IN THE SUPREME COURT OF PENNSYLVANIA

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No. 11 EAP 2019
CHILDREN'S FAST TRACK APPEAL

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IN THE INTEREST OF N.B.-A., A MINOR CHILD

APPEAL OF E.A., MOTHER.

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# BRIEF FOR AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF APPELLANT

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Appeal from the Opinion Dated February 19, 2019, of the Superior Court, 893 EDA 2018

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Pennsylvania is a nonprofit, nonpartisan membership organization dedicated to defending and expanding individual rights and personal freedoms throughout Pennsylvania. The ACLU of Pennsylvania has appeared many times as *amicus curiae* in federal and state courts at all levels, including both civil and criminal proceedings, in cases involving the rights of parents in dependency and related proceedings. The proper resolution of this case is a matter of substantial importance to the ACLU and its members.

*Amicus* seeks to supplement the parties' briefs by providing this Court with its analysis of the constitutional ramifications of the Superior Court's application of 23 Pa. Cons. Stat. § 6381(d), which adopts – contrary to the statute's language – a presumption that the parent is always appropriately named a perpetrator once child abuse is proven, subject only to the parent disproving that presumption. The Superior Court's misreading of the statute sets up a presumption without factual basis that violates due process and, in its application, will require parents, like the Mother here, to disprove a hypothetical failure to prevent abuse of which she had no warning. In its operation, then, the presumption becomes irrebuttable and, therefore, unconstitutional.

## SUMMARY OF ARGUMENT

The court below has misread, and therefore misapplied the presumption set forth in 23 Pa. Cons Stat. § 6381(d). The principle of constitutional avoidance also requires this Court to reverse the decision below, as to hold otherwise would violate fundamental notions of due process. This Court should answer in the affirmative the questions as to which it granted review:

> (1) Did the Superior Court err by affirming the trial court's finding that Mother was a perpetrator of child abuse in the absence of clear and convincing evidence that she intentionally, knowingly, or recklessly caused or created a likelihood of sexual abuse through a recent act or failure to act?
>
> (2) Did the Superior Court commit an error of law by applying 23 Pa.C.S. § 6381(d) to find that DHS established a prima facie case that Mother was responsible for the abuse perpetrated against N.B.-A. where another individual had been identified as the direct perpetrator?
>
> (3) Did the Superior Court commit an abuse of discretion by finding that Mother failed to rebut the prima facie presumption that she was a perpetrator of child abuse pursuant to 23 Pa.C.S. § 6381(d)?

## ARGUMENT

The court below has misread, and therefore misapplied the presumption set forth in 23 Pa. Cons Stat. § 6381(d). Under that provision, evidence that a child has suffered abuse "of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent" (or other caregiver) may establish a prima facie case that the parent caused the abuse, either through act or omission. § 6381(d). The purpose of the presumption is to allow a parent to be identified as a perpetrator of abuse in the absence of direct evidence as to the cause of the abuse. But in this case, the Superior Court applied the presumption without any evidence that the sexual abuse suffered by N.B.-A. "would ordinarily not be sustained or exist except by reason of the acts or omissions of [Mother]." The Superior Court then turned the presumption on its head by requiring Mother to rebut what no evidence supported – a presumption that the parent is always responsible for abuse sustained by her child. That is simply not what the Legislature wrote.

Beyond the plain language of the statute, the cardinal principle of constitutional avoidance also requires this Court to reverse the decision below, as to hold otherwise would violate fundamental notions of due process. "[W]hen a statute is susceptible of two constructions, one of which supports the act and gives it effect, and the other renders it unconstitutional and void, the former will be

adopted, even though the latter may be the more natural interpretation of the language used." *Commonwealth ex rel. Carson v. Mathues*, 59 A. 961, 980 (Pa. 1904) (quoting 26 Am. & Eng. Ency. of Law (2d ed.)); *Atl.-Inland, Inc. v. Bd. of Supervisors of W. Goshen Twp.*, 410 A.2d 380, 382 (Pa. Commw. Ct. 1980) (courts have an "obligation to adopt a reasonable construction which will save the constitutionality of a statute").

Interpreting § 6381(d) to presumptively label a parent a perpetrator of child abuse whenever abuse is found would violate this principle of statutory construction and place the statute directly in violation of state and federal constitutional due process protections.

