No. 18-1431

In the
Supreme Court of the United States

FRANK G.,
Petitioner,
v.
JOSEPH P. AND RENEE P.-F. ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Appellate Division, Supreme Court of New York, Second Judicial Department

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* LEGAL SCHOLAR ADAM J. MACLEOD IN SUPPORT OF PETITIONER

DAVID R. LANGDON
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069
(513) 577-7380
dlangdon@langdonlaw.com

Counsel for *Amicus Curiae*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1. *Amicus curiae* Adam J. MacLeod, pursuant to Supreme Court Rule 37(2)(a) and (b), respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari filed by Frank G., in Case Number 18-1431.

2. On June 4, 2019, counsel for *amicus curiae* requested consent from all parties to file the accompanying brief. On June 6, 2019, Respondent Joseph P. answered that he would *not* consent to the filing of the *amicus curiae* brief. Counsel for *amicus curiae* received no response from other Respondents. Counsel for Petitioner consents to the filing of this brief.

3. In this case, the Appellate Division of the Supreme Court of New York affirmed a trial court's order depriving a father of custody of his biological children without any showing that the father had committed abuse or neglect or any other legal wrong. The case turns on the constitutional question whether parents still possess the ancient, fundamental right to be presumed lawful custodians of their natural children.

4. That constitutional question implicates the broader question whether fundamental rights remain those rooted in the history, traditions, and conscience of our people or are now instead those discerned by judges as they discover new insights.

5. The contemporaneously filed brief addresses this Court's precedents concerning where to locate and how to identify fundamental rights. As the brief explains, the Court's recent precedents concerning fundamental rights have generated confusion and conflicting rulings in state courts and inferior federal courts. This case presents this Court with an opportunity to clear up the confusion.

6. The proposed *amicus curiae* makes this motion for leave to file in support of Petitioner.

7. No party or party's counsel authored any part of the accompanying brief. Law and Liberty Institute provided funding for the preparation and submission of this brief.

For these reasons, the motion for leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted.

DAVID R. LANGDON
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069
(513) 577-7380
dlangdon@langdonlaw.com

Counsel for *Amicus Curiae*

June 14, 2019

QUESTION PRESENTED

Whether a biological father still enjoys the ancient, fundamental right to be presumed the lawful custodian of his natural children.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Adam J. MacLeod is Professor of Law at Faulkner University, Thomas Goode Jones School of Law. He is co-editor of *Foundations of Law* (Carolina Academic Press 2017) and the author of *Property and Practical Reason* (Cambridge University Press 2015) and academic articles in peer-reviewed journals and law reviews in the United States, United Kingdom, and Australia. Amicus has researched and written about the tradition of fundamental rights in Anglo-American constitutions and law and is interested in the merits of this Court's precedents that locate fundamental rights in our Nation's history, traditions, and conscience.

SUMMARY OF ARGUMENT

Does the natural parent-child relationship still have a special status in the fundamental law of the United States? More precisely, do parents still have the ancient, fundamental right to be presumed lawful custodians of their natural children? As this case shows, the answers to those questions are now unclear. And this lack of clarity illustrates a more profound and general confusion about the nature and sources of fundamental rights, which this case enables the Court to resolve.

---

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part. Law and Liberty Institute provided funding for the preparation and submission of this brief. All counsel were timely notified of this filing as required by Supreme Court Rule 37.2. Petitioner consented to the filing of this brief, Respondent Joseph P. refused consent, and the other Respondents did not respond.

This case rests on a fault line in this Court's jurisprudence of fundamental rights. The fault line split open a few terms ago, and the fissure is now spreading through the decisions of state courts and inferior federal courts. That fissure is causing confusion and disagreement about fundamental rights, confusion that now pervades legal scholarship and lower court opinions.

Some say fundamental rights are those "rooted in the traditions and conscience of our people," as this Court has long taught. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Only those rights that are objectively rooted in fundamental law are fundamental. As a result, courts should presumptively defer to ancient customary law and the political branches rather than make radical innovations in constitutional rights analysis.

