No. 99-138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

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 *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Washington is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the right to family autonomy, both as direct counsel and as *amicus curiae*. This case raises those issues again. Its proper resolution is therefore a matter of direct concern to the ACLU and its members.

STATEMENT OF THE CASE

In December 1993, petitioners Jenifer and Gary Troxel filed a petition in Washington state court seeking a decree ordering that they be allowed visitation with Isabelle and Natalie Troxel, over the objections of the girls' mother, respondent Tommie Granville.[2] Isabelle and Natalie were one and three years old, respectively, at the time the petition was filed. Brief of Pet. at 1-2. The Troxels' son, Brad, was the father of the girls. He committed suicide in May 1993, six months before the Troxels filed their visitation petition.

Brad Troxel and Tommie Granville were never married, although they lived together intermittently. After their sepa-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Unless otherwise indicated, facts cited in this brief are taken from the opinion of the Supreme Court of Washington.

ration, Brad lived with his parents, and Isabelle and Natalie visited him in the Troxels' home on occasion. Although Isabelle and Natalie continued to visit the Troxels from time to time for a few months after Brad's death, a dispute soon developed between the Troxels and the children's mother, and she decided to limit visitation.

The Troxels then sought court-ordered visitation under RCW 26.10.160(3) and former RCW 26.09.240.[3] RCW 26.10.160(3) provides:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Former RCW 26.09.240 provides:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

After a hearing on the Troxels' petition, the trial court entered a visitation decree ordering visitation one weekend

[3] Subsequent to the filing of the Troxels' initial visitation petition, RCW 26.09.240 was amended to require that any nonparent seeking visitation show that he or she has a significant relationship with the child and to limit petitions to cases where the child's parent or parents has commenced an action for divorce, legal separation, or modification of a parenting plan. Washington Laws of 1996, ch.177, §1(1).

per month, one week during the summer, and four hours on each of the Troxels' birthdays. In addition, the court ordered Ms. Granville not to speak with her children about their father's suicide-death until she and the Troxels had agreed on a joint explanation. Brief of Pet. at 5. Finally, the court ordered Tommie Granville to notify the Troxels of the girls' school and extracurricular activities. Brief in Opp. to *Cert.* at 2.

Ms. Granville appealed, and while the appeal was pending she married Kelly Wynn. Mr. Wynn adopted Natalie and Isabelle in February 1996.[4]

The Washington Court of Appeals subsequently reversed the visitation order, holding that nonparents lack standing to seek visitation under Washington's statutes unless a custody action is pending. *In re Visitation of Troxel*, 940 P.2d 698 (Wash.App. 1997). The Troxels sought and were granted review by the Supreme Court of Washington. The Washington Supreme Court later held that the Troxels had standing to seek visitation, but that both RCW 26.10.160(3) and former RCW 26.09.240 violated Tommie Granville's right under the United States Constitution to decide how to rear her children. *In re Custody of Smith v. Stillwell*, 969 P.2d 21 (Wash.1998).[5]

[4] In light of the children's adoption by the mother's husband, there may be some question under Washington law as to whether the Troxels legally qualify as the children's grandparents. However, as discussed in Point IC below, this Court has never dwelt on such legal technicalities. Because the record suggests that the Troxels have maintained a grandparent relationship with the children, whether they fit the legal definition of grandparent is irrelevant to the issues before this Court.

[5] The Troxels' case was combined with two others, and styled by the Washington Supreme Court as *In re Custody of Smith v. Stillwell*, 969 P.2d 21 (Wash.1998).

The Troxels filed a petition for *certiorari* with this Court on July 5, 1999. The petition was granted on August 10, 1999.

SUMMARY OF ARGUMENT

Few ideas are more entrenched in our constitutional jurisprudence than the notion that parents, rather than the state, are presumptively entitled to make decisions about the best interests of their children. Plato, for one, thought otherwise. But, as this Court noted more than seven decades ago, Plato's "ideas touching the relations between individual and state were wholly different than those upon which our institutions rest." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Explaining that difference, this Court has repeatedly held: "It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The Washington state statutes challenged in this case are irreconcilable with that constitutional vision. They permit the state to substitute its own judgment regarding a child's best interests for the contrary judgment of the child's own parents, and to order visitation over the parents' objection with any third party that may petition the court. The intrusion on family autonomy created by this statutory scheme is a significant one. The decision about what role other adults will play in a child's life is a critical one for most parents, especially when the child is too young to make that decision independently. Nothing in our constitutional tradition permits the state to override those decisions merely because a judge disagrees.

