No. 18-1431

IN THE
Supreme Court of the United States

FRANK G.,
Petitioner,
v.
JOSEPH P. AND RENEE P.-F., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Appellate Division, Supreme Court of New York, Second Judicial Department

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE OF NEW YORKERS FOR CONSTITUTIONAL FREEDOMS AND THE NATIONAL ASSOCIATION OF PARENTS IN SUPPORT OF PETITIONER

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MOTION OF NEW YORKERS FOR CONSTITUTIONAL FREEDOM AND THE NATIONAL ASSOCIATION OF PARENTS, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37, New Yorkers for Constitutional Freedom ("NYCF") and the National Association of Parents, Inc. ("ParentsUSA") respectfully move this Court for leave to file the accompanying brief as *amici curiae*.

On June 3, 2019, counsel for NYCF and ParentsUSA requested consent from all parties to file the accompanying brief. Counsel for Petitioner granted consent. Respondent Joseph P. (who appears to be unrepresented) expressly denied consent. The other Respondents did not send a reply.

NYCF and ParentsUSA submit that there is good cause for this Court to grant leave to file. The Petitoner here asks the Court to reaffirm its precedents endorsing parental rights under the Due Process Clause. But as noted in the accompanying brief, some of the members of this Court have indicated that these precedents should be set aside as inconsistent with the original understanding of the Clause.

NYCF and ParentsUSA would like to address this important originalist objection by providing this Court with substantial and relevant historical evidence. They believe that this evidence has not been

significantly considered in prior cases before this Court.

This evidence shows that the Due Process Clause of the Fourteenth Amendment, as originally understood and initially interpreted, incorporated the presumption favoring the parents' custody of their offspring.

By thus addressing one of the main objections to what Petitioner requests—an emphatic reaffirmation of this Court's parental-rights holdings—this brief will be of substantial assistance to the Court in its consideration of the petition.

NYCF and ParentsUSA therefore respectfully request that leave to file be granted.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

New Yorkers for Constitutional Freedoms ("NYCF") is a 501(c)(3) nonprofit organization that works to promote public-policy objectives that are consistent with biblical ethics and the principles of the United States Constitution. One of those constitutional principles is the right of fathers and mothers to the custody, care, and education of their offspring.

The National Association of Parents, Inc. ("ParentsUSA") is a secular, nonpartisan. 501(c)(3) nonprofit organization that serves both mothers and fathers, whether married or unmarried, whether biological or adoptive, throughout the United States. One of its missions is the preservation of the constitutional rights of mothers and fathers to raise their children—as those rights have been recognized by this Honorable Supreme Court of the United States of America.

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[1] *Amici* affirm that no counsel for a party wrote this brief or the accompanying motion in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. The preparation and submission of this brief was partly funded by the Independence Law Center, a public-interest law firm focused on protecting our fundamental rights. All unrepresented parties and counsel for represented parties received timely notice of *Amici*'s intent to file this brief to which filing Petitioner consented and Respondents did not consent.

SUMMARY OF ARGUMENT

Does the Due Process Clause, properly interpreted, still afford parents the presumptive right to the custody, care, and education of their offspring?

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

But as the Petitioner points out, some courts have concluded that this holding has been partly nullified by recent developments in law and policy, including this Court's holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Brief of Petitioners at 13-16.

Amici write separately to refute the originalist objection that this parental presumption was never good law. In his dissent in *Troxel*, the late Justice Scalia contended that the *Meyer* and *Pierce* precedents were ill-begotten—"from an era rich in substantive due process holdings that have since been [rightly] repudiated." *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (citing *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), as overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

Justice Thomas likewise questioned whether this parental presumption, given its derivation from "substantive due process," was consistent "with the original understanding of the Due Process Clause." *Id*. at 80 (Thomas, J. concurring). Yet unlike Justice Scalia, he concluded that because the parties had not

raised this originalist challenge, the Court should "leave the resolution of that issue for another day." *Id.*

Amici submit that the Court should now resolve this issue and emphatically reaffirm its parental-rights precedents. The parental presumption, *Amici* believe, is fully consistent with the original understanding of the Due Process Clause of the Fourteenth Amendment.

