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 A Writ Of Certiorari To The Appellate Division, Supreme Court Of New York, Second Judicial Department

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* MARRIAGE LAW FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

1. *Amicus curiae*, the Marriage Law Foundation, pursuant to Supreme Court Rule 37(2)(a) and (b), respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari filed by Frank G., in Case Number 18-1431.

2. On June 3, 2019, counsel for *amicus curiae* requested consent from all parties to file the accompanying brief. Counsel for Petitioner granted consent.

3. On June 3, 2019, the Respondents answered that they would not consent to the filing of the *amicus curiae* brief, preferring to require the Court to formally address this motion.

4. This case involves a critical issue of constitutional law – the ability of a State to abridge the settled right of biological and adoptive parents to direct the upbringing of their children without undue interference from the State.

5. The ruling of the court below threatens to limit that right by conferring on a "new parent" parental rights and powers relative to two children with a fit biological parent (the Petitioner) and thereby largely eliminate that biological parent's right to direct the children's upbringing.

6. Marriage Law Foundation makes this motion for leave to file the accompanying *amicus curiae* brief in support of Petitioner.

7. No party or party's counsel authored any part of the accompanying brief, nor did Marriage Law Foundation or its counsel receive any money from a party to fund the preparation or submission of the brief.

8. The accompanying *amicus curiae* brief addresses in a way helpful to the Court the phenomenon of States assigning rights to non-parents in ways that limit or interfere with the long-protected rights of biological and adoptive parents and explains how this phenomenon will have broad implications that make this case certworthy.

For these reasons, the motion for leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Amicus adopts the Question Presented of Petitioner.

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INTEREST OF *AMICUS CURIAE*[1]

The Marriage Law Foundation is a nonprofit, nonpartisan organization which, since its creation in 2004, has provided to courts, legislatures, executive branch departments, other government entities, educational institutions, and the general public information, analysis, arguments, and data bearing on the important and pressing family law issues of the day, with a particular focus on the interests of children, now and in the coming generations.

SUMMARY OF THE ARGUMENT

At an accelerating pace, the courts of a number of States have conferred parenthood status on persons who are neither the natural nor the adoptive parents of the child. This project ("new-parent project") has the potential to, and often does, materially impact the parental rights and responsibilities of natural and adoptive parents (hereafter collectively "normative parents") in ways violative of the Fourteenth Amendment's Due Process Clause. That is because to confer under color of state law parental status on a stranger

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioner has consented to the filing of this brief, but Respondents have withheld consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

("new parent") is to insert into the parent-child relationship a second or a third holder of powers that generally are equal to those of the normative parent and that cannot but operate to constrain those of the normative parent. Indeed, the constraint has the potential to become virtually complete, largely or even entirely eliminating the fit normative parent's rights – as happened in this case.

Thus, the new-parent project implicates the Constitution and not just tangentially or peripherally. A State's creation of a new parent operates to constrain and, in not infrequent instances, may eliminate the fit normative parent's right, long recognized by this Court, to direct the upbringing of her child, with that right encompassing matters of schooling, religion, civic training, character development, and residence.

Although there is no blanket constitutional prohibition on a State conferring parental or parental-like rights on a person other than a natural or adoptive parent, under this Court's parental rights jurisprudence a State may not do so in a way that materially deprives a fit normative parent opposed to that conferral of her constitutionally guaranteed rights to direct her child's upbringing. Yet that is precisely what New York did here.

Marriage Law Foundation's deep experience in the family law field teaches that such constitutional transgressions are widespread and increasing. Hence, the pressing need for this Court to adjudicate cases such as this one and thereby provide much-needed guidance

to the States experimenting with the new-parent project. Responsible voices are calling for just such adjudication and guidance.

This case presents the clearest, cleanest conflict between this Court's jurisprudence on normative parents' liberty interests relative to child-rearing, on one hand, and, on the other hand, State interference with and even destruction of those liberty interests by way of the new-parent project. That conflict is clean and sharp because here (i) there is no normative parent consent or acquiescence, (ii) the normative parent is fit, and (iii) the purposes of the State-creation of the new parent are (a) to gratify adult desires and (b) to advance State policies designed to promote an egalitarian treatment of adults with some non-biological role in bringing forth the child or with some role in the nurture of the child – adult- and government-centered purposes.

