

No. 25-840

In the Supreme Court of the United States

INTERNATIONAL PARTNERS FOR
ETHICAL CARE, INC., ET AL.,
Petitioners,

v.

BOB FERGUSON, GOVERNOR
OF WASHINGTON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF LEGAL HISTORY AND
FAMILY LAW SCHOLARS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

ANGELA CAI
Counsel of Record
PLATKIN LLP
1 Gateway Center,
Suite 1150
Newark, NJ 07102
(973) 561-1952
acai@platkinllp.com

(additional counsel on inside cover)

MARY ZIEGLER
*Chancellor's Leadership
Professor and Martin Luther
King Jr. Professor of Law*
UC DAVIS SCHOOL OF LAW
*One Shields Avenue
Davis, CA 95616
mziegler@ucdavis.edu*

MAXINE EICHNER
*Graham Kenan
Distinguished Professor of Law*
UNIVERSITY OF NORTH
CAROLINA SCHOOL OF LAW
*Van Hecke-Wettach Hall
160 Ridge Road, CB #3380
Chapel Hill, NC 27599
meichner@email.unc.edu*

NAOMI R. CAHN
*Justice Anthony M.
Kennedy Distinguished
Professor of Law
Co-Director, Family
Law Center*
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
*580 Massie Road
Charlottesville, VA 22903
ncahn@law.virginia.edu*

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INTERESTS OF *AMICI CURIAE*¹

Amici curiae are well-recognized scholars of legal history and family law who share an interest in providing this Court with accurate historical evidence and context for evaluating constitutional questions. *Amici* have published scholarly works on the historical grounding of parental rights and child wellbeing and leading family law casebooks. They are also national experts who have participated in drafting the American Law Institute's Restatement of Children and the Law and are active in the Uniform Law Commission on family law issues. A list of *Amici* and additional background are included in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the question presented in this case is narrowly focused on Article III standing, both Petitioners and *Amici* supporting Petitioners have advanced an exceedingly broad historical account of parental rights. See, e.g., Pet. Br. 32–33, 54–55; U.S. Br. 3, 21–22; Legal Scholars Br. 4–12; Florida Br. 4–8. Similarly, Judge VanDyke's dissent from denial of rehearing *en banc* asserted, “Centuries of American and English tradition recognize that fit parents hold a near-absolute right to make decisions about the care and upbringing of their children, free from state interference.” Pet. App. 41a.

¹ *Amici* certify pursuant to Rule 37.6 that no party or party's counsel authored this brief in whole or in part and that no person or entity, apart from *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

But the “near-absolute” conception of parental rights lacks support in our Nation’s historical tradition. Certainly, our Nation has long recognized a fundamental right of parents “to direct the education and upbringing of one’s children.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). But equally foundational is the understanding that the parental right is not “beyond limitation.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Any discussion of the metes and bounds of parental rights requires fidelity to history. That history shows that any notion that parents have near-absolute power to be free from external influence affecting the upbringing of children lacks support. Instead, as Founding and Reconstruction-era jurists and treatise writers recognized, parental rights are significant in our tradition because decision-making by parents is generally the best means to further the wellbeing of children. But this rationale itself imposes limits on parental authority: our legal tradition also recognizes that parental decision-making does not serve children’s wellbeing on all occasions and with respect to all decisions. Further, our history demonstrates that the State, under its *parens patriae* authority, is charged with protecting “the welfare of children”—an important “limitation” on parental rights. *Id.*, at 165–66. Indeed, the State has “a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.” *Id.*, at 167.

These principles are borne out in several contexts in Founding-era and nineteenth-century cases and legal writings. *First*, early American cases in which fathers—the only ones with recognized parental rights at the time—swore out writs of *habeas corpus*

for return of their children from their mothers or other relatives were not decided on the basis of parental authority alone and often did not result in the fathers' favor. Rather, in case after case, jurists closely examined the facts to determine whether the child's best interests were served by being returned to the father's custody; they often concluded in the negative. At the time of the ratification of the Fourteenth Amendment, courts coalesced around the principle that parental rights were fundamental but not absolute and that the State, through judicial oversight, had power to constrain parental authority to serve "what is for the best interest of the child." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 348 (1868).

Second, American jurisprudence, by the time of the Fourteenth Amendment's ratification, accepted the view that the State had significant *parens patriae* and police powers to support the wellbeing of children. See, e.g., *Ex parte Crouse*, 4 Whart. 9, 11–12 (Pa. 1839).

Third, in nineteenth-century cases involving children enlisting in military service, marrying, and seeking medical care, courts allowed children to enter contractual obligations deemed to advance their wellbeing while recognizing the general right of parents to custody and control of their children. Courts also recognized the State's power to intervene on minors' behalf or afford them more decision-making power. See *United States v. Bainbridge*, 24 F. Cas. 946, 950 (CC Mass. 1816). These cases confirmed that at the time of the Fourteenth Amendment's ratification, parental rights were both accorded

importance and had significant limitations, especially when the exercise of parental authority undercut children's wellbeing.

