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Faux Advocacy in Amicus Practice

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Abstract

Amicus brief filing has reached "avalanche" volume. Supreme Court Justices and lower court judges look to these briefs particularly for non-case-specific factual information—"legislative facts"—relevant to a case. This Article calls attention to a recurrent yet unrecognized problem with amicus filings offering up legislative facts in the many cases centrally involving the most vulnerable members of society—namely, non-autonomous persons, including both adults incapacitated by mental illness, intellectual disability, or other condition, and children. Some amici present themselves as advocates for such persons but use the amicus platform to serve other constituencies and causes, making false or misleading factual presentations about the interests of the group for whom they purport to speak and urging the Court to act on rights of other parties—rights that might operate contrary to the welfare of the non-autonomous persons. Law professors present themselves as scholarly experts on the rights and interests of these vulnerable populations when they actually are not and their real aim is furthering a personal political agenda. The danger of duping judges seems especially great with these faux advocates and experts, both because they bear the aspect of disinterested altruism and because their supposed beneficiaries are incapable of choosing, monitoring, or correcting them. This Article catalogs the various manifestations of faux advocacy using child welfare cases that reach the Supreme

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Court to illustrate, then proposes new checks on amicus practice, including ex ante *vetting and* ex post *penalties, to eliminate this unethical and dangerous practice.*

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I. INTRODUCTION

Hearing the Supreme Court has accepted a constitutional challenge to a state program of sterilizing female residents at a facility for mentally disabled adults, members of a pro-eugenics group form an organization they call "Advocates for the Mentally Disabled" to file an amicus brief in the case. Several law professors with offspring who are now mentally disabled women and who have caused their parents much anguish by forming intimate relationships join to submit a brief as "Scholars of the Rights and Welfare of Mentally Disabled Adults," even though none teaches or publishes on the topic. Both briefs confidently assert that sterilization is in the residents' best interests, claiming it prevents seizures likely with pregnancy and hygiene problems associated with menstruation while having no negative impact. These "scholars" cite no supportive empirical research and actually devote most of their brief to legal arguments for a parental right to direct medical care for incompetent adult offspring. The "advocates" cite a study funded by The Irving Fisher Foundation and published in an obscure journal. On the other side of the case is an amicus brief filed by members of an abortion-rights group calling themselves "The Institutionalized Persons Welfare League," contending sterilization is contrary to facility residents' best interests because it traumatizes them to learn they cannot reproduce, citing as support its "decades of experience." The brief also argues, though not relevant to the case, that mentally disabled women who become pregnant have a right to exercise whatever right to abortion their state allows. None of these briefs addresses the other side's factual claims regarding the welfare of the purported beneficiaries of their advocacy.

In this hypothetical case (The Hypo), would these groups be permitted to file briefs? Most likely, yes. Typically, parties grant blanket permission, and the Supreme Court, like lower courts, does not vet *amici*.[1] Yet one might

1. *See* Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 GEO. L.J. ONLINE 135, 136 (2017) ("[A]micus participation is essentially open access."); *cf.* FED. R. APP. P. 29(a)(2) (stating that any entity may file an amicus brief if "all parties have consented to its filing," or else "by leave of court"); SUP. CT. R. 37(3)(a) ("An amicus curiae brief in a case before the Court for oral argument may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file . . . ."). Potential amici must simply file a motion stating "the identity of the amicus curiae, its interest in the case, and the source of its authority to file." FED. R. APP. P. 29(a)(4)(D). State appellate rules are generally similar. *See, e.g.*, VA. SUP. CT. R. 5:30(b). This statement could facilitate judges' assessment of a brief's value without having to read it, which might neutralize some problematic filing, but the statements are typically conclusory—e.g., "we are experts on," so the Justices or their clerks would have to do digging for which they have neither time nor inclination. *Cf.* Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997)

reasonably view them all as *faux* advocates, serving agendas other than the welfare and rights of the persons for whom they purport to speak, and potentially promoting an outcome contrary to the wellbeing of those persons.[2]

Would these briefs have any impact? Supreme Court Justices have increasingly woven into their opinions "legislative facts" derived from amicus briefs[3]—supposed truths, not subject to the challenge a trial provides,[4] about the likely impact of one outcome or another.[5] The sheer volume of briefs, now grown to a volume characterized as "avalanche,"[6] makes careful scrutiny of their claims infeasible.[7] There is evidence that judges rely especially on

("The tendency of many judges of this court, including myself, has been to grant motions for leave to file amicus curiae briefs without careful consideration . . . .").

2. *See infra* Part II for non-hypothetical examples.

3. *See* Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 71 (2013) (stating that "adjudicative facts," in contrast, are case-specific findings at trial).

4. *Cf.* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1807 (2014) ("When the Supreme Court uses amicus briefs in this way, it is bypassing the procedural safeguards that exist at the trial level, and evaluating the studies marshaled by the amici on its own, largely without even a check from the parties and under a tight deadline."); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1216 (2013) ("Amicus briefs . . . may be replete with dubious factual assertions that would never be admitted at trial.").

5. *See, e.g.*, William D. Blake, *"Don't Confuse Me with the Facts": The Use and Misuse of Social Science on the United States Supreme Court*, 79 MD. L. REV. 216, 220 (2019) ("[M]odern political science research . . . finds amicus curiae briefs are influential because they provide Justices with information they otherwise would not have when deciding a case."); Collins, *supra* note 1, at 226 ("[T]here is a general consensus that amicus briefs are influential in several regards."); Jeffrey Scott, *You Got A Friend in Me: Facts and Supreme Court Amicus Briefs*, 29 GEO. J. LEGAL ETHICS 1353, 1354 (2016) (calculating that in its 2012–2013 term, the Supreme Court cited amicus briefs in fifty-three percent of its decisions, and one-fifth of those citations were to support a factual claim); Larsen, *supra* note 4, at 1777 ("Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void."); Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 987 (2009) ("There has been no shortage of praise in the legal literature for the ability of amicus briefs to 'inform the court of implications of a decision' . . . . [and] provide relevant factual information not offered by the parties . . . .").

6. Bruhl & Feldman, *supra* note 1, at 135.

7. *See* Collins, *supra* note 1, at 230 (citation omitted) ("[T]here is evidence in the US Supreme Court that amicus briefs are triaged by law clerks, thus indicating that not all (or even most) amicus briefs are read by judges."); Scott, *supra* note 5, at 1353–54 (noting that a thousand amicus briefs were filed in the Supreme Court in its 2012–2013 term, an average of fourteen briefs per case); Larsen, *supra* note 4, at 1786 (noting an instance when Justice Alito relied on an unsupported and false factual claim in an amicus brief); *id*. at 1787 ("Lest one think this 'take their word for it' practice is only committed by fringe-players, the Solicitor General of the United States . . . has also made unsupported factual assertions (later proved erroneous) that have ultimately found their way into the U.S. Reports.").

"scholar briefs" filed by law professors, presuming academics possess deeper knowledge and act with greater objectivity and integrity than other filers.[8] They might also put particular faith in briefs filed by apparently altruistic advocates for vulnerable groups, especially as to assertions those advocates make about the interests of persons in those groups.[9] Yet those persons might be unable to select or monitor the advocates, or to confirm or deny the claims that scholars or self-appointed advocates make, leaving them at risk of being disserved by *faux* advocacy.[10]

The existing literature uniformly presupposes that the intended ultimate beneficiaries of briefs filed on behalf of interest groups are autonomous adults who are capable of overseeing advocacy on their behalf and challenging claims that ring false to or would disserve them, and who can ensure that those who commission, draft, and file the briefs are true advocates for them.[11] This presupposition overlooks a highly problematic phenomenon that this Article addresses: a practice raising distinct concerns about fidelity to and protection of the most vulnerable groups in society—that is, the third of the population that is non-autonomous (children and incompetent adults), whose fundamental interests are frequently at issue in appellate litigation.[12] "*Faux* advocacy" entails purporting to speak on behalf of a group, yet actually using the platform, and the credibility afforded by self-anointing oneself as representative for or expert regarding the group, to serve other causes.[13] It intensifies problems all amicus briefs pose for the courts, in terms of judges receiving reliable information.[14] Additionally, it adds a previously unrecognized problem, that

8. *See* Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor,* 4 J. LEGAL ANALYSIS 223, 228 (2012) (citing a survey of Justices and their clerks and referring to "distinctively scholarly expertise and perspective" and "an implied warranty of scholarly integrity").

9. *Cf.* Scott, *supra* note 5, at 1359 ("[S]ometimes the status of the private party is enough to lead to the conclusion that the party's assertion is true.").

10. *Cf.* Larsen, *supra* note 4, at 1808 ("[W]e have a court seeking expert testimony without any limits on the evidence these experts can bring.").

11. *Cf.* Larsen, *supra* note 4, at 1810 (suggesting parties themselves should police experts providing amicus briefs, implying the parties are always capable of advocating for themselves, yet some parties to a case might also be non-autonomous persons).

12. *See infra* Part II.

13. *Cf.* Larsen, *supra* note 4, at 1762 ("The American College of Pediatricians . . . is a socially conservative group founded to protest the adoption of children by gay couples, in opposition to the contrary position taken by the similarly named American Academy of Pediatrics.").

14. *See id.* at 1761–62 ("In a digital world where factual information is exceedingly easy to access, more amici than ever before can call themselves experts and seek to 'educate' the Court on factual matters . . . It is a mistake to conclude that the Justices can easily tell which of these amici are real

some amici are not only fake friends of the court but also fake advocates, appearing to serve a group of sympathetic beneficiaries by filing briefs in their name but actually promoting an outcome detrimental to them.[15] Whatever skepticism judges now have about amicus briefs in general, they might not perceive the latter problem, and might take at face value assertions that apparent advocates make about the welfare of non-autonomous "clients."[16] Therefore, there is unrecognized potential for injury to those for whom the amici purport to speak as well as to the administration of justice.[17]

Yet, because those persons are not clients in the normal legal sense of the amici or of the attorneys who file the briefs, they seemingly have no protection against the disservice *faux* advocates can do.[18] Further, there seems less likelihood than in other contexts that "more speech" will dissolve the problem.[19] True advocates for non-autonomous persons might be few and not well resourced, there is generally little or no opportunity for parties or non-parties to reply to amicus briefs, and the swelling number of amicus briefs makes it less likely judges will read briefs filed by less elite lawyers for less familiar organizations or individuals.[20] It also bears mention that some judges might look to amicus briefs selectively for support of conclusions they are predisposed to reach.[21] *Faux* advocacy can supply judges with seemingly reliable but

factual experts and which of them are not.").

15. *See infra* Part III.

16. *See* Larsen, *supra* note 4, at 1762–63 (observing that judges typically use amicus briefs as sources of factual information rather than merely research tools).

17. *See* Nancy Morawetz, *Convenient Facts:* Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1612 (2013) (describing the injury that has occurred in cases where the Court relied on facts introduced by private parties to determine its ruling); Larsen, *supra* note 4, at 1762–63 ("[I]t becomes increasingly difficult to sort the reliable amici information from the unreliable.").

18. *But see infra* Part IV (suggesting possible remedies for those disserved by *faux* advocates).

19. *See* Bruhl & Feldman, *supra* note 1, at 135 ("Although amicus briefs can provide valuable information, the large and growing volume of amicus filings threatens the Court and commentators with a form of information overload. Knowledgeable sources tell us what logic suggests, namely that some truly valuable information can get lost in the amicus avalanche.").

20. *See* Collins, *supra* note 1, at 230 ("[S]ome low-resource groups that may want to file amicus briefs might be prevented from doing so because of filing and printing fees, the inability to procure appropriate legal counsel, and other barriers related to the rules and procedures that govern amicus filings.").

21. *See* Blake, *supra* note 5, at 252 ("Rather than letting scientific knowledge mitigate a Justice's ideological proclivities, the data indicate Justices on both ends of the spectrum resort to scientific arguments to bolster their underlying worldviews."); *id.* at 248 ("[I]t is likely that amicus briefs . . . provide the Court with relevant social science research they can choose to cite."); Emily Bazelon, *Antonin Scalia Didn't Trust Science*, N.Y. TIMES (Dec. 21, 2016),

fabricated support that otherwise would not exist, facilitating a stronger statement of position or a separate opinion.[22]

Courts, and the legal system more broadly, should adopt mechanisms for deterring filing of unreliable amicus briefs.[23] Others have offered suggestions for the general run of cases.[24] This Article proposes stronger measures to address the particular problem of *faux* advocacy for non-autonomous persons.[25] Negative effects from holdings that rest on flawed factual assumptions can be especially great for these vulnerable groups, yet such assumptions are especially likely to creep into judicial reasoning when advanced in briefs ostensibly filed altruistically on behalf of persons who cannot object to misrepresentation of their interests.[26] Consequences are especially likely to be profound and far reaching when a case inspires many amicus briefs.[27] Yet those cases are often also highly-charged politically, creating the greatest temptation for *faux* advocacy.[28] Controversies surrounding child welfare issues in particular tend to trigger filings motivated by ulterior ideological agendas, such as religious accommodation, reproductive rights, and eliminating discrimination or disparate impact based on race, gender, or sexual orientation.[29] Deception by *faux* advocates in such cases can have endless ripple effects; lower courts, in similar or even quite different cases, cite Supreme Court statements of legislative fact as authoritative, not just the Court's legal holdings.[30] Additionally, lower courts increasingly receive amicus briefs themselves in high-impact

https://www.nytimes.com/interactive/2016/12/21/magazine/the-lives-they-lived-antonin-scalia.html (quoting Professor John Donahue's statement that "Scalia was willing to cite work that was thoroughly refuted by an accepted scholarly institution," while rejecting the most rigorous research on the subject).

22. *See* Collins, *supra* note 1, at 228 ("[R]esearch reveals that judges are more likely to author concurring and dissenting opinions in cases with a relatively large number of amicus briefs, as such briefs . . . provide judges with a foundation for drafting a separate opinion.").

23. *See infra* Part IV (providing possible solutions to prevent and limit *faux* amicus brief filings).

24. *See, e.g.*, Larsen, *supra* note 4, at 1809–16.

25. *See infra* Part IV.

26. *See, e.g.,* Scott, *supra* note 5, at 1363 (explaining why the holding in *Nken v. Holder* had a negative impact on the immigrant community).

27. For specific case examples, see *infra* Part II.

28. *See* Bruhl & Feldmen, *supra* note 1, at 135 ("Cases with thirty or more amicus briefs are no longer particularly rare, and the highest-profile cases see amicus filings reaching the triple digits.").

29. *See infra* Part II.

30. *See* Larson*, supra* note 4, at 1781–82 ("[A] factual statement in a Supreme Court opinion today can easily drift over to a new context and make an appearance in a subsequent lower court opinion—affecting new parties and creating new law.").

cases, and judges in those courts might be even more disposed to accept without close scrutiny seemingly-altruistic amici's factual claims about non-autonomous persons' interests.[31] And whereas much amicus filing at the Supreme Court is controlled by an elite group of Supreme Court Bar members with strong self-interest in maintaining a reputation for credibility, filing in lower courts is less subject to such self-restraint.[32] At all levels, ability to critique empirical claims and cited research must be highly variable across jurists and clerks, whose training is generally in legal analysis rather than scientific methods.[33]

This Article is distinctive in focusing not just on the impact amicus briefs can have on courts and the integrity of the legal system, but also on potential harm to private individuals from court decisions promoted by their own purported advocates. It breaks new ground in situating deceptive amicus practice within the contexts of professional ethics rules and malpractice.[34] Bar discipline is an especially promising corrective because it does not require establishing that those disserved by *faux* advocacy are clients in the usual sense nor that the *faux* advocacy caused harm in a given instance.[35] The *potential* for prejudice to any person or to the judicial process from unethical attorney conduct suffices to trigger sanction.[36] Discouraging irresponsible filings that could cause harm, though, should also make amicus practice better for the courts, by reducing the overall quantity of briefs filed, and in particular the number of untrustworthy briefs.[37]

To make the scope manageable, this Article focuses on factual claims in advocacy submitted ostensibly for children in cases at the Supreme Court. Assertions of law could also mislead judges, especially if in briefs filed by

31. *See* Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, 46 COLO. LAW. 23, 23 (2017).

32. *See, e.g.*, Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1929 (2016); *cf.* Sup. Ct. R. 37 ("An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court . . . .").

33. *See* Blake, *supra* note 5, at 229–31.

34. *Cf.* Fallon, *supra* note 8 (exploring the role-based ethical obligations of law professors who participate in amicus filing, but only at theory level and not exploring whether some such professors are breaching the MRPC and so making themselves vulnerable to bar complaints).

35. *See* discussion *infra* Section IV.C.

36. *Cf.* Scott, *supra* note 5, at 1362 (speculating that bar discipline would be beneficial for the amicus brief system by alerting attorneys to potential consequences for negligently submitting misleading materials).

37. *Cf.* Bruhl & Feldman, *supra* note 1, at 135 ("Some truly valuable information can get lost in the amicus avalanche.").

law professors, but the deception danger seems greater with factual assertions.[38] Further, as The Hypo illustrates, the population for whom a concern about *faux* advocacy exists is broader than just children, including also adults who, for one reason or another, have diminished capacity. The elements of the phenomenon documented in Parts II and III pertain also to those other groups. In addition, the problem can exist at any level of the federal court system and in state appellate courts.[39] Part IV's recommendations for addressing *faux* child advocacy at the Supreme Court would extend also to amicus practice in lower courts.[40]

Part II describes several cases in which amicus briefs filed by self-styled child-welfare advocates and experts have advanced factual claims for which they had little or no support and should have believed false.[41] Part III catalogs several particular aspects of amicus practice, illustrated by those cases, that raise substantial ethical concerns—including lack of qualification to advocate for children, false claims of expertise, conflicts of interests, use of the child-advocacy platform to advocate for other groups, endorsement of others' problematic framing of children's legal situations, and misrepresentation of facts.[42] Part IV considers possible measures to foster greater fidelity to non-autonomous persons in advocacy on their behalf and greater discipline in making factual representations to courts regarding their welfare.[43] These include a formalized process for vetting potential amici who present themselves as advocates or scholarly experts regarding rights and interests of non-autonomous persons.[44] Other suggestions include *ex post* consequences for *faux* advocacy, such as bar complaints against attorneys who violate the Rules of Professional Conduct in the course of amicus filing and, in any case where causation and harm could be shown, tort suits against amici or their attorneys.[45]

38. *See, e.g.*, Larsen, *supra* note 4, at 1772–73, 1784 ("[F]actual assertions by amici played an important role in the Court's 2003 decision upholding the University of Michigan Law School's race-based affirmative action decision. . . . [T]he factual data amici present to the Court and the studies they choose to highlight are all funneled through an advocacy sieve.").

39. *Id*. at 1781–82 (noting how factual statements often are relied on by lower courts, including state courts).

40. *See infra* Part IV.

41. *See infra* Part II.

42. *See infra* Part III.

43. *See infra* Part IV.

44. *See infra* Part IV; *see also* Larsen, *supra* note 4, at 1810 (describing one process by which amicus brief submission can be vetted).

45. *See infra* Part IV.

II. *FAUX* ADVOCACY IN ACTION

Danger of suspect advocacy exists across the political spectrum.[46] Liberals filing briefs as purported advocates for children might be driven by an overriding sympathy for racial or sexual minorities, women, or the poor.[47] Conservatives might tailor purportedly child-welfare-based arguments to coincide with pro-religion, libertarian, or parental-rights positions.[48]

For a recent example on the liberal side, in the Supreme Court's 2022 term, *Brackeen v. Haaland* challenged the constitutionality of the Indian Child Welfare Act (the Act or ICWA), a federal law of great symbolic importance to Native Americans.[49] Though predicated in part on federalism and states' rights claims, the Complaint also challenged the Act's discriminatory treatment of "Indians" and "non-Indians."[50] It asserted that the Act harms many of the children whom it captures despite their never having lived on tribal lands.[51] Complainants maintained that the Act made it more difficult for child welfare agencies to ensure safety and permanency for "Indian children" and forced disruption of many long-term foster and adoption placements in order to relocate children to tribal lands.[52] The case thus invited the Court to

46. *Cf.* JAMES G. DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES ch. 7 (Routledge 2018) (ebook) (analyzing liberal and conservative adult-centered mindsets in relation to child welfare); Blake, *supra* note 5, at 217 ("[I]ndividuals, on the left and right, are more likely to deny the accuracy of science that challenges their ideology . . . .").

47. *See, e.g.*, James G. Dwyer, *Smith's Last Stand? Free Exercise and Foster Care Exceptionalism*, 24 U. PA. J. CONST. L. 856, 896–905 (2022) (describing the implausible child-welfare arguments advanced by advocates for same-sex couples in defense of a city's exclusion of a Catholic agency from its foster care system); Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in Child Welfare Reform*, 24 WM. & MARY BILL RTS. J. 725, 725–26 (2016) (describing the liberal groups who serve the interest of poor adults but place no focus on the welfare of children).

48. *See, e.g.*, JAMES G. DWYER & SHAWN F. PETERS, HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE 120–58 (2019) (ebook) (critiquing conservative arguments against state oversight of homeschooling couched in child welfare terms).

49. Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022).

50. *See* Second Amended Complaint at 38, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

51. *Id.*

52. *Id.* ("The [Act's] classification of Indians and non-Indians, and its discrimination against non-Indians, is based on race and ancestry and violates the constitutional guarantee of equal protection."). The Complaint does not explicitly allege violation of children's rights, and no children are named as parties, but the lower courts focused largely on the Act's discrimination between "Indian" and "non-Indian" children. *See* Brackeen v. Haaland, 994 F.3d 249, 336–40 (5th Cir. 2021) (en banc) ("[W]e cannot say that simply because ICWA's definition of 'Indian child' includes minors eligible for tribal membership . . . the classification is drawn along racial lines."); Brackeen v. Bernhardt, 937 F.3d 406,

determine whether portions of the Act applicable to "off-reservation" children generally do serve or disserve their welfare, and to do that the Justices might look to fact claims in amicus briefs. Any advocacy groups sympathetic to Native American tribes thus had reason to try to convince the Court that the Act operates consistently with children's welfare.[53] Presenting themselves as advocates for children rather than for the tribes or for parents (who receive heightened protection under the Act against removal of their children and against termination of rights (TPR)) could give these advocacy groups greater credibility in that endeavor.[54]

Thus, Casey Family Programs, a behemoth foundation known in the social work field for promoting a family-preservation ideology and ignoring child welfare outcomes in the research it commissions,[55] filed an amicus brief on behalf of "Casey Family Programs and Twenty-Six Other Child Welfare

430 (5th Cir. 2019) (panel) (citations omitted) ("[W]e conclude that the special treatment ICWA affords Indian children is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of 'protect[ing] the best interests of Indian children and [ ] promot[ing] the stability and security of Indian tribes.'"); *Zinke*, 338 F. Supp. 3d at 536 ("The ICWA's racial classification applies to potential Indian children, including those who will never be members of their ancestral tribe, those who will ultimately be placed with non-tribal family members, and those who will be adopted by members of other tribes. . . . [T]his blanket classification of Indian children is not narrowly tailored to a compelling governmental interest and thus fails to survive strict scrutiny review.").

53. *See infra* note 54.

54. *Cf. How Can Child Welfare Systems Apply the Principles of the Indian Child Welfare Act as the "Gold Standard" For All Children?,* CASEY FAM. PROGRAMS (Apr. 1, 2022), https://www.casey.org/icwa-gold-standard/ ("[T]he values and spirit embedded in ICWA are critical to the well-being of AI/AN children, youth, and families and should form the basis of child welfare practice for all.").

55. *See* James G. Dwyer, *The Most Dangerous Branch of Science? Reining in Rogue Research and Reckless Experimentation in Social Services*, 87 MO. L. REV. 1, 14–16, 25–26 (2022) (footnote omitted) ("With each new strategy or program they promote, the Casey Foundation claims it will use government funds more effectively to achieve removal-prevention and reunification objectives, which do not necessarily equate to what is best for a child."); Marie Cohen, *The Misuse of Data to Support Preferred Programs: The Case of Family Resource Centers*, CHILD WELFARE MONITOR (Sept. 21, 2021), https://childwelfaremonitor.org/2021/09/21/the-misuse-of-data-to-support-preferred-programs-the-case-of-family-resource-centers/ (demonstrating flaws in research on "family resource centers" that Casey funded and promoted); Marie Cohen, *The Power of Wishful Thinking: The Case of "Race-Blind-Removals" in Child Welfare*, CHILD WELFARE MONITOR (July 27, 2021), https://childwelfaremonitor.org/2021/07/27/the-power-of-wishful-thinking-the-case-of-race-blind-removals-in-child-welfare/ (deconstructing a report Casey commissioned to support "race-blind removals," and noting that the organization did not provide requested documentation for the reported results); Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 576–77, 582–84, 587, 591–92, 609–11, 614–16 (2015) (describing the pervasive lobbying presence of Casey Family programs and its promotion of the Racial Disproportionality Movement despite evidence that the relied-upon research claims were false).

and Adoption Organizations," a title that obscures which of the twenty-seven signatories purports to be a "child welfare organization" rather than an "adoption organization."[56] Many are manifestly neither.[57] Citing the organizations' "decades of experience" with "safeguarding the welfare of children and families," but without citing any child welfare research, the brief makes sweeping claims about children being best served by "preserving" a relationship with a tribal community and with Native American culture.[58] It makes these claims without regard to whether children have ever lived in an Indian community or participated in Indian cultural practices and without regard to whether a child has far more ancestry in cultures other than that of any tribe.[59] The brief plausibly contends that children removed from parental custody generally benefit from keeping other aspects of their life stable.[60] However, it ignores the facts that (a) for most children in state-court maltreatment proceedings, this counsels *against* applying ICWA's placement preferences for tribe members, because the child's social community is not a tribe,[61] (b) a substantial portion of

56. Brief of Casey Fam. Programs & Twenty-Six Other Child Welfare & Adoption Orgs. as Amici Curiae in Support of Fed. and Tribal Defendants at 1, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022) (Nos. 21-376, 21-377, 21-378, 21-380) [hereinafter Brief of Casey Fam. Programs et al.]. In this brief, Casey describes itself as "focused on safely reducing the need for foster care" rather than devoted to doing what is best for children regardless of whether that means more or less foster care. *Id.* at 1. The brief describes CFP's sister foundation, Annie E. Casey Foundation, as seeking "to strengthen families and transform struggling communities" and "to advance racial and ethnic equity and inclusion." *Id.* at 2.

