NO. 99-138

IN THE
SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE VISITATION OF
NATALIE ANNE TROXEL AND
ISABELLE ROSE TROXEL, MINORS.

JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF OF THE STATES OF WASHINGTON, ARKANSAS, CALIFORNIA, COLORADO, HAWAII, KANSAS, MISSOURI, MONTANA, NEW JERSEY, NORTH DAKOTA, OHIO, AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

CHRISTINE O. GREGOIRE
Attorney General

Maureen A. Hart*
Senior Assistant Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

**Counsel of Record for the Amicus Curiae*

Additional Counsel Listed Inside

Mark Pryor
Attorney General
State of Arkansas
323 Center Street Suite 200
Little Rock, AR 72201
501-682-2007

Bill Lockyer
Attorney General
State of California
1300 I Street Suite 124
Sacramento, CA 94244-2550
916-323-7355

Ken Salazar
Attorney General
State of Colorado
1525 Sherman Street 7th Floor
Denver, CO 80203
303-866-5856

Earl I. Anzai
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813
808-586-1500

Carla J. Stovall
Attorney General
State of Kansas
301 SW 10th Avenue
Topeka, KS 66612-1597
785-296-2215

Jeremiah W. (Jay) Nixon
Attorney General
State of Missouri
Supreme Court Building
207 W High Street
Jefferson City, MO 65101
573-751-3321

Joseph P. Mazurek
Attorney General
State of Montana
Justice Building
PO Box 201401
Helena, MT 59620-1401
406-444-2026

John J. Farmer, Jr.
Attorney General
State of New Jersey
R.J. Hughes Justice Complex
25 Market Street PO Box 080
Trenton, NJ 08625

Heidi Heitkamp
Attorney General
State of North Dakota
600 E Boulevard Avenue
Bismarck, ND 58505-0040
701-328-2210

Betty D. Montgomery
Attorney General
State of Ohio
30 E Broad Street 17th Floor
Columbus, Ohio 43215
614-466-4940

Paul G. Summers
Attorney General and Reporter
Cordell Hull Building
Nashville, TN 37243-0485
615-741-3491

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IDENTITY AND INTEREST OF AMICI

Amici, the State of Washington and eleven additional states, submit this brief. Statutes authorizing actions for child visitation by parties who have significant and beneficial relationships with minor children, but who are not their natural parents or legal custodians, are nearly universal in state law.[1]

The states have a significant interest in the welfare of children who reside within their borders. Third-party visitation statutes, such as Washington's, protect the well-being of children by affording persons who are not the natural parent or legal custodian of a child an opportunity to prove that some limited contact with the child is in the child's best interests. Such statutes constitute reasonable and minimally intrusive action by the states to advance the welfare of children. They

---

[1] State statutes vary with respect to the circumstances under which visitation may be sought and the persons entitled to seek it. In some states, visitation may be sought only when the child's custody is at issue or when a natural parent has died. In some states, visitation may be sought only by persons related to the child by blood, such as grandparents. In other states, both or neither of these restrictions apply. *See, e.g.*, Ala. Code 30-3-4.1; Alaska Stat. 25.20.065, 25.24.150; Ariz. Rev. Stat. 25-409; Ark. Code. Ann. 9-13-103; Cal. Fam. Code 3102, 3104; Cal. Fam. Code App. 197.5; Colo. Rev. Stat. 19-1-117; Conn. Gen. Stat. Ann. 46b-59; Del. Code Ann. tit. 10, § 1031; Fla. Stat. Ann. 752.01; Ga. Code Ann. 19-7-3; Haw. Rev. Stat. Ann. 571-46.3; Idaho Code 32-719; Ill. Comp. Stat. 5/607; Ind. Code Ann. 31-17-5-1; Iowa Code Ann. 598.35; Kan. Stat. Ann. 38-129; Ky. Rev. Stat. Ann. 405.021; La. Rev. Stat. Ann. 1267, 1269; Maine Rev. Stat. Ann. tit. 19-A, § 1803; Md. Code Ann., Family Law 9-102; Mass. Gen. Laws Ann. ch. 19, § 39D; Mich. Comp. Laws Ann. 722.27b; Minn. Stat. Ann. 257.022; Miss. Code Ann. 93-16-3; Mo. Ann. Stat. 452.402; Mont. Code Ann. 40-9-102; Neb. Rev. Stat. 43-1802; N.H. Rev. Stat. Ann. 458:17d; N.J. Stat. Ann. 9:2-7.1; N.M. Stat. Ann. 40-9-2; N.Y. Dom. Rel. Law 72; N.C. Gen. Stat. 50-13.2; N.D. Cent. Code 14-09-05.1; Ohio Rev. Code Ann. 3109.051, 3109.11, 3109.12; Okla. Stat. Ann. tit. 10 § 5; Or. Rev. Stat. 109.119, 109.121; Pa. Cons. Stat. Ann. 5311; R.I. Gen. Laws 15-5-24.1, 15-5-24.2, 15-5-24.4; Tenn. Code Ann. 36-6-307; Tex. Fam. Code Ann. 153.433; Utah Code Ann. 30-5-2; Vt. Stat. Ann. tit. 15, §§ 1011, 1012; Va. Code Ann. 16.1-241, 16.1-278.15; W. Va. Code 48-2B-1, 48-2B-3; Wis. Stat. Ann. 767.245; Wyo. Stat. Ann. 20-7-101.

