No. _____

In The

Supreme Court of the United States

W.S.,

Petitioner,

v.

S.T. and M.T.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A father's right to parent his own child is a protected liberty interest. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). A father's interest in retaining custody of his child is cognizable and substantial. *Ibid.*

California's Uniform Parentage Act, Family Code § 7611(d), is the statutory mechanism for determining the existence of an unmarried father's paternity. It requires proof of two elements: (1) that the alleged father received the child into his home and (2) openly held the child out as his own natural child.

The questions presented are:

1. Whether California's Family Code § 7611(d) is impermissibly vague, as applied, when the Court of Appeal holds "[t]here are no specific factors that a trial court must consider before it determines that a parent has 'received' a child into the home[,]" and thereby affirms a trial court's deprivation of an unmarried father's protected liberty interest in continuing to raise his biological daughter.

2. Whether California's Uniform Parentage Act exceeds constitutional limits in violation of procedural due process, substantive due process, and equal protection, when it operates to deprive an unmarried biological father of the substantial bond he developed with his daughter, whom he raised for the first five years of her life.

LIST OF PARTIES

The name of the Petitioner is:

W.S.

The name of the Respondents are:

S.T. and M.T.

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W.S. petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Sixth Appellate District.

OPINIONS BELOW

The opinion of the California Court of Appeal, *W.S. v. S.T.* is reported at 20 Cal. App. 5th 132. App. 1-33. The constitutional claims were decided by the California Court of Appeal in affirming the Superior Court's judgment. A petition for review was timely filed in the California Supreme Court and denied on April 25, 2018. App. 51.

INTRODUCTION

W.S. raised his biological daughter A.T. for the first five years of her life. Prior to this action, he never needed to formally establish his paternity because he worked out an informal custody and visitation arrangement with A.T.'s mother S.T.

On July 30, 2014, when A.T. was five years old, S.T. unilaterally cut W.S. out of A.T.'s life for good because S.T. was attempting to reconcile with her estranged husband M.T.

A month later, W.S. filed this action in California Superior Court for custody and visitation of A.T., but California does not recognize an unmarried father's parental rights unless he can establish paternity.

In this situation, W.S.'s only mechanism for establishing paternity of his own daughter was under

California's Family Code § 7611(d) which required him to prove, *inter alia*, that he "received" his daughter into his home.

The trial court determined that W.S. did not "receive" his daughter into his home and is therefore not her father.

The trial court concluded "W.S. had not received [A.T.] into his home, because he had not satisfied the standard of 'regular visitation' which included 'assumption of parent-type obligations and duties. . . .'" App. 10. And, that W.S.'s "involvement with [A.T.], though loving, as a biological father, was visitation as a matter of convenience. Specifically, [W.S.'s] involvement with [A.T.] included seeing the child in his home on the average of two times per week for a relatively brief period of time of one to three hours." App. 43. "While this ruling determines legal rights and obligations of the parties during the minority of the child, it does not change the fact that [W.S.] is the biological father of the child, and that the child is aware of [W.S.] and had a relationship with him, notwithstanding not to the [sic] standard of a presumed father." *Id.* at p. 50.[1] "The absence of a present legal right to visitation

[1] California's Uniform Parentage Act (UPA) has been amended so many times one can no longer track its language and discern what precisely a "presumed parent" is anymore, let alone how to become one. For example, California Family Code § 3010(a) makes child custody rights contingent on whether an individual is "presumed to be the father" under California Family Code § 7611(d). But California Family Code § 7611(d), no longer defines what a "presumed parent" is. Instead, it was amended to define who is presumed to be a "natural parent." See *infra*, n. 5.

does not prohibit [S.T. and M.T.] from informally agreeing to it to the extent it may be psychologically healthy and in the best interest of [A.T.]."

W.S. challenged the trial court's interpretation of the statute which cannot be found in the statute's plain and ordinary meaning, and is inconsistent with other state and federal courts.

The Court of Appeal denied W.S.'s constitutional challenges and affirmed the trial court's judgment denying his paternity. App. 1-2, 39.

More troubling, the Court of Appeal held California's Family Code § 7611(d) "does not provide an express definition of what constitutes receipt of a child into a parent's home" App. 14. And, "there are no specific factors that a trial court must consider before it determines that a parent has 'received' a child into the home and established a parental relationship." App. 17.

Petitioner challenges the law, as applied, because it is impermissibly vague and fails to provide notice of what conduct the state required of him before it deprived him of the substantial father-daughter bond he had with his daughter.

