No. 22-6481

In the Supreme Court of the United States

COURTNEY J., PETITIONER

v.

BEAUFORT COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION FOR THE RESPONDENT NORTH CAROLINA GUARDIAN AD LITEM PROGRAM

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QUESTIONS PRESENTED

1. Whether this case presents an unsuitable vehicle for this Court to review petitioner's constitutional issues when she waived appellate review of those issues in state court under well-established state law by failing to present them to the trial court, and because the matter is moot where the children were adopted prior to the filing of the instant petition for writ of certiorari.

2. Whether petitioner has failed to demonstrate that the trial court violated her constitutional rights when it terminated her parental rights pursuant to four of the grounds for termination defined in North Carolina's Juvenile Code, including her willful failure to pay a reasonable portion of the cost of the children's care.

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OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at *In re J.C.J.*, 381 N.C. 783, 874 S.E.2d 86 (2022). (Pet. App. 1a-9a)

JURISDICTION

The opinion of the Supreme Court of North Carolina was filed on 15 July 2022. The Court denied a petition for rehearing on 23 August 2022. (Pet. App. 10a) The petition for writ of certiorari in No. 22-6481 was filed in this Court on 19 November 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

In October 2020, the Beaufort County, North Carolina, District Court adjudicated four statutory grounds to terminate the parental rights of petitioner Courtney J ("petitioner") to the twins J.C.J. and J.R.J. (collectively, "the twins"): neglect; dependency; willful failure to make reasonable progress toward correcting the conditions that led to the twins' removal from the home while they were in a placement outside the home for 12 months; and willful failure to pay a reasonable portion of the cost of the twins' care for the six months preceding the filing of the termination petition. (Pet. App. 2a)[1]

The twins have five older half-siblings, and the Beaufort County Department of Social Services ("DSS") had a history of nineteen child protective service reports for the family dating back to March 2013. The prior reports included allegations of parental substance abuse, the children's exposure to sexual conduct, and inadequate supervision, discipline, and medical care. (Pet. App. 1a) The twins were born in 2015, and DSS filed petitions in October 2017 alleging that they were neglected based on the injurious home environment, and because they received improper care, supervision, and discipline. Four of the twins' half-siblings were already adjudicated neglected because petitioner failed to engage with the remedial services offered. The twins' speech was delayed, and DSS alleged that petitioner also refused to ensure they received speech therapy. (Pet. App. 1a)

The trial court adjudicated the twins neglected in April 2018 and ordered petitioner to comply with her Out of Home Family Services Agreement ("OHFSA"). (Pet. App. 1a, 160a-173a) The OHFSA required petitioner to attend the Families Understanding Nurturing Program, continue to receive therapeutic treatment at a counseling center, participate in

[1] The trial court's order also terminated the parental rights of the twins' father, but he has not filed a petition for writ of certiorari with this Court.

family therapy when it was recommended by both the twins' therapist and her own therapist, attend all visits with the children, and acquire a valid driver's license and transportation. (Pet. App. 1a-2a, 172a, ¶7)

The trial court ordered a trial home placement in November 2018, but it terminated that placement in May 2019 because the parents failed to bring the twins to daycare on time, which prevented them from receiving remedial services including speech and occupational therapy, and because the parents provided improper supervision, including an incident when one of the twins was burned after touching a "burn barrel" while in the parents' care and the parents failed to seek medical care or report the injury to DSS. (Pet. App. 2a) DSS filed a termination of parental rights petition in April 2020, and the trial court received more than 100 stipulations of fact, among other evidence, to support its findings of fact and adjudication of all four grounds alleged to terminate parental rights. (Pet. App. 2a, 11a)

The parents appealed to the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7B-1001(a1)(1) (2019). The Court affirmed the termination of petitioner's parental rights based on her willful failure to pay a reasonable portion of cost of the twins' care. Citing North Carolina case law and the evidence that petitioner never contributed support for the twins, had the ability to work but elected not to do so, and was aware as early as 2018 of a referral to the child support agency and was in arrears on court-ordered support, the Court rejected petitioner's argument that she could not be expected to provide monetary support for the twins. (Pet. App. 4a) The Court also declined, based on the North Carolina Rules of Appellate Procedure and North Carolina precedent, to review petitioner's constitutional issues because she had failed to preserve them by presenting them to the trial court. (Pet. App. 5a) After the Supreme Court of North Carolina affirmed the termination of parental rights order, the twins were adopted.

