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
NORTH CAROLINA SUPREME COURT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The parties do not disagree: Under the "inherent duty" interpretation of N.C. Gen. Stat. § 7B-1111(a)(3) (2022) described in *In re S.E.*, 373 N.C. 360, 366, 838 S.E.2d 328, 333 (2020), North Carolina's child welfare agencies are empowered to terminate a parent's rights to her children if she fails to do something that no one ever actually asked her to do during the relevant six-month period: pay some unspecified sum, via some unspecified means, to some unspecified government recipient.

Despite Respondents' mischaracterization of it, the issue here is not whether N.C. Gen. Stat. § 7B-1111(a)(3) is unconstitutional as written. Rather, it is whether the North Carolina Supreme Court's *interpretation* of that statute is unconstitutional, given that this interpretation—and it alone—transforms nonpayment into a strict liability termination ground for the small subset of North Carolina parents who are involved in child welfare cases.

Both Respondents—the Beaufort County Department of Social Services ("BCDSS") and the North Carolina Guardian ad Litem Program ("NCGALP")—seek to shield the "inherent duty" interpretation from scrutiny. Their arguments only serve to reveal why this Court's involvement is needed.

CORRECTED STATEMENT OF THE CASE

NCGALP asserts that "[t]he trial court . . . terminated" the twins' trial home placement with their parents. NCGALP Resp. 3, 13. That is false. Pet. App. 61a–64a, 73a–75a.

ARGUMENT

I. The "inherent duty" interpretation of the termination statute is indefensible under the law.

A. *In re S.E.*—just like Respondents' attempted defense of it—is based on outdated cases that interpreted a prior, strict liability version of the termination statute.

Respondents try to defend *In re S.E.* by claiming that its "inherent duty" interpretation is nothing new. BCDSS Resp. 4–5; NCGALP Resp. 6–7. Respondents miss their target so badly that they actually hit Petitioner's, because their arguments only reveal yet more reasons why *In re S.E.* is indefensible under the law.

Respondents claim that *In re S.E.* only reiterates the so-called "long-standing" precedent described in three North Carolina Court of Appeals decisions: *In re Biggers*, 50 N.C. App. 332, 274 S.E.2d 236 (1981); *In re Wright*, 64 N.C. App. 135, 306 S.E.2d 825 (1983); and *In re T.D.P.*, 164 N.C. App. 287, 595 S.E.2d 735 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). Notably, these same three cases are the *only* authority cited within *In re S.E.*'s "inherent duty" analysis and holding. *In re S.E.*, 373 N.C. at 366, 838 S.E.2d at 333. For purposes of interpreting N.C. Gen. Stat. § 7B-1111(a)(3), however, these three cases are useless relics.

Just like Respondents do here, the analysis in *In re S.E.* ignored the fact that both *In re Biggers* (1981) and *In re Wright* (1983) concerned a prior version of the relevant nonpayment termination provision, one that did *not* include any willfulness element for parents in child welfare cases. The legislature did not add

the willfulness element until 1985.[1] This amendment transformed what was originally a strict liability provision into one that now requires proof of the parent's mental state or intent. *See State v. Bryant*, 359 N.C. 554, 562–63, 614 S.E.2d 479, 484 (2005) (explaining how legislature transformed statute into strict liability provision); *Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 15, 220 S.E.2d 536, 542 (1975) (discussing lack of willfulness element). It also brought this provision in line with the nonpayment termination provision applicable in private cases (which, since its inception, has always included a willfulness element, *see* N.C. Gen. Stat. § 7B-1111(a)(4); 1977 N.C. Sess. Laws 879, § 8), thereby placing all North Carolina parents on equal "willfulness" footing in this context.

Because they were decided under the prior, strict liability version of N.C. Gen. Stat. § 7B-1111(a)(3), neither *In re Biggers* nor *In re Wright* offers any relevant guidance here. By relying exclusively on *In re Wright*, the cited analysis in *In re T.D.P.* likewise failed to consider the significance of the 1985 amendment, thereby rendering it irrelevant, too. *In re T.D.P.*, 164 N.C. App. at 289, 595 S.E.2d at 737.

