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 *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND THE NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESONDENT

Filed December 13, 1999

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae Christian Legal Society is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors. *Amicus curiae* National Association of Evangelicals is a nonprofit association of Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people.

Both *amici* have worked for over two decades to protect citizens' right to religious belief and practice. The protection of the right of parents to direct the upbringing of their children without State interference – the core issue in this case – is a vital component of the protection of individual liberty (including, but not limited to, religious liberty) for all citizens.

A more detailed statement of interest of the *amici* is set forth in the Appendix to this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *See* S. Ct. Rule 37.6. *Amicus* Christian Legal Society received a grant from the Alliance Defense Fund to cover its expenses in producing the brief. The Alliance Defense Fund is a 501(c)(3) organization headquartered at 7819 East Greenway Road, Suite 8, Scottsdale, Arizona 85260. The Alliance Defense Fund exercised no control over the content of the brief.

STATEMENT OF THE CASE

The most important fact about this case is that it is *not* about "grandparents' rights"[2] or about the constitutionality of grandparent-visitation statutes in general. Instead, this case is about one State's extraordinarily broad third-party visitation laws, laws which, as interpreted by that State's highest court, seriously undermine family autonomy and parents' fundamental rights. Thus, the policy and prudential arguments that the Petitioners and their *amici* have advanced in favor of grandparent-visitation statutes (*see* Pet. Br. 8-18), do *nothing* to call into question the correctness of the decision below or to rehabilitate the unconstitutionally invasive nature of the specific statutes at issue.

Washington law purports to permit "any person" – not just grandparents or other family members – to ask a court "at any time" for the right to visit – and therefore to influence – someone else's child. Visitation rights may be granted to "any person" – presumably over the child's parents' objection – so long as the court believes visitation is in the "best interests" of the child. No prior finding of parental neglect, abuse, or incompetence, nor any showing of harm to the child, is required. The person seeking visitation need not establish any substantial relationship with the child. The court is not required to consider the parents' reasons for their decision to limit or

[2] The Petitioners now concede as much. *See, e.g.*, Brief for Petitioners (hereinafter "Pet. Br."), at 18 ("The petitioners are not advancing an argument that grandparents have a constitutional right to visit their grandchildren.").

deny access to their children.[3] In short, *any person* simply may ask a court to second-guess parents' decisions – and thereby impose on parents the cost of defending those decisions – about what influences are in the "best interests" of their children. *See* Revised Code of Washington § 26.10.160(3), § 26.09.240 (amended 1996); *see also* Pet. App. 5a-12a, 21a-22a (describing and analyzing the statutes).

The reach and intrusiveness of these statutes is so striking that the Washington Court of Appeals believed the laws could not possibly mean what they say. *See In re Visitation of Troxel*, 87 Wash. App. 131, 940 P.2d 698 (Wash. Ct. App. 1997). After observing that the statutes purport to confer on "any person" the right to petition for visitation, the Court of Appeals insisted that:

> A literal reading of this statute could lead to the sort of absurd result that our canons of statutory construction forbid. Does "any person" have standing to petition "at any time" for visitation with a child? For example, could a member of the state Legislature who has displeased a constituent find herself faced with the considerable expenditure of time, money, and emotional energy to oppose a wholly frivolous petition by that constituent? Should this occur without any showing that the parent was unfit or that the family was unstable or that the child was otherwise facing any threat to its well-being? Our

[3] Washington law does provide courts with a list of factors they "may" consider in determining whether third-party visitation is in the child's "best interests," but these factors do not, of course, preclude "any person" from seeking visitation and imposing the burdens of litigation on parents. *See* Appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App."), at 27a (reprinting RCW § 26.09.240 (as amended 1996)).

> Legislature could not have intended such an absurd and potentially pernicious result from so broad a reading of the statute.

Pet. App. 58a. The Petitioners, in similar fashion, attempt to assure this Court that the Washington statutes do not *really* mean what they say[4] and wholly ignore their atypical overbreadth.

But these statutes – "absurd" or not – *do* mean what they say, the Supreme Court of Washington held, after reviewing their text and history in detail. Pet. App. 6a-13a. That court insisted that "[w]hile the statute as written may have potentially troubling consequences for stable families, this does not justify [the] Court of Appeals rewriting of the statute" (Pet. App. 12a), and that "we will not read qualifications into the statute which are not there." Pet. App. 11a.

