No. 09-612

In the
Supreme Court of the United States

Ariel King,
Petitioner

v.

Michael Pfeiffer,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of the Commonwealth of Virginia

Amicus Curiae in Support of Petitioner

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amici respectfully move this Court for permission to file the following *Amicus Curiae* Brief. As required by Rule 37.2(b), consent of all parties was requested and notice was given at least 10 days prior (1 December 2009) to the due date of *amici curiae's* intention of filing this brief. Petitioner's counsel has consented to the filing of this brief, but Respondent has not responded.

The *Amici* represented herein have sufficient interest and good reason for presenting an *amicus* brief. *Amici* are four national and one California organization that work extensively on the issues in family courts especially those related to the violations of due process and equal protection alleged in this brief. Stop Family Violence has 24, 000 members nationwide while Protective Mother's Alliance has chapters in 20 states. These problems are long standing and deeply rooted in family courts and these organizations have been working on the problems for more than 10 years with little result due in large part to failure to apply constitutional law in family courts.

Amici further submit that the facts presented in the brief will add relevant information and may be of considerable help and aid to the Court in its consideration of the constitutional issue. *Amici* have been directly and indirectly involved in much research and documentation of existing practices in family courts and can add valuable expertise. California Protective Parents alone has worked

with over 2,000 persons, and the Battered Mother's Custody Conference gathers national experts annually.

Therefore, Amici pray that the Court grant this motion for leave to file *Amicus Curiae* Brief.

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Interest of Amicus Curiae[1]

Stop Family Violence, is a national organization that works at the national, state and local level to ensure safety, justice, accountability and healing for people whose lives are affected by domestic violence, sexual violence or child abuse. Stop Family Violence has approximately 24,000 members nationwide, including survivors of family violence, anti-violence advocates from national, state and local anti-violence programs, and allied professionals. Stop Family Violence coordinates the Family Court Reform Coalition - a coalition of advocates, professionals and organizations formed in response to the national crisis in the custody court system, where all too often, judges order children to live with abusers and punish, silence, or jail the parent who tries to protect the children from harm. The FCRC's mission is to promote reform and accountability to ensure that victims of domestic violence and child abuse are protected from abuse in child custody determinations. Stop Family Violence hears from parents on a daily basis who are fighting to retain custody, or who have lost

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae represent that no counsel for a party authored this brief in whole or in part, and no counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rules 37.2(a) counsel of record for all parties were sent notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

child custody to abusers, often in gross violation of due process. Stop Family Violence is concerned about the nationwide failure of family courts to adhere to basic due process and to protect children from harm.

The Protective Mothers Alliance (PMA) is an organization made up primarily of mothers who have been punished by family law courts for their efforts to protect their children from abusive fathers post-separation. The organization also welcomes the participation of other women and men as allies. Our mission is to bring justice across the United States to mothers who have been battered or whose children have been abused by the father and who now have to confront the father in legal proceedings regarding custody or visitation.

PMA objectives are to expose the current miscarriages of justice that are taking place and to build public pressure on courts to make reforms. Specifically, we promote reforms that will make courts conduct themselves in fair and objective ways in custody proceedings involving reported risks to children, will hold courts accountable, and will require courts to protect children from suffering or witnessing abuse. In addition, we strive to prohibit the punishment of mothers for efforts to protect their children. The most common punishment currently is the transfer of custody of the children to the abusive father, but some mothers are also being fined or jailed.

We consider this issue to be of the utmost urgency. Not only are thousands of children per year being

endangered or harmed by such judicial actions, but countless additional children are being put at risk because their mothers become afraid to take steps to protect them once they learn that courts are retaliating against protective mothers.

The Protective Mothers Alliance currently has groups in over twenty states and in a number of other countries. We have grown exponentially in the last six months, and expect to have chapters in all fifty states in less than a year from now. It is the policy of our organization that protective mothers themselves are always to be in the key positions of leadership in our local chapters and in our national office.

The Protective Mothers Alliance is currently co-directed by Janice Levinson and Lundy Bancroft, with Ms. Levinson providing the primary leadership. The organization's telephone number is 941 822-5592.

The Battered Mothers Custody Conference is an annual national conference, held in Albany, New York, that promotes education, activism, advocacy, and dialogue among legal, policy, psychological, child protective workers, and other helping professionals with battered mothers from across the nation. The conference's sole focus is the serious injustices faced by battered women who seek protection for themselves and their children in this nation's family court/divorce court system.

