No. 24-425

IN THE

Supreme Court of the United States

JESSE REHBEIN, *et al.*,

Petitioners,

v.

ANNETTE REHBEIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF PARENTS, INC. D/B/A PARENTSUSA IN SUPPORT OF PETITIONERS

DAVID S. DELUGAS
Counsel of Record
NATIONAL ASSOCIATION OF
PARENTS INC.
D/B/A PARENTSUSA
1600 Parkwood Circle,
Suite 200
Atlanta, GA 30339
(888) 687-4204
david.delugas@parentsusa.org

Counsel for Amicus Curiae

130677

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Parents, Inc. ("ParentsUSA") is a secular nonpartisan 501(c)(3) nonprofit national organization with its offices located in Atlanta, Georgia. ParentsUSA exists to serve all legal parents; i.e., mothers and fathers, married or unmarried, biological or adoptive,[2] and their children throughout the United States. One of the missions of ParentsUSA is to preserve and support the parent-child relationship by protecting the constitutional rights of parents—as those rights have been recognized by this Court. See https://parentsusa.org.

SUMMARY OF ARGUMENTS

States are split on the burden of proof and the standard required for nonparents to be awarded visitation and any rights resembling or being called parental rights including physical custody and legal custody, however each state uses new and inventive terminology. The case Petitioners have brought provides an excellent vehicle to provide parents, nonparents, and the states with the certainty and predictability to reduce litigation and to avoid behaviors by parents that otherwise would result

1. Counsel of record for all parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

2. Because the gender of the parents or their sexual orientation should not be a qualifier, ParentsUSA intentionally does not include a term by which to do so. Yet, for clarity, ParentsUSA does not differentiate parents based on their gender or sexual orientation, nor should it or should any court.

in the unintended consequence of parents shunning and avoiding involvement by grandparents and other nonparents, parents not remarrying to avoid step-parents having an inroad to obtaining parental rights over the objection of the former spouse or romantic partner, if unmarried. Mostly, the fundamental constitutional rights of parents as this Honorable Court have declared them to exist is in dire need of being revisited as times have changed and families are fractured and different than in decades past.

Troxel v. Granville, 530 U.S. 57 (2000) was a plurality decision. Since 2000, courts and litigants have used Troxel v. Granville to support and expand or to detract and limit the fundamental constitutional rights of parents. Litigation has exploded nationwide as legislatures have expanded the circumstances under which nonparents can initiate or can intervene in cases concerning the legal and physical custody, visitation, decision-making authority, visitation (a less offensive word, yet still the taking of a child from a parent for a period of time), equitable caregiver, guardianship, and other terms utilized to disguise or to describe accurately what will happen to children or what the arrangement will be.

The burden of proof, the evidentiary standards to meet the burden of proof, the subjectivity of the thousands of trial courts, and the deference of appellate courts to the evidence and factual findings at trial are terrorizing parents. When parents are subjected to such litigation over their children, parents capitulate and settle to avoid the disruption, uncertainty, legal expenses, and family discord that filters down to the very children states claim they are serving, either the best interests of the children or to prevent harm to the children.

The parents who have the will and the resources to push back against the attacks to the integrity of their family, parents and children, face years of litigation and tens and thousands of dollars in legal fees. The toll on parents and the children cannot be quantified. It is easier simply to state the obvious: the time, energy, emotions, and financial resources expended are better directed to benefit the very children the states claim to be serving. Parents are the ones who should be insulated and protected BY the states from the sanctity of their family being so easily invaded, with the assistance of the state.

Some states provide a modest level of family protection through threshold requirements. Florida, in the context of "grandparent visitation," has done so. Yet, even Florida's statutory procedure still subjects parents to the threat of litigation and, if in litigation, to the expense of attorneys to force the offense of the grandparents to be resisted and to ensure the threshold burden is resisted, with trial judges, many of whom are grandparents, some are not even parents, and some are young and some are old, making subjective determinations with scant direction from state supreme courts, all of which take differing views on the holdings made by this Honorable Court in the few cases that have addressed the rights of parents and the rights of their children.

As set forth herein, below, ParentsUSA contends that the Montana Supreme Court erred and the Hawaii Supreme Court correctly analyzed and reiterated the correct legal standard that this Court should reaffirm and expand on matters including the sufficiency and quality of the evidence required.

ARGUMENT

The Court Should Grant The Writ To Allow Briefing on the Merits for Consideration and Clarification of the Fundamental Constitutional Rights of Parents When States Seek to Take Children From Fit Parents And Award Any Time or Custody To Nonparents Without the Requisite Showing By Clear and Convincing Evidence that Actual Harm Would Befall A Child.

A. Petitioners May Not Be Ideal Parents To Present the Questions for The Court, But the District Court found them to be "Fit Parents"

> *Do or do not. There is no try.*—Yoda
>
> *Fit parent or unfit parent. There is no other category of parents.*—ParentsUSA.

With apologies to this Honorable Court, by quoting from the movie *Star Wars*, ParentsUSA does not make light of the dignity of the Court or the seriousness of this (and every) petition for certiorari that comes before it. Rather, ParentsUSA urges this Honorable Court to set aside any negative thoughts or feelings about the Petitioners and their worthiness as parents based on their history as set forth by Petitioners in the *Petition for Writ of Certiorari*, pp. 3-5, and recognize the Petitioners are "fit parents" as the District Court specifically found. *Petition for Writ of Certiorari*, p. 6; Appendix A, p. 16-17, Opinion of the Supreme Court of the State of Montana, filed July 16, 2024, ¶19 ("While the District Court did find Jesse and Danielle to be fit parents that have progressed markedly since the children were removed from their care, the fitness of the natural parents is not a consideration under § 40-4-228 MCA.")

