No. 20-618

IN THE
Supreme Court of the United States

KELLY GEORGENE ROUTTEN,
Petitioner,

v.

JOHN TYLER ROUTTEN,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of North Carolina

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

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

Counsel for Amicus Curiae

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INTEREST OF *AMICUS* IN THIS CASE[1]

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

SUMMARY OF ARGUMENT

ParentsUSA contends that, when children are deprived of significant time with each of their fit parents, children have poorer "outcomes on all measures of behavioral, emotional, physical, and academic well-being and relationships with parents and grandparents." Such poorer outcomes include drug abuse, depression, teen pregnancies, misbehavior, deficient academic performance, and increased incidence of physical health issues. Better outcomes for children come from fit parents having significant roles in their children's lives and the parents making the best decisions they can concerning their children by reason of the "natural bonds of affection[.]" *Troxel*

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[1] All parties have consented in writing to the submission of this Brief. Counsel for the parties received the notice of the intention by *Amicus* to file this brief at least ten (10) days prior to the deadline to file the brief. Amicus affirms that no portion of this Brief was authored by counsel for a party and that no person or entity other than *Amicus* made a monetary contribution intended to fund the Brief's preparation or submission.

v. Granville, 530 U.S. 57, 68 (2000) (plurality opinion).

ParentsUSA further contends that, because of the better outcomes for children who have significant parenting time with each of their parents and because of the constitutional rights of parents, as recognized by this Court, trial courts must not be permitted to intrude and to micromanage families by imposing custody schedules that *de facto* sever or undermine the parent-child relationship without first finding, upon clear and convincing evidence, an unfit parent or actual or likely harm to children.

In this divorce case, the trial court did not find Petitioner unfit and did not find that the children would suffer or likely would suffer harm in her care through parenting time. The trial court did not award Petitioner-Mother any in-person contact with the children, not even if visitation was supervised, not even on Mother's Day, only awarding Petitioner phone contact with the children. The trial court further confirmed and amplified Petitioner's fitness as a parent by the trial court delegating to Respondent-Father the unfettered authority to permit the children to be with Petitioner as often and for as long as Respondent decided. The totality of the award was a *de facto* termination of Petitioner's parental rights.

Because the North Carolina Supreme Court decided important federal questions in ways that conflict with relevant decisions of this Court, ParentsUSA urges this Court to grant the Petition. Then, on the merits, this Court can clarify the body of opinions on the constitutional rights of parents so that courts throughout the United States of America

will cease employing the "best interest of the child" standard as a mechanism, perhaps unknowingly, by which to by-pass the rights of parents in the absence of findings of fact, upon clear and convincing evidence, of parental unfitness or actual or likely harm to a child that is greater than the harm the children will suffer under the restrictive terms and conditions the courts otherwise would impose upon the parents and the children.

SUPPLEMENTAL STATEMENT OF THE CASE

ParentsUSA supplements Petitioner's Statement of the Case by highlighting the following from the trial court's memorandum and orders set forth in Petitioner's Appendix, Appendix C, Appendix D, and Appendix E:

1. Although the trial court's findings of fact may have justified the award of primary physical custody to Respondent-Father with Petitioner-Mother's parenting time a/k/a visitation or custodial time either limited, contingent, or supervised, nowhere does the trial court reveal that (a) Respondent-Father alleged that Petitioner was an unfit parent, (b) Respondent-Father alleged that the children would be or likely would be harmed when in Petitioner's care if she was awarded parenting time a/k/a visitation, (c) Respondent-Father alleged that contingent or supervised visitation would be necessary to protect the children from harm from Petitioner; or (d) Respondent-Father requested a parenting plan or visitation schedule that would deny the children any in-person contact with their mother.

2. The trial court did not find that Petitioner-Mother was unfit or that the children would be harmed or likely would be harmed when in her care.

3. Petitioner-Mother's fitness and that the children would not be harmed when in her care were confirmed by the trial court also authorizing the Respondent-Father to "permit custodial time between the children and [Petitioner-Mother]" within his sole discretion, taking into account the recommendations of H.'s counselor as to frequency, location, duration, and any other restrictions deemed appropriate by the counselor for permitting visitation between H. and [Petitioner-Mother]." Pet. App. 80a, ¶2. The trial court did not order Respondent-Father to follow the counselor's recommendations, but only to take them into account. The trial court also authorized Respondent-Father to allow Petitioner-Mother to attend the children's healthcare appointments. Pet. App. 79a-80a, ¶1.