The right to parent one's own child is a fundamental right—a protected liberty interest. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

COURT'S JURISDICTION

The California Supreme Court's order denying review was entered on April 25, 2018. App. 51. The California Court of Appeal, Sixth Appellate District's decision was entered on February 1, 2018. App. 1. The Superior Court of the State of California for the County of Santa Clara's statement of decision was filed on March 19, 2015. App. 40. This Court has jurisdiction under 28 U.S.C. § 1257(a). 28 U.S.C. § 2403(b) may apply to this appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No . . . State [may] deprive any person of life, liberty, or property without due process of law; nor deny to any person within this jurisdiction equal protection of the law" U.S. Const. amend. XIV § 1.

California Code § 7611(d) provides in part:

> A person is presumed to be the natural parent of a child if the person meets the [condition] provided . . .
>
> * * *
>
> The presumed parent
>
> > [1] receives the child into his or her home and

> [2] openly holds out the child as his or her natural child.[2]

The parties stipulated that W.S. satisfied the second element. App. 49. The only issue was whether he received the child into his home.

Other pertinent statutory provisions are reproduced in the appendix to this petition. See App., infra, 55-66.

STATEMENT OF THE CASE

A. Factual Background

In 2002, S.T. married M.T. App. 2. In 2006, they separated, stopped living together, and filed for divorce. *Ibid.*

About a year later, S.T. began dating W.S., one of her co-workers. *Ibid.* W.S. believed S.T. was divorced and living with her mother. *Ibid.* W.S. and S.T. had an intermittent romantic relationship from 2007 until 2014.

In 2008, S.T. became pregnant with W.S.'s daughter. App. 3. S.T. told W.S. he was not the father and that she had reconciled with M.T. *Ibid.*

In 2009, shortly after A.T. was born, S.T. suspected W.S. was the father. App. 3. Using a DNA testing kit purchased at a drugstore, W.S. and S.T. confirmed that the child was W.S.'s daughter. *Ibid*.

W.S. first saw A.T. several weeks after she was born, during a brief visit that lasted only several

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[2] Bracketed enumeration added.

minutes. App. 3. W.S. testified that he saw his daughter almost every day and she spent the night at his apartment approximately once or twice a week. App. 3. S.T. testified she only brought A.T. to visit W.S. approximately once or twice a week during her first year. *Ibid.* W.S. believed that S.T. and A.T. were living with S.T.'s mother. App. 3.

W.S. had all of the joys of being A.T.'s father. He changed A.T.'s diapers, cleaned her, and bathed her.

He had purchased a crib for A.T., but she did not use it. *Ibid.* A.T. slept in W.S.'s bed if she spent the night. *Ibid.*

W.S. made bottles for her if she woke up by putting a scoop of formula in a bottle with warm water. *Ibid.* At trial, S.T. insisted she "would not have permitted her daughter to drink bottles made with warm water that was not boiled first." *Ibid.*

In 2013, A.T. was enrolled in a private pre-school under W.S.'s last name. App. 4. W.S. paid for A.T.'s tuition for approximately one year. *Ibid*. He frequently dropped A.T. off and picked her up at school. *Ibid*. A.T.'s teacher at preschool confirmed that W.S. and S.T. often picked A.T. up at school together. *Ibid*. A.T. would run to W.S. when he came to get her. *Ibid*. W.S. participated in school activities and parent-teacher conferences. The teacher recalled that A.T. called W.S. "Pa" or "Daddy." App. 4-5.

W.S. paid for his daughter's private Montessori pre-school. App. 49.

S.T. took A.T. to W.S.'s house on A.T.'s first five birthdays, and on Halloween, or holidays such as Christmas when W.S. had gifts for A.T. App. 7.

S.T. acknowledges A.T. went on trips with W.S. and W.S.'s mother, including a trip to the Jelly Belly factory for A.T.'s second birthday, and a trip to Six Flags for her fourth birthday. App. 7.

On July 4, 2014, S.T. confessed to M.T. that she had been leading a double life. App. 8. All along, S.T. had purportedly misled M.T. into believing that he was A.T.'s biological father. *Ibid*. S.T. also confessed to M.T. that she was in a relationship with W.S. *Ibid*.

On July 30, 2014, S.T. picked A.T. up from W.S.'s home for the last time and unilaterally cut W.S. out of A.T.'s life forever. A month later, W.S. filed this action.