Once being found "fit parents," these Petitioners must enjoy the same liberty interests as do the pristine honor parents across the USA engaged in the same battles with nonparents over any interest in their children. Parents are fit or unfit and all fit parents must be treated the same by courts and legislatures.

B. "Fit Parents" Across the USA are engaged in legal battles with nonparents and granting the Petition for Writ of Certiorari will bring the issues presented to this Honorable Court for full briefing and consideration and, assuredly, dozens of Amicus Curiae Briefs

The State of Georgia has a grandparent visitation statute, O.C.G.A. § 19-7-2, and, as well, an equitable caregiver statute. O.C.G.A. § 19-7-3.1. Both statutes have been the subject of countless appeals to the Georgia Court of Appeals and to the Georgia Supreme Court. ParentsUSA has served as an amicus curiae or as counsel for parents in many of such appeals. E.g., *Michele A. Dias vs. Abby L. Boone*, Case No. S24A0887, in which the same-sex former romantic couple, one who adopted a child before the relationship ended and one who did not adopt that child but later petitioned to be named an "equitable caregiver." The Georgia Supreme Court is tasked with addressing many issues including the constitutionality, facially and as applied, of the statute. Oral arguments were on October 22, 2024, and the supplemental briefing requested by the Justices and the supplemental brief of ParentsUSA, leave being granted, were submitted as of November 12, 2024, and *Jessica Pinkerton vs. Kathy S. Nichols*, Case No. A25A0005, in which the paternal grandmother and mother battled for years in the trial court over grandparent visitation. This appeal before

the Georgia Court of Appeals has remaining only the reply brief of Appellant Jessica Pinkerton, represented by ParentsUSA, which is due by November 18, 2024, and oral arguments (rarely granted) scheduled on December 4, 2024.

Florida's grandparent visitation statute, Fla. Stat. §752.011, and Florida's jurisdiction (to modify) statute, Fla. Stat. §61.516, and Pennsylvania's grandparent's rights (partial physical custody) statute, 23 Pa.C.S. §§ 5324-5325, are at odds and the subject of a pending case (with the notice of appeal being filed by December 4, 2024, by ParentsUSA on behalf of the parents). *Alexis Aluise and Andrew Aluise v. Glenda Spanos*, Fourth Judicial Circuit, Duval County, Case No. 2022-DR-008269, Division: FM-F. After the parents moved from Pennsylvania, the Pennsylvania grandparent partial physical custody order was domesticated in Florida with the consent of the grandparents. The parents' effort to modify the grandparent visitation order in Florida was dismissed, not on the merits, but on jurisdictional grounds. Ultimately, what matters is that Pennsylvania requires only a "best interest" finding based on certain factors (applied to parent and nonparents without differentiation), 23 Pa.C.S. § 5328, and Florida requires a "harm to the child" standard. Fla. Stat. Ch. 752.011(4).

In these cases of which ParentsUSA has personal knowledge and in hundreds of thousands of other cases nationwide,[3] the parents range from stellar to adequate.

3. For the merits stage, ParentsUSA will survey the USA and gather statistics on the number of cases at the trial level and on appeal annually. Of course, the cases that go to litigation represent only a fraction of the situations that do not result in

The consideration as to whether the "best interest" standard or "harm to the child" standard applies to the taking of any parental interest or rights from a parent should be made as to these Petitioners just as any fit parent. Doing otherwise would create layers of parenting other than "fit" and "unfit" which has heretofore not been created by courts or legislatures.

> Never Put Passion In Front Of Principle. Even If You Win, You Lose.
>
> Mr. Myagi, *The Karate Kid Part III*

If this Honorable Court does not put passion (the "feel good" "best interest" standard) in front of principle (the fundamental constitutional rights of parents), the Petition for Writ of Certiorari will be granted and, upon consideration of the issues on the merits, will generate the uniform standard for all parents and their children and all nonparents nationwide. In other words, the Petition for Writ of Certiorari should be granted because of the other parents across the USA, not just in Montana, who will be impacted by the Court's opinion on the merits and without regard to the assessment of the quality of parents Petitioners represent, because they have been deemed by the District Court as "fit parents." Pet. App. A., p. 16-17, Opinion of the Supreme Court of the State of Montana, filed July 16, 2024, ¶19.

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litigation, but are the source of conflict, manipulation, financial pressures, and leverage between parents and nonparents, all of which has deleterious impact on the very children for whose benefit the states enact legislation and issue appellate decisions under the premise that doing so is necessary either to serve the best interests of children or to prevent harm to children.

C. States Are Split, As New York and Hawaii Illustrate, With the Hawaii Supreme Court's Analysis and Holding Being the Model for This Court to Adopt To Preserve the Parent-Child Relationship, To Protect The Fundamental Constitutional Rights of Parents, and For Uniformity Across the USA.

For nearly a century, from *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and through *Stanley v. Kramer*, 455 U.S. 745 (1982) and *Troxel v. Granville*, 530 U.S. 57 (2000), this Court has repeatedly held that "the custody, care and nurture of the child reside first in the parents." *Troxel*, 530 U.S. at 60 (plurality opinion) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and citing other cases).

Amicus is challenged with persuasively presenting existing law to this Court knowing there have been few, if any, presentations more compelling than that provided by then Chief Judge Dillard of the Georgia Court of Appeals[4] in his fully and specially concurring opinion in *Borgers v. Borgers*, 347 Ga. App. 640, 820 S.E.2d 474 (2018). Chief Judge Dillard, relying on decisions from this Court, sets forth the rights of parents and the very limited circumstances under which states may interfere with those rights:

> The liberty interest of parents to direct the upbringing, education, and care of their children

4. In Georgia, the Court of Appeals now has exclusive appellate jurisdiction over domestic relations cases pursuant to the Appellate Jurisdiction Reform Act of 2016. See Ga. L. 2016, p. 883, §§ 3-1, 6-1(c); O.C.G.A. § 15-3-3.1(a)(6); O.C.G.A. § 5-6-34(a)(11) and (d) and O.C.G.A. § 5-6-35(j).

