

The Price To Parent: How the Supreme Court of North Carolina's Decision in *In re J.C.J.* To Terminate Parental Rights for Nonpayment of Foster Care Costs Violates Equal Protection*

*In July 2022, following a five-year battle to reunify with their twin sons, Courtney and Jeremy Johnson's parental rights were terminated. On appeal, the Supreme Court of North Carolina evaluated only one statutory ground for termination of their parental rights: section 7B-1111(a)(3) of the juvenile code, which allows the State to terminate parental rights for willful nonpayment of foster care costs. But the Johnsons were never told that they owed the State any money, let alone how much, or to whom, they were supposed to pay. This Recent Development argues that the Supreme Court of North Carolina's decision in *In re J.C.J.* to terminate the Johnsons' parental rights under section 7B-1111(a) was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.*

INTRODUCTION

In July 2022, just days after celebrating their twin sons' seventh birthdays, Courtney and Jeremy Johnson's parental rights were terminated.¹ For five years, the Johnsons fought to get their sons back: they attended visitation; bought gifts, clothing, and diapers; and completed the court-mandated case plan that required parenting classes, participation in family therapy, attendance at all available visits with the twins, and acquisition of drivers' licenses and transportation.² In the end, though, most of their efforts did not matter. What did matter was that the Johnsons failed to pay the State any money to subsidize the cost of the twins' foster care. At trial, the court found this failure sufficient to satisfy section 7B-1111(a)(3) of the juvenile code, which allows the State to terminate parental rights for willful nonpayment of foster care costs.³ On appeal, the Supreme Court of North Carolina agreed.⁴ But before the State commenced termination proceedings, the State never told the Johnsons that they owed any money.⁵ And once the State initiated the proceedings, it was too

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1. See *In re J.C.J.*, 381 N.C. 783, 785, 799, 874 S.E.2d 888, 890, 899 (2022), cert. denied, 143 S. Ct. 2616 (2023) (mem.).

2. *Id.* at 785–86, 874 S.E.2d at 891.

3. *Id.* at 788–90, 874 S.E.2d at 893.

4. See *id.* at 789–91, 874 S.E.2d at 893–94.

5. *Id.* at 791, 874 S.E.2d at 894–95.

late to pay.⁶ The Johnsons' legal rights to their sons were permanently severed simply because they did not pay a debt they were never told they owed.⁷

Under the Child Support Enforcement Amendments of 1984,⁸ Congress created a state-federal partnership to seek payments from parents with children in foster care.⁹ Enforcement is initiated under Title IV-E of the Social Security Act ("Title IV-E"), which requires interagency partnerships between child welfare agencies and child support agencies to generate government revenue to cover agency costs.¹⁰ For a state to recover foster care costs from the federal government under Title IV-E, the children must be from families that are IV-E eligible—generally, low income families.¹¹ In June 2022, in an effort to promote reunification, the U.S. Department of Health and Human Services ("HHS") ended its policy requiring child welfare agencies to refer Title IV-E eligible families to child support agencies.¹² Under current law, states can now choose to bill parents for foster care costs—a policy change that has the potential to be enormously impactful for families in states that opt to follow federal guidance.¹³

But many states still charge parents—usually poor parents¹⁴—for the cost of foster care,¹⁵ and these bills can have devastating impacts on families'

6. When parents are involved in termination of parental rights proceedings for nonpayment under section 7B-1111(a)(3), the trial court determines whether the parent made contributions to the child's care for the six months prior to commencement of the proceeding. *Id.* at 788–89, 874 S.E.2d at 893. At this stage, even if parents can afford to pay the accrued debt, it is too late to do so because the period for which the court assesses a parent's contribution has run.

7. On November 18, 2022, Courtney Johnson filed a petition for writ of certiorari to the Supreme Court of the United States. Petition for a Writ of Certiorari at 28, *J. Courtney v. Beaufort Cnty. Dep't of Soc. Servs.*, 143 S. Ct. 2616 (2023) (mem.) (No. 22-6481). The Supreme Court denied this petition in June 2023. *J. Courtney*, 143 S. Ct. at 2616.

8. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, §§ 3–5, 98 Stat. 1305, 1306–14 (codified as amended in scattered sections of 26 and 42 U.S.C.).

9. David L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1333–34 (2009); see also Child Support Enforcement Amendments §§ 3–5.

10. Hatcher, *supra* note 9, at 1333–34.

11. *Id.*

12. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE POLICY MANUAL § 8.4C (2022) (question five), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp [<https://perma.cc/JS7N-H7BA>].

13. DIANA AZEVEDO-MCCAFFREY, CTR. ON BUDGET & POL'Y PRIORITIES, STATES SHOULD USE NEW GUIDANCE TO STOP CHARGING PARENTS FOR FOSTER CARE, PRIORITY FAMILY REUNIFICATION 1 (2022), <https://www.cbpp.org/sites/default/files/10-13-22fis.pdf> [<https://perma.cc/34GF-3P9Z>].

14. Hatcher, *supra* note 9, at 1333; 42 U.S.C. § 671(a)(17).

15. See, e.g., N.C. GEN. STAT. § 7B-904(d) (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.) ("At the dispositional hearing or a subsequent hearing, when legal custody of a juvenile is vested in someone other than the juvenile's parent, if the court finds that the parent is able to do so, the court may order that the parent pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered.").

reunification prospects. Parents' foster care bills are often enormous: an NPR investigation found that foster care charges range from \$25 to more than \$1,000 per month.¹⁶ And these bills increase the amount of time that children spend in foster care. One study found that a monthly \$100 charge increased the length of foster care stays by six months.¹⁷ In most cases, if a child spends fifteen out of twenty-two months in foster care, federal law directs child welfare agencies to begin procedures to permanently terminate parental rights.¹⁸ In North Carolina, if a child spends twelve out of twenty-two months in foster care, the Department of Social Services ("DSS") is statutorily required to initiate a termination of parental rights ("TPR") proceeding.¹⁹ And foster care payments do not just delay reunification: in over a dozen states,²⁰ including North Carolina,²¹ failing to pay these costs is itself a ground to terminate parental rights. In North Carolina, failure to pay can be the sole ground for termination.²²

This Recent Development argues that TPR for nonpayment of foster care costs, as illustrated in the recent Supreme Court of North Carolina case, *In re J.C.J.*, is poor policy and unconstitutional. The argument proceeds in four parts. Part I provides background on TPR in North Carolina. Part II discusses *In re*