This Court should likewise reject the Petitioners' efforts to frame this case as a referendum on the "constitutionality of grandparent visitation statutes" (*see* Petition for a Writ of Certiorari (hereinafter "Pet."), at 11) and to distract this Court's attention from the ambitious reach of the laws actually at issue. As it happens, the Petitioners in this case *are* grandparents.[5] We are aware of no reason

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[4] *See* Pet. Br. 10 ("In some instances, . . . the states simply provided that any person could make such a request. Legislation framed in this manner was not intended to authorize visitation suits by total strangers; so far as we have been able to ascertain, total strangers have not been awarded, or even requested, visitation under these laws.")

[5] Jenifer and Gary Troxel's son Brad was Natalie and Isabelle's father. He committed suicide in 1993. The children's mother – respondent Tommie Granville – decided to limit the Troxels' access to the children soon after Brad's death. Ms. Granville later married Mr. Kelly Wynn, who adopted the children in February 1996. Pet. App. 2a-3a.

to question Jenifer and Gary Troxel's love for their grandchildren, Natalie and Isabelle, nor does the decision below contain any facts suggesting that contact with the Troxels would or would not be detrimental to their grandchildren. But that is not the point. The children's mother decided *not* to permit such conduct and "as between [parents and judges], the parents should be the ones to choose whether to expose their children to certain people or ideas." Pet. App. 22a.

The Supreme Court of Washington's decision that these statutes are unconstitutional "as written" (Pet. App. 1a) rests on three basic points – all of which are consonant with, and indeed are compelled by, this Court's precedents. *First*, parents have a fundamental right under the Fourteenth Amendment to "autonomy in child rearing decisions." Pet. App. 12a. *Second*, state interference with parents' rights is forbidden unless the "state can show that it has a compelling interest [in interfering] and such interference is narrowly drawn to meet only the compelling state interest involved." Pet. App. 15a. *Third*, "[s]hort of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights." Pet. App. 21a-22a.

Alleging conflicts with decisions interpreting other States' far more narrow and carefully drafted "grandparents' rights" statutes (Pet. 6-11), the Petitioners invited this Court to engage in social engineering, asking it to recognize that "it may be time to pay more attention to our children's state of mind than a parent's rights" and

stating that the "issue before this Court is whether there is also an equal penumbra of responsibilities by parents to sustain loving and nurturing relationships between their children and third parties." *Id.* at 15. The Petitioners claim that the court below – a "conservative judiciary" – mistakenly "idealized the 'basic family unit' " which, they opine, is a "recent phenomenon of modern civilization." *Id.* at 11-12.[6] They state, "there has been a dramatic erosion of [this] 'stable basic family unit,' " and ask, "[a]re the courts and our society equipped to deal with modern life using the traditional view of the family?" *Id.* at 12-13. This Court granted certiorari. *Troxel v. Granville*, ___ U.S. ___, 120 S.Ct. 11 (Sept. 28, 1999) (No. 99-138).

SUMMARY OF THE ARGUMENT

Our argument that the decision below should be affirmed rests on a few basic points, *none* of which necessarily prejudices the case for a grandparent-visitation statute that is *narrowly tailored* to serve a *compelling state interest*.[7] *First*, the statutes at issue are *not* grandparent-visitation statutes. Even if they were, the Petitioners and their *amici* have not pointed to any other visitation statutes that share the objectionable and unconstitutional features of Washington's particular statutes.[8]

Second, the Fourteenth Amendment's Due Process Clause – narrowly construed in light of history and tradition – protects the integrity and autonomy of the family from intrusive intervention by the State at third parties' request. Any State's law that, on its face, requires parents, at "any person's" request, to submit their decisions about who should have contact with and influence upon their children for judicial approval tramples on the "liberty" protected by the Fourteenth Amendment and is therefore, on its face, unconstitutional.

Third, because the Washington statutes infringe "fundamental rights" protected by the Due Process Clause, they must survive strict scrutiny. We urge this Court to once again[9] reject the "sliding scale" mode of substantive-due-process analysis proposed by the Petitioners (*see* Pet. Br. 22-24) and also to repudiate the suggestion that parents' rights to control and direct the upbringing of their children are somehow "second class" rights, rights less

[6] Here and elsewhere, the Petitioners confuse the obvious fact that family structure has changed (although the "basic stable family unit" that the Petitioners deride has proved to be an inspiringly durable center-point *around which* these changes occur) with the entirely different point that, however organized, the family in general and parents in particular have been protected against unjustified *state intrusion* by the Constitution. The fact that families take many forms tells us nothing about whether the family should be subject to increased government oversight or third-party second-guessing.