Others say that the Court now locates fundamental rights in "new dimensions of freedom" that appear to each new generation "through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process." *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584, 2596 (2015). Fundamental rights thus appear to the Court from time to time as "new insight[s]." *Id.* at 2598. On this view, the Court is to welcome opportunities to innovate doctrines of fundamental rights, even to strike down centuries-old doctrines such as the definition of marriage as the union of a man and woman or the right of a natural parent to be presumed to have lawful custody of his children.

This case is an opportunity for the Court to teach clearly what fundamental rights are and how to identify them. The decisions of the New York courts in this case reflect the confusion that now attends this Court's fundamental rights jurisprudence. And because the case involves a conflict between the ancient, fundamental right of a natural parent and a novel right claim of a non-parental adult, a holding in this case could produce clarity.

STATEMENT OF THE CASE

Petitioner Frank G. is the biological father of two children. Without any showing that Frank G. had committed any legal wrong, such as abuse or neglect of the children, the New York courts ended his sole custody of his children. After assessing Frank G.'s fitness as a parent and the best interests of the children, the New York courts awarded sole legal and physical custody to Frank G.'s former romantic partner, Joseph P., who was married to neither of the children's biological parents and had not adopted the children but is the uncle of the children. Frank G. was allowed visitation times. The family court also denied a custody petition by Renee P.-F., the children's biological mother who had earlier renounced her parental rights in a surrogacy contract that was then unenforceable under New York law. *Matter of RPF v. FG*, 47 N.Y.S.3d 666 (N.Y. Family Court 2017), affirmed 161 A.D.3d 1163 (N.Y. App. Div. 2018).

ARGUMENT

I. Fundamental Rights and the Natural Family

A. Fundamental Rights of Natural Parent and Child

Like the right to life, *Washington v. Glucksberg*, 521 U.S. 702, 710-16 (1997), the rights and duties of the relationship between a biological parent and child are fundamental. A natural parent's immunity against being deprived of custody, which is grounded in and derived from those correlative rights and duties, is equally fundamental. It is fundamental in two senses.

First, it precedes government and the positive laws that govern families. The bond between parent and child exists prior to and independently of the positive laws of any state or nation. Since Aristotle and Justinian, jurists have long recognized the relations between parent and child as foundational to society and government. Aristotle, The Politics I.12; The Institutes of Justinian 12 (J.B. Moyle, trans., 5th ed. 1913).

Second, the natural parent's immunity secures the well-being of children, persons whom the government did not create and whom it lacks constitutional competence to harm. It is wrong to separate children from their natural parents without cause. 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 95 (Oxford University Press ed. 2016) (1765) [hereinafter "Bl. Comm."] (discussing the wrong of abduction). Governments act both unjustly and unwisely that break those bonds or attempt to reconfigure them.

1. The Parent's Right Precedes Government

In the common law of England and the United States, the most foundational rights of fundamental law are natural liberties known as "absolute rights," meaning that governments may not justly deprive a person of those rights without first proving that the right bearer relinquished the rights in an act of wrongdoing. Blackstone, the great champion of Parliamentary sovereignty, taught that not even a legislature is competent to eliminate the natural rights and duties of the parent-child relationship "unless the owner [of the rights] shall himself commit some act that amounts to forfeiture." 1 Bl. Comm. 43. James Kent also included the rights of children to the care and support of their natural parents among the "absolute rights" of fundamental law. 1 James Kent, Commentaries on American Law 1, 34, 75, (O.W. Holmes, Jr., ed., 12th ed. 1873); 2 Kent, at 189, 203 n.(c).

