IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re CADEN C., A Person Coming Under the Juvenile Court Law. SAN FRANCISCO HUMAN SERVICES AGENCY, Plaintiff and Appellant, v. CHRISTINE C. et al., Defendants and Respondents; CADEN C., a Minor, Appellant	No. S255839 Court of Appeal Nos. A153925 consolidated with A154042 San Francisco No. JD153034

SUPREME COURT
FILED
DEC 12 2019
Jorge Navarrete Clerk
Deputy

APPLICATION OF PROFESSORS OF FAMILY AND CLINICAL LAW FOR LEAVE TO FILE AND PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF CHRISTINE C.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rule of Court 8.2000(c), Paul Bennett, Khiara M. Bridges, Christopher Church, Peggy Cooper Davis, Kathryn E. Fort, Matthew I. Fraidin Marsha Garrison, Cynthia Godsoe, Christine Gottleib, Martin Guggenheim, Josh Gupta-Kagan, Clare Huntington, Tarek Ismail, Lisa A. Kelly, Vivek S. Sankaran, Jane M. Spinak, and Shanta Trivedi respectfully request permission to file the attached amicus curiae brief in support of Christine C.

Applicants are professors of family and clinical law with expertise in the field of child welfare. Applicants are extremely concerned about the harm that unnecessary terminations of parental rights inflict upon children and families throughout the United States, and write to offer the Court information on the policy and social science context we believe informs the critical questions raised by this appeal.

The landscape of child welfare law in the United States has changed significantly in the wake of passage of the Adoption and Safe Families Act ("ASFA") in 1997. In particular, during the subsequent decades, legal scholars and social science researchers have studied the development of new permanency options for children in foster care and the psychological effects of termination of parental rights on children.

Amici offer analysis of these policy and social science developments

because they are directly relevant to the questions presented by this appeal insofar as the Court is being asked to consider whether the application of the beneficial parent-child exception to adoption requires the parent to establish that they have made progress in addressing the issues that led to the dependency. Requiring such a showing would severely restrict the applicability of the exception, and social science developed in the two decades since ASFA's passage indicates that this could have an adverse impact on children in foster care who are closely bonded to their biological parents and who would suffer lifelong harm as the result of having these relationships permanently severed.

Granting leave to file the attached amicus brief would not delay or complicate the proceedings in this case. The parties would have ample time to respond to the points discussed in this brief before oral argument. No party or counsel for any party has authored the attached proposed amicus brief in whole or in part or funded the preparation of the brief.

Accordingly, applicant law professors respectfully request that this Court accept and file the attached *amicus curiae* brief.

Dated: November 27, 2019

Respectfully submitted,

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Martin Guggenheim is the Fiorello LaGuardia Professor of Clinical Law and Co-Director of the Family Defense Clinic at New York University School of Law.

Josh Gupta-Kagan is an Associate Professor at the University of South Carolina School of Law.

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[1] The titles and institutional affiliations of the individual Amici are included as an appendix to this motion. Institutional affiliations are given for identification purposes only and are not to be taken as indicating endorsement by the schools themselves.

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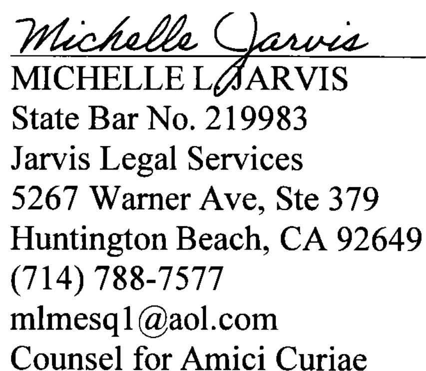
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Rule 8.208 of the California Rules of Court does not apply in appeals in juvenile cases. Still, the undersigned certifies there are no interested entities or persons required to be listed under California Rules of Court rule 8.208.

Dated: November 27, 2019

Respectfully submitted,



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ARGUMENT

Amici are professors of family and clinical law at law schools throughout the United States who have expertise in the field of child welfare. Amici are concerned about the harm that unnecessary terminations of parental rights inflict upon children and families in this country, and write to offer this Court information on the policy and social science context we believe informs the critical questions raised by this appeal.