### A. The Plain Language of Section 6381(d) Does Not Create a Presumption that a Parent is a Perpetrator of Child Abuse by Omission Whenever Abuse is Established.

A parent is liable for sexual abuse of his or her child pursuant to Pennsylvania's Child Protective Services Law (CPSL) when they "caus[e] sexual abuse or exploitation of a child through any act or failure to act," or when they "creat[e] a likelihood of sexual abuse or exploitation of a child through any recent act or failure to act." 23 Pa. Cons. Stat. § 6303(b)(i)(4), (6). In the absence of direct evidence of a parent's culpability, the CSPL allows a court to find prima facie evidence of culpability pursuant to 23 Pa. Cons. Stat. § 6381(d):

> (d) Prima facie evidence of abuse. — Evidence that a child has suffered child abuse of such a nature as would ordinarily not be

> sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the welfare of the child shall be prima facie evidence of child abuse by the parent or other person responsible for the welfare of the child.

According to the words of the statute, the presumption comes into play only where the nature of the abuse is such that it "would ordinarily not … exist except by reason of the acts or omissions of" the person being accused. *Id.* In this case, the child was sexually abused by her adult stepbrother. Nothing in the record explains the nature or circumstances of the abuse – there is, for example, no evidence that the stepbrother was permitted to baby-sit N.B.-A., or even evidence as to whether the abuse happened at home, or at some other place that the stepbrother obtained access to the child.

Sexual abuse certainly may occur when a child has insufficient supervision – but it may also occur despite a parent's best efforts to care for and supervise a child. The mere fact that a child was abused, therefore, does not establish that the abuse was "of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of" Mother. As this Court wrote in *In the Interest of L.Z.*, 111 A.3d 1164, 1185 (Pa. 2015), a presumption exists when the Legislature has defined "[s]uch evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts …." The Legislature did not create a presumption that sexual abuse occurs only when parents fail their children – it created a presumption that when child abuse appears to have resulted from the

acts or inaction of a specific caretaker or caretakers, the Court may presume that it did and require those caretakers to rebut the presumption. It does not appear that the predicate for applying the presumption is present in this case, as no party has submitted evidence that the abuse of N.B.-A. resulted from a lack of care-taking. Under the plain language of the statute, therefore, it was improper to apply the presumption and require Mother to rebut it.

If there were evidence that the abuse in this case resulted from a lack of supervision, then it would be appropriate for the trial court to presume that Mother is responsible for that lack of supervision, unless she presented evidence that she did not fail to provide proper supervision. For instance, in *In re M.S.*, 980 A.2d 612 (Pa. Super. Ct. 2009), the mother was found to have subjected her daughter to sexual abuse, even though she did not actively participate in the sexual abuse of her Child. Mother failed to protect her Child from the repeated sexual assault committed by her older brothers while all of them were living with their mother, and the mother refused to remove her sons from her home, even after learning that they had sexually abused Daughter. *Id.* at 616.

But there are no such facts in this case. The "parental duty... to protect a Child from harm that others may inflict" does not extend to harms that are not foreseeable. *J.J. v. CYS (In re R.W.J.)*, 826 A.2d 10, 14 (Pa. Super. Ct. 2003).

Parents and caregivers cannot be held liable for acts of abuse that a reasonable person in their position would not have known were occurring.

### B. Forcing Parents to "Rebut" a Presumption Without Factual Basis Imposes the Impossible Burden of Disproving a Hypothetical.

The opportunity to "rebut" a presumption that somehow, in some unidentified way, Mother could have prevented, but failed to prevent, N.B.-A.'s abuse does not cure the Superior Court's error, but compounds it. The Superior Court rejected Mother's testimony, which left the presumption – which itself had no grounding in fact – as the only evidence of Mother's culpability.

"The appropriate standard to use to determine whether a parent or caretaker is a perpetrator by omission is whether a reasonable person in the position of the caretaker, knew or should have known that acts of abuse were occurring and the parent or caretaker failed to take steps to remove the child from harm's way." *Bucks County Children & Youth Social Servs. Agency v. Department of Pub. Welfare*, 616 A.2d 170, 174 (Pa. Commw. Ct. 1992). *See also*, *L.S. v. Dep't of Pub. Welfare*, 828 A.2d 480 (Pa. Commw. Ct. 2003) (indicated child abuse report cannot be sustained, where DPW presented no evidence that Petitioner, a child care provider, failed to act to protect Child, or that she had knowledge that violent child needed extra supervision).