satisfy due process and should stand. Because this case considers the constitutionality of such statutes, amici offer this brief.

SUMMARY OF ARGUMENT

The decision below, invalidating Washington's third-party visitation statutes under the due process clause of the Fourteenth Amendment, concludes that a parent has a fundamental right to preclude a child from having contact with persons other than another parent, regardless of the circumstances, and in the face of a judicial determination that such contact is in the best interests of the child.

This conclusion is at odds with decisions of this Court. It overstates the constitutionally protected interests of parents with respect to their minor children and understates the permissible bases upon which government may act to promote the welfare of children and the public welfare.

Parental autonomy is not absolute. Decisions of this Court, recognizing fundamental parental rights, have been concerned with interests at the core of parental liberty. Thus, the Court has found a fundamental parental right in continuation of the parent-child relationship and in directing the religious upbringing of children. However, none of the decisions of this Court, considered in context, stand for the proposition that parents have a broad-based fundamental right to direct all aspects of their children's lives, free from reasonable governmental regulation that promotes the child's welfare.

The fundamental constitutional rights of parents do not encompass the right to preclude a child from having contact with persons other than another parent or legal custodian, when it has been established before a neutral judicial tribunal that such contact is in the best interests of the child.

Moreover, even if it were assumed that parents have a broad-based fundamental right to autonomy in child-rearing, Washington's visitation statutes do not unduly burden that

right. Parents have a full opportunity to be heard in actions seeking visitation under Washington's statutes. The rights and interests of parents, as well as those of their children, must be taken into account in such proceedings. The minimal intrusion of visitation is authorized only when it has been established before a neutral decision-maker that visitation is in the best interests of the child. Washington's visitation statutes thus satisfy due process.

ARGUMENT

1. Washington's Statutes Authorize Visitation Only When A Petitioning Party Establishes In Court Proceedings That Visitation Is In The Best Interests Of The Child

A. The Statutes

The Troxels sought visitation with their grandchildren, the minor daughters of their deceased son, under Washington statutes authorizing third parties to maintain an action seeking child visitation. At the time the Troxels filed their petition for visitation in December 1993, two Washington statutes authorized third parties to file petitions seeking visitation with a child – Wash. Rev. Code 26.09.240 and 26.10.160(3); 1989 Wash. Laws ch. 375, § 13 and 1989 Wash. Laws ch. 326, § 2(3). The challenged statutes authorized the court to grant visitation when visitation would be in the best interests of the child. The statutes also authorized the court to modify an order granting or denying visitation whenever modification would serve the best interests of the child. 1989 Wash. Laws ch. 375, § 13; 1989 Wash. Laws ch. 326, § 2(4).

B. The "Best Interests" Standard

The "best interests of the child" standard is a touchstone in numerous state law determinations relating to children. It is a standard familiar in Washington. Whether a particular course is in the best interests of the child requires a case-specific examination of all factors that bear on the well-being of the child, in the context of the particular inquiry

before the court. *In re the Dependency of J.B.S.*, 123 Wash. 2d 1, 11, 863 P.2d 1344 (1993).

The "best interests" standard has as its ultimate goal the welfare of the child, but its focus is far broader than the child. By virtue of the nature of childhood, the best interests of a child are inextricably intertwined with the rights and interests of others. Of necessity, a child's best interests must take into account the rights, interests, and circumstances of those persons legally responsible for the child, including the child's parents and those who play a significant role in the child's life. *In re the Welfare of Becker*, 87 Wash. 2d 470, 478, 553 P.2d 1339 (1976) ("[T]he courts have broad discretion and are allowed considerable flexibility to receive and evaluate all relevant evidence in reaching a decision that recognizes both the welfare of the child and parental rights.")