> is the most ancient of the fundamental rights we hold as a people, and is "deeply embedded in our law." This cherished right derives from the natural order, preexists government, and may not be interfered with by the State except in the most compelling circumstances.

Id. 820 S.E.2d at 478-479 (citations omitted).

> Our trial courts must be mindful in every case involving parental rights that, regardless of any perceived authority given to them by a state statute to interfere with a natural parent's custodial relationship with his or her child, such authority is only authorized if it comports with the long-standing, fundamental principle that "[p]arents have a constitutional right under the United States and Georgia Constitutions to the care and custody of their children." In this respect, the Supreme Court of the United States has acknowledged that "[t]he liberty interest . . . of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests. . . ." And while a parent's right to raise his or her children without state interference is largely expressed as a "liberty" interest, the Supreme Court of the United States has also noted that this right derives from "privacy rights" inherent in the text, structure, and history of the federal constitution.

Id. 820 S.E.2d at 479-48 (citations omitted).

Amicus relies extensively, as did Chief Judge Dillard, on this Court's holdings that address children and their parents and the sanctity of the family. *In Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), this Court noted the "liberty interest guaranteed by the Fourteenth Amendment [to the United States Constitution] includes freedom . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home[,] and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men[.]" In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) this Court recognized there is a "private realm of family life which the state cannot enter." Similarly, the parent-child relationship was aptly described in *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925), thusly: "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."

The Georgia Supreme Court also consistently relies on the longstanding precedents of this Court with regard to the barriers to state intervention in the parent-child relationship:

> The presumption that children ordinarily belong in the care and custody of their parents is not merely a presumption of the statutory and common law, but it has roots in the fundamental constitutional rights of parents. The Constitution secures the fundamental "right of parents to direct the upbringing of

> their children," *Troxel v. Granville*, 530 U.S. 57, 65 (2000), and it "protects a private realm of family life which the state cannot enter without compelling justification." *Arnold v Bd. of Ed. of Escambia County*, 880 F.2d 305, 313 (11th Cir. 1989).

In the Interest of M. F., 298 Ga. 138, 780 S.E.2d 291, 297 (2015).

Regrettably for Petitioners and for other parents similarly situated across the USA, the Montana Supreme Court failed to consider and then to follow this Court's long recognized constitutionally protected interest of parents to raise their children without undue state interference.

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost [at least] temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Stanley v. Kramer, 455 U.S. 745, 753-754 (1982). See generally U.S. Const. amend. IX ("The enumeration in

the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. Const. amend. XIV, § 1 (" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."); Ga. Const. Art. 1, § 1, XXIX ("The enumeration of rights herein contained as part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.").

"Orwellian" is an adjective that Merriam-Webster defines as: "of, relating to, or suggestive of George Orwell or his writings[;] *especially*: relating to or suggestive of the dystopian reality depicted in the novel *1984*." https://www.merriam-webster.com/dictionary/Orwellian. "Yet Orwellianism isn't just about big government; it's about authoritarianism coupled with lies." *Five Myths about George Orwell*, Gordon Bowker, The Washington Post, February 24, 2017. https://www.washingtonpost.com/opinions/five-myths-about-george-orwell/2017/02/24/24ef0572-f9ec-11e6-9845-576c69081518_story.html

> [W]hen [in the absence of compelling circumstances necessary to substitute its own preferences for the parent's decision] state actors engage in this sort of Orwellian policymaking disguised as judging, is it any wonder that so many citizens feel as if the government does not speak for them or respect the private realm of family life.
>
> In sum, I take this opportunity, yet again, to remind our trial courts that, in making any

> decision or taking any action that interferes with a parent-child relationship, our state statutes are subordinate to and must be construed in light of the fundamental rights recognized by the federal and Georgia constitutions [ ]. As this Court has rightly recognized, "[t]he constitutional right of familial relations is not provided by government; it preexists government." Indeed, this "cherished and sacrosanct right is not a gift from the sovereign; it is our natural birthright. Fixed. Innate. Unalienable." Thus, regardless of a court's personal feelings or perception of a parent's fitness to care for or retain custody of his or her child, careful consideration of these bedrock constitutional principles and safeguards must remain central to each case without exception. And when this fails to occur, we will not hesitate to remind our trial courts of the solemn obligation they have to safeguard the parental rights of all Georgians.

Borgers v. Borgers, 820 S.E.2d at 482 (citations omitted) (CJ Dillard, specially concurring).

Nothing could be more "Orwellian policymaking disguised as judging" *Id.* at 482, than nonparents being afforded, by legislatures and supported by well-intentioned appellate courts, any means or mechanism to obtain any part of parenting, however described, such as visitation or partial physical custody, without meeting the burden of proving by clear and convincing evidence that a child would suffer harm.

ParentsUSA presents the decision of the Supreme Court of Hawaii in *John Doe and Jane Doe v. John Doe and Jane Doe*, 172 P.3d 1067 (Haw. 2007), as the most highly reasoned and thorough analysis of *Troxel v. Granville*, 530 U.S. 57 (2000) as part of that court's consideration of the constitutionality of HRS § 571-46.3, Hawaii's grandparent visitation statute, that the Hawaii Supreme Court held "can be interpreted to comply with *Troxel*, but . . . that it implicates a fundamental right and is not narrowly tailored to further a compelling governmental interest." 172 P.3d at 1069.