California Protective Parents Association was created 10 years ago to address the problem of

family court judges removing children from safe protective parents (mostly mothers) and giving the children to identified physically and sexually abusive parents (mostly fathers). After assisting over 2,000 protective parents we have found that while our efforts have improved various laws and procedures the underlying problem persists. Not only have judges been misinformed through professional training to consistently disbelieve children's disclosures of physical or sexual abuse, a cottage industry of expensive court-ordered private court appointees has emerged to encourage this misinformation. It appears to be public policy in California family courts to place children with batterers and molesters.

The National Organization for Men Against Sexism is an activist organization of men and women supporting positive changes for men. It is a pro-feminist, gay affirmative, anti-racist organization enhancing men's lives. NOMAS seeks to take direction from the collective voices of women and to be allies of women in the work to end sexism, domestic violence and other forms of oppression against women.

SUMMARY OF ARGUMENT

Parenting is indisputably a fundamental constitutionally protected right for both the parent and the child. The fundamental right of parenting is frequently violated in state courts nationwide. This is a long standing and wide spread problem which *amici*, from their experience and expertise, can address. Equal protection, due process, and freedom of speech are all commonly violated constitutional rights in family courts stemming from discriminatory attitudes, unwarranted assumptions and incorrect interpretation and use of the law.

Courts improperly apply the domestic relations exception rule and the *Ex parte Burrus*, 136 U.S. 586, 10 S. Ct. 850, 34 L. Ed. 500 (1890) decision as the Virginia Supreme Court did here. While these cases are different from termination cases when the State is opposing a parent's right, the parents still have constitutional protections which the courts, as state actors, are obligated to uphold.

Some federal circuits have held that a litigant in the position of the petitioner should have been appointed counsel to uphold her Constitutional rights, while the WA Supreme Court has held the opposite.

ARGUMENT

A. Parenting is a fundamental, constitutionally protected right.

It is undisputed that parents have a constitutionally protected right to the care, custody and management of their children. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Santosky, v. Kramer*, 455 U.S. 745, 770, 102 S.Ct. 1388, 1403-04, 71 L.Ed.2d 599 (1982); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion).

That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency. *Stanley, supra.* The state's power to manage aspects of family law is subject to scrutiny by the federal judiciary under the Due Process and/or Equal Protection clauses of the Fourteenth Amendment. Fundamental personal rights protected by the Bill of Rights and pre-existing the Constitution are protected by the federal judiciary from overreaching by States. *Wise v. Bravo*, 666 F. 2d 1328, (10th Cir, 1981) Custody rights were not created by state law but were pre-existing and are a fundamental right under the Constitution that this court must protect. *Brittain v. Hansen,* 451 F. 3d 982 (9th Cir., 2006)

In fact, one court has recognized that the right to contact with your children may be more vital than the right to life, "As this court has observed, a parent's right to custody and control of his or her children is "'more precious to many people than the right of life itself." (*In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974))

B. The child has an equal right that is constitutionally protected.

The Fourteenth Amendment clearly covers the integrity of the family unit for the child as well as the parent. A child's Fourteenth Amendment right cannot be ignored because it is within a domestic dispute. *Wooley v. City of Baton Rouge*, 211 F. 3d 913 (5th Cir. 2000). The right is reciprocal and belongs to both equally. *Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir 1977); *Bennet v. Town of Riverhead*, 940 F.Supp. 481, 488-89 (E.D.N.Y. 1996); *Franz v. U.S.*, 707 F 2d 582 (DC Cir. 1982) Here King was the primary caretaker for the entire child's life and suddenly without warning or reason, the child is not allowed to see her mother. The constitutional rights of the child have been seriously abridged.

In fact King had taken her child for medical treatment and according to the Petition, reasonable cause existed to believe the father had injured the child.[2] A child also has a Fourteenth Amendment liberty interest in the right to personal safety.

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[2] See footnote 6 in writ of certiorari.

Because of the court's failure to protect children, children have seen that their words do not count and their agony is unimportant. They have started their own support system called Courageous Kids Network [3] in an attempt to both support those who remain trapped in abuse and change the system.

