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.

Brief of the Domestic Violence Project Inc./Safe House (Michigan); The Pennsylvania Coalition Against Domestic Violence, Inc.; the Florida Coalition Against Domestic Violence, the Iowa Coalition Against Domestic Violence, and the Missouri Coalition Against Domestic Violence as *Amici Curiae* in Support of Respondent.

Filed December 13, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

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STATEMENT OF INTEREST OF *AMICI*

Amici are comprised of various non-profit state organizations and coalitions dedicated to addressing the legal and societal problems facing children, low-income families, and survivors of domestic violence.

Amici's collective experience has shown that the effects of reversal of the decision of the Washington Supreme Court, and the resulting potential for increased third-party interference in otherwise fit families, will have a devastating impact on children in terms of security and stability. Children will be subjected to arduous legal proceedings between parents and third persons, leaving them open to manipulation and stress.

Amici have first hand experience in addressing the problems of low-income families and understand the fundamental burdens (financial and emotional) placed on such families in third-party intervention cases.

Amici have first hand knowledge of the effects of domestic violence on children. Children are harmed whether they are themselves abused or they witness the abuse of a parent. However, many adverse consequences of observing or experiencing violence can be averted or mitigated in children if the child is protected against future maltreatment and is shown parental role modeling of non-violence. *Amici* have first hand experience with the common occurrence of the abuser's relations intervening in child-related proceedings, and the increased probability that the children will continue to be exposed to abuse.[1] See Appendix.

SUMMARY OF ARGUMENT

The crux of Petitioners' (and supporting *amici's*) argument is that the State can substitute itself as a parent in fit families and make the individualized day-to-day decisions that

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1 Consent has been granted by both parties for *amici* to file this brief. There have been no monetary contributions except by *amici*.

go the heart of being a parent. However, as discussed in this brief, the concept of *parens patriae* is not applicable unless parents have acted in a way which falls below certain minimum standards of fitness, creating a situation which causes harm to a child.

The most fundamental right that exists in our society is that fit parents can make decisions concerning their children free from intrusion by the State or any third person. All natural (including adoptive) parents, whether part of a two-parent family, divorced, or single parents, have this right. This is not a difficult or complex concept. It recognizes the central premise that parents are presumed to act in the best interests of their children. The State has a duty to ensure that all parents act within a minimal "objective" standard of fitness that ensures the physiological safety of the child. The State, however, does not have a right, in the face of the Constitutionally protected parent-child relationship, to interfere in decisions that do not bear on parental fitness. Parents should not lose the right to parent their children when their decisions do not fall below certain minimal standards of behavior.

Petitioners desire to go far beyond the State ensuring minimal "objective" levels of fitness. They seek a society where the courts second-guess the truly private and subjective decisions made by parents as part of daily life. These decisions include deciding with whom children may associate, the choice of children's religion, how to educate children, and imparting parental views on social and moral issues.

Petitioners' argument is premised on the idea that allowing third-person visitation is not a sufficient enough intrusion to violate the constitutional protections surrounding the fit parent-child relationship. Petitioners would define the rights of parent and child in terms of acceptable intrusions into that relationship. However, at issue is not the level of intrusion, but the intrusion itself. Petitioners ignore the fact that there is no inherent right for third persons to intrude into the parent-child relationship.

Third person rights to visitation and custody are legislatively created and vary widely from jurisdiction to jurisdiction. These legislative creations cannot compete against the Constitutionally protected parent-child liberty, privacy, and association interests that "derive from blood relationship, state-law sanction, and basic human right..." Smith v Organization of Foster Families (OFFER), 431 US 816, 846 (1977). To allow such a "localized" legislative approach sets up a slippery slope which would allow thousands of individualized cases from numerous jurisdictions to define a fundamental Constitutional right. On a practical level, a family moving from Vermont to California may be faced with very different statutory intrusions into the integrity of the relationship between parents and children with little or no notice of such changes.

This brief will address the serious Constitutional, societal, and policy issues raised by allowing the State, through the petitions of third persons, to intervene in parental decisions which do not affect the fundamental health or safety of children or raise issues of objective fitness to raise children.

ARGUMENT

I. THE NATURAL PARENT CHILD RELATIONSHIP IS PROTECTED BY CONSTITUTIONAL LIBERTY AND PRIVACY RIGHTS, AND THE APPLICATION OF STRICT SCRUTINY, FROM INTRUSIONS BY THIRD PERSONS.

Any third-party interference with the parent-child relationship, which includes third-person or grandparent visitation, is subject to review in light of the constitutionally protected liberty, privacy, and associational interests between natural (including adoptive) parent and child.[2] Cases involving

[2] Third persons are non-parents - persons who are not natural (i.e.

State intrusion into parental choices on child rearing are subject to a strict scrutiny analysis. This Court has noted its "historical recognition that freedom of choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Santosky v Kramer, 455 US 745, 753 (1972). "[T]he Fourteenth Amendment forbids the government to infringe fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Washington v Gluckberg, 521 US 702, 721 (1997)(citing Reno v Flores, 507 US 292, 302 (1993)). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v City of East Cleveland, 431 US 494, 503 (1977). The Constitution prohibits any intrusion into the parent-child relationship absent established substantive and procedural due process protections, specifically a requirement of a finding of unfitness in appropriate proceedings as a prerequisite to intervention. The Washington statutory provisions before this Court contain no such prerequisite.