To the contrary, this Court has recognized a broad right to family autonomy in numerous cases over the years.

Moreover, the Court's understanding of the parent-child relationship has never been limited to biology. Thus, the Court has distinguished between the constitutional rights of an unwed father who had no ongoing relationship with his biological children, *Lehr v. Robertson*, 463 U.S. 248 (1983), and the constitutional rights of an unwed father who helped raise his children for eighteen years. *Stanley v. Illinois*, 405 U.S. 645 (1972). The Court has also acknowledged that others can and do perform a parenting role in some families. In *Prince*, it was an aunt; in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), it was a grandmother; and in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), it was foster parents.

Amici recognize, of course, that the rights of parents are not absolute. We also recognize that the "best interest of the child" standard utilized in the Washington state statutes is a familiar one in family law. However, this is not a case in which the state has been forced to act as a referee between separating parents. Under those circumstances, we agree, the "best interest of the child" standard is an appropriate yardstick for resolving the competing parental claims. Nor is this a case where parental rights have been terminated and the state is attempting to develop an alternative parenting plan. And this is not a case where the state has invoked its police power or *parens patriae* power to protect children from serious harm.

Here, by contrast, there is no disagreement among parents nor any claim that respondent is unfit. The decisions she has made about how to raise her children may be wise or unwise. But, at least absent some showing of substantial harm to her children, respondent has a constitutional right to raise them on her own without state interference.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT LIMITS THE POWER OF STATES TO INTERFERE IN A PARENT-CHILD RELATIONSHIP AND INCLUDES A FUNDAMENTAL RIGHT TO FAMILY AUTONOMY IN CHILD-REARING DECISIONS

It is well established that the Due Process Clause protects family relationships from undue state interference. Moreover, there is a fundamental right to autonomy in parent-child relationships, which encompasses a parent's right to make decisions about child-rearing. Only when the state is pursuing a compelling interest may it replace the parent and take on responsibility for how a child will be raised. This Court has wisely recognized that the parent-child relationship is determined by the realities of family life and familial relationships, rather than by isolated factors such as biology, and has invoked the protections of the Due Process Clause with this principle in mind.

A. The Due Process Clause Of The Fourteenth Amendment Protects The Parent-Child Relationship

One need look no further than the constitutional reference point of extant tradition,[6] as articulated in this Court's

[6] There has been much recent debate about the role of history and tradition in determining whether an asserted right can be located within the protections of the Due Process Clause. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997). Because the right of family autonomy is so plainly rooted in this nation's history and tradition, there is no need to revisit that debate here. Nevertheless, it is worth noting that a full historical analysis must take into account "what history teaches are the (continued...)

cases over the past seventy-five years, to determine that the parent-child relationship is constitutionally protected and that the state can interfere in that relationship only in the service of a "powerful countervailing interest." *Stanley v. Illinois*, 405 U.S. at 651. In *Stanley*, this Court addressed the most drastic form of state interference -- termination of the parent-child relationship. Under Illinois law, custody of children born to an unwed mother automatically reverted to the state upon the mother's death, thus terminating the relationship between father and children regardless of father's fitness as a parent. Characterizing the constitutional interest in the parent-child relationship as "essential" and one of the "basic civil rights of man," *id.* at 651, this Court held that the Due Process Clause required that Stanley be proven unfit before his relationship with his children could be terminated by the state.

This Court used the same analysis ten years later in *Santosky v. Kramer*, 455 U.S. 745 (1982), a constitutional challenge to a New York statute that allowed termination of parental rights upon a showing, by a fair preponderance of the evidence, that a child had been "permanently neglected." The question in *Santosky* was whether a "preponderance of the evidence" standard was sufficient in light of the weighty

[6] (...continued)
traditions from which [society] developed as well as the traditions from which it broke." *Moore v. City of East Cleveland*, 431 U.S. at 502 (plurality opinion), quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). In that sense, as Justice Harlan pointed out, "tradition is a living thing." *Id.* at 542. Moreover, because "tradition is a living thing," even historically recognized rights may take different forms over time. Thus, in conducting an historical analysis under the Due Process Clause, it is important to "characterize relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989)(O'Connor & Kennedy, JJ., concurring).

constitutional interests at stake. Noting "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," *id.* at 753, the Court held that the Due Process Clause requires that the state support its allegations by at least clear and convincing evidence. *Id.* at 769. Thus, the New York statutory scheme was ruled unconstitutional.

