RULE 5.2 - JUVENILE

Docket No. _____

In the Supreme Court of the United States

DAMMUON E., Petitioner

v.

RUSSELL COUNTY DEPARTMENT OF HUMAN RESOURCES, Respondent

On Petition for a Writ of Certiorari to the Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

DAMMUON EPPS
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QUESTION PRESENTED

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Whether the State violates the Due Process Clause when it assumes initial custody of a child from an involved biological parent utilizing dependency proceedings that exclude parental fitness as a factor in the decision.

Whether the application of the ore tenus rule in appellate review of judgments depriving a parent of the custody, control and care of a child in favor of a non-parent adequately and fairly protects the rights of parents to control the upbringing of their children from erroneous deprivation under the Due Process Clause.

PARTIES TO THE PROCEEDINGS

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To preserve confidentiality, the identities of the parties and the petitioner's children are in a sealed letter on file with the clerk.

Dammuon Epps. – biological father / petitioner

Tanya Griffin – biological mother

D.V.G. – minor child

K.G.E. – minor child

D.A.G. – minor child

K.A.E. – minor child

K.A.S. – minor child

L.D.E. – minor child

K.I.G. – minor child

Russell County Department of Human Resources – state agency / respondent

CORPORATE DISCLOSURE STATEMENT

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Pursuant to Supreme Court Rule 29.6, Petitioner, discloses the following. There is no parent or publicly held company owning 10% or more of Applicant's stock.

LIST OF PROCEEDINGS

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In the Russell County Juvenile Court

Juvenile Dependency Actions: *In re D.V.G.*, (JU-14-232.01); *In re K.G.E.,* (JU-14-233.01); *In re D.A.G.*, (JU-14-234.01); In re K.A.E., (JU-14-235.01); In re K.A.S., (JU-14-236.01); In re L.D.E., (JU-14-262.01); and In re K.I.G., (JU-16-0081.01), consolidated. Decided November 6, 2014

Termination of Parental Rights Actions: *In re D.V.G.*, (JU-14-232.02); *In re K.G.E.,* (JU-14-233.02); *In re D.A.G.*, (JU-14-234.02); *In re K.A.E.*, (JU-14-235.02); *In re K.A.S.*, (JU-14-236.02); *In re L.D.E.*, (JU-14-262.02); and *In re K.I.G.*, (JU-16-0081.02), consolidated – Decided August 8, 2017.

In The United States District Court for the Middle District of Alabama

State of Alabama Russell County Department of Human Resources, et al. v. Dammuon Epps, et. Al Case No. 3:14-cv-01194-WKW-TFM, Decided December 5, 2014

In The Alabama Court of Civil Appeals

T.G. v. Russell Cnty. Dep't of Human Res., 212 So. 3d 222 (Ala. Civ. App. 2015), appeal dismissed.

D.E. v. Russell Cnty. Dep't of Human Res., 228 So. 3d 446 (Ala. Civ. App. 2016), appeal dismissed as to T.G. without published opinion.

D.E. v. Russell Cnty. Dep't of Human Res., 231 So. 3d 298 (Ala. Civ. App. 2016), appeal dismissed without published opinion.

D.E. v. Russell Cnty. Dep't of Human Res., 246 So. 3d 129 (Ala. Civ. App. 2017) Dismissed no published opinion.

D.E. v. Russell Cnty. Dep't of Human Resources (In re D.E.), 268 So. 3d 41 (Ala. Civ. App. 2017) mandamus denied. No published opinion.

Ex parte D.E. No. 2170104 through 2170110, writ denied no opinion (Ala. Civ. App Oct. 31, 2017).

Ex parte T.G. No. 2170111 through 2170117, writ denied (Ala. Civ. App Oct. 31, 2017).

D.E. v. Russell Cnty. Dep't of Human Res., 272 So. 3d 1072 (Ala. Civ. App. 2018), Affirmed No Opinion.

D.E. v. Russell Cnty. Dep't of Human Res., No. CL-2022-0882 (Ala. Civ. App. Apr. 14, 2023) rehearing denied.

D.E. v. Russell Cnty. Dep't of Human Res., No. CL-2022-0882 though 2022-877 (Ala. Civ. App. Feb. 24, 2023) Affirmed No Opinion. *Certiorari* denied Ala. Sup. Ct., June 9, 2023.

In The Alabama Supreme Court

Ex Parte D.E. and T.G. 285 So. 3d 218 (2018), writ denied May 11, 2018, decision without published opinion.

Ex Parte D.E. and T.G. 285 So. 3d 219 (2018), writ denied May 11, 2018, decision without published opinion.

Ex parte D.E., No. SC-2023-0295 through SC-2023-0301 (Ala. June 9, 2023) certiorari denied June 9, 2023.

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TABLE OF AUTHORITIES

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Cases

JURISDICTION

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The Alabama Court of Civil Appeal's opinion was issued on February 24, 2023. Rehearing was denied on April 14, 2023. The Alabama Supreme Court denied review on June 9, 2023. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

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The Fourteenth Amendment states in relevant part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF COMPLIANCE

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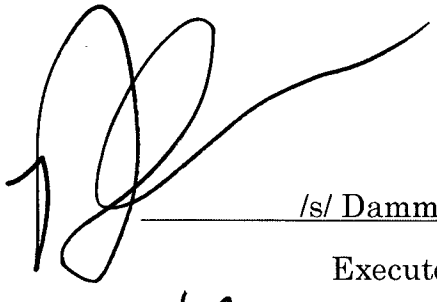
I certify that this petition for certiorari complies with the word and page limit of the Supreme Court Rules.

I declare certify under penalty of perjury that the foregoing is true and correct.



