No. 23-450

In The
Supreme Court of the United States

M.C. and J.C.,

Petitioners,

v.

INDIANA DEPARTMENT OF CHILD SERVICES,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

BRIEF OF AMICUS CURIAE HERITAGE DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE[1]

Heritage Defense Foundation is a national nonprofit legal advocacy organization with the mission to advance the kingdom of Christ by protecting and empowering the biblical family through the protection of children and the preservation of civil rights and civil liberties secured by law for both parents and children.

SUMMARY OF ARGUMENT

This case merits the Court's attention because, among other reasons, it involves a shocking violation of one of the most fundamental liberty interests given by God and which this Court has repeatedly deemed to be protected by the U.S. Constitution: parental rights. Left unaddressed, the violation at issue will destabilize the bedrock of society and foster anxiety among parents across the country regarding the security of their parental rights. While the Court has held that it has jurisdiction under the Fourteenth Amendment to protect parental rights, it has left considerable confusion remaining, especially after its plurality decision in *Troxel*. More clarity is needed, lest respect for parental

[1] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part; and no person or entity other than amicus, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for amicus timely notified the counsel of record of intent to file this brief.

rights become a mere platitude gutted of any real meaning.

ARGUMENT

I. The Court should grant certiorari because of the importance and scope of the liberty interests affected.

a. Parental rights are God-given.

Under ordinary circumstances, who should have authority to make decisions for a minor child: the child, the state, or the parents?

All human authority is derivative. The ultimate source of all legitimate earthly authority is divine—it comes from God. He delegates limited jurisdiction to different spheres of authority, such as the family and the state. In every case, those jurisdictions include both authority and responsibility.

The family pre-existed all other human institutions. As William Blackstone wrote, "single families . . . formed the first natural society," becoming "the first though imperfect rudiments of civil or political society."[2] For the family, God has given jurisdiction to

[2] 1 William Blackstone, *Commentaries on the Law of England* *41 (1765).

parents to nurture, teach, and train their children, among other rights and duties.[3]

As Prime Minister of the Netherlands and theologian Abraham Kuyper explained, the authority of parents is not derived from the state, but from God:

> Behind these organic spheres, with intellectual, aesthetical and technical sovereignty, the sphere of the family opens itself, with its right of marriage, domestic peace, education and possession; and in this sphere also the natural head is conscious of exercising an inherent authority,—not because the government allows it, but because God has imposed it. Paternal authority roots itself in the very life-blood and is proclaimed in the fifth Commandment.[4]

As one state supreme court put it:

> God, in his wisdom, has placed upon the father and mother the obligation to nurture, educate, protect, and guide their offspring, and has qualified them to discharge those important duties by writing in their hearts sentiments of affection, and establishing between them and their children ties which cannot

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[3] *See* Ephesians 6:1-4; Colossians 3:20-21; Deuteronomy 6:6-7, 11:19; Proverbs 22:6; 1 Timothy 5:8; 2 Corinthians 12:14; Proverbs 13:24, 19:18; Psalm 103:13.

[4] Abraham Kuyper, *The L.P. Stone Lectures for 1898-1899: Calvinism (Six Lectures Delivered in the Theological Seminary at Princeton)*, 123 (1898).

> exist between the children and any other persons.[5]

Of course, there are boundaries to a parent's authority over their child. Their authority is not absolute. Serious misconduct by a parent involving abuse or neglect of their child invokes the state's jurisdiction to intervene by punishing the offending parent so as to protect the minor child. The state may also have authority where parents have voluntarily delegated jurisdiction to it by invitation, such as to help with an out-of-control child.

Most important to note is that parental authority and responsibility do not come from the state. The state is not God. While the state may and should recognize authority and responsibility and secure the legal freedoms to fulfill them—commonly called "rights"—such rights do not come from man, but from God. Without such a wholly benevolent and transcendent source, the very concept of human rights is subjective, ethereal, and essentially meaningless.

