

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34618

STATE OF WEST VIRGINIA *ex rel.*  
KATHRYN KUTIL and CHERYL HESS,

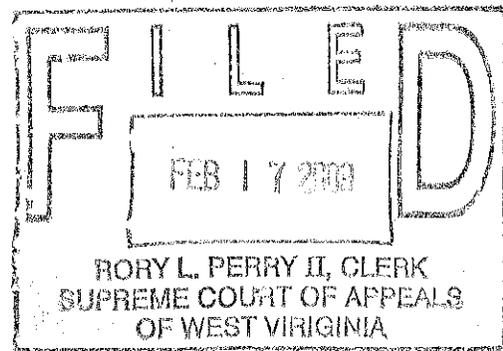
Petitioners,

v.

Fayette County Juvenile Abuse  
and Neglect No. 07-JA-72

THE HONORABLE PAUL M. BLAKE, JR.,  
CIRCUIT JUDGE, TWELFTH JUDICIAL  
DISTRICT, and WEST VIRGINIA  
DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES, MARTHA YEAGER  
WALKER, SECRETARY

Respondents.



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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION,  
AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA, AND  
PEOPLE FOR THE AMERICAN WAY FOUNDATION

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Dated: February 17, 2009

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## IDENTITY AND INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide and a long history of legal advocacy to protect the constitutionally guaranteed liberty of all individuals. The American Civil Liberties Union of West Virginia is the state affiliate of the ACLU.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and other supporters nationwide, including West Virginia. PFAWF frequently represents parties and files *amicus curiae* briefs in litigation to protect fundamental constitutional principles like the ones implicated in this case.

The issues presented by this appeal implicate fundamental questions involving the constitutional duty of care that the State owes to a child in its care, which includes a duty not to harm a child by removing her from a certified foster-adoptive family that is indisputably meeting her needs, has asked to be considered as an adoptive placement for her, and with whom the child has formed an emotional bond, in the absence of an individualized evidence-based determination that such removal would further her best interests.

## INTRODUCTION

*Amici* agree with Petitioners and the other *amici* filing in support of Petitioners that the Circuit Court erred when it ordered the removal of the infant Baby Girl C. ("B.G.C.") from the foster home of Petitioners Kutil and Hess based solely on its belief that, irrespective of the facts in B.G.C.'s specific situation, placement with a married mother and father should be attempted by DHHR prior to consideration of Petitioner Kutil and her household as a candidate to adopt B.G.C. *Amici* not only agree that the Circuit Court lacked the statutory authority to order the expedited removal of B.G.C. from Petitioners' home when the evidence in the record clearly demonstrated that removal of B.G.C. from Petitioners' home would not be in the child's best interests, but indeed, as set forth below, cautions that the Circuit Court's actions, if left unaddressed, raise concerns of constitutional magnitude.

West Virginia statutory and case law necessarily ensures that the State's decisions regarding foster and adoptive placements of children in state care satisfy its obligations under the Due Process Clause of the Fourteenth Amendment to the United States Constitution by making the best interests of the child involved the paramount consideration. Yet rather than allowing B.G.C.'s best interests, as determined after assessing the facts in her individual case, to determine where B.G.C. should be placed, the Circuit Court inserted its own personal preference for heterosexual married couples, which appears nowhere in the adoption statutes, and which is unsupported by evidence in the record specific to B.G.C., in the decision-making calculus. By ignoring the clear evidence in the record of the harm that would befall B.G.C. should she be removed from the only home she has ever known and from foster parents with whom she has bonded, and by ordering B.G.C.'s immediate removal from Petitioners' home based on the Circuit Court's personal belief that DHHR should place children, wherever possible, in adoptive

homes that have a married mother and father, the Circuit Court's actions not only contravene the best interests of the child mandate in statutory and case law but also necessarily violate the State's constitutional duty to avoid inflicting unnecessary and unjustified harm upon individuals who are in its custody or care. The Court should rectify the grave error committed by the Circuit Court by granting Petitioners' writ of prohibition.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

B.G.C. was born on December 8, 2007, in Charleston to a drug-abusing mother, and at birth tested positive for cocaine, opiates and benzodiazepines. The West Virginia Department of Health and Human Resources ("DHHR") immediately instituted child abuse and neglect proceedings, and sought to remove B.G.C. from her biological mother's custody. *See* Response to Petition for Writ of Prohibition ("Response") Exh. 1. In its Petition to Institute Child Abuse and Neglect Proceedings, DHHR noted that "[s]ince delivery, [B.G.C.] has suffered from withdrawals [sic] symptoms such as sleeplessness, hyperactivity, poor muscle tone, and emesis. Baby Girl has also been in an almost constant state of crying during her stay, per the nursery staff at Women's and Children's Hospital." *Id.* at 2. On the date the petition was filed, B.G.C. was still suffering these symptoms of withdrawal, and DHHR noted that the agency could not anticipate the date by which B.G.C. would be discharged from the hospital. *Id.*

The Child Protective Service Worker assigned to the case, Heather Hunter (now Heather Lucas), contacted Petitioners, who agreed to bring B.G.C. into their home. Response Exh. 13 ("11/21/08 Hearing Tr.") at 198. Petitioners are certified foster-adoptive parents, which means that they successfully completed 30 hours of Parent Resources Information, Development and Education ("PRIDE") training, as well as the home visit, personal interviews, and other background checks that are part of the certification process. *Id.* at 189-190; *see also id.* at 48-49

(describing certification process). Their household has been certified as a DHHR foster-adoptive home for over two years. *Id.* at 191. DHHR was aware that Petitioners were a couple, and had placed children in their home previously. *Id.* at 61, 200. For example, in response to a request from DHHR, Petitioners added a room onto their home in four days to accommodate a sibling group of four. *Id.* at 200. In this case, the social worker assigned to B.G.C. case suggested Petitioners specifically as an appropriate foster placement. *Id.* at 61.

Even before B.G.C. was placed in Petitioners' home, Ms. Hunter asked Petitioners to go to the hospital to bond with newborn B.G.C., which they agreed to do. *Id.* at 198. For example, Petitioners bottle-fed B.G.C. while she was still in the hospital. *Id.* On Christmas Eve 2007, B.G.C. was discharged from the hospital and brought by Ms. Hunter to Petitioners' home. *Id.* During the weeks that followed, there were many nights when Petitioners stayed up all night long with B.G.C. *Id.* at 201.

