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No. 21-1088

In The
Supreme Court of the United States

JOSE LUIS ALVAREZ,

Petitioner,

v.

GABRIEL PINON,

Respondent.

**On Petition For Writ Of Certiorari
To Washington Court Of Appeals**

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED

Since freedom of personal choice in matters of family life is a fundamental liberty interest protected by the U.S. Constitution, did the state court err by looking to the best interest of the child as the basis for granting nonparental custody when it is insufficient to overrule a parent's constitutionally-protected fundamental liberty interest?

RELATED CASES

1. *In re Custody of SA-M, Gabriel Pinon and Jose L. Alvarez*, No. 16-3-00354-39, Superior Court of Washington for Yakima County, orders entered August 16, 2019.
2. *In the Matter of the Custody of SA-M*, No. 37108-5-III, Washington Court of Appeals, decision entered June 15, 2021.
3. *In the Matter of the Custody of SA-M*, No. 99980-5, Washington Supreme Court, order terminating review entered November 3, 2021.

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The Washington Court of Appeals opinion affirming the trial court was filed on June 15, 2021, and was published in the official reports at 17 Wn. App.2d 939, 489 P.3d 259, *review denied*, 198 Wn.2d 1021 (2021) and is reproduced at Appendix 2. The Washington Supreme Court's order denying the petition for review was filed on November 3, 2021, was not published in the official reports, and is reproduced at Appendix 1. The trial court orders were filed on August 16, 2019, and are reproduced at Appendix 22, 31, 37, and 46.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IX provides:

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 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State 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.”

◆

STATEMENT OF THE CASE

Gabriel Pinon filed a pro se nonparental custody petition on March 30, 2016. After several amendments to the petition, another amended de facto parentage petition was filed to conform to RCW 26.26A, effective January 1, 2019.

Jose Luis Alvarez and Karina Morales had a daughter, SA-M, who was born September 2, 2010. After the relationship ended with Ms. Morales in 2012, he moved away from Yakima, Washington, because of financial issues from so little work in town.

Ms. Morales and Mr. Pinon lived together for the next four years. He had a good relationship with SA-M. By 2016, Ms. Morales and Mr. Pinon were engaged, but she was murdered at her job before they got married.

Mr. Alvarez intended to move back to Yakima even before Ms. Morales died. He kept in contact with SA-M often. In the first three years, it was mostly telephone calls although he did return to Yakima and visited her

in 2014. After that, contact was through telephone calls every 3-4 months.

Mr. Alvarez sent SA-M birthday gifts and provided financial support for her by making \$200 monthly payments to Ms. Morales' bank account for their daughter. He made these payments on his own as he was never ordered to pay child support.

On Mr. Alvarez's motion to transfer custody, the court did not find the extreme circumstances needed to justify a nonparental custody order, so SA-M transitioned to custody with Mr. Alvarez, her birth parent. She lived with Mr. Alvarez since August 2017.

He had struggled some in his relationship with her as he wanted to educate himself on how to deal with her depression and the loss of her mother. The counseling was helpful and improved his relationship with her.

Mr. Alvarez said he did not mistreat SA-M. He did admit inadvertently hitting her with a belt when she was throwing a tantrum. He hit the table and the belt slid off and hit SA-M. Mr. Alvarez realized he needed help to deal with those difficult situations. He learned parenting techniques from a mental health counselor and also took parenting classes from the State. There had been allegations he had abused SA-M. CPS determined the allegations were unfounded. The counselor was aware of CPS reports against Mr. Alvarez, but they did not concern her.

SA-M described spending time with her brother, M, and cared a lot for him. She was afraid of M's being hit or hurt by Mr. Pinon, with whom SA-M described spending very little time. As counseling progressed, SA-M's behavior became more appropriate and she bonded more with Mr. Alvarez, developing a positive relationship with him. They seemed to be doing well.

SA-M also voiced concerns to the counselor about Mr. Pinon, who touched her bottom while carrying her and kissed her on the lips. The counselor did not feel someone was putting those words in SA-M's mouth and called CPS twice about Mr. Pinon's behavior. She felt SA-M's spending that much time in his home was not a safe thing. Moreover, SA-M reported being bullied by two daughters of Mr. Pinon's girlfriend, Brenda Barragan. SA-M did not like Ms. Barragan, who hit her and was mean. The counselor noted SA-M and Mr. Alvarez had a positive relationship with open communication.

The GAL did his first report in spring 2017. He met with SA-M, Mr. Alvarez, and Mr. Pinon. The GAL concluded SA-M should stay with Mr. Alvarez the majority of the time, but still have consistent visits with Mr. Pinon. There were no CPS concerns.