ARGUMENT

This case is an unsuitable vehicle to resolve the constitutional issues presented by the petition for writ of certiorari. The Supreme Court of North Carolina followed the plain language of Rule 10 of the North Carolina Rules of Appellate Procedure and its own well-settled precedent when it held petitioner waived appellate review of her constitutional issues by failing to raise them in the trial court. In addition, the twins' subsequent adoptions have rendered the matter moot because the adoptions cannot be reversed under state law. Alternatively, should this Court reach the merits of petitioner's constitutional issues, petitioner has failed to make any showing of possible merit to her constitutional challenges to North Carolina's statutory ground for termination of parental rights based on the willful failure to pay a reasonable portion of the cost of care for a child in foster care. Accordingly, this Court should deny the petition for writ of certiorari.

1. This case is an unsuitable vehicle to resolve the constitutional issues presented in the petition.

A. Waiver

To reach the merits of petitioner's constitutional issues, this Court would have to upend a long-standing and well-grounded principle of North Carolina law, that an appellant must preserve an issue for appellate review by first presenting it to the trial court. This Court, however, has historically respected the authority of the states to set, "the rules of practice to be applied in [the exercise of appellate court jurisdiction], and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paulin*, 231 U.S. 583, 585, 34 S. Ct. 178, 179-79, 58 L. 2d. 381, 383 (1913). Thus, when, "there can be no [pretense] that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this

Court accepts the decision whether right or wrong." *Wolfe v. North Carolina*, 364 U.S. 177, 195, 80 S. Ct. 1482, 1492, 4 L. Ed. 2d 1650, 1662 (1960).

The North Carolina Rules of Appellate Procedure explicitly require a party to make a "timely request, objection, or motion" stating the specific grounds for the requested ruling and to obtain a ruling from the trial court to preserve an issue for appellate review. N.C.R. App. P. 10(a)(1). North Carolina's Rule 10 operates similarly to Rule 30 of the Federal Rules of Criminal Procedure. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983); *see also Harris v. United States*, 359 U.S. 19, 19, 79 S. Ct. 560, 562, 3 L. Ed. 2d 597, 598 (1959) (noting that defendant failed to raise constitutional objection to jury instructions at trial).

"The purpose of [Rule 10] is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991). "If [North Carolina's courts] did not have this rule, a party could allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work." *Id.* Axiomatically, therefore, in North Carolina "the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

Accordingly, the Supreme Court of North Carolina has consistently held that a party may waive appellate review of constitutional issues by either "express consent or by conduct inconsistent with a purpose to insist upon it." *State v. Horner*, 310 N.C. 274, 282, 311 S.E.2d 281, 287 (1984) (citing *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970)); *State v. Valentine*, 357 N.C. 512, 591 S.E.2d 846 (2003); *compare M.E. v. T.J.*, 380 N.C. 359, 869 S.E.2d 624 (2022) (holding that the trial court's written order acknowledged plaintiff had properly preserved a constitutional issue by raising it in the trial court).

North Carolina courts have not excused parents from Rule 10's requirement to preserve constitutional issues for appellate review by making a timely request, motion, or objection. *In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022) (holding that the claim of a constitutional right did not obviate a parent's obligation to preserve the issue for appellate review); *In re C.M.P.*, 254 N.C. App. 647, 652, 803 S.E.2d 857, 857 (2017) (holding that a parent was required to argue that a continuance request affected a constitutional right to preserve the issue for appeal); *Mitchell v. Mitchell*, 199 N.C. App. 392, 681 S.E.2d 520 (2009) (holding that a parent waived the argument that a custody modification violated her constitutional rights by failing to raise it in the trial court).

