conclude that it is appropriate to give parents' view some consideration, but no parental constitutional right compels it to do so.

Further, the division failed to recognize that children, like adults, possess a constitutional right against the state's destroying their home life and established relationships. The fundamental Fifth and Fourteenth Amendment right of intimate association protects the children in this case, at least to the extent of requiring that any court contemplating severance of their attachment relationships with R.W. and A.W. give substantial weight to the harm it would thereby inflict on them.

ARGUMENT

Parental constitutional rights are more limited than the division assumed, and they have no role to play in this case. Specifically, there is no federal doctrinal support for ascribing to parents a constitutional right to decide who will assume the parental role when their own parental

status is terminated for inability properly to care for their offspring. The reasoning underlying the Supreme Court's several child rearing doctrinal lines leads to an opposite conclusion.

Conversely, children in long-term foster care do have a constitutional right that constrains a court's choice as to who will adopt them. The fundamental constitutional right of intimate association precludes the state from destroying an attachment relationship that a child has developed during a long period of foster care without taking into account the harm this would inflict on them. The foster care situation is unusual; it typically begins with an intention for it to be temporary. However, at some point and under certain conditions, the child's relationship with foster parents who wish to adopt must command constitutional protection. The protection is not absolute, but it does require that a court give appropriate weight to a child's interest in continuing that relationship, and it is stronger when the alternative for a child is not return to a parent but rather adoption by some other non-parent.

I. There is No Constitutional Right to Decide Who Replaces You as a Parent

The division began its review of the trial court's decision in favor of R.W. and A.W. with this set of statements:

> Even when biological parents have not been "model parents," they have a "fundamental liberty interest ... in the care, custody, and management of their child[ren]" and a "vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Because of the fundamental rights at issue when biological parents, with parental rights intact, consent to an adoption petition in a contested adoption proceeding, "the trial court cannot merely weigh the competing adoption petitions against one another, as if they began in equipoise." *In re K.D.,* 26 A.3d at 778. Thus, the adoption petition of the biological parents' chosen caregiver can only be denied if it can be shown by clear and convincing evidence that placement with that caregiver is "clearly contrary" to the best interests of the children, rather than simply not in the children's best interests.

The division's analysis of the substantive issue in this case thus rested on an assumption about constitutional law, one tied to the U.S. Supreme Court's decision in *Santosky v. Kramer*. Yet the quotation from *Santosky* makes evident that the decision is irrelevant to the substantive

issue. *Santosky* concerned the *procedural* protections legal parents receive in connection with a state's decision never to return children to *their* "care, custody, and management" and instead permanently to end "*their* family life" with those children. It says nothing about *substantive* rights of parents, and it is irrelevant to a choice between adoption applications. In fact, statements of the Supreme Court in *Santosky* and in other doctrinal areas relating to parenthood make plain that the division's supposition that the biological parents in this case have a fundamental right at stake in choice of adoptive parents was mistaken.

The Court has recognized parenthood-related constitutional rights in three contexts: A) the procedural rights of legal parents in termination of parental rights (TPR) proceedings; B) the rights of unwed biological fathers to become legal parents, and C) the substantive rights of custodial legal parents to direct particular aspects of children's upbringing, such as schooling. The first two of these doctrinal lines concern rights to be in a legal relationship with a child, whereas the third concerns parental control rights within established and intact custodial parent-child relationships. The third doctrinal line, insofar as it addresses parental decision making power, is actually of greatest potential relevance to the substantive issue in this case. Regardless, none of the Court's decisions in any of these contexts supports attributing to non-custodial legal parents a constitutional right to select someone else to be a child's legal parent.

A. Supreme Court Precedent Concerning Termination of Parental Rights Does Not Support the Notion that Parents Whose Child is in Foster Care Have a Constitutional Right to Decide Who Adopts the Child

The Supreme Court has issued three decisions relating to involuntary termination of parental rights (TPR) proceedings. *Santosky* (right to heightened evidentiary standard), *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (right to appointed counsel), and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (right to appeal a TPR without payment of record preparation fees), all addressed only procedural rights. As such, they are not directly relevant to the substantive issue in this case – that is, the choice between adoption petitions.

Fourteenth Amendment procedural due process analysis typically begins, though, by assessing the importance of the substantive interest at stake. In all three Supreme Court

decisions relating to TPR, the parental interest at stake was not one in controlling some specific aspect of a child's life, and certainly not in deciding who will adopt a child presently in foster care. What was at stake was rather the core parental interest in remaining a child's legal parent and thereby preserving the chance to gain custody and establish a family life with the child. That interest is not at stake in this case in connection with the choice between adoption applicants.

