The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Alexander Stuart Rieger

Office Address: 500 Dr. Martin L. King Jr. Blvd.
(including county) Nashville, TN 37202 (Davidson County)

Office Phone: (615) 741-2408 Facsimile: (615) 532-4892

Email Address: [redacted]

Home Address: [redacted]
(including county) Lebanon TN, 37087 (Wilson County)

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I currently serve as a Senior Assistant Attorney General in the Public Interest Division of the Tennessee Attorney General's Office.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was licensed in 2010. My BPR Number is 029362

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I am licensed to practice law only in Tennessee. Please see response #2 for information concerning my Tennessee licensure.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

I have never been denied admission to, suspended, or placed on inactive status by the Bar of any state.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

From September 2010 to the present, I have been employed by the Tennessee Attorney General's Office. I have held multiple positions within the office including Assistant Attorney General, Deputy Attorney General, and Senior Assistant Attorney General with the General Civil Division and the Public Interest Division.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I have been continuously employed since completion of my legal education.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

In my current position, I handle complex constitutional challenges and class actions—in both state and federal courts—concerning high-profile issues through both trial and appeal. Before trial courts, I engage in a full motion practice and regularly conduct discovery, and should a case survive summary judgment, I try the case to its conclusion. On appeal, I draft briefs and argue before state and federal courts including the Tennessee Supreme Court, the Tennessee Court of Appeals, and the Sixth Circuit Court of Appeals.

Approximately 40 percent of my current responsibilities consist of defending the constitutionality of state laws, rules, or regulations on appeal in federal and state courts.

Approximately 60 percent of my current responsibilities consist of defending the constitutionality of state laws, rules, or regulations or other state action in state and federal trial court.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

After graduating from law school, I took a position with the General Civil Division of the Attorney General's Office. In my time with that division, I represented a number of Tennessee agencies, including the Department of Children's Services, the Department of Labor and Workforce Development, the Department of Human Services, the Museum Commission, the Department of Intellectual and Developmental Disabilities, and the Department of the Military.

During that time with the General Civil Division, I briefed over one hundred appeals and presented oral argument in more than half of those appeals before the Tennessee Supreme Court, Tennessee Court of Appeals, and the Sixth Circuit Court of Appeals in areas including constitutional challenges, Uniform Administrative Procedures Act appeals, workers' compensation appeals, terminations-of-parental-rights appeals and federal deprivation-of-civil-rights claims. I also served as lead counsel on trial matters for constitutional challenges, class-actions, and chancery-court judicial-review cases. I was fortunate to serve in the General Civil Division, as it gave me the opportunity to gain a wide exposure to many practice areas, including

contract law, domestic relations, health care liability (previously known as medical malpractice), and constitutional litigation. The subject matter varied often, and that variety allowed me to grow as an attorney without cabining myself to a single practice area.

In my third year with the office, I was chosen to join an interdivisional team to litigate Tennessee's same-sex marriage case, *Tanco v. Haslam*. During that process, I had the opportunity to learn from some of the best attorneys in my office and from extremely experienced and professional opposing counsel. While ultimately unsuccessful, it sparked my desire to litigate challenging, high-profile constitutional issues.

After the Deputy of the General Civil Division retired, I was promoted to her position. In that role, I sat on interoffice appellate moot courts to simulate an appellate judge for younger attorneys in the office. I also reviewed all appellate briefs filed by attorneys in that division while maintaining an active caseload dealing primarily with constitutional challenges.

Later on, an office reorganization placed what had been the General Civil Division into a new Civil Law Division. The Attorney General assigned me to the Public Interest Division, and I was tasked with handling high-profile constitutional litigation.

During my time with the Public Interest Division, I have led teams of attorneys in cases involving Tennessee's abortion laws (including the waiting period, non-discrimination, and abortion-reversal informed-consent laws), transgender issues (including Tennessee's bathroom signage law and the Accommodations for All Children Act), COVID-19 election issues, and redistricting. In that role, I've served as lead counsel from answer through appeal. I also regularly consult with other attorneys in the Attorney General's Office to provide advice, guidance, and mentorship on complex issues and class-actions cases.

I have been afforded many professional opportunities during the course of my career. I was arguing before the Court of Appeals less than a month after I was licensed in Tennessee and have now handled over 150 appeals altogether. These cases gave me countless opportunities to hone my legal writing, research, and analysis. In turn, I've tried to give back to my office by mentoring younger attorneys, sitting on moot courts, and presenting CLEs. I have happily watched my teammates grow into highly proficient litigators. And I've been privileged to argue on behalf of the State in complex cases concerning matters of public importance.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

The following cases are examples of matters I routinely litigate for the Tennessee Attorney General's Office:

Tennessee Supreme Court

In re Kaliyah S., 455 S.W.3d 533 (Tenn. 2015) (lead counsel for appellants successfully challenging 11-year-old precedent from the Court of Appeals that reasonable efforts were a precondition to termination of parental rights.).

Mansell v. Bridgestone Firestone N. Am. Tire, LLC, 417 S.W.3d 393 (Tenn. 2013) (lead counsel successfully defending the constitutionality of a statutory provision granting a rebuttable presumption of correctness to an independent medical examination in the context of workers' compensation cases).

Ellithorpe v. Weismark, 479 S.W.3d 818 (Tenn. 2018) (lead counsel successfully defending the constitutionality of the Tennessee Health Care Liability Act).

Pope v. Nebco of Cleveland, 585 S.W.3d 874 (Tenn. Workers. Comp. Appeals. Panel, 2018), *decision adopted by Tennessee Supreme Court* (lead counsel successfully defending the Workers' Compensation Reform Act of 2013).

In re Gabriella D., 531 S.W.3d 662 (Tenn. 2017) (supervising counsel successfully litigating against a finding that termination of parental rights was in the children's best interests).

Fisher v. Hargett, 604 S.W.3d 381 (Tenn. 2020) (successfully achieved reversal of a chancery court's preliminary injunction extending vote-by-mail to all Tennessee voters during the COVID-19 pandemic) (also trial counsel).

Tennessee Court of Appeals

CitiMortgage, Inc. v. Drake, 410 S.W.3d 797 (Tenn. Ct. App. 2013); *Patelco Credit Union v. Dutton*, 413 S.W.3d 75 (Tenn. Ct. App. 2013) (lead counsel successfully defending the constitutionality of Tennessee's non-judicial foreclosure process).

In re S.J., 387 S.W.3d 576 (Tenn. Ct. App. 2012) (lead counsel successfully achieving a finding of severe child abuse based solely upon circumstantial evidence).

In re Isaiah R., 480 S.W.3d 535 (Tenn. Ct. App. 2015) (lead counsel successfully appealing a child-custody placement pursuant to the Interstate Compact on the Placement of Children).

Falls v. Goins, No. M2020-01510-COA-R3-CV (Tenn. Ct. App. Oct. 5, 2021), *perm. app. pending* (lead counsel successfully defending the Division of Election's interpretation of restoration-of-voting-rights requirements) (also trial counsel).

In re I.E.A., 511 S.W.3d 507 (Tenn. Ct. App. 2016) (lead counsel successfully defending alleged defects in juvenile court appointment of special judge to hear parental-termination proceeding).

In re Neveah W., 470 S.W.3d 807 (Tenn. Ct. App. 2015) (lead counsel successfully litigating an extraordinary appeal concerning a jurisdictional dispute between a chancery court and a juvenile court).

In re Melanie T., 352 S.W.3d 685 (Tenn. Ct. App. 2011) (lead counsel successfully arguing that a juvenile court had authority to render a finding of severe child abuse against a non-parent during dependency-and-neglect proceedings).

Tenn. Cmty. Orgs. v. Tenn. Dep't of Intellectual and Developmental Disabilities, No. M2017-00991-COA-R3-CV (Tenn. Ct. App. May 11, 2018), *perm app. denied*. (lead counsel successfully defending grant of summary judgment in matter involving the statutory and

contractual authority of the Department of Intellectual and Developmental Disabilities to sanction a provider for violating the terms of a federal waiver) (also trial counsel).

United States Supreme Court

Tanco v. Haslam, No. 14-571 (member of interdivisional team charged with defending Tennessee's Marriage Laws concerning same-sex marriage. Heard jointly and resolved with *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

Vanessa G. v. Tenn. Dep't of Children's Servs., 137 S.Ct. 44 (2016) (mem.) (counsel of record responding in opposition to petition for certiorari concerning constitutional claims of ineffective assistance of counsel in parental-termination cases. The United States Supreme Court ultimately denied the petition).

Sixth Circuit Court of Appeals

Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020), *cert. granted judgment vacated*, 141 S.Ct. 1262 (2021) (mem.) (defending constitutionality of Executive Order issued during COVID-19 pandemic requiring health care providers to postpone for three weeks elective and non-urgent surgical and invasive procedures in the abortion context).

Thomas v. Lee, 776 Fed. Appx. 910 (6th Cir. 2019); *Robinson v. Long*, 814 Fed. Appx. 991 (6th Cir. 2020) *rehg. en banc denied*, 966 F.3d 521 (defending Tennessee's license-revocation statute against an equal-protection challenge in the context of a class action brought by indigent motorists) (also trial counsel).

Wright v. O'Day, 706 F.3d 769 (6th Cir. 2013) (defense of indicated perpetrator (child-abuse) registry).

Trial Matters

Adams & Boyle, P.C. v. Slatery, 455 F.Supp.3d 619 (M.D. Tenn. 2020) (lead counsel for trial team defending the constitutionality of Tennessee's 48-hour waiting period for abortions).

Curb Records, Inc. v. Lee, No. 3:21-cv-00500 (M.D. Tenn.); *Bongo Prods., LLC v. Lawrence*, No. 3:21-cv-00490 (M.D. Tenn.) (lead counsel defending the constitutionality of Tennessee's bathroom-signage requirements)

A.S. v. Lee, No. 3:21-cv-00600 (M.D. Tenn.) (lead counsel defending the constitutionality of the Tennessee Accommodations for All Children Act concerning bathroom accommodations for schools).

Tennesseans for Sensible Election Laws v. Slatery, Davidson County Chancery Court No. 20-312-III (defending a Tennessee statute prohibiting false statements made in opposition to a political candidate).

People First of Tenn. v. Clover Bottom Dev. Ctr. No. 3:95-cv-01227 (M.D. Tenn.) (successfully litigating exit from a twenty-year old class action asserting violations of the Americans with Disabilities Act and the Individuals with Disabilities Education Act on behalf of residents of developmental centers operated by the state).

Brian A. v. Haslam, No. 3:00-cv-0445 (M.D. Tenn.) (successfully litigating the exit and termination of court jurisdiction of a 2010 Modified Settlement Agreement in a class action seeking overhaul of Tennessee's foster care system).

Lichtenstein v. Hargett, No. 3:20-cv-00736 (M.D. Tenn.) (defending the constitutionality of statute prohibiting the unsolicited provision of applications for an absentee ballot).

Memphis A. Phillip Randolph Inst. v. Hargett, No. 3:20-cv-00374 (M.D. Tenn.) (defending the constitutionality of several Tennessee election laws, including one requiring first-time voters to vote in person if they registered to vote by mail or online).

Planned Parenthood of Tenn. and N. Miss. v. Slatery, No. 3:20-cv-00740 (lead counsel defending the constitutionality of informed-consent law requiring abortion providers to supply patients with information regarding the use of supplemental progesterone to counteract the medication abortifacient).