A. A FUNDAMENTAL LIBERTY INTEREST EXISTS BETWEEN PARENT AND CHILD

This Court has held that the care, custody and control of one's children comprise a fundamental natural and constitutional right. Smith v Organization of Foster Families (OFFER), 431 US at 845 (1977); Stanley v Illinois, 405 US 645, 651 (1972); Santosky v Kramer, 455 US 745, 758 (1982). See also In re Clausen, 442 Mich 658, 502 NW2d 649 (1993); In re LaFlure, 48 Mich App 377, 385, 210 NW2d 482, lv den 380 Mich 814 (1973)(right to the custody of his or her children is an element of the "liberty" guaranteed by the Fifth and

biological) or adoptive parents. See e.g. Michigan Compiled Laws §722.22(c) "[t]hird person" means any individual other than a parent.

Fourteenth Amendments of the Constitution of the United States).

In Stanley, 405 US at 651, this Court emphasized the paramount importance of the natural parent-child relationship:

> [T]he rights to conceive and to raise one's children have been deemed essential ... basic civil rights of man. and [r]ights far more precious ... than property rights. ... It is cardinal with us that the custody, care, and nurture of the child reside first in the parents. ... The integrity of the family unit has found protection in the Due Process clause of the Fourteenth Amendment, ... the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment ... (citations omitted).

See also Santosky v Kramer, 455 US at 758 (1982)

The Fourteenth Amendment applies where there is "state action." A state court custody or visitation decision constitutes state action for purposes of the Fourteenth Amendment of the United States Constitution. See Palmore v Sidoti, 466 US 429, 432 n.1 (1983)(custody decision). The State acts through the use of its courts and judiciary. Shelly v Kraemer, 334 US 1, 14 (1948); Ex parte Virginia, 100 US 339, 346-347 (1880

In Smith v OFFER, 431 US at 845, this Court states that the parent–child relationship is recognized and protected under the Constitution:

> The individual's freedom to marry and reproduce is 'older' than the Bill of Rights ... [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in the intrinsic human rights, as they have been understood in 'this Nation's history and tradition'...

The Smith Court found that the natural parent-child liberty

interest is derived from "blood relationship ... and basic human right." Id. at 846. Lehr v Robertson, 463 US 248 (1983); Franz v United States, 707 F.2d 582, 602 (D.C. Cir. 1983)(custody and care comprise all of what we call natural parental rights). See also Olmstead v. U.S. 277 U.S. 438, 478 (1928) (Brandeis, J, dissenting), describing "the most comprehensive of rights and the right most valued by civilized men," namely, "as against the government, the right to be let alone."

Our essential rights are not created by pieces of paper; "[t]hey are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power ... In short, they are founded on the immutable maxims of reason and justice." [John Dickinson], *An address to the Committee of Correspondence in Barbados* (1766), quoted in Bernard Bailyn, The Ideological Origins of the American Revolution, at 187 (1967).

B. THE PARENT-CHILD RELATIONSHIP IS PROTECTED BY THE FIRST, NINTH, AND FOURTEENTH AMENDMENT RIGHTS OF ASSOCIATION AND PRIVACY

"Choices about ... the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' (Boddie, 401 U.S. [371] at 376, 91 S. Ct., at 785 [1970]), rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). Although not explicitly mentioned in the Constitution, it is well settled that associational rights are also guarded by the First Amendment. City of Dallas v. Stanglin, 490 U.S.19, 23-24 (1989). This Court has concluded that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role

of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Id.

It follows that the associational rights of parents and children are also protected by the First Amendment. "We have emphasized that the First Amendment protects those relationships *including family relationships*, that presuppose 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." Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) (emphasis added). "[T]he Court has held that the Constitution protects against unjustified government interference with the individual's choice to enter into and maintain certain intimate or private relationships." Id. 481 U.S. at 544.

Thus, since associational rights are fundamental rights protected by the First and Fourteenth Amendments, parents and their children cannot be compelled by the State to associate with third persons against their will, especially in the absence of any actual or threatened harm to the children. "Freedom of association therefore plainly presupposes a freedom not to associate." Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (citing Abood v. Detroit Board of Education, 431 U.S. 234-235 (1984)). See also Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292 (1986).

Certainly the associational rights of parents and their children deserve constitutional protection that is equal to the above cases, especially since fundamental liberty and privacy rights are also at issue.

The Washington statute impermissibly infringes on these rights of association and privacy. The State seeks to compel parents to allow visitation of their children with third persons who may expose children to different religious views, who have different philosophies on child rearing and discipline, or who may harbor views repugnant to the parents. Parents have the right to decline such association for any reason or for

no reason at all. Reversing the decision of the court below would constitute a substantial departure from existing precedent on associational rights and the State's parens patriae authority.

C. THERE ARE NO CONSTITUTIONAL PROTECTIONS OF THE RELATIONSHIP BETWEEN A THIRD PARTY AND A CHILD AS AGAINST NATURAL PARENT AND CHILD; THE CONSTITUIONAL PROTECTIONS EXTEND MUTUALLY ONLY TO NATURAL PARENT AND CHILD.

Third parties have no inherent rights to visitation, let alone custody of children.[3] Smith v OFFER, supra, involved third-party foster parents' attempts to have input in determining the custody of children. The Court refused to acknowledge the claimed "liberty interests" of the foster parents.

> It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference in the family-like associations into which they have freely entered, even without biological connection or state law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood

[3]"There are no inherent rights of third parties to request custody or visitation of another person's child ... [T]hird-party custody flies directly in the fact of Constitutionally protected rights" of association between parents and their children. Victor, Bassett, Robbins, Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support, 25 Family Law Quarterly, p. 19 (1991).

