No. 416PA08-2 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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JULIA CATHERINE BOSEMAN, Plaintiff v. MELISSA ANN JARRELL Defendant and MELISSA ANN JARRELL, Third-Party Plaintiff v. JULIA CATHERINE BOSEMAN and NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Third-Party Defendants	)	From New Hanover County 07-CVD-625 COA08-957

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BRIEF OFAMICI CURIAE THE AMERICAN COLLEGE OF PEDIATRICIANS, THE CHRISTIAN ACTION LEAGUE OF NORTH CAROLINA, THE NORTH CAROLINA FAMILY POLICY COUNCIL, NC4MARRIAGE, AND THE CHRISTIAN FAMILY LAW ASSOCIATION IN SUPPORT OF DEFENDANT-THIRD PARTY PLAINTIFF / APPELLANT

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INTEREST OF AMICI CURIAE

Amici Curiae are non-profit organizations that research, educate, and advise parents, the general public, members of the General Assembly, the Courts, legal service providers, and other policy-makers on issues, policies, and laws of the State of North Carolina and the United States of America which affect families, the endeavor of childrearing, and health issues related to children and family life. These organizations also variously engage in lobbying, policy-making, and litigation as necessary to further these goals. *Amici* have a strong interest, therefore, in this Court's ruling in this case.

The *Amici* organizations' missions include assuring compliance with state laws and constitutional restraints on government such as the separation of powers. To that end, the efforts of the *Amici* organizations focus primarily on preserving individual liberties under the North Carolina and United States Constitutions and laws, the enforcement of existing statutory and constitutional rights, the adherence to the public policy of the State as demonstrated by the North Carolina General Assembly, and the enabling of all children to reach their optimal physical and emotional health and well-being. Specific issues that *Amici* may address through public interest litigation, lobbying, research, and education include, but are not limited to, adoption, child custody, marriage, childrearing, child health, and child

welfare. More specifically, in this case *Amici* are concerned that the courts should not expand the scope of North Carolina adoption statutes to give adoptive rights to unmarried cohabitating persons, such as in a "second-parent adoption." *Amici* are also concerned that the courts should not expand the scope of North Carolina child custody laws to give persons who have no legal or biological link to the child custodial rights merely because the biological parent has allowed a third-party to develop a relationship with her/his child.

INTRODUCTION

This was a case of collusion by the parties and the District Court Judge to ignore and turn on its head the requirements of the adoption statutes. The question presented in this case is whether the District Court can override a public policy so clearly expressed by the General Assembly in the statutes regulating adoption and marriage. The District Court ignored the plain wording of these statutes and the underlying public policy concerns that motivated them. We believe that the District Court has overstepped its authority and has allowed an unmarried cohabitating couple to do indirectly what they cannot do directly—adopt a minor child. The District Court has fashioned its own remedy to the dilemma created by the parties to this case, and in so doing has violated the public policy of the State. When this Court contrasts the General Assembly's clearly enunciated public policies with

respect to adoptions that may be granted in this State and the adoption granted in this case, the inescapable conclusion must be reached that this adoption violates our State's adoption statutes and public policies and must be immediately declared void *ab initio*.

Further, this Court must end the vague standard of "psychological" or "pseudo" parenting and uphold the well-recognized constitutional right of the biological parent to maintain oversight of her child's care, custody, and associations, without the interference of unrelated third parties. This Court should reverse the District Court's order granting joint custody to Boseman, because she is neither an adoptive parent nor a third-party who has any recognizable right to custody.

ARGUMENT

I. THE ADOPTION DECREE WAS VOID *AB INITIO* BECAUSE IT WAS CONTRARY TO LAW, CONTRARY TO PUBLIC POLICY, AND VIOLATES THE SEPARATION OF POWERS

A. The Adoption Decree Was Void *Ab Initio* Because The District Court Lacked Subject Matter Jurisdiction.

The fact that the Durham County District Court is empowered to hear adoption matters does not absolve the court of all the mandatory provisions of Chapter 48 of the General Statutes. N.C. Gen. Stat. § 48-1-103 provides that

"[a]ny adult may adopt another individual *as provided in this Chapter*, but spouses may not adopt each other." (Emphasis added) This Court has said that since the adoption statute ". . . is in derogation of the common law and works a change in the canons of descent, it must be construed strictly and not so as to enlarge or confer any rights not clearly given." *Grimes v. Grimes*, 207 N.C. 778, 780, 178 S.E. 573, 574 (1935), cited with approval in *Crumpton v. Crumpton*, 303 N.C. 657, 281 S.E.2d 1 (1981). We can conclude that the only means of adoption is that provided in Chapter 48.

North Carolina statutes establish the circumstances under which a natural person may adopt a minor child: (1) agency placement of a relinquished child ("agency adoption"), N.C. Gen. Stat. § 48-3-201(a) (1) (2009); (2) adoption by a step-parent who is legally married to the child's biological parent ("step-parent adoption"), N.C. Gen. Stat. § 48-4-101 (2009); and (3) direct placement by the child's parents or guardian into the adoptive parents' family ("direct placement adoption") N.C. Gen. Stat. § 48-3-201(a)(2), (3) and (4) (2009). The General Assembly did not include in this statutory scheme second-parent adoptions. "Second-parent adoption" refers to, "An adoption by an unmarried cohabiting partner of a child's legal parent, not involving the termination of a legal parent's rights; esp., an adoption in which a lesbian, gay man, or unmarried heterosexual

person adopts his or her partner's biological or adoptive child." *Black's Law Dictionary* (8th ed., 2004), adoption.[1]

The Boseman adoption was not an agency adoption based on parental relinquishment. Neither was it sought on the basis of Boseman being a step-parent to Jacob, because Boseman and Jarrell were same-sex partners who could not marry under the laws of the State of North Carolina. The adoption in this case was fashioned as a direct placement adoption, in which Jarrell, the biological parent, purported to place the child for adoption while retaining her parental rights and legal duties over him, but more nearly resembles a second-parent adoption, which the adoption statutes do not authorize.

Pursuant to Chapter 48, the consent of a living parent, termination of parental rights, or proof of abandonment must be shown in order for the court to have jurisdiction over an adoption proceeding. Where there has been no valid consent, or a termination of parental rights has not occurred, the court lacks subject matter jurisdiction to enter an adoption decree. *In re Adoption of Hoose*, 243 N.C.

[1] The following was included with the definition of second-parent adoption in Black's Law Dictionary: Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5 cmt. i. Although not all jurisdictions recognize second-parent adoption, the practice is becoming more widely accepted. *See also*, *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992). — Also termed *de facto stepparent adoption*; *pseudo-stepparent adoption*. Cf. *stepparent adoption*.

589, 594, 91 S.E.2d 555, 558 (1956) (holding that in absence of consent of the parents, the court is without jurisdiction to order the adoption of the child unless the parents have abandoned the child); *In re Holder*, 218 N.C. 136, 10 S.E.2d 620, 622 (1940) (holding where there was no abandonment of child and parents did not give consent to the adoption in manner contemplated by statute, adoption proceeding was void for want of jurisdiction of the subject matter); *Ward v. Howard*, 217 N.C. 201, 7 S.E.2d 625, 627 (1940) (holding the consent of a living parent must be made to appear to court as a jurisdictional requirement).

North Carolina law is quite clear that "(w)here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond those limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975). *See also*, *Matter of Andersen*, 589 P.2d 957 (Idaho, 1978); *Lee v. In re Adoption of Marsolf*, 434 P.2d 1010 (Kan., 1967); *Petition of Sherman*, 63 N.W.2d 573 (Minn., 1954); *R.A.B. v. R.A.B.*, 562 S.W.2d 356 (Mo., 1978); *Furgeson v. Jones*, 20 P. 842 (Or. 1888); *Straszewicz v. Gallman*, 342 So.2d 1322 (Ala.Civ.App. 1977); *Superior Court In and For Pima County*, 540 P.2d 1274 (Ariz .App. Div. 2, 1975); *In re Adoption of Baby Boy Brooks*, 737 N.E.2d 1062, (Ohio App. 10. Dist. Franklin Co., 2000); *Small v. Andrews*, 530 P.2d 540 (Or.App., 1975) (holding apart from certain exceptions,

consent of parents, guardian or other person *in loco parentis* has been made jurisdictional prerequisite to entry of any adoption decree, and any action taken in absence of necessary consent is a nullity, not voidable, but void); *Fancher v. Mann*, 432 S.W.2d 63 (Tenn. App., 1968); *Pearce v. Harris*, 134 S.W.2d 859 (Tex. Civ. App. El Paso, 1939).

