No. _____

IN THE

Supreme Court of the United States

COURTNEY JOHNSON,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of North Carolina's interpretation of a termination of parental rights statute, N.C. Gen. Stat. § 7B-1111(a)(3), deprives parents in child welfare cases of their rights to due process and equal protection of the law by permitting terminations of parental rights for failing to pay the government money absent any preceding demand for payment.

PARTIES TO THE PROCEEDING

Petitioner on review here, Courtney Johnson, was the respondent-appellant-mother below.

Respondents on review here are: Beaufort County Department of Social Services (petitioner-appellee below); the Guardian ad Litem for the juveniles (appellee below); the North Carolina Guardian ad Litem Program (appellate amicus curiae below); and Jeremy Johnson (respondent-appellant-father below).

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OPINIONS BELOW

The district court of Beaufort County, North Carolina terminated the parental rights of the Petitioner, Mrs. Courtney Johnson, as to her five-year-old twin sons, J.C.J. and J.R.J., by virtue of a termination adjudication order and a termination disposition order, entered in case numbers 17 JT 113 and 17 JT 114. Those orders are not reported. Pet. App. 11a. The Supreme Court of North Carolina affirmed the termination of Mrs. Johnson's parental rights in a published opinion. *In re J.C.J. & J.R.J.*, 2022-NCSC-86, 381 N.C. 783, 874 S.E.2d 888. Pet. App. 1a. The Supreme Court of North Carolina's order denying Mrs. Johnson's petition for rehearing is not reported. Pet. App. 10a.

JURISDICTIONAL STATEMENT

The Supreme Court of North Carolina affirmed the termination of Mrs. Johnson's parental rights on 15 July 2022. Pet. App. 1a. On 19 August 2022, Mrs. Johnson filed a petition for rehearing, which was denied by written order entered on 23 August 2022. Pet. App. 10a, 124a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a), in that the validity of the Supreme Court of North Carolina's interpretation of N.C. Gen. Stat. § 7B-1111(a)(3) is drawn into question on the grounds of that interpretation being repugnant to the United States Constitution, in that it has violated Mrs. Johnson's right to due process and equal protection under the Fourteenth Amendment of the United States Constitution and thereby infringed on her fundamental, constitutionally protected parental rights. *See Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551 (1972) ("The integrity of the family unit has

found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment[.]") (citations omitted).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . .
>
> (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).

STATEMENT OF THE CASE

I. Overview of terminations of parental rights in North Carolina based on the willful nonpayment of money

A. Statutory framework

In North Carolina, parental rights may be terminated based on any one of eleven distinct statutory grounds, *e.g.*, abuse, illegitimacy, or abandonment. N.C. Gen. Stat. § 7B-1111(a)(1)—(11). Two of those statutory grounds allow for termination based entirely on the parent's willful failure to pay money: in cases such as this one, in which the juvenile is in the government's custody in foster care, N.C. Gen. Stat. § 7B-1111(a)(3) applies; in private, inter-parent actions, N.C. Gen. Stat. § 7B-1111(a)(4) applies.

B. The "inherent duty to support" interpretation of N.C. Gen. Stat. § 7B-1111(a)(3)

In *In re S.E.*, 373 N.C. 360, 838 S.E.2d 328 (2020), the Supreme Court of North Carolina began interpreting N.C. Gen. Stat. § 7B-1111(a)(3) in a new way. In *In re S.E.*, a social services agency successfully terminated the mother's parental rights on multiple grounds, including the willful nonpayment ground of N.C. Gen. Stat. § 7B-1111(a)(3). *In re S.E.*, 373 N.C. at 363, 838 S.E.2d at 331. The Supreme Court of North Carolina affirmed that termination order based only on the willful nonpayment ground and, consistent with well-established case law, declined to review all the other grounds. *Id.* at 367, 838 S.E.2d at 333. The mother conceded she had paid nothing during the relevant six-month "continuous period" (*i.e.*, the six months preceding the initiation of the termination action). *Id.* at 365, 838 S.E.2d at 332. Nonetheless, the mother argued that her nonpayment could not have possibly

been willful because "she did not know she had to pay a reasonable portion of the cost of care for her children or how to do so[.]" *Id.* at 366, 838 S.E.2d at 333. Rejecting that argument, the Supreme Court of North Carolina pronounced for the first time that parents who claim that they failed to pay the government because no one ever actually *asked* them to pay the government—let alone told them *how* to pay the government—are trying to "hide behind a cloak of ignorance" and thereby avoid their "inherent duty to support their children":

> 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. . . . Given her inherent duty to support her children, respondent cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful.