[7] *See, e.g.*, Brief of the *Amicus Curiae* American Academy of Matrimonial Lawyers, at 7-9 ("[W]e urge this Court to declare the Washington third-party access statute unconstitutionally overbroad but preserve the question for a future case whether a carefully drawn third-party access statute would be constitutional.").

[8] It is, therefore, not true that "affirmance of the decision below would invalidate virtually all grandparent visitation statutes nationwide." Brief *Amicus Curiae* of AARP and Generations United In Support of Petitioners, at 17.

[9] *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720-722 (1997) (reaffirming traditional mode of due-process analysis and rejecting sliding-scale approach).

worthy of enthusiastic protection by the federal courts than other – perhaps more fashionable – freedoms, or rights that must ride piggy-back on some other constitutional claim in order to be vindicated. *See generally*, Pet. Br. 22-35.

Finally, we suggest an additional, complementary constitutional basis for affirming the decision below. In our view, not only do the broad statutes at issue unconstitutionally intrude on parents' rights and family autonomy, they unconstitutionally limit, censor, and co-opt the values that families communicate through their expressive association. *Of course*, the family is different in kind, and not merely in degree, from other voluntary associations. Still, parents communicate their values, to their children and to the world, through their child-rearing decisions – indeed, for many parents, this message is their most lasting and important statement – and this "speech," this "expressive association," is protected by the First Amendment.

* * *

This is no time to disregard or downgrade well established constitutional rights, nor is it the time to wade into the various controversies about the changing structure of the family. We respectfully urge the Court to affirm the decision below, to endorse its reasoning, and to reject the Petitioners' invitation to bring "up to date" fundamental constitutional rights through the statist imposition of new and sweeping "penumbra[l]" responsibilities. *See* Pet. 15-18.

ARGUMENT

I.

Parents Enjoy the Fundamental Right to Direct Their Children's Education and Upbringing, and to Decide Who and What Will Influence and Shape Their Children During Their Formative Years, Without Judicial Approval or Second-Guessing By the State.

It is a *fundamental* principle of constitutional law that, as the court below concluded, "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." Pet. App. 22a. The statist implications of the contrary view are staggeringly dangerous to the autonomy of the family and to democratic values. *Accord, In re Visitation of Troxel, supra* (Pet. App. 58a). The Petitioners argue that after centuries at a central place in Anglo-American legal tradition, the right of non-abusive parents to raise their own children as they see fit should yield to *ad hoc* judicial intervention at third parties' request. We disagree.

A. Our Nation's History and Tradition, Not the Policy Preferences of Judges or Popular Majorities and Not Novel Sociological Theories, Inform and Constrain This Court's Interpretation and Exposition of the Due Process Clause.

It is now settled that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests[.]" *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997); *see also Michael H. v. Gerald D.*, 491

U.S. 110, 121 (1989) ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint."). These "fundamental" rights are limited to those that are deeply rooted and firmly anchored in our Nation's history, tradition, and practice. *Glucksberg*, 521 U.S. at 710; *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (The Due Process Clause protects only those rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality op.) (The fundamental rights protected by the Fourteenth Amendment are those that are "deeply rooted in this Nation's history and tradition.").

This Court has often warned, however, of the danger that protecting fundamental rights not specifically mentioned in the Constitution might tempt judges to substitute their own subjective commitments or the prevailing preferences of vocal interest groups for clearly established traditions. *See, e.g., Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (The Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."). Given this danger, "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking,' [*Collins*, 503 U.S. at 125], that direct and restrain [the Court's] exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721.

The Supreme Court of Washington's decision was consistent with, and is an instructive example of, the careful analysis that this Court requires in "substantive due process" cases. *See* Pet. App. 12a-15a. It did not

create any novel or previously unappreciated fundamental constitutional rights, nor did it purport to "update" our society's morality or family policies. Similarly, we do not ask this Court to expand the boundaries of Fourteenth Amendment "liberty" or to evaluate, endorse, or reject societal and demographic trends. We are mindful of this Court's warning that "[t]he doctrine of judicial self-restraint requires [this Court] to exercise the utmost care whenever [it is] asked to break new ground in this field." *Collins*, 503 U.S. at 125. We believe *both* that this Court should continue to adhere to the restrained mode of analysis outlined in *Glucksberg, supra, and* that this Court should affirm the decision and reasoning of the decision below, specifically, the controlling principle that the Fourteenth Amendment protects parents' fundamental right to control and direct the upbringing of their children.