When a statute confers power on a court or administrative body to adjudicate cases involving the members of a certain class, a court's attempt to exercise its power over one who is not a member of that class is void for lack of jurisdiction. *See, e. g., Askew v. Leonard Tire Co*., 264 N.C. 168, 141 S.E.2d 280 (1965); *Aylor v. Barnes*, 242 N.C. 223, 87 S.E.2d 269 (1955). The general rule is that the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. *Minneapolis & St. Louis Railroad Co. v. Peoria & Pekin Union Railway Co*., 270 U.S. 580, 46 S.Ct. 402 (1926); *State v. Howell*, 107 Ariz. 300, 486 P.2d 782 (1971); *Gardner v. Gardner*, 253 S.C. 296, 170 S.E.2d 372 (1969). Jurisdiction over the person of a defendant or respondent is obtained by service of process upon him, by his voluntary appearance, or consent. The jurisdiction of a court or administrative agency over the subject matter of a proceeding is derived from the law which organized the tribunal. Such jurisdiction, therefore, cannot be conferred upon a court by consent, waiver, or estoppel. 3 Strong's North Carolina Index 3rd Courts §2.1 (1976); 21 C.J.S. Courts § 28 (1940).

The Court of Appeals concludes in its opinion that: "the adoption court acted within its authority in granting the direct placement adoption decree, and that the grant of waiver of certain provisions was, at most, erroneous and contrary to law. Thus, the adoption decree is not void." *Boseman v. Jarrell*, 681 S.E.2d 374, 381 (2009). We submit that the Court of Appeals was dead wrong. The District Court did not act within its authority as spelled out by statute in granting the adoption decree, and thus the adoption was void *ab initio* based upon lack of subject matter jurisdiction.

1. **The Court Lacked Subject Matter Jurisdiction Because the Statute Mandates a Complete Substitution of Families and a Severance of Relationship, Legal Duties, and Obligations Between the Adoptee and the Former Parents.**

The General Assembly, when it established the public policy concerning the legal effect of a decree of adoption, said that:

> (a) A decree of adoption effects a complete substitution of families for all legal purposes after the entry of the decree… (c) A decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to the adoptee, except that a former parent's duty to make past-due payments for child support is not terminated, and the former parents are divested of all rights with respect to the adoptee.

N.C. Gen. Stat. § 48-1-106(a)(c) (2009).

This statute has been described by this Court and the Court of Appeals as evidence of the General Assembly's intent to create a complete substitution of families. *Crumpton v. Mitchell*, 303 N.C. 657, 661 281 S.E.2d 1, 4 (1981), *citing, Crumpton v. Crumpton*, 28 N.C. App. 358, 363, 221 S.E.2d 390, 393 (1976). Such intent is evidenced in the adoption forms crafted by the Department of Health and Human Resources for use in adoption proceedings, which accomplish a complete substitution of families, discussed hereafter, *infra*.

The District Court's Decree of Adoption attempted to accomplish contradictory results not allowed by the statutes it cited. First, it attempted to maintain the parent and child relationship between the biological mother and the child being adopted and neither relieve the mother of any legal duties and obligations nor divest her of any rights with respect to the adoptee. Second, it attempted a complete legal substitution of families, while maintaining the relationship with the biological parent, in addition to an establishment of a parent and child relationship between petitioner and the child being adopted.

A substitution of families would dictate that Boseman *or* Jarrell, but not both, is the legal parent of Jacob. If, on the one hand, there has been a "complete substitution of families for all legal purposes", as required by North Carolina's present adoption laws and as declared by the Court, then Boseman, the petitioner adoptive parent, is substituted as the adoptive mother in place of Jarrell, the

biological mother who granted consent to the adoption, and Jarrell's parental rights to Jacob are terminated by the adoption decree. This is obviously not a result intended by the parties or the District Court where, on the other hand, the decree also seeks to preserve Jarrell's parental rights with the decree of adoption. We can conclude that if the legislative intent—substitution of families—is upheld by this Court, then Boseman is now the legal mother of Jacob. On the other hand, if the Durham County District Court second-parent adoption is upheld, then Jacob now has two legal mothers, a clear violation of North Carolina's public policy on adoptions. In construing the statutes as to what is in the best interest of Jacob, as more fully discussed below, it is better that Jacob retain his biological mother and lose his adoptive mother in this case. Since a substitution of families has not occurred with respect to Jacob as required by North Carolina's public policy, and construing the adoption statutes in Jacob's best interests, the attempted second-parent adoption by Boseman must be declared void *ab initio."*

2. <u>The Court Lacked Subject Matter Jurisdiction Because Jarrell's Consent Did Not Comply with the Mandatory Statutory Provisions.</u>

Statutory provisions mandate that in a direct placement adoption, such as was attempted here, the biological or previous parent of the minor must sign a

written consent. N.C. Gen. Stat. § 48-3-601(2) a (2009). The detailed requirements of the consent form include a provision:

> That the individual executing the consent understands that when the adoption is final, all rights and obligations of the adoptee's former parents or guardian with respect to the adoptee will be extinguished, and every aspect of the legal relationship between the adoptee and the former parent or guardian will be terminated.

N.C. Gen. Stat. § 48-3-606(9) (2009).

For direct placement adoptions, the Department of Social Services provides Form DSS-1802, "Consent to Adoption By Parent, Guardian Ad Litem, or Guardian," which is normally executed by parents who consent to the adoption of their children. The form states in paragraph 7 the following:

> That I understand that when the adoption is final, all of my rights and duties with respect to the minor will be extinguished and all aspects of the legal relationship between the minor child and the parent will be terminated.[2]

As this Court has previously noted, "[t]he procedural safeguards provided in the adoption statutes are not mere window dressing—they serve to protect the interests of the parties, the child, and the public." *In the Matter of the Adoption of P.E.P.*, 329 N.C. 692, 704, 407 S.E.2d 505, 511 (1991). This Court held that statutory violations, together with numerous other irregularities, required an interlocutory decree to be set aside and the adoption proceeding dismissed. *Id.* at 704, 512.

[2] *See*, Exhibit A, Form DSS-1802.

Since North Carolina's statutory framework for adoptions does not recognize a second-parent adoption, the attorney representing the parties prepared and presented to Jarrell for her signature a modified form DSS 1802 entitled "Consent to Adoption by Parent Living with Petitioner Form DSS-1802," (the "modified consent"). *Consent to Adoption by Parent Living with Petitioner Form DSS-1802*, Ex. 1 to Record. The modified consent presented to Jarrell was distinctly different from approved Form DSS-1802 that complies with the statute. For instance, in paragraph 5 of the modified consent, Jarrell states:

> That I waive my right to severance of the relationship of parent and child between myself and the minor child when this adoption is entered, so that the minor child shall have two legal parents, myself and JULIA CATHERINE BOSEMAN, and with that waiver intact, I hereby consent to the adoption of the minor by the aforementioned adoptive parent[.]

In paragraph 7 of the modified consent, Jarrell states:

> That I understand that when the adoption is final, I will retain all of my rights and duties with respect to the minor and that all aspects of the legal relationship between the minor child and myself will remain intact. That I have filed a motion seeking a waiver of the statutory provisions contained in N.C.G.S. 48-1-106(c) and 43-3-606(9) so that the adoption will not terminate the legal relation of parent and child between myself and the adoptee[.]

