No. 19-

IN THE

Supreme Court of the United States

SANDRA REY AND SERGIO MADRID,

Petitioners,

v.

ARIZONA DEPARTMENT OF CHILD SAFETY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

KRISTINA B. REEVES
Counsel of Record
MARK SHIELDS
DEEAN GILLESPIE
GILLESPIESHIELDS
7319 North 16th Street, Suite 100
Phoenix AZ 85020
(602) 870-9700
kreeves@gillaw.com

Counsel for Petitioners

293268

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

QUESTION PRESENTED

Whether, in order to terminate a parent's parental rights to their child, the Due Process Clause of the United States constitution requires that a State must allege and prove, by clear and convincing evidence, that a parent is unfit?

PARTIES TO THE PROCEEDING

Petitioners are Sandra Rey and Sergio Madrid. Respondent is the Arizona Department of Child Safety. No party is a corporation.

STATEMENT OF RELATED CASES

- *In the Matter of: M.R., F1000131, DOB: 8/13/2008; F.M., Fl 117404, DOB: 3/21/2015; J.M., F1118162, DOB: 3/11/2017.* Case Nos: JD20586, JS19097, Superior Court of Arizona, Maricopa County. Judgment entered April 23, 2018.

- *Sandra R, Sergio C. v. Department of Child Safety, M.R., F.M., J.M.,* No. 1 CA-JV 18-0147, Arizona Court of Appeals, Division One. Judgment entered January 29, 2019.

- *Sandra R, Sergio C. v. Department of Child Safety, M.R., F.M., J.M.,* No. CV-19-0057 PR, Arizona Supreme Court. Judgment pending.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES

Page

OTHER AUTHORITIES

TREATISES

CONSTITUTIONAL PROVISIONS

Petitioners Sandra Rey and Sergio Madrid (collectively "Parents") respectfully petition for a writ of certiorari to review the judgment of the Arizona Court of Appeals, Division One.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals, Division One, (App. 1a-19a), is reported at 246 Ariz. 180, 436 P.3d 503. The decision of the Arizona Supreme Court, (App. 46a-48a), granting review on an issue unrelated to that raised herein, and denying review as to the issue raised herein, is not published. The superior court's order terminating the parental rights of Parents, (App. 20a-45a), is not published.

JURISDICTION

The judgment of the Arizona Court of Appeals was entered on January 29, 2019. The decision of the Arizona Supreme Court denying review as to the issue raised herein was entered on August 27, 2019. On October 30, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 4, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment states, in relevant part: "No state shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend, XIV, § 1.

Arizona Revised Statute, § 8-533(B)(3) states, in relevant part, that "evidence" will be deemed "sufficient to justify termination of the parent-child relationship shall include" that: "the parent has neglected or willfully abused a child. This abuse includes … situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child."

The full text of the Arizona state statutory provision is reproduced in the appendix to this petition. App. 49a-53a.

STATEMENT OF THE CASE

This case concerns the State of Arizona's termination of the parental rights of Petitioners Sandra Rey (Mother) and Sergio Madrid (Father) (collectively "Parents") to their young daughter, J.M., who was born in March 2017.

A. Factual background.

Sandra R.[1] (Mother) and Sergio M. (Father) are the parents of F.M., born in 2015, and J.M., born in 2017. On the evening of April 24, 2017, after six-week-old J.M. finished nursing, she vomited twice. App. 26a. Mother and Father both became concerned, and assuming J.M was having a stomach issue, Father went to the store to buy something that he believed would help J.M. to feel better. *Ibid.* While Father was gone, however, Mother called him, concerned that J.M.'s medical condition had

1. Mother is also the parent of M.R., born in 2008. Since 2013, Mother and M.R. had lived with Father and Father was helping Mother to raise M.R. The State terminated Mother's parental rights to M.R. in the same underlying proceeding.

worsened. *Ibid.* Father immediately returned home and Parents took J.M. to an urgent-care center for treatment. *Ibid.* Once there, the emergency medical personnel made Parents wait 40 minutes before evaluating J.M. App. 3a. Once a doctor did examine J.M., he advised Parents to take J.M. to the hospital and they immediately did so. App. 26a.

At the hospital, through medical testing, the doctors determined that J.M. had a large subdural hemorrhage on the left side of her brain and a small subdural hemorrhage on the right side. App. 3a. The doctors performed emergency neurosurgery. *Ibid.* After the surgery, Dr. Melissa Jones, a pediatrician who specialized in "child abuse pediatrics" evaluated J.M. and opined that J.M.'s condition was caused by abuse. *Ibid.* J.M. had no external injuries indicating abuse, such as bruising, lacerations, or abrasions. App. 27a.

In Arizona, when the State seeks to take custody of a child from the parent, the State must file a petition alleging that the child is dependent. *See* Ariz. R.P. Juv. Ct. 48(A). Although there was no other evidence of abuse, and no evidence that any of Parent's other children had been abused, the State immediately took custody of both of Parent's children, J.M. and F.M., as well as M.R. App. 3a. On May 9, 2017, the State filed a petition alleging F.M. and M.R. were dependent, and when J.M. was released from the hospital on May 25, 2017, the State filed a petition alleging that J.M. was dependent also. App. 23a. Both petitions were solely based on the State's allegation Mother had abused J.M. and Father failed to protect her from abuse, or that Father had abused J.M. and Mother had failed to protect her from abuse, or both Parents had

abused J.M. App. 24a. Less than two months later, on July 5, 2017, the State petitioned to terminate Parent's rights to their two children as well as Mother's rights to M.R., based on the same allegations in the petition. App. 23a. For the next seven months, in an effort to keep their children, Mother and Father completed every service DCS asked of them. App. 3a-4a. Nonetheless, the State continued to pursue termination of their parental rights. App. 4a.

B. Trial court proceedings.

In its petition to terminate their parental rights to all their children, the State alleged that Mother had abused J.M. and Father had failed to protect J.M. from the alleged abuse, *or*, that Father had abused J.M. and Mother had failed to protect J.M. from the alleged abuse, *or*, Father and Mother had both abused J.M. App.3a. The court conducted a single hearing and jointly considered the State's dependency and termination petitions. App. 20a-45a. Over a three-day evidentiary hearing, the State offered evidence from Dr. Ruth Bristol, J.M.'s pediatric neurosurgeon, as to the extent of J.M.'s condition. App. 4a. The State also offered the testimony of Dr. Jones, who opined that J.M.'s condition resulted from non-accidental trauma and were caused by "acceleration/deceleration with significant force," or "shaken-baby." App. 2a; App 27a.

Parents presented testimony from Dr. Joseph Scheller, who is a pediatric neurologist with specialties in pediatric neurology and neuroimaging. App. 4a. Dr. Scheller testified that in his expert opinion, J.M.'s condition was a result of an unusual complication from a head injury that J.M. had sustained during her birth. App. 27-28a. He also testified that the lack of any external injuries indicated that J.M. had not been abused. App. 28a.

The State did not offer any other evidence to support their allegation that Mother had abused J.M. The State did not offer any other evidence to support their allegation that Father had abused J.M. The State did not offer any evidence that J.M. had been crying uncontrollably for an extensive period. The State did not offer any evidence that Mother had been unusually stressed, or that Father had been unusually stressed, or that anything unusual had occurred prior to the alleged abuse. The State did not offer any evidence that any circumstance existed which supported their theory that Mother had suddenly snapped and shaken her baby. The State did not offer any evidence that any circumstance existed which supported their theory that Father had suddenly snapped and shaken his baby. Rather, Mother testified that "nothing out of the ordinary" had occurred before J.M. became symptomatic. App. 31a.

The trial court determined that "[e]ach parent either abused [J.M.], knew that [J.M.] had been abused, *or* reasonably should have known that the other parent had abused [J.M.]." App. 32a (emphasis added). Based on this determination, the trial court terminated Parent's rights to all their children. App. 43a.

C. Appellate court proceedings.

Mother and Father separately appealed the termination orders. On appeal, Mother argued that the State had failed to present clear and convincing evidence that she had willfully abused J.M., or that J.M. had sustained a serious physical injury in a situation where she knew or reasonably should have known that Father was abusing J.M. *See* Mother's Op. Brief. Likewise,

Father argued that the State had failed to present clear and convincing evidence that he had willfully abused J.M., or that J.M. had sustained a serious physical injury in a situation where he knew or reasonably should have known that Mother was abusing J.M. *See* Father's Op. Brief. In a single opinion, the Arizona Court of Appeals affirmed the orders terminating Mother's and Father's to all of their children. App. 1a-19a. The court held that the State had failed to present clear and convincing evidence that Mother had abused J.M. and that the State had failed to present clear and convincing evidence that Father had abused J.M. App 2a. Instead, the court found that since DCS had established that "Mother and Father abused *or* failed to take steps to protect J.M. after the abuse occurred," specifically, by getting married and "remain[ing] committed to each other," *after* the abuse occurred, that "the statutory grounds to terminate" Mother's and Father's parental rights were met. App. 14a (emphasis added).

Mother and Father filed separate petitions for review to the Arizona Supreme Court. In her petition for review, Mother raised two issues, neither of which raised the issue presented herein. *See* Mother's Pet. for Rev. In his petition for review, Father raised the question presented herein, specifically: "Whether Arizona's statutory termination scheme, and case law suggesting that proof of a ground alone automatically constitutes a lack of parental fitness, complies with constitutional due process protections and the dictates of *Santosky v. Kramer*?" Father's Pet. for Rev. at 4. The Arizona Supreme Court granted Father's petition for review as to only the question: "Does it violate due process to make the nexus finding in the best-interests inquiry?" App.47a The Arizona Supreme

Court granted Mother's petition for review as to the same question presented. App. 47a. The questions for which the Arizona Supreme Court granted review do not address the question presented herein, nor do the questions relate to the termination of Mother's and Father's parental rights to J.M. The Arizona Supreme Court denied review as to the question presented herein.

REASONS FOR GRANTING THE PETITION

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by" this Court. *Troxel v. Granville,* 530 U.S. 57, 65 (2000) (plurality opinion). Nearly a century ago, in *Meyer v. Nebraska*, this Court "held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children'." *Id.*at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)) Since *Meyer*, the decisions of this Court have "made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

As held by this Court, "[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). "If the State prevails," in a termination action, "it will have

worked a unique kind of deprivation.... A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Id. (internal quotations omitted)*

In *Santosky*, this Court held that, under the Due Process Clause of the federal constitution, before a state may involuntarily terminate parental rights, the State must prove its allegations for termination by clear and convincing evidence. This Court did not explicitly hold, however, whether the federal constitution requires that the state must allege and prove that a parent is unfit. This case calls upon this Court to answer the question left open in *Santosky*; whether, in order to involuntarily terminate a parent's rights to their child, the Due Process Clause of the federal constitution requires that the state must allege and prove that the parent is unfit.

This Court should grant this petition and resolve the question presented for two reasons. First, although the vast majority of states have interpreted the federal constitution to require that the State must allege and prove that a parent is unfit in order to involuntarily terminate parental rights, there is a split among the states. Resolution of the split among the states is urgently demanded. The question presented has been percolating through the various state judicial systems for 37 years, since this Court's decision in *Santosky*. Each of the states have appeared to have reached a resolution that no state appears inclined to re-evaluate. It is not reasonable that further percolation would aid this Court in resolving the question presented.

Second, even among those states that have concluded that the state must allege and prove that a parent is unfit in order to involuntarily terminate parental rights, in the absence of guidance from this Court, the states have reached widely varying opinions on what evidence will satisfy the constitutional mandate that the state prove unfitness. Given this disagreement among the states on the proper interpretation of the federal constitution as to such an important fundamental right, this Court's guidance is urgently needed.

A. The states are irreconcilably split on whether the federal constitution requires a state to prove that a parent is unfit in order to involuntarily terminate parental rights.

Although this Court has not ever specifically held that the constitution requires that a state must prove that a parent is unfit in order to involuntarily terminate parental rights, this Court's jurisprudence includes ample language that strongly suggest that such a showing is constitutionally mandated. For example, in *Quilloin v. Walcott*, this Court stated: "We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of *unfitness* and for the sole reason that to do so was thought to be in the children's best interest." 434 U.S. 246, 255 (1978) (internal quotation marks and brackets omitted) (emphasis added). Additionally, in *Stanley v. Illinois*, this Court established that the essential predicate to a person's parental rights is his or her fitness to parent. *See* 405 U.S. 645, 651–52 (1972).

In *Santosky*, this Court repeatedly emphasized the connection between the constitutional right to parent and parental fitness. First, this Court noted: "Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness." 455 U.S. at 760, n.4 (emphasis in original). This Court further stated that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id*. at 760. Additionally, this Court observed that the State's termination of parental rights, "entails a judicial determination that the parents are unfit to raise their own children," *id*. at 760 and that "the State registers no gain [toward] its declared goals when it separates children from the custody of fit parents," *id*. at 767. "Any *parens patriae* interest in terminating the natural parents' rights," this Court noted, "arises only at the dispositional phase, *after* the parents have been found unfit." *Id*. at 767, n.17 (emphasis in original).

