

No. 22-509

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**In the Supreme Court of the United States**

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J.T.H.; H.D.H.;  
PETITIONERS,

*v.*

SPRING COOK,  
RESPONDENT.

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit*

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**BRIEF OF AMICUS CURIAE  
THEM BEFORE US IN SUPPORT OF  
PETITIONERS**

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Them Before Us is a national nonprofit organization dedicated to defending children’s rights to a mother and a father. From its home in Seattle, Them Before Us represents a global movement working to advance children’s rights through education, research, and legislative action.

Your Amicus respectfully supports the grant of a writ of certiorari. Them Before Us advocates for each child’s fundamental right to his or her biological parents. This case asks not only if First Amendment rights can be protected, but also whether fundamental rights of children and parents will be vindicated going forward.

*Troxel v. Granville*, 530 U.S. 57 (2000), affirmed the fundamental right of parents to direct the care, custody, and control of their children. Them Before Us, your amicus, urges this Court to recognize this fundamental right as one that protects children and not just parents.

Government has a legitimate responsibility to investigate and intervene when there is probable cause to believe parents are *not* acting in the best interests of the child. But this Court also observed the dangers of unjustified investigations into family life. Thus, in *Troxel*, this Court said there was “no reason

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), counsel for Amicus Curiae certifies that all counsel of record received timely notice of the intent to file the brief under the Rule. All parties gave consent. Pursuant to Rule 37.6, counsel for Amicus Curiae further certifies that no counsel for a party authored the brief in whole or in part. No person other than the Amicus Curiae or their counsel made a monetary contribution to fund the preparation or submission of this brief.

for the State to inject itself into the private realm of the family to further *question* the ability of the parent to make the best decisions concerning the rearing of that parent’s child.” *Id.* at 68-69 (emph. added). Untrammelled investigations can hinder fundamental rights, too.

The Eighth Circuit’s approach opens children and their families to the risks of unlimited retaliatory questioning in investigations, making the promise of *Troxel* empty, a dead letter. If individuals and agencies are allowed to leverage the authority of the child welfare system to investigate and separate families in retaliation, children will needlessly suffer.

Therefore, your Amicus wishes to draw the Court’s attention to the importance of family stability for children, and the long-lasting trauma imposed when government actors upend this fundamental right.

## SUMMARY OF ARGUMENT

Child welfare systems are intended to keep children safe and to strengthen families.<sup>2</sup> These two goals strengthen each other.

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<sup>2</sup> See U.S. Dep’t Health & Human Serv., *How the Child Welfare System Works* (2022) (available at <https://www.childwelfare.gov/pubpdfs/cpswork.pdf>); see also MandatedReporter.Com, *How Does the Child Welfare System Work* (2022) (available at <https://mandatedreporter.com/blog/how-does-the-child-welfare-system-work/>) (last accessed Dec. 8, 2022) (“Child welfare systems typically take the following actions: . . . Support families (provide prevention services to families that need assistance protecting and caring for their children to prevent entry into foster care) . . . Seek to return children to their families when safety has improved.”).

The child's relationship with his (or her) own parents is key to protecting the child's welfare. Children deserve to be loved, cared for, and protected. The best chance of achieving all three occurs with the child's own, married parents.

In this case, a government actor in a 'child welfare' system did not prioritize the best interests of the child. She did not act to strengthen the child or the family involved. Even though there was no evidence of abuse or neglect from the parents, Spring Cook<sup>3</sup> launched a retaliatory investigation. When the interests and rights of children are not truly prioritized within the child welfare system, the system itself has strayed from its very purpose for existence. Rather than being a tool to protect children and strengthen families, it becomes a source of destabilization, undermining the relationships that are most important to a child and separating him from the people who are most invested in his well-being.

Family separation leaves children with deep wounds and lifelong trauma.<sup>4</sup> It is tragic that, in some cases, separation is necessary for the safety of the child. It is outrageous that, here, a child faced the threat of separation due to government retaliation.

