**No. _____**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

N.P.,
Petitioner
v.
STATE OF VERMONT,
Respondent

On Petition for Writ of Certiorari
To the Vermont Supreme Court

# PETITION FOR WRIT OF CERTIORAI

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## QUESTIONS PRESENTED

This case concerns the constitutionality of Vermont law governing the termination of parental rights, specifically, whether it is a violation of the Fourteenth Amendment to terminate parental rights without demonstrating a nexus between the parent's conduct and the safety of the child.

Petitioner's infant daughter was removed from her care after Petitioner's stepson sustained minor unexplained injuries to the side of his face while in the care of his father and Petitioner. The State never proved that Petitioner caused the child's injuries, and there was no allegation that Petitioner abused or neglected her daughter. Petitioner substantially complied with her court-ordered plan of services, but the court terminated her parental rights anyway, finding that she had missed visits and failed to achieve a case plan goal requiring her to improve her ability to manage anger. The only evidence of Petitioner's ongoing "anger" problems during the eleven months preceding the termination of her rights were two occasions where Petitioner yelled at or insulted other adults.

Under Vermont law, the child welfare agency is empowered to remove children from their parents' care without proving that child maltreatment occurred. The State can also terminate parental rights in these cases upon proof that the parent has "stagnated" in making progress toward case plan goals and that termination is in the child's best interests. In other words, the government can terminate parental rights because the parent failed to adequately remedy the child protection agency's concerns, even if the parent never harmed the child or otherwise

placed the child's safety in serious jeopardy. This statutory scheme begs the question of exactly when, and how, the court makes a finding of parental "unfitness" by clear and convincing evidence as required by this Court's holding in *Santosky v. Kramer*, 455 U.S. 745, 760, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982).

On appeal, Petitioner argued that the State failed to prove a nexus between Petitioner's behavior and her fitness as a parent in violation of this Court's holding in *Santosky*, and she objected on First Amendment grounds to the State's reliance on two instances of protected speech as evidence that she failed to make adequate progress in learning to manage her anger. The Vermont Supreme Court affirmed the termination of Petitioner's parental rights.

The questions presented are:

1. Whether the standards that Vermont applies in termination of parental rights cases, including "best interests of the child" and "stagnation," violate the Fourteenth Amendment because they permit termination of parental rights without proof that the parent harmed the child or placed the child at risk of serious harm.
2. Whether the State can prove parental "unfitness" by clear and convincing evidence without demonstrating a nexus between the parent's condition or behavior and the safety of the child who is the subject of the proceeding.
3. Whether the First Amendment prohibits the termination of a parent's rights based at least partially on the parent's engagement in protected speech.

## LIST OF PARTIES

The parties to the judgment from which review is sought are:

N.P., mother – Petitioner
State of Vermont – Respondent
G.L., juvenile – Respondent

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, N.P., respectfully petitions for a writ of certiorari to review the judgment of the Vermont Supreme Court in this case.

## OPINIONS BELOW

The opinion of the Vermont Supreme Court is not published, but is electronically reported at *In re G.L.*, No. 22-AP-004, 2022 WL 2189545 (Vt. June 17, 2022). App. 1a. A motion for reargument was denied on July 14, 2022. App. 1b.

## JURISDICTION

The Vermont Supreme Court entered judgment on June 17, 2022. A motion for reargument was denied on July 14, 2022. The Honorable Justice Sotomayor extended the time to file the petition for a writ of certiorari until December 12, 2022. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall…deprive any person of life, liberty, or property, without due process of law…

U.S. Const. amend. XIV, § 1.

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law…abridging the freedom of speech…

U.S. Const. amend. I.

## STATEMENT

Although this Court has repeatedly held that parents have a constitutional right to raise their children without arbitrary or unnecessary interference from the State, it has never articulated substantive standards governing proceedings to terminate parental rights (TPR). *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2059–60, 147 L. Ed. 2d 49 (2000) (observing that the Due Process Clause "guarantees more than fair process" and "includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests") (internal citations and quotation marks omitted); *Santosky v. Kramer*, 455 U.S. 745, 760, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982) (requiring the state to bear the burden of proving that the parents are "unfit" by clear and convincing evidence before terminating parental rights but declining to define "unfitness"). Without substantive standards to govern these life-altering decisions, the states have been left to decide for themselves when permanently severing the legal relationship between parent and child is appropriate. In Vermont, the absence of substantive standards is particularly acute – the government can terminate parental rights without proof that the parent abused or neglected the child. This Court must address this problem because "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65.

To illustrate why Vermont's standard for terminating parental rights violates substantive due process, it is necessary to offer a brief overview of the state statutes and case law governing dependency proceedings. Under Vermont law, a child can enter and remain in custody if he or she is "without proper parental care and subsistence . . . necessary for his or her wellbeing." 33 V.S.A. § 5102. This standard allows the government to remove a child who has not been harmed or placed at risk of serious harm. *In re L.M.,* 2014 VT 17, ¶ 29, 195 Vt. 637, 93 A.3d 553. The next stage in the proceeding is a hearing on the merits of the petition, where the state must prove by a preponderance that the child "was in need of care and supervision," usually because she was "without proper parental care." *In re M.O.*, 2015 VT 120, ¶ 6, 200 Vt. 384, 386, 131 A.3d 738. Merits is the only stage of a dependency proceeding where the rules of evidence apply, and hearsay is generally inadmissible. 33 V.S.A. § 5315.