Thus, in prior opinions, this Court has strongly implied that in order to involuntarily terminate parental rights, not only must the State prove its allegations by clear and convincing evidence, but the State's grounds for termination must equate to an allegation that the parent is unfit. This Court, however, has not explicitly reached such a holding. In the absence of such a holding, the states have arrived at different conclusions as to whether the Due Process Clause requires that the state prove unfitness in order to involuntarily terminate parental rights.

The vast majority of states have reached the conclusion that the Due Process Clause requires that the state prove unfitness in order to involuntarily terminate

parental rights. As stated by the Washington Supreme Court: "The first question here is whether a parent has a due process right not to have the State terminate his or her relationship with a natural child in the absence of an express or implied finding that he or she, at the time of trial, is currently unfit to parent the child. According to the United States Supreme Court, this court, and our Court of Appeals, the answer is yes." *In re A.B.*, 232 P.3d 1104, 1109 (Wa. 2010) (en banc) (*referencing Santosky*, 455 U.S. at 747–48); The vast majority of other states have reached similar conclusions. *See In re Desmond F.*, 795 N.W.2d 730, 739 (Wis. App. 2019) ("A court may not terminate parental rights without first making an individualized determination that the parent is unfit"); *In re T.S.*, 192 A.3d 1080, 1091 (Pa. 2018) (holding that in *Santosky,* this Court "concluded that clear and convincing evidence of parental unfitness was constitutionally necessary"); *Adoption of Virgil*, 102 N.E.3d 1009, 1013 (Mass. App. 2018) ("In order to terminate a parent's rights, the department must first prove and the judge must find … that the parent is currently unfit...") *In re Ta.L.*, 149 A.3d 1060, 1081 (D.C. 2016) (citing *Santosky* and holding that this Court has "recognized that the fundamental right of an individual to parent his or her child … may not be terminated without a predicate determination, by clear and convincing evidence that the individual is unfit to parent"); *Kenneth C. v. Lacie H.*, 839 N.W.2d 305, 314 (Neb. 2013) (discussing constitutional constraints and noting that "there is no clear and convincing evidence that [appellant father] is presently unfit as a parent"); *Copeland v. Todd*, 715 S.E.2d 11, 20 (Va. 2011) (for a termination-of-parental-rights statute "to pass constitutional due process scrutiny, [it] must provide for consideration of parental fitness"); *In re Ann* S., 202 P.3d 1089, 1102

(Cal. 2009) (noting that as a matter of constitutional law, "some showing of unfitness is called for when a custodial parent faces termination of his or her rights. ... In that circumstance, there is no dispute that the best interest of the child would not be a constitutionally sufficient standard for terminating parental rights." (internal quotation marks and citation omitted)); *In re D.T.*, 818 N.E.2d 1214, 1225–27 (Ill. 2004) (explaining that *Santosky* requires clear and convincing evidence of parental unfitness, and that best interests is a separate inquiry); *In re Scott S.*, 775 A.2d 1144, 1151 (Me. 2001) (holding that a court seeking to terminate parental rights must consider parental unfitness before it separately considers the best interests of the child and noting that this holding "springs from the mandates of the federal ... constitution"); *In re J.J.B.*, 894 P.2d 994, 1003–04 (N.M. 1995) (holding that the statute establishing "abandonment" as a criterion for the termination of parental rights was constitutional only because "abandonment of one's child establishes parental unfitness"); *In re Kristina L.*, 520 A.2d 574, 579–80 (R.I. 1987) (explaining that the Constitution requires a finding of unfitness and that "[t]he best interest of the child outweighs all other considerations once the parents have been adjudged unfit. In essence, a finding of parental unfitness is the first necessary step"); *In re J.P.*, 648 P.2d 1364, 1376 (Utah 1982) (determining that the statute providing for termination of parental rights based on the best interests of the child alone was "unconstitutional on its face" and explaining that "[u]nlike the standard of 'parental fitness,' which imposes a high burden on the state in an adversary proceeding, the standard of 'best interest' of the child provides an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse"); *People in the Interest*

of A.M.D., 648 P.2d 625, 640 (Colo. 1982) (citing *Santosky* to hold only if "a parent is deemed unfit when tested by demanding standards … is a parent-child relationship to be terminated").

Some states, however, have determined that the state may, consistent with the federal constitution, involuntarily terminate a parent's right to their child without requiring the State to prove that the parent is unfit. For example, the Maryland Supreme Court has determined that, in terminating parental rights, the Constitution requires the state to show "that the parent is 'unfit' *or* that 'exceptional circumstances' exist" before involuntarily terminating a parent's right to their child. *In re Rashawn H.*, 937 A.2d 177, 188 (Md. 2007) (emphasis added). In New Jersey, the courts of that state have held that the State may terminate parental rights "where the parent is unfit *or* the child has been harmed *or* placed at risk of harm." *New Jersey Div. of Child Prot. & Permanency v. C.J.R.*, 175 A.3d 200, 209 (N.J. App. 2017) (citing N.J.S.A. 30:4C–15.1(a)) (emphasis added).

As this Court has observed, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky*, 455 U.S. at 753-54. Parents "faced with forced dissolution of their parental rights have a … critical need for procedural protections." *Id.* This Court's observation in *Quilloin*, *supra* is correct. The Due Process Clause is offended by states continuing to force the breakup of a natural family over the objections of the parents, without some showing of unfitness. The fact that some states are continuing to destroy families without first showing that the parent is unfit is intolerable. Resolution of the question justifies this Court's review.

B. The states are irreconcilably split on what the federal constitution requires a state to prove in order for the state to prove that a parent is unfit.

Although, as discussed above, this Court has strongly implied in numerous decisions that a state must prove that a parent is unfit in order to take a child from his or her parent, this Court has not yet expressly defined the term "parental unfitness." As observed by Justice Rehnquist, a state scheme that permitted the termination of parental rights based merely on a finding that "such action would be in the best interests of the child" would be unlikely to pass constitutional muster. *Santosky*, 455 U.S. at 773 (REHNQUIST, J (dissenting)). But what a state scheme must require in order to pass constitutional muster remains an open question in this Court. In *Troxel*, this Court observed only that parental fitness exists "so long as a parent adequately cares for his or her children." (plurality opinion). This definition is imprecise. Due to the express lack of a definition of parental unfitness from this Court, even among those states that have determined that a state must prove parental unfitness in order to terminate parental rights, the states have reached widely varying conclusions as to what this constitutional imperative entails. This Court has recognized a parent's rights to their child as being as essential to the functioning of a free society as other fundamental rights, such as the right of persons to speak freely or to exercise their chosen religion. *See Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) ("In a long line of cases, [the Supreme Court has] held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] ... to direct

the education and upbringing of one's children") The importance of "the interest of parents in a continuation of the family unit and the raising of their own children … cannot easily be overstated." *Santosky*, 455 U.S. at 787 (REHNQUIST, J (dissenting)) The lack of a definition of such an essential term as "parental unfitness" to such an essential right warrants this Court's review and guidance. In order to ensure some basic consistency in the protection of such a fundamental right, this Court's intervention is urgently needed.

Although this Court has yet to explicitly hold what the state must prove in order to prove that a parent is unfit, this Court's jurisprudence provides significant insight into the correct answer. It is well established that courts must subject state practices that infringe on fundamental rights to strict-scrutiny analysis. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978) ("a government practice or statute which restricts 'fundamental rights' … is to be subjected to 'strict scrutiny")

"When the State initiates a parental rights termination proceeding, it seeks not merely to infringe [a] fundamental liberty interest, but to end it." *Santosky,* 455 U.S. at 759. Since the termination of parental rights is a state action that not only infringes on a fundamental liberty interest, but seeks to end it, any definition of parental unfitness must survive strict-scrutiny analysis.[2] *See In re Welfare of*

2. As noted by Justice Thomas in his concurring opinion, in *Troxel*, the opinion of the plurality did not "articulate[] the appropriate standard of review," but since the statute implicated the infringement of a fundamental right, the appropriate standard was "strict scrutiny." (THOMAS, J, concurring)

Child of R.D.L., 853 N.W.2d 127, 133 (Minn. 2014) ("Because the right to parent is a fundamental one," the parental termination statute is subject "to strict scrutiny"); *Chism v. Bright*, 152 So. 3d 318, 322 (Miss. 2014) ("State statutes providing for the termination of parental rights are subject to strict scrutiny")

Application of this Court's strict-scrutiny analysis jurisprudence provides an answer to the question of what the state must prove in order to prove that a parent is unfit and terminate parental rights. Such an analysis also shows that while many states have determined that the state must prove unfitness to involuntarily terminate rights, the states are woefully inconsistent in their determination of what the constitution requires in order to prove unfitness. For example, in Arizona, although the question of the constitutionality of Arizona's parental-rights-termination statutes has been addressed by Arizona's appellate courts, those courts have repeatedly failed to apply the required strict-scrutiny analysis to properly determine if its statutes are constitutional. Most recently, the Arizona Supreme Court held that when a severance is contested, a court must "find, by clear and convincing evidence, parental unfitness." *Alma S. v. Dep't of Child Safety*, 425 P.3d 1089, 1093 (Ariz. 2018). The Arizona Supreme Court correctly noted that "if a statutory ground" for termination was "not synonymous with unfitness, a contested severance based on such ground would be constitutionally infirm." *Id.* The court, however, never took the required step of subjecting Arizona's parental-rights-termination statutes to a strict-scrutiny analysis to determine if the statutes actually did satisfy the constitutionally mandated unfitness requirement. Rather, the court simply held that they did. Thus, in Arizona, no

Arizona appellate court has ever properly determined that Arizona's parental-rights-termination statutes demand that the state prove all of the elements of parental unfitness that the constitution demands.

"Strict scrutiny is a searching examination, and it is the government that bears the burden to prove" that its statutes satisfy strict scrutiny. *Fisher v. Univ. of Texas at Austin,* 570 U.S. 297, 310 (2013; see *also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (Laws that are "subject to strict scrutiny," require the Government to prove that the law "furthers a compelling interest and is narrowly tailored to achieve that interest") The burden the government must bear is a "heavy" one. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2211 (2016)).

The first step of strict-scrutiny analysis is that the "State must first identify its objective with precision," and then determine if "that interest is compelling." *Williams-Yulee v. Florida Bar,* 135 S. Ct. 1656, 1677 (2015). Although the question of the compelling state-interest furthered by parental-rights-termination statutes is one that has not been addressed in Arizona, the courts of other states have addressed the question. Uniformly those courts have determined that the state interest furthered by parental-rights-termination statutes is that of protecting children from harm. *See e.g.*, *Matter of Dependency of M.A.F.S.,* 421 P.3d 482, 497 (Wash. App. 2018) ("the compelling interest of the State [is] to prevent harm to the child from continuation of the parental relationship"); *TR v. Washakie County Dept. of Public Assistance and Social Services*, 736 P.2d 712, 715 (Wy. 1987) (holding same); *R.D.L.,* 853 N.W.2d at 134 (holding same) These holdings are consistent with this Court's

identification of the *parens patriae* interest of the State in terminating parental rights as its interest "in preserving and promoting the welfare of the child." *Santosky*, 455 U.S. at 766 (1982). As acknowledged by this Court, the State "has an urgent interest in the welfare of the child." *Id.* Thus, the compelling state interest furthered by parental-rights-termination statutes is its interest in protecting children from harm.

Although the state interest in protecting children from harm is a compelling one, in determining the constitutionality of state action, a court is not only asked "to evaluate the legitimacy of the state ends." *Stanley,* 405 U.S. at 652. To determine constitutionality, a court must "determine whether the means used to achieve these ends are constitutionally defensible." *Id.*

In order for a state to prove parental unfitness, this Court's jurisprudence dictates that there are three necessary elements that the state must prove. First, a state must prove that the unfitness determination "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Second, the state must show a finding of unfitness "is necessary to achieve the compelling state interest." *Kenyon v. Hammer*, 142 Ariz. 69, 86-87 (1984) (citing *Bernal v. Fainter*, 467 U.S. 216 (1984)). "The test... for 'necessity'" is that such a finding "furthers the compelling interest 'by the least restrictive means practically available.'" *Id.* Third, encompassed within strict-scrutiny analysis is the requirement that the state's grounds for termination cannot be over-inclusive. *See Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 666 (1990), *overruled on other grounds by Citizens United,*

558 U.S. at 310. A statute is "over-inclusive" if it "burden[s] more persons than necessary to cure the problem." *Black's Law Dictionary* 1279 (10th ed. 2014). Thus, if the State's ground for termination would allow for termination when parents are not unfit, then it is unconstitutionally over-inclusive.

1. The states have reached different conclusions as to what the state must prove in order to satisfy the element that a finding of parental unfitness is necessary to protect the parent's child from harm.

