GETTING ABUSED AND NEGLECTED CHILDREN INTO COURT: A CHILD'S RIGHT OF ACCESS UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT

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This Note takes a new approach to the protection of children from abuse and neglect. It argues that children have a right of access to courts guaranteed by the First Amendment's petition clause. This often overlooked portion of the Federal Constitution overcomes modern jurisprudential obstacles which have refused to extend constitutional protection to child victims of abuse and neglect at the hands of private actors, such as their parents. After a survey of current state practices with respect to the initiation and voluntary dismissal of abuse and neglect proceedings, this Note concludes that restrictions on a child's right of access to courts to begin abuse and neglect proceedings must be judged under strict scrutiny and that recognition of this right should prevent voluntary dismissal of abuse and neglect proceedings.

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"Child abuse casts a shadow the length of a lifetime."[1]

I. INTRODUCTION

Although child abuse and neglect[2] is a national epidemic, national attention was not focused on this problem until the civil rights movement of the 1960s.[3] It has been estimated that one out of every seven children in the United States has been maltreated,[4] with approximately 794,000

1. Herbert Ward, Episcopal Priest, *quoted in* JAMES B. SIMPSON, SIMPSON'S CONTEMPORARY QUOTATIONS 92 (1988).

2. This Note uses the term "abuse and neglect" to refer generally to the nonjuvenile delinquency workload of most juvenile courts. *See* H. Ted Rubin, *The Nature of the Court Today*, FUTURE CHILD., Winter 1996, at 40, 40–41. Other terms include child maltreatment, dependency, and deprivation. *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM §§ 2:4, 6:3–:4 (2d ed. 2009). There are no generally accepted definitions for such terms. *See, e.g.*, Christina Paxson & Ron Haskins, *Introducing the Issue*, FUTURE CHILD., Fall 2009, at 3, 4–5.

3. JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT PRACTICE 42 (2d ed. 1998).

4. Fred Wulczyn, *Epidemiological Perspectives on Maltreatment Prevention*, FUTURE CHILD., Fall 2009, at 39, 40. For an overview of the effects of maltreatment, see generally Diana J. English, *The Extent and Consequences of Child Maltreatment*, FUTURE CHILD., Spring 1998, at 39 (discussing that maltreated children can suffer consequences of the maltreatment throughout their entire lives, including physical, cognitive, emotional, and social development effects).

children abused or neglected during 2007—most by their parents.[5] What is particularly disturbing about these statistics, however, is that most abuse and neglect cases do not reach the courts.[6]

This Note focuses on the petition stage of abuse and neglect cases.[7] It argues that children[8] have a fundamental right, derived from the petition clause of the First Amendment and incorporated against the states through the due process clause of the Fourteenth Amendment,[9] to petition courts to initiate abuse and neglect proceedings.[10] Recognition of this right not only permits children to access court proceedings, but it also protects them from being subject to voluntary dismissal by the executive branch.[11]

This Note begins, in Part II, with a review of the doctrine of *parens patriae* and Supreme Court jurisprudence relating to protecting the interests of the child. It argues that, although Supreme Court justices across the ideological spectrum have recognized and supported the protection of children, as a body the Court has shied away from giving children any real constitutional protection. Part II sets the stage for the need that the Court recognize a right of access to courts for children in order to provide them with such protection.

Part III looks to current state practice as well as constitutional issues. First, this Part provides an overview of who can initiate abuse and neglect proceedings across the fifty states, the District of Columbia, and under the Model Juvenile Court Act. It categorizes each state into one of three categories: (1) any person may initiate abuse and neglect pro-

5. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 2007, at xii–xiii (2009), http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf.

6. Richard P. Barth, *The Juvenile Court and Dependency Cases*, FUTURE CHILD., Winter 1996, at 100, 100.

7. For an overview regarding all the stages of abuse and neglect proceedings, see Mark Hardin, *Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases*, FUTURE CHILD., Winter 1996, at 111, 113–16.

8. Children can either act individually or through an attorney or guardian ad litem. For an overview of the role of the attorney or guardian ad litem, see generally Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939 (1995). Of course, the younger the child, the more important the role of an attorney or guardian ad litem, even in the petition stage. *See* DONALD N. DUQUETTE ET AL., ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES 29–33 (1990). A difficult question, not directly faced by this Note, is the extent to which a child may individually act to institute an abuse and neglect proceeding, given that children are generally deemed to be under a legal disability that prevents them from suing in an individual capacity. *See, e.g.*, Newman v. Newman, 663 A.2d 980, 987 (Conn. 1995) ("[T]he general rule is well established that a child may bring a civil action only by a guardian or next friend, whose responsibility it is to ensure that the interests of the ward are well represented." (internal quotation marks omitted)). *But see* Bruso v. Alexian Bros. Hosp., 687 N.E.2d 1014, 1017 (Ill. 1997) ("[I]t has long been the public policy of this state that courts should carefully guard the rights of minors and that a minor should not be precluded from enforcing his or her rights unless clearly barred from doing so."). Nonetheless, abuse and neglect proceedings are not seen as truly civil in nature, and thus such restrictions may not apply. *See, e.g.*, *In re* J.J.Z., 630 A.2d 186, 192 (D.C. 1993); *In re* J.J., 566 N.E.2d 1345, 1350 (Ill. 1991).

9. *See infra* Part III.C.2.

10. *See infra* Part IV.A.

11. *See infra* Part IV.B.

ceedings, (2) only the executive branch may initiate abuse and neglect proceedings, and (3) only the judicial branch may authorize the initiation of abuse and neglect proceedings.

Second, Part III looks at those states with precedent on an often overlooked topic[12]—voluntary case dismissal by the executive branch. Those states with precedent on this topic are subcategorized further into: (1) those which do not require dismissal, and (2) those which require the court to dismiss a pending action. Third, Part III provides an overview of jurisprudence on the right of access to courts, based on due process and on the petition clause.

Finally, Part IV makes two arguments. First, it argues that children have a right to petition a court to initiate abuse and neglect cases with respect to themselves. This right is based on the petition clause of the First Amendment, an often overlooked portion of the Bill of Rights which has seen renewed interest by scholars in the past decade.[13] Second, Part IV argues that once the right of access is recognized, the concern over voluntary dismissal by the executive branch disappears.

This Note adds to scholarship both on the petition clause of the First Amendment and on the rights of children. Up until today, suggestions for better protecting children from abuse and neglect have not investigated the possibility of giving children access to the courts.[14] This Note hopes to begin filling that gap in both scholarship and jurisprudence.

II. BACKGROUND: *PARENS PATRIAE*, THE SUPREME COURT, AND THE INTERESTS OF THE CHILD

The term *parens patriae*, which is Latin for "ultimate parent or parent of the country,"[15] has a long and varied history of use and interpretation.[16] The term appears to extend back to at least late seventeenth, early eighteenth century England, and was used to describe "the king as a protector or supreme guardian of those classes threatened by forces beyond their control."[17] This included the protection of children, though at first only with respect to those of the landed gentry.[18]

Today, however, the term embraces state intervention to protect all children and is at the heart of both dependency (protecting children from

12. In fact, no articles appear to have been published on this topic.

13. Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 437–38 (2009).

14. *See, e.g.*, Douglas J. Besharov et al., Commentary, *Four Commentaries: How We Can Better Protect Children from Abuse and Neglect*, FUTURE CHILD., Spring 1998, at 120.

15. Vivek S. Sankaran, Parens Patriae *Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 59 n.16 (2009).

16. George B. Curtis, *The Checkered Career of* Parens Patriae*: The State As Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 895 (1976).

17. *Id.* at 897.

18. *Id.* at 897–98.

abuse and neglect) and delinquency (rehabilitating children who have committed crimes) proceedings.[19] As the Illinois Supreme Court said in 1953 with respect to the Illinois Juvenile Court Act: "The Juvenile Court Act is a codification of the ancient equitable jurisdiction over infants under the doctrine of *parens partriae*. Historically, courts of chancery, representing the government, have exercised jurisdiction over the person and property of infants to insure that they were not abused, defrauded, or neglected."[20] Even the Supreme Court of the United States has recognized that *parens patriae* involves the government's "interest in preserving and promoting the welfare of the child."[21]

The Supreme Court has also recognized, however, that proceedings under the doctrine of *parens patriae* (such as those involving abuse and neglect or the termination of parental rights) involve at least two competing interests: the interests of the child and the interests of the parents.[22] In *Santosky v. Kramer*, the Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."[23] The Court's conclusion was primarily based upon two propositions: first, that the "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"[24] and, second, that the state is pitted "directly against the parents" because "the State cannot presume that a child and his parents are adversaries."[25] According to the majority, only once "the State has established parental unfitness . . . [may a court assume] that the interests of the child and the natural parents do diverge."[26]

The *Santosky* dissent accused the majority of "miss[ing] the mark."[27] According to the dissent, the majority failed to take into account the fact that "the child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him."[28] Thus, the dissent argued that preponderance of the evidence was an appropriate standard for due process considerations because "an incorrect finding of fault would produce consequences as undesirable as the con-

19. *See id.* at 898–902; Sankaran, *supra* note 15, at 59; Elizabeth S. Scott, *The Legal Construction of Childhood*, *in* A CENTURY OF JUVENILE JUSTICE 113, 116 (Margaret K. Rosenheim et al. eds., 2002).

20. People *ex rel.* Houghland v. Leonard, 112 N.E.2d 697, 699 (Ill. 1953) (citations omitted).

21. Santosky v. Kramer, 455 U.S. 745, 766 (1982).

22. *See id.* at 759 (dismissing the notion that judicial fact finding with respect to parental termination involves only a balancing between "the child's interest in a normal family home" and "the parents' interest in raising the child"); *id.* at 787–90 (Rehnquist, J., dissenting) (recognizing three interests at stake in the termination of parental rights, "the interest of parents in a continuation of the family unit and the raising of their own children," "the often countervailing interests of the child," and the State's "urgent interest in the welfare of the child").

23. *Id.* at 747–48 (5-4 decision) (majority opinion).

24. *Id.* at 753.

25. *Id.* at 759–60.

26. *Id.* at 760. *But see id.* at 788 n.13 (Rehniquist, J., dissenting).

27. *Id.* at 788 n.13 (Rehniquist, J., dissenting).

28. *Id.*

sequences that would be produced by an incorrect finding of *no* fault" and, thus, the preponderance of the evidence standard "allocates the risk of error more or less evenly."[29] In essence, the dissent argued for a more robust respect for the welfare of the child than the majority.