In *Santosky* and *M.L.B.,* the Court did characterize the parental interest at stake as "fundamental," but it was *only* the primary and paradigmatic parental interest in simply occupying the role of parent in a child's life that the Court characterized as such. After stating that parental interests do not entirely "evaporate" when the state removes maltreated children from parents' custody, the *Santosky* Court stated that what parents in this situation retain, specifically, is their "interest in preventing the irretrievable destruction of their family life." *Santosky*, 455 U.S. at 753. *See also M.L.B.*, 519 U.S. at 116-17 ("M. L. B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake."), 121 ("In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is 'irretrievabl[y] destructi[ve]' of the most fundamental family relationship.") (quoting *Lassiter*); *Lassiter*, 452 U.S. at 27 ("Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation."). There is neither logical nor textual basis for extending what the Court said about that core interest in remaining a parent to everything relating to a child's life as to which a parent might have a preference, and especially not to a paradigmatically state function like approving petitions for adoption.

Moreover, the *Santosky* Court predicated its conclusion as to the procedural protection constitutionally required in the fact-finding stage of a state-initiated TPR proceeding on an assumption that the parent's interests are at that point entirely congruent with those of the child, and therefore that these protections served the child's welfare as well as the parents' desire. The Court was careful to avoid any suggestion that the parents' rights could operate contrary to the

best interests of children. *See id.* at 760-61 ("After the State has established parental unfitness at that initial [factfinding] proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures."); *id.* at 766 ("'Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision' at the *factfinding* proceeding.") (quoting *Lassiter*, 452 U.S. at 27) (emphasis in original). In contrast, in this case the division implicitly conceded a conflict of interests between the children's welfare – in particular, the harm they would incur from severance of their attachment relationship with R.W. and A.W. – and the biological parents' preference.

The *Santosky* Court went on to suggest that once the state proves unfitness by clear and convincing evidence, whatever constitutional rights parents did retain following the initial child protection removal do vanish, and at that point the focus of state attention rightfully shifts to the child's interests, unconstrained by any right of the unfit parents. *Id.* at 761 (referring to foster parents' ability to make their case for permanent custody "at the dispositional stage of a state-initiated proceeding, where the judge already has decided the issue of permanent neglect and is focusing on the placement that would serve the child's best interests."), 767 n.17 ("Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit"). In short, only as to an unfitness determination do parents have any recognized constitutional rights in connection with a TPR, and the rights the Court has recognized in that context are only procedural ones.

Finally, *Santosky*, *Lassiter*, and *M.L.B.* all addressed state-initiated proceedings to terminate parental rights, and the *Santosky* Court suggested that a different constitutional analysis would apply in a proceeding initiated by foster parents or other private parties who wish to adopt a child. *Id.* at 761 ("However substantial the foster parents' interests may be, they are not implicated directly in the factfinding stage of a state-initiated permanent neglect proceeding

against the natural parents. If authorized, the foster parents may pit their interests directly against those of the natural parents by initiating their own permanent neglect proceeding."). For that reason as well, *Santosky* does not support the division's assumption about parents' rights.

B. The Unwed Father Precedents Support A Conclusion that A.H. and T.L. Have No Constitutional Right to Decide Who Adopts A.L. and Ta.L.

In the 1970s and early 80s, the Supreme Court decided three cases in which a biological parent was attempting to block adoption of a child by a biologically-unrelated person. These cases involved step-parent adoption petitions opposed by unwed fathers who had not yet established paternity, so they differed in significant ways from the present case. But two aspects of the Court's reasoning in those cases are worth noting.

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

In the other two cases, *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court concluded that the biological fathers had no fundamental right to become legal parents themselves or prevent someone else from adopting, because they had not demonstrated commitment to the responsibilities of child rearing, did not have a substantial relationship with the children at issue, and were not seeking custody for themselves. *See Quilloin*, 434 U.S. at 255 ("this is not a case in which the unwed father at any time had, or

sought, actual or legal custody of his child"); *Lehr*, 463 at 257 ("the rights of the parents are a counterpart of the responsibilities they have assumed"); *id.* at 261 ("The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant."); *id.* at 261 n.17 (acknowledging "the constitutional importance of the distinction between an inchoate and a fully developed relationship"); *id.* at 266-67 ("the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child"); *cf. Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (plurality opinion) (interpreting prior Court decisions relating to rights of unwed biological fathers as respecting "the relationships that develop within the unitary family"). Simply wanting to prevent someone else from becoming a legal parent and custodian of a child is not an interest that receives constitutional protection.

Second, the Court has explicitly endorsed the position that the state may approve an adoption by an existing non-relative caregiver based simply on a finding that doing so is in the child's best interests, regardless of a non-custodial biological parent's objection, even if that biological parent is fit and seeking parental status for himself. The *Quilloin* Court stated:

> Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child."