B. This Court Has Held, and Should Reaffirm, That Parents Enjoy the Fundamental, Constitutionally Protected Right to Direct the Upbringing and Education of Their Children.

The family is the building block of civil society and the seed-bed of good citizenship. Our constitutional tradition has therefore respected its autonomy and integrity. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with [this Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that . . . decisions have respected the private realm of family life which the state cannot enter."). A long line of this Court's decisions confirm that

parents' rights sit at the very heart of the "liberty" protected by the Fourteenth Amendment.[10] As this Court observed in *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citations omitted):

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations". . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. BLACKSTONE, COMMENTARIES 447; 2 J. KENT, COMMENTARIES ON AMERICAN LAW 190.

These rights are not recent innovations, but instead reflect protections deeply rooted in our history and tradition. As the Court stated in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972):

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

[10] The Petitioners' observation that the Supreme Court of Washington erred because "[t]here is no well established legal tradition of refusing such visitation" (Pet. Br. 7) reverses the burden. There *is* a well established tradition of leaving the decisions about visitation and other child-rearing matters to parents.

Parents' rights and family autonomy do not depend on or derive from positive law, but rather are "intrinsic human rights, as they have been understood in this Nation's history and tradition," *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977). This Court has protected the "sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503 (emphasis added). As one Court of Appeals stated recently:

> To say that the institution of the family is deeply rooted in this Nation's history and tradition . . . as the Supreme Court often has said . . . borders on understatement. The unitary family is the foundation of society. Through the intimate relationships of the family, our children are nurtured, tutored in the values and beliefs of society, and prepared for life. . . . Through these relationships, our children – indeed, we, as parents – are strengthened, fulfilled and sustained. The bonds between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons.

Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994) (Virginia's emergency-removal statute did not violate parents' due-process rights) (citations and quotation marks omitted).

Contrary to the Petitioners' suggestion, parents' rights are not anachronistic relics, nor is the protection of

family autonomy somehow "conservative"[11] or backward-looking. That the parents play the primary role in childrearing and educating is true not just as a matter of Anglo-American tradition and constitutional law. There is universal recognition of the fact that "parents seem naturally inclined to love and care for their children." Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 Univ. Chi. L. Rev. 937, 953 (1996);[12] *see also Parham*, 442 U.S. at 602 (The concept of the "family as a unit with broad parental authority over minor children" is rooted in the recognition that the "natural bonds of affection lead parents to act in the best interests of their children"); *Smith*, 431 U.S. at 844 (right to family integrity reflects "the emotional attachments that derive from the intimacy of daily association"). Moreover, it simply cannot be disputed that, as a general matter, "parents are more likely to pursue the[ir] child's best interests as they define it than is the state to pursue the child's best interest as the

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[11] *See* Pet. 11-12, 13 ("A conservative judiciary has defined the traditional concept of a family. . . . The conservative judicial view of the 'basic stable family unit' . . . may even be unintentionally racial or socioeconomically based."). Relatedly, it is worth noting that the Petitioners appear to have abandoned their earlier suggestion that the place of the "basic stable family unit" in our legal and social traditions is somehow racist. *See* Petition for Certiorari, at 13. Although the charge is untenable, it should be said that, in fact, poor families and ethnic minorities would seem particularly vulnerable to the intrusive meddling and governmental second-guessing, the unarticulated biases of upper-middle-class decisionmakers, and the burdensome costs of litigation that are authorized and invited by the statutes at issue.

[12] Prof. Gilles cites John Locke and "countless other observers" for this unremarkable yet fundamental premise. *See* Gilles, 63 U. Chi. L. Rev. at 953 n.59.

state defines it." Gilles, *supra*, at 940. Here, then, there is a happy consonance between universally observed facts and constitutional law.

Of course, no constitutional right – not even a "fundamental" liberty right – is absolute. *See, e.g., Prince*, 321 U.S. at 166 ("[T]he family itself is not beyond regulation in the public interest. . . . [The] rights of parenthood are [not] beyond limitation."). The Petitioners make much of this point, but they are tilting windmills. There are, obviously, situations where the States may and should intervene in family life to protect children and promote the common good. Parents, like everyone else, are subject to the host of general laws that States may enact pursuant to their police powers. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972) ("The State's right – indeed, duty – to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here."). Vindication of the right at issue here need not invite – notwithstanding the Petitioners' "parade of horribles" (Pet. Br. 28-30) – an avalanche of nullification of reasonable health and welfare legislation.