Given the above description of *Santosky*, the Court's ideological breakdown is surprising.[30] The majority consisted of the more *liberal* justices, and the dissent consisted of the more *conservative* justices.[31] The majority opinion was written by Justice Blackmun and joined by Justices Brennan, Marshall, Powell, and Stevens.[32] The dissent was written by Justice Rehnquist and joined by Chief Justice Burger and Justices White and O'Connor.[33] In other words, the *conservative* justices of the Court advocated a stronger role for the interests of the child than the more liberal Justices.[34]

A different ideological breakdown occurred several years later when the Court faced another case involving the interests of the child.[35] The case was *DeShaney v. Winnebago County Department of Social Services*[36] and, in the words of the majority, involved "undeniably tragic" facts.[37] At the age of four years old, Joshua DeShaney was beaten so severely by his father that, at the time the Supreme Court decided this case almost five years later, Joshua was "expected to spend the rest of his life confined to an institution for the profoundly retarded."[38] Joshua and his mother brought an action under 42 U.S.C. § 1983 alleging that the state "deprived Joshua of his liberty without due process of law" in violation of the Fourteenth Amendment "by failing to intervene to protect him

29. *Id.*

30. For a listing of U.S. Supreme Court Justices' ideological position, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 146 tbl.1 (2002) (indicating in columns two and three a justice's ideological position, with a higher positive number indicating a more conservative Justice and a negative number indicating a more liberal Justice).

31. For a visual depiction of the ideological breakdown of *Santosky*, see Santosky v. Kramer, *U.S. Supreme Court Case Summary & Oral Argument*, OYEZ PROJECT, http://www.oyez.org/cases/1980-1989/1981/1981_80_5889?sort=ideology (last visited May 30, 2011) [hereinafter Santosky, *Case Summary*]. The ideological breakdown is based on Martin & Quinn, *supra* note 30. *About: The Oyez Project*, OYEZ PROJECT, http://www.oyez.org/about (last visited May 30, 2011) [hereinafter *About: The Oyez Project*].

32. *Santosky*, 455 U.S. at 746.

33. *Id.* at 746–47.

34. Recharacterizing *Santosky* as a federal intrusion into states' rights better explains the case's ideological breakdown. *See id.* at 772 (Rehnquist, J., dissenting) ("[F]ixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes.").

35. For a visual depiction of the ideological breakdown of this case, see DeShaney v. Winnebago County, *U.S. Supreme Court Case Summary & Oral Argument*, OYEZ PROJECT, http://www.oyez.org/cases/1980-1989/1988/1988_87_154?sort=ideology (last visited May 30, 2011) [hereinafter DeShaney, *Case Summary*]. The ideological breakdown is based on Martin & Quinn, *supra* note 30. *About: The Oyez Project*, *supra* note 31.

36. 489 U.S. 189 (1989).

37. *Id.* at 191.

38. *Id.* at 193.

against a risk of violence at his father's hands."[39] The Court concluded, however, that because "the State had no constitutional duty to protect Joshua," its failure to protect Joshua "simply does not constitute a violation of the due process clause."[40]

This time, it was the more *liberal* justices on the Court, now writing in dissent, which advocated a stronger role for the interests of the child.[41] Justice Brennan, joined by Justices Marshall and Blackmun, argued that "[t]hrough its child-protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger."[42] Thus, "the Constitution itself 'dictated a more active role' for [the State] in the circumstances presented," and so the dissenters would have arrived at a different result.[43]

Two important conclusions emerge from the combination of *Santosky* and *DeShaney*. First, both liberal and conservative members of the Court have advocated a *stronger* role for the interests of the child: in *Santosky*, the more conservative members of the Court advocated this *stronger* role, while in *DeShaney*, the more liberal members of the Court were the advocates. Second, *Santosky* and *DeShaney* also demonstrate that, despite the recognition of the interests of the child, the Court has shied away from giving real constitutional protection to children.

While *DeShaney* has been severely criticized by scholars,[44] it remains good law that "the due process clause [does] not give any individual, including a helpless child, a substantive right to be protected by the government from injury inflicted on the person by a private party."[45] Thus, *DeShaney* provides an obstacle to giving real constitutional protection to children subjected to abuse and neglect.[46] The remainder of this

39. *Id.*

40. *Id.* at 201–02.

41. *Compare* DeShaney, *Case Summary*, *supra* note 35, *with* Santosky, *Case Summary*, *supra* note 31.

42. *Deshaney*, 489 U.S. at 210 (Brennan, J., dissenting).

43. *Id.* at 203.

44. *See, e.g.*, Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse As Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1384–85 (1992) (arguing that the Thirteenth Amendment could have been a successful argument in *DeShaney*); Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, a Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 594 (2009) ("There will come a day when the Court will make these statements regarding *DeShaney*: '*DeShaney* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *DeShaney v. Winnebago County Department of Social Services* should be and now is overruled.'"); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659, 686–700 (1990) (critiquing the Supreme Court's due process analysis in *DeShaney*); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1514 (1989) ("Chief Justice Rehnquist's opinion for the majority in *DeShaney* is an abomination.").

45. RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6(h), at 726 (4th ed. 2007).

46. *Cf.* Lawrence G. Albrecht, *Human Rights Paradigms for Remedying Governmental Child Abuse*, 40 WASHBURN L.J. 447, 454–55 (2001) ("*DeShaney* presents a formidable analytical obstacle . . . .").

Note provides the basis for such protection in the form of direct access to abuse and neglect proceedings. This approach provides constitutional protection to children while not advocating radical change in Supreme Court precedent or jurisprudence. Instead, it only calls for the recognition of an often overlooked portion of the First Amendment: the petition clause.[47]

III. ANALYSIS: SURVEY OF CURRENT PRACTICE AND RIGHT OF ACCESS TO COURTS

In order to best understand the practical consequences of recognizing a child's right of access to courts under the petition clause of the First Amendment, it is important to begin with a survey of state practice and jurisprudence on the right of access to courts. This Part provides that survey so that state practice can be analyzed under the constitutional constraints elaborated in Part IV. Section A looks at current practice with respect to the initiation of abuse and neglect proceedings. Section B then reviews state practice with respect to voluntary dismissal of abuse and neglect proceedings by the executive branch. Finally, Section C analyzes jurisprudence on the right of access to courts under the Constitution of the United States. Most importantly, this Part sets the stage for defining a right of access for children in Part IV.

A. Initiating Abuse and Neglect Proceedings

The fifty states, the District of Columbia, and the Model Juvenile Court Act provide three different methods of initiating abuse and neglect proceedings: (1) any person may initiate abuse and neglect proceedings, (2) only the executive branch may initiate abuse and neglect proceedings, and (3) only the judicial branch may authorize the initiation of abuse and neglect proceedings. This Section provides examples of each of these methods of initiating abuse and neglect proceedings, with Table 1 and Figure 1 containing a brief categorization of each jurisdiction. This Section demonstrates the diversity of practices with respect to the initiation of abuse and neglect proceedings. It also provides the basis for a constitutional analysis of these practices in Part IV.A.[48]

47. *See infra* Part IV.A.
48. *See infra* Part IV.A.

TABLE 1:
INITIATING ABUSE AND NEGLECT PROCEEDINGS

Any Person May Initiate	**Only Executive Branch May Initiate**	**Only Judicial Branch May Authorize**
Alabama (18+ years old)	California (social worker)	Alaska
Arizona (interested party)	District of Columbia	Colorado
Arkanas (adult)	Hawaii	Georgia
Connecticut (executive branch, child, child's representative, foster parents)	Idaho	Michigan
Delaware	Indiana	Mississippi
Florida	Iowa	Missouri (court can also order executive branch to file petition)[49]
Illinois (adult person)	Louisiana (court can also authorize another person)	Model Juvenile Court Act[50]
Kansas	Maryland	
Kentucky (interested person)	Montana	
Maine (three or more persons or executive branch)	Nebraska	
	Nevada[51]	
	New Mexico	

49. MO. SUP. CT. R. PRAC. & PROC. JUV. & FAM. CT. DIVS. CIR. CT. 111.01(c) ("If it does not appear to the juvenile officer that the information could bring the juvenile within the jurisdiction of the court, the juvenile officer, if practicable, shall so notify the informant. Any person, including the informant, may thereafter bring the matter directly to the attention of the court by presenting the information in writing to a judicial officer of the court. If it appears to the judicial officer that the information could bring the juvenile within the jurisdiction of the court, the judicial officer may order the juvenile officer to take further action, including . . . filing a petition.").

50. MODEL JUV. CT. ACT § 19 (2009) ("A petition under this Act shall not be filed unless the [probation officer,] the court, or other person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child." (alteration in original)).

51. A 2003 amendment removed "or any reputable person residing in the county, with the consent of the county attorney" from the language of § 43-274(1). 2003 Neb. Laws L.B. 43, § 13, http://www.legislature.ne.gov/FloorDocs/98/PDF/Slip/LB43.pdf; *see also* Matney v. State (*In re* Interest of Valentin V.), 674 N.W.2d 793, 797–98 (Neb. Ct. App. 2004) ("Before the 2003 amendment of § 43-274, a GAL could have filed a petition to initiate adjudication . . . with the county attorney's consent, but it is clear that now, only the county attorney can initiate proceedings in juvenile court . . . .").

Any Person May Initiate	**Only Executive Branch May Initiate**	**Only Judicial Branch May Authorize**
Massachusetts	New York (court can also authorize another person)	
Minnesota (reputable person)	North Carolina	
New Hampshire	North Dakota (other people can also be authorized to file a petition)	
New Jersey	Oklahoma[52]	
Ohio	Rhode Island (also other authorized persons)[53]	
Oregon	South Dakota[54]	
Pennsylvania	Texas	
South Carolina	Vermont	
Tennessee	Virginia (also child's attorney)	
Utah	Wisconsin (also counsel or guardian ad litem, and court can order filing of petition)	
Washington	Wyoming	
West Virginia (reputable person)		

Note: Any person may initiate;[55] only executive branch may initiate;[56] only judicial branch may authorize.[57]

52. Oklahoma law used to say that: "Any reputable person being a resident of the county having knowledge of a child in his county who appears to be either neglected [or] dependent . . . may file . . . a petition in writing . . . ." *Ex parte* Lewis, 188 P.2d 367, 379 (Okla. Crim. App. 1947).

53. R.I. R. JUV. P. 13(a) ("Information that a child is abused, neglected, or dependent shall be submitted to the court in the form of a petition by the department for children and their families or by any person authorized by law.").

54. But, the South Dakota Code also seems to indicate that a petition can be filed by someone other than the state's attorney. S.D. CODIFIED LAWS § 26-7A-43 (2010) ("If the petition is signed by a party other than a state's attorney, the petition shall be verified.").

