Supreme Court No. 101270-5

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF A.M.F.

BRIEF OF AMICI CURIAE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, WASHINGTON DEFENDER ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND WASHINGTON STATE OFFICE OF PUBLIC DEFENSE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Throughout Washington, the state routinely calls parents as witnesses against themselves even as it seeks to terminate their fundamental right to care for their children. When the state calls a parent to the stand and starts examining them, the parent faces a profoundly stressful and highly coercive situation – they must testify about some of their most difficult, painful experiences. In that moment, a parent can be asked under oath in open court about whether they have engaged in criminal conduct at practically any point in their lives. If, in response, the parent chooses to remain silent, courts should not be permitted to draw an adverse inference from that silence.

First, drawing an adverse inference facilitates the termination of parental rights, and therefore imposes an extreme sanction on a parent's invocation of their Fifth Amendment right that effectively coerces parents to break that silence. Second, the state has less burdensome ways to prove its case, making the adverse inference unnecessary and therefore unconstitutional.

II. STATEMENT OF THE CASE

The mother, Ms. R, was called as the state's first witness in the trial to terminate her rights to A., one of her two young children. RP 33:17-19, RP 89. At several points during the trial, she was asked about illegal drug use. RP 113 (the Assistant Attorney General asked: "when was the last time you currently [sic] used *illegal* substances?") (emphasis added); RP 398 (the attorney for the court appointed special advocate (CASA) asked: "Did you use heroin yesterday?"). In response, the mother's attorney instructed her to invoke her Fifth Amendment privilege. RP 113-116; RP 399-401. The mother was also asked if she knew if she had a warrant out of King County District Court, to which she answered yes. RP 395.

At multiple points during the trial the mother was overcome by emotional distress:

> THE COURT: Right, I gotcha. But it sounds like you're crying. It sounds like you're upset.
>
> [MS. R]: Yeah, I am upset. They're taking my kids away. I mean, [inaudible] it's not a good time, you know?

RP 22-23; *see also* RP 82:25 (describing a panic attack mid-trial); RP 384:11-13 (describing the process of testifying as stressful and overwhelming).

At the conclusion of trial, the court terminated Ms. R's rights to parent her son, and her son's right to be parented by Ms. R., finding she was actively using illicit drugs. RP 484:7-8. The finding of ongoing drug use, used to establish RCW 13.34.180(1)(e) in the court's oral ruling, was based on an adverse inference drawn from the mother's invocation of her Fifth Amendment right to remain silent.[1]

III. ARGUMENT

Existing caselaw provides insufficient direction to trial courts about how to handle a situation that routinely occurs in

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[1] It is unclear from the record whether the Court relied on the rebuttable presumption in RCW 13.34.080(1)(e)(i) to make this finding. The court did not mention the presumption in its oral ruling and *amici* therefore assume that was not a basis for the court's decision.

dependency and termination proceedings: an individual's right to parent their child comes in direct conflict with their Fifth Amendment right to remain silent regarding alleged criminal conduct. Although courts have drawn adverse inferences from a litigant's assertion of their Fifth Amendment rights in cases where money damages are at issue, it is currently unclear whether it is permissible to draw an adverse inference from a parent's silence, where their fundamental right to parent may be terminated. It is also unclear whether parents may be compelled to testify against themselves at a termination trial at all.

This case presents an important opportunity for this Court to make clear that a trial court cannot draw an adverse inference from a parent's invocation of their constitutional right against self-incrimination at a termination.

An adverse inference is unconstitutional, in this context, for two reasons. First, attaching any negative weight to a parent's silence effectively compels parents to break that silence to protect their right to remain a part of their child's life. Such a

forced choice violates the Constitution. Second, an adverse inference is unnecessarily prejudicial. The state has access to an extraordinary amount of information about the parent such that the added evidentiary benefit of an adverse inference is minimal; yet the burden on parents, who are disproportionately likely to be Black or Native American, is profound.

A. Drawing an Adverse Inference from Parents' Silence at Termination Trial Unconstitutionally Burdens the Right Against Self-Incrimination and the Fundamental Right of Family Integrity Because It Compels Parents to Testify

It is unconstitutional to draw an adverse inference from a parent's silence at a termination trial because the penalty for silence is so significant that it effectively compels parents to testify. The U.S. Supreme Court has held that where the adverse consequences of remaining silent are so significant as to constitute "compulsion," they are prohibited because they deny the privilege to the person who would have asserted it. *See Garrity v. State of N.J.*, 385 U.S. 493, 498, 87 S. Ct. 616, 619, 17 L. Ed. 2d 562 (1967); *see also State v. Powell*, 193 Wn. App.