Memphis Ctr. for Reprod. Health v. Slatery, No. 3:20-cv-00501 (lead counsel defending the constitutionality of fetal-heartbeat legislation and provisions that prohibit physicians from performing abortions that are sought for discriminatory purposes).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not served as a mediator, arbitrator, or a judicial officer.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have no experience serving in a fiduciary capacity such as a guardian ad litem, conservator, or trustee.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

During my third year of law school, I worked part time for Legal Aid of East Tennessee as a paid law clerk.

During my second summer of law school, I clerked for District Attorney General Mike Flynn (5th Judicial District) and the Office of the Tennessee Attorney General.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission

or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

This is my first application for a judgeship.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Vanderbilt University (B.A., 2007)

Majors: English, History

Notable Activities: Departmental Honors in English; Vanderbilt Honor Council Member and Investigator

University of Tennessee College of Law (J.D. 2010)

Concentrations: Business Transactions; Advocacy and Dispute Resolution

Notable Activities: Articles Editor, *Tennessee Law Review*; Editor, *Tennessee Journal of Law and Policy*

PERSONAL INFORMATION

15. State your age and date of birth.

I am 36 years old. My date of birth is [redacted] 1985.

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee a total of 27 years. I was born in Oklahoma and lived in Illinois and Indiana until my family relocated to Maryville in 1996. I lived in Nashville from 2003–2007 while attending college, then in Knoxville from 2007–2010 while attending law school. After law school, my wife and I lived in Hermitage from 2010–2013 until finally settling in Lebanon from 2013 to the present.

17. How long have you lived continuously in the county where you are now living?

I have lived in Wilson County for the past nine years.

18. State the county in which you are registered to vote.

I am registered to vote in Wilson County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have not served in the military.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

No formal complaints have been filed against me.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC,

corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

None.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Member, Ethics Committee, Office of the Tennessee Attorney General, 2015–2020

Member, LEAD Tennessee, Alliance 7, 2016–present (program to develop emerging leaders in

state government)

Member, Law Committee, Court Improvement Program Work Group, Tennessee Administrative Office of the Courts, 2015–present.

Designee, Employee Misclassification Task Force, 2013–2015

Designee, Employee Misclassification Advisory Committee, 2015–2017

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Finalist, Michael E. Moore Writing Award, 2015 (Award for best legal writing in the Attorney General's Office given to one of three finalists)

Finalist, Michael E. Moore Writing Award, 2016

Core Values Award, 2020 (Award for Demonstrating Excellence in the Core Values of Collaboration and Discipline)

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

CLEs from 2016–present:

"Finding Yourself in the Hotseat: Preventing Federal Lawsuits Against Yourself and DCS; Working with the AG's office; and What To Do During Federal Suits," 2021 Department of Children's Services Fall Legal Conference (October 7, 2021).

"Writing for Effect—Building a Logical Framework," 2021 Department of Children's Services Fall Legal Conference (October 8, 2021).

"Awards of Attorneys' Fees," Tennessee Attorney General's Office (August 24, 2021).

"Motions—Legal Writing and Argument," Tennessee Attorney General's Office and NAGTRI (April 27, 2021).

"Current Hot Topics in the World of Ethics: Review of 2018 Disciplinary Cases and Issues Related to Sanctions, Rules, and Recent Court Opinions," 2018 Department of Children's Services Fall Legal Conference (September 12, 2018).

"From DCS Referral to Trial," 2018 Department of Children's Services Fall Legal Conference (September 13, 2018).

"So You Have a Substantiated Perpetrator that has Appealed his/her Substantiation, Now What?

From Appeal Summary to Chancery Court," 2018 Department of Children's Services Fall Legal Conference (September 14, 2018).

"Terminations of Parental Rights in the Court of Appeals," 2017 Department of Children's Services Fall Legal Conference (September 20, 2017).

Other:

"Litigating High-Profile Constitutional Challenges," Brown Bag Presentation, Tennessee Attorney General's Office (January 15, 2020).

"Constitutional Challenges," Brown Bag Presentation, Tennessee Attorney General's Office (August 29, 2020).

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

The following writing samples are attached to my application:

1) A merits brief filed in the Tennessee Supreme Court in *In re Kaliyah S.*, No. E2013-01352-SC-R11-PT, on July 7, 2014. I drafted the brief, and it was reviewed per operating procedures by one of my colleagues in the Attorney General's Office who made minor edits. It reflects 95% of my own effort.

2) A brief in opposition to a petition for certiorari filed in the United States Supreme Court in *Vanessa G. v. Tennessee Department of Human Services*, No. 15-1317, on May 27, 2016. I drafted the brief by myself and it was reviewed per operating procedures by three of my colleagues in the Attorney General's Office who made minor edits. It reflects 95% of my own effort.

3) A merits brief filed in the Tennessee Supreme Court in *Ellithorpe v. Weismark*, No. M2014-00279-SC-R11-CV. I drafted the brief, and it was reviewed per operating procedures by three of my colleagues in the Attorney General's Office who made minor edits. It reflects 95% of my own effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

Most appeals to the Tennessee Supreme Court are discretionary, thus the Court of Appeals often serves as the last court for many cases—meaning that the responsibility of serving as a Judge on the Court is a weighty one. When I began my career with the Attorney General's Office, most of my practice consisted of appellate litigation before the Court of Appeals. I had the privilege of learning from Tennessee's appellate judges and gaining a deep understanding of the appellate process. My appellate experience has reinforced my belief that good appellate judges will avoid substituting their judgment for that of a trial court except as required by the standard of review. I believe that this restrained approach, alongside my experience in writing, research, and analysis gained over the course of litigating complex cases will serve the Court well.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

During the last twelve years, my employment as a government attorney for the Tennessee Attorney General's Office which has limited my ability to volunteer for pro bono legal work. However, before joining the Attorney General's Office, I was a part-time law clerk for Legal Aid of East Tennessee during my third year of law school helping research issues and draft documents for clients that were underserved by the legal community and were unable to obtain private counsel. Also during my third year of law school, I took part in the College of Law's Legal Clinic, where I represented clients facing eviction from Section 8 housing, applicants for asylum, and defendants accused of criminal charges who were unable to afford private counsel.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek a position on the Tennessee Court of Appeals. The Court consists of twelve members, four from each Grand Division. Judges of the Court sit in panels of three, although not necessarily for cases within their own Grand Division. The Court of Appeals exercises jurisdiction over non-criminal final orders from trial courts and certain state boards and commissions. The Court of Appeals may also exercise jurisdiction over interlocutory appeals and appeals of recusal orders. If selected, I believe that my experience with constitutional jurisprudence and terminations of parental rights (which form a large percentage of the Court's docket) will be an asset. My experience with the Attorney General's office has also allowed me to avoid focusing entirely on one area of law during my career, and I believe that my experience in many different areas of the law will be a benefit to the Court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I am a father of a three-year old son and a soon-to-be-born daughter. Those happy responsibilities combined with my workload litigating high-profile cases mean that I have focused my involvement on the legal community—I consistently seek to educate and mentor younger attorneys and aspiring lawyers.

I regularly sit on moot-court panels for Belmont's Dean's Cup (first-year appellate-advocacy competition) and the Tennessee Student Intercollegiate Legislature. I've had the privilege to offer these students advice on their advocacy skills and introduce them to appellate advocacy.

One of the reasons I joined the General Civil Division with the Attorney General's Office was because of my firm belief that no child should have to experience abuse and trauma. I volunteer regularly to present CLEs to Department of Children's Services trial attorneys to teach them best practices to ensure that they avoid legal pitfalls and instead achieve whatever result is in the children's best interests.

If appointed to the Court of Appeals, I would continue my participation in Belmont's Dean's Cup and the Tennessee Student Intercollegiate Legislature. I would also advocate to expand the Court's SCALES Program. When I started at the Attorney General's Office, I attended a SCALES argument and found that the opportunity to teach students about the legal process and allow them to ask questions of judges was a wonderful experience. I would take every opportunity to teach students about the role of the judicial branch and our system of government, to the extent permitted by the Judicial Code of Conduct.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

During college, I was privileged to be elected to the Vanderbilt Honor Council. In that role, I was charged with sitting on panels to determine whether academic infractions had occurred and to determine what punishment, if any, was appropriate. This experience taught me the weighty responsibility of sitting in judgment, and created a lifelong desire to serve as a judge and help to resolve difficult legal questions—which is why I never pass on an opportunity to sit on a moot court.

My time litigating complex, high-profile cases has taught me that decisions reverberate, especially appellate ones. Each opinion forms part of Tennessee's body of law, and due to our precedential system of jurisprudence, can have unintended consequences in to future cases. My experience has taught me to cautiously advocate for changes in the law and restrain myself from advancing arguments that, even if successful in the present, could damage Tennessee's jurisprudence in the long term.

I have also had the pleasure of litigating against some of the best attorneys in the state and becoming friends with some of my repeated adversaries. I always try to disagree without being disagreeable, and to respect that all lawyers, regardless of the legal positions they advance, are

part of a fellowship. Fairness and mutual respect are necessary to maintain the integrity of the legal profession, and I will strive as a judge to maintain these principles.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

If I am selected to serve on the Court of Appeals, I will faithfully apply the law without regard for my personal opinions concerning the substance or public policy of the law. To do otherwise is repugnant to the separation of powers required by the Tennessee Constitution. In our system of government, the responsibility to determine Tennessee's public policy through enactment of statutes and rules belongs to the General Assembly as the representative branch of government. The judicial branch is charged by the Tennessee Constitution with interpreting and applying the law, not creating it, and certainly not expanding it beyond its text.

For example, when drafting opinions on behalf of the Tennessee Attorney General's Office, I have faithfully applied binding precedent regardless of my personal opinions regarding the correctness of those decisions. Ignoring precedent simply because I disagree with it would disrespect our judicial process, compromise the integrity of the opinion, and tarnish the reputation of the Office—to the peril of our clients and to the State as a whole.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Joseph F. Whalen, Associate Solicitor General, Office of the Tennessee Attorney General. [redacted] Nashville, TN 37202. [redacted]
B. Ashley Howell, Executive Director, Tennessee State Museum. [redacted] Nashville, TN 37208 [redacted]
C. Janet M. Kleinfelter, Deputy Attorney General, Office of the Tennessee Attorney General. [redacted] Nashville, TN 37202. [redacted]
D. Juvonda Dowell-Dulin, Sr. Manager of Diversity, Equity, Inclusion and Belonging, Cracker Barrel Inc; Member, Appeals Board, State of Tennessee. [redacted]., Lebanon, TN 37087. [redacted]
E. Mark Goins, Tennessee Coordinator of Elections. [redacted]. Nashville, TN 37243. [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: _____, 20_____.

_____

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

_____
Type or Print Name

_____
Signature

_____
Date

_____
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

_____

_____

_____

_____

_____

_____

_____

_____

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

IN RE KALIYAH S. [redacted]	)	
	)	
	)	
Children under Eighteen (18) Years of Age	)	
	)	**No. E2013-01352-SC-R11-PT**
	)	**Bradley Co. Juvenile Court**
[redacted]	)	**No. J08435**
	)	
Respondent-Appellee,	)	
	)	
v.	)	
	)	
STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES,	)	
	)	
Petitioner-Appellant.	)	

ON APPEAL FROM THE JUDGMENT OF THE COURT OF APPEALS

BRIEF OF THE TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES

ROBERT E. COOPER, JR.
Attorney General & Reporter

JOSEPH F. WHALEN
Acting Solicitor General

ALEXANDER S. RIEGER
Assistant Attorney General
General Civil Division
P.O. Box 20207
Nashville, TN 37202
(615) 741-2408
BPR No. 029362

ISSUE PRESENTED FOR REVIEW

In order to sustain a ground for termination of parental rights under Tenn. Code Ann. § 36-1-113, must the Department of Children's Services prove that it made reasonable efforts toward the reunification of the family when the ground alleged constitutes an aggravated circumstance as defined in Tenn. Code Ann. § 36-1-102 and does not expressly require reasonable efforts by the Department, considering that a party seeking to terminate parental rights is required by Tenn. Code Ann. § 36-1-113 to prove only that a ground supporting termination exists and that termination is in the best interests of the child?