55. ALA. CODE § 12-15-121(a) (2010) ("A juvenile petition alleging . . . dependency may be signed by any person 18 years of age or older . . . who has knowledge of the facts alleged or is informed of them and believes that they are true."); ARIZ. REV. STAT. ANN. § 8-841(A) (2011) ("Any interested party may file a petition to commence proceedings in the juvenile court alleging that a child is dependent."); ARK. CODE ANN. § 9-27-310(b)(3) (2011) ("Petitions for dependency-neglect or family in need of services may be filed by . . . [a]ny adult . . . ."); CONN. GEN. STAT. ANN. § 46b-129(a) (West 2011) ("Any selectman, town manager, or town, city or borough welfare department, any probation officer, or the Commissioner of Social Services, the Commissioner of Children and Families or any child-caring institution or agency approved by the Commissioner of Children and Families, a child or such

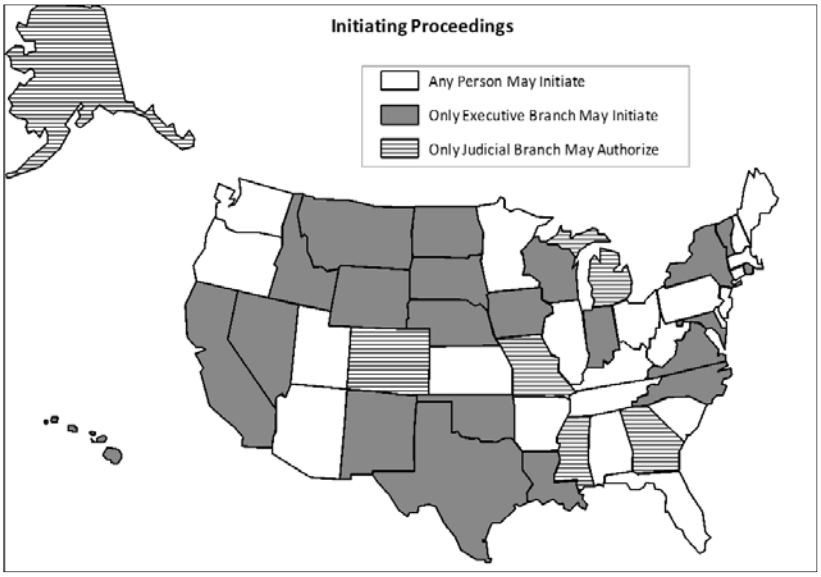
child's representative or attorney or a foster parent of a child, having information that a child or youth is neglected, uncared-for or dependent, may file . . . a verified petition plainly stating such facts as bring the child or youth within the jurisdiction of the court as neglected, uncared-for or dependent . . . ."); DEL. CODE ANN. tit. 10, § 1003 (2011) ("Any person having knowledge of a child within the State who appears to be neglected [or] dependent . . . may file . . . a petition in writing setting forth the facts verified by affidavit."); FLA. STAT. ANN. § 39.501(1) (West 2011) ("All proceedings seeking an adjudication that a child is dependent shall be initiated by the filing of a petition by an attorney for the department, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true."); 705 ILL. COMP. STAT. ANN. 405/2-13(1) (West 2011) ("Any adult person, any agency or association by its representative may file, or the court on its own motion, consistent with the health, safety and best interests of the minor may direct the filing through the State's Attorney of a petition in respect of a minor under this Act."); KAN. STAT. ANN. § 38-2233(b) (West 2011) ("Any individual may file a petition alleging a child is a child in need of care and the individual may be represented by the individual's own attorney in the presentation of the case."); KY. REV. STAT. ANN. § 620.070(1) (West 2010) ("A dependency, neglect, or abuse action may be commenced by the filing of a petition by any interested person in the juvenile session of the District Court."); ME. REV. STAT. ANN. tit. 22, § 4032(1) (2011) ("[Child Protection] Petitions may be brought by: A. The department through an authorized agent; B. A police officer or sheriff; or C. Three or more persons."); MASS. GEN. LAWS ANN. ch. 119, § 24 (West 2011) ("A person may petition under oath the juvenile court alleging on behalf of a child within its jurisdiction . . . ."); MINN. STAT. ANN. § 260C.141(1)(a) (West 2011) ("Any reputable person . . . having knowledge of a child . . . who appears to be in need of protection or services . . . may petition the juvenile court . . . ."); N.H. REV. STAT. ANN. § 169-C:7(I) (2011) ("A proceeding under this chapter is originated by any person filing a petition . . . alleging neglect or abuse of a child."); N.J. STAT. ANN.§ 9:6-8.34 (West 2011) ("The following persons may originate a proceeding [for adjudication of alleged child abuse or neglect] . . . .[:] d. Any person having knowledge or information of a nature which convinces him that a child is abused or neglected."); OHIO REV. CODE ANN. § 2151.27(A)(1) (LexisNexis 2011) ("[A]ny person having knowledge of a child who appears . . . to be an . . . abused, neglected, or dependent child may file a sworn complaint . . . ."); OR. REV. STAT. § 419B.809 (West 2011) ("Any person may file a petition in the juvenile court alleging that a child named therein is [dependent] . . . ."); 42 PA. CONS. STAT. ANN. § 6334(a) (West 2011) ("A petition . . . may be brought by any person including a law enforcement officer."); S.C. CODE ANN. § 63-3-550 (2010) ("[A]ny person having knowledge or information of a nature which convinces such person that a child is neglected . . . may institute a proceeding respecting such child."); TENN. CODE ANN. § 37-1-119 (2010) ("The petition may be made by any person, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true."); UTAH CODE ANN. § 78A-6-304(2)(a) (LexisNexis 2010) ("[A]ny interested person may file a petition."); WASH. REV. CODE ANN. § 13.34.040(1) (West 2011) ("Any person may file with the clerk of the superior court a petition showing that there is within the county, or residing within the county, a dependent child and requesting that the superior court deal with such child as provided in this chapter."); W. VA. CODE ANN. § 49-6-1(a) (LexisNexis 2010) ("If the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts . . . .").

56. CAL. WELF. & INST. CODE § 325 (West 2011) ("A proceeding in the juvenile court to declare a child to be a dependent child of the court is commenced by the filing with the court, by the social worker, of a petition, in conformity with the requirements of this article."); D.C. CODE § 16-2305(c)(1) (2011) ("Each petition shall be prepared by the Attorney General after an inquiry into the facts and a determination of the legal basis for the petition."); HAW. REV. STAT. ANN. § 587A-11(5) (LexisNexis 2011) ("[T]he department shall file a petition."); IDAHO CODE ANN. § 16-1610(1)(a) (2011) ("A petition must be signed by the prosecutor or deputy attorney general before being filed with the court."); IND. CODE ANN. § 31-34-9-3 (West 2011) ("A petition must . . . (3) be signed and filed by the person representing the interests of the state . . . ."); IOWA CODE ANN. § 232.87(2) (West 2011) ("A petition may be filed by the department of human services, juvenile court officer, or county attorney."); LA. CHILD. CODE ANN. art. 631(A) (2010) ("A child in need of care proceeding shall be commenced by petition filed by the district attorney. The Department of Children and Family Services, when authorized by the court, may file a petition if there are reasonable grounds to believe that the child is a child in need of care."); MD. CODE ANN., CTS. & JUD. PROC. § 3-809(a) (LexisNexis 2011) ("On receipt of a complaint from a person or agency having knowledge of facts which may cause a child to be subject to the jurisdiction of the court . . . the local department shall file a petition . . . if it concludes that the court has jurisdiction over the matter and that the filing of a petition is in the best interests of the child."); MONT. CODE ANN. § 41-3-422(2) (2010) ("The county attorney, attorney general, or an attorney hired by the county shall file all petitions [for abuse or neglect]."); NEB. REV. STAT. ANN. § 43-

274(1) (LexisNexis 2010) ("The county attorney, having knowledge of a juvenile in his or her county who appears to be [abused or neglected] . . . may file . . . a petition . . . ."); NEV. REV. STAT. ANN. § 432B.510(1) (LexisNexis 2010) ("A petition alleging that a child is in need of protection may be signed only by: (a) A representative of an agency which provides child welfare services; (b) A law enforcement officer or probation officer; or (c) The district attorney."); N.M. STAT. ANN. § 32A-1-10(A) (West 2010) ("A petition initiating proceedings [of Child Abuse and Neglect] . . . shall be signed by the children's court attorney."); N.Y. JUD. CT. ACTS LAW § 1032 (McKinney 2011) ("The following may originate a proceeding under this article: (a) a child protective agency, or (b) a person on the court's direction."); N.C. GEN. STAT. § 7B-403(a)–(b) (2010) ("All reports concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the director of the department of social services for screening. Thereafter, if it is determined by the director that a report should be filed as a petition, the petition shall be . . . filed . . . . A decision of the director of social services not to file a report as a petition shall be reviewed by the prosecutor if review is requested . . . ."); N.D. CENT. CODE § 27-20-20 (2010) ("A petition may be prepared and filed by the state's attorney. A petition may also be prepared by any other person, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true. A petition prepared by any person other than a state's attorney may not be filed unless the director, the court, or other person authorized by the court has determined the filing of the petition is in the best interest of the public and the child."); OKLA. STAT. ANN. tit. 10A, § 1-4-501 (West 2011) ("Except as otherwise provided by this Code, the district attorney shall prepare and prosecute every hearing and proceeding within the purview of the Oklahoma Children's Code, and shall act as petitioner in all cases."); R.I. GEN. LAWS § 14-1-11(a) (2010) ("Filing shall take place upon authorization by the intake department . . . , upon authorization by a justice of the family court . . . , or immediately upon appearance of the child before the court following emergency detention, unless the court otherwise orders."); S.D. CODIFIED LAWS § 26-7A-43 (2010) ("A state's attorney may file with the clerk of courts a written petition alleging a child . . . to be an abused or neglected child . . . ."); TEX. FAM. CODE ANN. § 262.001(a) (West 2011) ("A governmental entity with an interest in the child [e.g., Texas Department of Protective and Regulatory Services] may file a suit affecting the parent-child relationship requesting an order or take possession of a child without a court order as provided by this chapter."); VT. STAT. ANN. tit. 33, § 5309(a) (2010) ("The state's attorney . . . shall prepare and file a petition . . . ."); VA. CODE ANN. § 16.1-260(A) (2010) ("All matters alleged to be within the jurisdiction of the court shall be commenced by the filing of a petition . . . . No individual shall be required to obtain support services from the Department of Social Services prior to filing a petition seeking support for a child. Complaints, requests and the processing of petitions to initiate a case shall be the responsibility of the intake officer. However, (i) the attorney for the Commonwealth of the city or county may file a petition on his own motion with the clerk, (ii) designated nonattorney employees of the Department of Social Services may complete, sign and file petitions and motions relating to the establishment, modification, or enforcement of support . . . , and (iii) any attorney may file petitions on behalf of his client with the clerk except petitions alleging that the subject of the petition is a child alleged to be in need of services, in need of supervision or delinquent. Complaints alleging abuse or neglect of a child shall be referred initially to the local department of social services . . . ."); WIS. STAT. ANN. § 48.25(1)–(3) (West 2011) ("The district attorney, corporation counsel or other appropriate official . . . may file the petition if the proceeding [involves abandonment, abuse, or neglect] . . . . The counsel or guardian ad litem for a parent, relative, guardian or child may file a petition [involving abandonment, abuse, or neglect] . . . . If the district attorney, corporation counsel or other appropriate official . . . refuses to file a petition, any person may request the judge to order that the petition be filed and a hearing shall be held on the request. The judge may order the filing of the petition on his or her own motion."); WYO. STAT. ANN. § 14-3-411 (2010) ("Complaints alleging a child is neglected shall be referred to the office of the district attorney. The district attorney shall determine whether the best interest of the child requires that judicial action be taken. . . . The district attorney shall prepare and file a petition with the court if he believes action is necessary to protect the interest of the child.").