16. Joseph Shapiro, Teresa Wiltz & Jessica Piper, *States Send Kids to Foster Care and Their Parents the Bill—Often One Too Big To Pay*, NPR (Dec. 27, 2021, 4:35 PM), <https://www.npr.org/2021/12/27/1049811327/states-send-kids-to-foster-care-and-their-parents-the-bill-often-one-too-big-to-> [https://perma.cc/Z2MZ-92BM]. Parents billed for foster care are disproportionately parents of color. *Id.* In California, 57% of families who received payment orders were parents of color. *Id.*

17. *Id.*

18. See 42 U.S.C. § 675(5)(E).

19. N.C. GEN. STAT. § 7B-906.1(f). Although DSS is usually required to initiate TPR proceedings if a child reaches the maximum out-of-home placement period, there are three limited circumstances under which a court may find that TPR is not required: (1) the primary permanent plan for the child is guardianship or custody with a relative or other suitable person, (2) the court makes specific findings that TPR would not be in the child's best interests, or (3) DSS has not provided the child's family with services the department deems necessary when reasonable efforts are still required to enable the child's return to their safe home. *Id.*

20. Joseph Shapiro, *In Some States, an Unpaid Foster Care Bill Could Mean Parents Lose Their Kids Forever*, NPR (Jan. 19, 2023, 5:00 AM), <https://www.npr.org/2023/01/19/1148829974/foster-care-parental-rights-child-support> [https://perma.cc/LX27-P5AF] [hereinafter Shapiro, *In Some States*]; see, e.g., KY. REV. STAT. ANN. § 625.090(3)(f) (Westlaw through laws effective March 14, 2024 and the Nov. 7, 2023 election); NEB. REV. STAT. § 43-292(3) (2023); KAN. STAT. ANN. § 38-2269(c)(4) (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kansas Leg. effective on February 15, 2024).

21. N.C. GEN. STAT. § 7B-1111(a)(3) ("The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.").

22. *In re J.C.J.*, 381 N.C. 783, 788, 874 S.E.2d 888, 893 (2022) ("A single ground for termination is sufficient to support a trial court's decision to terminate a parent's parental rights in a child."), *cert. denied*, 143 S. Ct. 2616 (2023) (mem.).

J.C.J., and Part III argues that the Supreme Court of North Carolina's interpretation of the termination provision at issue in *In re J.C.J.*, section 7B-1111(a)(3) of the juvenile code, is unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Part IV analyzes the implications of the court's decision in *In re J.C.J.*, calls for the Supreme Court of North Carolina to disavow its current interpretation of the foster care nonpayment provision, and suggests additional ways to reduce section 7B-1111(a)(3)'s impact.

I. BACKGROUND ON TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA

TPR is the State's "ultimate interference" in a parent's relationship with their child.²³ An order terminating parental rights completely severs the legal relationship between parent and child,²⁴ and in North Carolina, parents can never petition for reinstatement of these rights.²⁵ The legal consequences of a TPR order are so severe that many refer to TPR as the "civil death penalty."²⁶

TPR did not exist at common law, and North Carolina's first statute authorizing TPR was not passed until 1969.²⁷ Today, North Carolina law authorizes a trial court to terminate parental rights if the court finds²⁸ that at

23. SARA DEPASQUALE, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA 9-5 (6th ed. 2022).

24. *Id.* at 9-113. While TPR renders the child and parent "legal stranger[s]," child support arrears remain after TPR. *Id.* (quoting *In re Z.O.G.-I.*, 375 N.C. 858, 869, 851 S.E.2d 298, 306 (2020)).

25. See N.C. GEN. STAT. § 7B-1114(a). Parental rights can be reinstated only in limited circumstances: first, a motion to reinstate parental rights may only be filed by a child whose parents' parental rights have been terminated, the G.A.L.'s attorney advocate, or a county DSS with custody of the child; second, the child must be at least twelve years old (or, if younger than twelve, the motion must allege extraordinary circumstances requiring consideration of the motion); third, the juvenile must not have a legal parent, be in an adoptive placement, or be likely to be adopted within a reasonable time; and finally, the order terminating parental rights must have been entered at least three years before the motion is filed. *Id.*

26. See, e.g., Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadi, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 887 (2021).

27. Beth Frances Murphy, Comment, *Termination of Parental Rights*, 21 WAKE FOREST L. REV. 431, 437 (1986).

28. TPR proceedings occur in two stages. First, at adjudication, the court hears evidence and adjudicates the existence, or nonexistence, of an alleged ground for TPR. DEPASQUALE, *supra* note 23, at 9-39. If the trial court finds that there is "clear, cogent, and convincing" evidence that one or more of the statutory grounds for termination is present, the court moves to disposition. *Id.* at 9-6. At disposition, the court makes a discretionary determination as to whether it would be in the child's "best interests" to terminate parental rights. *Id.* If, after adjudication and disposition, the court finds that a statutory ground for TPR is met, and that TPR would be in the best interests of the child, the court must file a TPR order within thirty days. *Id.* at 9-110.

least one of eleven statutory grounds for termination exists and that TPR would be in the child's best interests.²⁹

North Carolina's TPR statute includes two grounds for termination based on nonpayment. First, in "agency" cases under section 7B-1111(a)(3)—when the child is in the State's custody³⁰—if the parent willfully fails to pay the State a "reasonable portion of the [child's] cost of care" for the six months prior to the filing of a termination motion despite being "physically and financially able to do."³¹ Courts frequently terminate parental rights for nonpayment under section 7B-1111(a)(3). A 2021 NPR investigation reviewed over 200 appellate court decisions and found that failure to pay foster care costs was a ground for TPR in nearly one in three TPR cases.³² In a dozen cases, failure to pay was the sole ground for termination.³³ Second, in "private" cases under section 7B-1111(a)(4)—when the child is in one parent's custody—if the parent without custody of the child has "for a period of one year or more next preceding the filing of the [TPR] petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement."³⁴ This Recent Development's focus is on agency cases—when the State terminates parental rights for nonpayment of foster care costs pursuant to section 7B-1111(a)(3).