Id. at 366, 838 S.E.2d at 333. *Contra State v. Mason*, 268 N.C. 423, 425, 150 S.E.2d 753, 755 (1966) (holding that parent may only be liable for misdemeanor based on willful nonpayment of support if a preceding "demand" for payment had been made).

A year later, the Supreme Court of North Carolina reaffirmed that ruling. In *In re D.C.*, 2021-NCSC-104, 378 N.C. 556, 682 S.E.2d 614, the parents argued that the "inherent duty to support" interpretation of N.C. Gen. Stat. § 7B-1111(a)(3) from *In re S.E.* was fundamentally flawed, in that it effectively erased the explicitly stated willfulness element from the statute and transformed the statute into a strict liability statute, thereby leading to unconstitutional results:

> Respondents contend that we should disavow *In re S.E.* Respondents claim that the interpretation of N.C.G.S. § 7B-1111(a)(3) as set forth in *In re S.E.*, when compared to termination for lack of support pursuant to N.C.G.S. § 7B-1111(a)(4), "results in an unconstitutional dichotomy, under

> which similarly situated parents are treated differently depending on who the child's custodian is." Respondents argue that "the General Assembly could not have possibly intended to hold only some parents to a strict liability standard, for doing so would result in an unconstitutional outcome in which those parents are deprived of the equal protection of the law."

Id. at ¶ 18, 378 N.C. at 561–62, 682 S.E.2d at 618.

Without offering any explanation for why (if at all) it believed the parents' challenge to *In re S.E.* was flawed or lacked merit, the Supreme Court of North Carolina rejected those challenges and reaffirmed *In re S.E.* by declaring: "Adhering to the principles of *stare decisis*, we decline to change our interpretation of N.C.G.S. § 7B-1111(a)(3)." *Id.* at ¶ 19, 378 N.C. at 562, 682 S.E.2d at 618. Consistent with its belief that parents have an "inherent duty to support," the Supreme Court of North Carolina proceeded to affirm the termination of parental rights without any consideration for the statute's willfulness element:

> The trial court's unchallenged findings of fact demonstrate that respondents had the ability to pay a reasonable portion of David's cost of care but failed to pay any amount to DSS or the foster parents toward cost of care. Accordingly, we conclude that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(3) to terminate respondents' parental rights.

Id. at ¶ 20, 378 N.C. at 563, 682 S.E.2d at 618. Instead of determining whether any case-specific facts or evidence showed that the parents had willfully failed to pay, the Supreme Court of North Carolina merely presumed that the parents' nonpayment was willful based on its judicial fiat that, in this context, parents have an "inherent duty" to pay—regardless of whether there was any preceding demand for payment.

II. The trial court proceedings

On 23 October 2017, Beaufort County Department of Social Services ("Beaufort County DSS") filed juvenile petitions in case numbers 17 JA 113 and 17 JA 114[1], alleging that Mrs. Johnson's twin sons (who were two years old at the time) were neglected juveniles, as defined by N.C. Gen. Stat. § 7B-101(15). *See generally* N.C. Gen. Stat. §§ 7B-400 to 7B-408 (governing the filing of juvenile neglect petitions). That same day, the trial court granted Beaufort County DSS nonsecure custody of the juveniles. *See* N.C. Gen. Stat. § 7B-503 (describing criteria for nonsecure custody). Also on that same day, Beaufort County DSS served the juvenile petitions on Mrs. Johnson, along with a summons. In a section titled "IMPORTANT NOTICES," that summons stated:

> If the Court determines at the hearing on the petition that the allegations of abuse, neglect or dependency are true, the Court will conduct a dispositional hearing to consider the needs of the juvenile and enter an order designed to meet those needs and the objectives of the State. The dispositional order, or a subsequent order, may:
>
> . . .
>
> 2. order the parent to pay child support if custody of the juvenile is placed with someone other than the parent[.]

Pet. App. 159a.

Consistent with that "IMPORTANT NOTICE," the trial court in child welfare cases has the express statutory authority to order "the parent to pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the

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[1] In North Carolina, child welfare cases involving allegations of neglect, abuse, or dependency are assigned "JA" case numbers. Termination of parental rights cases are assigned "JT" case numbers.

[dispositional] order is entered," but only "if the court finds that the parent is able to do so." N.C. Gen. Stat. § 7B-904(d).