In Issue III of the certiorari petition, petitioner acknowledges that she did not present her constitutional issues to the trial court and instead raised them for the first time in her brief to the Supreme Court of North Carolina. Attacking the Supreme Court's reliance on its own precedent, specifically *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (holding that a criminal defendant waived appellate review of a constitutional issue by not raising it in the trial court), petitioner argues that raising her constitutional issues in the trial court would have been "futile, frivolous—and, therefore, unethical," because the trial court did not have the authority to overrule the Supreme Court of North Carolina's prior holding in *In re S.E.*, 373 N.C. 360, ___ S.E.2d ___ (2020). (Pet. 25)

Petitioner's argument, however, mischaracterizes the holding of *S.E.*, which did not address any constitutional issues. *Id.* at 366-67. Instead, the Court's analysis in *S.E.* was grounded in the plain language of N.C. Gen. Stat. § 7B-1111(a)(3) (2019) and long-standing North Carolina precedent that the lack of a "court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children." *S.E.*, 373 N.C. at 366 (citing

In re T.D.P., 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004); *In re Wright*, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983); *In re Biggers*, 50 N.C. App. 332, 339, 274 S.E.2d 236, 241 (1981)). Petitioner's argument that *S.E.* presented a new interpretation of the termination grounds in North Carolina, therefore, is similarly erroneous. For these reasons, the Supreme Court of North Carolina's opinion in *S.E.* was no obstacle to petitioner's opportunity to present, or her obligation to preserve, her constitutional issues in the trial court, and petitioner has provided no basis for this Court to overturn North Carolina's well-settled approach to preservation of issues for appellate review.

Petitioner also describes the Supreme Court of North Carolina's application of the waiver rule defined by Rule 10 and consistently applied in decades of state court decisions as a "transparent attempt to evade [her] argument that *In re S.E.* must be disavowed[,]" but she provides no support for her claim. (Pet. 21) As discussed herein, the opinion in *S.E.* did not address the constitutional issues petitioner now asks this Court to address for the first time. Far from being a pretense to avoid petitioner's particular constitutional arguments, the requirement that a party, even a parent, must preserve constitutional issues by raising them in the trial court was well-established in North Carolina law long before the Supreme Court of North Carolina decided petitioner's appeal. In fact, the Court applied the same procedural bar in another case just two months earlier in *In re J.N.*, 381 N.C. at 133, 871 S.E.2d at 497, when it rejected the parent's argument that a constitutional issue was automatically preserved for appeal. Thus, petitioner's argument that the Supreme Court of North Carolina acted faithlessly to avoid considering her constitutional issues is not supported in the law or by the record in this case.

In sum, the Supreme Court of North Carolina unanimously applied a well-understood state rule of appellate procedure to the circumstances of this case, where petitioner waived appellate review because she did not raise her constitutional issues in the trial court.

Therefore, this Court should decline petitioner's invitation to upend North Carolina's rules of practice and deny the petition for writ of certiorari.

B. Mootness

In addition to having waived the constitutional issues under state law, the matter is moot because the twins have been adopted. The twins' adoption decrees were filed on 22 September 2022 in Beaufort County District Court under the docket numbers 22 SP 128-29, after the Supreme Court of North Carolina affirmed the termination of parental rights order and before petitioner filed the instant petition for writ of certiorari in this Court.[2] Now that the twins have been adopted, there is no mechanism in North Carolina law to allow petitioner to disrupt the adoptions if this Court rules in her favor. Accordingly, the matter is moot because there is no judicial relief that can redress the alleged injury, the loss of petitioner's parental rights.

This Court has held that Article III of the United States Constitution requires that a justiciable case or controversy must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (internal quotation marks omitted). The appellant "'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)). When subsequent events render an alleged injury impossible to redress by judicial decision, the matter becomes "classically moot." *Iron Arrow*

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[2] Decrees of adoption are public documents under North Carolina law. N.C. Gen. Stat. § 48-9-102(a) (2021). The decree entered in this case is not attached hereto to protect the twins' anonymity.

Honor Society v. Heckler, 464 U.S. 67, 70-71, 104 S. Ct. 373, 375, 78 L. Ed. 2d 58, 62 (1983) (internal quotation marks omitted).

Adoptions in North Carolina are not subject to collateral attack. *Hicks v. Russell*, 256 N.C. 34, 41, 123 S.E.2d 214, 219 (1961). The North Carolina General Assembly has codified the policy behind its adoption statutes: "In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor." N.C. Gen. Stat. § 48-1-100(c) (2021).

Consistent with that policy:

> No adoption may be attacked either directly or collaterally because of any procedural or other defect by anyone who was not a party to the adoption. The failure on the part of the court or an agency to perform duties or acts within the time required by the provisions of this Chapter shall not affect the validity of any adoption proceeding.