B. *In re S.E.* effectively repeals a 1985 legislative amendment.

By relying exclusively on cases that ignore the legislature's 1985 amendment, the analysis in *In re S.E.* runs afoul of interpretive doctrines requiring consideration for both a statute's plain language and legislative amendments. *See,*

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[1] The original statute, enacted in 1977, was quoted in full in *In re Biggers*, 50 N.C. App. at 338–39, 274 S.E.2d at 240; *see* 1977 N.C. Sess. Laws 879, § 8. The willfulness element became effective October 1, 1985. 1985 N.C. Sess. Laws 758, § 2. *See also* 1997 N.C. Sess. Laws 202, § 6 (recodifying Juvenile Code in Chapter 7B of North Carolina General Statutes); 2000 N.C. Sess. Laws 183, § 11 (recodifying termination grounds statute at N.C. Gen. Stat. § 7B-1111).

e.g., In re B.L.H., 376 N.C. 118, 122, 852 S.E.2d 91, 94–95 (2020); *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 240, 328 S.E.2d 274, 280 (1985). In ignoring these doctrines, the Supreme Court of North Carolina has effectively transformed N.C. Gen. Stat. § 7B-1111(a)(3) back into the strict liability provision that it once was, decades ago.

In this way, the Supreme Court of North Carolina has, in a "forbidden" act of "judicial legislation," *Rice v. Denny Roll & Panel Co.*, 199 N.C. 154, 154 S.E. 69, 70 (1930), effectively repealed the legislature's 1985 amendment and improperly imposed its own public policy vision on the small subset of North Carolina parents involved in child welfare cases. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (acknowledging legislature "is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws").

C. There is no coherent way to reconcile the "inherent duty" interpretation with *State v. Mason*.

For properly interpreting N.C. Gen. Stat. § 7B-1111(a)(3), neither Respondent can explain away the significance of *State v. Mason*'s straightforward proposition: In order to be willful, a parent's nonpayment must be preceded by some type of a demand for payment; otherwise, how would the parent know that the would-be payee expects payment? *See State v. Mason*, 268 N.C. 423, 425, 150 S.E.2d 753, 755 (1966). The statute with which BCDSS tries to draw a distinction, N.C. Gen. Stat. § 14-36.1, is irrelevant because, unlike the statute in *Mason*, it has no willfulness element. BCDSS Resp. 12. NCGALP actually echoes Petitioner's

argument about *Mason*: courts should not "effectively strip[]" a statute of its willfulness element. NCGALP Resp. 18. Yet that is exactly what *In re S.E.* does.

D. No law obligates parents to pay an unrequested, unspecified sum of money to some unspecified government recipient.

Respondents wrongly believe that, even absent any preceding demand for payment, N.C. Gen. Stat. § 7B-1111(a)(3) nonetheless obligates parents like Petitioner to pay some unspecified sum, via some unspecified means, to some unspecified government recipient. BCDSS Resp. 12; NCGALP Resp. 15–16. Like the Supreme Court of North Carolina, NCGALP believes parents like Petitioner are improperly claiming "ignorance" of some such legal obligation. NCGALP Resp. 21–22. *See In re S.E.*, 373 N.C. at 366, 838 S.E.2d at 333 (accusing mother of trying to "hide behind a cloak of ignorance"). The fatal flaw with these arguments is that no such legal obligation exists, because no statute creates this sort of strict liability duty.[2] Accordingly, for Petitioner to explain the myriad reasons why *In re S.E.* is an affront to the rule of law is for Petitioner to explain that it is the Supreme Court of North Carolina—not she—who has been acting in ignorance.

NCGALP's own ignorance of the law is further revealed by its assertion that, but for N.C. Gen. Stat. § 7B-1111(a)(3), parents in child welfare cases "could simply elect not to provide support for their children once they are placed in DSS custody,

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[2] As BCDSS notes, N.C. Gen. Stat. § 110-135 "creates a debt, in the amount of public assistance paid." BCDSS Resp. 13. However, a child support agency still must establish a child support order to collect that debt, which is precisely what happened here: the Beaufort County child support agency filed an action for support against Petitioner, but not until thirty-eight days *after* BCDSS had initiated its termination action. *See id.*; *id.* at §§ 110-130.1(c), 110-138. Pet. 7–9, 17.

excusing them from one of the fundamental responsibilities of caring for their children." NCGALP Resp. 15. That is false. NCGALP ignores the plain language of N.C. Gen. Stat. § 7B-904(d), which expressly authorizes the trial court in a child welfare case to order a parent to make support payments "if the court finds that the parent is able to do so." (NCGALP's ignorance here is difficult to comprehend, given that Petitioner has repeatedly highlighted this particular statute. Pet. 6–8, 17; Pet. App. 87a, 89a, 135a.)