B. The Constitutionally Protected Parent-Child Relationship Encompasses Family Autonomy In Child-Rearing Decisions

While the Due Process Clause places clear limits on the state's power to end a parent-child relationship, constitutional protections do not stop there. In addition, this Court has recognized the central importance of family autonomy and the strong constitutional interest of a parent in the "companionship, care, custody and management of his or her children."[7] *Stanley*, 405 U.S. at 651. Several of this Court's decisions specifically address family autonomy in child-rearing decisions.

In *Meyer v. Nebraska*, 262 U.S. 390, this Court considered the constitutionality of a Nebraska statute that prohibited the teaching of a foreign language to any student who had not graduated from the eighth grade. *Meyer* recognized the state's general interest in improving "the quality of its citizens" and the state's specific interest in training students in English. *Id.* at 401-02. Nonetheless, those state interests were outweighed by the fundamental right of parents "to control the education of their children." *Id.* Thus, the Nebraska statute was held to violate the Due Process Clause.

This Court reached a similar conclusion two years later in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a case involving a constitutional challenge to an Oregon statute requiring parents to send their children to public schools. This Court had no difficulty holding that the statute violated the rights of Oregon parents under the Due Process Clause:

> Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534-35 (citation omitted).

Almost a half century later, this Court reaffirmed the constitutional protections provided to parental decisions about child-rearing in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, parents who were Old Order Amish challenged the constitutionality of their criminal convictions under a Wisconsin statute requiring children to attend high school. The Yoders refused to send their children to high school because it conflicted with the Amish religion and way of life. This Court once again recognized that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232. This constitutional interest, together with the free exercise interests of Amish parents, were held

[7] This Court has not yet had the opportunity to address the child's constitutional interest in maintaining the parent-child relationship. *Michael H. v. Gerald D.*, 491 U.S. at 130 ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining a filial relationship"). Nonetheless, *amici* believe it is of equal constitutional magnitude to that of the parent.

sufficient to override the state's strong interest in universal education.[8]

To be sure, a parent's right to raise her child as she sees fit is not absolute and may be overcome in some circumstances even when a parent is not unfit. For example, this Court has recognized that there are circumstances in which a child's own constitutional right to make important decisions for herself must take precedence over parental control. *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979)(state must provide opportunity for minor to seek court order allowing her to obtain abortion without parental involvement).

Moreover, under some circumstances the state may override a parent's child-rearing decision even in the absence of a countervailing constitutional interest. *Prince v. Massachusetts*, 321 U.S. 158, provides one example. In *Prince*, this Court was asked to determine whether the Due Process Clause prohibited Massachusetts from enforcing its child labor laws against Sarah Prince, a Jehovah's Witness who wished her niece and ward to accompany her and help her sell religious publications. While recognizing that there is a "private realm of family life which the state cannot enter," *id.* at 166, this Court nonetheless held that Massachusetts did not violate Mrs. Prince's constitutional rights by prosecuting her for violating the state's child labor laws.

Prince cannot be read as a charter, however, authorizing wholesale state intervention in a parent's judgments about child-rearing. Instead, *Prince* is best understood as an example of this Court's deference to a state's use of its police

[8] While the free exercise interests of the Amish parents were an important element of the *Yoder* decision, this Court has since explained that it would not have ruled as it did were it not for the Due Process Clause's protection of parental child-rearing decisions. *See Employment Development Division v. Smith*, 494 U.S. 872, 881 (1990).

power to protect children as a class from the dangerous conditions associated with child labor, a rampant social problem in many parts of the country in the first part of this century. *Id.* at 168. Indeed, this Court has limited *Prince* to a "narrow scope," recognizing that the decision was influenced by "the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor . . ." *Yoder*, 406 U.S. at 229-30.

C. In Recognizing The Constitutional Protection Afforded To Parent-Child Relationships, This Court Has Focused On The Realities Of Family Life Rather Than Narrow Definitions Of Who Is A Parent

It is not fatal to an individual's quest for a court order preserving a relationship with a child that the individual seeking the court order may not, in fact, be a biological parent. While this Court has consistently invoked the Due Process Clause to protect parent-child relationships, it has never defined those relationships by biology alone. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. at 256. An approach to family that "disdains present realities in deference to past formalities, [] needlessly risks running roughshod over the important interests of both parent and child." *Stanley*, 405 U.S. at 657.

