No. 18-900

IN THE
Supreme Court of the United States

PHILIP ZODHIATES,

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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

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

Pursuant to this Court's Rule 37.3(b), *amicus* Foundation for Moral Law requests leave of the Court to file this brief *amicus curiae* in support of Petitioner. The Foundation has provided timely notice to the parties and requested consent. The Petitioner has consented, but the Respondent never answered.

On this 5th of February, 2019.

Respectfully submitted,

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

The Foundation for Moral Law ("the Foundation") is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because there are underlying religious freedom and parental-rights issues that should be considered, in addition to the Fourth Amendment issues that Mr. Zodhiates raised.

SUMMARY OF ARGUMENT

The International Parental Kidnapping Act is unconstitutional as applied to Zodhiates's case. The government's theory of the case was that Mr.

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[1] Pursuant to this Court's Rule 37, *amicus* has provided timely notice (more than 10 days) to all parties of *amicus*'s intent to file this brief. Petitioner has consented, but *amicus* never heard back from Respondent. Pursuant to Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

Zodhiates aided and abetted Lisa Miller in kidnapping her biological child. But by that logic, if Ms. Miller could not have been convicted, then neither could Mr. Zodhiates.

Lisa Miller, as the child's biological mother, had the constitutional right to direct the upbringing of her child, both on Fourteenth Amendment and Free Exercise grounds. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972). Ms. Miller fled the country with her daughter because of her Christian faith. She had religious objections to her daughter being raised by a lesbian, and the Constitution of the United States protects her rights to object, both on religious grounds and as the child's natural parent. Miller's constitutional rights to direct the child's custody and upbringing outranked any parental rights Jenkins acquired under Vermont's civil-union law and state court order.

Any attempt to abridge Miller's constitutional rights therefore must satisfy the strict-scrutiny test. *Yoder*, 406 U.S. at 215. This Court has held that a parental right arising under state law is not as strong as the right of a natural parent to her child. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845-47 (1982). Thus, the government did not have a "compelling state interest" in protecting Ms. Jenkins's visitation rights that overcome Ms. Miller's First and Fourteenth Amendment rights to her own daughter.

Because Miller's constitutional rights were superior to Jenkins's statutory rights, Miller was

entitled to leave the country with her child. Consequently, Zodhiates could not have been convicted because he was not interfering with the "lawful exercise of parental rights." 18 U.S.C. § 1204(a).

This Court may consider these issues because they are "antecedent to … and ultimately dispositive of the present dispute." *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). The Court could also call for supplemental briefing from the parties if it desires. But regardless of whether it considers these issues *sua sponte* or calls for briefing from the parties, it should not ignore the First and Fourteenth Amendment issues underlying this case, because they present "important question[s] of federal law." Supreme Court Rule 10(c).

ARGUMENT

I. Lisa Miller's rights to direct the custody, supervision, and upbringing of her daughter were protected by the First and Fourteenth Amendments.

In 2000, Lisa Miller and Janet Jenkins entered into a civil union in Vermont. Miller conceived a child, IMJ,[2] through artificial insemination, and gave birth to her in 2002. About a year later, Miller separated from Jenkins, moved to Virginia with her

[2] The court proceedings below referred to the child by her initials for the sake of protecting her privacy. Out of respect for her, *amicus* will do the same.

daughter, and dissolved the civil union. Shortly thereafter, Miller objected to letting Jenkins have unsupervised visits with her daughter.

This began a court battle that made its way up to two state appellate courts and caught national attention. *See Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006). After losing the court battles, Miller eventually fled the country with her daughter. The Petitioner was eventually prosecuted for helping Miller leave the country with the child, which the government claims is a violation of the International Parental Kidnapping Act.

Why did Miller oppose Jenkins's attempts to gain custody over the child so vigorously? And why did she resort to fleeing the country when she lost? The answer to that question is critically important: "Miller renounced her foray into lesbianism and returned to her Christian faith .... Miller has repeatedly balked at allowing her biological 7-year-old-daugter, [IMJ], to have court-mandated, unsupervised visits with Jenkins, who is still an active lesbian." Appellant's Appendix at A123, *Zodhiates v. United States*, 901 F.3d 137 (2d Cir. 2018) (No. 17-837-CR).[3]

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[3] This document was marked as Defendant's Exhibit 25 for trial. *Id.* There was also evidence that Jenkins was sexually abusing the child. *See* Matthew Cullinan Hoffman, *Christian Businessman Sent to Federal Prison for Freeing Child From Court-Imposed Lesbian "Mother,"* Life Site News, goo.gl/93PWjB (Dec. 7, 2018). Mr. Zodhiates appeared to believe the allegations, which motivated him to help Ms. Miller. *Id.*

The First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I.[4] The Free Exercise Clause protects not only the right to believe, but also to act on those beliefs. Thus, Lisa Miller was not only entitled to believe that allowing her daughter to remain in the custody of a lesbian was wrong, but she was also allowed to act on that belief within constitutional parameters.