Accordingly, because rights such as those that parents naturally possess have been given by God, they cannot be taken away by the state. The Lord gives; the Lord takes away.[6] A parent's misconduct may invoke the state to intervene, and a parent's misconduct may even rise to the level that they waive or wholly forfeit their rights. Yet without some misconduct or voluntary invitation on the part of parents, the state may not

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[5] *State v. Deaton*, 54 S.W. 901, 903 (Tex. 1900).

[6] Job 1:21.

interfere with the parents' divinely bestowed jurisdiction.

One state supreme court justice has described it this way:

> God, not the state, has given parents these rights and responsibilities, and, consequently, [the] courts should interfere as little as possible with parental decision-making, instead deferring to parental authority whenever it has not been fundamentally compromised by substantial neglect, wrongdoing, or criminal act.[7]

b. The interest of parents in the care and custody of their children is a fundamental liberty interest.

As this Court has held, 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."[8]

Even when a parent has previously "lost temporary custody of their child to the State," this "fundamental liberty interest of natural parents in the care,

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[7] *Ex parte G.C.*, 924 So. 2d 651, 677-78 (Ala. 2005) (Parker, J., dissenting).

[8] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

custody, and management of their child does not evaporate."[9]

Indeed, one of the most central of these fundamental liberty interests of parents is the right "to guide the religious future and education of their children."[10]

Where the parents have not been determined to be or to have been abusive or neglectful, the state has no jurisdiction to override the decision-making of the parents regarding what is in the best interests of their child. "The child is not the mere creature of the State."[11]

As this Court has said, the idea "that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" is a "statist notion" that "is repugnant to American tradition."[12]

c. Tolerating such significant uncertainty regarding parental rights destabilizes society.

Petitioners state, "They fear that the state of Indiana may, in reliance on the Court of Appeals' decision, interfere in their home and in the care and custody of

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[9] *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

[10] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

[11] *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

[12] *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (emphasis original).

their other children."[13] Petitioners indicate that they are "gravely concerned that the state of Indiana will come for their other children."[14]

If this case is not properly addressed, the anxiety that Petitioners express will spread like a cancer to parents across the country, destabilizing our entire social order.

Among other things, this case is about whether the state can remove a child from parents even when the state agrees that those parents have done nothing wrong.

In the instant case, the state agreed to dismiss, unsubstantiate, and expunge all allegations against the parents.[15] The trial court apparently approved this agreement. And nothing indicates the parents consented to the removal at issue. Yet the trial court still removed the child. This is because, according to the Indiana Court of Appeals in this case, "A CHINS-6 adjudication is made 'through no wrongdoing on the part of either parent.' "[16] Indeed, there appears to be no dispute that the removal of the child was not based on any wrongdoing on the part of either parent.

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[13] Pet'rs' Br. at 5.

[14] Pet'rs' Br. at 36.

[15] *A.C. v. Ind. Dep't of Child Servs.*, 198 N.E.3d 1, 8 (Ind. Ct. App. 2022).

[16] *Id*. at 10 (quoting *In re N.E.*, 919 N.E.2d 102, 105 (Ind. 2010)).

This is chilling.

Courts and jurists have sometimes referred to terminating parental rights as the "civil death penalty."[17] While the trial court in this case did not completely terminate Petitioners' parental rights, it severed their most fundamental right of custody. Ultimately, the removal resulted in them losing custody until their child reached majority.

It is one thing for parents to be deterred from bad behavior by an understanding that they could have their child removed if they engaged in abuse or neglect. It is quite another thing for parents to have a fear that, even if they do nothing wrong, their child could be removed from them simply because they have a disagreement with the child and the government chooses to take the child's side.

This strikes at the very heart of parental authority. If custody by parents is always subject to the will of the state, even when the parents have committed no wrong, parents become mere servants of the state. The state and its bureaucrats become the arbitrary micromanagers of every family, controlling them with the implied threat: "Do what the current political administration says or lose your children."