/s/ Dammuon Epps

Executed on 9/7/2023

11/3/23

STATEMENT OF THE CASE

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The decision below is part of a disturbing national trend of placing nonvictim children in foster care without evidence of maltreatment by their parents. According to the latest data from the Department of Health and Human Services, (DHHS), of the nationally estimated 3,016,000 children who were the subject of a child welfare agency response in fiscal year (FY) 2021, only 600,000 children, (20%), (estimated), were determined to be victims of maltreatment, while 2,416,000 children, (80%), (estimated), were determined to be nonvictims. See DHHS, Child Maltreatment 2021 at xiv. (2023), available at https://www.acf.hhs.gov/cb/report/child-maltreatment-2021. (Attachment A). Of the 2,416,000 nonvictim children, 720,937, (30%), were forced into some CPS administered service, including 43,252 being placed in foster care in FY 2021. See id. at xiv. The total number of children placed in foster care by child welfare services subject to a CPS response in FY 2021 was 156,576 children. This means that roughly 28%, (43,252), of the children who were placed in foster care based on a report in FY 2021 were not victims of maltreatment by their parents. *See id.* These alarming statistics raise serious questions about the constitutionality and wisdom of using dependency proceedings to remove children from their parents' custody without clear and convincing evidence of parental unfitness or harm to the child.

A. **Legal Framework**

This case is about preserving a parent's liberty "to direct the upbringing and education of [their] children," a right protected by the Fourteenth Amendment as

interpreted in decisions such as *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 529 (1925). This Court has reaffirmed this right in several other cases over the years, including *Wisconsin v. Yoder*, 406 U.S. 205, 232-233 (1972), and *Troxel v. Granville*, 530 U.S. 57, 61 (2000). *Yoder* reaffirmed a parent's right to direct the education of their children, while *Troxel* decided that, absent a compelling reason, the State could not interfere in a parent's right to raise his or her children. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held that parents are due a hearing on their fitness prior to being deprived of their children by a non-parent. *Santosky v. Kramer*, 455 U.S. 745 (1982) established the procedural rule requiring clear and convincing evidence of unfitness.

Like the *Stanley* case, Alabama has both neglect/abuse and dependency proceedings.

1. Abuse and Neglect Proceedings

In Alabama, neglect and abuse proceedings involving presumptively fit parents and non-dependent children are governed by two legal avenues. The first is the Alabama Protection from Abuse Act, (APFAA), at Ala. Code (1975) §30-5-1 et seq., which enumerates specific acts of abuse against persons including children. This act references the Alabama Child Abuse Act, (ACAA), at *Ala. Code* (1975) §26-15-1 et seq., which has been interpreted by Alabama appellate courts to encompass willful acts and omissions (neglect) that lead to serious injury to a child as defined in the Alabama criminal code at §13A-1-2(14). *See... Graham v. State*, 210 So. 3d 1148, 1154-1155 (Ala. Crim. App. 2016).

The second avenue for neglect/abuse proceedings involving fit parents of non-dependent children is codified at Ala. Code (1975) §12-15-138 to 12-15-144. This section of the AJJA grants the juvenile court emergency powers outside of juvenile dependency. *See...* Ala. Code (1975) §12-15-138 ("The juvenile court, at any time after a dependency petition has been filed, ***or*** on an emergency basis, may enter an order of protection or restraint to protect the health or safety of a child subject to the proceeding.") The standards of neglect and abuse under this portion of the AJJA are to be interpreted in conjunction with the APFAA, ensuring clarity and avoiding ambiguity. The intent is to maintain consistency with other criminal laws related to child abuse, except in cases of conflict. (Ala. Code (1975) §12-15-144).

2. Dependency Proceedings

Under Alabama law, dependency proceedings do not require a finding of parental unfitness and base their judgments on the best interest of the child alone. *See... J.W. v. T.D. and B.D*, 58 So. 3d 782, 788 (Ala. Civ. App. 2010) cert. denied (Ala. Sup. Ct. 2010), ("[A] finding of parental "unfitness," as contemplated in *Ex parte Terry*, is not the standard that a petitioner in a dependency case is required to prove."). The Alabama Juvenile Justice Act ("AJJA") defines "dependent child" as "a child *who* ***has been adjudicated*** *dependent* by a juvenile court and is in need of care or supervision and meets any of the following circumstances: [...]." *Alabama Code* (1975) §12-15-102(8)(a). The legislature empowered a juvenile court to act on a dependency petition only if "at the time a petition is filed in the juvenile court alleging dependency, the child meets the statutory definition of a dependent child." *See... A.E. v. M.C.*, 100 So.

3d 587, 596 (Ala. Civ. App. 2012) citing *Ex Parte L.E.O*, 61 So. 3d 1042, 1046 (Ala. 2010).

Under Alabama law, dependency proceedings are conducted without a jury. *See...* Ala. Code (1975) §12-15-129. Because juvenile courts are empowered to conduct hearings without a jury, take oral evidence in those hearings, and adjudicate and dispose of rights in those hearings, dependency and termination of parental rights judgments are subject to the ore tenus rule. See... Ala. Rules of Juvenile Procedure Rule 24; See also... *Spencer v. Spencer*, 258 So. 3d 326 (Ala. 2018) ("When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error.' "); See also...*Ex Parte R.E.C,* 899 So. 2d 272, 279 (Ala. 2004) (In ore tenus proceedings, the trial court is the sole judge of facts.). A parent whose child has been adjudicated dependent does not retain the liberty rights recognized in *Pierce, Troxel, Stanley* and other parental rights cases of this court. Once an adjudication is rendered those rights are converted into the statutorily created privilege of "residual parental rights". *See...* Ala. Code (1975) §12-15-102(23).

In the cases of *Hobbs v. Heisey* and *A.S. v. T.R.B.,* Alabama's highest courts held that parents have no procedural right to a hearing requiring the state to prove parental unfitness prior to assuming custody of a child. See... *A.S. v. T.R.B.*, 246 So. 3d 963, 967 (Ala. Civ. App. 2017) certiorari denied Ala. Sup. Ct. 1160840, referencing *Hobbs v. Heisey*, 118 so. 3d 187, 191 (Ala. Civ. App. 2012), ("[T]he failure to require clear and convincing evidence of parental unfitness before placing custody with a

nonparent amounts only to a violation of substantive, not procedural, due process[.]"). These holdings uphold the use of juvenile dependency as a procedure that can be utilized by the state to assume initial custody of a child from an involved biological parent without regard to his fitness.