57. *See id.* at 1–8 (naming the organizations with interest as amici curiae). For example, Generations United advocates for grandparents; Black Administrators in Child Welfare and W. Haywood Burns Institute are anti-racism groups; Center for the Study of Social Policy and the Yarg Foundation are general purpose social justice advocates; the National Association of Social Workers advocates for social workers; and Nebraska Appleseed Center for Law in the Public Interest advocates for immigrants and the poor. *See id.*

58. *See id.* at 1.

59. *See id.* at 8 ("Children are best served by preserving and strengthening their family and community relationships to the fullest degree that safety allows."); *id.* at 24–29 ("In the context of Indian children, a child's community includes his or her tribe or related tribes. . . . In *amici's* firsthand experience, a child who has been removed from her biological family can suffer deep rifts in her sense of identity and connection to a shared history. A community-focused approach to child welfare recognizes the importance of maintaining a child's connection to a broader network of caring adults, her culture, and familiar settings.").

60. *Id.* at 25 (citations omitted) ("[P]lacement within a child's community or network serves the interest of stability. Out-of-home placements are very disruptive, and community placement can help the child to 'maintain a continuity of schools, providers and participation in their community.'").

61. *Cf.* NAVAJO DIV. OF HEALTH WITH NAVAJO EPIDEMIOLOGY CTR., NAVAJO POPULATION PROFILE: 2010 U.S. CENSUS 21 (2013), https://nec.navajo-nsn.gov/Portals/0/Reports/NN 2010PopulationProfile.pdf (finding that over half of Navajos live outside the boundaries of the Navajo Nation and

those children are too young to have any social ties outside the immediate family,[62] and (c) a given child's larger social world might not be consistent with his or her welfare.[63] True advocates for children would attend more closely to the reality of their situation. Further, the brief more broadly presents the implausible view that all children impacted by any aspect of ICWA are well-served, falsely asserting that the Act is always applied in a context-specific way.[64] The only place the brief acknowledges that ICWA harms some children is when it recognizes that the Act's preferences regarding adoptive placements cause severance of attachment relationships with long-term caregivers who are not kin or Indian.[65] And this group of purported child advocates then dismisses this harm as a necessary cost of ensuring a court does not "reward" non-Indian caregivers for the fact that litigation is protracted (which is actually not the main cause of children's remaining in foster care long enough to form an attachment—caseworkers' "active efforts" to reunify with parents commonly continue for two years or more).[66] Finally, the brief makes

only one-fifth of them live in a town on the borders).

62. Children Entering Foster Care by Age Group in the United States, ANNIE E. CASEY FOUND., https://datacenter.kidscount.org/data/tables/6270-children-entering-foster-care-by-age-group#detailed/1/any/false/574,1729,37,871,870,573,869,36,868,867/1889,2616,2617,2618,2619,122/13037,13038 (last visited Nov. 8, 2022) (showing twenty percent of children entering foster care are less than one year old, and another thirty percent are one to five).

63. *Cf.* James G. Dwyer, *No Place for Children: Addressing Urban Blight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and "Adult-Only" Residential Zoning*, 62 ALA. L. REV. 887, 896–99 (2011) (arguing that high-rates of poverty and substance abuse in certain localities should influence state decision-making in choosing the best available situations for children).

64. Brief of Casey Fam. Programs et al., *supra* note 56, at 14 ("Rather than departing from universal best practices . . . ICWA embodies a context-specific implementation of those universal best practices."). Among the rules ICWA imposes on state court child welfare proceedings, only the placement preferences are subject to a "good cause" exception (which the Bureau of Indian Affairs has said should not include consideration of the standard of living in a tribal community or a child's attachment relationship if it has developed in a "non-compliant" placement). 25 U.S.C. § 1911(b) (West 1978); 25 C.F.R. §§ 23.132(d)–(e). Thus, for example, the ICWA provision mandating that courts find "beyond a reasonable doubt" that reunification with a parent can never occur without causing a child "serious emotional or physical damage," before they can consider whether termination of parental rights would be in a child's best interests, is exceptionless. 25 U.S.C. § 1912(f) (West 1978). The brief also asserts that ICWA, under BIA guidance, has an exception for "aggravated circumstances" to the requirement that child protection agencies make "active efforts" to reunify maltreated children with parents. Brief of Casey Fam. Programs et al., *supra* note 56, at 21 (citations omitted). However, the sources the brief cites make no mention of aggravated circumstances, a well-defined category of egregious parental conduct that the federal Adoption and Safe Families Act made a basis for foregoing reunification efforts. *See id.*; 42 U.S.C § 671(15)(D)(i) (West 2018).

65. Brief of Casey Fam. Programs et al., *supra* note 56, at 30–32.

66. Brief of Casey Fam. Programs et al., *supra* note 56, at 31.

no effort to demonstrate that state laws applicable to non-Indian children would disserve off-reservation children labeled Indian whose caregivers are reported for abuse or neglect,[67] nor to explain why it is appropriate to elevate in importance the children's Indian ancestry above all other components of their ancestry even when, as is likely true for the great majority of them, the latter are much greater.[68]

Another amicus brief in *Haaland* was filed by a group of organizations that are ordinarily devoted to child advocacy, yet the group's primary argument was that children's best interests are not the only thing that matters in child protection proceedings. Remarkably, this group of "Children's Rights Organizations" asserted that courts in such proceedings must serve parents' rights and tribal interests.[69] Even if that were a defensible position, it would not be a point that advocates for children should make. The group tried to disguise the adult-centered nature of its arguments with peculiar locutions like

67. *See, e.g.*, GA. CODE ANN. §§ 15-11-26, -26(12) (West 2014) ("Whenever a best interests determination is required, the court shall consider and evaluate all of the factors affecting the best interests of the child in the context of such child's age and developmental needs. Such factors shall include: [s]uch child's background and ties, including familial, cultural, and religious . . . ."). Such state laws certainly allow, and some explicitly direct, courts to consider a child's interest in continuity of cultural or religious practices. *See id.* They simply do not presuppose, as ICWA does, that a child needs to be connected to some particular culture regardless of past experience, ethnic makeup, or likely future need. *See id.*

68. *Cf.* Wendy Wang, *Interracial Marriage: Who is 'Marrying Out'?,* PEW RESEARCH CENTER (June 12, 2015), https://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/#:~:text=American%20Indians%20have%20the%20highest,of%20American%20Indian%20male%20newlyweds (stating that rates of interracial marriage have grown steadily since the Supreme Court's 1967 *Loving v. Virginia* decision and showing that the rate of "marrying out" for American Indians is more than twice that for any other group—a whopping 58%); Tristan Ahtone, *Native American Intermarriage Puts Benefits at Risk*, NPR (Mar. 31, 2011, 12:01 AM) https://www.npr.org/2011/03/31/134421470/native-american-intermarriage-puts-benefits-at-risk#:~:text=Native%20American%20Intermarriage%20Puts%20Benefits%20At%20Risk%20More%20than%20half,a%20loss%20of%20federal%20benefits (quoting a professor of American Indian Studies saying "intermarriage has always been the norm," and reporting that many tribes have reduced their blood quantum requirements for membership as a result).

69. *See* Brief of Nat'l Ass'n of Couns. for Child. & Thirty Other Child.'s Rts. Orgs. as Amici Curiae in Support of Fed. & Tribal Defendants at 2, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted,* 142 S. Ct. 1205 (2022) (mem.) (Nos. 21-376, 21-377, 21-378, 21-380) [hereinafter NACC Haaland Brief] (citing the Court's parents' rights decision in Reno v. Flores, 507 U.S. 292 (1993)) ("[T]his Court has made clear that the 'best interest of the child" rule' . . . is not the sole standard in proceedings involving the removal of a child from parental custody."); *id.* at 5 (citing a long list of parents' rights cases); *id.* at 11 (noting approvingly that ICWA's placement preferences promote the stability of tribes); *id.* at 13 (noting that ICWA benefits parents and promotes tribal sovereignty).

"the family's right to raise children in accordance with its own culture," bizarrely suggesting that children share in some group right to raise themselves and enter the world with a culture stamped on their brains.[70] This group likewise blithely labeled children as Indian, and correspondingly imputed to them an interest in tribal immersion, with no regard to what portion of their ancestry is Indian or what their life experience has been.[71] It thereby erased the children's individuality—again, something true advocates would not do. Purported advocates for children did the same in the 2013 *Adoptive Couple v. Baby Girl* case, involving a toddler with 1.2% Cherokee ancestry.[72] Advocates ascribed to the girl an interest of overriding importance in growing up immersed in Cherokee community and culture (rather than any community or culture represented by the other 253/256 of her ancestry), with which she had had no contact before a state court disrupted her long-term adoptive placement by applying ICWA.[73] The NACC Brief in *Haaland* does not even acknowledge the harm to children that ICWA causes by disrupting attachment relationships and by removing off-reservation children from their larger social world to transport them to tribal lands, which can be thousands of miles away from the place they know as home.[74]

For a recent example on the conservative side, the Court in its 2021 term entertained a free exercise challenge to a school voucher-type program that excluded religious schools from participation.[75] In *Carson v. Makin*, the American Federation for Children (AFC) filed an amicus brief along with the

70. *Id*. at 4; *see also id*. at 5–6 ("The Constitutional interest of parents in the relationship with their children includes the family's right to 'bring up children' in accordance with its own culture . . . ."); *id.* at 12 ("ICWA's placement preferences also protect the family's right to 'bring up children' in accordance with its own tradition and religion . . . .").

71. *See id*. at 12, 20–21 (referring generally to the "Indian child's Tribe").

72. 570 U.S. 637, 641 (2013) (holding that ICWA adoption preferences do not apply when the Indian parent has never had custody of the child and no other party has formally sought to adopt the child). Bethany Berger contends the child might have had more Native American ancestry than 1.2% but provides no explanation why 6% or 10% or even 30% would alter assessment of the child's need to be connected to any tribe, in the abstract or relative to other cultural groups represented in her ancestry. *See* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 329 (2015).

73. *See infra* notes 195–196 and accompanying text.

74. *See* NACC Haaland Brief, *supra* note 69, at 20–21 (prioritizing placement of a child with members of the child's Indian Tribe).

75. *See* Carson v. Makin, 142 S. Ct. 1987, 1990 (2022) (hearing a challenge to Maine's prohibition of distributing public funds to sectarian schools through its voucher-type program).

Liberty Justice Center (LJC) and Atlantic Legal Foundation (ALF).[76] AFC describes itself as "a leading national advocacy organization promoting school choice with a specific focus on school vouchers, scholarship tax credit programs, and Education Savings Accounts" and "advancing public policy that empowers parents, particularly those in low-income families, to choose the education they determine is best for their children."[77] So the group, though called a federation "for children," does not advocate for children per se or what research shows to be best for children, but rather for empowering parents (in particular, parents who might be most vulnerable to misinformation provided by schools).[78] Moreover, AFC's bedfellows in this brief are strange indeed; their missions are quite distant from child welfare or even family life more broadly.[79] LJC says it "seeks to protect economic liberty, private property rights, free speech, and other fundamental rights."[80] ALF says its "mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice."[81] Despite its avowed concern to inject "sound science" into judicial proceedings, ALF and its companion amici cite not a single scientific study of anything, nor any facts about the religious schools that Maine excluded, despite declaring that those are "worthy schools."[82] As it happens, the Court manifested no interest in the quality of the excluded schools and, in fact, noted that Maine did not appear to have any meaningful requirements for participating schools other than that they not be religious.[83]

76. Brief of the Liberty Just. Ctr., Am. Fed'n for Child., & Atl. Legal Found. as Amici Curiae Supporting Petitioners, Carson v. Makin at 1, 142 S. Ct. 1987 (2022) (No. 20-1088), 2021 WL 4173211 [hereinafter Brief of the Liberty Just. Ctr. et al.].

77. *Id.* at 1.

78. *See Statement from the American Federation for Children on Efforts to Advance Parental Choice at the Federal Level*, AM. FED'N FOR CHILD. (July 16, 2015), https://www.federationforchildren.org/statement-american-federation-children-efforts-advance-parental-choice-federal-level/ (providing a statement from chairman of the American Federation for Children, Betsy DeVos, thanking Senators Lamar Alexander and Tim Scott for their efforts to empower low-income parents with greater educational choice).

79. *See* Brief for Liberty Just. Ctr. et al., *supra* note 76, at 1–2 (noting that Liberty Justice Center and American Liberty Foundation do not self-describe as organizations whose advocacy efforts focus on the welfare of children or family life specifically).

80. *Id.* at 1.

81. *Id.* at 1–2.

82. *Id*. at 2, 5.

83. *See* Carson v. Makin, 142 S. Ct. 1987, 1999, 2001 (2022).

Another recent example is the briefing in *Fulton v. City of Philadelphia*, which, like *Haaland*, concerned the child protection system.[84] Philadelphia applied the anti-discrimination rule of its public accommodation law to oust a religious agency, Catholic Social Services (CSS), from its foster care system because the agency does not accept same-sex couples for certification as foster parents.[85] CSS was one of roughly thirty private agencies that recruit, certify, train, and support foster parents with whom Philadelphia places children removed from parental custody.[86] Liberals generally welcomed the City's action because they support eradication of discrimination against LGBTQ+ persons by private or public actors and are generally disinclined to indulge social-conservative religious views. Thus, when CSS challenged the exclusion on First Amendment free exercise grounds, numerous liberal organizations and individuals—many presenting themselves as advocates for or experts regarding children's welfare and rights[87]—lined up to file amicus briefs supporting the City, uniformly contending Philadelphia's action benefitted children.[88]

The child-welfare impact was important in *Fulton*, even though (as in *Haaland*) no children were parties.[89] Indeed this consideration was perhaps crucial after the Court decided to apply strict scrutiny,[90] because the clearest candidate for a state interest the Court would accept as justification for the City's action was the welfare of foster-care children, especially in light of Philadelphia's pressing need for more qualified foster parents.[91] Leaders and supporters of the gay-rights movement therefore insisted that CSS's very

84. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

85. *See id.* at 1874–75.

86. *See id.*

87. *See infra* Part II.

88. *See infra* Part III.A.1 (discussing the various groups and individuals who filed Amicus briefs in *Fulton* purporting to be advocates for children's welfare).

89. *See Fulton*, 141 S. Ct. at 1876 (naming Petitioners as CSS and affiliated foster parents.)

90. *See id.* at 1881.

91. *See* Julia Terruso, *Philly Puts Out 'Urgent' Call—300 Families Needed for Fostering*, PHILA. INQUIRER (Mar. 8, 2018), https://www.inquirer.com/philly/news/foster-parents-dhs-philly-child-welfare-adoptions-20180308.html. If the Court had applied rational basis review, which would have required both (a) finding the City's ordinance and application of it religiously neutral and (b) rejecting calls to overturn *Smith v. Employment Division*, the City's several asserted non-child-welfare-related interests might have sufficed. *See Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 685 (E.D. Pa. 2018). These interests included attracting businesses and tourists, promoting social equality for LGBTQ persons, giving taxpayers something in return for financing the child welfare system, and avoiding discrimination lawsuits—all legitimate interests conceivably served by the city's decision but perhaps not "compelling interests that cannot otherwise be served." *Id.*

presence in the foster care system drove away same-sex couples who would otherwise have sought to foster, thereby reducing the size and diversity of the foster-home pool.[92] Yet all nine Supreme Court Justices cursorily rejected that contention as baseless and implausible.[93] The fact that both liberal and conservative Justices gave the central child-welfare claim no credence provides some reassurance that amicus briefs might have no impact when they make unsubstantiated claims. But it also supports a judgment of disingenuousness as to those amici who purported to speak for children—that is, that they used a pretense of child advocacy to serve another, adult-centered cause.[94] It thus helps to substantiate the reality of the phenomenon of *faux* advocacy, which raises serious questions of professional ethics even when ineffective.[95]

Another example, one that supports a concern that *faux* advocacy is sometimes effective, is *Zelman v. Simmons-Harris*, a precursor to *Carson*, in which most members of the Court appeared to endorse blanket contentions that school voucher programs are beneficial for all children who participate.[96]

92. *See infra* notes 243–251 and accompanying text. The City and amici also claimed without any evidence that the City's contracting with CSS psychologically harmed gay foster youth, by sending them a message of some sort. *See infra* notes 243–251 and accompanying text.

93. See *Fulton*, 141 S. Ct. at 1882 ("If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. . . . As Philadelphia acknowledges, CSS has `long been a point of light in the City's foster-care system.'"); *see also id.* at 1886–87 (Alito, J., concurring) ("[N]ot only is there no evidence that CSS's policy has ever interfered in the slightest with the efforts of a same-sex couple to care for a foster child, there is no reason to fear that it would ever have that effect. . . . Remarkably, the City took this step even though it threatens the welfare of children awaiting placement in foster homes. There is an acute shortage of foster parents, both in Philadelphia and in the country at large. By ousting CSS, the City eliminated one of its major sources of foster homes. And that's not all. The City went so far as to prohibit the placement of any children in homes that CSS had previously vetted and approved. . . . The City apparently prefers to risk leaving children without foster parents than to allow CSS to follow its religiously dictated policy, which threatens no tangible harm."); *see also id.* at 1930 (Gorsuch, J., concurring) ("To the City, it makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies.").

94. *See infra* Section III.A.1 (discussing the possible motives of individuals and groups filing amicus briefs in the *Fulton* case).

95. *See infra* Part III (discussing the problems associated with *faux* advocacy).

96. 536 U.S. 639, 662 (2002). For an example of sweeping statements about benefits to all children who attend private school with a voucher, see Brief of Children First America et al., as Amici Curiae in Support of Petitioners at 1, *Zelman v. Summons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1638645 ("This year alone, more than 60,000 low-income children will benefit from a private tuition scholarship."). The *Zelman* majority was actually unclear whether it viewed the benefit of the program as flowing to children (better education) or parents (more choices).

They adopted that factual premise even though Cleveland's program entailed no accountability measures nor restrictions on how state money was spent and, as a result, subsidized transfer of some children to quite troubling religious facilities.[97] As in *Carson*, the Court's holding did not directly rest on an assumption of positive educational effects; the Court conceptualized the voucher program as distributing state money to parents rather than schools, which in the majority's view obviated the Establishment Clause objection to state financial support of religious schools.[98] But it likely made it easier for Justices to sign on to this rationale if they believed the voucher program was entirely beneficial for all children whose parents used it to transfer them from public schools to religious or other private schools.[99] The case was generally viewed as pitting the welfare of certain lucky children against the survival of the public school system.[100]

Another example of Justices possibly having been hoodwinked with far-reaching consequences was a 1981 procedural due process decision concerning termination of parental rights: *Santosky v. Kramer*.[101] Termination of parental rights (TPR) is typically a two-step process under state law, requiring first a finding of parental unfitness (sometimes called "the fault prong") and then a finding that ending the legal parent-child relationship is in the child's best interests.[102] The Court held that state courts must apply a clear and convincing evidentiary standard in the first step.[103] A crucial factual assumption supporting this holding, urged in an amicus brief by the ACLU Children's Rights Project,[104] was that parents and children share an interest in accurate

See generally Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002) (concluding the Ohio Pilot Project Scholarship Program provided "benefits directly to a wide spectrum of individuals". Certainly, the state did not characterize its aim as gratifying parents. *See id.*

97. *See* JAMES G. DWYER, VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM 175–82 (2002) (describing an absence of accountability in the Cleveland voucher program, programs in other jurisdictions, and some of the schools receiving voucher money).

98. *See Zelman*, 526 U.S. at 650.

99. *See id*. at 650–51.

100. *See* Dwyer, *supra* note 55, at 33–39.

101. 455 U.S. 745, 769 (1982).

102. *Id.* at 748.

103. *Id.* at 769.

104. *See* Brief of the Am. Civ. Liberties Union Child.'s Rts. Project, et al., Amici Curiae at 11–12, Santosky v. Kramer, 455 U.S. 745 (1982) (No. 80-5889), 1981 WL 389937, at *11–12 [hereinafter ACLU Brief] (asserting that children's "separate interests neatly—and completely—converge" with parents in TPR cases).

application of a state's fitness test.[105] That supposition entails a twin set of empirical propositions—namely, that accurate application of parental fitness tests is good for parents and that it is good for children.[106]

So, the ACLU Children's Rights Project can be understood to have claimed it is always or typically in children's interests for courts to find fitness and dismiss a TPR petition whenever their parents actually meet whatever test a state has for that, and to find unfitness when parents fail the state's test, whatever it is.[107] However, the advocacy organization provided no evidentiary basis for this claim.[108] The claim is actually absurd, as becomes apparent when one realizes that states can have any substantive fitness standards they like, so the potential range is infinite.[109] A state could in theory deem parents unfit if they ever said an unkind word to any child, or conversely could deem parents fit so long as they have never beaten the child in question into a coma.[110] On the former test, it would be best for children on the whole to have many false negatives. On the latter, many false positives. The former example makes apparent that the supposition that parents' interests are always served by "accurate" decisions was also nonsense. Looked at another way, parents' interests might be thought served in every case simply by winning—even if that requires misapplication of a rule—whereas accurate application of TPR rules would inherently serve children's interests only if "best interests" were the sole standard and both a necessary and sufficient condition. The range of actual state fault standards is substantial, and there is no reason to suppose any existing standards are calibrated to serve children well rather than to serve parental interests up to the point where parental conduct is so

105. *See Santosky*, 455 U.S. at 760 ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); *id.* at 761 ("[A]t the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures."); *id.* at 765 ("[T]he parents and the child share an interest in avoiding erroneous termination.").

106. *Id.* at 761 (supposing that both the child and parents benefit from accurate fitness tests to avoid erroneous terminations of parent-child relationships).

107. *See* ACLU Brief, *supra* note 104, at 12 ("The child's best interests as well as the parent's are better served by a careful, fair decision-making process . . . .").

108. *See generally id.* (demonstrating the organization's lack of evidence).

109. *See* Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. & FAM., CHILD.'S BUREAU 1–5 (2021), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/groundtermin/ ("Each State is responsible for establishing its own statutory grounds, and these vary by State.").

110. *See, e.g.*, Child Welfare Information Gateway, *supra* note 109, at 2–4 (demonstrating the range of state standards).

bad it generates social costs.[111] Yet, the Court accepted as true this assertion that children's interests always lie in accurate application of states' parental-fitness standards, and this seems to have been outcome-determinative.[112] Ever since, state courts have had to apply a heightened evidentiary standard (clear and convincing) to allegations of parental unfitness in TPR cases.[113] In addition, lower courts have repeated this premise—a unity of interests between child and parent in fitness determinations—innumerable times as a truth that should guide courts, including in non-TPR contexts.[114]

Zelman and *Santosky* manifest correlations between case outcomes and factual assertions by amici presenting themselves as advocates for children.[115] To establish that any brief actually influenced the Justices, though, might be impossible. An opinion rarely says, "[W]e are persuaded by amicus brief X as to the truth of factual claim Y."[116] Even if it did, one might not be able to rule out that some Justices were predisposed to assume a claim true and cited a brief only to lend credibility to their view. But the immense effort and expense committed to producing amicus briefs suggests widespread belief that

111. *Id.* at 2, 4.

112. *Id.* The first prong of procedural due process analysis is the private interest at stake, and assuming a unity of interests between parent and child (and to some extent the state as well) enabled the Court to depict the balancing test as comparing unified and powerful interests of parents, children, and state as *parens patriae* against a weak state interest in minimizing administrative costs. *Santosky*, 455 U.S. at 766–68.

113. *Id.* at 756, 769–70 (establishing a "clear and convincing evidence" standard in parental fitness cases and holding unconstitutional a "preponderance of the evidence" standard).