Based upon the modified consent signed by Jarrell and Petitioner's Motion For Wavier of Statutory Provisions [*Petitioner's Motion For Wavier of Statutory Provisions*, Exhibit 1 to Record] on August 10, 2005 the Durham County District

Court entered an Order Granting Waiver Of Certain Statutory Requirements which provided in the decretal portion of the order:

> 1. That the provisions set forth in N.C.G.S. § 48-1-106(c) and N.C.G.S. § 48-3606(9) requiring termination of the biological parent's rights may be waived in this proceeding.
>
> 2. The consent filed by the biological parent of the minor adoptee herein is sufficient for the purposes of this adoption proceeding.

Order Granting Waiver Of Certain Statutory Requirements, Exhibit 1 to Record.

Jarrell's reservation of parental rights and waiver of statutory rights as provided in the modified consent do not comply with the statutory requirements for a consent to adoption. Jarrell possessed only the right to consent to the adoption for herself, as contemplated by Chapter 48, using a standard form consent to adoption. Jarrell did not possess the right to waive mandatory statutory provisions and preserve parental rights which must be lost, as provided in Chapter 48. In effect, Jarrell's consent to the adoption was obtained upon the legal fiction that Jacob could be adopted by Boseman without Jarrell losing her parental rights. Because the consent to adoption was obtained from Jarrell based upon a legal fiction presented to Jarrell, the consent was not legally voluntary, was against public policy, and is void. *See, e.g., Stanly County Dept. Of Social Services v. Reeder*, 127 N.C.App. 723, 727, 493 S.E.2d 70, 73 (1997) (holding an agreement to consent to

adoption in return for mother's waiver of past child support and promise not to seek future support was void as contrary to public policy).

It is unlikely that Jarrell would have consented to the adoption if she had known that by entry of the adoption decree her parental rights to Jacob would be terminated, and that Boseman would be Jacob's sole adoptive mother. Yet, this outcome is the mandatory legal requirement of North Carolina's current adoption statutes. Since the modified consent to adoption, which Jarrell relied upon to preserve her parental rights, was void, then the adoption based upon that invalid modified consent must be declared void *ab initio* for lack of subject matter jurisdiction.

3. The Lack of Subject Matter Jurisdiction Renders the Adoption Decree Void *Ab Initio*.

The Durham District Court is required to comply with North Carolina's adoption laws. The District Court does not have the power to fashion a new form of adoption, i.e., second-parent adoption, as was done in this case. In as much as the consent to adoption executed by Jarrell was invalid, the District Court lacked subject matter jurisdiction to enter its Order waiving statutory provisions and preserving parental rights and the decree of adoption must be declared void *ab initio*. A valid consent to adoption is jurisdictional. *Eudy*, 288 N.C. at 75, 215 S.E.

2d at 785, *Hoose*, 243 N.C. at 594, 91 S.E.2d at 558, *Holder*, 218 N.C. 136, 10 S.E.2d at 622, *Ward*, 217 N.C. 201, 7 S.E.2d at 627.

What the District Court did in this case, by waiving statutory provisions and exceeding its jurisdiction, is analogous to the District Court's granting a divorce from bed and board to both parties in *Allred v. Tucci*, 85 N.C.App. 138, 354 S.E.2d 291, (1987). In *Allred*, the District Court signed and entered a consent judgment which granted both parties to a family law dispute a divorce from bed and board. Following the entry of the consent judgment, one of the parties died. Over one year later, her executrix moved pursuant to Rule 60(b)(4) to set aside the consent judgment on grounds that it was void. The District Court granted the motion and held the consent judgment void *ab initio*. The Court of Appeals affirmed, finding that the District Court was without jurisdiction to enter the judgment granting the parties a divorce from bed and board by consent where the court failed to make findings of material fact necessary for granting a divorce from bed and board. The Court of Appeals held the consent judgment void, and stated in conclusion "[t]o hold otherwise would be to sanction a divorce for cause not given by statute; and causes of divorce are statutory in North Carolina." (Citation omitted) *Allred v. Tucci*, 86 N.C.App. at 144, 354 S.E.2d at 295 (1987).

Similarly here, the Durham County District Court has granted a second-parent adoption that is based upon a modified consent to adoption that is not

authorized by North Carolina adoption law. This was an unauthorized result. Just as awarding both parties a divorce from bed and board is not possible, as only an injured party who is free of fault is entitled to such relief, an adoption that is based upon the biological parent retaining her relationship and rights to the adoptee at the same time the adoptive parent is substituted as the new family is void *ab initio* for lack of subject matter jurisdiction.

B. The Adoption Decree Was Void *Ab Initio* Because It Violates The Public Policy Of The State Of North Carolina.

The parties in this case colluded to violate the legislative intent and public policy of North Carolina, namely that adoption effects a substitution of families, severing the rights and relationship between the adoptee and his natural parents and that unmarried cohabitants should not be the adoptive parents of a minor child. The adoption laws are designed to protect the child who is being adopted. Because a private party cannot waive a statutory requirement that would undermine the intent of the statute's goals, the consent to adoption that Jarrell signed, with its waiver of statutory provisions, was void as against public policy. Jarrell could not waive that requirement of the statutes that effected a substitution of families, a severance of her parental rights, and her consent to that severance; furthermore, the District Court's order granting that waiver violated public policy. In addition, since Boseman and Jarrell were unmarried cohabitants, the adoption decree was entered

in violation of clearly enunciated public policy that prohibits adoption by unmarried cohabitants. Therefore it was void *ab initio* and could not serve as a basis for Boseman to have standing as an adoptive parent in a contested custody dispute with Jarrell, the natural parent of the minor child Jacob.

"Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Coman v. Thomas Mfg. Co*., 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989), *citing, Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184,188, 344 P. 2d 25, 27 (1959). This Court has declared that the General Assembly has the power to create public policy. *Carolina Water Serv. v. Town of Pine Knoll Shores*, 145 N.C. App. 686, 689, 551 S.E.2d 558, 560 (2001), *citing, Riegel v. Lyerly*, 265 N.C. 204, 209, 143 S.E.2d 65, 68 (1965). "Where the law-making power speaks on a particular subject over which it has power to legislate, public policy in such cases is what the law enacts. An agreement which cannot be performed without violation of a statute is illegal and void." *Carolina Water Serv.,* 145 N.C. App. at 689, *citing, Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947).

N.C. Gen. Stat. § 48-1-100 declares that:

> The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of

> minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption.

N.C. Gen. Stat. § 48-1-100(b)(1) (2009).

The statute also provides that, "the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor." N.C. Gen. Stat. § 48-1-100(c) (2009). This is the broad public policy behind our adoption statutes—that the welfare of the minor is to be sought in the adoption process. This public policy renders the adoption decree involved in this case void *ab initio*, because it fails to promote the welfare of the minor child Jacob, as more fully explained below.

1. <u>Adoption Acts as a Severance of Parental Rights to Protect the Minor Child from Having Two Families.</u>

Here, Jarrell filed a Motion for Waiver of Statutory Provisions by Biological Mother [*Motion for Waiver of Statutory Provisions by Biological Mother*, Ex. 1 to Record] wherein she asked the District Court to waive the statutory provisions of both N.C. Gen. Stat. § 48-1-106(c) and §48-3-606(9) requiring her consent to "an agreement to terminate all her parental rights…." The District Court held that the provisions of both statutes could be waived and that the consent form Jarrell filed was sufficient to do so. *Boseman v. Jarrell*, 681 S.E.2d 374, 376 (2009). Her

consent was not the typical consent Form DSS-1802, but was modified to state that Jarrell voluntarily consented to the adoption of her child by Boseman and that she "waived[d] [her] right to severance of the relationship of parent and child between [herself] and the minor child when this adoption is entered, so that the minor child shall have two legal parents." *Id.*at 376.

The District Court's subsequent entry of a decree of adoption that did not sever the rights of the biological mother and that did not effect a complete substitution of families, *id.*, attempts to accomplish results that are mutually exclusive and, as such, are contrary to the public policy of the State on adoption. The Court's decree of adoption failed to advance the welfare of the minor child in this case and fails to protect other minors from being caught in such a legal quagmire or life of instability.