57. ALASKA STAT. § 47.10.020(a) (2010) ("Whenever circumstances subject a child to the jurisdiction of the court . . . , the court shall appoint a competent person or agency to make a preliminary inquiry and report . . . . Upon receipt of the report under this subsection, the court may . . . . (3) authorize the person or agency having knowledge of the facts of the case to file with the court a petition setting out the facts."); COLO. REV. STAT. § 19-3-501(1) (2010) ("Whenever it appears to . . . [any] person that a child is or appears to be within the court's jurisdiction . . . [that] person may refer the matter to the court, which shall have a preliminary investigation . . . . On the basis of the preliminary investigation, the court may: . . . (b) Authorize a petition to be filed . . . ."); GA. CODE ANN. § 15-11-37 (2010) ("A petition alleging . . . deprivation . . . of a child shall not be filed unless the court or a person autho-

FIGURE 1:
INITIATING ABUSE AND NEGLECT PROCEEDINGS



1. Any Person May Initiate

Roughly half the states have an "open door" policy with respect to the initiation of abuse and neglect proceedings. For instance, Illinois law specifies that "[a]ny adult person, any agency or association . . . or the court on its own motion . . . may direct the filing through the State's Attorney of a petition . . . . alleg[ing] that the minor is abused, neglected, or dependent."[58] Similarly, Alabama permits "any person 18 years of age or older" to file a petition.[59]

Many other state statutes go further and permit any "person" to file a petition. South Carolina, for instance, after a listing of private and public individuals, provides a catchall clause stating that "any person having

rized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child."); MICH. COMP. LAWS ANN. § 712A.11(1)(1) (West 2011) ("[I]f a person gives information to the court that a juvenile is [abused or neglected] . . . , a preliminary inquiry may be made . . . . If the court determines that formal jurisdiction should be acquired, the court shall authorize a petition to be filed."); MISS. CODE ANN. § 43-21-451 (2010) ("All proceedings seeking an adjudication that a child is . . . a neglected child or an abused child shall be initiated by the filing of a petition. Upon authorization of the youth court, the petition shall be drafted and filed by the youth court prosecutor unless the youth court has designated some other person to draft and file the petition."); MO. ANN. STAT. § 211.081(1) (West 2010) ("Whenever any person informs the court in person and in writing that a child appears to be [abused or neglected] . . . the court shall make or cause to be made a preliminary inquiry . . . . On the basis of this inquiry, the juvenile court . . . may authorize the filing of a petition by the juvenile officer.").

58. 705 ILL. COMP. STAT. ANN. 405/2-13(1)–(2) (West 2011).

59. ALA. CODE § 12-15-121(a) (2010).

knowledge or information of a nature which convinces such person that a child is neglected . . . may institute a proceeding respecting such child."[60] Massachusetts law simply states that "[a] person" may file a petition with the court.[61]

Still other states only permit "interested"[62] or "reputable"[63] persons to initiate proceedings. Most interesting and pertinent to this Note, however, is that only one state, Connecticut, textually permits a child to initiate proceedings on the child's own behalf.[64] In comparison, the Illinois Supreme Court has explicitly stated that "a minor, individually, may not file a petition."[65] This is hardly surprising given that the Illinois statute states that "any adult" may direct the filing of a petition.[66] On the other hand, one Utah Court of Appeals has held that the Utah statute, which provides that "any interested person may file a petition,"[67] permits a sixteen-year-old to file a petition on behalf of one's self and younger siblings.[68] Obviously, even the twenty-two states with an "open door" policy with respect to the initiation of abuse and neglect proceedings do not agree on whether a child should have access to courts to initiate such proceedings.

2. Only the Executive Branch May Initiate

Roughly another half of the states, and the District of Columbia, only permit the executive branch to initiate proceedings. The District of Columbia is one of the most restrictive; it provides that all petitions alleging neglect "shall be prepared by the Attorney General" and that "[a]ny decision of the Corporation Counsel on whether to file a petition shall be final."[69] Similarly, Idaho law requires all petitions to "be signed by the prosecutor or deputy attorney general before being filed with the court."[70]

Nevada provides a more expansive list of members of the executive branch that are authorized to file a petition, including representatives of a child welfare agency, a law enforcement or probation officer, and the district attorney.[71] Iowa permits essentially the same members of the ex-

60. S.C. CODE ANN. § 63-3-550 (2010).
61. MASS. GEN. LAWS ch. 119, § 24 (West 2011); Care & Prot. of Benjamin, 525 N.E.2d 418, 420 (Mass. 1988).
62. ARIZ. REV. STAT. ANN. § 8-841(A) (2011); KY. REV. STAT. ANN. § 620.070(1) (West 2010).
63. MINN. STAT. ANN. § 260C.141(1)(a) (West 2011); W. VA. CODE ANN. § 49-6-1(a) (LexisNexis 2010).
64. CONN. GEN. STAT. ANN. § 46b-129(a) (West 2011).
65. *In re* D.S., 763 N.E.2d 251, 257 (Ill. 2001).
66. 705 ILL. COMP. STAT. 405/2-13(1) (2008).
67. UTAH CODE ANN. § 78A-6-304(2)(a) (LexisNexis 2011).
68. State *ex. rel.* D.M., 790 P.2d 562, 564–65 (Utah Ct. App. 1990).
69. D.C. CODE § 16-2305(c)(1) (2011).
70. IDAHO CODE ANN. § 16-1610(1)(a) (2011).
71. NEV. REV. STAT. ANN. § 432B.510(1) (LexisNexis 2011).

ecutive branch to file petitions.[72] Other states provide that other persons, including individuals outside of the executive branch, may be authorized to file a petition, though generally only if authorized by the court.[73] Virginia, however, specifically authorizes a child's attorney to file a petition,[74] while Wisconsin allows a guardian ad litem to file a petition.[75]

Wisconsin's statute also specifically authorizes the court to require the executive branch to file a petition upon the request of any person.[76] Iowa has arrived at a similar result with respect to parental rights termination cases through judicial interpretation. The Iowa Supreme Court in *In re K.C.*[77] established that, during a dependency proceeding, a court may order the county attorney to file a petition to terminate parental rights.[78] Not surprisingly, the county attorney argued that permitting a court to order the county attorney to file a petition would violate the doctrine of separation of powers.[79] This argument will be repeated in the context of voluntary dismissal of abuse and neglect proceedings by the executive branch.[80] The Iowa Supreme Court rejected the county attorney's contention as well as a "rigidly compartmentalize[d]" notion of the separation of powers.[81] Instead, that court found that the judiciary has a "concomitant obligation to act in the best interests of the child" alongside the county attorney and that, as a result, "[t]he court's powers . . . are designed to effectuate the best interests of the child which may not necessarily be the same as what the parties are advocating."[82]

3. Only the Judicial Branch May Authorize

A small minority of states follow the Model Juvenile Court Act's approach of requiring the judicial branch to authorize the filing of a peti-

72. IOWA CODE ANN. § 232.87(2) (West 2011) ("A petition may be filed by the department of human services, juvenile court officer, or county attorney.").

73. LA. CHILD. CODE ANN. art. 631(A) (2011) (allowing the Department of Children and Family Services to file with authorization from the court); N.Y. JUD. CT. ACTS LAW § 1032 (McKinney 2011) (allowing a child protection agency or other person to file if directed by the court); N.D. CENT. CODE § 27-20-20 (2010) (allowing a petition to be filed by a person other than the state's attorney only if authorized by the court); R.I. R. JUV. P. 13(a) (2010).

74. VA. CODE ANN. § 16.1-260(A)(iii) (2010) (noting that complaints alleging abuse or neglect must initially be referred to the local department of social services).

75. WIS. STAT. ANN. § 48.25(1) (West 2011).

76. *Id.* § 48.25(3).

77. 660 N.W.2d 29 (Iowa 2003).

78. The right was statutory in nature. IOWA CODE ANN. § 232.58(3)(c) (West 2011); *In re K.C.*, 660 N.W.2d at 37–38. Iowa law also permits "[a] child's guardian, guardian ad litem, or custodian, the department of human services, a juvenile court officer, or the county attorney" to file a petition to terminate the parent-child relationship outside the delinquency context. § 232.111(1) (West 2011). Furthermore, any competent person may be authorized to file a petition in order to adjudicate for a child "in need of assistance," in other words, abused. *Id.* § 232.87(1), (3).

79. *In re K.C.*, 660 N.W.2d at 32–34.

80. *See infra* Part III.B.

81. *In re K.C.*, 660 N.W.2d at 34 (citing *In re* D.S., 763 N.E.2d 251, 258–60 (Ill. 2001)).

82. *Id.* at 35.

tion.[83] According to the authors of the Model Juvenile Court Act, the purpose behind this provision was "to avoid groundless and ill-advised petitions."[84] Surprisingly, out of the three jurisdictions which have adopted the Model Juvenile Court Act,[85] only Georgia has maintained this requirement.[86]

Jurisdictions which require judicial authorization often provide for a preliminary inquiry before the filing of a petition. For instance, Alaska's statute requires a court to "appoint a competent person or agency to make a preliminary inquiry and report" before the court can authorize a petition to be filed.[87] Michigan allows for a preliminary inquiry to be made, but does not require such an inquiry before the court can authorize the filing of a petition.[88]

Missouri presents an unusual combination of discretion and power. First, the Missouri statute permits any person to inform the court that a child may be abused or neglected.[89] Once the court has been so informed, it must "make or cause to be made a preliminary inquiry."[90] Thereafter, if the court determines that it is in "the interests of the public or of the child" for further action to be taken, it "may authorize the filing of a petition by" the executive branch.[91] The Missouri Court Rules, however, do not leave final discretion in the executive branch. Instead, if the executive branch decides not to file a petition, any person may "bring the matter directly to the attention of the court" and the court may "order" the executive branch to file a petition.[92]

B. Voluntary Dismissal of Abuse and Neglect Proceedings

Having reviewed current practice on the initiation of abuse and neglect proceedings, this Subpart reviews states with precedent on voluntary dismissal of abuse and neglect proceedings. Two different categories of states emerge from this analysis: (1) those in which the court is *not* re-

83. MODEL JUV. CT. ACT § 19 (2009) ("A petition under this Act shall not be filed unless the [probation officer,] the court, or other person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child." (alteration in original)).

84. *Id.* § 19 cmt.

85. Georgia, North Dakota, and Pennsylvania are considered to have adopted substantial portions of the Model Juvenile Court Act. MODEL JUV. CT. ACT REFS. & ANNOS. (2009). New Jersey also adopted some provisions which were inspired by the Model Juvenile Court Act. *Id.*

86. GA. CODE ANN. § 15-11-37 (2010) ("A petition alleging . . . deprivation . . . of a child shall not be filed unless the court or a person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child.").

87. ALASKA STAT. § 47.10.020(a) (2010).

88. MICH. COMP. LAWS ANN. § 712A.11(1) (West 2011) ("[I]f a person gives information to the court that a juvenile is [abused or neglected] . . . , a preliminary inquiry may be made . . . . If the court determines that formal jurisdiction should be acquired, the court shall authorize a petition to be filed.").

89. MO. ANN. STAT. § 211.081(1) (West 2010).

90. *Id.*

91. *Id.*

92. MO. SUP. CT. R. 111.01(c) (2010).

quired to dismiss and (2) those in which the court *is* required to dismiss. Table 2 contains a brief categorization of these jurisdictions. This Section demonstrates that courts consider at least three interests in evaluating voluntary dismissal: (1) the separation of power between the judicial and executive branches, (2) the *parens patriae* role of the court to protect the best interests of the child, and (3) the authority to begin abuse and neglect proceedings.