Such considerations are explicit in the current version of Washington's statute relating to third-party visitation petitions in dissolution or separation proceedings.[2] Wash. Rev. Code 26.09.240 provides that in determining the child's best interests the court may consider:

> "(a) The strength of the relationship between the child and the petitioner;
>
> (b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
>
> (c) The nature and reason for either parent's objection to granting the petitioner visitation;

[2] Wash. Rev. Code 26.09.240 was amended in 1996, after the petition for visitation was filed in this case. *See* 1996 Wash. Laws ch. 177, § 1.

> (d) The effect that granting visitation will have on the relationship between the childand the child's parents or the person with whom the child is residing;
>
> (e) The residential time sharing arrangements between the parents;
>
> (f) The good faith of the petitioner;
>
> (g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and
>
> (h) Any other factor relevant to the child's best interest." Wash. Rev. Code 26.09.240(6) (1996 Wash. Laws ch. 177, § 1).

Similar nonexclusive factors are recognized in decisions from other states where statutes authorize third-party visitation, when such visitation would be in the best interests of the child. *See, e.g.*, *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121, 126-27 (1993) ("The trial court must concern itself solely with the welfare and prospects of the child. In so doing, the court should assess in their totality all relevant factors and circumstances pertaining to the grandchild's best interests. These would include, but not be limited to: the nature and stability of the child's relationships with its parents; the nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact, and amount of time spent together; the potential benefits and detriments to the child in granting the visitation order; the effect, if any, grandparental visitation would have on the child's attachment to its nuclear family; the physical and emotional health of the adults involved; and the stability of the child's living and schooling arrangements."); *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478, 482-83 (1985); *In re Whitaker*, 36 Ohio St. 3d 213, 522 N.E.2d 563(1988).

2. A Parent Does Not Possess A Fundamental Right To Preclude A Child From Having Contact With Persons Other Than Another Parent, Regardless Of The Circumstances And In The Face Of A Judicial Determination That Such Contact Is In The Best Interests Of The Child

In a 5-4 decision, the Washington Supreme Court concluded that a parent has a fundamental liberty interest in determining whether his or her child may have visitation with a third party who is not the child's parent. According to the court below, this fundamental right precludes the state from establishing a process whereby persons who seek visitation with a child may secure visitation by demonstrating that such contact is in the best interests of the child. In so holding, the court below effectively ruled that a parent may deprive a child of any contact with a non-parent, regardless of the basis for the parent's decision, regardless of the child's circumstances, regardless of the relationship between the non-parent and the child, and regardless of whether visitation would be in the best interests of the child. The majority below reached this conclusion by relying on selective phrases from decisions of this Court, without regard to their holdings. Pet. Writ Cert. at 12a-13a.

To be sure, parsed phrases and passages from opinions of this Court, void of context, can be read to suggest near absolute autonomy in parental decision-making. However, when the statements of this Court in each of these cases are considered in context, it becomes apparent that the scope of fundamental parental liberty is more narrow than that determined by the Washington Supreme Court and that the specific right asserted in this case is not encompassed by it.

A. Certain Core Aspects Of Parental Liberty Rise To The Level Of Fundamental Rights

In *Stanley v. Illinois*, 405 U.S. 645 (1972), quoted extensively by the court below, this Court considered a statute that extinguished the parent-child relationship between unwed fathers and their children upon the death of the children's natural mother. The statute did so without a hearing concerning the parental fitness of the father. Under the challenged statute, the children became wards of the state, and the father lost all legal right to companionship, care, and custody of his children.

It is in this context that the Court stated the "private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection" and noted that the "rights to conceive and raise one's children have been deemed essential". *Stanley*, 405 U.S. at 651. The interest at issue in *Stanley* was the survival of any legally protected relationship between a father and his child. Neither the decision nor the oft-quoted passages from it signal that parents are free from reasonable state regulation in all decision-making with respect to their children.

The same is true of *Santosky v. Kramer*, 455 U.S. 745 (1982), quoted by the court below. *Santosky* considered a state law that forever cut off all legal rights of parents with respect to their children. At issue in *Santosky* was the constitutionally required burden of proof in proceedings to terminate parental rights for permanent child neglect. A New York statute allowed termination on a showing of permanent neglect by a "fair preponderance of the evidence". *Santosky*, 455 U.S. at 745. *Santosky* simply stands for the proposition that "[b]efore a state may sever completely and irrevocably the rights of

parents in their natural child", due process requires the state to prove its allegations by clear, cogent, and convincing evidence. *Id.* at 746.

