No. 20-1516

In the Supreme Court of the United States

VERONICA V. BADESCU,
Petitioner,

v.

CATALIN S. BADESCU,
Respondent.

On Petition for a Writ of Certiorari
to the Ohio Tenth District Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Precisely what constitutes a compelling state interest justifying deprivation of a fit parent's—and primary caregiver's—constitutional right to legal and physical custody of her child in a divorce?

2. Is the "best interest of the child" standard, as it pertains to Ohio Revised Code §§ 3109.03, 3109.04 and 3109.051, unconstitutionally vague and broad?

3. Does overzealous application of the state-law principle that courts speak only through their journal entries violate the Due Process Clause?

DIRECTLY RELATED CASES

- *Badescu v. Badescu*, No. 16DR002436, Franklin County Ohio Court of Common Pleas, Division of Domestic Relations and Juvenile Branch. Judgment entered November 28, 2018.
- *Badescu v. Badescu*, No. 18AP000947, Ohio Tenth District Court of Appeals, Judgment entered September 3, 2020.
- *Badescu v. Badescu*, No. 2020-1270, Ohio Supreme Court. Jurisdiction declined December 29, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Veronica V. Badescu respectfully petitions for a writ of certiorari to review the judgment of the Ohio Tenth District Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The Ohio Supreme Court's decision declining to accept review of the case is published at 159 N.E.3d 1162 and is reproduced at Pet. App. C-86a. The Ohio Tenth District's opinion is published at 2020-Ohio-4312 and is reproduced at Pet. App. B-26a. The Franklin County, Ohio Court of Common Pleas's opinion is unpublished but is reproduced at Pet. App. A-1a.

JURISDICTION

The Ohio Supreme Court declined jurisdiction on December 29, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The statutes involved are Ohio Revised Code §§ 3109.03, 3109.04 and 3109.051. Pet. App. D, E and F.

INTRODUCTION

This case presents fundamental questions of parental rights and constitutional law: First, precisely what constitutes a compelling state interest justifying deprivation of a fit parent's—and primary caregiver's—constitutional right to legal and physical custody in a divorce? Second, is the "best interests of the child" standard, as it pertains to Ohio Revised Code §§ 3109.03, 3109.04 and 3109.051, unconstitutionally vague and broad? Third, does overzealous application of the state-law principle that courts speak only through their journal entries violate the Due Process Clause? These questions present important issues on the adequacy of the governing laws and procedures to protect the fundamental parental rights, under the Fourteenth Amendment to the United States Constitution, of a relocating fit parent.

Our society has become increasingly more mobile, resulting in a similar increase in relocation-related child-custody issues. These cases implicate constitutional interests of travel, autonomy, privacy, home, marriage,[1] and gender. The Constitution protects the fundamental right to marry, but to unmarry is costly and burdensome. Divorce laws require the marriage to persist until child custody is determined and other contentions are resolved.[2] For nearly five decades, the legal rule for resolving child-

[1] LaFrance, Arthur. (2008). Child Custody and Relocation: A Constitutional Perspective. University of Louisville Journal of Family Law. 34.

[2] Brian L. Frye and Maybell Romero, The Right to Unmarry: A Proposal, 69 Clev. St. L. Rev. 89 (2020)

custody disputes has been the Best-Interests-of-the Child standard. The vagueness and indeterminacy of this standard and the misplaced faith that rests in the ability or expertise of divorce courts, mental health professionals and guardians ad litem to reliably predict what is truly best for the child regularly impinges upon the fundamental rights of thousands of parents across the United States each year. The nature of the divorce proceedings is adversarial and, in many instances, inhuman. Some courts, as here, employ the cruelest tool of imposing Hobson's choice between livelihood and parenthood. This is especially devastating to women who are restarting their careers after delaying career advancement for the marriage and serving as the primary caregiver for the child/ren[3] – because they

[3] Laufer-Ukeles, Pamela. (2011). Custody through the Eyes of the Child, Introduction to the 2011 Gilvary Symposium, 36 University of Dayton Law Review 299 (2012) (Symposium Edition) [citing Nancy D. Polikoff, Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determination, 7 WOMEN'S RTS. L. REP. 235, 236; Lynn Hecht Schafran, Gender and Justice: Florida and the Nation, 42 FLA. L. REV. 181, 192 (1990); Katharine Bartlett, Comparing Race and Sex Discrimination in Custody Cases, 28 HOFSTRA L. REV. 877, 880-81 (2000); Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 139, 203 (1992); STATE BAR OF MICH., THE FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 69 (1989), available at http://www.michbar.org/publications/msword/REG-Rpt2.doc (finding that sex stereotypes influence judges to the disadvantage of women seeking custody of their children, often granting custody to minimally interested fathers even when the mother has been the primary caregiver for years, perceiving mothers who focus on their careers as less fit parents than fathers who do the same and evaluate women's social interests and finances more critically than they do men); Susan Beth Jacobs, The Hidden Gender Bias Behind The Best Interest of the Child Standard in Custody Decisions, 13 GA. ST. U. L.