B. The Statutory Framework

In California, "parent and child relationship" means "the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship." Cal. Fam. Code § 7601(b).

The "parent and child relationship" may be established between a child and the "natural parent" by

proof of having given birth to the child, or under California's Uniform Parentage Act ("UPA").[3] Cal. Fam. Code § 7610(a).

"Natural parent" means a nonadoptive parent established under the UPA, "whether biologically related to the child or not." Cal. Fam. Code § 7601(a).[4]

The "parent and child relationship" extends equally to every child and to every parent, regardless of the marital status of the parents. Cal. Fam. Code § 7602. However, this directly conflicts with Cal. Fam. Code § 7540, which states: "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

"The primary means for a father in California to acquire rights as a natural father is through application of California Family Code § 7611." *Vernoff v. Astrue*, 568 F.3d 1102, 1107 (9th Cir. 2009). Subject to some exceptions, not relevant here, an unmarried biological father is "presumed to be the natural parent of a child if . . . [t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child." Cal. Fam. Code § 7611(d).

"The mother of an unemancipated minor child and the father, if presumed to be the father under Section

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[3] The UPA is codified at Cal. Fam. Code §§ 7600-7730.

[4] The meaning of "natural parent" is often confused because prior to the enactment of Cal. Fam. Code § 7601(a), "natural parent" meant a child's biological parent.

7611, are equally entitled to the custody of the child." Cal. Fam. Code § 3010(a).

The UPA "does not preclude a finding that a child has a parent and child relationship with more than two parents." Cal. Fam. Code § 7601(c).

C. The Trial Court's Paternity Test

On August 22, 2014, W.S. filed a petition to establish a parental relationship with daughter. App. 8. W.S. alleged he was A.T.'s biological father and requested joint legal and physical custody and equal visitation. *Ibid.*

S.T. filed a response asserting that A.T. was not W.S.'s daughter. App. 8. S.T. admitted that she had a relationship with W.S. before she became pregnant with A.T. *Ibid.*

S.T. declared, however, that M.T. was the father because S.T. and M.T. were married and cohabiting during conception. App. 8.

On October 21, 2014, the trial court found under California Family Code § 7540, there was a conclusive presumption that M.T. was A.T.'s father, because he was married to and cohabitating with S.T. when A.T. was conceived. App. 10. The trial court granted M.T.'s motion for joinder. *Ibid.*

The trial court conducted a three day trial on W.S.'s paternity, or lack thereof. App. 10.

On March 19, 2015, the trial court issued a written statement of decision denying W.S.'s paternity and concluded that since he was not a legally recognized parent, there was no need for a hearing on the issues of custody or visitation. App. 40-50.

Although the trial court only recognized that S.T. and M.T. have parental rights, California's UPA allows for a child to have over two parents. Cal. Fam. Code § 7601(c).

The trial court found: "W.S. did not prove by a preponderance of the evidence that he received the child into his home within the meaning of Family Code Section 7611(d), and accordingly, he is not a presumed parent under Family Code Section 7611(d)." App. 40. It further found, "[w]here the child has not lived in a party's home, as the case here, the requirement under Family Code Section 7611(d) of receiving the child into the party's home may be met by an alternate means of sufficient evidence of regular visitation[.]" App. 41.

The trial court's test is a dangerous misinterpretation of the language from *Lehr v. Robertson* 463 U.S. 248 (1983). In *Lehr*, this Court explained "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [citation], his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." *Id*., at 261 (quoting *Caban v. Muhammad*, 441 U.S. 380, 392, 389, n. 7).

The trial court, however, did not focus on whether W.S. came forward *to participate* in the rearing of A.T., as mentioned in *Lehr*. Instead, the trial court focused on California cases that mistakenly confuse *Lehr* to require that W.S. had to prove he had *alr*

eady participated in rearing his child in a responsible manner. The trial court's interpretation creates a paradox. The trial court required W.S. to prove his paternity based on how responsible of a father he *had* been. *Lehr* simply required an unwed father demonstrate a full commitment to responsibilities of parenthood going forward. *Lehr* does not actually require the unwed father be a "responsible" parent. But the trial court's statement of decision is permeated by the judge's qualitative analysis of the depth of the parental obligations W.S. had taken on during the first five years of A.T.'s life. For example, the trial court entertained testimony such as whether W.S. used warm or spoiled water when he prepared A.T.'s baby formula. App. 4.

This Court further explained in *Lehr* that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." 463 U.S. at 262.