A merits adjudication does not mean that the parent is unfit. *In re R.L.,* 148 Vt. 223, 227, 531 A.2d 909, 911 (1987). That determination occurs at the disposition stage of the proceeding. *Id*. The statutes governing disposition hearings provide no substantive criteria for courts to apply when evaluating "unfitness," except for the "best interests of the child." 33 V.S.A. §§ 5317, 5318.

At disposition, the court can terminate parental rights if it determines that TPR is in the "best interests of the child." 33 V.S.A. § 5317. When assessing the "best interests" of the child, the court must consider: the child's adjustment to her current home, school and community; the child's relationships with her parents,

siblings, foster parents, and other people who are important to her; whether the parent has played and continues to play a constructive role in the child's life; and whether the parent can resume parental duties within a reasonable period of time. 33 V.S.A. § 5114.

If the court sets a goal of reunification at disposition, the child welfare agency prepares a case plan that sets "goals" for the parent to achieve and outlines a set of "action steps" that the parent must take to achieve each goal. 33 V.S.A. § 5316; *In re A.M.*, 2020 VT 95, ¶ 3, 213 Vt. 402, 404, 246 A.3d 419. In cases where the goal is reunification, the court can terminate parental rights after disposition if the state proves that the parent's progress toward the case plan goals has "stagnated" and that TPR is in the child's best interests. 33 V.S.A. § 5113; *In re A.W.*, 167 Vt. 601, 603, 708 A.2d 910, 913 (1998).

Stagnation occurs when the parent fails to make the expected progress toward achieving case plan goals despite the passage of time. The court may find "stagnation" even in cases where the parent has completed all the action steps in the case plan and made some progress toward the case plan goals. *In re D.M.*, 2004 VT 41, ¶ 7, 176 Vt. 639, 640, 852 A.2d 588 (explaining that the "case plan is not intended to be a mere checklist the parent must satisfy to ensure the automatic return of the children to the parent's care" so that "even if a parent participates in every program set forth in [the agency's case] plan," the court may still terminate parental rights). The child welfare agency's failure to make reasonable efforts to

facilitate reunification is not a defense to TPR. *In re C.P.*, 2012 VT 100, ¶ 38, 193 Vt. 29, 47, 71 A.3d 1142.

The absence of any enforceable "reasonable efforts" requirement gives the child welfare agency tremendous power to shape the court's assessment of both "stagnation" and the statutory best interest factors. For example, without a requirement to make reasonable efforts to assist a parent in establishing regular parent-child contact, the child welfare agency is free to structure visits so that the parent cannot attend consistently. Likewise, the agency is free to require parents to participate in services that they cannot access or to craft goals that are so broad or so vague that they are essentially impossible to achieve. Similarly, the longer a child stays in foster care, the more the statutory best interest factors weigh in favor of termination of parental rights, regardless of parental fitness. *In re C.L.*, 2005 VT 34, ¶ 17, 178 Vt. 558, 563–64, 878 A.2d 207.

Petitioner's story is typical of many termination cases in Vermont. In this case, Petitioner's five-month-old daughter, G.L., was taken into custody in September 2019, after Petitioner's four-year-old stepson sustained "unexplained injuries" to the side of his face. App. 1a. The injuries consisted of red marks, and although the child initially accused Petitioner of "smacking" him, he also told investigators alternatively that his father hit him and that he had been itching his face because he had insect bites. After the temporary care hearing, custody remained with the State, and G.L. remained in the care of a non-relative foster parent. *Id.*

The court did not schedule a hearing on the merits of the State's petition until six months later. *Id.* at 2a. Petitioner, who was by then having overnight visits with her daughter, stipulated that her daughter was "a child in need of care and supervision" due to the "unexplained injuries" her stepson sustained while in the care of Petitioner and his father and because "a history of violence in the home interfered with home life." *Id.* at 1a-2a. In other words, Petitioner did not admit, and the State did not prove, that Petitioner caused the injuries to her stepson.

The court held a disposition hearing in June 2020. At that hearing, the State sought and obtained an order discontinuing Petitioner's unsupervised visits because of two instances where Petitioner and Father fought during G.L.'s overnight visits. *Id.* at 2a. The disposition case plan called for reunification but gave the parents just three months to achieve that goal. *Id.* Two of the goals listed in the disposition case plan required that Petitioner "engage in therapy to address her aggressive behaviors and attend all visits with G.L." *Id.* Ultimately, Petitioner's reported failure to meet these two goals, to the satisfaction of the court, resulted in the termination of her parental rights. *Id.* at 3a.

Shortly after disposition, Petitioner separated from Father, moved into an apartment with her mother and sister, and participated in a domestic violence assessment, thereby addressing the sole remaining issue in the case – Petitioner's admission that "violence in the home" had "interfered with home life." *Id.* at 2a. Still, the court did not reinstate her unsupervised visits. *Id.* In August 2020,

Petitioner began seeing a clinician at the local mental health agency weekly to address the goal of learning to manage her anger. *Id*. at 4a.

Unfortunately, Petitioner, who suffered from a traumatic brain injury, was involved in two altercations with her sister while they were living together. *Id*. at 2a. Thereafter, in November 2020, Petitioner moved out of the apartment with her mother and sister and began staying in a motel. *Id*. In February 2021, Petitioner allegedly "yelled" at the owners of the motel after they entered her room without permission. *Id*.