The constitutional protections accorded to the parent-child relationship and the right to family autonomy in child-rearing have been recognized whenever a parenting *relationship* in fact exists, regardless of legal technicalities.[9] In

[9] This does not change the position of the Troxels with regard to visita- (continued...)

Stanley, this relationship-based approach was applied on behalf of a father, when the Court struck down an Illinois statute that clung to historical formalities by providing that an unwed father was never a "parent" entitled to a fitness hearing before termination of parental rights. In rejecting the irrebuttable presumption that Illinois law embraced, this Court emphasized that the father in *Stanley* had lived with and raised his children for eighteen years, despite the fact that he never married the children's mother. Similarly, in *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court struck down a Louisiana statute denying natural but "illegitimate" children the right to initiate a wrongful death action because, as the Court later explained in *Stanley*, 405 U.S. at 652, "familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."

This Court also adopted a functional approach in *Prince v. Massachusetts*, 321 U.S. 158, when it treated the relationship of Sarah Prince and her niece as that of parent and child. The Court allowed Mrs. Prince to invoke "the parent's claim to authority in her own household and in the rearing of her children," *id.* at 165, because she exhibited "motherlike" behavior in rearing the child and was the

[9] (...continued)
tion, since they have never claimed that they maintained a parental relationship with respondent's children. However, because the Court's disposition of the Troxels' claims will influence the subsequent development of case law in the family arena, *amici* believe it is important to emphasize this Court's nuanced analysis of who may be afforded the protections inherent in the parent-child relationship. Ultimately, these matters will be settled largely by state courts. *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). This Court's flexible approach, combined with vigilant protection of the family as required by the Due Process Clause, allows the states maximum latitude as they continue to experiment to identify the best approaches to rights and responsibilities in modern family life.

child's custodian. *Id.* at 162. Likewise, in considering what constitutional interest foster parents may have in maintaining a relationship with children in their care, this Court stressed that it is the *actual relationship* between adult and child that determines the family unit:

> Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child may exist even in the absence of blood relationship.

Smith v. Organization Of Foster Families, 431 U.S. at 844 (citation omitted).

Finally, in *Moore v. City of East Cleveland*, 431 U.S. 494, a plurality of this Court invoked the Due Process Clause to protect the relationship between a grandmother and the two grandsons she was raising in her home. East Cleveland's housing ordinance limited occupancy to single family dwellings and defined "family" in such a way that Mrs. Moore's was excluded. The fact that Mrs. Moore had taken on "major responsibility for the rearing of the children" and that the family occupied the same household was crucial to the Court's determination that the housing ordinance violated the Moore family's rights under the Due Process Clause.[10]

[10] By contrast, this Court has rejected the claim that a biological connection, without anything more, is sufficient to establish a constitutionally (continued...)

This Court's relationship-based approach is supported by a strong state law tradition of focusing on the realities of family life when sorting through the rights and responsibilities of parents and children. State courts have repeatedly recognized the right of an individual who has maintained a parental relationship with a child to seek custody and/or visitation, regardless of legal relationship or biological connection to the child. Some of these cases have relied on an "equitable parent doctrine," under which a biological parent is estopped from denying the parenthood of a nonbiological parent if they have both acted as the child's parents.[11] Other state cases have granted visitation, absent a biological

[10] (...continued)
protected parent-child relationship. For example, *Lehr v. Robertson*, 463 U.S. 248, held that an unwed biological father who never took any part in the rearing of his child and who failed to register as the child's putative father was not constitutionally entitled to notice and hearing prior to the child's adoption by the mother's husband. And, in *Michael H. v. Gerald D.*, 491 U.S. 110, this Court denied parental status to a man who impregnated a woman married to another man, upholding the constitutionality of a California statute that presumed the child to be of the marriage. Justice Scalia contrasted the unmarried father in *Stanley*, who lived with and supported his children for eighteen years, with Michael H., whose principal claim to parenthood was biological. *Id.* at 124.