As the foster care population in the United States increased between the 1970s and the 1990s, attention focused on the harm to children of growing up in foster care, without any permanent home and, in many cases, without any positive, meaningful connection to a parent or other adult relative. As a result of increased attention to this issue, in 1997, Congress passed the Adoption and Safe Families Act ("ASFA"), which encouraged states to terminate the parental rights of children who remained in foster care for more than one year and who were unlikely to be able to return to their parents in the foreseeable future.

ASFA's increased emphasis on obtaining stability for children unable to reunify with their families was an important policy shift, given the very real problem of children remaining in foster care without ever achieving any form of permanency. However, perhaps predictably, efforts to address this problem led to a pendulum swing too far in the direction of prioritizing adoption. As beneficial as it may have been to identify adoption

as the best course for providing many children in foster care with permanency, many states that enacted new laws implementing ASFA were insufficiently precise in specifying when termination of parental rights was appropriate and failed to consider the harm many children suffer when their parents' rights are permanently severed. The unprecedented increase in the termination of parental rights caused by ASFA may have benefited many children, but it was far from an unmitigated good. On the contrary, social science developed in the wake of ASFA has established that children suffer very real harms when their ties to their biological families are permanently severed—even in those cases where termination may be necessary and the children in question are ultimately adopted into stable, permanent homes. And unsurprisingly, the harm is even worse for those children whose parents' rights are terminated but who are unable to achieve stability, either because they are never adopted at all or because their adoptions fail, with their new, permanent homes proving just as impermanent as their original ones were.

Section 366.26(c)(1)(B)(i) of the California Welfare and Institutions Code—commonly known as the beneficial parent-child relationship exception—plays an essential role in counterbalancing the pendulum swing described above and protecting children from the harms caused by termination itself. As discussed in Part III below, the exception is already extremely limited in scope. As this Court considers whether it should be

further limited, so as to specifically require that a parent requesting application of the exception show that they have made progress in addressing the issues that led to the child's underlying dependency, Amici hope an analysis of the legislative and policy choices that produced the current state of affairs and the growing body of related social science research regarding its effects may be helpful to the Court's analysis. Ultimately, given the very real harms caused by permanent severance of the parent-child bond, and the crucial role that the exception plays in protecting children from the worst of these harms, Amici respectfully request that this Court reverse the Court of Appeal's decision below, and make it clear that the focus of the beneficial parent-child relationship exception is on the child, and the child's relationship with the parent, rather than on the successes or failures of the parent with regard to the issues that led to the dependency.

I. STUDIES SHOW THAT TERMINATION OF PARENTAL RIGHTS CAUSES LIFELONG HARM EVEN TO CHILDREN WHO ARE ULTIMATELY ADOPTED.

The permanent destruction of a child's relationship to her parent is a tremendous loss to that child, even where the parent in question has struggled to provide the child with a stable home. This loss is not simply erased if the child is adopted into a "new" family. Studies have shown that children maintain "significant psychological ties" to their family of origin even after adoption, and grieve their loss even as they bond with their

adoptive parents. *See* Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. Rev. L. & Soc. Change 397, 414 (1996). *See also* Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 Fam. L.Q. 233, 237-40 (1986) (describing the family of origin as the child's "primary lifeline").

The loss of a parent through legal severance of the parent-child relationship is described by mental health experts as an "ambiguous loss" because the parent is lost to the child—almost certainly for the duration of her childhood and possibly forever—without the clear finality of physical death. *See* Robert E. Lee & Jason B. Whiting, *Foster Children's Expressions of Ambiguous Loss*, 35 Am. J. Fam. Therapy 417 (2007). Even when necessary, the ambiguous loss of "being physically removed from one's parents and nuclear family system . . . can raise lifetime questions for children about their identities as members of their families of origin and the degree to which they can ever become 'real' members within a foster or adoptive family system." Gina Miranda Samuels, *Ambiguous loss of home: the experience of familial (im)permanence among young adults with foster care backgrounds*, 31 Child. & Youth Serv. Rev. 1229 (2009).