W.S. raised A.T. for the first five years of her life, therefore, California should be compelled to listen to his opinion of where A.T.'s best interests lie by way of a hearing on custody and visitation.

The trial court's interpretation of what's required conflicts with and far exceeds the requirements discussed in *Lehr*. The trial court concluded "[i]t is clear that receiving the child into one's home is an element requiring more than consent, request, or facilitation of the child into the party's home by the party seeking presumed parent status. Rather, that element may be proven by regular visitation, which decided cases define as an assumption of parent-type obligations and duties such as feeding, bathing, putting the child to bed or naps, changing clothes, cleaning up after the child, discipline and the like. Whenever this Court in its ruling today refers to parental-type task or duties, the court is referring specifically to these stated responsibilities of care as more specifically set forth in the cited cases." App. 41.

The trial court found "that the child never lived in [W.S.'s] home, and from the totality of the credible evidence, including inferences drawn from the evidence, finds that [W.S.] failed to satisfy the alternative means of proving receipt of the child into his home by the regular visitation standard." App. 42. The trial court further found "that [W.S.'s] involvement with the child, though loving, as a biological father, was visitation as a matter of convenience. Specifically, [W.S.'s] involvement with the child included seeing the child in his home on the average of two times per week for a

relatively brief period of time of one to three hours." *Ibid.*

The trial court found "Notwithstanding, overnights of the child in the home of the parent seeking presumptive parent status is but one factor in the overall assessment of whether or not a party has met the requirements of Family Code section 7611(d)." App. 44.

The trial court in determining W.S. failed to receive A.T. into his home, looked to the fact that W.S. did not previously seek a court order regarding visitation any sooner than he did. The trial court found "The failure to exercise or seek orders for more visitation, including overnights, under these particular circumstances, is a factor in assessing whether or not [W.S.] assumed parental type duties, and, hence, whether or not he had regular visitation." App. 44.

D. The Court Of Appeal

W.S. appealed the trial court's decision on constitutional grounds, including, his substantive due process right under the Fourteenth Amendment to parent his daughter. (AOB 29-32). And that his interest in custody of his child was a cognizable and substantial interest that could not be terminated absent showing unfitness under *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989). (AOB 30-31).

W.S. argued "California's statutory scheme is unconstitutional, violating the principles of due process and equal protection." App. 2. He raised the equal

protection argument that "California law automatically grants custody to biological mothers, but not fathers." (AOB 31). That California law requires fathers to establish a right which according to the U.S. Supreme Court is an inherent right. (AOB 31). He raised the issue that "California law further divides this suspect class of fathers into subclasses based on their marital status. Those who are married are granted presumed parent status and therefore the right to custody. Those who are unwed however, must prove receipt and acknowledgment of their child, before they are conferred with the fundamental right to custody of their child. Yet [California Family Code § 7602] provides '[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents. This scheme directly conflicts with [California Family Code §§ 3010 and 7611] which explicitly grant preferences to mothers over fathers and prefer married fathers over unwed fathers. As applied, the court automatically granted M.T. parentage rights under section 7540, because [A.T.] was a child of the marriage. M.T., did not have to prove he parented [A.T.], yet received parent status.'" (AOB 31-32). W.S. argued "[t]his contravenes the intent of [California Family Code § 7602]." And that, " . . . California can provide no compelling government interest furthered by such discrimination. Especially given the Legislature's intent for equal rights expressed in the context of establishing a parent child relationship under the UPA. (§ 7602.)" (AOB 32).

The Court of Appeal acknowledged W.S. raised "several constitutional challenges to the statutory scheme of the UPA and the Family Code. [W.S.] argues he has a liberty interest, protected as a matter of substantive due process, in his relationship with [his] daughter. He also argues section 3010 violates equal protection principles, because it automatically grants custody to biological mothers while requiring fathers to establish 'presumed' parenthood under section 7611. He argues California law further divides fathers into various subclasses based on their marital status, readily granting married fathers presumed parenthood status while requiring unmarried fathers to additionally prove receipt of the child into the home and acknowledgement of the child as his own." App. 27

The Court of Appeal preliminarily ruled that W.S.'s "constitutional arguments are waived for failure to raise them to the trial court . . . " App. 27. W.S. "did not discuss these constitutional issues in either his trial brief or his original petition to establish a parental relationship." *Ibid.* But constitutional issues were in fact raised in W.S.'s trial brief. The Court of Appeal then determined, "even if we were to consider [W.S.'s] arguments as pure questions of law presented by undisputed facts, we would reject them." *Ibid.*

Notwithstanding, the Court of Appeal determined W.S. does not have a "protected liberty interest in establishing a parental relationship with [A.T.] and his parental rights were not entitled to equal protection as to those of a mother." App. 27.