> relationship, state-law sanction, and basic-human right...

Id. at 846. This Court recognized that foster families develop a relationship with children, but specifically found that they have no rights as against the natural child-parent relationship and refused to permit the state-created interests of the third parties, the foster parents, to rise to the level requiring the same due process rights guaranteed to natural parents.

In re Clausen, supra, reaffirmed these Constitutional principles in a nationally debated custody case. The Michigan Supreme Court did not balance claimed interests of the third person petitioners against the natural parents, and applied constitutional protections only to the natural parent-child relationship, recognizing the "mutual due process liberty interest" between natural parent and child. 442 Mich at 687, fn. 46. The court specifically rejected an attempt by the third party custodians who "maintain[ed] that there is a protected liberty interest in their relationship with the child, which gives them standing..:."

> We reject these arguments. ... It is not enough that a person assert to be a "contestant" or "claim" a right to custody with respect to a child. If that were so, then any person could obtain standing by simply asserting a claim to custody, whether there was any legal basis for doing so or not. The Court of Appeals has correctly read our decision in Bowie as requiring the existence of some substantive right to custody of the child. We adhere to the holding of Bowie that a third party does not obtain such a substantive right by virtue of the child's having resided with the third party. Id. at 687.

The Clausen court stated that the United States Supreme Court cases relied upon by the third parties:

> ... do not establish that they have a federal

> constitutional right to seek custody of the child. ... While some of those cases place limits on the rights of natural parents, particularly unwed fathers, they involve litigation pitting one natural parent against the other, in which, almost of necessity, one natural parent must be denied rights that otherwise would have been protected ... Id. at 683-684 (discussing, among other cases, Quillon v Walcott, 434 US 246 (1978)).

The rights of natural parent and child do not diverge unless there is a finding of unfitness or unless the parent has voluntarily terminated parental rights in an appropriate proceeding with all attendant due process protections. See note 5, infra. The Michigan Supreme Court repeatedly stated in In re Clausen, supra, that:

> While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit.
>
> * * *
>
> The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness. As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child. Clausen 442 Mich at 687 (emphasis added).

The fundamental right to family integrity does not belong to the parent alone, but also to the child. The right "extends to a mother and her natural offspring." Duchesne v Sugerman, 566 F.2d 817, 825 (2nd Cir. 1977). The natural parent and child are identified as one, absent unfitness. Familial rights are relationship rights between parent and

child and are "not the individual interests of either parent or child." Bohl, Joan, "*'The Unprecedented Intrusion': A Survey and Analysis of Selected Grandparent Visitation Cases*," 49 Okla L. Rev. 29, p. 46 (Spring 1996). The rights of fit parent and child are not in competition, and are not balanced against each other.4

D. IN THE ABSENCE OF UNFITNESS, THERE IS NO COMPELLING STATE INTEREST JUSTIFYING ANY INTERFERENCE INTO THE PARENT - CHILD RELATIONSHIP.

The primary protection of the natural parent-child liberty interest is that parental custody may not be disturbed absent a showing that the natural parent is unfit. This "objective" standard recognizes both the liberty and other interests attached to the natural parent-child relationship and the societal interests in preserving that relationship. The instant case, unlike an abuse and neglect proceeding, does not involve allegations of unfitness.

As opposed to a "subjective" and wide-ranging best interests comparison between parties, the more objective fitness test focuses on the parent and is not a comparison with other proposed custodians. The best interest test has historically been used in divorce proceedings between competing parents who have the same Constitutional rights with respect to each other. For example, in both Lehr v Robertson, supra, 463 US and Quillon, supra, each a stepparent adoption case, the child was living with one natural parent so the cases involved natural

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4 There is nothing in the inherent and Constitutionally protected parent-child relationship that limits that right to two-parent families. The right is intact for all fit parents and their children. See e.g. Rust v Rust, 846 SW2d 52, 56 (Tenn. Ct. App 1993)(single-parent family unit entitled to similar measure of constitutional protection against unwarranted governmental intrusion as accorded intact two-parent family).

parent against natural parent. In such situations, a best interest standard is appropriate. See Sheppard v Sheppard, 630 P2d 1121 (1981)(discussing Quillon). Cf. Moore v City of East Cleveland (recognizing grandparent-child relationship, but not as asserted against natural parent-child relationship).5

When the case involves a third person who has no inherent rights of custody or visitation as against natural parents, parents must be shown to be unfit before the State may intrude and impose third person association. Alleging that such association may be in the child's best interest is insufficient. See Smith v OFFER; Stanley v Illinois, Santosky v Kramer, supra; Sheppard, supra.

In Parham v J.R., 442 US 584 (1979), counsel for a child sought to argue that the child had a competing liberty interest (in the child's admission to a mental health care facility) which needed to be balanced against that of the natural parents. This Court, recognizing the long-standing presumption that parents act in the best interests of their child, rejected this argument, concluding "that our precedents permit the parents to retain a substantial, if not the dominant, role in that decision, absent a finding of neglect or abuse ... " Id. at 604. (emphasis added).

5 A best interests test is comprised of a number of considerations which compare the competing parties. In Michigan, for example, these highly subjective factors include assessing the love and emotional ties between the child and the parents or parties, the capacity of the parties to give affection, to provide food, clothing, and other staples of life, the moral, physical, and mental fitness of the parties, the reasonable preference of the child, the willingness to facilitate visitation, and any other factor the court may deem relevant. See eg Mich Comp Laws Sec. 722.23. The Michigan statute does include consideration of whether there has been domestic violence, however, the paucity of case law on the topic in Michigan suggests that this factor is given little consideration. See Issue II (discussion of third party cases and domestic violence). While a fitness standard will always contain some subjectivity, it's an individualized focus on the parent while the best interests tests by their nature are subjective comparisons.