C. Equal protection rights under the 14th Amendment are routinely violated in family courts.

The violation of constitutionally protected due process and equal protection as well as the fundamental right of parenting is a national tragedy that has gone unremediated for at least 30 years. Especially in situations as this petitioner, when there is proof of sexual abuse against the children, [4] the mother's rights and most importantly the children's protection are ignored.

Dr. Elizabeth Morgan illustrated this failure of the courts. "When I asked the U.S. courts to protect my child from sadistic abuse and incest I was jailed three times for no crime, the third time for more than two years. Judge after judge was enraged that I asked for justice. I am one of many mothers so misused. In the end my child, more fortunate than most, was protected, but never by a U.S. judge." [5]

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[3] Courageous Kids Network, www.courageouskids.net, accessed 30 November 2009.

[4] The Maryland court found probable cause that sexual abuse existed. See footnote 6 in petition for writ of certiorari.

[5] EXPOSE: The Failure of Family Courts to Protect Children from Abuse in Custody Disputes: A Resource Book for Lawmakers, Judges, Attorneys and Mental health

A new book includes chapters by over 25 of the leading experts in the U.S. and Canada including judges, lawyers, psychiatrists, psychologists, sociologists, journalists and domestic violence advocates. It provides up-to-date research that mistaken practices are overwhelmingly applied against mothers and comes to remarkable agreement that the family court system is broken creating a serious violation of equal protection.[6]

Several qualitative studies have been done to document this pattern of bias against mothers and the states failure to protect children. *Battered Mothers Speak Out*, a report published by the Battered Mothers Testimony Project (BMTP) at Wellesley College in November 2002 ([7]) documents the human rights violations battered women suffer when they fight against their abusers for custody of their children in the Massachusetts family courts. "Despite their diversity, the problems that they identified were remarkably similar. The courts fail to protect battered women and children by issuing child custody rulings that endanger them. Family courts give custody to batterers. Child abusers are given unsupervised visitation. Women and children are required by the courts to interact with their abusers with no protection."

Professionals, Our Children Our Future Charitable Foundation, Los Gatos, CA, 1999, p. 1.

[6] Maureen T Hannah, PHD, Barry Goldstein, co-editors, DOMESTIC VIOLENCE, ABUSE and CHILD CUSTODY: Legal Strategies and Policy Issues (Civic Research Institute, forthcoming February-2010)

[7] Wellesley Center for Women, Women's Rights Network, Wellesley College.

The 1989 gender bias study commissioned by the Massachusetts Supreme Judicial Court found that fathers win three times more often than mothers in contested custody battles. The BMTP found that the Massachusetts Family Court system also violated the law by holding mothers to a higher parenting standard than fathers, treating women with disrespect, and failing to hold batterers accountable for child support.

In an effort to replicate the Wellesley study in a different state, the Arizona Coalition Against Domestic Violence carried out a two-year study. [8] In that study, 86% of the participants reported discrimination based on gender, socioeconomic status, religion, language and race. A mother *pro se* was disadvantaged and many cases were decided *ex parte* as occurred in the instant case. In the same year, a study was released regarding the domestic relations division of the Philadelphia Family Court. [9] The findings included limited access to court, inadequate length of hearings so it was impossible to establish an adequate evidentiary basis, lack of appropriate translation, disrespect and lack of information, and gender and racial bias.

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[8] Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence, Arizona Coalition Against Domestic Violence, June 2003.

[9] Justice in the Domestic Relations Division of the Philadelphia Family Court: A Report to the Community, Women's Law Project, Philadelphia, Pa, April 2003.

These studies from such disparate states as well as national data are disturbingly similar. Documented domestic violence and child abuse is ignored, due process is violated, and discrimination is rampant in family courts.

As shown by the evidence, it is the norm in family courts that domestic violence and sexual abuse allegations are not taken seriously and the victims are not protected from further abuse. The national scope of the problem requires Supreme Court attention.

1. Equal protection is violated by gender bias in family courts.

Since the 1990's, the findings of the thirty-one state and five federal gender bias task forces are similar and disturbing. They report that its victims are overwhelmingly women, that male judges and lawyers of all ages are largely unaware of the experiences and perceptions of their female colleagues, and that the disrespect and devaluation experienced by white women is even more pronounced for women of color such as the plaintiff in this case.