face a higher risk for both judicial gender and class bias[4]; sex stereotypes can influence judges in perceiving mothers who focus on their career as "selfish"—willing to place their own needs before the needs of their children—compared to fathers who do the same or more.[5] Yet at the first tick of the divorce clock, generally, women do not earn as much or have postponed career advancement during marriage and often find themselves without adequate resources for legal representation or cannot compete in the hidden economic factors in the analysis of the Best Interests of the Child factors in determining who should be the legal custodian and school residential parent—even when both parents are deemed fit. Compounding the issues is when domestic abuse is involved. Even when moderate, physical and emotional abuse is often not given due consideration but its misused "counterpart," parental alienation theory, creeps thru the proceedings and influences the "friendly parent" factors of the best interests standard that further undermine the rights of abused parents, relocating and nonrelocating, alike. In the relocation context, the move is viewed as failure to foster a relationship with the other parent and/or that the proposal of a

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REV. 845, 849-50 (1997) ("Many judges consider present income, future earning potential, housing, maintenance of the family home, and other marital advantages in making custody determinations. This has had a devastating effect on women, who generally do not earn as much as men because of disparity in wages, and because of focus on raising children instead of advancing career opportunities."); *Jones v. Jones*, 542 N.W.2d 119 (S.D. 1996). But see *Palmore v. Sidoti*, 466 U.S. 429 (1984).]

[4] Harrington Conner, Dana, Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women (August 10, 2009). American University Journal of Gender, Social Policy & the Law, Vol. 17, No. 2, 2009

[5] Pl. Dep. at 103-104; Ex. R-2,17,18; Tr. at 279-280,737,950,953,1031.

parallel parenting plan, which is appropriate in high-conflict cases, is viewed as rejection of shared parenting, even when the home-state parent readily admits to not having any original shared parental intent to remain in the local community or provide conflicting testimonies of any long-term plans to remain there post-divorce; or even when the home-state parent plainly agrees to the parallel parenting plan. Divorce courts often fail to recognize the fundamental right of familial association and override the relocating primary caregiver's right based on the concern that the child's relationship with the community or even the house in which he or she was raised is too strong to permit adjustment to a new community. And even when the court finds that a child is well-adjusted in both the home-state and relocated parents' communities or that the child could benefit from the flexibilities in the relocated parent's schools and community setting, the presentation of the advantages of the move, which the statutes require, is viewed as failure of the relocating parent to acknowledge the home-state parent and his community as an 'equal' and is penalized for such a mild 'offense' and factors into the award of sole legal and residential custody to the home-state parent.

A few appellate courts recognize that the subject of custody and welfare of children is fundamentally important and should receive close scrutiny and review the record *de novo*.[6] But here, where a trial court erred as a matter of law, the court of appeals abused and distorted the principle that "a court speaks only through its journal entries", by concluding that oral pronouncements and other acts

[6] See, e.g., *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Schriner v. Schriner*, 25 Neb. App. 165, 903 NW 2d 691 (2017)

by a trial court are unreviewable, leaving no true avenue for relief, and falsehoods and half-truths unchecked.

Each year, billions of dollars pour into the family court system instead of our children and instead of going into building the infrastructure that would make gender equality a reality. It is a daily occurrence that divorcing *and* fit parents, many of whom end up in bankruptcy, are required to fight and are systematically deprived of their fundamental right to parenthood. Furthermore, a parent exercising the right to move will suffer perhaps greater risk of losing custody than when the parent has caused a relationship to fracture through infidelity,[7] alcohol,[8] drug or gambling addiction,[9] or even domestic violence and child abuse.[10] It is for these reasons, as will be explained in more detail, that this Court must intervene.

STATEMENT OF THE CASE

This is an appeal by Veronica V. Badescu ("Veronica") from a 2018 Order of Custody granting Catalin S. Badescu ("Catalin") sole legal and physical custody of the parties' minor son, M.B. This case involved parental relocation prior to finality of divorce or any grant of permanent custody. It raises important constitutional questions concerning the showing that must be made in order for the state to abridge a relocated parent's fundamental parental rights, whether Ohio's best-interest-of-the-child test

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[7] *El-Badewi v. El-Badewi,* 2007 Ohio 3800, (Ohio Ct. App. 2007)
[8] *Liston v. Liston,* 2012 Ohio 3031 (Ohio Ct. App. 2012)
[9] *Siferd v. Siferd*, 2018 Ohio 3616 (Ohio Ct. App. 2018)
[10] *In Re Brayden James*, 113 Ohio St. 3d 420 (2007)

(the "Best Interest" test) is a sufficient mechanism for protecting those rights, and whether that test is unconstitutionally vague and broad.

Veronica is proceeding *pro se* and respectfully requests that this Court construe this petition liberally and provide an opportunity to address any possible deficiencies prior to any denial.