> If a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the State cannot enter." Smith v OFFER, supra, 431 US at 863, citing Prince v Commonwealth of Massachusetts, 321 US 158, 166 (1944).

See also Meyer v Nebraska, 262 US 390, 399-400 (1923)(child rearing "central part" of liberty protected by due process clause); Pierce v Society of Sisters, 268 US 510, 534-535 (1925); Santosky (finding of parental unfitness required);. Clausen, supra at 687(reiterating finding of unfitness before intrusion by third person)6

In issuing its decision in Clausen, the Michigan Supreme Court discussed a long line of custody cases where the rights of natural parents were not disturbed in the absence of findings of unfitness, sometimes despite the preferences of the child. Id. at 687, citing Burkhardt v Burkhardt, 286 Mich 526, 282 NW 231 (1938); Liebert v Derse, 309 Mich 495, 15 NW2d 720 (1944); Riemersma v Riemersma, 311 Mich 452, 18 NW2d 891 (1945); Herbstman v Shiftan, 363 Mich 64, 108 NW2d 869 (1961). Clausen, supra, at 681-682.

The Washington Supreme Court has followed an

6 Each state has an appropriate forum for the determination of parental unfitness. The appropriate forum in Michigan, for example, is a probate proceeding, where Michigan law provides procedural and substantive protections of the parent-child relationship See Ruppel v Lesner, 521 Mich 559, 565, 364 NW2d 654 (1984), that there must be a finding of parental unfitness in an "appropriate" abuse or neglect proceeding in probate court Discussing such proceedings under the juvenile code. See Clausen, supra at 687, fn. 46,"[a] determination can be made regarding whether the parents' unfitness so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship."

analysis of parental rights parallel to that of the Michigan Supreme Court in Clausen. The Washington Court likewise reviewed the decisions cited by the Petitioners in support of their claim that "best interests" of the child may warrant the exercise of the state's parens patriae power, and, as did the Michigan Supreme Court, soundly rejected this interpretation. "The Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere only 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. Wisconsin v Yoder, 406 U.S. at 234." In re Custody of Smith, 137 Wash.2d 1, 17; 969 P.2d 21, 29 (1999). This is not a question of standing. It is a question of the State's authority to intervene into a fit family

Similarly, this Court denied the third-person petitioners' Motion for Stay in Clausen, rejecting the position that their relationship with the minor child eliminated the requisite of parental unfitness prior to third-party intervention:

> Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: "[C]ourts are not free to take children from parents simply by deciding another home appears more advantageous." *In re B.G.C.*, 496 N.W. 2d 239, 241 (1992) (internal quotation marks and citation omitted).

Clausen v Deboer, 509 US 1301, 1302 (1993)(Opinion of Justice in Chambers). (emphasis added.)

This Court must again reassert the proposition that third-party interference is inappropriate absent parental unfitness. Third-party visitation cannot be imposed over the objections of otherwise fit parents.

Numerous cases from various jurisdictions have applied due process protections, including a fitness standard, to the natural parent-child relationship in cases involving third- party intrusions, including seeking visitation. See e.g. Beagle v. Beagle, 678 So.2d 1271 (S Ct Fla. 1996)(grandparent visitation statute found unconstitutional under federal and state constitutions as state may not intrude upon parents' fundamental right to raise their children except where child is threatened with harm); Peterson v Rogers, 445 SE2d 901 (S Ct NC 1994)(fit parents entitled to custody of children; best interest test unconstitutional); Brooks v Parkerson, 265 Ga 189, 454 S.E. 2d 769, cert. denied. 516 US 942 (1995)(Georgia grandparent visitation statute unconstitutional under Georgia and federal constitutions, state cannot interfere with parental rights to custody and control of children except in cases where health and safety is threatened)7; Hawk v Hawk, 855 SW2d 573 (Tenn. 1993)(holding unconstitutional Tennessee's grandparent visitation statute under state constitution); Ex Parte Woodfin v Bentley, 596 So2d 918 (S Ct. Ala 1992)(finding that a showing of parental unfitness is required in custody case between parent and third party custodian and returning child to mother);8 In the Matter of the Guardianship of Williams, 869

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7 In Brooks, at 773, the Georgia Supreme Court held the statute "falls short both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation can be ordered. ... [T]here is insufficient evidence that supports the proposition that grandparents' visitation with their grandchildren always promotes the children's health or welfare." Such a proposition is indeed based on subjective, personal views of what is "best" for a child, as opposed to a determination of what is needed to ensure that a child is safe from objective harm.

8 As stated in Woodfin, supra,

So strong is this [parental presumption] ... that it can be overcome only by a finding, supported by competent evidence, that the parent seeking custody is guilty of misconduct or neglect to a degree which renders that parent an unfit and improper person to be entrusted with the care and upbringing of the child in question. Id. At 920.

P2d 661 (S Ct Kan. 1994)(Kansas Supreme Court striking down the best interests test in challenges between a parent and third party, following a line of cases in Kansas as well as the "rule, in one form or another, in a majority of the jurisdictions in this country" that fit parents are entitled to custody without challenge by third person); Drummond v Fulton County, 237 Ga 449, 288 SE2d 839 (S Ct Ga 1976), cert denied, 432 US 905 (dismissing as unconstitutional a foster parent claim based on a "best interest standard" and finding the "best interest standard" only applicable between natural parents who have equal interest in the child-parent relationship); Sheppard v Sheppard, 630 P2d 1121 (S Ct Kan 1981) (finding unconstitutional a statute authorizing courts in divorce and custody cases to award custody to third parties absent a finding of parental unfitness).