N.C. Gen. Stat. § 48-2-607(a) (2021).

Accordingly, an adoption decree that becomes final in North Carolina extinguishes any parental rights of a biological parent. *In re Adoption of C.H.M.*, 282 N.C. App. 102, 105, 871 S.E.2d 136, 138-39 (permitting an interlocutory appeal to allow a parent to assert his rights *before* an adoption decree became final, because his rights would be lost once the decree became final), *disc. review denied*, 381 N.C. 715, 873 S.E.2d 3 (2022).

In this case, the twins were adopted in September 2022. Petitioner did not file the instant petition until November 2022, after the adoption became final. Even if this Court were to invalidate the termination of petitioner's parental rights, there is no means under North Carolina law for petitioner to disrupt the twins' adoptive placement. Petitioner's parental rights were extinguished by operation of law through the twins' subsequent

adoption. Accordingly, petitioner is without an injury that can be redressed by judicial process and the matter is moot.

To avoid mootness, petitioner may argue that she will suffer from collateral consequences resulting from the termination of her parental rights to the twins, because the termination places her parental rights to her other children at risk of termination. This Court, however, will not presume the existence of collateral consequences. *Spencer*, 523 U.S. at 14, 118 S. Ct. at 986, 140 L. Ed. 2d at 54. In addition, a presumption exists that parties will "conduct their activities within the law" and collateral consequences that would be incurred only as a result of future unlawful conduct do not avoid mootness. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1541, 200 L. Ed. 2d 792, 802 (2018) (citing *Spencer*, 523 U.S. at 15). Moreover, this Court has held that, "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." *St. Pierre v. United States*, 319 U.S. 41, 43, 63 S. Ct. 910, 911-12, 87 L. Ed. 2d 1199, 1201 (1943).

Under North Carolina law, an involuntary termination of parental rights to one child can support a subsequent termination of parental rights to another child only if "the parent lacks the ability or willingness to establish a safe home." N.C. Gen. Stat. § 7B-1111(a)(9) (2021). Given the presumption that parties will act consistently with the law in the future, however, petitioner cannot establish collateral consequences from the termination of her parental rights to the twins based on the Section 7B-1111(a)(9) ground for termination because, in addition to the prior termination, the statute also requires proof that she lacks the ability or willingness to establish a safe home. Thus, a party seeking to terminate petitioner's parental rights to another child would be required to prove not only that petitioner previously had her rights to the twins involuntarily terminated, but that she still could not establish a safe home for the other child. Additionally, any reputational harm

petitioner suffered as a result of the termination of her parental rights does not preserve the matter for review.

In sum, the twins' adoption, which occurred prior to the filing of the instant petition for writ of certiorari, rendered this matter moot because it left petitioner without a judicial remedy that can address the alleged injury. Petitioner also cannot show that she will suffer collateral consequences that would sustain her claim. Accordingly, the petition can also be denied as moot.

2. There is no merit to petitioner's constitutional claims.

In the alternative, if this Court elects to review the substance of petitioner's equal protection and due process arguments, they lack merit. Petitioner has failed to establish that the North Carolina Juvenile Code's establishment of separate grounds for termination of parental rights for parents whose children are in DSS custody and parents whose children are in the custody of another parent and are subject to a child support order violates the Equal Protection Clause. Moreover, although parental rights are a protected liberty interest under the Fourteenth Amendment, petitioner's due process rights were protected by the judicial proceeding in state court, which included notice of the grounds for termination, a judicial determination of the support for the alleged grounds, and representation by counsel and an opportunity to be heard. Accordingly, this Court should find no merit in petitioner's constitutional issues.

Contrary to petitioner's arguments, North Carolina's termination of parental rights process protected her constitutional rights, and her parental rights were ultimately terminated because there was substantial evidence, including stipulations of fact, to support four grounds to terminate her parental rights. (Pet. App. 2a) In North Carolina, termination of parental rights consists of a two-stage process: adjudication and disposition. N.C. Gen. Stat. § 7B-1109 (2021); N.C. Gen. Stat. § 7B-1110 (2021). "At the adjudicatory stage, the

petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (2019) (quoting N.C. Gen. Stat. § 7B-1109(f)). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights[.]" *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019).

The grounds for termination of parental rights in North Carolina include:

> (3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.
>
> (4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C. Gen. Stat. § 7B-1111(a) (2021) (emphasis added).

