STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE BATES MINORS, Minor children.	Supreme Court No. 165815 Court of Appeals No. 361566 Grand Traverse Circuit Court No. 18-004645-NA

BRIEF OF AMICI CURIAE CITIZENS FOR SELF-GOVERNANCE, PARENTAL RIGHTS FOUNDATION, AND HOME SCHOOL LEGAL DEFENSE ASSOCIATION IN SUPPORT OF NEITHER PARTY

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ISSUES ADDRESSED BY AMICI[1]

On January 31, 2024, the Court issued an order asking the parties to address the following three questions:

1.A. Whether, when a child is in the care of a relative, the trial court is required to consider and eliminate available alternative remedies short of termination as a matter of constitutional due process, see generally *Washington v. Glucksberg*, 521 US 702, 721 (1997) (The government may not infringe on fundamental liberty interests "unless the infringement is narrowly tailored to serve a compelling state interest.")?

Appellants answered "yes," while appellee, the trial court, and the court of appeals answered "no." For the reasons that follow, your amici believe the answer should be "yes."

1.B. Whether, when a child is in the care of a relative, the trial court is required to consider and eliminate available alternative remedies short of termination by statute, see MCL 712A.19b(5)?

Appellants answered "yes," while appellee, the trial court, and the court of appeals answered "no." For the reasons that follow, your amici believe the answer should be "yes."

1.C. Whether the trial court erred in this case?

Appellants answered "yes," while appellee, the trial court, and the court of appeals answered "no." Your amici take no position on this question.

[1] No counsel for any party participated in the writing of this brief in any fashion. No counsel has made any financial contribution towards this brief. No person or entity other than the three named amici furnished any funding or support for this brief.

INTEREST OF AMICI CURIAE

Citizens for Self-Governance is a nonprofit organization dedicated to the preservation of the principles of self-governance within a democratic republic. The family is the first unit of self-governance and deserves the highest levels of protection.

The Parental Rights Foundation (PRF) is a national, nonprofit, nonpartisan advocacy organization with supporters in all fifty states. PRF is concerned about the erosion of the legal protection of loving and fit parents to raise, nurture, and educate their children without undue state interference, and about the unfortunate, unintended consequences to innocent children caused by the routine overreach of the child-welfare system. PRF seeks to protect children by preserving the liberty of their parents by educating those in government and the public about the need to roll back some of the intrusive state mechanisms that have worked to harm more children than they help, and about the need to strengthen fundamental parental rights at all levels of government.

The Home School Legal Defense Association (HSLDA) is a nonprofit advocacy organization established to defend and advance the constitutional right of parents to direct the education of their children and to protect family freedoms. HSLDA represents over 100,000 member families in all 50 states and the District of Columbia. Because the right of parents to direct the upbringing and education of children is central to the ability to homeschool, HSLDA takes a keen interest in disputes between parents and third-parties over the care and custody of children. As the Ninth Circuit Court of Appeals recognized, "the government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents." *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999). In the years since, we have addressed these concerns to many state courts, calling upon them to

embrace constitutional protections that properly balance the interest of the state and the rights of families in these complicated situations.

INTRODUCTION

The Supreme Court has treated parental rights as a singular liberty interest, but has used two different frameworks in analyzing parental rights cases. In cases involving the removal of children from parental custody, the Court has used the framework of procedural due process to protect parental rights. However, in cases where the government intrudes upon some particular aspect of parental decision-making, the Court has used a substantive due process framework. The Court has never explained its rationale for this two-track system of deciding parental rights cases.

Amici submit that this Court should adopt a framework that synthesizes both approaches, thus affording parental rights the fullest possible legal protection while allowing for governmental intervention when it is truly warranted.

ARGUMENT

I. The Supreme Court's Bifurcated Approach to Analyzing Parental Rights Cases.

A. The Supreme Court has repeatedly held that parents have a fundamental right to direct the upbringing, care, and education of their children.

The Fourteenth Amendment guarantees that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Starting with *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), the Supreme Court has repeatedly endorsed the self-evident idea that parental rights are among the liberty interests protected by this provision. *See Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L. Ed.2d 15 (1972).

The Supreme Court has repeatedly used soaring and eloquent language to describe this nation's constitutional commitment to the protection of the relationship between parents and children. In *Yoder*, the Court declared that "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* In *Moore v. City of East Cleveland, Ohio*, the Court recognized that "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L. Ed.2d 531 (1977) (plurality opinion). *Troxel v. Granville* reaffirmed that "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). Perhaps the most striking is *Parham v. J.R.*, which traced the protection of parental rights through the ages:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.