The task forces also found that custody awards often punish women who breach the stereotype of the ideal mother, e.g. they work outside the home or have a sexual relationship outside of marriage. There is a growing tendency to award custody to the wealthier parent rather than to award child support. Given women's and men's unequal earning power, this constitutes a paternal preference.

Judges often refuse to listen to or believe allegations of abuse because of gender bias. The American Bar Association found that even in those few instances when allegations are untrue or unable to be proven "most sex abuse allegations in custody cases are made in good faith and are not the result of vindictiveness."[10] The Judicial Council of the California Advisory Committee found that few allegations of child sexual abuse are false and when they are the falsehood is usually not deliberate or malicious. [11] Yet such allegations trigger judges to apply stereotypes and to label women as hysterical or vindictive, emphasizing the lack of credibility the system affords women and children.

A woman's credibility is immediately suspect because the perception among judges is often that she is simply trying to gain advantage.[12] Her word is often doubted as soon as the allegation is raised. Such views of women are particularly apt to be held when fathers are professional people as in this case.[13] One authority said it is more in accord with

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[10] Karen Winner, Divorced From Justice: The Abuse of Women and Children by Divorce Lawyers and Judges 133 (1996).

[11]. Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts (Final Report) 151 (1996) (hereinafter Report)

[12]Women's Credibility Doubted in Many Family Courts, Women's e-News (Sept. 21, 2001), *at* http://www .canow. org/issues/famlaw_courts.html.

[13] Report, supra note 4, at 152, quoting Sandra Joan Morris, a certified family law specialist and past vice-president of the American Academy of Matrimonial Lawyers.

our images of the world to regard a mother as "crazy or hysterical" rather than to recognize an otherwise seemingly rational and caring father as capable of the behaviors described.[14] Gender bias, along with class bias, permeates society at such a deep level that "rational, logical, professional" men are easily found more believable than "crazy, hysterical" mothers.

In fact, mothers are less likely than fathers to make false allegations. Twenty-one percent of father's allegations were shown to be false compared to only 1.3% of mothers. Gender bias is manifested by the failure to consider all the evidence especially evidence of violence against women and children. "It's very common for people to make recommendations in child protective cases and child custody litigation without ever looking at clinical evidence of child abuse, spouse abuse or trauma," says Robert A. Geffner, who directs the Institute on Violence, Abuse and Trauma in San Diego's Alliant International University. [15] In this case there was evidence of such violence by Pfeiffer's behavior at the embassy, the protection order and the finding of the Maryland court. Yet the Virginia court issued no evidentiary findings. Refusal to consider the evidence violates the best interest of the child (BIC)

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[14] Sandra Joan Morris, Sexually Abused Children of Divorce, 5 Journal of the American Academy of Matrimonial Lawyers (1989) at 35, citing Waterman et al. Sexual Abuse of Young Children 150 (1986), cited in Report, supra note 1, at 153.
[15] Custody Disputes Often Bypass Abuse Assessments, by Marie Tessier, WeNews correspondent, July 6, 2007.

standard and denies the child's right to live free from violence.

Numerous scholars have commented on the tendency of family courts, and especially psychological evaluators, to respond to women's allegations of abuse or danger by labeling them in some way as mentally unstable or pathological. "Judges should be wary of much of the psychological evidence offered to assist a court in evaluating abuse allegations, which may ... cover up abuse and wrongly characterize the reporting parent with a pathological diagnosis. [16] The American Psychological Association's Presidential Task Force on Violence in the Family warns that women are often given inappropriate pathological labels.[17] Though the National Association of Juvenile and Family Court Judges Have said that psychological testing is not appropriate in domestic violence cases and it is the rare case where it would be useful, it is routinely used to the detriment of protective parents. [18] The U.S. Supreme Court

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[16] Rita Smith and Pamela Koukos, Fairness and Accuracy in Determination of Domestic Violence and Child Abuse in Custody Determinations, The Judges Journal, 38-56, 39, (1997).

[17] Report of the APA Presidential Task Force: Violence and the Family, Report of the APA Presidential Task Force (1996), available at http://web.archive.org/web/20050303175323/www.apa.org/pi/pii/familyvio/homepage.html

[18] Dalton, Drozd and Wong, Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judges Guide, for the State Justice Institute and National Association of Juvenile and Family Court Judges (2006)

prohibited such practice in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) because under Federal Rules of Procedure, Rule 35 the mental or physical condition of the party sought to be examined must be "in controversy" and "good cause" must be shown. This requirement cannot be met by mere conclusory allegations. Trial judges must use discriminating application demonstrating both "in controversy" and "good cause". *Amici* have found it common that the person who raises issues of abuse, usually female, is then required to have a psychological exam as in this case.