The Hawaii Supreme Court discusses *each and every* opinion; i.e., the plurality of Justice O'Connor joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer, separate concurring opinions by Justice Souter and Justice Thomas, and separate dissenting opinions by Justice Stevens, Justice Scalia, and Justice Kennedy. ParentsUSA would do a disservice to this Honorable Court to convey the discussion and application of *Troxel* by the Hawaii Supreme Court. 172 P.3d at 1071-1075.

Ultimately, the Hawaii Supreme Court determined that a "harm to the child" standard is constitutionally required and such standard cannot be read into HRS § 571-46.3 "without making a substantive amendment to the statute" which the Hawaii Supreme Court considered judicial legislation that it lacks the power to do. The Hawaii Supreme Court affirmed the lower court's finding that HRS § 571-46.3, as written, is unconstitutional. 172 P.3d at 1079.

In reaching its holding, the Hawaii Supreme Court correctly considered this Court's opinions, appellate decisions of Hawaii, and other jurisdictions that have held "the strict scrutiny inquiry is satisfied only where denial of visitation to the nonparent third party would result in significant harm to the child." 172 P.3d at 1078-1079. The other jurisdictions cited by the Hawaii Supreme Court were Colorado, New Jersey, Connecticut, Virginia, Washington, Oklahoma, Florida, Georgia, and Tennessee.

The New York's Court of Appeals[5] made a similar analysis of the implications of *Troxel* (though ParentsUSA contends it did so erroneously) and concluded that N.Y. Dom. Rel. Law § 72(1), requiring only the "best interest" standard, is constitutional on its face and as applied. *In the Matter of E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007). In this analysis, reference was made to how courts in other states have "read their grandparent visitation statutes to encompass the constitutional protections necessary to safeguard parent rights[ ]" referring to Pennsylvania, Utah, and Massachusetts. 8 N.Y.3d at 160, 863 N.E.2d at 106.

Only by this Court granting the *Petition for Writ of Certiorari* can the disparate opinions of the states be reconciled and made consistent. In our mobile society, the people and the bench and bar deserve guidance and certainty.

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5. For readers not familiar with the appellate courts of New York, the Court of Appeals is the highest appellate court in New York.

D. The State of Montana Legislatively Provides For Parents' Rights Then Provides Contradictory Legislation And Appellate Courts Issues Decisions That Render Parents' Rights Meaningless in Montana

Montana's statutes address the rights of parents and also renders those rights meaningless by other statutes. The statutes are a maze for which definitive holdings by this Honorable Court would untangle the patchwork in Montana and bring certainty and protect the fundamental constitutional rights of parents.

See Appendix A:

1. MCA § 40-4-227 Rights of Parents and Children—Policy—Findings.

2. MCA § 40-4-228 Parenting and Visitation Matters Between Natural Parent and Third Party.

3. MCA § 40-6-104 How Parent and Child Relationship Established.

4. MCA § 40-6-601 Legislative Finding and Purpose—Definitions.

5. MCA § 40-6-602 Caretaker Relative Rights Upon Return of Parent—Continuing Custody Affidavit—Review, Finding, and Order By District Court—Limited Reconsideration—Immunity.

6. MCA § 40-6-701 Interference With Fundamental Parental Rights Restricted—Cause of Action.

7. MCA § 40-6-707 Construction.

8. MCA § 40-6-708 Construction.

9. MCA § 40-9-102 Grandparent-Grandchild Contact.

E. Across the USA, Taking Children From Fit Parents Has Become Routine, Common, and A Cottage Industry, With "Taking" Including Taking Time Through Visitation to Taking Children by Awarding Custody, Equitable Caregiver, or Guardianship to Nonparents.

ParentsUSA stands by the statement, above, regarding the various means by which statutes and courts take from *fit* parents in increments that are slight (the frog in a pot of water being heated) to full custody, all due to a subjective finding that doing so serves the "best interests" of the child. If the *Petition for Writ of Certiorari* is granted, ParentsUSA will provide an analysis of the takings from parents and the disparate standards of proof under which such takings occur and the depth and breadth of such takings.

What is difficult for many to grasp is that not all parents and grandparents are capable of having a meaningful and positive relationship. Such a concept is foreign to many and certainly not the subject of *Hallmark Channel* feel-good family movies, especially around

the traditional family holidays including Thanksgiving, Christmas, Hanukkah, Kwanzaa, and Diwaili. But the reality is some parents choose to distance themselves from their own parents (the grandparents to the children) and states do not respect such decisions, enacting laws and proclaiming through appellate decisions that somehow grandparents and other nonparents have a right to intrude on the parent-child relationship.

Consider these situations as reported:

Children taken away from parents due to misreporting of drug tests, say experts, The Guardian, Hannah Summers, 11/09/2024

https://www.theguardian.com/law/2024/nov/09/uk-children-taken-away-from-parents-due-to-misreporting-of-drug-tests-say-experts

Stepchildren's Views About Former Step-Relationships Following Stepfamily Dissolution, National Council of Family Relations *Journal of Marriage and Family*, Marilyn Coleman, Lawrence Ganong, Luke Russell, Nick Frye-Cox, 02/28/2015

https://doi.org/10.1111/jomf.12182

'*I never want you around your grandchild': the families torn apart when adult children decide to go 'no contact,' The Guardian*, Gabby Hinsliff, 11/9/2024

https://www.theguardian.com/lifeandstyle/2024/nov/09/the-families-torn-apart-when-adult-children-decide-to-go-no-contact

People Who Went No-Contact With Their Parents Are Revealing The "Final Straw" Moment That Led To Their Decision, And I Have No Words, Buzzfeed, Liz Richardson, 05/31/2024. https://www.buzzfeed.com/lizmrichardson/people-who-cut-off-toxic-parents-stories

Legislators and appellate judges and justices across America likely are not familiar with such situations or have a fairy-tale attitude that everyone will find a way to get along "for the sake of the children." In practice, families fight and battle, tens of thousands and hundreds of thousands of dollars are consumed in the legal battles, families move to get away from other family members, and yet our legal system allows nonparents to fight for the nonparents' desires and interests at the expense of parents and their children. Minimally, the bar, the standard, should be nearly insurmountable; i.e., clear and convincing evidence, expert opinion evidence, not merely layperson conjecture presented as fact, that a child will be harmed in the absence of state intervention.