B. **Background and Procedural History**

Dammuon Epps, a devoted and caring African American father, has been tirelessly fighting to regain custody of his seven children for over eight years. The State of Alabama, specifically the Russell County Department of Human Resources (RCDHR), initiated a dependency proceeding against Dammuon in 2014. The reason behind these legal actions was Dammuon's refusal to allow RCDHR to conduct a search and seizure of his home without a proper warrant. (Attachment A28: *DHR Certified Letter*); (Appendix Vol. 2 - A29 and A39 : *DHR Dependency Information Sheets*); (Appendix Vol. 2 - A30 and A38: *DHR Affidavit of Efforts*); and (Attachment A78: *2016 DHR Affidavit of Efforts*).

An anonymous report concerning the welfare of his children was allegedly received by RCDHR around October 1, 2014. In response, RCDHR attempted a home visit to assess the situation, but Dammuon and his wife denied them access. Before leaving, RCDHR was instructed by Dammuon's wife to send a certified letter explaining the reasons why they should be allowed to conduct an unwarranted search of their home and children. RCDHR drafted and mailed a letter on or about October 2, 2014. The letter stated that RCDHR's intention was to "interview you, your

children, and do a home visit to help assess any needs your family may have." (Attachment A28: *DHR Certified Letter*).

After continued refusal of RCDHR's assessment, on October 3, 2014, RCDHR sought an emergency court order for custody of the children and entry into Dammuon's home on grounds that the refusal to allow RCDHR access constituted harm to the children. (Appendix Vol. 2- A29: *DHR Dependency Information Sheet*). However, this request was denied. (Appendix Vol. 2- A41 – A45: *2017 DHR Report*). Following the rejection of the emergency protective order, RCDHR filed a dependency petition with the Russell County Juvenile Court solely in the best interest of the child. The petition claimed that Dammuon's children were already adjudicated as dependent by a juvenile court, based on Alabama Code §12-15-102(8)(a)(2),(6) and 8. (Appendix Vol. 2- A31 – A33: *2014 Dependency Petition*).

A hearing was then scheduled for November 6, 2014, which was more than 30 days after RCDHR's initial visit to D.E.'s home. On October 30, 2014, RCDHR filed a report providing an update on their interactions with Dammuon and his wife which did not indicate any substantial risk or harm to the children. (Appendix Vol.2- A34 – A36: *DHR October 30, 2014 Report*).

On the day of the hearing, only the mother appeared in court, and Dammuon stayed home with the children as he was not named in the initial petition. During the hearing, the court-appointed guardian ad litem for the children petitioned the probate court for the mother's involuntary commitment. Following the hearing, the juvenile court issued pick-up orders for all six children. The orders stated that the "best

interest of the child or public requires that the custody of the [children] be immediately assumed by the State in that: the parents are refusing access to the children by DHR and there are allegations that the mother is unstable. Mother *appeared* unstable in court." Nothing in the order stated any child was in any harm. (Appendix Vol. 2- A9: *November 2014 Pick up Order*).

While the mother was undergoing involuntary commitment, Dammuon left the children with a relative and began searching for the mother. During his search, Dammuon was apprehended by Sheriff's deputies and forced to speak with the probate judge without any petition for his commitment. In the meantime, his children were picked up by the local Sheriff's Office from the relative's house. Without service of any petition or other information regarding DHR's allegations, Dammuon was ordered to attend a November 7, 2014 hearing by the probate judge.

A dependency petition was drafted on November 7, 2014 for Dammuon's youngest child, who was previously unknown to RCDHR. At the November 7, 2014 hearing, a pendent lite shelter care order granted RCDHR temporary custody of the children. (Appendix Vol. 2- A10 – A15: *November 2014 Shelter Care Order*). This order also failed to state that any child was in harm. Each petition contained the exact same language and expressed concern for the mother using the word property in connection with her right to raise her children despite the court's own practice of referring to children as property when seized subject to a search warrant. (Attachment Vol. 2- A40: 2016 Return and Inventory).

After receiving custody, DHR moved for a continuance for more time to "work the case", which was granted. Neither parent was allowed to associate with the children accept by permission of RCDHR, the court or foster parents. Dammuon made efforts to remove the dependency action to the United States Federal District Court, but the attempt failed, and his appeal to the Alabama Court of Civil Appeals was dismissed. After the removal motion was filed, the juvenile judge immediately appointed the mother an attorney weeks after removing the children upon finding the "mother appeared unstable in Court".

Subsequently, Dammuon had another child on June 1, 2016. RCDHR tried to gain access to the home and child on June 7, 2016, but Dammuon and his wife denied them access again. As before, RCDHR initiated a dependency petition claiming that the newborn child was a child who had been adjudicated dependent and requested removal because of the parents' refusal to cooperate. (Appendix Vol. 2- A75: *2016 Dependency Petition*); (Appendix Vol. 2- 38: *2016 DHR Affidavit of Efforts*); and (Appendix Vol. 2- A37: *2016 Dependency Information Sheets*). The Child Custody Affidavits attached to this petition also failed to demonstrate the child had been previously adjudicated dependent.

The matter was brought before the same juvenile judge from the 2014 hearings who immediately recused himself. A pickup order was issued by another juvenile judge on the grounds that "[t]he parents refuse to allow Russell County DHR access to the child and that the parents do not have custody of their children. DHR has temporary custody." (Appendix Vol. 2- A16: *2016 Pickup Order*). The child was

removed without a hearing on June 16, 2016. A post-deprivation hearing was held 22 days later without serving Dammuon or the mother. In that hearing, a dependency order was rendered without any indication that the child was in danger or that the parents were unfit. (Appendix Vol. 2- A17 – A23: *2016 Dependency Order*).

Dammuon's parental rights to all seven of his children were ultimately terminated on August 4, 2017. (Appendix Vol. 2- A24 – A27: *Order Terminating Parental Rights*). He filed a direct appeal, but it was affirmed without any specific opinion. In March 2018, Dammuon petitioned for a writ of Mandamus, challenging the juvenile judge's capacity to act as a judge in the case due to his role as Russell County Children's Policy Council Chairman. The petition was denied.