The "evil" parental-rights-termination statutes seek to remedy is harm to children. Numerous states have recognized the constitutional imperative that their parental-rights-termination statutes seek to remedy this "evil," and go no further. For example, in Washington, its parental-rights-termination statutes require that, in every case, the State prove, "by clear, cogent and convincing evidence," that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." *M.A.F.S.*, 421 P.3d at 495 (citing RCW 13.34.190(1)(a)(i)). Citing this requirement, Washington's Court of Appeals has held that Washington's parental-rights-termination statutes "ensure" "that the requisite harm to the child is not merely an abstract concept." *Id.* at 496. Washington's courts have found that Washington's parental-rights-termination statutes survive strict-scrutiny analysis because "the termination statutes require the State to prove 'in every instance' that termination of parental rights is necessary to prevent harm or the risk of harm to children." *Id.* Similarly, New Jersey's parental-rights-

termination statutes have been held by New Jersey's appellate courts to survive strict-scrutiny analysis because they require the State to prove, by clear and convincing evidence, in every case, that "[t]ermination of parental rights will not do more harm than good." *In re Guardianship of Jordan*, 336 N.J. Super. 270, 274 (App. 2001) (citing N.J.S.A. 30:4C-15.1(a)).

In contrast Washington's and New Jersey's statutes that specifically incorporate a requirement that the State prove by clear and convincing evidence that termination is necessary to prevent harm to the child, Florida's current termination statutes do not incorporate a requirement that the State prove a risk of significant harm to the child from reunification. *B.C. v. Dep't of Children & Families*, 887 So.2d 1046, 1050 (Fla. 2004). In considering its statutes, Florida's Supreme Court has recognized the constitutional infirmity created by the absence of this requirement. *Id.* at 1052. In a decision pre-dating the current statutes, the court had held that in order to comply with constitutional requirements, "before parental rights in a child can be permanently and involuntarily severed, the state must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child." *Padgett v. Dep't of Health & Rehab. Services*, 577 So. 2d 565, 571 (1991). In order to preserve the constitutionality of its current statutes, the Florida Supreme Court held that Florida's newly amended statutes "must be read in light of *Padgett's* requirement … that 'the state must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child.'" *B.C.*, 887 So.2d at 1053 (internal citation omitted). Reading the statutes to include *Padgett's* requirement, Florida's Supreme Court held that its statutes are constitutional. *Id.*

The courts in Arizona, however, have reached a different conclusion than the courts of Washington, New Jersey, and Florida. Arizona's courts have interpreted that the federal constitution such that the State is only required to prove, in the best-interest stage that occurs only after the court finds that the termination statute has been satisfied, "how the child will benefit from severance" or that "the child will be harmed if severance is denied." *Alma S.,* 425 P.3d at 1093 Since this occurs in the best-interest analysis, in Arizona, the standard is preponderance of the evidence, and not clear and convincing evidence. *Id.* Thus, in Arizona, parental rights may be terminated based merely on a finding, by a preponderance of the evidence, that a child would benefit in some way from severance of the parent-child relationship. *Id.* It is not required that the State ever prove that termination is necessary to prevent harm to the child.

Here, the Arizona Court of Appeals affirmed the termination of Mother's and Father's rights to J.M based on testimony from the child safety department's case manager that J.M. was separated from her siblings and her parents, in a non-familial placement that was not willing to adopt her, but the case manager had "identified other potential adoptive placements." App. 18a. The court determined that this evidence was sufficient to satisfy the State's burden to prove that J.M. would derive some benefit from having all connections to her natural family, including her siblings, severed. Such evidence, however, does not satisfy the state's constitutionally imposed burden to prove, by clear and convincing evidence, that termination is necessary to protect the child from harm. J.M. was removed from her parents when she was six-weeks old. Termination of Mother's and Father's parental

rights foreclosed her ability to ever know her parents. This kind of loss is tremendous. *See Santosky*, 455 U.S. at 760–761, n. 11 (describing the foreclosure of a newborn child's opportunity to "ever know his natural parents" as a "los[s] [that] cannot be measured"). This Court's review is urgently required to make clear that states cannot irrevocably end a parent's fundamental right to the child based merely on a determination that termination may provide some minimal benefit to the child.

2. To prove parental unfitness, the State must prove that termination of parental rights is the least restrictive means of protecting the parent's child from harm.

"Few forms of state action are both so severe and so irreversible" as the termination of parental rights. *Santosky*, 455 U.S. at 760. Given the severe and irreversible consequences of the termination of parental rights, some states have recognized the constitutional imperative of requiring that, before the State takes the drastic step of severing the parent-child bond forever, that the State must prove that no viable alternative to termination exist. For example, in Alabama, before terminating parental rights, "the court must examine viable alternatives to the termination of parental rights." *State Dept. of Human Res. v. A.K.*, 851 So. 2d 1, 7 (Ala. App. 2002). By statute, Alabama law "provides a number of alternatives to termination, including, without limitation, placement of the child with a private organization or facility willing and able to assume the child's education, care, and maintenance, and placement of the child with a relative or other individual found qualified by" the responsible agency. *Id.* at 19-20 (MURDOCK, J, dissenting), citing Ala. Code 1975, § 12-15-71(a)).

Florida, however, has reached a different interpretation of the federal constitution's requirements. In Florida's view "[c]onstitutional principles and case law require that [the State] demonstrate that some action short of termination of parental rights could have been undertaken by the State before filing a petition to terminate the parent's right, indicating that termination is the least restrictive means of protecting the child from harm." *S.M. v. Florida Dept. of Children & Families*, 202 So. 3d 769, 777 (Fla. 2016). Thus, Florida holds that the least-restrictive means prong "focuses specifically on what actions were taken by the State before filing a petition to terminate the parent's rights." *Id.* at 778. To satisfy this prong in Florida, the State must "prove that before it file[d] a petition to terminate the parent's rights, [it] made a 'good faith effort to rehabilitate the parent and reunite the family.'" *Id.* at 779. Similarly, Colorado's Supreme Court has held that "[b]efore terminating the parent-child relationship, the trial court must consider and eliminate less drastic alternatives … and the parents must be given the opportunity to rehabilitate through participation in the treatment plan." *A.M. v. A.C.*, 296 P.3d 1026, 1035 (Colo. 2013) (internal citations omitted).

In contrast to the interpretation of these other states, Arizona's courts have held that "all that must be proven by clear and convincing evidence is that the parent engaged in one of the statutory grounds for termination, which by itself constitutes a finding of parental fitness." *Alma S.*, 425 P.3d at 1097 (BOLICK, J (concurring in the result)) (internal brackets and quotation marks omitted). The less drastic alternative of the rehabilitation of the parent, Arizona's Supreme Court has held, is merely part of the "totality of the circumstances that a court must consider

in a termination proceeding." *Id.* (internal quotation marks omitted). As stated by Justice Bolick, a justice of Arizona's Supreme Court, Arizona's Supreme Court has "err[ed] significantly by failing to accord proper weight" to the "central" consideration of the state's efforts to rehabilitate the parent and the success of those efforts, by "reducing it from an essential element in proving unfitness to merely considering it as one part of the child's best-interests determination, where it is subordinate to other priorities." *Id.* As Justice Bolick observed, failing to require the State to prove, as an element of unfitness, that termination is the least restrictive method of protecting children by, at a minimum, requiring the state to prove that it made diligent efforts to reunify the family and that those efforts were unsuccessful, "bodes serious ramifications that eviscerate the parent's fundamental rights." *Id.* This is so because "[t]he unfitness determination cannot be properly made without considering the state's reunification efforts and the parent's success in regaining or attaining parenting skills." *Id.*

As Justice Bolick has correctly observed, the conclusion of the Arizona Supreme Court that proof that terminating parental rights is the least restrictive means of protecting a child is not an "essential element" of proving parental unfitness is "at odds" with this Court's decision in *Santosky*. *Id.* In *Santosky*, "the statutory scheme before the court required the state" in order to prove parental unfitness, to prove "'the intensity of its agency's efforts to reunite the family.'" *Id.* (quoting *Santosky*, 455 U.S. at 762.) This court held that "[p]roof the state's efforts, *combined* with proof of the parent's failings, both by clear and convincing evidence, "not only makes termination of parental rights possible; it entails a

judicial determination that the parents are unfit to raise their own children." *Id.* (quoting *Santosky*, 455 U.S. at 760.) In Arizona, "by contrast," the state is only required to prove the statutory ground, and is not required to prove that it made "diligent efforts to reunify the family or that the parent has failed to remediate the problem." *Id.* This "glaring omission … from a due process prospective," *id.*, is evident in the Arizona Court of Appeals' decision here. The Arizona Court of Appeals acknowledged that the state had "offered Mother and Father services," and that Mother and Father participated in services," but failed to consider whether the State had proven, by clear and convincing evidence, that it had been diligent in offering services, or whether the Mother or Father, or both, had been so unsuccessful during those seven-months of service that forever severing their parental rights to their infant daughter was the least restrictive means of protecting her. This Court's review is necessary in order to make clear what this Court strongly implied in Santosky; that proof that terminating parental rights is the least restrictive means of protecting a child is an essential element of parental unfitness.

3. To prove parental unfitness, the State must prove that the grounds for termination is not over-inclusive.

Assessments of over-inclusivity have long been a part of a strict-scrutiny analysis. *See, e.g., Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 804-05 (2011) (holding that the law at issue failed strict-scrutiny analysis because it was "vastly" and "seriously overinclusive"); *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978) (striking down a law because it was "substantially overinclusive"). A ground

for termination is overly-inclusive if it allows the State to infringe on constitutional rights more than is necessary to further the State's compelling interest in protecting children. *See ACLU v. Mukasey,* 534 F.3d 181, 193 (3rd Cir. 2008) (holding that a statute is over-inclusive if it infringes on constitutional rights more "than is necessary to further Congress' compelling interest").

Here, Arizona terminated Parents parental rights based on a grounds for termination that are unconstitutionally over-inclusive. In other words, Arizona terminated Parents' parental rights based on grounds that could apply to fit parents.

Parental rights are individual in nature. *See Santosky*, 455 U.S. at 764 (1982) (noting that "a parental rights termination proceeding" deprives "an individual" of a right.) It is entirely possible that the termination of the rights of one parent may be constitutional, while the termination of the rights of another is not. *See State in Interest of A.M.*, 280 P.3d 422, 423 (Utah 2012). Therefore, the termination of a person's parental rights must be evaluated on an individual basis. Thus, the termination of Mother's rights and the termination of Father's rights must be considered individually.

a. The State did not prove that Mother had abused J.M.; the State did not prove that Father had abused J.M.

A fit parent does not abuse their child. Here, however, the Arizona Court of Appeals determined that the State had proven that J.M. had been injured as the result of abuse, but that "the evidence did not prove which parent

abused the child." App. 2a. In other words, the Arizona Court of Appeals held that the evidence did not prove that Mother had abused J.M. The Arizona Court of appeals held that the evidence did not prove that Father had abused J.M. Thus, the State did not prove that Mother was unfit because she had abused J.M. The State also did not prove that Father was unfit because he had abused J.M.

b. The State did not prove that Mother was unfit; the State did not prove that Father was unfit.

As stated by the California Court of Appeals in considering a case presenting a similar fact pattern to that present here:

> We do not quarrel with the proposition that when the child's injury or injuries were obvious to the child's caretakers and they failed to act, the court is not required to identify which parent inflicted the abuse by act and which parent inflicted the abuse by omission or consent. In such a case, the evidence supports a conclusion that both parents knew the child was injured or being abused.

Tyrone W. v. Superior Court, 151 Cal. App. 4th 839, 852 (2007).

Here, however, the allegation that J.M. had been shaken on one occasion was the only allegation of abuse. There was no other allegation that J.M. had been abused at any other time. J.M.'s injuries were not readily visible. In fact, when Parents took J.M. for medical treatment, the

fact that Parents had to wait 40 minutes before being seen suggests that trained medical personnel did not observe any serious injury. J.M.'s injuries were only diagnosed after she was subjected to a series of medical testing. Here, as in *Tyrone W.*, the child's "injuries were not visible and there were no obvious signs of injury." *Id.* at 851. Here, as in *Tyrone W.*, the record contained "no evidence to support a finding that, if only one parent inflicted serious physical harm on the child, the other parent knew about the abuse and either consented to it or failed to act to prevent it, thus allowing the abuse to continue." *Id.* at 852. And here, as there, there was "no evidence either parent witnessed the other physically abuse or mistreat the baby." *Id.* As held by the California Court of Appeals, "where there is no evidence to show both parents knew the child was abused or injured, the court must identify the parent who inflicted the child's injuries before" it can find that either parent is unfit. *Id.*

The Arizona Court of Appeals did not cite nor discuss any evidence that indicated that Mother knew or should have known that J.M. would be abused. Rather, the Arizona Court of Appeals found that Mother's rights could be terminated because, "*after* [she] knew or reasonably should have known that J.M. had been abused," she failed to protect J.M. App. 13a (emphasis added). Thus, the court did not determine that Mother knew, or reasonably should have known, that J.M. would be abused, and failed to protect her from the abuse that actually occurred, but rather that *after* J.M. had been abused, Mother might fail to protect her from abuse that may occur in the future.

