No. 99-138

In The
SUPREME COURT OF THE UNITED STATES

Jenifer Troxel, et vir,

Petitioners,

v.

Tommie Granville,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

Counsel of Record: **Robert C. Fellmeth**
Price Professor of Public Interest Law and
Director, Children's Advocacy Institute
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4806

Joan Hollinger, Visiting Professor of Law
University of California at Berkeley School of Law
Marvin Ventrell, Executive Director,
National Association of Counsel for Children
Donald N. Duquette, Clinical Professor of Law and
Director, Child Advocacy Law Clinic,
University of Michigan Law School

For *Amicus Curiae*
National Association of Counsel for Children

Table of Contents

Table of Authorities

U.S. Supreme Court Cases

State Cases

In re Marriage of Sleeper, 982 P.2d 1126 (Or. 1999)
J.A.L. v. E.P.H., 453 Pa. Super. 78, 682 A.2d 1314 (Pa. Super. Ct. 1996)
Meldrum v. Novotny, 599 N.W.2d 651 (S.D. 1999)
Pence v. State, 652 N.E.2d 486 (Ind. 1995)
Roberts v. Ward, 126 N.H. 388, 493 A.2d 478 (N.H. 1985)
Troxel v. Granville, 137 Wash.2d 1, 969 P.2d 21 (1998)
V.C. v. M.J.B., 319 N.J. Super. 103, 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999)
Youmans v. Ramos, 429 Mass. 774, 711 N.E.2d 165 (1999)
Zack v. Fiebert, 235 N.J. Super. 424, 563 A.2d 58 (1989)

Statutes

Cal. Fam. Code § 3101.
Ore. Rev. Stat. 109.119(1-3)
Wash. Rev. Code 26.10.160(3)
Wash. Rev. Code 26.09.240

Miscellaneous Authority

American Law Institute Principles of the Law of Family Dissolution §§ 2.03, 2.04, 2.21 (Tent. Draft No. 3 Part I 1998)

Annette R. Appell and Bruce A. Boyer, Parental Rights v. Best Interests, 2 DUKE J. GENDER LAW & POL. 63 (1995)

Gary Crippen, Stumbling Beyond the Best Interests of the Child, 75 MINN. L. REV. 427 (1990)

Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TULANE L. REV. 1365, 1181 (1986)

Joan H. Hollinger, Adoption Law & Practice, Chapter 13 (J.H. Hollinger, ed. 1989–99)

Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs. 226 (Summer 1975)

Hillary Rodham, Children Under the Law, 43 Harv. Ed. Rev. 487 (1973)

I. THE INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Founded in 1977, the National Association of Counsel for Children (NACC) consists of nearly 2,000 professionals from all 50 states. Most of the members are attorneys who represent children before the family and juvenile courts of the nation. NACC's Board and membership also includes judges, physicians, psychologists, social workers, law professors and other professionals concerned about children. NACC helps to train professionals who assist children within the legal system, and educates public officials about their needs. The NACC works with the American Bar Association, The American Academy of Pediatrics, The National Council of Juvenile and Family Court Judges, and others. Over the past twenty years, the NACC Amicus Committee has contributed numerous *amicus curiae* briefs to federal and state appellate courts, sharing the views of its membership with courts facing difficult decisions.

The NACC submits this *amicus* brief on behalf of the interests of children in having the law recognize and protect their significant relationships to the adults they have come to regard as members of their family. While this primarily entails protecting the fundamental rights of their parents to love, nurture and raise them free from unwarranted state interference, it may occasionally call for state action to protect children's significant relationships with others, including grandparents and other relatives, stepparents, and unrelated *de facto* parents.[1]

II. SUMMARY OF ARGUMENT

Under the Washington statute challenged here, any local judge can issue a court order requiring a mother to "confer" with her children's paternal grandparents, who have never been their custodial caregivers, about how and when to tell the children about their biological father's suicide. That judge can also require many other things of parents and their children, trivial and momentous, at the request of "any person" seeking visitation with a child and without a preliminary inquiry into the nature of the person's relationship to the child or any finding that the child will be otherwise seriously disadvantaged.

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with this Court under separate cover.

Pursuant to Rule 37.6, *amicus* NACC states this brief was not written in whole or in part by counsel for a party, and no individual or entity, other than NACC or their members, has made a monetary contribution to the preparation or submission of this brief. The four listed attorneys all participated in its research and writing.

The Washington Supreme Court correctly ruled that Wash. Rev. Code 26.10.160(3) and the former 26.09.240 are unconstitutional incursions on the fundamental rights of children and their parents to family privacy and autonomy under the due process clause of the 14th Amendment.[2] By shifting the locus of decisionmaking about a child's "best interests" to state courts and away from those who have custodial responsibility for the child—usually one or both parents—this statute strikes at the heart of longstanding common law and constitutional principles that protect parental autonomy and ensure that a child will not become "the mere creature of the State," *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). While there are compelling circumstances warranting state intervention, the statute lacks any standing requirement limiting outside application for visitation, and the criteria for parental supersession is the amorphous "best interests of the child." These overbreadth and vagueness infirmities allow courts to arrogate to themselves the right to override routine parental decisions, such as where children will spend their weekends and holidays, or challenge more private and intimate beliefs, such as what children should be told about the cause of a parent's death.