Parham v. J.R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (alteration in original), *quoting Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L. Ed.2d 1070 (1925).

B. The Supreme Court currently employs a bifurcated approach to analyzing parental rights cases.

Unfortunately, while the Supreme Court's *recognition* of parental rights has never wavered, its jurisprudence surrounding the *application* of that right has bifurcated into two differing approaches. The Supreme Court of the United States has decided thirteen cases where

parental rights were the central or major issue. These can be divided into two groups—total removal of parental rights or governmental interference with a single element of parental rights. Where the government seeks to *fully remove* parental custody the Supreme Court consistently uses the framework of *procedural due process* to protect parental rights. But in cases where there is a *governmental intrusion into a single element* of parental decision-making—such as education or medical care—the Court has consistently used the theory of *substantive due process*. The Court has never explained its rationale for this two-track system of deciding parental rights cases.

Cases involving termination of parental rights fall within two sub-groups: cases where parental rights were being terminated for cause, and cases where a biological father's rights were being terminated via adoption. The cases are broken down as follows:

- **Termination for cause:** *Lassiter v. Dep't of Soc. Servs*., 452 U.S. 18, 101 S.Ct. 2153, 68 L. Ed.2d 640 (1981) (concerning the right to counsel in termination proceedings); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L. Ed.2d 599 (1982) (concerning the burden of proof); *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 136 L. Ed.2d 473 (1996) (concerning the right to a transcript for appeal).
- **Termination in the context of non-consensual adoptions or the like:** *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L. Ed.2d 62 (1965); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).
- **Cases involving governmental interference with a particular area of parental decision-making:** *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042

(1923) (education); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L. Ed.2d 1070 (education); *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (child labor); *Wisconsin v. Yoder*, 406 U.S. 205, 92.S.Ct. 1526, 32 L. Ed.2d 15 (1972) (education); *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (medical treatment); *Troxel*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (control of visitation).

The first seven cases, all of which involved the complete termination of parental rights, were decided using the framework of procedural due process. The last six cases, all of which involved governmental interference with a particular aspect of decision-making, were decided using the rubric of substantive due process.

C. The Supreme Court's current approach is peculiar, given that the same singular liberty interest animates both lines of jurisprudence.

Despite this bifurcated approach, it is very clear that the Court views parental rights as a singular liberty interest. It regularly cites both substantive and procedural due process cases in the same paragraph to demonstrate that parental rights are a protected liberty interest.

To cite just a few examples, *Santosky v. Kramer* is a leading procedural due process case, but the Court cites three procedural due process cases (*Lassiter v. Department of Social Services*, *Quilloin v. Walcott*, and *Stanley v. Illinois*) and three substantive due process cases (*Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Prince v. Massachusetts*)—along with a variety of miscellaneous cases which mention parents and the family in slightly differing contexts—to illustrate the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky*, 455 U.S. at 753. *Stanley v. Illinois*, another procedural due process case, cites *Meyer v. Nebraska* and *Prince v. Massachusetts*—both substantive due process cases—to demonstrate that "[t]he

integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment." *Stanley*, 405 U.S. at 651.

And in the Court's most recent substantive due process case, *Troxel v. Granville,* the plurality cites a mixture of substantive cases (*Meyer, Pierce, Prince,* and *Yoder*) and procedural cases (*Stanley, Quilloin,* and *Santosky*) to bolster its conclusion that parental rights are a protected fundamental liberty interest. *Troxel*, 530 U.S. at 65–66. In fact, the plurality describes *Stanley* (a procedural due process case) as the *lead* case for the proposition that parents have a "fundamental right" to "make decisions concerning the care, custody, and control of their children," *id.* at 66, even though *Troxel* involved only grandparent visitation (governmental interference with a particular aspect of decision-making), not the termination of parental rights. This statement strongly supports the conclusion that fundamental rights analysis is properly applied to both categories of parental rights cases. The starting point for understanding the Supreme Court's parental rights doctrine is the recognition that there is a single liberty interest—not two different interests.

II. A Proposed Synthesis for Parental Rights Cases.

There is no obvious reason for treating these different situations as requiring two different tests. After all, the core concept of parental rights is that parents are empowered to make decisions for their children—where they will live, where they will be educated, issues of medical care, and much, much more. In *Parham v. J.R.*, Justice Stevens, joined by Justices Thomas and Breyer, used several examples of parental decision-making to illustrate the broad range of parental rights. The custodial parent's rights included the right to decide: "whether h[er] son undergoes a particular medical procedure; whether h[er] son attends a school field trip; whether and in what manner h[er] son has a religious upbringing; or whether h[er] son can play a

videogame before he completes his homework." *Abbott v. Abbott,* 560 U.S. 1, 23, 130 S.Ct. 1983, 176 L. Ed.2d 789 (2010) (Stevens, dissent).