"Failure," however, is defined as the "omission of performance of an act or task." Webster's Third New

International Dictionary 815 (3rd ed. 2002). The term implies that a person must have the opportunity to perform a duty or act before he or she can fail to perform. An individual does not have an opportunity to act if she does not know that a need exists. Thus, as numerous states have held, in order for a parent to be deemed unfit for failing to protect her child from abuse, the State must prove that she had the knowledge and opportunity to act but failed to do so. *See e.g. D.N. v. Dep't of Children & Families*, 277 So. 3d 127, 131 (Fla. Dist. Ct. App. 2019) ("Florida courts have declined to terminate the parental rights of a parent where the facts fail to establish that the parent was involved in the abuse of a child or knew about the abuse but failed to prevent it"); *In re A.A.*, 318 P.3d 1019 (Kan. Ct. App. 2014) (unpublished decision) (overturning of finding of parental unfitness after it determined that "[t]here was never any direct evidence, much less clear and convincing evidence, presented at trial that [the parent] participated in the abuse of [the child] or even knew about the abuse of [the child].") *State ex rel. K.G.*, 841 So. 2d 759, 763–64 (La. 2003) (overturning a finding of parental unfitness because "the trial court's finding was manifestly erroneous as the state failed to prove by clear and convincing evidence that [the parent] knew of the abuse but failed to take any action to prevent it." *In re Welfare of A. P. S.*, No. A10-2159, 2011 WL 2119418, at *8 (Minn. Ct. App. May 31, 2011) (unpublished opinion) (overturning a finding of parental unfitness and holding "[w]here a parent has not personally inflicted [abuse] on the child, it is difficult to conceive how …. that harm could indicate that parent's lack of regard for the well-being of the child unless that parent were somehow aware of the harm and its cause" and the record in that case did "not support a finding that [the parent] knew or should have known that" the child was being abused.")

Furthermore, even if, contrary to the finding of every other state court to have considered the question, Mother could be deemed to have failed to protect J.M. for actions she took "*after* the abuse occurred," the actions relied upon by the Arizona Court of Appeals in no rational sense indicate parental unfitness.

First, the court cited Mother's action of "continu[ing] to deny that abusive conduct occurred." Mother's continuing denial that any abuse had occurred, however, was reasonable. The only incident of alleged abuse was that J.M. had been shaken on one occasion. The theory of abuse by "shaken baby" has, in recent years, been soundly and repeatedly called into question by both legal and medical experts. Three Justices of this Court have noted that "[d]oubt has increased in the medical community 'over whether infants can be fatally injured through shaking alone.'" *Cavazos v. Smith*, 565 U.S. 1, 13–14 (2011) (GINSBURG, J., dissenting) (quoting *State v. Edmunds*, 746 N.W.2d 590, 596 (2008)). Since 2011, the doubts about the theory of shaken baby have only increased. *See, e.g., Del Prete v. Thompson*, 10 F. Supp. 3d 907, 957 n.10 (N.D. Ill. 2014) (noting that "a claim of shaken baby syndrome is more an article of faith than a proposition of science"); *New York v. Bailey*, 999 N.Y.S.2d 713, 726 (N.Y. Monroe Cnty. Ct. Dec. 16, 2014) ("[A] significant and legitimate debate in the medical community has developed in the past 13 years, over whether young children can be fatally injured by means of shaking[.]"). Dr. Scheller, a pediatric neurologist—a medical expert— testified that he had doubts that J.M's injuries were caused by abuse. The fact that numerous medical and legal experts have called into question the occurrence of abuse in circumstances of an alleged "shaken-baby" and that a medical expert familiar

with the specific circumstances of J.M.'s injuries doubted that abuse occurred, Mother's denial that abuse occurred was reasonable, and in no way an indication of her lack of parental fitness.

The Arizona Court of Appeals also based its termination of Mother's parental rights on her decision to continue her relationship with Father. But this decision also does not in any way indicate her unfitness to parent J.M. As noted by a New Jersey appellate court, "continuation of a relationship with a loved one is not a basis for interference with a person's parental rights; it is the failure to protect a child from harm caused or threatened by the loved one that provides a basis for such intrusion." *New Jersey Div. of Youth & Family Servs. v. A.M.H.*, 2009 WL 1181606, at *19 (N.J. Super. Ct. App. Div. May 5, 2009) (unpublished opinion).

The Arizona Court of Appeals based its decision to affirm the termination of Father's parental rights on the same actions it relied upon to affirm the termination of Mother's parental rights. As with Mother, the Arizona Court of Appeals determined that Father failed to protect J.M. "*after* the abused occurred," because he "continued to deny that abusive conduct occurred, presented a 'united front'" with Mother, and Mother and Father "remained committed to each other and their relationship." App. 12a-13a (emphasis added). For the same reasons argued above, Father's belief that J.M. had not been abused was not evidence of his lack of parental fitness. Neither was his decision to continue his relationship with Mother.

Both a fit parent and an unfit parent could have held the belief that J.M. had not been abused. Both a fit

parent and an unfit parent could have chosen to continue their relationship with their loved one. In affirming the termination of Mother's and Father's parental rights, the Arizona Court of Appeals determined only whether the State had satisfied the statutory grounds for termination, but failed to consider whether the conduct satisfied the constitutional requirement that the state prove that the parent cannot "adequately care[] for his or her children," *Troxel*, 530 U.S. at 68 (plurality opinion), i.e., is unfit. This Court should accept review to make clear that the constitution requires that for the state to so definitively and permanently infringe on the fundamental rights of parents, a state's statutory grounds for the termination of parental rights cannot be over-inclusive; they must be limited to conduct which actually equates to parental unfitness.

CONCLUSION

As this Court has recognized, quoting Cicero: "The first bond of society is marriage; next, children; and then the family." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (citing De Officiis 57 (W. Miller transl. 1913)). When the State permanently severs a parent-child relationship, it destroys a family. When the State is repeatedly able to unconstitutionally destroy families, the situation threatens the basic foundations of our society. The question presented in this case warrants this Court's review.

Respectfully submitted,

Kristina B. Reeves
Counsel of Record
Mark Shields
DeeAn Gillespie
GillespieShields
7319 North 16th Street, Suite 100
Phoenix AZ 85020
(602) 870-9700
kreeves@gillaw.com

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF ARIZONA COURT OF APPEALS, DIVISION ONE, FILED JANUARY 29, 2019

IN THE ARIZONA COURT OF APPEALS, DIVISION ONE

No. 1 CA-JV 18-0147

SANDRA R., SERGIO C.,

Appellants,

v.

DEPARTMENT OF CHILD SAFETY, M.R., F.M., J.M.,

Appellees.

January 29, 2019, Filed

Appeal from the Superior Court in Maricopa County
No. JD20586
JS19097
The Honorable Alison Bachus, Judge

AFFIRMED

OPINION

Judge Paul J. McMurdie delivered the opinion of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

Appendix A

McMURDIE, Judge:

¶1 Sandra R. ("Mother") appeals the termination of her parental rights to her three children: M.R., born in 2008; F.M., born in 2015; and J.M., born in 2017. Sergio C. ("Father") appeals the termination of his rights to their two children in common, F.M. and J.M.[1] We affirm the termination orders and hold: (1) the court committed harmless error by allowing the Department of Child Safety ("DCS") to introduce statements from scientific articles without meeting the foundation requirements of Arizona Rule of Evidence 803(18); (2) sufficient evidence supports the abuse finding related to the shaken-baby injury (nonaccidental trauma) even though the evidence did not prove which parent abused the child; and (3) under *Alma S. v. DCS*, 245 Ariz. 146, 425 P.3d 1089 (2018), the "constitutional nexus" requirement established by *Linda V. v. ADES*, 211 Ariz. 76, 117 P.3d 795 (App. 2005), is considered under the totality of the circumstances in determining whether termination is in the best interests of the child.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2013, Mother and her five-year-old daughter M.R. began living with Father. Mother subsequently gave birth to F.M. and J.M. In April 2017, six-week-old J.M. slept most of the day and vomited "a lot" that evening. Mother noticed that J.M.'s arms began shaking at various

1. M.R.'s father's parental rights were terminated in the same proceeding. He is not a party to this appeal.

times. Assuming it was a stomach issue, Father went to the store to buy tea for J.M. Meanwhile, J.M.'s condition worsened. J.M. turned pale, started moaning, could not fully open her eyes, and her arms became stiff. After Father returned from the store, Mother and Father took J.M. to an urgent-care center where they waited more than 40 minutes for the doctor to evaluate her. Upon examination, the doctor told Mother and Father to immediately take J.M. to Phoenix Children's Hospital ("PCH").

¶3 At PCH, a scan revealed that J.M had a large subdural hemorrhage on the left side of her brain and a smaller subdural hemorrhage on the right. She also had damage to her optic nerve and severe retinal hemorrhaging in both eyes. The hemorrhaging caused her brain to shift out of position and compress her brainstem. Because J.M.'s life was in danger, doctors had to perform emergency neurosurgery. After surgery, Dr. Melissa Jones, a pediatrician with a specialty in child abuse pediatrics, evaluated J.M. After ruling out possible medical causes, Dr. Jones determined the injuries resulted from abusive head trauma and Mother and Father provided no alternative explanation for the cause of J.M.'s injuries. PCH reported the injuries, and DCS took custody of all three children and filed dependency petitions. The juvenile court later established the case plan as severance and adoption.

¶4 In July 2017, DCS petitioned to terminate Mother's rights to J.M., F.M., and M.R., and Father's rights to J.M. and F.M., under the abuse ground. *See* Ariz. Rev. Stat. ("A.R.S.") § 8-533(B). Over seven months, DCS

offered Mother and Father services, including hair-follicle testing to rule out drug abuse, psychological evaluations, individual counseling, and a parent aide during visits with the children. Although Mother and Father participated in services, in discussions with counselors, they continued to minimize J.M.'s severe injuries and provided no further explanation for how the injury occurred.

¶5 The juvenile court held a three-day termination hearing. Dr. Jones testified for DCS, opining that J.M.'s injuries resulted from nonaccidental trauma. Dr. Ruth Bristol, J.M.'s pediatric neurosurgeon, testified on the manner and extent of J.M.'s injuries. Mother and Father's expert, Dr. Joseph Scheller, a pediatric neurologist with specialties in pediatric neurology and neuroimaging, opined that J.M.'s injuries most likely resulted from an unusual complication of a birth injury. The court took the matter under advisement and later issued an order terminating Mother's rights to J.M., F.M., and M.R., and Father's rights to J.M. and F.M. Mother and Father timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 8-235(A), 12-120.21(A)(1), and -2101(A)(1).

DISCUSSION

¶6 To terminate a parent-child relationship, the court must find at least one statutory ground for termination under A.R.S. § 8-533(B) by clear and convincing evidence. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013 (2005). The court must also find termination is in the child's best interests by a preponderance of the evidence. *Id.* We review the court's termination determination for

an abuse of discretion and will affirm unless no reasonable evidence supports the court's findings. *Mary Lou C. v. ADES*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43 (App. 2004). The juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *ADES v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943 (App. 2004).

A. The Court Committed Harmless Error by Allowing DCS to Cross-Examine Mother and Father's Expert Witness with Publications in His Field Without Laying Proper Foundation.

¶7 Mother and Father assert that DCS failed to lay proper foundation for the scientific articles it used to impeach Mother's and Father's expert witness, Dr. Scheller. Although we agree the court erred by not requiring DCS to lay the proper foundation for the publications, we conclude the error was harmless. *See Monica C. v. ADES*, 211 Ariz. 89, 94, ¶ 22, 118 P.3d 37 (App. 2005) (harmless error applies in juvenile proceedings).

¶8 This court will affirm the juvenile court's evidentiary rulings "absent a clear abuse of its discretion and resulting prejudice." *Lashonda M. v. ADES*, 210 Ariz. 77, 82-83, ¶ 19, 107 P.3d 923 (App. 2005). Abuse of discretion occurs when a court's decision is "manifestly unreasonable" or based on "untenable" grounds. *Id.* (quoting *Quigley v. City Court of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738 (1982)).

¶9 Arizona Rule of Evidence 803(18) governs the admission of hearsay statements from learned treatises,

periodicals, or pamphlets. Rule 803(18) provides that statements from such publications may be read into evidence, but not received as an exhibit, if:

> (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
>
> (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

"The learned treatise exception to the hearsay rule stems from [the] . . . independent guarantees of trustworthiness of such works." *Rossell v. Volkswagen of Am.*, 147 Ariz. 160, 173, 709 P.2d 517 (1985). By requiring the proponent to elicit an expert's recognition of the publication's reliability, Rule 803(18)(B) provides the proper method to verify the statement's trustworthiness. *See State v. West*, 238 Ariz. 482, 500-501, ¶¶ 68, 70, 362 P.3d 1049 (App. 2015).

¶10 Mother and Father argue DCS failed to lay the proper foundation before recounting statements from the scientific articles in the following two instances:

> [DCS Counsel:] Okay. In Jones' study, he concluded, again, that these are rare, but cannot be diagnosed unless nonaccidental head injury had been questioned thoroughly, do you agree with that statement?