TABLE 2: VOLUNTARY DISMISSAL OF ABUSE AND NEGLECT PROCEEDINGS

	Any Person Can Initiate	**Only Executive Branch May Initiate**	**Only Judicial Branch May Authorize**
Dismissal Not Required	Illinois[93] Massachusetts (if another party continues proceeding)[94] South Carolina[95] West Virginia[96]	California[97] Maryland[98] New York[99] Wisconsin[100]	Colorado[101] Mississippi[102]

93. 705 ILL. COMP. STAT. ANN. 405/2-13(1) (West 2011); *In re* James J., 549 N.E.2d 834, 837–38 (Ill. App. Ct. 1989); *In re* J.J., 566 N.E.2d 1345, 1349–50 (Ill. 1991); *In re* S.G., 661 N.E.2d 437, 439–40 (Ill. App. Ct. 1996).

94. MASS. GEN. LAWS ANN. ch. 119, § 24 (West 2011); Care & Prot. of Benjamin, 525 N.E.2d 418, 420 (Mass. 1988).

95. S.C. CODE ANN. § 63-3-550 (2010); S.C. Dep't of Soc. Servs. v. Pritcher (*In re* Ashley Pritcher), 495 S.E.2d 242, 245 (S.C. Ct. App. 1997) ("The dismissal of an action upon request of the plaintiff is within the discretion of the court.").

96. W. VA. CODE ANN. § 49-6-1(a) (LexisNexis 2010); *cf. In re* Randy H., 640 S.E.2d 185, 187 (W. Va. 2006) (explaining that the court must make factual findings and "conclusions of law" regarding a petition and "the circuit court has the inherent authority to compel the Department [of Health and Human Resources] to amend its petition").

97. CAL. WELF. & INST. CODE § 325 (West 2011); Taylor M. v. Superior Court, 130 Cal. Rptr. 2d 502, 508–09 (Ct. App. 2003); Allen M. v. Superior Court, 8 Cal. Rptr. 2d 259, 260–62 (Ct. App. 1992).

98. MD. CODE ANN., CTS. & JUD. PROC. § 3-809(a) (LexisNexis 2011); *In re* Najasha B., 972 A.2d 845, 856–58 (Md. 2009).

99. N.Y. JUD. CT. ACTS LAW § 1032 (McKinney 2011); *In re* Rafael P., 712 N.Y.S.2d 714, 717 (N.Y. Fam. Ct. 2000); *In re* Billy R., 427 N.Y.S.2d 364, 366 (N.Y. Fam. Ct. 1980).

100. WIS. STAT. ANN. § 48.25(1)–(2) (West 2011); State *ex rel.* Kenneth S. v. Circuit Court, 756 N.W.2d 573, 576 (Wis. Ct. App. 2008).

101. COLO. REV. STAT. ANN. § 19-3-501(1) (2010); People *ex rel.* G.S., 820 P.2d 1178, 1180 (Colo. App. 1991); People *ex rel.* R.E., 729 P.2d 1032, 1034 (Colo. App. 1986).

102. MISS. CODE ANN. § 43-21-451 (2010); *In re* C.R., 879 So. 2d 1119, 1121 (Miss. Ct. App. 2004).

	Any Person Can Initiate	**Only Executive Branch May Initiate**	**Only Judicial Branch May Authorize**
Dismissal Required	Florida (if executive branch filed petition)[103]	District of Columbia (only for insufficiency of proof)[104] Indiana (at least until mother admits allegations in petition)[105] Nebraska (until trial)[106] Vermont (until hearing)[107]	Missouri (executive branch required to minimize negative impact of voluntary dismissal)[108]

1. Voluntary Dismissal Not Required

Although not the first case to find that voluntary dismissal was not required when requested by the executive branch,[109] the Illinois Supreme Court case of *In re J.J.*[110] is illustrative of judicial opinions which analyze whether courts should have discretion to reject a motion to dismiss and has been heavily discussed by other jurisdictions attacking the same problem.[111] The facts are typical: after a petition for adjudication of wardship based on allegations of abuse was filed with the court, the office of the state's attorney moved to dismiss the petition and the guardian ad litem objected.[112] The office of the state's attorney argued that the court must dismiss the petition because it is a matter of executive discretion to decide which cases to pursue.[113] This is so, argued the office of the state's attorney, because once a petition for adjudication of wardship is filed with the court, the people become "the real party in interest," and

103. FLA. STAT. ANN. § 39.501(1) (West 2011); *In re* J.M., 560 So. 2d 343, 343 (Fla. Dist. Ct. App. 1990) (not required to dismiss grandparents' petition); McCutcheon v. Trettis, 501 So. 2d 710, 711 (Fla. Dist. Ct. App. 1987) (required to dismiss Department of Health and Rehabilitative Services' petition).

104. D.C. CODE § 16-2305(c)(1) (2011); *In re* J.J.Z., 630 A.2d 186, 194–96 (D.C. 1993).

105. IND. CODE ANN. § 31-34-9-3 (West 2011); *In re* K.B., 793 N.E.2d 1191, 1197–98 (Ind. Ct. App. 2003).

106. NEB. REV. STAT. ANN. § 43-274(1) (LexisNexis 2010); *In re* Stephen Jeffrey Moore, 180 N.W.2d 917, 918 (Neb. 1970); *In re* Interest of Cassandra L., 543 N.W.2d 199, 208 (Neb. Ct. App. 1996).

107. VT. STAT. ANN. tit. 33, § 5309(a), (c) (2010).

108. MO. ANN. STAT. §§ 211.081(1), .091(4) (West 2010).

109. *See supra* notes 93–96, 103.

110. 566 N.E.2d 1345 (Ill. 1991).

111. *See In re* J.J.Z., 630 A.2d 186, 195–96 (D.C. 1993); *see also In re* Najasha B., 972 A.2d 845, 853–54 (Md. 2009).

112. *In re* J.J., 566 N.E.2d at 1346–47.

113. *Id.* at 1348.

to permit a court to deny a motion to dismiss would violate the doctrine of separation of powers.[114] In essence, the office of the state's attorney argued that principles of prosecutorial discretion in criminal cases[115] should be applied to dependency and neglect proceedings.[116]

The Illinois Supreme Court, however, rejected this argument. First, the court established that permitting the judiciary to reach the merits of a motion to dismiss in dependency and neglect proceedings would not violate the separation of powers.[117] The Illinois Supreme Court noted that the doctrine of separation of powers does not dictate a rigid compartmentalization of governmental power but, instead, "[t]here are instances in which the separate spheres of governmental authority overlap."[118] Furthermore, dependency and neglect proceedings are *civil* proceedings and distinguishable from criminal proceedings because "[t]he State does not act in an adversarial capacity against the minor, who is not being punished and is not regarded as a criminal."[119]

Second, the Illinois Supreme Court noted that "both the State's Attorney and the court are charged with the duty of ensuring that, at each step of the wardship adjudication process, the best interests of the minor, the minor's family and the community are served."[120] Therefore, a court "has not only the authority but the duty to determine whether the best interests of the minor will be served by dismissing a petition alleging abuse of a minor."[121] The Illinois Supreme Court was also quick to point out that the state's "obligation to act in the best interests of the minor" in dependency and neglect proceedings modifies a court's role from truly civil proceedings, in which the plaintiff "has an absolute right to a voluntary dismissal."[122]

Having found no obstacle in the doctrine of separation of powers, the Illinois Supreme Court had little difficulty concluding that the judicial branch need not dismiss an abuse and neglect proceeding only because the executive branch requested the dismissal. The Illinois Supreme Court went even further, however, and relying on a court's duty to protect the best interests of the minor, held that a court *must* judge the merits of a motion to dismiss; in the words of the Illinois Supreme Court:

> We hold that when the State moves to dismiss a petition alleging abuse of a minor, the . . . court shall consider the merits of the motion and determine, on the record, whether dismissal is in the best interests of the minor, the minor's family, and the community.

114. *Id.*
115. For an insightful description of prosecutorial discretion in criminal law, see generally Lara Beth Sheer, *Prosecutorial Discretion*, 86 GEO. L.J. 1353 (1998).
116. *In re* J.J., 566 N.E.2d at 1348.
117. *Id.* at 1348–49.
118. *Id.* at 1348.
119. *Id.*
120. *Id.* at 1349.
121. *Id.*
122. *Id.* at 1350.

> Only in this way will the . . . court be able to fulfill its duty to ensure the best interests of the minor . . . .[123]

Despite this broad and powerful holding of the Illinois Supreme Court, *In re J.J.* has received almost no attention in legal scholarship and is generally only passively mentioned.[124]

Similar to the Illinois Supreme Court, a Colorado Court of Appeals has held that a court "is not required to dismiss a dependency and neglect petition merely because the state chooses for any reason not to pursue the proceedings."[125] The Colorado Court of Appeals reasoned that although only the state is authorized to file a petition alleging abuse and neglect, in doing so the state has "set forth credible facts supporting its belief that the child is dependent and neglected" and, therefore, "the child . . . is entitled to a determination of the merits, and the petition may not be dismissed over the objection of the guardian ad litem."[126] A Colorado Court of Appeals later limited the scope of this holding by concluding that the court is not required to "conduct a hearing on the merits" before granting a motion to dismiss a dependency petition when the grandmother objected to the dismissal, but the guardian ad litem did not.[127]

Some California courts have also concluded that courts must determine whether dismissal is in the best interests of the child.[128] In *Allen M. v. Superior Court*,[129] a California Court of Appeals held that "judicial review of a dismissal is critical to protect the welfare of the minor."[130] That court rejected the Department of Social Services' contention that the department's determination of insufficient or weak evidence should support its motion to dismiss.[131] Instead, the California Court of Appeals concluded that "[s]ufficiency of the evidence is a legal question, not a matter for the discretion of the Department."[132] This is in stark contrast to the District of Columbia Court of Appeals' conclusion in *In re J.J.Z.*[133] that a court must dismiss a petition when insufficiency of the evidence is alleged by the party in interest.[134]

123. *Id.* at 1349.

124. *See, e.g.*, Charles P. Golbert & Kass A. Plain, *Appellate Jurisdiction over Child Protection Orders*, 93 ILL. B.J. 466, 467 (2005); Shahan G. Teberian, *Judicial Branch*, 23 RUTGERS L.J. 966, 966–67 (1992); Amy Kosanovich, Note, *One Family in Two Courts: Coordination for Families in Illinois Juvenile and Domestic Relations Courts*, 37 LOY. U. CHI. L.J. 571, 583 (2006);. *But see* Sara Jeruss, *Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. REV. 853, 887 (2009) (citing *In re* J.J., in the context of state rights of access to courts).

125. People *ex rel.* R.E., 729 P.2d 1032, 1034 (Colo. App. 1986).

126. *Id.* at 1033–34.

127. People *ex rel.* G.S., 820 P.2d 1178, 1180–81 (Colo. App. 1991).

128. *See* Taylor M. v. Superior Court, 130 Cal. Rptr. 2d 502, 508 (Ct. App. 2003).