From the parent's natural duties toward his children is derived his right to parent them, what Blackstone called the parental "power," which is "more moderate" than the father's absolute dominion over his children in Roman law but nevertheless "still sufficient to keep the child in order and obedience." 1 Bl. Comm. 288-92. Compare James Wilson, Collected Works of James Wilson 1076-77 (Kermit L. Hall and Mark David Hall 2007). Thus, as a matter of both ancient usage and natural reason, a child has a presumptive right to be cared for by her own parents. Matthew Hale, Of the Laws of Nature 88 (David S. Sytsma, ed. 2015) (1670);

1 Bl. Comm. 43, 288-97; R.H. Helmholz, Natural Law in Court: A History of Legal Theory in Practice 103-07 (2015). For the same reasons, her parents are presumptively at liberty to care for her and raise her. Melissa Moschella, To Whom Do Children Belong (2016).

Positive laws that hold parents accountable for their children are not the sources of parental rights and duties but only securities for preexisting duties. 1 Bl. Comm. 288-97 (explaining that municipal law reinforces natural parental obligations); 2 Kent, at 189 (explaining that the natural responsibilities of a parent are reinforced by law). The natural family pre-exists political power and government. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). As this Court explained in *Pierce*, "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." *Pierce*, 268 U.S. at 535.

To deprive a child of those natural bonds is to take away something that governments are powerless to create and destroy. Thus, this Court declared in a landmark of fundamental rights jurisprudence that the collectivist reconfiguring of families that Plato proposed and Sparta practiced are "wholly different from those upon which our institutions rest, and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the

Constitution." *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

For this reason, it is not "within the competency" of governments to infringe the fundamental rights of marriage and the natural family. *Pierce*, 268 U.S. at 535. See also *Meyer*, 262 U.S. at 399–403. The relations of the natural family pre-exist government and officials do not generate their rights and duties. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality) (recognizing the fundamental rights of parents to make decisions about the care, custody, and control of their children). Rather, the duty of judges is to declare the pre-existing reality that a parent and his natural child are connected to each other in fact, and are presumed to be legally connected as a matter of ancient customary law and fundamental right. As Justice Sotomayor has observed, the right of a biological father to remain connected to his children and to withhold consent from another person's adoption of his children is "an interest far more precious than any property right." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 673 (2013) (Sotomayor, J., dissenting).

States lawfully exercise their powers to provide for orphans and children whose parents are abusive, but this is not the same as a power to define the rights and duties of natural parentage. Our legal traditions have always distinguished between natural parentage and relationships that are grounded in the consent of adult caregivers. Unlike the rights and duties of natural parentage, which are fundamental and pre-political, the legal incidents of guardianship, adoption, and foster care are generated by positive law.

Roman law recognized adoption as an artificial status that "imitates nature" and is derived from civil law. The Institutes of Justinian 15-17 (J.B. Moyle, trans., 5th ed. 1913). Accord *Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804, 809 (11th Cir. 2004) (explaining that adoption is not a fundamental right like marriage and parentage but rather the product of state law). In English common law, adoption and foster care were acts of charity and private ordering, and they did not involve official recognition or the laws of inheritance. Helmholz, at 96-97. In place of dead or absent parents, the common law recognized a different species of relation, known as guardian and ward, which Blackstone characterized as "a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural." 1 Bl. Comm. 272.

2. The Parent's Right Secures the Well-Being of Children

The unique, fundamental rights of parents and their natural children to be connected to one another are reinforced by pragmatic concern for the well-being of children. The ancient progeny of the natural family's special status reflects practical wisdom that this Court has long been loath to disregard. The insight that it is wrong to separate children from their natural parents without cause is supported by the fact that the institution of natural parentage has met the needs and supplied the well-being of children far better and for much longer than state-created institutions, such as foster care, and parental arrangements built on contract or revocable consent. Helen Alvaré, Putting

Children's Interests First in U.S. Family Law and Policy 58-65 (2017).

The law presumes that children belong to their natural parents and are entitled to their care and provision, and that natural parents are thus immune from loss of custody absent a showing of grave wrongdoing. This presumption reflects the accumulated practical wisdom of centuries and undergirds the American tradition of deferring to the judgment of parents in the upbringing of their own children. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel*, 530 U.S. at 66; James Wilson, at 1076-77 (contrasting the civil-law tradition of scrutinizing parental decisions with the common-law tradition of leaving judgment about parental decisions concerning their children "to the decision of that judge, which holds its tribunal in every parent's breast").