However, the trial court in these cases never ordered Mrs. Johnson to pay the government any money for the support of her twin sons. In a 12 April 2018 order, the trial court ordered Mrs. Johnson to "continue to participate in the activities in her Out of Home Family Services Agreement" (*i.e.*, her case plan), which included requirements such as: "Mother shall continue to attend the Families Understanding Nurturing Program." Pet. App. 172a. However, her case plan did not require her to pay the government any money. Nonetheless, while they were in foster care, Mrs. Johnson provided clothing, diapers, and gifts for her sons. *In re J.C.J. & J.R.J.*, at ¶ 15, 381 N.C. at 790, 874 S.E.2d at 894. Pet. App. 4a.

In short, Beaufort County DSS never asked Mrs. Johnson to pay anything, nor did Beaufort County DSS make any attempt of its own to collect any payments directly from Mrs. Johnson. Instead, in a report filed in anticipation of a 21 November 2018 hearing, Beaufort County DSS briefly noted: "There is no child support order in place currently. A referral has been made [to the Beaufort County child support agency]." Pet. App. 177a. Nothing in that report pointed to anything that Mrs. Johnson needed to do in relation to that "referral" (*e.g.*, attend any appointment with, or submit any information to, the child support agency).

On 6 April 2020, Beaufort County DSS filed a motion to terminate Mrs. Johnson's parental rights on four grounds, including the willful nonpayment ground of N.C. Gen. Stat. § 7B-1111(a)(3). Beaufort County DSS alleged that "for a

continuous period of six months next preceding the filing of" the motion to terminate—*i.e.*, 6 October 2019 to 6 April 2020—Mrs. Johnson had "willfully failed for such period to pay a reasonable portion of the costs of care for the juvenile[s] although physically and financially able to do so." N.C. Gen. Stat. § 7B-1111(a)(3). *In re J.C.J. & J.R.J.*, at ¶ 6, 381 N.C. at 786–87, 874 S.E.2d at 892–93. Pet. App. 2a.

As of 6 April 2020, however, nothing had come of the two-year-old "referral" to the Beaufort County child support agency. There had not been any determination that Mrs. Johnson actually owed anyone any money, or that she had the ability to pay any child support. *See* N.C. Gen. Stat. § 7B-904(d) (allowing for orders requiring parent to pay support "if the court finds that the parent is able to do so"). No one had sent Mrs. Johnson any sort of bill. No one had actually asked her to pay anything or provided any instructions as to how she could possibly remit any payments to any government agency.

Then, thirty-eight days *after* Beaufort County DSS filed the termination motion on 6 April 2020—*i.e.*, thirty-eight days after Beaufort County DSS had slammed shut the relevant six-month nonpayment window of N.C. Gen. Stat. § 7B-1111(a)(3)—the Beaufort County child support agency filed an action for child support against Mrs. Johnson, for all six of her children (four of whom are not the subject of this case).[2] Months later, the judge in the child support action ordered

[2] Nothing in the record purports to explain why, after Beaufort County DSS sent the "referral" back in 2018, it took the Beaufort County child support agency approximately two years to act.

Mrs. Johnson to pay a total of $50.00 per month in ongoing child support for all six children—*i.e.*, $8.33 per month, per twin—plus costs and arrears. Pet. App. 132a.

The trial court in the child welfare case ultimately terminated Mrs. Johnson's parental rights based on all four grounds, including the nonpayment ground. *In re J.C.J. & J.R.J.*, at ¶ 7, 381 N.C. at 787, 874 S.E.2d at 892. Pet. App. 2a.

III. The direct appeal at the Supreme Court of North Carolina and the raising of the federal question for which review is now sought

Mrs. Johnson challenged all four grounds of her termination order on direct appeal to North Carolina's highest court, the Supreme Court of North Carolina.[3] As to N.C. Gen. Stat. § 7B-1111(a)(3), Mrs. Johnson argued in her principal brief that *In re S.E.* must be disavowed because it results in unconstitutional outcomes, in direct contravention of a rule of statutory construction that prohibits such interpretations. *State v. James*, 371 N.C. 77, 87, 813 S.E.2d 195, 203 (2018) ("Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter.") (quotation omitted). She argued that allowing for termination for failure to pay the government "without any formal notice of an obligation to do so" is "an unconscionable and unconstitutional termination by ambush." Pet. App. 88a.

Mrs. Johnson explained how such terminations are a due process violation under both the Fourteenth Amendment of the United States Constitution and the

[3] At that time, appeals of termination orders were taken directly from the district court (*i.e.*, the trial court) to the Supreme Court of North Carolina. Those appeals are now taken to our intermediate appellate court, the North Carolina Court of Appeals. 2021 N.C. Sess. Laws 18.

North Carolina Constitution, given the disparity between the lack of notice of a requirement to pay and the unquestionably high stakes involved. Pet. App. 89a.

