No. _____

In the Supreme Court of the United States

MICHAEL VECHERY,
Petitioner,

v.

FLORENCE COTTET-MOINE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fourteenth Amendment require, in a child custody and visitation proceeding, that a state family court may not issue an order terminating all contact between a parent and his child for an indefinite period of time absent a finding, supported by clear and convincing evidence, that the parent has engaged in child abuse or child neglect, or is otherwise an unfit parent?

2. Does the Due Process Clause of the Fourteenth Amendment require, in a child custody and visitation proceeding, more than a showing of the best interests of the child in order for a state family court to terminate all contact between a parent and his child for an indefinite period of time?

3. In issuing a protective order prohibiting a father from having any contact with his minor daughter for two years, may a state court properly determine the father, whose parental rights have not been terminated or properly suspended, "stalked" his minor daughter through innocuous and inoffensive, albeit unwanted, contacts such as attending high school sports games in which his daughter participated, attempting to talk to her at a concession stand during one such sports game, and approaching her in a school parking after another such game to speak with her, without violating the father's federal constitutional due process right to nurture and raise his daughter?

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The Loudoun County, Virginia, Circuit Court, the Honorable Jan L. Brodie presiding, issued an oral ruling and findings of fact on February 20, 2020. (SA88 - SA118.)[1] The Virginia Court of Appeals, in affirming the March 4, 2020 Final Order of the Loudoun County Circuit Court and the Circuit Court's protective order of February 20, 2020, issued a Memorandum Opinion on June 15, 2021. (2a - 29a; *Vechery v. Cottet Moine*, 2021 WL 2431901 (Va.App. June 15, 2021) (No. 0636-20-4).)

JURISDICTION

The Virginia Court of Appeals' judgment affirming the March 4, 2020 Final Order of the Loudoun County Circuit Court and that court's Protective Order of February 20, 2020, was entered on June 15, 2021. (30a) The Virginia Supreme Court dismissed Petitioner's Petition for Appeal for lack of jurisdiction on March 4, 2022. (1a.) Jurisdiction of this Court to review the Virginia Court of Appeals' judgment is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Section 1. (50a)

STATEMENT OF THE CASE

This Petition raises fundamental questions of great public importance regarding (1) whether federal due process dictates a state family court, in a child custody and visitation proceeding, cannot issue

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1 "SA" refers to the Sealed Supplemental Appendix filed in conjunction with this Petition for Certiorari.

an order terminating all contact between a parent and his child for an indefinite period of time absent a finding of parental abuse, neglect or other parental unfitness supported by clear and convincing evidence; (2) whether federal due process dictates a state family court cannot, in a child custody and visitation proceeding, terminate virtually all of a father's parental rights, including all contact with his child, based on no more than a showing of the best interests of the child; and (3) whether a state family court, in issuing a protective order against a father prohibiting him from having any contact with his minor daughter for two years, may determine the father, whose parental rights had not been terminated or properly suspended, "stalked" his minor daughter through innocuous unwanted contacts such as attending high school sports games in which his daughter was playing, approaching his daughter at a concession stand during one such game, and approaching his daughter in a school parking lot following another such game to speak to her, without violating the father's federal due process right to nurture and raise his daughter?

Summary of Proceedings Below

In this child custody and visitation proceeding, on June 9, 2016, the Loudoun County Circuit Court entered a Custody and Visitation Order, awarding sole legal and primary physical custody of the unmarried parties' minor child, LCM,[2] to Mother, and awarding Father[3] visitation of four overnights every two weeks and two weeks vacation (SA18 -

2 LCM is currently 16 years old.

3 "Mother" refers to Respondent Florence Cottet-Moine. "Father" refers to Petitioner Michael Vechery.

SA24). On October 2, 2017, Father moved before the Loudoun County Juvenile and Domestic Relations Court ("J&DR Court") to have full custody of LCM granted to him.

Following a trial, the J&DR Court entered a final order on February 1, 2019, denying Father's motion to amend custody and amending visitation with Father as follows: (a) prohibiting visitation and access for one month; (b) thereafter allowing only supervised visitation at "Father's expense," for no more than 4 to 8 hours on Saturday and Sunday, every other weekend, and (c) allowing telephone visitation no more than twice a week for no more than twenty minutes per call (SA12 - SA17).

On February 8, 2019, Father appealed the JD&R Court's February 1, 2019 order to the Loudoun County Circuit Court.

On August 30, 2019, the Loudoun County Circuit Court entered an Order finding Father in contempt of certain of its prior orders, because Father "posted to social media, which postings are replete with references to these proceedings, and has been in contact with the child outside the court order" (SA9). The court directed

> [t]here shall be no visitation or contact for the next 45 days. During this time, the child, the guardian ad litem, the child's therapist, Dr. Stac[e]y Hoffmann, and [Mother] shall meet to help LCM with the psychological harm caused by [Father]. Until Dr. Braxton and Dr. Hoffman agree that LCM is emotionally stable enough for visitation or contact with plaintiff, there shall be none. No contact or visitation shall occur if it could psychologically harm the

child in any way or visitation will be suspended (SA10).

On February 20, 2020, the Loudoun County Circuit Court entered a Protective Order that Father shall have no contact with Mother or LCM, except as ordered by the Circuit Court or a court of competent jurisdiction, until February 22, 2022. (31a - 38a).

On March 4, 2020, the Circuit Court, the Honorable Jan. L. Brodie presiding, entered a Final Order, providing Mother shall have "full sole legal and physical custody" of LCM (SA2 - SA3). The order further provided Father shall have "no contact" with LCM, "including through third parties, whether in person or through any other means, including but not limited to telephone, electronic contact, media or social media"; Father "is not allowed to attend any activities or events in which [LCM] is participating or to appear in any place where she is known to be present"; Father "shall not post any material related to [LCM], nor any assessment, reports, investigations online or in other public places, and shall not distribute any such material"; Father, "for good cause shown, shall not have any access to [LCM's] health records but the mother shall present him with invoices for services"; Father "shall have access to Child's academic records, namely her quarterly and annual progress reports only" but shall not be "permitted to communicate with any school administrator, teacher, staff, coach, or other personnel about [LCM]" (SA3 - SA4).