Ambiguous losses are particularly stressful "because [they] def[y] resolution," Pauline Boss, *Ambiguous Loss Research, Theory, and Practice: Reflections After 9/11*, 66 J. Marriage & Fam. 551, 553 (2004), in

part because of the lack of "culturally or socially recognized ritual[s] for mourning or even acknowledging what has been lost." Daniel Pollack et. al., *Foster Care As A Mitigating Circumstance in Criminal Proceedings*, 22 Temp. Pol. & Civ. Rts. L. Rev. 43, 63 (2012). Ambiguous losses create feelings of confusion, helplessness, and "immobilization," Lee & Whiting, *supra*, at 419, and individuals who suffer such losses often cope by "freezing the grief process in hopes of facilitating a sense of closure and emotional control," Miranda Samuels, *supra*, at 1230. This can lead to rigidity, denial, black-and-white patterns of thinking, and externalizing behaviors such as intense expressions of anger, bullying, and "precocious displays of self-sufficiency with regard to emotional and logistic need for others." Lee & Whiting, *supra*, at 419, 425-26. *See also* Boss, *supra*, at 553-54 (describing common internal and external reactions to situations involving ambiguous loss).

In contrast to our legal and cultural framing of adoption as the ideal form of permanency and a "new start" that replaces what has been lost, the ambiguous loss caused by termination is not necessarily resolved by the child's legal placement into a new family unit. Notably, studies have shown that foster children's ideas about permanence—and the role of adoption in creating permanence—are often quite different than the idea of it that is reflected in the legal system. While the child welfare and court systems focus almost exclusively on achieving *legal* permanency for

children in foster care, children themselves "are much more focused on … relational permanency than [on] securing legally binding outcomes." Randi Mandelbaum, *Re-Examining and Re-Defining Permanency From a Youth's Perspective*, 43 Cap. U. L. Rev. 259, 278 (2015). *See also* Cynthia Godsoe, *Permanency Puzzle*, 2013 Mich. St. L. Rev. 1113, 1123-29 (2013). This need for relational permanency is reflected in children's ongoing loyalty to and identification with their families of origin. Mandelbaum, *supra*, at 297-301. *See also* Gina Miranda Samuels, A Reason, a Season, or a Lifetime: Relational Permanence Among Young Adults with Foster Care Backgrounds 83 (2008) ("In thinking about relational permanence, the role of biological family must be extended beyond that family's official or legal status in a child's permanency plan. Biological family remains psychologically present for participants despite their physical separation."). A system that demands legal permanency at the expense of relational permanency—that creates new, legally permanent relationships only on the condition that the child's existing bonds to those individuals who have been most important to her are terminated completely—does not serve children's actual need for permanency.

Moreover, because the family of origin is a critical "source of identity," termination of that relationship can damage the child's self-esteem and harm their developing sense of identity. Beyer & Mlyniec, *supra*, at 238. "When children are to be adopted as a result of some

perceived inadequacy in their parents," as in cases involving the involuntary termination of parental rights, "a significant risk of a negative impact on the child's identity and self-esteem results." Johnson, *supra*, at 414-15. Given the message that the parents were so inadequate that they must be excised from a child's life, "the child must either disconnect psychologically from the family of origin, with the resultant loyalty conflict, or accept some injury to their self-esteem for maintaining some identification with the 'defective' family." *Id.* at 415.

II. TERMINATION OF PARENTAL RIGHTS CREATES INSTABILITY, RATHER THAN STABILITY, FOR CHILDREN WHO ARE NOT ADOPTED, OR WHOSE ADOPTIONS FAIL.

As discussed above, termination causes harm even to children who are ultimately adopted. However, for a number of children, the harm of losing their family of origin is compounded by the trauma of never having that family "replaced" by another, or by the trauma of having their new families fall apart as well. California law attempts to protect against this by requiring that the juvenile court find a child "adoptable" before severing their parents' rights. *See* Cal. Welf. & Inst. Code § 366.26(c)(1). Yet this provision is at best an imperfect solution, requiring only that the child be "likely" to be adopted based on a generalized assessment of families open to children with their characteristics, *see, e.g., In re R.C.*, 86 Cal. Rptr. 776 (Ct. App. 2008), and there is no guarantee that a child deemed "adoptable"