4. The Orders and Memorandum of Judgment, Appendix 65a – 101a, do not reflect that any consideration was given to the harm or adverse impact on the children that could come (a) from the children having phone contact, but no in-person time with their mother; (b) from the children not having their mother at sports, dance, music, school or other activities, events, and functions as their father and their peers' parents would be attending; or (c) from having their father, Respondent, be the "gatekeeper" to their

mother on a day-to-day basis including on such special holidays as Mother's Day.

ARGUMENT

The Court Should Grant The Writ To Protect Children From Poorer Outcomes When Deprived Unnecessarily Of The Parent-Child Relationship And To Clarify The Standard States Must Follow Before *De Facto* Taking Children From Their Parents.

A. Children Have Poorer Outcomes When Deprived Of A Meaningful Parent-Child Relationship And When A Parent Is Authorized To Be The Gatekeeper.

> Almost a quarter-century ago, 18 expert social scientists chosen by the National Institute of Child Health and Human Development recommended that parenting time be distributed so that it would "ensure the involvement of both parents in important aspects of their children's everyday lives and routines—including bedtime and waking rituals, transition to and from school, extracurricular and recreational activities (Lamb, Sternberg, & Thompson, 1997, p. 400)."

Preface to the Special Issue: Shared Physical Custody: Recent Research, Advances and Applications, Journal of Divorce & Remarriage 2018, Vol. 59, No. 04, p. 5 (Nielsen, Ph.D., Linda), https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1455303

In social science, "child well-being" or "outcomes" are derived from the following categories:

(1) academic or cognitive outcomes, which include grades, attentiveness in class, and tests of cognitive development;

(2) emotional or psychological outcomes, which include feeling depressed, anxious, or dissatisfied with their lives or having low self-esteem;

(3) behavioral problems, which include misbehaving at home or school, hyperactivity, and teenage drug, nicotine, or alcohol use;

(4) overall physical health or stress-related physical problems (e.g., sleep or digestive problems, headaches); and

(5) the quality of parent–child relationships, which includes how well they communicate with and how close they feel to their parents.

Joint Versus Sole Physical Custody: Children's Outcomes Independent of Parent–Child Relationships, Income, and Conflict in 60 Studies, Journal of Divorce & Remarriage 2018, Vol. 00, No. 00, pp. 5, 11 (Nielsen, Ph.D., Linda) https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1454204

> JPC [or Joint Physical Custody, which is defined for purposes of the 60 studies summarized in this article as 30% to 50% of a child's time with each parent] is generally linked to better outcomes than [Sole Physical Custody or] SPC for children, independent of parenting factors, family income, or the level of conflict between parents. It appears that leaving the classwork, clothing, cleats, or clarinet at the other parent's house and living under two sets of rules has not created dire circumstances for

> JPC children—perhaps because they are not leaving behind the love, attention, involvement, and commitment of either parent when with their other parent.

Id. at 30. *Accord* Sanford L. Braver & Michael E. Lamb (2018) *Shared Parenting After Parental Separation: The Views of 12 Experts*, Journal of Divorce & Remarriage, 59:5, 372-387, 383 https://doi.org/10.1080/10502556.2018.1454195 (a minimum of 35% of the child's time should be allocated to each parent for the child to reap the benefits of Shared Parenting and the existence of interparental conflict or opposition to Shared Parenting by one parent should not preclude or rebut Shared Parenting).

Here, Petitioner was awarded zero percent (0%) of the children's time and, making her life and the lives of the children worse, Respondent was appointed by the trial court to be the "gatekeeper." "Parental gatekeeping refers to parents' attitudes and actions that serve to affect the quality of the other parent's relationship and involvement with the child." William G. Austin, Marsha Kline Pruett, H.D. Kirkpatrick, James R. Flens, and Jonathan W. Gould, *Parental Gatekeeping And Child Custody/Child Access Evaluation: Part I: Conceptual Framework, Research, And Application,* Family Court Review, Vol. 51 No. 3, July 2013, 485–501, Abstract at 485. https://www.researchgate.net/publication/256662725_Parental_Gatekeeping_and_Child_CustodyChild_Access_Evaluation_Part_I_Conceptual_Framework_Research_and_Application. Gatekeeping varies from facilitative to restrictive, with restrictive gatekeeping adversely impacting children and fostering parental conflict. *Id. See also Parental*

Gatekeeping & Parental Alienation, Psychological Center for Expert Evaluations, Inc. http://forensicpsychologicalcenter.com/2013/07/08/parental-gatekeeping-parental-alienation/

The research on gatekeeping does not contemplate cases, as is the situation before this Court, when a trial court denies Petitioner any parenting time or physical custody, but then empowers and authorizes Respondent to follow the custody schedule or parenting plan with no in-person contact or, on a whim, for good reasons or for no reason at all, to allow as little or as much contact with the children as Respondent decides (only taking into account the recommendation of one child's counselor).