Mrs. Johnson also explained how such terminations are an equal protection violation under both the Fourteenth Amendment of the United States Constitution, and the North Carolina Constitution, given that parents in private termination actions would still be entitled, under N.C. Gen. Stat. § 7B-1111(a)(4), to advance notice of an obligation to pay, whereas, under the "inherent duty" interpretation of N.C. Gen. Stat. § 7B-1111(a)(3) set forth in *In re S.E.*, parents subject to governmental termination actions are not so entitled. Mrs. Johnson explained that parental rights are fundamental constitutional rights, and that this type of disparate treatment between parents advances no compelling government interest. Pet. App. 89a–90a.

Mrs. Johnson ultimately argued: "Because *In re S.E.*, 373 N.C. 360, 366, 838 S.E.2d 328, 333 (2020) fails to account for these considerations, it results in an unconstitutional interpretation of the statute and must be disavowed." Pet. App. 90a.

Additionally, in her reply to the response brief of Beaufort County DSS, Mrs. Johnson further explained how terminations conducted under the "inherent duty" interpretation of *In re S.E.* amount to a due process violation. Pet. App. 118a.

However, those arguments were never considered, because the Supreme Court of North Carolina refused to address the merits of Mrs. Johnson's challenge to *In re S.E.* The Supreme Court of North Carolina acknowledged that Mrs. Johnson

> urges us to disavow our decision in *In re S.E.*, in light of the constitutionally impermissible "disparate treatment" afforded to parents involved in private termination proceedings and parents involved in child welfare cases. However, since respondent-mother did not advance the constitutional argument upon which she now relies before the trial court, we decline to consider it for the first time on appeal. *See State v. Gainey*, 355 N.C. 73, 87 (2002) (reiterating that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal").

In re J.C.J. & J.R.J., ¶ 18, 381 N.C. at 792, 874 S.E.2d at 895. Pet. App. 5a.

In the end, the Supreme Court of North Carolina affirmed the order terminating Mrs. Johnson's parental rights based on the nonpayment ground, thereby ignoring the merits of Mrs. Johnson's challenges to the other three grounds. *Id.* at ¶ 29, 381 N.C. at 799, 874 S.E.2d at 899. Pet. App. 8a.

In a petition for rehearing, Mrs. Johnson explained that the Supreme Court of North Carolina's reliance on the preservation rule of *Gainey* was fundamentally misplaced, "because the 'constitutional issues' that are subject to that rule of preservation are, necessarily, only those issues which a trial court has the authority to adjudicate." Pet. App. 138a. Mrs. Johnson explained that it is impossible to classify her challenge to *In re S.E.* as being such an issue, because "[a] trial court has no authority to adjudicate such a challenge to this Court's precedent; rather the doctrine of *stare decisis* obligates a trial court to follow that precedent." Pet. App. 139a. Mrs. Johnson also explained that it is implausible to read the Supreme Court of North Carolina's ruling as suggesting that a trial court does have authority to consider this type of challenge to existing precedent, because if that were true, "then the Court's ruling here would mark the end of *stare decisis* as we know it, for it

would open the floodgates for every trial court to reconsider the validity of precedential appellate holdings on a case-by-case basis." Pet. App. 144a.

The Supreme Court of North Carolina denied the petition for rehearing. Pet. App. 10a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. Without any preceding demand for payment, it violates the equal protection and due process rights of parents in child welfare cases to terminate their parental rights based on their failure to pay child support.

As shown in both this case and *In re D.C.*, the effect of the "inherent duty" ruling from *In re S.E.* is as clear as it is unthinkable: it allows the government to permanently take children from their parent if the parent fails to give the government some unspecified amount of money—*even if the government never asked the parent for any money during the relevant six-month period.* Consequently, parents are left to figure out, all on their own, that they must give the government some unspecified amount of money, in some unspecified manner, lest they lose their children forever. This type of termination of parental rights is only made possible by the Supreme Court of North Carolina's "inherent duty" interpretation of N.C. Gen. Stat. § 7B-1111(a)(3). This interpretation of the statute results in two unconstitutional outcomes.

First, it is an equal protection violation under the Fourteenth Amendment of the United States Constitution. U.S. Const. amend. XIV, § 1. Parents in private actions may have their rights terminated for nonpayment under N.C. Gen. Stat. § 7B-1111(a)(4) only when actual notice of a payment obligation exists. However,

under the Supreme Court of North Carolina's "inherent duty" ruling from *In re S.E.*, parents in child welfare cases may have their rights terminated under N.C. Gen. Stat. § 7B-1111(a)(3) absent any such notice. Parental rights are fundamental constitutional rights. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). Thus, such disparate treatment between classes of parents—if permissible—must be narrowly tailored to serve some sort of compelling government interest. *Richardson v. Ramirez*, 418 U.S. 24, 78, 94 S.Ct. 2655, 2682, 41 L.Ed.2d 551 (1974). No such compelling government interest exists here. Indeed, it would defy reason to suggest that one group of parents must first be told that they need to pay, whereas another group of parents should be expected to just "know better" and figure out on their own that they should be paying—especially when the latter consists of families that, by definition, have already been found in need of the government's help. Notably, no party in the appeal below even attempted to identify any such government interest—whether compelling or not—that could conceivably justify such disparate treatment.