In the absence of any evidence as to how the abuse took place, Mother cannot reasonably be expected to prove that she had no ability to prevent it.

Notably, the Superior Court did not rely on any evidence that Mother failed to provide proper supervision for her daughter prior to learning that she had a sexually transmitted disease. Instead, the Superior Court faulted Mother for her reaction to her daughter's diagnosis with chlamydia (although that reaction was perfectly consistent with her testimony that she could not imagine how the daughter could have been abused, since she was never without supervision).

The only evidence concerning the supervision of the child was that Mother ensured that the girl was cared for by one of the women in the household at all times, and that Mother had no reason to suspect that her child care arrangements were insufficient. Mother testified that she did not initially think her daughter had been abused because her daughter denied it and because Mother did not believe there had been any opportunity for abuse, as her daughter was always supervised and slept either with Mother or with the grandmother.

The fact that the trial court found Mother not credible in some respects undermines her testimony, but it does not create evidence from thin air: there is still no evidence in the record that Mother had the opportunity to prevent the abuse. In *L.Z.*, this Court made clear that the § 6381(d) presumption must be rebuttable with evidence that the parent had no reason for concern about her care arrangements for the child:

> Moreover, the Legislature balanced the presumption of Section 6381(d) by making it rebuttable as it merely establishes "prima facie

> evidence" that the parent perpetrated the abuse. 23 Pa.C.S. § 6381(d). As commonly understood, prima facie evidence is "[s]uch evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary 825 (6th ed. abridged 1991). Accordingly, evidence that a child suffered injury that would not ordinarily be sustained but for the acts or omissions of the parent or responsible person is sufficient to establish that the parent or responsible person perpetrated that abuse unless the parent or responsible person rebuts the presumption. The parent or responsible person may present evidence demonstrating that they did not inflict the abuse, potentially by testifying that they gave responsibility for the child to another person about whom they had no reason to fear or perhaps that the injuries were accidental rather than abusive. The evaluation of the validity of the presumption would then rest with the trial court evaluating the credibility of the prima facie evidence presented by the CYS agency and the rebuttal of the parent or responsible person.

*L.Z.*, 111 A.3d at 1185; *id.* at 1186 ("Mother failed to rebut the presumption by presenting evidence or testimony from her, Aunt, or her boyfriend establishing that Child was not in her care when the injuries were suffered and that she had no reason to question her decision to leave Child in Aunt's care. "); *id*. at 1186 ("Moreover, even assuming Mother did not inflict the [abuse], she is still responsible for Child's injuries by failing to protect him from Aunt, absent rebuttal from Mother that she had no reason to fear leaving Child with Aunt. ").

Having put an imaginary rabbit in the hat, the Superior Court then held Mother responsible when she could not find and extract the rabbit. That is not how a legitimate evidentiary presumption works.

### C. To Interpret Section 6381(d) as the Superior Court Has Done Would Violate Due Process.

In evaluating the constitutionality of a legislatively prescribed presumption, this Court has explained that the presumption must have "some rational connection between the fact proved and the ultimate fact presumed, and ... the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *City of Pittsburgh v. Workers' Comp. Appeal Bd. (Robinson)*, 67 A.3d 1194, 1205 (Pa. 2013) (quoting *Rich Hill Coal Co. v. Bashore*, 7 A.2d 302, 313 (Pa. 1939)). *See also Petrone v. Moffat Coal Co.*, 233 A.2d 891, 893 (Pa. 1967) ("A presumption should always be based upon a fact, and should be a reasonable and natural deduction from that fact.").

An arbitrary presumption violates due process:

> Due process, in the most general sense, protects individuals from oppressive or arbitrary governmental conduct. *See Commonwealth v. Kratsas*, 564 Pa. 36, 764 A.2d 20, 27 (Pa. 2001) (citing *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

*Commonwealth v. Bomar*, 104 A.3d 1179, 1209 (Pa. 2014).