will in fact be adopted, nor that the child's adoption will last into adulthood, *see In re B.D.*, 247 Cal. Rptr. 3d 740 (Ct. App. 2019) (reversing termination on the basis of evidence that the child had been removed from his foster parents because of physical abuse and a risk of sexual abuse, where the foster parents' expected adoption of the child had formed the basis of the lower court's conclusion that it was likely he would be adopted); *In re Carl R.*, 27 Cal. Rptr. 3d 612, 616 (Ct. App. 2005) (original prospective adoptive parent for severely disabled child—whose existence provided a basis for the juvenile court's initial finding that the child was adoptable—disqualified after it was determined that she had a criminal record and a child protective history).

There is no dispute that one of the primary harms that termination of parental rights statutes are intended to protect against is the harm of protracted impermanency and "foster care drift"—a harm that policymakers have viewed as best prevented by adoption. *See, e.g.*, Richard P. Barth, et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 Va. J. Soc. Pol'y & L. 371, 373-74 (2005). Yet, while termination of parental rights is a necessary step towards adoption, termination itself does not guarantee a child will be adopted. As of September 30, 2017, there were 7,280 children in foster care in California whose parents' rights to them had been terminated. While many of these children may find an adoptive placement, a significant number will not—

and some who were in adoptive placements as of that date will see those placements disrupt. During the 2017 federal fiscal year, 3,648 children "aged out" of foster care in California without achieving legal permanency. Those emancipations represented 13% of all exits in California, well above the national rate of 8%.[1]

Even adoption itself is not a guarantee that a child will have a "permanent" family. In recent years, increased attention has been paid to the phenomenon of "broken" or dissolved adoptions, in which a finalized adoption falls apart, either informally—with the child going to live somewhere else—or formally, with the child re-entering foster care and, in some cases, the adoptive parents actually surrendering their legal rights. *See, e.g.*, The Children's Law Center, The Broken Adoption Project Report (2014); Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 Cap. U. L. Rev. 437 (2012). The trauma to children who experience broken adoptions is immense: after losing their families of origin, these children found what was supposed to

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[1] Data utilized in this brief were made available by the National Data Archive on Child Abuse and Neglect (NDACAN), Cornell University, Ithaca NY; and have been used with permission. Data from the AFCARS dataset are originally collected by the state's child welfare agency pursuant to federal reporting requirements. Staff at Fostering Court Improvement have analyzed the data and analyses are on file with them. Neither the collector of the original data, the funder, the Archive, Cornell University, or its agents or employees bear any responsibility for the analyses or interpretations presented here.

be a new, permanent home, only to lose that family as well. The impact on children's self-esteem and ability to form healthy attachments is exponential.

Statistics on the rate of adoption dissolution are difficult to obtain. Child welfare agencies and states do not regularly keep this data, in part because it is not required by the federal government, and in part because broken adoptions are hard to track: the children's names are generally changed, and the subsequent dependency case involving the adoptive family cannot be linked to the previous one involving the birth family. *See* Post & Zimmerman, *supra*, at 441. Factors associated with broken adoptions may include: the age of the child or adoptive parent; the child's behavioral and/or emotional concerns; the child's prior placement history; the child's ongoing emotional attachment to their siblings and their biological parents; and the lack of necessary services and resources. Dawn J. Post, *What are the Factors Leading to Broken Adoptions?*, 72 Adoption Advoc. 1, 1 (June 2014), https://www.adoptioncouncil.org/publications/2014/06/adoption-advocate-no-72. *See also* Evan B. Donaldson Adoption Inst., What's Working for Children: A Policy Study of Adoption Stability and Termination 12-25 (2004) (discussing the various risk factors for disruption). These risk factors for adoption disruption are far more prevalent in adoptions from foster care than in private adoptions.

Because the permanent severance of a child's legal tie to her parent is not only inherently harmful, but risks causing one of the very harms that ASFA was meant to prevent—namely, the harm to children of aging out of the foster care system as legal orphans, with no family at all—courts must take such a drastic step only where they are absolutely certain it is necessary, and where the very real risk of severing the child's existing relationships with their families of origin is in fact outweighed by the child's opportunity for legal permanency through adoption. It is crucial that courts being asked to make this assessment be given the ability to preserve the child's existing bonds in appropriate cases, just as the beneficial parent-child relationship exception contemplates.