In light of N.C. Gen. Stat. § 7B-904(d), if either BCDSS or the juveniles' guardian ad litem genuinely believed that parental payments were needed in this case for some reason (*e.g.*, "to defray some of the costs of care for the state," NCGALP Resp. 18), then the question begs itself: Instead of "referring" the matter to the Beaufort County child support agency (which, for years, did nothing, *see* Pet. 7–9), why didn't BCDSS or the guardian ad litem simply utilize N.C. Gen. Stat. § 7B-904(d) in this case and ask the trial court to require Petitioner—on top of everything else she was required to do—to make payments consistent with her ability to pay? In light of their arguments to this Court, Respondents' answer would seem to be:

> *No one should have to actually use that law because a "fit" parent should be able to just figure out for herself that she needs to pay some unspecified sum, via some unspecified means, to some unspecified government recipient—and a parent's failure to figure that out means she is an "unfit" parent who deserves to lose her children forever.*

II. Petitioner's constitutional claims are meritorious.

A. Rather than identify any relevant state interest served by "inherent duty" terminations, Respondents try to muddy the waters and obscure the true issue.

Respondents mischaracterize Petitioner's equal protection challenge as concerning the language of the termination statute itself, rather than the North Carolina Supreme Court's interpretation of it. BCDSS Resp. 10; NCGALP Resp. 13. Once again, to be clear: the "inherent duty" interpretation is the *only* reason why nonpayment is now a strict liability termination ground for only the small subset of North Carolina parents involved in child welfare cases. Because this judicially created "classification here touches on the fundamental right of [parents to *be* parents, *see, e.g., Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000)], its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S. Ct. 1322, 1333, 22 L. Ed. 2d 600 (1969), *disavowed on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

Neither Respondent has even attempted to articulate any such "compelling state interest." Instead, they try to muddy the waters by offering up irrelevant thoughts like: "it is reasonable for the State to require parents to support their children in DSS custody regardless of the presence of a child support order" and "the state has a significant interest in requiring parents to provide reasonable support for children that have been removed from their care." BCDSS Resp. 13; NCGALP Resp. 18. Such statements only misrepresent the true issue here, which

does not concern the government's ability to "require" payment (*e.g.*, via court order, *see* N.C. Gen. Stat. § 7B-904(d)), or whether an order for payment exists.

Respondents' focus on child support orders also leads NCGALP to misleadingly assert that nonpayment terminations in private cases are "based on the violation of a court order in a private custody matter[.]" NCGALP Resp. 17. That is only a half-truth. Under N.C. Gen. Stat. § 7B-1111(a)(4), violation of an "agreement" for payment also suffices.

Despite NCGALP's extensive reliance on it, the equal protection analysis in *Quilloin v. Walcott* offers no guidance here. NCGALP Resp. 14–15. Citing *Quilloin*, NCGALP says "this Court has held that the Equal Protection Clause does not require states to treat all parents identically." *Id.* at 14. However, *Quilloin* concerned a distinction that is irrelevant here, *i.e.*, that between "a separated or divorced father" and a biological father who had never legitimated or formed any parental relationship with the child. *Quilloin v. Walcott*, 434 U.S. 246, 256, 98 S. Ct. 549, 555, 54 L.Ed.2d 511 (1978).

Respondents' refusal to confront the true issue here—coupled with their efforts to misrepresent and obscure it—only serve to further reveal that, regardless of the level of scrutiny, there is no justification for what *In re S.E.* has unleashed on North Carolina families like Petitioner's.

B. In an "inherent duty" termination, the parent's fate is sealed before the termination court proceedings ever begin.

Respondents argue that because the termination court proceedings were conducted properly, Petitioner's procedural due process claim lacks merit. BCDSS

Resp. 13–14; NCGALP Resp. 19–22. Respondents ignore the nature of that claim, which does not concern what took place *after* the termination pleading was filed. Rather, it concerns the fact that, exclusively because of the "inherent duty" interpretation, child welfare agencies like BCDSS are able to terminate a parent's rights for nonpayment pursuant to the following blueprint: First, give the parent a case plan full of tasks and goals to complete in order to get her children back—but do *not* tell the parent to pay anything to anyone. Then wait at least six months. Then, if, in addition to everything else she was told and ordered to do, the parent still hasn't figured out for herself that she needs to pay some unspecified sum, via some unspecified means, to some unspecified government recipient, file the termination pleading. And that's it: the trap has been sprung! At that point, there is nothing the parent can do to avoid termination under the "inherent duty" interpretation of N.C. Gen. Stat. § 7B-1111(a)(3). Pet. 15–17. Thus, no matter how much procedural due process is subsequently afforded *after* the termination pleading is filed, it makes no practical difference, because the irreversible damage has already been done. Accordingly, proceedings after that point are not "meaningful." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972) (quotation omitted).