As this Court acknowledged in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), there is a "private realm of family life which the state cannot enter" that has been afforded both substantive and procedural protection against arbitrary state intrusion into the intimate relationships of parents and children alike. Absent a "powerful countervailing interest" of the state in protecting a child's welfare, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), court action on behalf of a non-parent based on an ill-defined "best interests of children" test is an impermissible burden on parents and on the liberty interests of children to a parent and a measure of family autonomy. That burden includes financial, time, and privacy sacrifices by the affected family.

The constitutional doctrines most relevant here are both substantive and procedural due process and this Court is being asked to consider the ways in which they operate within the context of state court actions initiated by private parties seeking a court order for visitation with a child over the objection of a custodial parent or parents. The statute that authorizes these private actions is overbroad in allowing "any person" to commence an action without a preliminary inquiry into the nature, scope, or quality of the person's relationships to a child. It is also impermissibly vague, as manifest by its failure to define or set any limitations on "visitation," specify the factors that should be considered in making a best interests determination, or allocate the burden of proof for either an initial or a modification hearing. Although the state's *parens patriae* interest in protecting children against "harms" or threatened harms is compelling, it does not warrant allowing any person to invoke this interest against a child's custodial parent

[2] NACC refers to these provisions hereafter singularly, as "the statute."

absent a showing that the parent is, in fact, insufficiently protecting the child against harm.

However, notwithstanding *amicus* NACC's support of judgment for the Respondent, the Washington Supreme Court decision delineating "parental rights" is overly broad in the opposite direction, and should not be adopted as written. The court below posits a superseding "parental rights" constitutional concept which would categorically bar the visitation rights of non-parents— including those who have historically performed as parents and who are regarded as such by affected children.[3] The adoption of a simplistic definition ignores the legitimate compelling state interests which can justify state intervention in parent-child relations, and completely ignores the constitutional rights of children. This theory denigrates the child's right to associate with those to whom he or she has bonded, and precludes a proper, balanced role of the state to protect legitimate child interests. Moreover, a pendulum shift from "anyone can invoke the courts to visit a child," to "no one except a parent can do so," would bar court intervention where many states properly allow it, and would be as harmful to the affected children as the statute challenged here.

A statute with better procedures— a threshold standing requirement to show that someone seeking third party visitation has a significant relationship with a child, followed by a substantive standard and allocation of the burden of proof that will honor the common law and constitutional presumption that parents act in their child's best interests—should survive constitutional review. The Washington statute does not.

Accordingly, *amicus* NACC asks this Court to walk a line down the middle between the objectionable statute and the objectionable analysis of the Washington decision. We ask this Court to uphold the judgment below, but on a narrower basis, one which recognizes the potential to cure the Washington statute's serious infirmity. NACC asks that the decision preserve necessary state action on a compelling state interest basis. NACC further asks that this Court acknowledge for the first time that any analysis of

---

[3] *See also Prince v. Massachusetts*, *supra* at 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." These rights do not necessarily reside only with biological parents. In *Prince*, for example, the "parent"was the child's aunt and legal custodian. "Nor has the [Constitution] refused to recognize those family relationships unlegitimized by a marriage ceremony." *Stanley v. Illinois*, *supra* at 651. Note that both parties agree that state courts may properly order visitation or otherwise legally protect (in some situations) children's ties to individuals who have become their *de facto* parents without state law recognition of full parental status.

parental constitutional right must consider the counterpart constitutional right of a child. Children are included in our Constitution. The parent-child relationship involves two parties. Rights arising from that relationship are not reserved for either exclusively, but flow in both directions.

III. THE COURT BELOW HAS PROPERLY STRUCK A STATE VISITATION SCHEME THAT VIOLATES FAMILY PRIVACY — BUT ON THE BASIS OF AN OVERLY BROAD DEFINITION OF PARENTS' RIGHTS

The narrow issue before this Court is whether the critical Washington statute, as construed by that state's highest court, impermissibly burdens rights to family privacy and parental autonomy protected by the Due Process Clause of the 14th Amendment. *Amicus* NACC agrees that the legislative language objectionable to the Washington Supreme Court is overly broad. The conferral of visitation rights to non-parents may involve a serious intrusion into family autonomy and may gratuitously challenge parental authority to raise a child. As the Respondent argues, the statute here at issue would confer a charter to the state to breach family privacy and to interfere with parental rights without clear criteria or comprehensible limitation.