A. Legal Background

1. Chapter 3109 of the Ohio Revised Code governs issues related to children. The sections relevant to this case are §3109.03—Equality of parental rights and responsibilities; §3109.04—Allocating parental rights and responsibilities for care of children - shared parenting; and §3109.051—Parenting time - companionship or visitation rights.

Sections 3109.04 and 3109.051 instruct parents who have been awarded either a majority or an equal share of parenting time on how to seek to relocate with their children. But it provides no procedure for parents to whom parenting time has not yet been allocated. While § 3109.03 purports to place parents on "equal footing," in reality its text conflicts with that purpose, as it implicitly places the burden of proof upon the parent requesting to modify the existing allocation of parental rights and visitation through its requirement that "[t]he harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child." § 3109.04(E)(1)(a)(iii)

2. Embedded in § 3109.04(F) are the Best Interest factors used to determine custody, whether pre-decree or post-decree. These factors include: the geographic locations of the parents, § 3109.04(F)(2)(d); which parent is likely to honor parenting time rights and encourage contact between the child and the

other parent, § 3109.04(F)(2)(b) and § 3109.04(F)(1)(f); and the child's adjustment to the child's home, school, and community, § 3109.04(F)(1)(d). Section 3109.04(F)(3) expressly forbids the court from giving preference to a parent because of that parent's financial status or condition. But due to the broadness and effectively limitless considerations that § 3109.04(F) permits and the condition of proving the advantages of a change in environment imposed by § 3109.04(E)(1)(a)(iii), the economic condition[11] of a parent is inevitably considered in the context of relocation, especially when the reason for the move is employment.

3. The Ohio trial court's Local Rule 27 is often the default parenting schedule based on the geographic proximity of parents. Ohio is the only state that prescribes visitation "guidelines" based on a 90-mile distance between parents. The Tenth District precedent, *Ash v. Dean*, 70 N.E.3d 987, 2016 Ohio 5589 (Ohio Ct. App. 2016), held that a conditional custody arrangement does not violate the constitutional rights to travel of the relocating parent so long as the trial court determines that the child's best interests is to remain in the county where they lived (citing *Brown v. Brown*, 2d Dist. No 2012-CA-40, 2013-Ohio-3456) and so long as a conditional custody arrangement only attaches a consequence to a parent's relocation outside of a specified area. It also held that the right to own property does not necessarily equate to the right to live where one chooses.

4. While this Court has recognized the parental

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[11] This is also true for the non-relocation case. See *Hawbecker v. Hawbecker*, 5th Dist. Fairfield No. 16-CA-9, 2016-Ohio-5740. (GAL here has a history of improperly emphasizing economic means as a basis for awarding parental rights.)

rights of single, unmarried, and married parents, the rights of divorcing and divorced parents are left unprotected. The Best Interest standard functions as a penal code that strips the fundamental right of a relocating fit parent in a divorce and child-custody proceeding.

B. Factual Background

The parties married in 2010 and resided in Virginia, where both were employed. Pet. App. B-28a. In 2011, Catalin obtained a position in Dayton, Ohio; Veronica gave up her job and seniority with the federal government, and the couple moved to Centerville, Ohio, to accommodate Catalin's career move. *Id.* The move was purely for professional reasons; neither Veronica nor Catalin had any other ties to Ohio.

Due to a federal hiring freeze and the general economic temperature in 2011, Veronica was unsuccessful at obtaining a job. In 2012, the couple decided that she would go back to school in Columbus, Ohio, where she was admitted into graduate school. The parties moved to Galloway, Ohio, as a compromise between Veronica's commute to school and Catalin's commute to work. Tr. at 235.

Catalin thought it was justified to buy and live in a house for three years while Veronica was in school. Pl. Dep. at 62, 258. They moved again to Dublin, Ohio, just before their only child, M.B., was born in 2015. The parties' marriage began to deteriorate primarily due to disagreement regarding the house purchase and renovations, and conflicts in parenting styles of the newborn. The marital differences became intractable, and the relationship became abusive, culminating in Catalin kicking Veronica and breaking her tailbone. Tr. at 529-530, Pet. App. B-52a.

Veronica cared for M.B. full time during the first months of his life. Due to the marital strife, she decided to cut her studies short and began looking for a job. She again had difficulties finding reasonable employment for various reasons including being asked whether it would be difficult to go back to work with a nine-month-old or concerns that she would have a long commute (from Dublin). Tr. at 948, Def. Dep. at 85-86. Catalin made overtures on potential relocation to the West Coast. Pl. Dep. at 188-189, Tr. at 576. After Veronica widened her job search to areas with a larger industry base and where she has family and friends, she received a formal offer of employment for a position in her field in San Diego, California, in April 2016.