434 U.S. at 255; *see also Lehr*, 463 U.S. at 259 ("The trial court [in *Quilloin*] found adoption by the new husband to be in the child's best interests, and we unanimously held that action to be consistent with the Due Process Clause."); *Guardianship of Ann S.*, 45 Cal. 4th 1110, 1129 (2009) ("*Quilloin* demonstrates that the best interest of the child is a constitutionally permissible basis for terminating parental rights in some circumstances."). If a best-interest finding is a constitutionally sufficient basis for rejecting a fit biological parent's request to serve as a legal

parent himself, then surely it is a constitutionally sufficient basis for rejecting a biological parent's preference as to someone else serving as a legal parent.

C. Parental Constitutional Control Rights Are Limited in Scope and Power

The Supreme Court has decided several cases attributing to legal parents a constitutional right to some authority over certain aspects of children's upbringing. Importantly, all involved fit legal parents whose children were living with them in intact families. Moreover, none extended the parental control right to a decision even remotely like choosing substitute parents. Further, none established a rule that what parents want must be inherently harmful for the state to insist on something else for a child. Rather, these cases at most established that the state must presume what fit custodial parents wish for their child is in the child's best interests, putting on the state a modest burden to show that what the state requires is actually better for the child. In addition, all the Court's decisions relating to parental control rights have confirmed the authority, responsibility, and compelling interest of the state to protect and promote children's wellbeing.

Meyer v. Nebraska, 262 U.S. 390 (1923) and *Pierce v. Society of Siste*rs, 268 U.S. 510 (1925), involved state regulation of private schooling. Parents were not parties, but the Court referred to parental rights under the Fourteenth Amendment as partial justification for invalidating the regulations (prohibition of instruction in German in *Meyer*, prohibition of private schooling altogether in *Pierce*). The Court applied rational basis review in both cases, finding that neither prohibition served any legitimate state interest. *See Meyer*, 262 U.S. at 399-400, 403; *Pierce*, 268 U.S. at 534-35. In both cases, the Court emphasized that the state had failed to show any detriment to the children would result from the parents' choices regarding schooling relative to what the state sought, and that states are constitutionally free to oversee children's education in private schools in order to protect children's educational interests. *See Meyer*, 262 U.S. at 403 ("there seems no adequate foundation for the suggestion that the purpose was to protect the child's health"); *Pierce*, 268 U.S. at 534 (noting that nothing in the record indicated any educational deprivation of private school students); *id.* ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine

them, their teachers and pupils."). *See also Lehr*, 463 U.S. at 257 ("the Court has emphasized the paramount interest in the welfare of children").

Two later cases, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding an ordinance prohibiting involvement of children in distributing religious pamphlets on streets at night) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding Amish parents are constitutionally entitled to exemption from compulsory schooling laws for their children after eighth grade), involved Free Exercise Clause as well as substantive due process claims to parental power. The Court in both cases indicated that *non-religious* parental child-rearing preferences by themselves give rise to no constitutional right to resist reasonable child welfare laws. *Prince,* 321 U.S. at 165 ("Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved."), 166 ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control. *Yoder*, 406 U.S. at 215–16 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction.") Indeed, even when religious belief is at stake, the state constitutionally may act contrary to parents' wishes if necessary to protect children's wellbeing. *Id.* at 233–34 ("To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation...if it appears that parental decisions will jeopardize the health or safety of the child."); *id.* at 230 ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.").

The Court's most recent decision concerning custodial parents' control rights, *Troxel v. Granville,* 530 U.S. 57 (2000), addressed a situation somewhat more like that in this case. A custodial mother asserted a parental constitutional right to control her child's relationship with

third parties – in that case, paternal grandparents. The plurality decision determined that Washington State went too far in ordering substantial grandparent visitation without according any deference to the custodial mother's view that less visitation time would be best for the children. In a plurality opinion, Justice O'Connor characterized the "liberty interest" of parents that the Substantive Due Process Clause protects in stronger terms than the Court had done in its prior cases in this doctrinal line, beginning her analysis by invoking "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66.

However, the plurality emphasized that the mother was a custodial parent whose fitness was not in any doubt. *Id.* at 67 (expressing concern that "in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation") (emphasis in original), 68 ("the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children."), 68-69 ("so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children"). *See also id.* at 100-101 (Kennedy, J., dissenting) ("a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a *de facto* parent may be another."). *Cf. Parham v. J.R.*, 442 U.S. 584, 602 (1979) (holding that Georgia's procedures for committing a juvenile to a psychiatric facility did not violate the juvenile's rights, and stating: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this.").