As these cases show, a parent's (and child's) Constitutional rights are not less affected when, as in a visitation case, the interference in the family may not be permanent or irreversible. These decisions are consistent with this Court's handling of the related issues in Stanley v Illinois.

In Stanley, the Court reversed and remanded a decision where a parent was denied custody pursuant to an Illinois Dependency Statute where there was no finding of parental unfitness. There, an unwed father's access to his children was severely limited under an Illinois dependency statute due to the death of the children's mother; the father was left with only the opportunity to act as a guardian for his own children. There was no finding of parental unfitness, and the case was not a parental termination proceeding. This Court found that the dependency statute "empowers state officials to circumvent neglect proceedings." Stanley, 405 US at 649. Under the Illinois Neglect Statute, the father would have been entitled to an array of procedural protections, including a fitness determination, while under the Dependency Statute, he experienced no such protections. This Court reversed the Illinois Court and remanded the case for additional procedures consistent with the Due Process and Equal Protection Clauses. The Court further

held that the constitutional protections were not satisfied by the suggestion that the father could have regained custody through adoption or guardianship proceedings. The Court, in finding due process and equal protection violations, stated that "such restricted custody and control" of children pursuant to a guardianship statute was not full parenthood and constituted a violation of the parent-child relationship. Id. 405 US at 648-649.

Thus, if the minimally restricted "custody and control" of children in Stanley violates the Constitution, imposition of third person visitation upon objecting fit families constitutes a violation of the parent-child relationship.

This Court has held that a State may exercise its parens patriae power only when there is harm or threat of harm to the child. Wisconsin v. Yoder, 406 U.S. at 230. " It is insufficient for the state to show that the Washington statute may further an interest that the State may find important. It is not the "level" of the interference that is the issue, it is the very fact that there is any interference at all into a fit family.9

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9 The Washington dissent admits that "historically the natural parent's right to custody of a child ... [was considered to be] absolute, barring a showing of unfitness." In re Custody of Smith, supra, 137 Wash 2nd 1, 24-25, 969 P2d 21, 32-33 (dissenting opinion):

> It is now well established that when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a parens patriae right and responsibility to intervene to protect the child. Id. at pg. 12 .

The dissent, however, fails to support its desired conclusion that the State has developed other less fundamental interests that justify intrusion into a fit family. The dissent attempts to distinguish Wisconsin v. Yoder, 406 U.S. 205 (1972) , arguing that it involved claims that state action intruded on both the liberty interest in parental autonomy and First Amendment rights. To the extent that the dissent seemingly requires some type of additional "rights" to be involved before protecting the parent-child relationship, it ignores the fact that privacy, associational, and liberty interests are already subsumed within the protected right of parent and child. See Smith; supra; M.L.B. v. S.L.J, supra; Board of Directors of

There is an articulated, fundamental liberty interest between natural parents and their children. Allowing any person, even grandparents, to seek visitation over the objection of fit families, ignores that there is no Constitutional liberty, privacy, or associational interest in a relationship between a third person and a child, even when a child has resided with a third person.

II. THIRD PARTY INTERVENTION CREATES FUNDAMENTAL BURDENS ON ALL FIT PARENTS AND THEIR CHILDREN

The holding suggested by the dissent in the Washington Supreme Court case will create significant problems for children and their fit parents, particularly vulnerable families facing poverty and those seeking to permanently leave a violent home.

A. INTERFENCE INTO FIT FAMILIES CREATES INSTABILITY FOR CHILDREN

There is no question that the very fact of litigation polarizes the parties and leaves the child somewhere in the middle. No matter how hard the system may try to convey a

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Rotary International, Roberts, Abood, Chicago Teachers Union, City of Dallas v. Stanglin, supra

Additionally, Petitioners cite Boggs v. Boggs, 520 U.S. 833 (1997) for the proposition that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States," Id at 848, as a means of exempting state enactments concerning families from constitutional scrutiny. However, Boggs dealt with ERISA preemption of state community property laws and thus did not implicate fundamental parent-child liberty, privacy and associational rights, as does the present case. Therefore, it is inconceivable that such fundamental rights would be analyzed under a "state's rights" doctrine.

"best interest" message, the real message to the child is that there is no stability and certainty in the child's world and the child cannot look to his or her own fit parent for guidance. Third persons, and the court, are substituted in as additional parental figures with the potential of playing each off the other. Children are placed in the untenable position between loved parents and third persons. This subjects a child to a form of psychological warfare:

> "Grandparent visitation disputes expose children to all the long and short term stresses of divided loyalty that come with family-law conflicts between parents. Not only do children encounter loyalty conflicts at the time of the dispute, but also they are likely to face long-term loyalty conflicts if a visitation order is granted." Sykora, Theresa, "*Grandparent Visitation Statutes: Are the Best Interest of the Grandparent Being Met Before Those of the Child*," 30 Family Law Quarterly 753, 761 (Fall 1996).