In *Employment Division v. Smith*, this Court held the Free Exercise Clause does not exempt a religious adherent from a duty imposed by a valid, neutral law of general applicability that happens to burden religious exercise. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).[5] However, *Smith* stated that more constitutional protection would be given if the infringement of religious liberty were also accompanied by the infringement of another constitutional right. *Id.* at 881-82.

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[4] The Fourteenth Amendment applies the Free Exercise Clause to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

[5] The Foundation believes that *Smith* was wrongly decided and has urged the Court to overrule it. *See, e.g.,* Brief of Foundation for Moral Law as *Amicus Curiae* Supporting Petitioners, *Klein v. Oregon Bureau of Labor & Indus.* (U.S. No. 18-547). Within the last month, Justices Alito, Thomas, Gorsuch, and Kavanaugh suggested that they would be open to overruling *Smith* if asked. *Kennedy v. Bremerton Sch. Dist.*, No. 18-12 (U.S. Jan. 22, 2019) (Statement of Alito, J., respecting denial of certiorari), slip op. at 6.

This Court has recognized that the Fourteenth Amendment protects the "fundamental liberty interest of *natural* parents in the care, custody, and management of their child[.]" *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (emphasis added).[6] Miller was IMJ's natural parent; therefore she had a fundamental liberty interest in the custody, care, and management of IMJ. Because Miller's objections to sharing custody with Jenkins involved both religious liberty and the rights of natural parents over their children, *Smith*'s "hybrid rights" doctrine applies, demanding the highest level of constitutional protections. *Smith*, 494 U.S. at 881-82.

This Court faced a similar situation in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In that case, several Amish and Mennonite families challenged the constitutionality of Wisconsin's compulsory-education laws, arguing that they infringed on their constitutional rights. The Court reminded the State that this law, which, as *Smith* would put it, was a valid general law of neutral applicability, still had to yield to constitutional rights. As the Court said,

> "[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of

[6] This Court originally recognized this right in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

> the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children ...."

Yoder, 406 U.S. at 214. The Court went on to hold that "only those interests of the highest order and those not otherwise served" could prevail over the constitutional claims. *Id.* at 215. In other words, the government had to pass the "strict-scrutiny" test. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010) (holding that strict scrutiny "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest") (citation and internal quotation marks omitted).

II. The First and Fourteenth Amendments bar the application of the criminal statutes at issue to Ms. Miller and, consequently, to Mr. Zodhiates.

Mr. Zodhiates was convicted under the International Parental Kidnapping Act (the IPKA), which is a valid neutral law of general applicability. However, it is a cardinal rule that if any statutory law conflicts with the Constitution of the United States, then that law is void, or, at the very least, may not be applied in that particular case. U.S. Const. art. VI, cl. 2.

The IPKA provides, "Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the

lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both." 18 U.S.C. § 1204(a). In this statute, "the term 'parental rights,' with respect to the child, means the right to physical custody of the child – (1) whether joint or sole (and including visiting rights); and (2) whether arising by operation of law, court order, or legally binding agreement of the parties." 18 U.S.C. § 1204(b).

In this case, it is believed that Ms. Miller took IMJ to Canada and then to Nicaragua. The government's theory of the case was that Mr. Zodhiates drove Ms. Miller and IMJ to the border so Ms. Miller could "kidnap" the child. Thus, the government believes that Mr. Zodhiates was punishable as a principal because he was an accomplice. *See* 18 U.S.C. § 2(a) (holding that accomplices are punishable as principals). The government also believed that Mr. Zodhiates was guilty of conspiracy to violate the IPKA. *See* 18 U.S.C. § 371.

Therefore, according to the government, Mr. Zodhiates is guilty because Ms. Miller is guilty. But by that logic, if Ms. Miller is not guilty (say, because the Constitution of the United States protected her actions), then Mr. Zodhiates would not be guilty, either.

In this case, Ms. Jenkins' right to the child did not arise from the Constitution of the United States, but rather from a Vermont court order granting her custody rights to the child. That right is protected by

a federal statute – the IPKA. However, Ms. Miller's right to her child did not arise from a state court, a state statute, or a federal statute, but from the Constitution itself. The Constitution is the "Supreme Law of the Land." U.S. Const. art. VI, cl. 2. Therefore, Ms. Miller's rights to the child were superior to Ms. Jenkins's rights.

Therefore, under *Yoder* and *Smith*, if the government wanted to prosecute Ms. Miller or Mr. Zodhiates, then it would have to pass the strict-scrutiny test. As discussed above, this requires this Court to determine whether the government has a compelling state interest in enforcing Ms. Jenkins's right to see a child that is not her biological child.