Under section 7B-1111(a)(3), the "cost of care" generally refers to the amount DSS spends on care for the child.³⁵ Of this amount, "[a] parent is

29. *Id.*; N.C. GEN. STAT. § 7B-1111. A court is statutorily authorized to terminate a parent's parental rights if: (1) the parent abused or neglected the child; (2) the parent willfully left the child in foster care or a placement outside the home for more than twelve months without showing reasonable progress in correcting the conditions that led to the child's removal; (3) the parent willfully failed to pay a reasonable portion of the child's foster care costs to the State, although physically and financially able to do so; (4) one parent is awarded custody of the child and the parent whose rights may be terminated willfully failed to pay for the child's care, support, and education as required by judicial decree or custody agreement for a year prior to termination; (5) the father of a child born out of wedlock did not take action to legitimate the child or establish paternity; (6) the parent is incapable of providing proper care and supervision of the child and there is reasonable probability that the incapacity will continue for the foreseeable future; (7) the parent willfully abandoned the child for at least six months (or an infant for sixty days) prior to the filing of the petition or motion; (8) the parent committed or attempted to commit murder or voluntary manslaughter of another child or the parent of another child residing in the home; (9) the parent's parental rights have been terminated for another one of their children and the parent cannot establish that they have a safe home; (10) the child has been relinquished to the State for adoption; or (11) the parent committed a sexual offense that resulted in the conception of the child. *See id.* § 7B-1111(a)(1)–(11).

30. This includes custody with a county DSS, a licensed child-placing facility, a child-caring institution, or a foster home. *Id.* § 7B-1111(a)(3).

31. *Id.*

32. Shapiro, *In Some States*, *supra* note 20.

33. *Id.*

34. N.C. GEN. STAT. § 7B-1111(a)(4).

35. *See In re J.C.J.*, 381 N.C. 783, 789, 874 S.E.3d 888, 893 (2022) (citing *In re J.M.*, 373 N.C. 352, 357, 838 S.E.2d 173, 176–77 (2020)), *cert. denied*, 143 S. Ct. 2616 (2023) (mem.).

required to pay that portion of foster care cost that is fair, just, and equitable based on the parent's ability or means to pay,"³⁶ "irrespective of the parent's wealth or poverty."³⁷ Section 7B-1111(a)(3) also requires that a parent's nonpayment be "willful."³⁸ In 2020, in *In re S.E.*,³⁹ the Supreme Court of North Carolina held that a parent's knowledge of their support obligations under section 7B-1111(a)(3) is "irrelevant" in determining whether a parent "willfully" failed to pay.⁴⁰ Reasoning that parents have an "inherent duty" to support their children,⁴¹ the court declared that parents "cannot hide behind a cloak of ignorance to assert [that their] failure to pay a reasonable portion of the cost of care for [their children] was not willful."⁴² In practice, this means that the

36. *Id.*

37. *In re J.E.E.R.*, 378 N.C. 23, 27, 859 S.E.2d 191, 194 (2021) (quoting *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981)). North Carolina's Juvenile Code prohibits TPR on the basis of poverty. N.C. GEN. STAT. § 7B-1111(a)(2). But there is a strong link between poverty and foster care: circumstances of poverty, including economic instability, lack of access to health care, and housing instability are often grounds for child removal. Hatcher, *supra* note 9, at 1341. North Carolina law may prohibit TPR on the basis of poverty in principle, but it does not always in practice. *See, e.g., In re J.A.E.W.*, 375 N.C. 112, 117–18, 846 S.E.2d 268, 272 (2020) (rejecting father's defense to TPR for nonpayment of foster care costs under § 7B-1111(a)(3) because he did not make enough through his (stable) employment to live on); *id.* ("[I]n the circumstances of this case, the trial court did not need to make findings regarding respondent's own living expenses. It is enough here, when respondent made no payments whatsoever to cover the costs of [his daughter's] care, that the trial court found that respondent was employed with some income. Respondent's living expenses might be relevant evidence to be taken into account if he had made some child support payments during the applicable time period."); *cf. In re J.K.C.*, 218 N.C. App. 22, 31–32, 721 S.E.2d 264, 271 (2012) (finding that father did not willfully fail to pay child support because he attempted to pay but was told by the child support enforcement agency that a payment order could not be arranged because he did not have enough income).

38. N.C. Gen. Stat. § 7B-1111(a)(3).

39. 373 N.C. 360, 838 S.E.2d 328 (2020).

40. *Id.* at 366–67, 838 S.E.2d at 333; *see also* DEPASQUALE, *supra* note 23, at 9–70; Hatcher, *supra* note 9, at 1360–62 (discussing *In re T.D.P.*, 164 N.C. App. 287, 287–93, 595 S.E.2d 735, 736–40 (2004), which upheld the termination of an incarcerated father's parental rights for failure to pay a \$72 bill about which he was never told).

41. *In re S.E.*, 373 N.C. at 366, 838 S.E.2d at 333 ("The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children." (citing *In re T.D.P.*, 164 N.C. App. at 289, 595 S.E.2d at 737)); *see also In re D.C.*, 387 N.C. 556, 561, 862 S.E.2d 614, 617–18 (2021) (quoting *In re S.E.* and upholding TPR); *In re E.I.H.*, 290 N.C. App. 365, 890 S.E.2d 928, 2023 WL 5690114, at *4 (2023) (unpublished table decision) (same).

42. *In re S.E.*, 373 N.C. at 366, 838 S.E.2d at 333; *cf. In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) ("[T]here must be a proper application of the words 'willfully' in [section 7B-1111(a)(3)]. This Court has had numerous occasions to consider the meaning of willfulness as used in statutes such as these. The word 'imports knowledge and stubborn resistance . . . one does not willfully fail to do something which it is not in his power to do.'" (quoting *In re Moore*, 306 N.C. 394, 411, 293 S.E.2d 127, 137 (1982) (Carlton J., dissenting))); *In re S.W.*, 259 N.C. App. 423, 812 S.E.3d 915 (2018) (unpublished table opinion) (defining "willful" as "imports knowledge and a stubborn resistance" and remanding case on grounds that trial court failed to address whether father acted willfully in failing to pay a reasonable portion of foster care costs).

absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to nonpayment under section 7B-1111(a)(3).⁴³

In *In re J.C.J.*, the Supreme Court of North Carolina relied on its interpretation of section 7B-1111(a)(3) from *In re S.E.* to uphold an order terminating parental rights based on “willful” nonpayment of child costs even though the parents did not receive a payment order before the TPR proceedings were initiated.⁴⁴ Part II, below, explores *In re J.C.J.* in detail. Part III subsequently argues that the Supreme Court of North Carolina’s interpretation of section 7B-1111(a)(3), as illustrated in *In re J.C.J.*, creates an unconstitutional dichotomy between parents in agency TPR proceedings and parents in private TPR proceedings.