Considerations of both judicial economy and judicial prudence identify this case as ideally suited for the beginning of this Court's attention to the pressing and fundamental constitutional issues unavoidably arising from the new-parent project. Moreover, this case well serves as a vehicle for this Court's attention to profound and pressing questions going both to the source of parental rights in our constitutional regime and to the scope and force in that regime of the child's bonding right.

REASONS FOR GRANTING THE PETITION

I. The accelerating "new-parent project" in a number of States gives rise to pressing and fundamental constitutional issues that this Court will have to resolve, and this case presents the ideal first case in that process.

The phenomenon that makes this case particularly certworthy is a state-law project: At an accelerating pace, the courts of a number of States have conferred parenthood status on persons who are neither the natural nor the adoptive parents of the child ("new-parent project"). That project began many years before *Obergefell*[2] and, although same-sex marriage enlarges the project, the project got material impetus from earlier law reform efforts[3] and often operates – as in this case – independent of any marital relationship.[4]

In the absence of guidance from this Court, the new-parent project has the potential to, and often does,

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[2] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[3] *E.g.*, Am. Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations (2002).

[4] For accounts of the history of (at least some aspects of) the new-parent project, see generally Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307 (2017) (hereinafter Grossman); Katharine K. Baker, *Quacking Like A Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI.-KENT L. REV. 135, 148-60 (2017) (hereinafter Baker); David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47 (Robin Fretwell Wilson ed. 2006).

materially impact the parental rights and responsibilities of natural and adoptive[5] parents (hereafter collectively "normative parents") in ways violative of the Fourteenth Amendment's Due Process Clause. It could not be otherwise. To confer under color of state law parental status on a stranger ("new parent") is to insert into the parent-child relationship a second or a third holder of powers that generally are equal to those of the normative parent. In the very nature of family life, the new parent's powers cannot but operate to constrain those of the normative parent, even in a setting of parental cooperation and amiability.[6] When that setting is one of conflict and disagreement, the constraint has the potential to become virtually complete, largely or even entirely eliminating the fit normative parent's rights – again, as happened in this case.

The new-parent project implicates the Constitution and not just tangentially or peripherally. This Court has long taught that the Constitution protects,

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[5] This Court in *Troxel v. Granville*, 530 U.S. 57, 66 (2000), acknowledged that the fundamental right of parents to make decisions for their children is the same for adoptive parents as it is for biological parents:

> [A]doption is a means of family formation that is no less fundamental because it is characterized by choice and commitment rather than blood and procreation. . . . The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

[6] Grossman, *supra* note 4, at 308 ("When parental status is granted to one adult, the rights of any other legal parent are diluted.").

against coercive state action, a fit normative parent's right to direct her child's upbringing, and that right encompasses matters of schooling, religion, civic training, character development, and residence. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 529 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57, 61 (2000); *cf. Prince v. Massachusetts* 321 U.S. 158 (1944). That is the very right that a State's creation of a new parent operates to constrain and may even eliminate.

Certainly there is no blanket constitutional prohibition on a State conferring parental or parental-like rights on a person other than a natural or adoptive parent. But under this Court's parental rights jurisprudence, a State may not do so in a way that materially deprives a fit normative parent opposed to that conferral of her constitutionally guaranteed rights to direct the upbringing of her child. Yet that is precisely what New York did here. Moreover, there is good reason to believe that such constitutional transgressions are widespread and increasing. Hence, the pressing need for this Court to adjudicate cases such as this one and thereby provide much-needed guidance to the States experimenting with the new-parent project. Responsible voices are calling for just such adjudication and guidance.[7]

In providing such guidance and as always for constitutional analysis, the different facts that surround

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[7] *E.g.*, Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483 (2018) (hereinafter Higdon).

creation of a new parent may lead to different conclusions. At one end of the possibilities is the normative parent's agreement with or acquiescence in the State's creation of the new parent. That can happen in one of two ways: one, the normative parent gives informed consent to the creation or, two, the normative parent marries a person in a State where the marriage itself will make the marriage partner a new parent. An intermediate possibility is the agreement, tacit or otherwise, of the normative parent and a legal stranger to jointly support the bringing forth of a child, with no agreement or even joint understanding about the stranger's subsequent legal status relative to the child. A further step removed from the agreement/acquiescence fact pattern is the situation where the normative parent subsequently opposes quite actively State creation of the new parent. At the far end of the possibilities is the case where the legal stranger seeking new-parent status had no material role relative to the bringing forth of the child and only an ambiguous "parental" role thereafter.[8]

An intermediate case, such as this case, is where this Court should start resolving the constitutional issues unavoidably created by the new-parent project. For one thing, the extreme case described at the end of the last paragraph is unlikely to come before this Court because of the reluctance of family courts to grant new-parent status in such a case.[9] That leaves,

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[8] For a discussion of the range of factual scenarios, see Baker, *supra* note 4, at 148-60.