Notwithstanding their dedication to this child, the Guardian ad Litem ("GAL") appointed for B.G.C. in this case, Thomas K. Fast, filed a *Motion To Order DHHR To Remove Child From Physical Placement in Homosexual Home And For Other Injunctive Relief* on January 24, 2008. See Response Exh. 4. The GAL filed this Motion after only one visit to Petitioners' home on January 16, 2008, which lasted approximately seven minutes. See 11/21/08 Hearing Tr. at 196-97; see also Response Exh. 4 at 3. During his visit, the GAL refused Petitioners' invitation to hold B.G.C. 11/21/08 Hearing Tr. at 197. In fact, the visit by the GAL was so brief that he neither sat down nor took off his coat. *Id.*

In the Motion, the GAL indicated that it was "apparent that these two women desire to adopt the infant child who is the center point of this case." See Response Exh. 4 at 3.<sup>1</sup> The GAL

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<sup>1</sup> The relief currently sought by Petitioners in their Amended Writ Petition is for a Writ of

noted that “[t]he home appeared to be comfortable and physically safe for [B.G.C.]” *Id.* Nevertheless, the GAL asked the Circuit Court to remove B.G.C. from the home based on his belief “that the best interest of the child is not to be raised, short term or long term, in a homosexual environment and that the same is detrimental to the child’s overall welfare and well-being.” *Id.* The GAL also asked the Circuit Court to enter a statewide injunction against DHHR prohibiting it “from placing foster children in homosexual homes.” *Id.* at 7. Counsel for DHHR objected to the GAL’s motion, challenging it as procedurally improper and substantively without basis. *See* Response Exh. 5 at 2-3. Specifically, DHHR noted that the GAL’s motion “states only generic political opinions and fails to state specific allegations regarding this foster home.” *Id.* at 3.

The Circuit Court of Fayette County, the Honorable Paul M. Blake, Jr., conducted a hearing on the GAL’s motion on January 31, 2008, after granting Petitioners’ motion to intervene over the GAL’s objection. *See* Response Exh. 3 at 1-2. After hearing argument, the Circuit Court decided not to interfere with B.G.C.’s placement with Petitioners, but reserved ruling upon the GAL’s Motion and the GAL’s request for a full hearing on his Motion. *Id.*

Over the next several months, it became clear that B.G.C.’s mother would not be able to improve her situation or be a fit parent to B.G.C. Accordingly, following a hearing held on October 8, 2008, the Circuit Court terminated the biological mother’s parental rights in an order entered on November 5, 2008. *See* Response Exh. 11 at 2, Exh. 22. The Circuit Court also

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Prohibition “prohibiting DHHR from removing [B.G.C.] from the Petitioners’ home absent any concerns for the child’s health, safety or welfare and directing that the Petitioner, Kathryn Kutil, and her household be considered the primary candidate as an adoptive parent.” *See* Amended Petition for Writ of Prohibition at 13. As Petitioners are not seeking the right to jointly adopt B.G.C. at this time, any issue about whether such a request could be granted is not before this Court. *See also* discussion *infra* note 7.

terminated the rights of the unknown father, who was deemed to have abandoned the child. *See* Response Exh. 11 at 2; Resp. Exh. 22.

Shortly after the termination of parental rights, in accordance with DHHR's procedures, the members of a multidisciplinary treatment team ("MDT"), consisting of the Assistant Prosecuting Attorney, the GAL, counsel for Petitioners, an Assistant Attorney General, the child welfare consultant, the adoption unit supervisor, the foster parents, and the child protective service worker, met to discuss transferring B.G.C.'s case to the Regional Adoption Unit. The team's status report concluded that "[B.G.C.] is nearly eleven months old and continues to reside in the home of Kathryn Kutil and Cheryl Hess. [B.G.C.] presently has no medical or developmental concerns and seems to be thriving in her current environment." *See* Response Exh. 7. The Adoption Unit Supervisor stated that the Adoption Unit would be reluctant to "uproot" a child from the only home she knows. *Id.* With the exception of the GAL, the MDT recommended that B.G.C. remain with her foster parents and the case be transferred to the Regional Adoption Unit for an official recommendation regarding B.G.C.'s prospective adoptive parents. *Id.*

At the Permanency Hearing on November 6, 2008, before Circuit Court Judge Blake, the Assistant Prosecuting Attorney, on behalf of DHHR, took the position, consistent with the MDT's recommendation, that B.G.C.'s interests would be best served by facilitating an adoption, and explained that the Adoption Unit would make a recommendation as to the placement. *See* Response Exh. 9 ("11/6/08 Hearing Tr.") at 4-6. DHHR's permanency plan further noted that Petitioners had expressed their desire to adopt B.G.C., and that placement with Petitioners would be appropriate because, *inter alia*, their home "is the least restrictive and a family setting," "is in close proximity to [B.G.C.]'s sibling," "is consistent with the best interest of child," "is the only

placement child has been in,” and because B.G.C. “has a bond with foster parents with whom she has resided her entire life.” *See* Response Exh. 7.

At this point, the GAL renewed his January motion which sought, among other things, the removal of B.G.C. from a “homosexual home,” and requested that the Circuit Court “immediately set for a hearing, a full hearing, and let’s duke it out here, Your Honor, this whole issue of the homosexuality.” 11/6/08 Hearing Tr. at 17. When asked for his response by the Circuit Court, Petitioners’ counsel noted that the purpose of the hearing on B.G.C.’s permanency plan was to confirm that adoption was the course that DHHR should pursue for this child, and that DHHR would not make a recommendation regarding which prospective adoptive parent(s) would, in DHHR’s view, best meet B.G.C.’s needs until the agency, among other things, had received input from the ongoing worker assigned to the case and had interviewed prospective adoptive candidates. *Id.* at 18. With respect to the GAL’s objections, Petitioners’ counsel noted that, throughout the proceedings, no one – including the GAL – had anything negative to say about the quality of care being provided by Petitioners to B.G.C., and “the only bad thing that . . . [the GAL.] can say about [Petitioners] is they’re a same-sex couple.” *Id.* at 20.

After noting that Petitioners had taken good care of B.G.C., the Circuit Court stated, “I think I’ve indicated time and time again, this Court’s opinion is that the best interest of a child is to be raised by a traditional family, mother and father. Now, that’s this Court’s opinion as to what a typical West Virginian would feel and what the typical attitude is of the West Virginia Supreme Court, a traditional family.” *Id.* at 22-23. The Circuit Court ruled that it would entertain adoption by a “nontraditional” family only if there were no other alternative. *Id.* at 23.

At that point, the Circuit Court agreed to tentatively approve the permanency plan insofar as it recommended pursuing adoption for B.G.C., but then informed those present that he wanted

to hold a hearing on the GAL's motion, and "to hear [Petitioners' counsel's] response to it, because it's the Court's intention to remove this child at this time from the home of Ms. Kutil and Ms. Hess." *Id.* at 26. After counsel for DHHR asked the Circuit Court whether it actually intended to remove the child from Petitioners' home that very day, *id.* at 26 ("Today?"), the Circuit Court noted that "it would be too traumatic to take the child at this time and just uproot her right now," and ordered instead that B.G.C. be transitioned to a new foster home over a two-week period. *Id.* at 27. Having heard no evidence about the current foster placement, nor any specific information about other placements that might be available, the Circuit Court further ordered that B.G.C. "be placed in a traditional home with a mother and a father." *Id.* The Circuit Court also instructed DHHR that the permanency plan "needs to include adoption by a traditional family unit." *Id.* at 28.