On July 1, 2022, Dammuon filed an Ala. R. Civ. P. Rule 60(b)(4) motion seeking to vacate the orders in the .01 original dependency actions. However, the motion was denied by the trial court on July 13, 2022 on grounds that Dammuon lacked standing to challenge any order removing his children from his custody. (Appendix Vol. 2- A8 - *Order Denying Motion to Vacate filed in .01 action*). Dammuon timely filed a notice of appeal with the Court of Civil Appeals on July 25, 2022. The Court of Appeals rejected the lack of standing ruling but the court issued a no-opinion affirmance of the trial court's denial on February 24, 2023 citing *Hobbs v. Heisey*, 118 So. 3d 187 (Ala. Civ. App. 2013) and *A.S. v. T.R.B.*, 246 So. 3d 963 (Ala. Civ. App. 2017), which held that the State's deprivation of parental custody of a child in favor of a third party without a hearing requiring a finding of parental unfitness only violates substantive due process not procedural due process. (Appendix Vol. 1- A6 – A7: *Ala.*

Civ. App. Order Affirming Judgment). None of the authorities cited suggest support for the trial court's and DHR's contention that Dammuon lacked standing to challenge the trial court's orders. A request for rehearing was overruled on March 10, 2023. (Appendix Vol. 1- A4 – A5: *Ala. Civ. App. Order Overruling Rehearing*).

In a last attempt, Dammuon filed a petition for Certiorari Review in the Supreme Court of Alabama, which was denied on June 9, 2023. (Appendix Vol. 1- A1: *Order Denying Certiorari*). A final Judgment from the Alabama Court of Civil Appeals was issued on June 9, 2023. (Appendix Vol. 1- A2 – A3: *Ala. Civ. App. Final Judgment*)

Throughout this arduous legal journey, Dammuon has faced a series of challenges, including jurisdictional disputes, parental rights termination, and multiple failed appeals, all in his determined effort to regain custody of his beloved children.

REASONS FOR GRANTING CERTIORARI

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This Court should grant this petition because the Alabama Supreme Court's interpretation of the Due Process Clause's procedural requirements conflicts with this Court's precedents and other state and federal courts, and because it has serious implications for the rights and welfare of parents and children.

I. Certiorari is Warranted Because the Alabama Supreme Court's Holdings Allowing the State to Assume Initial Custody of a Child from an Involved Biological Parent Utilizing Dependency Procedures That Exclude Parental Fitness as a Factor in the Decision Violate Procedural and Substantive Due Process Rights of Parents.

A. This Court Has Held That Clear and Convincing Evidence of Parental Unfitness Is Required Prior to Depriving an Involved Biological Parent of Control of the Upbringing of His Children in Favor of a Non-Parent.

In 2000, this Court held that biological parents have a right to control access to their children. In *Troxel v. Granville,* a Washington law gave any person the right to seek visitation of a child in custody proceedings. 530 U.S. 57, 61 (2000). In a plurality opinion, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Ginsburg and Justice Breyer, noted that there was no finding or even accusation that the mother was unfit. Based on this, the plurality built on Pierce and held that "there is a presumption that fit parents act in the best interests of their children." *Troxel,* 530 U.S. at 68. The Washington trial court's decision was held unconstitutional because it "applied exactly the opposite presumption[.]" *Id.* at 69. Although this Court did not define "unfitness", other holdings of this Court suggest that "unfitness" must involve the child's health being placed in serious jeopardy, or a threat to public safety. *See... Parham v. J. R,* 442 U.S. 584, 603 (1979); *See also.... Wisconsin v. Yoder,* 406 U.S. 205, 230 (1972). Alabama has defined unfitness as a degree of neglect or misconduct that renders a parent unable to care for a child. *Ex parte Terry,* 494 So. 2d 628 (Ala. 1986).

This Court has also established that a fair and meaningful adjudication of an involved biological parent's right to control the upbringing of his children includes a hearing that produces clear and convincing evidence of parental unfitness before depriving the parent of custody in favor of a non-parent. *See.... Stanley v. Illinois,* 405

U.S. 645 (1972); *See also... Santosky v. Kramer*, 455 U.S. 745, 753-754 (1982). In *Stanley*, this Court, referencing its holdings in *Bell v. Burson*, 402 U.S. 535 (1971), reasoned that the state could not merely presume a parent is unfit and evade a hearing requiring proof of unfitness. *Stanley*, 405 U.S. at 657 – 658. In *Bell* 402 U.S. 535, this Court found Georgia's Safety Responsibility Act denied license holders, who had been in accidents without insurance, a meaningful hearing according to the nature of the case when it suspended their driver's license in a hearing that excluded fault of the accident as a factor in determining whether to suspend the license. Id. 541 – 542. Parental fitness is as essential as fault in the *Bell v. Burson* case when considering parental rights deprivation.

Alabama Courts have adopted the strict scrutiny test for state invention into parental rights and held that the state has no compelling interest in dispositioning the best interest of a child contrary to the wishes of the parent without a finding of unfitness.

> *Ex Parte E.R.G.*, No. 1090883, at *19 (Ala. June 10, 2011) ("The state's compelling interest is limited to overruling the decisions of unfit parents. As the United States Supreme Court said in Santosky v. Kramer, 455 U.S. 745 (1982), it is only "[a]fter the State has established parental unfitness at that initial proceeding, [that] the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge." 455 U.S. at 760. Unless the parents are shown by clear and convincing evidence to be unfit, the state's interest is not compelling: ").

This Court has hinted at a similar stance in reasoning 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.'" *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) *citing* "*Smith* v. *Organization of Foster Families*, 431 U.S. 816, 862-863 (1977). In *Quilloin*, this Court did not directly address whether the application of the best interest of the child standard alone in non-parent custody disputes violated procedural due process because the court found that the father's lack of involvement with the child precluded a substantive claim that any procedure would protect. *Id.* at 254. However, this Court noted that the question before the court was whether the father's interest "were adequately protected by a best interest of the child standard." *Id.* 254.