[11] *See, e.g., In re Adoption of Young*, 364 A.2d 1307 (Pa.1976)(mother estopped from terminating former husband's parental rights, based on fact he was not biological father, because husband had acted as father and been treated as father by mother); *In re Gallagher*, 539 N.W.2d 479 (Iowa 1995)(under equitable parent doctrine, former husband allowed to bring claim for custody of two-year-old child with whom he had developed parent-child relationship during marriage); *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill.App.1996)(man who was the only father child had ever known awarded visitation rights, even though he was not biological parent and visitation was not specifically authorized by statute); *Quinn v. Mouw-Quinn*, 552 N.W.2d 843 (S.D.1996)(court may order visitation for mother's ex-husband, even though he was not biological parent, because he was only father child knew during her seven years of life).

tie and over the objections of the biological parent, where a parent-child relationship developed, based on the *in loco parentis* doctrine.[12] These custody and visitation cases were presaged by an older body of state case law recognizing parent-child relationships, and assigning rights and responsibilities accordingly, in a broad range of circumstances.[13]

[12] *See, e.g., Spells v. Spells*, 378 A.2d 879 (Pa.Super.Ct.1977)(visitation granted to stepparent who functioned as parent to child); *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982)(same); *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wisc.), *cert. denied*, 516 U.S. 975 (1995)(biological mother's former lesbian partner could obtain visitation by proving she had parental relationship with child and visitation in child's best interest); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa.Super.Ct.1996)(same). *See also In the Matter of the Custody of C.C.R.S.*, 892 P.2d 246 (Colo.), *cert. denied*, 516 U.S. 837 (1995)(custody will be awarded to "psychological parent" over natural parent if in the child's best interest).

[13] As far back as the mid-nineteenth century, the Tennessee Supreme Court held that a stepfather had standing to sue for damages for an injury to his stepdaughter, despite the absence of any legally defined parent-child relationship. *Maguinay v. Saudek*, 37 Tenn. 146 (Tenn. 1857)(because stepfather who assumed all the responsibilities of a parent was considered *in loco parentis* to the child and could be held liable for child support, corresponding right to service and control of child should be same). Similarly, in *Eaves v. Fears*, 64 S.E. 269 (Ga.1909), the Georgia Supreme Court held that grandparents who stood *in loco parentis* to a child were entitled to the proceeds from the child's labor and concomitantly responsible for the child's care, maintenance and support. *See also Sparks v. Hinkley*, 5 P.2d 570 (Utah 1931)(because aunt stood *in loco parentis* to nephew, relationship was akin to that of parent and child and nephew was not entitled to recoup the contributions he made to aunt's support upon her death); *London Guarantee & Accident Co. v. Smith*, 64 N.W.2d 781 (Minn.1954)(granting parental immunity in negligence actions by children against stepparents because of duties and responsibilities they assume with respect to their children); *Hush v. Devilbiss Co.*, 259 N.W.2d 170 (Mich.App.1977)(applying *London Guarantee* to extend parental immunity to grandmother functioning as parent); *Vol-*
(continued...)

In sum, under a long line of state cases, the lack of a biological or legal tie eviscerates neither the rights nor the responsibilities that adhere in a parent-child relationship.[14] Consistent with that understanding, this Court's emphasis on protection for parent-child relationships has not operated to deny the realities of family life, but instead has encompassed them.

II. WASHINGTON'S NONPARENT VISITATION STATUTES ARE AN UNCONSTITUTIONAL INTERFERENCE BY THE STATE IN PARENT-CHILD RELATIONSHIPS IN VIOLATION OF THE DUE PROCESS CLAUSE

The Troxels sought and obtained visitation with Tommie Granville's children, over her objection, pursuant to RCW 26.10.160(3) and former RCW 26.09.240, both of which address the visitation rights of nonparents. Both statutes allow *any person* to seek and obtain a court order for visitation *at any time* upon a showing that visitation "may serve" the child's best interest.

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[13] (...continued)
unteer State Life Ins. Co. v. Pioneer Bank, 327 S.W.2d 59 (Tenn.App. 1959)(potential adoptive parents who raised child since shortly after birth stood *in loco parentis* to child and were therefore entitled to benefit from rule that parent has insurable interest in child's life).

[14] *See, e.g., Jensen v. Jensen*, 80 A.2d 244 (N.J.Super.1951)(man could not escape child support payments by proving he was not biological father where he held out children as his own); *People v. Sorenson*, 437 P.2d 495 (Cal.1968)(upholding defendant's conviction for failure to provide support for child to former wife, even though he was not biological parent, because he represented himself as father). *See also Wener v. Wener*, 35 A.D.2d 50 (N.Y.App.1970); *Tyler v. Tyler*, 671 S.W.2d 492 (Tenn.App.1984); *K.B. v. N.B.*, 811 S.W.2d 634 (Tex.App.1991), *cert. denied*, 504 U.S. 918 (1992).