Father also "is enjoined from filing any pleadings related in any way to custody or visitation without

leave of court"; and Father cannot obtain a restoration of his rights to either contact or visit LCM without satisfying a long list of onerous conditions, whose satisfaction "shall be used as a threshold to determine whether a material change of circumstances has occurred such that it would be appropriate for this Court to consider any reunification of Father and [LCM]." (SA4 - SA5). The conditions require Father "complete a new anger management course with a certified therapist"; Father "commence individual therapy" with a therapist who is a member of the Association of Family and Conciliation Courts (AFCC); Father's therapist determine "he has shown significant progress" so he "may . . . proceed with reunification efforts"; and Father sign a release "for his individual therapist to speak with the child's therapist, [Stacey Hoffmann], and Mother" (SA4 - SA5). After finding "significant progress," Father's therapist may contact a reunification therapist who is a member of the AFCC "to commence discussions about reunification therapy with Father." (SA5). The reunification therapist must then engage the child's therapist "to assess the risk to the child and the child's wishes as part of any reunification process" (*Id.*). Finally, Father's therapist and the reunification therapist "must" jointly agree in writing "Father is ready to appropriately engage with Child in a manner that will not have a negative impact on her mental health" (*Id.*).

Nowhere in either the March 4, 2020 Final Order, or in the Circuit Court's oral ruling and findings of fact handed down on February 20, 2020 (SA88 - SA118), did Judge Brodie make any finding of fact Father physically, sexually or psychologically abused

LCM, or neglected LCM, or was otherwise an unfit parent.

The March 4, 2020 Final Order further provided, "Father shall provide thirty days' advance notice to the court and to the other party of any intention to relocate and of any intended change of address. For good cause shown, namely issuance of the [February 20, 2020] Protective Order against Father, Mother is not required to comply with [the notice-of-relocation statute, Va.Code § 20-124.5]" (SA4).

On June 15, 2021, the Virginia Court of Appeals affirmed both the March 4, 2020 Final Order and the February 20, 2020 Protective Order. (30a). On March 4, 2022, the Virginia Supreme Court dismissed Father's petition for appeal for lack of jurisdiction. (1a).

Statement of Facts

A. Testimony of Dr. Stacey Hoffmann

Dr. Stacey Hoffmann, Mother's expert in clinical and forensic psychology with an emphasis in reunification therapy, testified below LCM was embarrassed by Father's posting things online that LCM's friends could see publicly (SA51) and very embarrassed about Father reportedly getting into conflict with the parents of one of LCM's friends (SA52). Dr. Hoffmann further testified LCM is "very anxious" about "potentially having to have contact with her father, which she says is not going to have . . . at this point" (SA53).

Dr. Hoffmann then recommended Father have no contact with his daughter until after a "reunification process" has been completed. (SA54). For reunification to happen, Father would have to make

"significant progress" and be "ready to move forward in a very different manner than what has occurred, if that were to happen" (SA58). She testified "[i]t is inappropriate and unethical for us to put an adolescent in a room with a parent if we have data to believe that the parent is going to behave in a way that is not in that child or adolescent's best interests." (*Id.*)

She further testified she had seen multiple instances "where [Father's] conduct has had a profound negative impact upon LCM and her mental health" (SA55). The two specific instances she pointed to were (a) in November 2019 when Father went to a school event, followed LCM to a concession stand and attempted to converse with her, which was "very distressing to LCM" and (b) the December 13, 2019 incident where Father "engaged in an altercation with [Raynelle Araque] who[m] [Dr. Hoffmann described as being] a very trusted family friend." (SA56 - SA57).

On cross-examination, Dr. Hoffmann admitted she had no meetings with Father (SA59 - SA60) and had not talked to LCM's mentor, friend, and professional golfer Kris Tschetter because "I don't have a release of information from [Mother], who has legal custody, to discuss LCM with Ms. Tschetter" (SA62). She further admitted she did not know Father tutored LCM every day for more than an hour, and stated LCM "never described you as her teacher" (SA63). Dr. Hoffmann also conceded LCM told her she wanted to live with Father (SA61).

B. Testimony of Dr. William Ling

Dr. William Ling, an expert in custody evaluations and child psychology, who actually met with Father, Mother, and LCM, testified, in his opinion, Father has the capacity to change his behavior and operate in LCM's best interests "to limited degrees" (SA74). He further opined Father "is able to respond positively, appropriately, flexibly" (SA75).

Dr. Ling also testified he believed Father and LCM "have [a] relationship and . . . that she has an attachment to you [Father] and you to her" (SA76 - SA77), and conceded Father "is a fine coach" (SA77). Despite intervening events, Dr. Ling further confirmed his original recommendation that Father see LCM every other Sunday, for four to eight hours, without supervision, and that regular visitation could resume within six months depending on Father's behavior during that time period (SA79, SA121 - SA122). Dr. Ling also confirmed he continued to recommend LCM practice weekly golf with Father, including giving Father access during golf tournaments to coach LCM during play and for an hour before and after each tournament (SA80, SA122).

While Dr. Ling believed Father's behavior was damaging to his relationship with LCM and her individual development, he further opined "a relationship [exists] between the two of them, and . . . it was important to try to balance those two ends." (SA81).

Dr. Ling, in his custody evaluation, reported LCM told Ling she "expressed to Dr. Hoffmann that she wants to live with" Father (SA120). Ling

admitted on cross-examination LCM, during her interview with him, wished to live with her father (SA78).