Fifteen years after *Quilloin*, *Reno v. Flores*, 507 U.S. 292, 304 (1993) stated that the best interest of the child standard alone does not govern the fundamental rights of parents. Later, in *Troxel*, it was noted that "[t]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." 530 U.S. at 72-73. This Court observed that "[s]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Id. at 68-69.

This Court's precedents reflect the principle that parental rights are not absolute but are subject to limitation only when there is a compelling state interest. *See eg.*. *Troxel* 530 at 80. J. Thomas concurring (Strict scrutiny is the appropriate standard

of review in fundamental rights cases); *See also eg... Reno* 507 at 301 ("Government cannot infringe on a fundamental right without a compelling state interest".). However, the U.S. DHHS FY2021 Maltreatment Report and the cases presently before this court suggest that Alabama and other states fail to consistently apply strict scrutiny to state actions seeking to deprive parents of custody in favor of a non-parent, because in their view, there is no clear law of the land from this Court requiring strict scrutiny to state invasions of parental rights.

> *See, eg... Feist v. Lemieux-Feist*, 793 N.W.2d 57, 60 (S.D. 2010) (Troxel only required special weight be given.); *See also, eg... Crafton v. Gibson*, 752 N.E.2d 78, 92 (Ind. Ct. App. 2001) ("*Troxel* did not articulate what standard would be applied in determining whether nonparental visitation statutes violate the fundamental rights of parents, only Justice Thomas"); *See also, eg.... Weigand v. Edwards*, 296 S.W.3d 453, 458 (Mo. 2009) ("[A] parent's interest in his or her children is entitled to 'heightened protection,' it is not entitled to 'strict scrutiny."); *See also, eg.... Price v. New York*, 51 A.D.3d 277 (N.Y. App. Div. 2008) ("[T]here is no clear precedent requiring the application of strict scrutiny to government action which infringes on parents' fundamental right to rear their children.")

States who refuse to apply strict scrutiny in parental rights cases unsurprisingly have the highest percentages of children receiving foster care services who were nonvictim children. See... DHHS Maltreatment Report FY2021 pg. 88, *Supra.* (South Dakota-20%; Indiana- 26%; and Missouri-70%). Comparably, states like Texas, (10%); Oklahoma, (2%); and Iowa, (2%), have codified strict scrutiny standards with regard to parental rights and experience the lowest percentage of children receiving foster care services who are nonvictims. *Id.* 88. Other states, like Alabama (27%), Minnesota (50%), and Wisconsin (55%), continue to maintain a high percentage of children receiving foster care who were nonvictims despite established state court precedent because of an inconsistent application of strict scrutiny. *Id.*at 88. The

confusion surrounding which standard of scrutiny applies has given rise to confusion surrounding what procedures are due to parents. Because the scrutiny ranges across the nation the protection afforded to parents also ranges. This lack of clarity has resulted in an inconsistent enforcement of fundamental rights across the nation and basically empowered some state agencies with regulatory power over a parent's rearing of his or her child no different than a licensed day care. This is not consistent with this nation's traditional history regarding government intervention into the family. This inconsistency warrants this Court's review.

B. The Holdings in *Hobbs, A.S. v. T.R.B.*, and the Cases Presently Before This Court Incorrectly Hold That the Denial of a Hearing Requiring the State to Prove Parental Unfitness with Clear and Convincing Evidence Prior to Depriving an Involved Biological Parent of Custody of His Child Does Not Violate Procedural Due Process.

These cases, *Hobbs* and *A.S. v. T.R.B.* permit the state to skip the process of finding parental unfitness before it assumes custody of a child from its parents. Based on this, the lower court in this case and in *Hobbs* and *A.S. v. T.R.B.* depart from *Troxel*, *Stanley*, *Santosky*, *Quilloin* and other holdings of this Court. These holdings cement the use of juvenile dependency to assume initial custody of a child from a parent without requiring the state to prove unfitness with clear and convincing evidence. Juvenile dependency proceedings are unfair to parents when employed as an initial custody action. Three main characteristics render them grossly inadequate. First, juvenile dependency's exclusion of fitness as a factor inhibits the ability of

parents to defend against actions where the state has no compelling state interest in the care of the child. The primary defense available to parents in actions where the state seeks to override the parent's ideals of the best interests of the child in the absence of danger or serious harm, is parental fitness. *Ex Parte E.R.G.* No. 1090883 (Ala. Civ) , at *19. The exclusion of parental fitness as a factor at the initial hearing of any case seeking to deprive a parent of control of the upbringing of his children in favor of a non-parent denies a fair and meaningful opportunity for the parent to defend against the action. Subjecting a presumptively fit parent to a dependency proceeding in defense of his fundamental right to control the upbringing of his children renders him nothing more than a toothless dog barking at the moon. No matter how fit he is, his right to his children's care is at the discretion of the juvenile court and the child welfare agency.

Secondly, dependency utilizes clear and convincing evidence of dependency standards as opposed to clear and convincing evidence of unfitness standards. *See... A.G. v. Ka.G.,* 114 So. 3d 24, 26 (Ala. 2012); See also... *Ex Parte L.E.O,* 61 So. 3d 1042, 1054 (Ala. 2010) J. Murdock dissenting citing *O.L.D. v. J.C.*, 769 So.2d 299, 302 (Ala.Civ.App. 1999). Because parental unfitness is not the standard attached to clear and convincing evidence of dependency, the only other standard that can be associated with a clear and convincing evidence of dependency standard is the best interest of the child. *See... Troxel at* 96 (Justice Kennedy dissenting) ("[T]he law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child."). The best interests

of the child standard does not govern parents' exercise of control of the upbringing of their children. *Reno v. Flores*, 507 U.S. at 304. Permitting the utilization of the best interest of the child standard alone in non-parent custody disputes eradicates the constitutional basis on which to restrain government from substituting "its judgment for that of a fit parent as to any issue". See... *Ex Parte E.R.G.*, No. 1090883, at *75 (Ala. June 10, 2011). The utilization of these standards alone also denies the parent a meaningful opportunity to defend his sacred bonds with his children.