In March 2021, the State filed to terminate Petitioner's rights to G.L. *Id*. That same month, Petitioner was able to obtain a two-bedroom apartment for herself and G.L. *Id*. She continued to visit with G.L. throughout the spring and summer of 2021. *Id*. In September 2021, Petitioner, believing that her visits were supposed to move from the community to her home as of that day, became frustrated with her child protection agency worker when she refused to discuss the issue. Petitioner "reacted by yelling insults and swearing" at the worker in question. *Id*. at 3a. This was the only instance of "volatile" behavior that had occurred with G.L. present since Petitioner ended her relationship with Father. *Id*. Neither this incident, nor the motel incident involved threats or physical aggression. Moreover, Petitioner was able to refrain from physical aggression and threatening behavior for nearly a year before her parental rights were terminated.

Throughout the post-disposition phase of the case, Petitioner was offered two supervised visits with G.L. per week. *Id*. at 2a. The court found that Petitioner

"struggled to consistently attend and complete visits for a variety of reasons within her control, including lack of reliable transportation, illness, violating COVID-19 restrictions, failing to timely confirm appointments, and domestic strife." *Id*. at 3a. The court faulted Petitioner for attending "only half of her scheduled visits with G.L." between December 2020 and April 2021, failing to appreciate that Petitioner was homeless and without transportation for most of that time. *Id*. at 2a.

Following the termination of parental rights hearing, the court recognized Petitioner's progress but determined that it was insufficient to preserve her parental rights.

> As to mother, the court found that she had put effort into meeting case-plan goals and improving her life circumstances, including securing stable housing, remaining financially secure, and working with a counselor on mental-health issues. However, it found that she struggled to meet case-plan goals in two critical respects: (1) her volatile behavior and emotional dysregulation was ongoing and continued to negatively impact G.L.; and (2) she continued to be unable or unwilling to maintain consistent contact with G.L. since supervised visits began in July 2020, and she was not able to progress to overnight or unsupervised visits. Based on these findings, the court concluded that mother's progress had stagnated.
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> *Id*. at 3a.

On appeal, Petitioner argued that the court terminated her parental rights without proving that she was "unfit" by clear and convincing evidence, as required by this Court's holding in *Santosky v. Kramer*. The crux of Petitioner's argument was that the State failed to prove that she had ever abused or neglected any child and she had long since ended her volatile relationship with Father. Thus, at the time of the termination of her parental rights, Petitioner had addressed the sole issue relevant to G.L.'s safety, and the State failed to present any additional

evidence demonstrating that Petitioner was unfit to parent G.L. In response to this argument, the Vermont Supreme Court was explicit in holding that proof of parental unfitness was not required to terminate parental rights. In the words of the court:

> The court did not need to specifically find that mother assaulted G.L.'s sibling or that mother's aggressive behavior always occurred in front of G.L. to conclude that termination was in G.L.'s best interests. The best-interests factors focus on the needs of the child, and the parent's ability to meet those needs and resume parental duties within a reasonable period of time. As the court explained, G.L. "needs caregivers who prioritize her needs above their own and can provide stability and consistency in her life."
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> App. 6a.

Applying the concepts of "stagnation" and "best interests," the Vermont Supreme Court affirmed the termination of Petitioner's parental rights. In support, the court cited Petitioner's "inconsistent" visitation and faulted Petitioner for visits that were missed due to Petitioner's illness, COVID restrictions, lack of transportation, or Petitioner's failure to confirm that day's visit by 6:30 AM. *Id*. at 3a. The court also pointed to Petitioner's "volatile behavior" as evidence that she had failed to achieve the goal of learning to manage her anger despite her consistent engagement in counseling as required by the disposition case plan. *Id*.

Outside of the altercations with her sister, which occurred nearly a year before the TPR and did not involve G.L., the only evidence against Petitioner on this point involved two instances of protected speech – where Petitioner "yelled" at the owners of the motel where she was staying and subsequently "insulted" and "swore at" her agency worker. The Vermont Supreme Court did not address Petitioner's

argument that these instances of protected speech could not form the basis of a decision to terminate her parental rights, and the court refused to credit Petitioner's argument that she had refrained from violent and threatening behavior for nearly a year before TPR. *Id.* at 1a-6a.

## REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clarify that regardless of the procedural protections afforded in a termination of parental rights (TPR) case, the government must prove that it has a compelling interest, beyond simply promoting the "best interests of the child," in permanently severing the legal relationship between parent and child. The State cannot prove that it has the requisite compelling interest without first proving that the parent is unfit by clear and convincing evidence. In nearly all cases, proving unfitness first requires proof that the parent harmed the child, abandoned the child, or at least placed the child at risk of serious harm. Such evidence was explicitly and conspicuously absent from this case, as it is from many similar cases across the state.

Vermont and a handful of other states have failed to define parental "unfitness" in statute, instead permitting termination under vague grounds that require no explicit proof that the parent harmed the child or is otherwise unfit to parent. Statutory definitions of "unfitness" vary greatly from state to state, as does the government's substantive burden in these life-altering cases. This Court should grant certiorari to clarify that the Fourteenth Amendment requires clear and convincing proof of parental unfitness before parental rights can be terminated and

to clarify whether the government can meet its burden of proving unfitness without demonstrating a nexus between the parent's conduct and the safety of the child.