2. Equal protection is violated when victims of violence or sexual abuse are not allowed to present evidence because such violence disproportionately impacts women and children.

Domestic violence is a factor in 50-80% of divorce cases in the U.S., depending on the jurisdiction. [19] The victims of domestic violence are overwhelmingly (95%) women and children. [20] Therefore, wrongful practices in the family courts disproportionately impact women, especially battered women. In addition, a high correlation has been shown between spouse abuse, child abuse and incest [21] putting at risk the children of these battered women.

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[19] Divorce Mediation and Domestic Violence, Domestic Violence Report (Civic Research, Inc. Kingston, N.J., Oct/Nov. 1998), at 1.

[20] Jaffe, P.G, Wolfe, D., & Wilson, S., Children of Battered Women. Newbury Park, CA: Sage, 1990

[21] American Bar Association, Young Lawyer's Division, Center for Child Advocacy and Protection, *Legal Response: Child*

A series of studies from the National Institute of Justice [22] concluded that interpersonal violence (IPV) was ignored by the courts even with a documented, substantiated history and strong protections for the children were absent. [23] They found that contrary to popular thought, fathers restrained by orders of protection (OPs) were more likely to obtain visitation orders than not (64%). [24] Thus King's attempts to protect herself and her daughter by getting a protection order after his incident in the embassy only resulted in a higher likelihood that the child would not be protected, contrary to the intent of the law.

Women are also discriminated against in child kidnapping cases, as implicated here. According to studies commissioned by the Office of Juvenile Justice and Delinquency Prevention[25] mothers and

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Advocacy and Protection, No. 2, P. 1 (June-July 1979); Roy, A Current Study of 150 Cases, *Battered Women: A Psychological Study of Domestic Violence* (1979).

[22] National Institute of Justice Grant number 2000-WT-VT-0016, "History of Intimate Partner Violence and the Determination of Custody and Visitation among Couples Petitioning for Dissolution of Marriage" published in Violence Against Women, No. 11, Volume 8, Sage, 2005, p. 991, Children in the Crossfire.

[23] Child Custody Determinations among Couples with a History of Intimate Partner Violence, p. 991, Kenic, Monrary-Ernsdorff, Koepsell, Holt in Children in the Crossfire.

[24] Outcomes of Visitation and Custody Petitions when Fathers are Restrained by Protection Orders: The case of the New York City Family Courts, Rosen and Sullivan, National Institute of Justice Grant no. 1998- IJ-CS-0021, secondary analysis of data, p. 1054.

[25] Janet R. Johnson, Inger Sagatun-Wedward, Martha-Elin Blomquist, and Linda K.Girdner, "Early Identification of Risk

fathers are equally likely to abduct children. Men were more likely than women to be arrested for abduction, but the women who were arrested for abduction were more likely than men to be convicted and incarcerated. King experienced this practice when she was convicted of kidnapping and the Virginia JDR judge issued an arrest warrant that effectively prevented her from participating further in Virginia.

Treating children and protective parents, often women, differently under a state law or practice because of their status as victims of domestic violence or treating the mother differently because of her gender violates their rights. The court cannot rely on archaic or stereotypical notions concerning the roles and abilities of males and females, mothers or fathers. The court must apply the same searching analysis regardless of whether the case involves family issues. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 3336-37, 73 L.Ed.2d 1090 (1982)

This case follows the pattern established by research across the nation that shows that women are treated differently and negatively in court and that children are not given the protection that is mandated under state statute and the constitution. The mother was treated differently from the father by not fairly testing the evidence of abuse, by *ex parte* procedures in favor of the father, by refusing

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Factors for Parental Abduction",<http://www.ncjrs.org/html/ojjdp/2001_3_1/contents.htm.l>

to listen to evidence put forth by the mother, and by punishing not only her but the child for the mother's attempts to protect. This pattern and practice is gender discrimination in violation of equal protection.