III. THE BENEFICIAL PARENT-CHILD RELATIONSHIP EXCEPTION IS AN ESSENTIAL, BUT LIMITED, PROTECTION AGAINST THE ESTABLISHED HARM THAT TERMINATION OF PARENTAL RIGHTS CAUSES TO CHILDREN IN FOSTER CARE.

California's framework for providing legal permanency for children in foster care who have been found to be unable to reunify with their families of origin is codified at section 366.26 of the Welfare & Institutions Code. Pursuant to this statute—and in accordance with ASFA—there is a "strong preference for adoption" over other forms of legal permanency for children, including guardianship. *In re S.B.*, 79 Cal. Rptr. 3d 449, 454 (Ct. App. 2008). Essentially, once a parent's reunification services have been terminated, if the juvenile court finds that the child is likely to be adopted,

the court must enter an order terminating the parent's rights and placing the child for adoption. Cal. Welf. & Inst. Code § 366.26(c)(1). *See also, e.g.*, *In re B.D.*, 72 Cal. Rptr. 3d 153, 164 (Ct. App. 2008); *In re Autumn H.*, 32 Cal. Rptr. 2d 535, 537-38 (Ct. App. 1994).

However, in recognition of the harms that permanent severance of the child-parent bond may cause—and in recognition of the fact that these harms may outweigh the benefit provided by legal permanency—the California Legislature has specifically provided a series of crucial exceptions to this general rule, including the exception at issue here, codified at section 366.26(c)(1)(B)(i) of the Welfare and Institutions Code, and known as the beneficial parent-child relationship exception. The beneficial parent-child relationship exception provides that, even in a case where a parent has failed to make sufficient progress to justify continuation of reunification services, and even where the child is found to be adoptable by clear and convincing evidence, the court should decline to terminate parental rights if it finds that the benefit to the child of maintaining the parent-child relationship outweighs the benefit to the child of adoption. *In re E.T.*, 242 Cal. Rptr. 3d 391, 397-98 (Ct. App. 2018); *In re S.B.*, 79 Cal. Rptr. 3d at 454; *In re Jasmine D.*, 93 Cal. Rptr. 644, 652 (Ct. App. 2000); *Autumn H.*, 32 Cal. Rptr. 2d at 538.

The beneficial parent-child relationship exception is a vital part of California's statutory scheme governing permanency for children in care.

Because the exception has been interpreted extremely narrowly, in keeping with the Legislature's explicit prioritizing of adoption over other forms of legal permanency, it is simply not able to address all of the harms discussed above. There are undoubtedly many children in California whose cases would never fall under the exception as currently interpreted who would nevertheless benefit from being offered an alternative form of legal permanency that would allow them to grow up in stable environments while still maintaining their relationships with their families of origin. What the exception does, however, is ensure that, at the very least, in those cases where the child's bond to their parent is extremely strong and perhaps even crucial to their development and identity, the child in question does not have to lose their parent entirely simply because that parent is not—and may not ever be—in a position to provide them with day-to-day care. *See, e.g.*, *In re Scott B.*, 115 Cal. Rptr. 3d 321 (Ct. App. 2010). The beneficial parent-child relationship exception respects the child's sense of permanency, and allows the juvenile court not to be forced to formulaically subordinate the child's established need for relational permanency to the generalized legislative priority for adoption as the primary form of legal permanency.

The beneficial parent-child relationship exception has been judicially interpreted to involve a three-prong test. Before it can apply the exception, a court must find, by a preponderance of the evidence, that: (1) the parent

has regularly visited with the child; (2) the parent and the child have a "beneficial" relationship; and (3) there is a compelling reason to forego adoption because the benefit to the child of continuing the parent-child relationship outweighs the benefit the child would receive from adoption. *See In re Logan B.*, 207 Cal. Rptr. 3d 837, 843-44 (Ct. App. 1997); *In re S.B.*, 79 Cal. Rptr. 3d at 454-55. Importantly, because the parent has already been found to be unfit and failed to reunify by the time that the question of the applicability of the exception arises, the focus of the inquiry regarding the exception is on the child, not the parent. *Autumn H.*, 27 Cal. App. 4th at 575-76. *See also In re Amber M.*, 127 Cal. Rptr. 2d 19, 22 (Ct. App. 2002) (after termination of services, the focus is on "the child's need for permanency and stability").