Despite what might be erroneously inferred from reading this Court's opinions in *Meyer* and subsequent cases, this presumption was not dependent on Lochnerean substantive due process. In the years between the passage of the Fourteenth Amendment and the *Lochner* era, state courts recognized that the parental presumption was essential to constitutional due process. These early decisions, dating from just after the Amendment's ratification, were consistent with the Amendment's original meaning. Like the presumption of bodily liberty, the parental presumption was (1) one of those "settled usages and modes of proceeding" essential to the original meaning of "due process of law," *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855), and (2) integral to the presuppositions implied by the Clause's prohibition on certain deprivations.

ARGUMENT

I. Decades before the *Lochner* Era, state courts held that the Due Process Clause required the parental presumption.

This Court first recognized constitutional parental rights in *Meyer*. *Troxel*, 530 U.S. at 65 (plurality op.); *id*., at 76 (Souter, J., concurring). Decided in 1923, well into the *Lochner* era (1897-1937), the *Meyer*'s holding was based expressly on economic, substantive due-process precedents. Writing for the Court, Justice McReynolds cited, *inter alia*, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and *Lochner v. New York*, 198 U.S. 45 (1905) to support the claim that "liberty," as used in the Due Process Clause, "denotes not merely freedom from bodily restraint but also the right of the individual to contract…,to marry, establish a home and bring up children…and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. It was, therefore, reasonable for Justices Scalia and Thomas to identify "substantive due process" as the parent of constitutional parental rights.

But well before *Meyer*—and indeed decades before the *Lochner* era—state courts had affirmed that, under the Due Process Clause, parents have the presumptive right to the care and custody of their offspring, and cannot be deprived of such without a showing of unfitness. Just two years after the ratification of the Fourteenth Amendment, the Illinois Supreme Court held that the Due Process Clause invalidated a statute authorizing juvenile detention

absent a finding of either the child's criminal liability or the parent's "gross misconduct or almost total unfitness"—a situation the court called "dire necessity." *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 287–88 (1870).[2] In the next decade, various state courts accepted *Turner,* but upheld different juvenile detention statutes precisely because they required a finding of unfitness. According to the Wisconsin Supreme Court, the Illinois law invalidated in *Turner* seemed to require only "nice fault-finding with the course of the parent with the child," such as a mere "failure in some measure of support or education," but Wisconsin's law satisfied due process by requiring proof of "the total failure of the parent to provide for the child." *Milwaukee Indus. Sch. v. Supervisor of Milwaukee County*, 40 Wis. 328, 338–39 (1876). The Illinois Supreme Court likewise upheld a revised statute that included "anxious provision…for the due protection of all just rights," including a required showing "that the parent or guardian is not a fit person to have the custody of the infant." *In re Ferrier*, 103 Ill. 367, 371 (1882). The court explained that the statute thus respected the long-recognized "natural presumption" of parental authority over the care and education of the infant. *Id.* at 372.[3]

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[2]In discussing constitutional due process, Judge Anthony Thornton, the author of the opinion, did not specify the Fourteenth Amendment's Due Process Clause or the virtually identical prohibition in the state constitution, ILL. CONST., art. II, § 2 (1870) ("No person shall be deprived of life, liberty or property without due process of law.").

[3] These cases indicate that *Turner* was not, as one scholar has recently claimed, an "outlier," JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES AND THE

The parental presumption was found essential to not only the process whereby the state assumed custody from a parent, but also the process whereby the state authorized a transfer of custody to adoptive parents or other substitute guardians. For instance, in *Schiltz v. Roenitz*, 86 Wis. 31 (1893), Wisconsin's supreme court invalidated an adoption because, contrary to the Fourteenth Amendment, the trial court had deprived a parent of "his most sacred natural rights in respect to his child" and "without notice to the plaintiff, or opportunity to him to defend against the charge of abandonment,"*id.* at 40. Such a process, the high court said, was adverse to "all our ideas respecting the administration of justice" and "the principles which lie at the foundation of all judicial systems." *Id.* *See also*, *Boescher v. Boescher*, 5 Ohio Dec. 184, 184–85 (Ohio C.P. 1883) (affirming that "due process" requires that, before a parent can be deprived of "the possession and society of his minor child," there must be "some form of adjudication" showing that the parent "has forfeited that right by misuse of the child, or by something that will justify a court of chancery in interfering and for the protection of the child").