112, 120, 370 P.3d 56, 59 (2016) (holding the state cannot compel someone to incriminate themselves absent protections against future prosecution based on the disclosures); *McKune v. Lile*, 536 U.S. 24, 53, 122 S. Ct. 2017, 2035, 153 L. Ed. 2d 47 (2002) (O'Connor, J. concurring in judgment) ("any penalty that is capable of compelling a person to be a witness against himself is illegitimate"). "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than in case of a failure to accept it, and then to declare the acceptance voluntary." *Garrity*, 385 U.S. at 498 (quoting *Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. 67, 70, 39 S. Ct. 24, 25, 63 L. Ed. 131 (1918)).

1. The Termination of Parental Rights is So Significant a Penalty that it Compels Parents to Testify Against Themselves

The U.S. Supreme Court has recognized that a termination of parental rights trial implicates rights as significant as the right to liberty in a criminal case. *Santosky v. Kramer*, 455 U.S. 745,

769, 102 S. Ct. 1388, 1403, 71 L. Ed. 2d 599 (1982) (quoting the legislative history of the Indian Child Welfare Act "that 'the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty....'"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 125, 117 S. Ct. 555, 568, 136 L. Ed. 2d 473 (1996) (holding that a parent in a termination case, "[l]ike a defendant resisting criminal conviction, . . . seeks to be spared from the State's devastatingly adverse action.").

Accordingly, one New Jersey court has recognized that "the coercive effects the United States Supreme Court found so compelling in . . . *Garrity* pale in comparison to the prospect of losing the Constitutional right to parent and have a relationship with one's children." *New Jersey Div. of Child Prot. & Permanency v. S.K.*, 456 N.J. Super. 245, 271, 193 A.3d 309, 326 (N.J. Super. Ct. App. Div. 2018); *see also Matter of Welfare of J.W.*, 415 N.W.2d 879, 882 (Minn. 1987) (finding the state's threat to file a termination petition unless the parents submitted to a psychological evaluation to be a "potent sanction," which

impermissibly compelled testimony in violation of the Fifth Amendment).

Therefore, termination of parental rights trials, though nominally civil, involve dynamics of compulsion as significant as those in criminal case because these trials implicate "perhaps the oldest of the fundamental liberty interests recognized by [the] Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000). Indeed, the termination of parental rights has been called the "civil death penalty." *See, e.g., In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004); *In re K.D.L.*, 58 P.3d 181, 186 (Nev. 2002).

Where, as here, the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other and no such waiver is valid. *Garrity*, 385 U.S. at 498.

2. The Context in Which Termination Trials Arise Exacerbate the Coercive Nature of the Questioning

In most jurisdictions in Washington, parents are called as a primary witness in the state's case-in-chief at a termination

trial, often – as in this case – as the state's *first witness*.[2] In addition to the magnitude of the possible sanction, the context of a termination trial is particularly intimidating and coercive.

a. A Termination Trial Can Adjudicate Facts that are Identical to Those a Parent is Facing in a Criminal Case

The nature of the questioning at a termination trial can vary widely. Sometimes, as here, the questions relate to uncharged criminal conduct, for which there is no realistic possibility of securing immunity mid-trial. But questions may relate to pending criminal charges, including charges for which a parent, unable to afford bail, is incarcerated pretrial.

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[2] Parents are summoned to appear at the trial (RCW 13.34.070, JuCR 4.3), and are also routinely served with a notice of intent to take testimony, and motion for default, under the civil rules. CR 43, 55. In jurisdictions that require parents file an answer, if a parent does not file an answer the state will proceed to default; if the parent answers but does not appear on the day of trial, the state often seeks to use CR 43 to strike the parent's answer and move to enter the termination petition as substantive evidence against them. CR 43(f)(3).

In such a situation, a parent may be brought to the courtroom from the jail, shackled, and called to the witness stand to testify against themselves while wearing jail clothes. They will take an oath and swear to tell the truth. Yet, whenever there is a risk of criminal liability, a defense attorney will likely advise a parent to invoke their Fifth Amendment privilege.