Vermont has dramatically elevated rates of TPR compared to other states, likely because it applies vague legal standards that fail to require proof of unfitness. Vermont children experience TPR at a rate that is more than double the national average. Christopher Wildeman, Frank R. Edwards, & Sara Wakefield, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 Child Maltreatment 32, 38 (2020). In fact, Vermont terminates parental rights at the fourth highest rate[1] in the entire nation, and a Vermont child is more than four times as likely to experience TPR than a child in neighboring New Hampshire. *Id.* Not surprisingly, New Hampshire law articulates clear, substantive standards governing termination proceedings. *See* N.H. Rev. Stat. § 170-C:5. In all cases, parental rights cannot be terminated without proof of abandonment, abuse, neglect, prolonged parental incapacity, or a "substantial" risk of harm as established by the testimony of two expert witnesses. *Id.*

Without a definition of "unfitness" to apply, Vermont courts have become a rubber stamp for arbitrary child protection agency decisions. Year after year, Vermont courts grant the vast majority of termination petitions filed by the child protection agency. In contested termination proceedings on petitions filed between 2010 and July 2016, trial courts denied petitions to terminate parental rights less than five percent of the time. Email from Brenda Palin, Program Assistant, GAL &

[1] Only Alaska, Oklahoma, and West Virginia have higher termination rates than Vermont. Wildeman, Edwards & Wakefield, *supra*.

Court Improvement Programs, Office of the Court Administrator (Oct. 3, 2016, 03:21 EST) (on file with author). In fiscal year 2019, of the 560 termination of parental rights petitions filed in Vermont, 490 (eighty-eight percent) were granted, and just two petitions were denied following a contested hearing. Email from Shari Young, Program Manager, Office of the Court Administrator (Nov. 25, 2020, 13:03 EST) (on file with author). The remainder were settled or withdrawn. *Id*. In fiscal year 2020, of the 525 petitions filed, just one was denied following a contested hearing. *Id*.

On appeal, the vast majority of TPR decisions are affirmed. Over the last five years, the Vermont Supreme Court reversed just three terminations of parental rights, and none were reversed on substantive grounds. *In re A.W.*, 2020 VT 34, 212 Vt. 225, 235 A.3d 518 (reversing because the trial court refused to hold an evidentiary hearing even though the children, who were parties to the case, did not agree to the parents' voluntary relinquishment of their rights); *In re M.P.*, 2019 VT 69, 211 Vt. 20, 219 A.3d 1315 (reversing because Father was never provided with a case plan prior to the termination of his parental rights); *In re L.H.*, 2018 VT 4, 206 Vt. 596, 182 A.3d 612 (reversing because the children's attorney became the prosecuting attorney midway through the proceeding, creating a material conflict of interest). In one other case, the Vermont Supreme Court reversed a lower court decision declining to terminate a father's parental rights where the court had terminated the mother's rights. *In re N.L.*, 2019 VT 10, ¶ 29, 209 Vt. 450, 465, 207 A.3d 475 ("This is one of those rare cases in which we need not remand the matter

to the family division to make the appropriate findings because the record, as described above, demonstrates by clear and convincing evidence that the statutory best-interests factors compel termination of father's parental rights."). Practically speaking, this means that when the child protection agency decides to terminate parental rights, the parents have almost no chance of prevailing, despite the ostensibly robust procedural protections afforded to parents in these proceedings.

## I. This Court should grant the petition because the states are split on the definition of "unfitness" and whether proof of unfitness is required to terminate parental rights.

Nearly every state in the nation has enacted a statute requiring the government to prove specific substantive grounds constituting parental "unfitness" before terminating parental rights.[2] While many states incorporate the "best

[2] Ala. Code § 12-15-319; Alaska Stat. Ann. § 47.10.088 (requiring proof of reasonable efforts); Ariz. Rev. Stat. Ann. § 8-533 (requiring proof of reasonable efforts); Ark. Code Ann. § 9-27-341 (TPR may only be considered if there is a permanent placement for the child); Colo. Rev. Stat. Ann. § 19-3-604; Conn. Gen. Stat. Ann. § 17a-112; Del. Code Ann. tit. 13, § 1103; Fla. Stat. Ann. § 39.806; Ga. Code Ann. § 15-11-310 (permitting termination due to "lack of proper parental care" but requiring as additional elements proof that: the agency made reasonable efforts; parental deficiencies are likely to continue for the foreseeable future; and preservation of parental rights would threaten the child's safety or wellbeing); Idaho Code Ann. § 16-2005; 750 Ill. Comp. Stat. Ann. 50/1 (defining "unfitness"); Iowa Code Ann. § 232.116; Kan. Stat. Ann. § 38-2269; Ky. Rev. Stat. Ann. § 625.090; La. Child. Code Ann. art. 1015; Me. Rev. Stat. tit. 22, § 4055; Md. Code Ann., Fam. Law § 5-323; Mass. Gen. Laws Ann. ch. 210, § 3; Mich. Comp. Laws Ann. § 712A.19b; Minn. Stat. Ann. § 260C.301; Miss. Code. Ann. § 93-15-121; Mo. Ann. Stat. § 211.447; Neb. Rev. Stat. Ann. § 43-292; Nev. Rev. Stat. Ann. § 128.105; N.J. Stat. Ann. § 30:4C-15.1 (requiring proof that continuing the parental relationship would harm the child and that the parent is unwilling or unable to remedy the harm); N.M. Stat. Ann. § 32A-4-28; N.Y. Soc. Serv. Law § 384-b (requiring agency to make "diligent efforts); N.C. Gen. Stat. Ann. § 7B-1111; N.D. Cent. Code Ann. § 27-20.3-20; Ohio Rev. Code Ann. § 2151.414 (requiring "reasonable case planning" and "diligent efforts" to assist the parents in remedying the conditions that brought the child into custody); Okla. Stat. Ann. tit. 10A, § 1-4-904; Or. Rev. Stat. Ann. §§ 419B.502, 419B.504, 419B.506, 419B.508; 23 Pa. Stat. and Cons. Stat. Ann. § 2511; 15 R.I. Gen. Laws Ann. § 15-7-7; (requiring reasonable efforts); S.C. Code Ann. § 63-7-2570; Tenn. Code Ann. § 36-1-113 (requiring reasonable efforts); Tex. Fam. Code Ann. § 161.001; Utah Code Ann. §§ 80-4-104 (incorporating language from *Santosky* into the statute), Utah Code Ann. § 80-4-301 (listing specific grounds for termination, requiring reasonable efforts, and specifically prohibiting termination on the grounds that the parent failed to complete services offered in the case plan); Va. Code Ann. § 16.1-283; Wash. Rev. Code Ann. § 13.34.180; Wis. Stat. Ann. § 48.415; Wyo. Stat. Ann. § 14-2-309.