She informed Catalin of the offer. He initially expressed interest in moving to San Diego but ultimately decided that his salary and lifestyle expectations may not be met. Ex. Z-1, Z-2, Tr. at 843. The couple first sought to mediate the termination of their marriage but, ultimately, were unable to reach agreement regarding the shared parenting of M.B. because Catalin required that Veronica's family that she pre-agree that he would be the legal custodian. Tr. at 973.

On June 20, 2016, Catalin filed a complaint in Franklin County seeking divorce from Veronica and custody of M.B. At a hearing on July 14, 2016, the magistrate permitted Veronica to move to San Diego along with M.B. but also granted Catalin's request for a rotating monthly parenting schedule. During the course of the divorce and custody proceedings—while the 30-day rotation was in place—Veronica established roots with her son in California: She enrolled M.B. in preschool, and she and M.B. enjoyed close relationships with, and support from, family

and friends.

C. Proceedings Below

1. Trial Court

Pretrial hearings were held on October 28, 2016 and March 6, 2017. The trial court found, regarding which parent was most suitable for primary custody, that it was a "flip of a coin between the two [parents]...because both are reportedly very good parents." March 6, 2017 Pretrial transcript at 20. The court emphasized that, concerning the dispute over custody of M.B., Veronica's decision to move to San Diego meant that, from the outset, she bore a heavy burden to convince the court that she was worthy of custody despite her move:

> "**[T]he burden is on [Veronica] to demonstrate why she's upsetting the proverbial applecart** . . . and to have to show me that she absolutely was not going to be able to pursue a career before I even get to the step if I'm going to allow a residential parent to be outside of this jurisdiction. . .."

October 28, 2016 Pretrial Tr. at 11, 14 (emphasis added).

> The court further indicated that it would delve into the motivations for Veronica's move, apparently in order to assess the degree of penalty that should be imposed upon her for moving:
>
> "[I]t's family decisions that I'm going to look at. . . [Y]ou have a young child who isn't enmeshed into the community . . . so . . . motivation for the move, as it were, is the first place I'm going to start looking at. . . [T]he other things you have to look at is is [sic] there

availability for your client to move closer there." *Id.* at 12, 13.

The court noted to the guardian ad litem:

> ....you're saying . . . is that if you had a vocational evaluation that might give you some hope or indication, whatever, that she could be employed here, you might consider naming her residential parent for as long as she's in Franklin County **to try to get her to move back**.

October 28, 2016 Pretrial Tr. at 17 (emphasis added).

Dr. David Lowenstein, the court-appointed psychologist, also stated that "if the situation was reversed where Mother was living in Columbus, ...[he] would say Veronica should be the residential parent,". . . Tr. at 1030, Psych. Dep. at 77.

With these impermissible standards in place, trial proceeded on the notion that Veronica had the burden to establish her move was necessary. The investigation of necessity for Veronica's career delved into specifics such as the reasonableness of her pay expectations, economic advantage, and whether these expectations balanced the perceived higher cost of living in CA, whether she sufficiently applied to jobs in Ohio. Def. Dep. at 180, GAL Rep. at 23-24; Tr. at 903, 950, 958, 978.

On the other hand, Catalin was not required to, nor did he, produce any job applications outside of Ohio to support his assertion that he could not locate work acceptable to him on the west coast. OppB at 5. Catalin's primary stated reason for resisting a move is because he was "comfortable" in his job and believed that he would be stepping down to a lower

pay if he moved. Pl. Dep. at 103-104; Ex. R-2; Tr. at 737.

The court "**fully recognize[d] that other statutory factors favor [M.B.] primarily residing with Veronica** [such as school and presence of extended family]." Tr. at 1015, also Pet. App. B-40a-43a. But the court unreasonably found that "Veronica's presentation is notable as it is evident that in [her] mind, California living and the opportunities it avails is far superior than life in Ohio could provide for M.B." and to Catalin's advantage, his "home is more familiar to M.B. and is filled with neighbors and children...he has known his *entire* life." Pet. App. B-42a-43a. (emphasis added) The overemphasis and undue weight on father's neighborhood is incorrect because the rotating 30-day temporary parenting order began when M.B. was one year old and had been spending equal time in San Diego.

Ultimately, the trial court found that Veronica's decision to live out of state was determinative. The court faulted Veronica for having "no intentions of leaving" California and dismissed Veronica's arguments that "her move across country should not be 'held against' her in [M.B.'s] custodial determination" as mere "rationalization." *Id.* at 34a. And the court faulted Veronica for "never waver[ing] in her intent to move," *id.* at 35a, and concluded that she had been selfish in accepting the position in San Diego, *id.* at 57a. Ohio is where the parties had made "parental decisions to raise their child" and therefore the court could "[]not agree [that] Mother's decision to accept a position across the country from the child's Father placed the child's best interest above her own career ambitions." *id.* The court found that Veronica should have just stayed in Ohio because "it is evident that Plaintiff controlled the family household

finances... this is not a case that [she]...would have been economically disenfranchised during the course of the divorce, ...even if she could not have found a job she could of availed herself to the court process in requesting temporary orders of support and/or assistance with living expenses during the pendency of the case." *Id.*