And so, while sitting in the witness box, a parent will face impossible pressures – the parent must testify honestly, but not say anything that would jeopardize their pending criminal case. Yet, if a parent invokes their right to remain silent, a judge may infer that they committed a criminal act, possibly even an act that harmed their child, thereby creating evidence in support of the termination of their own parental rights. This is precisely the kind of impossible choice, between competing fundamental rights, that the Constitution forbids.

b. Parents Face Questions at Trial That Are Invasive and Unpredictable

In the witness box at a termination trial, parents face intense pressures and uncertainty. Parents are under extraordinary constraints, in part because stakes of the trial are so significant, but also because the scope of possible testimony at a termination trial is vast, and therefore hard to predict or prepare for, while also deeply private and therefore intimidating and sometimes even humiliating. The intensely personal and unpredictable nature of the questions compounds the coercive effect of termination trials.

For example, in this case, the state asked the mother about the nature of her intimate relationships, RP 99 (asking Ms. R whether she considers the father of her children to be her partner), and to explain her relationship with members of their extended family. RP 385, 428 (asking about her relationship with her parents). She was asked about her employment and education history, RP 96, 98; prior mental or behavioral health diagnoses,

RP 111; and the interior of her home. RP 94. The mother was questioned about events that took place before the child in question was even born. RP 402-03 (asking about a surgery which led to a prescription opiate addiction). Ms. R was also asked questions to further the termination of the *father's* rights including whether he has a cell phone, RP 93; his sources of income, RP 100; and whether he visits his children. RP 100.

The state's open-ended questions can be broad and invasive. Often, questions are not tied to a specific event or fact but rather probe areas where the state does not know how the parent will respond; accordingly, it can often be difficult for parents to understand what is being asked and formulate a response.

For example, in this case the Assistant Attorney General asked the mother:

> Q: [Ms. R], do you believe that you have done the best that you can for your son, [A]?
>
> A: Uhm, yes.
>
> Q: Okay.

> A: I could do better, but, yes, with what I've been given, yes.
>
> Q: Okay. Can you explain what you mean by "what I've been given"?
>
> A: Well, contrary to maybe your belief, but there was a national pandemic that took place within the time of my, uh, dependency, which, uhm, for homeless people has been kind of, uhm, a hindrance to say the least.
>
> And I, being one of those homeless people that are maybe, you know, not in the upper or middle-class bracket, have had some struggles with insurance, with locations, with being homeless. So, with all being taken into consideration, yes, it's been difficult to have my child also taken from me during this time.

RP 396:7-20.

In addition, questions sometimes seek to examine a parent's own internal discourse or belief system. For example, at one point in this trial the mother was asked about her level of enthusiasm for complying with services: "So, you see them as – you see the services as just hoops to jump through?" RP 431. This kind of inquiry is not just deeply personal, it adds to the

difficulty for parents who are often surprised by and unprepared for the state's questions.

The profound emotional distress most parents experience at trial exacerbates the coercive nature of these proceedings. *E.g.*, RP 82:25 (describing a panic attack mid-trial); RP 384:11-13 (describing the process of testifying as stressful and overwhelming).

Finally, this unpredictable dynamic also creates real challenges for defense attorneys trying to determine what questions will elicit incriminating testimony. RP 401 (discussing whether testimony about the mother's first drug use falls under a Fifth Amendment privilege). Here, for example, the mother was asked a number of questions closely tied to possible criminal liability, including: "Has drug use impacted your day-to-day life?" (RP 407); and "Okay. So, do you believe that you can be a good parent and not be sober?" RP 431. The profound uncertainty and distress that parents face at trial contributes to the compulsion inherent in a trial with such significant stakes.

c. Black and Native American People in Washington Are More Likely to Be Harmed by the Criminal Legal System and the Dependency System

The burden of this forced choice – whether to incriminate oneself or accept an adverse inference against oneself at a termination trial – falls disproportionately on Black and Native American people who face a greater risk of getting ensnared in both systems.[3] *Matter of Welfare of D.E.*, 196 Wn.2d 92, 104,

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[3] J. Christopher Graham, Wash. State Dept. of Children, Youth & Families, *2019 Washington State Child Welfare Racial Disparity Indices Report* 2-4 (2020) (finding Black children are 1.5 times more likely and Native American children 1.8 times more likely than white children to be referred to CPS; and Black children are 1.7 times more likely and Native American children were more than 2 times more likely than white children to be living in foster care within 1 year of referral); *see also* Task Force 2.0 Race and the Criminal Justice System, *Report and Recommendations to Address Race in Washington's Juvenile Legal System: 2021 Report to the Washington Supreme Court*, at 34, (2021). In 2020, the Seattle Times reported that Black, Indigenous, and multiracial people make up 11% of Washington's population, yet 32% of the roughly 3,200 dependency cases filed in 2020. Nina Shapiro, *Is Washington State Taking Too Many Children From Their Parents? Movement Seeks to Overhaul Foster Care*, SEATTLE TIMES, Mar. 30, 2021.