If Petitioner does not "push back" against Respondent's gatekeeping, she risks the children feeling betrayed by her. In addition to harming the children's relationship with Petitioner, the trial court has authorized Respondent to marginalize the children's mother and, as a consequence, Respondent risks the children rebelling against him, blaming him, and becoming estranged from him. Gatekeeping is ultimately about control, control that the trial court provided Respondent without honoring the constitutional rights of Petitioner and, based on its orders and judgments, without understanding the ramifications to the children, their relationship with Petitioner, and their relationship with Respondent. *See Unloved Daughters and the Dark Side of Maternal Gatekeeping,* Psychology Today, Peg Streep. https://www.psychologytoday.com/us/blog/tech-support/201903/unloved-daughters-and-the-dark-side-maternal-gatekeeping

The volume of divorces in the USA is staggering. One out of every two marriages, many including children, end in divorce. Parents are adults and must handle the emotional impact of the divorce that is individual to each parent on a continuum from feeling relieved to feeling devasted. But "[c]hildren often believe they have caused the conflict between their parents. Many children assume the responsibility for bringing their parents back together, causing them additional stress. Vulnerability to both physical and mental illnesses can originate in the traumatic loss of one or both parents through divorce." *Children and Divorce,* American Academy of Child & Adolescent Psychiatry, No. 1, January 2017. https://www.aacap.org/AACAP/Families_and_YouthFacts_for_Families/FFF-Guide/Children-and-Divorce-001.aspx

Trial courts are charged by state law with addressing the issues presented in divorces, including the "award" of legal custody, jointly or solely to one parent, and the custody schedule or parenting plan for the children. When trial courts fail to consider and to balance the harm that the award being imposed will cause or likely cause the children, merely claiming such award is in "the children's best interests," employing the magic words that lack definition[2] by legislation or by case law, lack any objective

[2] No standard definition of the term "best interests of the child" exists. Many states provide "guiding principles" and subjective "factors." In practice, trial courts are unconstrained and merely have to draft orders and judgments in a manner to claim compliance with such principles and factors. Child Welfare Information Gateway (2020), *Determining the best interests of the child*, Washington, DC: U.S. Department of Health and

standard, and insulate trial courts from meaningful appellate review, trial courts often participate in, perhaps unknowingly, and exacerbate the children's "traumatic loss of one or both parents through divorce." *Id.*

B. Absent A Finding Of Unfitness Or That Parenting Time Would Harm A Child, Depriving A Parent Of Meaningful Contact With Her Children And Making The Other Parent The Gatekeeper Must Not Be Countenanced.

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

Amicus is challenged with persuasively presenting existing law to this Court knowing there have been few, if any, presentations more compelling than that provided by then Chief Judge Dillard of the Georgia Court of Appeals[3] in his fully and specially concurring opinion in *Borgers v. Borgers*, 820 S.E.2d

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Human Services, Administration for Children and Families, Children's Bureau.
https://www.childwelfare.gov/pubPDFs/best_interest.pdf

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

474 (Ga. App. 2018). Chief Judge Dillard, relying on decisions from this Court, sets forth the rights of parents and the very limited circumstances under which states may interfere with those rights:

> The liberty interest of parents to direct the upbringing, education, and care of their children is the most ancient of the fundamental rights we hold as a people, and is "deeply embedded in our law." This cherished right derives from the natural order, preexists government, and may not be interfered with by the State except in the most compelling circumstances.

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

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

> rights" inherent in the text, structure, and history of the federal constitution.

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

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

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

> The presumption that children ordinarily belong in the care and custody of their parents is

> not merely a presumption of the statutory and common law, but it has roots in the fundamental constitutional rights of parents. The Constitution secures the fundamental "right of parents to direct the upbringing of their children," *Troxel v. Granville,* 530 U.S. 57,65 (2000), and it "protects a private realm of family life which the state cannot enter without compelling justification." *Arnold v Bd. of Ed. of Escambia County,* 880 F.2d 305, 313 (11th Cir. 1989).

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

Regrettably for Petitioner and for other parents similarly situated across the USA, the North Carolina Supreme Court and many states' highest appellate court fail to follow this Court's long recognized constitutionally protected interest of parents to raise their children without undue state interference.

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

> bonds, it must provide the parents with fundamentally fair procedures.

Stanley v. Kramer, 455 U.S. 745, 753-754 (1982). See generally U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. Const. amend. XIV, § 1 ("... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...."); Ga. Const. Art. 1, § 1, XXIX ("The enumeration of rights herein contained as part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.").