interests of the child" standard into their termination statutes, Vermont is the only state in the nation that explicitly allows parental rights to be terminated solely because it serves the child's "best interests." *See e.g.*, *Matter of R. D. D.-G.*, 365 Or. 143, 158–59, 442 P.3d 1100, 1109 (2019) (explaining the court's "two-step analysis" requiring clear and convincing evidence of statutorily-defined parental unfitness, followed by proof that termination is in the child's best interests). In most states, the "best interests" test functions as a reason *not* to terminate the rights of an otherwise unfit parent, rather than the primary basis for terminating parental rights. *State ex rel. Juv. Dept. v. Beasley*, 314 Or. 444, 451-52, 840 P.2d 78 (1992) (explaining that "if a parent's conduct justifies termination, then the best interests of the child are considered explicitly, and could even then prevent termination from occurring").

Only six other states have failed to enact a statute that lists specific grounds for termination. These states include California, Hawaii, Indiana, Montana, South Dakota, and West Virginia. Of these states, all but California[3] and Indiana terminate parental rights at a rate well above the national average, with West Virginia leading the nation in TPRs. Wildeman, Edwards & Wakefield, *supra*. Like Vermont, West Virginia's statutory scheme focuses on the child's "best interests"

[3] Under the statutory scheme in California, the state bears the burden of establishing "unfitness" by clear and convincing evidence at multiple earlier stages of the proceeding. *In re Brittany M.*, 19 Cal. App. 4th 1396, 1402–03, 24 Cal. Rptr. 2d 57, 61 (1993) (explaining that at the TPR stage, "the grounds for initial removal of the child from parental custody have been established under a clear and convincing standard" and that the state has already had to overcome a statutory presumption that the child should be returned unless the parent is unfit at multiple hearings).

and requires the court to assess future parenting ability.[4] W. Va. Code Ann. §§ 49-4-604, 49-4-605.

There is wide variation among states that have enacted statutes defining parental unfitness. Most states require proof that the parent's conduct jeopardized the child's safety or caused harm and that the parent has made little or no effort toward rehabilitation despite assistance from the child protection agency. For example, Utah requires that the court find that termination is "strictly necessary" and that the parent has abused, abandoned, or neglected the child. Utah also permits termination of parental rights when a child has been in state custody due to maltreatment, but only if the parent "substantially neglected, willfully refused, or has been unable or unwilling to remedy the circumstances that cause the child to be in an out-of-home placement," and "there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care in the near future." Utah Code Ann. § 80-4-301. However, the same statute also explicitly prohibits termination solely because the parent has failed to comply with the agency's case plan. *Id.* Wyoming permits termination in cases where the juvenile court has found abuse or neglect, but only if the agency makes reasonable efforts to rehabilitate the parent, the parent cannot or will not be rehabilitated, and "the child's health and safety would be seriously jeopardized by" a return to the parent. Wyo. Stat. Ann. § 14-2-309. Idaho permits termination only on grounds of abandonment, abuse, neglect, incarceration that will persist for a substantial period

[4] Unlike Vermont, West Virginia law prescribes substantive criteria to assess future parenting ability.

of the child's minority, or an inability "to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child." Idaho Code Ann. § 16-2005. Kentucky permits termination based on the traditional grounds of abuse, neglect, or abandonment, but it also permits termination of parental rights in cases where a pregnant woman used substances without a prescription, her newborn is diagnosed with neonatal abstinence syndrome, and she refuses treatment or treatment is unsuccessful. Ky. Rev. Stat. Ann. § 625.090. Georgia permits termination in cases where the child is "without proper parental care," and New Jersey permits termination based on "best interests," but both states also require proof that continuing the parental relationship would harm the child. Ga. Code Ann. § 15-11-310; N.J. Stat. Ann. § 30:4C-15.1. Thus, most of these statutes requires the state to demonstrate a nexus between the parental conduct that forms the basis for termination and the safety of the child.

The government's burden in termination cases also varies greatly by state. Utah, for example, incorporated this Court's language from *Santosky* into its statutory scheme, and requires the court to apply heightened scrutiny in all cases where the government petitions to terminate parental rights. Utah Code Ann. § 80-4-104. When assessing future risk of harm to a child, New Hampshire requires the court to base its findings on the testimony of two qualified experts, and in all TPR cases, the government bears the burden of proof "beyond a reasonable doubt." N.H. Rev. Stat. § 170-C:5. Other states permit termination based on the court's

assessment of future risk but do not require expert testimony to prove risk. *See, e.g.*, W. Va. Code Ann. § 49-4-604.