To avoid this constitutional disparity, a constitutionally sound interpretation of the "willfulness" element of N.C. Gen. Stat. § 7B-1111(a)(3) would need to, at a minimum, require that the government first make a preceding demand for payment; only then may the parent's nonpayment may be considered willful. Indeed, the Supreme Court of North Carolina long ago settled on that very interpretation—but in a different context. Under N.C. Gen. Stat. § 49-2, "[a]ny parent who willfully neglects or who refuses to provide adequate support and

maintain his or her child born out of wedlock shall be guilty of a Class 2 misdemeanor." According to the Supreme Court of North Carolina, a parent may only be held liable under N.C. Gen. Stat. § 49-2 for willful nonpayment after a "demand" for payment has first been made on the parent. *State v. Mason*, 268 N.C. 423, 425, 150 S.E.2d 753, 755 (1966). In other words, parents facing the proverbial slap on the wrist in the criminal context are entitled to advance notice of the obligation to pay, whereas parents in child welfare cases facing the permanent destruction of their family are not.

Second, terminations as allowed by the "inherent duty" interpretation of the termination statute amount to due process violations under the Fourteenth Amendment of the United States Constitution. U.S. Const. amend. XIV, § 1. "The touchstone of due process is protection of the individual against arbitrary action of government[.]" *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974) (citation omitted).

> This Court has held that the Due Process Clause protects individuals against two types of government action. So-called substantive due process" prevents the government from engaging in conduct that shocks the conscience, *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325–326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). This requirement has traditionally been referred to as "procedural" due process.

United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987).

The type of termination of parental rights allowed under *In re S.E.* is a substantive due process violation, because it is conduct that shocks the conscience. It is also a procedural due process violation, because it allows for the permanent deprivation of a fundamental constitutional right absent fair procedures—namely, notice and an opportunity to be heard that are "granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972) (quotation omitted). These violations become especially clear when one considers the way in which a parent in Mrs. Johnson's position is misled into not paying anything during the relevant six-month period—and then subsequently trapped in a position from which she cannot possibly free herself. In short, *In re S.E.* allows for termination by ambush.

Consider the relevant facts from Mrs. Johnson's perspective:

- The government temporarily takes your children because of problems in the family home.
- According to the government's own policy manual:
    - The government's stated mission is to provide you with "family-centered services" that are meant "to achieve wellbeing through ensuring self-sufficiency, support, safety, and permanence." Pet. App. 97a.
    - "The underlying beliefs" of the government's "family-centered System of Care approach to child welfare" include:
        - "Family members are our colleagues."

  - "It is our job to instill hope."
  - "Inappropriate intervention can do harm."
  - "Children have the right to their family." Pet. App. 101a.

- Consistent with this "family-centered System of Care approach to child welfare," the government then works with you to develop a case plan, which is a list of goals for you to accomplish to work towards getting your children back (*e.g.*, complete a parenting education course). Paying the government money is not on that list.
- At the start of your case, the government also gives you formal notice on a government-issued summons that a court "may" order you to pay child support "if" a court determines that you have the ability to pay something. But that never happens: the judge in your case never assesses your ability to pay and never orders you to pay anything.
- The government does not ask you to pay anything, either. Instead, the government lets you know that it has made a "referral" to the child support agency. In the meantime, you continue to provide for your children, by buying them clothes, diapers, and gifts.
- You never hear anything from that child support agency—until it is too late. Now, your failure to figure out, all on your own, that you should have been giving the government some unspecified amount of money in the past means that you lose your children forever. No matter how

much you pay now, it makes no difference, because the relevant six-month period has already passed.

Of course, if Beaufort County DSS had ever really wanted any money from Mrs. Johnson, it could have asked the trial court in the child welfare case to assess Mrs. Johnson's ability to pay and, if appropriate, order her to pay. *See* N.C. Gen. Stat. § 7B-904(d) (allowing for the entry of such orders in child welfare cases). But Beaufort County DSS never did that.