Moreover, the Wyoming Supreme Court upheld an adoption process, even without notice to the father. Due process was satisfied when "the fact of [his] abandonment" had been established by the evidence. *Nugent v. Powell*, 4 Wyo. 173, 202 (1893). Even more than notice and hearing, it seems, proof of the parent's unfitness was essential to due process.

ENFRANCHISEMENT OF CHILDREN 95 (2014). Though often distinguished, its holding on the parental presumption was good law and endorsed in subsequent decisions.

These parental-presumption decisions did not depend on any proto-Lochnerean substantive due process. Rather, like the presumption of life and bodily liberty in criminal cases, the parental presumption was simply part of the *process* that was *due* in any decision to deprive a person of the custody of his or her bodily offspring. In fact, the same court that decided *Turner* proved unfriendly to substantive economic due process when it first appeared. *See Munn v. People*, 69 Ill. 80, 90 (1873) (holding that mere price regulations of warehouses did not "deprive" the warehouse owners of property).

Moreover, unlike economic due process, the rebuttable parental presumption seemed uncontested in the courts. As the Wisconsin Supreme Court noted, "[i]t is not disputed but that a father has dominion, by right, over his minor children, nor that such primary right may be lost or forfeited by him by abandonment, neglect, or abuse." *Schiltz*, 86 Wis. at 37. To the knowledge of *Amici* and their counsel, no American judge before 1900 denied that parents had the presumptive right to the custody of their offspring, or that such a presumption was essential to constitutional due process.

II. These early decisions were consistent with the original meaning of the Due Process Clause.

The opinion in *Turner* was published just two years after the ratification of the Amendment, and authored by a member of the Thirty-Ninth Congress

that drafted it.[4] As indicated *supra*, other decisions endorsing the parental presumption were decided within the next twenty-five years. Given the authorship and date of these judicial opinions, they provide substantial evidence as to the original meaning of the Fourteenth Amendment.

At the same time, these opinions did not closely specify how the presumption of parental right mapped onto the text of the Due Process Clause.[5] Still, in at least two respects, the parental presumption was essential to the original meaning of the Clause.

A. The parental presumption was one of those "settled usages and modes of proceeding" of Anglo-American law and thus essential to "due process of law."

First, the parental presumption seems essential to the original sense of "due process of law." According to the Amendment's framers, this phrase had already been authoritatively defined by the courts. As John Bingham said in the Thirty-Ninth Congress, in response to a request for a definition "the courts have settled that long ago, and the gentleman can go and read their decisions." CONG. GLOBE, 39th Cong., 2d sess., 1089 (1866).

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[4] A BIOGRAPHICAL CONGRESSIONAL DIRECTORY: WITH AN OUTLINE HISTORY OF THE NATIONAL CONGRESS, 1774-1911, at 1055 (1913).

[5] "No state shall…deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

The leading judicial decision expounding "due process of law" was Justice Curtis's opinion for a unanimous Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). At the time of the Amendment's adoption, state courts treated *Murray's Lessee* as an accurate and authoritative interpretation of the phrase "due process of law," as that phrase was used in the state as well as federal constitutions. *See, e.g.*., *Huber v. Reilly*, 53 Pa. 112, 117 (1866) (affirming that "due process of law" "was never better [defined] both historically and critically," than in *Murray's Lessee*).