This Court has already answered that question in the negative. In *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1982), the Court unanimously rejected the proposition that a nonbiological parent has the same liberty interest in a child that a biological parent does. In this case, an organization of foster parents challenged New York's procedures for removing foster children from their homes, drawing on this Court's Fourteenth Amendment precedents concerning privacy and parental rights.

The majority opinion rejected the foster organization's argument, noting that there are "important distinctions between the foster family and the natural family." 431 U.S. at 845. The Court noted that the natural family has "its origins entirely apart from the power of the State," and therefore the

contours of its rights are not to be sought "in state law" but rather "in intrinsic human rights, as they have been understood in this Nation's history and tradition." *Id.* (citations and quotation marks omitted). In contrast, the foster family had its origins "in state law[.]" *Id.* Consequently, the Court reasoned that "the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family." *Id.* at 846.

The Court also rejected the foster families' arguments on another ground: it could not recognize their rights to the children without taking away from the natural parents' rights to the children. The Court reasoned that it would be difficult to "acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right." *Id.* The Court therefore concluded that even if the foster families had a liberty interest in keeping the children, that interest must be "substantially attenuated" when it conflicted with the right of the natural parents to have the children back in their custody." *Id.* at 847.[7]

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[7] Three justices concurred in the result but concurred with the majority opinion's distinction between natural families and families that are creations of the State. "If 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, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.' But

Applying the foregoing to the present case, the government cannot meet its burden of proving that it has a compelling interest in enforcing Ms. Jenkins's State-created right to the custody of IMJ at the expense of Ms. Miller's constitutional and natural rights. *Smith* distinguished between natural relationships and state-created ones. Ms. Miller has a natural connection with IMJ; Ms. Jenkins does not. And although *Smith* did not say which level of scrutiny state-created relationships are entitled to, the Court made clear that they are inferior to the natural parent's, especially when they cannot be granted except at the natural parent's expense.

This Court's subsequent decisions concerning homosexuality do not change the analysis. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court did not hold that homosexuals had a fundamental right that was entitled to strict scrutiny but instead applied rational-basis review. 539 U.S. at 578. Moreover, all three of the Court's same-sex marriage decisions in favor of homosexuals hinged on the title of "marriage." *Pavan v. Smith*, 137 S.Ct. 2075, 2076 (2017); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2593 (2015); *United States v. Windsor*, 570 U.S. 744, 769 (2013). Jenkins and Miller were never married. Thus, this case is governed by *Smith v. Organization of Foster Families for Equality & Reform*. *Lawrence, Pavan, Obergefell*, and *Windsor* are irrelevant.

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this constitutional concept is simply not in point ...." *Id.* at 862-63 (Stewart, J., concurring in the result, joined by Burger, C.J., and Rehnquist, J.).

Therefore, Ms. Miller could not have been convicted of violating the IPKA. Miller's natural right to her daughter, protected by the First and Fourteenth Amendments to the United States Constitution, outranked the state-created right that the Vermont court created for Ms. Jenkins, which was protected only by a federal statute. And because Ms. Miller could not have been convicted, Mr. Zodhiates could not have been convicted of either conspiracy or as an accomplice for helping Ms. Miller do what was fully within her rights to do.

III. This Court may consider these issues even though the parties did not raise them.

This Court has held that it may consider issues not raised by the parties when they are "antecedent to … and ultimately dispositive of the present dispute." *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). Even though the parties did not raise the issues presented in this *amicus* brief, they are antecedent to and dispositive of the questions presented. This Court need not consider whether the cell phone data should have been excluded if Mr. Zodhiates never should have been prosecuted in the first place. The questions in this brief precede the questions in the petition and ultimately dispose of them. Thus, this Court may grant certiorari to consider these issues.

If the Court still hesitates to address these issues because they have not been raised by the parties, then it could call for supplemental briefing to address these questions. This would give the parties the

chance to be heard and have the issue considered through the adversarial process. But whether the Court considers these questions *sua sponte* or calls for supplemental briefing, it should not deny certiorari simply because the parties themselves did not raise this issue. The free-exercise and parental-rights issues in this case present "important question[s] of federal law," Supreme Court Rule 10(c), and this Court should address them.

CONCLUSION

The government charged Mr. Zodhiates with adding and abetting another with the crime of kidnapping; therefore he could be guilty only if Ms. Miller was guilty. The Constitution of the United States and the precedents of this Court dictate one result: Ms. Miller was innocent, and therefore Mr. Zodhiates is innocent as well. Because an innocent man has been sent to prison in violation of the First and Fourteenth Amendments to the United States Constitution, this Court should grant certiorari and reverse the judgment of the Second Circuit.

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