A. The Washington Statute is Overly Broad

The Washington statute lacks any specificity. There are no requirements for standing or any preliminary showing of who "any person" is in relation to a child. There is no allocation of the burden of proof, or any other limitation or criterion. While the statute offers any one at any time potential court-ordered access to a child, Washington does not provide for any concomitant obligation by any claimant to support the child, to stand liable for child truancy or delinquency, or even to visit the child as the claimant requests of the court and may promise to a child. A child's parent or parents, who are subject to these and other obligations, may find themselves defending their parenting choices under a statute that simply empowers a trial judge to substitute his or her choice, without standing limitations as to applicants, or clear standards as to the basis or nature of visitation ordered. Because of their overbreadth and vagueness, the visitation statute here at issue was properly struck by the Washington Court.

B. The "Best Interests" Standard of the Washington Statute is Impermissibly Vague

Although best interests is "indisputably a substantial governmental interest" in custody disputes between two parents (*Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)), this Court has rejected its use as a basis "for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of

others." (*Reno v. Flores*, 507 U.S. 292, 304 (1993).) This Court's opinions indicate that the Constitution precludes the use of an amorphous "best interests" test between a legal parent and a non-parent without some preliminary finding that justifies an inquiry into the parent's childrearing decisions. For example, in *Stanley*, *supra* at 653 n.5, this Court eschewed a state's reliance on "best interests" as "the only relevant consideration in determining the propriety of governmental intervention in the raising of children...." Because Stanley was an unwed father who had "both sired and raised" his children, the Court found he was entitled as a matter of due process to a hearing on his parental fitness before the State could remove the children from his custody. By contrast, when an unwed biological father has failed to perform parental duties, the state is justified in denying the biological father a right to block his child's adoption by others. Thus, in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), the state was allowed to use a best interests test to "give full recognition to a family unit already in existence," a family consisting of the child's custodial mother and her husband who sought to adopt the child. In abuse and neglect cases, the state must first establish grounds for removing a child from the parents' legal custody of a parent before placing the child in foster care or for adoption based on a best interests standard (*see Santosky v. Kramer*, 455 U.S. 745 (1982)).

Where competing fundamental interests are at stake, the best interests standard is not helpful because "it provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores...." *Bellotti v. Baird*, 443 U.S. 622, 655–56 (1979) (Stevens, J. concurring). A best interests test that fails to give any deference to a parent's fundamentally protected right to parental autonomy is not a narrowly tailored means for the state to implement its *parens patriae* interests, except in those specific situations where the *parens patriae* interest is genuinely compelling.

The best interests test has long been the subject of academic as well as judicial criticism for being indeterminate, providing little guidance on how to weigh the different needs of individual children, especially as they change over time; Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs., 226, 257 (Summer 1975). Best interests operates as "an empty vessel into which adult perceptions and prejudices are poured." Hillary Rodham, Children Under the Law, 43 Harv. Ed. Rev. 487, 513 (1973).[4]

---

[4] *See also* Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TULANE L. REV. 1365, 1181 (1986) (The "best interests" standard is "a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge. Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and

C. The Court's Decision Prohibiting Any Alternative Statutory Scheme for Non-Parent Visitation is Overly Broad

On the other hand, the Court partly based its holding on a definition of "right to parent" which itself is overly broad. Indeed, adoption of the Court's definition of that "right to parent" portends irreparable harm to children and disruption of a myriad of state provisions that provide for visitation with more specific criteria and justifiable consequences. In fact, as the case law on point suggests, excessive interference by the state in parental prerogative through visitation orders to marginally involved persons is not common. But the need to allow some contact between children and non-parents who have a genuine, longstanding relationship is more common. Such persons often are grandparents, but may not always be biologically related at all.

Consider the overbreadth of the Washington court's decision. A grandparent who has effectively raised a child over many years, may be denied further contact, including the right to ask a court to consider allowing it. The objection to such absolutism goes beyond grandparent interest. Whether grandparent, uncle, or family foster care provider, the involved children may have bonded with such persons. To them, they have been removed from a person who may be the only parent they have ever known, someone they rely on for their security, who they love as only a child can love. States properly pay attention to a child's powerful psychological ties to people who may not fit the legal status of "parent" at a given moment in time, and a visitation order as against the legally defined parent may be constitutionally fashioned with proper statutory threshold qualification.[5]

---

the divorce process itself."); Gary Crippen, Stumbling Beyond the Best Interests of the Child, 75 MINN. L. REV. 427, 499 (1990); Annette R. Appell and Bruce A. Boyer, Parental Rights v. Best Interests, 2 DUKE J. GENDER LAW & POL. 63 (1995) (analysis of cultural, class, religious, ethnic, and racial biases that pervade totally discretionary use of "best interests").