Baseless attacks on parents' and children's rights cannot be ignored. The precedent set by this

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<sup>3</sup> Respondent Cook is director and circuit manager for the Children's Division of Missouri Department of Social Services, in Scott County, MO.

<sup>4</sup> See Children's Rights Litig. Committee of A.B.A. Sec. of Litigation, *Trauma Caused by Separation of Children from Parents* (2019) (available at [https://www.americanbar.org/con- tent/dam/aba/publications/litigation\\_committees/chil- drights/child-separation-memo/parent-child-separation-trauma- memo.pdf](https://www.americanbar.org/con- tent/dam/aba/publications/litigation_committees/chil- drights/child-separation-memo/parent-child-separation-trauma- memo.pdf)) (last accessed Dec. 9, 2022).



case could prove disastrous to the future of parents' and children's rights. Individuals and agencies who needlessly disrupt family stability and threaten the removal of a child in retaliation against parents are taking a system that was designed to protect the most vulnerable members of society—children—and are turning it into a weapon against families. This turns children into pawns in a sickening game of chess in which there are no winners. Your Amicus urges the Court to prevent further weaponization of investigation in this scenario. The well-being of children must be protected, and that must include protecting and prioritizing the bond between a child and parents.

## ARGUMENT

### **I. Retaliatory Investigations That Threaten Family Separation Interfere with the Fundamental Rights of Children.**

No child should ever experience abuse or neglect, especially in what should be the safest place for them — his own home.

When a child is experiencing maltreatment and his safety is compromised, child protection services have an obligation to intervene on the child's behalf and to protect the well-being of the child. But recognizing and responding to the seriousness of abuse and neglect should not lead officials to overlook or downplay the significant trauma and lasting effects of unnecessary family separation.

In this case, the best interest of the child was not prioritized. Instead, the child's rights were destabilized by the threat of investigation and separation.

This destabilizing threat is an injustice to the fundamental rights of the child. Them Before Us advocates to protect children's legal and natural rights to be raised by their mother and father. Family separation is so traumatic that it has significant, lasting effects on children. Every child deserves to be safe, cared for, and loved. And every child deserves that fundamental relationship to be free from retaliatory governmental investigation.

Overwhelmingly, children are most likely to be protected and cared for and to thrive when they are raised by their own married biological parents. Even when separation is necessary, it should be an exception to the general rule. The fundamental relationship between child and parents must be protected; it should not be subject to the vagaries of qualified immunity, as if the right were not well established. Families should not be separated without evidence of maltreatment. Families should never face separation as a retaliatory action. And when such unfair retaliation can be shown, families should have resort to the courts for the damage caused by such investigations.

In this case, the trial court found that Respondent misused the investigating authority of her position against J.T.H. and his family, an investigation that could quickly lead to family separation. Yet the investigation was begun without any evidence of maltreatment, and appeared to be geared toward protecting other government employees in the same county.

Unfortunately, media reports show J.T.H.'s experience is not unique. *The Atlantic* reported about a couple who were placed on a safety plan and threatened with the removal of their children despite the police closing the case in less than two weeks after medical confirmation that there was no evidence of

abuse. Despite this confirmation, the CPS worker petitioned for an extension of the investigation, which ultimately confirmed the earlier findings of police and medical professionals.<sup>5</sup> Other families have experienced case workers repeatedly returning to their homes and even intentionally misleading them about warrants in order to gain access to their homes.<sup>6</sup>

Moreover, the legal standards for investigation are sweeping. One scholar has noted that a neglect case can be opened if a caseworker subjectively believes there may be *potential* for harm. So the trigger for questioning the parent-child relationship becomes the caseworker's personal judgment about parenting.<sup>7</sup>

And increasingly, investigations begin when government disagrees with the parent's choice of disfavored activities. David Pimentel has documented how reports of "endangered" children increasingly reflect disagreements over parenting approaches, rather than actual instances of child endangerment.<sup>8</sup> Pimentel notes the irony of acting against parents in the

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<sup>5</sup> Diane Redleaf, *After the Hotline Call*, THEATLANTIC.COM (2019) (available at <https://www.theatlantic.com/ideas/archive/2019/01/problem-child-protective-services/580771/>) (last accessed November 8, 2022).