II. *IN RE J.C.J.*

Twins Jaden and Jack Johnson were born in July 2015.⁴⁵ In July 2017, Beaufort County DSS removed them from their home, placed them in nonsecure custody,⁴⁶ and filed petitions that they were neglected juveniles.⁴⁷ Nine months later, in April 2018, Jack and Jaden were officially declared neglected juveniles, and on April 11, 2018, the twins’ parents were ordered to comply with a court order that set the terms required for their reunification.⁴⁸ The terms did not require the twins’ mother, Mrs. Johnson, to pay any money to cover the cost of the twins’ foster care.⁴⁹

In October 2018, Mrs. Johnson requested authorization of a trial home placement.⁵⁰ Following a hearing in November 2018, the district court

43. See, e.g., *In re J.C.J.*, 381 N.C. 783, 791, 874 S.E.3d 888, 894–95 (2022), cert. denied, 143 S. Ct. 2616 (2023) (mem.).

44. *Id.* at 788–99, 874 S.E.3d at 893–99.

45. *Id.* at 785, 874 S.E.3d at 890. “Jack” and “Jaden” are pseudonyms assigned by the court to protect the twins’ identities. *Id.* at n.1.

46. Juveniles in nonsecure custody may be placed with DSS or, if designated in an order for temporary residential placement, in (1) a licensed foster care home; (2) a facility operated by DSS; or (3) any other home or facility, including the home of a parent, relative, nonrelative kin, or other person with legal custody of the juvenile’s sibling, who is approved by the court and designated in the order. N.C. GEN. STAT. § 7B-505(a) (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.).

47. *In re J.C.J.*, 381 N.C. at 785, 874 S.E.2d at 890–91. These petitions alleged that the twins “resided in an injurious environment” and that they received “improper care, supervision, and discipline.” *Id.* at 785, 874 S.E.2d at 891.

48. The terms included compliance with an Out of Home Family Services Agreement, attendance at a Families Understanding Nurturing Program, participation in family therapy if recommended by the twins’ therapists, attendance at all available visits with the twins, and acquisition of drivers’ licenses and transportation. *Id.* at 785–86, 874 S.E.2d at 891.

49. *Id.*; Petition for a Writ of Certiorari, *supra* note 7, at 7.

50. *In re J.C.J.*, 381 N.C. at 786, 874 S.E.2d at 891. A trial home placement is placement with the parent(s) a child was removed from, while DSS retains legal custody of the child. NC INTEGRATED CARE FOR KIDS, FOSTER CARE GUIDE 5 (2021), https://ncinck.org/wp-content/uploads/2022/01/F_NC-InCK-Foster-Care-Guide_12.30.2021.pdf [<https://perma.cc/2UVX-N7WR>].

determined that the Johnsons made sufficient progress to warrant a trial home placement, and Jack and Jaden were temporarily returned home.⁵¹ At this point, the Johnsons still had not been notified of their obligation to pay foster care costs.⁵² To the contrary, a report filed on November 21, 2018, just prior to the hearing approving the temporary home placement, stated “[t]here is no child support order in place currently. A referral has been made.”⁵³ The Johnsons never received information about what, if anything, they were supposed to do in relation to the “referral” mentioned in the report.⁵⁴

In March 2019, following a permanency hearing, the district court found that the risk of harm to the twins at home was low but that the situation was “rickety” and “perhaps prone to sudden collapse.”⁵⁵ On these findings, the district court denied permanent home placement, and in May 2019, the twins’ trial home placement ended.⁵⁶

One year later, on April 6, 2020, DSS filed a motion to terminate the Johnsons’ parental rights on four grounds, including willfully failing to pay a reasonable portion of the cost of the twins’ care.⁵⁷ Several weeks later, on April 23, 2020, the Beaufort County Child Support Agency filed a complaint against the Johnsons seeking child support.⁵⁸ In August 2020, the court found that Mrs. Johnson should have been paying \$50 per month in child support and owed \$1,650.⁵⁹ In September 2020, the court found that the twins’ father owed \$17,028.⁶⁰ Consequently, the trial court determined that the Johnsons’ failure to pay child support was “willful as both parents were aware they had the obligation to support their children, knew that [DSS] had made a referral to the Beaufort County Child Support Agency, and decided to take no step to address

51. *In re J.C.J.*, 381 N.C. at 786, 874 S.E.2d at 891.

52. *See* Petition for a Writ of Certiorari, *supra* note 7, at 7.

53. *Id.*

54. *Id.*

55. *In re J.C.J.*, 381 N.C. at 786, 874 S.E.2d at 891.

56. *Id.*

57. DSS alleged, and the trial court found, that TPR was authorized on three other grounds: (1) neglect, (2) willfully leaving the twins in a placement outside the home for more than twelve months without making reasonable progress to correct the standards that led to their removal, and (3) dependency. *Id.* at 786–87, 874 S.E.2d at 891–92. The court also agreed with DSS that termination of the twins’ parents’ parental rights would be in the twins’ best interests. *Id.* A finding of dependency means that the parent is incapable of providing proper care and supervision of the child and that there is “reasonable probability” that the parent’s inability to care for the child will continue for the foreseeable future. N.C. GEN. STAT. § 7B-1111(a)(6) (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.).

58. Petition for a Writ of Certiorari, *supra* note 7, at 8. Mrs. Johnson owed \$50 per month for all six of her children, plus costs and arrears, although the termination action only involved the twins. *Id.* at 8–9. She owed \$8.33 per month, per twin. *Id.* at 9.

59. *In re J.C.J.*, 381 N.C. at 789, 874 S.E.2d at 893.

60. *Id.* The court found that Mr. Johnson should have paid \$473 per month in support. *Id.*

the issue until they were sued for failure to pay child support.”⁶¹ Following hearings on September 30 and October 2, 2020, the trial court found that DSS’s evidence supported terminating parental rights on all four grounds alleged in the TPR motion.⁶² In May 2021, the trial court terminated the Johnsons’ parental rights.⁶³

The Johnsons appealed the district court’s decision to terminate their parental rights on all four grounds. On appeal, the Supreme Court of North Carolina only considered the trial court’s decision to terminate their parental rights for nonpayment under section 7B-111(a)(3), which it upheld.⁶⁴ The court agreed with the trial court that the Johnsons failed, pursuant to North Carolina statute,⁶⁵ to pay a “portion of the cost of foster care” that was “just and equitable” considering the parents’ ability or means to pay.⁶⁶

The Supreme Court of North Carolina rejected Mrs. Johnson’s claim that her failure to pay a reasonable portion of the cost of care was not willful, as required by statute, because she did not know that she was required to pay any money to the State until *after* DSS filed its termination motion.⁶⁷ The court relied on its interpretation of section 7B-111(a)(3) from *In re S.E.*, where it held that “[t]he absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent’s obligation to pay reasonable costs,

61. *Id.* at 790, 874 S.E.2d at 893. On appeal, Mrs. Johnson argued that the trial court erred in determining that she had not contributed to the cost of the twins’ care because she provided gifts, clothing, and diapers. *Id.* at 790, 874 S.E.2d at 893–94. She argued that these “in-kind contributions were [their] only option” because it was “impossible to pay the government money.” *Id.* at 790, 874 S.E.2d at 894 (alteration in original). The Supreme Court of North Carolina disagreed. While acknowledging these contributions, the court held that the “[t]he sporadic provision of gifts for the benefit of the twins by respondent-mother does not preclude a determination that respondent-mother had failed to pay a reasonable portion of the cost of care that the twins had received following their removal from the family home given that respondent mother made no payment to DSS or the foster parents.” *Id.* at 790–91, 874 S.E.2d at 894.