In *Murray's Lessee*, this Court had held that "due process of law" required conformity with the "settled usages and modes of proceeding" of Anglo-American law. 59 U.S. at 277. This interpretation (both of the case and the Due Process Clause) prevailed when the Fourteenth Amendment was adopted. *See Huber*, 53 Pa. at 117 (holding that due process generally requires the "opportunity to answer and a trial according to some settled course of judicial proceeding"); *Martin v. Snowden*, 59 Va. 100, 141 (1868) (invalidating a mode of collecting taxes because it was unknown "to the usages and modes of proceeding which prevailed in England or in this country before, or at the time of, the adoption of the [federal] constitution"); *Gibson v. Mason*, 5 Nev. 283, 302 (1869) (affirming that "nothing further was intended by [the Clause] than to secure to the citizens the usual and ordinary means or course of judicial proceedings generally followed or observed in similar cases at the time it became a part of the fundamental law").[6]

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[6] Two decades later, this Court would read *Murray' Lessee* as holding that conformity with settled modes merely a *sufficient*,

At the time of the adoption of both the original Constitution and the Fourteenth Amendment, the parental presumption was a well settled mode or usage in Anglo-American procedural law. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 205 (1832) (Parents are "generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion, and when the morals, or safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere."). *Accord*, 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1341, at pp. 561–62 (8th ed. 1861); W.C. RODGERS, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 536 (1899).

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but not *necessary* condition. *Hurtado v. California*, 110 U.S. 516, 528 (1884); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 245 (2015) (explaining that after *Hurtado*, "[h]istorical acceptance was a sufficient but not a necessary condition of constitutionality"). *Amici* respectfully submit, however, that the original understanding of *Murray's Lessee*—and, by extension, of the Fourteenth Amendment's Due Process Clause—was more accurately reflected in the dissent of Justice Harlan in the same case, *id.* at 542–46 (Harlan, J., dissenting), and in a recent opinion by Justice Gorsuch, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring) (citing *Murray's Lessee* and other authorities to conclude that under due process, a person must enjoy "the benefit of (at least) those customary procedures to which freemen were entitled by the old law of England" (internal quotations omitted)).

B. Like the presumption of bodily liberty, the parental presumption is a presupposition of the prohibited deprivation.

Second, like the presumption of bodily liberty, the parental presumption was a presupposition implied in the Clause's prohibition. The forbidden *deprivation* presupposes something already *privy* or *private* to the person, including his or her bodily integrity (life), locomotion (liberty), and certain property, such that their loss is a violence—something that must be justified. Thus, by its text, if not also its history, the Clause's prohibition would seem to presuppose the existence of certain rights of which the person cannot be deprived absent *good cause*. As Justice Curtis explained a few years before *Murray's Lessee*, in a case involving bodily liberty, within the Due Process Clause "is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it unless it is proved." *Greene v. Briggs*, 10 F. Cas. 1135, 1140 (C.C.D.R.I. 1852) (No. 5,764) (quoted in *Wynehamer v. People*, 13 N.Y. 378, 443 (1856) (Selden, J., concurring)).

The parental presumption would likewise seem implied in the words of the Due Process Clause. The liberty or property right of a parent to his or her bodily offspring would also seem to be something *privy* to the person, much like the person's bodily liberty or the clothing or other effects on his or her person. Consequently, any deprivation would seem to be a violence that would be unlawful absent a showing of good cause.

III. During the *Lochner* era, courts continued to recognize the parental presumption without reliance on substantive due process.

The parental presumption was not only consistent with the original meaning of the Due Process Clause, but continued to prevail throughout the *Lochner* era—without reliance on the emerging Lochnerean due process. For the most part, state courts generally endorsed the parental presumption without any mention of the *Lochner* line of cases. *See, e.g.*, *Kennedy v. Meara*, 127 Ga. 68, 78 (1906) (holding that under the Due Process Clause, the mother cannot be deprived of the custody of her minor child unless "the parent has been accorded a right to be heard on the question as to whether [by her conduct] a forfeiture has taken place"); *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183, 192 (1906) (holding that "[n]o father can be deprived of his child without an adjudication by a court of competent jurisdiction that he has abandoned or deserted it, or is unfit to have its custody and control"); *Mill v. Brown*, 31 Utah 473, 484 (1907) (reviewing *Nugent* and other cases to show that "[t]he whole fabric of the law…rests upon this theory [of the parent's presumptive right], and those laws are sustained by virtue of it"); *Bell v. Krauss*, 169 Cal. 387, 391 (1915) (holding that "*[p]rima facie* a parent is presumed competent and he is entitled to have the custody of his child unless found by the court to be incompetent," and finding that a father was "denied the care and custody of his daughter without due process of law" by the failure to provide him with notice and a hearing to defend his competence); Note, *Rights of Parents to Custody of Children*, 6 COLUM. L. REV. 454, 456 (1906) (re-