[9] *Id.*

as a practical matter, an intermediate case such as this case as the one presenting the "easiest" of the constitutional issues arising from the new-parent project. It is the easiest because it presents the clearest, cleanest conflict between this Court's jurisprudence on normative parents' liberty interests relative to child-rearing, on one hand, and, on the other hand, State interference with and even destruction of those liberty interests by way of the new-parent project. That conflict is clean and sharp because here (i) there is no normative parent consent or acquiescence, (ii) there is no marital relationship, (iii) the normative parent is fit or, at least, has not been adjudicated otherwise, and (iv) the purposes of the State-creation of the new parent are (a) to gratify adult desires and (b) to advance State policies designed to promote an egalitarian treatment of adults with some non-biological role in bringing forth the child.

That last point is important here because only those two purposes – (a) and (b) – are what has brought this case to this Court. This case is not before this Court as the result of some New York program to randomly seek out families where "the best interests of the child" might be advanced by the creation of a new parent. No, this case is before this Court because Joseph wanted for himself new-parent status and New York wanted to implement its policy of egalitarian treatment of adults with some non-biological role in bringing forth the child. The combination of those two desires is what, by coercion of State law, has led to the large destruction of normative parent Frank's parental

rights. And if this Court's jurisprudence is to be credited, those rights are fundamental federal constitutional rights and New York's conduct in this case amounts to a serious violation of them.

Two other and related reasons, one sounding in judicial economy and one sounding in judicial prudence, counsel this Court to use this intermediate case to start resolving the constitutional issues unavoidably created by the new-parent project. As to judicial economy, if this Court holds in favor of New York's actions in this intermediate case, such a holding will quite probably preclude normative parents' constitutional claims in agreement/acquiescence cases; the lower courts will have the analytical tools they need to resolve those cases in a way consistent with this Court's judgment.

As to judicial prudence, if this Court holds against New York's actions in this intermediate case, the Court's reasoning will almost certainly shed light on the "harder" constitutional issues presented by the agreement/acquiescence cases. That is not to say that the Court's reasoning will necessarily mandate a resolution of those cases one way or the other. Rather, it is to say that the Court's reasoning will almost certainly stimulate and guide on-going discussion, debate, and analysis, thereby better enabling this Court to handle well those "harder" cases when they arrive here, as they certainly will.

Regarding this last point, this Court's resolution of this case should call forth reasoning on two large

ideas at the heart of our Nation's current struggles with the nature of the parent-child relationship. One idea goes to the source of parental rights, whether those rights are natural rights among those "certain unalienable Rights" with which "all [persons] . . . are endowed by their Creator"[10] or whether those rights are State-created, to be conferred and withdrawn at the will of the State, or whether they are some combination of those two kinds of rights.

The other idea is what is referred to in the literature as "the child's bonding right," the right of each child – to the greatest extent society can reasonably achieve this – to know and be raised by the two people whose biological union brought her or him into existence.[11]

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[10] *Declaration of Independence*. In 2000, Justice O'Connor declared, in her plurality opinion in *Troxel v. Granville*, that "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 v. Granville*, 530 U.S. 57, 65 (2000).

[11] *E.g.*, Monte Neil Stewart, Jacob D. Briggs, Julie Slater, *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 B.Y.U. L. REV. 193, 243-56; Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & POL'Y 1, 22-23 (2006); DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 180-83, 188-90 (2007) (hereinafter Blankenhorn); Margaret Somerville, *What About the Children?*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 67 (Daniel Cere & Douglas Farrow eds., 2004) (hereinafter Somerville).

We address those two large ideas in the following sections but set forth first two other and related reasons counseling this Court to take this case.

The first of those two reasons is the breadth of the impact of whatever this Court does with the new-parent project, whether to adjudicate the inherent constitutional issues to resolution or to do nothing. The new-parent project is big and getting bigger, meaning that an ever growing number of families are affected by it, an ever growing number of normative parents are having their parental rights constrained by it (whether gladly or otherwise), and an ever growing number of children in this Nation are having their very upbringing shaped by it.