C. December 13, 2019 Incident

On December 13, 2019, after a high school basketball game, Father, after waiting in the school parking lot for several minutes, approached in his car once LCM and Mother had got into their car, pulled his car up closely and parallel to their car on the passenger side, rolled down his window, and tried to talk to LCM, who moved to the other side of the car while Mother locked the doors. (SA34, SA35 - SA37, SA38 - SA39, SA108). Father did not assault either LCM or Mother, or attempt to open any of the doors to their car (SA29, SA43, SA44).[4] He remained in the driver's seat of his own car while opening the driver's side window to speak to LCM, who was seated in the back seat of Mother's car with her window down (SA36, SA38). Father never yelled at LCM (SA39). He merely attempted to talk to her, to say "Good game" or "LCM, I love you, I miss you. Merry Christmas. Is there anything I can do related to your school or your grades." (SA34, SA37, SA41).

At that point, Mother's friend, Raynelle Araque, while standing in front of Mother's car, whipped out her phone, Mother turned on her headlights, and Araque began using the phone to videotape the incident (SA38, SA39). Father told Araque to put her phone away because he though she was filming at the direction of Mother in violation of a court order prohibiting the parties from filming each other

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4 Mother admitted she did not see Father try to open the door to Mother's car (SA29).

(SA38, SA39). When Araque continued videotaping, Father got out of his car, approached Araque and told her to stop videotaping (SA39, SA40).

Araque then turned around and walked away from Father, saying she was going to call the police (SA40). Father then turned around to face Mother's car, and Mother pulled her car back about five (5) feet (SA41). When Father attempted to go around the car to talk to LCM, he had only walked a few feet without reaching the side of Mother's car, before Mother pulled the car back even further, by another eight (8) feet. (SA41 - SA42).

Father then turned around to discover Araque only 8 to 10 feet away videotaping Father again (SA42). After Father again warned Araque not to videotape, he tried to reach for Araque's phone (*Id.*). Araque turned around, pulling the phone away from Father's grasp, then walked about 30 feet away from Father, who then drove away. (SA42 - SA43). Father does not recall touching Araque, but she pressed charges against Father for assault and battery (SA43, SA65, SA108 - SA109).

The charge of assault and battery on Araque was nol prossed on April 5, 2021 when Araque failed to appear at the trial of the charges against Father (39a - 42a). Under Virginia law, "[a]fter a nolle prosequi of an indictment, the slate is wiped clean, and the situation is the same as if 'the Commonwealth [had] chosen to make no charge.'" *Burfoot v. Commonwealth*, 23 Va.App. 38, 44, 473 S.E.2d 724 (1996) (quoting *Arnold v. Commonwealth*, 18 Va.App. 218, 222, 443 S.E.2d 183, *aff'd en banc*, 19 Va.App. 143, 450 S.E.2d 161 (1994)). Furthermore, on July 19, 2021, the protective order

Raynelle Araque had originally obtained against Father on December 30, 2019 due to the December 13, 2019 incident was dissolved after an evidentiary hearing held before Judge Douglas L. Fleming, Jr. of the Loudoun County Circuit Court, wherein Judge Fleming determined Araque failed to prove the elements required for the protective order's issuance (43a-44a).

Further regarding the December 13, 2019 incident, Father was originally charged with assault on Mother, but those charges were later dropped (SA28).

On February 20, 2020, however, Judge Brodie, in the custody and visitation proceeding, found Father had engaged in "stalking" of both Mother and LCM in violation of Va.Code § 18.2-60.3, reasoning, "[i]n this case the Court has directly ordered [Father] to have no contact with [Mother] and minor child, and [Mother] has also indicated that she wished to have no contact with him. [Father] repeatedly violated this by following them or attempting to contact them, which has increased their fear of him to the extent of LCM being afraid of him at the games at school and precautions being taken before leaving school" (SA109 - SA110). Judge Brodie then determined: "[i]n light of the custody and visitation decision of this Court and these past actions, the Court finds that the protective order is appropriate and grants the mother's request for a two-year protective order that prohibits contact with the mother and daughter" (SA110).

D. Father's Current Lack of Contact With LCM

Father has had no visitation with LCM for three years and four months (40 months) (*see* SA33) and has had no contact whatsoever with LCM since December 13, 2019, a period of over two years and six months. Since Father has been unable to visit or contact his daughter, Father and daughter have become estranged.

The Virginia courts, moreover, are unlikely to allow Father to visit with or contact his daughter anytime before she reaches the age of majority in November 2023. On May 6, 2022, the Loudoun County JD&R Court, per the Honorable Pamela Brooks, denied Father's motion for leave to file a motion to modify the Court's March 4, 2020 Custody Order due to changed circumstances "because of his failure to demonstrate full and complete compliance with the requirements of the Circuit Court entered March 4, 2020" (SA1).

E. Treatment of Federal Constitutional Issues by the Virginia Courts.

On March 13, 2020, Father filed written objections to the Loudoun County Circuit Court's March 4, 2020 Final Order, including: "[t]he trial court's termination of most of Father's residual parental rights in paragraphs 2, 3, 5, 6, 7, and 11 of the lower court's final order, upon proof of less than clear and convincing evidence, violates Father's fundamental, Fourteenth Amendment due process right to raise his child"; "the trial court's denial of all visitation and all other contact by Father with his child for two years and, thereafter prohibiting any contact or visitation by Father with his child except

upon compliance with the draconian and unduly burdensome conditions set forth in paragraph 11 of the lower court's final order . . . violates Father's fundamental Fourteenth Amendment due process right to raise his child"; and "[t]he *two-year* Protective Order entered by the trial judge, which prohibits any contact by Father with his child *until at least February 20, 2022*, was not only unjustified by the evidence of record but . . . constitutes a violation of Father's fundamental due process right to raise his child." (SA124-SA125 (emphasis in original).) Father reiterated these three objections in his Assignments of Error filed as part of his Opening Brief of Appellant with the Virginia Court of Appeals. (45a-46a.)