North Carolina's appellate courts review "a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.'" *E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52 (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "'Where the trial court sits as the finder of fact, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court.'" *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020) (quoting *Stancill v. Stancill*, 241 N.C. App. 529, 531, 773 S.E.2d 890, 892 (2015)).

As summarized in the Supreme Court of North Carolina's opinion, the evidence in this case supported four grounds to terminate petitioner's parental rights. The termination hearing took place in 2020, but petitioner had been ordered to comply with her OHFSA in 2018. That services agreement required petitioner to attend the Families Understanding Nurturing Program, attend individual therapy, attend family therapy when recommended by the twins' therapist, attend visits with the children, and acquire a driver's license and transportation. (Pet. App. 1a-2a) Although the trial court ordered a trial home placement in 2018, it terminated that placement in 2019 because the parents failed to bring the twins to daycare so that they could receive speech and occupational therapy, and they also failed to provide appropriate care and supervision, including when one of the twins was burned on a "burn barrel" and the parents failed to obtain medical treatment for him or disclose the injury to DSS. Petitioner also did not contribute to the cost of the twins' care, and she remained unemployed and did not wish to seek or obtain employment. (Pet. App. 2a-3a) In addition, the trial court found that petitioner was aware as early as 2018 that the case had been referred to the child support agency, and that she had been ordered to pay $50 per month in child support and was found in August 2020 to owe a $1650 arrearage. (Pet. App. 4a) Although the Supreme Court of North Carolina's opinion addressed only one of the grounds found by the trial court to support termination, its approach was consistent with settled North Carolina precedent that only one ground is necessary to support a termination order. *E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53.

A. Equal Protection

Petitioner argues that she was denied equal protection because North Carolina's Juvenile Code defines separate grounds for the termination of parental rights of parents whose children are in DSS custody who have failed to pay a reasonable portion of the cost of their care and parents whose children are in the custody of another parent who have failed

to comply with a child support order, but she has not identified a classification that offends the Equal Protection Clause. "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis." *Graham v. Richardson*, 403 U.S. 365, 371, 91 S. Ct. 1848, 1852, 29 L. Ed. 2d 534, 541 (1971). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 2d 563, 573 (1955). Thus, "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L. Ed. 2d 491, 502 (1970).

More specifically, this Court has held that the Equal Protection Clause does not require states to treat all parents identically. For example, a state law may recognize the difference in parental interests between married, or formerly married, and unmarried fathers and provide them with different rights in adoption proceedings. *Quilloin v. Walcott*, 434 U.S. 246, 256, 98 S. Ct. 549, 555, 54 L. Ed. 2d 511, 520 (1978). State laws that require unmarried fathers to support their children are not subject to heightened scrutiny, even though they are based on classifications of parents. *Rainey v. Chever*, 527 U.S. 1044, 1046, 119 S. Ct. 2411, 2412, 144 L. Ed. 2d 808 (1999).

In *Quilloin*, a father challenged the constitutionality of Georgia adoption laws that denied him the authority to veto the adoption of his child born out of wedlock. *Quilloin*, 434 U.S. at 247, 98 S. Ct. at 551, 54 L. Ed. 2d at 515. Under Georgia law, a child born in wedlock could not be adopted without the consent of both living parents, unless they had voluntarily relinquished their parental rights or had been adjudicated unfit. When a child was born out of wedlock, the father was required to legitimate the child to acquire the same parental

authority. *Id.* at 248, 98 S. Ct. at 247, 54 L. Ed. 2d at 515. In *Quilloin*, the father never tried to legitimate his child during the eleven years between the child's birth and the filing of the adoption petition, but he responded to the adoption petition by arguing that the Georgia laws that provided different authority to different parents violated the Equal Protection Clause. *Id.* at 250-51, 98 S. Ct. at 552, 54 L. Ed. 2d at 516.