62. *Id.* at 787, 874 S.E.2d at 892.

63. *Id.*

64. *Id.* at 788, 874 S.E.2d at 893. Because a “single ground for termination is sufficient to support a trial court’s decision to terminate a parent’s parental rights,” the Supreme Court of North Carolina did not evaluate the other grounds for TPR. *Id.*

65. N.C. GEN. STAT. § 7B-111(a)(3) (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.).

66. *In re J.C.J.*, 381 N.C. at 789, 874 S.E.2d at 893 (quoting *In re J.M.*, 373 N.C. 352, 357, 838 S.E.2d 173, 177 (2020)). The court credited the trial court’s findings that the twins’ parents were “capable of working”; throughout the pendency of the case, neither parent contributed to the costs of care, although they provided their children with gifts; the twins’ father was employed, had “surplus money” and was willing to work more to make additional income to support his children; and while the twins’ mother was “physically able to work” she had “chosen not to do so.” *Id.*

67. *Id.* at 791, 874 S.E.2d at 894–95. Mr. Johnson’s challenge on appeal was different from Mrs. Johnson’s and solely related to factual findings regarding the six-month determinative period leading to the filing of the TPR motion. *Id.* at 792–93, 874 S.E.2d at 895.

because parents have an inherent duty to support their children.”⁶⁸ The court held that Mrs. Johnson had an “inherent duty” as a mother to support her twin sons and was not “entitled to argue that her failure to pay a reasonable portion of the care her children received while they were outside her home was not willful based upon the absence of a court order requiring her to do so.”⁶⁹ The court also credited the trial court’s finding that Mrs. Johnson was aware that a *referral* was made to a child support enforcement agency regarding her support obligation, and that she failed to “investigate the referral or attempt to ascertain the amount of child support that she needed to pay.”⁷⁰ Thus, although Mrs. Johnson never received a child support order, nor was she told how, how much, or to whom, she was supposed to pay, the Supreme Court of North Carolina upheld the termination of her parental rights.

After finding that Mrs. Johnson’s failure to pay satisfied the statute’s willfulness requirement, the court acknowledged, but refused to decide, Mrs. Johnson’s argument that the court’s interpretation of section 7B-1111(a)(3) created an unconstitutional dichotomy between parents involved in private actions and agency actions.⁷¹ Because Mrs. Johnson did not raise her constitutional challenge at the trial level, the court held that she was precluded from doing so on appeal.⁷² While the Supreme Court of North Carolina refused to address this challenge,⁷³ Part III, below, argues that application of the TPR provision in *In re J.C.J.* violates equal protection.⁷⁴

68. *Id.* at 791, 874 S.E.2d at 894 (quoting *In re S.E.*, 373 N.C. 360, 366, 838 S.E.2d 328, 333 (2020)).

69. *Id.*

70. *Id.* at 791, 874 S.E.2d at 894–95.

71. *Id.* at 792, 874 S.E.2d at 895; *see also* N.C. GEN. STAT. § 7B-1111(a)(4) (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.) (“One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.”); *In re S.R.*, 384 N.C. 516, 521, 888 S.E.2d 166, 171–72 (2023) (“[T]his court explained that the party petitioning for termination of parental rights under N.C.G.S. § 7B-1111(a)(4) must show ‘the existence of a support order that was enforceable during the year before the petition was filed.’” (quoting *In re C.L.H.*, 376 N.C. 614, 620, 853 S.E.2d 434 (2021))).

72. *In re J.C.J.*, 381 N.C. at 792, 874 S.E.2d at 895. In a petition for rehearing, Mrs. Johnson argued that the court’s refusal to hear the constitutional issues was misplaced because the preservation rule applies only to issues that a trial court has the authority to adjudicate, and the trial court has “no authority to adjudicate such a challenge to [the Supreme Court of North Carolina’s] precedent.” Petition for a Writ of Certiorari, *supra* note 7, at 11. The court denied the petition for rehearing. *Id.* at 12.

73. Petition for a Writ of Certiorari, *supra* note 7, at 12.

74. Although not addressed in the Supreme Court of North Carolina’s opinion, Mrs. Johnson also alleged that application of section 7B-1111(a)(3) under the court’s interpretation in *In re S.E.* violated due process. Petition for a Writ of Certiorari, *supra* note 7, at 4–5. Mrs. Johnson also made

III. THE SUPREME COURT OF NORTH CAROLINA'S INTERPRETATION OF SECTION 7B-1111(A)(3) IS UNCONSTITUTIONAL

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁷⁵ The Equal Protection Clause is often used to analyze government actions that draw a distinction between people based on specific characteristics, such as race⁷⁶ or gender.⁷⁷ But laws can also violate equal protection if they discriminate among people in the exercise of a fundamental right.⁷⁸

The Supreme Court has repeatedly held that parents have a fundamental right to custody of their children.⁷⁹ A child’s “custody, care and nurture . . . reside[s] first in the parents, whose primary function and freedom include a preparation for obligations the state can neither supply nor hinder.”⁸⁰ This right “is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court,”⁸¹ and it “does not evaporate simply because [parents] have not been model parents or have lost temporary custody of their child to the State.”⁸² Because parents’ custody of their children is a fundamental, constitutionally protected right, “there must be a very substantial reason before parental custody can be terminated” by the State.⁸³ Laws that infringe these

this argument in her petition for certiorari to the U.S. Supreme Court. *Id.* at 15 (“It is . . . a procedural due process violation, because it allows for the permanent deprivation of a fundamental constitutional right absent fair procedures—namely, notice and an opportunity to be heard that are ‘granted at a meaningful time and in a meaningful manner.’” (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972))).

75. U.S. CONST. amend. XIV, § I.

76. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (holding that racially segregated schools violate equal protection).

77. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 519 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982).

78. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 731 (6th ed. 2019); *see, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 535–36, 541 (1942) (holding that the right to procreate is fundamental and invalidating as violative of the Equal Protection Clause a state law requiring surgical sterilization for individuals convicted three or more times of crimes of “moral turpitude”); *id.* at 541 (“[S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”).

79. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

80. *Prince*, 321 U.S. at 166.

81. *Troxel*, 530 U.S. at 65.

82. *Santosky*, 455 U.S. at 753.

83. CHERMERINSKY, *supra* note 78, at 869; *Quilloin*, 434 U.S. at 255 (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring))).

parental rights are subject to strict scrutiny⁸⁴ and are only upheld if narrowly tailored to achieve a compelling government purpose.⁸⁵

North Carolina's termination statute includes two termination provisions for nonpayment: 7B-1111(a)(3) involving nonpayment of foster care costs to the State (agency cases), and 7B-1111(a)(4) for nonpayment of child care costs to a custodial parent (private cases).⁸⁶ Before the State can terminate parental rights for failure to pay costs to a *private* party, the State must establish the "existence of a support order that was enforceable during the year before the petition was filed."⁸⁷ Yet the Supreme Court of North Carolina's interpretation of section 7B-1111(a)(3), governing agency cases, means that parents in agency TPR actions are not entitled to any notice of a payment obligation and, instead, must "inherently" know that they owe the State money.⁸⁸ The court's interpretation of the foster care nonpayment termination provision, and its application in *In re J.C.J.*, thus creates a distinction between parents whose children are in foster care, and parents whose children reside with a custodial parent. Because parental rights are fundamental rights, an equal protection challenge implicates strict scrutiny. The court's dichotomy cannot survive a strict scrutiny analysis.

The State has no interest, let alone a compelling interest, in requiring a payment order before terminating parental rights in private actions while expecting parents in agency actions, like Mrs. Johnson, to know of their "inherent duty" to support their children. TPR proceedings are initiated to protect a child's best interests,⁸⁹ regardless of whether a parent is making payments to a custodial parent or to the State. Unlike private support payments, which are made to the parent with custody of the child to help feed, clothe, house, and nourish the child, foster care support payments reimburse the *State*

84. See CHEMERINSKY, *supra* note 78, at 731.

85. *Id.* at 727.

86. See *supra* Section I.B; N.C. GEN. STAT. § 7B-1111(a)(3)–(4) (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.) ("One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.").

87. *In re S.R.*, 384 N.C. 516, 521, 886 S.E.2d 166, 172 (2023) (quoting *In re C.L.H.*, 376 N.C. 614, 620, 853 S.E.2d 434, 439 (2021)).

88. See, e.g., *In re J.C.J.*, 381 N.C. 783, 791, 874 S.E.2d 888, 894 (2022) (citing *In re S.E.*, 373 N.C. 360, 366, 838 S.E.2d 328, 333 (2020)), *cert. denied*, 143 S. Ct. 2616 (2023) (mem.).

89. See, e.g., N.C. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE MANUAL 4 (2020), <https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/purpose.pdf> [<https://perma.cc/Q75Y-HZUU>] ("The county child welfare agency's foremost responsibility is to protect the child and to assure a safe environment."); *In re J.C.J.*, 381 N.C. at 797, 874 S.E.2d at 898 ("In North Carolina, the best interests of the child are the paramount consideration in termination of parental rights cases." (citing *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984))).

for the costs of care.⁹⁰ Because these payments are merely “government revenue,”⁹¹ they do nothing to promote the child’s best interests. North Carolina seemingly has a more compelling interest in holding parents in *private* cases to a higher standard than parents in agency cases.

Moreover, any argument that the State has a compelling interest in establishing a higher burden for parents in agency cases is disputed by the North Carolina Department of Health and Human Services’ own policy manual. The manual asserts that the State’s mission in child welfare cases is to provide “family-centered services” to help—not harm—families in child welfare cases.⁹² The “family-centered” system of care is based on certain underlying beliefs, including that “parents should be supported in their efforts to care for their children.”⁹³ Given the State’s commitment to assisting parents in child welfare cases, it makes little sense that in drafting sections 7B-1111(a)(3) and 7B-1111(a)(4), the General Assembly intended to make it easier to terminate the rights of parents in agency cases than those in private cases. It is clear that there is no compelling interest in holding parents in agency cases to a higher standard.

North Carolina may defend the court’s interpretation of section 7B-1111(a)(3) on the grounds that it has a compelling interest in protecting the State’s budget. Because the State pays for the care of children in foster care, but not for the care of children residing with a custodial parent, the differential treatment between parents involved in agency actions and those in private actions is satisfied by North Carolina’s interest in recovering foster care costs.⁹⁴ But by allowing DSS to initiate TPR procedures without first notifying parents of their payment obligations—after it is too late for parents to pay⁹⁵—the court’s interpretation of section 7B-1111(a)(3) actually undermines this interest. Under the court’s interpretation, fewer parents will be told that they owe money, so fewer will be likely to pay. If North Carolina was truly concerned about protecting the state fisc, it would *always* tell parents about their foster care support obligations.

In addition, North Carolina collects so little in foster care payments from parents that any alleged interest in protecting the State’s finances is hardly compelling. In 2021, North Carolina recovered just under \$2.6 million in foster care costs—only 3.2% of the nearly \$80 million the State spent on Title IV-E

90. See Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, IOWA L. REV. (forthcoming) (manuscript 36–37) [hereinafter Gupta-Kagan, *Distinguishing Family Poverty*].

91. *Id.*

92. N.C. DEP’T OF HEALTH & HUM. SERVS., *supra* note 89, at 2.

93. *Id.*

94. See *In re C.W.*, 177 N.C. App. 286, 628 S.E.2d 259, 2006 WL 997769, at *5 (2006) (unpublished table opinion) (foster care payment orders are issued to “defray the costs of care of [one’s] children”).

95. See *supra* note 6 and accompanying text.

foster care claims.⁹⁶ And these values do not include the amount the State spent *collecting* the payments. Studies repeatedly demonstrate that states *lose* money when attempting to recoup foster care costs.⁹⁷ In Minnesota, the State collected between twenty-four and forty cents for every dollar it spent; in Orange County, California, the county collected forty-one cents for every dollar spent; and in Washington, the State collected an average of thirty-nine cents for every dollar spent.⁹⁸ Given that North Carolina collects so little from parents, and may lose money doing so, fiscal responsibility is not a sufficiently compelling state interest to justify the differential treatment parents receive under the court's interpretation of section 7B-1111(a)(3).