The Virginia Court of Appeals addressed Father's argument "the circuit court's denial of all *visitation* except upon compliance with the conditions set forth in the final order violated his fundamental Fourteenth Amendment due process right to raise his child (9a; *Vechery*, 2021 WL 2431901, at *4 (emphasis added)), without acknowledging Father had also been denied *all contact* with his daughter by the trial court's order. While acknowledging "'the relationship between a parent and child is constitutionally protected by the Due Process Clause of the Fourteenth Amendment'" (*id.*, quoting *Copeland v. Todd*, 282 Va. 183, 198, 715 S.E.2d 11 (2011), *cert. denied*, 566 U.S. 938 (2012)), the Virginia appellate court reasoned "[e]ven in cases involving a dispute between two fit parents, when fit parents assert their constitutional rights against each other, neither parent is entitled to primacy over the other," and the circuit court thus did "not err by by deciding the case based solely on the best-interest

standard," and "in doing so did not violate father's constitutional rights." (10a; *Vechery*, 2021 WL 2431901, at *4.)

The Virginia Court of Appeals also upheld the two-year protective order on the grounds Father "stalked" both his minor daughter and his wife in violation of Va. Code § 18.2-60.3(A). (16a - 25a; *Vechery*, 2021 WL 2431901, at *6-10.) With respect to the daughter, the court pointed to evidence "Father went to more than one of L.C.M.'s [, i.e., LCM's] sports games in the fall of 2019 and waited for her in the hallways and parking lots," "[h]e approached L.C.M at the concession stand at one game, [and] then approached here while she was in mother's car in the high school parking lot on December 13, 2019." (20a; *Vechery*, 2021 WL 2431901, at *8.)

The Virginia Court of Appeals further noted, to the extent Father argued "the two-year protective order issued against him for L.C.M. violates his Fourteenth Amendment due process right to parent his daughter, the order specifically disallows contact with L.C.M. 'except as ordered by the circuit court or court of competent jurisdiction,'" and "[t]herefore, father would be able to resume a relationship with L.C.M. once he met the conditions of the circuit court's order, notwithstanding the existence of the protective order." (25a; *Vechery*, 2021 WL 2431901, at *10 n. 11.)

In his Petition for Appeal to the Virginia Supreme Court that was dismissed for lack of jurisdiction (1a), Father raised the following pertinent Assignments of Error: "The Court of Appeals erred in failing to hold . . . federal

procedural due process requires termination of all child-parent contact in a custody and visitation proceeding be based on proof of abuse/neglect by clear and convincing evidence"; "The Court of Appeals erred in failing to hold . . . federal due process requires termination of parental rights, or of all child-parent contact, be based on more than a showing of the child's best interests"; and "The Court of Appeals erred in holding a father of a minor daughter, whose parental rights had not been terminated nor properly suspended, may be found to have 'stalked' his daughter through unwanted contacts in violation of Va.Code §18.2-60.3(A), without violating father's constitutional substantive due process right to raise his daughter" (48a).

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Petition Presents A Novel And Fundamental Question of Constitutional Law Whether, In A State Child Custody and Visitation Proceeding, Due Process Requires A Family Court's Termination Of All Child-Parent Contact Between Father And His Daughter Must Be Based On A Finding Of Child Abuse, Child Neglect, Or Other Parental Unfitness, By Clear And Convincing Evidence.

This Court has long recognized "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), citing *Quilloin v. Walcott*, 434 U.S. 246, 434 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842 (1977); *Moore v. East*

Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Indeed, the Court has recognized "a natural parent's 'desire for, and *right to,"the companionship, care, custody, and management of his or her children"' is an interest far more precious than any property right.*" *Santosky*, 455 U.S. at 758-59 (citations omitted; emphasis added).

Furthermore, "[t]he fundamental liberty interest of [a] natural parent[] in the care, custody, and management of [his or her] child does not evaporate simply because [he or she] ha[s] not been [a] model parent[] or ha[s] lost temporary custody of [his or her] child [either] to the State [or to the child's other natural parent]." *Santosky*, 455 U.S. at 753. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.*

Thus, "persons faced with forced dissolution of their parental rights have a . . . critical need for procedural protections . . .." *Santosky*, 455 U.S. at 753. Consequently, it is undisputed "'state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.'" *Id.* (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 37 (1981)). In other words, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54.

This Court has long held due process "mandate[s] an intermediate standard of proof -- 'clear and convincing evidence' -- when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky*, 455 U.S. at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). Thus, in *Santosky*, the Court held, "[i]n parental rights termination proceedings, [1] the private interest affected is commanding; [2] the risk of error from using a preponderance standard is substantial; and [3] the countervailing governmental interest favoring that standard is comparatively slight." *Id.* at 758. Evaluation of these three factors -- the *Mathews v. Eldridge*, 424 U.S. 319 (1976) factors, "compel[led] the [*Santosky* court to reach the] conclusion [New York state's] use of a 'fair preponderance of the evidence' standard in such [parental rights termination] proceedings is inconsistent with due process." *Id.* The *Santosky* court further held the "'clear and convincing evidence' standard of proof [adopted by a majority of states] strikes a fair balance between the rights of the natural parents and the State's legitimate concerns" and "such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.* at 769.

While this Court has yet to address the issue, the Vermont Supreme Court has held, in view of federal, as well as state, due process principles, "*in divorce or custody proceedings the family court may not terminate child-parent contact of either parent absent clear and convincing evidence* that the best interests of the child require such action." *Mullin v. Phelps*,

162 Vt. 250, 267, 647 A.2d 714, 724 (1994) (emphasis added), reversing the trial court's termination of all child-parent contact based on a finding, supported by a mere preponderance of the evidence, father engaged in sexual abuse of the child.