STATEMENT OF THE CASE AND THE RELEVANT FACTS

This appeal involves the termination of the parental rights of [redacted] ("Father"), whose criminal career rendered him unable to parent his daughter Kaliyah (d.o.b. 7/6/2008). (Tech. R. Vol. I, p. 53). On May 11, 2009, Father pled guilty to possession of marijuana for resale, possession of Schedule II drugs for resale, and simple possession of a Schedule III drug. (Ex. 1). He was sentenced to six years of incarceration as a result of these drug convictions, suspended to probation. (Ex. 1). On December 16, 2009, Father was convicted of domestic assault and sentenced to supervised probation. (Ex. 1). On January 16, 2010, Father was convicted of vandalism over $1000 and sentenced to an additional 364 days of probation. (Ex. 1). On April 26, 2010, the Criminal Court of Bradley County revoked Father's parole and sentenced him to community corrections, finding that Father had been arrested for domestic violence and vandalism and failed to report those arrests. (Ex. 1). On September 9, 2010, Father was again arrested for domestic assault and sentenced to 364 days, 30 of which were to be served in incarceration and the remainder as supervised probation. (Ex. 1). On January 18, 2011, the Criminal Court of Bradley County found that Father had violated the conditions of the Southeast Tennessee Community Corrections Program and ordered Father to serve the remainder of his sentence with the Tennessee Department of Corrections Boot Camp. (Ex. 1).

On May 25, 2011, the Department of Children's Services filed an amended petition to terminate the parental rights of Father, whom Kaliyah's mother had

identified as the biological father of Kaliyah after another man had been excluded via DNA testing. (Tech. Vol. I, 31-45). The petition sought termination based upon abandonment by wanton disregard under Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv). (Tech. Vol. I, 31-45).[1]

At trial, Father confirmed that he had been incarcerated since April 1, 2012, and would not be eligible for release until early 2013. (Vol. X, p. 19). Prior to April 1, 2012, Father was last in prison from December 15, 2010, until November 29, 2011. (Vol. X, p. 19; Vol. III, p. 17). The Bradley County Juvenile Court terminated Father's parental rights, finding that he abandoned Kaliyah by engaging in criminal conduct exhibiting a wanton disregard for her welfare and that termination of his parental rights was in Kaliyah's best interests. (Tech. R. Vol. II, pp. 175-180). The juvenile court also concluded that the Department was absolved of its duty to provide reasonable efforts toward reunification based upon the classification of abandonment by wanton disregard as an aggravated circumstance. (Tech. R. Vol. II, pp. 175-180).

On appeal, the Court of Appeals reversed the termination of Father's parental rights. The court determined that Tenn. Code Ann. § 37-1-166(g)(2) requires the Department to make reasonable efforts toward family reunification and that this obligation continues until such time as a court determines that an aggravated circumstance exists. *In re Kaliyah S.*, No. M2013-01352-COA-R3-PT, slip op. at 7-8, 12-13 (Tenn. Ct. App. Feb. 28, 2014) ("Opinion"). The court

[1] The termination proceeding also involved another child, the mother of both children, and the father of the other child. (Tech. R. Vol. I, pp. 1-11).

acknowledged that its holding departed from the published decision in *In re Arteria H.*, 326 S.W.3d 167, 183 (Tenn. Ct. App. 2010), and that various panels of the Court of Appeals had previously reached "conflicting conclusions." Opinion at 4, 12.

Judge Swiney dissented, stating that he did "not believe it was the intent of the General Assembly to require DCS to attempt to reunify a child and a parent in those circumstances where aggravated circumstances serve as the basis for termination." *In re Kaliyah S.*, No. M2013-01352-COA-R3-PT, diss. op. at 2 (Tenn. Ct. App. Feb. 28, 2014) (Swiney, J., dissenting). Judge Swiney noted that the majority's reasoning would require the Department to attempt to reunify children subjected to "aggravated assault, aggravated kidnapping, especially aggravated kidnapping, aggravated child abuse and neglect, aggravated sexual exploitation of a minor, especially aggravated sexual exploitation of a minor, aggravated rape, rape, rape of a child, incest, or severe child abuse" by their parents. *Id.* at 1 (citing Tenn. Code Ann. 36-1-102(9)).

On June 6, 2014, this Court granted the Department's application for permission to appeal.

STANDARD OF REVIEW

The Department of Children's Services challenges the Court of Appeals' holding that Tenn. Code Ann. § 37-1-166 requires the Department to make reasonable efforts toward reunification when a parent subjects a child to aggravated circumstances and that failure to do so is fatal to the Department's petition for termination of parental rights. Therefore, the sole issue before this Court is a legal one. This Court reviews a court's conclusions of law de novo with no presumption of correctness. *In re Bernard T.*, 219 S.W.3d 586, 597 (Tenn. 2010) (citing *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010)).

ARGUMENT

"Few consequences of judicial action are so grave as the severance of natural family ties." *In re Angela E.*, 303 S.W.3d 240, 249 (Tenn. 2010) (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996)). As this Court has noted, termination proceedings in Tennessee are governed by statute. *Id.* at 250 (citing *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Tennessee law provides that termination of parental or guardianship rights must be based upon a finding by clear and convincing evidence that a ground to terminate parental rights exists and that termination of the parent's or guardian's rights is in the child's best interests. Tenn. Code Ann. § 36-1-113(c); *In re Angela E.*, 303 S.W.3d at 250-51.

The Court of Appeals erred in interpreting Tenn. Code Ann. § 37-1-166 to require the Department to make reasonable efforts to reunify the family, regardless of the conditions that led to the child's removal into state custody, until it is relieved of that duty by a court of competent jurisdiction. Under this interpretation, the

Department would carry a third burden when seeking to terminate parental rights—to prove not only that a ground for termination exists and that termination is in the best interests of the child, but also that it made reasonable efforts even when no such requirement appears in Tenn. Code Ann. § 36-1-113. This is not the proper interpretation of the interplay between Tenn. Code Ann. § 37-1-166 and Tenn. Code Ann. § 36-1-113.

I. TERMINATION-OF-PARENTAL-RIGHTS ACTIONS DO NOT GENERALLY REQUIRE REASONABLE EFFORTS TOWARD REUNIFICATION.

While Tenn. Code Ann. § 36-1-113 generally requires proof only of a ground supporting termination and of the child's best interests, certain grounds enumerated in Tenn. Code Ann. § 36-1-113 do expressly require a showing of reasonable efforts by the Department. *See, e.g.*, Tenn. Code Ann. 36-1-102(1)(A)(ii) (abandonment for failure to provide a suitable home requires a showing that "the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child"). But the remainder do not, including the ground of abandonment involved here—abandonment by wanton disregard under Tenn. Code Ann. § 36-1-102(1)(A)(iv). This failure to mention reasonable efforts implies its exclusion. *See Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007) (relying upon the Latin maxim *express unius est exclusio alterius*).

The line of decisions holding that the Department has a general obligation to make reasonable efforts towards reunification in order to sustain a ground for termination of parental rights, even where not expressly required by the ground

alleged, began with the decisions in *In re D.D.V.*, No. M2001-02282-COA-R3-JV, 2002 WL 225891 (Tenn. Ct. App. Feb. 14, 2002); *In re R.C.V.*, No. W2001-02102-COA-R3-JV, 2002 WL 31730899 (Tenn. Ct. App. Nov. 18, 2002); and *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326 (Tenn. Ct. App. Mar. 9, 2004). The Court of Appeals relied here on its decision in *In re B.L.C.*, No. M2007-01011-COA-R3-PT, 2007 WL 4322068 (Tenn. Ct. App. Dec. 6, 2007), and *In re B.L.C.* in turn relied upon *In re C.M.M.* for the proposition that Tenn. Code Ann. § 36-1-113 and Tenn. Code Ann. § 37-1-166 require reasonable efforts as a condition precedent to termination. But *In re C.M.M.*'s interpretation of the interplay between Tenn. Code Ann. §§ 36-1-113 and 37-1-166 was incorrect. It pointed to a "relationship between Tenn. Code Ann. § 36-1-113 and Tenn. Code Ann. § 37-1-166" to reach its holding, but neither of these statutes supports the conclusion that a failure to make reasonable efforts is fatal to a termination proceeding.

A. Tenn. Code Ann. § 37-1-166 Does Not Apply To Termination Proceedings.

In *In re C.M.M.*, the Court of Appeals stated that "Tenn. Code Ann. § 37-1-166(b) applies to any proceeding to determine whether a child should remain in the Department's custody. The statute is broad enough to cover termination proceedings brought by the Department because these proceedings result in placing the child in the Department's custody prior to adoption." 2004 WL 438236, at *7 n. 28. But Tenn. Code Ann. § 37-1-166(a) requires a court, "at any proceeding of a juvenile court, prior to ordering a child committed to or retained within the custody of the department of children's services" to determine whether the Department has

made reasonable efforts. The Court of Appeals' application of this subsection to termination proceedings was in error because a termination-of-parental-rights action does not itself confer upon the deciding court the power to modify a preexisting order awarding custody.[2]

Custody determinations are made in dependency-and-neglect proceedings, under Tenn. Code Ann. § 37-1-103, and dependency-and-neglect proceedings are distinct from termination actions. *See In re L.A.J., III*, No. W2007-00926-COA-R3-PT, 2007 WL 3379785 (Tenn. Ct. App. Nov. 15, 2007) (citing *In re Audrey S.*, 182 S.W.3d 838, 874-75 (Tenn. Ct. App. 2005)). Whereas dependency-and-neglect proceedings afford a juvenile court exclusive original jurisdiction to modify custody, termination actions limit their scope to whether a parent should be permanently stripped of the fundamental right to parent their child. Nothing in Tenn. Code Ann. § 36-1-113 gives the court hearing a termination action the power to award or change custody of the subject child.

Furthermore, circuit and chancery courts exercise concurrent jurisdiction with the juvenile court to hear termination actions. Tenn. Code Ann. § 36-1-113(a). Yet the obligation to make a reasonable-efforts determination under § 37-1-166(a) applies only to a juvenile court. And if a circuit or chancery court could modify the custody order of a juvenile court as a result of a termination action, such authority would encroach upon the exclusive original jurisdiction of the juvenile court to place

[2] In *In re Drinnon*, 776 S.W.2d 96 (Tenn. Ct. App. 1989), the Court of Appeals concluded during a termination appeal that "custody of the children should be returned to DHS from the foster parents." 776 S.W.2d at 100. The Court cited no authority for its exercise of this power.

children in appropriate custody during the dispositional phase of a dependency-and-neglect proceeding. *See* Tenn. Code Ann. § 37-1-103(a)(1).