<sup>6</sup> Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One*, PROPUBLICA (2022) (available at <https://www.propublica.org/article/child-welfare-search-seizure-without-warrants>) (last accessed November 8, 2022).

<sup>7</sup> Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019) (available at [https://scholarworks.law.ubalt.edu/all\\_fac/1085](https://scholarworks.law.ubalt.edu/all_fac/1085)).

<sup>8</sup> David Pimentel, *Protecting Free Range Kids: Recalibrating Parental Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1 (2016). [https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1010&context=faculty\\_scholarship](https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1010&context=faculty_scholarship).

name of “best interests of the child,” while causing the child lasting harm and disruption. “If the governing principle is the well-being of children, the state would need to be rescuing them from a genuinely grave situation for them to justify subjecting them to the harms that intervention itself would inflict upon them.”<sup>9</sup>

All these developments contradict this Court’s stated protection of the family relationship in cases like *Troxel*. Rather than protect the family from intrusive questioning, investigations are allowed to begin on the flimsiest of reasons. And while these are not “criminal” proceedings, retaliatory investigations can harm fundamental liberty interests.

## **II. Child Welfare Workers Are Acting Without Appropriate Oversight**

This case arises against a backdrop of increasing concern about children being removed from their homes unnecessarily.

Your Amicus believes the evidence shows that unnecessary separation is increasing. One trend is the number of “short stayers” in the child welfare system. Research shows that roughly 10% of the children removed from their homes spend less than thirty days in foster care.<sup>10</sup> For these “short stayers” the median length of stay is only six days. Fully three-fourths of this group were returned to their homes within two weeks. While a short stay does not always mean the concern was unfounded, it does suggest removals are

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<sup>9</sup> *Id.*

<sup>10</sup> See Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J. LAW & SOC. CHANGE 207 (2017) (available at <https://scholarship.law.upenn.edu/jlasc/vol19/iss3/2>).

happening over matters that could be remedied quickly while the child is in the home; 76% of short stayers are returned to their home of origin, suggesting the home situation was not a permanent problem.

Furthermore, children can often be removed without judicial review or attorney involvement. For instance, in New Mexico, child removal for up to forty-eight hours is allowed without any review from a judge or attorney.<sup>11</sup> It is unlikely that it is a mere coincidence that New Mexico has a high number of short stayers and the most common length of stay is forty-eight hours or less.<sup>12</sup> Quick reunification does not mean that family separation was avoided, nor does it mean that children were spared the trauma of being removed from their parents. As legal scholar Shanta Trivedi has pointed out, even when the adults involved view removal as an isolated event, for the child it is a “significant turning point... that many children will relive over and over again in their minds.”<sup>13</sup>

Even where minimal review is allowed, judges are reluctant to hold child-welfare actors accountable for violating these low standards. This creates a perfect storm of incentives to ignore the actual well-being of the child. Although juvenile courts are supposed to determine whether reasonable efforts were made to prevent family separation, it often takes very little to

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, citing data from AFCARS, Foster Care File, retrieved from National Data Archive on Child Abuse & Neglect, Cornell University, 2013 Federal Fiscal Year.

<sup>13</sup> Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523 (2019) (available at [https://scholarworks.law.ubalt.edu/all\\_fac/1085](https://scholarworks.law.ubalt.edu/all_fac/1085)).

clear this bar. One state found that 90.4% of its judges had *never* ruled the government’s efforts were unreasonable. And of those judges, 40.5% said they had made “reasonable efforts” findings even when later review showed the government had not made reasonable efforts.<sup>14</sup> The pressure to issue “reasonable efforts” findings means children’s fundamental rights are being systematically undermined.