F. The Law of Unintended Consequences Has and Will Continue Adversely To Impact the Very Fiber of American Families and Extended Families and Only This Court Can Stop the Escalating Madness Caused By The Overreach by States to Assuage The Needs and Feelings of Nonparents at the Expense of the Rights of Parents and the Needs of Children.

The law of unintended consequences has found another victim: children and families. Before explaining, we should review a few examples[6] of when laws with good intentions produced contrary unintended results:

1. "Three strikes" laws may actually be increasing the murder rate, and not decreasing it.

2. Seat belt laws increase the number of car accidents, and increase pedestrian and cyclist deaths.

3. Banning the insecticide DDT almost certainly has led to more deaths, not fewer.

4. Teaching children not to talk to strangers (e.g. the "Stranger Danger Campaign") may be making them less safe, not more safe.

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6. *Ten Examples of The Law of Unintended Consequences*, American Enterprise Institute, Mark J. Perry (November 19, 2013). https://www.aei.org/carpe-diem/ten-examples-of-the-law-of-unintended-consequences/

5. The lengthy and costly FDA approval process might be causing more, not fewer, deaths.

6. Government regulations that reduced logging in America's national forests (e.g. to protect the threatened northern spotted owl) may have resulted in more acres of forest being harvested worldwide, not less.

7. Increasing state cigarette taxes may significantly decrease government tax revenues, not increase revenues as expected.

8. Tariff on imports are passed in order to protect domestic industries and jobs from foreign competition, but often end up costing more American jobs than are saved by protectionism.

9. Vegetarianism may lead to an increase in animal deaths, and not a decrease.

10. Thanks to the efforts of animal rights activists, horse slaughter is now banned in the US. But that ban is very likely making the treatment of horses worse, not better.

Until declared unconstitutional or severely limited through this Court's opinion addressing all the issues raised by Petitioners and by ParentsUSA, statutes in all jurisdictions that allow nonparents to take from parents other than upon a showing by clear and convincing evidence of harm to a child (with harm defined so as to

be useful in its application) have and will continue to have the following unintended consequences as more and more *fit* parents across the USA learn of the consequences of their behavior that can result in their parental rights being taken through innocent conduct never intended to be consent):

1. From birth, parents will decline assistance, financial and caregiving, and any contact by grandparents and others.
2. Parents who divorce or, if never married, will not remarry.
3. Parents who divorce or, if never married, when considering a romantic relationship, will not live with a romantic partner.
4. Parents will not permit other adults, relatives or nonrelatives, to develop relationships with their child.

Why would parents do so? Parents will be engaging in prophylactic conduct out of fear allowing such contact with their children could be interpreted subjectively as "consent" to the loss of parental rights. The public policy of every state is to encourage relationships between children and grandparents and other relatives, to promote healthy relationships between consenting adults, and to promote and nurture marriage. With the costs and risks of litigation under statutes across the USA that permit nonparents to seek visitation and custody, the law of unintended consequences will grow over time and children will be isolated from relatives including grandparents and single parents will not marry and will not permit another adult to spend time and become close with their children.

CONCLUSION

For the foregoing reasons, *Amicus* ParentsUSA respectfully requests that this Court grant Petitioners' Petition for Writ of Certiorari and, thereafter, emphatically reaffirm and clarify its parental-rights precedents by requiring a showing of harm to a child by clear and convincing evidence before visitation or any part of parenting can be awarded to a nonparent.

Respectfully submitted,

David S. DeLugas
Counsel of Record
National Association of
Parents Inc.
d/b/a ParentsUSA
1600 Parkwood Circle,
Suite 200
Atlanta, GA 30339
(888) 687-4204
david.delugas@parentsusa.org

Counsel for Amicus Curiae

November 15, 2024

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1. MCA § 40-4-227 Rights of Parents and Children—Policy—Findings:

(1) It is the policy of the state of Montana:

(a) to recognize the constitutionally protected rights of parents and the integrity of the family unit;

(b) to recognize a child's constitutionally protected rights, including all fundamental rights unless those rights are specifically precluded by laws that enhance their protection; and

(c) to ensure that the best interests of the child are met in parenting proceedings.

(2) The legislature finds:

(a) that while it is in the best interests of a child to maintain a relationship with a natural parent, a natural parent's inchoate interest in the child requires constitutional protection only when the parent has demonstrated a timely commitment to the responsibilities of parenthood; and

(b) that a parent's constitutionally protected interest in the parental control of a child should yield to the best interests of the child when the parent's conduct is contrary to the child-parent relationship.

Appendix

2. MCA § 40-4-228 Parenting and Visitation Matters Between Natural Parent and Third Party.

(1) In cases when a nonparent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of this chapter apply unless a separate action is pending under Title 41, chapter 3.

(2) A court may award a parental interest to a person other than a natural parent when it is shown by clear and convincing evidence that:

(a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and

(b) the nonparent has established with the child a child-parent relationship, as defined in 40-4-211, and it is in the best interests of the child to continue that relationship.