Amazingly, the Court of Appeals allowed this decree to stand, improperly concluding that N.C. Gen. Stat. § 48-1-106(c) (requiring severance of the relationship, rights, and duties of the former parent to the adoptee) was intended primarily for the benefit of the former parent, holding that a waiver would be detrimental to that parent and not to the minor child. "Any waiver of this provision accrues to the detriment only of the would-be former parent, while actually conferring benefits on the minor who gains an additional adult who is legally obligated to his care and support." *Boseman*, 681 S.E.2d at 380. The Court deluded

itself into believing that waiver of the statutory requirements "put the minor's 'needs, interests, and rights' above those of either Boseman or Jarrell." *Id.* at 381.

But the consent, like the substitution of families and severance of parental rights, is intended to protect the child from the interference of the former parent once the adoption is complete. The public purpose is manifest and compelling. Allowing the natural parent to retain parental rights potentially subjects the child to the parental control of two competing families, which can cause untold emotional and mental injury to the child. It can lead to chaos in terms of competing parental authority, not to mention the difficulty of sorting out financial responsibility for the child. It can be analogized to a biological father making a motion in a step parent adoption to prevent himself from losing his parental rights upon the adoption by the stepfather, so the child ends up with two fathers—a biological father and an adoptive stepfather. Based on the rationale of the Court of Appeals, having two fathers would appear to be better than having one. But it is not in fact "better," because the statute was purposely designed by the General Assembly to prevent such a result. Adding parents is not the legislative goal. Substitution of suitable parents and families for parents who can no longer, due to hardship or other reason, continue to parent is the goal of the statute.

When it enacted N.C. Gen. Stat. § 48-1-106(c) and N.C. Gen. Stat. § 48-3-606(9), *supra*, the General Assembly intended unequivocally that the legal effect

of a decree of adoption would be the complete substitution of families by severing the relationship, rights, and duties of the biological parents and the adoptee, regardless of what the biological parents intend or desire. Such a termination of parental rights is demanded by public policy, because it protects the minor child from having two families. This Court stated in *Crumpton*, 303 N.C. at 664, 281 S.E.2d at 6, that:

> Given the legislative intent that the legal effect of a final order of adoption shall be substitution of the adoptive in place of the natural family and severance of legal ties with the child's natural family, the implication is clear that the legislature intended that children adopted out of a family would, for *all* legal purposes, no longer be a part of that family. We are convinced the severance of legal ties with the child's natural family was not intended to be partial. It is most unlikely that in enacting G.S. 48-23[3] the legislature intended the child would for some purposes remain legally in its natural bloodline. Such a construction violates the spirit of the act and thwarts that which the act seeks to accomplish.
>
> Instead, we view G.S. 48-23 to mean that upon a final order of adoption the severance of legal ties with the child's natural family is total. The child acquires full status as a member of his adoptive family and in so doing is for all legal purposes removed from his natural bloodline.

[3] G.S. 48-23 is the former version of N.C. Gen. Stat. § 29-17, covering intestate succession by, through, and from adopted children. Statutes relating to adoption should be construed *in pari materia* as constituting one law. *Wilson v. Anderson, v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950).

As stated *supra*, the inescapable conclusion is that the modified consent executed by Jarrell was void. To reach this conclusion, it is necessary to consider the attempted waiver of statutory provisions which is inextricably related to Jarrell's reservation of parental rights. As recognized in *Ingold v. City of Hickory*, 178 N.C. 614, 101 S.E. 525 (1919), "[a] person may lawfully waive by agreement the benefit of a statutory provision. But there is an imputed exception to this general rule in the case of a statutory provision whose waiver would violate public policy expressed therein, or where rights of third parties which the statute was intended to protect are involved." *Cited with approval in*, *Utilities Commission v. Carolina Utility Customers Association*, 348 N.C. 452, 464, 500 S.E.2d 693, 702 (1998).

In waiving these statutory provisions and preserving parental rights, as was done by Jarrell in this case, she was not only preserving her rights, but was also waiving the rights of the petitioner, Boseman, the child, Jacob, and his heirs. Neither N.C. Gen. Stat. § 48-1-106(c) nor N.C. Gen. Stat. § 48-3-606(9), *supra,* create a personal right in either Boseman or Jarrell so as to allow either of them to waive and preserve various statutory requirements, some of which do not belong solely to them, as was done in this case. Boseman and Jarrell could not avoid the legal consequences of the statutes by intentionally entering into an agreement to avoid the legislative requirements. A benefit or right conferred by statute where

that statute was enacted *for the protection of the public or to serve a public purpose* may not be waived by an individual. *See* 31 C.J.S. Estoppel and Waiver § 75 (1996).

Our statute mandates a complete substitution of families and a severance of the biological parent's relationship and rights to the child being adopted. This mandate serves important public policy interests—protecting the adoptee from the parental control of two families and guarding the child's emotions and future well-being. Because of the violation of these statutes and their underlying public policy, Jarrell's child is torn between two women now hostile to one another, yet Jarrell alone has the biological and legal link to support her constitutionally guaranteed parental rights.

Allowing the private waiver of a statutory requirement that is based on public policy undermines the General Assembly's intent in enacting the statute and additionally undermines the statute's public goals. Therefore, Jarrell's execution of a statutorily deficient consent and the District Court's adoption decree based upon that consent stand in direct opposition to the State's public policy, as expressed by the General Assembly. The Court of Appeals substituted its own policy for the State's public policy, by glossing over the waiver of a mandatory statutory provision. Under the Court of Appeals' reasoning, the child ends up with two

families instead of one family. Adoption of this variety focuses on the desires of the biological and adoptive parents, while ignoring the welfare of the child.

2. Unmarried Cohabitants Cannot Adopt Minor Children—Second Parent Adoptions Are Not Legal in North Carolina.

The type of adoption proceeding attempted by Boseman and Jarrell in this case is commonly referred to as a "second-parent adoption." However, Chapter 48 does not permit second-parent adoptions, because marriage is a prerequisite for adoptions by step-parents, and because biological parents are required to sever both the relationship and the legal rights they possess to the children they place directly for adoption. An August 29, 2009 article in the News & Observer, quoted Cheryl Howell, a family law expert at UNC-Chapel Hill's School of Government who trains District Court judges, as saying that it is a mistake for judges to view the Court of Appeals ruling as a validation of second-parent adoptions."The statute doesn't allow for second-parent adoptions," Howell said, "I stand firm on that." Mandy Locke, *Triangle Judges Aid Gay Adoption,* News & Observer, August 22, 2009. *Accord,* Reynolds, *Lee's North Carolina Family Law*, § 17.51, at 17-70 (5th ed., Vol. 3, 2002).

Despite all the modern advances in medical technology, it still ultimately takes a mother and a father to produce natural children. Inherent in the State's adoption public policy, then, is the common sense notion that it is in the best

interests of all children to be brought up, as natural children are, in a home with a married mother and father. Chapter 48 contains 13 references to "married," 22 references to "mother," and 29 references to "father." It also contains 13 references to "family." Considering all the provisions in the statute, it appears that the legislative intent was to promote adoption of minor children into a traditional family consisting of a mother and a father who are married. Whether direct placement, agency, or stepparent adoption, this appears to be the clear legislative intent of the statute. The District Court, however, bent over backwards to create out of thin air the legal fiction of a second-parent adoption, and the Court of Appeals upheld it. The statute, although it may be liberally construed for what is in the best interest of the child, cannot be re-written or waived so as to change the legislative intent or public policy stated therein.

Note that N.C. Gen. Stat. § 48-2-301(c) provides that "If the individual who files the petition is unmarried no other individual may join in the petition." The obvious public policy behind this provision is that if the petitioner is single, he or she can adopt, but unmarried cohabitants are prohibited from adopting. In this case, the parties conspired to violate the legislative intent and public policy of N.C., namely, that unmarried cohabitants cannot be the adoptive parents of a child.