129. 8 Cal. Rptr. 2d 259 (Ct. App. 1992).

130. *Id.* at 263.

131. *Id.* at 262.

132. *Id.*

133. 630 A.2d 186 (D.C. 1993).

134. *Id.* at 194. *See infra* text accompanying notes 138–153.

According to at least one New York Family Court's interpretation of that state's statutory language, a court "may dismiss the [neglect] petition *only if* facts sufficient to sustain the petition under [the statute] are not established, or if . . . the court concludes that its aid is not required on the record before it."[135] Similarly, a Mississippi Court of Appeals concluded that its statute permitted a court to dismiss a petition alleging abuse "*only if* the youth court finds such action to be conducive to the welfare of the child and in the best interest of the state."[136] A Wisconsin Court of Appeals also concluded that its statute prevented the district attorney from withdrawing a petition alleging that a child was in need of protection or services "without the approval of the court."[137]

2. Voluntary Dismissal Required

The District of Columbia Court of Appeals case of *In re J.J.Z.* provides an illustrative example of a judicial opinion requiring dismissal of an abuse and neglect proceeding.[138] Again the facts are typical: after a petition alleging neglect was filed in the court, the Corporation Counsel (i.e., the government) moved to dismiss the petition because of insufficient evidence and the guardian ad litem objected.[139] The guardian ad litem made two arguments. First, the guardian ad litem "argued that the District of Columbia had a special duty to protect abused and neglected children and that the court, as *parens patriae*, had the inherent power to reject an arbitrary dismissal of a neglect petition."[140] Second, the guardian ad litem argued that, in this case, "the facts known to the government at the time of the . . . motion to dismiss . . . would support a finding of neglect."[141] The District of Columbia Court of Appeals, however, never reached the guardian ad litem's second argument and rejected the guardian ad litem's contention that the court, under the doctrine of *parens patriae*, must always evaluate the merits of a motion to dismiss.[142]

Focusing on the Corporation Counsel's "exclusive authority to file a neglect petition,"[143] the District of Columbia Court of Appeals held that "where the government seeks to dismiss a neglect petition based upon its good faith determination that its proof is insufficient to sustain the charges, the . . . court must grant the motion."[144] In other words, when the government moves to dismiss a petition alleging neglect, and the

135. *In re* Rafael P., 712 N.Y.S.2d 714, 717 (Fam. Ct. 2000) (emphasis added) (internal quotation marks omitted).

136. *In re* C.R., 879 So. 2d 1119, 1121 (Miss. Ct. App. 2004) (emphasis added) (internal quotation marks omitted).

137. State *ex rel.* Kenneth S. v. Circuit Court, 756 N.W.2d 573, 579 (Wis. Ct. App. 2008).

138. 630 A.2d at 186.

139. *Id.* at 188.

140. *Id.*

141. *Id.* at 188–89.

142. *See id.* at 187.

143. *Id.* at 190.

144. *Id.* at 187.

government represents to the court (in good faith) that it is moving for dismissal because it lacks sufficient evidence to proceed, a court cannot look to the factual evidence supporting the allegations of neglect and must summarily dismiss the petition. The District of Columbia Court of Appeals reasoned that although neglect proceedings are civil in nature and distinguishable from criminal prosecutions, "the prosecutorial function explicitly reserved to the Corporation Counsel . . . supports the implicit, concomitant authority of the designated governmental official to exercise discretion in determining prior to trial whether to proceed with any petition which he deems to be unsupportable."[145] This analysis contravenes similar analysis by a California Court of Appeals in *Allen M. v. Superior Court*.[146]

The District of Columbia Court of Appeals did, however, find a role for the best interests of the child and the court's role as *parens patriae* with respect to the dismissal of petitions. The District of Columbia Court of Appeals distinguished between, on the one hand, motions to dismiss based on insufficiency of the evidence and, on the other hand, motions to dismiss based on "other reasons," such as changed circumstances.[147] When motions to dismiss are based upon such "other reasons," they raise "different considerations" and a court "can exercise [its] *parens patriae* role . . . [and] may [properly] review such motions to dismiss."[148] In fact, the District of Columbia Court of Appeals held that:

> [W]here the government seeks to dismiss the petition over the objection of the guardian *ad litem* for reasons other than a lack of proof of neglect, the court must make an appropriate inquiry, including an evidentiary one if necessary, to determine whether the best interests of the child will be served by dismissal.[149]

In support of this holding, the District of Columbia Court of Appeals discussed the Illinois case of *In re J.J.*,[150] finding its justification for requiring a court to evaluate the merits of a motion to dismiss persuasive in the context of reasons other than insufficiency of the evidence. Nonetheless, the District of Columbia Court of Appeals distinguished the Illinois Supreme Court's holding in *In re J.J.* from its own by focusing on the different statutory schemes in Illinois and the District of Columbia.[151]

In sum, the District of Columbia Court of Appeals requires dismissal of a petition alleging neglect when the Corporation Counsel determines, in good faith, that there is insufficient evidence to support the

145. *Id.* at 191–92.
146. 8 Cal. Rptr. 2d 259 (Ct. App. 1992). *See supra* text accompanying notes 129–132.
147. *In re J.J.Z.*, 630 A.2d at 194.
148. *Id.* at 194.
149. *Id.* at 187.
150. 566 N.E.2d 1345 (Ill. 1991). *See supra* text accompanying notes 110–124.
151. *In re J.J.Z.*, 630 A.2d at 195–96 (discussing how, in the District of Columbia, only Corporation Counsel can bring abuse and neglect petitions whereas in Illinois, petitions may be filed by other interested parties).

petition's allegations.[152] When the Corporation Counsel moves to dismiss a petition for any other reason, however, such as changed circumstances, and the guardian ad litem objects to the dismissal, a court must determine whether the dismissal will serve the best interests of the child.[153]

A Florida District Court of Appeals followed different reasoning when it held that a court must dismiss a dependency petition. In that case, the Department of Health and Rehabilitation Services had filed a petition alleging dependency but later submitted a motion to withdraw the petition.[154] The Florida District Court of Appeals concluded that the court was required to dismiss the petition because, according to the Florida Rules of Juvenile Procedure, "a petition for dependency may be voluntarily dismissed by the petitioner without leave of the court at any time prior to the entry of an order of adjudication."[155] Given that a similar rule under the Florida Rules of Civil Procedure permitting voluntary dismissal had "been held to be absolute," the "properly filed dismissal divest[ed] the court of jurisdiction."[156] Following this logic, a different Florida District Court of Appeals later held that a court was *not* required to dismiss a petition at the request of the Department of Health and Rehabilitative Services when the petition for dependency had been filed not by the department, but by the child's maternal grandmother.[157]

C. The Right of Access to Courts

In order to provide children with a right of access to courts throughout the United States, which would provide a basis for overcoming voluntary dismissal of abuse and neglect proceedings,[158] such a right should be based on the U.S. Constitution.[159] The main source of this right emanates from the First Amendment, which provides "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[160] Although only originally applied to the federal government,[161] the petition clause has been incorpo-

152. *Id.* at 187.
153. *Id.* at 194.
154. McCutcheon v. Trettis, 501 So. 2d 710, 711 (Fla. Dist. Ct. App. 1987).
155. *Id.*
156. *Id.*
157. *In re* J.M., 560 So. 2d 343, 343 (Fla. Dist. Ct. App. 1990).
158. *See infra* Part IV.B.
159. *Cf.* U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land . . . .").
160. U.S. CONST. amend. I. Only four percent of the U.S. population knows that the First Amendment contains a right to petition. FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT 2009, at 4 (2009),http://www.firstamendmentcenter.org/Madison/wp-content/uploads/2011/03/SOFA 2009.analysis.tables.pdf.
161. United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("The first amendment to the Constitution prohibits Congress from abridging 'the right of the people to assemble and to petition the government for a redress of grievances.' This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.").

rated against the states through the Fourteenth Amendment[162] and is considered to be a fundamental right.[163]

Despite the long historical roots of the right to petition, which extend to at least the Magna Carta in 1215,[164] there has been little written on this right.[165] No doubt, this is partly the result of the Supreme Court's own conflation of the right to petition with other constitutional guarantees, such as that of due process.[166] Nonetheless, it is clear that part of the right to petition includes access to courts.[167]

The first Subsection of this Section reviews Supreme Court jurisprudence on the right of access to courts derived from due process. The second Subsection then moves on to analyze the petition clause of the First Amendment in relation to the right of access to courts. This Section most directly sets the stage for Part IV, which argues that children have a right of access to courts for abuse and neglect proceedings.

1. Due Process and the Right of Access to Courts

The fundamental nature of the right of access to courts was recognized as early as *Marbury v. Madison*,[168] although its recognition was not couched in the First Amendment's petition clause.[169] Instead, Justice Marshall wrote that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . .
>
> Blackstone states [that] . . . "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . ."
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[170]

162. United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 221–22 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964); Nicholson v. Moran, 835 F. Supp. 692, 695 (D.R.I. 1993) (citing De Jonge v. Oregon, 299 U.S. 353, 364 (1937)).

163. Morales v. Turman, 326 F. Supp. 677, 680 (E.D. Tex. 1971).

164. Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1155 (1986).

165. Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 739 (1999).

166. *See, e.g.*, Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 570–71 (1999).

167. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 525 (2002); Cruz v. Beto, 405 U.S. 319, 321 (1972); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); Andrews, *supra* note 166, at 625–68.

168. 5 U.S. (1 Cranch) 137 (1803).

169. Andrews, *supra* note 166, at 563–64.

170. *Marbury*, 5 U.S. (1 Cranch) at 163.

In other words, Justice Marshall relied on a fundamental understanding of the nature of the United States, and upon the writings of Blackstone,[171] to justify the fundamental right of court access.

Later, the Supreme Court recognized the right of access to courts as a fundamental aspect of liberty which was protected by the privileges and immunities clause.[172] For example, in *Ward v. Maryland*[173] the Court wrote that: "the words 'privileges and immunities,' . . . are words of very comprehensive meaning . . . and unmistakably secure[] and protect[] the right of a citizen of one State . . . to maintain actions in the courts of [any other State of the Union]."[174] As all first-year law students in Constitutional Law recognize, however, the utility of protections under the privileges and immunities clause is minimal given that the clause only prevents states from discriminating against citizens of other states in order to benefit their own citizens.[175]

One of the most important cases for defining the right of access to courts came in 1971.[176] This was the case of *Boddie v. Connecticut*,[177] which held that a state cannot deny access to judicial proceedings to obtain marriage dissolution because of an individual's inability to pay applicable court fees.[178] In the words of Justice Harlan, writing for the Court:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[179]

There are three important points to consider from *Boddie*. First, the Court based its conclusion on the due process clause of the Fourteenth Amendment,[180] and not on the petition clause of the First Amendment. Second, the state's *monopolization* of "the adjustment of a fundamental human relationship" was important to the Court for the resolution of this case.[181] Third, the Court was quick to state the narrowness of its holding, noting that "[w]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due

171. Andrews, *supra* note 166, at 563–64.
172. *Id.* at 565.
173. 79 U.S. (12 Wall.) 418 (1870).
174. *Id.* at 430.
175. *See* CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 108-17, ARTICLE IV–STATES' RELATIONS 911 (2002), http://www.gpoaccess.gov/constitution/pdf2002/014.pdf.
176. Andrews, *supra* note 166, at 568.
177. 401 U.S. 371 (1971).
178. *Id.* at 381–82.
179. *Id.* at 374.
180. *Id.* at 382.
181. *Id.* at 382–83.

Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual."[182]

The first of these points, in many ways, does not affect this Note's analysis. By its terms, the First Amendment, along with the other amendments contained in the Bill of Rights, is only a limitation on the federal government, and not upon the states.[183] Instead, most of the provisions of the Bill of Rights, including the First Amendment's petition clause, have been "incorporated"[184] through the Fourteenth Amendment's due process clause to be applied against the states.[185] Therefore, in a technical sense, it is not the First Amendment's petition clause which is at issue in this Note, but the due process clause of the Fourteenth Amendment. Nonetheless, the lack of even a reference to the First Amendment's petition clause in *Boddie* is surprising.

The second point appears to provide a basis for extending the rationale of *Boddie* to abuse and neglect proceedings. Just as marriage and divorce implicate "fundamental human relationship[s]" over which the state has a monopoly with respect to the adjustment of such relationships,[186] so, too, is the parent-child relationship. As mentioned in Part II,[187] the Supreme Court has recognized both the "fundamental liberty interest of . . . parents in the care, custody, and management of their child" and the importance of "familial bonds" (i.e., the parent-child relationship).[188] Not only is the parent-child relationship a fundamental human relationship, but it is also one over which the state exercises a monopoly with respect to its adjustment.[189]

The third, and final, of these points limits the direct applicability of *Boddie* as precedent but does not alter the utility of its analysis with respect to child abuse and neglect proceedings. Although the Supreme Court refused to extend its holding beyond the facts and circumstances presented in *Boddie*, other courts have been willing to extend it. As the Fifth Circuit has written:

> The Supreme Court has recognized that, in some circumstances, access to courts is protected by the due process clause. While the *Boddie* principle does not give any broad "right" of access to feder-

182. *Id.*

183. *See* CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 108-17, AMENDMENTS TO THE CONSTITUTION–FIRST THROUGH TENTH AMENDMENTS: BILL OF RIGHTS 1001 (2002), http://www.gpoaccess.gov/constitution/pdf2002/018.pdf.

184. *See generally* Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

185. For a list of the provisions of the Bill of Rights which have been incorporated against the states through the due process clause of the Fourteenth Amendment, see CONG. RESEARCH SERV., *supra* note 183, at 1006 n.37.

186. *Boddie*, 401 U.S. at 382–83.

187. *See supra* Part II.

188. Santosky v. Kramer, 455 U.S. 745, 753–54 (1982).

189. *See, e.g.*, Hobus v. Hobus, 540 N.W.2d 158, 161 (N.D. 1995) ("North Dakota law does not provide for voluntary termination of parental rights without court order.").

> al court, the courtroom door should not lightly be barred to a person who has a tenable legal claim.[190]

Even the Supreme Court recently extended the utility of *Boddie* when it discussed "the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."[191] Thus, *Boddie*, itself, provides a basis for ensuring that children have a right of access to courts to initiate abuse and neglect proceedings.

2. The First Amendment and the Right of Access to Courts

Another method to develop a theory of access to courts for children comes from the First Amendment's petition clause. This right to petition is separate from the other First Amendment guarantees, including the right to free speech.[192] Surprisingly, the right to petition was originally considered superior to the other rights protected by the First Amendment.[193] Ironically, however, the other protections of the First Amendment have been given greater significance and importance in modern jurisprudence, while the jurisprudential importance of the right to petition has waned.[194] This, no doubt, is likely due to the fact that litigants rarely invoke the clause.[195]

During the late nineteenth century, the Supreme Court recognized the importance of the petition clause, stating that "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."[196] More recently, the Supreme Court has said that the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights."[197]

Despite the importance of the petition clause, defining the boundaries of its protection has eluded both courts and scholars, particularly with respect to the right of access to courts.[198] Nonetheless, the right clearly exists. As the Seventh Circuit has noted:

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190. Doe v. A Corp., 709 F.2d 1043, 1048 (5th Cir. 1983) (footnote omitted) (citation omitted); *see also* Willy v. Admin. Review Bd., 423 F.3d 483, 495 (5th Cir. 2005).

191. Tennessee v. Lane, 541 U.S. 509, 532 (2004) (quoting *Boddie*, 401 U.S. at 379); *see also* Risa E. Kaufman, *Access to the Courts As a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1480 n.8 (2008).

192. Wayte v. United States, 470 U.S. 598, 610 n.11 (1985).

193. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17 (1993).

194. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2154 (1998).

195. *See* Spanbauer, *supra* note 193, at 16.

196. United States v. Cruikshank, 92 U.S. 542, 552 (1875); *see also* BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524–25 (2002).

197. United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967); *see also BE&K Constr. Co.*, 536 U.S. at 524.

198. *See generally* Andrews, *supra* note 166.

> The right of access to the courts is the right of an individual . . . to obtain access to the courts without undue interference. The right of individuals to pursue legal redress for claims that have a reasonable basis in law or fact is protected by the First Amendment right to petition and the Fourteenth Amendment right to substantive due process.[199]

This right extends both to civil actions[200] and criminal complaints.[201] There is also little doubt that this right extends to children, as the Supreme Court has noted that "minors are entitled to a significant measure of First Amendment protection,"[202] which includes the petition clause.

Fortunately, it is not necessary to fully develop a theory regarding the scope of the petition clause for purposes of this Note. Instead, it need only be recognized that such a right exists and that children are entitled to its exercise.[203] This right has been expressed narrowly by one scholar as the right of persons "to file claims that are [potentially] winning and within the court's jurisdiction."[204] The more complicated question is how a court must respond to such filed claims.[205] Nonetheless, such a discussion is beyond the scope of this Note.

Before moving onto Part IV, however, it is important to recognize that regulation of the right of access to courts, which is protected by the petition clause of the First Amendment, must be subjected to strict scrutiny review.[206] This corresponds both with the level of scrutiny generally given the other First Amendment protections[207] and with the Supreme Court's espousal that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[208] Thus, in order for a state to reg-

199. Snyder v. Nolen, 380 F.3d 279, 291 (7th Cir. 2004).

200. *See* Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008); Van Deelen v. Johnson, 497 F.3d 1151, 1156 (10th Cir. 2007); Hill v. Scranton, 411 F.3d 118, 126 (3d Cir. 2005); *Snyder*, 380 F.3d at 291.

201. *See* Meyer v. Bd. of Cnty. Comm'rs of Harper Cnty., Okla., 482 F.3d 1232, 1243 (10th Cir. 2007); Jackson v. N.Y. State, 381 F. Supp. 2d 80, 89 (N.D.N.Y. 2005); Lott v. Andrews Ctr., 259 F. Supp. 2d 564, 568 (E.D. Tex. 2003); United States v. Hylton, 558 F. Supp. 872, 874 (S.D. Tex. 1982).

202. Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975).

203. At least two courts have specifically recognized that the right to petition extends to minors. Walker-Serrano v. Leonard, 168 F. Supp. 2d 332, 346 (M.D. Pa. 2001) ("Juveniles enjoy the right to petition the government for redress of grievances under the First Amendment as well as adults."); *In re* Appeal in Maricopa Cnty., 887 P.2d 599, 604–05 (Ariz. Ct. App. 1994) ("The Supreme Court has recognized that the First Amendment rights of minors include the freedoms of speech, expression, and religion. We see no reason why juveniles should not also enjoy the rights to assemble, to petition the government for the redress of grievances, and to associate." (citations omitted)).

204. Andrews, *supra* note 166, at 625 (emphasis omitted).

205. *See generally* Lawson & Seidman, *supra* note 165 (discussing the obligation to respond).

206. *See* Andrews, *supra* note 166, at 676–80.

207. *See, e.g.*, Mejia v. L.A., 67 Cal. Rptr. 3d 228, 235 (Ct. App. 2007) ("Restrictions on the right to petition generally are subject to the same analysis as restrictions on the right of free speech. Laws that regulate speech based on the content of the expression ordinarily are evaluated under the strict scrutiny standard. A regulation of speech is considered content based if the purpose of the law is to restrict speech because of the government's disagreement with the message it conveys. Under strict scrutiny, a content-based regulation is permissible only if it is narrowly tailored and the least restrictive means to serve a compelling government interest." (citations omitted)).

208. NAACP v. Button, 371 U.S. 415, 438 (1963).

ulate an individual's right of access to courts in a "content-based" manner (e.g., regulations only affecting child abuse and neglect proceedings), such a regulation must be "narrowly tailored to serve a compelling government interest."[209]

IV. RESOLUTION: A CHILD'S RIGHT OF ACCESS TO COURTS FOR ABUSE AND NEGLECT PROCEEDINGS

Having reviewed the landscape in Part III, this Part proposes a new understanding of abuse and neglect proceedings. Section A argues that children have a constitutional right, based on the First Amendment's petition clause as incorporated against the states through the due process clause of the Fourteenth Amendment, to petition courts to initiate abuse and neglect proceedings. Section B then argues that, having recognized this right, concerns over the ability of the executive branch to unilaterally dismiss abuse and neglect proceedings[210] evaporate.

A. Initiating Proceedings

Earlier, this Note categorized states into three groups with respect to the initiation of abuse and neglect proceedings: (1) those states for which any person may initiate a proceeding, (2) those which only allow the executive branch to initiate a proceeding, and (3) those which require the judicial branch to authorize the initiation of a proceeding.[211] This Section now argues that those states which prevent a child from initiating an abuse and neglect proceeding on the child's own behalf violate the First Amendment's petition clause. Therefore, state legislatures should amend their statutes to permit a child to initiate an abuse and neglect proceeding on the child's own behalf.

As established in Part III.C, the First Amendment's petition clause guarantees a right of access to courts[212] and any restrictions which are placed upon this right must be judged under strict scrutiny.[213] Furthermore, children are entitled to protection under the petition clause,[214] which has been incorporated against the states.[215] While this Note will focus on the application of the petition clause to abuse and neglect proceedings, it is also worth noting that there is a valid argument to extending the reach of *Boddie v. Connecticut*[216] to cover the initiation of abuse and neglect proceedings.[217] In any case, this Section begins with the pre-

209. Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1127 (2009).
210. *See supra* Part III.B.
211. *See supra* Part III.A.
212. *See supra* note 167 and accompanying text.
213. *See supra* notes 206–209 and accompanying text.
214. *See supra* notes 202–203 and accompanying text.
215. *See supra* note 162 and accompanying text.
216. 401 U.S. 371 (1971).
217. *See supra* notes 176–191 and accompanying text.

mise that children are entitled access to courts in order to seek the initiation of an abuse and neglect proceeding, consistent with the petition clause. The rest of this Section looks to the compliance of states with respect to this aspect of the petition clause.