Applying the *Mathews v. Eldridge* factors, the Vermont Supreme Court in *Mullin* reasoned "[h]ere, the father's interest in not having parent-child contact terminated is similar to the parents' interest in a termination proceeding." 162 Vt. at 265, 647 A.2d at 723. The *Mullin* court further determined "the mother's countervailing interest in protecting her children" is analogous to the state interest in a termination proceeding under the third *Mathews* criterion: "[w]hile a parent's interest in protecting his or her children is arguably more compelling than the similar state interest in a termination proceeding, it can be satisfied without completely terminating contact between the children and the parent accused of abusing them," such as by supervised visitation. 162 Vt. at 265-66, 647 A.2d at 723.

As for the second *Mathews* criterion, the risk of erroneous deprivation, the Vermont Supreme Court in *Mullin* initially pointed out "[t]he accused parent . . . may face a former spouse who will do or say anything to obtain custody or to prevent the other spouse from obtaining custody, sometimes even to the extent that it devastates the children's lives," and the fact "custody proceedings involving private litigants often pit decidedly interested and sometimes belligerent parties against each other militates against terminating parent-child contact based on less than clear and compelling evidence." 162 Vt. at 266, 647 A.2d at 723. The *Mullin* court

further pointed out "the trial court in a divorce or custody proceeding 'possesses unusual discretion to underweigh probative facts' that might favor one of the parents." *Id.* (quoting *Santosky*, 455 U.S. at 762). Finally, "custody proceedings do not provide parents with procedural protections available in termination proceedings[.]" 162 Vt. at 266-67, 647 A.2d at 724.

Based on this evaluation of the *Mathews v. Eldridge* factors, the *Mullin* court concluded "due process required the court either to find the evidence of sexual abuse by clear and convincing evidence or to permit, at minimum, continued contact between the father and the boys consistent with their safety."[5] *Id. Cf. Mallory v. Mallory*, 207 Conn. 48, 53, 539 A.2d 995, 998 (1988), wherein the

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5 The Vermont Supreme Court in *Mullin* declined to follow *Stewart v. Stewart*, 521 N.E.2d 956, 962-63 (Ind.Ct.App. 1988), wherein the Indiana Court of Appeals refused to apply a clear-and-convincing standard in a modification-of-custody proceeding in which the visitation rights of a father with AIDS had been terminated. The *Stewart* court distinguished *Santosky* because the state was not a party to the proceeding, and because the no-visitation order could be revoked in a future modification proceeding. *Id.* Importantly, unlike the "no contact" orders in *Mullin* and the instant case, the order in *Stewart* only suspended visitation, not all contact:

> [A] termination of visitation is not permanent *nor does it necessarily prohibit the parent from maintaining contact with the child through correspondence, telephone calls or other methods. We are aware that physical visitation is more satisfying and more meaningful but it must be acknowledged that contact with the child is not completely and irrevocably terminated when visitation is denied.*

Id. at 963 (footnote omitted; emphasis added).

Connecticut Supreme Court held the preponderance of the evidence "is applicable in child custody hearings in which there are allegations that a parent has sexually abused his child, *at least where that parent retains some visitation rights*, which may be reasonably restricted to protect 'the best interests of the child.'" (Emphasis added.)

Similar to the Vermont high court's holding in *Mullin*, the Louisiana Supreme Court, in *State in interest of A.C.*, 643 So.2d 743 (La. 1994), *cert. denied sub nom. A.St.P.C. v. B.C.*, 515 U.S. 1128 (1995), held the Louisiana Post-Separation Family Violence Relief Act, La.Rev.Stat. 9:364 D, violated federal due process "because it prohibits all visitation and contact between a parent and child, after a court has found by a mere preponderance of the evidence that the parent sexually abused the child, until such time as the court determines that the parent has successfully completed a 'treatment program designed for such sexual abusers' and that supervised visitation is in the child's best interest." 643 So.2d at 744. The court determined an evaluation of the *Mathews v. Eldridge* factors requires "application of a standard of proof by clear and convincing evidence at the factfinding hearing in order to satisfy procedural due process." *Id.* at 747.

After pointing out "[a] parent's interest in a relationship with his or her child is a basic human right," *id.*, citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), the Louisiana high court in *A.C.* reasoned "[t]he nature of the private interest threatened by a proceeding under La.Rev.Stat. 9:364 D is the allegedly abusive parent's total loss not only of all visitation rights, but also of all contact of any kind with his or her child,"

and, thus, "there is a great deal of similarity between the private interest in this case and the one in the *Santosky* case." *A.C.*, 643 So.2d at 747-48. Indeed, "[t]he primary private interest involved—the parent's right to a family relationship with his or her child—is an interest that far surpasses any property rights." *Id.* at 748.

The *A.C.* court further recognized "the loss of any chance for supervised visitation *is of an uncertain duration which may be beyond the control of the parent,*" since "[t]he parent, in addition to proving that supervised visitation is in the child's best interest, must also prove successful completion of a 'treatment program' to the judge." *Id.* at 748 (emphasis added). Furthermore, "many treatment programs refuse to accept persons who do not first admit guilt, a fact this father continues to deny." *Id.* Consequently, the court determined, "[u]nder these circumstances, an accurate determination of guilt in the factfinding phase is critically important." *Id.* The court therefore concluded "the factors relating to the private interest affected by the proceeding weigh heavily in favor of a heightened standard of proof." *Id.*

Turning to the second *Eldridge* factor regarding the risk of an erroneous deprivation, the Louisiana Supreme Court in *A.C.* determined the consequence of a factfinding error resulting in deprivation of the parent's visitation and contact rights with his or her child "*is the destruction of all or almost all of the existing family relationship that may be worth preserving.*" *Id.* at 749 (emphasis added). This consideration "strongly tips the balance in favor of a standard of proof that allocates a higher burden to the state and correspondingly increases the degree of

confidence in the correctness of the factfinding process." *Id.*

As for the third *Eldridge* factor, the *A.C.* court concluded "[t]he state has almost as great an interest in preserving worthwhile family relationships as it has in terminating family relationships when the parent cannot or will not behave appropriately in the relationship," and "[t]he government's *parens patriae* interest therefore is served by protecting against erroneous factual determinations of guilt." *Id.* at 749. The Louisiana high court therefore concluded "La.Rev.Stat. 9:364 D's failure to require proof of sexual abuse of the child by the parent in a factfinding hearing by clear and convincing evidence renders the statute unconstitutional as violative of the parent's procedural due process rights." *Id.* at 750.