The Court of Appeal determined W.S.'s "claim that the statute unconstitutionally prefers married fathers over unmarried fathers in violation of equal protection principles is undeveloped on appeal." App. 30. The Court of Appeal analyzed the equal protection issue and determined "Legislative classification is permissible when made for a lawful state purpose and when classification bears a rational relationship to that purpose." *Ibid.* But, the Court of Appeal ignored that California expressly states that parental rights extend equally to both parents despite marital status. *See* Cal. Fam. Code § 7602.

W.S. timely filed a petition for discretionary review in the California Supreme Court which was denied on April 25, 2018. App. 51.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeal Could Not Determine What The Statute Specifically Requires

This case presents novel questions including the opportunity to explain the applicability of the vagueness doctrine in the family law context. What specificity is required of a state law that can circumvent an individual's protected liberty interest in raising his own children? What is the constitutional limit on a state's paternity determination? Are states free to pick and choose who they want to recognize as having a protected liberty interest?

The Court of Appeal's acknowledgment that California's Family Code § 7611(d) "does not provide an express definition of what constitutes receipt of a child into a parent's home" begs the question, how then, could any citizen of ordinary intelligence discern what the statute requires?[5] App. 14.

The Court of Appeal further concluded, "there are no specific factors that a trial court must consider before it determines that a parent has 'received' a child into the home and established a parental relationship." App. 17.

But "Fair notice of the law's demands as we've seen, is 'the first essential of due process'" *Sessions v. Dimaya*, 138 S.Ct. 1204, 1228 (2018) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).) "And as we've seen, too, the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law." *Ibid.*

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[5] In this case, no ordinary person of average intelligence could understand what conduct is required of an individual to establish his parentage by reading the plain language of California's Family Code § 7611(d). Or, as Justice Thomas recently reminded us, that he adheres to his view that "a law is not facially vague '[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1252 (2018) (Thomas, J., dissenting) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 112 (1999)) (quoting *Kolender v. Lawson*, 461 U.S. 352, 370–371 (White, J., dissenting)).

"If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108. How can it be that a father's fundamental right to parent his own child, to continue the loving bonds he had with his own daughter for the first five years of her life, could be severed and terminated abruptly by such vague language? How could any individual be on notice of what California Family Code § 7611(d) requires if the Court of Appeal cannot recognize any "express definition" of what "receipt into the home" requires? App. 14.

That the language of the statutory provision is impermissibly vague is further evidenced by the number of arbitrary decisions in California such as *Jason P. v. Danielle S.*, 9 Cal. App. 5th 1000, 1022 (2017), affirming a finding that Jason P. was the father because he "received" the child into his home. The lower court's finding was based on the child having "regularly spent time at the apartment when Jason was living there, Jason made arrangements with his assistant to accommodate [the mother and child] during their visits, he and [the child] went to the park when he was not working, he fed, played music for, and read to [the child], he arranged for an allergist to see [the child] in New York, he obtained a baby gate to prevent [the child] from falling down the stairs in the apartment, and there was a

room in the apartment that was designated as [the child's] room when he was there. The court concluded that '[g]iven the historically liberal interpretation of acts sufficient to 'receive' a child into the home and the case law specifically finding that no period of any specific length is required to meet the 'receiving' requirement, the evidence is sufficient to make that finding.'" *Ibid.*

B. California Disavowed Its Former Interest In Preserving Marriage Via Paternity

California Family Code § 7602 broadens the guarantees of equal protection by insisting that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." This Legislative demand directly conflicts with California Family Code §§ 7611(d) and 7540. California Family Code § 7611(d) must violate equal protection because it requires an unmarried father to prove a substantially burdensome test before the state will recognize his fundamental right to parent his own child. While California Family Code § 7540 conclusively presumes that a spouse married to the birth mother has parental rights.

In addition, California now permits a child to have over two parents. This undermines any argument California may have had in *Michael H.*, that the statutory purpose of not recognizing the unmarried father's parental rights is to somehow preserve the mother's marriage.

Plus, during the trial, M.T. could not even identify the name of A.T.'s pre-school. App. 7. Yet California,

has extended him the constitutionally protected liberty interest in being A.T.'s exclusive father.