> [Dr. Scheller:] Yes and no. It's sort of -- it's a very complicated statement that he said. And I'm happy to explain why or I'll just say --
>
> * * *
>
> [DCS Counsel:] And you're familiar with the Feldman study that was published in September of 2001?
>
> [Dr. Scheller:] Yes, 2001. Because he's published a real lot of studies.
>
> * * *
>
> [DCS Counsel:] And [Feldman's] study found chronic or mixed chronic and acute subdural hematoma were found only in abused children in his study, that's what he found, correct?
>
> [Dr. Scheller:] Yes.

Mother timely objected to each line of questioning, citing DCS's failure to establish that the publications containing the articles were reliable as required by Rule 803(18)(B). The court overruled each objection and found Dr. Scheller's knowledge of the studies provided adequate foundation to question him about the contents.

¶11 DCS asserts it was not obligated to follow Rule 803(18)'s foundation requirements during the cross-examination because it "did not seek to admit the articles into evidence." We reject this argument. By asking Dr. Scheller to confirm its paraphrased descriptions of the articles' findings, DCS put the truth of the findings themselves at issue. *See* Ariz. R. Evid. 801(c) (hearsay means an out-of-court statement offered to prove the truth of the matter asserted in the statement); Ariz. R. Evid. 802 (hearsay generally inadmissible); *West*, 238 Ariz. at 501, ¶ 71 (superior court properly sustained objection to prosecutor's reference to the findings of a "great deal of literature" in scientific journals); *Sharman v. Skaggs Cos.*, 124 Ariz. 165, 168-69, 602 P.2d 833 (App. 1979) (discussion of a report's findings on cross-examination introduced hearsay statements from report). Thus, before recounting the articles' findings, DCS was required to first lay proper foundation concerning the reliability of the publications in which those articles appeared, or the reliability of the studies within the articles. DCS did not lay the required foundation, and the court erred by overruling Mother's and Father's objections to DCS's improper cross-examination.

¶12 Although the court should have required DCS to establish the publications' reliability before receiving evidence of the articles' findings, we nonetheless conclude that the error was harmless. Dr. Scheller conceded his familiarity with each authority, was able to answer DCS's follow-up questions, and at times challenged DCS's attempts to restrict his explanations of the articles' findings. While Mother and Father take issue with whether the referenced publications were current and credible,

their respective counsel did not develop these arguments on redirect examination despite the opportunity to do so. And although the juvenile court ultimately rejected Dr. Scheller's opinion, it based that decision on the testimony of J.M.'s treating physicians and Dr. Scheller's concessions surrounding the cause of J.M.'s injuries, not whether Dr. Scheller's opinion was contrary to the weight of published authority.

B. Sufficient Evidence Supports the Court's Order Terminating Mother's and Father's Rights Based on Abuse or Failure to Protect from Abuse.

¶13 Mother and Father argue insufficient evidence supports the court's termination order under the abuse ground. A.R.S. § 8-533(B)(2) provides:

> B. Evidence sufficient to justify the termination of the parent-child relationship shall include . . .
>
> * * *
>
> 2. [t]hat the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.

If a parent abuses or neglects their child, the court may terminate that parent's rights to their other children

on this basis, even if there is no evidence that the other children were abused. *Linda V.*, 211 Ariz. at 79, ¶ 14.

¶14 Reasonable evidence supports the court's finding that J.M.'s injuries were caused by abuse. While in Mother and Father's exclusive care, J.M. suffered a large subdural hemorrhage on the left side of her brain and a smaller subdural hemorrhage on the right. She also had significant midline shift and herniation of her brain, meaning there was so much pressure in the brain that it started to shift out of its normal position. J.M. required emergency neurosurgery to relieve the pressure because it had become so great that her skull could no longer contain the brain and its contents without threatening her life. She also had diffused retinal hemorrhages (or bleeding) in all quadrants of the retina and all layers of the retina. Her head injuries negatively affected a multitude of systems in her body. Post-trauma, doctors diagnosed her with cerebral palsy because she had significant motor impairment. She also suffers from regular epileptic seizures and is blind. She now requires occupational therapy, feeding therapy, and 24-hour monitoring. Dr. Bristol testified that J.M. will likely require long-term, full-time care for the foreseeable future.

¶15 At the termination hearing, Dr. Jones opined that J.M.'s injuries occurred within a few days before her hospital admission and resulted from nonaccidental trauma. After reviewing the family's medical history and J.M.'s birth records, Dr. Jones found no alternative medical explanation for her injuries. Similarly, Dr. Bristol testified that J.M.'s injuries were most likely caused by

recent trauma. Dr. Jones added that J.M.'s lack of external injuries did not rule out abuse.

¶16 Dr. Scheller disagreed and testified that J.M.'s injuries resulted from a subdural hematoma at birth that began spontaneously re-bleeding some weeks later, which in turn caused her retinal hemorrhages. Dr. Scheller conceded that this occurrence would be "an unusual complication" and that no other non-traumatic medical condition could have caused J.M.'s injuries.

¶17 Dr. Jones and Dr. Bristol opined on Dr. Scheller's conclusion, testifying that such an occurrence under the circumstances present with J.M. would be "very, very rare." Dr. Jones testified that "children [who] have spontaneous re-bleeding [also] have some other complicating factor with their brain." Dr. Bristol testified that in her experience as a pediatric neurosurgeon she had "not seen a spontaneous re-bleed to that degree." Dr. Jones opined that J.M.'s presentation and injuries did not correspond to Dr. Scheller's theory, particularly the diffuse nature of J.M.'s retinal hemorrhages, which was consistent with "massive trauma with acceleration and deceleration." Regarding J.M.'s eye injuries, Dr. Jones stated that:

> [T]here had to be [a] significant force that led to that pattern of retinal hemorrhages. You can get retinal hemorrhages from many different causes, but the only times we see [J.M.'s] pattern of retinal hemorrhages in the pediatric population is from abusive head trauma, severe

> motor vehicle collisions or there's some case reports of children who have fallen out of two or three story windows onto concrete.

Dr. Jones specifically distinguished Dr. Scheller's theory, testifying that "when the pressure is high in the brain, you can get retinal hemorrhages," but they are typically "in the . . . most recessed part of the retina . . . surrounding the optic nerve," which was "not the same pattern that [J.M.] had."

¶18 Throughout the investigation, dependency, and termination hearings, Mother and Father maintained that J.M. had suffered no accidents or injuries that would explain her injuries. At J.M.'s first health checkup (a few weeks before her traumatic brain injury), the doctor examining J.M. noted no concerns. Likewise, Mother and Father maintained that J.M. only began showing symptoms the evening they took her to the hospital. In sum, reasonable evidence supports the juvenile court's determination that J.M.'s injuries were the result of nonaccidental trauma.

¶19 Based on its conclusion that J.M.'s injuries were the result of nonaccidental trauma, the court also found that Mother or Father, or both, intentionally abused J.M. or knew or reasonably should have known that the other parent abused her, "as she was in their sole care when she suffered life-threatening injuries." The court also found that, despite the "timing, extent, mechanics and presentation of [J.M.'s] injuries," Mother and Father continued to deny that abusive conduct occurred, presented

a "united front," and remained committed to each other and their relationship. And because neither parent had "shown a willingness to leave the other to protect the children from the other parent," the court concluded that "both parents have demonstrated their lack of protective capacities for all of the children, not only [J.M.]."

¶20 Mother and Father have consistently maintained that they were J.M.'s only caregivers since her birth. Mother and Father continuously denied J.M. was abused, even after they were confronted with PCH's medical assessments of J.M.'s injuries. Despite strong evidence that at least one of them caused J.M.'s injuries, Mother and Father made no attempt to distance themselves from one another. To the contrary, in the months following the incident with J.M., Mother and Father deepened their commitment to one another by marrying. Given this record, reasonable evidence supports the juvenile court's determination that: (1) one or both parents willfully abused J.M. by causing J.M.'s physical injuries; and (2) one or both parents failed to protect J.M. after they knew or reasonably should have known J.M. had been abused. *See Maricopa County Juv. Action Nos. JS-4118/JD-529*, 134 Ariz. 407, 408-09, 656 P.2d 1268 (App. 1982) (where mother refused to obtain a divorce or otherwise separate herself from husband who had committed abuse, her "knowing failure" to protect her children from abuse by her husband justified termination of her parental rights); *see also Mario G. v. ADES*, 227 Ariz. 282, 287-88, ¶¶ 19-25, 257 P.3d 1162 (App. 2011) (finding a father's failure to protect one child from abuse justified termination of his rights to another child); *Linda V.*, 211

Ariz. at 79, ¶ 14 (parents "who permit another person to abuse or neglect their children" may have their parental rights terminated). Once DCS established Mother and Father abused or failed to take steps to protect J.M. after the abuse occurred, the statutory grounds to terminate Mother's and Father's rights to the other children were also met. A.R.S. § 8-533(B)(2); *Linda V.*, 211 Ariz. at 79, ¶ 14. Accordingly, reasonable evidence supports the court's finding that termination of Mother's rights to J.M., F.M., and M.R., and Father's rights to J.M. and F.M., was justified under A.R.S. § 8-533(B)(2).

C. *Alma S. v. DCS* Requires Courts to Consider the Connection Between the Prior Abuse of One Child and the Risk of Future Abuse to the Other Children During the Best-Interests Inquiry.

¶21 Mother and Father argue insufficient evidence supports the juvenile court's finding that there was a "nexus" between the abuse of J.M. and the risk of abuse to F.M. and M.R. In the past, this court has expressly held that termination of parental rights to a child who has not been the direct target of abuse requires the party seeking termination of rights to show, at the statutory-grounds stage, "a constitutional nexus between the prior abuse and the risk of future abuse to the child at issue." *Seth M. v. Arienne M.*, 245 Ariz. 245, 248, ¶ 11, 426 P.3d 1224 (App. 2018) (quoting *Tina T. v. DCS*, 236 Ariz. 295, 299, ¶ 17, 339 P.3d 1040 (App. 2014)); *Mario G.*, 227 Ariz. at 285, ¶ 16. This court recently revisited the constitutional nexus requirement, noting that it "first appeared in a footnote in the *Linda V.* opinion, although that opinion does not

identify any legal source for such a requirement and it is not present in the statute itself." *Seth M.*, 245 Ariz. at 248, ¶ 11 (citing *Linda V.*, 211 Ariz. at 80, ¶ 17, n.3).

¶22 The uncertainty expressed in *Seth M.* towards requiring this showing at the statutory-grounds stage was realized when our supreme court issued its decision in *Alma S. v. DCS*. In *Alma S.*, the supreme court held "the substantive grounds for termination listed in § 8-533(B) [are synonymous] with parental unfitness," and once the juvenile court finds a parent to be unfit, the best-interests analysis is triggered. 245 Ariz. at 150-51, ¶¶ 9, 12. *Alma S.* thus makes clear that, at the statutory-grounds stage, the juvenile court should *only* determine whether the party seeking termination has met its burden of proving a parent unfit under one of the grounds for termination. *See Alma S.*, 245 Ariz. at 154, ¶ 32-33 (Bolick, J., concurring in the result) ("However, the Court today holds that all that must be proven by clear and convincing evidence is that the parent engaged in one of the statutory grounds for termination, which by itself 'constitute[s] a finding of parental fitness.'" (alteration in original) (quoting *id.* at 150, ¶ 11)). Considerations outside the scope of A.R.S. § 8-533(B)(2)—such as whether a connection exists between a parent's abuse of one of their children and the risk of abuse to their other children—are left to the best-interests inquiry. This conclusion not only comports with *Alma S.*'s discussion of the two-step termination inquiry, but also *Linda V.*'s original application of a "nexus" requirement. *See Linda V.*, 211 Ariz. at 80, ¶ 17, n.3 (addressing the need to demonstrate a nexus between prior abuse and the risk of future abuse in the court's best-interests analysis).

D. Reasonable Evidence Supports the Court's Finding that Termination of Mother's and Father's Parental Rights Served the Children's Best Interests.

¶23 Once the court finds a parent unfit under at least one statutory ground for termination, "the interests of the parent and child diverge," and the court proceeds to balance the unfit parent's "interest in the care and custody of his or her child . . . . against the independent and often adverse interests of the child in a safe and stable home life." *Kent K.*, 210 Ariz. at 286, ¶ 35. "[A] determination of the child's best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730 (1990) (emphasis omitted). Courts "must consider the totality of the circumstances existing at the time of the severance determination, including the child's adoptability and the parent's rehabilitation." *Alma S.*, 245 Ariz. at 148, ¶ 1. In cases where termination of a parent's rights to one child is predicated on the parent's abuse of another child, courts must also consider the connection between that abuse and the risk of future abuse to the child at issue. *See Seth M.*, 245 Ariz. at 248, ¶ 11; *Mario G.*, 227 Ariz. at 285, ¶ 16; *Linda V.*, 211 Ariz. at 79-80 ¶¶ 14-15, 17. "When a current placement meets the child's needs and the child's prospective adoption is otherwise legally possible and likely, a juvenile court may find that termination of parental rights, so as to permit adoption, is in the child's best interests." *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 12, 365 P.3d 353 (2016). Finally, "[t]he existence and effect of a bonded relationship between a biological parent

and a child, although a factor to consider, is not dispositive in addressing best interests." *Dominique M. v. DCS*, 240 Ariz. 96, 98, ¶ 12, 376 P.3d 699 (App. 2016).