This Court rejected the equal protection arguments the father advanced in *Quilloin* and held that the father's interests were "readily distinguishable from those of a separated or divorced father," which permitted the state to provide him with less authority than a married father. *Id.* at 256, 98 S. Ct. at 555, 54 L. Ed. 2d at 520. Unlike a separated or divorced father who took part in the daily "supervision, education, protection, or care" of his child, the father in *Quilloin* had never taken any responsibility for his child. The state was thus permitted to differentiate between fathers based on the "extent of [their] commitment to the welfare of the child." *Id.*

As in *Quilloin*, the classification of parents in the North Carolina Juvenile Code is based on their relationship to, and support of, their children, and it does not impact any protected class. Rather than discriminate against parents who are not subject to a child support order, the Section 7B-1111(a)(3) ground for termination addresses an entirely different situation than the Section 7B-1111(a)(4) ground. The plain language of Section 7B-1111(a)(3) applies only to the parents of a child "placed in the custody of a county department of social services," or other involuntary, out-of-home placement, meaning that the children have already been removed from parental custody because of DSS intervention. Without the ground, parents in that situation could simply elect not to provide support for their children once they are placed in DSS custody, excusing them from one of the fundamental responsibilities of caring for their children. The ground, therefore, provides departments of

social services with a path to proceed to termination in cases where parents, like petitioner in this case, have willfully failed to fulfill a basic responsibility of parenthood.

The Supreme Court of North Carolina has recognized the sound policy underlying the Section 7B-1111(a)(3) ground for termination of parental rights: "'The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children.'" *In re D.C.*, 378 N.C. 556, 561, 862 S.E.2d 614, 618 (2021) (quoting *In re S.E.*, 373 N.C. 360, 366, ___ S.E.2d ___ (2020)). Furthermore, as the Court acknowledged, the plain language of the Section 7B-1111(a)(3) ground subjects parents to termination of parental rights only if they "willfully" fail to pay a "reasonable portion" of the cost of care. The ground does not hold a parent responsible for the entire cost of her child's care regardless of her ability to pay, but it does require parents to continue to support their children according to their ability after the children have been removed from their care. The party petitioning to terminate parental rights based on this ground, therefore, must prove by clear and convincing evidence that the parent's failure to provide support was willful and that the amount of support was reasonable for the parent. The government interest in providing this ground for termination of parental rights, therefore, is to protect the best interests of children in DSS custody by requiring their parents to show a willingness to support them.

The existence of a separate ground for termination of parental rights under Section 7B-1111(a)(4) for parents whose children are in the custody of another parent and are subject to a child support order does not violate equal protection principles because the separate grounds are necessary to address the disparate circumstances. As this Court recognized in *Quilloin*, parents can be treated differently based on their involvement in the care of their children. The Section 7B-1111(a)(4) ground only applies to parents of children who are placed in the custody of another parent pursuant to a judicial decree or custody agreement and who

have been ordered to pay child support pursuant to that decree or agreement. Therefore, the ground holds parents subject to a support order accountable for violating the order, rather than for failing to fulfill their inherent duty to support their children. *See In re I.R.L.*, 263 N.C. App. 481, 486, 823 S.E.2d 902, 906 (2019) (private termination order vacated because petition did not provide the father notice his rights were subject to termination for failure to comply with a child support order). North Carolina law provides that any party who has custody of a child may bring an action for child support. N.C. Gen. Stat. § 50-13.4(a) (2021). Parents are primarily responsible for the support of their minor children. N.C. Gen. Stat. § 50-13.4 (b) (2021). In determining the monthly amount of child support a parent will be required to pay, the trial court must consider both the needs of the child and the parent's ability to pay. N.C. Gen. Stat. § 50-13.4(c) (2021). Thus, the Section 7B-1111(a)(4) ground, which is based on the violation of a court order in a private custody matter, addresses a different legal situation than the Section 7B-1111(a)(3) ground, which is based on a parent's failure to perform an inherent duty of parenthood when a child is in DSS custody. Given the difference in the legal and factual circumstances, there is a rational basis for the distinction in the Juvenile Code, and the existence of separate grounds does not violate the Equal Protection Clause.

Petitioner similarly misplaces reliance on the holding of *State v. Mason*, 268 N.C. 423, 150 S.E.2d 753 (1966), a Supreme Court of North Carolina case that addresses a criminal charge for nonsupport of a child born out of wedlock. The relevant statute creates criminal liability for a parent who "willfully neglects or who refuses to provide adequate support and maintain his or her child born out of wedlock[.]" N.C. Gen. State. § 49-2 (2021). In *Mason*, the Court held that a trial court erred because it did not instruct the jury in a nonsupport prosecution that it was required to find the defendant's failure to provide support for his illegitimate child was willful after a demand for payment. *Id.* at 425-26, 150 S.E.2d at 755.