114. *See, e.g.*, Lipman v. Budish, 974 F.3d 726, 751 (6th Cir. 2020) (civil rights suit by estate of murdered child against child protection agency for failing to remove her from parental custody); Hall v. Bush, No. 1:20-CV-731, 2021 WL 4239855, at *8 (W.D. Mich. July 21, 2021), *rep. & recommendation adopted sub nom*. Hall v. Bush, No. 1:20-CV-371, 2021 WL 3750164 (W.D. Mich. Aug. 25, 2021) (detailing a civil rights suit by parents against child protection agency for removing a child); Kovacic v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs., 809 F. Supp. 2d 754, 776 (N.D. Ohio 2011), *aff'd and remanded*, 724 F.3d 687 (6th Cir. 2013) (regarding a civil rights suit on behalf of a child for wrongful removal); Roska v. Sneddon, 366 F. App'x 930, 934 (10th Cir. 2010) (citing *Santosky's* unity-of-interest declaration to support assertion that "[t]he Supreme Court has long recognized the right to familial relations as a component of substantive due process"); United States v. McCotry, No. IP 06-CR-25-01-H/F, 2006 WL 2460757, at *11 (S.D. Ind. July 13, 2006), *rev'd sub nom*. United States v. Hollingsworth, 495 F.3d 795 (7th Cir. 2007) (describing a parental complaint that a police-directed interview of a child at school regarding her parents' drug use violated the family's right to privacy).

115. *See supra* notes 96–114 and accompanying text.

116. *But see* Larsen, *supra* note 4, at 1777–78 ("[T]he past several decades have also brought a dramatic upswing in citation to amicus briefs in Supreme Court opinions.").

they are influential.[117] Rules of professional conduct that fault lawyers for making claims they cannot reasonably believe to be true also seem to rest on an assumption that judges can be misled and influenced in their decisions by false claims, often enough for jurisdictions to proscribe the conduct and threaten penalties for breach of the duties of honesty, candor, and diligent research and investigation.[118]

III. FEATURES OF *FAUX* ADVOCACY

Cataloging the problematic characteristics of supposed advocates and their presentation of factual claims will help determine whether and how to adopt measures to discourage or prevent false or misleading claims in amicus briefs.

A. Representation Problems

Two fairly common phenomena in purported advocacy for children are false claims of commitment or expertise and joint filing with organizations that have conflicting interests. Feigning expertise occurs in all types of cases,[119] but feigned commitment and illicit conflicts might arise principally with cases involving non-autonomous persons.

117. *See* Masciocchi, *supra* note 31, at 23–35 (discussing the widespread use and impact of amicus briefs).

118. *See id.* at 25 (describing Colorado Rules requiring attorneys for amici to "comply with the duty of candor and . . . not 'make a false statement of material fact or law to a tribunal,' . . . nor 'offer evidence that the lawyer knows to be false,'" and proscribing arguments lacking "a basis in law and fact . . . that is not frivolous"); *id.* ("Amicus counsel plainly must take care to cite reputable sources and portray them accurately.").

119. *See* Larsen, *supra* note 4*,* at 1800 ("[M]any of these amicus briefs are also 'mismatched' from author to subject matter—meaning that a group who is not an expert on the factual subject submits factual authorities to the Court anyway."); Fallon, *supra* note 8, at 228 ("[S]igners of scholars' briefs represent their submissions as offering distinctively scholarly expertise and perspective.").

1. Claiming Authority One Does Not Have

In juvenile courts, to represent individual children requires special qualifications—typically special training and a period of supervision by experienced child advocates.[120] Advocates must adhere to special guidance a jurisdiction gives for carrying out the role and, if attorneys, the general code of professional responsibility.[121] The latter includes the same duties of diligence and undivided loyalty that a divorce or criminal defense attorney would owe an adult client, as well as duties of candor and integrity in making representations of fact to the court.[122]

In amicus advocacy, it seems there are no rules.[123] The eugenics group in The Hypo could file a brief as advocates for mentally disabled adults without showing any true devotion to their wellbeing or any special ability to speak for or about them, and neither they nor the attorney who files the brief for them would owe any duty of diligence or loyalty to those adults, who are not technically clients. In the real world, groups and individuals have received permission to file qua advocates or experts regarding child welfare despite having no credentials as either or despite having a résumé suggesting divided loyalty or sole allegiance to other causes and constituencies.

For example, in *Fulton*, six academics filed an amicus brief as "Scholars of the Constitutional Rights and Interests of Children" (Scholars' Brief).[124]

120. *See, e.g.*, 750 ILL. COMP. STAT. 5/506 (West 2016); *Florida Guardian ad Litem FAQ*, FLA. GUARDIAN AD LITEM OFF. (2022), https://guardianadlitem.org/faq/; *Responsibilities of a Child Advocate Attorney*, ATTORNEYS.COM, https://www.attorneys.com/child-custody/responsibilities-of-a-child-advocate-attorney (last visited Nov. 8, 2022).

121. *See, e.g.*, *Juvenile Justice Standards*, AM. BAR. ASS'N (Nov. 16, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/juvenile_justicestandards/ (discussing ABA expectations and defining the role of the lawyer); 750 ILL. COMP. STAT. 5/506 (stating the requirements for lawyers and child advocates in the representation of a child); AM. BAR ASS'N, ABA, MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS 5–9 (2011), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf (detailing the expectations of a child's lawyer).

122. *See id.* at 2.

123. *Cf.* SUP. CT. R. 37 (indicating that an amicus brief is "not favored" if it would not bring new and relevant information to the Court's attention, and requiring a statement of interest in the unusual circumstance that one of the parties has not given blanket consent, but not requiring any demonstration of qualification); Masciocchi, *supra* note 31, at 23 (noting the "Federal Rules of Civil Procedure are silent on the filing of amicus briefs").

124. *See* Brief of Amici Curiae Scholars of the Const. Rts. & Ints. of Child. in Support of Respondents at 33–34, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5027315 [hereinafter Scholars' Brief].

Half of the six academics specialize in fields unrelated to child welfare, such as corporate or employment law.[125] Much of that brief was devoted to rights and interests of adults, same-sex couples in particular, and the brief never articulates a right of children.[126] Though there is some disagreement among academics about the degree to which "scholar briefs" should meet standards of scholarship, there is unanimity on the view that law professors should not sign such a brief unless they are truly experts in the field and motivated by sincere desire to assist the court rather than to promote a political or other personal agenda.[127]

With advocate briefs, instances of questionable commitment or multiple loyalties are common.[128] As noted above, Casey Family Programs' history of promoting policies protective of biological-parent rights and purchasing research to support that policy—research that consistently fails to assess child

125. *See id.* Further investigation might reveal plausible basis for the self-description, but judging from faculty webpages and CVs posted thereon: Cary Shelby "specializes in corporate and securities law," teaches various business courses, and has no courses or publications relating to children. *Cary Martin Shelby, Professor of Law,* WASH. & LEE UNIV. SCH. OF L., https://law.wlu.edu/faculty/full-time-faculty/cary-martin-shelby (last visited Nov. 8, 2022). Lauren Fontana is a Director of Affirmative Action Programs and lecturer in public affairs and also appears to have never produced scholarship on children's issues. *Lecturers: Lauren Fontana, J.D., Director of Affirmative Action Programs*, UNIV. OF COLO. DENV. SCH. OF PUB. AFFS., https://publicaffairs.ucdenver.edu/people/lecturers/Fontana-Lauren-UCD6000598400 (last visited Nov. 8, 2022). Catherine E. Smith has published a few articles ostensibly about children's rights, but her webpage lists "Employment and Labor Law, Torts, and Workplace Law," and nothing relating to children, as areas of expertise. *Catherine E. Smith, Professor,* UNIV. OF DENV. STRUM COLL. OF L., https://www.law.du.edu/about/people/catherine-smith (last visited Oct. 9, 2022). A fourth signer, Angela Onwuachi-Willig, has taught and published in family law, but her scholarship relating to minors consists of three short, co-authored articles on anti-bullying policies; her primary focus seems to be on adult issues. *Curriculum Vitae, Angela Onwuachi-Willig*, B.U. SCH. OF L., https://www.bu.edu/law/files/2018/08/angela-onwuachi-willig.pdf (last visited Nov. 8, 2022).

126. *See* Scholars' Brief, *supra* note 124, at 19–31; *cf.* Larsen, *supra* note 4*,* at 1762 ("It is a mistake to conclude that the Justices can easily tell which of these amici are real factual experts and which of them are not.").

127. *See, e.g.,* Amanda Frost, *In Defense of Scholars' Briefs*, 16 GREEN BAG 2D 135, 139 ("[A] scholar should only sign a brief if she: (1) is an expert in the area of law addressed in the brief; (2) has no… personal stake in the case . . . ."); *id.* at 141 ("[S]cholars are uniquely disinterested, in that they have no financial or personal stake in most litigation."); *id*. at 141, n.19 (suggesting signing a brief to enhance "status in the academy" would be problematic and might be revealed by "a professor list[ing] her decision to join in such a brief on any publicly available document describing her accomplishments," such as a faculty webpage); *id. at* 146 ("[L]aw professors should not author or sign an amicus brief that makes arguments based solely on their personal preferences . . . ."); Fallon, *supra* note 8, at 260.

128. *Cf.* Fallon, *supra* note 8, at 235–37 (discussing the complexity of interests that parties seeking to file amicus briefs may hold).

welfare outcomes—belies its self-representation as a child advocacy organization in its *Haaland* and *Adoptive Couple* amicus briefs.[129] In *Adoptive Couple*, another amicus brief was filed by the Oklahoma Indian Child Welfare Association (OICWA),[130] whose avowed mission "is to promote the well-being of American Indian children, their families, and their tribes."[131] On some matters, interests of children, families, and tribes might align—for example, government financial assistance for schools on tribal lands. But, certainly situations arise where there is divergence. For example, tribes have an interest in avoiding bad external publicity,[132] but children being raised by adults in a tribal community plagued by extraordinarily high rates of domestic violence and child abuse have an interest in the larger American society being aware of that.[133] In *Adoptive Couple*, a potentially important issue was whether the child in question had a compelling interest (avoiding disruption of her attachment relationship with the couple that had been parenting her since birth) at odds with tribal interest in bolstering membership.[134] OICWA's brief did not acknowledge the former interest but spoke at length about the tribe's survival.[135]

In *Fulton*, Lambda Legal Defense, a leader of the movement promoting equal rights for same-sex couples, filed an amicus brief on behalf of

129. *See* Cohen, *Misuse of Data*, *supra* note 55; Cohen, *Power of Wishful Thinking*, *supra* note 55; Bartholet, *supra* note 55, at 582–92, 609–11, 613–15.

130. Brief of Amicus Curiae for the Okla. Indian Child Welfare Ass'n Supporting Affirmance at 1, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1308819.

131. *See Home: Our Mission*, OKLA. INDIAN CHILD WELFARE ASS'N, https://www.oicwa.org/ (last visited Nov. 8, 2022).

132. *Cf.* National Congress of American Indians with Pyramid Communications, Effective Tools for Communications and Leadership in Indian Country 2, https://www.ncai.org/news/tribal-communicators-resources/NCAI_ConferenceBooklet_FINAL_SinglePage.pdf (last visited Nov. 8, 2022) ("Tribal nations and tribal organizations will always be stronger when we can speak with one voice—one that is strong, unified and clear.").

133. *See Domestic Violence Rampant Among Native Americans*, DomesticShelters.org (Mar. 13, 2017), https://www.domesticshelters.org/articles/statistics/domestic-violence-rampant-among-native-americans ("According to a study from the National Institute of Justice, some 84 percent of American Indian and Alaska Native women have experienced violence in their lifetime, and more than half have endured this violence at the hands of an intimate partner. More than two-thirds of the women, or 66 percent, say they have been the victims of psychological aggression by a partner.").

134. Adoptive Couple v. Baby Girl, 570 U.S. 637, 688–89, 692 (2013) (Sotomayor, J., dissenting) (recognizing that conflict and taking the position that tribal interests trump because that was Congress's intent).

135. *See* OICWA Brief, *supra* note 130, at 11–13, 20; *infra* note 170.

"Organizations Serving LGBTQ Youth."[136] Most of the organizations listed as signatories actually primarily serve adults, so, like Lambda Legal, presumably would have had great difficulty taking any position contrary to that of the same-sex couples complaining of CSS's presence in the system, regardless of how the case developed over time.[137] In *Carson*, as noted, an organization called American Federation for Children filed a brief but did not even mention children in its statement of interests.[138] Instead, it characterized its mission as "advancing public policy that empowers parents."[139]

2. Putting Oneself in a Position of Conflict of Interests

Some organizations might ordinarily have a singular focus on child well-being and rights but join in an amicus brief with organizations whose focus is different and potentially—indeed, likely—conflicting. Child advocacy organizations have filed along with churches or organizations advocating for adults whose interests or rights are implicated by a case.[140] Those other entities might have invited the co-briefing to enhance their credibility in making assertions about child welfare.[141] The situation clearly could result in child advocates coming under pressure from those other groups to endorse factual claims or case outcomes they might not otherwise embrace, or to forego

136. Brief Amici Curiae Orgs. Serving LGBTQ Youth in Support of Respondents at 2, Fulton v. Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5020356.

137. *Id.* at 2–9 (naming organizations which serve LGBTQ communities at large rather than LGBTQ youth). These organizations also have no evident experience with any foster care system. *Id.* at 1.

138. Brief of the Liberty Just. Ctr. et al*., supra* note 76, at 1.

139. *Id.*

140. *See, e.g.*, Brief Amici Curiae of Miguel H. Diaz, Ambassador to the Holy See et. al. at 1, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2020) (No. 19-123), 2020 WL 5044725 [hereinafter Holy See Brief] ("*Amici* are organization and individuals representing women and men of faith, children and employees of numerous organizations."); *see also Religious, Civil Rights, and Child Advocacy Groups Support Same-Sex Couples in Legal Battle to Marry*, ACLU (Sept. 26, 2007), https://www.aclu.org/press-releases/religious-civil-rights-and-child-advocacy-groups-support-same-sex-couples-legal (reporting on amicus briefs submitted by "scores of religious, civil rights, and child advocacy organizations, along with numerous California municipal governments, bar associations, and leading legal scholars").

141. *See* Michael C. Dorf, *Scholars' Amicus Brief Controversy Reflects the Evolving Relationship Between the Bench and the Legal Academy*, VERDICT (Nov. 21, 2011), https://verdict.justia.com/2011/11/21/scholars-amicus-brief-controversy-reflects-the-evolving-relationship-between-the-bench-and-the-legal-academy ("[A]lthough individuals and organizations sometimes spontaneously volunteer to file amicus briefs, often the parties and their attorneys play an active role in soliciting such briefs from third parties with interests and/or expertise that may be relevant to the Court.").

assertions, arguments, or positions they would otherwise adopt.[142]

Ordinarily, representatives of an advocacy organization could waive a conflict, but this is ethically problematic if the organization presents itself to a court as advocating for persons who are not its members and who anyway are not competent to authorize the waiver.[143] With competent clients, one must explain the conflict and any potential downside that joint representation entails, then encourage them to do what is in their best interests.[144] With children just brought into foster care or at risk of removal from home, it would obviously be inappropriate for appointed lawyers to ask them to waive a conflict or for the lawyers themselves to waive the conflict. That amicus advocates for children are self-appointed and have no contact with the children does not make it any more appropriate to enter into a conflict situation.

Fulton provides several examples. Child USA, a think tank that does valuable work relating to foster care and prides itself on developing "evidence-based solutions and information needed by policymakers," [145] signed on to a brief along with the U.S. Ambassador to the Holy See and several organizations that promote equality rights of adults.[146] What little the brief had to say about children rested on factual claims with no evidence base.[147] Another brief was filed jointly by advocates for child welfare, advocates for adults wishing to adopt, and advocates for social workers—a problematic mix to be sure.[148]

In *Adoptive Couple* and *Haaland*, many self-described "Child Welfare Organizations" joined the brief orchestrated by Casey Family Programs.[149]

142. *See, e.g.*, Holy See Brief, *supra* note 140, at 1–2 (listing Child USA, a child advocate group, as a co-author on a brief arguing for rights of same-sex couples).

143. *Cf.* Masciocchi, *supra* note 31, at 25 (discussing the importance of legal counsel avoiding conflicts of interest in amicus briefing).

144. *See* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 143 (9th ed. 2019).

145. *See Press Release: Child USA to Honor Advocate Gretchen Carlson and Other Heroes in Child Protection at National Constitution Center*, CHILD USA (Nov. 1, 2022), https://childusa.org/press/ (describing Child USA's mission).

146. Holy See Brief, *supra* note 140, at 1–3.

147. *See* Holy See Brief, *supra* note 140, at 13, 18 (asserting without citing any evidence that allowing CSS to continue with its policy would "deprive children of loving and nurturing families").

148. *See* Brief for Voice for Adoption & N. Am. Council on Adoptable Child, et al. as Amici Curiae in Support of Respondents at 1, Fulton v. City of Philadelphia, 141 S Ct. 1868 (2020) (No. 19-123), 2020 WL 5027322 [hereinafter CWLA Brief].

149. Brief for Casey Fam. Programs & Child Welfare League of Am. et al. as Amici Curiae in Support of Respondent Birth Father at 1–2, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No.

Lead counsel for the brief in both cases was someone who founded and directs a parent-advocacy clinic and who authored a book arguing against recognition of rights for children.[150] As noted above, the *Haaland* Casey brief had a quite disparate group of signatories, including some whose mission is far afield from child welfare.[151] Also in *Adoptive Couple*, the "National Indian Child Welfare Association" joined a brief with groups whose mission is simply promoting tribal sovereignty and interests—namely, the Association of Indian Affairs, National Congress of American Indians, Indian Tribes, and "Other Indian Organizations."[152] The brief listed three "main goals of ICWA," including "protect the rights of biological parents and extended families," but made only oblique reference to children's wellbeing through a lens of tribal rights.[153]

In cases addressing state aid to religious schools, actual or purported child advocacy organizations have joined briefs with organizations devoted generally to religious freedom, libertarian politics, and parental rights.[154] In *Carson*, as noted, the "American Federation for Children" joined with the Liberty Justice Center and the Atlantic Legal Foundation.[155] In *Zelman*, a group called

12-399), 2013 WL 1279468; *see* Brief of Casey Fam. Programs & Ten Other Child Welfare & Adoption Orgs. as Amici Curiae in Support of Petitioners at 1–2, Haaland v. Brackeen, 994 F.3d 249 (5th Cir. 2021) (No. 21-376, 21-377) 2021 WL 4803872 [hereinafter Casey Fam. Haaland Brief].

150. *See* Brief of Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father, *supra* note 149, at 38; Casey Fam. Haaland Brief, *supra* note 149, at 23; *Martin Guggenheim*, N.Y.U. L. SCH., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=19969 (last visited Nov. 8, 2022) (listing Martin Guggenheim as faculty co-director and outlining that the Family Defense Clinic represents parents and other adult relatives of children in foster care in New York City); MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS (2015); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005).

151. *See also* CWLA Brief, *supra* note 148, at 1 (naming signatories which included groups addressing issues including social worker rights and child abuse).

152. Brief for Amici Curiae Ass'n on Am. Indian Affs. & Nat'l Cong. of Am. Indians et al. in Support of Respondents at 1, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279462.

153. *Id.* at 3 ("[R]ecognize the vital role of Tribes in protecting their children through the confirmation of their exclusive jurisdiction over children resident or domiciled on the reservation, as well as their right to intervene in (and in appropriate cases, seek transfer of) state child custody proceedings in order to effectuate their *parens patriae* interest in Indian children . . . .").

154. *See, e.g.*, Brief of the Liberty Just. Ctr. et al., *supra* note 76, at 1; Brief of the Liberty Just. Ctr. & Am, Fed'n for Child. as Amicus Curiae in Support of Petitioners at 1, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195), 2019 WL 4858287 [hereinafter Am. Fed'n Brief].

155. Brief of the Liberty Just. Ctr. et al., *supra* note 76, at 1; *see* Am. Fed'n Brief, *supra* note 154, at 1.

Children First America joined in a brief with several organizations having some variant of "parental choice" in their names.[156] In any given case, these other organizations might on some issues adopt a position that is in fact consistent with child wellbeing. The point is that child wellbeing per se is not their avowed organizational aim.

B. Content Problems

Even if an organization is truly devoted to child advocacy and has true expertise in child welfare, and even if it files alone or only in conjunction with other true child advocacy organizations, it might nevertheless stray from its child-advocacy mission in a given case. Some cases put leaders of such organizations in a personally difficult position, presenting a potential conflict between children's welfare and the interests of groups of adults with which they sympathize.[157] This phenomenon is not unique to the child welfare context; some advocates for abused women, for example, might feel conflicted when contemplating that domestic-violence perpetrators are disproportionately black or Native American and poor.[158] Different people resolve such conflicts in different ways.[159] As shown below, on both ends of the political spectrum one might find purported advocates for children who put some other cause or constituency first in hard cases. This Section identifies types of problems with content of amicus briefs that might sometimes reflect this phenomenon.

156. *See, e.g.,* Brief of Child. First Am., et al., as Amicus Curiae in Support of Petitioners, *supra* note 96, at 1.

157. *Cf.* Bartholet, *supra* note 46, at 725–26 ("While the dominant liberal group claims to care about child interests, its real goal appears to be to serve the interests of poor adults and to alleviate the suffering associated with poverty, including any harm that parents might suffer from state intervention in cases of child maltreatment.").

158. *See National Intimate Partner and Sexual Violence Survey, 2010 Summary Report*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DIVISION OF VIOLENCE PREVENTION & CONTROL 39–40 (2011) https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf ; *cf.* JENNIFER F. WIECH, HOW SOCIAL WORKERS RESOLVE THE ETHICAL DILEMMAS THAT ARISE WHEN WORKING WITH WOMEN EXPERIENCING DOMESTIC VIOLENCE 4 (2009) (outlining ethical dilemmas faced by social workers including "honoring cultural values when [domestic violence] is present.").

159. *See* WIECH, *supra* note 158, at 34 (summarizing findings of the study where responses varied from intervening, non-intervening, and seeking police intervention).

1. Asserting Rights of Other Persons and Groups

Self-described child advocates have devoted an extraordinary amount of space in their amicus briefs to rights of persons and groups other than children. Sometimes asserting rights of others is an effective means of securing victory for one's clients if the clients' own interests carry less weight—for example, when business owners assert third-party standing to invoke constitutional rights of customers, to oppose certain business regulations.[160] But in all cases described in Part II, children plainly have the most important interests at stake, and it would not be difficult to translate those interests into constitutional rights.[161] Moreover, in all those cases, there were plenty of advocates for the adult interests at stake, so the child advocates' invocation of adult rights added nothing of substance.[162] It might serve to signal non-objection to an adult-focused decision, but that could have been done without endorsing claims of adult entitlement, which true advocates for children should be wary of gratuitously doing. In the long run, that practice could undermine their advocacy efforts, bolstering rights that operate against their position in other cases and weakening their credibility qua child advocates.

In *Fulton*, a brief filed by the intervenor "Support Center for Child Advocates," as well as nearly all amicus briefs filed by self-styled advocates for and experts on children's rights and welfare, were replete with assertions of rights of LGBTQ+ *adults*—principally, against discrimination in "public accommodations" and against experiencing stigma.[163] Child USA's arguments were primarily about eliminating discrimination against adults based on their sexual orientation.[164] The Scholars' Brief likewise mostly extols rights of would-be foster parents against discrimination.[165] Indeed, it assimilated the case to the Supreme Court's 1984 *Palmore v. Sidoti* decision,[166] which

160. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 195 (1976).

161. *See, e.g.*, *infra* notes 246–247 and accompanying text (describing briefs that did this in *Fulton* and in *Adoptive Couple*); Dwyer, *supra* note 63, at 939–42 (analyzing voucher programs from a child-centered perspective); James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons,* 56 UCLA L. REV. 755, 758–60 (2009) (articulating a right of children against the state's forcing them into a legal relationship with or custody of unfit parents).

162. *See, e.g.*, Scholars' Brief, *supra* note 124, at 1.

163. *See* Brief for Intervenor-Respondents at 3, 10–21, 46–48, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2020) (No. 19-123), 2020 WL 4820032.

164. Holy See Brief, *supra* note 140, at 5, 13–15, 34.

165. *See* Scholars' Brief, *supra* note 124, at 20, 22, 25, 27, 31.

166. *Id.* at 19–20.

subordinated the welfare of the child at issue in a custody dispute to the ascribed equal protection rights of the mother and her new partner, whose interracial relationship had caused peer conduct harmful to the child, and to the progressive societal aim of eliminating racism, making the child bear the cost of fulfilling those supposed rights and pursuing that aim.[167] The *Palmore* Court effectively said social equality for an oppressed group of adults trumps child welfare,[168] and by invoking this aspect of Palmore in support of their position these scholars were basically saying the same, while purporting to be expositors of children's rights.[169] This subordination of child welfare to progressive societal aims might be morally defensible,[170] but it is not something that purported advocates for children ought to be urging a court to do.

The *Fulton* brief for Children's Rights et al., a large collection of organizations that are ordinarily bona fide advocates for children, opens by stating that the group's focus is on "protecting children's rights" and by claiming, with a bit of grandiosity, to "speak on behalf of the children throughout the nation."[171] Yet the brief's primary focus is not children or child welfare; instead it focuses on the asserted wrong to taxpayers and to adults who incur discrimination in seeking to benefit from what these organizations blithely term a "public service[]."[172] Like so much *faux* advocacy for children, there

167. 466 U.S. 429, 433–34 (1984).