In reaching this decision, the court disregarded Catalin's testimony that he was comfortable with Veronica's proposed parallel parenting plan which (1) provided allocated decision rights (rather than one parent being deprived of all decision rights) and (2) stated that Ohio would continue to be the home state as long as Catalin lives in Ohio and (3) provided more flexible/longer visitations. Tr. at 503-507. Instead, the court ordered 'Local Rule 27 Model Parenting Time Schedule for Parents Travelling Over 90 Miles One Way'–*without a requirement that Catalin maintain his present residence in order to retain sole custody.* Pet. App. B-66a and Ex. 2B (See also March 6, 2017 Pretrial at 20.) The court also issued a 'move back scenario' parenting time schedule should parents be under 90 miles apart. Currently, the parenting time order is for M.B. to live with Catalin for the entirety of the school year, with only brief visits with Veronica at Christmas and over spring break and half of summer break.

2. Ohio Court of Appeals

On appeal to the Tenth District of Ohio, Veronica raised two assignments of error:

> [I.] The trial court erred as a matter of law and abused its discretion by placing the initial burden on Mother to demonstrate the necessity of move and placing unfairly prejudicial weight on Mother's decision to live

> out of state, in violation of R.C. § 3109.03.
>
> [II.] The trial court erred in granting sole custody to Father by failing to assess the best interest of the child properly under Ohio law, including without undue emphasis on Mother's decision to move out of state.

Pet. App. A-4a.

Veronica also argued under the second assignment of error that the trial court erred and committed plain error[12] in admitting Catalin's video recordings into evidence which was in derogation of the criminal statutory of California. The "cherry picked" recordings allegedly show that Veronica prevents quality Skype sessions were misleading. Catalin also submitted recordings of himself while M.B. and Veronica were interacting which unfairly influenced the court in concluding that he "is the most cognizant to share love, affection and contact with the other parent" Pet. App. B-51a. Veronica argued that the videos violating two-party-consent law skewed the "friendly parent factors" in favor of Catalin. Ex. 28

A three-judge panel of the court of appeals considered the two assignments together and affirmed. The court of appeals concluded, essentially, that the trial court's above-quoted pronouncements from the bench—that it would apply an impermissible standard to, and place in impermissible burden on, Veronica—could be ignored in light of the principle that "a court speaks only through its journal entries, and not through mere oral pronouncements." Pet. App. B-8a at ¶ 12. And it concluded that, R.C. 3109.03

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[12] Though her trial counsel failed to object to the videos, Veronica brought to the trial court's attention that California "ha[s] [] different rule[s] about recording other people." Tr. at 610

notwithstanding, "the trial court was required to consider the circumstances regarding [Veronica's] move to San Diego." *Id.* at ¶ 16. This misguided conclusion was further buttressed by an erroneous reading of R.C. 3109.04(F)(2)(d), which merely requires a trial court to consider the "geographic proximity" of the parents when assessing whether shared parenting is in the child's best interest. Thus, the court of appeals concluded, contrary to law and fact, that there was "no indication the trial court placed a burden on [Veronica] to demonstrate the necessity of moving or placed unfairly prejudicial weight on her decision to live out of state." *Id.* at ¶ 34.

The Supreme Court of Ohio declined jurisdictional review on December 29, 2020. This petition follows.

REASONS FOR GRANTING THE PETITION

The reasons provided below are of nationwide importance and involved substantial constitutional challenges.[13] The states are also divided on the ability to protect the constitutional rights of the relocating parent.

I. CERTIORARI IS WARRANTED TO DETERMINE WHAT CONSTITUTES A COMPELLING STATE INTEREST JUSTIFYING DEPRIVATION OF A FIT PARENT'S PARENTAL RIGHTS.

A. In finding that both parents are fit, the

[13] The issues involved are of public and great general interest. (e.g. see Palmer, Ron and Sherry Palmer. Not In the Child's Best Interest: How Divorce Courts get it all Wrong and How the Constitution can fix it. 2013; ACTION OHIO Coalition For Battered Women; Ohio NOW ELF)

trial court did not have a compelling state interest to award sole custody to Father.

1. The text of the Fourteenth Amendment provides that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In recognition of parental rights as one of the oldest fundamental liberty interests, this Court in *Troxel v. Granville*, 530 U.S. 57 (2000), enumerated extensive precedents which held that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. This includes the right to "establish a home and bring up children" and "to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

2. In *San Antonio Independent School Dist. v. Rodrigues*, 411 U.S. 1 (1973), this Court found that "strict judicial scrutiny [is] appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications." Furthermore, "strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its . . . system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives, and that it has selected the 'less drastic means' for effectuating its objectives."