469 P.3d 1163, 1169 (2020) (recognizing that "the majority of cases involve persons who are poor, uneducated, and/or minorities, leaving an opening for class and racial bias.").

The Department of Children, Youth, and Families (DCYF) does not report data on racial disproportionality at termination; however, one study found American Indian/Alaskan Native Children in Washington face a cumulative risk of termination 2.99 higher than white children, and Black children 2.4 times higher. Wildeman, C., et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016,* 25 Child Maltreatment 32, 35 (2020), at Table 3.

Likewise, racial disproportionality exists in the criminal legal system. Task Force 2.0 Race and the Criminal Justice System, *Report and Recommendations to Address Race in Washington's Juvenile Legal System: 2021 Report to the Washington Supreme Court*, Appx E-2, (2021) ("state level data demonstrates high racial disproportionality ratios when comparing race within the state prison population.") Perhaps

more importantly, "[t]he available state-level data indicates that Black and Native American residents are vastly overrepresented in Washington's jails." *Id.* at E-7.

Because Black and Native American parents are disproportionately likely to face the criminal legal system and the termination of their parental rights, the coercive effect of an adverse inference disproportionately falls on those groups.

Taken together, the stakes of the litigation and the context in which the testimony arises create an environment in which parents are compelled to break their constitutionally protected silence. Therefore, no adverse inference can flow from a parent's silence at a termination trial without unconstitutionally undermining both the right to remain silent and the fundamental right of family integrity.

B. This Court Should Prohibit Trial Courts from Drawing an Adverse Inference When Parents Assert Fifth Amendment Rights Because an Adverse Inference Unduly Prejudices Parents' Rights and There are Other Sources of Information Available to the State

Courts have only permitted an adverse inference to be taken in situations where "'the detriment to the party asserting it [is] no more than is necessary to prevent unfair and unnecessary prejudice to the other side.'" *Doe ex rel. Rudy–Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (quoting *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994)). "[N[o negative inference can be drawn against a civil litigant's assertion of his privilege against self-incrimination unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information." *Id.*

This analysis is similar to what the court would consider under a procedural due process theory (*Matter of Welfare of M.B.*, 195 Wn.2d 859, 867, 467 P.3d 969, 974 (2020)) and the result is the same – the state has little need for the evidence gained from a parent's testimony, but the parent faces extreme

prejudice. Ultimately, an adverse inference is unconstitutional because it unnecessarily burdens a parent's Fifth Amendment right and fundamental right to family integrity.

The state does not need a parent's testimony at a termination trial; from the outset of the case, there is a vast disparity between the two sides of the litigation. *Matter of Welfare of D.E.*, 196 Wn.2d 92, 104, 469 P.3d 1163, 1169 (2020) (recognizing that at termination "the evidence is largely controlled by the State . . . the State can shape the history and future of the child through placement and visitation, and the State has access to experts and social workers who are also employed by the State."); *Santosky*, 455 U.S. at 764 ("The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options."). Unlike other civil litigants, the state does not need any additional advantage, in the form of an adverse inference, to ensure the fairness of the proceeding.

First, unlike other civil cases, the state must be prepared to prove the elements of termination regardless of whether the parent testifies, or even appears on the day of trial. *In re C.R.B.*, 62 Wn. App. 608, 616, 814 P.2d 1197, 1202 (1991) (requiring a hearing on the merits even if a parent fails to appear for trial). Even when a parent would otherwise be in default, "[b]efore a default termination judgment can be entered, the court must have a meaningful hearing on the merits of the case in accordance with statutory requirements for termination to satisfy due process." *In re Welfare of S.I.*, 184 Wn. App. 531, 542, 337 P.3d 1114, 1119 (2014). That means that the state cannot proceed to trial without a good faith basis to believe it has sufficient evidence to justify termination, irrespective of the parent's testimony.