C. "Inherent duty" terminations shock the conscience because they are in no way reflective of parental fitness.

This Court has "little doubt that the Due Process Clause would be offended" by a termination of parental rights that is not based on parental unfitness. *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 555. Respondents offer no coherent argument that

strict liability "inherent duty" terminations are in any way reflective of parental unfitness, such that they would not shock the conscience to a degree that violates the substantive due process rights of parents like Petitioner.

In arguing that the "inherent duty" blueprint does not shock the conscience to an unconstitutional degree, BCDSS does not dispute that Petitioner's case plan called for no payments. However, BCDSS nonetheless says about Petitioner's case: "Payment of child support or the lack of payment was not an issue regarding reunification and was irrelevant to its existence as a ground for termination of parental rights." BCDSS Resp. 15. One struggles to make any sense of this assertion, given that "the lack of payment" was, by the end of her direct appeal, the *only* reason for which BCDSS successfully terminated Petitioner's parental rights. Pet. 11.

BCDSS also points to certain findings of fact that, according to BCDSS, suggest that Petitioner herself could have taken steps to somehow help the Beaufort County child support agency expedite its years-long, dragged-out effort to establish a child support order. BCDSS Resp. 13–14; Pet. 7–9. Petitioner challenged those findings on appeal, because nothing in the record showed that there actually were any such steps Petitioner could have hypothetically taken. For unknown reasons, the Supreme Court of North Carolina refused to even acknowledge, let alone adjudicate, that challenge. Pet. App. 149a–151a. Regardless, proving a parent's knowledge that the government *is in the process* of establishing a child support order (so that it may then collect payments, *see* Pet. 17) is not the functional

equivalent of *actually asking* for payment during the relevant six-month period. Thus, such knowledge is irrelevant to Petitioner's arguments.

NCGALP's obfuscation tactics continue with its due process arguments. Contrary to what NCGALP would have this Court believe, Petitioner has never argued that "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." NCGALP Resp. 21. Rather, her due process argument is rooted in the fact that no one ever asked her to pay anything prior to that point.

NCGALP saves its most jaw-dropping assertion for last: "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." NCGALP Resp. 22. In other words, in NCGALP's worldview, a mother like Petitioner—that is, a mother who forms a "good relationship" with her child's foster parents, and who provides clothing, diapers, and gifts for her child during his foster care stay, but who nonetheless fails to make a total of $50.00 in governmental reimbursement payments during a six-month period in which no one gave her a bill or asked her to pay a single cent—is no different, and no less "unfit," than a parent who *deprives her child of food and shelter*. Pet. 4, 7; Pet. App. 64a, 86a. NCGALP cannot be taken seriously.

III. This matter is not moot.

This matter is not moot because Petitioner has suffered an "actual injury" (*i.e.*, the involuntary termination of her parental rights) that is "likely to be

redressed by a favorable judicial decision" (*e.g.*, via the setting aside of that involuntary termination).[3] *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983, 140 L. Ed. 2d 43 (1998) (quotation omitted).

Additionally, this matter is not moot because of two collateral consequences that result from involuntary terminations in North Carolina. *See, e.g., Turner v. Rogers*, 564 U.S. 431, 439, 131 S. Ct. 2507, 2514, 180 L. Ed. 2d 452 (2011). First, a prior involuntary termination is—on its own—a sufficient basis for eliminating "reasonable efforts for reunification" in a later child welfare case. N.C. Gen. Stat. § 7B-901(c)(2). Second, under N.C. Gen. Stat. § 7B-1111(a)(9), a prior involuntary termination conclusively establishes one of two elements required to terminate the same parent's rights as to her other children, the other being: "the parent lacks the ability or willingness to establish a safe home." *Id.*