In this case, the Virginia trial court's order prohibited *any and all human or virtual contact by Father with his daughter*: "There shall be *no contact* between [Father] and Child, *including through third parties*, whether in person or through any other means, including *but not limited to* telephone, electronic contact, media or social media" (SA3 (emphasis added)). The "no contact" order not only precludes visitation of any kind, including supervised visitation, but essentially cuts Father off from any relationship with his daughter whatsoever. Father is also prohibited from attending "any activities or events in which Child is participating or to appear in any place where she is known to be present," such as sporting events, weddings, or graduation ceremonies; from "posting any material related to Child, nor any assessment, reports, investigations online or in any public places, and

shall not distribute such materials"; from having "any access to Child's health records"; and from communicating "with any school administrator, teacher, staff, coach or or other personnel about Child" (SA3 - SA4). The order has no expiration or termination date, and remains in effect until LCM reaches the age of majority (18) in November 2023.

Thus, the Virginia trial court terminated all child-parent contact between Father and his daughter in a custody and visitation proceeding wherein the burden of proof on Mother was only to demonstrate the best interests of the child by a preponderance of the evidence. No evidence in the record of this case, let alone clear and convincing evidence, supports a finding Father either sexually, physically, or psychologically abused, or that he neglected, his daughter, or was otherwise unfit to be a parent. No such finding was made by any Virginia court.

Addressing the *Mathews v. Eldridge* factors, the father's interest in not having all parent-child contact terminated is similar to the parents' "commanding" interest in the termination proceeding at issue in *Santosky*. Thus, the primary private interest involved—the father's right to a family relationship with his daughter—is an interest far surpassing any property rights, or any right to recover money in a civil action.

Furthermore, as in *A.C.*, "the [father's] loss of any chance for [any kind of visitation, even] supervised visitation *is of an uncertain duration which may be beyond the control of the parent*," *A.C.*, 643 So.2d at 748 (emphasis added). Contrary to the Virginia Court of Appeals' statement, Father cannot achieve

"reunification" with his daughter simply by "attend[ing] therapy and hav[ing] the therapist determine" he "made 'significant progress' which would be considered a material change in circumstance by the court" (9a; *Vechery*, 2021 WL 2431901, at *3). In addition, the trial court's order requires Father's therapist *and* a designated "reunification therapist" *jointly* "agree in writing that Father is ready to appropriately engage with Child in a manner that will not have negative impact on her mental health" (SA5). Furthermore, the requisite reunification therapy also requires the cooperation and participation of Mother, who to date has indicated she has no desire or intent to participate in reunification therapy sessions with Father (51a, 52a). Finally, compliance with all of the specified conditions in the custody order is only to be "used *as a threshold*[6] to determine whether a material change in circumstances has occurred such that it would be appropriate for the Court *to consider* any reunification of the Father and Child" (SA4 (emphasis added)). Given that any "path for reunification" (9a; *Vechery*, 2021 WL 2431901, at *3) under the trial court's custody order is at best extremely problematic, "an accurate determination of guilt in the factfinding phase is critically important." *A.C.*, 643 So.2d at 748.

In sum, the factors relating to the private interest affected by the custody and visitation proceeding in question here weigh heavily in favor of a heightened standard of proof.

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6 "Threshold" means "the place or point of entering or beginning." *Webster's Third New International Dictionary* 2383 (1976).

As for the second *Mathews* criterion, the risk of erroneous deprivation, this case well illustrates the Vermont Supreme Court's observation "custody proceedings involving private litigants often pit decidedly interested and sometimes belligerent parties against each other [, thus] militat[ing] against terminating parent-child contact based on less than clear and compelling evidence." *Mullin*, 162 Vt. at 266, 647 A.2d at 723. Furthermore, the Virginia trial court, like other state family law courts, "possesses unusual discretion to underweigh probative facts" favoring one of the parents. *See Santosky*, 455 U.S. at 762. Finally, and most importantly, a factfinding error resulting in the deprivation of the parent's visitation and contact rights with his or her child will lead to *"the destruction of all or almost all of the existing family relationship that may be worth preserving."* *A.C.*, 643 So.2d at 749 (emphasis added). Dr. Ling testified a relationship existed between Father and LCM that was worth preserving (SA76-77, SA81: the actions of the Virginia courts below have caused Father to become estranged from his daughter and destroyed that relationship. In short, the *Eldridge* factor concerning the risk of erroneous deprivation weighs very heavily in favor of requiring a higher standard of proof.

Turning to the third *Mathews* criterion, the mother's countervailing interest in protecting her child is analogous to the state's interest in a termination proceeding under the third *Mathews* criterion. Even assuming the mother's interest in protecting her child is arguably more compelling than the similar state interest in a termination proceeding, the mother's interest can be satisfied

without completely terminating contact between the child and the non-custodial father, such as by supervised visitation. *Mullin*, 162 Vt. at 265-66, 647 A.2d at 723. In any case, the mother's interest cannot be allowed to undermine the state's interest in preserving worthwhile family relationships, which interest is best served by protecting against erroneous factual determinations of guilt through the use of an enhanced burden of proof.