Second, by the time a case has reached a termination trial, the state will have access to vast amounts of information it has accumulated over the course of the dependency case. A termination case is the culmination of a longer process that starts with the filing of a dependency. RCW 13.34.180(1)(a). The state

does not typically look to file a termination petition until a child has been placed out of home for over a year.[4]

During that lengthy period, the state will have custody of the child and access to all of the child's medical and educational records. RCW 13.34.069; RCW 13.50.100(10). Further, the dependency court will have ordered the parent to participate in evaluations and/or services. RCW 13.34.130. Once ordered to participate in services and evaluations, the mandatory court form for dependency dispositions requires parents to sign releases of information to give DCYF access to their records:[5]

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[4] In 2021, the median number of months from the filing of a dependency petition until all parental rights are terminated was 29.9 months, an increase from 24.0 months in 2019. Orme, M., et al., *Dependent Children in Washington State Case Timeliness and Outcomes*, *2021 Annual Report*, Center for Court Research, Administrative Office of the Courts (2022), 21. The median number of months in out-of-home care prior to TPR petition filing decreased to 13.2 months in 2021. *Id.* at 20.

[5] This language is from page 7 of "Order of Disposition on Dependency (ORDD)-WPF JU 03.0410 (07/2018)" available at: https://www.courts.wa.gov/forms/documents/JU03_0410%20Order%20of%20Disposition%20on%20Dependency.doc

3.8 **Release of Information:** All court-ordered service providers shall make all records and all reports available to DCYF, attorney for DCYF, parent's attorney, the guardian ad litem and attorney for the child. Parents shall sign releases of information and allow all court-ordered service providers to make all records available to DCYF and the guardian ad litem or attorney for the child. Such information shall be provided immediately upon request. All information, reports, records, etc., relating to the provision of, participation in, or parties' interaction with services ordered by the court or offered by DCYF may be subject to disclosure in open court unless specifically prohibited by state or federal law or regulation.

The state also has the power to subpoena records relating to the parent. CR 34, CR 45. As a state agency, the state can obtain other records including birth and death records, child support records, and records relating public benefits (including evaluations submitted in the course of benefit applications). The state can also seek to introduce records from prior criminal cases, provided the record satisfies other rules of evidence regarding admissibility.

The state also has access to other witnesses. The state employs social workers who monitor and assess parents throughout the life of the case. At termination, as in this case,

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Advocates have asked the pattern form committee to make this section a check box rather than a mandate, because there is no statutory requirement behind this language. However, this language continues to be included in the mandatory pattern court forms.

the state will call their social worker as a witness at trial to testify about their observations, and if qualified as an expert, their opinions and conclusions about the parent. Typically, as in this case, if there is a court appointed advocate for that child, that person will support the state's position and may have a lawyer to serve as a second prosecutor in the case. The state can also call individuals with whom the state contracts, including visitation supervisors, evaluators, and service providers. With access to all of this evidence the state should not need the testimony of a parent.

Third, the evidentiary benefit of an adverse inference should be, at most, cumulative of other evidence, providing only minimal benefit to the state when applied correctly. DCYF Supp. Br. at 17; *see also Ikeda v. Curtis*, 43 Wn.2d 449, 459, 261 P.2d 684, 690 (1953) (holding that, although an inference may be drawn from the refusal to testify, it must be considered with, "proper and relevant evidence tending to prove such fact"); *Baxter v. Palmigiano*, 425 U.S. 308, 317–18, 96 S. Ct. 1551,

1557–58, 47 L. Ed. 2d 810 (1976) (applying an adverse inference against a prison inmate who elected remain silent in his disciplinary hearing, but recognizing that "an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board."); *In Re Samantha C.*, 268 Conn. 614, 638, 847 A.2d 883, 899–900 (2004) (holding that "[a]n adverse inference, however, does not supply *proof* of any particular fact; rather, it may be used only to *weigh* facts already in evidence").

Ultimately, therefore, it is unconstitutional to hold a parent's silence against them because the state has no substantial need to compel them to answer in the first place.

C. Termination Trials Are Akin to Criminal Cases and Raise Similar Concerns Regarding Compelled Testimony

The argument against drawing an adverse inference in this context is further supported by the similarly strong argument that parents cannot be compelled to testify against themselves *at all*. Although the text of the Fifth Amendment specifically prohibits compelled self-incrimination only in criminal cases, the U.S.