¶24 Here, based on its finding that Mother or Father abused J.M. or that they failed to protect J.M. from abuse, the juvenile court found that it had "grave concerns about the parents' protective capacities in the future." Mother and Father argue that the risk of abuse to F.M. and M.R. is remote because J.M. was a vulnerable infant, unlike the older children. But the juvenile court rejected this argument and concluded that by failing to take steps to protect J.M. from the unidentified abusing parent, "Mother and Father have demonstrated they cannot or will not protect their children." The court specifically found that:

> Although [M.R. and F.M.] are no longer infants, [they] are young children who are vulnerable. [M.R.] has already been the victim of child abuse by Mother in the past.[2] Mother and Father . . . have not been forthcoming about the cause of [J.M.'s] injuries.

The court also found that "given the parents' persistent denials that any abuse occurred," both J.M. and her older siblings remained at risk of future abuse.

---

2. In 2011, while Mother went shopping, she left M.R., who was two years old at the time, unsupervised inside her car for 40 minutes. The temperature outside was 106 degrees. A police officer removed M.R. from the car before she suffered any serious injury, but Mother was arrested and subsequently pled guilty to child abuse.

¶25 Reasonable evidence in the record supports these findings. M.R. was nine years old at the time of the termination hearing and F.M. was almost three—both still dependent on Mother and Father to meet their needs. Both parents' actions after learning the nature of J.M.'s injuries demonstrated they could not recognize danger and keep the children safe. As J.M.'s primary caregivers, Mother and Father are the only ones in a position to explain how her injuries occurred. Mother and Father have refused to acknowledge abuse occurred or that at least one of them was responsible. Instead, they have remained together, and neither parent has taken steps to prevent the children from being returned to the same situation that led to J.M.'s near-fatal injuries. On this record, we conclude reasonable evidence supports the court's finding that the abuse to J.M. bore a substantial connection to the risk of future abuse to the other children in Mother's and Father's care.

¶26 Moreover, reasonable evidence concerning the children's adoptability supports the juvenile court's best-interests finding. The case manager testified that F.M. and M.R. were in a kinship placement that was meeting their needs and the foster parents wished to adopt them. Due to J.M.'s special needs, she was in a separate placement for a medically-fragile child that was providing her the specialized care she required. Although J.M.'s placement was not willing to adopt, DCS identified other potential adoptive placements for her. Considering the children's stability in their current placements, and the availability of adoptive placements, the case manager testified that termination would provide the children with "a safe, secure environment, where all of their needs will be

met." Reasonable evidence supports the court's finding that termination was also in the children's best interests because of their adoptability.

CONCLUSION

¶27 For the foregoing reasons, we affirm the juvenile court's order terminating Mother's rights to J.M., F.M., and M.R. and Father's rights to J.M. and F.M.

AMY M. WOOD
Clerk of the Court
FILED: AA 12

APPENDIX B — ORDER OF THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, FILED MARCH 23, 2018

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

IN THE MATTER OF:

MARLENE VEGA REY
F1000131
DOB: 8/13/2008

FALY JASMINE MADRID
F1117404
DOB: 3/21/2015

JULIETA MADRID
F1118162
DOB: 3/11/2017

UNDER ADVISEMENT RULING

ORDER ADJUDICATING MARLENE REY DEPENDENT AS TO SANDRA REY

ORDER ADJUDICATING FALY AND JULIETA MADRID DEPENDENT AS TO SANDRA REY AND SERGIO MADRID

ORDER TERMINATING PARENTAL RIGHTS OF SANDRA REY AS TO MARLENE REY, FALY MADRID AND JULIETA MADRID

Appendix B

ORDER TERMINATING PARENTAL RIGHTS OF ROSARIO VEGA AS TO MARLENE REY

ORDER TERMINATING PARENTAL RIGHTS OF SERGIO MADRID CASTO AS TO FALY AND JULIETA MADRID

The termination and dependency adjudication hearings of these matters were conducted on December 5, 2017; December 6, 2017; December 8, 2017; and March 9, 2018. Mother and Mr. Sergio Madrid, father to the children Faly and Julieta, were present and contested both matters. Following the trial, the Court took the matters under advisement.

A parent in a termination case has a duty to appear at all properly noticed proceedings. Mr. Rosario Vega, father to the child Marlene, failed to appear and such failures were without good cause. Regardless of whether the severance is initiated by motion or petition, the failure to appear shall be treated as a waiver of rights and an admission of allegations. *Marianne N v. DCS,* 243 Ariz. 53, 401 P.3d 1002 (2017). This applies whether the scheduled proceeding was the adjudication of the motion or petition, or whether the matter was set for pretrial conference, status conference or any other properly noticed proceeding. *Adrian E. v. Ariz. Dep't of Econ. Sec.,* 215 Ariz. 96, 101,14, 158 P.3d 225, 230 (App. 2007).

The Court has reviewed the evidence and testimony provided, the pleadings filed, the arguments of counsel, applicable law, and the case history. Based thereon, the

Court makes the following findings of fact and conclusions of law and enters the following orders.

I. BACKGROUND

Parties

The minor children are Marlene Vega Rey, born August 13, 2008; Faly Jasmine Madrid, born March 21, 2015; and Julieta Madrid, born March 11, 2017.

The mother of the children is Sandra Holguin Rey, aka Sandra Rey Holguin, born December 7, 1977, and she is hereinafter referred to as "Mother."

The father of the child Marlene is Rosario Vega, born January 12, 1985, and he is hereinafter referred to as "Father Vega." Paternity has been established via acknowledgment.

The father of the children Faly and Julieta is Sergio Madrid Castro, born July 10, 1978, and he is hereinafter referred to as "Father Madrid." Paternity for both children has been established via acknowledgment.

The Department of Child Safety is also a party to these proceedings. It will hereinafter be referred to as the "Department" or "DCS."

Appendix B

Initial Referral and Procedural History

This matter most recently[1] came to the attention of the Department and this Court in May 2017, following the sudden hospital admission of Julieta Madrid. A petition regarding Julieta's older sisters, Marlene and Faly, was filed by DCS on May 9, 2017. When Julieta was released from the hospital, DCS filed a petition alleging Julieta was dependent on May 25, 2017. The allegations in both petitions regarding Mother and Father Madrid are limited to abuse of Julieta. The parents were properly served. Father Vega failed to appear in the dependency matter, and Marlene was adjudicated dependent as to him on August 28, 2017.

DCS filed a Petition for Termination of Parent-Child Relationship regarding all aforementioned parents and. their respective child(ren) on July 5, 2017. All parents have been properly served. In the interest of judicial economy, a joint adjudication hearing on both dependency and termination matters were held simultaneously. The bulk of evidence was presented in December 2017, during the first three days of trial. An additional trial day was added upon the parties' request, and the matter was taken under advisement on March 9, 2018.

Thus, the matters currently pending before this Court are the dependency petitions as to Mother and Father

1. As will be described *infra,* a previous dependency case regarding the child Marlene took place in 2011 and 2012. Marlene was reunified with Mother in 2012 and the case was dismissed.

Madrid in JD 20586, and the Petition for Termination in JS 19097 as to all parents. The Court will address those matters in turn.

II. DEPENDENCY PETITION—JD 20586 (Mother and Father Madrid only)

Based upon the testimony and evidence received by the Court in this matter, the Court finds it has jurisdiction over the subject matter of this dependency case pursuant to A.R.S. § 8-202. Service of the dependency petition regarding Marlene and Faly was complete as to both parents on May 11, 2017, and service of the dependency petition regarding Julieta was complete as to both parents on June 1, 2017.

A finding of dependency requires proof by a preponderance of the evidence. A.R.S. § 844(C)(1). A dependent child is one who "has no parent or guardian willing to exercise or capable of exercising such care or control." A.R.S. § 8-201(14)(a)(i).

The sole allegation in both dependency petitions as to each parent is abuse or failure to protect from abuse. Specifically, DCS alleges that all three children are dependent because of the abuse by the parent(s) on Julieta. A child may be found dependent when a parent is unwilling or unable to protect the child from abuse, *see Pima Cnty. Juv. Action No. J-77188,* 139 Ariz. 389, 392 (App. 1983) ("Effective parental care clearly implies prevention of sexual as well as other physical abuse."). The Court must find that a dependency exists at the time of

the trial, *see* A.R.S. § 8-201(14)(a)(i) (defining dependent child as one who "has no parent or guardian willing to exercise or capable of exercising such care or control"). *See Pima Cnty. Juv. Dependency Action No. 96290,* 162 Ariz. 601,604 (App. 1990). However, a dependency finding is appropriate:

> as to parents who presently deny that they are responsible for past abuse and neglect for the obvious reason that such denial of responsibility supports a finding that their children do not have parents presently willing to or capable of exercising proper and effective parental care and control. To hold otherwise would permit an abusive or neglectful parent to defeat an allegation of dependency by the mere passage of time.
>
> *Id.*

After having the opportunity to assess the credibility of witnesses and carefully review all the admitted evidence in this matter, the Court finds that grounds for a dependency exist as to each parent.

Findings of Fact Regarding Julieta's Injuries

Mother and Father Madrid testified that Julieta presented normally until April 24, 2017. Their testimony indicated Mother was at home with Julieta while Father worked; Father returned home between six to eight o'clock in the evening. Mother testified Julieta slept from

5:00 p.m. to 8:00 p.m. At some point in the evening, likely around 8:45 p.m., according to Father Madrid's testimony, Mother breastfed Julieta, who began vomiting. Mother and Father Madrid testified that, at first, they did not think much of the vomiting because their other children had vomited in the past. Julieta vomited again, and Father eventually went to the store to buy some tea for Julieta. Father Madrid testified his mother had given him tea as a child when he was sick. Father Madrid went to the store shortly before midnight, and Mother called him to express concern about Julieta's condition. Father Madrid returned home, and he and Mother transported Julieta to an urgent care facility. Julieta's limbs were becoming stiff. After waiting at urgent care to be seen by a physician, the parents were , advised to quickly take Julieta to Phoenix Children's Hospital. They did so. At the hospital, Julieta was assessed and underwent emergency surgery at 3:45 a.m. on April 25, 2017. Ex. 19, hospital records, at Bates 1050.

The Court heard from three medical experts in this case. While the nature of Julieta's condition when she presented to the emergency room in April 2017 was uncontroverted at trial, the cause of her condition was contested.

Julieta, who was less than two months old when she was rushed to Phoenix Children's Hospital on April 25, 2017, suffered from a number of significant injuries. First, she suffered from a large, subdural hematoma on one side of her head and another, smaller one on the right side of her head. She had significant midline shift of the brain,

meaning pressure had caused the brain to move out of its normal position. She required emergency surgery to remove the blood clot that was causing the pressure. During surgery, the child was noted to have bled profusely. Julieta had retinal hemorrhaging that was severe — she had bleeding present in every layer of her eyes and all over each eye. Julieta had no external injuries, such as bruising, lacerations or abrasions.

The Court heard differing expert opinions on the etiology of Julieta's injuries. Two of the physicians who treated Julieta in April 2017 at Phoenix Children's Hospital were called as witnesses by the Department of Child Safety. The treating physicians testified that the injuries suffered by Julieta were non-accidental trauma that had recently been inflicted. The retinal hemorrhaging was indicative of "massive trauma" caused by acceleration/deceleration with "significant force," according to Dr. Melissa Jones' testimony. Dr. Ruth Bristol, the neurosurgeon who performed the emergency surgery and removed the blood clot from Julieta's head, opined that the blood clot was only one or two days old. She testified that the clot had not been present since birth. She further opined that the blood clot had been causing Julieta's symptoms, including loss of consciousness, loss of appetite, and vomiting. Dr. Bristol testified that she could not definitively opine that there was more than one injury to Julieta. Importantly, the doctors opined that the injuries were of a recent and sudden nature.

Mother and Father Madrid retained an expert, Dr. Scheller, who testified that Julieta had suffered a scalp

injury at birth, resulting in a subdural hematoma, and Julieta's injuries were complications of that original hematoma. The basis for his opinion regarding the hematoma was his review of April 2017 CT scans on Julieta's brain, which showed the presence of "old blood" and "new blood." He opined that the "old blood" was between three and six weeks old; therefore, by his own testimony, it is possible Julieta's "old blood" was not from her birth. Dr. Scheller conceded during his testimony that there was no other medical condition that could have caused the injuries. He opined that the severe retinal hemorrhaging to Julieta's eyes was caused by blood from the hematoma traveling through the circulatory system. He further opined that external injuries would have been present if the child had been abused.