The GAL did another report in 2019, the weekend before trial. He again met with SA-M, Mr. Alvarez, and Mr. Pinon. He looked into the CPS allegations against Mr. Alvarez. Although having concerns about his fitness as a parent in that certain inappropriate behaviors had taken place, the GAL nonetheless concluded

that on the whole, Mr. Alvarez was not an unfit parent. The GAL was also aware of the CPS allegations against Mr. Pinon and assessed them unfounded as did CPS. SA-M consistently told the GAL she wanted to live with Mr. Alvarez and was really unconcerned about not seeing Mr. Pinon. SA-M denied Mr. Alvarez had pulled her hair or ears or hit her. She had concerns about Mr. Pinon touching her bottom and kissing her on the mouth.

The GAL recommended SA-M should live primarily with Mr. Alvarez. But he felt there was nothing he found that would justify fully restricting Mr. Pinon's visits with SA-M. The GAL testified it was in SA-M's best interests to continue her relationship with Mr. Pinon. Mr. Alvarez fulfilled all parenting functions, with SA-M feeling more comfortable in his home than Mr. Pinon's.

The court granted Mr. Pinon's de facto parentage petition and ordered he was a legal parent. The court also entered a parenting plan and a final order and findings for a parenting plan, residential schedule and/or child support. A final parentage order was entered. Mr. Alvarez appealed. The Court of Appeals affirmed in a published opinion filed June 15, 2021, and the Supreme Court denied Mr. Alvarez's petition for review on November 3, 2021.

REASONS FOR GRANTING THE PETITION

Parents have a fundamental right to autonomy in child rearing decisions. *In re Custody of Smith*, 137 Wn.2d 1, 13, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000). Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Ninth Amendment to the United States Constitution. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed.2d 551 (1972). The custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State cannot supply or hinder. *Id.*

Short of preventing harm to the child, the “best interest of the child” is insufficient to be a compelling state interest overruling a parent’s constitutionally-protected fundamental rights. *In re Custody of Smith*, 137 Wn.2d at 15-16; *Troxel*, 537 U.S. at 70. Only under “extraordinary circumstances” is there a compelling state interest justifying interference with parental rights. *In re Custody of Shields*, 157 Wn.2d 126, 145, 136 P.3d 117 (2006); *Troxel*, 537 U.S. at 70. The trial court may issue a custody order granting nonparental placement only if it finds the parent is unfit or placement with the parent would result in actual detriment to the child’s growth and development. *In re Custody of B.M.H.*, 179 Wn.2d 224, 235, 315 P.3d 470 (2013); *Parham v. J.R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed.2d 101 (1979).

Although concluding Mr. Alvarez was an unfit parent, the trial court made no findings to support that determination. Moreover, Washington law is that a parent using reasonable and moderate force to restrain or correct a child is not physical abuse. *In re Dependency of H.S.*, 188 Wn. App. 654, 664, 356 P.3d 202 (2015). The court focused on the best interest of the child. That is insufficient to be a compelling state interest overruling the natural father's rights as there was no harm to SA-M to prevent. *Troxel, supra*. This is not a case of extraordinary circumstances justifying interference with Mr. Alvarez's parental rights. *Stanley, supra*.

The Washington Court of Appeals concluded the trial court properly focused on SA-M's relationship with Mr. Pinon and the child's best interest was the primary factor in determining whether a de facto parentage exists. But it is not the primary factor. This conclusion conflicts with *Troxel*, *Stanley*, and the Ninth and Fourteenth Amendments to the United States Constitution establishing that absent a compelling state interest overruling a natural parent's rights, non-parental custody cannot be granted.

It is important for the Supreme Court to decide whether the state Court of Appeals relied on Mr. Pinon's de facto parent status to avoid this constitutional question, but his status after the fact does not determine whether the trial court should have considered *Troxel* in making its decision on de facto parentage in the first place. This question should be decided as the state court opinion adversely affects natural parents

and their fundamental constitutional liberty interests in family matters when third parties seek nonparental custody of their natural children.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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App. 1

THE SUPREME COURT OF WASHINGTON

In re the Custody of:)	No. 99980-5
S.A.-M.,)	ORDER
)	Court of Appeals
)	No. 37108-5-III
)	(Filed Nov. 3, 2021)
_____)	

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener (Justice Montoya-Lewis sat for Justice Madsen), considered at its November 2, 2021, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 3rd day of November, 2021.

For the Court
/s/ González, C.J.
CHIEF JUSTICE