Counsel for DHHR asked to have "the Department's objection to removal of the child" noted on the record, and Petitioners' counsel asked the Circuit Court to articulate its basis for immediately removing B.G.C. from Petitioners' home and placing her transitionally somewhere else before a hearing on the GAL's motion could be held. *Id.* at 28. The only explanation offered by the Circuit Court was that removal was intended to aid in the transition of B.G.C. to "an appropriate traditional family unit." *Id.* at 28-29.

Petitioners filed a Motion for an Emergency Stay of Order with this Court on November 17, 2008, to prevent enforcement of the Circuit Court's order to remove B.G.C. from their home. Response Exh. 14. The next day, the Circuit Court agreed to stay the transfer of custody pending the evidentiary hearing on the GAL's motion. Response Exh. 12.

The Circuit Court conducted an evidentiary hearing on November 21, 2008.<sup>2</sup> The Circuit Court first heard testimony from a DHHR Adoption Supervisor about the steps that DHHR had taken in order to comply with the Circuit Court's order to find a "traditional foster home" for B.G.C., and about the fact that any new placement for B.G.C. would require a six-month test period before DHHR would recommend permanent placement pursuant to DHHR policy. *Id.* at 25-44. The Circuit Court then heard from a DHHR Home Finding Supervisor, who testified that the only way for DHHR to make a decision on the best adoptive home for a child is through individual interviews of prospective parents, *id.* at 51, and that, in terms of making its placement decisions for a particular child, DHHR does not discriminate on the basis of the sexual orientation of the applicant(s), *id.* at 53.

After allowing the GAL to call Petitioner Hess for the purpose of establishing that she and Petitioner Kutil were, in fact, a couple who loved each other, *id.* at 67-71, the Circuit Court then heard from the two witnesses offered as experts. Over Petitioners' objection, the Circuit Court qualified as an expert Trayce Hansen, a witness who had never conducted a parenting evaluation, and who had never been accepted by any court as someone with sufficient expertise

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<sup>2</sup> *Amici* note that, between the November 6, 2008, hearing and the November 21, 2008, hearing, DHHR changed its position regarding removal of B.G.C. from Petitioners' home. After the Circuit Court's November 12, 2008, Order, DHHR apparently "discovered" that Petitioners had more foster children in their home than permitted by statute. Amended Petition for Writ of Prohibition ¶¶ 3-4. Petitioners were over the limit because, on October 31, 2008, DHHR had placed another foster child in Petitioners' care. *Id.* at ¶ 4. Petitioners claim that the DHHR worker placing this seventh child in their home assured them that a waiver of the statutory limit would be forthcoming. *Id.* at ¶ 3. DHHR, however, has since taken the position that they cannot grant any such waiver, and that any representation made by a DHHR worker to the contrary was improper. Compare *id.* at ¶¶ 3-4 with Answer of West Virginia Department of Health and Human Resources to Amended Petition for Writ of Prohibition ("DHHR Response") ¶ 4. *Amici* do not focus on this aspect of the case because it is apparently undisputed that Petitioners' household is no longer over the statutory limit, see Amended Petition for Writ of Prohibition ¶ 19; DHHR Response ¶ 19, and the record reflects that, even if overcrowding had not been an issue, the Circuit Court would still have ordered DHHR to remove B.G.C. from Petitioners' home due to its belief that she should be placed with a "traditional family."

to render an opinion regarding a parenting evaluation. *Id.* at 84-85. Dr. Hansen did not offer any testimony about B.G.C.'s specific case, offering only her opinion that, as a general matter, "[t]he optimal or ideal environment for children is to be raised in a mother/father, married couple family." *Id.* at 108.

In response, Petitioners called Dr. Christine Cooper-Lehki, an assistant professor of clinical psychiatry at West Virginia University, and an expert in child clinical psychiatry who performs court-ordered parental fitness evaluations routinely. *Id.* at 129-31, 139. Dr. Cooper-Lehki testified that, based on the credible social science in the field, all the mainstream national child welfare organizations have concluded that there is no difference in parenting outcomes between heterosexual and gay or lesbian parents. *Id.* at 140-59. Dr. Cooper-Lehki testified that any studies referring to the benefits to a child of being raised in a "traditional family" were not applicable to B.G.C.'s situation because she was no longer being raised by her biological mother and father, and therefore was "already out of that group of traditional families." *Id.* at 159; *see also id.* at 170-72. Dr. Cooper-Lehki then explained to the Circuit Court that a significant bond would have already formed between B.G.C. and Petitioners during the eleven months that she had been in their care, and testified about the harm that would be caused to B.G.C. by removing her from that home, and the ways in which the harm would manifest itself in the short and long terms. *Id.* at 159-69.<sup>3</sup>

In light of the fact that the Circuit Court had threatened to remove B.G.C. from Petitioners' home without even hearing testimony about the quality of care being provided to

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<sup>3</sup> *Amici* refer the Court to the *amicus* brief of the social science experts offered in support of Petitioners, which offers a more thorough evaluation of the testimony of Dr. Hansen and Dr. Cooper-Lehki and confirms that there is no legitimate scientific argument to be made that a "mother/father, married couple family" is the optimal or ideal adoptive placement for all foster children in state care. *See* Brief of *Amici Curiae* National Association of Social Workers, *et al.* (filed February 17, 2009).

B.G.C. by the Petitioners, Petitioners' counsel offered witnesses who would testify "that [Petitioners] are excellent parents, that there's a loving relationship between them and all of the children in their home." *Id.* at 185. Conceding that there was no dispute about the quality of the care that Petitioners were providing B.G.C., and noting that Petitioners could "probably bring in a truckload of people to testify about what wonderful people they are and what wonderful parents they are," the Circuit Court refused to hear the testimony, stating that it did not think that any such evidence was "something that is really relevant and material here." *Id.* at 185-86.<sup>4</sup>

Notwithstanding these comments, at the conclusion of the hearing, the Circuit Court ordered DHHR to remove B.G.C. from Petitioners' home by noon the following day. *Id.* at 222.

Petitioners filed a Motion for Emergency Stay with the West Virginia Supreme Court of Appeals on November 24, 2008. Response Exh. 18. Two days later, the potential adoptive parents with whom B.G.C. had been placed, Roger and Amy Thompson, contacted DHHR to say they were no longer interested in adopting B.G.C. See Answer of West Virginia Department of Health and Human Resources to Amended Petition for Writ of Prohibition ("DHHR Response") ¶ 29 (confirming Petitioners' statement that, "[o]n November 26, 2008, the Thompsons contacted DHHR and advised that they had reconsidered adopting [B.G.C.] and decided that they were no longer interested in following through with the adoption. In light of the preceding, DHHR moved [B.G.C.] to a new foster home in Greenbrier County later in the day.").

On the same day, the Supreme Court of Appeals granted Petitioners' motion, and B.G.C. was returned to them. Response Exh. 20. Petitioners filed an Amended Petition for Writ of Prohibition with the Supreme Court on December 4, 2008.