As mentioned above, the Courts of Appeal have construed the beneficial parent-child relation exception extremely narrowly. While the first prong of the test—regular visitation—requires only that the parent "visit consistently and to the extent permitted by court orders," *In re I.R.*, 171 Cal. Rptr. 3d 469, 477 (Ct. App. 214), and does not involve any inquiry into the "quality" of the visitation, *In re Grace P.*, 213 Cal. Rptr. 3d 714, 720 (Ct. App. 2017), the second and third prongs are significantly harder for a parent to meet. To establish that the relationship between the parent and child is a "beneficial" one pursuant to the statute, "a parent must show more than frequent and loving contact, an emotional bond with the child, or

pleasant visits." *In re Dakota H.*, 33 Cal. Rptr. 3d 337, 348 (Ct. App. 2005). *See also In re Marcelo B.*, 146 Cal. Rptr. 3d 908, 915 (Ct. App. 2012) ("Evidence that a parent has maintained frequent and loving contact is not sufficient to establish the existence of a beneficial parental relationship.") (internal quotations removed). Rather, the parent must prove that they "occup[y] a parental role in the child's life, resulting in a significant, positive, emotional attachment of the child to the parent." *Id. See also In re Helen W.*, 57 Cal. Rptr. 3d 914, 922 (Ct. App. 2007) ("To overcome the strong policy in favor of terminating parental rights and to fall within [the exception's] purview, the parent must show more than frequent and loving contact, and be more to the child than a mere friendly visitor or friendly nonparent relative.").

Even where the parent in question clearly occupies a "parental role" in their child's life, and the child has a "significant, positive emotional attachment" to the parent, such that termination of that relationship would be harmful to the child, that alone is not enough to establish that the beneficial parent-child relationship exception should be applied. The third prong of the test requires the juvenile court to weigh the benefit to the child of continuing the relationship against the "well-being the child would gain in a permanent home with new, adoptive parents; if severing the relationship would deprive child of substantial, positive emotional attachment such that child would be greatly harmed, preference for

adoption is overcome and natural parent's rights should not be terminated." *In re Casey D.*, 82 Cal. Rptr. 2d 426, 433-34 (Ct. App. 1999). Given the strength of the preference for adoption attributed to the Legislature by the courts—and the underlying assumption that adoption will in fact provide the child with a permanent family, and that it is, in every case and no matter the circumstances, more stable than long-term foster care or even legal guardianship—this is a high bar to meet. *See, e.g.*, *In re A.S.*, 239 Cal. Rptr. 3d 20, 38 (Ct. App. 2018) (explaining that adoption is the preferred plan "because it ensures permanency and stability for the minors"); *Autumn H.*, 32 Cal.Rptr.2d at 538 (requiring the court to balance "the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer"); *In re Brian R.*, 3 Cal. Rptr. 2d 768, 778 (Ct. App. 1991) ("Only if adoption is not possible, or if there are countervailing circumstances, or if it is not in the child's best interests are other, less permanent plans, such as guardianship or long-term foster care considered.")[2]

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[2] In fact, studies have shown that permanency options such as placing the child in the permanent custody or guardianship of a relative are as lasting as adoption and can help more children leave foster care to permanent homes. *See* Josh Gupta-Kagan, *The New Permanency*, 19 U.C. Davis J. Juv. L. & Pol'y 1, 14-15, 18 (2015) (summarizing study results). *See also* U.S. Dep't of Health and Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, Synthesis of Findings: Subsidized Guardianship Child Welfare Waiver Demonstrations (2011), available at http://www.acf.hhs.gov/sites/ default/files/cb/ subsidized_0.pdf; Mark F. Testa, *Subsidized Guardianship: Testing an Idea Whose Time Has*

Thus, even under the current caselaw, the scope of the beneficial parent-child relationship exception is very limited, applying only to the "extraordinary case." *In re K.P.*, 137 Cal. Rptr. 3d 494, 499 (Ct. App. 2012). It should not be further curtailed.