Further, only after conducting a fitness hearing which meets due process standards and after

demonstrating that a parent's decision puts the child's health and safety in imminent danger, can the State be the parent of last resort. "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745 (1982)

3. In this case, the trial court, GAL and psychologist repeatedly and unanimously concluded that both parents are fit and good parents. Thus, the decision of the trial court to strip Veronica of her fundamental rights as a parent fails the first prong of Strict Scrutiny which requires the State to have a compelling interest in the custody determination. A divorce court must subordinate and treat *de minimis* its beliefs on this matter to those of the fit parent.

B. Divorce does not make a parent unfit.

1. While this Court has long addressed that both married and unmarried persons are accorded the same equal protection rights, and that "rights of the individual...must be the same for the unmarried and the married alike," this Court has not yet explicitly addressed the constitutional rights of both parents upon the dissolution of marriage. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). However, for this Court's precedents to stand, it is reasonable that the same equal protection extend to both parents in a divorce because "fundamental liberty interests of natural parents....does not simply evaporate" when the union is dissolved, not even when "parents have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745 (1982).

2. For a divorce court to deprive a fit parent custody of her/his child is to suggest that a divorce

process simply declares a fit parent unfit, and that the state has carte blanche authority to deprive divorced parents of their fundamental liberties. This line of reasoning cannot stand. Divorced parents are and have been subject to prejudice, social and legal stigma, and hostility. It is a mark of shame – especially for mothers – as a sign of either psychological failure or a selfish failure to consider her child's need. This Court must recognize that divorced parents as a suspect class deserving of Constitutional protection. If "[u]nder our Constitution, the freedom to marry, or not marry.... cannot be infringed by the State," the same must be said for the freedom to unmarry. *Loving v. Virginia*, 388 U.S. 1 (1967).

C. Fit parents, by definition, do not harm their child/ren and their fundamental constitutional rights may only be abrogated by the presence of an objective, plainly articulated compelling state interest.

1. If there is harm to a child in divorce, the amount of harm that warrants coercive intrusion by the State must be properly and explicitly articulated. Without threat of State intrusion, fit married parents often disagree and fight bitterly on the proper way to raise a child. It is irreconcilable that when these same disputes are before a divorce court, one fit parent's basic civil right may vanish.

2. When fundamental liberty is at issue, the parameters within which the State may intervene to deprive an individual of that liberty must be precisely defined. And in no circumstances should the determination of whether a compelling state interest justifying such a curtailment of liberty is present rest entirely in the subjective judgment of a divorce court.

There is no amount of "experience" or personal "wisdom" – as was used by the trier of fact in this case in justifying its determination[14,15] – which can guarantee that disputes will be reduced by a sole custody award nor close-proximity of parents would ascertain a child would grow up to be a successful adult. March 6, 2017 Pretrial Tr. at 20., App. B-21a.

3. Whether conflicts between parents or the distance between parents would prove that shared parenting to be unworkable, the state may only impinge on either fit parent's parental rights via the "least restrictive means" available. *Dunn v. Blumstein*, 405 U.S. 330 (1972). The least restrictive means available to the court here was to grant Veronica's proposed parallel parenting plan. Instead, the trial court overrode both parents' apparent acceptance of the parallel parenting and ordered shorter visitations in the non-custodial home due to concerns that the "kid will literally live a divided life that he won't be able to do sports with the people he goes to school with." March 6, 2017 Pretrial at 29.

II. CERTIORARI IS WARRANTED TO REMEDY ABUSES OF THE "BEST INTERESTS OF THE CHILD" STANDARD.

A. Chapter 3109 - Ohio's rendition of the Best Interests of the Child standard - is unconstitutionally vague.

1. "The goal of granting custody based on the best interests of the child is indisputably a substantial

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[14] March 6, 2017 Pretrial at 20; App. B-21a

[15] On the contrary, numerous studies show that divorce courts are not knowledgeable of the dynamics of abuse and caters to abusers. (e.g. see https://escholarship.org/uc/item/31z272j1)

governmental interest for purposes of the Equal Protection Clause." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). But it is constitutionally impermissible wield that "best interest" as a punitive weapon in divorce proceedings.

2. Ohio Revised Code § 3109.03 ostensibly places parents on "equal footing," but it is vague and impossible to apply to relocation cases. First, there is no procedure for relocation at the time of initial custody determination. Second, § 3109.04 and § 3109.051 place a burden of proof on the parent requesting to modify the parental rights and visitation. In the Tenth District of Ohio, custody determination after relocation has commenced is relatively rare[16] compared to relocation after the divorce has been finalized. Nevertheless, both pre-decree and post-decree relocation cases are ostensibly subject to the same test: § 3109.04, the best-interests-of-the-child factors.