Lastly, in Alabama, juvenile dependency is collaboratively administered by the juvenile courts and child welfare agencies. The Court Improvement Program, (CIP), is a federal grant program aimed at strengthening the role of courts in achieving stable and permanent outcomes for children in foster care through collaboration with child welfare agencies (see 42 U.S.C. 629h). [1] In Alabama, one of the goals of the CIP is to streamline dependency procedures and processes to increase child welfare efficacy. See... 2021 Alabama Administrative Office of Courts Annual Report. [2] The Children's Policy Council, (CPC), is a state-level collaborative body within the Executive Branch of Alabama government which is tasked with addressing the needs of children and families, including child welfare, governed by the Ala. Code (1975) §26-24-30 through §26-24-34. The CPC includes prominent officers such as the

[1] In receipt of CIP grants, courts and child services entities such as DHR/CPS must engage and meaningful and ongoing collaboration in the administration of proceedings related to foster care such as dependency. Collaboration ranges from training parent court appointed attorneys to the creation of specialized courts. The key goal of this collaboration is to "improve outcomes for children and families throughout the State". See... U.S. Department of Health and Human Services, Court Improvement Programs: Collaboration Between Child Welfare Agencies and Legal and Judicial Communities, https://www.childwelfare.gov/pubPDFs/cip_collaboration.pdf

[2] https://www.alacourt.gov/Annual%20Reports/2021AOCAnnualReport.pdf

Alabama Supreme Court Chief Justice, the juvenile judge of each county and the heads of child welfare agencies in each county all engaged in collaborative child welfare policy making. *See....* CPC website found at http://www.alcpc.org/ and Alabama Department of Early Childhood website found at https://children.alabama.gov/for-advocates/childrens-policy-council/ . This collaboration creates conflicts of interest, a lack of impartiality, and violations of procedural safeguards in dependency proceedings.

One significant issue stems from the extrajudicial provision of funding, training, data, and resources to the courts and child welfare agencies through the CIP and CPC. The Ala. Code (1975) §41-15B-2.2(b)(3)(a) requires that a portion of grant funds administered by CPC, through the juvenile judge as chairman of CPC, shall be allocated to the Alabama Department of Human Resources for various children's services, including those unrelated to the judicial process. *See also... Ala. Code* (1975) §41-15B-3. This leads to perceptions of bias, as judges may be influenced by recommendations, guidelines, or goals favoring child welfare agencies and their preferred outcomes. A juvenile judge is seen as part of the child welfare team as opposed to an independent adjudicator. Training and education provided by the CIP and CPC on child welfare topics, laws, and practices also raise concerns. While it is essential for stakeholders to be well-informed, there is a great risk that judges are influenced by opinions or expectations that are not directly related to the facts or law of the specific case they hear. In an interview broadcasted by one of the local media companies, the Russell County juvenile judge involved in this case brazenly explains

how fairness is excluded in child welfare cases until children are provided with what he deems as protection by child welfare agencies. He continues to explain the existence of a symbiotic relationship between the juvenile court and child welfare agencies. [3] This collaboration and symbiosis has streamlined the requirement of prior occurring findings of parental unfitness out of existence with enforcement from *Hobbs* and *A.S. v. T.R.B.*. This streamlining has made CPS/DHR extremely effective and efficient at the expense of the fundamental rights of parents and their children. This partnership in dependency demonstrates that these procedures were never intended, nor could they ever be intended to be applied to assume initial custody of a child from a parent in favor of child welfare agencies.

C. Holdings of Other State Courts of Last Resort Conflict with Alabama's Holdings that the Denial of a Hearing Requiring the State to Prove Parental Unfitness with Clear and Convincing Evidence Prior to Depriving a Parent of Custody Does Not Violate Procedural Due Process.

State supreme courts are now split as to what procedures are owed to parents in dependency actions under the Due Process Clause. Only this court can address the split between state courts and bring clarity to this crucially critical area of law. Some courts uphold the denial of a hearing requiring the state to prove parental unfitness before depriving a parent of the control of the upbringing of his child as a violation of procedural due process.

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[3] "Street Talk with Loretta Rose – Judge Zack Collins Sr." Beam 7, October 26, 2021. https://www.youtube.com/watch?v=0043-SojQvQ&t=820s beginning at minute 13:34.

1. For example, in *In re J.L.*, 20 Kan. App. 2d 665, 891 P.2d 1125, rev. denied 257 Kan. 1092 (1995), the Kansas Appellate Courts relied on this Court's rulings in *Mathews v. Eldridge,* 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976); *Stanley v. Illinois,* 405 U.S. 645, 656-658 (1972); *Carrington v. Rash,* 380 U.S. 89 (1965); and *Bell v. Burson,* 402 U.S. 535 (1971) in holding that the state's employment of a presumption of parental unfitness to remove a child from the custody of a mother who had been found unfit eight years prior, in an unrelated case, violated procedural due process when it failed to provide her with a hearing on her current fitness with relation to a child born subsequent to the finding of unfitness. *In re J.L.*, at, 1132-1133.

The court noted that: (1) a natural parent's rights to the custody of his children is a fundamental right which "may not be disturbed by the State or third persons absent a showing the natural parent is unfit.", (2) the risk of error in allowing the state to employ a presumption of unfitness in matters involving a right as significant as the right of a parent to the custody and control of his child is "too great", (3) allowing a presumption of unfitness magnifies the extreme disadvantage parents face with regard to the availability of resources to litigate claims, and (4) the fact that presuming unfitness may be more convenient and less burdensome does not justify the existence of the presumption. *Id.* at 1130 - 1133. Here, in these cases, the trial court did not provide a hearing on fitness and merely presumed Dammuon's and his wife's unfitness simply because the juvenile intake officer filed the petition. the basis that the petition had been filed.