B. Fundamental Rights from Fundamental Law

Until recently, this Court has identified fundamental rights by looking within fundamental law. Our fundamental law consists of the law that is more fundamental than governments, James R. Stoner, Jr., Common-Law Liberty 79-81 (2003), the natural and conventional norms "upon which our institutions rest." *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). Therefore, this Court teaches that rights are fundamental if they are rooted in our traditions and conscience. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

To say the same thing in the conventional language of the jurists, rights are fundamental if they are grounded either in (1) customs so old that human memory runs not to the contrary, i.e. ancient usages, or (2) as a matter of the natural reason that all human societies share, i.e. the natural duties of the law of wrongs that are *mala in se*. See 1 Bl. Comm. 43, 48-58. For example, the right to life is fundamental. We know it to be fundamental both because the law has always protected it and because the law teaches that intentional killing while in one's right mind is inherently wrong, i.e. contrary to what conscience allows. *Glucksberg*, 521 U.S. at 710-16.

Anglo-American law has long recognized those two fonts of rights and duties—tradition and conscience; ancient custom and the law of inherent wrongs—as fundamental in at least two respects. First, rights grounded in ancient custom and the law of inherent wrongs are pre-positive and pre-political. They are not created by positive laws and official acts of government. Rather, governments are instituted precisely to secure them. See The Declaration of Independence. They are fundamental because they are the source of a government's legitimacy. Indeed, those rights that are natural and fundamental are beyond the constitutional competence of governments, including courts, to abrogate or infringe.

This is the sense of the idea that judges and other officials do not create rights but instead find and declare rights. 1 Bl. Comm. 43; David J. Bederman, Custom as a Source of Law 168-71 (2010); Stephen E. Sax, *Finding Law*, 107 Calif. L. Rev. __ (2019),

available at https://scholarship.law.duke.edu/faculty_scholarship/3788/. Though some ancient rights remain somewhat indeterminate until enforced or vindicated in a legal judgment, they can still direct judges toward correct judgments. Adam J. MacLeod, Property and Practical Reason 173-96 (2015). Thus, judges can serve and apply the law in their judgments. They need not rule over the law, nor need they create it.

Second, ancient rights are fundamental in the sense that it is wrong—it contradicts reason or conscience—to take them away without cause. The rights that are infringed by inherent wrongs are those which history and tradition show to be necessary for a free and well-ordered society. This Court and other courts recognize certain rights as fundamental rights because ordered liberty and legal justice would not be possible otherwise. *Snyder*, 291 U.S. at 134; *Moore*, 431 U.S. at 503-05. The right to life and a child's right to be connected to her natural parents and biological kin, among a few other rights, are fundamental because it is wrong to take them away without cause and no society can long flourish that does not secure them.

Therefore, far from empowering courts to innovate and legislate, customary and natural rights are sources of constraint on the judicial power. As it has "stressed the need for 'judicial self-restraint'," this Court has "required that implied fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Obergefell*, 135 S. Ct. at 2618

(Roberts, C.J., dissenting) quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and *Glucksberg*, 521 U.S. at 720-21

.

II. Rights from Judicial Opinions

A. *Obergefell* and *Pavan*

Recently, this Court launched a new line of inquiry in its search for fundamental rights. Rather than looking within the accumulated practical wisdom of fundamental law, this new search looks within the wisdom of the Court itself. Beginning with its decision in *Obergefell v. Hodges* and extending that decision in *Pavan v. Smith*, 582 U.S. __, 137 S. Ct. 2075 (2017), the Court has twice now searched for fundamental rights not in tradition and conscience but rather in the Court's own insights.