C. The Decision Conflicts With This Court And Many Others.

This Court held in *Lehr*, *supra*, 463 U.S. at 261-262, that fathers who have participated in raising their illegitimate children and have developed a relationship with them have constitutionally protected parental rights.

Federal courts interpret California's Family Code § 7611(d) differently than the state courts. The Ninth Circuit determined that a father did not satisfy 7611(d) by receiving the child into the mother's home. *Robleto v. Holder*, 539 Fed.Appx. 756 (2013). The federal court required the alleged father to prove he had received the child "*into* his home, not the grandmother's home." (emphasis in original). W.S. was required, however, to prove much more than the fact that he brought A.T. *into* his home.

In *Neil S. v. Mary L.*, 199 Cal. App. 4th 240, 247 (2011), the Court of Appeal determined " . . . [e]stablishing presumed father status under this presumption requires a certain level of contact between the alleged father and child; a putative father's time spent with the child on alternate weekends has been held sufficient to constitute receiving a child into his home . . . as has daytime childcare and one overnight stay each week in the putative father's home." (citing *Craig L. v. Sandy S.*, 125 Cal. App. 4th 36, 44-45 (2004)).

In *Barthelemy v. Ashcroft*, the Ninth Circuit explained that a father legitimated his son under California Family Code § 7611(d) when he "took his son into his home with his wife Marie's consent, and held out Barthelemy as his son. Therefore Roger legitimated his son under California law." 329 F.3d 1062 (9th Cir. 2003) *as amended* (June 9, 2003).

In *E.C. v. J.V.*, 202 Cal. App. 4th 1076, 1086 (2012), the Court of Appeal gave the language of California Family Code § 7611(d) its plain meaning and held that receiving a child into one's home was met by uncontradicted evidence that the mother and child had moved into the presumed parent's home, without any inquiry into the parenting relationship.

More chaotic is the wide range of mechanisms employed by other states to determine the existence of parental rights. There is no consensus amongst the states regarding the meaning of "father" and many states do not make parental rights contingent on "receiving" a child into the home.

Some states are identical to California's Family Code § 7611(d). Colorado's, Minnesota's, and Montana's, and New Jersey's, and Tennessee's laws are similar to California's but require the father receive the child into the home, while the child "is under the majority[.]" Colo. Rev. Stat. § 19-4-105; Minn. Ann. Stat. § 257.55, Mont. Ann. Code § 40-6-107; N.J. § 9-17-43; Tenn. Code § 36-2-304(a). Some states have nuances to the "receipt" requirement. Massachusetts requires thealleged father to have "jointly with the mother,

received the child into their home . . . " Mass. Ann. Laws Ch. 209C, § 6. Pennsylvania requires clear and convincing evidence of receipt into the home while California requires a preponderance of the evidence. Penn. Const. Stat. tit. 23, § 5102. Pennsylvania permits the alleged father to circumvent receipt and acknowledgement altogether by simply providing "support for the child." *Ibid.* In American Samoa, a father can obtain legal rights by "asserting his paternity in writing." Am. Somoa Code § 45.0103(21). Delaware law requires that for the first two years of the child's life, the alleged father has to reside "in the same household with the child and openly hold out the child as his own." Del. § 8-204(5). Still, other states do not recognize parental rights based on whether a child is received into the home. *See*, *e.g.*, Fla. §§ 742.10, 409.256. This chaotic web of rights is arbitrary given the fundamental nature of the liberty interest at stake.

D. National Importance

This case presents important federal questions about parental rights. In *Meyer v. Nebraska*, 262 U.S. 390, 339 (1923), this Court held that the Due Process Clause protects a parent's right to "establish a home and bring up children." And that the "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535. This Court later determined that a father has a protected liberty interest in

parenting his own children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

California's Legislature has declared there is a compelling state interest in establishing paternity for all children for several reasons including "[k]nowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development." Cal. Fam. Code § 7570(a).

California law states: "[f]or purposes of state law, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, benefits, responsibilities, obligations, and duties of parents, any reference to two parents shall be interpreted to apply to every parent of a child where that child has been found to have more than two parents under this part." Cal. Fam. Code § 7601(d).

CONCLUSION

W.S. has not seen his daughter in over four years. He has no idea what she looks like any more, where she is, or whether she is safe. It cannot stand that California treats W.S. as a complete stranger to his own daughter who recognizes him as her "pa daddy."

Respectfully submitted,

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