168. *See id.* at 433–34 ("The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. . . . Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights . . . .").

169. Scholars' Brief, *supra* note 124, at 19–20, 23 (acknowledging that in *Palmore* "the [trial court] judge found that placement with the father was in the child's best interest" and that the Supreme Court reversed not based on a conclusion that this finding was inaccurate, but because it determined that the Fourteenth Amendment requires courts to aim above all to eradicate discrimination and private biases, and endorsing this view).

170. *But see* JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 191–95 (2006).

171. *See* Brief of Child.'s Rts. & Professor Bruce Boyer et al. as Amici Curiae Supporting Respondents at 15, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (N. 19-123), 2020 WL 5074340 [hereinafter Brief of Child.'s Rts. et al.].

172. *Id.* at 16 ("Engaging in prohibited discrimination with taxpayer funds while performing a delegated government service intended to benefit children is not in the public interest."); *id.* at 18, 28 (saying "*Amici Curiae's* concern is with the harmful discrimination . . ." and citing as the compelling state interest that justifies infringing CSS's supposed free exercise right "eradicating discrimination" rather than promoting children's welfare); *id.* at 19–20 ("Allowing CSS a unilateral contractual exemption from the City's neutral anti-discrimination policy sends a harmful and dangerous message to . . . potential foster parents, other foster agencies, and the City's taxpayers."); *id.* at 20 ("It tells all Philadelphians that their government is unable to enforce its anti-discrimination policies or protect

is a series of adult-centered complaints followed by insistence, with no evidentiary basis, that there is also harm to children.[173] In *Haaland* and *Adoptive Couple*, some briefs filed by purported child advocacy organizations primarily touted the rights of parents and tribes.[174] In aid-to-religious-school cases, supposed child advocates supportive of aid likewise extol parental rights.[175] In *Santosky*, the ACLU Children's Rights Project even asserted, remarkably, that parents' rights outweigh the state's *parens patriae* interest in protecting child welfare.[176]

2. Saying Little About Children's Rights and Interests

Corresponding to the misplaced focus on adult rights and interests is a failure to devote concerted attention to children's experience and needs. When representing individual children in juvenile court matters, a guardian *ad litem* should collect evidence from the children and from people involved in the children's lives about how they are faring, what they wish for, what services and living situations are available for them, how the adults in their world are behaving, and so forth.[177] Only after reviewing such evidence

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them from discrimination . . . .*")*; *id.* ("The City's taxpayers certainly have an interest in ensuring that the millions of dollars in public funds CSS receives each year are not being used to allow that government contractor to deny services to some of those very taxpayers."); *id.* at 28 ("[T]he City has a compelling interest in eradicating discrimination."); *id.* (characterizing private foster care agencies as "receiving public funds to provide services to the general public"). In contrast, CSS characterized its work as a service to children. *See Fulton*, 141 S. Ct. at 1928 (Gorsuch, J. concurring) ("[A] letter [CSS] sent to the City before litigation even began . . . contends that the organization's services do not qualify as 'public accommodations' because they are 'only available to at-risk children who have been removed by the state and are in need of a loving home.'").

173. Brief of Child.'s Rts. et al., *supra* note 171, at 20 ("These public interests served by the City's anti-discrimination policy also serve the best interests of the children *Amici Curiae* represent.").

174. *See, e.g.,* NACC Haaland Brief, *supra* note 69, at 5–9; OICWA Brief, *supra* note 130, at 8–14; Brief of the Hamline Univ. Sch. of L. Child Advoc. Clinic as Amicus Curiae in Support of Respondents Birth Father and the Cherokee Nation at 5–9, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1247775 [hereinafter Hamline Brief]; Brief of Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father, *supra* note 149, at 12 ("Birth fathers have the right to parent their children, with or without the birth mother.") *id.* at 20 ("[T]he express consent of Father was required for any adoptive placement."); *id.* at 21 ("This Court has characterized '[t]he liberty interest *** of parents in the care, custody, and control of their children' as 'perhaps the oldest of the fundamental liberty interests recognized . . . .'").

175. *See, e.g.*, ACLU Brief, *supra* note 104, at 7, 10, 12, 18, 23.

176. *Id.* at 23.

177. *See* Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further*

closely should they presume to advance an opinion about what is best for a child.[178] Children in foster care, in particular, are dealing with a quite complex and challenging reality, and their own concerns are often different from what an adult's might be or what we might expect.[179]

Yet briefs filed by self-styled advocates for children in *Haaland, Fulton, Adoptive Couple*, *Zelman*, and other cases offer only simplistic platitudes and fail seriously to consider how their preferred outcome could negatively impact children.[180] The Casey Family Programs brief in *Haaland* assumes, with no evidentiary support, that children labeled by a federal law as "Indian" have an overriding interest in maintaining "their culture," which Casey assumes to be, solely because of the legal label rather than any facts about actual children, the culture of an Indian tribe.[181] The erasure of children's reality and individuality is striking. OICWA dismissed "baby girl's" attachment relationship as irrelevant, stating: "The South Carolina Court held that the bonding that took place during the protracted litigation did not constitute good cause to deviate from the ICWA placement preferences. . . . This finding is true to the ICWA statute and consistent with congressional intent."[182] In *Fulton*, the intervenor Support Center for Child Advocates said nothing about children's interests at all until the last three of the fifty pages of argument.[183]

Faux advocacy is also betrayed by failure to articulate what rights children have and to develop arguments based on them.[184] The "Brief of Amici Curiae Scholars of the Constitutional Rights and Interests of Children" in *Fulton* merely refers in passing to children having rights and never even states what those rights are.[185] The Brief for Children's Rights et al. in *Fulton*

Study, 6 NEV. L.J. 966, 998 (2006) ("[T]he guardian ad litem may 'be an attorney or a court appointed special advocate (or both)' with a mind 'to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child.'").

178. *Id*.

179. *See* Katie Naftzger, PARENTING IN THE EYE OF THE STORM: ADOPTIVE PARENT'S GUIDE TO NAVIGATING THE TEEN YEARS 18–34 (2017).

180. *See* NACC Haaland Brief, *supra* note 69, at 2; Brief of Child.'s Rts. et al., *supra* note 171, at 16; Brief for Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father, *supra* note 149, at 6–7.

181. Casey Fam. Haaland Brief, *supra* note 149, at 24–29.

182. OICWA Brief, *supra* note 130, at 20–21.

183. Brief for Intervenor-Respondents, *supra* note 163, at 49–51.

184. Scholars' Brief, *supra* note 124, at 19–20, 23.

185. *Id.* at 18, 21, 33. This brief says at one point the state "has a duty to take actions that facilitate, rather than foreclose, placement in the optimal setting," and the scholars might think that duty owed

referred to children as right holders in just one paragraph.[186] In that one paragraph it invokes a constitutional right to reasonable state efforts to ensure safe and non-abusive conditions, and it says this would be infringed by any City policy or practice that reduces the average quality of available foster homes.[187] Such a right sounds morally correct, but these amici made little effort to provide a legal foundation for it or to establish the analytical or empirical connection between safe and non-abusive conditions and average quality of foster homes.[188] Further, they offered no evidentiary basis for believing their preferred outcome would be consistent with this right rather than contrary to it.[189] Moreover, they do not consider whether children have a constitutional right against the state's treating as a public accommodation, to which all adults have a right of access, their substitute care after being maltreated by their parents.[190] In fact, they adopted this instrumental view themselves, repeatedly extolling open public access to foster children.[191]

On the whole, one finds little child-rights-based advocacy in the great majority of briefs filed by supposed child advocacy organizations.[192] Yet, it would be straightforward to launch analysis of these cases from a base of children's constitutional rights.[193] *Haaland* and *Fulton* are ultimately about how the state carries out a practice of seizing children from their homes to place them in other living circumstances and potentially creating a new family for them.[194] So, an obvious line of reasoning would be to consider when and under what conditions it is consistent with children's Fourteenth Amendment rights for the state to do that. In *Adoptive Couple*, the child at issue had presumably formed an attachment relationship with adoptive parents by the time

to the children (rather than to parents or society). *Id.* at 7. But courts have not recognized any right of foster children to an "optimal setting," and certainly not to maximization of the foster parent pool; thus, the scholars needed to develop a case for such a constitutional right of children but did not. *See id.* Even if they had, they would face the problem that there is no evidence CSS's participation had any negative impact on the foster-home pool but is ample evidence that it had positive impact, as discussed below. *Id.*

186. Brief for Child.'s Rts. et al., supra note 171, at 23.

187. *Id.* at 23–24.

188. *Id.*

189. *Id.* at 23–33.

190 *Id.*

191 *Id.* at 20–29.

192 *See supra* Section II.B.2 (discussing the lack of child advocacy in the *faux* advocacy briefs).

193 *See, e.g.*, Dwyer, *supra* note 47, at 870–74.

194 *See* Brackeen v. Haaland, 994 F.3d 249, 249 (5th Cir. 2021), *cert. granted*, 142 S Ct. 1205 (2022); *see* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

the state court ordered she be transferred to her father's custody.[195] This state action disrupting a fundamentally important intimate relationship could also be challenged on the ground that it violates a substantive due process right.[196]

3. Accepting Parties' Self-Serving Characterization of a Child's Nature or Needs

Advocates for women, racial minorities, and sexual minorities are highly circumspect about societal imposition of identities upon those persons and attribution of needs to them.[197] Most organizations that style themselves as advocates for children before the courts lack such skepticism and, instead, blithely accept ways the adults and organizations who are parties ultimately frame cases about central aspects of children's lives and how those parties categorize and characterize children.[198]

In *Fulton*, supposed advocates for children almost uniformly accepted the City's characterization of foster care as a public accommodation—that is, a service provided to "the general public" that should serve the "public interest."[199] In this depiction, children are the equivalent of cakes in a bakery or statues in an art museum. As the *Fulton* majority observed, public

195. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 645 (2013) (noting that the child was two years old by the time the trial took place in Family Court and twenty-seven months when removed from the couple who had parented her since birth).

196. *See* James G. Dwyer, *Adoptive Couple v. Baby Girl: Erasing the Last Vestiges of Human Property*, 93 B.U. L. REV. Annex 51, 55–56 (2013); *cf.* Obergefell v. Hodges, 576 U.S. 644, 667 (2015) ("[T]heir committed relationships satisfied the basic reasons why marriage is a fundamental right."). In disrupted-adoption cases like *Adoptive Couple*, the difficult question arises as to what effect delay caused by courts or adoption applicants should have on the outcome, but an advocate for children would call attention to both the presumptive right of a child against relationship destruction and the worry about creating a perverse incentive to engage in illicit delay tactics, potentially hurting children, and would try to help the Court reach the correct outcome from a purely child-centered perspective. In stark contrast, the Casey brief in *Adoptive Family* instead flippantly dismissed the harm of attachment-disruption as necessary to avoid "rewarding" foster parents. Brief for Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father, *supra* note 149 at 18.

197. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (discussing the writings of feminist legal theorists and arguing against gender essentialism, which is the exclusion "of race, class, sexual orientation, and other realities of experience" in discussing women's situation). *See generally* SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION (1990) (identifying and critiquing pervasive views of "proper femininity").

198. *See infra* notes 199–205 and accompanying text.

199. Brief for Intervenor-Respondents, *supra* note 163, at 3; Brief of Child.'s Rts. et al., *supra* note 171, at 18–19.

accommodation laws were intended to universalize access for all persons to facilities generally open to public patronage.[200] They preclude discrimination based on some characteristics, such as severe intellectual disability, that are generally regarded as appropriate bases for excluding persons altogether as foster parents,[201] or characteristics such as religious affiliation, which are uncontroversial bases for selecting from among already-certified foster parents in making individual placement decisions.[202] Indeed, the City's amicus supporters would likely themselves approve of discriminating on the basis of sexual orientation in assigning LGBTQ youth to foster parents; they would allow the City to favor same-sex couples over heterosexual couples, suggesting their embrace of the public accommodation framing had nothing to do with the inherent fittingness of that conceptualization.[203] Bakeries do not exist for the welfare of the cakes, and though museums serve a curator role, they ultimately are truly about giving something to the general public for consumption. A real advocate for children would recoil at the assimilation of foster care to such facilities and at the implicit treatment of children as consumables that should be made available to all.[204] They would insist that foster care be

200. *See* 43 PA. STAT. AND CONS. STAT. ANN. § 954(l) (West 2020) (defining "public accommodation" as "any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, . . . recreation or rest, or restaurants . . . or any store, park or enclosure, . . . ice cream parlors, confectioneries, . . . drug stores, . . . clinics, hospitals, bathhouses, swimming pools, barber shops, beauty parlors, retail stores and establishments, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, . . . and all educational institutions, . . . nonsectarian cemeteries, garages and all public conveyances operated on land or water or in the air as well as the stations, terminals and airports thereof, financial institutions and all Commonwealth facilities and services . . . [but not] any accommodations which are in their nature distinctly private."). For similar itemization of public accommodations in federal law, see 42 U.S.C. § 12181(7) (West 1990).

201. *See What Can Disqualify You From Becoming a Foster Parent?*, FOSTERVA, https://www.fosterva.org/blog/what-can-disqualify-you-from-becoming-a-foster-parent (last visited Nov. 9, 2022).

202. *See, e.g.*, MINN. STAT. ANN. § 260C.212, subdiv. 2(2)(b)(6) (West 2022; 11 PA. STAT. AND CONS. STAT. ANN. § 31 (West 2021) ("It shall be the duty of the society, to whom a commitment shall be made . . . to select, so far as it may be possible, families of the same religious denomination as that to which the parents of children committed to its care shall belong.").

203. *Cf.* Scholars' Brief, *supra* note 124, at 5–6 (footnotes omitted) ("This breach is particularly acute for 'special needs' children who face unique placement challenges and for LGBT children who have been forced from their homes because their families reject their sexual orientation or gender identity, often on religious grounds."); Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2404 (2019) (stating that "the need for safe and supportive environments for LGBTQ youth is especially great" and noting that many foster parents might be ill-equipped or disinclined to support the special needs of such youth).

204. This is a common allegation regarding adoption of children from poor countries. *See, e.g.*,

viewed solely as a societal mechanism for doing the best thing possible for children who have suffered maltreatment, as a guardian-like role the state assumes, with an exclusive focus on its wards' welfare.[205]

In *Haaland* and *Adoptive Couple*, the labeling problem was the ascription of "Indian" status to children based on the bare fact of a Tribe's claiming them, which tribes typically do based on ancestral connection, however slight.[206] ICWA prescribes such labeling but advocates for children should oppose that when it is inappropriate in light of a given child's circumstances, including lack of prior experiential connection between the child and any tribe or tribal culture, because that labeling has momentous and potentially destructive implications for children.[207] They should regard such labeling with great skepticism, especially in light of the remarkably explicit congressional intent to treat children instrumentally—as a "resource" for struggling tribal communities.[208] Instead, they would take a hard-nosed look at the reality of a child's observable characteristics, experiences, and needs. Yet individuals and groups claiming to be devoted to child rights and welfare have unhesitatingly accepted this labeling of all children captured by ICWA as "Indian"—in

Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interests of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 349 (2004) (characterizing international adoption of children by wealthier countries' citizens as colonialist acquisition of national resources); Ryiah Lilith, *Buying a Wife But Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoption*, 9 BUFF. WOMEN'S L.J. 225, 229 (2000–2001) (purporting to reveal the "imperialism and commodification underlying intercountry adoptions"). For response to that allegation, see James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT'L L. 189, 239-41 (2013).

205. See Dwyer, *supra* note 47, at 875–85.

206. *Cf.* Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation,* 50 ARIZ. L. REV. 127, 129 (2008) ("One of the key criticisms of the Act is that it objectifies Indian children as tribal 'resources' and mandates certain jurisdictional and placement outcomes that benefit tribes without regard to children's interests.").

207. *Cf.* Brief of Christian Alliance for Indian Child Welfare and ICWA Child. and Fams. as Amici Curiae Supporting Petitioners at 8–14, Brackeen v. Haaland, 142 S. Ct. 1205 (2022) (mem.) (Nos. 21–378 & 21–380), 2021 WL 4776060 [hereinafter Brief of Christian Alliance] (presenting personal stories).

208. *Cf.* Adoptive Couple v. Baby Girl, 570 U.S. 637, 689 (2013 (Sotomayor, J., dissenting) (arguing on the basis of "[a] tribe's interest in its next generation of citizens . . . ."); OICWA Brief, *supra* note 130, at 11 ("ICWA is intended to protect not only the interests of individual Indian children and families but also the interests of the tribes themselves in long-term tribal survival."); Hamline Brief, *supra* note 174, at 3-6 (arguing that Guardians ad Litem (GALs) should serve tribal interests as well as their clients' interests since "the policy goals behind the ICWA serve to protect both the interests of Native American tribes . . . and the best interests of Indian children[,]" and noting that "the ICWA states as its purpose . . . to promote the stability and security of Indian tribes . . . .").

Adoptive Couple, a child with a mere 3/256 Cherokee ancestry whose early childhood was lived in mainstream American society far from any tribe.[209] The label is accurate as a legal conclusion given the content of federal law.[210] But it bears the aspect of empirical fact—a true statement about a child's core extra-legal identity and nature—on the basis of which needs are attributed to the child, and as such is presumptuous and usually, with children who have been living in mainstream society, inapt and indefensible.[211]

Still another sort of misdescription occurs especially in private-school funding cases, when amici ontologize "the family," referring to "family choice," "family freedom," or "family rights," even in regard to the schooling of very young children unlikely to have much voice or freedom in choice of the schooling they receive.[212] True advocates for children would be wary of treating families as epistemic units in this way, eliding the reality of parental dominance and the potential for conflicting interests within families in matters of school choice.[213]

4. Skewed Factual Presentation and Analysis

Subsection 5 below addresses the problem of making factual claims that have no evidentiary basis.[214] Even when factual propositions have some empirical support, amicus advocacy purportedly on behalf of children is deficient if it considers only evidence supportive of one party's preferred outcome and

209. *See Adoptive Couple*, 570 U.S. at 641.

210. *See id.* at 642 n.1 (citation omitted) ("Baby Girl's eligibility for membership in the Cherokee Nation depends solely upon a lineal blood relationship with a tribal ancestor.").

211. *See* Navajo Population Profile, *supra* note 61 (noting that half of tribe members do not live on the reservation and only one-fifth of them live in a town near the reservation).

212. *See, e.g.*, Brief of the Liberty Just. Ctr. et al., supra note 76, at 4 ("The exclusion of faith-based schools from choice programs severely curtails the educational options available to families."); *id.* at 6 ("[e]xcluding schools that live out their religious faith from participating in a choice program slams the door shut on the substantial majority of options for those families."); Brief of Child. First Am., et al., as Amicus Curiae in Support of Petitioners, *supra* note 96, at 1, 14–15 ("Amici curiae Children First America and its local and regional affiliates are non-profit organizations whose primary mission is to promote school choice for low-income families through privately-funded tuition scholarships. . . . [T]he program gives parents full control over whether or not to send their children to a participating school. . . . [T]he Scholarship Program, in tandem with other provisions of Ohio law, makes available to Cleveland parents a wide range of alternative choices . . . ."); *see also* NACC Haaland Brief, *supra* note 69, at 4–5 (invoking a "family's right" repeatedly).

213. *See* JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 7–45 (2001) (ebook) (identifying ways in which some schools parents choose might disserve their children's wellbeing).

214. *See infra* Section III.B.5.

ignores countervailing relevant evidence, if it incorporates into its reasoning only facts supporting one party to a case rather than all the facts relevant to an overall assessment of where the interests of the advocacy's beneficiaries lie, or if it presents factual information in a misleading way.[215] This is different from the concern about one-sided legal arguments aimed at securing the outcome that is actually best for one's clients, which has been a matter of some debate regarding "scholar briefs."[216] Here, the concern is with skewed fact presentations that inhibit judges' ability to accurately assess what is actually in the best interest of non-autonomous persons—which judges might less often verify for themselves relative to legal arguments.[217]

In aid-to-religious-schools cases, this takes the form of unqualified statements that children benefit from attending private schools whenever parents deem that preferable to attending public school,[218] with no acknowledgment that private schools can also be highly problematic, that various factors inhibit parents' ability to make accurate assessments of schools, and that aid programs at issue make no effort to limit the effect of aid to support of schools that are, from the state's perspective, in fact beneficial.[219] In the ICWA cases, *Haaland* and *Adoptive Couple*, it was a matter of ascribing one set of (fabricated or exaggerated) interests to children, either being immersed in "her culture" or being raised by kin, while paying little or no heed to a more certain and important set of interests—namely, the child's attachment needs and avoiding the developmental harm likely to result from disrupting her

215. *Cf.* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 100 (1993) ("The presentation of social scientific data in Supreme Court amicus curiae briefs is too often designed to persuade rather than to inform the Court. Most authors of amici briefs are lobbyists whose primary goal is to advance the interests of their clients. They are not guided by the scientific norms of neutrality and objectivity but by the ideology of advocacy. The desire to win the case encourages the amici to distort or ignore any damaging social science findings.").

216. *See* Frost, *supra* note 127, at 151–52.

217. *Cf.* Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD. & FAM. ADVOC. 1, 8 (2014) (describing the plethora of ideologically-driven "bad research" in the child welfare field, which would complicate any judge's effort to verify advocates' factual claims).

218. *See, e.g.*, Brief of the Liberty Just. Ctr. et al., *supra* note 76, at 21–22 (asserting that "[i]nstitutional pluralism in education . . . works according to the research: 'Evidence from around the world suggests that studying within "distinctive educational communities in which pupils and teachers share a common ethos" vastly increases the odds of students' acquiring academic and civic knowledge, skills, and sensibilities.'").

219. James G. Dwyer, *The Parental Choice Fallacy in Education Reform Debates*, 87 NOTRE DAME L. REV. 1837, 1841–52 (2012).

relationship with attachment figures.[220] The Brief of Casey Family Programs in *Adoptive Couple* repeatedly insisted (without evidence, as discussed below) that it is always, on the whole, best for any child to be raised by their biological parents so long as the parents meet whatever standard of bare fitness a jurisdiction has, regardless of the child's past experience or existing attachment relationships.[221] And in *Haaland*, the Brief of Casey Family Programs baldly asserted, again without citation to any research support, that any child labeled Indian by ICWA has an important interest in growing up participating in "their culture."[222] In both cases, Casey barely acknowledged, and cursorily dismissed, the contrary potential interest of a child who has been in a pre-adoptive placement, which is a very common scenario when ICWA is applied, in avoiding disruption.[223]

In *Fulton*, the skewing was largely a matter of endorsing one side's view on a particular factual question (the impact of CSS involvement on quantity and diversity of foster homes) and ignoring the other side's view on that same question. Most briefs by *faux* child advocates, including the Scholars' Brief, devote singular attention to the City's unsupported factual claim that excluding CSS would result in the most robust foster care pool.[224] One would expect any amici sincerely concerned for child welfare to seriously consider the possibility that CSS's contrary factual claims were true: (a) that many potential foster parents would never be reached if CSS, with its unique access to the

220. *See* Brackeen v. Haaland, 994 F.3d 249, 345 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022) (No. 380, 2021 Term); Adoptive Couple v. Baby Girl, 570 U.S. 637, 656 (2013).

221. *See* Brief of Casey Fam. Programs et al as Amici Curiae in Support of Respondent Birth Father, *supra* note 149, at 7 ("Through decades of experience, *amici* have found that the cornerstone of an effective child welfare system is the presumption that children are best served by supporting and encouraging their relationship with fit birth parents who are interested in raising them and are able to do so safely."); *id.* at 9 ("[*A*]*mici* are unanimous that it is a best practice to preserve a child's ties with her fit, willing birth parents").

222. *See* Brief of Casey Fam. Programs et al., *supra* note 56 at 3, 24–29 (contending that children treated as Indian under ICWA must cherish and remain connected to their culture and that "[i]n the context of Indian children, a child's community includes his or her tribe or related tribes").

223. *See id.* at 13–16 (dismissing attachment disruption trauma as the price that must be paid (by the child) to avoid "rewarding" foster parents); *see also* NACC Haaland Brief, *supra* note 69, at 13–14. Also, in *Adoptive Couple*, Casey disingenuously ascribed to the guardian ad litem the view that the child's interests lay in remaining with her adoptive parents solely because of their relative affluence. *See* Brief of Casey Fam. Programs et al as Amici Curiae in Support of Respondent Birth Father, *supra* note 149, at 14 (disparaging the "guardian ad litem's subjective—and, in *amici*'s view, entirely baseless and harmful—judgment that 'best interests of the child' have something to do with the prospective parents' provision of 'private school[s]' or 'beautiful home[s].'").

224. *See* Scholars' Brief, *supra* note 124, at 5.

million-plus Catholics in Philadelphia, is excluded, thus reducing the "pool" relative to what it would be with CSS's continued involvement, and (b) that CSS's policy had not resulted in exclusion or deterrence of a single couple from fostering.[225] The refusal to engage with alternative empirical views regarding what outcome is best for the welfare of one's "client," despite having no evidence to support one's own views, also betrays a lack of genuine dedication to youth.