Incredibly, the Court of Appeals said in its ruling that, “the specific nature of the parties’ relationship or marital status was not relevant to resolution of the

instant appeal. The same result would have been reached had the parties been an unmarried heterosexual couple." *Boseman v. Jarrell*, 681 S.E.2d 374, 381 (2009). The Court's opinion would allow the adoption of minor children by unmarried cohabitating heterosexual couples, by grandparents, or by any group of people who wish to establish a parenting relationship with a child. Indeed, there is nothing in the ruling that would prevent "group adoption" such that a child could end up with several parents. We submit that it was never the intent of the legislature to allow unmarried cohabitants, whether heterosexual or homosexual, to adopt minor children.

Further, the General Assembly has expressed the State's public policy of prohibiting marriages between same-sex persons. N.C. Gen. Stat. § 51-1 (2009) states that marriage is "created by the consent of a male and female person who may lawfully marry…to take each other as husband and wife" in the presence of an ordained minister or magistrate. In addition, N.C. Gen. Stat. § 51-1.2(2009) states that: "Marriages…between individuals of the same gender are not valid in North Carolina." Because these statutes prohibit marriages between same-sex partners, same-sex couples cannot legally adopt minor children under North Carolina adoption statutes as step-parents. Nor can they adopt minor children as unmarried cohabitants, where the biological parent retains parental rights and yet consents to the adoption of her child by her unmarried partner (the so called "second-parent

adoption"). To allow same-sex cohabitating partners to adopt minor children while they cannot marry under our statutes produces an illogical result. The public policy of the State as expressed in both the adoption statutes and the marriage statutes favors adoptive parents who are a married mother and father, and disfavors unmarried cohabitants as adoptive parents.

3. Social Science Indicates that Optimal Childrearing Occurs in an Adoptive Family Composed of a Married Mother and Father.

The reasons for upholding such a public policy are well-established. Whenever possible, adopted children should be placed in the optimal childrearing environment with a father and a mother who are married. Childrearing studies have consistently shown that children are more likely to thrive emotionally, mentally, and physically in a home with married parents of differing sexes. *See* A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, 6(2) Journal of Law & Family Studies 213-35 (2004); Sotirios Sarantakos, *Children in Three Contexts: Family, Education, and Social Development*, 21 Children Australia 23-31 (1996); David Popenoe, *Life Without Father* 144, 146 (1996); Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 45 (1994); Jeanne M. Hilton & Esther L. Devall, *Comparison of Parenting and Children's Behavior in Single-Mother, Single-*

Father, and Intact Families, 29 Journal of Divorce and Remarriage 23-54 (1998); Elizabeth Thomson *et al., Family Structure and Child Well-Being: Economic Resources vs. Parental Behaviors*, 73 Social Forces 221-42 (1994). The veracity of this principle remains unrefuted.

These scientific results rest on the intuitive and well-supported principle that children benefit from close, daily interaction with both a male and a female. *See Hernandez v. Robles*, 7 N.Y.3d 338, 359, 855 N.E.2d 1, 7 (N.Y. 2006) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."); *see also* Linda Thompson & Alexia J. Walker, *Gender in Families: Women and Men in Marriage, Work, and Parenthood*, 51(4) Journal of Marriage and the Family 845-71 (1989); Shelley E. Taylor *et al., Biobehavioral Responses to Stress in Females; Tend-and-Befriend, not Fight-or-Flight*, 107(3) Psychological Review 411-429 (2000). Neither can this principle be credibly challenged.

It is indisputable couples of the same gender are unlikely to provide a child with two parents of differing sexes or much needed parental interaction with both a male and a female. Consequently, North Carolina's adoption statutes rest on the rational, if not compelling, basis of placing adopted children in a premier childrearing environment consisting of a mother and a father who are married.

Studies have shown that same-sex parenting has deleterious effects on children. A recent meta-analysis of 21 same-sex parenting studies revealed significant effects of same-sex parenting on children. While each of the 21 studies purported to show that there are no significant differences between children raised by same-sex couples and those raised by opposite-sex couples, same-sex-parenting advocates Judith Stacey and Timothy Biblarz detected serious methodological flaws in each study. Stacey and Biblarz performed a meta-analysis designed to minimize the effect of those flaws. To their surprise, the meta-analysis revealed significant differences between children raised by opposite-sex couples and those raised by same-sex couples. For example, children raised by same-sex couples were more likely than children raised by opposite-sex couples to initiate sexual activity at earlier ages, to have more sexual partners, and to experiment with homosexual behavior. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 American Sociological Review 174-79 (2001). Stacey and Biblarz also found that children raised by same-sex couples are less likely to conform to gender roles. For instance, boys raised by two women were less aggressive than boys raised by a mother and father. And girls raised by same-sex couples were more aggressive than girls raised by opposite-sex couples.

There are serious methodological problems with the available studies. The studies suggesting neutral or favorable results by children raised by two parents of

the same sex have critical flaws such as non-longitudinal design, inadequate sample size, biased sample selection, lack of proper controls, or failure to account for confounding variables. *See* Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same Sex Parenting* (2001). Much further study and critique must occur before the scientific community can fully rely upon this developing area of study. Indeed, at this early stage, there is no consensus—but only disagreement—on this issue in the scientific community. Importantly, no study has purported to show that a household comprising two parents of the same-sex is *preferable* to the time-tested model of a male-female parental unit. This developing area of scientific study is not the place for a court to substitute its policy preference for that of the General Assembly.

Even though the law and the public policy of North Carolina do not support second-parent adoptions, the District Courts in Orange and Durham have granted several hundred of these void adoptions to same-sex partners. ("Hundreds of gay couples in North Carolina have turned to judges in Orange and Durham counties to give them what most courts won't: the legal right to be a parent to their partner's child.") Mandy Locke, *Triangle Judges Aid Gay Adoption,* News & Observer, August 22, 2009. These District Courts are creating a mockery of the State's public policy as expressed in its statutes. It is time for this Court to say, "No more." The rule of law and its underlying public policy cannot be subverted any longer.

C. The Adoption Decree Was Void *Ab Initio* Because The District Court Exceeded Its Judicial Authority In Violation Of The Doctrine Of Separation Of Powers.

For more than 200 years, North Carolina's government has strictly adhered to the principle of the separation of powers. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599, 286 S.E.2d 79, 83 (1982). *See also* N.C. Const. Art. I § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). This principle, of course, distributes the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary. *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982). A violation of the separation of powers occurs when one branch of state government exercises powers that are reserved for another branch of state government. *Ivarsson v. Office of Indigent Def. Servs*., 156 N.C.App. 628, 631, 577 S.E.2d 650, 652, *disc. review denied*, 357 N.C. 250, 582 S.E.2d 269 (2003). The standard of review for constitutional questions is de novo. *Piedmont Triad Regional Water Authority v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

The legislative branch of government is without question the policy-making agency of our government. *Rhyne v. K-Mart Corp*., 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). Where the law-making power speaks on a particular subject over

which it has power to legislate, public policy in such cases is what the law enacts. *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947). When the General Assembly enacts a statute after examining its legal and public policy implications, it is not the province of the courts to substitute their judgment for that of our legislature. *See, e.g., Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008); *Newlin v. Gill*, 293 N.C. 348, 350-52, 237 S.E.2d 819, 821-22 (1977); *see also Bockweg v. Anderson*, 328 N.C. 436, 451-52, 402 S.E.2d 627, 636-37 (1991) (Martin, J., dissenting). For instance, a court may not substitute its judgment of what is reasonable for that of the legislative body when the reasonableness of a particular classification is to be determined. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983).

Our Supreme Court has stated that it has no power to amend an Act of the General Assembly. *State v. Davis*, 267 N.C. 126, 128, 147 S.E.2d 570, 572 (1966) (per curiam). Where the language of an Act is clear and unambiguous, the courts must give the statute its plain and definite meaning, *State ex rel. Utilities Com. v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977); moreover, " 'it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction.' " *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (quoting *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977)).

In this case, the Durham County District Court failed to strictly construe provisions of the adoption statute that were clear and unambiguous. The District Court ignored the legislative mandates of the adoption statute to allow a second-parent adoption, which is clearly a change in the public policy of our adoption law. Particularly, although our law requires that Jarrell lose her parental rights by giving consent to the adoption, the court modified the requirements of the statute to allow her to preserve her parental rights. An amendment or modification of the adoption laws to allow for a second-parent adoption is a legislative function and is within the province of the General Assembly. Certainly, the Durham County District Court has no greater powers than the North Carolina Legislature. By enlarging and conferring rights not clearly given by the adoption statute, the District Court violated the doctrine of separation of powers.