D. Due process rights under the 14th Amendment are routinely violated in family courts. .

Due process is flexible and the procedural protections must meet what the particular situation demands. (*Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593,33 L. Ed 2d 484 (1972)) The private fundamental liberty interest involved in retaining custody of one's child and the integrity of one's family is of the greatest importance. *Santosky v. Kramer* and *Stanley v. Illinois supra.* When all contact with the child is cut off, as here, more than the mere availability of a procedural remedy is necessary. It is the state that has the burden to initiate appropriate proceedings to verify its actions. *Weller v. Dep't of Soc. Serv.*, 901 F. 2d 387 (4th Cir, 1990) But here, it is the state that has made those proceedings impossible. Furthermore when it is the state that removes the child from the jurisdiction, as here by taking the child from its parent in Maryland where it had residence to Virginia where it had been only for a short time during an emergency, it reduces the possibility of appropriate post-deprivation proceedings. *Weller*

Santosky made clear that the nature of the due process required is a balancing act between the private interests, the risk of error and the governmental interest. Here the private interest is

one of the weightiest involving ones own child. The risk of error is extremely high as it will have severe impact on not only the parent but the innocent child for generations to come. (*Weller supra)* The risk is grave and the states administrative or fiscal burden is of no importance in such a case. *Duchesne v. Sugarman, supra*

The minimum standard of proof balances the weight of the public and private interests and a societal judgment about the risk of error and how it should be distributed between the litigants. The child should never bear that risk as she is here by being prohibited from seeing her mother and primary caretaker. That minimum standard is a question of federal law that this Court must resolve. Case by case review does not preserve fundamental fairness when an entire class of proceedings i.e. family law is governed by a constitutionally defective evidentiary standard. *Santosky v. Kramer supra.*

Even the post-deprivation remedy offered to King was a violation of due process. *Weller supra* The court in *Weller* found that the complaint did allege a violation of procedural due process because his claim that his attempts at a post-deprivation remedy were stymied by the department and the procedure offered by the juvenile court would not have offered an appropriate remedy. Here the court made it impossible for King to access any post deprivation remedy by issuing an arrest warrant for her so that if she appeared to defend her rights, she would be arrested. Thus the "remedy" was not available and since this impossibility was created

by the court, it does not meet due process requirements. The liberty interest in King as in *Weller* i.e. custody of a child is of great import and appropriate remedies must be provided. Federal jurisdictions do not hesitate to resolve due process claims arising out of custody disputes when a constitutional claim is raised and the state law issues are not central to the claim. (*Weller)*

1.The failure to appoint counsel in family court cases is a violation of due process and a conflict exists between state and federal law.

Empirical studies have shown that indigent litigants without counsel receive less favorable outcomes than those with counsel. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956)

A Harvard law professor studied 900 families involved in custody proceedings. The study found that attorney-represented mothers were twice as likely as *pro se* mothers to be awarded full or joint custody when opposing fathers were represented by counsel.[26] A study in King County, Washington, found that shared parenting plans are as much as 42% more likely where both parties are represented

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[26] Robert H. Mnookin, Eleanor E. Maccoby, Catherine R. Albiston & Charlene E. Depner, Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating, in Divorce Reform at the Crossroads (Stephen D. Sugarman & Herma Hill Kay eds.,1990).

by counsel than in cases where one party appears *pro se*.[27] Other studies show similar disparity between parties represented by counsel and parties acting *pro se*.[28] Federal District Court Judge Robert W. Sweet observed that "every trial judge knows[] the task of determining the correct legal outcome is rendered almost impossible without effective counsel."[29].

State procedures must be fundamentally fair especially in cases dealing with constitutionally protected rights such as parenting. *Lassiter v. Dep't of Soc. Serv*, *supra* The fundamental fairness doctrine of the Due Process Clause requires that counsel be appointed for an indigent litigant when s/he may be deprived of physical liberty but that is not the end of the question. There are other elements of due process such as private interest at stake, governmental interest and the risk that the procedures used will lead to erroneous decisions. These must be weighed against the need for counsel.

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[27] Jane W. Ellis, Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals, 24 U. Mich. J.L. Reform 65, 132 (1990).

[28] Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment, 35 Law & Soc'y Rev. 419, 428-29 (2001).

[29] Robert W. Sweet, Civil Gideon and Confidence in a Just Society, 17 Yale L. & Pol'y Rev. 503, 505 (1998).