“Emergency” removals, under low standards, without accountability are a recipe for disaster – disasters like the one created in J.T.H.’s family.

### **III. The Prospect of Family Separation Can Traumatize Children**

Children suffer long past the end of retaliatory investigations. Family separation causes significant trauma to the children involved.<sup>15</sup>

One study found that children placed in foster care experienced a broad range of negative outcomes. These included higher aggression, temper tantrums, speech defects, shyness and sensitivity, difficulties around food, and crying.<sup>16</sup>

More recent research reinforces these findings, showing that that children in the welfare system are more likely to have high levels of behavioral and emotional problems. They are more likely to be expelled

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<sup>14</sup> See Sankaran & Church , *supra* at n. 10.

<sup>15</sup> See Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long Lasting*, NOVA Next (2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/> . (last retrieved November 10, 2022).

<sup>16</sup> See Shauna Trivedi, *The Harm of Child Removal*, *supra* note 13.

from school. They are more likely to skip school. The risks are higher for welfare-involved children, even compared to households deemed “at risk.”<sup>17</sup>

So even where removal may be justified, it comes with long-lasting trauma to the child. Children who have experienced family separation, even temporarily, are more likely to struggle with guilt, post-traumatic stress disorder, isolation, anxiety, low self-esteem, substance abuse, and despair.<sup>18</sup>

Despite the narrative that children are resilient, family separation and removal, whether short term or long term, has been shown to negatively impact a child’s ability to form healthy attachments and to impair their social and emotional functioning, self-regulation, and decision-making abilities.<sup>19</sup>

It is one thing for a child to endure these struggles because of separation that was necessary to avoid harm or abuse. But when a child’s family stability is upended in retaliation for the parents’ exercise of their rights, the calculus shifts. When government actors fail to establish evidence of real risk of any danger, these costs are more than tragic – they are unjust.

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<sup>17</sup> Katherine Kortenkamp & Jennifer Ehrle, Urban Institute Series B-43, *The Well-Being of Children Involved with the Child Welfare System: A National Overview*, (2022) (available at <https://www.urban.org/sites/default/files/publication/59916/310413-The-Well-Being-of-Children-Involved-with-the-Child-Welfare-System.pdf>).

<sup>18</sup> See Shauna Trivedi, *The Harm of Child Removal*, *supra* note 13, citing Dr. Monique Mitchell, *The Neglected Transition: Building a Relational Home for Children Entering Foster Care* (2016).

<sup>19</sup> See Shauna Trivedi, *The Harm of Child Removal*, *supra* note 13.

#### IV. **Protecting the Parent-Child Bond is Necessary for a Flourishing Society**

Children deserve to be safe, loved, and cared for. Unwarranted family separation undermines that right. Statistically, the safest, most nurturing place for a child remains the home of their own married mother and father. This Court has always rejected the idea that children simply need *an* adult. The Constitution protects a child's interests in the relationship with his or her own parents.

The biological connection between a parent and child creates a unique bond that cannot simply be replaced. Significant harm results from the breaking of that bond. Children who are raised by their own parents in intact families are more likely to be physically and emotionally healthy. They are likely to experience better social outcomes than peers raised by non-biological parents. According to the Center for Disease Control, children in nuclear families were less likely to have asthma, less likely to have frequent headaches or migraines, less likely to experience mental health issues or developmental delays, less likely to have learning disabilities or ADHD, and less likely to lack a usual place for healthcare.<sup>20</sup> Of all the groups studied, they were the least likely to have had two or more emergency department visits in the past 12 months.<sup>21</sup>