NCGALP notes that purely speculative consequences in the criminal context are insufficient to avoid mootness. NCGALP Resp. 10. No such speculative consequences are involved here. Consider that BCDSS has a long history of involvement with Petitioner's family, which includes other children beyond the twins in this case. NCGALP Resp. 2. According to BCDSS's subjective standard, conduct as innocuous as a mother posting videos of quirky, G-rated TikTok dances—*i.e.*, dances of the type seen in Applebee's commercials—is one of many

[3] The involuntary nature of terminations under N.C. Gen. Stat. § 7B-1111(a) distinguishes them from other ways in which the parent-child bond may be legally severed, *e.g.*, upon adoption, following the parent's voluntarily relinquishment of his parental rights. N.C. Gen. Stat. §§ 48-1-106(c), 48-3-701.

suitable reasons for terminating her parental rights. Pet App. 84a. The fact that BCDSS uses the "inherent duty" blueprint also shows that BCDSS will use any available method to achieve its desired ends—no matter how untethered to parental fitness, or how contrary to its so-called "family-centered" mission, those methods may be. Pet. 15–16. Moreover, such efforts by BCDSS come with the full-throated support of NCGALP, which, if it is acting in accordance with its statutory duty, believes that such tactics somehow "promote and protect the best interests" of the children in cases like this. *See* N.C. Gen. Stat. § 7B-601(a). With government agencies like these lurking over her shoulder, the collateral consequences resulting from the involuntary termination of her parental rights in this civil matter are, for Petitioner and her family, far from speculative.

With no record evidence, both Respondents also assert that Petitioner's twin sons have been adopted in another case. BCDSS Resp. 8; NCGALP Resp. 8. Even if true, that fact would be irrelevant, because the actual injury would still be the involuntary termination from this case. Regardless, no adoption is necessarily permanent. Adoptions can be collaterally attacked, *see Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010) (setting aside adoption after considering same statutes that Respondents cite here, N.C. Gen. Stat. §§ 48-1-106(c) & 48-2-607(a)), or dissolved by other voluntarily and involuntarily means. *See* N.C. Gen. Stat. §§ 7B-1111(a), 48-1-102, 48-3-307.

IV. The federal question was sufficiently and properly raised.

In arguing that a federal question was not raised below, Respondents repeatedly try to cast Petitioner's arguments as the type of "constitutional issue"

that should be subject to the common law rule of preservation described in cases like *State v. Garcell*, 363 N.C. 10, 44, 678 S.E.2d 618, 639 (2009). BCDSS Resp. 17–18; NCGALP Resp. 4–7. This is the same common law rule on which the Supreme Court of North Carolina based its decision to avoid Petitioner's arguments regarding *In re S.E.*[4] Pet. 23–24. For generations, though, that common law rule has been recognized as being only "ordinarily" applicable. *See, e.g., id.*; *State v. Grundler*, 251 N.C. 177, 187, 111 S.E.2d 1, 8 (1959). Petitioner's case is no "ordinary" scenario in which that common law rule could possibly apply, because it is undisputed that the underlying issue here—*i.e.*, whether the Supreme Court of North Carolina must overrule its own precedent—is one that trial courts are powerless to adjudicate.

Tellingly, Respondents are unable to identify any case in which this common law rule was applied in such an extraordinary scenario. Rather, every case they cite, *e.g., In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022), involved a case-specific "constitutional issue" that the trial court could have fully adjudicated, had it been asked to do so. Petitioner has raised no such "constitutional issue." Pet. 9–10. Tellingly, Respondents are also unable to identify any theoretical purpose that could possibly be served by requiring Petitioner to raise her issue before a powerless trial court. Accordingly, Respondents are advocating for an exercise in futility.

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[4] NCGALP also discusses Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, but that rule played no role in the decision below. NCGALP Resp. 5. Regardless, in relevant terms, that rule and the common law rule are the same.

V. A writ of certiorari is needed to protect the constitutional rights of parents like Petitioner.

Respondents have shown that they see no problem with using the "inherent duty" blueprint to pursue strict liability terminations against parents in child welfare cases. The Supreme Court of North Carolina has shown that it has no interest in considering the legislature's clearly expressed intent on this matter. Respondents' arguments here reveal that there is no lawful justification for such terminations. Thus, for both Petitioner and other vulnerable families across the state, this Honorable Court is the last remaining hope for ending this unconscionable and unconstitutional practice in North Carolina.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: 18 May 2023