Further, the plurality concluded that the mother's constitutional right required merely that her view about third-party visitation receive "some special weight." *Troxel*, 530 U.S. at 71. *See*

also id. at 69 ("The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption."). The plurality expressly declined to establish a harm standard – that is, a rule that the state must defer to a custodial parent's wishes about visitation unless it can prove this would be harmful to the child. *Id.* at 73. *See also id.* at 85-86 (Stevens, J., dissenting) ("that the Federal Constitution requires a showing of actual or potential 'harm' to the child before a court may order visitation continued over a parent's objections—finds no support in this Court's case law").

In sum, Supreme Court doctrine articulating a Fourteenth Amendment right of parents to control some aspects of children's upbringing has attributed such a right only to fit custodial parents actively raising their children and only in a few contexts – schooling, religious proselytizing, and third-party visitation; has treated that right as a relatively modest one, requiring some presumption in favor of a fit custodial parent's judgment about a child's best interests; and has emphasized the power of the state to override parental wishes if the state has substantial basis for believing this will serve children's wellbeing.

Conversely, the Court has never suggested that even fit custodial parents are constitutionally entitled to presumptive control over *every* aspect of children's lives; that the state must defer to parents if it cannot show what the parents want is inherently harmful, rather than simply worse for a child than what the state seeks; nor that parents can be constitutionally entitled to a result contrary to a child's wellbeing. *Cf. In re S.M.*, 985 A.2d 413, 419 (D.C. 2009) ("To be sure, at the end of the day, the paramount consideration must of course be the best interest of the child. The rights of even fit parents 'are not absolute, and must give way before the child's best interests.'") (citations omitted).

This line of constitutional decisions thus yields the conclusion that the trial court in this case was absolutely free as a matter of federal constitutional law to choose between the competing adoption petitions solely on the basis of what would be in the children's best interests,

and in doing that to consider any and every way in which denying the petition of A.W. and R.W. and instead granting the petition of E.A. could make the children worse off than they currently are, including the harm arising from severing their attachment relationship with A.W. and R.W.

This conclusion gains further support from lower court decisions and agency practices in contexts more closely resembling the present one. *See., e.g., In re Baby Boy C.,* 630 A.2d 670, 682 (D.C.,1993) ("rights of natural parents to bring up their children . . . must give way before the child's best interests. . . . Thus, contrary to appellant's assertion, a finding of parental unfitness is not a constitutional prerequisite to granting an adoption petition notwithstanding lack of parental consent."); *Blair v. Badenhope,* 77 S.W.3d 137 (Tenn. 2002) (holding that if there has been a valid initial order placing custody of a child in a non-parent, parents seeking to change custody to themselves do not enjoy the "superior rights" accorded parents seeking to prevent a child's initial removal from their custody, even if the parents had voluntarily surrendered custody to the non-parent, because "the child's interest in a stable and secure environment is at least as important, and probably more so, than the parent's interest in having custody of the child returned"); *id.* ("Most other jurisdictions addressing this issue have largely concluded that the superior rights doctrine is not applicable when a natural parent seeks to modify a custody arrangement [with a non-parent] established by a valid order. Instead, these courts focus upon whether the change in custody would be in the best interests of the child."); *C.R.B. v. C.C.,* 959 P.2d 375, 380 (Alaska 1998) ("Having once protected the parent's right to custody [in an initial proceeding to transfer custody to a non-parent], at the risk of sacrificing the child's best interests, we should not then sacrifice the child's need for stability in its care and living arrangements by modifying those arrangements more readily than in a parent-parent case.").

Obviously, the routine state practice of removing children from parental custody because of maltreatment or incapacity entails a great diminishment of parental authority and control over the children's lives. Parents are not deemed to have a constitutional right to decide or even influence the decision as to who the foster parents will be. *Cf. Guardian ad Litem Program v. R.A.*, 995 So.2d 1083, 1084 (Fla. 5th Dist. Ct. App. 2008) (rejecting a father's motion to change

placement of his daughter from foster parents to the paternal grandmother, and stating that "where a child has been declared dependent, it is the trial court, not the parents whose child has been declared dependent, who must decide what is in the best interest of the child."). Recognizing such a right could have a crippling effect on the foster care system.

Indeed, even as to parents who are non-custodial because of dissolution of their relationship with a child's other parent, rather than because of any maltreatment or incapacity, courts generally deny that they are constitutionally entitled to control the course of their children's lives. At most, they have a constitutional right to maintain contact with a child through visitation. See David Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA LAW REVIEW 1461, 1475 (2006) ("a survey of court decisions across a range of topics shows considerable reluctance to recognize constitutional rights on the part of non-custodial parents"), 1480 ("if non-custodial parents aspire to more than a bare minimum of access to a child--to assert, for instance, their views about how their children should be raised or educated--the courts are notably less receptive.") (citations omitted). *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (holding that a non-custodial parent lacked standing to challenge the constitutionality of a school district's policy requiring recitation of the Pledge of Allegiance).