Careful weighing of the *Mathews v. Eldridge* factors therefore compels the conclusion, in view the federal due process principles as expressed in *Santosky* and other decisions of this Court, that in divorce or custody and visitation proceedings a state family court may not terminate all child-parent contact of either parent absent at least clear and convincing evidence of child abuse, child neglect, or other parental unfitness.

In the United States, a man need not show he is a saint without flaw or a "model parent" to maintain contact and visitation with his child. *See Santosky*, 455 U.S. at 753. Nor should visitation and contact with the child be conditioned upon him undergoing some sort of ill-defined transformation through psychological treatment or "reunification therapy" simply because he has hurt his daughter's feelings or caused her embarrassment. Rather, before terminating all contact and visitation by a parent with his child, a state court should be required to find, by clear and convincing evidence, the parent has abused or neglected the child, or is otherwise an unfit parent.

The Petition for Certiorari should therefore be granted to address the novel and fundamental

constitutional issue whether the Virginia family court's termination of all contact between parent and child in a custody and visitation proceeding for an indefinite period, on less than clear and convincing evidence of child abuse, neglect, and/or parental unfitness, violated Father's federal due process right to raise and nurture his child.

B. The Petition Presents A Novel And Fundamental Question of Constitutional Law Whether, In A State Child Custody and Visitation Proceeding, Due Process Requires More Than A Showing Of The Best Interests Of The Child To Terminate Parental Rights.

This Court has recognized on numerous occasions "the relationship between parent and child is constitutionally protected." *Quilloin*, 434 U.S. at 255 (citations omitted). "It is cardinal . . . the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, 321 U.S. at 166. "[I]t is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Quilloin*, 434 U.S. at 255 (quoting *LaFleur*, 414 U.S. at 639-40).

This Court has opined, albeit in dicta, "the Due Process Clause would be offended '[i]f 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.'" *Quilloin*, 434 U.S. at 255

(quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment). "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).

Here, the trial court did not find LCM was an "abused child,"[7] or Father engaged in any sexual, physical, or psychological abuse of LCM, or that any alleged abuse suffered by LCM presented a serious and substantial threat to her life, health, or development.[8] Va.Code § 16.1-283(B)(1).

As the Constitution requires more than a mere showing of the child's best interests to terminate parental rights, *see Quilloin*, 434 U.S. at 862-63, the Virginia Court of Appeals erred in holding the trial court could deny Father his due process rights by terminating virtually all of his parental rights in a custody and visitation proceeding simply upon finding such action was in the child's best interests. The Petition for Certiorari should therefore be granted to address the novel and fundamental question whether, in a custody and visitation proceeding, federal due process requires a state family court not terminate a father's (or mother's) parental rights based on a mere showing of the

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7 *See, e.g.*, Va.Code § 16.1-228 (definition of "abused or neglected child").

8 Nor was there any finding of neglect: "[B]oth parents care about their daughter and want to be involved in her life." (SA99.)

child's best interests without also making a finding of parental unfitness.

C. The Crime of Stalking Cannot Constitutionally Be Applied To Prohibit Inoffensive And Innocuous, Albeit Unwanted, Contacts Between A Father Whose Parental Rights Have Not Been Terminated And His Minor Daughter Without Infringing On Father's Federal Due Process Right To Nurture And Raise His Daughter.

It is well established a father has a federal due process right to participate in the custody, care and nurture of his child. *See Prince*, 321 U.S. at 166. The Virginia Court of Appeals held Mother "proved by a preponderance of the evidence that father stalked her and [his daughter]," in violation of Va.Code § 18.2-60.3(A) and "the circuit court did not err in issuing the [two-year] protective order." (20a; *Vechery*, 2021 WL 2431901, at *8). This represented the first time a Virginia court held a father, whose parental rights had not been terminated or properly suspended, could be held to have stalked his minor daughter through inoffensive and innocuous, albeit unwanted, contacts. This holding infringed on Father's federal constitutional right to raise his daughter.

The proof showed Father allegedly violated a "no contact" order by attending athletic games in which his daughter was playing, by approaching his daughter at a concession stand during one of the games, and by approaching and attempting to talk to her in the school parking lot following a game on the night of December 13, 2019. (SA83 - SA84, SA85 -

SA86, SA108.) At the time of these alleged violations, Father's parental rights had not been terminated, and the 45-day "no contact" order of August 30, 2019 had been imposed without a finding Father abused his daughter in any way, let alone a finding based on clear and convincing evidence. In any case, the order's 45-day time period had expired by mid-October 2019. The evidence is also uncontradicted Father's sole intent or purpose in making these contacts was to see and talk to his minor daughter, with whom he had had no visitation since February 1, 2019, a period of nearly 10- and-half months. (SA37.)

Finding Father guilty of "stalking" under these circumstances deprived Father of his Fourteenth Amendment substantive due process right to raise his daughter. Prosecutions for "stalking" involve legal strangers to the alleged victim, e.g., former boyfriends, ex-husbands, or crazed fans of celebrities. Fathers whose parental rights have neither been terminated nor suspended upon proper proof of clear and convincing evidence of abuse or neglect cannot logically or constitutionally be found guilty of "stalking" their minor children through such inoffensive and innocuous contacts.

The Petition for Certiorari should therefore be granted in order to address the novel and fundamental question whether a father can constitutionally be found to have stalked his minor daughter through innocuous, albeit unwanted, contacts, where the father's parental rights have neither been terminated nor properly suspended.