In short, the right of parental custody is a bundle of decision-making rights. Therefore, we respectfully suggest that there should likewise be one constitutional standard, not two, in deciding all parental rights cases.

A. Procedural due process provides the best framework for resolving parental rights cases.

Amici respectfully suggest that all the Supreme Court's cases on parental rights can be properly understood as fitting within the framework of procedural due process. This is because all the elements of substantive due process analysis—including strict judicial scrutiny, the compelling interest and least restrictive means tests—are, upon closer examination, actually procedural in nature. They ultimately turn on questions of which party has the burden of proof and what must be proven in order to prevail.

This case is a particularly appropriate vehicle to consider this kind of doctrinal synthesis. Because this case involves the complete termination of parental rights, under the old categories it would be a procedural due process case, and thus one might think that the requirements of a compelling interest and narrow tailoring are not be applicable. But the Court has never directly ruled that the rules heretofore associated with substantive due process are inapplicable to termination cases. In fact, the statement in *Troxel* that *Stanley* is the "lead case" for concluding that parental rights are a fundamental liberty strongly suggests that such rules should be fully applicable in termination cases. Indeed, logic and justice demand that result. If the government must demonstrate a compelling interest, pursued in a narrowly tailored manner, in order to justify interference with a single element of parental rights, it surely must be required to meet these high standards before it can *terminate* parental rights altogether.

For centuries, Anglo-American law on this subject has begun, not with rights, but with responsibilities. Parents are responsible for the care, education, and upbringing of their children. Parental rights flow from these responsibilities. If parents are to be held responsible for the care of their children, they must have the legal ability to make decisions to carry out those duties. The Supreme Court has said: "the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr v. Robertson,* 463 U.S. at 257. The Court has trumpeted this same theme from the very beginning of its parental rights jurisprudence. Quoting its 1925 decision of *Pierce,* the Court said:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.

Parham, 442 U.S. at 602 (alteration in original), *quoting Pierce,* 268 U.S. at 535.

In the context of parental rights cases, due process analysis really begins when we ask the question: What does the government have *to prove* in order to interfere with a parent's right to make decisions for their children? To borrow an analogy from criminal law, the common law demanded that the prosecution establish the elements of the crime by the applicable evidentiary standard. To prove common law burglary, the prosecution had to prove that the defendant broke and entered into the dwelling house of another in the nighttime to commit a crime therein. These five elements had to be proven beyond a reasonable doubt. All components of these legal principles had to be followed to accord procedural due process to the defendant. And of course, there are additional procedural requirements generally applicable as well, such as notice and an opportunity to be heard, a neutral decision maker, and more. Skip one or more of these

requirements, no less than failing to prove an element of the crime or employing a lower evidentiary standard, would violate procedural due process.

Likewise, when the government wants to interfere with a parent's right to make decisions for her children, the following elements must be proven:

- The parent has breached his or her responsibilities by abuse, neglect, or abandonment;
- The government's intervention is necessary to advance an interest of the highest order (a compelling interest); and
- The government's intervention is no more intrusive than is necessary to accomplish that interest.

The burden of proof that is required to prove these elements is the "clear and convincing evidence" standard established by the Supreme Court in *Santosky v. Kramer*. We discusse each of these elements below.

B. Proof of a Breach of Parental Responsibilities.

In order for the government to substitute its judgment for that of the parents, on one matter or *in toto*, it must prove that they have breached their fundamental responsibilities vis-a-vis their children. The Supreme Court summarized this rule in *Quilloin* with respect to a total deprivation of parental rights:

> We have little doubt that the Due Process Clause would be offended "[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

Quilloin, 434 U.S. at 255, *quoting Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring).

It is self-evident that this rule is applicable in all cases where the government sought to totally sever the parent-child relationship. In the termination cases, the "harm" at issue was an

allegation of serious child abuse. *See* Michael Farris, *Rethinking Parental Rights,* 18:4 LIB. U. L.REV. 1, 31 (2024). In the cases involving termination of the parental rights of biological fathers, the successful cases involved allegations that amounted to abandonment. *Id.* at 31-33.