In *In re K.C.*, No. M2005-00633-COA-R3-PT, 2005 WL 2453877 (Tenn. Ct. App. Oct. 4, 2005), the Court of Appeals recognized this distinction. When simultaneously considering a parent's petition for custody and a separate termination action, the court relied upon two different standards: a material change of circumstances for the petition for custody, and the ground-for-termination/best-interest analysis of Tenn. Code Ann. § 36-1-113(c) for the termination action. *Id.* at *5-7. Indeed, the court explicitly noted that "[o]ur reversal of the trial court's termination of Mother's parental rights does not affect [the child's] custody. The prior order granting custody to Aunt remains in effect and can only be modified in accordance with the legal requirements set out earlier." *Id.* at *13. *See also In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *8 (Tenn. Ct. App. Apr. 27, 2009) (noting that custody is an issue to be raised in dependency-and-neglect proceedings). Termination actions do not involve "ordering a child committed to or retained within the custody of the department of children's services," and therefore Tenn. Code Ann. § 37-1-166 does not apply to such proceedings.[3]

[3] In *In re R.L.F.*, 278 S.W.3d 305, 316 (Tenn. Ct. App. 2008), the Court of Appeals cited both Tenn. Code Ann. §§ 37-1-166(b) and 37-1-166(g)(2) for the proposition that the Department must prove reasonable efforts towards reunification when filing for termination based upon substantial non-compliance with a permanency plan. But for the reasons discussed, no part of the statute applies to termination proceedings.

B. Tenn. Code Ann. § 36-1-113 Does Not Require the Department To Prove Reasonable Efforts For All Termination Proceedings.

Tenn. Code Ann. § 36-1-113, which sets forth the grounds for termination of parental rights, mentions reasonable efforts on only three occasions. The first, subdivision (h)(2)(C), permits the Department the option not to file for termination in accordance with the general timelines required by subsection (h) if the Department "has not made reasonable efforts under § 37-1-166 to provide to the family of the child, consistent with the time period in the department permanency plan, such services as the department deems necessary for the safe return of the child to the child's home." Tenn. Code Ann. § 36-1-113(h)(2)(C). The discretion conferred upon the Department here certainly does not compel the conclusion that failure to make reasonable efforts should be fatal to a termination proceeding. The second, subdivision (i)(2), instructs the trial court to consider "whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible," as part of the best-interest analysis. Tenn. Code Ann. § 36-1-113(i)(2). But this best-interest factor does not require reasonable efforts as a condition precedent to termination. Should reasonable efforts not be made by the Department, this factor should not militate against the parent during the best interest determination. *See In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005) ("the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent's rights is in

the best interest of a child.").[4] The third usage of the term concerns "reasonable efforts to place the child for adoption" and certainly does not create a precondition for termination. *See* Tenn. Code Ann. § 36-1-113(m).[5]

The lower-court majority's interpretation of the interplay between Tenn. Code Ann. §§ 36-1-113 and 37-1-166 works to the disadvantage of children in the Department's custody. It is far easier for private-party guardians or custodians to terminate parental rights for the children within their care, because this reasonable-efforts requirement has not been applied to private termination proceedings. Requiring the Department to prove grounds, best interests, *and* reasonable efforts in order to terminate parental rights creates an unequal burden for children within its custody. Such an interpretation thus places an additional barrier to permanence for these children and should be rejected.

II. EVEN IF TENN. CODE ANN. § 37-1-166 APPLIES TO TERMINATION PROCEEDINGS, § 37-1-166(g)(4) RELIEVES THE DEPARTMENT OF ANY OBLIGATION TO MAKE REASONABLE EFFORTS TOWARD REUNIFICATION WHERE THE GROUND PROVED IS AN AGGRAVATED CIRCUMSTANCE.

Even if the Department is generally required to prove that it made reasonable efforts towards reunification during any termination action (including those where reasonable efforts are not expressly required by the ground alleged), it need not do so when the ground alleged also constitutes an "aggravated

[4] Courts routinely apply the best-interest standard of -113(i) in private-party terminations where the Department is not involved and no services have been provided to the respondent parent. *See, e.g., In re H.E.J.*, 124 S.W.3d 100 (Tenn. Ct. App. 2003).

[5] As discussed above, the definition of abandonment for failure to provide a suitable home under Tenn. Code Ann. § 36-1-102(1)(A)(ii) expressly requires reasonable efforts. But the other termination grounds either enumerated or incorporated within Tenn. Code Ann. § 36-1-113 do not.

circumstance" as defined in Tenn. Code Ann. § 36-1-102. Tenn. Code Ann. § 37-1-166(g)(4) provides that "reasonable efforts . . . shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that: (A) The parent has subjected the child that is the subject of the petition . . . to aggravated circumstances as defined in § 36-1-102."[6] The lower-court majority held that the duty to make reasonable efforts could not be relieved *until* a court has made the requisite determination. Opinion at 8, 11. But the dissenting judge disagreed, finding that the General Assembly made a "policy decision" not to require the Department to make reasonable efforts to reunify families where the parents have subjected their children to aggravating circumstances. Dissenting Opinion at 1-2 (Swiney, J., dissenting). As noted in both the majority opinion of the Court of Appeals and the Department's application for permission to appeal, this issue has been analyzed by various panels of the Court of Appeals, each arriving at differing results.

The dissent is correct. The majority opinion relies upon the argument set forth in *In re B.L.C.*, where the Court of Appeals held that it was appropriate to construe Tenn. Code Ann. § 37-1-166(g)'s use of "has determined" to mean "at such time." *In re B.L.C.*, 2007 WL 4322068, at *9-10. But if § 37-1-166 is to be applied to termination proceedings, it cannot be so construed. As the dissenting judge noted, if the Department were required to make reasonable efforts to reunify a family *until* a court determines the existence of an aggravating circumstance, the Department

[6] In the case at bar, the trial court relieved the Department of making reasonable efforts upon finding the existence of a ground for termination that constituted an aggravating circumstance (abandonment via wanton disregard). (Tech. R. Vol. II, pp. 175-180).

would be compelled to make efforts to reunify a child with a parent who has perpetrated severe sexual abuse or rape. *See* Dissenting Opinion at 2 (Swiney, J., dissenting); Tenn. Code Ann. § 36-1-102(9). This is a construction of the statute that strays from the overriding purpose of Titles 36 and 37: to provide for the best interests of the child.

And what about the ramifications of an appeal? Consider the following example: A parent engages in conduct that the Department regards as constituting an aggravating circumstance under Tenn. Code Ann. § 37-1-166(g)(4), and it seeks an evidentiary hearing so such a determination may be made.[7] The juvenile court rules that it does constitute an aggravated circumstance. The Department, secure in the juvenile court's ruling, makes no reasonable efforts to reunify and files for termination. The juvenile court hears the evidence for a second time and orders termination. Parent appeals to the Court of Appeals, which holds that while there are grounds for termination, the juvenile court's determination that the child was subjected to aggravating circumstances was in error. Now the child is left in limbo, as the termination ground is forever lost because the Department has no ability to retroactively make the required reasonable efforts despite otherwise meeting the requirements of Tenn. Code Ann. § 36-1-113.[8]

This cannot be what the General Assembly intended. *See* Dissenting Opinion

[7] If it were not part of a dependency-and-neglect proceeding, it is unclear exactly how the juvenile court's limited jurisdiction could stretch to create this new hearing where such a procedure does not exist within Tennessee law. It is doubtful that the juvenile court could expand the permanency hearings contemplated in Tenn. Code Ann. § 37-2-409 to convene a hearing to consider aggravated circumstances, as the statute does not contemplate it.

[8] This result would be even more concerning in situations where the Department determines that making reasonable efforts would be contrary to the child's emotional and physical health.

at 2 ("I do not believe it was the intent of the General Assembly to require DCS to attempt to reunify a child and a parent in those circumstances where aggravated circumstances serve as the basis for termination."). A more fitting construction of § 37-1-166(g) would relieve the Department of any burden to make reasonable efforts to reunify where the parent has subjected the child to aggravated circumstances. If § 37-1-166 applies to termination proceedings, therefore, a trial court's finding that aggravated circumstances exist relieves the Department of the requirement to make reasonable efforts under that statute.

Here, the trial court found that the Department had proven abandonment by wanton disregard based upon Father's history of repeated incarceration that excluded any opportunity to parent Kaliyah. (Tech. R. Vol. II, pp. 175-180). During Kaliyah's placement in state custody, Father committed a litany of criminal offenses resulting in repeated incarceration: possession of marijuana for resale, possession of a schedule II drug for resale, simple possession of dihydrododeine, a schedule III drug, two instances of domestic assault, and vandalism over $1000. (Ex. 1).[9] This extensive criminal behavior certainly qualifies as abandonment by wanton disregard, which is an aggravated circumstance under Tenn. Code Ann. § 36-1-102(9). Under the proper construction of Tenn. Code Ann. § 37-1-166(g)(4), and consistent with the intent of the General Assembly, the Department was properly relieved of any obligation to make reasonable efforts to reunify Kaliyah with her perpetually incarcerated Father upon the trial court's determination that Father

[9] The vandalism and the first domestic violence offense each resulted in a separate violation of Father's probation. (Tech. R. Vol. II, p. 29; Ex. 1). During the pendency of the termination proceeding, Father was twice charged with new criminal offenses. (Tech. R. Vol. II, p. 29).

subjected her to this aggravated circumstance. Father's parental rights were properly terminated under Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv). The termination should therefore be affirmed.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

ALEXANDER S. RIEGER
Assistant Attorney General
General Civil Division
P.O. Box 20207
Nashville, TN 37202
(615) 741-2408
BPR No. 029362

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief on behalf of the Tennessee Department of Children's Services has been forwarded by first-class, U.S. Mail postage paid, to:

Chessia Cox, Esq.
Attorney for [redacted]
[redacted], Suite 7
Athens, TN 37303

Wilton Marble, Esq.
[redacted]
753 Kinser Road SE
Cleveland, TN 37323

Beau Skelly, Esq.
Department of Children's Services
Assistant General Counsel
2703 Ralph Buckner Blvd.
Cleveland, TN 37311

Lynn Perry, Esq.
Guardian ad Litem
P.O. Box 545
Cleveland, TN 37364-0545

Jerry Hoffer, Esq.
[redacted]
140 North Ocoee Street, Suite 100
Cleveland, TN 37311-5091

on this 7th day of July, 2014.