Grandparent visitation sounds innocuous – to be opposed to "grandparents" automatically makes one sound emotionally cold at best. However, grandparent visitation raises a number of fundamental concerns:

> Although many grandparents might ideally like more involvement with their grandchildren, very few grandparents will ever go to court against their own children to seek visitation. While grandparent visitation sounds innocent and even desirable, the reality is that the vast majority of grandparent visitation cases involve dysfunctional and high conflict families. Giving them visitation is likely to only put more stress on the children. Rather than encouraging such claims, we should be highly suspicious of them. Zorza, J. "*PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes*," Domestic

Violence Report, Vol. 4 No. 4, p.61-62 (April/May 1999).

Parents and children should not be placed in the difficult position of litigating against each other.10.

When a court orders visitation that parents do not welcome, "ill feelings, bitterness and animosity" between the parents and grandparent may intensify. Strouse v Olsen, 397 NW2d 651, 655 (S D., 1986). A court order will not serve the best interest of a child if it forces the child into an environment consisting of hostile and conflicting authority figures. Id.

Any third party litigation exposes parents (and consequently the children in the household) to arduous, and emotionally and financially draining court proceedings. Families would be litigating the fundamentally personal, private and subjective decisions concerning association for their child.11

10 Pitting a child against a fit parent violates the mutual parent-child liberty interest. A family is not just the sum of its parts: a mother, father, sister, brother. Likewise, a family is not an arena for the competing "liberty interest" of each family member to be "happy" individually. Families are dynamic relationships that change with time and circumstance. At one moment, family members' happiness may be subordinated to the welfare of a sick child, or an unemployed father, or a mother who is finishing law school, or a brother who has yet to immigrate to this country. At another moment, a family may share their happiness in welcoming a new baby, a promotion, or a birthday.

11 There are numerous practical problems with such litigation. For example, if the "relationships" of a two-year-old child are at issue, whose interests and rights are truly at stake. The child cannot express a preference. Is a guardian ad litem then appointed for the child to make a recommendation based on the best interest factors concerning the significant relationship? Who pays for the guardian ad litem? Must a young family, who should be saving for a child's future, spend their money for their own attorney, court costs, and the costs of a guardian, as well as for various [costly] experts.

The use of a best interests test opens the door for subjective value judgments concerning the court's view of family:

> The best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is "best" for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding that it is a matter of deciding what kind of children and families, what kind of relationships – we want to have." Weaver-Catalana, Bernadette "*The Battle for Baby Jessica: A Conflict of Best Interests*," 43 Buffalo Law Review 583 (Fall 1995)(emphasis added).

Wide discretion under the best interest factors raises the spectre of cultural, class, life-style and other types of bias and prejudice.12 The very subtle ramifications of social bias often invade custody and visitation decisions. Poorer, less educated parents will always look worse in relation to older, seemingly more established and settled grandparents, who often have significantly more resources. Social bias against fit, but single, parents will also affect decision makers.13

12 There are other areas of concern raised by other amici supporting Respondent, specifically the role of gay and lesbian couples in relation to children. These concerns, however, can be addressed by state statutes authorizing gay and lesbian couples to adopt their partner's biological child where there is not another parent, or granting step-parent status in jurisdictions which have statutes providing for step-parent adoption. Likewise, guardianship provisions may also provide relief. These avenues of relief would not conflict with the central premise that fit parents are entitled to make decisions concerning their children.

13 A fit parent is a fit parent. Single and divorced parents should not be faced with different treatment that fit parents in two-parent households. See Rust, supra ; Frame v Nehls, 452 Mich 171, 550 NW2d 739 (1996)

Various factual situations can always arise which will appeal to our emotions. These emotional considerations, however, present inherent dangers and should never trump the very fundamental rights of association, privacy, and liberty between fit parent and child. Well-intentioned, yet highly subjective concerns will lead to a slippery slope of other, seemingly innocuous interventions of the parent-child relationship. The result is confusion and uncertainty, which ultimately works to the detriment of the child.14

"Courts are not free to take children from parents simply by deciding that another home offers more advantages." In the Matter of Burney, 259 NW2d 322, 324 (Iowa, 1977). Although visitation is not an award of custody, it is a removal of children from the care and control of their fit parents based on consideration of the "advantages" of a third person over a parent. Custody, care, and control comprise all of what we call "parental rights." Franz v United States, 707 F. 2d 582, 602 (D.C. Cir. 1983). Families are entitled to the reciprocity of both rights and responsibility.

> Even assuming that the parent makes a mistake in denying the child the right to see the grandparent, the fundamental right of parents to make decisions concerning their children must include the right to make wrong decisions. For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.

(paternity cases involving unmarried parents, finding that grandparents, compared to parents (including single parents), have no fundamental right to a relationship with the child, thus grandparents cannot argue equal protection).

14 See Clausen, 442 Mich at 674, stating "[c]ustody litigation is full of injustice -- let there be no doubt about that. No system of law is perfect. Consistency in the application of laws goes a long way toward curing much of the injustice.

Sykora, 30 Family Law Quarterly at 762.

B. THIRD PARTY CASES DISPROPORTIONATELY IMPACT LOW-INCOME AND SINGLE PARENT HOUSEHOLDS, WHICH ARE PREDOMINENTLY HEADED BY WOMEN

Most low-income families consist of single parent households. Women head the majority of these single parent households.15 These are the families who most often seek support outside of the nuclear family, necessitated by an emergency, illness, homelessness, domestic violence, loss of employment, as well as job demands, military service, or school. Parents should always be encouraged to do what is in the best interest of their children, including temporary placement outside the home. Parents should not be punished for taking steps that are best for their children. They should not fear that permitting their child to develop a positive relationship with a grandparent or supportive neighbor (or in the alternative, limiting a relationship) will subject them to expensive litigation as the state permits increased third-person intrusions into the family, allegedly for the "best interests" of the child.