What is less familiar is that "harm" has also played an important role in the Court's substantive due process cases, which involved something less than a total deprivation of parental rights. In *Meyer,* for example, the state banned foreign language instruction prior to high school. The real goal, of course, was to ensure that many students raised in families of German-descent were fully Americanized in the wake of the bitterness from World War I. But the Supreme Court rebuffed this attempt at interference with parental rights, saying that "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is *not injurious* to the health, morals or understanding of the ordinary child." *Meyer,* 262 U.S. at 403 (emphasis added). In other words, parents were not harming their children by teaching them German, so there was no justification for the state's interference with parental decision-making.

Both *Pierce* and *Yoder,* the Court's two other education cases, also considered the issue of harm, and the government's case was once again found wanting. In *Pierce,* the Court said that private schools were "not inherently harmful, but long regarded as useful and meritorious." *Pierce,* 268 U.S. at 534. The *Yoder* Court rejected the government's argument for two additional years of compulsory education, holding that "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Yoder,* 406 U.S. at 230.

And the same pattern emerges in *Prince v. Massachusetts* and *Parham v. J.R. Prince,* which involved a challenge to a law limiting working hours for children, held that physical harm

to children was a ground for intervention in parental decision-making, including religiously motivated decisions, because "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Prince*, 321 U.S. at 166–67. On the contrary, when parents' medical decisions were challenged in *Parham v. J.R.*, there was no proof that any of the parents involved had made harmful decisions for their child.[2] Accordingly, the Court rejected the "statist notion" that such harm could be simply assumed on the basis that some parents might abuse their children. *Parham,* 442 U.S. at 603.

In summary, the Court has routinely looked at the issue of harm in both procedural and substantive due process cases. Absent such a finding, fit parents maintain the fundamental right to make decisions for their children, even when the government disagrees with those decisions. And the Court has consistently ruled that way, whether the case before it involves the termination of parental rights or some narrower challenge to parental decision-making.

C. Proof of a Compelling Governmental Interest.

Most of the substantive due process cases involving parental rights (*Meyer, Pierce, Prince*) were decided long before the phrasing of a *compelling governmental interest* and the accompanying tests were explicitly adopted by the Court. But that issue was squarely addressed in *Yoder*. There, the state of Wisconsin argued that literacy and self-sufficiency satisfied the Court's test that the interest must be of "the highest order." The Court agreed that the government's contention that children should be literate and self-sufficient would satisfy this standard—if in fact a breach of that standard had been proven. But the Court engaged in a lengthy examination of the facts, and ultimately rejected the idea that the government had proven

[2] The argument was raised that some parents were acting in bad faith by using mental hospitals as a dumping ground for difficult children. The Court rejected this saying: "No specific evidence of such 'dumping,' however, can be found in the record." *Parham,* 442 U.S. at 597-598.

that Amish children lacked either quality in light of the totality of their upbringing. *Yoder,* 406 U.S. at 221-229.

In a similar fashion, this Court rejected the argument of the State of Michigan that all children needed to be taught by certified teachers in *People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127 (1993). This Court's discussion of the compelling interest prong is noteworthy for how closely it follows *Yoder's* example:

> [T]he state in the instant case has failed to provide evidence or testimony that supports the argument that the certification requirement is essential to the preservation of its asserted interest. Conversely, while the record is barren of evidence supporting the state's claim, it clearly indicates that the DeJonge children are receiving more than an adequate education: they are fulfilling the academic and socialization goals of compulsory education without certified teachers or the state's interference. Nor has the state suggested that the DeJonges have jeopardized the health or safety of their children, or have a potential for significant social burdens. In sum, the state has failed to provide one scintilla of evidence that the DeJonge children have suffered for the want of certified teachers; it has failed to prove a "clear and present" or "grave and immediate" danger to the welfare of the children that justifies the onerous burden placed upon the DeJonges' exercise of their religious beliefs.

DeJonge, 442 Mich. at 292.

Accordingly, this Court held that the state failed to meet its burden of proving "(1) a state regulation be justified by a compelling state interest, and (2) the means chosen be essential to further that interest." *Id.* at 286.

When it comes to proving the existence of a compelling interest, proof of serious harm to the individual child would obviously satisfy this standard. But that is the only government interest that has been held compelling enough to justify interference with that bundle of rights particular to the parent-child relationship. And the interest must be *proven* with evidence: the mere *claim* of an important, even crucial, governmental interest is never sufficient on its own. This requirement is directly parallel to the burglary analogy referenced earlier. The government cannot convict merely by *suggesting* that keeping strangers out of one's house is a very

important governmental goal. Procedural due process requires that the government *prove* that the defendant *actually entered* the dwellinghouse of another with the requisite criminal intent.