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<sup>4</sup> The Court did, however, allow Petitioner Kutil to testify about her educational training in social work, and her professional experience at the Fayette Nursing and Rehabilitation Center, as well testimony about Petitioners' care for B.G.C. and the other foster children in their home. 11/21/08 Hearing Tr. at 188-201.

## ARGUMENT

### **I. Under West Virginia Statutory and Case Law, the Best Interests of the Child Involved Is the Paramount Consideration in Any Determination of a Placement, or Removal from a Placement, for a Particular Child.**

This Court has “recognized consistently” that, in the context of child welfare proceedings, a “fundamental mandate...is that the ultimate determination of child placement must be premised upon an analysis of the best interests of the child.” *Napoleon S. v. Walker*, 217 W. Va. 254, 259, 617 S.E.2d 801 (2005). Consequently, this Court has reiterated on numerous occasions that “the best interests of the child is the polar star by which decisions must be made which affect children.” *Id.* (internal citations and quotations omitted).

The preeminence of the child’s best interests, relative to other interests, is reflected in the statutes governing the state child welfare system. For example, the system’s first two goals, as delineated by the Legislature, are to “(1) assure each child care, safety and guidance, [and] (2) serve the mental and physical welfare of the child.” W.Va. Code. § 49-1-1(a)(1)-(2). Further emphasizing this point, the statute contains an express statement of purpose by the Legislature clarifying that the best interests of the child involved shall be given paramount consideration: “In pursuit of these goals it is the intention of the Legislature . . . to secure for the child custody, care and discipline consistent with the child’s best interests and other goals herein set out.” W.Va. Code § 49-1-1(b).

The Circuit Court has an important role to play in ensuring that the best interests of the child remain the paramount consideration. As this Court has explained:

In order to effectuate the legislative intent expressed in W. Va. Code § 49-1-1(a), a circuit court must endeavor to secure for a child who has been removed from his or her family a permanent placement with the level of custody, care, commitment, nurturing and discipline *that is consistent with the child’s best interests*.

*Napoleon S.*, 217 W. Va. at 259-60 (quoting *State v. Michael M.*, 202 W. Va. 350, 358, 504 S.E.2d 117 (1998)) (emphasis added).

In order to implement this commitment to promoting the best interests of children, West Virginia child welfare laws and regulations insist that assessments of children and prospective foster and adoptive parents be made on an individualized basis. See W. Va. Code R. § 78-2-13.1.b (foster and adoptive parents must be “nurturing, responsible, patient, stable, flexible, mature, healthy adults *capable of meeting the individual and specific needs* of children referred for placement services”) (emphasis added). Consistent with this individualized approach, the practice of DHHR is to make assessments and determinations about appropriate foster and adoptive placements based on a particular child’s needs and best interests, and the particular attributes of a foster or adoptive parent. See 11/21/08 Hearing Tr. at 47-52.<sup>5</sup> Each prospective foster or adoptive parent is assessed individually when DHHR explores the possibility of placing a child in that home as a temporary foster placement, or with the goal of facilitating adoption.

W. Va. Code R. § 78-2-16.1 (discussing comprehensive home study, including a minimum of one individual in-person interview for each prospective foster or adoptive parent, and two joint interviews); *id.* at §§ 78-2-13, 78-2-16 (listing range of factors to be considered when evaluating a prospective parent, including (but not limited to) the prospective parents’ childhood and family experiences; education and employment history; important life experiences; values, ideals, and religious beliefs; attitudes towards discipline; decision-making processes; health history; hobbies

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<sup>5</sup> See also W. Va. Dept. of Health & Human Res., Adoption Policy § 7.2 (2004), available at [http://www.wvdhhr.org/bcf/policy/adoption/Adoption\\_Policy.pdf](http://www.wvdhhr.org/bcf/policy/adoption/Adoption_Policy.pdf) (last visited Feb. 11, 2009) (child’s Adoption Worker will prepare a complete child assessment summary which will detail the child’s needs, strengths, talents, disabilities, special needs, behaviors and weaknesses); *id.* at § 7.3 (prospective adoptive parents are evaluated on a case-by-case basis “based on their ability to meet the social, emotional, physical and financial needs of the child”).

and interests; parenting and child care experience; financial resources; living arrangements; and understanding of the legal rights of the child).

The fact that a prospective parent is straight, gay or bisexual does not alter the process that DHHR undertakes to determine a person's suitability as a foster or adoptive parent. *See* 11/21/08 Hearing Tr. at 52-53. Indeed, state law and regulations explicitly provide that discrimination on the basis of sexual orientation has no place in the child welfare decision-making process. *See, e.g.,* W. Va. Code R. § 78-2-9.1.a (noting that services will be provided to children and their family on an equal basis, "regardless of race, religion, ethnicity, gender, disability, or sexual orientation"). This commitment to nondiscrimination on the basis of sexual orientation is consistent with West Virginia case law, which has reaffirmed on numerous occasions that a gay or lesbian sexual orientation *per se* is not a factor that should negatively influence a custody determination. For example, in *Rowsey v. Rowsey*, 174 W. Va. 692, 695-96, 329 S.E.2d 57 (1985), this Court held that speculation about harm that might result from a mother's association with a lesbian was not sufficient to justify a change in custody. Likewise, in *M.S.P. v. P.E.P.*, 178 W. Va. 183, 186, 358 S.E.2d 442 (1987), this Court held that a circuit court committed legal error in denying a biological mother, who was the primary caretaker of her child, primary custody of her child due to her relationship with a bisexual man, where there was no evidence of any harm to the child resulting from the relationship. *Cf. Clifford K. v. Paul S.*, 217 W. Va. 625, 619 S.E.2d 138 (2005) (recognizing psychological parent status of a woman whose relationship with the child developed in the context of a relationship with the child's mother).

Just as there is no preference in West Virginia law regarding the sexual orientation of the prospective adoptive or foster parent, there also is no preference with respect to his or her marital

status.<sup>6</sup> The only place in West Virginia child welfare law where married couples are addressed is the statutory provision that makes clear that, for a prospective adoptive parent who is married, he or she must either secure the consent of his or her spouse or the couple must adopt jointly. See W.Va. Code § 48-22-201 (“Any person not married or any person, with his or her spouse’s consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners.”). Therefore, notwithstanding Respondent’s and the GAL’s suggestions to the contrary, West Virginia has no law or policy providing that married couples are the preferred placement that DHHR should pursue for every child in its care.<sup>7</sup>

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<sup>6</sup> Rule 41(a)(6) of the Rules of Procedure for Child Abuse and Neglect Proceedings, which requires consideration of whether a placement is “the least restrictive (most family-like one) available,” provides no support for the Circuit Court’s argument that the State favors adoption by married couples. As a review of these rules in their entirety reveals, Rule 41(a)(6) simply indicates a preference for a foster home over a group home or institutional setting. See W. Va. R. P. Abuse & Neglect Pro. 41(a)(10)(E) (“If placement in a group home or institution is recommended, [matters for discussion at a permanent placement review conference shall include] an explanation of why treatment outside a family environment is necessary, including a brief summary of supporting expert diagnoses and recommendations; and a discussion of why a less restrictive, more family-like setting is not practical, including placement with specially trained foster parents.”); see also *id.* at 28(c)(3).