A. The Challenged Statutes Constitute A Substantial Interference In The Parent-Child Relationship

At the outset, it is worth noting that when a court intervenes in a parent-child relationship and orders that a child have visitation with a third party, over the parent's objection, a substantial burden has been placed on family autonomy in child-rearing. The right to family autonomy in child-rearing necessarily encompasses a parent's judgments about such everyday but nonetheless critical questions as: with whom the child will maintain an ongoing and intimate family relationship; with whom the child will spend substantial amounts of time; and to whom the child will look for healthy adult role models. It is precisely these types of decisions, central to the upbringing of children, that are generally reserved to parents in the absence of an overriding state interest. *See Pierce*, 268 U.S. 510; *Yoder*, 406 U.S. 205. To transfer such decisions to a state court, whenever any third party files a visitation petition, cannot persuasively be characterized as a minor or inconsequential burden on the parent-child relationship.

One need look no further than the visitation order entered on behalf of the Troxels to aptly illustrate the point. The trial court entered a decree ordering visitation with the Troxels one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. *In Custody of Smith v. Stillwell*, 969 P.2d 21, 23 (Wash. 1998). In addition, the trial court prohibited Ms. Granville, the mother, from talking to her children about the suicide-death of their father until she and the Troxels were able to arrive at a joint explanation. Brief of Pet. at 5. Finally, the trial court ordered Ms. Granville to notify the Troxels of the children's school and extracurricular activities. Brief In Opp. To Cert. at 2.

Thus, the trial court in this case vetoed a mother's decision about what type of relationship her children should have with third parties, substituted itself for the mother in deciding who would be included as the children's adult role models and, at the behest of third parties, ordered the mother not to help her children understand the suicide-death of their father. Clearly, the trial court, acting pursuant to the challenged statutes, substantially interfered with the parent-child relationship enjoyed by Ms. Granville and her children. Indeed, this Court has found a violation of the Due Process Clause based on a far less significant burden on parental decisionmaking. *Meyer*, 262 U.S. at 403 (statute that prohibited teaching foreign languages to students who had not completed eighth grade violates parents' constitutional right to control the education of their children).[15]

B. The "Best Interest Of The Child" Standard Is Too Low A Threshold To Permit Interference With A Parent-Child Relationship On Behalf Of A Third Party

The "best interest of the child" standard utilized in the challenged statutes is, by its nature, imprecise and broadly defined. Under Washington law, the breadth of factors to

[15] It is true that government can influence a child's role models, most notably through the provision of public education. But the state's especially strong interest in the education of children for citizenship is well-established. *Meyer*, 262 U.S. at 399; *Yoder*, 406 U.S. at 214. The state has no comparable interest in interfering with a fit parent's decisions about what adults will have a familial relationship with her child, and what forms those relationships will take. *Stanley*, 405 U.S. at 657-58 ("The State's interest in caring for Stanley's children is *de minimus* if Stanley is shown to be a fit parent"). Indeed, even in the context of education, a parent can choose alternative role models by exercising her constitutional right to remove her child from public education in favor of a private school. *Pierce*, 268 U.S. 510.

be considered in applying the test are indeterminate and "not capable of specification, each case being largely dependent upon its own facts and circumstances." *In re Welfare of Aschauer*, 611 P.2d 1245 (Wash.1980). The broad discretion which such a test invests in the court unavoidably places the state, rather than the parent, in the position of deciding how the child is best reared. Granting such powers to a court, at the expense of a fit parent, conflicts with the constitutional protections afforded to parental decisionmaking:

> 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. "You may do whatever you choose, so long as it is what I would choose also" does not constitute a delegation of authority.

Kathleen Bean, "Grandparent Visitation: Can The Parent Refuse?", 24 U. Louisville J.Fam.L. 393, 441 (1985-86).

There is no precedent in this Court's decisions for allowing a state to interfere, on behalf of a third party, in a fit parent's decisionmaking about child-rearing on a "best interest of the child" showing. Indeed, when a fit parent is raising a child, the state's interest in that child's care is generally "*de minimus*." *Stanley*, 405 U.S. at 657-58. Here, the contrast with decisions of this Court that have *allowed* state interference with parental child-rearing is instructive. For example, the state generally may require school attendance over a parent's objection. *Meyer*, 262 U.S. at 399; *Yoder*, 406 U.S. at 214. Likewise, the state may require both children as well as adults to be vaccinated for protection from communicable diseases. *Prince*, 321 U.S. at 166-67; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). And, as discussed above, this Court held in *Prince* that state child

labor laws could be enforced against a parent who arranged for her child to sell publications in the street. Thus, state interference in the parent-child relationship has been permitted to protect children from illiteracy, disease, and the severe effects of working outside the home at an early age. The state simply has no interest of comparable weight in acting on behalf of a third party to veto a fit parent's judgment concerning with whom her children should spend time. *Stanley*, 405 U.S. at 657-58.