After carefully listening to the medical evidence and expert opinions in this case, the Court rejects Dr. Scheller's opinion. Of critical significance to this Court are the extent, severity, and location of Julieta's retinal hemorrhaging. Julieta's treating doctors testified that a subdural hematoma could not have caused the retinal hemorrhaging observed in Julieta, because the location of the hemorrhaging and the extent of the hemorrhaging were not consistent with hemorrhaging caused by a subdural hematoma. Juliet's hemorrhaging was not confined to the back of the eye, as one would expect as a result of a subdural hematoma. Rather, the hemorrhaging was present in every layer of the eye, and around the entire eye. The Court heard there were so many hemorrhages that the ophthalmologist was unable to count them. Also, the retinal hemorrhaging quickly resolved, which

indicated the hemorrhaging had recently occurred. Those injuries were not caused by a hematoma traveling down the circulatory system, as Dr. Scheller suggested; those injuries were caused by abuse to Julieta. Julieta's treating physicians also credibly testified that subdural hematomas at birth, while not usual, are not of the size found in Julieta. Dr. Scheller conceded that Julieta had suffered trauma to her optic nerve; he opined it was due to intracranial pressure, but he conceded it was also possible the nerve damage was due to abuse. The Court finds the presentation and characteristics of Julieta's internal injuries were consistent with abusive head trauma, not a subdural hematoma as Dr. Scheller opined.

The Court further rejects Dr. Scheller's testimony that Julieta would have had to have suffered external injuries if she were abused. Dr. Jones testified that abusive head trauma does not necessarily result in external injuries. For example, if a child is shaken, she may not present with external injuries, but abusive head trauma may occur. Dr. Jones testified that the absence of external injuries to Julieta does not affect her diagnosis of abusive head trauma. The Court agrees. Dr. Jones further testified that the parents provided no plausible explanation for Julieta's injuries, and medical conditions were ruled out. Dr. Scheller conceded no other medical condition would have caused the child's injuries.

Finally, the Court rejects Dr. Scheller's testimony that the child's "scalp injury" at birth, caput succedaneum, caused the child's injuries by leading to a subdural hematoma. As Dr. Scheller conceded, caput is a common

occurrence in vaginal deliveries it normally resolves shortly after birth. There is no evidence that Julieta's caput did not resolve; the child presented normally at regular pediatric checks following birth. And, as described above, Dr. Scheller's timeframe for the blood on the child's CT scan was "between" three and six weeks. According to Dr. Scheller's testimony, it is possible the bleeding he claims was caused during birth trauma did not present until three weeks later, which would belie his theory that the hematoma was present at birth. Dr. Scheller also conceded that the "re-bleed" he claims resulted in Julieta's emergency admission to the hospital caused a significant amount of bleeding. This difference is important, because he testified that a small amount of "jostling" could have caused the re-bleed; such a small amount of movement would not have caused Julieta's profuse bleeding. The Court finds a small movement would not account for the baby's injuries and symptoms she exhibited on April 24, 2017.

In addition to carefully reviewing the evidence outlined *supra,* the Court notes that Mother has previously been convicted of child abuse. Ex. 8, Mother's Criminal Case Records, at Bates 038-039. The conviction stemmed from an incident in 2011 where Mother left Marlene, who was two years old at the time, in Mother's car while Mother shopped. *Id,* Ex. 7, Tolleson Police Department Report. The incident occurred in July, and the outdoor temperature was approximately 106 degrees. Ex. 7 at 3-4. Mother told police that she decided to leave Marlene in the car because she did not believe she would be in the store very long, even though Mother had previously

heard of children dying in hot cars. *Id* at 4-5. Mother told police it was easier to leave Marlene in the car than wake the child up and bring her into the store. *Id.* at 4. Mother estimated she had been in the store for twenty minutes. *Id.* at 4. Surveillance footage showed she had been inside for 41 minutes, *Id.* at 5. Mother told police that she was at the store to buy a toy and school uniforms; surveillance footage showed Mother was at the cosmetics counter and in the bathroom. *Id.* at 4-5. Mother's conviction was for a class 6 undesignated felony, and she was sentenced to 30 days' incarceration and one year on probation. Ex. 8 at Bates 038-39. Mother was successfully discharged from probation in 2012, and her felony was designated as a misdemeanor. *Id.* at Bates 042-43. In addition, Mother went through a dependency case with Marlene, which Mother successfully completed.

At trial, Mother testified that nothing out of the ordinary had occurred with Julieta before Julieta became symptomatic on April 24, 2017, other than some sleepiness at feeding time.[2] The Court had the opportunity to observe Mother throughout these proceedings, and Mother presented with a completely flat affect at all times. On the stand, Mother's affect remained flat, even when describing the harrowing incidents with Marlene in 2011 and Julieta in 2017. During his testimony, Father Madrid did not similarly present; however, his testimony was troubling in other ways. Although he testified that Mother's 2011 conviction for child abuse of Marlene concerned him, he

2. Mother admitted that she did not raise any concerns regarding sleep with Julieta's pediatrician. She testified Julieta's pediatrician noted Julieta was in good health during well checks.

made clear that he remains in a committed relationship with Mother. He testified that he had asked Mother if something had happened to Julieta, and Mother responded in the negative. He denied shaking Julieta, but he and Mother were the child's only caregivers in the timeframe in which Julieta suffered her injuries. Father Madrid agreed in his testimony that whatever happened to Julieta had happened suddenly. He provided no explanation for the child's injuries and denied engaging in any abusive conduct. Mother and Father Madrid's testimony and conduct in the courtroom, which this Court had the chance to carefully observe and consider, demonstrated to this Court that the parents are a "united front" and committed to each other. Their testimony on key issues, such as what happened to Julieta, was simply not credible.

After carefully considering the evidence, the Court finds the only plausible explanation for Julieta's injuries is that she suffered non-accidental trauma. The parents testified they were her only caregivers. They testified thatno abusive conduct occurred. They denied the child was dropped or any other accidental trauma occurred. Mother and Father Madrid's testimony, however, was not credible. Their testimony that Julieta was not abused simply does not conform to the medical evidence.Julieta was abused while in the parents' exclusive care. Each parent either abused Julieta, knew that Julieta had been abused, or reasonably should have known that the other parent had abused Julieta due to the timing, extent, mechanics and presentation of Julieta's injuries. Furthermore, Mother and Father Madrid have remained in their relationship after Julieta was abused. Neither

has shown a willingness to leave the other to protect the children from the other parent. Thus, both parents have demonstrated their lack of protective capacities for all of the children, not only Julieta. Children in Mother and Father Madrid's care are at risk for abuse.[3]

---

3. The Court notes that both parents underwent psychological evaluations, in which the psychologist was asked to opine on the risk to children in each parent's care. *See* Ex. 5, Father's Psychological Evaluation, and Ex. 6, Mother's Psychological Evaluation. For the reasons below, the Court cannot rely on those evaluations.

The psychologist opined that a child would not be at risk in Father Madrid's care. Ex. 5 at Bates 013. However, the psychologist's opinion was apparently based on Father Madrid's "lack of history of placing children at risk to be neglected, nor neglecting any child." *See id.* The psychologist went on to note that Father Madrid reported that he was not present when Julieta was taken to the hospital. *Id.* Father testified he did not know why the psychologist would have stated Father Madrid reported he was not present. As noted in this Order, Father was indeed present when the child became symptomatic. Finally, the psychologist noted "if anything happened to [Father Madrid's] daughter, it is possible that it may have occurred under his and [Mother's] care." *Id.* The psychologist did not have the benefit of the medical testimony presented to this Court. The Court has found that something did indeed happen to Julieta — she was abused in the exclusive care of Mother and Father Madrid. Consequently, the Court does not find Father Madrid's psychological evaluation to carry any significant weight.

When the same psychologist evaluated Mother, he opined that a child would not be at risk in Mother's care. Ex. 6 at Bates 014. Although he acknowledged Mother's 2011 incident with Marlene, the psychologist noted Mother's denials of harming Julieta and her consistency in doing so. *Id.* Mother reported to the psychologist that she was caring for Julieta but she did not know how Julieta sustained her injuries. *Id.* She denied harming Julieta. *Id.* Again, the Court

Appendix B

Conclusion as to Dependency

For the foregoing reasons, the Court adjudicates the three children dependent as to Mother and the children Faly and Julieta dependent as to Father Madrid.

Regarding disposition, the permanency plan is severance and adoption; the Court next addresses the pending termination petition.

III. TERMINATION PETITION — JS 18864 (all parents)

Jurisdiction

The children are and have been physically present within the State of Arizona through all times relevant to these proceedings. All requirements of Title 8, Chapter 5, Article 2 have been met. The Court finds that it has subject matter jurisdiction in this case. A.R.S. § 8-532(A). This matter is not subject to the Indian Child Welfare Act.

Generally Applicable Law

Parental rights are fundamental, but they are not absolute or inviolate. *Dominique M. v. Dep't of Child Safety,* 240 Ariz. 96,7, 376 P.3d 699, 700 (App. 2016). As a matter of law, termination of parental rights may be

---

does not find the psychologist's conclusions to carry any significant weight. The psychologist did not hear the evidence before this Court. Mother's claims that Julieta was not abused, while consistent, are untrue.

ordered only if grounds for termination under A.R.S. Section 8-533 are established by clear and convincing evidence. This heightened standard requires a showing that the grounds are highly probable or reasonably certain. *Kent K. v Bobby M.* 210 Ariz. 279, 284-85, ¶ 25, 110 P.3d 1013, 1018-19 (2005).

If the grounds are found to exist, the Court must also find that the termination of parental rights would be in the best interests of the child. The burden of proof to establish that termination is in the best interests of the child is by a preponderance of evidence. *Kent K.,* 210 Ariz. at 288, 110 P.3d at 1022. In making the best interests finding, the Court must determine whether the child would either benefit from the severance or be harmed by maintaining the parental relationship. *Maricopa Cty. Juv. Action No. JS-500274,* 167 Ariz. 1, 6-7, 804 P.2d 730, 735-36 (1990); *Ariz. Dep't of Econ. Sec. v. Oscar O.,* 209 Ariz. 332, 334, ¶ 6, 100 P.3d 943, 945 (App. 2004).

Grounds for Termination and Findings

As provided in A.R.S. § 8-533(B), termination of parental rights requires establishment of any one of the enumerated grounds provided by statute. The Department proceeded under specific sections of the statute. Those grounds and the Court's findings are as follows:

Abandonment (A.R.S.. § 8-533(B)(1)) — FATHER VEGA

"Abandonment" is defined in A.R.S. § 8-531(A)(1). This statute provides that:

Appendix B

> "Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause *for a period of six months* constitutes prima facie evidence of abandonment. (Emphasis added.)

There is no bright line formula developed to determine whether a parent abandoned an existing relationship or failed to establish a relationship with a child. *Matter of Pima County Juv. Severance Action S-114487,* 179 Ariz. 86, 876 P.2d 1121 (1994). It is determined by conduct of the parent, not by the subjective intent of the parent. *Michael J. v. Ariz. Dep't of Econ. Sec.,* 196 Ariz. 246, 995 P.2d 682 (2000). A parent must act persistently to establish or maintain the relationship and must "vigorously assert... legal rights to the extent necessary." *Id.* at 250, 686.

In assessing the actions of the parent, the Court should consider factors such as whether a parent has provided 'reasonable support,' 'maintain[ed] regular contact with the child and provided 'normal supervision.'" *Kenneth B. v. Tina B.,* 226 Ariz. 33, ¶ 18, 243 P.3d 636 (App. 2010). In this context, the Court must also consider "whether the parent has taken steps to establish and strengthen the emotional bonds linking him or her with the child." *Id.* at 37, 640. Where "only minimal efforts to support and

communicate with the child" are made, the Court may conclude the child has been abandoned. *Id.*

In this matter, the evidence establishes that Father Vega has not had contact with Marlene since this case began in May 2017. He has sent Marlene no cards, gifts, or letters in that time period. Likewise, he has provided no support to Marlene since May 2017. The case manager credibly testified that she was unaware of Father Vega having made any efforts, even before this case began, to parent the child. He has failed to make even minimal efforts to establish or maintain a normal parent-child relationship with Marlene.

The Department has presented a *prima facie* case of abandonment, demonstrating that Father Vega failed to maintain a normal parent relationship for a period of greater than six months without just cause. This showing by the Department has not been rebutted by Father Vega.

Based upon the foregoing, Father Vega has abandoned the child. The Department has met its burden of proof as to this ground for termination against Father Vega.

Abuse (A.R.S.§ 8-533(B)(2)) — MOTHER AND FATHER MADRID

Termination may be ordered when it is found that a parent has willfully abused a child or failed to protect a child from abuse. The abuse contemplated includes "serious physical or emotional injury or situations in which the parent knew or reasonably should have known

that a person was abusing ... a child," but the abuse need not be "serious." *E.R. v. Department of Child Safety,* 237 Ariz. 56, 59, 344 P.3d 842, 845 (App. 2015). Rather, the Court need only find that the statutory definition of abuse is shown. *Id.* That definition, which is found in A.R.S. § 8-201(2), is: "the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage." No diagnosis by a medical doctor or psychologist is required in order to demonstrate this ground. *E.R.,* 237 Ariz. at 59, 344 P.3d at 845.