The second reason is the depth of the impact of whatever this Court does with the new-parent project. Many things in life are important and consequential to the development and flourishing (or not) of the individual – schooling, health, security, financial arrangements, and on and on – but our Nation's strong consensus has always been that nothing is more important and consequential to that development and flourishing than the child's upbringing in the family. It is no accident or casual matter that the Universal Declaration on Human Rights declares that "[t]he family is the natural and fundamental group unit of society. . . ."[12] The new-parent project is designed to have and is having a profound impact on that fundamental unit. If that were all the project were doing (important

[12] *Universal Declaration on Human Rights* Art. 16.3.

as it is), it would be of no concern to this Court. But the new-parent project gives rise – unavoidably – to pressing and fundamental federal constitutional questions, as this case clearly demonstrates. Accordingly, that project must be of great concern to this Court, with its high calling to resolve authoritatively just such questions. Performance of that calling can wisely and rightly begin with this case.

II. A new, statist model of parental rights is widely challenging the natural rights model of parental rights vindicated by this Court's decisions over the past century, and this case presents an ideal vehicle for addressing key constitutional aspects of that challenge.

Nowadays in America, family arrangements come in an increasingly broad and complex array. As Justice O'Connor wrote in *Troxel v. Granville*, 530 U.S. 57, 63 (2000), the "demographic changes of the past century make it difficult to speak of an average American family." And that makes it more challenging when speaking of "parent"; that term has been asserted to include unwed fathers, lesbian and gay co-parents, sperm and egg donors, and what are referred to as intended parents, functional parents, and de facto parents.[13] That reality of diverse arrangements means that, increasingly, litigants will seek from judges resolution of actual cases and controversies between persons seeking

[13] Grossman, *supra* note 4, at 308.

to guide, direct, and control the upbringing of the same child. Those disputes will often require judicial determination of which, if any, of the contending litigants holds the parental rights long-recognized by this Court as constitutionally protected. If one fit contestant holds those rights and the other does not, the judge, as one acting under color of state law, would be constitutionally required to uphold the claim of the former.[14]

So it is fair to say that those ever increasing cases will require American judges to determine who is a "parent" within the meaning of this Court's parental rights cases ("constitutional parent").[15] And, if honestly met, that requirement will in turn force answers to deeply philosophical and deeply important questions: Is a constitutional parent anyone so designated by the State? Or does a biological parent have a natural right to constitutional parent status, a right preceding the State and one the State is therefore bound to honor except upon a rigorous showing of unfitness? Can the State rightly diminish the parental rights of a fit biological parent by designating, over her protests, another person as a legal parent? If so, can it do so on any grounds or to advance any policy?

These are challenging questions because of powerful conflicting views in our society. Marriage Law Foundation's deep experience in the field of family law teaches that many influential voices speak against "privileging" biology, that is, allowing biology to play a

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[14] *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948).

[15] *See* Higdon, *supra* note 7, at 1489-90.

conclusive or primary or even any role in the conferral of constitutional parent status. At the same time, vast numbers of the men and women of this Nation, when looking upon the child their physical union has produced, both fervently feel a call to give that child their best and unflagging devotion, care, and love and strongly believe that they have towards the child large rights and obligations which are sacred as conferred by God and/or which inhere in any worthy concept of what it means to be human.

In this case, New York has resolved these challenging questions against the natural rights model of parentage and in favor of the statist model and done so in a quite absolutist way. The clear record in this case allows no other conclusion. Yet the Constitution does not confer on New York the ultimate authority to answer these questions. That authority resides in this Court. Until this Court exercises that authority, avoidable confusion and conflict will reign in far too many American homes.

This Court has rightly declared in case after case that the Constitution protects, against coercive state action, a parent's right to direct the upbringing of her child, with that right encompassing matters of schooling, religion, civic training, character development, and residence. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923); *Pierce v. Society of the Sisters*, 268 U.S. 510, 529 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57, 61 (2000). All those cases involved normative parents. Moreover, this Court has further held that the State, when

considering constitutional parent status, cannot, must not, disregard biological ties. *Stanley v. Illinois*, 405 U.S. 645 (1972) (vindicating the right of unwed biological fathers not to be categorically disregarded as parents); *cf. Quilloin v. Walcott*, 434 U.S. 246 (1978). And the strong tradition of the American people has always been to hold their rights and responsibilities arising from biological parenthood as inherent natural rights and responsibilities. Accordingly, as a matter of constitutional law, New York's act in response to the deep and important questions unavoidably presented by this case cannot be correct. It should not stand.