_____
ALEXANDER S. RIEGER
Assistant Attorney General

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE AND THE RELEVANT FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 6

I. TERMINATION-OF-PARENTAL-RIGHTS ACTIONS DO NOT GENERALLY REQUIRE REASONABLE EFFORTS TOWARD REUNIFICATION 7

A. Tenn. Code Ann. § 37-1-166 Does Not Apply To Termination Proceedings 8

B. Tenn. Code Ann. § 36-1-113 Does Not Require the Department To Prove Reasonable Efforts For All Termination Proceedings 11

II. EVEN IF TENN. CODE ANN. § 37-1-166 APPLIES TO TERMINATION PROCEEDINGS, § 37-1-166(g)(4) RELIEVES THE DEPARTMENT OF ANY OBLIGATION TO MAKE REASONABLE EFFORTS TOWARD REUNIFICATION WHERE THE GROUND PROVED IS AN AGGRAVATED CIRCUMSTANCE 12

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page(s)

Cases

In re Angela E.,
303 S.W.3d 240 (Tenn. 2010) 6

In re Arteria H.,
326 S.W.3d 167 (Tenn. Ct. App. 2010)..... 5

In re B.L.C.,
No. M2007-01011-COA-R3-PT, 2007 WL 4322068 (Tenn. Ct. App. Dec. 6, 2007) 8, 13

In re Bernard T.,
219 S.W.3d 586 (Tenn. 2010) 6

In re C.M.M.,
No. M2003-01122-COA-R3-PT, 2004 WL 438326 (Tenn. Ct. App. Mar. 9, 2004)..... 8

In re D.D.V.,
No. M2001-02282-COA-R3-JV, 2002 WL 225891 (Tenn. Ct. App. Feb. 14, 2002)..... 8

In re Drinnon,
776 S.W.2d 96 (Tenn. Ct. App. 1989)..... 9

In re H.E.J.,
124 S.W.3d 100 (Tenn. Ct. App. 2003)..... 12

In re Kaliyah S.,
No. M2013-01352-COA-R3-PT, slip op. (Tenn. Ct. App. Feb. 28, 2014)..... 4, 5

In re K.C.,
No. M2005-00633-COA-R3-PT, 2005 WL 2453877 (Tenn. Ct. App. Oct. 4, 2005)..... 10

In re K.L.D.R.,
No. M2008-00897-COA-R3-PT, 2009 WL 1138130 (Tenn. Ct. App. Apr. 27, 2009) 10

In re L.A.J., III,
No. W2007-00926-COA-R3-PT, 2007 WL 3379785 (Tenn. Ct. App. Nov. 15, 2007) 9

In re M.A.R.,
183 S.W.3d 652 (Tenn. Ct. App. 2005) 11

In re R.C.V.,
No. W2001-02102-COA-R3-JV, 2002 WL 31730899 (Tenn. Ct. App. Nov. 18, 2002) 8

In re R.L.F.,
278 S.W.3d 305 (Tenn. Ct. App. 2008) 10

Wells v. Tenn. Bd. of Regents,
231 S.W.3d 912 (Tenn. 2007) 7

Statutes

Tenn. Code Ann. § 36-1-102 ..... 2, 13

Tenn. Code Ann. § 36-1-102(1)(A)(ii) 7, 12

Tenn. Code Ann. § 36-1-102(1)(A)(iv) 4, 7, 16

Tenn. Code Ann. § 36-1-102(9) 14, 15

Tenn. Code Ann. § 36-1-113 ..... 2, 7, 8, 9, 11, 12, 15

Tenn. Code Ann. § 36-1-113(a) 9

Tenn. Code Ann. § 36-1-113(c) 6, 10

Tenn. Code Ann. § 36-1-113(g)(1) 4, 16

Tenn. Code Ann. § 36-1-113(h)(2)(C) 11

Tenn. Code Ann. § 36-1-113(i)(2) 11

Tenn. Code Ann. § 36-1-113(m) 12

Tenn. Code Ann. § 37-1-103 9

Tenn. Code Ann. § 37-1-103(a)(1) 10

Tenn. Code Ann. § 37-1-166 ..... 6, 7, 8, 10, 11, 12, 13, 15

Tenn. Code Ann. § 37-1-166(a) 9

Tenn. Code Ann. § 37-1-166(b) 8, 10

Tenn. Code Ann. § 37-1-166(g) 13, 15

Tenn. Code Ann. § 37-1-166(g)(2) 4, 10

Tenn. Code Ann. § 37-1-166(g)(4) 12, 13, 14, 16

Tenn. Code Ann. § 37-2-409 14

No. 15-1317

In the Supreme Court of the United States

VANESSA G.,

Petitioner,

v.

TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Tennessee Supreme Court

BRIEF IN OPPOSITION

HERBERT H. SLATERY III
Attorney General State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

ALEXANDER S. RIEGER
Assistant Attorney General
Counsel of Record

RACHEL E. BUCKLEY
Assistant Attorney General

Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-2408
Alex.Rieger@ag.tn.gov

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING REVIEW 4

I. THIS CASE IS A POOR VEHICLE FOR DECIDING THE QUESTION PRESENTED FOR REVIEW 4

II. THE DECISION OF THE TENNESSEE SUPREME COURT COMPORTS WITH THIS COURT'S PRECEDENTS. THE FOURTEENTH AMENDMENT DOES NOT COMPEL ADOPTION OF A STATE PROCEDURE FOR CHALLENGING THE TERMINATION OF PARENTAL RIGHTS BASED ON INEFFECTIVE ASSISTANCE OF APPOINTED COUNSEL 7

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

In re A.R.A.S.,
629 S.E.2d 822 (Ga. Ct. App. 2006) 5

In re Austin C., No. M2013-02147-COA-R3-PT, 2014 WL 4261178 (Tenn. Ct. App., Aug. 27, 2014) . . . 9

Baker v. Marion Cnty. Office of Family & Children,
810 N.E.2d 1035 (Ind. 2004) 10

Matter of Bishop,
375 S.E.2d 676 (N.C. 1989) 5

In re Geist,
796 P.2d 1193 (Or. 1990) 5

In re Grayson H., No. E2013-01881-COA-R3-PT, 2014 WL 1464265 (Tenn. Ct. App. Apr. 14, 2014) 9

In re Guardianship of A.W.,
929 A.2d 1034 (N.J. 2007) 6

J.B. v. Fla. Dep't of Children and Families,
170 So.3d 780 (Fla. 2015) 6

In re J.C., Jr.,
781 S.W.2d 226 (Mo. Ct. App. 1989) 5

Jones v. Ark. Dep't of Human Servs.,
205 S.W.3d 778 (Ark. 2005) 5

Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18 (1981) 2, 6, 7, 8, 11

Lehman v. Lycoming Cnty. Children's Servs.,
458 U.S. 502 (1982) 10

In re M.D.(S),
485 N.W.2d 52 (Wis. 1992) 5

In re M.E., No. M2003-00859-COA-R3-PT, 2004 WL 1838179 (Tenn. Ct. App. Aug. 16, 2004), *perm. app. denied* (Tenn. Nov. 8, 2004) 9

In re M.H., No. M2005-00117-COA-R3-PT, 2005 WL 3273073 (Tenn. Ct. App. Dec. 2, 2005) 9

Pennsylvania v. Finley,
481 U.S. 551 (1987) 2

In re R.E.S.,
978 A.2d 182 (D.C. Ct. App. 2009) 5

Santosky v. Kramer,
455 U.S. 745 (1982) 8, 9

In re S.D., No. M2003-02672-COA-R3-PT, 2005 WL 831595 (Tenn. Ct. App. Apr. 8, 2005) 9

State v. Anonymous,
425 A.2d 939 (Conn. 1979) 5

Troxel v. Granville,
530 U.S. 57 (2000) 8

In re V.F.,
666 P.2d 42 (Alaska 1983) 6

Wainwright v. Torna,
455 U.S. 586 (1982) 2

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV . . . . . *passim*

Tenn. Code Ann. § 36-1-113(c) 9

Tenn. Code Ann. § 36-1-113(d) 8

Tenn. Code Ann. § 36-1-113(e) 8

Tenn. Code Ann. § 36-1-113(g) 8

Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii) 4, 8

RULES

Tenn. R. Juv. P. 39(e) 9

Tenn. Sup. Ct. R. 13, § 1(c) 4

Tenn. Sup. Ct. R. 13, § 1(d)(2)(B) 4

OPINIONS BELOW

The October 21, 2014 opinion of the Tennessee Court of Appeals affirming the termination of Petitioner's parental rights is not reported but is available at 2014 WL 5390572. Pet. Apx. 1a. The January 29, 2016 opinion of the Tennessee Supreme Court affirming the opinion of the Court of Appeals is reported at 483 S.W.3d 507. Pet. Apx. 20a.

STATEMENT OF THE CASE

The Tennessee Department of Children's Services petitioned to terminate Petitioner's parental rights to Carrington H. on October 24, 2013. Pet. Apx. 28a. The Juvenile Court of Maury County, Tennessee, appointed counsel for Petitioner and heard the Department's petition on December 20, 2013. Pet. Apx. 30a. The juvenile court terminated Petitioner's parental rights in an order entered on February 27, 2014. Pet. Apx. 40a. Petitioner appealed to the Tennessee Court of Appeals, which affirmed the juvenile court. Pet. Apx. 41a-42a. The Court of Appeals granted the motion of Petitioner's appointed counsel to withdraw. Pet. Apx. 42a.

Proceeding *pro se*, Petitioner applied for permission to appeal to the Tennessee Supreme Court, raising for the first time whether her appointed counsel's representation was inadequate and thus deprived her of her statutorily guaranteed right to counsel. Pet. Apx. 42a. The Tennessee Supreme Court granted the application and appointed Petitioner new counsel to address "(1) whether the right to counsel in a termination of parental rights proceeding includes the right to effective assistance of counsel; and (2) [i]f so,

what procedure and standard should the Court adopt to review the claim." Pet. Apx. 43a.

The court held that Petitioner's statutory right to appointed counsel did not require "adoption of an additional procedure . . . [to] attack the judgment terminating parental rights based upon ineffective assistance of appointed counsel." Pet. Apx. 82a. The court acknowledged this Court's holding in *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18 (1981), that while the Due Process Clause of the Fourteenth Amendment entitles parents to "fundamental fairness" in parental-termination proceedings, it does not require States to appoint counsel for parents in every such proceeding. Pet. Apx. 55a; *see Lassiter*, 452 U.S. at 32. While Tennessee *statutorily* provides the right to appointed counsel for indigent parents in every parental-termination proceeding, Pet. Apx. 56a, the Tennessee Supreme Court declined Petitioner's request "to go a step further" and hold that this "statutory right to appointed counsel includes, in every case, the right to challenge a judgment terminating parental rights based on ineffective assistance of counsel." Pet. Apx. 57a, 72-73a. The court refused to "import criminal law post-conviction type remedies" into parental-termination proceedings. Pet. Apx. 68a. In reaching this conclusion, the court pointed to this Court's decisions in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *Wainwright v. Torna*, 455 U.S. 586 (1982), holding that, in the absence of a constitutional right to counsel, there is no constitutional right to effective of assistance of counsel, even in proceedings where counsel is appointed. Pet. Apx. 60a.

The Tennessee court reasoned that the constitutional mandate of fundamentally fair procedures could be achieved without compromising the interests of children in permanency and safety: "Tennessee court rules, statutes, and decisional law are already replete with procedures . . . designed to ensure that parents receive fundamentally fair parental termination proceedings," including the heightened standard of clear and convincing evidence, a statutory right to counsel, and a directive that the intermediate appellate court review a trial court's findings for each termination ground, even if unchallenged on appeal. Pet. Apx. 45a, 52a, 56a, 69a. "Moreover," the court concluded, the record in this case "refutes [Petitioner's] assertion that her counsel's representation denied her a fundamentally fair proceeding." Pet. Apx. 73a. While the dissent urged that Tennessee recognize a claim for ineffective assistance of counsel in parental-termination proceedings, it did not "disagree . . . that the mother was not deprived of a fundamentally fair parental termination proceeding." Pet. Apx. 92a.

Petitioner now seeks this Court's review.

REASONS FOR DENYING REVIEW

I. THIS CASE IS A POOR VEHICLE FOR DECIDING THE QUESTION PRESENTED FOR REVIEW.

Contrary to Petitioner's assertion (Pet. 21), this case is a poor candidate for certiorari because the question presented for review involves only a question of state law. Petitioner asks this Court to decide whether the right to counsel in a termination-of-parental-rights proceeding includes the right to the effective assistance of counsel. Pet. i. But the right to counsel at issue in this case was Petitioner's *statutory* right to counsel, i.e., her right to have counsel appointed under Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii),[1] as the Tennessee Supreme Court made quite clear in its opinion. *See, e.g.*, Pet. Apx. 42a (recounting that Petitioner, in her application for permission to appeal, "asserted that her appointed counsel's representation was inadequate and deprived her of the right to counsel *statutorily guaranteed* to indigent parents in termination proceedings") (emphasis added); Pet. Apx. 52a (proceeding to consider "[Petitioner's] assertion that her *statutory right* to appointed counsel necessarily includes the right to effective assistance of counsel") (emphasis added); Pet. Apx. 57a (observing that "Tennessee's statutory right to counsel is not disputed, and it is also undisputed that [Petitioner] was represented by appointed counsel in this matter. Instead, [Petitioner] asks us to go a step further and hold that *the statutory right* to

[1] The right to appointed counsel in termination proceedings is also secured by Tenn. Sup. Ct. R. 13, § 1(c), (d)(2)(B).

appointed counsel includes [the right to effective assistance of counsel]") (emphasis added).