A couple of the child-advocacy amicus briefs in *Fulton* did obliquely respond to CSS's contentions. They invoked the City Commissioner's testimony at trial that the number of children in either congregate care or temporary housing at DHS offices did not increase after CSS's departure, as if that settled the matter.[226] But anyone familiar with child protection systems knows

225. *Cf.* Fallon, Jr., *supra* note 8, at 242 (describing the norm of "confrontation," which "requires scholars to be candid in acknowledging difficulties with their arguments"); *id.* at 253 ("Ideally, the law professors who sign such briefs would have conducted as impartial an inquiry as possible before arriving at their conclusions [and by signing] implicitly represent that they have done so.").

226. CWLA Brief, *supra* note 148, at 21–22. This brief also cites Illinois as a success story because its congregate care numbers were lower in 2017 than in 2011 when it began enforcing a non-discrimination policy. *Id.* at 22. But the number of nonrelative foster care homes also declined during that period—and far more dramatically. *See* Brief for Neb., Ariz., and Ohio as Amici Curiae in Support of Petitioners at 17, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (reporting that Illinois's policy caused the number of non-relative foster care families to fall "nearly in half"); *see Who Cares: A National Count of Foster Homes and Families--Illinois*, IMPRINT, https://www.fostercarecapacity.com/states/illinois (last visited Oct. 27, 2022) (showing drop from 11,386 nonrelative homes in 2012 to only 6,034 as of 2019). This suggests the state's CPS agencies, rather than shifting from congregate care to foster homes, were simply leaving more children in maltreatment environments and/or channeling more to kin placements, consistent with a national trend to do both for other non-child-welfare reasons. *Cf. id.* (showing the number of youths in congregate care in Illinois in 2020 was actually higher than in 2010). These amici also did not mention that the Illinois chart shows the congregate-care number fell *before* the state implemented the non-discrimination policy, and that in 2012 and 2014 the number was rising. *See id.* These amici had access to that information but did not reveal it to the Court. *See* Brief for Neb., Ariz., and Ohio as Amici Curiae in Support of Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 3078490 (excluding statistical information available through public sites as reported in *The Imprint*). The brief also cites D.C. as a success story, but it too saw a decline by half in the number of available foster homes in the six years after it implemented a nondiscrimination policy. *See Who Cares: A National Count of Foster Homes and Families—Washington, D.C.*, IMPRINT, https://www.fostercarecapacity.com/states/washington-dc (last visited Oct. 27, 2022) (showing that in D.C., as in Illinois, the congregate care number fell more steeply before implementation than after). Otherwise, there is in this brief just a reference to another statement by the former Commissioner in court that the City had had a successful recruitment drive in 2018, garnering two hundred additional families. *See* CWLA Brief, *supra* note 148, at 21. But the Commissioner did not testify that the City thereafter had all the foster homes it needed or that any of those two hundred families were from the same population CSS had plumbed, so it does not support a conclusion that expulsion of CSS did not cause a loss of a substantial number of foster

that, as the Commissioner conceded,[227] there is no straightforward connection between that figure and foster-parent recruiting. Knowledgeable and sincere advocates would ask: What else influences numbers of children living in congregate care or agency offices?[228] Was the number of child removals from parent custody stable during this time? Or, might the agency have decided to leave more children in their homes, perhaps to avoid an appearance of having blundered by excluding CSS, or to comply with new federal mandates?[229] Did the Commissioner even have a basis in agency records for that testimony, or was it impressionistic guessing?[230] Why did the Commissioner not testify about the more directly relevant number of new foster homes being qualified, to assess the truth of CSS's prediction, rather than this indirect and ambiguous indicator? Surely, the Commissioner had access to a monthly or weekly inventory of foster homes.[231] Publicly available information in fact shows the number of total foster homes (existing plus new) in Philadelphia declined substantially after the exclusion of CSS, from nearly twenty thousand to less than fifteen thousand (though that figure, too, could have many explanations).[232]

Some briefs in *Fulton* betrayed a lack of objectivity by resorting to slippery-slope speculation, contending that if the City allowed CSS to

homes that would otherwise have been brought into the system. *See id.* With both CSS operating and a pro-LGBTQ City recruitment drive, the numbers in Philadelphia presumably would be much better than they are.

227. *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 674 (E.D. Pa. 2018).

228. *See, e.g.*, *A National Look at the Use of Congregate Care in Child Welfare*, U.S. DEP'T OF HEALTH AND HUM. SERV.'S, ADMIN. FOR CHILD. & FAMS. CHILD.'S BUREAU (May 13, 2015), https://www.acf.hhs.gov/cb/report/national-look-use-congregate-care-child-welfare (discussing reasons some children may be more likely than others to end up in congregate care).

229. *See* 42 U.S.C. § 675a (2018). The Family First Act of 2018 dramatically reduced federal funding for congregate care, sending agencies into a panic to find alternatives—in particular, leaving children in the custody of parents reported for maltreatment or moving them to informal kin placements. *Id.* If the agency saw "no change" in congregate-care numbers in 2019 and 2020 despite the impact of Family First, that actually suggests an increase in number of youths who could not be placed in a family setting. *Id.* In other words, there is a baseline problem in interpreting the Commissioner's report, even if it is accurate. *Cf. Fulton*, 320 F. Supp. 3d at 674.

230. *Id.* The Commissioner said these statements were based on her review of "weekly reports," but these reports apparently were not entered into evidence. *Id.* If there were documentary evidence, one would expect the court to cite that, rather than the self-interested testimony of the Commissioner. *See id.*

231. *Id.* The Commissioner's explanation for not providing numbers of foster homes from one year to the next was incomprehensible: "We are incredibly fortunate that we have foster care agencies, but it's not a one to one." *Id.*

232. *See Who Cares: A National Count of Foster Homes and Families—Pennsylvania*, IMPRINT, https://www.fostercarecapacity.com/states/pennsylvania (last visited Oct. 27, 2022).

discriminate, then many other private agencies would begin discriminating on so many bases that all potential foster parents would be discouraged, or so many contractors would demand exemptions that City agencies would fall apart trying to accommodate them.[233] But a genuine and competent advocate for children would regard any slippery-slope argument with skepticism, would look for concrete examples to support it, and would recognize that slippery slopes typically can run both ways. Foster care and other government agencies in numerous jurisdictions in this country have been accommodating private agencies' religious beliefs for some time,[234] yet no brief makes mention of any jurisdiction that has slid down the apocryphal slope. Should that not give pause to any child advocates genuinely committed to promoting an outcome best for foster care children? Further, CSS or its supporters could have responded with the converse conjecture that if every private agency and every foster parent must meet a test of secular purity and renounce any religious beliefs in tension with City policies, then *that* would cause the foster care system to collapse. So, this is another way in which supposed child advocates slanted their analysis away from the children for whom they were supposed to be advocating in order to support the LGBTQ community.

On the whole, the briefs of *faux* advocates in *Fulton* reflect a willful myopia. In addition to ignoring CSS's past success with the very large Catholic population in Philadelphia, they ignore limitations other private agencies might have that suggest it is okay for different agencies to deal with different populations. For example, some agencies might be unprepared to deal with applicants who would need translation services or special assistance because of a physical disability. Some might limit their focus to special needs children and refer to other agencies applicants who do not wish to foster a special-needs child, or the converse. Some might be ideologically opposed to trans-

233. *See, e.g.*, Brief of Amicus Curiae Kidsvoice in Support of Respondents at 12, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5044623 ("Should CSS prevail, any contracted provider with a religious objection could refuse to provide ongoing services in any of the ways described above, leaving local, state and federal governments to reassign and reallocate every 'carved out' service.").

234. *See* Brief of the Am. Psych. Ass'n, et al. as Amici Curiae in Support of Respondents at 11–12, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5044727 ("Eleven states currently allow state-licensed child welfare agencies to refuse to place children with same-sex couples and other sexual minority individuals if doing so conflicts with the agencies' religious beliefs, and twenty-one states do not expressly prohibit discrimination in foster care or adoption based on sexual orientation.").

racial placements. And so on.[235] The *faux* advocates also ignore the possibility that the City's decision to expel CSS because of its religious beliefs could send a stigmatizing message to Catholic applicants or, if there were any plausibility to the assumption that children in foster care are tuned into this culture war, to Catholic youth.

The most charitable explanation for the slanted treatment of facts by amici in *Fulton* might be that they acted on a gut reaction that any discrimination against any group tends to discourage its members from choosing to participate in social practices, thereby reducing the number and diversity of people participating in that practice. But it does not take much thought to recognize these contrary considerations: (a) the degree to which any deterrence occurs can vary tremendously based on the type of practice and its importance to the individuals, the salience of any discriminatory element—in particular, whether it is government policy or a private preference and how avoidable that element is—and other factors; (b) any deterrent effect might be an unavoidable incident of preventing worse consequences, so some balancing of effects is called for; and (c) refusing to allow some persons or organizations to adhere to discriminatory policies can itself look like discrimination against them and deter people who share their beliefs from participating in the practice. Moreover, anyone who read the lower court opinions or party briefs would have realized the outcome would likely turn on the particular facts in Philadelphia's foster care system and would have been aware of CSS's contrary claims.[236] True advocates for children and true scholars of children's welfare would look at potential adverse consequences of either case outcome,[237] but these amicus groups and individuals appear not to have done so.

5. Baseless Factual Assertions

A final manifestation of *faux* advocacy is factual assertion with no evidentiary support nor acknowledgment of the lack of evidence. Although this

235. *Cf. id.* at 7 ("Commissioner Figueroa admitted DHS had never 'done anything to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work. . . . Race, age, religion, disability and other characteristics are considered—and can be dispositive.").

236. *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 669 (E.D. Pa. 2018); Reply Brief for Petitioners at 1, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5578834 (providing the facts and background surrounding the claim against CSS).

237. *Cf.* Fallon, Jr., *supra* note 8, at 241 ("[A] scholar asserting conclusions should have done her conscientious best to weigh all relevant considerations and to reach a judgment that she is prepared sincerely to defend as supported by the overall balance of reasons.").

is a problem with amicus briefs across all cases, it takes unique form in briefs filed by purported advocates for non-autonomous persons, insofar as it infects factual claims amici advance about their own constituency's interests. This makes the conduct worse for several reasons: (a) judges might be more likely to accept those claims at face value than with other claims (e.g., claims about broader social consequences), and (b) the assertions, if false, could be hurting the advocates' own "clients."[238] The problem is perhaps most acute when amici cite, without qualification, purported sources for a claim, but the sources do not actually support the claim because they are irrelevant or unreliable.[239] Judges and their clerks might lack the time, ability, or inclination to examine cited sources and independently assess their relevance and quality. For some critics of the current, laissez-faire amicus regime, contemplating the full range of cases, clients, and claims, this is the chief concern.[240]

Presenting assertions with bad authority or no authority could occur innocently. Amici might simply misinterpret record evidence or published research, or they might have a conviction that something must be true of the world and hold to it unless and until presented with clear evidence to the contrary. At some point on the scale of implausibility, though, a conviction might be inherently unreasonable. Knowingly making false statements would, of course, be worse ethically, but the effect on judicial decision making is the central concern, and that effect depends on the content of the brief rather than on the mens rea of those authoring it.[241] And it is a dereliction of duty not only to the court, but also to the persons for whom one purports to advocate, when the irresponsible claims are about those persons' interests.[242]

In *Fulton*, factual assertions underwriting the City's supposed child-welfare justification were as follows: (1) CSS's participation caused fewer same-sex couples to foster than otherwise would have, thereby diminishing the overall number and diversity of foster homes,[243] and (2) CSS's participation

238. *See generally* Larsen, *supra* note 4, at 1779 (noting that Justices often will cite only to assertions in amicus briefs and not the accompanying sources as well).

239. On the pervasive problem of poorly done research in the child welfare field, see Cohen, *The Misuse of Data*, *supra* note 55; Bartholet*, Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, *supra* note 217, at 8.

240. *See, e.g.*, Scott, *supra* note 5, at 1359–60; Rustad & Koenig, *supra* note 215, at 156–57.

241. Rustad & Koenig, *supra* note 215, at 152 (explaining how judges tend to rely on "authoritative misinformation" in amicus briefs in the absence of legitimate data and facts).

242. Bartholet, *supra* note 215, at 2–3 (explaining how children are often used as pawns in litigation because adults can use children's disempowerment to advance their own interests).

243. *See, e.g.*, Brief for Intervenor-Respondents, *supra* note 163, at 2–4; Brief of Child.'s Rts. et

was causing psychological harm to LGBTQ foster children by sending them a stigmatizing message.[244] As to both, the City and its supporters made little pretense of having any evidentiary support.[245] They could not have been certain the City would have to satisfy strict scrutiny and bear the evidentiary burden, but they certainly were aware that it was likely, given widespread expectation that the Court would overturn *Smith*.[246] And again, true advocates or scholars would want some certainty about what outcome would actually be best for children before urging one result on their behalf. Despite absence of a basis for doing so, some briefs suggested same-sex couples were being "turned away."[247] However, it was uncontroverted that CSS had never refused any, because none had ever approached it.[248] A few briefs even suggested

al., *supra* note 171, at 20 ("CSS's refusal to certify same-sex couples as foster parents hurts *all* children because it unnecessarily narrows the pool of prospective parents."); Brief of Child.'s Rts. et al., *supra* note 171, at 24 ("Allowing discriminatory practices undermines the availability of suitable family-based settings for children in foster care and puts youth at increased risk of institutional placement.").

244. *See, e.g.*, Brief of Amici Curiae Orgs. Serving LGBTQ Youth in Support of Respondents, *supra* note 136, at 16 ("[C]ommunity-wide stigma would be felt acutely by LGBTQ youth in the foster care system."); Scholars' Brief, *supra* note 124, at 16 ("[W]hen discrimination against same-sex couples occurs in the context of the public child welfare system—a government program—it sends a message that stigmatizes and humiliates LGBT foster children."); Scholars' Brief, *supra* note 124, at 17 (identifying "a harmful message to LGBT youth who hope to one day become parents and foster parents themselves"); Brief of Child.'s Rts. et al., *supra* note 171, at 16 (identifying "a harmful message to vulnerable children in foster care . . . that the City will not protect them from discrimination"); Brief of Child.'s Rts. et al., *supra* note 171, at 19 (identifying a "harmful and dangerous message to all children in foster care-particularly LGBTQ youth"); Brief of Child.'s Rts. et al., *supra* note 171, 30–31 ("[I]t would also harm LGBTQ youth in foster care by sending a message that LGBTQ people are considered unsuitable to provide loving homes. The rejection same-sex couples suffer when being turned away from a foster care agency trickles down to LGBTQ youth and perpetuates a cycle of stigmatic harm. Forcing the City to allow agencies to discriminate would send a loud and powerful message that LGBTQ people are not valued and that the City is unable to protect them from discrimination. That dangerous message will undoubtedly make LGBTQ youth fearful of coming out, of realizing their identity, and of being rejected by the very providers on whom they depend." (citations omitted)).

245. *See, e.g.*, Brief of Amici Curiae Orgs. Serving LGBTQ Youth in Support of Respondents, *supra* note 136, at 14–16.

246. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021). The Court avoided deciding the continued fate of *Smith* by concluding that the City's contract terms and public accommodation law were not generally applicable, so strict scrutiny would apply even under the rule of *Smith*. *Id.*

247. *See, e.g.*, Scholars' Brief, *supra* note 124, at 3 ("[A]n exemption needlessly restricts the pool."); *id.* at 11 ("[M]ore foster children will experience the harms of long-term, institutionalized care."); Holy See Brief, *supra* note 140, at 18 ("Allowing religious institutions to discriminate against same-sex parents by refusing to let them adopt or foster will therefore deprive children of loving and nurturing families.").

248. *See* Brief for Intervenor-Respondents, *supra* note 163, at 49–50. Intervenor Support Center

same-sex couples in Philadelphia were subject to a categorical ban on fostering,[249] which was of course nonsense. The reduced-supply claim, to be at all plausible, had to rest on a factual premise that CSS's mere presence in the system, as one of thirty or so private agencies, deterred some couples who were interested in fostering from pursuing it at all with any agency, even though they all seemed to know they should approach one of the dozens of private agencies other than CSS.[250] Both claims were thus about a great

for Child Advocates attempted to support speculation about deterrence of same-sex couples by citing another amicus brief, filed by Family Equality, which presents three anecdotes of possible "turning away." *Id.* None of the anecdotes involved CSS. Brief of Amici Curiae Fam. Equal. and Pflag National in Support of Respondents at 9, Fulton v. Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5045253. Only one took place in Philadelphia, and it involved a couple (Bannon) that went to Bethany Christian Services and was not looking to foster nor to adopt from foster care but rather to adopt a refugee child from another country. *Id.* BCS referred the Bannons to another agency, but no other agency had refugee children, and that is why the Bannons ceased their pursuit. *Id.* That anecdote thus provides no support. The other two occurred in other states, which suggests Family Equality searched nationally but came up with only two instances in total of same-sex couples being put off from fostering, in the entire country. *Id.* One of those other two stories, in Alabama, involved a couple that became discouraged after meeting resistance from the local *public* foster care agency, following unsuccessful attempts with two private agencies. *Id.* at 9–10. That anecdote actually supports CSS's claim that were any couple to approach it, the couple would likely accept CSS's referral to an agency that would welcome them; they would try at least a few agencies before giving up. It does not support the claim that CSS's presence alone would deter couples from fostering. The third couple, in Ohio, "stopped trying to adopt other children from the child welfare system after years of rejected attempts," an experience that no couple would have in Philadelphia. *Id.* at 10. That anecdote also supports CSS's point that same-sex couples can and will simply go to another agency, as do the several stories in Family Equality's brief about couples who *did* foster and adopt even after meeting initial resistance at one agency and having to go to another. *Id.* at 8–10. In the Michigan litigation, the plaintiffs alleged that they "have contacted certain faith-based Michigan adoption agencies and, based upon their same-sex status, been denied the state-contracted-for services." Dumont v. Lyon, 341 F. Supp. 3d 706, 713 (E.D. Mich., 2018). However, they did not allege that they were ultimately unable to become foster parents, but rather that being refused by faith-based agencies "ma[de] it more difficult for [them] to obtain a benefit than it is for opposite-sex couples." *Id*. at 721 (internal quotation marks omitted). Nor did they explain why they started with faith-based agencies they knew had a policy of not accepting same-sex couples. *Id.*

249. *See, e.g.*, Scholars' Brief, *supra* note 124, at 12 ("Categorical exclusions of same-sex foster parents would shrink the already insufficient pool."); Brief of Child.'s Rts. et al., *supra* note 171, at 22 (citing unpublished 2007 "working paper" estimating impact on children and on state budget of *state* policies "banning LGBTQ families from the foster care system"); CWLA Brief, *supra* note 148, at 1.

250. *See, e.g.*, Brief for Intervenor-Respondents, *supra* note 163, at 49–50 (asserting that if any private agency discriminates, then qualified same-sex couples will be deterred "after experiencing the sting of discrimination by one of the City's official partners"). Supposed support for this contention was a "2019 study gathering data from hundreds of LGBTQ adults who experienced disruptions in the adoption or foster care process [that] concluded that anti-LGBTQ discrimination 'may lead some LGBTQ people to abandon foster care or adoption as a means of building their families.'" Brief of

psychological impact on LGBTQ adults and minors, from a supposed message the City was sending merely by having a contract with CSS.

It would be difficult to overstate the capacity of the City's supporters to find people, if they existed, who could provide testimonials to support these psychological-impact claims—that is, same-sex couples who gave up on fostering because of CSS's presence in the system, or foster youth traumatized by it. The legal teams dedicated to LGBTQ rights are large, heavily resourced, and highly sophisticated, including senior professors at top law schools.[251] The dozens of child advocacy organizations that collectively weighed in also command immense resources.[252] The various amici claiming to be advocates for children certainly would have been aware of this monumental capacity to amass evidence, and they included many smart lawyers trained to draw negative inferences from a party's failure to produce any evidence despite having such capacity.

Even if one treats personal intuition based on general human experience as a "reason" to believe something, and indeed a sufficient reason to make representations to a court of law, it is difficult to imagine these smart people actually had such an intuition. Regarding participation of same-sex couples, to intuit that they are discouraged, one would have to imagine many such couples—whom the City's supporters praise for their dedication and empathize with for their intense desire to participate in childrearing—having conversations about fostering and ultimately choosing not to bother simply because they know one private agency with whom the City contracts would not accept them. How would these couples know about the CSS foster care agency and its policy? Most likely from talking with other same-sex couples who have fostered and who directed them to other agencies. With a little thought, these

Child.'s Rts. et al., *supra* note 171, at 27–28. That survey actually undermines the claim that discriminatory recruiting agencies diminish the pool. It shows there are more direct obstacles in the system that have nothing to do with recruiting agencies, particularly decisions by *public* oversight agencies to disrupt placements after foster parents have been certified and welcomed a child into their home. That is something public agencies routinely do with children regardless of the characteristics of foster parents, typically to reunify a child with parents or shift to kincare. The same brief also cites statistics showing a great number and substantial percentage of same-sex couples nationwide currently serving as foster and adoptive parents, despite such obstacles, apparently not recognizing that this also undermines the amici's empirical claim that same-sex couples have been deterred from fostering and adopting. *Id.* at 21–22.

251. *See, e.g.*, Brief for Intervenor-Respondents, *supra* note 163 (listing counsel from top law schools, such as Stanford, and top law firms, such as O'Melveny & Myers LLP).

252. Brief of Child.'s Rts. et al., *supra* note 171 (listing numerous child advocacy amici, including Harvard Law School, and represented by counsel from Greenberg Traurig).

amici should have realized the discouragement claim would need hard evidentiary support to be plausible, something like testimony from many same-sex couples under oath that their aversion to participating in a system that includes CSS was so great as to overcome their strong desire to enter into a parenting role. It is unsurprising there were no such testimonials; couples that truly want to care for children would not be so easily put off, and it insults people in same-sex relationships to suggest they would be.

As to youth in foster care, if any were actually adversely affected, surely the LGBTQ lawyers could have found adults or minors who have exited foster care and reflected on their past experience and secured sworn statements from them. But there were none.[253] And again, if one were to charitably attribute to amici a belief sprung from intuition, one would have to suppose these advocates imagined a series of events by which LGBTQ children in foster care were made aware of CSS's involvement in the foster care system and its policy and interpreted that as constituting a message of condemnation of them by the City. How would that have happened? Do these amici suppose all LGBTQ youth in the community are familiar with the foster care system and talk amongst themselves about the presence of a Catholic agency that recruits foster parents but does not accept same-sex couples? Or is it that youth become aware of this upon entering the system? How? A caseworker would interview them immediately after removal, if not before, with a conscious aim of discovering any special needs. So, if doing their job well, they would elicit that a particular youth identifies as non-straight. And then what? The caseworker commences to lecture the child on CSS's policy and the City's toleration of it? Or is the speculation that after a youth is placed in a foster home, the foster parents sit the child down for an information session on anti-gay

253. *See, e.g.*, Brief of Amici Curiae Orgs. Serving LGBTQ Youth in Support of Respondents, *supra* note 136. The Brief of Organizations Serving LGBTQ Youth offered, as sole support for its claim about stigma, a statement at trial by the former Commissioner of Philadelphia DHS, who conjectured that continued involvement of CSS would send a "very strong signal to . . . [LGBTQ foster] youth that while we support you now, we won't support your rights as an adult." *Id.* at 13–14. That statement was itself lacking any evidence or plausible explanation of how any youth in foster care would receive this message, and it actually undercuts the position that youth are harmed psychologically insofar as it posits a message of "we support you now." *See id.* A brief filed by the American Academy of Pediatrics, along with two other medical organizations, likewise made claims about stigma, and it cited in support only studies of (a) the impact of stigma on LGBTQ adults and youth in society generally, and (b) struggles some LGBTQ youth have had in foster care in various parts of the country because they were placed in a home insufficiently supportive or helpful, which could happen with any placing agency. *See* Brief of the Am. Psych. Ass'n et al., *supra* note 234, at 12–14. These studies lend no support to the claim of stigma arising from CSS's involvement in the foster care system.

discrimination "in the system"? Or is it that LGBTQ youth in foster care are regularly reading the newspaper and thereby learn of the City's conflict with CSS? (In which case, they would get a contrary message about the City's attitude toward them, and the conflict itself would be the "but-for" cause of the awareness.) All these possibilities are utterly implausible. And even if some youth did become aware of the CSS issue, it is difficult to imagine they would give it significant thought when they are dealing with many more immediate and intense issues.[254] Many LGBTQ youth do suffer in the foster care system because of how they are directly treated by some caseworkers and foster parents,[255] but there is neither evidence nor plausible inference to tie any suffering to CSS's policy.

So, with no evidence whatsoever that CSS's involvement in the foster care system had any negative impact on children in care, but with knowledge of CSS's great past success at recruiting and training high-quality foster families, self-described amicus advocates for children fabricated reasons to oppose CSS and asserted those reasons with utmost confidence. Some might have submitted a brief, in part, precisely because there was no evidence to support the claim about child-welfare impact, hoping their supposed status as advocates or experts would lend credibility to the City's implausible claim and thereby persuade the Justices.