While parents' rights are not absolute, it does not follow that they are meaningless, just as the fact that some parents' misuse their authority and neglect their responsibilities does not negate the existence and importance of rights or justify their abrogation. As this Court emphasized in *Parham:*

> That some parents may at times be acting against the interests of their children . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. . . . The statist notion

> that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

442 U.S. at 602-603 (citations and quotation marks omitted).

In short, the Washington statutes at issue are unconstitutional on their face *not* merely because they regulate parents' decisionmaking, but because they are a blunderbuss assault on family integrity and are not crafted with the precision required of laws that interfere with or infringe upon fundamental "liberty" rights.

C. Washington's Sweeping Third-Party Visitation Statutes Infringe Parents' Rights and Must Therefore Be Put to Strict Scrutiny.

Laws that infringe or intrude upon[13] fundamental liberties must survive strict scrutiny. *Glucksberg*, 521 U.S. at 721 ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' " (quoting *Reno v. Flores*, 507 U.S. 292, 302

[13] The Petitioners' discussion of cases where this Court did not apply strict scrutiny because the law in question did not " 'directly and substantially' " interfere with or " 'heavily burden' the fundamental rights of the family involved" (Pet. Br. 23-24) is inapposite because, as we discuss in more detail below, the Washington statutes authorize "any person" "at any time" to require a parent to litigate and justify his or her decisions limiting or denying visitation. The intrusive impact of the Washington laws is more than sufficient to trigger the strict scrutiny generally required in fundamental-rights cases.

(1993)). The court below was correct in proceeding from this premise. *See* Pet. App. 15a.

Still, the Petitioners and some of their *amici*[14] insist that strict and searching review of these intrusive statutes' effect on parents' rights is not required.[15] They in effect ask this Court to "downgrade" parents' rights – rights which have, again, been *repeatedly* recognized by this Court as "fundamental" – to a lesser breed of right, a "poor relation"[16] which must ride piggy-back on some *other* right in order to enjoy meaningful constitutional protection. *See, e.g.*, Brief of the National Conference of State Legislatures, *et al.*, as *Amici Curiae* in Support of Petitioners, at 8-12 ("Although the Court has recognized a parental liberty interest in bringing up children, the scope

[14] Incredibly, some of the *amici* claim, as did the Petitioners below (*see* Pet. App. 17a), that the Washington third-party-visitation laws actually *pass* strict scrutiny.

[15] It is not clear whether the Petitioners and their *amici* believe this Court should employ a kind of balancing test or "undue burden" test in this case (*see* Pet. Br. 22-23); a hybrid-rights analysis, which would require parents' rights to be asserted in conjunction with *other*, supposedly more important, rights (*see* Pet. Br. 24-27); or the mere rational-basis review that is appropriate for social and economic legislation. *See* Pet. Br. 30-32; *see also* Brief of the National Conference of State Legislatures, *et al.*, as *Amici Curiae* in Support of Petitioners, at 16-18; Brief *Amici Curiae* of AARP and Generations United in Support of Petitioners, at 28-29 (urging reversal because "the protection of the welfare of children through grandparent visitation statutes is a rational means of addressing societal problems").

[16] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

of protection granted that interest depends upon the degree to which the State is impinging on some other constitutional right."). On this view, Washington's laws need only have a "reasonable relation to some purpose within the competency of the State." *Id.*, at 12 (citations and internal quotation marks omitted).

Alarmingly, many courts have in recent years embraced the "poor relation" theory of parents' rights and have de-commissioned them as "fundamental" rights.[17] In denigrating the constitutional pedigree of the

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[17] *See, e.g., Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir.), *cert. denied*, 519 U.S. 813 (1996) ("[W]here, as here, parents seek for secular reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the 'upbringing' of their child, rational basis review applies."); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996), *cert. denied*, 520 U.S. 1104 (1997) (stating that "rational basis review, not strict scrutiny," governs "wholly secular limitations on private school education"); *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (concluding that because parents' "interest is not religious, . . . we must reject their position if the [challenged regulation] bear[s] some rational relationship to legitimate state purposes"); *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) ("We need not decide here whether the right to rear one's children is fundamental[.]"); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1456 (E.D. Mich. 1989) (rights recognized in *Pierce* and *Meyer* are not fundamental and do not require strict scrutiny); *Hanson v. Cushman*, 490 F. Supp. 109, 113-114 (W.D. Mich. 1980) (same); *but see Peterson v. Minidoka City Sch. Dist.*, 118 F.3d 1351, 1357-58 (9th Cir. 1997) (opinion of Noonan, J.) (applying heightened scrutiny to *Pierce* claim), *amended*, 132 F.3d 1258 (1997); *In re Care and Protection of Charles*, 399 Mass. 324, 334, 504 N.E.2d 592, 598 (1987) (*Pierce* makes it "clear that the liberty interests protected by the Fourteenth Amendment extend to activities involving child rearing and