Thus, the question presented for review is only a question of Tennessee state law. Indeed, in most of the States whose decisions Petitioner says "conflict" with the decision here (Pet. 10), the right to effective assistance of appointed counsel in parental-termination cases exists as a matter of state, not federal, law. *See, e.g.*, *Jones v. Ark. Dep't of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005) ("[T]the legislature intended the right to counsel for parents in termination proceedings to include the right to effective counsel"); *State v. Anonymous*, 425 A.2d 939, 943 (Conn. 1979) ("Where, however, as here, a statute . . . mandates the assistance of counsel, it is implicit that this means competent counsel."); *In re R.E.S.*, 978 A.2d 182, 189 (D.C. Ct. App. 2009) ("[W]e hold that parents who are represented by appointed counsel in a termination of parental rights proceeding have a statutory right to the effective assistance of counsel."); *In re A.R.A.S.*, 629 S.E.2d 822, 825 (Ga. Ct. App. 2006) ("[A]n indigent parent has a statutory right to effective legal representation."); *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989) ("This statute [giving parents the right to counsel in a termination proceeding] implies a right to *effective* assistance of counsel; . . . ."); *Matter of Bishop*, 375 S.E.2d 676, 678 (N.C. 1989) ("[T]he right to counsel provided by [state statute] includes the right to effective assistance of counsel"); *In re Geist*, 796 P.2d 1193, 1200 (Or. 1990) ("[T]he legislature intended a statutory right to counsel to include a right to adequate counsel."); *In re M.D.(S)*, 485 N.W.2d 52, 55 (Wis. 1992) ("we conclude that a statutory provision for appointed counsel includes the right to *effective* counsel"). *See*

also, e.g., *In re V.F.*, 666 P.2d 42, 45 (Alaska 1983) (holding that because the Alaska Constitution guarantees indigent parents the right to appointed counsel in termination proceedings, the effective assistance of counsel is also guaranteed); *J.B. v. Fla. Dep't of Children and Families*, 170 So.3d 780, 790 (Fla. 2015) (holding that the right of indigent parents under the Florida Constitution to counsel in termination proceedings necessarily includes the right to effective assistance of counsel); *In re Guardianship of A.W.*, 929 A.2d 1034, 1037 (N.J. 2007) (holding that the guarantee of the right to counsel in termination cases under state statute and New Jersey Constitution includes the right to effective assistance of counsel).

In the petition itself, Petitioner restates the issue a bit differently, asserting simply that the question is whether parents are entitled to the effective assistance of counsel in termination proceedings under the Due Process Clause. Pet. 9, 16-17, 21. But that question does not warrant this Court's review because the answer must be "no." As the Tennessee Supreme Court observed, and as Petitioner herself concedes (Pet. 19), the Due Process Clause does not require States to appoint counsel for parents in every parental-termination proceeding. Pet. Apx. 55a (citing *Lassiter*, 452 U.S. at 32); *see* Pet. 19. If parents are not entitled to appointed counsel in every termination proceeding under the Due Process Clause, it necessarily follows that parents are not entitled to the effective assistance of appointed counsel in every termination proceeding under the Due Process Clause. As discussed above, the Tennessee Supreme Court did not decide the separate question whether, in this particular termination proceeding, Petitioner had a *constitutional* right to

appointed counsel, in addition to a statutory right. The court emphasized, in holding that the statutory right to counsel did not require adoption of a procedure to attack the judgment based on ineffective assistance of counsel, that there is no right to effective assistance of counsel in the absence of a constitutional right to appointed counsel. Pet. Apx. 61a, n.24.[2]

II. THE DECISION OF THE TENNESSEE SUPREME COURT COMPORTS WITH THIS COURT'S PRECEDENTS. THE FOURTEENTH AMENDMENT DOES NOT COMPEL ADOPTION OF A STATE PROCEDURE FOR CHALLENGING THE TERMINATION OF PARENTAL RIGHTS BASED ON INEFFECTIVE ASSISTANCE OF APPOINTED COUNSEL.

Review by this Court is not warranted even if the question Petitioner means to present is whether the Fourteenth Amendment demands that a parent who has been appointed counsel under state law in a parental-termination proceeding be afforded a procedure for challenging the termination of parental rights on the basis of ineffective assistance of appointed counsel. The decision of the Tennessee Supreme Court, holding that fundamental fairness in termination proceedings is satisfied without requiring the adoption

---

[2] In a footnote, the court did state that "even assuming *Lassiter* provides Mother with a constitutional right to counsel, nothing in *Lassiter* requires state courts to import criminal law concepts of ineffective assistance of counsel or to assess counsel's performance by standards developed in the criminal law context. Instead, *Lassiter* requires state courts to ensure that parents receive fundamentally fair procedures." Pet. Apx. 60a, n.22.

of such a procedure, fully comports with this Court's precedents.

Recognizing that parents enjoy a right to care and custody of their children as a "fundamental liberty interest protected by the Due Process Clauses of the state and federal constitutions," *Troxel v. Granville*, 530 U.S. 57, 65 (2000), Tennessee provides respondent parents with appointed counsel in parental-termination actions as a statutory right. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii). Due process under the Fourteenth Amendment demands that a state treat individuals with "fundamental fairness" whenever its actions infringe a protected liberty or property interest, such as when the state moves to terminate or impair a parent's right to custody and care of their child. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982). But unlike the Sixth Amendment in the criminal context, the Fourteenth Amendment's demand of fundamental fairness does not necessarily require the appointment of counsel for parental-termination actions. *See Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 31 (1981).

Contrary to Petitioner's assertions, Tennessee's parental-termination proceedings are fundamentally fair. Numerous procedural safeguards exist to ensure fairness: parents receive notice of grounds for termination and the opportunity to contest them;[3] parents enjoy the statutory right to counsel from trial to appeal;[4] Tennessee law places the heightened burden

---

[3] Tenn. Code Ann. § 36-1-113(d), (e), (g).

[4] Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii).

of clear and convincing proof upon the movant, as required by this Court's decision in *Santosky*;[5] and Tennessee's appellate courts will not affirm a termination of parental rights without a record complete enough to allow fair appellate consideration of the trial court's findings.[6] *See also* Pet. Apx. 69a-73a.

Petitioner implies that Tennessee is content with simply having a "warm body with a law license" representing such a parent. Pet. 18. Not so. Tennessee's courts are fiercely protective of parental rights, routinely examining the record on appeal to determine if parents were denied a fundamentally fair hearing by deficient counsel. *See, e.g., In re Grayson H.*, No. E2013-01881-COA-R3-PT, 2014 WL 1464265, at *10-11 (Tenn. Ct. App. Apr. 14, 2014) (no perm. app. filed); *In re M.H.*, No. M2005-00117-COA-R3-PT, 2005 WL 3273073, at *7-8 (Tenn. Ct. App. Dec. 2, 2005) (no perm. app. filed); *In re S.D.*, No. M2003-02672-COA-R3-PT, 2005 WL 831595, at *14-15 (Tenn. Ct. App. Apr. 8, 2005) (no perm. app. filed); *In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 WL 1838179, at *15 (Tenn. Ct. App. Aug. 16, 2004), *perm. app. denied* (Tenn. Nov. 8, 2004). Tennessee trial courts are empowered to seek additional information or expert testimony if necessary to ensure fairness. *See* Tenn. R. Juv. P. 39(e). In its decision here, the Tennessee Supreme Court made plain its expectation that these practices continue. *See* Pet. Apx. 51a, 71a.

---

[5] Tenn. Code Ann. § 36-1-113(c).

[6] S*ee, e.g., In re Austin C.*, No. M2013-02147-COA-R3-PT, 2014 WL 4261178, at *6 (Tenn. Ct. App., Aug. 27, 2014).

Indeed, the court ensured that Petitioner received the due process to which she was entitled in this case. The court thoroughly reviewed each of the grounds for termination of Petitioner's parental rights and the best-interests analysis, finding that the record supported each of the trial court's determinations. Pet. Apx. 75a-82a. It also reviewed the performance of Petitioner's counsel, concluding that "appointed counsel's representation did not deprive Mother of a fundamentally fair parental termination proceeding." Pet. Apx. 73a; *see* Pet. Apx. 73a-75a. Even the dissent agreed that a review of the record indicated that Petitioner received a fundamentally fair termination proceeding. *See* Pet. Apx. 92a.

The court's decision not only comports with the Fourteenth Amendment's requirement of fundamentally fair proceedings, it also appropriately balances parental rights with the welfare of Tennessee's children. It is plain that "transporting the structure of the criminal law, featuring as it does the opportunity for repeated re-examination of the original court judgment through ineffectiveness claims and post-conviction processes, has the potential for doing serious harm to children whose lives have by definition already been very difficult." *Baker v. Marion Cnty. Office of Family & Children*, 810 N.E.2d 1035, 1038-39 (Ind. 2004). And this Court's precedents likewise acknowledge the harms of impermanence: "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." *Lehman v. Lycoming Cnty. Children's Servs.*, 458 U.S. 502, 513-514 (1982). No

child should ever fear that her adoptive home could be lost after a long-shot collateral attack on a final parental-termination order—especially a child who has already suffered more than most.

While Petitioner would understandably prefer a post-termination action allowing a second chance to defeat the termination of her parental rights, the Constitution does not, as the Tennessee Supreme Court properly concluded, require the adoption of such a procedure. Tennessee's existing safeguards are constitutionally adequate and provide the fundamental fairness guaranteed to parents by the Fourteenth Amendment in parental-termination proceedings. *See Lassiter*, 452 U.S. at 27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Herbert H. Slatery III
Attorney General State of Tennessee

Andrée S. Blumstein
Solicitor General

Alexander S. Rieger
Assistant Attorney General
Counsel of Record

Rachel E. Buckley
Assistant Attorney General

Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-2408
Alex.Rieger@ag.tn.gov

Counsel for Respondent

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ADAM ELLITHORPE, ET AL.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	**No. M2014-00279-SC-R11-CV**
	)	**Circuit Court of Davidson County**
JANET WEISMARK,	)	**No. 13-C-2775**
	)	
Defendant-Appellant.	)	

ON APPEAL FROM THE JUDGMENT OF THE COURT OF APPEALS

BRIEF OF THE TENNESSEE ATTORNEY GENERAL

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

ALEXANDER S. RIEGER (BPR #029362)
PAUL JORDAN SCOTT (BPR # 031291)
Assistant Attorneys General
Office of the Attorney General
General Civil Division
P.O. Box 20207
Nashville, TN 37202
(615) 741-2408

ISSUES PRESENTED FOR REVIEW

I. Whether Plaintiffs-Appellees waived their constitutional challenge to the Health Care Liability Act by failing to raise it in the trial court or the Court of Appeals.

II. Whether the Health Care Liability Act's requirements of pre-suit notice and certification of good faith infringe upon the constitutional guarantees of equal protection and due process.