Instead, the trial court instructed the jury they were required to make only one determination, "is the defendant, Albert Mason . . . the father of the illegitimate child of the prosecuting witness." *Id.* at 424, 150 S.E.2d at 754. Thus, the trial court's jury instructions in *Mason* effectively stripped the willfulness requirement from the statute.

Like Section 7B-1111(a)(4), Section 49-2 addresses a different situation than Section 7B-1111(a)(3). The purpose of Section 49-2, as discussed in *Mason*, is to create criminal liability for nonsupport of a child born out of wedlock. Therefore, the holding in *Mason* is grounded in criminal procedure principles, including the state's burden to prove each essential element of a crime when a defendant pleads not guilty and the trial court's duty to charge the jury on those essential elements of the offense. *Mason*, 268 at 425, 150 S.E.2d at 755. The "paramount" purpose of North Carolina's Juvenile Code, however, is to protect the best interests of children. N.C. Gen. Stat. § 7B-100(5) (2021); *In re M.R.*, 381 N.C. 838, 849, 874 S.E.2d 554, 562 (2022) (holding that the child's best interests are the "polar star" of the Juvenile Code). Thus, the Supreme Court of North Carolina's "inherent duty" interpretation of Section 7B-1111(a)(3) is rational and consistent with the purpose of the Juvenile Code and has nothing to do with determining criminal liability. As discussed herein, the state has a significant interest in requiring parents to provide reasonable support for children that have been removed from their care. Providing reasonable support both demonstrates that a parent will be willing to do so when the child is returned to her care and helps to defray some of the cost of care for the state. The purpose of the criminal nonsupport statute is distinct from the statutory grounds for termination of parental rights, and the difference in the way the statutes deal with a parent's failure to support their children is rational.

In sum, the existence of a ground to terminate parental rights due to a parent's willful failure to support their children does not violate the parent's due process rights. Petitioner

has failed to identify a suspect classification based on her inherent duty to support her children, and this argument has no merit.

B. Due Process

Similarly, petitioner has failed to demonstrate that the Juvenile Code and the trial court's determination that grounds existed to terminate her parental rights violated her due process rights. This Court has recognized that personal choice in "matters of marriage and family" are liberties protected by the Fourteenth Amendment's Due Process Clause. *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S. Ct. 1932, 1935, 52 L. Ed. 2d 531, 537 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982). This Court, however, has also recognized that the "mere existence of a biological link does not merit equivalent constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 2993, 77 L. Ed. 2d 614 (1983); *see also Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994) (holding that findings that parents are unfit or have neglected the welfare of their children support state intervention).

Due process is a concept that defies an inflexible definition and is dependent upon specific circumstances. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230, 1236 (1961). Therefore, this Court has defined three factors to evaluate whether a particular process satisfies constitutional due process: (1) the private interest affected; (2) the government's interest; and (3) the risk of an erroneous deprivation of the private interest and the procedural safeguards in place to prevent error. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976).

This Court previously reviewed the due process afforded to parents by North Carolina's child welfare system, specifically the process to terminate parental rights, in *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). In

Lassiter, an incarcerated mother represented herself at a termination of parental rights hearing after the trial court determined that she had "ample opportunity" to obtain counsel. The mother did not claim that she was indigent. *Id.* at 21-22, 101 S. Ct. at 2157, 68 L. Ed. 2d at 646. After the hearing, during which the mother cross-examined witnesses, testified, and made arguments to the trial court, the trial court terminated her parental rights. The mother argued on appeal that she was denied due process by being required to proceed without counsel. This Court noted that mother was served with the termination petition and provided with notice that a termination hearing would be held. *Id.* at 21, 101 S. Ct. at 2157, 68 L. Ed. 2d at 646.

Employing the first two *Mathews* factors, this Court noted that parental rights were "an important interest" that "'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Id.* at 27, 101 S. Ct. at 2159-60, 68 L. Ed. 2d at 650. This Court also observed that the state had "an urgent interest in the welfare of a child," and that it shared a parent's interest in a just outcome in termination actions. *Id.* at 27-28, 101 S. Ct. at 2160, 68 L. Ed. 2d at 650.