Thus, neither federal court precedents on Fourteenth Amendment parental control rights nor Supreme Court doctrine and state practices relating to child protection interventions and adoption support the view that parents incapable of caring for a child themselves are entitled to decide who replaces them when their parental status is terminated. The state is constitutionally free to act in the way it believes most conducive to the best interests of children like A.L. and Ta.L., according no deference to current parents' preferences as to who adopts the children.

II. A.L. and Ta.L. Possess a Fundamental Constitutional Right of Intimate Association That Protects Their Relationship With A.W. and R.W.

In its decision, the division appeared to view itself as compelled to disregard the harm that would befall the children if the trial court severed their relationship with A.W. and R.W. by granting E.A.'s petition. In fact, constitutional rights of the children require the opposite – that

is, that the choice between adoption petitions take fully into account the children's profound interest in maintaining their current family life and attachment relationships. After placing A.L. and Ta.L. in the home and care of A.W. and R.W. and repeatedly deciding to keep the children there, knowing that the children could over time form an attachment relationship with and therefore psychological dependency on A.W. and R.W., the Districts' agencies and courts may not now treat that attachment and dependency as irrelevant to the momentous decision about the children's future family life. The Court is constitutionally required to give substantial weight to a child's long-established family relationship with foster parents, at least when the contest is not with biological parents seeking return of the children to them but rather with other non-parents who have filed a competing adoption petition.

All persons have a fundamental constitutional right of intimate association presumptively protecting them against state disruption of their established family relationships and home life. The right is not without exception, but it is among the strongest of constitutional rights. As it applies to relationships between children and their caregivers, the interests it protects are generally greater for the children than they are for any adults, because for children they include fundamental aspects of development as persons. A court would therefore need truly extraordinary justification for severing a long-term attachment relationship like the one A.L. and Ta.L. have formed and solidified over many years in the nurturing care of A.W. and R.W. Gratifying biological parents whose inability to care for their offspring caused them to end up and remain for many years in foster care cannot possibly constitute such a justification.

Notably, this Court has in prior cases protected children's existing relationship with foster parents over competing claims by extended biological family members preferred by a parent. *See, e.g.*, *In re T.W.M.*, 18 A.3d 815, 820 (D.C. 2011). Courts in other jurisdictions also routinely consider the harm of removing children from long-term foster parents in cases of competing adoption petitions, and some give categorical preference to long-term caregivers over other adoption applicants. *See, e.g.*, *In re S.G.*, 828 N.W.2d 118, 125 (Minn. 2013) (upholding trial court selection of foster parents rather than paternal grandparents for adoption, on the

grounds that the statutory requirement to consider relatives first for adoption placement was subordinate to the overarching statutory purpose to safeguard children's best interests, which requires taking into account harm from removing them from long-term caregivers); *In re Sarah S.*, 43 Cal. App. 4th 274, 285 (Cal.App. 2 Dist.,1996) (applying a statutory preference for non-parent caregivers over relatives who have not been caregivers, in choice between competing adoption petitions, and stating that "when reunification services have been terminated, the parents' interests in the care, custody and companionship of the child are no longer paramount, and "the focus shifts to the needs of the child for permanency and stability.").

In fact, this Court has given children in foster care such protection even when the choice was between adoption by foster parents and preservation of a biological parent's legal status. *See., e.g., In re C.L.O.*, 41 A.3d 502, 513 (D.C. 2012); *In re Baby Boy C.*, 630 A.2d 670, 683 (D.C. 1993). The division's contrary treatment of that threat to the children's fundamental wellbeing in this case is thus anomalous as well as unconstitutional. This Court should affirm that in cases of this type, the potential harm to children from severing their attachment to long-term caregivers is not only an appropriate consideration, but in fact a necessary and weighty one.

This Part describes the Supreme Court's development of the right of intimate association in the context of relationships between adults, explains how the doctrine extends to children, and identifies limiting principles that appropriately guide a court's determination of whether and when a particular foster-parent/child relationship acquires constitutional protection and what justifications might override the presumption against state disruption of a protected relationship.

A. The General Constitutional Right of Intimate Association

One of the most basic and important of our constitutional rights is that against state interference in our private home and family life. The U.S. Supreme Court has "long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609,

618 (1984). The interests we have at stake in our relationship choices are so fundamental that state policies short of preventing material harm to others cannot justify compromising our absolute right to choose what is best for us in terms of our intimate relationships. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating a state's anti-sodomy law as a violation of the Fourteenth Amendment right of substantive due process); *Roberts*, 468 U.S. at 617-18 (indicating that the right of intimate association, protecting from state interference "choices to enter into and maintain certain intimate human relationships," is even stronger than the First Amendment right of expressive association), 623 (stating that even the weaker right of expressive association required the state to present a compelling state interest in support of an anti-discrimination law as applied to a business- networking organization).