STATEMENT OF THE CASE AND THE FACTS

Plaintiffs-Appellees, Adam Ellithorpe, Ashley Ellithorpe, and their minor child, ML, sued Janet Weismark, a licensed clinical social worker, alleging negligence in performing health services and intentional and reckless infliction of emotional distress. (Vol. I, 4 ¶¶ 31–33).[1] Weismark filed her answer to the complaint contemporaneously with a motion to dismiss, based on Plaintiffs' failure to comply with the pre-suit-notice and certificate-of-good-faith requirements of Tennessee's Health Care Liability Act, Tenn. Code Ann. §§ 29-26-101 to -122. (Vol. I, 8–15). The Davidson County Circuit Court granted the motion to dismiss, (Vol. I, 39), and Plaintiffs appealed to the Court of Appeals. (Vol. I, 41–42).

The Court of Appeals was not presented with and did not address the constitutional challenge now raised:

> Appellants only argue that they were not required to comply with the THCLA because their claims sound in ordinary negligence and IIED. Consequently, our only task is to determine whether the trial court correctly classified all of the Appellants' claims as sounding in healthcare liability, rather than ordinary negligence or intentional torts.

Ellithorpe v. Weismark, No. M2014-00279-COA-R3-CV, slip op. at *6 (Tenn. Ct. App. Oct. 31, 2014) ("Slip op.").

The Court of Appeals vacated the circuit court's judgment, determining that the Health Care Liability Act did not require pre-suit notice and a certificate of good faith when the cause of action sounds in ordinary negligence instead of health-care liability. Slip op. at *13. The Court of Appeals remanded with instruction to evaluate whether Plaintiffs' claims sounded in ordinary negligence or health-care liability and to dismiss any individual claims sounding in health-care liability for failure to comply with the Health Care Liability Act's pre-suit requirements. Slip op. at *16.

[1] The record on appeal consists of one volume of technical record and one volume containing an audio recording of the trial-court proceedings. This brief will cite the record by volume number. When appropriate, this brief will also cite page

This Court granted Weismark's Rule 11 application for permission to appeal. In their brief as appellees in this Court, Plaintiffs asserted for the first time that the pre-suit-notice and certificate-of-good-faith requirements of the Health Care Liability Act, Tenn. Code Ann. §§ 29-26-121 to -122, were unconstitutional. (Appellee Br. 16). Although Plaintiffs purport now to challenge the constitutionality of the Health Care Liability Act, (Appellee Br. 21-25), the record reflects no mention of the statutes' constitutionality and contains no notice of the challenge to the Attorney General.

The Attorney General and Reporter moved to intervene to defend the challenged statutes, and this Court granted intervention.

---

and paragraph numbers.

ARGUMENT

Plaintiffs challenge the constitutionality of the Health Care Liability Act's requirements of pre-suit notice and certification of good faith. (Appellee Br. 23). The pre-suit notice provision requires "written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state." Tenn. Code Ann. § 29-26-121(a). The good-faith-certification provision requires that a certificate of good faith accompany the complaint if the claim necessitates expert testimony under the statute. *Id.* § 29-26-122(a). Failure to comply with either compels dismissal—without prejudice for failing to provide notice and with prejudice for failing to file a certificate. *Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs.*, 418 S.W.3d 547, 560 (Tenn. 2013) (citing Tenn. Code Ann. § 29-26-122(c)).

I. THE COURT MAY NOT NEED TO REACH THE CONSTITUTIONAL ISSUE.

In 2011, this Court held that the notice and certificate requirements applied to claims sounding in medical malpractice but not to claims sounding in ordinary negligence. *Estate of French v. Stratford House*, 333 S.W.3d 546, 557 (Tenn. 2011). Later that year, the General Assembly amended the medical-malpractice statute to add a new section defining "health care liability action" as "any civil action . . . alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, regardless of the theory of liability on which the action is based." 2011 Tenn. Pub. Acts, ch. 510, § 8 (codified at Tenn. Code Ann. § 29-26-101(a)(1)). The new section further provides that "[a]ny such civil action or claim is subject to this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint." *Id.* (codified at Tenn. Code Ann. § 29-26-101(c)). The legislation

also provided for replacement of the term "medical malpractice" with "health care liability."[2] *Id.*, § 9.

Defendant argues that the 2011 amendments abrogated *Estate of French*, applying the pre-suit requirements to claims concerning the provision of health-care services even if they sound in ordinary negligence. Thus, Defendant argues, Plaintiffs' claims warrant dismissal. Plaintiffs, on the other hand, argue that the statutes do not apply and that their claims here were improperly dismissed by the trial court.

It is well settled that "courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (quoting State *v. Taylor*, 70 S.W.3d 717, 720 (Tenn. 2002)).[3] It may not be necessary here to decide the constitutional issues. Plaintiffs and the Defendant disagree as to whether the challenged statutes apply to Plaintiffs' claims. The statute is implicated only if Plaintiffs fail in their primary argument. Until the statute is implicated and the challenge ripens, this Court should avoid the constitutional question.

II. PLAINTIFFS HAVE WAIVED THEIR CONSTITUTIONAL CHALLENGE.

Should this Court resolve the underlying statutory issue against the Plaintiffs, it should hold that Plaintiffs have waived their constitutional challenge by failing to raise it below. Although the now-challenged statutes formed the basis of Weismark's motion to dismiss and the trial court's order dismissing the case, (I, 14, 39), the record on appeal contains neither notice of a challenge to the

[2] The notice and certificate requirements at the time this Court decided *Estate of French* were the same as they are now, except the Code at that time used the phrase *medical malpractice*, which has since been replaced with *health care liability*. 2012 Tenn. Pub. Acts, ch. 798, §§ 13, 14 (codified at Tenn. Code Ann. §§ 29-26-121, -122).

[3] This sentiment is echoed in federal constitutional jurisprudence: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is *unavoidable*." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (emphasis added).

Attorney General[4] nor any references to the constitutionality of the health-care-liability statute. The challenge was also absent on appeal to the Court of Appeals:

> Appellants only argue that they were not required to comply with the THCLA because their claims sound in ordinary negligence and IIED. Consequently, our only task is to determine whether the trial court correctly classified all of the Appellants' claims as sounding in healthcare liability, rather than ordinary negligence or intentional torts.

Slip op. at *10–11.

It is a fundamental principle of appellate review that "questions not raised in the trial court will not be entertained on appeal." *City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey*, 126 S.W.3d 897, 905-06 (Tenn. 2004) (quoting *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)). This principle applies equally to constitutional challenges. *See In re M.L.P.*, 281 S.W.3d 387, 394 (Tenn. 2009) (declining to entertain a late-raised constitutional challenge).[5]

The challenge here is presented for the first time in Plaintiffs' principal brief to this Court. (*See* Appellee Br. 21–25). Thus, Plaintiffs waived their challenge; this Court should not address it.

III. THE CHALLENGED PROVISIONS OF THE HEALTH CARE LIABILTY ACT ARE CONSTITUTIONAL.

Should the Court nevertheless reach the constitutional issue, its consideration begins with the strong presumption that acts passed by the legislature are constitutional. *Osborn v. Marr*, 127 S.W.3d 737, 740–41 (Tenn. 2004). This Court has previously directed that courts must "indulge every presumption and resolve every doubt in favor of constitutionality." *Vogel v. Wells Fargo*

[4] The Attorney General must receive notice of any constitutional challenges and be afforded an opportunity to respond. *In re Adoption of E.N.R.*, 42 S.W.3d 26, 33 (Tenn. 2001) (citing Tenn. Code Ann. § 29-14-107(b), Tenn. R. Civ. P. 24.04, and Tenn. R. App. P. 32).

[5] This Court has identified a single exception—inapplicable here—for cases in which a statute is "so obviously unconstitutional on its face as to obviate the necessity for discussion." *City of Elizabethton v. Carter Cnty.*, 321 S.W.2d 822, 827 (Tenn. 1958). The challenged statutes in this case are not obviously unconstitutional, as the Court of Appeals has already uphold both of them against constitutional attack. *See, e.g.*, *Jackson v. HCA Health Servs. of Tenn., Inc.*, 383 S.W.3d 497 (Tenn. Ct. App. 2012) (upholding the certificate-of-good-faith requirement); *Webb v. Roberson*, No. W2012-01230-COA-R9-CV, 2013 WL 1645713, at *16-21 (Tenn. Ct. App. Apr. 17, 2013) (upholding the

Guard Servs., 937 S.W.2d 856, 858 (Tenn. 1996). "[The Court] must begin [its] inquiry with the presumption that the statutes in question pass constitutional muster." *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006). Further, "[t]he presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute." *Waters*, 291 S.W.3d at 882. Facial invalidity should be found "sparingly and only as a last resort." *Id.* at 922.

The Health Care Liability Act's pre-suit-notice and good-faith requirements are fully constitutional under the Tennessee and United States Constitutions.

A. The Pre-Suit Requirements Do Not Violate Due Process.

Plaintiffs contend that the Health Care Liability Act's pre-suit requirements represent "an unconstitutional abrogation of a plaintiff's property right in that cause of action." (Appellee Br. 21). Not so.

Article I, Section 8, of the Tennessee Constitution provides "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." This provision, known as the "law of the land clause," is "synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution." *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994) (citing *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980)). Due process under both the state and federal constitutions encompasses procedural and substantive protections. *Lynch*, 205 S.W.3d at 391. Plaintiffs do not identify the category of due process the challenged statutes allegedly deny. But under either the procedural- or substantive-due-process analysis, the statutes are constitutional.

---

constitutionality of the pre-suit-notice provision).

Procedural Due Process

Procedural due process at a fundamental level requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Bailey v. Blount Co. Bd. of Educ.*, 303 S.W.3d 216, 231 (Tenn. 2010) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). But procedural due process does not preclude the State from erecting pre-suit requirements. It is well settled "that a state may erect reasonable procedural requirements for triggering the right to an adjudication, such as statutes of limitations, and a state may terminate a claim for failure to comply with a reasonable procedural rule without violating due process rights." *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982)). When a claim is dismissed for failure to comply with pre-suit requirements, procedural due process inquires "'whether the state's policy reflected in the statute affords a fair and reasonable opportunity for . . . bringing . . . suit.'" *Burford*, 845 S.W.2d at 208 (quoting *Pickett v. Brown*, 638 S.W.2d 369, 376 (Tenn. 1982), *rev'd on other grounds*, 462 U.S. 1 (1983)).

It does. The challenged pre-suit requirements are meager and afford Plaintiffs a fair and reasonable opportunity to bring suit. The pre-suit-notice requirement simply requires Plaintiffs to provide the potential defendant with information including the name and birthdate of the patient, the name and address of the claimant and claimant's relationship to the patient, the name and address of the attorney sending the notice, a list of all other providers being sent a notice, and a medical authorization form permitting the recipient to obtain complete medical records from other noticed providers. Tenn. Code Ann. § 29-26-121(a)(2). Delivery can be accomplished personally or by certified mail. Tenn. Code Ann. § 29-26-121(a)(3). Although Plaintiffs must do so 60 days prior to filing their complaint, delivery of the notice tolls the applicable statute of limitations and repose for 120 days. Tenn. Code Ann. § 29-26-121(c). The certificate of good faith merely requires Plaintiffs

to file a certificate affirming that they have consulted with an expert witness who believes that there is a good-faith basis to maintain the action. Tenn. Code Ann. § 29-26-122(a). Neither of these requirements is onerous, and neither deprives Plaintiffs of a meaningful opportunity to pursue their claims. The challenged statutes therefore do not violate procedural due process.

Substantive Due Process

"Substantive due process bars certain government action regardless of the fairness of the procedures used to implement them." *Lynch*, 205 S.W.3d at 392 (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998)). It limits governmental action when the action denies a "particular constitutional guarantee" or is 'arbitrary, or conscience shocking in a constitutional sense.'" *Lynch*, 205 S.W.3d at 391–92 (citing *Collins v. City of Harker Heights*, 503 US. 115, 128 (1992)).