If the argument is made that it is the province of the trial courts to fashion remedies or defenses where none exists, our courts have previously frowned on such judicial activism. For instance, when the North Carolina Court of Appeals abolished the causes of action for alienation of affections and criminal conversation in *Canon v. Miller*, 71 N.C.App. 322 S.E.2d 780 (1984), this Court responded, "[i]t appearing that the panel of judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to override decisions of the Supreme Court of North Carolina and its responsibility to

follow those decisions, until otherwise ordered by the Supreme Court." *Canon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).

Here, the District Court, like the Court of Appeals in *Canon*, acted under the "misapprehension of its authority." The Court attempted to fashion a remedy—second-parent adoption—where none existed under North Carolina adoption law. Neither the General Assembly nor this Court has recognized second-parent adoptions. It is the province of the General Assembly, not the Durham County District Court, to establish the law on adoption in North Carolina, including whether second-parent adoptions should be authorized under our statutes. It is the duty of the district courts of this State to follow the laws enacted by the General Assembly, not usurp their power by making new laws.

The Durham County District Court exceeded its judicial authority by violating the separation of powers required in our Constitution. It engaged in judicial activism by crafting a public policy that is neither recognized nor sanctioned by the General Assembly—second-parent adoptions. To the contrary, the public policy of this State has opposed anything other than a complete substitution of families in adoption proceedings. The Court did not have subject matter jurisdiction to grant an adoption by unmarried cohabitants, which operated to the benefit of the adoptive parent, rather than protecting the welfare of the

adopted child. Such changes in the adoption statutes of the State of North Carolina are reserved solely to the General Assembly. For this reason, its decree of adoption recognizing Boseman as the legal adoptive parent of Jacob is void *ab initio.*

II. JARRELL HAS NOT KNOWINGLY OR IRREVOCABLY WAIVED HER CONSTITUTIONAL RIGHTS TO DETERMINE HER CHILD'S ASSOCIATIONS; THEREFORE BOSEMAN HAS NO RIGHT TO CUSTODY.

A. As Her Child's Sole Biological Mother, Jarrell Has Fundamental Parental Rights Recognized By Overwhelming Federal And State Precedent.

The parental rights that Jarrell retains are deeply rooted in American history and jurisprudence, being "perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("*Troxel"*). The right to "establish a home and bring up children" is "essential." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Troxel, supra*, 530 U.S. at 65. "[T]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). Parental rights are among the "basic civil rights of man." *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and

freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). Courts acknowledge far greater respect for parental rights to care and custody than for mere economic arrangements. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). The primary role of parents "is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972). The U.S. Supreme Court has recognized broad constitutional protection for parental rights on multiple occasions. *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978); *Parham v. J. R.,* 442 U.S. 584, 602 (1979). These fundamental rights do not vanish merely because a parent temporarily loses custody to the State or does not perform as a model parent. *Santosky v. Kramer,* 455 U.S. 745, 753 (1982). These basic associational rights are protected "against the State's unwarranted usurpation, disregard or disrespect." *M.L.B. v. S.L.J.,* 519 U.S. 102, 116 (1996), quoting *Boddie v. Connecticut,* 401 U.S. 371, 376 (1971).

North Carolina precedent is similar. Decades ago, state cases affirmed that the state must not lightly interfere with the prima facie parental right to custody. *Atkinson v. Downing*, 175 N.C. 244, 247, 95 S.E. 487, 488 (1918); *Brickell v. Hines*, 179 N.C. 254, 254-255, 102 S.E. 309, 310 (1920); *Spitzer v. Lewark*, 259 N.C. 50, 59, 129 S.E.2d 620, 623 (1963). Parents are entitled to determine their child's associations. *Moore v. Moore*, 89 N.C. App. 351, 365 S.E.2d 662 (1988)

(court refused to order grandparent visitations); *In re Hughes*, 254 N.C. 434, 119 S.E.2d 189 (1961) (grandmother granted custody of children abandoned by mother, while father served in the military).

In a custody dispute between a mother and stepmother, this Court held that in order for a third party to prevail, "there must be substantial reasons or, as various courts have put it, the reasons must be real, compelling, cogent, weighty, strong, powerful, serious, or grave." *James v. Pretlow*, 242 N.C. 102, 105, 86 S.E.2d 759, 761 (1955). In light of extensive federal and state precedent, there are no sufficiently compelling reasons for this Court to find that Jarrell has irrevocably waived her paramount rights, not only to custody, but also to oversight of her child's associations.

B. <u>This Court Should Apply Strict Scrutiny To Determine Whether Jarrell's Conduct Justifies Interference With Her Fundamental Rights.</u>

North Carolina has erected a high evidentiary hurdle in cases where a child is removed from the custody of a natural parent:

> The decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence.

Adams v. Tessener, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001), *citing Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982); *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751 (2005).

This high standard of proof is consistent with the strict standard that should be employed to evaluate whether Jarrell has irrevocably relinquished her exclusive parental rights. In *Troxel*, the U.S. Supreme Court upheld the basic constitutional right of parents to determine who will educate and socialize their children, but did not articulate the proper standard of review. In his concurrence, Justice Thomas recommended the application of strict scrutiny to infringements of fundamental rights. *Troxel, supra*, 530 U.S. at 80 (Thomas, J., concurring). In resolving third party parentage claims, any other test will fail to protect these important rights. Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to be a Parent Over the Objections of the Child's Biological Parent*, 21 Regent U.L. Rev. 1, 43 (2008-2009) ("*Sacrificing Motherhood*").

Moreover, "[u]nless a parent is unfit...there is no compelling governmental interest to undermine the parent's decision concerning visitation and custody." *Id.* at 44. The state has a compelling interest, and can rightly intervene to grant custody or visitation, only when a parent's decisions cause actual harm to the child. *Clark v. Wade,* 544 S.E.2d 99, 109 (Ga. 2001) (Sears, J., concurring). Mere

sadness at the child's loss of a relationship is insufficient for the state to intervene and undermine the parent's basic rights. *Griffin v. Griffin*, 581 S.E.2d 899, 903 (Va. Ct. App. 2003).

Many courts have veered off course, eschewing the constitutional analysis in favor of a blurred "exceptional circumstances" test, crafting visitation rights for a "psychological parent" without any showing of the legal parent's unfitness or actual harm to the child. *V.C. v. M.J.B.*, 163 N.J. 200, 748 A.2d 539 (2000) (former domestic partner granted visitation rights with partner's biological children); *Sacrificing Motherhood, supra*, 21 Regent U.L. Rev. at 47-48. Some courts "take the additional step of summarily concluding that the constitutional rights of the biological parent and the third party are coextensive." *Id*. at 49. The enormity of the error is even greater in these cases. If third party visitation rights demand some constitutional inquiry, that analysis is all the more imperative before a court declares a third party the legal equivalent of a parent. *Id*. at 50.

C. Jarrell Has Not Knowingly And *Irrevocably* Waived Her Parental Rights.

Jarrell v. Boseman illustrates the grave constitutional concerns that arise when a parent facilitates a relationship between her child and a third party without full knowledge of the legal ramifications. A natural parent's express consent to an adoption is straightforward and poses no constitutional concerns. But some courts,

including North Carolina in the *Mason* decision, "have sidestepped the constitutional analysis by concluding that the biological parent implicitly waived her constitutional rights." *Sacrificing Motherhood*, *supra*, 21 Regent U.L. Rev. at 50. An implicit waiver raises difficult evidentiary issues and "rests upon ambiguous and fact-intensive inquiries." *Id.* at 51; *Jones v. Barlow*, 2007 UT 20, 31, 154 P.3d 808, 816 (2007).