The Superior Court's application of the § 6381(d) presumption to find that Mother is a perpetrator of child abuse—despite the lack of any evidence that Mother knew or should have known of the risk of sexual abuse to her daughter—essentially converts a rebuttable presumption into an irrebuttable one. In the

absence of a meaningful opportunity to rebut a statutory presumption, that presumption violates Due Process. This Court recently explained:

> This Court's irrebuttable presumption doctrine derives from a series of United States Supreme Court cases in the 1970s involving statutes that infringed upon protected interests or denied benefits by utilizing presumptions that the existence of one fact was statutorily conclusive of the truth of another fact. The High Court concluded that, absent a meaningful opportunity to contest the validity of the second fact, the statutory irrebuttable presumptions deprived the citizenry of due process of law…
>
> This Court applied the irrebuttable presumption doctrine in 1995 in *Clayton*. We summarized the doctrine as providing that "irrebuttable presumptions are violative of due process where the presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact are available." *Clayton*, 684 A.2d at 1063 (citing *Vlandis*, 412 U.S. at 452). As support for the doctrine, we reiterated that "the essential requisites [of due process] are notice and meaningful opportunity to be heard," and we recognized that "a hearing which excludes consideration of an element essential to the [relevant] decision" does not comport with due process. *Id*. at 1064-65 (quoting *Bell*, 402 U.S. at 542).

*In the Interest of J.B.*, 107 A.3d 1, 14-15 (Pa. 2014) (striking down sex offender registration requirements for juvenile offenders).

In this case, the Superior Court's presumption that parents are responsible for any abuse their children suffer at the hands of another, even without evidence the parents knew or should have known their children were at risk, violates the Due Process Clause. First, it encroaches upon the same interest that was at issue in *J.B.*, the constitutional right to reputation. Second, it is not universally true that sexual abuse cannot occur absent parental negligence. And finally, courts can use the

available evidence to determine whether a parent knew or should have known that their child was at risk of abuse.

There is no question that being labeled a perpetrator of child abuse implicates the right to reputation under the Pennsylvania Constitution. *E.g.*, *G.V. v. Dep't of Pub. Welfare*, 91 A.3d 667, 671 (Pa. 2014) ( "identifying someone as a child abuser can profoundly impact that person's reputation "). As this Court recently explained, "the right of citizens to security in their reputations is not some lesser-order precept. Rather, in Pennsylvania it is a fundamental constitutional entitlement. The right is established in the opening passage of the Pennsylvania Constitution's Declaration of Rights—under the title 'Inherent rights of mankind'—and is couched as an 'indefeasible' guarantee." *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 572-73 (Pa. 2018); *see also* PA. CONST. art. I, §1; *J.B.*, 107 A.3d at 16 ("This Court has recognized that the right to reputation, although absent from the federal constitution, is a fundamental right under the Pennsylvania Constitution); *R. v. Dep't of Pub. Welfare*, 636 A.2d 142, 149 (Pa. 1994); *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346, 351 (Pa. 1987); *Moyer v. Phillips*, 341 A.2d 441, 443 (Pa. 1975); *Meas v. Johnson*, 39 A. 562, 563 (Pa. 1898). Indeed, "the Pennsylvania Constitution 'places reputational interests on the highest place, that is, on *the same level* as those pertaining to life, liberty, and property.'" *In re Fortieth Statewide Investigating*

*Grand Jury*, 190 A.3d at 573 (emphasis in original) (quoting *Am. Future Sys., Inc. v. Better Bus. Bureau*, 923 A.2d 389, 395 n. 7 (Pa. 2007)).

When a court makes a finding during a dependency proceeding that an individual is a perpetrator of child abuse, as the trial court did in this case, that individual is listed as the subject of a founded report in a statewide database, called ChildLine. 23 Pa. Cons. Stat. § 6303. Founded reports remain on the registry "indefinitely." 23 Pa. Cons. Stat. § 6338(c). There exists no opportunity for a parent with a founded report to establish, in any forum or tribunal, that he or she has rehabilitated or "no longer represents a risk of child abuse." 23 Pa. Cons. Stat. § 6341(a).