Supreme Court has repeatedly recognized that other types of cases can be so akin to criminal cases as to trigger a right not to be a witness against oneself. *Boyd v. United States*, 116 U.S. 616, 634–35, 6 S. Ct. 524, 29 L. Ed. 746 (1886); *see also United States v. Ward*, 448 U.S. 242, 253-54, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980) (limiting *Boyd* but recognizing that there are cases in which the penalty imposed, although clearly not "criminal" enough to trigger all constitutional protections, are still so akin to criminal cases "as to trigger the Self-Incrimination Clause of the Fifth Amendment"). In other words, a "civil label" is not always dispositive. *Allen v. Illinois*, 478 U.S. 364, 369, 106 S. Ct. 2988, 2992, 92 L. Ed. 2d 296 (1986). Where there is "'the clearest proof" that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil, it must be considered criminal and the privilege against self-incrimination must be applied." *Id.* quoting *Ward*, 448 U.S. at 248-249.

Though that is a high bar, the U.S. Supreme Court has previously acknowledged that "parental termination decrees are among the most severe forms of state action," and for that reason are like "quasi-criminal" cases for some due process analysis. *M.L.B.*, 519 U.S. at 128. Termination trials "bear many of the indicia of a criminal trial." *Santosky*, 455 U.S. at 746. Like in criminal cases, the government, rather than a private party, is typically the petitioner in the case. In addition, termination cases may adjudicate the very same conduct at issue in a criminal case – particularly when the parallel criminal case involves allegations of child maltreatment.

As noted above, the consequences of a termination trial are the permanent, irrevocable destruction of a fundamental right. Unlike a dependency trial, the termination of parental rights does not result in any remedial services. For those reasons, termination of parental rights cases are the kinds of quasi-criminal cases which carry a right not to testify at all.

Protecting a parent's right not to be a witness against themselves is consistent with the broader values underlying the privilege against self-incrimination. The privilege is rooted in the nation's oldest values and traditions which place the burden on the government to produce evidence. *Mitchell v. United States*, 526 U.S. 314, 325, 119 S. Ct. 1307, 1313, 143 L. Ed. 2d 424 (1999). It violates that tradition and those values, "to enlist the defendant as an instrument in his or her own condemnation . . ." *Id.; Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964) (explaining that the privilege is founded on, *inter alia*, a recognition that the privilege "while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent'").

Similarly, here, when a parent appears at trial hoping to *defend* their right to remain a part of their child's life, it offends our constitutional values to compel that parent to take the stand and, for hours or days, submit to the government's questioning to prove the government's case. The sheer scope of the burden

on the privacy and dignity of parents, and the disproportionate burden on Black and Native American families, suggests that parents should not be compelled to testify against themselves at a termination.

If the Constitution forbids any compelled testimony, then it necessarily also forbids drawing an adverse inference from invoking the right to silence in response to a particular question.

D. Vacating the Termination Order Would Allow This Case to Be Resolved by Guardianship, an Outcome the Law Now Entitles to Preference

Since the trial in this case, the Legislature has amended the termination statute to make clear that guardianship must be ruled out before a court terminates parental rights. RCW 13.34.180(1)(f). Enacting this change, Substitute House Bill 1747, the Legislature considered testimony by child welfare

experts and relative caregivers, including grandparents, about the need to prioritize relative guardianship over adoption.[6]

Here, the grandfather's testimony suggests a continued willingness to help his daughter and remain a part of her life, RP 166, that is at odds with the legal result of the trial, permanent termination. Vacating the termination here would return the case to dependency status and would allow the litigants to consider guardianship as an appropriate permanent plan.

IV. CONCLUSION

As argued herein, *amici* respectfully request the Court vacate the order of termination.

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[6] *See* House Children, Youth & Families Committee, January 24, 2022, at 1:30, available at: https://tvw.org/video/house-children-youth-families-committee-2022011577/?eventID=2022011577, (1:22), Testimony of Jerry Milner, former director of federal Children's Bureau, (urging the committee to prioritize relative guardianship over adoption); (1:26) Testimony of Shrounda Selivanoff, Director of Public Policy, Children's Home Society of Washington and relative caregiver (explaining how DCYF prioritizes adoption, which places pressures on grandparents, even when grandparents may not wish to become legal parents of their grandchildren).

DATED this 30th day of December 2022.

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V. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 4,986.

RESPECTFULLY SUBMITTED this 30th day of December 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2022, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on all attorneys of record.

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