<sup>7</sup> Although the Circuit Court insists that only married couples can adopt jointly, *amici* submit that there is no reason why the adoption statutes must or should be read so narrowly; moreover, the Court should have the benefit of a fuller record, and more comprehensive briefing, before construing West Virginia’s adoption statute in a manner that may have far-ranging consequences for children throughout the State in need of adoption. DHHR policy since 2004 provides that unmarried couples will be considered as candidates for adoption if they can “demonstrate that their relationship is stable and would provide an environment of stability for a child.” 11/21/08 Hearing Tr. at 49-50. Federal adoption statistics for 2006 (the most recent year for which comprehensive data are available) indicate that, in 1% of the cases in West Virginia, an unmarried couple was deemed to be the appropriate adoptive placement for a child. See U.S. Dep’t of Health and Human Services, Administration for Children and Families, Adoptive Family Structure, October 1, 2005 to September 30, 2006, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/statistics/adoptfs\\_tbl8\\_2006.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/adoptfs_tbl8_2006.htm) (last visited February 12, 2009). The record in this case indicates that both Petitioners are willing and eager to be considered as adoptive parents to B.G.C. However, because Petitioners are asking only that the Court enjoin the Circuit Court from preventing DHHR from considering “Petitioner, Kathryn

The Circuit Court's attempt to read a "married couple" preference into the law is further rebuffed by the fact that the Legislature has shown itself completely capable of crafting preferences with respect to adoptive placement, and has not done so with respect to married couples. The only two preferences that exist in West Virginia adoption law pertain to the preservation of relationships with the child's blood relatives. The first of these preferences ensures that siblings will not be separated unless necessary to promote one or more of the sibling's best interest. *See* W. Va. Code § 49-2-14(e)-(f). The other preference recognizes the importance of the relationship between children and their grandparents. *See* W. Va. Code § 49-3-1(a)(3) (DHHR "shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child").

Even where these preferences are implicated, placement with a sibling or a willing grandparent is not automatic. Rather, with respect to siblings, the State will terminate one foster care arrangement and place the child with his or her sibling "if termination and new placement are in the best interests of the children." W. Va. Code § 49-2-14(e). Likewise, where a child's grandparent has expressed an interest in adopting the child, "[i]f the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents." *Id.* at § 49-3-1(a)(3).

In other words, even in cases that trigger these statutory preferences, the best interest of the child remains the paramount consideration. Indeed, when presented with the question of the

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Kutil, and her household . . . the primary candidate as an adoptive parent [for B.G.C.],” *see* Amended Petition for Writ of Prohibition at 13, the question of whether a joint petition for adoption by Petitioners Kutil and Hess would be proper is not yet ripe. *Amici* submit that the question of whether an unmarried couple may petition jointly for adoption should await an actual adoption petition by an unmarried couple.

interplay between the grandparent preference and the best interests analysis, this Court resolved any apparent conflict by noting that the question of whether grandparents would be “suitable adoptive parents” inherently required DHHR to assess whether the placement would serve the child’s best interests:

[I]n the view of this Court, West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. . . . By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents “would be suitable adoptive parents,” the Legislature has implicitly included the requirement for an analysis by the DHHR and circuit courts of the best interests of the child, given all the circumstances of the case.

*Napoleon S.*, 217 W. Va. at 261.

In *Napoleon S.*, the Court built upon the analysis outlined by this Court in the *Carol B.* case regarding the interplay between a statutory preference for sibling unification and the best interests of the child standard. *Id.* at 260 (discussing *In re Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001)). In both cases, this Court made clear that even an express preference from the Legislature for placement of children with their grandparents and siblings did not eviscerate the best interests analysis. *Id.* at 260; *Carol B.*, 209 W. Va. at 665.

Because there is no preference for placement with married couples, the Circuit Court acted outside of its authority in issuing a directive to DHHR to act as though there were. Moreover, the Circuit Court’s order requires DHHR to pursue placement with a married couple regardless of whether such placement would be in the best interests of B.G.C., which directly contradicts the mandate that the needs of an individual child be given paramount consideration with respect to decisions about placement in a foster or an adoptive home. The Circuit Court’s

failure in this regard is reinforced by its complete refusal to hear evidence about the relationship between the Petitioners and B.G.C. and the manner of care that they provided to the child.

The fact that the Circuit Court exceeded its statutory authority in imposing this restriction on DHHR with respect to its decisions regarding B.G.C. is a sufficient basis for granting the writ of prohibition. As explained below, however, the Circuit Court's actions, in addition to being *ultra vires*, implicate fundamental constitutional guarantees.

**II. This Court Should Grant the Writ Because the Circuit Court's Actions, If Allowed to Stand, Would Violate This Child's Constitutional Right to Be Free from the Infliction of Unjustified Harm by the State While in Its Care.**

**A. The Constitution Imposes upon the State a Duty Not to Harm Children in Its Custody or Care.**

When the State takes an individual into its custody or care, the Due Process Clause imposes upon the State an affirmative duty of care toward that person. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200-01 & n.9 (1989); *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). This affirmative duty stems from the fact that, by depriving an individual of his or her liberty, the State has created a situation of dependence between itself and the individual. Where this "special relationship" of dependence exists, the State has a duty under the Due Process Clause, at a minimum, not to take actions that will inflict unnecessary and unjustified harm on the individual in its care. *DeShaney*, 489 U.S. at 200-01.

Because "[f]oster children, like the incarcerated or the involuntarily committed, are placed ... in a custodial environment ... [and are] unable to seek alternative living arrangements," courts have uniformly held that, "when the [S]tate places a child in state-regulated foster care, the [S]tate has entered into a special relationship with that child which imposes upon it certain affirmative duties." *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (internal citations

omitted). Consequently, as the Sixth Circuit explained, “the substantive due process right to personal safety . . . extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.” *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (citing *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), and *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981)); see also *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 292 (8th Cir. 1993) (State has duty to protect foster children commensurate with duty to protect others involuntarily confined by the State); *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 892 (10th Cir. 1992) (accord).