[5] Note that the Washington court's position could bar court enforcement of agreements negotiated by legal parents with third parties to allow continuing contact with a child, including post-adoption contact agreements. These compacts are becoming more prevalent. Joan H. Hollinger, Adoption Law & Practice, Chapter 13 (J.H. Hollinger, ed. 1989–99). At least 17 states have recognized the legality of agreements to permit continuing contact between a biological parent and a child after adoptive parents assume full parental status. In addition, many children who are allegedly abused are placed into foster care, bond with new caretakers often over many years, and are then returned to parents or permanently placed elsewhere. The court below's parenting rights definition would preclude visitation in these settings after court jurisdiction terminates to anyone

Indeed, there are longstanding common law and equitable cases acknowledging a recognized parental relationship between children and legal strangers. *See esp. Chapsky v. Wood*, 26 Kan. 650 (1881), a case where a father sought to reclaim custody of a child from a maternal aunt who had cared for her since infancy after the death of his wife. In upholding a decision to leave the child with the aunt, the *Chapsky* court writes: "the affection which springs from [the natural relation between parent and child] is stronger and more potent than any which springs from any other human relation," and, from a parent's natural duty of care arises the "reciprocal right to custody." The court notes, however, that children are not chattel and the right to custody is not absolute, concluding: "it is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel." Hence, a century before the "psychological parenting" theory became the vogue, American courts were recognizing the ties that bind children to non-parents.

D. Threshold Tests Can Cure the Statutory Defects

To cure the correctly identified overbreadth and vagueness flaws in the Washington law, such a visitation statute should properly include some threshold interest to confer standing for court intervention. Such a threshold may be based on an existing or prior relationship with a child, a child's prior or present relationship with an adult (the child's right), or a compelling state interest in monitoring a child's status. Mere biology, beyond parental status (*e.g.*, grandparent, uncle, sibling) is overly broad.[6] The proper standard, respecting the constitutional right to parent, the constitutional rights of the child, and possible compelling state interest limitations on both, should best follow American Law Institute standards to determine by objective standards what role an applicant individual plays in the life of the child. If a third part applicant has no such prior relationship with a child, the threshold burden is properly difficult: a showing that the child would be harmed if visitation is not allowed.[7]

---

but the custodial parent who has been awarded the child. The child may be treated as a trophy going to a winning parent. Imposing such inflexibility on judges and state legislatures is unwarranted.

[6] On the other hand, as discussed below, a constitutional requirement that state ordered visitation confine itself to parents is overly narrow.

[7] An example might be a special needs child whose mental health or physical development depends upon a continuing relationship. Other examples are analogous to the well developed body of law limiting parental authority where it denies children access to medical services important to their health and safety.

There may be circumstances where a judge is needed to check custodial parent determinations in such regards, particularly where cut-offs are imposed to those with a prior relationship or some other compelling state interest is triggered. But the family benefits, including the children, from a default rule of parental authority, with something more than a "best interests" call of a court to supersede it. Where such judicial entry is without any threshold qualification, the best interests standard, operating alone, may lead to a judge's personal values trumping the considered, bona fide judgment of the custodial parent, as argued above, or it may lead to a result based substantially on the comparative legal/financial resources available to the respective parties.

IV. THIS COURT SHOULD AFFIRM THE CHILD'S INTERESTS IN THE PARENT-CHILD RELATIONSHIP AND ALLOW FOR PROPERLY TAILORED STATUTES WHICH BALANCE THE RELATIONSHIP BASED ON COMPELLING STATE INTERESTS

A. This Court Should Affirm a Child's Fundamental Liberty Interest in a Relationship with His or Her Parent

Existing Supreme Court holdings pertaining to the rights of children have not always acknowledged two aspects distinguishing their interests. First, children are invariably the weakest of private parties outside the scope of the state. Any source of power, from individual adults to large institutions, may determine their fate without likely direct check from them (unless exercised by adult surrogates on their behalf). Given this private power impotence, the state is often the only societal mechanism available to protect their interests. Constitutional limitations on the state to so act may relegate them to untender mercies by limiting public intervention to a group that uniquely relies on its protective offices.

Second, the Court on occasion has selected an adult constitutional right, placed it exclusively on the table, and engaged in the standard constitutional line of inquiry: is this adult right "fundamental," if so, strict scrutiny applies and compelling state interest and least restrictive alternative analysis follows. The "right to parent" has been conferred such status. The problem with such a paradigm is its exclusion of competing constitution-based rights entitled to co-equal status. Where multiple rights are placed on the table for co-extensive consideration, the more balanced analysis informs resulting conclusions.

This Court has repeatedly recognized that children post-birth are entitled to constitutional protection. They are persons. *See Roe v. Wade,* 410 U.S. 113 (1973); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). And the Court well understands the bond of a parent for a child: "...a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is

an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18 (1981), quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1971). Is a child's "desire for and right to 'the companionship, care, custody, and management' by his or her parent" any less deserving of constitutional recognition? On what basis? Any distinction one might conjure in comparing the adult right commends more strongly acknowledgment of the child's counterpart right, as discussed below.

Such a clear holding does not mandate unworkable strictures. It merely places the interests of children on the constitutional table. They may be trumped by a competing constitutional right, including a parent's right. But such recognition balances both equitably, rather than relegating one to categorical dismissal.