Furthermore, even assuming *arguendo* that Beaufort County DSS somehow had the ability to accept payments directly from Mrs. Johnson without a child support order in place (*e.g.*, by accepting cash in hand), then nothing would have stopped Beaufort County DSS from (i) asking Mrs. Johnson to make such direct payments and (ii) explaining to her how she could make those payments. For example, Beaufort County DSS could have included this requirement for direct payments on Mrs. Johnson's case plan, right alongside all the other things that Beaufort County DSS expected her to do. But Beaufort County DSS never did that, either.[4]

[4] It bears noting that nothing in the record actually indicates that Beaufort County DSS has the ability to accept such direct payments from parents, whether in cash form or otherwise. On the contrary, by statute, child support payments are made to one centralized, state-level payment processing office, following the entry of a child support order. N.C. Gen. Stat. § 110-139(f). Nonetheless, even assuming that Beaufort County DSS *did* have the ability to somehow accept payments directly from a parent, the question begs itself: Then why didn't Beaufort County DSS ever *ask* Mrs. Johnson to make that type of direct payment, instead of referring the matter over to the child support agency?

The lack of meaningful notice of an obligation to pay—as only allowed by *In re S.E.*—is even more shocking to the conscience when one considers the fact that child welfare agencies like Beaufort County DSS have a federally mandated duty in cases like this to make "reasonable efforts" to help parents achieve reunification with their children. 42 U.S.C. § 671(a)(15). At a minimum, those "reasonable efforts" necessarily include telling parents what problems they need to fix in order to get their children back; after all, that is the whole point of giving parents a case plan aimed at addressing the underlying issues in the family's home. Thus, if Beaufort County DSS genuinely believed that the simple fact of a parent's nonpayment was, on its own, sufficient proof of parental unfitness that would warrant a family's permanent destruction, *see Stanley v. Illinois*, 405 U.S. 645, 652–53, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551 (1972) ("the State registers no gain towards its declared goals when it separates children from the custody of fit parents," because "the State spites its own articulated goals when it needlessly separates" children from fit parents), then any list of governmental "reasonable efforts" would necessarily include the immeasurably simple task of telling the parent: "Oh, and by the way, on top of going to parenting classes, and getting counseling, etc., you need to pay us, too."

But again, Beaufort County DSS never did any such thing. Instead, having never actually asked Mrs. Johnson for a single cent before 6 April 2020, Beaufort County DSS filed its motion to terminate on that day, thereby slamming shut the

relevant six-month window and springing a trap from which Mrs. Johnson could not possibly free herself—no matter how much she may have subsequently paid.

This result is only possible because *In re S.E.* allows the government to pursue terminations of parental rights based on nonpayment absent any preceding demand for payment.

II. The question presented is important because it concerns the destruction of families via the "civil death penalty."

The question presented here is of unquestionable importance because it concerns the fundamental, constitutionally protected right of parents *to be parents.* "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000).

> The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Moore v. City of East Cleveland, 431 U.S. 494, 503–04, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977).

The fundamental liberty interest of parents

> does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753–54, 102 S.Ct. 1388, 1394–95, 71 L.Ed.2d 599 (1982).

Given the unquestionably high stakes involved, courts have described the termination of parental rights as the "civil death penalty." *Martinez-Cedillo v. Sessions*, 896 F.3d 979, 989 (9th Cir. 2018), *dismissed as moot*, 923 F.3d 1162 (9th Cir. 2019).

In N.C. Gen. Stat. § 7B-1111(a)(3), the North Carolina General Assembly has allowed the use of the "civil death penalty" based on a parent's failure to pay money to the government—but only when that nonpayment is "willful." In another context, the Supreme Court of North Carolina long ago acknowledged that a parent's nonpayment cannot be willful absent a preceding demand for payment. *Mason*, 268 N.C. at 425, 150 S.E.2d at 755. However, for reasons it has *never* identified or attempted to explain, the Supreme Court of North Carolina refuses to apply such a commonsense interpretation in this context, when the stakes are immeasurably higher. Instead, by virtue of its pronouncement that parents have an "inherent duty" to pay the government in this context, the Supreme Court of North Carolina has effectively erased the critical willfulness element from N.C. Gen. Stat. § 7B-1111(a)(3) altogether.

III. The federal question was sufficiently and properly raised, because Mrs. Johnson's direct appeal was her first opportunity to argue that *In re S.E.* must be disavowed. The Supreme Court of North Carolina's excuse for failing to address the merits of that argument is a transparent attempt to evade that argument.