It is not surprising that in the context of deprivation of all parental rights, the *Santosky* Court recognizes the parent's right to the companionship, care, custody, and management of his or her children as a fundamental liberty interest. *Id.* at 758-59. But again, *Santosky* neither holds nor suggests that parents have a fundamental liberty interest to be free from reasonable state regulation in directing all aspects of their children's lives.

Two other decisions of this Court, relied on by the court below, invalidated statutes because they interfered with the free exercise of religion under the First Amendment.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court sustained a challenge to a state law requiring children to attend public school beyond the eighth grade. The challenge was brought by parents of Amish children who contended that the law infringed on their freedom of religion. *Yoder* did not present a claim based on the Fourteenth Amendment, as is the claim in the instant case. Rather, *Yoder* concerned free exercise of religion under the First Amendment. *Yoder*, 406 U.S. at 207, 214.

Similarly, *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925), relied on by the court below, does not support the notion that parents have a fundamental liberty interest in all aspects of raising their children, that is free from reasonable government regulation. Like *Yoder*, *Pierce* implicated freedom of religion. *Yoder*, 406 U.S. at 233 ("However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.").

Pierce considered whether a statute requiring children between the ages of 8 and 16 to attend public school impermissibly infringed on the liberty of parents to educate

their children in parochial or military schools. In invalidating the statute, the Court observed:

> "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce*, 268 U.S. at 534.

That *Pierce* does not embrace the sweeping parental liberty interest announced by the court below is further made evident in *Yoder*, where the Court explained:

> "*Pierce*, of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State." *Yoder*, 406 U.S. at 233.

Thus, *Yoder* and *Pierce* speak to the right of parents to raise their children in a particular faith or on a particular moral path. These cases do not suggest that the state must defer to parental decision-making in all matters that bear on the welfare of children.

The final decision of the Court relied upon by the majority below is *Meyer v. Nebraska*, 262 U.S. 390 (1923). At issue in *Meyer* was a statute making it a crime to teach a foreign language to any child who had not completed the eighth grade. The statute was challenged by a parochial school teacher who had been convicted under its terms. The teacher claimed that his right to teach and the right of parents to engage

him to teach were within the liberty interests protected by the Fourteenth Amendment and that the statute unlawfully infringed on those rights. The *Meyer* Court concluded that the liberty protected by the due process clause included the right "to engage in any of the common occupations of life" and the right to "establish a home and bring up children". *Meyer*, 262 U.S. at 399. The Court went on to explain:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer*, 262 U.S. at 399-400.

The Court invalidated the statute at issue precisely because it determined the statute to be "arbitrary and without any reasonable relation to any end within the competency of the state". *Id.* at *403*. In this respect, the Court noted that the statute applied only to modern languages and, thus, would not support its claimed purpose of protecting the health of children by limiting their mental activities. The Court further expressed concern that the statute hindered proficiency in a foreign language by precluding its study at an early age, a consequence inconsistent with state-acknowledged benefits of education. *Id.* In *Meyer* then, the Court did not measure Nebraska's legislation against the strict scrutiny standard that applies when state action substantially infringes on a fundamental right.

Thus, none of these cases stand for the proposition that a parent invariably has a fundamental liberty interest in all decision-making relating to his or her child. Rather, these cases indicate is that there is a core of parental liberty with respect to child-rearing that encompasses interests so essential to individual liberty that the state may not infringe upon them, absent a compelling interest and an approach narrowly tailored to that interest. While not fully defined, this core of liberty interests includes maintaining the legal relationship between

parent and child. Before the state may terminate this legal relationship, due process demands a substantial showing that termination is necessary to protect the child from serious harm. Also within the core of this liberty are parental decisions concerning the religious upbringing of their children. Indeed, where fundamental liberty interests explicit in other constitutional provisions, such as the free exercise clause, coincide with parental decision-making, the state is not allowed to intrude, absent a compelling interest and a narrowly tailored approach. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), invalidating a requirement that children attending public school salute the American flag.

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." *Barnette*, 319 U.S. at 639.

But beyond this core of parental liberty, the state has a legitimate role to play in advancing the welfare of children and the public welfare by rational means. "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). In *Prince*, this Court recognized that "[a]cting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Id.* at 166 (footnotes omitted). "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[.]" *Id.* at 167; *see also Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("The state

also has an independent interest in the well-being of its youth.").