"liberty" rights vindicated below, however, the Petitioners and their *amici* fly in the face of this Court's recent decision in *Glucksberg*, as well as the line of cases on which *Glucksberg* rests. *See Glucksberg*, 521 U.S. at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[ ] . . . to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)[.]").

This Court has rejected the notion of family integrity as a second-class right. Instead, the right to "raise one's children [has] been deemed 'essential,' . . . [one of the] 'basic civil rights of man,' . . . and [a right] 'far more precious than property rights[,].' " *Stanley v. Illinois*, 405

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education" and that parents "possess a basic right in directing the education of their children"); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750, 769 (1976) ("[T]he right of a parent to direct the education, religious or secular, of his or her children [is a] fundamental right guaranteed by the due process clause of the Fourteenth Amendment."); *Henne v. Wright*, 904 F.2d 1208, 1213 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991) (*Pierce* and *Meyer* rights are "fundamental," but not implicated in case involving state statute that restricted surnames); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1252 (1999) ("We are mindful that the Supreme Court has suggested in other contexts that parents may possess a fundamental right against undue, adverse interference by the state."); *Jordan v. Jackson*, 15 F.3d 333, 342-343 (4th Cir. 1994) (observing that "to say that the institution of the family is rooted in this Nation's history and tradition . . . borders on understatement[,]" that "the relationship between parent and child [is] inviolable except for the most compelling reasons," and that *Pierce* and *Meyer* rights are "essential" and "fundamental").

U.S. at 651 (internal citations omitted), and has been recognized as a "fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Meyer*, 262 U.S. at 401 ("That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain *fundamental rights which must be respected.*") (emphasis added). This is not the language of mere rational-basis review.

D. Washington's Expansive Third-Party Visitation Statutes Cannot Survive Strict Scrutiny.

Whatever important public interests might theoretically be served by other States' grandparent-visitation laws, the *particular* laws at issue here cannot fairly be described as "narrowly tailored to serve [a] compelling state interest," *Reno*, 507 U.S. at 302, and therefore cannot survive strict scrutiny. The court below was correct to reject the breathtakingly intrusive argument that "a judicially determined finding that visitation is in the best interests of the child is a sufficiently compelling justification to override a parent's opposition, regardless of the fact that the parent's fitness is not challenged or that there has been no showing of harm or threatened harm to the child." Pet. App. 17a. Instead, "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.' " Pet. App. 17a (quoting *Yoder*, 406 U.S. at 234). As the court below emphasized, "[t]he statutes at issue do not contemplate any . . . harm or potential harm to the child which must be prevented by third party visitation rights" (Pet. 20a); they "lack other safeguards to prevent stable families from defending in court against frivolous petitions for visitation" (Pet. App. 22a); they "do not require the petitioner to establish that he or she has a substantial relationship with the child" (*ibid.*); and they "do not require the court to take into consideration such factors as the parents' reasons for restricting visitation[.]" *Ibid.*

We emphasize that the Washington statutes fail strict scrutiny *not* simply because they employ a "best interests" standard and *not* simply because they authorize third-party visitation to which the parents object. The problem here is that *no threshold finding* is required before competent, fit, non-abusive parents are required to take on the burdens, costs, and insult of litigating and defending in court their child-rearing and visitation decisions at "any time" and at the behest of "any person" who disagrees with them.

E. The Washington Statutes Are Unconstitutional on Their Face, and This Court Should Resist Petitioners' Efforts to Distract Its Attention from the Intrusiveness of the Washington Statutes to the Standard of Review.

In their Petition for Certiorari, the Petitioners insisted that this Court's review was necessary to "address[ ] the welfare of our children and preserv[e] the family in the future" (Pet. 11); to reject the "conservative" view of the "stable family unit" (*id.* at 13); to recognize a new set of "penumbra[l]" constitutional "responsibilities" of parents to "sustain loving and nurturing relationships between their children and third parties" (notwithstanding the parents' different view about the "nurturing" character of those relationships) (*id.* at 15); and to

"replace[ ]" "parental authority" with "parental responsibility in recognition that children's views and wishes should be taken into account." *Id.* at 17.