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[17] *E.g.*, *Martinez-Cedillo v. Sessions*, 896 F.3d 979, 989 (9th Cir. 2018), *vacated*, 923 F.3d 1162 (9th Cir. 2019); *Marcus Steven H. v. State Dep't of Family Servs. (In re T.M.R.)*, 487 P.3d 783, 788 (Nev. 2021); *Commonwealth v. K.S.*, 585 S.W.3d 202, 220 (Ky. 2019); *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004); *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring).

As the Washington Supreme Court quoted in its own *Troxel* opinion:

> For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. "You may do whatever you choose, so long as it is what I would choose also" does not constitute a delegation of authority.[18]

Moreover, as has been discussed, such a delegation comes not from the state, but from God.

A child here has been removed not for wrongdoing, but due to a mere disagreement. If the state can remove a child for this particular disagreement, why not others? What is the limiting principle? Allowing this uncertain state of affairs to exist will disrupt the very fabric that holds an ordered society together.

What assurance do families have that they will not be next to have their children removed? Is being a "fit" parent no longer enough to feel secure in one's role as a parent? Striking at parental authority is striking at the very foundation of society. Data demonstrating the importance of intact homes for children and society have become so well-known, and so frequently confirmed, as to be unnecessary to recite. The

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[18] *Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998), (quoting Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. Louisville J. Fam. L. 393, 441 (1985-86)), *aff'd*, 530 U.S. 57 (2000).

state endangers the authority of parents to its own peril.

But this is not all. Undermining parental authority will have other unintended consequences. If parents fear that seeking help with mental health concerns for their child has a significant likelihood of resulting in their child's removal, many parents may conduct a cost-benefit analysis and elect not to seek such help at all.

In the instant case, one irony is that the initial removal from the parents did not even help improve the child's eating disorder, which had only worsened in foster care.[19] In its final order, the trial court stated, "The Court finds that it is in the best interests of the child to be removed from the home environment and remaining in the home would be contrary to the welfare of the child because of the allegations admitted."[20] Yet the allegations admitted were not against the parents. Instead, they were allegations the child was making about the child's own mental health. And this was *after* the child had already been living in a so-called "accepting"[21] foster home for over six months (from June 2, 2021 to December 8, 2021). The Indiana Department of Child Services (DCS) had itself stated, "Since the filing

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[19] *See* Pet'rs' Br. at 13.

[20] Pet'rs' Br.at 27 (quoting App. 48a).

[21] "[S]he should be in a home where she is excepted [sic] for who she is." Pet'rs' Br. at 12 (quoting App. 127a-128a).

of the original CHINS petition, DCS has learned that the child's eating disorder has worsened."[22]

Perhaps the child and the state did not know what was best.

II. The Court should grant certiorari to address significant confusion remaining after its opinion in *Troxel*.

Some may argue, perhaps soundly, that the business of protecting parental rights is generally a state issue not within the jurisdiction of the federal courts.[23] But this Court has already decided that it is. Since the Court has already decided it has jurisdiction in this arena, it has the responsibility to ensure that its judgments are clear and unambiguous. Currently, they are not.

The most recent statement by the Court on the issue of parental authority is found in *Troxel v. Granville*.[24]

Distinguished commentator Erwin Chemerinsky has described *Troxel* like this:

> *Troxel* did more to confuse than clarify the law in the area of grandparents' rights laws. On the one hand, the case can be read broadly as reaffirming that parents have a fundamental

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[22] Pet'rs' Br. at 13 (quoting App. 134a-135a).