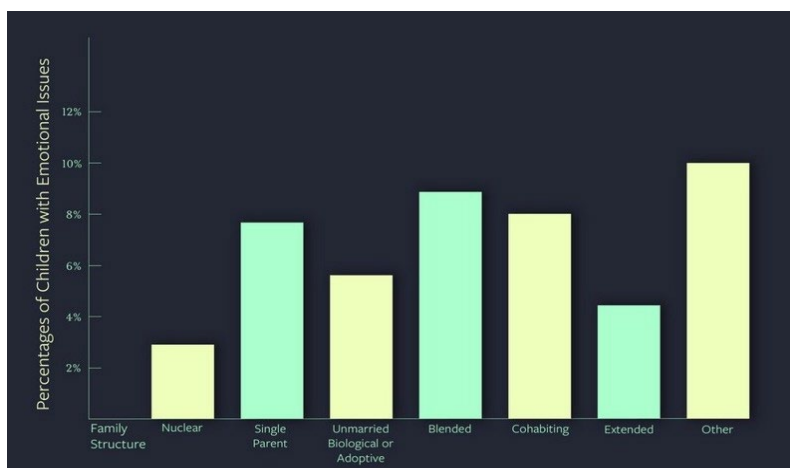
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<sup>20</sup> Center for Disease Control, *Family Structure and Children's Health in the United States: Findings From the National Health Interview Survey, 2001–2007*, 10 VITAL & HEALTH STAT. 246 (2010), (available at [https://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_246.pdf](https://www.cdc.gov/nchs/data/series/sr_10/sr10_246.pdf)).

<sup>21</sup> *Id.*



Additionally, children in nuclear families were the least likely to be depressed or to have definite or severe emotional or behavioral difficulties.<sup>22</sup>



*Figure 1: Data from the Center for Disease Control “Family Structure and Children’s Health” based on the National Health Interview Survey.*

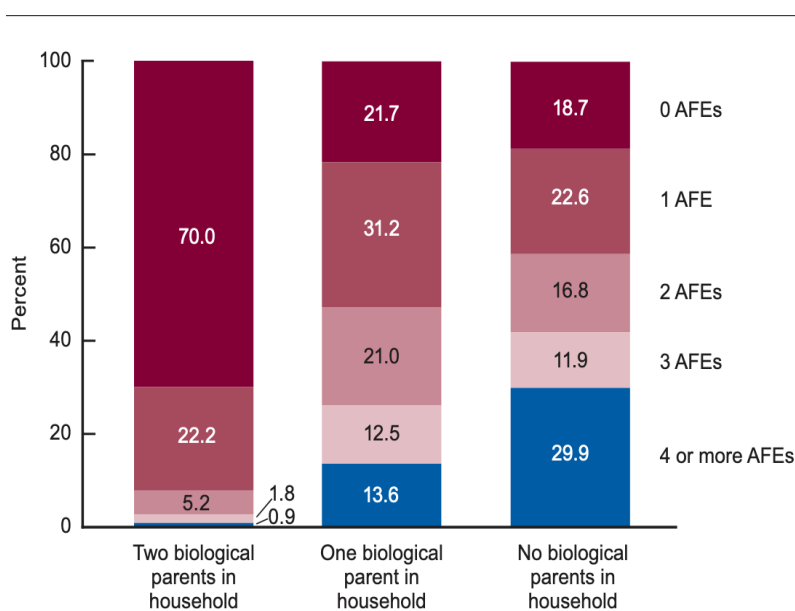
Children raised in nuclear families, with biological parents, have statistically lower cortisol levels,<sup>23</sup> indicating lower levels of stress than those experienced by their peers, and are less likely to experience traumatic circumstances during their childhood.<sup>24</sup> Of those children living in a home with both biological

<sup>22</sup> *Id.*

<sup>23</sup> Joseph Henrich, Robert Boyd, & Peter Richerson, *The Puzzle of Monogamous Marriage*, 367 *PHIL. TRANS. ROYAL SOC. B* 657 (2012). <https://doi.org/10.1098/rstb.2011.0290>.