viewing cases and concluding that "due process of law" protects the "legal and natural rights of parents" by "requiring that before a child can be taken from the parent's custody it must be shown that the parent is so unfit or inefficient that the welfare of the child demands an exercise of the State's control"); *but see Ex parte Tillman*, 84 S.C. 552, 560-562 (1910) (anticipating *Meyer* by relying on *Allgeyer* to define "liberty" to include certain "family rights," including the right of the mother to the custody of her offspring against the putative right of an abusive father).

At the same time, however, some courts began to call into question the parental presumption. They relied on a new jurisprudence that treated parental authority as a revocable delegation from the state. For instance, two decades after the Amendment's adoption, Professor Christopher Tiedeman wrote that the "parent has no vested natural right to the control of his child," as "that right emanates from the State, and is an exercise of the police power," and criticized *Turner* as inconsistent with the idea that that "parental control [is] only a privilege or duty, granted or imposed by the State." CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES §§ 165 & 166a. at pp. 552–54, 560 (1886). *See also* LOUIS HOCHEIMER, THE LAW RELATING TO THE CUSTODY OF INFANTS, § 10, at 7 (3d ed. 1899) (stipulating that parents, as "the appointees of the government," have no "vested right" in their offspring). And in two cases, courts adopting this theory categorically rejected all parental due-process claims. *Wadleigh v. Newhall*, 136 F. 941, 948 (C.C.N.D. Cal. 1905) (citing Hochheimer and other sources to declare categorically that there is "no parental authority independent of

the supreme power of the state"); *Kenner v. Kenner*, 139 Tenn. 700, 702 (1917) (denying that any claim that a parent's loss of custody could be a deprivation of "property" under the Clause, for domestic relations are "regulated not on any theory of property, but rest, fundamentally, on the inherent police power of each of the States").[7]

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[7] To be sure, under the old rule, the parent's "property" interest did not amount to chattel ownership. Rather it was in the nature of a trust. But the grantor of that trust was not the state, but nature (or nature's Author). By this theory, then, parental authority arose from a trust that was anterior to the state. State interference with this parental trust was not, therefore, the revocation of a governmental grant but the adjudication that the natural trustee had relinquished or forfeited his or her authority.

For instance, in one antebellum case, a federal court explained that "the dictates of natural law" enjoin the father "to support, protect, and provide for the well-being of his children, according to the measure of his ability" and "the law invests him with a right of control over their persons," only to "enable[] him to perform more effectually and completely those duties which are enjoined, as well by the instincts of nature and the dictates of reason, as by the law of the land." *The Etna*, 8 F. Cas. 803, 805-06 (D. Me, 1838) (No. 4,542). The author of this natural law, and thus the grantor of this trust, was nature's Author: "The Creator of man, in giving to him a social nature and endowing him with those qualities which fit him for the enjoyment of social life, has imposed upon the parent, as one of the conditions of his being, the obligation of providing for his offspring while they are incapable of taking care of themselves." *Id.*

Thus while Professor Tiedeman claimed that the parental trust "emanates from the state," Judge Thornton called the parental trust "an emanation from God," that should not be infringed "except from dire necessity." *Turner*, 55 Ill. at 284–85.

Nonetheless, as indicated above, these cases were outliers in the pre-*Meyer* era. Courts generally still affirmed the longstanding rule that parents have the presumptive right to the custody of their offspring, and that such a presumption is essential to due process of law.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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