2. The Wisconsin Supreme Court makes it abundantly clear that its interpretation of procedural due process encompasses a hearing that requires proof of parental unfitness before stripping a parent of the right to control the upbringing of his children. The Wisconsin Supreme Court, citing *Santosky* and *Stanley,* held that procedural due process requires that parental unfitness must be proved by the state with clear and convincing evidence. *Steven V. v. Kelley*, 271 Wis. 2d 1, 7 (Wis. 2004) ("By statute and as a matter of procedural due process, parental unfitness must be proved by clear and convincing evidence").

3. Michigan has also adopted a similar interpretation of the procedural requirements in state actions to deprive a parent of the custody, care, or control of his children. In *In re Sanders*, that court struck down a law that allowed both parents to be deprived of the right to control the custody and care of their children, based on a finding that one parent was unfit. *In re Sanders*, 852 N.W.2d 524, 527, 530-532 (Mich. 2014). The *Sanders'* court held that there were insufficient "procedural safeguards" in place to protect the due process rights of the parent who had not been deemed unfit. *Id.* at 555.

4. The Seventh Circuit has also found that the denial of a hearing on unfitness prior to depriving a parent of custody in favor of a non-parent implicates a procedural due process violation. In *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000), the court found that procedure at a minimum required officials to not misrepresent facts to obtain removal of a child from his parents and required adequate pre-deprivation hearings in the absence of exigent circumstances. Dependency proceedings, as shown

above, are grossly inadequate procedures when applied to remove a child from a presumptively fit parent.

II. Certiorari is Warranted Because the State's Application of the Ore Tenus Rule in Appellate Review of Parental Rights Cases Conflicts with the Holdings of *Santosky* and Holdings of Other State Courts of Last Resort.

Alabama's reliance on the ore tenus rule in appellate review of third-party custody disputes creates a conflict with the standard set by this Court in *Santosky v. Kramer*, which requires clear and convincing evidence of unfitness to protect parental rights in non-parent custody proceedings. In contrast, other state courts recognize the importance of applying a stricter standard of review in parental rights cases, as required by *Santosky*, to ensure that parental rights are not arbitrarily or erroneously deprived by lower courts or administrative agencies.

For example, the Oklahoma Supreme Court in, *In the Matter of S.B.C*, 64 P.3d 1080 (Okla. 2002), emphasized that appellate courts must scrutinize the record to ensure that the trial court's findings rest on clear and convincing evidence. The court reasoned that failure to do so would allow trial courts to rely on a lower burden of persuasion, creating reversal proof judgments which undermine the fundamental right of parents to their children. Id. *at* 1082-83. Similarly, Georgia's highest court, in *Blackburn v. Blackburn*, 249 Ga. 689, 692 (Ga. 1982), and California's highest court, in *T.B. v. O.B. (In re O.B.)*, 9 Cal.5th 989, 995 (Cal. 2020), both denounced the use of ore tenus review in parental rights cases, acknowledging the need for a higher level of scrutiny to safeguard parental rights.

Although some exceptions to the ore tenus rule have been allowed by Alabama courts in some dependency cases, these exceptions are not the rule. *See, eg... J.C. v. State*, 986 So. 2d 1172 (Ala. Civ. App. 2007); *See also, eg... Ex parte R.G.*, 168 So. 3d 1214 (Ala. 2015). The application of any exceptions appears to be applied on an ad hoc basis. Rulings like *Hobbs v. Heisey* and *A.S. v. T.R.B.* perpetuate the ore tenus rule's judgment-proof status quo in parental rights cases involving non-parents, preventing *Santosky's* standard from being properly applied in appellate review.

States like Oklahoma, Georgia, and California have correctly assessed the need for a more stringent standard of appellate review in parental rights cases and have properly considered the significant impact on families when custody decisions are at stake. The cases before this Court aptly illustrate Oklahoma's, Georgia's, and California's assessment of appellate review of parental rights cases as the proper standard. In these cases, the trial court was allowed to depend solely on the testimony of its CPC partner, RCDHR, and the court appointed Guardian ad litem, who had never met any member of Dammuon's family. Naked assertions were all that it took to convince the trial court that Dammuon's children were children who had been adjudicated dependent by a juvenile court at the time of the filing of the petition. Nothing more is required in appellate review of these types of cases. There is no point in attending a hearing where the trier of fact will rely on the testimony of a partner whose testimony stands to enrich the partnership and then have that testimony given special weight in appellate review. The high rate of unnecessary removals in CPS cases demands a greater standard than the presumption of correctness. Applying

Santosky's clear and convincing evidence standard at all stages of litigation is crucial to ensure a fair and meaningful adjudication of parental rights cases.

III. The Alabama Supreme Court's Interpretation of Dependency Law Has Serious Implications for the Rights and Welfare of Parents and Children.

The Alabama Supreme Court's interpretation of dependency law also has serious implications for the rights and welfare of parents and children, especially those involved in CPS responses with no Maltreatment but still force family break ups and participation in child welfare services. According to the US DHHS Child Maltreatment 2021 Report, Alabama had 2,833 children placed in foster care in response to a maltreatment allegation in fiscal year 2021. Of those 2,833 children, 753 (27%) were not victims of maltreatment. *Id* at 88. One in 4 of the children placed in Alabama's foster care system in response to an allegation of maltreatment were not exposed to maltreatment. This raises serious questions of whether Alabama's dependency proceedings are consistent with the federal and state laws that protect parents and children from unwarranted state intervention.

It is well-established that the removal of a child from their parents causes significant harm to the child. [4] The state has a compelling interest in protecting children from significant harm which runs counter to removing a child from a parent

[4]See... Trivedi, Shanta, The Harm of Child Removal (February 25, 2019). 43 New York University Review of Law & Social Change 523 (2019), Available at SSRN: https://ssrn.com/abstract=3341033 or http://dx.doi.org/10.2139/ssrn.3341033; See also... American Bar Associaion, "Trauma Caused by Separation of Children from Parents", see also... https://www.americanbar.org/groups/litigation/committees/childrens-rights/trauma-caused-by-separation-of-children-from-parents/

who has not been shown to have caused harm to his or her child. According to the DHHS Maltreatment Reports, thousands of children across the nation are being harmed every year, not by their parents, but by the state.