In *Michael H. v. Gerald D.*, this Court noted: "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here...." (491 U.S. 110, 130 (1989).) Clear acknowledgment that children have a constitutional right to a parent is long overdue. Where that relationship is abusive and harmful to the child, a compelling state interest arises which may limit its enjoyment, but such an interest properly modifies a child's concomitant rights, it should not eliminate them.

1. The Fundamental Rights of Families Are Not Determinable Solely By Biology

This Court has recognized that families, as distinct entities, have fundamental rights, and the individuals who comprise a family have a fundamental right to associate with each other. The "intangible fibers that connect parent and child...[and] are woven throughout the fabric of our society....are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). This Court has recognized further that the freedom to enter into and continue certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Although the Court has not marked the precise boundaries of this type of protection, it has invoked the due process and equal protection clauses of the 5th and 14th amendments to protect marital relations (*Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978)), the conception and bearing of children (*Carey v. Pop. Servs. Intern'l*, 431 U.S. 678, 684–86 (1977)), decisions about child rearing, education, and religious beliefs made by parents who are actually engaged in the task of caring for and nurturing their children (*Pierce v. Society of Sisters,* 268 U.S. 510, 534–34 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)), and extended family relationships when children were in the *de facto* long term custody of a relative other than a parent (*Moore v.*

East Cleveland, 431 U.S. 494 (1977)).

Most recently, this Court decided *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), emphasizing the importance of familial relations warranting transcript provision to a mother facing a parental termination judgment. Justice Ginsburg wrote: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' *Boddie*, 401 U.S. at 376, rights sheltered by the 14th Amendment against the State's unwarranted usurpation, disregard, or disrespect." [citations omitted]

The First Amendment's right of association is also a source of constitutional protection for intimate personal relationships, family privacy, and family continuity because these relationships involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. United States Jaycees*, 468 U.S. 609, 619–20 (1984). Relationships that grow out of shared experience, nurturing and interdependence are "an intrinsic element of personal liberty." *Id.* at 620. The constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. *Id.* at 619. The "emotional enrichment" garnered by children from their families sustains them as they grow to maturity. The State must protect children against the unwarranted loss of psychological and emotional ties to their established families. When children's sense of "family" extends beyond one or both parents and other *de facto* parents to third parties, may on occasion be necessary for state to protect these ties.

This Court has recognized that the "intangible fibers" quoted above that connect and sustain children's familial relationships do not depend on a biological connection between a parent and a child. *Lehr v. Robertson*, *supra*, 463 U.S. at 261: "No one would seriously dispute" that familial interests and rights may attach to the emotional ties which grow between members of a *de facto* family. *Smith v. O.F.F.E.R.*, 431 U.S. 816, 843 (1977). While concluding that the nature of the state's contract with licensed foster parents means that foster parents have no reasonable expectation of forming a permanent family with the children placed with them for temporary care, Justice Brennan recognized the strength of the emotional ties that can form even without a biological connection:

> ...biological relationships are not exclusive determination of the existence of a family....The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of

> children [citations omitted], as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

Id.

Indeed, the definition of family for constitutional purposes has never endorsed the view that parental rights or family are determined by biology alone—nor that "parents" is a term constitutionally limited to a child's biological progenitors. Cousins, aunts, and grandparents living together are a family and are entitled to the same constitutional protection as an ostensibly more "traditional" family consisting of a mother, father, and their biological offspring. (*Moore v. East Cleveland*, 431 U.S. 494 (1977).) The stepparent adoptions permitted in *Quilloin* and *Lehr* over the objection of a biological father protected "a family unit already in existence" and then consisting of a biological mother and a non-biologically related stepfather.

Similarly, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) held that a state could constitutionally choose to subordinate a child's ties to her biological father in the interests of protecting the "unitary" family of the child's biological mother and the man to whom she was married when the child was born. Although the court did not reach or discuss the separate liberty interest of the child, a plurality held that California could constitutionally choose to protect the marital unit as against the claims of a child and an alleged biological father. However, that plurality did not preclude states from recognizing child's ties to people with whom they have substantial relationship short of finding parental unfitness or concrete harm.

Nearly thirty years ago, this Court held that despite possible violations of a biological father's due process rights, the state court should give "due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for [a] period of time," *Rothstein v. Lutheran Soc. Servs. of Wisconsin*, 405 U.S. 1051 (1972).

2. Children Have Constitutionally Protected Liberty Interests, Some Of Which Are Fundamental Rights

A child's status as a minor does not negate her status as an identified individual with constitutionally protected rights. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1 (1967).[8] This Court is well-versed

[8] *See, e.g.*, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are

in the numerous decisions according protection to the due process and equal protection rights of children, many of which are considered "fundamental," even if they are not co-extensive with the rights of adults. Some states have also explicitly recognized that "children are not simply chattels belonging to their parent, but have fundamental interests of their own...." *In re Jasmon O.*, 8 Cal.4th 398, 419, 33 Cal.Rptr.2d 85, 878 P.2d 1297 (1994). Such fundamental interests are of constitutional dimension. *In re Bridget R.*, 41 Cal. App.4th 1483, 1490, 41 Cal.Rptr.2d 507 (1996), *cert. denied*, 519 U.S. 1060 (1997).