<sup>24</sup> U.S. Dep’t. Health & Human Serv., *Adverse Family Experiences Among Children in Non-Parental Care, 2011-2012*, 74 *Nat’l Health Stat. Rep.* 1 (2014) (available at <https://www.cdc.gov/nchs/data/nhsr/nhsr074.pdf>).

parents, 70% had not experienced circumstances such as living with someone who was mentally ill or suicidal, witnessing drug or alcohol abuse in the home, witnessing violence in the home or neighborhood, or being a victim of violence. In comparison, only 20% of children with one or no biological parents in the home had experienced none of these traumatic circumstances.<sup>25</sup>



NOTES: Children living with step or adoptive parents were excluded. AFE is adverse family experience.  
SOURCE: CDC/NCHS, State and Local Area Integrated Telephone Survey, National Survey of Children's Health, 2011–2012.

*Figure 2: Data from the Center for Disease Control's National Health Statistics Report. Percent distribution of number of different types of adverse family experiences for children aged 0–17 years, by number of biological parents living in the household.*

<sup>25</sup> *Id.*

The data shows that the environment in which a child is most likely to be cared for, healthy, and secure is one in which they are raised by their own married father and mother.

Ignoring the importance of a child's connection with his biological parents is also costly to society. Children raised in intact, two-parent families are more likely to have a high school diploma or GED, earn more as adults, and are more likely to have intact families themselves.<sup>26</sup> Furthermore, a greater number of married, two-parent families in a community increases upward economic mobility for the community as a whole and communities with a high number of children growing up without one of their biological parents have worse economic outcomes.<sup>27</sup> No one wins when the bond between parent and child is needlessly severed. Children experience irreparable harm and entire communities suffer from this wound.

## **V. Parents are the Most Invested in the Well-Being of their Children**

More so than any other adults in his life, a child's parents are deeply invested in protecting his best interest and promoting his well-being, and again, the evidence shows this reality. Sometimes called the

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<sup>26</sup> Bradley Wilcox & Robert Lerman, American Enterprise Institute, *For Richer, For Poorer: How Family Structures Economic Success in America*, American Enterprise Institute (2014) (available at <https://www.aei.org/research-products/report/for-richer-for-poorer-how-family-structures-economic-success-in-america/>).

<sup>27</sup> See Raj Chetty, Nathaniel Hendren, Patrick Kline, & Emmanuel Saez, *Where is the land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. ECON. 1553 (2014) (available at <https://doi.org/10.1093/qje/qju022>).

“Cinderella Effect,” step-parents are statistically less invested in their step-children than biological parents. Sociologists Martin Daly and Margo Wilson write, “Step-parents do not, on average, feel the same child-specific love and commitment as genetic parents, and therefore do not reap the same emotional rewards from unreciprocated ‘parental’ investment.”<sup>28</sup> Step-mothers provide stepchildren with less healthcare, lower quality education, spent fewer dollars on food compared with biological mothers.<sup>29</sup> What is more, stepmothers are 2.4 times more likely to kill their stepchild than birthmothers, and children living with an unrelated parent are between 15 and 77 times more likely to die “accidentally.”<sup>30</sup>

Nor is this unique to stepmothers. In a study following 644 newborns from families that were considered at risk for neglect or abuse for the first eight years of their lives, researchers found that maltreatment was the lowest among children who lived with two biological parents, and highest in homes with a stepfather or boyfriend.<sup>31</sup> Federal data also show that

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<sup>28</sup> Martin Daly & Margo Wilson, *The ‘Cinderella Effect’ is no Fairy Tale*, 9 TRENDS IN COGNITIVE SCI. 507 (2005) (available at <https://doi.org/10.1016/j.tics.2005.09.007>).

<sup>29</sup> Anne Case & Christina Paxson, *Mothers and Others: Who Invests in Children’s Health?*, 20 J. HEALTH & ECON. 301 (2001) (available at [https://doi.org/10.1016/S0167-6296\(00\)00088-6](https://doi.org/10.1016/S0167-6296(00)00088-6)).