A founded child abuse report within the past five years is an absolute bar to employment in a wide variety of positions that involve contact with children. Job applicants must submit a child abuse clearance when they apply for a wide variety of positions. This includes work as a daycare provider; teacher; school lunch aide; bus driver; crossing guard; school janitor; counselor; caregiver; librarian; pastor; clerk at a children's store; athletic coach; many health care providers; camp counselor; lifeguard; or as an employee at *any* "program, activity or service" placing her in direct contact with children. 23 Pa. Cons. Stat. § 6344. It also includes working for a home health care agency, or providing in-home personal care or respite care. 28 Pa. Code § 611.53(b). Indeed, there is no bar to *any*

employer making employment contingent upon a child abuse clearance, and in practice a growing number of employers, including nursing homes and elder care facilities, choose to do so. The law was recently expanded beyond employment to also prohibit individuals with a founded child abuse report within the last five years from serving as volunteers in any capacity in which they will have direct contact with children. 23 Pa. Cons. Stat. § 6344.2. This ban extends to parents who wish to volunteer at a holiday party in their child's classroom.

Although this Court has previously held that the harm to an individual's reputation from being listed on ChildLine is "limited" due to the statutory limits on the persons to whom such reports may be disclosed in *R. v. Dep't of Pub. Welfare*, that case was decided before the expansion of the Child Protective Services Law in 2014 to require volunteers in any activity involving direct contact with children, including their own children's classroom parties and field trips, to first obtain a child abuse clearance. *Id.* at 150. The current law has vastly expanded the number of individuals who must seek child abuse clearances as well as the number and type of recipients of those reports. This expansion greatly increases the number of groups and individuals who will be privy to ChildLine reports as well as the potential and probability for disclosure to groups and individuals not specifically authorized to receive them.

The application of the § 6381(d) presumption to all parents and caregivers whose child has been abused by another person would not only greatly expand the number of individuals listed as the subjects of ChildLine reports, but under the Superior Court's analysis, would also deprive them of any meaningful opportunity to challenge the presumption. *See J.B.*, 107 A.3d at 17. That is because the Superior Court's decision holds parents responsible for failing to prevent the abuse of a child even when there is no evidence that the parent's failure to protect his or her child from known or suspected dangers led to the abuse. Parents are thus presumed to be responsible for failing to prevent another person's abuse of their child in the absence of any evidence showing they disregarded any risk. For most if not all parents, rebutting such a presumption would prove impossible.

Because the presumption that parents could have prevented, but did not prevent, abuse of their children by others is not universally true, applying that presumption in a manner that makes it impossible to rebut violates the due process clause. The Commonwealth has other means to achieve its interest in protecting children, namely by requiring evidence that a parent's failure to protect his or her child from known or suspected dangers led to the abuse before listing an individual as the subject of a founded report of child abuse on ChildLine. Requiring individual determinations that a parent's failure to act caused or created a likelihood of abuse in order to list the parent on ChildLine will ensure that the

registry serves its stated purpose—to protect children from future abuse or neglect—by ensuring that the registry does not capture large numbers of individuals who pose no danger to children.

Given that parents and other caregivers have a protected right to reputation encroached by a presumption that parents are always responsible for abuse by another individual, where the presumption is not universally true, and where there is a reasonable alternative means of determining whether the parent's failure to act caused or created a likelihood of abuse, the Superior Court's application of § 6381(d) to the Mother in this case violated her due process rights.

## CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges This Honorable Court to reverse the decision of the Superior Court finding Mother a perpetrator of child abuse.

Respectfully submitted,

Date: June 6, 2019

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## CERTIFICATES

### Certification Pursuant to Rule 531

I hereby certify that no person or entity other than staff of the American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania ("ACLU") has: (1) paid in whole or part for the preparation of the *amicus curiae* brief filed by the ACLU in this matter, or (2) authored, in whole or in part, the amicus curiae brief filed by the ACLU in this matter.

Dated: June 6, 2019 */s/ Mary Catherine Roper*
Mary Catherine Roper

### Certification of Word Count

I hereby certify that this brief contains 4832 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

Dated: June 6, 2019 */s/ Mary Catherine Roper*
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### Certificate of Compliance with Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing

confidential information and documents differently than non-confidential information and documents.

Dated: June 6, 2019 */s/ Mary Catherine Roper*
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**Certificate of Service**

I hereby certify that I caused true and correct copies of the foregoing Amicus Brief to be served upon the persons indicated below by PACFile and First Class Mail, which service satisfies the requirements of Pennsylvania Rules of Appellate Procedure 121:

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