Moreover, as suggested above, the right of a child to a familial relationship is more compelling than the counterpart "right to parent" of an adult. A child's interest in her family relationships represents more than the emotional and social interest which adults have in family life; it includes the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.

Numerous decisions recognize that no parent in this country has an absolute right to the *custody* of his or her biological children, even if a fit parent. (*See, e.g., Bennett v. Jeffreys*, 40 NY2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976). A child's legal parent is presumed fit to raise, nurture, and care for his or her child; but no parent has an absolute or preemptive right to his or her child's custody without regard to the child's interests and welfare. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 170 (1944): "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children...."

The doctrines of parental preference and a child's best interests are not necessarily in conflict. "'In general, children's needs are best met by helping parents achieve their interests.'" *In re Angelia P.,* 28 Cal.3d 908, 917–18, 623 P.2d 198, 171 Cal.Rptr. 637 (1981). Yet, when parents and children's interests are in conflict, "'the legal system should protect the child's interests. Not only is the child a helpless party but the parents should suffer the consequences of their inadequacy rather than the child.'" (*Id.*, citations omitted).

The parental side of the parent-child fundamental liberty interest is more conditional in its formulation. With parental "rights" come reciprocal duties. *Lehr, supra*, 463 U.S. at 257: "...the rights of the parents are a counterpart of the responsibilities they have assumed." It is perhaps most accurate to say that children have a substantive liberty interest in remaining with their parents and having their personal associations determined by their parents, subject to the parents actually serving the child's interests regarding their

---

protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

protection, care, support, and nurturance. When the interests of the parent and the child diverge to the point where the child is harmed or threatened with harm, the state has an obligation as *parens patriae*, to protect the welfare of the child. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944). Under some circumstances, this requires giving legal protection to the child's ties to caregivers other than their biological parents.

B. Compelling State Interests Can Sometimes Justify Court Ordered Visitation of Children by Non-Parents

If a categorical parental liberty interest forecloses non-parent visitation, legislatures are accordingly barred from allowing it under any alternative arrangement. If the Court finds that hypothetical or actual statutes are acceptable as limitations on such a right, the categorical bar must be rejected.

1. Preliminary Inquiry and Threshold Requirements Can Provide Procedural Due Process to Allow Court Ordered Visitation

Amicus NACC does not ask this Court to draft an alternative statute to Washington's unacceptable version. As discussed above, we share Respondent's basic position that it is fatally flawed. But the Washington Court's categorical denial of any possible compelling state interest basis for parental right limitation produces a sledgehammer to swat a fly. Not only may a child's competing constitutional rights be implicated, but a host of possible interests, as discussed briefly above, may well apply.

Although the decision below does not categorically preclude the State of Washington from crafting a third party visitation that would survive constitutional review, it misstates the constitutional guidelines within which such statutes may be drawn. This Court has never held that parental childrearing decisions are virtually unassailable in the absence of proof that they "directly and severely imperiled the child." (*Troxel v. Granville*, 137 Wash.2d 1, 969 P.2d 21, 29 (1998).) By suggesting in dicta that a non-parent may be awarded visitation only where there is proof of "harm" or "threatened harm" to the child, the court below is unclear whether it is referring to physical harm of the child by a parent or, alternatively, psychological harm to a child because of the loss of a significant relationship to a third party. Surely, the psychological harm to a child that is posed by a severance of prior ties to those with whom they have had a significant relationship should be sufficient to justify intervention pursuant to the state's *parens patriae* role.

Procedural due process ideally would here include a preliminary inquiry about the nature of the relationship between a third party and a child and the basis for that

individual's claim that severing such a relationship would be detrimental to the child.[9] This is the most appropriate way to minimize the risk of impermissibly burdening the parent-child relationship. Such a proposition transforms the issue from from the limitless "any person" of the Washington statute, to a preliminary standing requirement of "any person with a significant relationship to child." Wherever the lines may be drawn, alternative models are in existing state statutes from other states,[10] common law and equitable decisions, and the proposals of the American Law Institute (ALI)[11] for granting visitation or a share of custodial responsibility to *de facto* parents and to others, including grandparents.

Only if an individual seeking visitation can survive the preliminary inquiry by making the requisite showing of a significant relationship would the court then set a hearing for visitation. At that stage, the petitioner would have to sustain the burden of proving that visitation is in the best interests of the child and that parental objections are

---

[9] Some states treat standing under state law as a "prudential limitation on the ability of individuals to seek redress in our courts." *Cablevision of Chicago v. Colby Cable Corp*., 417 N.E.2d 348, 352 (Ind. Ct. App. 1981) because states want to be confident that a person seeking relief from court has a "substantive right to enforce the claim that is being made in the litigation." *Pence v. State*, 652 N.E.2d 486, 487 (Ind. 1995). The purpose served by a threshold standing requirement is not to determine the issue of third party visitation is a justiciable one, but whether the person is proper party to request that the issue be adjudicated, *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 118 (1997).