Every parental rights case deserves this same approach. Both *Yoder* and *DeJonge* reinforce that generalized claims of altruistic state goals cannot suffice. The government must prove that the facts demonstrate that intervention is essential to achieve the government's compelling interest in preventing some harm to the child whose situation is then before the court. "[A] compelling state interest must be truly compelling, threatening the safety or welfare of the state in a clear and present manner." *DeJonge,* 442 Mich. at 286. This Court should reaffirm that same fundamental principle here.

D. Proof of Narrow Tailoring.

Finally, *DeJonge* removed any doubt that the duty of proving there is no less restrictive alternative falls upon the government and not the parent:

> [T]he Court of Appeals erroneously placed the burden of proof upon the DeJonges. The Court of Appeals, by requiring that the individual burdened by governmental regulation prove that alternatives exist, while at the same time accepting at face value unsubstantiated assertions by the state, has turned constitutional jurisprudence on its head.

DeJonge, 442 Mich. at 298.

The case at bar illustrates how this standard can be applied in the context of an effort to terminate parental custody—and perhaps more importantly, why this procedural approach is so necessary. There is little doubt that the state presented significant evidence that these children should be in the actual custody of others. And yet, the parents were allowed to participate in supervised visitations for a considerable period of time. This approach would appear to model the constitutional doctrine of narrow tailoring: even if the state has a compelling interest in placing these children with someone else (because of evidence of harm to the child), allowing

supervised visitation is a narrower way to accomplish that end than immediately terminating parental rights.

The record is also clear that, at some point, something changed (because the state moved to terminate the parental relationship entirely). But what changed—and when, and why—is not clear. There was no indication that the children were being harmed by supervised visitations. There is no suggestion that the child was placed for adoption, or that continued visitation was untenable in that context. And even if parents are incapable of raising children because of ongoing addictions, the fundamental right of parents does and should require the state to *prove* that terminating the relationship *entirely* is necessary to protect the welfare of the child, before the state can take that drastic step.

Any argument that the test of narrow tailoring is not necessary in termination cases is untenable. If the government must demonstrate that its intervention in education decisions or medical decisions is no more intrusive than necessary to accomplish its interest, there is neither logic nor justice behind the suggestion that the government need not satisfy this constitutional standard when it seeks a more comprehensive form of intrusion. In all cases, the intrusion upon the parent-child relationship should be no more than is necessary to accomplish the government's aims.

III. Applying the Best Interest of the Child Standard Prior to the Completion of Constitutional Due Process Is An Erroneous Approach.

Just as the government cannot impose sentencing requirements in a criminal case prior to an adjudication of guilt, it is improper for the government to employ the "best interest of the child standard" prior to the completion of constitutional due process in a parental rights case.

The "best interest" standard is not a simple decision about the best path for the child. Most legal conflicts over *what* is best for the child arise over the question of *who decides* what is

best for a child. Because our legal tradition clearly states that a *parent* has that right (unless divested of it), the state may not argue—consistent with the Constitution—that it must terminate all contact between a child and a parent simply because it would be "best" for a child. Rather, only after the state satisfies the constitutional standards for terminating the relationship can the state take on the mantle of parental decision-making and decide which choice is best for the child.

The Supreme Court has made it clear that parents must be "presumed" to act in the best interests of their children. *Parham,* 442 U.S. at 602. Moreover, in *Yoder,* the Court rejected the state's claim that an additional two years of education was in the best interest of the Amish children. "[W]e cannot accept a *parens patriae* claim of such all-encompassing scope." *Yoder,* 406 U.S. at 224.

The most sweeping discussion of the best interest standard comes from the Court's decision of *Reno v. Flores.* Using adoption as a hypothetical example, the Court said:

> Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

Reno v. Flores, 507 U.S. 292, 305-307, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

Government may not make retail or wholesale decisions for children where it substitutes its judgment for that of the parents simply because it believes it knows best.

CONCLUSION

The Supreme Court of the United States has treated parental rights as a single liberty interest, but has employed a procedural due process framework in cases involving termination of parental rights and a substantive due process framework in cases involving governmental

interference with a single area of parental rights. However, nothing the Court has said precludes a re-examination of the idea that two different tests should govern this singular right. And several things the Court has said and done suggest that synthesis is the correct approach. This case presents the opportunity to synthesize the two streams of parental rights law into a coherent single test that protects all parents in all cases. Ultimately, this approach provides the greatest protection for the parent-child relationship that forms the bedrock of our self-governing society.

Respectfully submitted this 22nd day of April, 2024:

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STATEMENT OF COMPLIANCE

Pursuant to Rule 7.212(B), the foregoing Brief of Amici Curiae contains 5,201 words.