After engaging in that analysis of the first two *Mathews* factors, this Court examined the capacity of the judicial process to achieve accurate decisions in termination of parental rights cases in North Carolina. This Court noted which parties could file a termination petition, that the termination petition must allege facts sufficient to describe the grounds for termination, that the parent must be notified she has 30 days to file a written answer, that the trial court must appoint a guardian ad litem for the child if the parent denies a material allegation in the petition, that the court hears the matter without a jury and must make findings based on clear, cogent, and convincing evidence, and that any party may appeal within a prescribed timeframe. *Id.* at 28-29, 101 S. Ct. at 2160, 68 L. Ed. 2d at 650-51.

Ultimately, this Court held that due process did not require appointment of counsel for the mother in *Lassiter*. Instead, in view of all the circumstances, including the parent's interests, the state's interests, and the process in place to ensure accurate results, the process defined by North Carolina law met the "standards necessary to ensure that judicial proceedings are fundamentally fair." *Id.* at 33, 101 S. Ct. at 2163, 68 L. Ed. 2d at 653-54.

Although this termination of parental rights case was heard many years after *Lassiter*, North Carolina's Juvenile Code still required that petitioner receive the same due process approved of by this Court in *Lassiter*, including a termination petition that provided notice of the facts supporting the alleged grounds for termination, an opportunity to respond to the petition, a judicial process to prove or disprove the allegations in the petition by clear and convincing evidence, appointment of a guardian ad litem to represent the children when an allegation was denied, and a right to appeal any adverse outcome. N.C. Gen. Stat. §§ 7B-1101, 7B-1104, 7B-1106.1, 7B-1108, 7B-1109, 7B-1001 (2021). Unlike the mother in *Lassiter*, however, petitioner also had a statutory right to appointed counsel and was represented by counsel throughout the case. N.C. Gen. Stat. § 7B-1101.1 (2021). Thus, the judicial process that petitioner received in this case exceeded the constitutional due process requirements this Court previously approved for a termination of parental rights proceeding.

Petitioner argues she was denied due process because she was not notified prior to the filing of the termination petition that her rights could be terminated if she willfully failed to provide reasonable support for the twins. On this point, petitioner argues for something beyond due process of law. Following petitioner's logic would create an open-ended constitutional requirement that parents are entitled to pre-termination proceeding notice of all possible inappropriate parenting practices that could ultimately support a termination of parental rights, or those actions could not be found to be willful. It is well-settled, however, that "ignorance of the law is no defense" in civil or criminal cases and ignorance cannot

mitigate the state of mind required for action that violates the law. *Barlow v. United States*, 32 U.S. 404, 411, 8 L. Ed. 728, 731 (1833); *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563, 91 S. Ct. 1697, 1701, 29 L. Ed. 2d 178, 182 (1971); *Jerman v. Carlisle McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 572, 130 S. Ct. 1605, 1611, 176 L. Ed. 2d 519, 528 (2010). As the Supreme Court of North Carolina held, providing basic support for children, when within a parent's ability to pay, is an "inherent duty" of parenting. *S.E.*, 373 N.C. at 366, 838 S.E.2d at 333. Like providing children with food or shelter, the need to support a child is a parental obligation that does not require special notice beyond the allegations in a termination of parental rights petition.

In conclusion, the trial court's termination of petitioner's parental rights did not violate her constitutional rights. Petitioner's rights were terminated for multiple grounds, she has not identified an equal protection issue, and she was afforded substantial due process in North Carolina's courts to contest the grounds for termination. Accordingly, should this Court reach the merits of petitioner's constitutional arguments, the petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

MATTHEW D. WUNSCHE
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MAY 2023

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original BRIEF IN OPPOSITION FOR THE RESPONDENT NORTH CAROLINA GUARDIAN AD LITEM PROGRAM has been filed by mail and electronically, through first-class mail and the United States Supreme Court's electronic filing website, respectively.

I further hereby certify that a copy of the above and foregoing BRIEF IN OPPOSITION FOR THE RESPONDENT NORTH CAROLINA GUARDIAN AD LITEM PROGRAM has been duly served by first-class mail and by electronic mail, upon:

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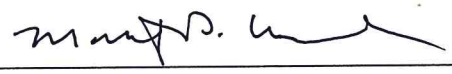
This the 4th day of May, 2023.



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