This case can be viewed as affected by both the pre-decree and post-decree issues. For the case of pre-decree relocation, the GAL rationalized: "you take a job and leave without having that issue [being legally married and still living in the marital residence] resolved with finality, that's the problem." Tr. at 1022. If a parent who has not yet been allocated parenting time may not seek to relocate with a child, then we are left with the unreasonable conclusion that parents must first resolve the allocation of parenting time and then address the relocation. That would require the relocating parent to forgo

[16] The meager caselaw that exists suggests mothers are rarely permitted to leave the county, and an implicit burden is placed on the relocating parent in an initial custody determination. *See Ash v. Dean*, 2016-Ohio-5589; *Bond v. De Rinaldis*, 2016-Ohio-3342.

employment which is the very reason she is requesting permission to relocate and leaves her at the losing end of the best-interests analysis.

As discussed above, Catalin submitted a parenting plan that spelled out his possible relocation weighed little in the trial court's decision. Furthermore, the court did not place a conditional custody condition on Catalin. Legal custody would also remain unchanged regardless of the distance of the parents. So, for the case of post-decree, § 3109.051 becomes irreconcilable with the Constitution when the burden of proof is placed on a relocated primary caregiver parent during the initial custody determination, but modification procedures favor the home-state parent in a future relocation. Ohio case law also favors preserving the status quo in modification cases. In other words, the system is skewed against the relocating mother from top to bottom.

If the trial court viewed the case as a modification of the status quo with Veronica as the primary caregiver and "analogize[d] this situation to a custody modification", at worst the custody determination should have been a form of shared parenting. *Marshall v. Marshall*, 117 Ohio App. 3d 182 (1997).

3. Even if we are to accept Chapter 3109 as a penal code, this Court has held that "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a

well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

On one hand, the trial court insisted that parents should "get closer together" and stated how it would likely rule regardless of what is presented at trial:

> "[Y]ou can try your case and put on all of your story about how you got to where you got... and we could still be back here in four years, three years because times have changed one way or the other...What...I will do if the two of you are living in two different places and I decide that I'm not going to put an Ash v Dean limitation...I will put into place a schedule should the parties live in closer proximity to each other..." March 6, 2017 Pretrial at 19-20

On the other hand, Veronica was required to prove the benefits and advantages of the relocation but punished for it, including quality of life factors:

> "Defendant's presentation is notable as it *is evident that in Defendant's mind*, California living and the opportunities it avails is far superior than [what] life in Ohio could provide for [M.B.]. In fact, both parties' residences have positives that support their contentions and that would support [M.B.'s] best interest. Pet. App. B-42a.

The vagueness of Chapter 3109 entraps fit parents into 'offenses' that factor in the deprivation of

custody.

B. Revised Code 3109.04(F)(2)(d) is unconstitutionally broad, allowing Ohio courts to depart far from accepted and usual course of judicial proceedings and infringe on fundamental rights.

1. This Court has recognized the overbreadth of similar best-interests-of-the-child statutes in *Troxel v. Granville*, 530 U.S. 57. Here, the broad formulation of §3109.04 allows for its insidious and unconstitutional applications.

2. Section 3109.03 requires that courts treat parents living apart from one another—i.e., parents living in separate geographic locations—equally when it comes to allocation of parental rights:

> When husband and wife are living separate and apart from each other, or are divorced, and the question as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children is brought before a court of competent jurisdiction, they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved.

Here, the record is replete with evidence that the trial court disregarded the statute and gave improper, prejudicial weight to Veronica's relocation. But the court of appeals sought to justify the trial court's departure from the plain mandate of § 3109.03 by asserting that § 3109.04(F)(2)(d) actually required the trial court to parse "the circumstances regarding [Veronica's] move to San Diego." Pet. App. B-55a.

But § 3109.04(F)(2)(d) merely provides that, "[i]n determining whether shared parenting is in the best interest of [a] child[]," a trial court must consider "[t]he geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting." It says nothing regarding any inquiry into how the parents reached their respective geographic positions and provides no license to burden one parent or the other with the task of justifying his or her location before being considered for custody. In other words, § 3109.04(F)(2)(d) permits only consideration of the "practical" effects of the current geographic reality; it does not provide a trial court with carte blanche to conduct an after-the-fact, normative probe of a parent's decision to take up residence in a specific geographic locale.

3. Section 3109.04(F)(3) expressly forbids the court from giving preference to a parent because of that parent's financial status or condition. But the erroneous reading of § 3109.04(F)(2)(d) and an improper fixation on Catalin's locational "stability" and economic means and Veronica's decision to move out of state unfairly prejudiced the outcome of the decision. These sorts of decision are "discriminatory," "cruel," and "den[y] full humanity to women." *Burchard v. Garay*, 42 Cal.3d 531, 539 (1986).

4. As applied by the Ohio courts here,

- Section 3109.04(F)(2)(d) nullifies § 3109.03's mandate that no parent should be penalized for "living separate and apart" from another.
- Section 3109.04(F)(2)(d) nullifies § 3109.04(F)(3)'s mandate that no preference should be given to a parent because of financial status through inquiry and requirement of special justification for a

parent's decision to "liv[e] separate and apart" from the other.