Accordingly, we adults have an absolute right to choose with whom we maintain mutually voluntary friendships and intimate partnerships, on the basis of what is best for us at any given point in time. *Cf. Loving v. Virginia*, 388 U.S. 1 (1967) (holding that anti-miscegenation laws violate the Fourteenth Amendment Equal Protection Clause). We adults take for granted that no state actor could order us to end one personal relationship and form another, regardless of how we came to know the persons with whom we choose to share a life and regardless of what preferences other private parties might have concerning with whom we choose to associate. Even if we met and formed a relationship with another adult only as a result of the state's placing us in a common living situation, the relationship would be constitutionally protected. *Cf. Turner v. Safley*, 482 U.S. 78 (1987) (holding that prison inmates have a constitutional right to marry).

Related to this right to protection of relationship choices is a right against disruption of an established household and family life. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality decision) (invalidating as a violation of substantive due process a zoning provision that would cause the breakup of a household that did not match a traditional conception of family).

The Supreme Court has repeatedly articulated the basis for the right of intimate association in terms of the importance of psychological and emotional bonds that form during

daily association. *See e.g.*, *Roberts*, 468 U.S. at 619 ("the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others."), 619 (stating that the "personal affiliations" warranting the highest constitutional protection "are those that attend the creation and sustenance of a family," including "the raising and education of children."), 619–20 (interpreting "family" as a social relationship, a sharing of home and daily life: "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."); *Lehr* at 463 U.S. 261 ("the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association"); *Smith v. Org. of Foster Families,* 431 U.S. 816, 843 (1977) ("A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases. . . . Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot(ing) a way of life" through the instruction of children. . . .").

The constitution thus imposes severe limits on state action that would disrupt or interfere with adults' close personal social relationships and home life. We adults take for granted this constitutionally-guaranteed insulation from state intrusion into our existing relationships, whether they have been legally formalized or not. We also take for granted that we have an absolute right to refuse any new intimate relationship that we do not want, even if it would not be inherently harmful, and correspondingly that we cannot insist on having a family relationship with someone who does not reciprocate our wish. The *Roberts* Court made the obvious point that the right to freedom of association "plainly presupposes a freedom not to associate." *Id.* at 622. Thus, the state would violate this fundamental constitutional right not only by forcibly

separating two people who are in a healthy cohabiting relationship together and want to continue, but also by forcing a person into an intimate association he or she does not want.

B. Applying the Fundamental Right of Intimate Association to Children

The Supreme Court has not directly addressed claims on behalf of children grounded in the right of intimate association. In *Santosky* the Court suggested that the child and the foster parents might have constitutionally protected interests at stake stemming from their relationship. 455 U.S. at 754, n.7 (conceding that "important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding."). In other cases, as well, some Justices have intimated that children must, like adults, possess a constitutional right to protection of their relationships with persons who have stood in a parental role toward them. *See, e.g.*, *Smith*, 431 U.S. at 844 (plurality opinion) ("At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals."); *Troxel*, 530 U.S. at 88-89 (Stevens, J., dissenting) ("While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.").

It is not necessary, of course, for the Court to address constitutional claims by members of every conceivable group before a constitutional right exists for everyone. The Court does not need, for example, to decide a case involving an intimate partnership between two women before

the broad right it pronounced in *Lawrence* applies to women in same-sex relationships. Every person in the United States possesses a constitutional right of intimate association. And the Supreme Court has in numerous contexts emphasized that children are persons and holders of constitutional rights. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment."); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated."); *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969) (upholding First Amendment speech rights of public high school students); *Prince*, 321 U.S. at 165-66 (1944) (referring to "rights of children to exercise their religion").

There is therefore no need to recognize a "new constitutional right" in order to apply in the present case the children's constitutional right of intimate association. That they have one is already established, and some state courts have noted this. *See, e.g., In re Jasmon O.*, 8 Cal. 4th 398, 419 (1994) ("Children, too, have fundamental rights-including the fundamental right to be protected from neglect and to 'have a placement that is stable [and] permanent.' (Citations omitted) Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent."); *N.J. Div. of Youth & Family Servs. v. C.S.*, 367 N.J. Super 76, 118 (2004) (holding in context of TPR proceeding that trial court "erred by focusing almost solely upon the parental rights of C.S. and failed to properly weigh and consider the rights of M.S. independent of her biological mother," which included protection of her relationship with the foster parent who had become her "psychological parent"); *N.J. Div. of Youth & Family Servs. v. S.F.*, 392 N.J. Super 201, 209-10 (App. Div.) ("A child cannot be held prisoner of the rights of others, even those of his or her parents. Children have their own rights, including the right to a permanent, safe and stable placement.") (internal

quotations and citations omitted), *cert. denied*, 192 N.J. 293 (2007). This court's analysis should begin with a recognition of this right and of the limits it imposes on what the courts may do to A.L. and Ta.L. now that the legal tie between them and their birth parents is going to end and they have formed a positive attachment to long-term foster parents.