In *Adoptive Couple*, the Supreme Court's decision narrowed the scope of two provisions of ICWA designed to inhibit TPR of "Indian" parents, and of a provision giving post-TPR adoptive placement preference to Indians over non-Indians.[256] The child at issue was two years old by the time of the trial to resolve a contest between her adoptive parents, who had cared for her since

254. *See Foster Care*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Foster-Care-064.aspx (Oct. 2018). Such issues can include past rejection and abuse by their parents; separation from parents, siblings, grandparents, and friends; difficulties fitting into the foster home or at a new school; or the fitting in at the same school but fearing peers will know they are in foster care; etc.

255. *See* Blair, *supra* note 210, at 2348–49 (2019) ("LGBTQ youth are more frequently rejected or unwanted by foster families, adoptive parents, and group homes. Many LGBTQ youth also experience discrimination from child welfare providers and frontline caseworkers, which can negatively affect their placement and treatment in the child welfare system. In addition, LGBTQ youth suffer higher rates of physical, sexual, and verbal abuse in foster families and group homes." (citations omitted)). Woods, though intending to say something about *Fulton*-type situations, never actually establishes any connection between adverse treatment and religious belief, let alone with any religious agency's certification process. *See id.* The Article seems to expect that readers will simply assume anti-gay mistreatment arises from religious belief.

256. Adoptive Couple v. Baby Girl, 570 U.S. 637, 641–42 (2013).

birth, and her biological father.[257] When a state court decided in favor of the biological father and ordered the child transferred to him, she was twenty-seven months of age and mostly likely securely attached to the adoptive parents, and she had never seen the biological father.[258] He had only a small fraction of Cherokee ancestry but was a tribe member.[259] The birth mother, who voluntarily relinquished her rights and selected the adoptive couple, was characterized as non-Indian and "predominantly Hispanic."[260] The Court majority characterized the child as 3/256 Cherokee and observed that the Act could in some circumstances, like this one, harm children.[261] It "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian."[262]

In *Adoptive Couple*, the amicus briefs for those presenting themselves as child advocates and experts were more balanced between the two sides than in *Fulton*. Some acknowledged the importance to the child's welfare of protecting her attachment relationship with her adoptive parents, a position for which there is a mountain range of empirical research support, and which was expressed by the child psychologist who testified at trial.[263] Though the majority did not mention this, its conclusion that the special ICWA protections for birth parents do not apply when the child has not been in the custody of those parents is consistent with this fact about child development. If a child has not been in the custody of birth parents, presumably she has been in other people's care. If that care has continued for substantial time, the child has likely formed a relationship with the caretakers of some importance—how much depending on age, length of time, quality of interactions, etc.[264] Briefs

257. *Id.* at 641.

258. *See id.*

259. *See id.* at 643.

260. *Id.* at 643–44.

261. *Id.* at 641 (2013) ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child.").

262. *Id.* at 655.

263. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 563 (S.C. 2012).

264. *See* Brief of Child Advoc. Org.'s as Amici Curiae in Support of Baby Girl Supporting Reversal at 9, *Adoptive Couple*, 570 U.S. 637 (No. 12-399), 2013 WL 749939 (providing psychological research sources that indicate the importance of the attachment relationship); Joan Heifetz Hollinger, *Adoption Law*, 3 FUTURE CHILD. 43, 49 (1993) ("The complete absorption of the child into the legal and

filed in support of the adoptive couple generally did not acknowledge, however, that the child might also benefit from having some contact with and getting to know the biological father, given the social significance of biological relations in American society.[265] Their authors might be faulted for that omission, even though that benefit likely would be insufficient to justify the state court's decision.

On the other side, supporting the father and the intervenor Cherokee Nation, amicus briefs made factual claims ranging from exaggerated and myopic to ludicrous. Starting with the ludicrous, to claim the child had an important interest in being immersed in Cherokee life because eight generations back in her lineage there were three Cherokee ancestors, compared to 253 ancestors in that generation belonging to other peoples,[266] is ideological claptrap. It is an insult to the child's distinct personhood (and to those other peoples). It entails willfully ignoring her life's reality, in which the miniscule ancestral connection to the Cherokees was meaningless and would remain so absent contrivance to impose an artificial identity on her. She was simply a child, who did not need to be labeled as belonging to any ethnic group or culture independently of her lived experiences and social relationships, and who had no greater need to be aware of that de minimus Cherokee ancestry than any other person has to become aware of the nationality of every one of their remote ancestors. To dress up this irrational race-essentialist view of children in the language of "best interests" was disingenuous in the extreme.[267]

The exaggeration and myopia reside in treating the child's connection to

economic web of the adoptive family presumably encourages the emergence of a lasting personal and psychological bond between the child and the adoptive parents.").

265. *Cf.* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 323–35 (2004).

266. *See, e.g.*, Hamline Brief, *supra* note 174, at 13 ("Baby Girl's best interests were not represented by the appointed Guardian ad Litem where Baby Girl's best interests *as an Indian child* were altogether ignored.") (emphasis in original); *id.* at 13 (faulting the Guardian ad Litem (GAL) for not "taking into consideration the degree of importance that Baby Girl's Cherokee heritage played in the determination of her best interests"); *id.* at 4 (faulting the "non-native GAL who did not address Baby Girl's best interests as an Indian child" and who "acted without consideration of the child's Native American culture"); *id.* at 5 (asserting falsely that Baby Girl had been removed from an Indian home and separated from her culture).

267. *See, e.g.*, *id*. at 4 (stating that in every case "a GAL must make final recommendations that will ensure that the Indian child is connected to their family, culture, heritage, and tribe"); *id.* at 8–9 ("Baby girl was not only moved hundreds of miles away from her birthplace, but she was also placed for adoption without regard for her Native American heritage.").

biological family as if it is of the utmost importance.[268] Despite absence of empirical research supporting an assumption that this connection is of more than minor significance on any measures of human wellbeing, it is not outlandish to suppose that it is.[269] However, to suppose it is the sole or ultimate value for a child is plainly unwarranted. It is most clearly disingenuous when amici ignore or are dismissive of the impact of attachment disruption,[270] or manifest no interest in other aspects of the child's situation— such as caregiver stability and maturity and the health of a community—that might suggest the child would be better off remaining with adoptive parents, aspects typically salient in these common cases where biological parents do not form a family unit and a child gets placed for adoption.[271]

268. *See, e.g.*, Brief of Fam. L. Professors as Amici Curiae in Support of Respondent's Birth Father and Cherokee Nation at 21–22, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1308809. Though not labeling themselves advocates for children, this group of academics repeatedly makes sweeping empirical claims, without citation to any empirical support, about child welfare—specifically, that it is in every child's best interest, under any circumstances, to be in the custody of a biological parent as long as that is safe. *Id.* at 14 ("Children deserve to grow up with their biological parents when it is possible and safe for them to do so."); *id.* at 15 (noting the IWCA is "designed to ensure that Indian children are raised by a fit biological parent whenever possible"); *id.* at 21 ("[T]he child's primary interest is in a relationship with her fit biological father."). They nowhere engage with the fact of the child's attachment to the adoptive parents, except to say it would be unfair to the biological father to consider it. *Id.* at 16 n.10. "This Court's precedent indicates that even where attachments with non-parent custodians may exist, any interest in them is subordinate to the child's interest in a continued relationship with her fit parent." *Id.* at 22 (citing Smith v. Org. Foster Fam.'s, 431 U.S. 816, 846–47 (1977)). *Smith* does not in fact say that a child's attachment-related interests are subordinate to a supposed interest in a continued relationship with her fit parent. *Cf.* 431 U.S. at 843–44. Furthermore, the quoted passage can be read as a point of law rather than an empirical finding, and the Court did not cite any empirical literature that could support any such finding. *Smith* does say, however, "[B]iological relationships are not exclusive [determinants] of the existence of a family. . . . [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." *Id.* The Family Law Professors also failed to acknowledge that when the state court rendered its decision there was no relationship with the biological father to continue.

269. *See, e.g.*, *Helping Your Adopted Children Maintain Important Relationships with Family*, CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU (2019), https://www.childwelfare.gov/pubs/factsheets-families-maintainrelationships/ (noting that giving adopted children ongoing contact with their biological families can lower the children's feelings of rejection, promote a sense of belonging, and aid in their identity development).

270. *Cf.* Brief of Fam. L. Professors as Amici Curiae in Support of Respondents Birth Father and Cherokee Nation, *supra* note 268, at 16 n.10 ("Petitioners and their amici make much of the fact that Baby Girl was almost two years old by the time she was returned to her father's custody. But as the South Carolina Supreme Court correctly noted, it would not be fair to the father to consider the bonding that occurred during the litigation.").

271. *See generally* Rene A. C. Hoksbergen, *The Importance of Adoption for Nurturing and*

Yet some briefs in *Adoptive Couple* made sweeping claims as to the ultimate importance of this child's interest in being raised by a biological parent (in this case, the father) rather than by non-relative adoptive parents, citing no research basis.[272] One brief cited precedents extolling parental entitlement and fear of excessive state power as its empirical demonstration of where a given child's interests lie, a glaring non sequitur.[273] These briefs also at times elide the practical distinction between biological connection and reunification with prior caregivers, which in a case like *Adoptive Couple* are two entirely different things, and relatedly, the distinction between "preserving ties" to a biological parent and placing a child in that biological parent's custody for the first time.[274] Some organizations invoked their experience and expertise as authority, as if simply having worked in some capacity in family law cases makes one's impressions equivalent to scientific conclusions, regardless of what advocacy aims one brought to that practice (i.e., it might have been solely in furtherance of parental empowerment).[275]

Enhancing the Emotional and Intellectual Potential of Children, 3 ADOPTION QUARTERLY 29, 32 (1999) (observing that certain traits of adoptive parents, such as a lower divorce rate and strong desire for children, may serve as protective factors for a child).

272. *See, e.g.*, Brief of Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father at 7, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279468 ("[C]hildren are best served by supporting and encouraging their relationship with fit birth parents."); *id.* at 26 ("ICWA is consistent with *amici's* field-tested experience and developed research [never cited] regarding how best to achieve the most favorable outcomes for vulnerable children and families.").

273. *Id*. at 22–23 ("[P]romoting and strengthening a child's ties with an interested birth parent is consonant with the child's best interests.") (citing In the Interest of B.G.C. et. al., 496 N.W. 2d 239, 241 (Iowa 1992) ("[W]ithout established procedures to guide courts in such matters, they would 'be engaged in uncontrolled social engineering.'")); *cf.* In the Matter of Michael B., 80 N.Y. 2d 299, 309 (N.Y. 1992) ("A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find 'better' parents."); *see* Brief of Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father, *supra* note 149, at 23 (invoking "this Nation's deep-rooted traditions to recognize a presumption in favor of custody by a fit and willing birth parent, regardless of emotional bonds developed in temporary custodial placements").

274. Brief of Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father, *supra* note 149, at 9 ("[R]eunification is the most desirable permanent outcome for children."); *id.* at 9 (noting it is "best practice to preserve a child's ties with her fit, willing birth parents"); *id.* at 10 ("[C]hild welfare agencies following best practices promote reunification.").

275. *See, e.g.*, *id.* at 2–3 ("In *amici's* collective judgment, ICWA works very well."); *id.* at 6 ("In their collective decades of experience on the front lines working within child welfare programs across the United States, *amici* have dealt with a broad variety of substantive and procedural standards governing the care and custody of children. Based on their firsthand experience, *amici* understand intimately what helps and what harms."); *id.* at 7 (noting *amici* have "decades of experience").

There is a difficult normative question in disrupted adoption cases: whether the focus of courts should be on the welfare of the individual child at issue, or on what is best for children, in general, under adoption statues, and particularly whether individual children may be sacrificed for the sake of the general aim of not incentivizing delay tactics in adoption litigation. Reasonable child advocates can differ on that normative question, and amici are understood to speak to the bigger picture rather than just the immediate case.[276] But true advocates for children or scholars of their rights would acknowledge and struggle with that dilemma, especially given that it arises frequently, rather than dismissing an individual child's welfare as obviously needing to be sacrificed for the supposedly greater good (and if appointed to represent an individual child in a case, as guardians ad litem are, the advocate should be exclusively focused on getting the best outcome for that child in that instance). Indeed, true child advocates should operate from a position of skepticism generally about this federal law that inherently treats children as instruments for serving adult-dominated groups, a "resource," and ignores every aspect of their lives other than their, often slight, ancestral connection to a tribe. And they would not continue invoking pre-ICWA history as if the statute still served its original purpose and state agency behavior was still the same as before 1978.[277] Doing so just creates the appearance of treating today's children as compensatory goods.

In *Haaland*, the fate of particular children did not seem to hang in the balance by the time of appellate court hearings; the plaintiff adoptive couples' situations were settled and stable, such that their standing even to bring the

276. *See* Paul M. Collins Jr., *Amici Curiae and Dissensus on the U.S. Supreme Court*, 5 J. EMPIRICAL LEGAL STUDS. 143, 146 (2008) (highlighting that amicus participation signals a case "has substantial public policy implications").

277. *Cf.* OICWA Brief, *supra* note 130, at 11 ("ICWA is intended to protect not only the interests of individual Indian children and families but also the interests of the tribes themselves in long-term tribal survival."); Hamline Brief, *supra* note 174, at 5–7 ("The ICWA states as its purpose . . . 'to promote the stability and security of Indian tribes.'"). Conspicuously, the sole citation to empirical research in the Hamline Brief is to a practice handbook from a quarter century ago, which in turn cites a couple of studies from two decades earlier that are now inaccessible and of dubious relevance even a half century ago. *Id.* at 4. *Cf.* B.J. JONES, THE INDIAN CHILD WELFARE ACT 10 n.24 (1995) ("There has been surprisingly little empirical data addressing the impact of the removal of Indian children from their culture and their placement in the non-Indian, predominately Anglo-Saxon culture, especially in light of the fact that Congress believed the problem was so serious that it threatened the existence of an entire culture. Much of what Congress relied on was anecdotal and statistical information and the inferences drawn from that. The studies that do exist generally pertain to transracial adoptions.").

suit was at issue.[278] The briefing at the Supreme Court, therefore, focused on the Act's general impact on children in state court maltreatment cases (and on tribes and state agencies).[279] Briefs for self-styled child advocates therefore made broad, baseless claims about the importance to the welfare of "Indian children" in general to be immersed in "their culture," with no effort to objectively assess multiple factors: (a) for how many off-reservation "Indian children" their Indian ancestry is dominant rather than dwarfed by other components of their ancestry, and (b) how significant a connection to ancestral culture is for the children relative to other aspects of personal wellbeing.[280] Existing research belies their romantic claims about inherent cultural need,[281] but these *faux* advocates show no interest in research on this issue. Their claims are ideological rather than factual.

C. Positive Examples of Child-Focused Advocacy

I close this Part with mention of a couple of exemplary child-advocate briefs. In *Fulton*, one brief by a child advocacy organization was filed in support of CSS, that of Generation Justice,[282] a progressive youth empowerment organization.[283] It models, in several ways, true advocacy for children. Perhaps the surest test is willingness to take a stance on behalf of children that might prejudice a group of adults with which one generally sympathizes. This brief begins by observing the incontrovertible fact that the consequences for children of any bad foster-care policy choice "vastly outweigh the interests of aspiring foster parents to work through a particular organization that does not share their values."[284] No self-described advocates for children who filed in

278. *See* Brackeen v. Bernhardt, 937 F.3d 406, 421–24 (5th Cir. 2019).

279. NACC Haaland Brief, *supra* note 69, at 9–11, 13 (discussing ICWA's general impact on children and their wellbeing in state court cases).

280. *Id.* at 12–13.

281. *See, e.g.*, REBECCA J. COMPTON, ADOPTION BEYOND BORDERS: HOW INTERNATIONAL ADOPTION BENEFITS CHILDREN 57–84 (2016).

282. Brief for Generation Just. as Amicus Curiae in Support of Petitioners at 2, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 3078499 [hereinafter Generation Justice Brief].

283. *Our Story*, GENERATION JUST., https://generationjustice.org/our-story/ (last visited Apr. 20, 2023).

284. Generation Justice Brief, *supra* note 282, at 2. This arguably overstates the competing interest; there was no evidence that same-sex couples were eager to work with CSS. *Id.* at 8–9. Rather, their expressed interest was in eliminating from the foster care system what they viewed as a stigmatizing message. *Id.* at 2.

support of the City explicitly acknowledged that truth.[285]

Another test is whether an advocate devotes concerted attention to rights of the professed client and keeps its attention there. Generation Justice stakes its position on the proposition that "[c]hildren's interests in forming familial bonds for their protection, development, and well-being are not merely factors to be weighed in balancing the parties' competing First Amendment arguments. These interests have an independent constitutional dimension."[286] That dimension lies in the Fourteenth Amendment's Due Process Clause, which can plausibly be read, as Generation Justice explains, to preclude state action that arbitrarily interferes with children's opportunity to form family relationships.[287] The organization devotes nearly the entirety of its brief to developing that theory of children's rights, in contrast to the amici who supported the City, whose mention of children's rights, if any, was window dressing.[288]

Further, Generation Justice did not attempt to support either CSS's supposed free exercise rights or same-sex couples' supposed equality right. It manifests an indifference to interests of anyone other than "the client," as one would expect of a true advocate and as ethical rules require with actual clients. Generation Justice emphasizes that the ultimate aim was to provide more, and better, foster placements for children and, unlike other amici, took a nuanced and realistic look at the situation in Philadelphia.[289] It acknowledges the unique capacity of faith-based agencies to reach particular populations, to infuse a religious dimension into recruited families' motivation to provide care, and to tap into church resources—human and material—to support foster parents.[290] And it accepted the patent truth that same-sex couples can and do go to other private agencies in Philadelphia.[291] There is no trace of ideology or adult-centered commitments skewing the brief's reasoning. Whether or not

285. *See supra* Section III.B.

286. Generation Justice Brief, *supra* note 282, at 2.

287. *Id.* at 11–12.

288. *See supra* Section III.B.2.

289. Generation Justice Brief, *supra* note 282, at 8 (noting that a systemic exclusion of the LGBT community from fostering would be bad for children); *id.* at 9 (acknowledging also that "("diminishing the role of faith-based agencies will decrease the pool of available foster placements"); *id.* at 30 ("[P]sychological, emotional, and developmental concerns inform an affirmative duty to respect children's existing familial relations and avoid disruption of constructive foster placements.").

290. *Id.* at 9 (noting that faith-based agencies "may be able to tap into faith communities and attract new populations of foster and adoptive parents").

291. *Id.*

its constitutional theory persuades anyone, Generation Justice acted as an advocate should, presenting the best argument it can in light of the best evidence of the client's situation and interests.

In *Adoptive Couple*, a positive example was the Brief of Child Advocacy Organizations, authored by eminent child law scholar Barbara Woodhouse on behalf of The Center on Children and Families at the University of Florida College of Law, the Child Rights Project and Barton Child Law & Policy Center at Emory Law School, and the Juvenile Justice Center.[292] It unflinchingly argued that children, even more so than adults, have a constitutional right against state destruction of their "developed family relationships" and a right to "a custody decision guided by her best interests."[293] This was not the "politically correct" position to take, and it also does not appear motivated by, or endeavor to produce, sympathy for the adoptive parents.[294] Rather, those organizations understood their loyalty was to children, not to any ideology or any adults.[295]

IV. FIXES FOR *FAUX* ADVOCACY

As noted at the outset, the problems Part III enumerated can occur at any judicial level where amicus briefs are filed and in ostensible advocacy for other groups of non-autonomous persons. One response to them is to presume judges, aided by parties' attorneys, can separate the wheat from the chaff.[296] In the modern era of amicus avalanche, however, that assumption seems overly optimistic even regarding cases that do not involve *faux* advocacy.[297] There are too many filings coming in, many at the final hour, to expect all to be addressed in conference or oral argument, let alone carefully examined by

292. Brief of Child Advoc. Org.'s as Amici Curiae in Support of Baby Girl Supporting Reversal at 1–3, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 749939.

293. *Id.* at 5, 18.

294. *See id.* at 4.

295. *See id.* at 3 (focusing on "Baby Girl's constitutional right to a custody decision that takes full and balanced account of all factors that affect her best interests").

296. *See* Bruhl & Feldman, *supra* note 1, at 135–36 (expressing doubts about this possibility).

297. Larsen, *supra* note 4, at 1764 ("While that may have been enough in a pre-Internet universe, it is insufficient today. The number of amicus briefs filed and the amount of seemingly legitimate information available to present makes it very unlikely that a litigant can adequately respond to amici-presented factual claims."); *id.* at 1812 ("The adversary system is currently providing only the very weakest of checks on amici fact finding. It is virtually ineffective.").

every individual judge.[298] Advocates can cite supposed sources too numerous for scrutiny, or cite nothing, knowing judges lack the time to search empirical literature themselves and so rely on amici's apparent authority.[299] Yet assertions amici make can determine outcomes for parties and others similarly situated, influence or facilitate judges' shaping of doctrine, and underwrite "factual precedents" repeated in future cases in the same and other contexts.[300]

Amicus filing on behalf of non-autonomous persons adds a large layer of obfuscation and presents additional dangers of illicit influence. Judges might let their skeptical guard down when amici claim to be advocates for the helpless. After all, who would use children or incompetent adults to serve ulterior agendas? Judges are unlikely to take the time to investigate the actual expertise of academic amici. They might take at face value any law professor's claim to be a "scholar" or "expert," especially if it is a subject matter with which the judges have little familiarity, as is probably generally true with matters centrally involving non-autonomous persons.[301] Federal judges might know little about state law topics or who the academic experts are on those topics, and they might be unaware how easily well-resourced *faux* advocates can purchase research they want to further a political agenda.[302] Moreover,

298. *Id.* at 1764 (lamenting the "widespread eleventh-hour supplementation of the factual record from sources that are not subject to cross-examination or other checks on reliability."); *id.* at 1801 ("[R]elatively few of the amicus-provided facts that make it into Supreme Court opinions are contested by the parties. . . . [T]he adversarial system is not functioning as the sort of safety net we assume it will be. Indeed, it is catching virtually nothing."); *id.* at 1802 ("[T]he amicus machine is too big, and the field of possible authorities is too vast for the parties to be able to keep up."). It is worth noting also that amici supporting petitioner have no opportunity to respond to a respondent's brief or to amici supporting the respondent. *See id.* at 1764.

299. *See id.* at 1762 ("It is a mistake to conclude that the Justices can easily tell which of these amici are real factual experts and which of them are not. Most of the names on the covers of the briefs sound neutral and mask the advocacy that may be motivating them.").

300. *See id.* at 1782–83 ("Of the 124 citations to amicus briefs for factual claims, I counted 97 of them that were used to answer what I have described as outcome-determinative questions. This demonstrates that a significant number of these citations are central to the Justice's explanation for his or her decision."); *id.* at 1781–82 ("[A] factual statement in a Supreme Court opinion today can easily drift over to a new context and make an appearance in a subsequent lower court opinion—affecting new parties and creating new law.").

301. *Id.* at 1779 ("More often than not a Justice citing an amicus brief to support a factual claim relies on *only* the amicus brief as authority without accompanying evidence (studies, articles, statistics, etc.) that can be found from within the brief. In fact, 61% of the time (76 of the 124), a citation to an amicus brief rests alone—without a 'see also' cite and without a parenthetical highlighting the source of the evidence that may or may not be contained in the brief. This practice indicates that the Justices treat amici as experts, not as a research tool.").

302. *Cf. id.* at 1805 ("American judges are generalists, appointed without regard to training outside

the ultimate "client" is not able to review advocates' representations for accuracy and authenticity.

Simply calling judges' attention to the problems peculiar to purported advocacy for non-autonomous persons might go some way toward addressing them, but the composition of courts changes, so the edification might need to be institutionalized. And awareness is insufficient to address all problems; some exist in part because judges and clerks lack the time needed to detect *faux* advocacy and investigate claims, even if they were on guard.[303] Calling out *faux* advocates publicly might have some disciplining effect, but that too is likely to be short-lived. Institutional and legal mechanisms to deter or prevent *faux* advocacy and its symptoms therefore seem desirable from a judge's perspective and beneficial to the legal system along with, in particular, non-autonomous persons whose treatment or welfare becomes the subject of ideologically fraught court battles. This Part offers possibilities for action, tracking Part III's categorization of problems. Some might apply only to advocacy for non-autonomous persons, whereas others might be fit for broader application. Sections A and B consider preventive judicial measures, and Section C considers ex-post punitive measures that private parties could initiate.

A. Correcting Representation Problems

To recap: the representation problems are that (1) individuals and organizations put themselves forth as advocates or experts despite lacking real dedication to, and knowledge about, the rights and interests of the persons for whom they purport to speak, and (2) those who do not have the first problem join in a brief with others whose loyalties lie with some other constituency,

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the law."); *id.* at 1788 ("[F]actual authorities created for a cause and with a case in mind lack an important credibility. The temptation to create one's own factual authorities is one that has likely always existed for well-funded amici, but it is aggravated now in the digital age with the new cheap and convenient method to publish data."); *id.* at 1789–90 ("Professors Michael Rustad and Thomas Koenig warned of this trend in a 1993 article on 'junk social science' in which they argued that 'the empirical findings presented to the Justices [by amici in these cases] have the aura of social science but do not follow the scientific truth-seeking norms that regulate valid research.' . . . They warn generally against 'studies financed by a partisan source, with the results presented in a manner that advances the purposes of the funding source.' The conflict of interest in such studies is inescapable."); *see also* Dwyer, *supra* note 55, at 14–16, 25–26.