The Supreme Court of North Carolina expressly acknowledged that Mrs. Johnson argued on appeal that *In re S.E.* must be disavowed because its interpretation of N.C. Gen. Stat. § 7B-1111(a)(3) results in unconstitutional outcomes. The only reason for which the Supreme Court of North Carolina concluded that this argument had not been properly raised was the common law preservation rule described in *State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463 (2002). *In re J.C.J. & J.R.J.*, ¶ 18, 381 N.C. at 792, 874 S.E.2d at 895. Pet. App. 5a. However, that rule has no applicability whatsoever in this context. Indeed, to apply that rule in this context would compel trial attorneys to make frivolously futile arguments to trial courts. The Supreme Court of North Carolina's reliance on the preservation rule from *Gainey* is a transparent attempt to evade Mrs. Johnson's argument that *In re S.E.* must be disavowed. Thus, the fact that the Supreme Court of North Carolina did not address the merits of Mrs. Johnson's argument should not bar review in this Court. *See Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) ("we will not consider a petitioner's federal claim unless it was either addressed by, *or properly presented to*, the state court that rendered the decision we have been asked to review") (emphasis added).

"The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583, 89

S.Ct. 1354, 1361, 22 L.Ed.2d 572 (1969). When deciding whether a federal question has been properly raised, consideration must be given to applicable state rules and procedures. *Id.* However, state courts cannot arbitrarily or unfairly resort to such rules or procedures in order to stifle or evade a federal question. *See Staub v. City of Baxley*, 355 U.S. 313, 328–30, 78 S.Ct. 277, 286, 2 L.Ed.2d 302 (1958) ("so long as the local procedure does not discriminate against the raising of federal claims and, in the particular case, has not been used to stifle a federal claim to prevent its eventual consideration here, this Court is powerless to deny to a State the right to have the kind of judicial system it chooses and to administer that system in its own way"); *Demorest v. City Bank Farmers Tr. Co.*, 321 U.S. 36, 42, 64 S.Ct. 384, 388, 88 L.Ed. 526 (1944) ("Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."); STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE § 3.18(a), p. 191 (10th ed. 2013) ("Thus, if the failure to raise the federal claim in the manner prescribed by state law . . . is due to a discriminatory application of state court rules, resulting in an evasion of the federal claim (*Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1919); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960)), the federal claim can be heard and adjudicated by the Supreme Court.").

Yet that is precisely what the Supreme Court of North Carolina did here, when it resorted to the rule from *Gainey*:, it evaded Mrs. Johnson's argument that

In re S.E. must be disavowed by invoking a rule of preservation that has no applicability in this context.

In *Gainey*, the defendant argued that a witness's "testimony regarding [an] anonymous phone call violated his constitutional right to confrontation." *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473. However, the Supreme Court of North Carolina refused to consider the substance of that argument:

> This claim is not properly before this Court, as defendant objected to this testimony at trial only on the basis of hearsay. Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. *State v. Benson,* 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988).

Id. This ruling from *Gainey* is in keeping with a long line of North Carolina cases that apply the same common law rule of preservation—*i.e.*, the rule that "constitutional issues" must be raised at trial and cannot be raised for the first time on appeal. *See, e.g., State v. Dorsett*, 272 N.C. 227, 229, 158 S.E.2d 15, 17 (1967).

However, Mrs. Johnson did not raise the type of "constitutional issue" that is subject to the preservation rule described in *Gainey*. This is because the "constitutional issues" that are subject to that rule are, necessarily, only those issues which a trial court has the authority to adjudicate. The issue that Mrs. Johnson has raised here is no such issue.

As *Gainey* shows, a trial court has, for example, the authority to decide whether a defendant's constitutional right to confrontation has been violated. *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473. Trial courts also have, for example, the authority to decide whether a defendant's arrest was unconstitutional, *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), or whether a particular

statute, regulation, or ordinance is unconstitutional. *Bland v. City of Wilmington*, 278 N.C. 657, 660–61, 180 S.E.2d 813, 816 (1971). Those "constitutional issues" are subject to the *Gainey* rule. However, Mrs. Johnson has not raised any of these types of "constitutional issues."

Rather, Mrs. Johnson is arguing that the Supreme Court of North Carolina's ruling in *In re S.E.* must be disavowed because its interpretation of the termination statute results in unconstitutional outcomes. She is arguing that the Supreme Court of North Carolina must revisit its own existing precedent, to correct its own errors. For one simple yet very critical reason, there can be no requirement for such an argument to be first raised at trial: At the state level, the Supreme Court of North Carolina is the only court that has the authority to disavow its own precedents. *See, e.g., State v. Barnes*, 345 N.C. 184, 230, 481 S.E.2d 44, 69 (1997) (overruling its own precedent). A trial court has no authority whatsoever to adjudicate such challenges; on the contrary, under the doctrine of *stare decisis*, all subordinate courts—including trial courts—are obligated to follow all of the precedents of the Supreme Court of North Carolina. *Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993); *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *aff'd*, 318 N.C. 502, 349 S.E.2d 576 (1986). It is axiomatic that trial courts do not get to decide for themselves which precedents they want to follow—regardless of whether the trial court perceives any flaws in those precedents.