Low-income families are disproportionately disadvantaged when litigating against third parties who have more money and resources to sustain long and expensive actions. As the system currently stands, a financially strapped

15 Symposium: Children, Divorce, and the Legal System: The Direction for Reform, 19 Columbia Journal Law and Social Problems 105, 115 (1985), citing House Select Committee on Child Abuse and Families: Current conditions and recent trends, Congress 1st Session 15 (1983). See also Weitzman, The Economics of Divorce: Social and Economic Consequences of Poverty, Alimony and Child support Awards, 28 UCLA Law Review 1181, 1241, 1249 (1981); Bruch and Wikler, Factors Figuring to Postdivorce Poverty, 63 Mich Bar Journal 472, 477 (June 1984).

party (usually a single mother) is overwhelmed by the prospect of a lawsuit. In visitation matters, there is no appointed counsel. There is nothing to equalize even partially the economic discrepancy between the lower income parent and the often higher income third party, and, contrasted to disputes between parents, there is often no ability of the court to enter child support orders or to order transfer of other items of economic value in order to equalize the two competing households financially. Often the simple filing of a lawsuit will result in a stipulated order for visitation because the lower income parent cannot pay an attorney. The parent without resources possesses no ability to even challenge the alleged "sufficient relationship" between the child and the third person (assuming there is such a statutory "standing" prerequisite), let alone continue into a second phase of litigation to defend their decision to sever the relationship.16

If forced to litigate to preserve parental autonomy, families will be divided into two classes, those who can afford to defend their parenting decisions, and those who will not be able to afford to do so.17

16 The Brief submitted on behalf of the American Academy of Matrimonial Lawyers in support of Petitioners agrees that the Washington State statute is unconstitutional and also points to the financial and emotional costs associated with family disputes. However, they propose a bifurcated, and potentially, more expensive and complex system to resolve the appropriateness of third party visitation. Their proposal would require a court to first determine whether a third person has a "sufficient" relationship to the child and that the child's right to retain that relationship overrides parental discretion. (There is no age cut-off for determining the child's interest or wishes). The Academy states that once such "standing" is created, there is a legitimate state interest in forcing parents to defend their decision concerning terminating or even limiting association with the third person. There is nothing which defines what constitutes a "sufficient" relationship. Presumably a court would have great discretion in determining a "sufficient" relationship. This bifurcated approach raises numerous practical problems and subjects families to extended litigation essentially involving best interests comparisons.

17 All too often the decision that a low-income family cannot afford to defend is the decision to deny contact with a controlling or abusive third party.

C. THIRD PARTY INTRUSIONS CREATE FUNDAMENTAL BURDENS ON PARENTS AND CHILDREN SURVIVING DOMESTIC VIOLENCE

Most significantly, the potential for increased state-authorized third-person intrusions into family decisions has serious implications for those parents leaving an abusive spouse. As of 1992, the United States Surgeon General estimated that from 1.8 to 4 million women were victimized each year by domestic violence.18 Research suggests that men who abuse their spouses are also at significantly elevated risk of abusing their children:

> Children from homes where there is parent-on-parent violence are more likely to be physically abused themselves by the battering parent. A random survey of the U.S. population in the early 1980's revealed that 50% of men who battered a partner also severely abused a child more than twice a year, whereas only 7% of non-battering men severely abused a child at the same frequency. One report concludes that children who live in a home where violence occurs between adults are physically abused or seriously neglected at a rate of 1500% greater than that of the general population." (footnotes omitted), Field, Julie Kunce, "*But He Never Hit the Kids": Domestic Violence as Family Abuse,*" Michigan Bar Journal, September 1994, Vol. 73, No. 9, p. 922.

Battered women face daunting hurdles as they seek to

18 Novell, A., From the Surgeon General, US Public Health Service, 23 J.A.M.A., 267 at 3132 (1992).

establish a home free of violence for themselves and their children. The same financial hardships that keep many survivors of domestic violence from leaving the assailant continue to plague them once they are separated. A custodial mother and her children face many changes as they establish a safe, violence-free household, perhaps starting new schools, moving away from friends, and changing day-care providers. "The greater the number of and the more frequent the changes, the greater is the likelihood of emotional and physical illness." Schecter and Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, for the conference, Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, Racine Wisconsin, June, 1994, page 13.

The risk of domestic violence is frequently greater after separation or breakup than during the co-habitation or the intimate relationship.19 The custody fight itself may be a form of perpetuation of the abuse. "Often, abusers are more interested in trying to continue control and harassment over an ex-partner than in actually obtaining custody of the minor children."20 "When domestic violence is not taken seriously, and because women are held to a much higher standard than men, abusers wind up with custody."21 "All of the gender bias studies have shown that women are already badly disadvantaged in divorce and custody litigation because they

19 Olvera, M., Custody and Visitation in the Model Code on Domestic and Family Violence, UNPUBLISHED PAPER, p. 14 (1994)(citing Mahoney, M.R., Legal Images of Battered Women: Redefining the Issue of Separation, MICH. L. REV, 90(1) (1991).

20 Saunders, Daniel, "Child Custody Decisions in Families Experiencing Woman Abuse, 39 Social Work 51 (January 1994); Chesler, P. "Mothers on Trial" The Battle for Children and Custody," Seattle, Seal Press (1987); Walker, L.E. and Edwall, G.E., "Domestic Violence and Determination of Visitation and Custody in Divorce" in Divorce," in D.J. Sonkin (ed.), Domestic Violence on Trial" Psychological and Legal Dimensions of Family Violence, New York, Springer (1987).