[23] *See Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

[24] 530 U.S. 57 (2000).

right to control the upbringing of their children and as providing a basis for invalidating orders for grandparent visitation over the objection of fit parents. On the other hand, *Troxel* can be read as a very narrow decision that involved a particularly broad law applied in a situation where the parent was fit and regular grandparent visitation still occurred. The absence of a majority opinion makes it even more difficult to assess the impact of the decision other than the certainty that it will lead to challenges to grandparents' rights law throughout the country.[25]

Another commentator put it this way:

The lack of a majority, the multiplicity of opinions, and the confusion characterizing each opinion have provided fertile ground for diverse and even contradictory interpretations of *Troxel*. Indeed, non-parental visitation cases attempting to follow the *Troxel* precedent are mixed and confused. Courts in different states have interpreted *Troxel* differently and even within states, variant understandings of *Troxel* have led to contradictory rulings as to the constitutionality of state statutes. *Troxel* has also proven a rich vein for extensive academic attempts to discern the case's meaning and implications. Not surprisingly, these scholarly

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[25] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 833 (Wolters Kluwer 4th Ed. 2011).

> analyses also offer contradictory readings of the case and its various opinions.[26]

One state supreme court justice discussed the confusion of *Troxel* at great length:

> The existence of parents' "fundamental liberty interest" in the care, custody, and control of their children is well-established in the Supreme Court's decisions. But the Supreme Court has not described the contours of the right with clarity. In *Troxel*, a case that deeply divided the Supreme Court, the plurality opinion recognized this lack of clarity but declined to ameliorate it: "[T]he constitutionality of any standard for awarding visitation turns on the specific manner in which the standard is applied and . . . the constitutional protections in this area are best 'elaborated with care.'"
>
> While the Supreme Court has broadly recognized the constitutional interest of parents in the care, custody, and control of their children, the Court has not articulated a standard of review by which to judge the constitutionality of infringements upon parents' rights. Given the lack of precision in the Court's decisions, it is difficult to state a precedent-based rule distinguishing impermissible government interference with parental prerogatives from permissible government action to protect child welfare. . . . The Supreme Court held

[26] Ayelet Blecher-Prigat, *Article: Rethinking Visitation: From a Parental to a Relational Right*, 16 Duke J. Gender L. & Pol'y 1, 11 (2009).

that "special weight" must be afforded to a fit parent's decision whether "an intergenerational relationship would be beneficial" to the child. But how much "special weight"? Under what circumstances can the parents' wishes be second-guessed by the government? Existing precedent does not provide clear answers.

One potential answer was proffered by Justice Thomas in his concurrence in *Troxel*: "I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." Another potential answer is that proffered by the court of appeals, which interpreted *Troxel* to flatly prohibit non-parent standing "while a fit parent is appropriately exercising his or her own parental rights."

. . . . As a matter of first impression, the rule announced by the court of appeals—that fit parents cannot be haled into court by non-parents to defend their decisions about the upbringing of their children—is certainly one plausible consequence of the Supreme Court's recognition of a "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* does not tell us exactly where the line is between constitutional and unconstitutional government interference with the rights of fit parents. In this case and thousands of others like it in our family courts, parents' fundamental

> rights are at stake. We should not assume, as the Court does, that placing additional burdens on those rights has no constitutional significance just because the *Troxel* plurality opinion does not prohibit it.[27]

If there is confusion about how to apply *Troxel* when reviewing grandparents' visitation statutes, there is exponentially more so when attempting to apply it in other contexts.

In the context of a case involving a child protective services investigation, the Seventh Circuit discussed the confusion left by *Troxel*:

> Despite the sweeping language used by the Supreme Court in describing the "fundamental" constitutional liberty interest parents have "in the care, custody, and control of their children," the appropriate standard of review for claims alleging a violation of this interest is less than clear. It is well established that when a fundamental constitutional right is at stake, courts are to employ the exacting strict scrutiny test. In *Troxel v. Granville*, however, a plurality of the Supreme Court—Chief Justice Rehnquist and Justices O'Connor, Ginsburg, and Breyer—used a "combination of factors" test to hold that a state's visitation statute, as applied, unconstitutionally infringed on parents' fundamental right to rear their children. In making this determination,

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[27] *In re H.S.*, 550 S.W.3d 151, 175-76 (Tex. 2018) (Blacklock, J., dissenting) (discussing parental rights in the context of a grandparent's visitation case) (cleaned up).

the plurality emphasized that "there is a [constitutional] presumption that fit parents act in the best interests of their children," and "accordingly, so 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." The *Troxel* plurality declined to define "the precise scope of the parental due process right in the visitation context," noting that "constitutional protections in this area are best 'elaborated with care.'" Justice Thomas concurred in the judgment of the Court, noting "I agree with the plurality that this Court's recognition of a fundamental right to direct the upbringing of their children resolves this case. . . . The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights."