The wide variation in standards for terminating parental rights across the states means that the same conduct is treated very differently depending on geography. For example, Petitioner's rights were terminated because a Vermont court applying Vermont law found that she failed to make sufficient progress toward her case plan goals and that termination was in G.L.'s best interests. The State never had to prove that Petitioner abused or neglected G.L. or G.L.'s half-brother, nor did it have to prove that G.L. was likely to suffer harm if returned to Petitioner's care. By contrast, under Florida law, the state would have to prove several additional elements by clear and convincing evidence including that the allegations supporting the termination petition were true, that at least one of the statutory grounds for termination had been met, that termination was in "the manifest best interests of the child," and that termination was the least restrictive means of protecting the child from harm. *In re E.C.*, 33 So. 3d 710, 714 (Fla. Dist. Ct. App. 2010). Proving the applicable statutory ground under Florida law would require clear and convincing evidence that the parent subjected the child to maltreatment and that "the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services." Fla. Stat. Ann. § 39.806. Given the absence of evidence that Petitioner posed a risk to her

daughter, it is unlikely that she would have lost her parental rights had she lived in Florida.

## II. The vague standards Vermont employs when terminating parental rights, including the "best interests of the child" standard, violate the Due Process Clause because they permit the court to terminate parental rights without proof of parental unfitness or even evidence that the parent harmed the child.

The vague standards Vermont employs when terminating parental rights violate the Due Process Clause because they permit the court to terminate parental rights without clear and convincing evidence of parental unfitness. *Cf. Sessions v. Dimaya*, 200 L. Ed. 2d 549, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J. concurring) ("Vague laws invite arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up."). This Court's precedent demonstrates the significance and deeply rooted character of parents' fundamental liberty interest in the care and custody of their children. *Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (holding that parents have a due process liberty interest in the ability to "establish a home and bring up children" and "to control the education of their own"); *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder,* 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."); *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions

that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Troxel*, 530 U.S. at 65–66 (citing the above cases and declaring that right of parents to raise their children is perhaps the oldest right protected by the Due Process Clause).

Vermont law authorizes the state to remove children from their homes and keep them in custody without proof that the child was harmed or even at risk. Parents who are engaged in rehabilitative services can then lose their parental rights for failing to meet poorly defined "case plan goals." These legal standards violate due process because they fail to define parental "unfitness," require no nexus between parental conduct and child safety, and ultimately, allow the state to terminate the rights of fit parents. *Stanley*, 405 U.S. at 652–53 (explaining that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents" and "the State spites its own articulated goals when it needlessly separates" a fit parent from her children).

### *A. Vermont's standard for removing a child from her home and proceeding to disposition and termination is unconstitutional because it requires neither proof of parental unfitness nor proof that the child is unsafe.*

Vermont's standard for removal is unconstitutional because it permits the government to maintain custody of the child and proceed to termination of parental rights without proof of parental unfitness or any link between the parental conduct at issue and child safety. Vermont case law is explicit that the State is not required

to prove that a child suffered "actual harm" or even a substantial risk of serious harm before he or she can be adjudicated a "child in need of care and supervision." *In re L.M.,* 2014 VT 17, ¶ 29; *In re M.E.,* 2010 VT 105, ¶ 13, 189 Vt. 114, 15 A.3d 112.

A Vermont child can enter and remain in the custody of the state for months or years based only upon proof by a preponderance of the evidence that the child was "without proper parental care." 33 V.S.A. § 5102; 33 V.S.A. § 5315. The State separates children who have not been harmed and face no risk from their families. *In re B.G.*, 2016 VT 107, ¶ 11, 203 Vt. 317, 321, 155 A.3d 179 (Dooley, J., concurring) (observing that the relevant statute "is so broadly written that it covers even a case where the child is being safely and appropriately cared for as arranged by the parent," and urging the child protection agency to exercise more discretion). To make matters worse, the Vermont Supreme Court has held that this already vague statutory "language must be liberally construed . . . so as to aid the purpose of its enactment." *In re B.R.*, 2014 VT 37, ¶ 15, 196 Vt. 304, 309, 97 A.3d 867 (quoting *In re N.H.,* 135 Vt. 230, 234, 373 A.2d 851, 855 (1977)). The exclusive focus "on the welfare of the child" favors family separation even when there is little risk to the child and less restrictive alternatives to address the state's concerns exist. *See In re C.P.,* 2012 VT 100, ¶ 28 (affirming termination of parental rights in case where child, who was safely residing with a family member, was taken into custody based on mother's failure to authorize the family member to seek medical care on the child's behalf).

*In re M.O.* perfectly illustrates the paucity of evidence necessary to prove that a child is "in need of care and supervision" (CHINS). In that case, a first-time mother with a learning disability lost custody of her three-day old infant because a hospital social worker was "concerned" about her parenting ability. As the Vermont Supreme Court explained:

> The social worker was concerned that mother was easily distracted, possibly because DCF was getting involved. Mother was unable to follow directions, possibly as a result of recently giving birth. The social worker had little confidence that mother could care for M.O. without some clearly defined assistance at all hours of the day. The court found that this presented a huge risk factor for the child. No one contested that mother wanted to appropriately parent the child…. Nonetheless, relying largely on the postpartum observations of the hospital social worker, the court concluded that M.O. was CHINS.

2015 VT 120, ¶ 4. On appeal, the parents argued that "the potential risk of harm" was insufficient to justify removal. *Id.* at ¶ 5. Although the Vermont Supreme Court labeled the case "difficult" because "the evidence [was] close," it ultimately determined that the opinion of the hospital social worker was enough to keep M.O. in custody. *Id.* at ¶ 13. In a concurring opinion, one justice observed that "[t]his is mother's first child" and lamented that "[t]his case does not fit the current paradigm for DCF intervention to take custody of a child." *Id.* at ¶ 20 (Dooley, J. concurring). This case illustrates how vague legal standards act to sweep parents who have never abused or neglected their children into the child protection system and hamstring courts from halting agency overreach. *See also In re M.M.*, 2015 VT 122, ¶ 65, 133 A.3d 379, 401 (Robinson, J., dissenting) (declaring that in scrutinizing CHINS proceedings, courts must "be exceptionally diligent to ensure that, in every

case, we ground our rulings in evidence and law, and not supposition and personal judgments.").