When it was enacted, § 3109.03 represented a paradigm shift in the law. The common law had provided that "the father, if a suitable person, had a paramount right to the custody of his children, except with respect to those of such tender years as to require a mother's personal care, and was prima facie entitled to custody of his children, even though the welfare of the children was of prime importance." *In re Pierson*, No. 79AP-846, 1980 Ohio App. LEXIS 10987, at *4 (Ct. App. May 8, 1980) (citing *Clark v. Bayer*, 32 Ohio St. 299 (1877)). Section 3109.03 is a drastic departure from this traditional system, and places both parents on an equal footing. There can be little doubt that, in situations where relational strife has caused parents to separate or divorce, the mother—for financial reasons or otherwise—is the party more likely to be forced to relocate in an attempt to ameliorate the negative effects of the separation. Placing the burden on the relocated mother to "justify" her move thus flies in the face of § 3109.03 and effects a de facto reversion, in part, to the constitutionally impermissible common-law system.

III. OVERZEALOUS APPLICATION OF THE STATE-LAW PRINCIPLE THAT COURTS SPEAK ONLY THROUGH THEIR JOURNAL ENTRIES VIOLATES THE DUE PROCESS CLAUSE.

A. The principle that courts speak only through their journal entries does not permit a reviewing court to ignore plain

legal errors made in pronouncements from the bench and not disavowed via subsequent journal entry.

1. The court of appeals also reversibly erred by concluding that the trial court's stated intentions to imply an incorrect legal standard and to impose an impermissible burden upon Veronica were not reversible error because "a court speaks only through its journal entries, and not through mere oral pronouncements." Pet. App. A-8a at ¶ 12. The court of appeals reasoned that, because the trial court's most egregious misstatements of the law occurred from the bench rather than in a journalized writing, they were unreviewable and thus could not constitute reversible error. *See id.*

2. The principle that "a court speaks only through its journal entries" simply means that court orders only attain the force of law once they are written and journalized.[17] But courts of appeals, with some frequency, distort this principle from one that ensures clarity and finality—and, therefore, accountability—in trial court proceedings into an excuse to avoid reviewing significant aspects of trial-court proceedings altogether. Indeed, a number of courts of appeals have added their own corollary to the courts-speak-through-their-journals principle that radically changes its meaning and has never been endorsed by this Court. These courts have appended to the courts-speak-through-their-journals principle the misguided rule that they "will not review" "ruling(s)" that are not "expressly set forth" in the journalized judgment. *Karmasu v. Bendolf*, 4th

[17] *See In re Guardianship of Hollins*, 114 Ohio St.3d 434 (2007); *In re A.W.*, 2020-Ohio-1457; *Johnson v. Sloan*, 154 Ohio St. 3d 476 (2018).

Dist. Scioto No. 93CA2160, 1994 Ohio App. LEXIS 4545, at *8 (Sep. 28, 1994) [18]

3. The Tenth District adhered to this perversion of the courts-speak-through-their-journals principle in this case. Here, the trial court made abundantly clear in plain statements from the bench what standards and burdens it would apply in analyzing the parties' competing parenting claims. And though it did not make the same pronouncements in writing in its journalized decision, it is nevertheless clear that those same standards and burdens served as the backdrop for the trial court's entire decision-making process. The court of appeals ignored the trial court's unequivocal statements from the bench by invoking the courts-speak-only-through-their-journals principle and abdicating its responsibility to review the trial court proceedings as a whole. *See, e.g.*, *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 551 N.E.2d 172 (1990), paragraph one of the syllabus ("the reviewing court must examine the entire entry and proceedings when it is in the interest of justice to ascertain the grounds upon which a judgment is rendered").

This Court should grant review.

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[18] See also, e.g., *State v. Collins*, No. 94CA1639, 1995 Ohio App. LEXIS 4409, at *25 (Ct. App. Sep. 22, 1995) ("An appellate court will not, ordinarily, review the correctness of a statement made in the courtroom unless that statement was carried into the court's judgment entry."); *Buckeye Telesystem, Inc. v. MedCorp, Inc.*, 6th Dist. Lucas No. L-05-1256, 2006-Ohio-3798, ¶ 17 ("[A]n appellate court will not ordinarily review the substantive or procedural content of a courtroom colloquy which was not carried over into the judgment entry."); *State v. Blalock*, 8th Dist. Cuyahoga No. 80599, 2002-Ohio-3637, ¶ 19 (same).

CONCLUSION

For the foregoing reasons, I, Veronica V. Badescu, pro-se Petitioner and mother of the now 6-year old M.B., respectfully ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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April 26, 2021

SEE ATTACHED NOTARIZATION

ACKNOWLEDGEMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Los Angeles)

On April 26, 2021 before me Clifton N. Star ---------- , Notary Public,

personally appeared Veronica V. Badescu ---------- ,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

Signature: _____
Notary Public

CLIFTON N. STAR
Notary Public - California
Los Angeles County
Commission # 2283133
My Comm. Expires Mar 28, 2023

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(REV.150504)