[10] *See, e.g.,* Ore. Rev. Stat. 109.119(1-3); *In re Marriage of Sleeper*, 982 P.2d 1126 (Or. 1999) (in the absence of a parent-like relationship between third party and child, custody or visitation rights conferred by statute are unavailable); the common law *de facto* parent and *in loco parentis* cases, or the commendable revision of Washington law as amended, *see* RCW 26.09.240.

[11]ALI Principles of the Law of Family Dissolution §§ 2.03, 2.04, 2.21 (Tent. Draft No. 3 Part I 1998) (tentatively approved at May 1998 Annual Meeting).Section 2.03(1)(b): A *de facto* parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the consent of a legal parent or as a result of a complete failure or inability of any legal parent to perform caretaking functions: (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived. Comment to ALI 2.21: "The standards reflect the societal consensus that responsibility for children ordinarily should be retained by a child's parents, while recognizing that there are some exceptional circumstances in which the child's needs are best served by continuity of care by other adults."

unreasonable. States are, of course, free to specify the content of such "best interests" as they choose, just as they can establish the content of "unfitness" in a termination of parental rights proceedings, *Santosky v. Kramer*, 455 U.S. 755 (1982). Alternatively, a state might require that petitioner prove that visitation is warranted in order to avoid detriment to a child. Also appropriate would be the standard suggested by Respondent in this case: petitioner would have to show that the child is at risk of harm if visitation is denied, meaning in effect, that the parental objection is not in the child's best interests.

To the extent, however, that petitioner shows at the preliminary inquiry that he or she has been a "*de facto* parent," as that term has been defined in a number of recent state decisions based on equitable principles, or in the proposed ALI Principles, a best interests standard may be appropriate so long as burden of proof is allocated to petitioner. Someone who has in fact functioned as a parent at the initial request of a legal parent and without expectation of financial gain, has been the child's residential caregiver, and is perceived by the child as a parent, whether legally acknowledged or not, invokes the constitutionally legitimate interest of the child to maintain that relationship.

But whether individuals who function as *de facto* parents receive constitutional protection or not, the States are not constitutionally barred from protecting their continued contact with children who regard them as a mother or father.[12] The Washington Court's overly broad analysis of "parental rights," if upheld by this Court, would act as such a bar. Amicus asks this Court not to let that occur, and further notes that many state statutes, common law and equitable decisions have recognized functional, psychological, or *de facto* parental status, including some where this Court has allowed the decisions to stand by denying certiorari.[13]

---

[12] *Amicus* NACC agrees with the New Hampshire court when it points to the fact that "[s]tepparents, foster parents, grandparents, and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact..." and children have a right to maintain "a close extra-parental relationship which has formed in the absence of a nuclear family." *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985).

[13] *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (Mass.1999), *cert. denied*, *Gebman v. Pataki*, 1999 U.S. LEXIS 7552 (Nov. 15, 1999) (holding that the trial court had equity jurisdiction to grant visitation between the child and the mother's former partner as the child's "*de facto*" parent). *See also V.C. v. M.J.B.*, 319 N.J. Super. 103, 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999) (holding that, while mother's former partner was not entitled to custody of children, she was entitled to visitation because she had performed parent-like functions as recognized by earlier N.J. cases); *Zack v. Fiebert*, 235 N.J. Super. 424, 563 A.2d 58 (1989) (when, as preliminary matter, third party can show that he or she stands *in loco parentis*, in parity with legal parent, such a third party should be treated as if he or she were a parent and best interests test may be used). *See*

The *Eldridge* test enumerates three critical due process factors. First, identify the private interest that will be affected by the official action; second, consider the risk of its erroneous deprivation through the procedures used, and the probable value of additional or substitute safeguards; and third, consider the government's interests, including any fiscal or administrative burden from an alternative procedure. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). These factors commend procedural due process protection to the cut-off of a child's relationship. The private interest is substantial, the risk of deprivation is great given the categorical bar suggested, and the government's burden is ameliorated by the threshold tests suggested above, and as implemented in extant state statutes.

2. Successful State Approaches Are Not Precluded by the Constitution

Amicus NACC suggests that one example of permissible state intervention occurs where a petitioner can prove that he or she has a parent-like relationship with the child and that "a significant triggering event" justifies state intervention in the child's relationship with a biological or adoptive parent. Wisconsin, for example, follows the approach suggested here. Their courts may invoke equitable principles to award visitation (but not custody) to an individual who demonstrates the existence of a "parent-like relationship" with a child by proving: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing to the child's support (emotional or financial) without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. *See Holtzman v. Knott,* 193 Wis.2d 649, 533 N.W.2d 419, 435–436 (Wis. 1995), *cert. denied*, *Knott v. Holtzman*, 516 U.S. 975 (1995).