IV. INTERPRETING THE EXCEPTION TO REQUIRE A SHOWING THAT THE PARENT HAS MADE PROGRESS IN ADDRESSING THE ISSUES THAT LED TO THE DEPENDENCY WOULD SEVERELY CONSTRAIN ITS APPLICABILITY AND CONTRADICT ITS UNDERLYING PURPOSE OF PROTECTING CHILDREN IN CARE FROM HARM OF LOSING PARENTS WHERE THAT HARM WOULD OUTWEIGH BENEFIT OF ADOPTION.

In its decision and order reversing the juvenile court's application of the beneficial parent-child relationship exception in this case, the Court of Appeal found that there was substantial evidence in the record to support the juvenile court's findings regarding the first two prongs of the test. *See In re Caden C.*, 245 Cal. Rptr. 3d 797, 814-16 (Ct. App. 2019). As to Christine C.'s relationship with her son, the court found that "it cannot be seriously disputed that Caden had a beneficial relationship with his mother—that is, a significant relationship the termination of which would cause him detriment. ... The record is replete with comments from various care providers attesting to the significance of the bond between mother and son." *Id.* at 815. Given this evidence, the court explained, it had "little

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Finally Come, Soc. Work. Res., Sept. 2002, available at https://spaulding .org/wp-content/themes/twenty fifteen-child-sfc/ archive%20pdf/ Subsidized-Guardianship-Testing-Effectiveness-Testa-2008.pdf.

difficulty concluding substantial evidence supports the juvenile court's implicit finding that a beneficial relationship existed here." *Id.*

Nevertheless, the Court of Appeal reversed the juvenile court because it found that the juvenile court had abused its discretion in finding that Christine C. had established that her relationship with Caden met the third prong of the test. *Id.* at 816. The court was clear that there were two reasons it had reached this conclusion:

> First, the juvenile court's determination that [Christine C.] had 'substantially complied with her case plan' and 'continues her efforts to maintain her sobriety and address her mental health issues' is not supported by the record. Second, the court gave short shrift to uncontroverted evidence that long-term foster care posed substantial risk of further destabilizing a vulnerable child . . . and robbed Caden of a stable and permanent home with an exceptional caregiver.

Id.

The second of these two considerations—the nature of the alternative permanency plan for Caden if his mother's rights were not terminated and the potential effect of this plan upon him—is undoubtedly a relevant consideration under the currently-established test for application of the exception. *See, e.g., In re G.B.*, 174 Cal. Rptr. 3d 405, 419-20 (Ct. App. 2014). The first is not, as Appellant Christine C. explains in detail in her merits brief. (*See* App.'s Opening Br. on the Merits, at pp. 38-55.) Moreover, a construction of the beneficial parent-child relationship exception that requires—or even permits—a court to consider a parent's

progress in their service plan as an element in and of itself will severely restrict the already narrow applicability of the exception, if not swallow it altogether. Given the life-long impact of termination of parental rights on children in foster care, and the immense harm it can cause especially to children who have a close bond to their parents, it is essential that the beneficial parent-child relationship exception not be further limited in this way, and Amici respectfully request that this Court take the opportunity presented to it by this case to ensure that it is not.

By the time that a court is tasked with determining whether the beneficial parent-child relationship exception applies, the parent has necessarily failed to make sufficient progress to reunify with their child, and reunification services have been terminated. *Autumn H.*, 32 Cal. Rptr. 2d at 538. As discussed above, the exception is specifically meant to apply in those cases where, despite the parent's failure to reunify—and despite the fact that they may never be able to act as a full-time custodial parent to their child—the court finds that the parent-child bond is so important to the child that the parent should not be permanently cut out of the child's life. *See, e.g., E.T.*, 242 Cal. Rptr. 3d at 397-99; *Scott B.*, 115 Cal. Rptr. 3d at 335-37. To require a parent requesting application of the beneficial parent-child relationship exception to show that they have made progress in addressing the issues that led to the child's underlying dependency would therefore render the exception meaningless – given the structure of the

statute, only parents who have not made sufficient progress are eligible to seek the exception – and would bar application of the exception to the many cases where it otherwise would be applied to prevent unnecessary harm to the children in question. *See, e.g.*, *In re Noah G.*, 203 Cal. Rptr. 3d 91 (Ct. App. 2016) (despite evidence of mother's extremely close relationship to her children, including her provision of the majority of their day-to-day care while they were residing with their grandmother, upholding lower court's finding that the beneficial parent-child relationship exception did not apply on the basis of its conclusion that her failure to report for drug testing meant that she was still using methamphetamines).