The "best interest of the child" standard has historically been reserved for cases involving conflict between two parents who are dissolving their relationship, or cases in which there is not a fit parent caring for the child. Thus, in Washington when two fit parents are ending their relationship and are unable to agree on child-rearing choices, the court is given broad discretion to develop and order a parenting plan. *In re Marriage of Littlefield*, 940 P.2d 1362, 1368 (Wash.1997). In that context, a court's exercise of such unfettered discretion cannot be constitutionally suspect because the conflict between the parents leaves no parental decisionmaker to whom the court can defer. Indeed, the court "compares the merit of the prospective custodians and awards custody to the better of the two." *In re Marriage of Croley*, 588 P.2d 738 (Wash.1978). A court could not constitutionally engage in such an inquiry as between a fit parent and a nonparental third party. *Stanley*, 405 U.S. 645.

Similarly, when the state is confronted with unfit parents in a dependency hearing, it cannot be constitutionally questioned that the rights of those parents are secondary, and the child's best interest is paramount. In such cases, a parent cannot or will not care for the child, and the state therefore has a compelling interest in providing care. *In re Sego*, 513 P.2d 831, 832 (Wash.1973)("when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail").

The best interest test may also play a role in some circumstances when a minor asserts a constitutional right to act independent of parental authority. For example, in the abortion context, the state may either permit minors who so choose to make the abortion decision without parental involvement, or may instead require parental involvement or a court order before a minor has an abortion. *Bellotti v. Baird*, 443 U.S. 622. If a minor goes to court for a waiver of a parental involvement requirement, and the court finds that she is not mature enough to make the abortion decision on her own, the court must then determine whether an abortion (without parental involvement) would be in her "best interest." *Id.* at 644; *Lambert v. Wicklund*, 502 U.S. 292, __, 117 S.Ct. 1169, 1172 (1997). In such a case, application of the best interest standard may be critical to the vindication of the minor's own constitutional rights.

The Washington statutes challenged here do not, however, provide a mechanism by which the minor can engage in constitutionally protected conduct independent of the parent. Nor is the state acting *in loco parentis* in the absence of a fit parent. Nor is one fit parent pitted against another. Instead, here the state is acting *on behalf of a third party* to override the judgment of a *fit* parent about what is best for her child. Under such circumstances, application of the best interest test is an unconstitutional intrusion into the parent-child relationship.[16]

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[16] As noted by the state supreme court, the intrusiveness of the best interests standard is magnified in this case by the fact that the challenged statutes permit any person to file a visitation petition, regardless of that person's past relationship with the child. Petitioners do not quarrel with this authoritative construction of state law. Citing *United States v. Salerno*, 481 U.S. 739 (1987), however, petitioners argue that the state supreme court erred in declaring the statutes facially invalid on the basis of this expansive standing rule since, they point out, virtually all the re-

(continued...)

C. This Court's Precedents Suggest That A Nonparent Visitation Statute Might Pass Constitutional Muster If It Required A Showing That Denial Of Visitation Would Substantially Harm A Child

While Washington's nonparent visitation statutes are in our view clearly unconstitutional, we believe that a carefully crafted law which permitted third party visitation upon a showing of harm might well be constitutional. *Wisconsin v. Yoder*, 406 U.S. at 206.

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[16] (...continued)
ported cases involve grandparents or other close relatives. Even accepting the accuracy of this assertion, *arguendo*, petitioners' reliance on *Salerno* is misplaced for several reasons. First, the proposition for which *Salerno* is cited -- that a law can be declared facially unconstitutional only if "no set of circumstances exists under which [it] would be valid," *id.* at 745 -- "has never been the decisive factor in any decision of this Court, including *Salerno* itself." *City of Chicago v. Morales*, 527 U.S. __, __, 119 S.Ct. 1849, 1858 (1999)(plurality opinion). In part, that may be because *Salerno* proposes a second test in the very next sentence that more closely resembles the traditional standard of substantial overbreadth. *Salerno*, 481 U.S. at 745 (statute should not be struck down if it is only unconstitutional in "some conceivable set" of marginal circumstances). Second, whatever its application in other contexts, the more rigid *Salerno* rule has never been the test for facial invalidity in First Amendment cases. *E.g.*, *Houston v. Hill*, 482 U.S. 451 (1987). And, while the constitutional right of family autonomy is most frequently discussed in substantive due process terms, it plainly also has roots in the First Amendment right of intimate association. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Third, the challenged statutes in this case are unconstitutional even under *Salerno*'s most exacting formulation. The "best interest of the child" standard will *never* give proper deference to the sanctity of the parent-child relationship and will *always* hold those seeking visitation to a lower threshold than is constitutionally permissible. Thus, the statutes can *never* be constitutionally applied because they *always* apply a constitutionally deficient test. *See Morales*, 119 S.Ct. at 1866 (Breyer, J. concurring)(a statute that always applies an unconstitutional standard is always unconstitutional).