(3) For purposes of an award of visitation rights under this section, a court may order visitation based on the best interests of the child.

(4) For purposes of this section, voluntarily permitting a child to remain continuously in the care of others for a significant period of time so that the others stand in loco parentis to the child is conduct that is contrary to the parent-child relationship.

(5) It is not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party under this section.

(6) If the parent receives military service orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to parent the child for the period the parent is called to military service, as defined in 10-1-1003, the court may grant visitation rights to a family member of the parent with a close and substantial relationship to the minor child during the parent's absence if granting visitation rights is in the best interests of the child as determined by 40-4-212.

3. MCA § 40-6-104 How Parent and Child Relationship Established.

The parent and child relationship between a child and:

(1) the natural mother may be established by proof of the mother having given birth to the child or under this part;

(2) the natural father may be established under this part;

(3) an adoptive parent may be established by proof of adoption.

4. MCA § 40-6-601 Legislative Finding and Purpose—Definitions:

(1) The legislature recognizes that the right of parents to the custody and control of their children is based upon the liberties secured by the United States and Montana constitutions and that a parent's right to that custody and control is therefore normally supreme to the interests of other persons. The legislature also recognizes a growing phenomenon in which absent or otherwise unavailable parents have temporarily surrendered the custody and care of a child to a grandparent or other caretaker relative for a lengthy period of time. The legislature finds that a caretaker relative frequently offers continuity of care by providing a child a loving, stable, and secure environment in which to live, make friends, and attend school, which is an environment not provided by a parent who temporarily abandons a child. However, a child is deprived of that caring and safe environment, and the related continuity of care it may provide, when a parent returns to claim the child with little or no notice to the caretaker relative. This situation, which in some instances has occurred multiple times with the same child, is disruptive to the more stable life offered by the caretaker relative and may violate the child's rights ensured by Article II, section 15, of the Montana constitution, such as the right under Article II, section 3, of the Montana constitution of seeking safety, health, and happiness. For these reasons, it is the purpose of the legislature in enacting 40-6-602 and this section to exercise its police powers for the health and welfare of children who have been abandoned by their parents to the care of relatives and to create a procedure,

applicable in limited situations caused by the voluntary surrender of a child by a parent, under circumstances indicating abandonment, whereby a child in the care of a relative may remain with that relative while the issue of abandonment by the parent is reviewed and determined by a court of law. The legislature believes that this temporary infringement on the right of a parent to the custody and control of a minor child is justified by the possibility of abandonment by the parent, because the welfare of the child is at stake, and because of the likely violation of the child's rights ensured by Article II, section 15, of the Montana constitution.

(2) As used in 40-6-602 and this section, the following definitions apply:

(a) "Caretaker relative" or "relative" means an individual related to a child by blood, marriage, or adoption by another individual, who has care and custody of a child but who is not a parent, foster parent, stepparent, or legal guardian of the child.

(b) "Parent" means a biological or adoptive parent or other legal guardian of a child.

5. MCA § 40-6-602 Caretaker Relative Rights Upon Return of Parent—Continuing Custody Affidavit—Review, Finding, and Order By District Court—Limited Reconsideration—Immunity.

(1) If custody of a child has been voluntarily given to a relative of the child by a parent of the child and the child has remained with that relative for at least 6 months under circumstances in which it is unclear whether or when the parent will return and retake custody of the child, the provisions of this section apply unless, during that 6-month period, the parent expresses to the relative a firm intention and a date on which the parent will return and resume custody of the child and subsequently adheres to that schedule.

(2) Upon a return of the parent and an expression by the parent of an intent by that parent to reassert the parent's right of custody and control over the child, the caretaker relative may file, without payment of a filing fee, with the district court in the county of the relative's residence a detailed affidavit as provided in this section. The affidavit must contain the following matters, the exclusion of any of which makes the affidavit void:

(a) the identification of: (i) the caretaker relative, including the relative's address; (ii) the child in the custody of the relative; and (iii) the parent demanding custody of the child, including the parent's address, if known;

(b) a statement of the facts, as nearly as can be determined, of: (i) the date, time, and circumstances surrounding the voluntary surrender of the custody of the

child to the caretaker relative, including any conversation between the relative and the parent concerning the purpose of the parent's absence and when the parent would return and resume custody of the child; (ii) the reason for the surrender of the child to the relative, as far as is known by the relative; (iii) the efforts made by the relative to care for the child, including: (A) facts explaining the nature and permanency or stability of the home provided by the relative for the child; (B) the schooling of the child while in the relative's custody; and (C) the socialization of the child with other children and adults, both inside and outside the family of the caretaker relative; and (iv) whether any contact was made by the child's parent with the relative, the child, or both, during the absence of the parent and if so, the date, time, and circumstances of that contact, including any conversation between the relative and the parent concerning when the parent would return and resume custody of the child;

(c) a statement by the caretaker relative as to: (i) why the relative wishes to maintain custody of the child; and (ii) how the relative has offered and will continue to offer continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home;

(d) a warning, in at least 14-point type, to the caretaker relative in the following language: "WARNING: DO NOT SIGN THE FOREGOING AFFIDAVIT IF ANY OF THE ABOVE STATEMENTS ARE INCORRECT OR YOU WILL BE COMMITTING AN OFFENSE PUNISHABLE BY FINE, IMPRISONMENT, OR BOTH"; and

(e) a notarized signature of the caretaker relative following a written declaration that the affidavit is made under oath and under penalty of the laws of Montana governing the giving of false sworn testimony and that the information stated by the caretaker relative in the affidavit is true and correct.