Father's challenge to the two-year protective order is not moot because (1) it forms the basis for

the Virginia trial court's separate order relieving Mother of her statutory obligation under Va.Code § 20-124.5 to give notice of an intent to relocate with LCM out-of-state (or out-of-the country to France, Mother's native land) (SA4); and (2) the protective order should in any case be expunged from Father's record so it cannot form the justification, in whole or in part, for any future protective order or denial of visitation with his daughter. Moreover, review of the two-year protective order can be had under the "capable of repetition, yet evading review" exception to the mootness doctrine. *See Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911), wherein the Court held it may review the validity of "short-term orders" that have already expired, since such orders are "capable of repetition, yet evading review." *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976), wherein the trial court's order imposing a prior restraint on pretrial publicity in a criminal case was held not moot even though the restrictive order had expired, since the controversy between the parties was "capable of repetition, yet evading review."

D. The Court Should Grant Certiorari To Ensure Non-Custodial Parents Are Not Unjustifiably Denied Their Due Process Rights To See, Hug, And Interact With Their Children.

In laymen's terms, this case is about having Father's minor child LCM – the most important person in his life – ripped away from him. His only permitted contact is to receive an e-mail every three months with LCM's academic grades. The Virginia courts have essentially told Father to pound sand, that he has no rights as a non-custodial dad to raise

and nurture his daughter. This despite Father never having been found to have committed any abuse or neglect of his daughter by any of the Virginia judges he has appeared before, and against whom no evidence of abuse, neglect, or parental unfitness of any kind has ever been adduced. In the years since Father has been forbidden to have contact with LCM, her grades have slipped, her skills as a golfer and basketball player have eroded, and her opportunities to obtain guaranteed athletic scholarships to colleges and universities have all but disappeared. The relationship Father had with his daughter, that Dr. Ling testified was worth preserving, has been destroyed.

Father is now reduced, not just to no visitation, but to no contact whatsoever with his daughter, all because he caused, on occasion, embarrassment and hurt feelings to her. Father has been treated worse than felons and sex offenders, who are generally allowed at least some contact with their children, including supervised visitation.

Absent this Court's intervention, what kind of justice can a non-custodial dad or mom, a loving all-in parent, expect in the future from Virginia's courts, in 2022 and beyond? Will non-custodial parents continue to lose, not just visitation, but all rights as a dad or mom simply for causing embarrassment or hurt feelings to his or her child by a social media post or an ill-considered exchange of words? Will the vague, ill-defined process of "reconciliation" continue to be used by Virginia's courts, as well as other state courts, to impose limitless and open ended "no contact" orders against non-custodial parents, thereby stripping them of their federal due process parental rights?

Most importantly, contact with and visitation by the noncustodial parent is "important for a child's whole growth -- mental, physical and spiritual--and denial of such [contact and] visitation can make a child feel rejected and confused."[9] "Children . . . who do not maintain contacts with their non custodial parents suffer harm at every developmental stage; those who maintain ties with noncustodial parents adjust more easily to their new situations."[10] To allow non-custodial parents to be cut off from their children by the imposition of "no contact" orders merely for causing embarrassment or hurt feelings is to ensure many children in Virginia and other states will experience permanent emotional and psychological harm from being deprived of the non-custodial parent's involvement while growing up.[11]

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9 *Main v. Main*, 292 So.2d 135, 149-50 (La.App. 2020) (quoting *Maxwell v. LeBlanc*, 434 So.2d 375, 379 (La.App. 1983)); *see also Pierce v. Yerkovich*, 80 Misc.2d 613, 621, 363 N.Y.S.2d 403, 410 (Fam.Ct. 1974).

10 K. Bartlett, "Rethinking Parenthood As An Exclusive Status," 70 Va.L.Rev. 879, 909 (1984). "Even children who have visiting relationships with parents who are erratic, who openly reject the child, *who hurt the child's feelings*, or who exploit the child for selfish purposes, seem to suffer less detriment as a result of divorce than children who lose contact with their noncustodial parent." *Id.* at 909 n. 146 (emphasis added; citations omitted).

11 "Currently, most non-custodial fathers fail to maintain contact with their children." J. Rutherford, "Duty in Divorce: Shared Income as a Path to Equality," 58 Fordham Law Rev. 539, 585-86 (1990), citing D.L. Chambers, "The Coming Curtailment of Compulsory Child Support," 80 Mich. L. Rev. 1614, 1623-24 (1982) (noting 52% of children who lived with their mothers had no contact with their fathers in at least a year). Indeed, the rate of contact drops "sharply" after 12 months, and after 10 years, 64% of fathers had no contact with their children. Frank F. Furstenberg, "The Life Course of

This Court now has a unique opportunity to remedy a serious and ongoing deprivation of federal due process parental rights, to reunify a dad with his minor daughter – again a loving, all-in dad who has been treated worse than sex offenders, murderers or other felons -- and to prevent such unconstitutional judicial overreach in the future. Having an only child flat out stolen from one and never having a clear path back to seeing, talking to, visiting with, and hugging her again, be it for two years or at anytime before she reaches the age of majority, is a gross injustice requiring action by this Court. This Court has the choice to grant the Petition, and to end, once and for all, the lower courts' barbaric and unconstitutional deprivation and denial of due process parental rights to non-custodial dads and moms in all future state custody and visitation proceedings.

CONCLUSION

In view of the arguments above, Petitioner Michael Vechery respectfully requests the Court grant the Petition and issue a writ of certiorari to the Virginia Court of Appeals, reverse the judgments of the lower courts, and remand with instructions (a) the Virginia courts dissolve the "no contact" order set forth in the March 4, 2020 Final Order of the Loudoun County Circuit Court and allow Mr. Vechery reasonable visitation and contact with his daughter, LCM, and (b) the Virginia courts vacate

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Children of Divorce: Marital Disruption and Parental Contact," 48 Am. Soc. Rev. 656, 663-64 (1983). The continued imposition of "no contact" orders on non-custodial parents without a finding of unfitness supported by clear-and-convincing evidence will only aggravate this trend.

and expunge the protective order issued on February 20, 2020 insofar as it prohibited contact by Father with his daughter for two years.

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