When presented with the question of when a State may be held liable for harm done to a child in a state foster-care system, different federal circuit courts have adopted different standards. Some courts have applied a “professional judgment” standard, under which the State may be held liable if its actions “were ‘such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.’” *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (quoting *Youngberg*, 457 U.S. at 323). See also *Whitley v. N.M. Children, Youth, & Families Dep’t*, 184 F. Supp. 2d 1146, 1155 (D.N.M. 2001) (social workers could be held liable if they “knew of the asserted danger to plaintiff or failed to exercise professional judgment, that is, that they abdicated their duty to act professionally, thereby causing injury”). Other courts have adopted a “deliberate indifference” standard. *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (liability if defendant was “plainly placed on notice of a danger and chose to ignore the danger”). Under either of these standards, however, the Circuit Court erred. Indeed, as set forth below, under *any* standard, the constitutional duty of care is violated where

the State takes action that it knows will harm a child in its care or custody based on nothing more than mere generalized speculation, as opposed to actual individualized evidence.<sup>8</sup>

*Amici* emphasize that, in this case, the State could satisfy its constitutional duty of care to B.G.C. under any of the articulated standards simply by engaging in and satisfying the kind of individualized best interests analysis contemplated by the child welfare statutes and regulations, something that the Circuit Court's order precludes the State from doing. Thus, the Court should grant the writ and permit DHHR once again to conduct an individualized analysis of B.G.C.'s specific case as required by state law and regulation, and determine whether removal of B.G.C. from Petitioners' home would be in her best interests. Absent the Circuit Court's proverbial finger on the scale, any constitutional ruling on these issues may be reserved for another day.

**B. In This Case, There Was Clear Evidence That an Order Directing DHHR to Remove B.G.C. from Petitioners' Home Would Result in Harm to the Child.**

In this case, the Circuit Court has compelled DHHR, through its Order to remove B.G.C. from Petitioners' home notwithstanding the undisputed evidence that doing so would cause B.G.C short- and long-term harm. First, the record shows that DHHR child care professionals informed the Circuit Court that B.G.C. was in a home that was meeting her needs. Specifically, coming into the November 6, 2008, hearing, the Circuit Court had the benefit of a report from the Child Protective Service Worker assigned to the case, Heather Hunter, in which she offered her opinion that Petitioners' home was an appropriate adoptive placement for B.G.C. for numerous reasons, including the fact that the home was "consistent with the best interests of the child," the home was "the only placement [B.G.C.] has been in," and B.G.C. "has a bond with foster parents with whom she has resided her entire life." See Response Exh. 8. The Circuit

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<sup>8</sup> While *amici* submit that a more heightened level of scrutiny should apply, this Court need not resolve which standard applies here because, as set forth below, the Circuit Court's actions may not stand under *any* standard.

Court also had a report which recounted the view of a DHHR Adoption Unit Supervisor that “the Adoption Unit would be reluctant to ‘uproot’ a child [*i.e.*, B.G.C.] from the only home she knows.” Response Exh. 7.

These observations from DHHR workers familiar with B.G.C.’s case reflect the opinions of people with relevant professional expertise and specific knowledge about the facts in this individual case. This Court should take judicial notice of the fact that the child care professionals most familiar with B.G.C.’s individual circumstances prior to the Circuit Court’s intervention on November 6, 2008, believed that B.G.C. was in a placement that was meeting her needs, and that a reasonable child care professional would be “reluctant” to “uproot” a child in B.G.C.’s situation.

During the hearing held on November 21, 2008, the evidence that was introduced into the record was clear (and indeed there was no evidence to the contrary) that B.G.C. would suffer real harm if she were removed from the only home that she has ever known. As explained by Petitioners’ expert Dr. Cooper-Lehki, even though B.G.C. would not be able to articulate her suffering in words, she would experience trauma. First, Dr. Cooper-Lehki established that, notwithstanding her young age, B.G.C. had likely formed an emotional bond with Petitioners:

Q: But the fact that this infant is only eleven months old, it is still your opinion that, in that time frame and given the degree to which she’s developed, that it’s typical for a child of that age to bond emotionally with the caregivers.

A: Yes. Absolutely.

Q: Notwithstanding the fact that an infant of that age cannot express verbally or otherwise emotion or how it’s feeling?

A: Right. Absolutely. . . .

11/21/08 Hearing Tr. at 162.

Dr. Cooper-Lehki also provided a detailed explanation of the importance of emotional bonding for an infant like B.G.C.:

[Emotional bonding] starts from the moment an infant is born, and there are critical milestones in the attachment process that might already be there in place by eleven months of age. I don't know if I can describe in detail all the milestones. But there are – as I was explaining to you earlier, they are established from very early on. It doesn't matter if they're hungry or cold or have a tummy ache or whatever, they just cry. The parent comes immediately, and you don't delay the child's needs when they're one month and two months old. And by responding to every single need that they have consistently, that's how the child learns to trust, and they learn that Mommy or Daddy or Caretaker, whoever it is, is going to be there, whoever that caretaking parent is. It's only until they have that established and know that their needs are going to be met and that they're taken care of and safe can they learn to wait, for example, for longer periods of time. So, you know, when they're seven months old, they're starting to learn that, yeah, you might [not] be there immediately, but you're going to be there. So if they're afraid, then they learn that there's somebody there who's going to take care of them and respond to their needs. And it's a gradual process, but it starts from the moment an infant is born.

*Id.* at 160-62.

Finally, when asked what harm would befall B.G.C. if she were removed from Petitioners' home, Dr. Cooper Lehki's testimony that B.G.C. could suffer significantly was equally definitive:

Q: Now, if [B.G.C.] were suddenly removed from the home of Ms. Kutil and Ms. Hess, what type of an emotional effect would that have on this infant.

A: There could be a wide variety of responses, and we can start with more immediate consequences. She may cry excessively, be very clingy, she may stop eating. When children are removed abruptly from the only home that they've ever known, they can develop severe attachment problems; they can develop failure to thrive, stop eating altogether, stop gaining weight, stop being playful. Their cognitive development, their thinking development that Dr. Hansen [the GAL's expert] was talking about earlier, can be impaired. They can actually have lower IQs than their potential

would have suggested otherwise. It's very disruptive to remove a child. That's why CPS doesn't do it unless they have to.

Q: Now, is there medical research to support the testimony that you just gave?

A: Yes, lots. This is very well established.

Q: And so this isn't a situation where, if you take an eleven-month-old child, move them to another home, and they just forget about Ms. Kutil and Hess and move on with their life?

A: You know, they won't have clear memories at eleven months of age, because they don't have words. You don't have very clear specific memories until you develop words, and that's around age three. But what they're going to have is that affective or emotional experience. They're going to be anxious and overwhelmed. They're not going to know who to trust. What happens is these babies can just be chaotic and cry all the time or completely withdraw and don't interact with their world, because it's so overwhelming because they have no idea what's going on. Suddenly to just be removed from everything that you know and with different people, they can't cope with it.

*Id.* at 163-64.

The GAL's expert offered no testimony that contradicted Dr. Cooper-Lehki's assessment that removal of B.G.C. would produce these kinds of short- and long-term harms. Nor did the Circuit Court fail to comprehend the substance of Dr. Cooper-Lehki's testimony, *id.* at 186 ("This Court – I've heard from your expert about the tremendous trauma that's going to be caused to this child if this child is removed from this home for purposes of adoption or for changing foster care."). Moreover, the Circuit Court expressly stated that it did not dispute that Petitioners were offering a good home to B.G.C, and, in fact, refused to allow Petitioners' counsel to offer additional evidence about the quality of care being provided by Petitioners to B.G.C. and the other children in their household because the issue, the Circuit Court insisted, was not in dispute. *Id.* at 185-86. Yet, at the conclusion of the hearing, the Circuit Court

nevertheless ordered DHHR to remove B.G.C. from Petitioners' home within less than twenty four hours and place her with a "traditional family," despite the undisputed high quality of care B.G.C. was receiving while in Petitioners' care. The Circuit Court's decision to do so was a decision to subject B.G.C. to certain harm, and clearly was not based on an individualized assessment of her best interests.