That the preservation rule from *Gainey* is inapplicable in this context is further demonstrated by three other points.

First, the logical implication of the Supreme Court of North Carolina's ruling here leads to an absurd result: Any trial attorney who argues that a trial court should ignore or disavow *In re S.E.* would be compelled to make a futile, frivolous—and, therefore, unethical—argument, because that trial attorney would necessarily be asking the trial court to violate its obligation under *stare decisis* to follow binding precedent. N.C. Rules of Professional Conduct, Rule 3.1. There is no good faith basis in the law for a trial attorney to make such a request.

This same conundrum for parents would exist not only at trial, but also on appeal to the North Carolina Court of Appeals, because that court is likewise bound by the precedents of the Supreme Court of North Carolina.[5] *State v. Whitaker*, 201 N.C. App. 190, 201–02, 689 S.E.2d 395, 402 (2009), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010). (Indeed, one panel of the North Carolina Court of Appeals even lacks the authority to overturn the precedents of other panels. *State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888 (2019).) Thus, even if the parent does as the Supreme Court of North Carolina would have her do and make a futile attempt to "raise" this issue before the trial court, then, on an ensuing appeal, the same practical problems would arise: the parent would have no valid basis for asking the North Carolina Court of Appeals to actually do anything—namely, rule in her favor.

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[5] As noted in footnote 3, *supra*, appeals of termination of parental orders are now taken to our intermediate appellate court, the North Carolina Court of Appeals.

In short, the Supreme Court of North Carolina would have parents like Mrs. Johnson pursue an absurd and impossible task: make certain arguments below, even when there is no valid basis for making them—and no possibility for them to ever be adjudicated on their merits.

Second, no opposing party in the appeal below ever suggested that Mrs. Johnson's challenge to *In re S.E.* had to be raised at trial. If this preservation argument were valid, the opposing parties would have been strongly incentivized to have raised it themselves.

Third, the Supreme Court of North Carolina gave no consideration to the *Gainey* rule in *In re D.C.*—even though the parents in that case made a similar argument as Mrs. Johnson makes here, *i.e.*, that the "inherent duty" interpretation from *In re S.E.* "results in an unconstitutional dichotomy, under which similarly situated parents are treated differently depending on who the child's custodian is." *In re D.C.*, at ¶ 18, 378 N.C. at 561–62, 682 S.E.2d at 618. Unlike here, however, the Supreme Court of North Carolina in *In re D.C.* did not even consider—let alone apply—the *Gainey* rule.[6] Nonetheless, in *In re D.C.*, the Supreme Court of North Carolina avoided addressing the substance of the parents' challenge to *In re S.E.* by pronouncing: "Adhering to the principles of *stare decisis*, we decline to change our interpretation of N.C.G.S. § 7B-1111(a)(3)." *Id.* at ¶ 19, 378 N.C. at 562, 682 S.E.2d at 618. Beyond that one-sentence pronouncement, however, the Supreme Court of

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[6] Undersigned counsel represented one of the parents on appeal in *In re D.C.* No argument about *In re S.E.* or any constitutional consequences had been raised at trial in that case.

North Carolina made no attempt or effort to explain *why* it declined to change its interpretation—*e.g.*, why or how it believed *In re S.E.* was a soundly reasoned decision; why or how it believed the challenge to *In re S.E.* lacked merit; or why the well-settled exceptions to the doctrine of *stare decisis* would not apply to this particular issue. *See, e.g.*, *Nelson v. Freeland*, 349 N.C. 615, 632–33, 507 S.E.2d 882, 892–93 (1998) ("The doctrine is not inflexible, and therefore we will not hesitate to abandon a rule which has resulted in injustices, whether it be criminal or civil. There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right.") (citation and quotation omitted); *State v. Mobley*, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954) ("Besides, the doctrine of stare decisis should never be applied to perpetuate palpable error.").

In sum, the Supreme Court of North Carolina's reliance on the preservation rule from *Gainey* is a transparent attempt to avoid addressing the merits of Mrs. Johnson's argument that *In re S.E.* is fundamentally flawed. Mrs. Johnson presented that argument at the first chance she could properly do so: in her direct appeal to the Supreme Court of North Carolina. The Supreme Court of North Carolina's evasion of that argument should not bar review in this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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