The Petitioners now purport to advocate a more narrow and measured course. They take pains to assure the Court that they are not asking for the creation of any new or novel rights (Pet. Br. 7, 18) ("We do not contend that grandparents have a constitutional right to visitation orders.") and they concede that granting third-party visitation over parents' objections *could* violate parents' rights (*id.* at 33, 39). The Petitioners' new, "far less categorical" approach (*id.* at 20) is to observe that the court below "did not rely on, and respondent did not there advance, any circumstance-specific constitutional objection to the application of the [statute] to this particular case" and that "[t]he court below properly dealt with this case as presenting only a facial challenge to the constitutionality of the Washington statute." (*Id.* at 19). However, the Petitioners assert, "[a]bsent a showing of the general invalidity required by [*United States v. Salerno*, 481 U.S. 739 (1987)] or [*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)], . . . there would be no occasion to consider the constitutionality of [the statute] in circumstances other than those of the instant case." Pet. Br. 21.

Although we welcome the Petitioners' newfound commitment to judicial restraint, we reject their argument and the purported modesty of their positions. *The Washington statutes at issue are unconstitutional on their face* – or, as the court below put it, "as written" (Pet. App. 1a) – and *not* simply "as applied" to this or any other particular case. The Respondent *can* establish, and did establish to the satisfaction of the court below, that almost all applications of the Washington law are unconstitutional.

The particular visitation order at issue in this case, as well as *every* application of the Washington third-party visitation laws, is unconstitutional because the statutes permit, *in every case*, "any person" to drag a parent into court "at any time" and for any reason to justify their decisions about third-party visitation to a court. That is, the Washington statute – *in every case* – fails to provide the constitutionally required respect and protection for competent, non-abusive parents' decisions about third-party visitation. It *does not matter* that some of the visitation orders issued under the Washington laws might also have issued under a constitutional standard or statute. It is the fact that, *on its face and in every case*, the Washington laws subject competent, fit, non-abusive parents' decisions to judicial second-guessing (outside the context of custody or like proceedings) on the whim of "any person," that dooms these *particular*, extraordinarily broad, visitation statutes.

* * *

This Court has held – and we believe it should reaffirm – that parents' rights and family autonomy are "fundamental" aspects of the "liberty" protected by the Due Process Clause and therefore that "strict scrutiny" must be directed toward any State's law that infringes on those rights. These basic principles are perfectly consistent with the responsible, measured use of the States' police and *parens patriae* powers to protect children from harm, abuse, and neglect, but they preclude the kind of unjustified and intrusive second-guessing of parents' decisions about third-parties' contact with and influence upon their children that the Washington visitation statutes encourage.

II.

Parents' Right to Decide Who and What Are Appropriate Influences on Their Children's Development, Education, and Character Is Expressive Activity Protected by the First Amendment.

An alternate, but closely related, constitutional basis for affirming the judgment below is that the Washington statutes curtail parents' expressive-association rights protected by the First Amendment.

A. The First Amendment Protects Expressive Association from Co-option and Censorship by the State.

In affirming the decision below, this Court should be guided not only by its substantive-due-process line of parental-rights cases, but also by its expressive-association precedents. It is "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas" is not only part of the "liberty" protected by the Fourteenth Amendment but is *also* inextricably linked with the freedoms of speech and expression guaranteed by the First Amendment. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Just as governmental attempts to control, shape, or co-opt the content of our expression are subject to strictest judicial scrutiny, so too are any state efforts to insinuate itself, its priorities, and its ideas into private associations and the messages they communicate, both internally and to the world. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."); *Democratic Party of United States v. Wisconsin ex rel. LaFollette*,

450 U.S. 107, 122 (1981) (First Amendment rights "necessarily presuppose[ ] the freedom to identify the people who constitute the association, and to limit the association to those people only."); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (Upholding "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to decide "what not to say").

It is often observed that one of the theoretical bases for our First Amendment freedoms is their crucial role in nurturing and creating citizens who are well prepared to exercise the responsibilities that necessarily attend participation in a democratic republic. The same is true of the various "mediating institutions," "intermediate associations," and "little platoons" of democracy that make up what political scientists and philosophers call "civil society" – the public realm between the person and the state[18] – which is one reason why this Court has taken care to protect expressive *association* as well as individual speech-acts. *See Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."); *id.* at 618-619 ("[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster

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[18] *See generally, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513-524 (1969 ed.); PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY (1977).

diversity and act as critical buffers between the individual and the power of the State.").