### B. *Vermont's standards for terminating parental rights, including "stagnation" and the "best interests of the child," are unconstitutional because they fail to require clear and convincing proof of parental unfitness.*

The legal standards governing Vermont termination proceedings are unconstitutional because they fail to require clear and convincing evidence of parental unfitness. Once the government has met the low bar of proof by a preponderance that the child is in need of care and supervision, little in the way of substantive legal protection stands between the parent and the permanent destruction of her family. *See In re D.M.*, 2004 VT 41, ¶ 5 (explaining that trial courts have "broad discretion" in deciding TPR cases). Somewhat confusingly, the determination that a child is "in need of care and supervision" is entirely separate from the determination of parental unfitness. As the Vermont Supreme Court explained, "the determination of parental unfitness, which triggers the transfer of custody away from the parents" is made at disposition. *In re R.L.,* 148 Vt. at 227.

Yet, the statutes governing disposition fail to define unfitness and permit TPR at disposition if it is in the child's "best interests." 33 V.S.A. § 5318; 33 V.S.A. § 5317; *In re C.P.*, 2012 VT 100, ¶ 30 (citing *In re J.T.,* 166 Vt. 173, 177, 179–80, 693 A.2d 283, 285, 287 (1997)). After initial disposition, the court may terminate parental rights if it finds that termination is in the child's best interest and that the parent's progress toward achieving case plan goals has "stagnated."

"Stagnation" is another vague concept that requires no proof of parental unfitness. Vermont law permits the court to find "stagnation" even when the parent "followed the case plan and cooperated with service providers" *In re D.M.*, 2004 VT 41, ¶ 7. According to the Vermont Supreme Court, the "case plan is not intended to be a mere checklist the parent must satisfy to ensure the automatic return of the children to the parent's care…." *Id*. Thus, "even if a parent participates in every program set forth in [the case] plan, the main concern must always be whether the individual parent has demonstrated the improvement contemplated at the time the children were removed from the parent's care." *Id*. Stagnation can also be found in cases where the parent has made progress toward achieving the case plan goals, but the court determines that there was a "lack of sufficient improvement over time." *In re A.G.*, 2004 VT 125, ¶ 19, 178 Vt. 7, 14, 868 A.2d 692. In other words, a parent can participate in every service listed in the case plan, make progress toward the often vague and generalized case plan goals, and still lose her parental rights.

Similarly, the "best interests of the child" factors, which govern TPR and other dispositional proceedings, require no proof of parental unfitness. 33 V.S.A. § 5114. The "best interest" factors that courts must consider include: "(1) the interaction and interrelationship of the child with his or her parents, siblings, foster parents, if any, and any other person who may significantly affect the child's best interests; (2) the child's adjustment to his or her home, school, and community; (3) the likelihood that the parent will be able to resume or assume parental duties within a reasonable period of time; and (4) whether the parent has played and

continues to play a constructive role, including personal contact and demonstrated emotional support and affection, in the child's welfare." 33 V.S.A. § 5114.

The "best interests of the child" standard, when viewed in the context of the rest of Vermont's dependency process, serves to deprive parents of a fundamental right without proof of parental unfitness. Recognizing that the "best interests of the child" standard cannot supersede the constitutional right to family integrity, this Court explained:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others…. Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

*Reno v. Flores*, 507 U.S. 292, 303–04, 113 S. Ct. 1439, 1448, 123 L. Ed. 2d 1 (1993); *see also Quilloin*, 434 U.S. at 255 ("We have little doubt that 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.") (citing *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in judgment)); *Stanley*, 405 U.S. at 653 (criticizing the State's argument that the challenged statute's purpose of furthering the "best interests of the child" was sufficiently

compelling to legitimize the deprivation of a presumptively fit parent's rights); *Santosky*, 455 U.S. at 773 (Rehnquist, J., dissenting) (observing that a state scheme that permitted the termination of parental rights based merely on a finding that "such action would be in the best interests of the child" would likely be unconstitutional).

Endeavoring to avoid constitutional infirmity, the Vermont Supreme Court has held that the third best interest factor, whether the parent can resume "parental duties within a reasonable period of time," is equivalent to the concept of "unfitness" that this Court articulated in *Santosky*. *In re D.C.*, 2012 VT 108, ¶ 22, 193 Vt. 101, 111, 71 A.3d 1191. However, Vermont's case law – and the court's decision in this case – belie this claim. Applicable case law provides little in the way of hard and fast rules and is often highly deferential to the trial court's decision. *See*, *e.g.*, *In re C.P.*, 2012 VT 100, ¶ 30 ("The reasonableness of the time period is measured from the perspective of the child's needs, and may take account of the child's young age or special needs."); *In re B.M.*, 165 Vt. 331, 337, 682 A.2d 477, 480 (1996) (stating that the court's inquiry regarding whether the parent can resume parental duties within a reasonable period of time must be "forward-looking" and examine the parents' "prospective ability to parent the child."). Additionally, the proper balance of the various best interest considerations remains an elusive standard. *Compare In re J.M.*, 2015 VT 94, ¶ 12, 199 Vt. 627, 127 A.3d 921, 924 (observing that "few, if any, circumstances concerning the welfare of the child should be considered entirely immaterial or, for that matter, entirely controlling")

*with In re B.M.*, 165 Vt. at 336 (holding that the most important "best interests" factor is the likelihood that the natural parent will be able to resume his or her parental duties within a reasonable period of time). To make matters worse from a due process standpoint, Vermont courts routinely conflate "stagnation" with the third best-interests factor, such that proof of "stagnation" is sufficient to prove that the parent cannot resume parental duties within a reasonable time. *In re A.W.*, 167 Vt. 601, 603, 708 A.2d 910, 913 (1998) (affirming TPR where the lower "court found that . . . due to mother's stagnation, mother would be unable to resume her parenting duties within a reasonable period of time").