Indeed, *Yoder* and *Pierce* sanction state regulation requiring parents to comply with educational standards for their children, at least where those standards do not impermissibly intrude on the free exercise of religion. And *Meyer* makes it clear that such state regulation passes constitutional scrutiny if it is reasonably related to legitimate state interests.

B. The Interest Asserted In This Case Is Not A Fundamental Aspect Of Parental Liberty

That parental decision-making does not invariably rise to the level of a fundamental liberty interest is consistent with the approach of this Court in considering claims that certain rights are fundamental. The Court requires "a 'careful description' of the asserted fundamental liberty interest". *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Court then considers whether the specifically identified interest has occupied such a place of honor in our Nation's traditions so as to be considered fundamental. *Id.* In the instant case, the asserted parental liberty interest is an absolute right to preclude a child from having visitation with persons other than another parent, regardless of the circumstances. Although the traditions of this country reflect deference to certain aspects of parental liberty, amici respectfully submit that they do not embrace the all-encompassing autonomy sought in this case.

In addition, caution is appropriate in extending the scope of rights recognized to be fundamental.

> "'[W]e ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' *Collins*, 503 U.S., at 125, 112 S. Ct., at 1068. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' *ibid*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, *Moore*, 431 U.S., at 502, 97 S. Ct., at 1937 (plurality opinion)." *Glucksberg*, 521 U.S. at 720.

Caution seems particularly appropriate in the instant case, as Washington's statutes implicate the liberty interests of minor children, as well as parties petitioning for visitation. The Court has recognized that freedom of association extends to "choices to enter into and maintain certain intimate human relationships", as an element of personal liberty. *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984). The First Amendment protects relationships, including but not limited to family relationships, that 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 distinctly personal aspects of one's life". *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (quoting *Roberts*, 468 U.S. at 619-20). Washington's statutes account for and strike a reasonable balance with respect to these associational interests.

The challenged statutes authorize visitation only on a showing by the petitioning party that visitation is in the best interests of the child. It is difficult to imagine that this standard will be met absent a personal and beneficial relationship between the petitioning party and the child. Indeed, the present version of Wash. Rev. Code 26.09.240 provides that a petition for visitation "shall be dismissed unless the petitioner or intervenor can demonstrate by clear and convincing evidence that a significant relationship exists with the child with whom visitation is sought". Wash. Rev. Code 26.09.240(3) (1996 Wash. Laws ch. 177, § 1).

Finally, where important liberty interests of children are implicated by state regulation, the Court has found constitutional value in a check on parental decision-making by a neutral third party. In *Parham v. J.R.*, 442 U.S. 584 (1979), this Court considered whether a Georgia statute that authorized parents and guardians to voluntarily commit their children to state mental hospitals satisfied procedural due process. In part because the commitment process required independent review by qualified medical personnel of the parental request for commitment, the Court concluded that the statute provided necessary procedural protections. In *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976), the Court held that the state may not give to parents an absolute veto over the decision of a pregnant minor to terminate her pregnancy. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 440 (1983), the Court concluded that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests". Washington's visitation statutes provide for a similarly appropriate neutral decision-maker to address competing constitutional interests.

In summary, the claim for parental autonomy asserted in this case does not rise to the level of a fundamental right. A parent has no fundamental right to preclude a child from having contact with other persons, regardless of the circumstances and where such contact would be in the best interests of the child.

3. Washington's Visitation Statutes Do Not Substantially Burden Parental Rights. The Statutes Rationally Advance The State's Important Interest In The Welfare Of Children And Should Stand

Even if one were to assume that the claimed parental interest in this case is fundamental, not every state regulation implicating a fundamental liberty interest must satisfy exacting scrutiny. That certain human activities have been deemed

fundamental rights does not mean that every state regulation touching on or implicating such rights is permissible only if it advances a compelling state interest through means that are narrowly tailored to effecting that interest.

> "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

To the same effect is *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), which upheld a statute allotting food stamps based on a statutory definition of "household". The definition treated parents, children, and siblings who lived together as a household, regardless of whether they purchased food or prepared meals together, but treated other individuals living together as a household only if they did so. Treatment as a household decreased food stamps available to parents, children, and siblings who lived together. In sustaining the statute, the Court held that the statutory classification did not "directly and substantially" interfere with family living arrangements and thereby burden a "fundamental right". *Lyng*, 477 U.S. at 638.