B. The First Amendment's Protection of Expressive Association Extends to Family Autonomy and to Parents' Choices about the Education and Upbringing of Their Children.

What this Court has said about the membership and message of parade organizations and benevolent organizations, and about the importance of mediating institutions, translates easily to the first among all expressive associations – the family. Of all the mediating, values-inculcating institutions – which deserve protection both for their own sake *and* for the sake of the democratic values that require them – surely the family is primary, both in time and in importance. Just as groups must be able to control their message to the world, free from unjustified government intrusion into their membership, rituals, and commitments, so must the decisions of parents to control and shape their family's character formation by determining who and what shall have access to their child be unfettered by intrusive and unwarranted judicial "proof-reading."

As some of this Court's decisions illustrate, the fundamental "liberty" rights of parents to direct and control their children's upbringing will in many cases complement religious-freedom rights protected by the Free Exercise Clause. *See, e.g., Wisconsin v. Yoder, supra.*[19] Indeed, courts and commentators sometimes fail to remember

[19] As we discussed above, however, it does not follow from this complementarity that family integrity *must* ride in tandem with First Amendment rights in order to be deemed and protected as "fundamental."

that, given the historical context out of which cases like *Meyer* and *Pierce* arose – a context of nativist hostility to the culture, language, *and religion* of many immigrants[20] – those cases are reminders of the need to safeguard the rights of religious and ethnic minorities as well as clear statements of parents' rights to build a family culture, to communicate values to their children and shape their character, and thereby to express their commitments and priorities to society.

In a similar way, the Fourteenth Amendment's promise of "liberty" to parents and autonomy to families mirrors the First Amendment's safeguards for expressive association. This notion that decisions about childrearing, third-party access, and education – decisions that under the Fourteenth Amendment, are, except in unusual cases, entrusted to the realm of family integrity and parental direction – are *expressive* and *communicative* decisions is not a novel or expansive idea. *See, e.g., Moore*, 431 U.S. at 503-504 ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). Indeed, the Washington Supreme Court itself observed, in striking down Washington's laws, that "parents should be the ones to choose whether to expose their children to certain people or ideas." Pet. App. 22a.

The law does not tell parents – at least not yet – who are deciding what school would be best for their child, or which friends' influences are likely to be beneficial, or whether their child is ready for contact football, or for a PG-13 movie, or for a date with the class president, "do

[20] *See generally, e.g.*, JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 151-156 (1999).

whatever you choose, so long as it is what I would choose also," Pet. App. 21a (citation and internal quotation marks omitted). This is because, when making these and other decisions, parents are not merely setting rules, they are *expressing* and *communicating* their values to their child and also to the community. *See, e.g., Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (noting important role of the family in "promot[ing] a way of life through the instruction of children"). By keeping a watchful eye on the forces and influences that shape a child – for whose character and conduct society will rightly hold them accountable – parents are, in a very real sense, speaking to their children and to the community about what is important. Under our Constitution, the State may not, in the usual course of things, co-opt these messages. *See, e.g., Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (noting that the law at issue would "deprive parents of a fair opportunity to procure for their children instruction which they think important and we cannot say is harmful"); *compare Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). Washington's third-party visitation laws – which, at the request of "any person," subject *every* parental decision about third-party access to a judicial determination about a child's "best interests" could preclude many low-income parents – who lack the resources to defend their decisions in court – from enjoying the fulfillment and satisfaction such expression brings.

That the content of parents' message is sometimes diffuse does not lessen its claim to constitutional protection. *See Hurley*, 515 U.S. at 569 ("a narrow, succinctly articulable message is not a condition of constitutional protection."). Nor should it matter that, in the opinion of outsiders – of the "any person" whom the Washington statutes empowered to seek a judicial veto of parents' decisions – the content of the family's message, of parents' communication to their children, of parents' decisions about who and what messages should be permitted access to their child, could be improved. *Hurley*, 515 U.S. at 581 ("Disapproval of a private speaker's statement does not legitimize use of the [government's] power to compel the speaker to alter the message by including one more acceptable to others."). In the words of the court below, "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision" (Pet. App. 21a-22a) anymore than the State has the power to revise the content of a political candidate's message or a minister's sermon because it thinks it could communicate a "better" message.

CONCLUSION

For all the foregoing reasons, we urge the Court to affirm the decision and judgment of the court below.

Respectfully submitted,

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