Where a legislative act impairs a fundamental right, the act must withstand strict scrutiny, requiring that the State's interest be sufficiently compelling to overcome the fundamental right. *See Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000). Otherwise, the rational-basis standard applies, only requiring the enactment to bear a "reasonable relation to a proper legislative purpose" and be neither arbitrary nor discriminatory. *Newton*, 878 S.W.2d at 110.

The right to bring an action in tort is not a fundamental right. *See Mills v. Wong*, 155 S.W.3d 916, 922 (Tenn. 2005); *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n. 32 (1978) ("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'"). Thus, a constitutional challenge bearing on the right to bring a tort action is reviewed under the rational-basis test.

To try to trigger strict scrutiny, Plaintiffs contend that the challenged pre-suit requirements violate their fundamental right to a jury trial. (Appellee Br. 22). They do not.

Article I, Section 6, of the Tennessee Constitution states "[t]hat the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors." In interpreting this right, this Court has held: "The right of trial by jury sanctioned and secured by this constitutional provision is the right of trial by jury as it existed at common law and was in force and use under the laws and Constitution of North Carolina at the time of the formation and adoption of our Constitution in 1796." *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992). The right guarantees only "that all contested factual issues be determined by an unbiased, impartial jury." *Ricketts v. Carter*, 918 S.W.2d 419, 421–22 (Tenn. 1996). And Plaintiffs retain their right to a jury trial in health-care-liability actions. *See, e.g.*, Tenn. Code Ann. § 29-26-115(d) (describing jury instructions); Tenn. Code Ann. § 29-26-117 (prohibiting disclosure of Plaintiff's demands to the jury). Simply requiring Plaintiffs to first comply with minor pre-suit requirements does not impair the right to a jury trial.[6]

Therefore, the challenged statutes need only satisfy the rational-basis test, discussed *infra*. *See Newton*, 878 S.W.2d at 110 (citing *Nebbia v. New York*, 291 U.S. 502, 537 (1934); *Nat'l R. R. Passenger Corp. v. Atchison, Topka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985)).

B. The Pre-Suit Requirements Do Not Deny Equal Protection.

The law of the land clause of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution also guarantee equal protection under the law. This guarantee requires that "all persons similarly circumstanced shall be treated alike." *Newton*, 878 S.W.2d at 109 (citing *Tenn. Small School Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)).

Plaintiffs assert that the Health Care Liability Act places health-care providers in a "special class" because its pre-suit requirements do not apply to lawsuits against other professionals, such as

[6] It is constitutionally permissible to dismiss a complaint for failure to comply with jurisdictional requirements in a summary procedure before a judge alone without violating the right to a jury trial. *See, e.g., Jerome B. Grubart, Inc. v.*

"attorneys, or architects, or accountants." (Appellee Br. 25). But Plaintiffs cannot compare themselves to health care professionals for purposes of their equal-protection claim. Plaintiffs must show that they are treated differently from others who are similarly situated. Plaintiffs are medical-malpractice claimants; they are therefore not similarly situated to health-care professionals. What Plaintiffs actually complain of, reduced to its heart, is that they, as medical-malpractice claimants, are treated unequally in comparison to non-medical-malpractice claimants.

But the discretion to set classifications is first vested in the legislature. *See Tenn. Small School. Sys.*, 851 S.W.2d at 153 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) ("'The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States,' and legislatures are given considerable latitude in determining what groups are different and what groups are the same. . . . In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest."). Only if the classification burdens a fundamental right or disadvantages a suspect classification will strict or heightened scrutiny apply. *See Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003).

It is well settled that medical-malpractice litigants do not enjoy suspect classification, and as discussed above, the challenged statutes do not burden a fundamental right. *See Newton*, 878 S.W.2d at 109 (citing *Sutphin v. Platt*, 720 S.W.2d 455 (Tenn. 1986)). Consequently, the challenged statutes are reviewed under a rational-basis standard.

Under rational-basis analysis, the challenged statutes must "bear[] a reasonable relation to a proper legislative purpose." *Gallaher*, 104 S.W.3d at 463 (citing *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997)). "The court's job is not to scrutinize the underlying wisdom of the challenged

---

Great Lakes Dredge & Dock Co., 513 U.S. 527, 537-38 (1995).

legislation; rather, if the court is able to conceive of a rational basis . . . the measure must be sustained." *Fritts v. Wallace*, 723 S.W.2d 948, 949 (Tenn. 1987).

As the Court of Appeals has held, the pre-suit requirements have a rational basis. *See Jackson*, 383 S.W.3d 497 (upholding the certificate-of-good-faith requirement); *Webb*, 2013 WL 1645713, at *10-14 (upholding the pre-suit-notice requirement). In *Jackson*, the Court of Appeals stated:

> [T]he legislature perceived a threat in 2009, not only to the medical profession and its insurers, but to the general welfare of the citizens of this state because, believing that as liability costs increase, so does the cost of health care and the practice of "defensive medicine," spawned by the fear of costly legal actions, may lead to lower quality health care in general. Whether these considerations are or are not valid is not for this court to determine. What is relevant and controlling is that they were accepted by the legislature and formed the predicate for its action.

Jackson, 383 S.W.3d at 505.

In *Webb*, the court likewise observed: "Simply put, [w]e find the legislature could conceive of a relationship between section 29-26-121's pre-suit notice requirements and its legislative objectives of preventing protracted litigation through early investigation, and possibly, facilitating early resolution through settlement." *Webb*, 2013 WL 1645713, at *19. "These objectives are of particular importance in the context of medical malpractice claims where . . . increased malpractice insurance costs threaten both health care affordability and accessibility." *Id.*

These observations are eminently correct. Health-care liability claims legitimately trigger concerns about increased liability costs leading to the practice of defensive medicine and increased health-care costs. And it was entirely reasonable for the legislature to ensure that the same pre-suit-notice and good-faith-certification requirements be applied to all claims involving the provision of health-care services in the hopes of avoiding protracted and expensive litigation. The challenged statutes are therefore constitutional.

CONCLUSION

For the reasons stated, if it becomes necessary for the Court to reach the constitutional issues raised, Plaintiffs' constitutional challenge should be deemed waived; in the alternative, the Court should declare the pre-suit requirements of the Health Care Liability Act constitutional under the Tennessee and United States Constitutions.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

ALEXANDER S. RIEGER (BPR #029362)
PAUL JORDAN SCOTT (BPR # 031291)
Assistant Attorneys General
Office of the Attorney General
General Civil Division
P.O. Box 20207
Nashville, TN 37202
(615) 741-2408

CERTIFICATE OF SERVICE

I certify a true and exact copy of the foregoing brief has been forwarded by first class U.S. Mail, postage paid to:

John F. Floyd
Jeremy A. Oliver
Attorney for Defendant
Todd, Floyd & Hammet, PC
3817 Bedford Avenue, Ste 220
Nashville, Tennessee 37215

Connie Reguli, Esq.
Attorney for Plaintiffs
LawCare-Family Law Center, P.C.
1646 Westgate Circle, Ste 101
Brentwood, TN 37027

on this the 18th day of May, 2015.

_____
ALEXANDER S. RIEGER
Assistant Attorney General

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 4

I. THE COURT MAY NOT NEED TO REACH THE CONSTITUTIONAL ISSUE. 4

II. PLAINTIFFS HAVE WAIVED THEIR CONSTITUTIONAL CHALLENGE 5

III. THE CHALLENGED PROVISIONS OF THE HEALTH CARE LIABILITY ACT ARE CONSTITUTIONAL 6

A. The Pre-Suit Requirements Do Not Violate Due Process 7

B. The Pre-Suit Requirements Do Not Deny Equal Protection 10

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Page(s)

CASES

Bailey v. Blount Co. Bd. of Educ.,
303 S.W.3d 216 (Tenn. 2010).....8

Burford v. State,
845 S.W.2d 204 (Tenn. 1992).....8

City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey,
126 S.W.3d 897 (Tenn. 2004).....6

City of Elizabethton v. Carter Cnty.,
321 S.W.2d 822 (Tenn. 1958).....6

Duke Power Co. v. Carolina Envtl. Study Group, Inc.,
438 U.S. 59 (1978).....9

Ellithorpe v. Weismark,
No. M2014-00279-COA-R3-CV, slip op. (Tenn. Ct. App. Oct. 31, 2014).....2, 6

Estate of French v. Stratford House,
333 S.W.3d 546 (Tenn. 2011).....4, 5

Fritts v. Wallace,
723 S.W.2d 948 (Tenn. 1987).....11

Gallaher v. Elam,
104 S.W.3d 455 (Tenn. 2003).....11

In re Adoption of E.N.R.,
42 S.W.3d 26 (Tenn. 2001).....6

In re M.L.P.,
281 S.W.3d 387 (Tenn. 2009).....6

Jackson v. HCA Health Servs. of Tenn., Inc.,
383 S.W.3d 497 (Tenn. Ct. App. 2012).....6, 12

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,
513 U.S. 527 (1995).....10

Lynch v. City of Jellico,
205 S.W.3d 384 (Tenn. 2006).....7, 9

Mills v. Wong,
155 S.W.3d 916 (Tenn. 2005).....9

Newport Hous. Auth. v. Ballard,
839 S.W.2d 86 (Tenn. 1992).....10

Newton v. Cox,
878 S.W.2d 105 (Tenn. 1994).....7, 9, 10, 11

Osborn v. Marr,
127 S.W.3d 737 (Tenn. 2004).....6

Planned Parenthood of Middle Tennessee v. Sundquist,
38 S.W.3d 1 (Tenn. 2000).....9

Ricketts v. Carter,
918 S.W.2d 419 (Tenn. 1996).....10

Spector Motor Serv., Inc. v. McLaughlin,
323 U.S. 101 (1944).....5

Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs.,
418 S.W.3d 547 (Tenn. 2013).....4

Tenn. Small School Sys. v. McWherter,
851 S.W.2d 139 (Tenn. 1993).....11

Vogel v. Wells Fargo Guard Servs.,
937 S.W.2d 856 (Tenn. 1996).....7

Waters v. Farr,
291 S.W.3d 873 (Tenn. 2009).....5, 7

Webb v. Roberson,
No. W2012-01230-COA-R9-CV, 2013 WL 1645713 (Tenn. Ct. App. Apr. 17, 2013).....6, 12

STATUTES

Health Care Liability Act.....6

Tenn. Code Ann. §§ 29-26-121 to -122.....3

Tenn. Code Ann. § 29-26-101(c).....4

Tenn. Code Ann. § 29-26-115(d).....10

Tenn. Code Ann. § 29-26-117.....10

Tenn. Code Ann. § 29-26-121(a) 4

Tenn. Code Ann. § 29-26-121(a)(2), (3) and (c) 8

Tenn. Code Ann. § 29-26-122(a) 4, 9

2011 Tenn. Pub. Acts, ch. 510, § 8 (codified at Tenn. Code Ann. § 29-26-101(a)(1)) 4

2012 Tenn. Pub. Acts, ch. 798, §§ 13, 14 (codified at Tenn. Code Ann. §§ 29-26-121, -122) 5

Tennessee's Health Care Liability Act, Tenn. Code Ann. §§ 29-26-101 to -122 2

OTHER AUTHORITIES

Fourteenth Amendment 7, 10

Constitution of North Carolina 10

Rule 11 3

Article I, Section 6, of the Tennessee Constitution 9

Article I, Section 8, of the Tennessee Constitution 7

clause of the Tennessee Constitution 10

United States Constitution 7, 10