**C. The Record in This Case Contains No Evidence That Removal of B.G.C. from Petitioners' Home Simply to Accommodate the Circuit Court's Extra-Statutory Preference for Married Heterosexual Parents Would Further B.G.C.'s Best Interests.**

The record reflects that the Circuit Court recognized that B.G.C. would be harmed if she were removed from Petitioners' home, and yet ordered her immediate removal anyway. The record also reflects that the consideration that trumped all others was not the best interests of B.G.C. but rather the Circuit Court's belief that a married mother and father should always be considered the presumptive best placement for a child, and that the mere possibility of such placement at some point in time was enough to justify inflicting this harm immediately. As there was no basis in law for the Circuit Court to impose this condition upon DHHR, and no facts in the record to suggest that placement with a particular married mother and father would better suit the needs of B.G.C., the Circuit Court committed error of constitutional magnitude, which must be corrected by this Court.

The Circuit Court offered a number of statements throughout the November 21, 2008, hearing that can leave no doubt that the Circuit Court was going to order removal of B.G.C. from Petitioners' home, and that nothing about B.G.C.'s particular situation would impact the result.<sup>9</sup>

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<sup>9</sup> The statements made by the Circuit Court during the November 6, 2008, hearing, *see, e.g.*, 11/6/08 Hearing Tr. at 22-23, and in the Circuit Court's "findings of fact" in its November 12, 2008, order, *see, e.g.*, Response Exh. 11 at 9 (finding that "children need both mother and father"), further demonstrate that the Circuit Court was firmly resolved to order removal of

For example, the Circuit Court posited that some level of trauma is inevitable whenever a child is removed from a home, as though that somehow relieved it of its obligation to ensure that there was actual individualized evidence that justified inflicting such trauma on B.G.C. *Id.* at 220 (“The parties talk about trauma. Trauma is always going to be present when you remove a child from a home that they know and put them in a home they do not know.”). With complete disregard for the evidence to the contrary presented to it (without contradiction), the Circuit Court made the unsupported suggestion that, due to her young age, the trauma that B.G.C. suffers at her age is of little import. *Id.* at 220 (“That trauma is lessened, though, with a child of tender years, a baby. I doubt that anyone in this courtroom can remember what occurred to them when they were eleven months of age.”). The Circuit Court attempted to diminish the significance of its actions by noting that it initially tried to lessen the trauma by ordering a gradual transition period, *id.*, but at the conclusion of the hearing, what the Circuit Court actually did was to order the child removed from Petitioners’ home by noon the next day, *id.* at 222.

Particularly troubling from not only statutory but also a constitutional perspective is the fact that the Circuit Court seemed to justify its harmful actions with respect to this child by referring in general terms to another case where another child suffered presumably even greater trauma:

This Court is familiar with a case where – out of our State Supreme Court of Appeals; it’s been 20-some years ago – where a child went through the adoption process, was adopted by a family and with a family eight years and, because there was a technicality in that adoption process, the Supreme Court overturned it.

And here is a child – I don’t know whether that child was 14 or 15 years old at that time – was taken from the only parents that it knew, and I think it was placed with them as a baby. You talk

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B.G.C. from Petitioners’ home irrespective of the existence of evidence to the contrary and the absence of evidence in support.

about trauma. So I consider that trauma, but it can't be the overriding consideration.

*Id.* at 220-21. The Circuit Court's vague recollection of a case in which another child was taken from his adoptive home – and presumably returned to a natural parent, the only person who would have had standing to challenge the adoption – certainly does not justify inflicting unnecessary harm on this child, and the Circuit Court's reliance on it is the antithesis of an individualized best interest analysis.<sup>10</sup>

Indeed, this is illustrative of the fundamental flaw in the Circuit Court's actions, which must fail constitutional scrutiny under any analysis. Where, as here, the evidence establishes that removal of a child from a placement would harm the child, and there is no actual individualized evidence that justifies inflicting the harm on the child, the infliction of such harm cannot stand under any standard. Here, the Circuit Court based its actions on nothing more than mere generalized speculation that a married mother and father might someday come along and be the sort of married mother and father that would prove to be a better placement. There is simply no actual individualized evidence that B.G.C.'s continued placement with Petitioners would harm her in a way that would outweigh the known and significant harm to B.G.C. that her removal from Petitioners' home would occasion. Likewise, there is simply no actual individualized evidence of an actual married mother and father who have been individually assessed who would benefit B.G.C. in a way that would outweigh the harm to B.G.C.<sup>11</sup> Inflicting harm on a child

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<sup>10</sup> It is worth noting that, even where there have been technical deficiencies with an adoption, this Court has ruled in some cases that the best interests of the child, even when weighed against the rights of a natural parent, may justify leaving a flawed adoption decree intact. *See, e.g., State ex rel. Smith v. Abbot*, 187 W. Va. 261, 266, 418 S.E.2d 575 (1992).

<sup>11</sup> The GAL advocated for removal of B.G.C. from Petitioners' home and placement in the Thompson home, *see* 11/21/08 Hearing Tr. at 210, apparently without having even met the Thompsons, *see* Response Exh. 17 at ¶ 19. *See also* Guardian *Ad Litem's* Brief in Response to Rule to Show Cause Why Writ of Prohibition Should Not Be Awarded at 7 (indicating that the

based on mere generalized speculation instead of actual individualized evidence necessarily violates the State's duty of care under any standard. It fails the professional judgment standard. Indeed, it is the consensus of the child welfare professional community, based on the social science, that a removal of a child from a placement under these circumstances is contrary to the best interests of the child.<sup>12</sup> It also fails the deliberate indifference standard. It is deliberate indifference to deliberately inflict a known and significant harm on a child without even bothering to assess whether there is an actual basis for doing so to that child. This is the Circuit Court's fundamental error.<sup>13</sup>

The delicate process of placing a child in a home that meets her best interests is not as simple as running a computer program and looking for a "match." *See id.* at 45-46 (exchange between Circuit Court and DHHR counsel about the process for matching foster children and prospective parents). Rather, as Amy Hunt, DHHR's Region IV Home Finding Supervisor, testified, the agency's "primary purpose is to find – is to match [a] child to a family, not to match a family to that child." *Id.* at 50-51. And yet, in the face of this clear testimony about the highly individualized nature of the placement process, and the clear evidence that B.G.C. would suffer immediate trauma and other longer term harm if she were immediately removed from Petitioners' home, the Circuit Court ordered her removal anyway. *Amici* submit that, whatever else the Due Process Clause may prohibit, it certainly prohibits a court from removing a child

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first time the GAL met with the Thompsons was on November 24, 2008, two days after B.G.C. was placed in their home).