In *Obergefell*, the Court's insights about the meaning of marriage supplied the justification for striking down the ancient definition of marriage as a man-woman union, notwithstanding the Court's acknowledgement that marriage has always been defined as a man-woman union throughout human history, *Obergefell*, 135 S. Ct. at 2594 ("There are untold references" to marriage throughout human history "spanning time, cultures, and faiths.... It is fair and necessary to say that these references were based on the understanding that marriage is a union between two persons of the opposite sex."), and in all of this Court's precedents prior to *Obergefell*. *Id*. at 2598 ("It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners"). In *Pavan*, the new right claims

that this Court had discovered in *Obergefell* motivated the Court to strike down the traditional doctrine—as old as the presumption of paternity and older than the United States—that the presumption of paternity extends only to a man who is married to the child's biological mother. The Court did not discuss fundamental rights in its short opinion. But it rejected the reasoning of the Arkansas Supreme Court that the traditional doctrine was justifiable on the basis of the relationship of the biological mother and father to the child. *Pavan*, 137 S. Ct. at 2077-79.

From this Court's rulings in *Obergefell* and *Pavan*, lower courts have drawn the lesson that at least some fundamental rights are no longer located in tradition and conscience but instead are located in the new insights that this Court uncovered in *Obergefell* or other innovative sources. Many legal scholars have learned the same lesson. A few examples will suffice to illustrate the confusion.

Citing *Obergefell*, several scholars have speculated that this Court no longer looks for fundamental rights in fundamental law but has instead become more innovative. See, e.g., Kenji Yoshino, *A New Birth of Freedom?*: Obergefell v. Hodges, 129 Harv. L. Rev. 147, 162-71 (2015); Courtney Megan Cahill, *Reproduction Reconceived*, 101 Minn. L. Rev. 617, 675-76 (2016); Elizabeth Price Foley, *Whole Women's Health and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2016 Cato Sup. Ct. Rev. 163, 180-84. Others argue that the *Snyder*/*Glucksberg* approach—searching in the traditions and conscience of the people—remains the valid method for discerning fundamental rights.

See, e.g., Scott W. Gaylord and Thomas J. Molony, *Individual Rights, Federalism, and the National Battle Over Bathroom Access*, 95 N.C. L. Rev. 1661, 1701-02 (2017) (arguing that the *Obergefell* majority neither denied the importance of tradition and conscience "nor overruled the substantive due process analysis the Court employed in" *Glucksberg*); Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. Rev. 159, 209-11 (2015) (suggesting that newly-recognizable fundamental rights are those which bear a "striking resemblance" to existing rights that are objectively rooted in tradition and conscience).

This uncertainty is already finding its way into judicial opinions. In analyzing a claim that legal prohibitions against assisted suicide infringe a fundamental right to die, the New Mexico Supreme Court observed that in *Obergefell*, this Court "criticized" the *Snyder*/*Glucksberg* approach to locating fundamental rights. *Morris v. Brandenburg*, 376 P.3d 836, 845 (N.M. 2016). The court noted that two justices of this Court "concluded that the *Obergefell* majority opinion jettisoned the careful substantive due process approach announced in *Glucksberg*, effectively overruling the approach." *Id*.

The New Mexico court ultimately concluded that the *Glucksberg* approach is the best fit for scrutinizing assisted suicide laws, in part because the holding of *Glucksberg* is directly on point. *Id*. at 848. Lower courts have struggled to discern the correct criteria for identifying fundamental rights in other contexts, where no direct precedent of this Court controls. Courts have expressed uncertainty about the continued vitality of

the *Glucksberg* approach when considering asserted claims to a minimum level of literacy in public schools, *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 363-66 (E.D. Mich. 2018), to engage in married, family life, *Struniak v. Lynch*, 159 F. Supp. 3d 643, 664-68 (E.D. Va. 2016), and to purchase sexual devices, *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia*, 831 F.3d 1342, (11th Cir. 2016), rehearing en banc granted, 864 F.3d 1258 (11th Cir. 2017), appeal dismissed and judgment vacated on grounds of mootness, 868 F.3d 1248 (11th Cir. 2017).