Thus, after *Troxel*, it is not entirely clear what level of scrutiny is to be applied in cases alleging a violation of the fundamental constitutional right to familial relations. What is evident, however, is that courts are to use some form of heightened scrutiny in analyzing these claims.[28]

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[28] *Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003) (cleaned up).

Indeed, that we are even discussing *Troxel* at all is telling since *Troxel* had nothing to do with a judge ordering the removal of a child. To admit *Troxel* is not on all fours with this case would be an understatement. And yet it is the best we have. But while the Court repeated its recognition that parental rights are a fundamental liberty interest protected by the Fourteenth Amendment, the Court provided very little guidance for how states are to honor that liberty interest.

Troxel merely provides that courts must give "special weight" to parents' opinions about their children's best interests. So *Troxel* created a presumption that fit parents act in the best interest of their children. This seems helpful, but it only raises more questions. Is the presumption absolute, or is it rebuttable? If rebuttable, what quantum of evidence is required? For final termination proceedings, the Court has said that clear and convincing evidence is required.[29] But what about removals? Here, the trial court applied preponderance.[30] Is preponderance sufficient? And regardless of the quantum of evidence, what is the standard of review? One would assume that for an intact home with fit parents, such as those at issue in this case, the standard must be quite high. Is it strict scrutiny, as Justice Thomas has suggested?[31]

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[29] *Santosky v. Kramer*, 455 U.S. 745, 748 (1982).

[30] *A.C. v. Ind. Dep't of Child Servs.*, 198 N.E.3d 1, 12 (Ind. Ct. App. 2022).

[31] *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

At least one previous justice of this Court has hinted that the presumption that a fit parent in an intact home acts in the best interest of their child is irrebuttable:

> 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."[32]

For a then-thorough review of the confusion created by *Troxel* in both state and federal courts regarding parental rights even beyond grandparent visitation cases, *see* Michael P. Farris, *The Confused Character of Parental Rights in the Aftermath of* Troxel, Parental Rts. (Feb. 20, 2009).[33] That article was written over 14 year ago, and the confusion has only grown since.

For now, the Court has provided no standard whatsoever. This lack of guidance results in divergent application. States are left to infringe upon parental rights so long as they say the magic words "special weight"—and often even when they do not.

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[32] *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

[33] Accessible at https://parentalrights.org/understand_the_issue/current-state-parental-rights/aftermath-of-troxel/ [https://perma.cc/M82Y-7NAX].

If the interest of parents in the care and custody of their children is a fundamental liberty interest protected by the Fourteenth Amendment, as this Court has already decided it is, then it is an interest demanding greater clarity to ensure it is given the respect it is due.

If this case is permitted to stand unanswered, it will make a mockery of this Court's repeated holdings that parental rights are a fundamental liberty interest protected by the Fourteenth Amendment. If a state can pay lip service to such liberties, and then act with carte blanche power to override them, then those liberties and this Court's protection of them are rendered meaningless.

CONCLUSION

Romans 13 says, "For rulers are not a terror to good works, but to evil. Do you want to be unafraid of the authority? Do what is good, and you will have praise from the same."[34]

Yet here, even though Indiana determined Petitioners to be fit, Petitioners have not only had one child removed, they have understandably become afraid "that the state of Indiana will come for their other children." This very real anxiety Petitioners experience

[34] Romans 13:3 (NKJV).

will spread and undermine the foundations of society unless addressed by the Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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