This case does not require the Court to delineate more precisely the constitutional tests that should be used to decide if a state law or state court decision which requires some showing of harm is sufficient. State courts, which are charged with sorting out family disputes, have been devoting considerable attention to just what those standards ought to be. For example, the issue has received significant attention in state cases addressing the circumstances under which the courts may interfere when separating parents cannot agree about the religious upbringing of a child. Because of the free exercise interests involved in those cases, state courts have eschewed the "best interests of the child" test normally applied to resolve child-rearing conflicts between separating parents, and instead have applied a substantial harm standard. Thus, most state courts have held that each parent can choose what, if any, religious training to provide for the child, without state interference, absent a showing of a "substantial threat of present or future, physical or emotional harm to the child." *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super.1990).[17] Under these cases, harm to a child cannot be simply assumed or surmised. *Felton v. Felton*, 418 N.E.2d 606, 607 (Mass.1981); *Hanson v. Hanson*, 404 N.W.2d 460, 464 (N.D.1987). Instead, a factual showing is required, and the harm must be demonstrated in detail.

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[17] *See, e.g.*, *Munoz v. Munoz*, 489 P.2d 1122 (Wash.1971); *Robertson v. Robertson*, 575 P.2d 1092 (Wash.App.1978); *Ledoux v. Ledoux*, 452 N.W.2d 1 (Neb.1990); *Khalsa v. Khalsa*, 751 P.2d 715 (N.M.App.1988); *Petition of Deierling*, 421 N.W.2d 168 (Iowa App. 1988); *Matter of Marriage of Knighton*, 723 S.W.2d 274 (Tex.App.1987); *Hanson v. Hanson*, 404 N.W.2d 460 (N.D.1987); *Kelly v. Kelly*, 524 A.2d 1330 (N.J.Super.1987); *In re Marriage of Mentry*, 190 Cal.Rptr. 843 (Cal. App.1983); *Sanborn v. Sanborn*, 465 A.2d 888 (N.H.1983); *Fisher v. Fisher*, 324 N.W.2d 582 (Mich.App.1982); *Felton v. Felton*, 418 N.E.2d 606 (Mass.1981); *Osier v. Osier*, 410 A.2d 1027 (Me.1980); *Compton v. Gilmore*, 560 P.2d 861 (Idaho 1977); *Harris v. Harris*, 343 So.2d 762 (Miss.1977).

Robertson v. Robertson, 575 P.2d 1092, 1093 (Wash.App. 1978); *Felton*, 418 N.E. 2d at 607. And, while the harm involved may be present or future injury, it typically must endanger the child's physical, mental or emotional health. *Robertson*, 575 P.2d at 1093. Some state cases also suggest that they will not entertain a request to order visitation over a parent's objection unless the third party involved has a significant relationship with the child in question. *See, e.g., Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind.App.1997).

Since Washington's statutes required no showing of harm at all, they are plainly unconstitutional. The question of whether other standards for determining harm may be constitutionally adequate should be left for a case which presents the issue squarely. It may well be that this Court will never need to say more than it already has. This Court has already made it plain that a clear showing of harm is essential. *Meyer v. Nebraska*, 262 U.S. at 403. And this Court has also recognized that "emotional attachments that derive from the intimacy of daily association" and the "deeply loving and interdependent relationship[s]" that can develop when an adult cares for a child over time do not require a biological or a marital relationship. *Smith*, 431 U.S. at 844; *Stanley*, 405 U.S. 645.[18] It is quite possible that the state courts that deal with the reality of family life day in and day out may need no more guidance than that.

[18] *See also Roberts v. United States Jaycees*, 468 U.S. at 618-20 ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life").

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Washington should be affirmed.

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