(3) A copy of the affidavit filed with the district court must be provided by the caretaker relative to the child's parent, if the address or location of the parent is known to the relative, and may be provided to the department of public health and human services. A caretaker relative may maintain temporary custody of the child for 5 days following the return of the parent and the demand by the parent for custody of the child pending completion of the affidavit and the order of the district court. During that 5-day period, the caretaker relative may not be deprived of the custody of the child by a peace officer or by the order of a court unless a court finds, upon petition by the child's parent and after a hearing and upon notice to the caretaker relative as the court shall require, that:

(a) the child has not been in the custody of the caretaker relative for at least 6 months;

(b) the caretaker relative has committed child abuse or neglect with regard to the child in the custody of the relative; or

(c) the action by the caretaker relative to make and file the affidavit with the district court in accordance with this section was not made in good faith.

(4) Upon receipt of the caretaker relative's affidavit pursuant to subsection (3), the department may proceed pursuant to 41-3-202 as if a report of abandonment of the child had been received.

(5)

(a) Within 48 hours of the filing of the affidavit, the district court shall review the affidavit and determine ex parte whether the affidavit contains prima facie evidence that the child was abandoned by the child's parent. If the court determines that there is prima facie evidence that the child was abandoned by the child's parent, the court shall within 3 business days of its determination of prima facie evidence enter appropriate findings of fact concerning the abandonment and enter an ex parte order approving and ordering continued custody and control of the child by the caretaker relative. An order of the district court pursuant to this subsection approving and ordering continued custody by the caretaker relative is effective for 14 days following entry of the order.

(b) If the court determines that the affidavit does not provide prima facie evidence of abandonment by the parent, the court shall within 3 business days of its determination make appropriate findings of fact and order the child returned to the parent. Upon receipt of the written findings and order of the court, the caretaker relative shall surrender the custody and control of the child to the child's parent.

(c) During or after the 14-day period established under subsection (5)(a), the caretaker relative may

commence a parenting plan proceeding under 40-4-211 or petition the court to be appointed the guardian of the minor under 72-5-225.

(6) Upon entry of an order by the district court pursuant to subsection (5)(a), a copy of the order must be sent to the child's parent, if the address of the parent is known.

(7) The child's parent may, after receipt of the court's findings and order ordering continued custody of a child by a caretaker relative, apply to the court, upon notice to the caretaker relative as the court shall provide, for a reconsideration of the court's order approving continued custody of the child by the relative. The court shall reconsider its order and may reverse its order based upon presentation of evidence of nonabandonment. Pending a reconsideration pursuant to this subsection, custody of the child must remain with the relative unless the order of the district court approving that custody expires or a court has ordered a change of custody pursuant to subsection (3).

(8)

(a) A caretaker relative refusing to surrender custody of a child while acting in good faith and in accordance with this section is immune from civil or criminal action brought because of that refusal.

(b) A peace officer acting in good faith and taking or refusing to take custody of a child from a relative in accordance with this section and the entity employing the officer is immune from civil or criminal action or

professional discipline brought because of the taking of or refusal to take custody of the child.

(9) Subject to availability of appropriations, the attorney general shall prepare a form for the affidavit provided for in this section and shall distribute the form as the attorney general determines appropriate.

6. MCA § 40-6-701 Interference With Fundamental Parental Rights Restricted—Cause of Action.

(1) A government entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children unless the government entity demonstrates that the interference:

(a) furthers a compelling governmental interest; and

(b) is narrowly tailored and is the least restrictive means available for the furthering of the compelling governmental interest.

(2) All fundamental parental rights are exclusively reserved to the parent of a child without obstruction or interference by a government entity, including but not limited to the rights and responsibilities to do the following:

(a) direct the education of the child, including the right to choose public, private, religious, or home schools and the right to make reasonable choices with public schools for the education of the child;

(b) access and review all written and electronic education records relating to the child that are controlled by or in the possession of a school;

(c) direct the upbringing of the child;

(d) direct the moral or religious training of the child;

(e) make and consent to all physical and mental health care decisions for the child;

(f) access and review all health and medical records of the child;

(g) consent before a biometric scan of the child is made, shared, or stored;

(h) consent before a record of the child's blood or DNA is created, stored, or shared, unless authorized pursuant to a court order;

(i) consent before a government entity makes an audio or video recording of the child, unless the audio or video recording is made during or as part of: (i) a court proceeding; (ii) a law enforcement investigation; (iii) a forensic interview in a criminal or child abuse and neglect investigation; (iv) the security or surveillance of buildings grounds, or transportation of students; or (v) a photo identification card;

(j) be notified promptly if an employee of a government entity suspects that abuse, neglect, or a criminal offense has been committed against the child unless the parent is suspected to have caused the abuse;

(k) opt the child out of any personal analysis, evaluation, survey, or data collection by a school district that would capture data for inclusion in the statewide

data system except data that is necessary and essential for establishing a student's education record;

(l) have the child excused from school attendance for religious purposes;

(m) participate in parent-teacher associations and school organizations that are sanctioned by the board of trustees of a school district; and

(n) be notified promptly if, and provide consent before, the child would share a room or sleeping quarters with an individual of the opposite sex on a school-sponsored trip. A child whose parent does not provide consent must be permitted to attend the trip and must be provided with reasonable accommodations that do not require the child to share a room or sleeping quarters with an individual of the opposite sex.

(3) Except for law enforcement, an employee of a government entity may not encourage or coerce a child to withhold information from the child's parent and may not withhold from a child's parent information that is relevant to the physical, emotional, or mental health of a child.

(4) This section may not be construed as invalidating the provisions of Title 41, chapter 3, or modifying the burden of proof at any stage of the proceedings under Title 41, chapter 3.