303. *See* Bruhl & Feldman, *supra* note 1, at 136 ("In a world of unlimited time and attention, the Supreme Court Justices, their law clerks, and other interested observers could carefully read every amicus brief. But in a world of limited resources, reading scores of briefs, many of them duplicative, is probably neither practicable nor desirable.").

and the former thereby compromise their independence and loyalty to their intended beneficiaries. These problems seem likely to arise primarily, if not exclusively, in purported advocacy for non-autonomous persons, who might be entirely unable to monitor and object. One might expect that charitable organizations and public-spirited individuals, particularly law professors, would be extremely cautious about claiming to speak for persons who have not requested their help and cannot check the accuracy or fidelity of briefs, but Part I's examples belie that expectation. External constraints, it seems, are needed.

1. Vetting amici

Judges and clerks are unlikely to have time to examine qualifications of proposed amici.[304] Courts could, however, institute a practice, just with respect to amici who propose to speak on behalf of non-autonomous persons, of referring them to a clearinghouse or vetting committee.[305] This would be akin to the qualification process for guardians ad litem, who represent individuals in local juvenile or probate court, which primarily aims to ensure competence.[306] The reviewing body might be constituted from existing ombudspersons for such persons around the nation.[307] Ideally, this could occur before

304. *See* Collins, *supra* note 1, at 230. However, courts do something like this when they scrutinize requests for "next friend" status under Federal Rule of Civil Procedure 17(c)(2), which primarily aims to ensure true dedication to the welfare of the non-autonomous persons whom the next friend would represent. *See* FED. R. CIV. PRO. 17(c)(2).

305. Larsen, *supra* note 4, at 1810 (suggesting empowering the parties to select those who will be permitted to submit amicus briefs, limiting them to a very small number, positing that parties would have an incentive to choose the best from a scientific standpoint, because they would know the Court is more likely to dig into those briefs to assess their reliability). One problem with this is that the amici would simply be adjuncts to the parties, not independent, and the parties do not actually want the qualitatively best per se; they want the briefs that most persuasively support their respective positions. So, as Richard Posner has observed, this would effectively just give the parties more pages of briefing, under the pretense of inviting independent perspectives. *Cf.* Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Chief Judge Posner) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse."). A second problem is exclusion of non-party perspectives. The most appropriate outcome might be one that rejects both parties' positions.

306. *See, e.g.*, *Representation of Children as a Guardian Ad Litem—2021 Qualifying Course*, VA. CONTINUING LEGAL EDUC., https://www.vacle.org/product.aspx?zpid=7166 (last visited Apr. 20, 2023).

307. *See, e.g.*, Child Welfare State Complaint Offices, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols:main.dspList&rolType=

the group writes a brief, to spare those rejected from wasted effort. Quick determination should be feasible, though an iterative process of information provision might be desirable, allowing applicants to respond to initial rejection or to requests for additional evidence of qualification. Opportunity for public comment might also be desirable; the clearinghouse could publish on a website a list of all applicants for amicus status and invite input. Repeat players might enjoy lasting qualification absent negative reports, as with bar admission.

Thus, regarding The Hypo, we might suppose a subset of existing state ombudspersons for adults with mental disabilities constitutes, on a rotating basis, a standing committee to whom individuals and organizations must send requests to file an amicus brief qua advocates for such adults in any case in federal court in which those adults' interests are implicated.[308] True advocates for, or academic experts regarding, mentally disabled adults who are aware of the clearinghouse process could automatically receive notification of applications and submit a positive or negative comment on any. They could inform the clearinghouse staff that "Advocates for Mentally Disabled Adults" is actually an ad hoc group of individuals whose true aim is promoting eugenics policies, and that The Fisher Foundation, funder of the cited research, is named after Irving Fisher, founder and first president of the American Eugenics Society. True scholars of intellectual disability and the law pertaining to it could inform the clearinghouse that they have never heard of the individuals billing themselves as Scholars of the Rights and Welfare of Mentally Disabled Adults, whose faculty webpages belie any claim to scholarly outlook or expertise on the legal or factual issues presented.

Such vetting naturally raises bias concerns. The vetting body should be directed not to judge based on content of views regarding the rights and interests of the non-autonomous persons. Its role would not be to exclude unorthodox views or bad arguments, but rather to screen out those whose loyalties lie elsewhere, or are, at best, divided, and those whose professed devotion appears too weak because they have not previously dedicated themselves to study, publication, and debate in the field. Moreover, the effect of rejection

Custom&RS_ID=31&rList=ROL; *Long-Term Care Ombudsman Program*, ADMIN. FOR CMTY. LIVING, https://acl.gov/programs/Protecting-Rights-and-Preventing-Abuse/Long-term-Care-Ombudsman-Program (last visited Apr. 20, 2023).

308. *See generally About*, NAT'L ASS'N OF COUNCILS ON DEVELOPMENTAL DISABILITIES, https://www.nacdd.org/ (last visited October 25, 2022) (describing this organization's focus on "protect[ing] the rights and opportunities" of individuals with disabilities).

would not be denial of all opportunity to file an amicus brief; it would simply preclude presenting oneself as an advocate for or expert regarding the rights and interests of the non-autonomous persons, or more narrowly as having passed the vetting process, so one would simply have to present oneself differently when filing a brief. And there could be a process for appealing a committee decision, perhaps to the court itself. Some might wish to do that, rather than just accept that they must present themselves differently to the court, as a point of pride or to enhance the impact of their briefs. Transparency regarding committee decisions for or against an applicant could provide an additional check; the committee might be expected to provide written explanation.

The very existence of a vetting process might have a substantial disciplining effect. An academic who has never taught or published anything relating to mentally disabled adults, who is really, for example, a corporate law scholar, yet who currently feels free to sign an amicus brief as a "scholar" of the rights and interests of those persons, might be quite reluctant to subject themselves to a vetting process and risk the shame of rejection. Likewise, an organization that has publicly taken positions supporting a different constituency or set of values that is potentially contrary to the interests of those for whom it claims now to advocate, or that has been publicly criticized for *faux* advocacy in the past, might be more hesitant to try to enter the fray qua advocate for those non-autonomous persons, knowing this committee might challenge its bona fides. This committee might also welcome and retain reports from judges about false or misleading claims detected in amicus briefs, reviewing those to assess new applications by the same advocates. The vetting could thus indirectly address substance problems as well.

Concern that "disciplining effect" equals chilling speech needs addressing. An initial response might be: From the perspective of optimizing the amount of speech, arguably there is currently an excess of amicus filings.[309] Further true advocates might be more likely to contribute their views if they believe that (a) there will be less noise in amicus filing from *faux* advocates and (b) judges will pay their brief greater heed because they have the imprimatur of the vetting body. And again, any who are denied the privilege of

309. *See* Paul M. Collins, Jr. et al., *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 229 (2014) (examining briefs filed at Supreme Court in 2002–2004 terms). Collins found little redundancy two decades ago. *Id.* However, his test of redundancy was "same phrasing," rather than same argument, and amicus volume has increased exponentially since that time. *Id.*

presenting themselves as advocates for non-autonomous persons can file an amicus brief in the case under some other cloak. That might amount to suppressing speech of a particular content (labeling oneself as an advocate or expert in the title and the interest statement of a brief), but courts would likely say that amicus filing is a nonpublic forum and that courts may adopt and enforce rules that facilitate their principal functions.[310] Those who feel unjustly suppressed can complain to all the world in any way they wish, even in a brief filed under a different label.

A further measure to maximize valuable and reliable contributors and to minimize unhelpful ones is to rouse the scientific community into action. Current amicus practice might be dominated by more heavily resourced advocacy groups and by law professors because they are most likely to be aware of litigation and the opportunity to weigh in, yet those might not be the best sources of objective factual presentations or reliable empirical research. Larsen suggests courts announce, when granting appellate review, the empirical questions pertinent to a case so that the scientific community would be on notice.[311] Those who respond might also be subjected to vetting, for credentials as objective scientific experts rather than as advocates. State ombudspersons might not be best positioned to make that judgment,[312] but discussed below is a model of scientific clearinghouses in the child welfare realm.

310. *See* Berner v. Delahanty, 129 F.3d 20, 26 (1st Cir. 1997) ("A courthouse—and, especially, a courtroom—is a nonpublic forum."); Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 449–50 (2006) ("A steep drop-off in expressive rights occurs, however, as the speaker moves from a 'public' forum to a 'non-public' forum. In non-public fora, where the state has not manifested any intent to open the property to public discourse, the speaker has very few rights. Here, the state's relationship to place is closest to the ownership metaphor. The government may make distinctions in access based upon subject matter, as well as on the basis of a speaker's identity. Regulation of a speaker's access must only be 'reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'")

311. Larsen, *supra* note 4, at 1814. Larsen proposes that, alternatively, courts might appoint an amicus or two to research and brief them on empirical issues. *Id.* One can imagine, though, division among judges on whom to appoint, with the result that there might simply be competing judicially commissioned experts, whose conclusions the judges know in advance. The same problem arises with Larsen's suggestion that a special master be appointed to adjudicate claims of legislative facts, or at least flag those lacking authoritative foundation. *Id.* Whom should they appoint for that role? The parties and amici might challenge a court's choice.

312. *See* Dwyer, *supra* note 55, at 80 n.375 (noting that "might not have empirical training").

2. Prohibiting Conflicts of Interest

This fix might be easiest to implement. It is an extension of one of the most common rules in legal practice regarding conflicts.[313] The same concern arises in amicus practice, that an advocate will compromise the interests of one client or constituency, or advocate less effectively, when also committed to serving another whose interests are not coextensive.[314] The divergence of interests might not be apparent at the outset, but in any case misalignment can increase or decrease over time as new information comes out, other players take particular positions likely to influence the courts, political climate changes, other precedents emanate from the courts, etc.

Thus, courts might adopt a rule that any individual or organization presenting as an advocate for a group of non-autonomous persons may not join in an amicus brief with individuals or organizations who do not present as advocates for that group. To conjoin would be a per se conflict of interest. Further, the conflict should not be waivable. Children's rights organizations simply should not be joining in briefs with churches, advocates for parents' rights, or organizations of adoption agencies or lawyers, sexual minorities, social workers, etc. Those other entities can file a brief separately, not claiming to be allied with advocates for children, though they would be free in their own brief to endorse that submitted by approved advocates for children. Coupled with the vetting process, this conflict rule should result in true advocates co-filing with other true advocates for the group and no one else.

B. Ex Ante Measures to Minimize Content Problems

At a minimum, courts should communicate basic expectations to amicus advocates for non-autonomous persons and indicate that substantial non-compliance will result in a court's disregarding their brief and/or making a negative notation for future vetting purposes. Some means of doing this less formal than adding to court rules should be adequate. Presently there is no guidance to anyone that is specific to amicus briefs,[315] though attorneys submitting them are subject to general rules of professional ethics, discussed

313. *Cf.* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

314. *See id.*; Larsen, *supra* note 4, at 1795 (describing conflicts of interest in amicus practice, specifically regarding amicus funding).

315. *See* Scott, *supra* note 5, at 1355 ("[N]owhere does the Rule [37 of the Supreme Court] set forth standards for the studies, statistics, or other facts presented to the Court in the amicus brief.").

below.[316] Suggestions for guidelines appear below as well.[317] Courts might receive assistance in applying them, especially as regards research support for empirical claims, from the same group constituting the vetting committee if its members have sufficient facility with norms of scientific study. That group might reject non-compliant briefs, with opportunity for amendment if infractions are modest, or it might simply flag deficiencies for the court. This would likely be costlier than the process of qualifying people to file,[318] but the committee need review only the briefs filed by those it has qualified—that is, the likely small number who submit as advocates for or experts regarding non-autonomous persons. This is a thin stream of the avalanche.

An alternative institutional measure might be for the Federal Judicial Center to establish an Office of Scientific Review, with a small staff of non-partisan experts in scientific methods. Federal judges could then routinely send to that office briefs that contain citations to empirical research. The staff could review the studies to assess the quality of design and analysis, then examine the briefs to determine whether the studies actually support claims based on them. Another possible location for this function is an expanded Supreme Court Fellows program. This program is now predominantly a learning experience for fellows, but it specifically invites persons with doctorates in political science.[319] It could take on more such persons and include, as expectations for some of them, participation in the judicial process by reviewing factual claims in briefs.

Below are suggestions for substantive content of guidance to advocates, which the judiciary might convey to a vetting body and/or directly to the bar, organized according to the problems Part III identified. For ease of reference, non-autonomous persons, for whom amici purport to advocate, are referred to as beneficiaries, a term suggestive of a fiduciary role. Guidance to scholars might differ in some respects from that given to advocates per se.

1. Proscribing Misplaced Advocacy

Though it can be advantageous for beneficiaries to endorse rights of other

316. *See infra* Section IV.C.

317. *See infra* Section IV.B.

318. *Cf.* Scott, *supra* note 5, at 1363–64 (rejecting as too expensive the possibility of creating a new office within the judiciary tasked with "fact checking" all amicus briefs).

319. *See About the Fellowships*, SUP. CT. OF THE U.S. https://www.supremecourt.gov/fellows/aboutfellowships.aspx (last visited Oct 25, 2022).

persons or organizations, as in some third-party standing cases, it is presumptively improper for the following reasons: (a) others' rights might not, in the present case, be the most propitious basis for advocating for beneficiaries; (b) those rights might, in future cases, disserve one's beneficiaries, and one will have given strength to them; and (c) doing so fosters an impression that one's beneficiaries themselves are not rights holders or have only weak claims, so it can inhibit recognition of their rights in the present case and development of their rights over time.[320] The presumption of impropriety might be overcome only by showing that invoking the rights of others is necessary in the present case because those rights present the best vehicle to an outcome, in this case, favorable to the beneficiaries and because no party or other amicus brief is likely to assert those rights adequately.[321] Such a showing seems highly unlikely. In any case, amici advocates should be required to convincingly explain why they are invoking rights of persons other than their beneficiaries, how that serves their beneficiaries, and why it is necessary.

2. Ensuring primary attention to rights and interests of the beneficiaries

A brief filed by 'Advocates for Group X' should devote at least the majority of its argument to explaining to the court, with the most robust support available, what Group X's rights and interests are, and why the court's decision should serve them as well as possible. To do otherwise can generate a negative inference, that Group X's position is actually weak. If persons inclined to file an amicus brief on behalf of non-autonomous persons find they have little to say about those persons' rights or interests in the context presented by the case, then they probably should not file. Scholars claiming expertise on the group's rights should feel free to present the view that the group has no rights, or lesser rights than others claim; a scholar of X is not necessarily an advocate of X. But they still should make that group's rights their main focus. At the same time, neither scholars of, nor advocates for, children's rights should consider themselves to have a roving commission to pipe

320. *See generally* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 49–70 (2021) (elaborating the issues with third-party standing cases that share some similarities with the above three improprieties).

321. *Cf.* Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 332–33 (2015) (proposing relaxed requirements for third-party right-holders to participate as amicus curiae).

in on every case impacting children, especially when the subject matter is outside the realm of their true focus or expertise.

3. Promoting Independent Perspectives

Non-autonomous persons are especially susceptible to stereotypes and false ascriptions of identity and need. Advocates for such persons, as well as scholars, should be urged to identify and challenge misdescriptions and mislabeling. Judges might convey such admonition in their opinions. Justice Alito arguably did so in authoring the majority opinion in *Adoptive Couple* when he noted that the child's Cherokee ancestry was a trivial portion of her entire ancestry, and judges might be encouraged to be more explicit in identifying briefs they believe manifest this problem.

4. Promoting thoroughness

To address the danger of factual presentations skewed by divided loyalties, the judiciary might simply communicate to the bar that judges will pay greater heed to amicus briefs that are thorough and balanced in their treatment of facts and law. When an opposing position has significant and reliable evidence on its side, directly contrary to claims an amicus brief makes, the amicus brief is inherently suspect if it does not squarely address that evidence.

5. Demanding objective and adequate support for factual claims

Advocates should not be making bold factual assertions without support from relevant, published, peer-reviewed empirical literature or from evidence introduced in litigation.[322] Relevance includes an element of recentness; evidence about, for example, rates of maltreatment by developmentally-disabled parents a half-century ago might be inapposite to decision making today, when much greater social-service support exists for such parents. Because the beneficiaries might have received no representation in lower courts, appellate

322. *Cf.* Larsen, *supra* note 4, at 1809–11 (asserting the necessity of having testimony, factual claims, and data submitted backed up with evidence of reliability and accuracy in amicus briefs); *id.* at 1811–12 (suggesting that "the Court could decline to accept any amicus brief filed with factual claims that are not backed up with an explanation of the methods used to discover them" or that are supported only with research reports that are not readily available to the court and other participants in the case, because they are unpublished and "'on file with' the author").

courts should perhaps welcome submission of evidence by amici themselves, such as sworn statements by people with first-hand experience of the matter discussed in the brief.[323] This should, of course, be subject to response by parties to a case and perhaps by other amici.[324]

Larsen suggests requiring amici to disclose any involvement they had in producing the studies they cite.[325] It is a serious problem in child welfare research, for example, that the Casey Family Programs foundation, which has a robust lobbying operation and often files amicus briefs, also funds a great bulk of the research in the field and, in the view of knowledgeable observers, styles studies to serve its parent-focused ideological agenda.[326] Such powerful entities might exist in other realms such as education, treatment of mental illness, etc. Current rules require amici to disclose sources of funding for the amicus filing, but do not require disclosure of their own involvement in producing cited research.[327] It should be easy and costless to add the latter.

C. Ex Post Penalties for Bad Amici

The foregoing, mostly ex-ante, measures that courts could adopt might effect substantial improvement in amicus practice relating to non-autonomous persons, but additional measures under the control of private parties might be needed. Vetting and admonition should suffice to put members of the elite Supreme Court bar, as well as many potential amici, on notice that they should be more scrupulous than in the past about how they portray themselves and what arguments and assertions they advance in a brief when portraying themselves as advocates for or experts regarding the welfare and rights of non-autonomous persons. Only members of that bar can perform the practical

323. *Id.* at 1810. Larsen suggests that courts allow parties to choose which groups are permitted to convey information. *Id.* But it might be that no party's interests in a given case are aligned with those of an impacted group of non-autonomous persons, and so that the outcome would not be presentation of the best information to the court.

324. *See id.* at 1812 (suggesting courts facilitate a second round of briefing limited to critiquing empirical claims others have made). As Larsen notes, some participants in a case might hesitate to call attention to deficiencies in others' briefs, lest they end up highlighting or enhancing the weight of those briefs, if judges might otherwise have overlooked or discounted them. *Id.* So, this can be only a partial corrective, but it seems a valuable one.

325. *Id.*

326. *See supra* notes 55, 114, and 207.

327. *See* Fed. R. App. P. 29.

filing of a brief,[328] and most would not want to risk being bounced or otherwise incurring the Court's disfavor. But still, some might be tempted, especially if they are drafting the brief, by the potential for hefty fees and notoriety, to play loose with portrayal of whom they serve and with factual assertions. And in lower courts, where there is not such a selective bar to serve a gatekeeping function, a content-vetting system might be infeasible, and admonitions might be less effective. Moreover, the judiciary might never act to correct amicus abuses. It seems worth considering extra-judicial means that private parties can initiate.

This final Section therefore considers ex post consequences for *faux* advocacy, principally for lawyers involved, given the greater responsibility and higher expectations they are under, by looking to codes of professional conduct and tort law. Amicus briefs are filed by attorneys; many amicus organizations have attorneys who participate in drafting, and some amici are themselves attorneys (e.g., law professors). Some general norms of ethical practice pertinent to lawyering clearly apply in the amicus context, and breach of those norms could lead to bar sanctions.[329] And because *faux* advocacy could conceivably cause material harm to vulnerable persons—the ostensible beneficiaries or, one might say, ultimate "clients"—we might consider whether malpractice law could ever serve as a deterrent to their bad behavior, even though the vulnerable persons are not actually clients in the normal sense. A tort action against amici per se, whether lawyers or not, also merits exploration.

1. Professional Ethics Complaints

Any observer who detects *faux* advocacy for non-autonomous persons in connection with some litigation of a sort that entails violation of the ethics code for attorneys could bring this to the attention of an appropriate bar. Every state has adopted some version of the American Bar Association's Model Rules of Professional Conduct (MRPC),[330] every state's bar has a mechanism for charging attorneys with unethical conduct, and the mechanism

328. *See, e.g.*, Sup. Ct. R. 37 ("An amicus curiae brief may be filed only by an attorney admitted to practice before this Court.").

329. *Cf.* Scott, *supra* note 5, at 1362–63 (proposing ex-post rules that create consequences for lawyers who purposefully or negligently misrepresent facts in amicus briefs).

330. *See* Lorelei Laird, *California Approves Major Revision to Attorney Ethics Rules, Hewing Closer to ABA Model Rules*, AM. BAR ASS'N J. (Oct. 2, 2018), https://www.abajournal.com/news/article/california_approves_major_revision_to_attorney_ethics_rules_hewing_closer_t.

is available to anyone—not just a lawyer's client.[331] In fact, those same rules impose a duty on all members of the profession to report violations of the rules by other attorneys.[332] The legal profession is supposed to be self-policing.[333]

The bar has available to it a range of potential sanctions, from mere statement of disapprobation to disbarment.[334] Conduct more serious, deliberate, or recurrent warrants stronger sanctions.[335] Non-public admonition from a bar might suffice, though, to prevent repetition by a given attorney. The substantive rules impose duties owed to courts, clients, and other parties.[336] It is easier to fit *faux* advocacy within some rules than others.

a. Breach of Duties Owed to Courts

Ethical duties owed to the courts apply straightforwardly to all lawyers involved in filing an amicus brief, regardless of who their client is or whether they can even be said to have a client in the case.[337] Law professors filing amicus briefs as scholars arguably have even higher duties than lawyers filing as or for advocates, because they represent to the court something about themselves, their objectivity, and their disinterestedness, in presenting themselves as such.[338] Though prior subparts focused on judicial efforts to enforce such duties or otherwise improve amicus practice, it is not essential that judges themselves or a vetting committee they create scrutinize credentials, identify conflicts of interest, discern true motives, or check cited sources. Any

331. *Resources for the Public*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/ (last visited Nov. 6, 2022).

332. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 1983) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

333. BENNETT & GUNNARSSON, *supra* note 144, at 2–3.

334. MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2020).

335. *See id.* r. 9(B) ("Conduct shall not be considered lesser misconduct if . . . (5) the misconduct involves dishonesty, deceit, fraud, or misrepresentation . . . or . . . (7) the misconduct is part of a pattern of similar misconduct."); *id.* r. 10(c). For a discussion on the implications of more serious conduct, see BENNETT & GUNNARSSON, *supra* note 144, at 704 ("A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.").

336. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983) (describing minimum standards of conduct for lawyers).

337. *See* SUP. CT. R. 37.

338. *Cf.* Fallon, *supra* note 8, at 256–58 (analyzing the need for law professors to adhere to an enhanced obligation of ensuring that, in their briefs, their stance is supported, and they stay sincere and trustworthy in their reasoning and conclusions).

observer who detects unethical behavior by lawyers can file a formal complaint with or, less aggressively, just express concern to the bar in a jurisdiction where the attorney is admitted to practice, where the attorney provides services in connection with the brief, or where the brief is filed.[339]

The most fundamental duty relevant to amicus practice that lawyers owe courts is one of candor. Model Rules of Professional Conduct (MPRC) Rule 3.3 states that a lawyer "shall not knowingly . . . make a false statement of fact or law to a tribunal."[340] Other iterations of the duty of candor suggest a broader range of deceptive representations constitute a breach, not just those patently false. Rule 8.4 pronounces that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or to "engage in conduct that is prejudicial to the administration of justice."[341] Articulations of more specific duties, discussed below, refer to "misleading" or "frivolous" claims.[342] Further, official commentary on the duty of candor maintains that neither intent to deceive nor an effect of actual deception is necessary to finding a breach; reckless disregard for accuracy suffices, even if a misrepresentation ultimately has no demonstrable impact on a case.[343] Several of the Model Rules give detail to this general obligation.

MRPC Rule 7.1 provides: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[344] This prohibition applies to all communications lawyers make about themselves as attorneys, including their credentials.345 It applies not just to statements lawyers make to clients or potential clients, but also to statements to anyone in a public setting, even in regard to a lawyer's personal affairs.[346] Thus, a declaration about one's expertise that

339. MODEL RULES OF PRO. CONDUCT r. 8.5(a) (AM. BAR ASS'N 1983).

340. MODEL RULES OF PRO. CONDUCT r. 3.3 (establishing "Candor Toward the Tribunal" as an official rule to which lawyers must adhere).

341. MODEL RULES OF PRO. CONDUCT r. 8.4.

342. *See* MODEL RULES OF PRO. CONDUCT r. 7.1, 3.1.

343. BENNETT & GUNNARSSON, *supra* note 144, at 714 (citing numerous court decisions); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2000) ("[F]or disciplinary purposes, reliance by and injury to another person are not required.").