The State might also defend the court's interpretation of section 7B-1111(a)(3) on the grounds that requiring parents to satisfy foster care payment orders ensures that parents in agency cases are financially prepared to reunify with their children. But North Carolina law forbids terminating parental rights on account of poverty.⁹⁹ Using incomplete foster care payment orders as a proxy for financial insecurity, and then terminating parental rights because of this, is precisely what North Carolina law prohibits. In addition, any sort of assessment of a parent's financial capacity administered at such a late stage in the termination proceeding—once children have been removed from the home for at least six months and, in many cases, much longer—is one that many parents are set up to fail. Families who lose their children to foster care often simultaneously lose their public benefits, social security benefits, and even tax benefits.¹⁰⁰ Without these benefits, it is even more challenging for parents to fulfill their payment obligations.¹⁰¹ Thus, North Carolina's efforts to gauge parents' financial means *after* these benefits have terminated do not consider the

96. See OFFICE OF CHILD SUPPORT ENFORCEMENT, TABLE P-12: DISTRIBUTED FOSTER CARE COLLECTIONS FOR FIVE CONSECUTIVE FISCAL YEARS 18 (2022), https://www.acf.hhs.gov/sites/default/files/documents/ocse/fy_2022_preliminary_report.pdf [<https://perma.cc/QF9L-U2GS>]; FY 2021 Title IV-E Foster Care Claims and Caseload, row 42, ADMIN. FOR CHILD. & FAMS. (July 14, 2022), <https://www.acf.hhs.gov/cb/report/report/programs-expenditure-caseload-data-2021> [<https://perma.cc/F6MJ-BD5U> (staff-uploaded archive)] [hereinafter FY 2021 Title IV-E]. The 3.2% value was calculated by dividing the amount collected through foster care payment orders in North Carolina in 2021 by the difference between the total spent on IV-E claims in North Carolina and the federal contribution to IV-E claims in North Carolina (2,558,830 / (182,145,531 – 102,689,114)). See *FY 2021 Title IV-E*, *supra*, at row 42.

97. See AZEVEDO-MCCAFFREY, *supra* note 13, at 10.

98. *Id.*

99. N.C. GEN. STAT. § 7B-1111(a)(2) (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.); see also *supra* note 37 and accompanying text.

100. See Gupta-Kagan, *Distinguishing Family Poverty*, *supra* note 90, at 40–43.

101. *Id.* For example, parents often lose their Temporary Aid to Needy Families (“TANF”) benefits. *Id.* TANF recipients tend to be very poor, rendering the loss of TANF benefits particularly severe. *Id.* Studies show that losing TANF benefits reduces the likelihood of reunification and, combined with the loss of other benefits intended to help families, makes it more challenging for families to fulfill payment obligations. *Id.*

vital resources that will be available to parents after reunification.¹⁰² Finally, even assuming the State has an interest in using completed payment orders to assess parents' financial fitness, the court's interpretation of section 7B-1111(a)(3) once again undermines this interest. If the State intends to use foster care support obligations as an effective proxy for financial fitness prior to reunification, it must ensure that parents know of their support obligations rather than expecting parents to "inherently know" of their duty to pay.

North Carolina does not have a narrowly tailored and compelling interest to draw distinctions between parents in private and agency actions in terminating parental rights for nonpayment under section 7B-1111(a)(3).¹⁰³ The Supreme Court of North Carolina's interpretation of "willfully" in section 7B-1111(a)(3) cannot stand. The court's interpretation of the statute is unconstitutional under the Equal Protection Clause, and its application in *In re J.C.J.* violated Mrs. Johnson's constitutional rights.

IV. IMPLICATIONS AND NEXT STEPS

In re J.C.J. is just one in a line of North Carolina cases terminating parental rights for nonpayment of foster care costs without first notifying parents of payment obligations.¹⁰⁴ Because section 7B-1111(a)(3), as interpreted and applied by the Supreme Court of North Carolina, creates a dichotomy that is unconstitutional under the Equal Protection Clause, the court must disavow its interpretation of section 7B-1111(a)(3) as established in *In re S.E.* Yet, in cases

102. In terminating parental rights under section 7B-1111(a)(3), North Carolina courts often seem more concerned with the parent's nonpayment than with their financial stability. For example, in *In re T.D.P.*, an incarcerated father's rights were terminated after he failed to pay a \$72.80 foster care charge about which he was never told. Hatcher, *supra* note 9, at 1360–62 (citing *In re T.D.P.*, 164 N.C. App. 287, 287–93, 595 S.E.2d 735, 736–40 (2004)) (calculating the father's earnings using the dissent's explanation that the father made forty cents per day across the six-month statutory period prior to TPR); *see also* Gupta-Kagan, *Distinguishing Family Poverty*, *supra* note 90, at 39. The State terminated his parental rights despite written attestation from the father's former employer that he would rehire the father after he was released from prison, guaranteeing a steady income to use to care for his daughter. *In re T.D.P.*, 164 N.C. App. at 297, 595 S.E.2d at 740.

103. While most equal protection cases evaluate the State's interest in the challenged classification, others examine whether the State can defend the law at all. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 375–76, 388–91 (1978) (invalidating on equal protection grounds a Wisconsin law that prohibited parents with outstanding support obligations from marrying and rejecting the State's "two interests . . . served by the challenged statute" but not examining the State's interest in the *classification*). But even if North Carolina were to defend the nonpayment statute itself, not its interest in treating parents in agency and private cases differently, it is not clear that the State could prevail. It would likely make many of the same arguments evaluated above—protecting the state fisc and ensuring that parents are financially prepared to reunify with their children—which are no more likely to succeed here.

104. *See, e.g.*, *In re S.E.*, 373 N.C. 360, 366, 838 S.E.2d 328, 333 (2020) ("The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty support their children." (citing *In re T.D.P.*, 164 N.C. App. at 289, 595 S.E.2d at 737)); *In re E.I.H.*, 290 N.C. App. 365, 890 S.E.2d 928, 2013 WL 5690114, at *4 (2023) (unpublished table decision) (same).

since *In re J.C.J.*, the North Carolina appeals courts have refused to invalidate this interpretation of section 7B-1111(a)(3).¹⁰⁵ Because the Supreme Court of North Carolina seems unlikely to do so, this part explores other ways to challenge section 7B-1111(a)(3) and to eliminate TPR orders for nonpayment. Section IV.A explores additional constitutional arguments that may be raised to challenge the constitutionality of section 7B-1111(a)(3), and Sections IV.B and IV.C explore several policy solutions.