21 J. Zorza, "Using the Law to Protect Battered Women and Their Children," Clearinghouse Review, Vol. 27 n. 12 at 1440.

are held to a higher standard, seen as less credible, and have fewer financial resources necessary for effective representation. "Zorza, J. *"PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes,"* Domestic Violence Report, Vol. 4 No. 4 (April/May 1999), citing Karen Winner, Divorced from Justice: The Abuse of Women and Children by Divorce Lawyers and Judges (NY, Regan Books, 1996). In visitation matters, "reasonable visitation is never appropriate for batterers because they are not reasonable and will use the visitation as a license to abuse the visitation and continue to control and abuse their former partners." Field, Id. At 924.

Just as an abusive spouse will continue to litigate custody and visitation matters in order to control the domestic violence survivor, he may use his family to engage in similar tactics. Often, in cases involving domestic abuse, the parents of the abuser will file for visitation, and even custody. Zorza, supra . Although courts may limit contact between the abuser and the custodial mother and children, courts are less aware or savvy when it comes to relatives of the abuser. See Bohl, *"The Unprecedented Intrusion: Survey and Analysis of Selected Grandparent Visitation Cases,"* 49 Okla L. Rev. 29 (1996). Courts may feel that children should have contact with the extended paternal family simply because contact with the abuser is limited. This, however, ignores the pervasiveness of abuse. Children will have increased chances of exposure to the abuser without adequate supervision. The tensions between the parties increase, the opportunity for an abuser to control increases, and the children are left in the middle:

> The Model Code [the Family Violence Model State Code developed by the National Council of Juvenile and Family Court Judges] instructs that the court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic of family violence, and recommends that supervised visitation be used as an option, with the supervision being done at a visitation center where staff understand

> domestic violence, child abuse and child development. Family members, including parents of the abusive spouse, are generally not good choices as supervisors, because they may also have been abusive, may not recognize an abuser's potential to seriously hurt the mother or child, or are in fact afraid of their abusive child. Field, Id. at 924.

This philosophy goes hand in hand with the doctrine of fitness, which requires that the State must ensure that all children are free from harm. The courts' primary duty is to ensure that children are in fit homes, and to ensure the basics of food and shelter. Additionally, implicit under the doctrine of parens patriae is the state's insurance of basic levels of education, truancy standards, and work restrictions concerning children. The use of the best interest standard, however, in third-person visitation situations, erodes the fundamental focus on fitness.

Even if third persons, including grandparents or other family members do not have a malicious intent in seeking visitation, they simply may not understand or respect the need of the survivor to reestablish her family without outside interference. Survivors of domestic violence must often leave the jurisdiction or reestablish a safe life for their children away from the abuse. See Field, p. 923. "Maintaining social support for the battered woman and her children through such major life changes is, therefore, critical. The need for supporting the remaining family unit – mother and children – in the aftermath of violence is consistent with current thinking in the area of family preservation." See Schecter and Edelson, supra, p.13.

> "In addition, based on my representation of over 200 battered women and my experience assisting in family law and domestic violence cases throughout the country as the senior attorney for the former National Center on Women and Family Law, maternal grandparents are far less likely to seek visitation than are paternal ones.

> Paternal grandparents often go to court to back up their sons who are abusive of their partners or the grandchildren. In some of the worst cases, the paternal grandparents have acted to circumvent the courts' denial of visitation to highly dangerous sons. In other cases, both parents, knowing of the abusiveness of one or both grandparents and anxious to protect their children, have opposed the visitation. Because many courts still view grandparent visitation favorably and because child abuse (and especially sexual abuse) claims are very difficult to prove ... and mental health professionals are often afraid or unwilling to report them (American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family 12 (Washington, DC 1996)), many parents' efforts to protect their children from abusive grandparents are unsuccessful." Zorza, J. "*PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes*," Domestic Violence Report, Vol. 4 No. 4 , p. 61-62 (April/May 1999).

Battered women and their children will be faced with increasing burdens as the potential for competing adults increases, with competing petitions from maternal and paternal grandparents, divorced grandparents, aunts, uncles, or other interested adults. Such litigation could continue throughout a child's minority. See Zorza, Id. at 62(discussion of effect on battered women of increased number of litigants and loss of confidentiality).

Best interests tests allow for insertion of the subjective value judgments of the trier of fact by emphasizing judicial discretion. The tests, by definition, do not limit consideration to more objective fitness standards. As such, it flies in the face of the Constitutional protections of the natural parent-child relationship discussed above. The effects of third-person intervention are even more burdensome for low-income women

and survivors of domestic violence who are seldom in a position to defend their family autonomy in protracted litigation.

CONCLUSION

The fundamental and compelling State interest is to ensure that children are in fit environments, including freedom from abuse and neglect, and receiving adequate food, shelter, clothing, and access to education. The welfare of children would be dramatically improved if the state were to satisfy this duty. However, the State has far to go in guaranteeing this minimal standard. Third parties have avenues of relief for addressing fitness issues through state juvenile and probate laws, including abuse and neglect proceedings, guardianships and other mechanisms. The State has no compelling interest, however, in realigning families based on subjective and individualized judgments about family make-up.

Allowing standing for grandparents as against the rights of fit parents and children would create widely divergent laws from jurisdiction to jurisdiction. The State cannot legislate the most private and fundamental of relationships – that between fit parents and children.

The decision of the Washington Supreme Court should stand.

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