(5) When a parent's fundamental rights protected by 40-6-702, 40-6-707, 41-1-402, 41-1-403, 41-1-405, and this

section are violated, a parent may assert that violation as a claim or defense in an administrative or judicial proceeding and may obtain appropriate relief without regard to whether the proceeding is brought by or in the name of a government entity, a private person, or any other party. The prevailing party in an action filed pursuant to 40-6-702, 40-6-707, 41-1-402, 41-1-403, 41-1-405, and this section is entitled to reasonable attorney fees and costs.

(6) As used in this section, the following definitions apply:

(a) "Child" means an individual under 18 years of age.

(b) "Education record" means attendance records, test scores of school-administered tests and statewide assessments, grades, school-sponsored or extracurricular activity or club participation, email accounts, online or virtual accounts or data, disciplinary records, counseling records, psychological records, applications for admission, health and immunization information including any medical records maintained by a health clinic or medical facility operated or controlled by the school district or located on the district property, teacher and counselor evaluations, and reports of behavioral patterns.

(c) "Government entity" means the state, its political subdivisions, or any department, agency, commission, board, authority, institution, or office of the state, including a municipality, county, consolidated municipal-county government, school district, or other special district.

(d) "Parent" means a biological parent of a child, an adoptive parent of a child, or an individual who has been granted the exclusive right and authority over the welfare of a child under state law.

(e) "Substantial burden" means an action that directly or indirectly constrains, inhibits, curtails, or denies the right of a parent to direct the upbringing, education, health care, and mental health of the parent's child. The term includes but is not limited to: (i) withholding benefits; (ii) assessing criminal, civil, or administrative penalties; or (iii) exclusion from a government program.

7. MCA § 40-6-707 Construction.

(1) Unless a right has been legally waived or legally terminated, a parent has inalienable rights that are more comprehensive than those listed in 40-6-701, 40-6-702, 41-1-402, 41-1-403, 41-1-405, and this section. The protections afforded by 40-6-701, 40-6-702, 41-1-402, 41-1-403, 41-1-405, and this section are in addition to the protections provided by the constitutions of the United States and the state of Montana and by federal and state law.

(2) Sections 40-6-701, 40-6-702, 41-1-402, 41-1-403, 41-1-405, and this section must be construed in favor of a broad protection of the fundamental right of parents to direct the upbringing, education, health care, and mental health of their child.

(3) Sections 40-6-701, 40-6-702, 41-1-402, 41-1-403, 41-1-405, and this section may not be construed to authorize any government entity to burden the fundamental right of parents to direct the upbringing, education, health care, and mental health of their child.

(4) If a child has no affirmative right of access to a particular medical or mental health procedure or service, then nothing in 40-6-701, 40-6-702, 41-1-402, 41-1-403, 41-1-405, and this section may be construed to grant the child's parent an affirmative right of access to the procedure or service on the child's behalf.

8. MCA § 40-6-708 Construction.

(1) Unless parental rights have been legally waived or legally terminated, parents have inalienable rights that are more comprehensive than those described in 40-6-701 or 40-6-703. The protections afforded by 40-6-701 and 40-6-703 are in addition to the protections provided under federal law, other state laws, the United States constitution, and the Montana constitution.

(2) Sections 40-6-701 and 40-6-703 must be construed in favor of a broad protection of the fundamental right of parents to direct the upbringing, education, health care, and mental health of their child.

(3) Nothing in 40-6-701 or 40-6-703 may be construed to authorize a governmental entity to burden the fundamental right of parents to direct the upbringing, education, health care, and mental health of their child.

(4) If a child has no affirmative right of access to a particular medical or mental health procedure or service, then nothing in 40-6-701 or 40-6-703 may be construed to grant the child's parent an affirmative right of access to the procedure or service on the child's behalf.

9. MCA § 40-9-102 Grandparent-Grandchild Contact.

(1) Except as provided in subsection (8), the district court may grant to a grandparent of a child reasonable rights to contact with the child, including but not limited to rights regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title. The department of public health and human services must be given notice of a petition for grandparent-grandchild contact regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title.

(2) Before a court may grant a petition brought pursuant to this section for grandparent-grandchild contact over the objection of a parent whose parental rights have not been terminated, the court shall make a determination as to whether the objecting parent is a fit parent. A determination of fitness and granting of the petition may be made only after a hearing, upon notice as determined by the court. Fitness must be determined on the basis of whether the parent adequately cares for the parent's child.

(3) Grandparent-grandchild contact may be granted over the objection of a parent determined by the court pursuant to subsection (2) to be unfit only if the court also determines by clear and convincing evidence that the contact is in the best interest of the child.

(4) Grandparent-grandchild contact granted under this section over the objections of a fit parent may be granted only upon a finding by the court, based upon clear and convincing evidence, that the contact with the grandparent would be in the best interest of the child and that the presumption in favor of the parent's wishes has been rebutted.

(5) A person may not petition the court under this section more often than once every 2 years unless there has been a significant change in the circumstances of:

(a) the child;

(b) the child's parent, guardian, or custodian; or

(c) the child's grandparent.

(6) The court may appoint an attorney to represent the interests of a child with respect to grandparent-grandchild contact when the interests are not adequately represented by the parties to the proceeding.

(7) The court may appoint a guardian ad litem to represent the best interests of a child with respect to grandparent-grandchild contact.

(8) This section does not apply if the child has been adopted by a person other than a stepparent or a grandparent. Grandparent-grandchild contact granted under this section terminates upon the adoption of the child by a person other than a stepparent or a grandparent.

(9) A determination pursuant to subsection (2) that a parent is unfit has no effect upon the rights of a parent, other than with regard to grandparent-grandchild contact if a petition pursuant to this section is granted, unless otherwise ordered by the court.