A. *Additional Constitutional Challenges*

Legal scholars argue that terminating parental rights for nonpayment violates a host of constitutional provisions, not just the Equal Protection Clause. Professor Hatcher suggests that terminating parental rights for nonpayment of a government debt may violate the prohibition against cruel and unusual punishment under the Eighth Amendment¹⁰⁶ and parents' substantive due process rights under the Fourteenth Amendment.¹⁰⁷ In addition, some courts have recognized that children's constitutional rights may include an interest, or even a right, to family integrity.¹⁰⁸ For example the Washington Supreme Court held that "children have fundamental liberty interests at stake in termination of parental rights proceedings" that include maintaining the integrity of family relationships, including with the child's parents and siblings.¹⁰⁹ The U.S. Court of Appeals for the District of Columbia Circuit similarly wrote that "children and parents enjoy 'reciprocal rights . . . to one another's companionship.'"¹¹⁰ In challenging section 7B-1111(a)(3)'s constitutionality in the future, advocates should continue to raise equal protection, substantive due process, and Eighth Amendment arguments, and explore challenges asserting children's constitutional rights in addition to their parents' rights.

105. See, e.g., *In re J.P.E.*, 893 S.E.2d 572, 2023 WL 7320780, at *5 (2023) (unpublished table decision). In addition, the Supreme Court of North Carolina is unlikely to revisit this issue soon. Briefly, between January 1, 2019, and July 1, 2021 (while *In re J.C.J.* was decided), appeals of TPR orders could be made directly to the Supreme Court of North Carolina. DEPASQUALE, *supra* note 23, at 9-112 to 9-113. The statute granting this direct right of appeal was repealed, and appeals are once again made to the North Carolina Court of Appeals, with no right of appeal to the state supreme court. *Id.*

106. Hatcher, *supra* note 9, at 1367-68.

107. *Id.* at 1364-67.

108. Josh Gupta-Kagan, *Due Process of Law and Child Protection*, in CHILD WELFARE LAW & PRACTICE 387, 396-97 (Donald Dunquette et al. eds., 2016) [hereinafter Gupta-Kagan, *Due Process of Law*]. State courts have recognized these rights more explicitly, but several Supreme Court decisions include dicta suggesting that "children benefit living with their families and free of state intervention." *Id.* at 397.

109. *In re Dependency of M.S.R.*, 271 P.3d 234, 244 (Wash. 2012).

110. Gupta-Kagan, *Due Process of Law*, *supra* note 108, at 397 (quoting *Franz v. United States*, 707 F.2d 582, 596 (D.C. Cir. 1983)).

B. *Other States' Efforts To Move Away from Payment Orders*

Since HHS ended its policy requiring states to charge parents for foster care costs,¹¹¹ several states have taken steps to ensure that parents are not required to reimburse the State for foster care costs. On September 1, 2022, the Washington State Department of Children, Youth & Families declared that it was ending its policy of “forcing parents involved in the child welfare system to pay the state for the costs of caring for their child in foster care.”¹¹² In its statement, Washington State acknowledged that many parents already face financial hardships when they come into contact with the child welfare system, and that its “old and misguided policy” to collect payment “only deepened that hardship and made it harder for parents to get their kids home.”¹¹³

Similarly, in 2022, California enacted a law directing its Departments of Social Services and Child Support Services to promulgate regulations to determine when ordering a child support payment would be in the best interest of the child removed from the home.¹¹⁴ In crafting these regulations, the law requires the agencies to consider whether a support payment will pose a barrier to reunification, either by compromising the parent’s current ability to meet payments or the child’s future needs.¹¹⁵ Crucially, the regulations require county welfare departments to “presume that payment of support by the parent is likely to pose a barrier to the proposed reunification.”¹¹⁶

Washington’s policy and California’s law are examples of executive and legislative actions that North Carolina may consider pursuing if the Supreme Court of North Carolina refuses to respond to constitutional challenges. While neither directly address the constitutional issues at the heart of *In re J.C.J.*, they reduce the likelihood that parents involved in the foster care system will be subject to a payment order and, perhaps, the likelihood that a North Carolina court could terminate a parent’s parental rights for nonpayment of foster care costs.¹¹⁷

111. See U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 12, § 8.4C (question five).

112. *DYCF Child Support Collection Referrals End Today*, WASH. STATE DEP’T CHILD., YOUTH & FAMS. (Sept. 1, 2022), <https://dcyf.wa.gov/news/dcyf-child-support-collection-referrals-end-today> [<https://perma.cc/T4FQ-UUJ2>].

113. *Id.*

114. CAL. FAM. CODE § 17552 (Westlaw through Chapter 1 of 2024 Reg. Sess.).

115. *Id.* § (a)(1)(A)–(B).

116. *Id.* § (a)(1)(B)(2).

117. Of course, the Supreme Court of North Carolina’s interpretation of the termination provision for nonpayment of foster care costs does not require the establishment of an official payment order; it is conceivable that, even if North Carolina adopts a policy of not charging parents for foster care costs, the Supreme Court of North Carolina could continue to enforce the termination provision as it has been, and continue to hold that parents have an “inherent duty” to support their children, whether or not a payment order is in place. But continuing to interpret the nonpayment of foster care costs provision in a manner that is both textually questionable *and* contrary to the State’s official policy on

C. *North Carolina Senate Bill 625*

In 2023, North Carolina Senators Krawiec, Jarvis, and Batch introduced the “Child Welfare, Safety and Permanency Relief” bill in the North Carolina General Assembly.¹¹⁸ In addition to important structural overhauls to the family welfare system in North Carolina, the bill, if passed, would repeal the statutory authority to terminate parental rights for failure to pay child support or foster care costs.¹¹⁹ Passing this legislation would eliminate courts’ ability to terminate parental rights for nonpayment in agency actions and private actions.

CONCLUSION

Executing the “civil death penalty” against parents on the grounds that they should inherently know of their financial obligations to reimburse the State for foster care costs is not just poor statutory interpretation, it is unconstitutional. As other states and the federal government move away from requiring parents to reimburse the State for foster care costs, North Carolina is running in the opposite direction. North Carolina should remove section 7B-111(a)(3) from its statutory grounds for parental termination. But at the very least, the State must abide by the Constitution and stop terminating parental rights for nonpayment in agency cases without notice to the parents of their financial obligations.

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parents’ financial obligations to the State for foster care costs would be misguided. So misguided, hopefully, that the Supreme Court of North Carolina would decline to do so.

118. S.B. 625, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

119. *Id.*

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