344. Model Rules of Pro. Conduct r. 7.1

345. BENNETT & GUNNARSSON, *supra* note 144, at 615, 637.

346. *Id.* at 371 (noting many instances of Rule 3.3 being applied to lawyers' conduct in personal affairs); *id.* at 705 (stating that "Rule 8.4 reaches outside the practice of law" and citing many cases of

"creates a false impression," such as that one is a scholar of children's rights when one actually only teaches and publishes in the area of corporate law, is professional misconduct subject to bar sanction.[347] Additionally, there is a general duty of competence that might be breached by presuming to advocate for non-autonomous persons when one actually lacks the knowledge necessary to do so properly.[348]

The commentary to the Rules notes that even a truthful statement can be unethically misleading, if, by omitting other pertinent information, "a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer . . . for which there is no reasonable factual foundation."[349] Further, the prohibition "includes both explicit falsehoods and falsehoods implicit in other claims."[350] Thus, even if one has at some point taught or written about some legal issue concerning a particular group of non-autonomous persons, it would be unethical to present oneself as a "scholar of" or "expert on" the rights of such persons in an amicus brief for a particular case if one's primary work is actually in other areas of law.[351]

Importantly, the attribution of professional misconduct would extend also to a lawyer who simply files a brief on behalf of other persons who falsely or misleadingly portrays themselves as advocates, scholars, or experts, if the lawyer knows the portrayal is false or misleading.[352] Rule 8.4 commands lawyers not to "knowingly assist or induce another" lawyer to violate or attempt to violate the Rules of Professional Conduct.[353] This would encompass the action of a lawyer who is, or works for, the principal drafter or signatory of an amicus brief and who solicits the signatures of other persons or organizations that will have to misrepresent their qualifications. An example would

lawyers being sanctioned for bad conduct in personal settings); *id.* at 707 (citing an example of false statements to a court); *id.* at 714.

347. *Id.* at 648 ("Any statement that creates a false impression about certification or expertise remains prohibited."); *id.* 619, 649, 716 (citing numerous cases and opinions of states' ethics panels condemning misstatement of qualifications or expertise).

348. *See id.* at 1 ("In all professional functions a lawyer should be competent, prompt and diligent.").

349. MODEL RULES OF PRO. CONDUCT r. 7.1 cmt. (AM. BAR ASS'N 1983).

350. BENNETT & GUNNARSSON, *supra* note 144, at 618.

351. *See* MODEL RULES OF PRO. CONDUCT r. 7.1 cmt.

352. *See* BENNETT & GUNNARSSON, *supra* note 144, at 698 (explaining that "knows" means "actual knowledge of the fact in question," which "may be inferred from the circumstances," and that though mere suspicion not enough, certainty is not required).

353. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 1983).

be when one law professor drafts a brief in a particular case and then invites other law professors to sign on as scholars/experts on the area of law pertinent to that case despite knowing they cannot plausibly characterize themselves as such.[354] This problem can and does arise in any sort of case, not just those involving non-autonomous persons.[355]

With respect to content problems in briefs, Rule 3.1 provides: "A lawyer shall not . . . assert or controvert an issue . . . unless there is a basis in law and fact for doing so that is not frivolous."[356] The commentary to Rule 3.1 explains that lawyers must "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their client's positions."[357] It notes "the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. . . . [So] the lawyer must not allow the tribunal to be misled."[358] Furthermore, under Rule 3.1, the duty not to advance meritless or frivolous arguments is not owed just (or even primarily) to clients, but also to the court and opposing parties.[359] And the lawyer's intentions are irrelevant; courts will apply an objective test of whether a lawyer's assertions had "a basis in law and fact. . . that is not frivolous."[360] Relatedly, Rule 3.4 admonishes that a lawyer "shall not . . . allude to any matter that . . . will not be supported by admissible evidence."[361]

Assertions of fact without citation to any evidentiary support might additionally run afoul of Rule 3.3's prohibition of misrepresentations if made in

354. *See* BENNETT & GUNNARSSON, *supra* note 144, 707 (noting examples of lawyers charged with professional misconduct for inducing another lawyer to make misrepresentations to a court).

355. *Rule 8.4(c)*, 2 LEGAL ETHICS & MALPRACTICE REP. 1, 3 (2021) (providing various examples of lawyers who violated Rule 8.4).

356. MODEL RULES OF PRO. CONDUCT r. 3.1.

357. MODEL RULES OF PRO. CONDUCT r. 3.1 cmt.; *see* BENNETT & GUNNARSSON, *supra* note 144, at 345.

358. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt.; *see* BENNETT & GUNNARSSON, *supra* note 144, at 362.

359. MODEL RULES OF PRO. CONDUCT r. 3.1 cmt.; *see* BENNETT & GUNNARSSON, *supra* note 144, at 346 (citing *In re* Olsen, 326 P.3d 1004 (Colo. 2014)).

360. *See* BENNETT & GUNNARSSON, *supra* note 144, at 347; *see also* People v. Bontrager, 407 P.3d 1235, 1247 (Colo. O.P.D.J. 2017) (discussing an attorney who failed to investigate facts before filing suit and persisting with nonmeritorious claims); In re Zohdy, 892 So.2d 1277 (La. 2005) (discussing an attorney who failed to investigate whether clients actually incurred harm they asserted); Att'y Grievance Comm'n v. Zhang, 100 A.3d 1112 (Md. 2014) (pushing client's claim that husband was impotent, with no factual basis).

361. MODEL RULES OF PRO. CONDUCT r. 3.4.

reckless disregard for the truth of the matter (or, of course, with knowledge that the assertions are false) and without noting that there is no evidence—that is, that the brief is offering what its author deems plausible speculation.[362] Even if merely negligent, factual assertions might be contrary to Rule 8.4's proscription of "conduct that is prejudicial to the administration of justice" if they are in fact baseless and if they have some impact.[363] The impact, though, need not be on the outcome of the case; the proscription is transgressed also if it "erodes public confidence in the legal profession."[364]

A final process-protecting rule worth mention is that proscribing double dipping as advocate and witness. Rule 3.7 states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," except in limited circumstances.[365] The primary concern this addresses is that "the trier of fact may be confused or misled."[366] Lawyers arguably fall afoul of this rule if they present themselves to a court as amicus advocates for children and make factual assertions based on their own professional experience in their brief—for example, their general impressions regarding children's interests formed from handling cases, as some amici have done in the ICWA cases before the Supreme Court.[367]

b. Breach of Duties Owed to Clients

The harder fit is with duties owed to clients, as wrongs to private persons lie at the heart of what is ethically troubling about *faux* advocacy for non-autonomous persons.[368] If those persons were themselves regarded as the clients in connection with amicus filings by their purported advocates, the lawyers involved would owe them duties of competence, diligence, and loyalty.[369]

362. *See* MODEL RULES OF PRO. CONDUCT r. 3.3.

363. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(d); BENNETT AND GUNNARSSON, *supra* note 144, at 727, 737 (stating "[l]ying to or misleading a court can violate Rule 8.4(d)" and citing many cases). *But see* In re Czarnik, 759 NW2d 217, 223 (Minn. 2009) (holding that a lawyer's dishonesty need not have been "material").

364. BENNETT & GUNNARSSON, *supra* note 144, at 729.

365. MODEL RULES OF PRO. CONDUCT r. 3.7 (AM. BAR ASS'N 1983).

366. BENNETT & GUNNARSSON, *supra* note 144, at 415.

367. *See, e.g.*, Brief of Casey Fam. Programs et al. as Amici Curiae in Support of Respondent Birth Father, supra note 149, at 7.

368. *See supra* notes 238–240 and accompanying text.

369. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983) (describing the duties lawyers owe to their clients and the court).

With respect to the first two of those duties, Rule 1.1 states: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[370] These obligations "require a lawyer to investigate all relevant facts and research applicable law."[371] Rule 1.3 adds: "A lawyer shall act with reasonable diligence and promptness in representing a client," and this entails adequate level of preparation and investigation.[372] These rules suggest lawyers should not be filing any documents with a court, amicus briefs or otherwise, without becoming substantially familiar with the applicable law and the pertinent facts—in particular, with the full range of facts that should inform a judgment of what position would actually best serve the persons for whom they purport to advocate.[373] Presuming to advocate for non-autonomous persons on the basis merely of one's distaste for some aspect of a party's behavior or legal stance, or one's ideologically-driven gut reaction to a case, relying on careless speculations about those persons' interests, is unethical (in a broad sense) not only because of its dishonesty toward the court but also because it violates ethical duties of competence and diligence owed to those persons.[374]

Such behavior also violates ethical duties of respect and dedication embodied in the rules relating to loyalty. Rule 1.7 addresses the problem of disserving a client because of other allegiances, which can include a lawyer's personal and collegial relationships or even personal political views or ideology.[375] It commands that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which exists if:

> (1) [T]he representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal

370. MODEL RULES OF PRO. CONDUCT r. 1.1.
371. BENNETT & GUNNARSSON, *supra* note 144, at 25.
372. MODEL RULES OF PRO. CONDUCT r. 1.3; BENNETT & GUNNARSSON, *supra* note 144, at 55.
373. *See* MODEL RULES OF PRO. CONDUCT r. 1.1, 1.3.
374. *See id.*
375. *See* MODEL RULES OF PRO. CONDUCT r. 1.7.

interest of the lawyer.[376]

The rule empowers competent clients to waive the conflict after receiving full disclosure from the lawyer about it,[377] but legally incompetent clients are unable to provide effective informed consent, so the duty is presumptively unalterable.[378] Thus, lawyers who file a brief on behalf of both organizations that advocate for non-autonomous persons and organizations with different missions presumptively violate the spirit of the duty of loyalty, even if there is no technical violation of the rule because the clients are actually the organizations per se, whose officers can sign a conflict waiver.[379] The concern is precisely that expressed in Part III above, that a lawyer purporting to represent in some way non-autonomous persons "will pursue that client's case less effectively out of deference to the other client," including by feeling constrained not to pursue any lines of argument that another client might deem contrary to its aims.[380] The commentary explains:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibility or interest. For example, . . . ability to recommend or advocate all possible positions . . . . The conflict in effect forecloses alternatives that would otherwise be available to the client. . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's

376. *Id.*; *see also* BENNETT & GUNNARSSON, *supra* note 144, at 157 ("Responsibilities attendant upon other kinds of relationships, in addition to personal relationships and lawyer-client relationships, can also create material-limitation conflicts . . . ."). Notably, "[p]rofessional interests that are not purely financial can also materially limit a representation." BENNETT & GUNNARSSON, *supra* note 144, at 155.

377. BENNETT & GUNNARSSON, *supra* note 144, at 158.

378. *See Informed Consent*, CORNELL L. SCH., https://www.law.cornell.edu/wex/informed_consent (last updated Dec. 2020) (noting that a legally incompetent individual cannot give informed consent by definition).

379. *See* Kevin Mohr, *Spotlight on Ethics: Unwaivable Conflicts of Interest*, CALI. L. ASS'N, https://calawyers.org/california-lawyers-association/spotlight-on-ethics-unwaivable-conflicts-of-interest/ (last visited Nov. 9, 2022) ("CRPC 1.7(d)(3) provides that representation under CRPC 1.7 is permitted only if the informed written consent of all clients is obtained '*and* . . . (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.'").

380. BENNETT & GUNNARSSON, *supra* note 144, at 140; *see also supra* Part III.

> independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[381]

In *Fulton*, for example, some individuals or organizations genuinely devoted solely to child welfare might have made an immediate judgement after hearing about the case that any sort of discrimination against same-sex couples in the system must be eradicated, and so agreed to join in a brief with any other organization that shares that position. But further digging into the facts of that or similar cases, or new factual revelations while the case was pending before the Court, should have led to a different stance—that the City should continue to tolerate CSS's policy because, on the whole, its participation was good for children, just as the City tolerates imperfections with other agencies and with foster parents. But those individuals and organizations had already created an amicus partnership that constrained their ability to modify their position. In addition to amicus alliances, reputation among peers could constitute an interest that limits the range of positions an individual or organization feels free to adopt on behalf of non-autonomous persons, so that too counsels against injecting oneself into the case. For example, if child law, family law, elder law, disability law, the legal academy more generally, or the social work profession is dominated by liberals, an individual or organization operating in any of those worlds presumably would find it difficult ever to take a stance on behalf of non-autonomous persons in opposition to any group of autonomous adults with which liberals generally sympathize. *Fulton*, *Adoptive Couple*, and *Santosky* are all examples.

In addition to the no-conflicts duty, Rule 1.3 entails an obligation during representation of "commitment and dedication to the interests of the client and . . . zeal in advocacy upon the client's behalf."[382] Thus, even when lawyers advocate only for non-autonomous persons, they engage in professional misconduct if they are induced by personal affinities or political agendas to act against those persons' interests or simply to be lax in investigation of facts or careless in positions adopted.[383] Rules 1.2 and 1.14 require consultation with clients as to the objectives and means of representation, even with clients of diminished capacity to the extent that is possible. These rules also require

381. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. (AM. BAR ASS'N 1983).
382. BENNETT & GUNNARSSON, *supra* note 144, at 49.
383. *See id.*

independent assessment of a non-autonomous person's interests after consultation and investigation, rather than just reliance on what any representative for the person says.[384]

Parts II and III showed that behavior of amici lawyers, in connection with child welfare cases, runs afoul of all these expectations.[385] Some lack competence to serve as advocates for children, while others are actually advocates for other persons but are using the pretense of child advocacy to pursue the agenda of those other persons. Some place themselves into situations of conflict by joining with other groups in a single brief. Many write briefs that in various ways are disloyal to and disserve the children for whom they purport to advocate—promoting supposed rights of other persons, saying little about children themselves, accepting problematic categorizations and characterizations of children, and skewing fact presentations to support outcomes they favor for reasons other than children's wellbeing.

The rub, though, is that the lawyers were not retained by the children for whom they claimed to advocate, nor were they appointed by any court or other government agency to represent those persons in the way that states appoint attorneys for children in juvenile court cases. Rather, some organizations or individuals who want to weigh in on pending litigation, perhaps because of some quite different agenda, hire attorneys to file (and perhaps also draft) a brief on their behalf, under the guise of being concerned solely for the rights and welfare of the children involved. Or some attorneys (e.g., law professors) themselves take the initiative because they personally have some goal that an amicus brief could serve. The latter situation includes individuals presenting themselves as experts, ostensibly aiming to serve the court. As explained above, though, presenting oneself as an expert on the rights and welfare of non-autonomous persons practically amounts to presenting oneself as an advocate for the group.

Because there is not retention of the lawyers to serve the non-autonomous persons in the usual way, it is difficult to fit the behavior of lawyers in amicus filing within the existing provisions of the Model Rules that pronounce duties to clients. The Model Rules do not define client, but the traditional and still prevailing understanding entails a contractual relationship.[386] Further, Rule

384. *Id.* at 257; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 (2000).

385. *See supra* Parts II–III.

386. *See, e.g.*, *Client*, LAW DICTIONARY, https://thelawdictionary.org/client/ (last visited Oct. 25, 2022) ("A person who employs or retains an attorney, or counsellor, to appear for him in courts, advise,

1.13(a) provides that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents," and the Commentary notes court decisions holding that such a lawyer does not represent the members of the organization (who likely would not include an advocacy organization's non-autonomous beneficiaries anyway; members presumably would be adults who pay a membership fee).[387] That seems to rule out treatment of the non-autonomous persons as the clients of any attorneys involved in amicus advocacy allegedly on their behalf.[388] The lawyer representing the organization would owe an obligation to thwart any illicit conduct by its officers only if it is "likely to result in substantial harm to the organization,"[389] and it might be quite difficult to convince anyone this is happening when an organization acts against the interests of some broad group of non-autonomous persons for whom it purports to advocate.

Arguably, this is a lacuna in bar oversight of lawyers. They carry authority and credibility that could enable them to harm nonclients.[390] If one shows up in any public forum purporting to advocate for an incompetent adult, then judges, other government officials, and the public might actually, or perhaps ought to be confidently able to, suppose the lawyer is genuinely devoted to the incompetent adult's interests, knowledgeable about that vulnerable person's needs and situation, and honest. They might thus rely on the lawyer's representations. Not only the lawyer's audience, but also the persons the lawyer purports to represent, who might be the only ones harmed in a material sense, whom this Article has sometimes referred to as the "ultimate clients," ought perhaps to have some recourse against the lawyers if the advocacy is actually false. The wrong done by making baseless assertions is ordinarily, when made on behalf of autonomous clients, done to the court and to adverse parties,[391] but Part II showed that it can also wrong purported beneficiaries of

assist, and defend him in legal proceedings, and to act for him in any legal business.") (citing court decisions in several states). Some sources offer a broader definition. *See, e.g.*, *Client Law and Legal Definition*," USLEGAL.COM, https://definitions.uslegal.com/c/client/ (last visited Oct. 25, 2022) (stating "[a] client generally means a person . . . who is rendered services by a service provider").

387. BENNETT & GUNNARSSON, *supra* note 144, at 241 (citing court decisions and ethics panel opinions).

388. *See* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 363 (2015) (outlining the various types of parties involved in amicus advocacy, none of which are attorneys filing on behalf of their own clients).

389. BENNETT & GUNNARSSON, *supra* note 144, at 244.

390. *See generally* MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE (AM. BAR ASS'N 2020).

391. *Cf.* BENNETT & GUNNARSSON, *supra* note 144, at 737 (referring to "conduct which frustrates

advocacy if they are unable to monitor and direct.[392]

The Model Rules reflect recognition of the possibility of betrayal in situations of formal guardianship,[393] but they contain no hint of having contemplated betrayal in unofficial representation of the sort that occurs with non-autonomous persons in amicus practice. This is a call, then, for the ABA to add rules of conduct pertaining to advocacy for non-autonomous persons outside the context of formal, contract-based representation. Those rules could simply proscribe presenting oneself to a court as an advocate for non-autonomous persons without formal appointment as such.[394] Or they could stipulate that any person or organization making that claim, or their lawyers, thereby assumes as to the non-autonomous persons all ethical duties owed to clients.[395] *Faux* advocates should not be able to cloak themselves in the mantle of representation without accepting its responsibilities.

2. Tort suits

The idea here is that an observer who perceives harm to a group of non-autonomous persons, as a result of a court decision, might file a complaint for damages on behalf of those persons. The observer might file as a "next-friend," under a state-law analogue to Federal Rule of Civil Procedure 17, against any *faux* advocates and/or their attorneys who participated in the court proceeding and promoted that case outcome.[396] The breach of duties that gives rise to malpractice or other tort liability are not substantively identical or formally tied to MRPC duties, but the MRPC can be evidence of the standard of care expected of lawyers for tort purposes,[397] and Subsection 1 above identified plausible claims of ethical breach.[398]

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the fair balance of interests").

392. *See supra* Part II.

393. BENNETT & GUNNARSSON, *supra* note 144, at 252 ("If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.")

394. *Cf. id.* at 737 ("A lawyer who purports to represent a party without authorization violates Rule 8.4(d).") (citing *In re Jarvis*, 349 P.3d 445 (Kan. 2015) (describing how a lawyer took legal action on behalf of client with diminished capacity without obtaining authorization from client's guardian and conservator)).

395. *See* MODEL RULES OF PRO. CONDUCT 1.1–1.8 (AM. BAR ASS'N 1983).

396. *See also* FED. R. CIV. P. 17.

397. *See* BENNETT & GUNNARSSON, *supra* note 144, at 4-5, 7.

398. *See supra* Section IV.C.1.

This might not be a very promising avenue of redress. Though the substantive standard of conduct—negligence—is low, unlike an ethics complaint a tort suit requires showing duty, harm, and causation, or for injunctive action a likelihood of harm.[399] That a court decision has occasioned harm might be possible to demonstrate in some cases, but tracing the harm causally to an amicus brief would typically be quite difficult.

For a legal malpractice tort cause of action, one generally must also establish an attorney-client relationship as a basis for establishing a duty.[400] Malpractice recourse for non-clients would not be unprecedented, but it has been rare.[401] The main example is in the estate context; some jurisdictions have afforded would-be will or trust beneficiaries standing in limited circumstances to sue an estate attorney as third-party beneficiaries to the legal-retention contract when the attorney bungles the drafting of a will or trust instrument.[402] That situation is structurally similar to amicus advocacy; someone hires an attorney to assist them in providing a benefit to third parties. The analogy breaks down, though, insofar as in the amicus context the lawyers are presumably actually following the direction of those who hired them. The perceived problem is that the hiring parties do not actually want to benefit the third parties. The third parties stand more in the position of adversaries vis the hiring parties, insofar as their actual interests might stand in the way of the hiring parties' true objectives. Or, at best, the third parties are incidental victims of the hiring parties' agenda. Adversaries or incidental victims of a lawyer's client generally cannot sue the lawyer for malpractice.[403]

It seems worth exploring, though, whether some sort of tort claim against an individual or organization that secures amicus status and files a brief might be colorable, in a rare case of fairly clear causation of material harm to non-

399. *See* Michael S. LeBoff, *When Does a Mistake Become Legal Malpractice?,* ABA. PRACTICE POINTS (Feb. 8, 2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/when-does-a-mistake-become-malpractice/.

400. *See* 61 A.L.R.4th 615 § 8 ("[G]enerally, a nonclient has no cause of action against an attorney for negligent performance of legal work, because of the lack of privity between them."); Fabian v. Lindsay, 765 S.E.2d 132, 136 (S.C. 2014).

401. *See Fabian*, 765 S.E.2d at 137–41 (discussing developments nationally on this question); Thomas R. Stauch et al., *Can You Bring a Malpractice Claim Against a Lawyer Who Was Not Your Lawyer?*, NOWAK & STAUCH, https://www.ns-law.net/published-articles/can-you-bring-a-malpractice-claim-against-a-lawyer-who-was-not-your-lawyer/ (last visited Nov. 9, 2022).

402. *See, e.g.*, Thorsen v. Richmond Soc'y for the Prevention of Cruelty to Animals, 786 S.E.2d 453 (Va. 2016); *Fabian*, 765 S.E.2d at 136.

403. *See* 61 A.L.R.4th 615 § 9 ("[A] party has no cause of action for negligence against an adversary's attorney."); Nat'l Sav. Bank of D.C. v. Ward, 100 U.S. 195, 205 (1879).

autonomous persons.[404] Imagine, for example, in The Hypo, that a court upholds the plan to sterilize facility residents, some are expeditiously sterilized thereafter, and in the court's decision the judge explicitly states that arguments in a particular *faux* advocate's amicus brief, predicated on particular factual claims about the residents' wellbeing, overcame an initial inclination to strike down the law. If a true advocate for the sterilized persons can show the amici knew the factual claims were baseless and fabricated empirical support for them, perhaps some court would entertain a claim for damages. In such an extreme case, lawyers who filed the brief might also be liable in tort, on a theory of malpractice entailing collusion to commit fraud upon the court,[405] or of knowing misrepresentation.[406] Tort scholars might develop these ideas further if any appear fruitful. Simply floating the ideas might bring home to repeat players that misusing the amicus platform can have serious detrimental consequences for real, vulnerable people.

V. CONCLUSION

The courts' current laissez-faire approach to amicus filing might have created an untenable situation at this point, and it might be time for an overall

404. Scott, *supra* note 5, at 1361 (proposing a remedy internal to Supreme Court proceedings for losing litigants when amici make a "material misstatement of misrepresentation of facts"). The redress would be reconsideration at the Supreme Court, expulsion of the filing attorney from the Supreme Court bar, or exclusion of the amicus from Supreme Court cases for fifteen years. *Id.* Scott would infer causation from the fact that an amicus brief "was cited by the majority in their opinion as the basis or part of the basis of their finding." *Id.* The nature of the cause of action, though, is such as to call directly into question the competence of the Justices who would be hearing it; they would have to admit they could rest a decision on factual presentations they were unable or unwilling to scrutinize closely. But they could fault the amicus party or lawyer even while denying the misconduct influenced the outcome.

405. *See, e.g.*, *Ward*, 100 U.S. at 205. The Supreme Court in *Ward* noted an exception to the privity requirement for malpractice actions for cases of "fraud of collusion." *Id.* ("Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract"). Lower courts have reiterated this exception in many subsequent cases but usually in dictum; there has been little application of the exception. *See* 61 A.L.R.4th 615 § 3. The rare case when it has been applied has involved a claim by the person who was defrauded, rather than harm to one person as a result of fraudulent misrepresentation to another. *See, e.g.*, Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 131 Cal. Rptr. 2d 777, 789 (Ct. App. 2003), *as modified on denial of reh'g* (Apr. 8, 2003). Nevertheless, an advocate for non-autonomous persons might seek extension of the exception to a case of *faux* advocacy, alleging collusion between organizations and their lawyers to commit fraud upon the courts.

406. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2000) ("The law governing misrepresentation by a lawyer includes . . . the law of misrepresentation in tort law").

rethinking of the practice. This Article has identified and analyzed a particularly glaring problem with the "open access" model; beyond avalanche, it has facilitated *faux* advocacy that threatens to endanger the most vulnerable persons in our society and detract from the administration of justice and the legal profession's integrity. Vetting of and guidance to proposed amici for non-autonomous persons seems in order. If the courts do not take effective action of that sort, private parties should enlist state bars to promote more ethical practice among lawyers who participate, including law professors, or even take the dramatic step of suing those officers of the court in tort should their illicit conduct demonstrably harm non-autonomous persons in a particular case.

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