Of course, this does not mean that a court cannot or should not consider a parent's progress insofar as it is actually relevant to one of the established prongs of the test—most likely the beneficial relationship prong itself. If the actions of the parent that led to the dependency kept the parent and child from ever developing a beneficial relationship in the first place, or the parent's inability to progress in services has significantly affected the quality of the parent-child interaction since the child was removed from the parent's care, such that "regular visits and contact" have not been able to "continue[] or develop[] a significant, positive, emotional attachment from child to parent," *Autumn H.*, 32 Cal. Rptr. 2d at 539, that would unquestionably factor into the court's assessment of whether the exception should be applied. But the relevant information there is not the parent's

failure to progress in and of itself. Rather, the issue is the nature of the parent-child relationship, which may have been affected by the parent's success or failure. The test, after all, is not simply whether the parent and child have a bond; the parent already has to establish that the bond their child has to them is a *beneficial* one to the child. *See In re Jamie R.*, 109 Cal. Rptr. 2d 123 (Ct. App. 2001) (exception did not apply where child's bond to her mother was such that she felt she had to take care of her mother, and "[would] do whatever is necessary to help her mother, even at her own expense"). If the parent's actions have led the child to develop a harmful bond to them, rather than a beneficial one, that should reasonably lead to a finding that the parent has failed to establish the second prong of the test. However, while there are undoubtedly cases where a parent's failure to progress will have had a negative effect on the quality of their child's bond with them, there are also many cases where the child maintains a truly beneficial relationship with their parent—and would be severely harmed by the destruction of that relationship—despite their parent's inability to make significant progress in addressing the issues that led to the underlying dependency. *See, e.g.*, *In re Noah G.*, 203 Cal. Rptr. 3d 91 (Ct. App. 2016). To construe the exception so as to deny these children its benefit because of their parent's underlying failure—a failure for which the child is blameless—would only harm the child, and cannot have been the Legislature's intent in enacting this provision of the law.

CONCLUSION

For the reasons stated above, Amici respectfully request that this Court reverse the Court of Appeal's decision below and clarify that application of the beneficial parent-child relationship exception does not require a showing that the parent has made progress in addressing the issues that led to the child's underlying dependency.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with California Rules of Court, rule 8.520(c)(1), I hereby certify that the foregoing brief of Amici Curiae professors of family and clinical law consists of 5,363 words, not including the cover sheet, the Application, the Tables of Contents and Authorities, the Certificate of Service, or this Certificate, as counted by the Microsoft Word computer program used to generate this brief. The brief is set in Times New Roman, 13-point.

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PROOF OF SERVICE

I, the undersigned, declare: I am over the age of eighteen years and not a party to the cause; I am employed in, or am a resident of, the County of Orange, California; where the mailing occurs; and my business address is 5267 Warner Ave, Ste 379, Huntington Beach, CA 92649. I caused to be served the Application of Professors of Family and Clinical Law to File *Amicus Curiae* Brief in Support of Christine C., together with a copy of the Proposed Brief of *Amici Curiae* Professors of Family and Clinical Law in Support of Christine C., by placing copies thereof in a separate envelope addressed as follows:

Honorable Monica F. Wiley
Superior Court of San Francisco County
400 McAllister Street, Room 402
San Francisco, CA 94102

Court of Appeal, First Dist., Div. 1
350 McAllister St.
San Francisco, CA 94102

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States mail, at Huntington Beach, California on November 27, 2019.

I also electronically served copies to the following via email:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 27, 2019, at Bonita, California.

MICHELLE L. JARVIS