<sup>12</sup> *Amici* refer the Court to the brief filed by state and national child welfare organization for further explication of the relevant social science. *See* Brief of *Amici Curiae* National Association of Social Workers, *et al.* (filed February 17, 2009).

<sup>13</sup> As noted previously, *amici* believe that an even more demanding level of scrutiny should apply in this case. *Amici* reiterate, however, that because the Circuit Court's actions fail under both the professional judgment and the deliberate indifference standard, this Court need not decide what precise level of review is triggered by the Circuit Court's actions.

from the only home that she has ever known and thereby subjecting her to harm while the State explores the *possibility* that there might be a married mother and father that could potentially provide what an individual judge personally believes is a more traditional, and therefore inherently better, home for the child. In other words, due process protections are implicated here because there is clear evidence that removing B.G.C. from Petitioners' home would cause B.G.C. harm, and the only proffered justification for this action is an individual judge's personal opinion "as to what a typical West Virginian would feel and what the typical attitude is of the West Virginia Supreme Court, a traditional family," 11/6/08 Hearing Tr. at 22-23, unsupported by any actual evidence involving B.G.C.'s individual circumstance.<sup>14</sup> In fact, the only married-mother-father couple that was interested in adopting B.G.C., changed their minds in a matter of days after B.G.C. was placed in their care and the child had to be moved to yet another temporary foster home before this Court's granted the emergency stay currently in place.

Amended Petition for Writ of Prohibition at ¶ 29; DHHR Response at ¶ 29.

Contrary to what the Circuit Court would have this Court believe, *amici*'s position is not that a child can never be removed from a foster home simply because the disruption will cause some level of trauma to the child. Rather, the issue is whether, in removing a child from a foster home, the State relies on evidence that supports a conclusion that the benefits to the particular child outweighs the harm to the particular child that removal will cause. For example, removal will almost certainly be justified, notwithstanding the trauma that removal may cause, in cases where removal furthers the child's best interests by, for example, (1) reunifying a child with his

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<sup>14</sup> *Amici* refer the Court to the *amicus* brief of the social science experts offered in support of Petitioners, which confirms the testimony of Dr. Cooper-Lehki that there is no legitimate scientific argument to be made that children will do better when raised by a married mother and father than with a loving committed gay or lesbian couple. See Brief of *Amici Curiae* National Association of Social Workers, *et al.* (filed February 17, 2009).

or her natural parents where the natural parents are fit to parent; or (2) preventing harm to a child where the foster home is not serving that child's best interests (in terms of discipline, academic support, etc.).

*Amici's* point is simply that the State may not take action that will cause unnecessary and unjustified harm to a foster child in its care without sufficient evidence particular to that child that justifies its actions. As set forth above, in this case, the critical point is that such evidence is entirely lacking. There is simply nothing in this record, or West Virginia law, that justifies the Circuit Court's order directing DHHR to subject B.G.C. to the harm occasioned by her removal from placement simply to accommodate a preference for hypothetical married adoptive parents. The Circuit Court's order runs completely contrary to the State's obligation to account for the best interests of B.G.C.<sup>15</sup>

Adhering to the kind of individualized best interests analysis contemplated by West Virginia's child welfare statutes and regulations not only makes sense as good child welfare policy but also has the added benefit of ensuring compliance with the State's constitutional duty not to inflict unnecessary and justified harm on the children in its care. This Court should

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<sup>15</sup> *Amici* share Petitioners' view that the decision by DHHR not to contest the Circuit Court's actions based on the fact that, due to either an oversight by DHHR or something more nefarious, Petitioners had more foster children in their home than permitted by statute, and DHHR refused to grant a waiver for Petitioners. *Amici* submit that, were DHHR continuing to rely on this argument to justify removal of B.G.C. from Petitioners' home, it would raise other legal issues. Even assuming that DHHR was required under statute to remedy the capacity issue, the solution that it arrived at -- literally overnight -- with no consideration as to the welfare of the children in Petitioners' home would run afoul of this Court's frequent pronouncement that the polar star in all matters affecting the placement of children is their best interests. *See, e.g., Napoleon S.*, 217 W. Va. at 259. Additionally, the constitutional principles outlined above could be implicated. According to Petitioners' Amended Writ Petition, however, Petitioners' household is no longer over the limit, *see* Amended Petition for Writ of Prohibition ¶ 19, a representation that DHHR did not dispute in its Response to Petitioners' Amended Writ. *See* DHHR Response ¶ 19. Accordingly, because this "justification" for removing B.G.C. from Petitioners' home no longer appears to be at issue, this Court need not resolve any of the constitutional issues that the Court might otherwise have needed to consider.

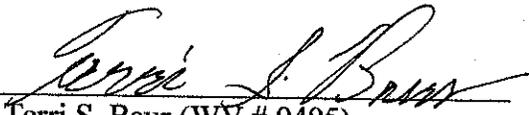
intervene to correct the Circuit Court's legal error, which, if allowed to stand, would cause harm of constitutional magnitude.

### CONCLUSION

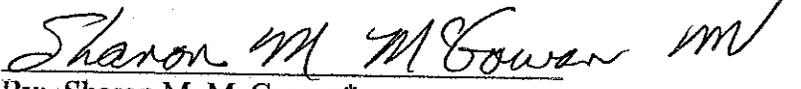
By ordering B.G.C.'s immediate removal from Petitioners' home based on the Circuit Court's personal belief that DHHR should place children, wherever possible, in adoptive homes that have a married mother and father, rather than using the individualized best interests analysis required by West Virginia child welfare law and regulations, the Circuit Court's actions implicate the State's constitutional duty to avoid unnecessary and unjustified harm to foster children who are in its custody or care. The Court should rectify the grave error committed by the Circuit Court, and grant Petitioners' writ of prohibition.

Respectfully submitted this 17th day of February, 2009.

AMERICAN CIVIL LIBERTIES UNION OF  
WEST VIRGINIA FOUNDATION

  
By: Terri S. Baur (WV # 9495)

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

  
By: Sharon M. McGowan\*

\*Motion for Admission *Pro Hac Vice* Pending

Counsel for *Amici*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO 34618

STATE OF WEST VIRGINIA ex rel,  
KATHRYN KUTIL and CHERYL HESS,

Petitioners,

v.

THE HONOEABLE PAUL M. BLAKE,  
JR., CIRCUIT JUDGE, TWELFTH  
JUDICIAL  
DISTRICT, and WEST VIRGINIA  
DEPARTMENT OF H EALTH AND  
HUMAN RESOURCES, MARTHA  
YEAGER WALKER, SECRETARY

Respondents

Fayette County Juvenile Abuse  
And Neglect No. 07-JA-72

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing BRIEF OF *AMICI CURIAE* were served upon counsel of record herein by placing true and correct copies thereof in properly addressed envelopes and by placing said envelopes in the regular course of the United States Mail on the 17<sup>th</sup> day of February, 2009, addressed as follows:

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