IV. This Case is an Excellent Vehicle

Finally, this case is an excellent vehicle for resolving the question presented and to resolve confusion as to what rights parents have when they become the subject of a CPS response. Alabama's highest court has made it clear that courts cannot permit entry into a private home without "probable cause to believe that a crime is being or is about to be committed or a valid regulation is being or is about to be violated." *H.R. v. St. Dept. of Human Resources,* 612 So. 2d 477, 479 (Ala. Civ. App. 1993), certiorari denied (Ala. Sup. Ct.1993). In *H.R. v. St. Dept. of Human Resources,* a mother also refused DHR entry into her home when investigating an allegation that did not involve serious harm to the child. After being refused entry, DHR filed petitions alleging abuse and neglect in the juvenile court which subsequently ordered the mother to allow the search and seizure. After nearly a year of DHR's searches and seizures, the mother received a ruling from the appellate courts holding that the search and seizures were illegal. *Id* at 479. Juvenile dependency is the latest vehicle for illegal and warrantless CPS search and seizures. Courts and child welfare agencies are utilizing the best interests of the child as the sole probable cause ground to search homes of presumptively fit parents and seize custody of their children through the application of dependency. This is far from the almost a century worth of cases from this Court recognizing the right to rear and raise a child free from

unwarranted government intrusion as a fundamental right worthy of substantive protection and the age-old maxim that a man's home is his castle.

The belief that refusal of a CPS investigation alone warrants removal of a child is a prevalent belief throughout the nation. According to an NBC News and ProPublica Report, "40 state child welfare agencies, all said they would only obtain a warrant or court order to search a home — or call the police for help — in rare cases when they are denied entry." [5] The report notes that coercion, with the threat of removal of the child and the filing of neglect petitions, are common tactics to gain warrantless entry. These warrantless searches have become such a problem that some states like Texas have passed bi-partisan legislation requiring CPS to provide written notification of allegations, the parent's right to remain silent, and the right to decline investigations to decrease the number of children in foster care. See... Texas HB730 88th Legislature. Found at https://legiscan.com/TX/bill/HB730/2023 . States like New York continue to support the status quo of warrantless searches. [6] A pronouncement from this Court affirming the requirement of some showing of parental unfitness resulting in tangible or imminent serious harm to the child prior to the initiation of dependency processes would curb the rampant CPS overreach evidenced in the DHHS Maltreatment Reports. This would also limit CPS' ability to utilize the

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[5] Hager, Eli, et al. "CPS workers search millions of homes a year. A mom who resisted paid the price." NBC News. https://www.nbcnews.com/news/us-news/child-abuse-welfare-home-searches-warrant-rcna50716

[6] Hager, Eli., "Texas, New York Diverge on Requiring Miranda-Style Warnings in CHild Welfare Cases." Pro Publica, 5 July 2023. https://www.propublica.org/article/texas-new-york-diverge-miranda-warning-bill

presently real threat of court intervention to search a home and seize a child where no allegation of serious harm is made or believed to be occurring.

Moreover, the issues addressed here affect minority populations with greater prevalence. See... US DHHS Bulletin, "Child Welfare Practice to Address Racial Disproportionality and Disparity". [7] African Americans and Native Americans are far more likely to be placed in foster care due to causes unrelated to a child safety concern. According to the DHHS FY2021 Maltreatment Report, non-white populations accounted for 61% (270,229) of the reported 443,643 nonvictim children forced into CPS services. *Supra*. Pg. 105. Again, these are children with no evidence of maltreatment by their parents. The U.S. Census Bureau reports that non-white populations only comprise of 38% of the U.S. population. Found at https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html .

In a concurring opinion joined by Justice Sotomayor and Justice Jackson, Justice Gorsuch cogently explained the issues Native Americans faced in combating attempts by child welfare agents to culturally assimilate them throughout the 19th and 20th centuries. *Haaland v. Brackeen*, No. 21-376 (June 15, 2023) at 43-52. The opinion notes a high prevalence of children being removed without actual harm, under vague grounds such as "neglect". *Id* at 50. These vague grounds have now built a stronghold within juvenile dependency. The solution posed by child welfare agencies is more involvement. *See... Child Welfare Practice to Address Disproportionality and*

[7] https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf

Disparity, pg. 8-31. The answer is not more agency involvement. The answer is a respect for the fundamental rights already recognized by this Court and owed to parents of all ethnic and socio-economic backgrounds. This case is an excellent vehicle to affirm the protection of the fundamental rights of all parents regardless of background and to clarify what procedures and levels of scrutiny are required when states seek to intrude upon one of this nation's oldest and most treasured liberties

CONCLUSION

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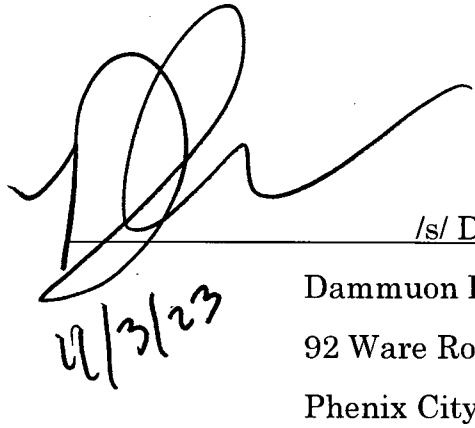
The constitutional rights of fit biological parents recognized by *Troxel* and *Pierce* are being eroded by lower courts. They will continue to flounder until this Court intervenes. This case presents a compelling vehicle for that needed intervention. The petition should be granted.



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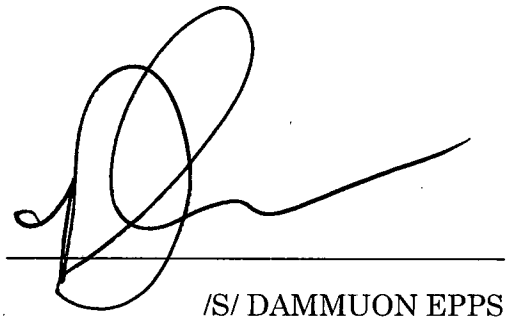

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