There need not be a showing that each child was abused; rather, such a finding as to any of the children could formulate a basis to terminate the rights even as to the other children for whom there is no evidence of abuse. *Linda V. v. Ariz. Dep't of Econ. Sec.,* 211 Ariz. 76 at 79, 117 P.3d 795 (2005). To support termination on this basis, there must be sufficient evidence showing a nexus between the abuse of another child and the risk of such abuse to the children at issue. *Id.* at 80.

The Court incorporates by reference its findings of fact made in Section II of this Order, *supra.* The Court specifically finds that the medical records and testimony provided in this matter demonstrate Julieta suffered from non-accidental trauma. Mother and Father Madrid testified that the child had not been abused in their care, but that simply cannot be true in light of the medical evidence. The Court did not find their testimony on this critical point to be credible. Both parents testified they were the child's only caregivers, and they testified they

were not the cause of and were unaware of the cause of Julieta's injuries. As the child's only caregivers, they should be able to identify the child's abuser. Circumstantial evidence establishes that Mother or Father Madrid, or both, intentionally abused Julieta, causing serious injuries. Mother or Father Madrid, or both, knew or reasonably should have known that the other abused Julieta, as she was in their sole care when she suffered life-threatening injuries.

The Court finds a significant nexus between the abuse of Julieta and the risk of abuse to Julieta's siblings. Julieta was abused while in Mother and Father Madrid's home, in their exclusive care. As a result of the abuse she suffered, Julieta requires a high level of medical care and around-the-clock monitoring. She has been diagnosed with cerebral palsy. She is blind. She has four to five seizures a day, and more when she sleeps. She is undergoing a significant regimen of occupational therapies to assist her, and she will require specialized therapies for eating. The Court has grave concerns about the parents' protective capacities in the future. Although they are no longer infants, Faly and Marlene are young children who are vulnerable. Marlene has already been the victim of child abuse by Mother in the past. Mother and Father Madrid have not been forthcoming about the cause of Julieta's injuries. Just as Mother and Father Madrid's denials regarding the abuse suffered by Julieta were not credible, Father Madrid and Mother's testimony that they would not harm their other children lacked credibility. After carefully observing the parents, the Court did not find Mother and Father Madrid's assurances that they would

keep all their children safe to be credible. The Court agrees with the testimony of the DCS case manager that Faly and Marlene are at risk for abuse by Mother and Father Madrid.

Based upon the foregoing, the Court finds that the Department has met its burden of proof as to this ground for termination against Mother and Father Madrid.

Best Interests

The Court has found that a statutory ground has been met for termination of parental rights. Parental rights may not be terminated, however, unless the Court also finds that termination would be in the best interests of the children. A.R.S. § 8-533(A). *See also In re Appeal in Maricopa Cty. Juv. Action No. JS-500274,* 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990). The burden of proof for a best interest determination is preponderance of the evidence. *Bennigno R. v. Ariz. Dep't of Econ. Sec.,* 233 Ariz. 345, 350, ¶ 23, 312 P.3d 861, 866 (App. 2013).

To establish that severance of a parent's rights would be in the children's best interest, "the court must find either that the child[ren] will benefit from termination of the relationship or that the child[ren] would be harmed by continuation of the parental relationship." *Mario G. v. Ariz. Dep't of Econ. Sec.,* 227 Ariz. 282, 288, ¶ 26, 257 P.3d 1162, 1168 (App. 2011) (quoting *James S. v. Ariz. Dep't of Econ. Sec.,* 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998)). The existence of a bonded relationship between the parents and the children does not preclude a finding

that severance is in the best interests of the children. *Dominique M v. Dep't of Child Safety,* 240 Ariz. 96, ¶ 12, 376 P.3d 699, 701 (App. 2016).

To determine whether the children would benefit, relevant factors considered by this Court consider include "whether the current placement is meeting the child[ren]'s needs." *Bennigno R.,* 233 Ariz. at 350, ¶ 23, 312 P.3d at 866 (citing *Maricopa Cty. Juv. Action No. JS-8490,* 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994)). The Court should also consider whether there is an adoption plan in place and even if the children are adoptable. *Mary Lou* C., 207 Ariz. at 50, ¶ 19, 83 P.3d at 50 (citing *JS-500274,* 167 Ariz. at 6, 804 P.2d at 735, and *Maricopa Cty. Juv. Action No. JS-501904,* 180 Ariz. at 352, 884 P.2d at 238, respectively). The Department must only show the children are adoptable; a specific adoption plan is not required. *JS-501904,* 180 Ariz. at 352, 884 P.2d at 238. Here, the Court finds from the evidence presented that if the current case plan for adoption cannot for any reason move forward, the children are adoptable.

The children Marlene and Faly are placed together in a kinship placement, with whom they have a significant relationship and bond. The placement is adoptive and is meeting all of the girls' needs. It is the least restrictive placement for Marlene and Faly.

Due to the severity of her medical condition and extent of her needs, Julieta is not placed with a member of her extended family or with her siblings. Rather, Julieta is placed in a licensed foster home that is specially trained

to care for medically fragile children. Her placement is not adoptive. At trial, DCS presented testimony indicating two possible adoptive placements are being explored for Julieta. First, Mother and Father Madrid identified a family friend; this friend would need to complete classes for caring for a medically fragile child to be considered. Second, a licensed foster home that has provided respite care to Julieta's placement has expressed interest in adopting Julieta. In accordance with A.R.S. § 8-538(C), the Court finds that placement with a member of the children's extended family is not feasible at this time, given the need for education regarding medically fragile children. If the potential family placement completes the classes, the option would be viable. The DCS case manager testified that Julieta is an otherwise adoptable child, even with her medical needs; the Court found that testimony credible. Given Julieta's extensive needs and the above facts, her current placement is the least restrictive placement. The current placement is meeting Julieta's needs, including her many special needs.

The Court finds that severance of parental rights will benefit the children, because they need a safe home in which their parents will protect them from abuse. As detailed, *supra,* Mother and Father have demonstrated they cannot or will not protect their children. Further, the Court finds that the children would suffer a detriment if parental rights remained intact, because the children would be at very serious risk for further abuse. Julieta nearly died due to the abuse she suffered in her parents' care. She and her siblings remain at risk, given the parents' persistent denials that any abuse occurred.

Based thereon, the Court finds that the Department has proven by a preponderance of the evidence that it would be in the minor children's best interest to have Mother and Father's parental rights terminated.

Final Order

Based upon the foregoing,

IT IS ORDERED granting DCS's Out of Home Dependency Petition, filed May 9, 2017, regarding Faly Madrid and Marlene Rey, and DCS's Out of Home Dependency Petition, filed May 25, 2017, regarding Julieta Madrid (JD 33645). The minor children Marlene Vega Rey, born August 13, 2008, Faly Jasmine Madrid, born March 21, 2015, and Julieta Madrid, born March 11, 2017, are adjudicated dependent as to Mother, Sandra Holguin Rey, aka Sandra Rey Holguin, born December 7, 1977. The minor children Faly Jasmine Madrid, born March 21, 2015, and Julieta Madrid, born March 11, 2017, are adjudicated dependent as to Father, Sergio Madrid Castro, born July 10, 1978. The case plan is severance and adoption.

IT IS ORDERED granting the Petition for Termination of Parent-Child Relationship filed by DCS on July 5, 2017.

IT IS FURTHER ORDERED terminating the parent-child relationship between Mother, Sandra Holguin Rey, aka Sandra Rey Holguin, born December 7, 1977, and the minor children, Marlene Vega Rey, born August 13, 2008, Faly Jasmine Madrid, born March 21, 2015, and Julieta Madrid, born March 11, 2017.

IT IS FURTHER ORDERED terminating the parent-child relationship between Father, Rosario Vega, born January 12, 1985, and the minor child, Marlene Vega Rey, born August 13, 2008.

IT IS FURTHER ORDERED terminating the parent-child relationship between Father, Sergio Madrid Castro, and the minor children, Faly Jasmine Madrid, born March 21, 2015, and Julieta Madrid, born March 11, 2017.

IT IS FURTHER ORDERED vesting the support obligation for the child on the Department of Child Safety, in accordance with A.R.S. § 8-538(D). It is noted that this order does not terminate the right of inheritance for the child and the obligation for support from the parents, which are terminated only upon a final order of adoption. A.R.S. § 8-539.

Appellate Rights/Withdrawal of Counsel

This is intended to be a final order of the Court. The parties are advised that an appeal may be taken to the Arizona Court of Appeals (ARPJC 103-108). A Notice of Appeal must be filed with the Clerk of the Maricopa County Superior Court **no later than 15 days** after this final order is filed with the Clerk of the Court. Counsel for any party affected by this ruling shall ensure that the party is informed of this ruling, is advised as to appeal rights and obtains authorization from the party to file the Notice of Appeal, if elected.

Appendix B

Upon expiration of the appeal time, counsel for Mother and Father Madrid are withdrawn from further representation and relieved of any further responsibility.

March 20, 2018
DATE

/s/
HONORABLE
ALISON S. BACHUS

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF ARIZONA, DATED AUGUST 28, 2019

SUPREME COURT
STATE OF ARIZONA

August 28, 2019

ROBERT BRUTINEL
Chief Justice

JANET JOHNSON
Clerk of the Court

RE: SANDRA R./SERGIO C.

v

DCS/M.R./F.M./J.M.

Arizona Supreme Court No. CV-19-0057-PR

Court of Appeals, Division One No. 1 CA-JV 18-0147

Maricopa County Superior Court No. JD20586

Maricopa County Superior Court No. JS19097

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 27, 2019, in regard to the above-referenced cause:

Appendix C

ORDERED: Mother's Petition for Review = GRANTED as to Issue #1 only.

FURTHER ORDERED: Appellant Sergio C.'s Petition for Review = GRANTED as to Issue #2 only as rephrased: Does it violate due process to make the nexus finding in the best-interests inquiry?

FURTHER ORDERED: The case shall be set for oral argument.

FURTHER ORDERED: The parties may file simultaneous supplemental briefs, not to exceed 20 pages in length, no later than 20 days from the date of this Court's Minute Letter. Any amicus briefs are due on or before September 23, 2019, and any responses to amicus briefs are due on or before September 30, 2019. Any amicus briefs or responses may not exceed 20 pages in length.

Chief Justice Brutinel and Justice Beene did not participate in the determination of this matter.

Filing of a supplemental brief is permissive rather than mandatory. This order should not be construed as an invitation to repeat the contents of the Petition for Review, the Response, or any Reply. Lack of a supplemental brief shall not be considered an admission that the position of the opposing party or parties should prevail.

Counsel shall be advised of the date and time of oral argument at such time as the hearing date is determined.

Appendix C

The Clerk of the Court of Appeals, Division One, Phoenix, shall forward the remaining record to the Clerk of the Supreme Court.

Janet Johnson, Clerk

TO:

John L Popilek
H. Clark Jones
Brunn W Roysden III
Autumn Spritzer
Lindsey H Richardson
Amy M Wood
Hon. Janet E Barton
Hon. Alison Bachus
Hon Jeff Fine

APPENDIX D — RELEVANT STATUTORY PROVISIONS

A.R.S. § 8-533

§ 8-533. Petition; who may file; grounds

A. Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, a foster parent, a physician, the department or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B of this section.

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child:

1. That the parent has abandoned the child.

2. That the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.

3. That the parent is unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.

5. That the potential father failed to file a paternity action within thirty days of completion of service of notice as prescribed in § 8-106, subsection G.

6. That the putative father failed to file a notice of claim of paternity as prescribed in § 8-106.01.

7. That the parents have relinquished their rights to a child to an agency or have consented to the adoption.

8. That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that one of the following circumstances exists:

(a) The child has been in an out-of-home placement for a cumulative total period of nine months

or longer pursuant to court order or voluntary placement pursuant to § 8-806 and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement.

(b) The child who is under three years of age has been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement, including refusal to participate in reunification services offered by the department.

(c) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to § 8-806, the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

9. That the identity of the parent is unknown and continues to be unknown following three months of diligent efforts to identify and locate the parent.

10. That the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge

parental responsibilities due to the same cause.

11. That all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.

(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

C. Evidence considered by the court pursuant to subsection B of this section shall include any substantiated allegations of abuse or neglect committed in another jurisdiction.

D. In considering the grounds for termination prescribed in subsection B, paragraph 8 or 11 of this section, the court shall consider the availability of reunification services to

the parent and the participation of the parent in these services.

E. In considering the grounds for termination prescribed in subsection B, paragraph 8 of this section, the court shall not consider the first sixty days of the initial out-of-home placement pursuant to § 8-806 in the cumulative total period.

F. The failure of an alleged parent who is not the child's legal parent to take a test requested by the department or ordered by the court to determine if the person is the child's natural parent is *prima facie* evidence of abandonment unless good cause is shown by the alleged parent for that failure.