When the parent's interests are strongest as in this case when the parent has lost complete contact with her child, the State's interests are weakest because there was no emergency. The risk of error is at its peak because to deprive the child of any contact with the person who had been its primary caretaker is a shocking harm. Under these conditions, due process would require appointment of counsel. King was the primary caretaker for the child's entire life until she was ripped away by the court in an *ex parte* proceeding without consideration of evidence that was necessary to protect the best interest of the child.

As in *Lassiter supra*, here the court has sought not to infringe the right of the parent to the child's companionship and vice versa, but has ended it completely, a unique kind of deprivation. (p. 27) The interest of King is a commanding one. Courts have generally held that the State must appoint counsel at termination proceedings. Most states do so even at dependency and neglect proceedings. While the King case was not in form a termination hearing, in substance it was with the effective termination of contact with her child. The legal questions are not simple but are complex jurisdictional and international questions. Few *pro se* litigants would be able to navigate through that system.

The Fourth Circuit takes the position that federal courts must be especially solicitous of civil rights plaintiffs especially those who are *pro se*. *Harrison v. U.S. Postal Service*, 840 F. 2d 1149 (4th Cir. 1988) Technical pleading errors should not defeat a claim of constitutional violations. Instead, courts should

treat *pro se* litigants with "special judicial solicitude", (*Weller supra).* However in this case, King was treated worse than an attorney would have been by having her mailing to the Virginia Court of Appeals refused because it was sent through a different mailing system though it was dated and arrived timely. In fact, the mailing service used by Dr. King ("USPS Priority Mail") is one of the two forms of mailing service that qualify for service of a filing on the U.S. Supreme Court. (U.S. Supreme Court Rule 29) *In Roe v. Borup*, 500 F. Supp 127 (E.D. Wisc. 1980) the culprit was an attorney who filed a claim using fictitious names after the permission to do so had expired. Opposing counsel sought dismissal but the court said a minor procedural error should not result in such a drastic remedy as dismissal. More so in this case with a *pro se* litigant and an important issue, a minor error that had no impact on the timely filing of the appeal should not result in dismissal.

The court in *Harrison supra* also found that the court must advise a *pro se* litigant of her rights and if there is a colorable claim but the *pro se* litigant does not have the capacity to present it, the court should appoint counsel. *Gordon v. Leeke*, 574 F. 2d 1147 (4th Cir, 1978) Claimants in family court cases have no lesser right. Yet the Washington Supreme Court found otherwise in *King v. King*, 174 P. 3d 659, 162 Wn. 2d 378 (2007). The question was whether an indigent mother was entitled to appointment of counsel during a custody trial. The court held that while termination and dependency proceedings implicated fundamental rights that required appointment of counsel, family court cases

did not. (¶14) They claimed that the difference was the outcome i.e. distribution of parental rights rather than termination. But in many cases, including the instant case, termination of parental rights is in fact the result of a family court case. When dealing with the fundamental right of parenting, a closer analysis that looks at the violation of the fundamental rights in question must be required. The Washington court stated that divorce is a private matter but in fact marriage and divorce are state created institutions to serve state interests. Further, under the BIC standard, a state can overrule decisions agreed upon by both parents if the judge thinks best. The state cannot declare an entire class of cases, family law, off limits to constitutional analysis and protection of fundamental rights.

Yet battered women are often at an extreme financial disadvantage in hiring attorneys. Though the battered woman faces potentially the greatest loss in her life, her children, she often lacks formal education, she must present her version of disputed facts, she must match wits with adverse lawyers, counselors, psychologists; she must cross-examine witnesses (often expert) under rules of evidence and procedures of which she knows nothing; she must deal with introducing documentary evidence she may not understand and this all must be done under the strange and stressful setting of the court. Failure to appoint counsel renders the Constitutional protections meaningless and makes a mockery of the Rule of Law.

2. Courts improperly apply the domestic relations exception to deny litigants access to court.

Courts often refuse to accept appeals in family relations cases because of an incorrect application of the domestic relations exception. The domestic relations exception, according to *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 468 (1992) specifically encompasses only cases involving the issuance of a divorce, alimony or child custody decree. Even that rule has not been iron clad. The Court has taken a case directly related to a state child custody order because it raised important federal issues. *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1964). However, courts often misconstrue the domestic relations exception and reject all cases even those grounded in constitutional violations. Thus plaintiffs are denied their opportunity to vindicate their constitutional rights.