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

> [W]hen [in the absence of compelling circumstances necessary to substitute its own preferences for the parent's decision] state actors engage in this sort of Orwellian policymaking disguised as judging, is it any wonder that so many citizens feel as if the government does

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

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

Nothing could be more "Orwellian policymaking disguised as judging" *Id.* at 482, than the trial court below, without a finding of unfitness or a finding that harm would come to the children if parenting time were awarded to Petitioner, depriving Petitioner of any meaningful relationship with her

children and, simultaneously, depriving the children of a meaningful relationship with their mother; that is, unless their father, Respondent, allows it.

It is an undisputed fact that, when a child's parents live together, married or unmarried, the child can spend time with each parent and also with both parents 100% of the child's time. The actual time with each parent or both parents depends, of course, on the age of the child, whether the child is of school-age and is attending school outside the home, the work schedule of one or both parents, and the use of family, friends or others for childcare.

When parents choose not to live together, divorcing, if married, or, if not married, just moving apart, this only means the parents choose to live apart from the other parent. The children have no part in the decision of their parents and the children still have the same number of parents; i.e., two, but now the children have two residences with one parent in each residence instead of only one residence with both parents. The children do not choose to slash their opportunity to share time with each parent from 100% of their time not spent asleep, in school, or in activities, to, at best, 50% due solely to the separate living arrangements of the children's parents.

Certainly, as is the case here, by the very nature of a divorce action, a legal process the state requires those married to endure, the trial court understands it has been empowered by state statutes and by the North Carolina Supreme Court to impose on the parents and on their children whatever custodial schedule the trial court deems in "the best inter-

ests of the children." Logistics alone may render a 50/50 split of parenting time unworkable for the parents and the children at issue. However, there should be, must be, compelling reasons to impose a parenting schedule that deprives one parent of her constitutional right to participate in her children's lives and that actually harms children and makes more likely poor outcomes throughout their childhood and into adulthood.

As noted above, children have poor outcomes when the parenting time of a parent is less than 25% (35% being the more commonly used benchmark). Nielsen, L. (2017), *Re-examining the research on parental conflict, coparenting, and custody arrangements,* Psychology, Public Policy, and Law, *23*(2), 211–231.https://doi.org/10.1037/law0000109; *Joint Versus Sole Physical Custody*, *id.* at 5, 11; *Shared Parenting After Parental Separation, id*. Therefore, Petitioner's zero percent (0%) parenting time cannot be considered acceptable without a finding that Petitioner is unfit or a finding that the children will be harmed or are likely to be harmed when in the care of Petitioner. Again, it is undeniable here that Petitioner is a fit parent and that the children are not at risk of harm when in her care. Otherwise, the trial court's grant of authority to Respondent-Father to allow Petitioner with as much time with the children as Respondent-Father decides would be indefensible as being in the children's "best interests." *Amicus* contends that when parenting time is negligible or non-existent, the parent-child relationship has been *de facto* terminated, without the statutory and judicial safeguards that must be followed when states seek to terminate parental rights.

Trial courts are not omniscient. Trial courts cannot be expected to make custody and parenting time allocations with the wisdom of Solomon, yet that is exactly what trial courts often appear to claim they are doing. What percentage of parenting time is in "the best interests of the children" in each case? If everyone involved in the process was honest about it, there is no means, no mechanism, by which trial courts or parents can know. Therefore, in the absence of a finding that a parent is unfit or that custodial time with a parent will or likely will cause harm to a child, trial courts should be directed to intervene as little as is necessary to provide a logistically workable parenting schedule and, thereby, to provide each parent and, therefore, the children not less than 25% to 35% of parent-child time.

The right of fit parents to meaningful time with their children, *Amicus* believes, is fully consistent with the original understanding of the Due Process Clause of the Fourteenth Amendment and wholly inconsistent with "the best interest of the child" standard. Here, in a divorce case in which legal custody, physical custody, and parenting time or visitation are to be determined by a trial court, ParentsUSA urges this Court to grant Petitioner's petition and provide the parties and *Amicus* the opportunity to brief fully the issues raised. This Court then may address the use of "the best interests of the child" standard as the mechanism by which courts across the United States infringe on the constitutional rights of parents and, in so doing, adversely impact the short and long-term outcomes of children without attempting to balance the "best interests" of the children courts may believe they are

serving with the harm the courts themselves are causing the children.

Amicus submits that the Court should now emphatically reaffirm and clarify its parental-rights precedents.

CONCLUSION

For the foregoing reasons, *Amicus* ParentsUSA respectfully requests that this Court grant Kelly Georgene Routten's Petition for Writ of Certiorari.

Respectfully submitted,

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

Counsel for Amicus Curiae

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