In addition to the fact-finding difficulties, a parent's implicit waiver of parental rights conflicts with longstanding U.S. Supreme Court precedent concerning the waiver of fundamental rights. *Sacrificing Motherhood*, *supra*, 21 Regent U.L. Rev. at 51. It is well established that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *quoting*, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882). "A waiver is ordinarily an *intentional* relinquishment or abandonment of a *known* right or privilege." *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937) (emphasis added). The waiver of fundamental parental rights should mandate both knowledge and appreciation of the legal consequences. But some courts—including North Carolina—"have concluded that the biological mother implicitly waived her parental rights by consenting to the development of a relationship

between her biological child and a third party." *Sacrificing Motherhood, supra*, 21 Regent U.L. Rev. at 53.

In this sensitive area of family law, the constitutional concerns are grave. "The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character." *Troxel, supra,* 530 U.S. at 78-79 (Souter, J., concurring). A mother's consent to a child's relationship with a third party does not necessarily imply that she has "knowingly, *and irrevocably*, waived her constitutional right to (1) be treated as the child's sole parent, or (2) make exclusive determinations concerning custody and visitation concerning her child." *Sacrificing Motherhood, supra*, 21 Regent U.L. Rev. at 53-54 (emphasis added). The average parent, lacking a legal education, probably does not intend to permanently surrender or share these basic rights—or expect to defend costly litigation.

The court-created "inconsistent conduct" doctrine is seriously flawed, in part because of its ambiguity. In framing this theory, the *Price* court held that:

> Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. *Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents*. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528 (1997) (emphasis added).

Price went on to hold that a parent who temporarily leaves a child in the custody of a third party "*should notify the custodian upon relinquishment of custody that the relinquishment is temporary*" in order to preserve his or her constitutional rights. *Id.* at 83 (emphasis added). Few parents would have the legal knowledge necessary to take this precaution and maintain admissible evidence in case of future litigation. *Price* involved an unwed mother who deceived her young child into believing that her live-in boyfriend was the natural father, then waited until the child was six years old to seek custody. The court could have based its decision on the mother's neglect, rather than creating an elusive doctrine that opens the door to questionable third party claims.

Two recent North Carolina cases, both involving the break-up of same-sex relationships, illustrate the monumental problems presented by implicit waivers. First, the appellate court established the irrevocability of such a waiver by holding that a parent who creates a parent-like relationship between her child and a third party "cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." *Dwinnell v. Mason*, 190 N.C. App. 209, 227, 660 S.E.2d 58 (2008). Even though *Dwinnell* did not go so far as to award the third party full parental rights, the court held that

custody or visitation could be granted. *Id.* at 227-228. In a similar case the same year, the court found that the natural parent had *not* waived her parental rights. *Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (N.C. Ct. App. 2008). But the court noted the imprecision: "There is thus *no specific set of factors that must be found or analyzed* in order for the standard in *Price* and *Dwinnell* to be met." *Id.* at 73 (emphasis added). It is difficult to understand how such fact-intensive litigation is in anyone's "best interests."

Moreover, an *irrevocable* implicit waiver clashes with the doctrine of *in loco parentis*, applied where an adult who is not a legal parent assumes a parental role in a child's life. *Jones v. Barlow*, 2007 UT 20, 154 P.3d 808, 811 (2007). It is inherently temporary in nature and may be terminated at any time. 59 Am. Jur. 2d Parent and Child § 9 (2002); *Babb v. Matlock*, 340 Ark. 263, 9 S.W.3d 508, 510 (Ark. 2000). "[T]here is no principle within the *in loco parentis* doctrine that purports to abridge a fit legal parent's right to govern her children's associations. The *in loco parentis* status is 'temporary by definition and ceases on withdrawal of consent by the legal parent.' *Carvin v. Britain (In re Parentage of L.B.)*, 155 Wn.2d 679, 122 P.3d 161, 168 n.7 (Wash. 2005)." *Jones v. Barlow*, 2007 UT 20, 154 P.3d 808, 813 (2007). The concept of a permanent waiver of parental rights cannot be reconciled with the common law doctrine of *in loco parentis*.

Where a parent neglects responsibilities over a long period of time or abandons a child, intervention can be justified without evading the constitutional issues. "When a parent neglects the welfare and interest of his child, he waives his usual right to custody." *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961). Numerous cases around the country provide a more solid basis to determine whether a parent has engaged in "inconsistent" conduct that would truly justify interference with parental rights. In each case, a parent failed to fulfill basic responsibilities, engaging in conduct better analyzed as abandonment or neglect rather than *Price's* ambiguous "inconsistent conduct": *Merchant v. Bussell,* 139 Me. 118, 124, 27 A.2d 816, 819 (1942) (after mother died in childbirth, father showed no interest in daughter during first four years of her life); *In re Gibbons,* 247 N.C. 273, 280, 101 S.E.2d 16, 21-22 (1957) (paternal grandparents adopted child; father visited infrequently and failed to provide support); *Bennett v. Jeffreys,* 40 N.Y.2d 543, 544, 356 N.E.2d 277, 280, 387 N.Y.S.2d 821, 823 (1976) (15-year-old unwed mother transferred custody of baby and had little contact during child's first eight years of life); *Quilloin v. Walcott,* 434 U.S. 246 (1978) (unwed father did not attempt to legitimize child until child was 11 years old and stepfather had filed adoption petition); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (father failed to establish significant custodial, personal, or financial relationship with child born out of wedlock and waited two years to establish a legal tie); *Ellison v. Ramos*, 130

N.C. App. 389, 502 S.E.2d 891 (1998) (father never took responsibility for child, but left her in care of grandparents in Puerto Rico who could not provide for her needs); *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (unwed father showed little interest in pregnancy and later failed to inquire about child); *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001) (mother implicated in her boyfriend's murder of father); *Simpson v. Brown*, 67 Cal. App. 4th 914, 925-26, 79 Cal. Rptr. 2d 389, 395 (1998) (same); *David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005) (father left child with paternal grandfather and step-grandmother, visiting infrequently and not providing support); *Middleton v. Johnson*, 369 S.C. 585, 633 S.E.2d 162 (Ct. of App. 2006) (mother's boyfriend continued joint custody arrangement after blood test excluded him as biological father; mother cut off contact after he reported her for suspected abuse of child; child had believed him to be father for 10 years).

It is alarming to observe that while prescriptive easements and adverse possession require open, continuous use of real property for a prescribed numbers of years, "one can acquire fundamental parental rights in another's child without any requirement that the third party live with and raise the child for any set period of time." *Sacrificing Motherhood, supra*, 21 Regent U.L. Rev. at 57. Parental rights are "far more precious...than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953). It is patently unconstitutional to allow the government, under the

guise of acting in a child's "best interests," to grant parental rights to a legal stranger under some fanciful form of "eminent domain." *Sacrificing Motherhood, Supra*, 21 Regent U.L. Rev. at 58.

D. The "Inconsistent Conduct" Test Violates Jarrell's Fundamental Parental Rights And Does Not Serve The Best Interests Of The Child.

In light of the underlying illegal adoption, this Court should apply the standard set forth in *Petersen*—a landmark case involving a custody dispute between the child's legal parents and a couple who had unlawfully adopted their child—rather than the vague *Price* standard that sidesteps important constitutional issues. *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). *Price* itself supports that conclusion:

> It was unnecessary in *Petersen* to articulate anything more than general constitutional principles. In *Petersen*, the plaintiffs unlawfully adopted the defendants' natural child.

Price v. Howard, 346 N.C. 68, 73, 484 S.E.2d 528 (1997).

The same is true here: Boseman illegally adopted Jarrell's child.

The *Price* "inconsistent conduct" doctrine has been summarized in terms of the "best interests" standard:

> [W]hen a court finds parental conduct inconsistent with the [parent's] protected status, the parent's paramount right to custody may be lost.... Until, and unless, the movant establishes by clear and convincing evidence that a natural parent's

> behavior, viewed cumulatively, has been inconsistent with his or her protected status, the "best interest of the child" test is simply not implicated. In other words, the trial court may employ the "best interest of the child" test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited his or her constitutionally protected status.

Owenby v. Young, 357 N.C. 142, 148, 579 S.E.2d 264 (2003).