Ex parte Burrus, 136 U.S. 586, 10 S. Ct. 850, 34 L. Ed. 500 (1890) is still cited to claim that the custody of a child by the parent does not arise under the Constitution, laws or treaties of the United States; therefore no jurisdiction arises in federal courts. However, since the decision in *Meyers v. Nebraska supra* in 1923, parenting has been held to be a fundamental right under the Constitution entitled to federal protection. As recently as 2007, (*Holmes v. Copeland,* 965 So. 2d 662 (Supreme Ct. of Mississippi, 2007)) the court relied incorrectly on *Burris* when the case had nothing to do with divorce or custody.

Inappropriate application of *Burrus* occurs regularly and needs to be halted.

The domestic relations exception is not applicable to this case because the question is a constitutional one and the problem affects a large number of people. *Sosna v. Iowa*, 419 U.S. 393, 95 Sc. Ct. 553, 42 L. Ed. 2d 532, 1975. This problem is widespread, long lasting and deeply rooted in the family court system.

3. Denial of access for family cases is state action for which the supervisory authority of the Supreme Court should be exercised.

Because divorce actions are between the parents and not the state, courts often fail to protect constitutional rights because they view the dispute as between two private parties, therefore, not implicating state action. However, to determine what is "state action", the constitutional doctrine requires an inquiry into the private party's behavior and whether it was instigated by or dependent upon the exercise of governmental authority sufficiently to make it state action. *Franz v. U.S.*, *supra.*

In the instant case, the state has issued a *capias* order and imposed conditions of effective parental termination. As in *Franz*, without the intervention of the court, via both the custody order conditions that could only be removed by the state and *capias* orders imposing arrest and imprisonment, King would have had access to court, access to remedies and contact with the child. With the aid of the

court, the father has denied her these rights. As in *Franz*, such a strong contribution to the ability of one party to infringe the legal interests of another may be sufficient to give rise to "state action". The state has, as in *Franz*, created the situation by its arrest warrants that prohibit King from even appearing to defend her rights in Virginia.

In *Hurd v. Hodge*, 334 U.S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948) the court looked at the validity of court enforcements of restrictive covenants under the due process clause of the Fifth Amendment. While the court held the covenants unlawful under the Civil Rights Act, they said that even in the absence of the statute, other considerations would make the covenants contrary to public policy of the U.S. and that the Court should use its supervisory powers. Private agreements are subject to federal court intervention when such agreements are in violation of public policy of the United States as manifested in the Constitution. When a state court takes actions that violate the provisions of the Fourteenth Amendment, federal courts cannot uphold those actions because public policy must be equally concerned with the protection of basic fundamental rights whether violated by state or federal entities.

In the companion case, *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed 1161, (1948), the court held that the Fourteenth Amendment also forbids discrimination when imposed by state courts. The question is not the validity of private agreements but the judicial enforcement of those agreements. It is the action of the state courts that

is in question, not any dispute between private parties. The action of the state courts has long been regarded as State action within the meaning of the Fourteenth Amendment. *Shelley supra* The restrictions on judicial action are not just procedural but whenever there is a denial of rights guaranteed under the Fourteenth Amendment regardless of the procedure used. Federal courts cannot be seen to allow state courts to violate federal law with impunity. Today that is the situation for thousands of parents across this land. The instant case is not a case where the parents of a child are fighting among themselves and the state does well to stay out of it. Like *Shelley v. Kramer*, this is a case where the state has brought to bear its full coercive power, including threat of arrest, to deny petitioner any contact with her child. "And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce constitutional commands." (page 20) *Amici* ask that the Supreme Court do so.

CONCLUSION

Gender bias in the courts and multiple violations of due process ensure that a victim of violence has a scant change of finding justice in court. Women are at a severe disadvantage because of the financial inability to hire attorneys and because of stereotyping by judges and other court actors. When they do seek to enforce their rights, higher courts refuse their pleas erroneously relying on the domestic relations exception. Fundamental fairness under the Rule of Law requires that the

law be applied equally to all and that those impacted have a fair opportunity to seek redress. That does not happen today in family courts and *amici* ask that the Court accept the *writ of certiorari* to address these vital issues for the future of our children.

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