B. Lower Courts Are Now Confusing Fundamental Rights of Parents with Consent-Based Relations

Though the confusion about fundamental rights is widespread, its effects are most dramatic in the law governing parental rights and duties. Lower federal courts that have ruled that states must list as second parent on a child's birth certificate the biological mother's female spouse in place of the presumed father have cited *Obergefell*. *Henderson v. Adams*, 209 F. Supp. 3d 1059, 1072, 1079-80 (S.D. Ind. 2016); *Marie v. Mosier*, 196 F. Supp. 3d 1202, 1218-20 (D. Kan. 2016). Those courts base their rulings in the "fundamental right" to "be a parent," *Henderson*, 209 F. Supp. 3d at 1077-78, and the "importance of parental rights," *Marie*, 196 F. Supp. 3d at 1219. They draw no distinction between fundamental rights that are grounded in tradition and conscience and those that this Court discerns as it discovers new insights. Lower courts that extend the presumption of paternity to a same-sex spouse or partner also have expressed their

rulings as vindications of the claimant's "fundamental" rights. *McLaughlin v. Jones*, 401 P.3d 492, 495-96 (Ariz. 2017); *Boquet v. Boquet*, __ So. 3d __, 2019 WL 1549704 (Ct. App. La. 2019).

At the same time (and, in some cases, by logical implication), courts are dropping from their reasoning the fundamental rights of biological parents. The Massachusetts Supreme Judicial Court ruled that a woman who is not the child's biological parent is entitled to the statutory presumption of paternity if she consents, even though she was not married to the child's mother and it was undisputed that she has no biological connection to the child. *Partanen v. Gallagher*, 59 N.E.3d 1133 (Mass. 2016). The same court earlier ruled that a child's relationship to her actual father has no presumptive weight in determining paternity, the known biological father is not entitled to notice or due process before termination of his parental status, and that parental status is instead determined entirely by the consent of two female adults who assert parentage. *Adoption of a Minor*, 29 N.E.3d 830 (Mass. 2015). Similarly, the New York Court of Appeals has ruled that consent to raise a child can alone confer standing on a person claiming parental status, notwithstanding that she is not the child's biological or adoptive parent. *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016).

Those courts now discount or disregard entirely the fundamental right of a biological father in such cases. The decision of the New York appellate court below in this case similarly illustrates the conflation of fundamental rights with consent-based claims that now

confounds the lower courts. The New York family court deprived Frank G. of custody of his biological children without any showing of legal wrongdoing, such as abuse or neglect. The court awarded legal and physical custody to Joseph P., who is not the children's biological father and did not qualify for a presumption of paternity. *Matter of RPF v. FG*, 47 N.Y.S.3d 666 (N.Y. Family Court 2017).

On appeal, Frank G. challenged Joseph P.'s standing to petition for custody. The Appellate Division ruled that Joseph P. "established standing to seek custody or physical access pursuant to the standard set forth in *Matter of Brooke S.B.*." *Matter of RPF v. FG*, 161 A.D.3d 1163 (N.Y. App. Div. 2018). The Appellate Division then affirmed the family court's best-interests and fitness findings. But those findings presupposed that Frank G. and Joseph P. were, *ab initio*, equally eligible to serve as custodial parent. That presupposition places the asserted right claims of Joseph P. on the same level as the fundamental rights of Frank G.

CONCLUSION

This case is an appropriate vehicle to clarify the confusion about fundamental rights that now pervades legal scholarship and judicial decisions. The case brings the ancient, fundamental right of a biological parent into direct conflict with the novel right claim of an interested adult who consented to help raise the children but has no biological connection to them and is not entitled to a presumption of paternity. To grant the petition and reverse the ruling of the New York Appellate Division would clarify this Court's

commitment to the judicial power as one of judgment rather than will, by reminding the legal community that fundamental rights are those found in fundamental law—tradition and conscience—rather than novel judicial insights.

The petition for certiorari should be granted.

Respectfully submitted.

DAVID R. LANGDON
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069
(513) 577-7380
dlangdon@langdonlaw.com

Counsel for *Amicus Curiae*

June 14, 2019