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

In the present context, where the ultimate question is who will become a child's legal parents after existing parents are terminated because of their incapacity to care for the child, a court acting on its *parens patriae* authority must serve as the proxy decision maker, just as courts do in post-divorce child custody disputes and in disposition hearings following findings of maltreatment. The only reason the state may involve itself in a decision of this kind — that is, who a person's family members will be, which is a kind of decision the state ordinarily would not and may not make — is that young children, like incompetent adults, need a proxy decision maker to effectuate their constitutional right of intimate association, and the state is in the best position to do that. Obviously, if A.L. and Ta.L. were now over eighteen, there could not properly be any court involvement in the decision whether they stayed with A.W. and R.W. or

instead left to live with someone else. It is the children's need for someone to choose for them what is best for them, and nothing else, that justifies this court's assumption of authority over their private lives. The trial court in this case appears to have understood that. The division's suggestion that the trial court should instead have exerted power over the children's life in order to serve the biological parents' desires or interests is unsupportable and incompatible with the children's personhood and their constitutional right to a decision that is in *their* behalf and not someone else's behalf. *Cf. Cruzan*, 497 U.S. at 286-87 (rejecting contention of parents that they possessed a right that should influence how the state makes surrogate medical care decisions for their incapacitated adult daughter).

In other words, there is no legitimate basis for exercise of the state's "police power" authority in this case, basing decisions on a balancing of many people's interests or on the basis of collective social interests; the only proper role for the court is a *parens patriae* role, a role of agent for and protector of the child. For this Court to force A.L. and Ta.L. to sacrifice their basic welfare (by suffering the psychological damage of attachment disruption) for the sake of gratifying other persons (birth parents who have lost custody), when it could never force any adults to sacrifice their basic welfare in order to gratify others in a relationship-choice context, would amount to treating the children as less than equal persons. It would demean and insult them, treating them more like things than like fully human individuals. It would be morally unprincipled and in direct conflict with the broad purpose of the Fifth and Fourteenth Amendments' Due Process Clause "'to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

C. Limiting Principles in Foster Care Situations

The foregoing does not amount to saying that a child's relationship with foster parents becomes constitutionally protected the moment children are placed in foster care, nor that when constitutional protection does materialize the state can never have legitimate justification for ending a child's relationship with foster parents.

Foster care placements are generally presumed at the outset to be temporary, because the state's aim is usually to make it possible for the child safely to return to parental custody. *Cf. Smith*, 431 U.S. at 844-46 (1977). In part because of that shared understanding, foster parents might never bond with a child and a child might never attach to the foster parents. If an attachment relationship does develop, it will not do so quickly; attachment is a lengthy process. So too with children's becoming psychologically dependent upon, and settled into a family life with, foster parents. Relationships between children and caregivers solidify, if at all, only after an extended period of time, at least many months and sometimes only after years. *Cf. Guardianship of Ann S.*, 45 Cal. 4th 1110, 1136 (2009) ("After years of guardianship, the child has a fully developed interest in a stable, continuing, and permanent placement with a fully committed caregiver. The guardian, after fulfilling a parental role for an extended period, has also developed substantial interests that the law recognizes."). Even if a child spends a long time in foster care, attachment to the foster parents might never occur if the child entered foster care already relatively old or developmentally damaged by maltreatment, or if the foster parents are not especially nurturing.

However, if as in this case, after a lengthy period of receiving nurturing care from and sharing a family life with foster parents, a child does develop a positive attachment to the foster parents, documented by a child psychologist trained to assess attachment, then the child will at that point have a sufficiently strong interest in maintaining the relationship that courts should deem the child constitutionally entitled to remain in that relationship absent legitimate and compelling countervailing considerations. Certainly it would be indefensible for a court to sever the relationship without giving substantial weight to the likely harm that disrupting the attachment would cause the child. Once a positive attachment forms, the child's fundamental wellbeing can depend on continuing the relationship through childhood, because disrupting attachment relationships is, as the experts testified at trial, typically quite damaging to a child. Certainly the child then has, as a factual matter, far greater interests at stake than does any adult in the decision whether the foster parents rather than someone else will adopt him or her.