<sup>30</sup> Joseph Henrich, Robert Boyd & Peter Richerson, *The Puzzle of Monogamous Marriage*, 367 PHIL. TRANS. ROYAL. SOC. B 657-660 (2012) (available at <https://doi.org/10.1098/rstb.2011.0290>).

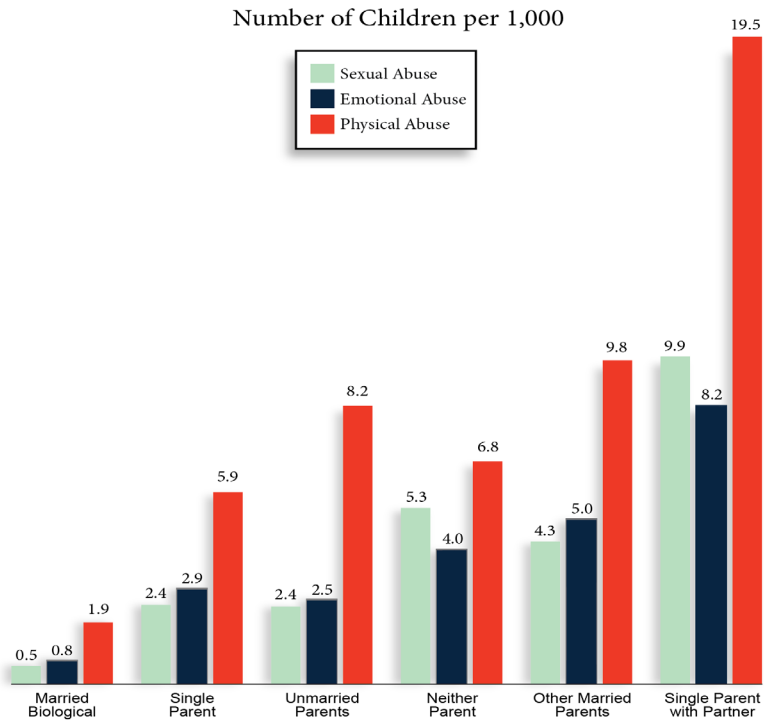
<sup>31</sup> Diana Zuckerman & Sarah Pedersen, *Child Abuse and Father Figures: Which Kind of Families Are Safest to Grow Up In?*, Na-

the family structure with the lowest likelihood of abuse is the intact married family and that abuse rates are higher when a child is living with an unrelated adult. The National Incidence Study found that rates of child physical, emotional, and sexual abuse are lower among children living with their married biological parents than in any other category.<sup>32</sup>

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tional Center for Health Research, <https://www.center4research.org/child-abuse-father-figures-kind-families-safest-grow/> (last retrieved November 8, 2022).

<sup>32</sup> U.S. Dep't Health & Human Serv., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress* (2010) (available at <https://www.acf.hhs.gov/opre/report/fourth-national-incidence-study-child-abuse-and-neglect-nis-4-report-congress>).



*Figure 3: Data from the National Incidence Study (2010)*

Not only is abuse more common in family structures with an unrelated adult, but it is also more severe. Children abused by a parent's partner are more likely to be severely injured, more likely to experience severe head injuries, and more likely to need intubation.<sup>33</sup>

### CONCLUSION

*Troxel v. Granville*, 530 U.S. 57, affirmed the fundamental right of parents to direct the care, custody, and control of their children. *Them Before Us*, your *amicus*, recognizes this fundamental right as one that protects children. Children are safest in their own homes, with their own biological parents, free from government interference or intrusion unless there is significant evidence of danger. The decision below threatens these fundamental rights, and this case presents an ideal vehicle to protect them from unfair government retaliation.

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<sup>33</sup> Children's Nat'l Hospital, *Child Abuse Injuries More Likely to Be Severe if Caregiver is Male and Unrelated to Child* (2017) (available at <https://childrensnational.org/news-and-events/childrens-newsroom/2017/child-abuse-injuries-more-likely-to-be-severe-if-caregiver-is-male-and-unrelated-to-child>) (last accessed November 8, 2022).

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