This kind of functional test for standing to commence an action for visitation pays attention to the context in which the petitioner and the child developed the actual ties the petitioner claims should be continued or resumed. Its limited application and petitioner burdens avoid the pitfalls of the simplistic "best interests" test of the

---

also J.A.L. v. E.P.H., 453 Pa. Super. 78, 682 A.2d 1314 (Pa. Super. Ct. 1996) (holding that mother's former partner stood *in loco parentis* with a child and, therefore, had standing to seek partial custody); *Holtzman v. Knott*, 193 Wis.2d 649, 533 N.W.2d 419 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995) (holding that, wile mother's former partner could not assert claim to custody or statutory claim to visitation, trial court may have equitable power to hear petition for visitation when it determines that petitioner has parent-like relationship with child, as originally encouraged and fostered by custodial mother).

Washington statute without the simplistic counterstroke suggested by the Washington court below. In Wisconsin, as well as in other jurisdictions that have followed the similar approach of the ALI Principles, including Massachusetts and New Jersey, a best interests analysis is permitted only after the four elements listed above are demonstrated.[14] In addition, although a few states have statutes that allow stepparents to seek visitation with a stepchild over the objection of a legal parent, others have invoked equitable principles or the doctrine of *in loco parentis* to permit visitation or custody claims by stepparents, when, for example a custodial parent dies and a noncustodial parent seeks sole custody of a child.[15]

CONCLUSION

Millions of children today, lacking traditional family stability, have ties to step and adoptive parents, to foster care families who function as parents, and to siblings (who may be the only stable human contacts for some). They may also have ties to a succession of other adults who provide emotional or financial support for them, some for many years, and for which children often feel gratitude and loyalty. The states are experimenting with a variety of ways to confer some status to these adults based on what they do for children, a contribution deserving a measure of respect from us all. The Washington statute fails because, as applied to Respondent and other custodial parents, it is too broad and too vague. It empowers the state to resolve on a discretionary and potentially capricious basis complex and intimate matters concerning the well being of children without articulating a state interest substantial enough to justify the infringement on substantive rights protected under the Due Process Clause of the 14th Amendment. The harms and extraordinary emotional and financial costs attendant upon the protracted litigation and ongoing judicial monitoring that this statute permits are evident from the

---

[14] *See, e.g., E.N.O. v. L.M.M, supra*; *Youmans v. Ramos,* 429 Mass. 774, 711 N.E.2d 165 (1999) (aunt who served as niece's caregiver for years awarded visitation over father's objection). *See also In re Marriage of Gayden*, 229 Cal. App.3d 1510, 1521–22 (1991): As strong as the rights of [biological] parents must be, there may be instances in which a child would be significantly harmed by completely terminating his or her relationship with a person who has (1) lived with the child for a substantial portion of the child's life; (2) been regularly involved in providing day-to-day care, nurturance and guidance for the child appropriate to the child's stage of development; and, (3) been permitted by a legal biologic parent to assume a parental role even though not married to the legal parent and not an adoptive or biological relative. The needs of the child, which are the most important consideration, may sometimes require that a visitation award be made to such a "*de facto* parent." This could apply to stepparent or to unmarried partner of legal parent.

[15] *See, e.g., Meldrum v. Novotny*, 599 N.W.2d 651 (S.D. 1999); Cal. Fam. Code § 3101.

details of Respondent's case as described more fully in her brief.

Nonetheless, the Constitution does not preclude, and indeed, authorizes the states to legislate in matters affecting personal and family relationships within constitutionally prescribed outer boundaries. A more carefully crafted third party visitation statute should survive constitutional scrutiny. A procedural due process analysis through the oft-worn lens of the *Matthews v. Eldridge* factors discussed above suggests two minimal safeguards: first, a threshold standing requirement that petitioners show that they have a significant relationship to a child and that severing this relationship would be detrimental to the child; and second, that those who meet this threshold test sustain some evidentiary burden to overcome the presumption that parents act in their child's best interests.

The Washington Court's proposition that a recognized liberty interest "to parent" is categorically not subject to state abridgement to compel visitation is as flawed in one direction as the state's visitation statute is flawed in the other. *Amicus* NACC asks that this Court steer a middle course and recognize the interests of children in their significant relationships to the adults they have come to regard as members of their family.

Respectfully Submitted,

Counsel of Record: **Robert C. Fellmeth**
Price Professor of Public Interest Law and
Director, Children's Advocacy Institute
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4806

Joan Hollinger, Visiting Professor of Law
University of California at Berkeley School of Law
Marvin Ventrell, Executive Director,
National Association of Counsel for Children
Donald N. Duquette, Clinical Professor of Law

and

Director, Child Advocacy Law Clinic,
University of Michigan Law School

For *Amicus Curiae*
National Association of Counsel for Children

December 10, 1999