In North Carolina courts began looking to the welfare of the child as their guiding star in 1883, foreshadowing the "best interests of the child" articulated by Judge Benjamin Cardozo in *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). *In re Lewis*, 88 N.C. 31, 1883 WL 2301 (1883). In 1977, N.C. Gen. Stat. § 50-13.2 was amended to eliminate any presumption in favor of either father or mother, instead looking to the child's "best interests." As between natural or adoptive parents, the child's welfare has long been the standard in custody determinations. *In Rosero v. Blake*, 357 N.C. 193, 207, 581 S.E.2d 41 (2003). On rare occasions the courts have used the "best interests" standard to award custody to a third party. *In re Gibbons*, 247 N.C. 273, 101 S.E.2d 16 (1957) (adoptive father lost custody battle with unrelated foster parents); *In re Hughes*, 254 N.C. 434, 119 S.E.2d 189 (1961) (grandmother had been raising children based on mother's unfitness).

But however appropriate it may be to use the "best interests" criterion in certain circumstances, the U.S. Supreme Court cautions that:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others.

Reno v. Flores, 507 U.S. 292, 303 (1993) (emphasis in original).

In *Dwinnell*, the appellate court veered astray in concluding that "the General Assembly has determined that it is the public policy of this State that the 'best interest of the child' standard shall apply whenever custody is sought regardless of the relationship of the recipient of custody to the child." *Dwinnell v. Mason*, 190 N.C. App. 209, 216, 660 S.E.2d 58 (2008). The court later qualified this statement, acknowledging that "our federal and state constitutions...do not allow this standard to be used as between a legal parent and a third party unless the evidence establishes that the legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent. *See Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)." *Estroff v. Chatterjee*, 190 N.C. App. 61, 63-64, 660 S.E.2d 73 (N.C. Ct. App. 2008).

Even if the "best interests of the child" is the appropriate guide in some circumstances, the "inconsistent conduct" doctrine fails to further that lofty goal. The Utah Supreme Court said it well:

> In carving out a permanent role in the child's life for a surrogate parent, this court would necessarily subtract from the legal parent's right to direct the upbringing of her child and *expose the child to inevitable conflict between the surrogate and the natural parents*.

Jones v. Barlow, 2007 UT 20, 33, 154 P.3d 808, 816 (2007) (emphasis added).

Litigation is particularly disruptive: "A single parent struggling to raise a child could have all hopes and plans for the child's future destroyed through the expense of attorney's fees necessary to defend against third-party visitation claims." *Sacrificing Motherhood*, *supra*, 21 Regent U.L. Rev. at 15. Litigation can develop even among close family members. *Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002). In *Grindstaff*, the father temporarily left his children in the custody of their grandmother but continued to provide support and maintain contact with them, resuming custody when his circumstances permitted. It is difficult to imagine how litigation between a father and grandmother could possibly promote any child's "best interests." The *Dwinnell* and *Estroff* cases further demonstrate the entangled, fact-intensive litigation spawned by the concept that a fit parent can create permanent parental rights in an unrelated third party who has no legal or biological relationship with either the child or the natural parent. Courts are obliged to determine custody when parents divorce, and some other situations merit judicial intervention. But the judicially manufactured

"inconsistent conduct" doctrine generates additional, unnecessary court battles that no doubt have a corrosive effect on the children and families involved.

Finally, the end result can be downright absurd. One commentator took this type of legal analysis to its logical conclusion and promoted the leap into multi-parenthood:

> When more than two people function as parents to a child, the child should not be limited to only two legally recognized parents. Existing law recognizes a maximum of two parents for each child, and even those courts that recognize two same-sex individuals as legal parents are adhering to the traditional two-parent family model. In order to reflect the reality of non-traditional families, *the courts must waive the numeric and gender restrictions and allow for third-parent adoption*. By doing so, the court system would legally recognize the reality of children's lives. By permitting a child to have more than two legal parents, lesbians and gays could enter into cooperative arrangements in which each attains full parental status.

Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families,* 26 Vt. L. Rev. 195, 211-12 (2001) (emphasis added), cited by William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 Cap. U.L. Rev. 787, 802 (2003).

As far-fetched as this idea may seem, it has already happened in at least one reported decision. In the State of Washington, a child had *three* parents after the mother ended a same-sex relationship and married the sperm donor. *Carvin v.*

Britain (In re Parentage of L.B.), 155 Wn.2d 679, 122 P.3d 161 (Wash. 2005. The dissent accused the majority of bypassing the constitutional analysis to "wav[e] a magic wand and creat[e] de facto parents," arguing that "it is this court's creation of this new class of parents that is the constitutional violation." *Id.* at 181 (Johnson, J., dissenting). Indeed it is, but that is exactly where North Carolina's current law is headed. This Court should stabilize the legal framework for custody proceedings by ending the practice of allowing a third party who has no legal or biological relationship with either the child or the natural parent to obtain legal rights to custody.

In this case, Jarrell has not acted inconsistently with her constitutionally guaranteed rights to parenthood. The Court of Appeals' opinion acknowledges that: "Jarrell's relationship with the child is described as hands-on, loving, and respectful." *Boseman v. Jarrell*, 681 S.E.2d 374, 376 (2009). There is no indication that Jarrell did anything to knowingly or irrevocably waive her right to control the associations of Jacob or to waive her position as legal parent primarily responsible for the custody, care and nurture of her child. Since her actions have not been inconsistent with her constitutional parental rights, this Court cannot apply the "best interests of the child" standard. Nor should it apply some vague standard of "implicit waiver" just because Jarrell allowed Boseman to develop a close relationship to her child. Jarrell at all times maintained her parental responsibilities

and duties, thus preserving her constitutional rights to control Jacob's associations—even his association with Boseman.

CONCLUSION

The Durham District Court did not have subject matter jurisdiction to grant the decree of adoption to Boseman, because (1) it was not allowed under the plain language of Chapter 48 of the North Carolina General Statutes, (2) the consent upon which it is based does not comply with statute and is void, (3) it violates public policy favoring the complete substitution of families by severing the relationship, rights, and duties of the biological parents and the adoptee, (4) it violates public policy favoring adoptive parents who are a married mother and father, and (5) it violates the constitutional doctrine of separation of powers. Therefore, the adoption decree was void *ab initio* and did not give Boseman standing to bring a custody action based on the adoption. The District Court and the Court of Appeals erred in upholding the validity of the adoption decree as a second-parent adoption, which is not recognized by statute or by public policy. Respectfully, *Amici Curiae* request that this Court settle North Carolina adoption law and find second-parent adoptions contrary to the statutes and public policy of this State.

The District Court erred in granting Boseman joint custody, because there was no showing that Jarrell had acted inconsistently with her parental rights. Merely allowing Boseman to develop a close relationship with her child does not show that Jarrell knowingly and irrevocably waived her parental rights. Respectfully, *Amici Curiae* ask this Court to find that it is unconstitutional to find an "implicit waiver" of parental rights as it relates to granting custody of minor children to third parties.

For these reasons, *Amici Curiae* respectfully urge the Court to rule in favor of the Appellant Jarrell, and, as requested by Appellant, prays that the Court (1) Holds the adoption decree void *ab initio*, and remands this case to the Court of Appeals with instructions to enter Orders allowing Jarrell's Rule 60(b)(4) Motion and Motion for Partial Summary Judgment, and to enter Declaratory Judgment in favor of Jarrell; and (2) Remands the remainder of this case to the Court of Appeals for remand to the Trial Court with instructions to enter an order dismissing with prejudice Boseman's custody action.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF OF *AMICI CURIAE* THE AMERICAN COLLEGE OF PEDIATRICIANS, THE CHRISTIAN ACTION LEAGUE OF NORTH CAROLINA, THE NORTH CAROLINA FAMILY POLICY COUNCIL, NC4MARRIAGE, AND THE CHRISTIAN FAMILY LAW ASSOCIATION IN SUPPORT OF DEFENDANT-THIRD PARTY PLAINTIFF / APPELLANT, pursuant to Rule 26(c), by email addressed to the following persons at the following email addresses which are the last email addresses known to me:

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