As with most constitutional rights, the right of intimate association is not absolute. With adults, permissible bases for infringing the right are quite limited. *Cf. Overton v. Bazetta,* 539 U.S. 126 (2003) (rejecting a constitutional challenge to prison regulations restricting visitation). With children, there is in connection with this right, as with other constitutional rights of children, reasonable basis for overriding the right on paternalistic grounds – that is, for the sake of serving interests of the children that are even more important to their well-being in their particular circumstances. Such other interests could include an interest in resuming a relationship with birth parents, if the birth parents are presently capable of providing adequate care. In a case like the present one, once it is settled that adoption is the permanency plan for a child and that birth parents' rights will be terminated, that interest is not present.

There could be other considerations counting against maintaining a relationship with foster parents, ones applicable even when return to birth parents is no longer contemplated. For example, new circumstances could develop in the foster home that present a danger for the child. A court considering alternative adoption petitions can consider any such facts relevant to the child's wellbeing. What it may not do constitutionally is to disregard the child's strong interest in preserving and continuing the home life and family relationships they have developed with nurturing caregivers. The upshot of recognizing that at some point a child's relationship with foster parents can become so well developed and important to a child's wellbeing that it becomes constitutionally protected is simply to require that the court resolving the adoption dispute apply a presumption against severing the attachment relationship, give substantial weight to the child's interest in maintaining that relationship, and impose on the competing adoption applicant the burden of demonstrating that other child welfare considerations outweigh the harm the court would cause the child by ending the relationship with the foster parents.

This Court must squarely address this constitutional right of A.L. and Ta.L. Young children cannot assert this right themselves the way competent adults do; they need a proxy decision maker to act in their behalf. Courts respect and effectuate this constitutional right by making decisions for a child at any given time based on a rational, evidence-based determination

of what will be best for them in light of their present circumstances, just as adults are entitled to choose their family relationships based on what is best for them. As an empirical matter, protecting a child's attachment relationships is presumptively best for them. This is essentially what this Court has done in prior cases it could now solidify this approach, and avoid a repeat of the division's anomalous and potentially harmful treatment of these vulnerable children, by explicitly recognizing that judicial respect for children's attachment relationships is not gratuitous on the courts' part but rather something to which children are constitutionally entitled.

CONCLUSION

Neither E.A. nor the biological parents can plausibly claim any constitutional right to the result they prefer. A.L. and Ta.L., on the other hand, have a constitutional right that presumptively precludes the District and its courts from destroying the attachment relationship they have formed over many years with A.W. and R.W. To justify infringing that right, a court must find that other, countervailing child welfare considerations are weightier.

Respectfully submitted,

By: _____

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Douglas H. Hallward-Dreimeier
(No. 994052)
ROPES & GRAY LLP
700 12th Street, NW, Suite 900
Washington, DC 20005-3948
+1 202 508 4600
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, I caused one copy of the foregoing Consent Motion and Brief of *Amici Curiae* to be served by U.S. First Class Mail upon the following:

Leslie Susskind, Esq.
1 Research Court, #600S
Rockville, MD 20850
Counsel for A.H./Appellant

N. Kate Gould, Esq.
5801 Nicholson Lane, #1234
Rockville, MD 20852
Counsel for T.L./Appellant

Stacy L. Anderson, Esq.
Office of the Solicitor General
441 4th Street, NW
Suite 600S
Washington, DC 20001
Counsel for the District of Columbia/Appellee

Tanya Asim Cooper, Esq.
The University of Alabama School of Law
Law Clinic Program
Box 870392
Tuscaloosa, AL 35487-0392
Counsel for E.A./Appellant

Joy Aceves-Amaya, Esq.
4545 Connecticut Ave., N.W.
Suite 825
Washington, DC 20008
Counsel for E.A./Appellant

Kelly Venci, Esq.
5203 Cannes Court
Alexandria, VA 22315
Guardian ad litem/Appellee

Melanie L. Katsur, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., NW
Washington, DC 20036
Counsel for R.W. & A.W./Appellees

John C. Keeney, Jr., Esq.
Legal Aid Society of DC
1331 H Street, NW, #350
Washington, DC 20005
Counsel for Appellants' Amici Curiae

Melissa Colangelo, Esq.
Allen Snyder, Esq.
Children's Law Center
616 H. Street, NW, Suite 300
Washington D.C. 20001
Counsel for Amicus Curiae

James Klein, Esq.
Public Defender Service
633 Indiana Ave., NW
Washington, DC 20004
Counsel for Appellants' Amicus Curiae

Douglas H. Hallward-Dreimeier
(No. 994052)
ROPES & GRAY LLP
700 12th Street, NW, Suite 900
Washington, DC 20005-3948
+1 202 508 4600
Counsel for Amici Curiae