III. The informed resolution of the new-parent project's constitutional issues requires careful attention to the child's bonding right, and this case presents an ideal vehicle for doing just that.

What is referred to in the literature as "the child's bonding right" is the right of every child to know and be reared by his or her own biological parents, with exceptions made only in the best interests of the child, not in the interests of any adult.[16] Whether the right exists in positive law, whether it constitutes an internationally recognized human right, or whether it is merely the expression of a powerful social but not legally enforceable ideal are all questions of some scholarly debate[17] and little or no adjudication.

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[16] *See* note 11 *supra*.

[17] *See* note 11 *supra*.

At the very least, the child's bonding right is a powerful social ideal. It also is the preeminent product of what Professor Katherine K. Baker has called "bionormativity." Her analysis of bionormativity – that is, of the norm that parental rights and obligations align with biological parenthood – teaches that the interests served by that norm must be analyzed separately for the State, parents, and children. In large part this is because "children's interests in bionormativity are not the same as the state's or parents'."[18] "[C]hildren seem to have what is potentially the strongest interest in the biology of biological parenthood."[19] "What really marks the difference in children's interest in bionormativity though is children's interest in the biology of biological parenthood. . . . "[20] "There may also be psychological benefits associated with being raised by one's biological parents. . . ."[21] Professor Margaret Somerville and David Blankenhorn have each in turn also illuminated the profound interests of the child in knowing and being raised by the two persons whose biological union brings that child into existence.[22]

If the making of constitutional law to resolve the new-parent project's constitutional issues has

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[18] Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 682 (2008).

[19] *Id.*

[20] *Id*. at 685.

[21] *Id*. at 686. See also COMMISSION ON CHILDREN AT RISK, HARDWIRED TO CONNECT: THE NEW SCIENTIFIC CASE FOR AUTHORITATIVE COMMUNITIES (Institute for American Values 2003).

[22] Blankenhorn, *supra* note 11; Somerville, *supra* note 11.

anything to do with human dignity, *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2596, 2597, 2603, 2608 (2015), then the human dignity of children – as the most vulnerable among us – ought to be of paramount concern. Children have interests in bionormativity, interests independent of and different from the interests of adults and the State. The new-parent project, by its very nature, may often operate in a way antithetical to that norm. The new parent is never a biological parent, and a State's creation of a new parent unavoidably constrains the biological parents' rights and interests in the child's upbringing. Moreover, the wellspring of the new-parent project is not attention to children's interests[23] but gratification of adult desires and advancement of the State's policy of egalitarian treatment of adults with some non-biological role in bringing the child into existence or in the child's nurture. However laudable that gratification and that advancement may be, those endeavors are adult centered and therefore neither has much of anything to do with enhancing the human dignity of children.

This case makes clear these realities relative to the new-parent project. Because it does, it is a worthy vehicle for beginning the process in this Court of

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[23] As Professor Jeffrey Shulman has argued, "[t]he best interests of the child are not served by granting rights to more and more parental claimants or by creating new varieties of constitutionally protected parenthood." JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 205 (2014).

resolving the pressing and fundamental constitutional issues unavoidably created by that project.

CONCLUSION

Justice Stevens was probably not seriously formulating a judicial test for the importance of any particular right presented for constitutional protection when he wrote: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976). But his language is good at provoking thinking about how seriously we Americans take particular rights. Such thinking teaches that no American right is more cherished or generates a more intense emotional response (especially when contemplating its loss) than the normative parent's right to control and direct the upbringing of his or her child. No doubt that is because the right is so inextricably tied together in the parent's heart and mind with his love for his child and his concern for her well-being, progress, and happiness – human emotions of the strongest kind.

All this is to say that this case merits this Court's review because it so well presents for clear resolution certain of the pressing and fundamental constitutional issues generated by the new-parent project gaining ground in a number of States. As this case clearly demonstrates, that project constrains and is capable of

destroying the long-cherished rights of natural and adoptive parents to guide and direct the upbringing of their children. The certain issues well-presented here are precisely those that this Court ought to address at the beginning of its process of resolving all the fundamental constitutional issues arising from, and certain to continue arising from, this radical experiment being worked on the fundamental unit of society.

The petition should be granted.

Respectfully submitted,

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