Not all of the states in the "any person may initiate" category elaborated in Part III.A allow a child to begin an abuse and neglect proceeding. In fact, only the state of Connecticut[218] specifically permits a child to initiate abuse and neglect proceedings. Nonetheless, those states that permit any (interested) person to bring an abuse and neglect petition also presumably permit a child to initiate an abuse and neglect proceeding. For instance, as one Utah Court of Appeals eloquently wrote when a father challenged his minor daughters' ability to file a petition alleging abuse:

> The statute specifically authorizes a person "having an interest in an abused child" to petition for a protective order. There is no prohibition as to the age or qualifications of the person who may petition, whether adult, minor, etc. The only qualification is an interest in an abused child . . . . Appellant's allegedly abused daughters have the paramount and primary interest in these particular children, i.e., themselves. Who would possibly have a greater interest in their welfare and protection than these girls? No one. Certainly, appellant would not argue that his daughters are not persons.[219]

Although states with similar "open door" statutes do not appear to have been confronted with this specific question, it is likely that courts from such states would arrive at the same result. Therefore, those states in the "any person may initiate" category which permit any person or any interested person to initiate an abuse and neglect proceeding[220] presumably allow children to initiate proceedings on their own behalves, and thus comply with the dictates of the petition clause.

On the other hand, states in the "any person may initiate" category, which only permit adult persons to file petitions, such as Illinois, deny a child the right to file on the child's own behalf.[221] Similarly, those states in the "only executive branch may initiate" category, which only allow the executive branch to file petitions,[222] *ispo facto*, prevent a child from beginning an abuse and neglect proceeding on the child's own behalf. Such states, by definition, violate a child's First Amendment right of access to courts.

The final category of states, entitled "only judicial branch may authorize," which require the judiciary to authorize the filing of a peti-

218. CONN. GEN. STAT. § 46b-129(a) (2009).

219. State *ex rel.* D.M., 790 P.2d 562, 564 (Utah Ct. App. 1990).

220. *See supra* note 55.

221. *E.g.*, *In re* D.S., 763 N.E.2d 251, 257 (Ill. 2001) ("[A] minor, individually, may not file a petition under the Juvenile Court Act.").

222. *See supra* note 56.

tion,[223] restricts a child's right of access to court and may not violate the petition clause. Such regulation implicates the petition clause of the First Amendment as well as both the due process and equal protection clauses of the Fourteenth Amendment.[224] As previously analyzed, the petition clause guarantees a person's right to file meritorious claims in court.[225] When states regulate a child's ability to petition the court in order to begin abuse and neglect proceedings, this regulation must be subjected to strict scrutiny analysis.[226]

Therefore, states in this third category must be able to prove that the restrictions they place on a child's unfettered ability to file abuse and neglect petitions on the child's own behalf are "narrowly tailored to serve a compelling government interest."[227] Such compelling interests could be the interest in maintaining familial bonds or the interest in avoiding unmeritorious abuse and neglect petitions. Despite the countervailing governmental interest in protecting children, based on the doctrine of *parens patriae*,[228] such governmental interest is certainly compelling.

Nonetheless, these states would still have to demonstrate that their regulation was "narrowly tailored" to this compelling interest. It is under this prong of the analysis that those states which only permit adults or the executive branch to initiate proceedings and those which require the judiciary to authorize proceedings diverge. Completely eliminating a child's right of access to the courts for abuse and neglect proceedings is too overinclusive a regulation to be considered narrowly tailored to any compelling governmental interests.[229] Such a regulation also significantly infringes upon the doctrine of *parens patriae* and the government's interest in ensuring the security of all children.

On the other hand, requiring judicial approval for the filing of an abuse and neglect petition may adequately protect compelling governmental interests while avoiding over- and under-inclusiveness. So long as a child can access court proceedings[230] to obtain review, and so long as

223. *See supra* note 57.

224. *See* 4 ROTUNDA & NOWAK, *supra* note 45, § 18.40, at 388–89 ("[W]henever a state burdens the freedom of . . . petition the law must be analyzed under the strict scrutiny required by the First Amendment as well as the general guarantees of the due process and equal protection provisions." (footnote omitted)).

225. *See supra* Part III.C.2.

226. *See supra* notes 206–209 and accompanying text.

227. Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1132 (2009).

228. *See supra* Part II.

229. *See supra* notes 199–209 and accompanying text.

230. All states which require judicial authorization, including the Model Juvenile Court Act, appear to permit unrestricted access to the courts. ALASKA STAT. § 47.10.020(a) (2010) ("Whenever circumstances subject a child to the jurisdiction of the court . . . ."); COLO. REV. STAT. § 19-3-501(1) (2010) ("Whenever it appears to a . . . person that a child is or appears to be within the court's jurisdiction . . . the . . . person may refer the matter to the court . . . ."); GA. CODE ANN. § 15-11-38 (2010) ("[T]he petition . . . may be made by any person . . . ."); MICH. COMP. LAWS ANN. § 712A.11(1) (West 2011) ("[I]f a person gives information to the court . . . ."); MISS. CODE ANN. § 43-21-451 (2010) (failing to specify specify who can bring information to court to obtain authorization); MO. ANN. STAT.

the court can either authorize the child to file a petition or can require a governmental agency to file a petition, such a regulation would not unduly infringe upon a child's right of access to courts. In fact, states which only permit the executive branch to initiate can follow a similar system, as evidenced by New York,[231] which would give a child access to the court to either be granted authority to file a self-petition, or to have the court order the executive branch to file a petition.

In sum, although giving an "open door" policy to children to file petitions on the child's own behalf is the easiest solution to achieve compliance with the dictates of the petition clause of the First Amendment, states can regulate access to court proceedings to at least some degree. One method already used by some states is to require judicial authorization for the filing of abuse and neglect petitions. This method complies with strict scrutiny when children are given access to the court for purposes of requesting authorization and the court can either authorize the child to file a petition or can order an executive agency to file the petition. Thus, legislatures in those states that do not currently comply with the dictates of the First Amendment's petition clause should amend their statutory schemes to give children access to courts, either through an "open door" policy or through a policy which requires judicial authorization. Such a proactive step could help prevent future litigation in federal courts by child advocates on behalf of children who have been denied access to courts for the initiation of abuse and neglect proceedings.

B. Voluntary Dismissal

Once a child has direct access to begin an abuse and neglect proceeding, it would seem that all jurisdictions would recognize that the executive branch may not unilaterally dismiss the case.[232] For example, Florida, a state that permits any person to file a petition,[233] only requires dismissal when the executive branch filed the petition.[234] This result is easy to justify.

As previously delineated, the rationale for voluntary case dismissal involves the separation of power between the judicial and executive branches, a court's *parens patriae* role to protect the best interests of the child, and the executive branch's authority to begin abuse and neglect

§ 211.081(1) (West 2010) ("Whenever any person informs the court in person and in writing . . . ."); MODEL JUV. CT. ACT § 20 (2009) ("[T]he petition may be made by any person . . . .").

231. N.Y. JUD. CT. ACTS LAW § 1033 (McKinney 2011) ("Any person seeking to file a petition at the court's direction . . . shall have access to the court for the purpose of making an ex parte application therefor.").

232. *See supra* Part III.B.

233. FLA. STAT. ANN. § 39.501(1) (West 2011).

234. *Compare In re* J.M., 560 So. 2d 343, 343 (Fla. Dist. Ct. App. 1990) (explaining that the court was not required to dismiss grandparents' petition), *with* McCutcheon v. Trettis, 501 So. 2d 710, 711 (Fla. Dist. Ct. App. 1987) (explaining that the court was required to dismiss Department of Health and Rehabilitative Services' petition).

proceedings.[235] The contrast between the Illinois Supreme Court's reasoning in *In re J.J.* and that of the District of Columbia Court of Appeals in *In re J.J.Z.* is illuminating in this respect.[236] Of particular importance to the District of Columbia Court of Appeals in distinguishing the Illinois Supreme Court case of *In re J.J.* was that, "[i]n Illinois, parties other than the government are authorized to file neglect petitions" while in the District of Columbia, the Corporation Counsel "has the exclusive authority to file a neglect petition."[237] A child's right of access, however, means that this logic is no longer valid.[238] Instead, the best interests of the child should be the overriding concern of the court[239] and arguments over encroachment into the executive branch by the judiciary should fall by the wayside.[240]

This conclusion is bolstered by the fact that only one state, Missouri, appears to require voluntary dismissal when a party other than the executive branch can file a petition.[241] Given the vast majority of states, which would seem to prevent the executive branch from unilaterally dismissing a petition once a child's right to petition is recognized, however, the concern over voluntary dismissal by the executive branch seems to be alleviated. Nonetheless, developing a sound theory behind a court's duty to respond under the First Amendment's petition clause[242] could provide a fuller constitutional basis for preventing unilateral, voluntary dismissal of abuse and neglect proceedings by the executive branch.

V. CONCLUSION

Although the Supreme Court case of *DeShaney v. Winnebago County Department of Social Services*[243] can be seen as a real obstacle to providing constitutional protection to child victims of abuse and neglect,[244] the petition clause of the First Amendment provides a vehicle for children to access state courts to receive protection.[245] Recognition of

235. *See supra* Part III.B.

236. *Compare In re* J.J.Z., 630 A.2d 186 (D.C. 1993), *with In re* J.J., 566 N.E.2d 1345 (Ill. 1991). *See also supra* Part III.B.

237. *In re J.J.Z.*, 630 A.2d at 190, 195.

238. *See supra* Part IV.A.

239. *See, e.g.*, *In re J.J.*, 566 N.E.2d at 1349 ("The overriding purpose of the Juvenile Court Act is to ensure that the best interests of the minor, the minor's family, and the community are served.").

240. *See, e.g.*, *id.* at 1350 ("Under the Juvenile Court Act, both the State's Attorney and the juvenile court are charged with acting in the best interests of the minor. Prosecution of a petition alleging abuse of a minor, when supported by the evidence, is the responsibility of the State's Attorney. Determining whether the petition may be dismissed—that is, determining whether the best interests of the minor will be served by dismissal of a petition alleging abuse—is the responsibility of the juvenile court.").

241. *See* MO. ANN. STAT. §§ 211.081(1), .091(4) (West 2010).

242. *See supra* note 205 and accompanying text.

243. 489 U.S. 189 (1989).

244. *See supra* notes 44–46 and accompanying text.

245. *See supra* Part IV.A.

this right breathes life into an often overlooked[246] component of the First Amendment and provides a basis for challenging state child abuse and neglect statutes under strict scrutiny. Under strict scrutiny, many state statutes regarding the initiation of abuse and neglect proceedings would be struck down as unduly infringing upon a child's First Amendment right of access to courts.[247] As a result, many states should move to amend their statutes to ensure children have access to courts.

Recognition of a child's right to petition also means that the executive branch may not unilaterally dismiss a child's abuse and neglect proceeding[248] and subject a child to continued maltreatment. These conclusions ensure at least some constitutional protection to child victims of abuse and neglect, helping to overcome the dark legacy left by *DeShaney*. Perhaps one day there will be a world without child abuse and neglect. Until that day comes, it is important to continue the fight to recognize the rights of all children, especially those guaranteed by the Constitution of the United States.

246. *See supra* Part III.C.2.
247. *See supra* Part IV.A.
248. *See supra* Part IV.B.