Despite the Vermont Supreme Court's efforts to shoehorn the "best interests" standard into the federal constitutional standard, case after case reveals that fit parents lose their parental rights when Vermont's vague termination standards are applied to their families. In the Vermont Supreme Court's own words:

> Considered against this legal and factual backdrop, father's claim that the trial court erred in terminating his parental rights absent a specific finding of parental unfitness is unpersuasive. Although the trial court found that father was ably parenting two children from another relationship, and possessed the skills to parent C.L., it observed, correctly, that the paramount concern was father's ability to resume his parental responsibilities for C.L. within a reasonable period of time, measured from the perspective of the child's needs….

*In re C.L.*, 2005 VT 34, ¶ 17. Thus, Vermont law explicitly permits termination without proof of "unfitness."

## III. Proof of unfitness, at a minimum, requires a nexus between the parent's condition or behavior and the safety of the child who is the subject of the proceeding.

Proof of parental "unfitness," at a minimum, requires the government to demonstrate that there is a nexus between the parent's condition or behavior and the safety of the child who is the subject of the proceeding. *See, e.g.*, *Stanley,* 405 U.S. at 651; *Quilloin,* 434 U.S. at 255. Vermont's vague standards for terminating parental rights fail to require proof that the parent continues to pose a risk to the child prior to terminating parental rights. In this case, the State failed to demonstrate that there was any connection between Petitioner's past behaviors and G.L.'s safety.

Clear and convincing evidence of parental unfitness is a necessary prerequisite to termination of parental rights. *Santosky*, 455 U.S. at 769; *Stanley*, 405 U.S. at 652. Most states define the concept of "unfitness" explicitly, and in all cases, unfitness requires a demonstrated nexus between the parent's condition or behavior and the safety of the child who is the subject of the proceeding. *See Matter of J.N.M.*, 1982 OK 153, 655 P.2d 1032, 1035–36 (holding that terminating parents' rights because they had paranoid schizophrenia was unconstitutional, absent "a showing of how that condition affects the fitness of the parent, the manner in which the condition is detrimental to the child, the likelihood of correction or control of the condition so that a parent would again be capable and fit to care for his children."); *In re Termination of Parental Rts. to Max G.W.*, 2006 WI 93, ¶ 55, 293 Wis. 2d 530, 562, 716 N.W.2d 845, 861 (holding that substantive due process prohibited termination of mother's parental rights merely because she was incarcerated and requiring the court to examine mother's parenting abilities).

This case began with an unproven allegation that Petitioner physically abused her stepson. At no point during the case did the state ever prove that this abuse occurred, let alone that Petitioner was the perpetrator. Yet, because of that allegation, Petitioner lost custody of her daughter permanently. The Vermont Supreme Court's decision affirming the termination of Petitioner's rights contains no findings that Petitioner ever harmed G.L., and to the extent that volatility in Petitioner's relationship with Father had impacted G.L. in the past, Petitioner had long ago ended that relationship.

## IV. A parent's engagement in protected speech directed at other adults cannot support a termination of parental rights.

Petitioner's engagement in protected speech directed at other adults cannot support the termination of her parental rights. Here, the Vermont Supreme Court relied on two verbal exchanges, where Petitioner uttered no threats, as evidence that she failed to achieve the disposition goal concerning anger management. At the time of TPR, these two incidents were the only recent examples of Petitioner's "volatility."

The first incident occurred in February 2021 and involved Petitioner "screaming at the owners of the motel where she was living" because she believed they had entered her room without permission. App. at 3a. The second incident involved Petitioner "yelling insults and swearing" at the child protection agency worker after the worker refused to move the visits to Petitioner's home. *Id.* Petitioner did not utter any "true threats" in either case. These two incidents were

the sole evidence concerning Petitioner's alleged ongoing "volatility" in the eleven months prior to the termination of her parental rights. *Id.* at 2a.

Neither incident can support the termination of Petitioner's parental rights. The First Amendment protects verbal criticism and profanity directed at government officials unless the speech is "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *City of Houston v. Hill,* 482 U.S. 451, 461 (1987) (quotation omitted). This Court has held that angry speech that uses profane, crude, and "vulgar" language is constitutionally protected. *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 210 L. Ed. 2d 403, 141 S. Ct. 2038, 2046 (2021) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) and *Cohen v. California*, 403 U.S. 15, 19–20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)).

Petitioner's disposition case plan required her to refrain from aggressive and threatening behavior, not expressions of anger amounting to no more than protected speech. The court seized on Petitioner's two verbal exchanges as evidence that her faithful participation in counseling had not improved her ability to manage anger. Instead, what the evidence revealed was that within four months of beginning anger management counseling, Petitioner was able to refrain entirely from aggressive and threatening behavior for the eleven months leading up to the termination of her parental rights.

## CONCLUSION

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

Respectfully submitted.

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