This approach also is apparent in *Bates v. City of Little Rock*, 361 U.S. 516 (1960). In *Bates*, an ordinance implicated a fundamental right – freedom of association. It required disclosure of membership lists of certain nonprofit corporations, including the NAACP. In discussing the appropriate analysis of the issue, the Court explained that "[w]here there is a *significant encroachment* upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates*, 361 U.S. at 524 (emphasis added). The Court's use of this analytical

framework also is discussed in depth in *City of Akron*, 462 U.S. at 462-64 (1983) (O'Connor, J., dissenting).

Washington's third-party visitation statutes do not substantially burden parental rights. Washington's visitation statutes do not diminish, let alone terminate, the legal relationship between a parent and child, as was the case in *Stanley* and *Santosky*. Nor do Washington's statutes interfere with legal custody of the child. Washington's statutes do not preclude a child's parents from controlling the child's religious upbringing or education, as was the case in *Pierce* and *Yoder*. They do not interfere with other essential aspects of the parent-child relationship. In short, under Washington's statutes, the parent-child relationship and the nuclear family remain intact, and legal custody remains with the parent.

In essence, Washington's statutes merely provide a mechanism by which a person, other than a natural parent or legal custodian of a child, may seek to protect the well-being of a child by proving to a neutral tribunal that his or her relationship with a child is significant enough that some level of contact with the child would be in the child's best interests. The child's parents are full participants in this inquiry. The child's parents have every right and opportunity to express their concerns and objections with respect to requested visitation. Parental rights and interests are important considerations not only in determining whether visitation is in the best interests of the child, but also in determining the form that any visitation should take, and restrictions that should attend it. Only if the petitioning party can demonstrate that contact is in the best interests of the child – in light of all of the relevant circumstances, including the rights and interests of the child's parents – is contact authorized. In these respects, the statutes are well designed to advance the very interests the law traditionally presumes a parent will advance – i.e., the best interests of the child. *Parham*, 442 U.S. at 604. And they do so in a way that respects parental interests.

Each of these factors supports the conclusion that Washington's visitation statutes do not significantly interfere with or impose an undue burden on parental rights. The statutes require consideration and balancing of the legitimate interests of all concerned parties. They leave the parent-child relationship and the nuclear family intact. And they leave legal custody and its attendant rights and obligations with the child's parents or legal custodians.

The majority below premised its decision on the view that Washington's visitation statutes are tantamount to asserting that "the state may break up families and redistribute its infant population to provide each child with the 'best family'". Pet. Writ Cert. at 21a. Without question, matters touching on family relations often evoke strong emotions. But the majority's characterization is untenable in light of the terms and limited reach of the statutes at issue.

So too is the majority's cramped view of the legitimate parens patriae and police power interests of the state. As the majority below views it, the state has no role to play in advancing the welfare of children, unless the child's parents agree with the state's actions or the state's actions are necessary to prevent serious harm to the child. Pet. Writ Cert. at 15a-16a. As is discussed above, the majority's conclusion elevates parental autonomy to a near absolute level, unwarranted by constitutional principles. In doing so, it unduly circumscribes the state's legitimate interests in the welfare of children and the public welfare.

> "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection." *Prince*, 321 U.S. at 168.

See also Kovacs v. Cooper, 336 U.S. 77 (1949) (recognizing that the police power of a state reaches beyond health, morals and safety and within constitutional limitations, comprehends

the duty protect the well-being and tranquility of the community).

Washington's statutes rationally advance the welfare of children. They reflect a legislative determination that a child's welfare is served by providing a child access to persons beyond the child's nuclear family who have manifested significant concern for the child and an important bond with the child. That "individuals draw much of their emotional enrichment from close ties with others", hardly can be doubted. *Roberts*, 468 U.S. at 619. Even in the best of situations, parents are not and need not be the only source of close human ties and emotional support for their children. In less ideal situations, parents may be ill-equipped to provide such support. If the state may not make available to third parties a process to protect the welfare of children, that contemplates full participation by parents and consideration of parental interests, and that authorizes the minimal intrusion of visitation only when it is demonstrated that visitation is in the best interests of the child, then the state's duty and authority to advance the welfare of children has little meaning. Amici respectfully submit that the United States Constitution does not compel this result and does not require the state to forgo its legitimate interests in the well-being of children under the circumstances contemplated by Washington's statutes.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

CHRISTINE O. GREGOIRE
Attorney General

Maureen A. Hart
Senior Assistant Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

November 10, 1999