Although Petitioners and their *Amici* rely on the common-law torts of enticement and harboring as justification for their historical claims, all such cases involved recovery against private parties. No such recovery was sought or allowed against a State exercising its authority to support children's wellbeing. Moreover, these causes of action awarded damages for the parent's loss of a child's services and companionship and thus were available only after a child left the home. In the absence of damages for loss of service or companionship, such a cause of action would not have been legally cognizable.

Finally, this Court's twentieth-century jurisprudence confirms these significant limits on parental rights found in earlier history. In cases involving the State's role in protecting children, this Court recognized that assertions of parental authority—even when voluntarily heeded by the child—must yield to the State's interest in protecting child welfare in appropriate circumstances. In short, modern jurisprudence does not see the parental right either as near-absolute or as an end in itself.

Amici's submission is thus a modest one: that this Court, in attending to the contours of Article III in this case, heed the historical tradition regarding the scope of parental rights. That tradition shows that parents' rights generally protect children's wellbeing and are necessarily limited by that very purpose.

ARGUMENT

I. Our Nation’s History and Tradition Have Treated Parental Rights as Fundamental but Far from Absolute.

Parental authority was not “near-absolute” at common law. Instead, limitations on parental authority were well recognized.

A. Parental Rights in England.

To begin, even Blackstone’s account—which recognized only the “empire of the father” and excluded the mother as having “no power,” only “reverence and respect”—nonetheless acknowledged that paternal rights depended on parents’ discharge of their responsibility to their children. ¹ William Blackstone, *Commentaries on the Laws of England* 434–35, 441 (1765). Blackstone contrasted the absolute power of fathers under Roman law with the English tradition, where “[t]he power of a parent by our English laws is much more moderate.” *Id.*, at 440–41. Under that tradition, parents’ rights “*derived* from the former consideration, their duty.” *Id.*, at 440 (emphasis added).

Importantly, Blackstone may have overstated the rights of fathers in English common law. As historians have observed, Blackstone’s emphasis on the “empire of the father” likely “was more fiction” than an accurate statement of English law.² Early nineteenth-century English chancery courts in fact exercised

² See Julia Bowes, *Every Man’s Home a Castle: Parental Rights and the Makings of Modern Conservatism* 9 (2026) (citing Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* 260–61 (2005)).

significant discretion to supervise fathers and limit their authority when they decided it served children's interests. For example, in *Wellesley v. Wellesley*, 2 Bligh (N.S.) 124, 144–45, 4 Eng. Rep. 1078 (H.L. 1828), the House of Lords affirmed the denial of a father's bid to recover his children from their maternal aunt, noting his "profane swearing."

B. Parental Rights in the Early American Republic.

The early American republic imposed even greater limitations over time, crystallizing a conception of parental authority limited by respect for children's welfare and the State's authority. As we show below, the limits on parental rights became clear in several different contexts. *First*, courts exercised significant discretion to pursue children's best interests when fathers petitioned for writs of *habeas corpus* to return their children to their custody. *Second*, at the time of the ratification of the Fourteenth Amendment, legislatures and courts recognized the State's *parens patriae* authority and its police power to intervene to protect the welfare of children. *Third*, courts throughout the nineteenth century often enforced agreements made by minors without parental consent if those agreements were believed to be to the minors' benefit.

1. That parental rights were significant but far from absolute is borne out in numerous early American cases where fathers tried to enforce their rights by petitioning for writs of *habeas corpus* for return of their children to their custody from mothers or maternal grandparents.

As Chancellor James Kent explained in his influential *Commentaries*, "the courts, both of law and

equity, [would] investigate the circumstances, and act according to sound discretion.” 2 James Kent, *Commentaries on American Law* 163–65 (1827). Rather than enforcing near-absolute rights for fathers, courts scrutinized whether returning the child truly comported with the child’s best interests. The result was that they often awarded custody to other family members.³ See generally Mary Ziegler, Maxine Eichner & Naomi Cahn, *The New Parental Rights Absolutism*, ___ Stan. L. Rev. ___ (forthcoming 2027), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7662242.

Justice Joseph Story emphasized both the purpose and the bounded nature of paternal rights in *United States v. Green*, 26 F. Cas. 30 (CC RI 1824), in reviewing the habeas petition of a father seeking custody of his ten-year-old daughter:

As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education.

Id., at 31–32. The court emphasized that fathers did not have “an absolute vested right in the custody.”

³ That was true even for white, wealthy fathers, who wielded the fullest measure of parental rights. Black fathers exercised no parental powers over their children, and poor parents’ rights were sharply restricted. See Ziegler et al., *The New Parental Rights Absolutism*, at 12–13.

Ibid. Instead, the courts would “look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes.” *Ibid.*

From the Founding through the antebellum era, numerous decisions likewise refused to reflexively rule in favor of a near-absolute parental right. In *Nickols v. Giles*, 2 Root 461, 461–62 (Conn. Super. 1796), the court rejected a father’s habeas petition because the child “was well provided for” by the mother and grandparents and the father had “no house and very little property, and [was] very irregular in his temper and life.” In *State v. Smith*, 6 Greenl. 462 (Me. 1830), the court denied a father’s habeas petition, noting “the father cannot claim them as matter of right,” and concluding that the children were better off with the mother. *Id.*, at 468–69. Cf., e.g., *Gishwiler v. Dodez*, 4 Ohio St. 615, 618 (1855) (finding in favor of father, noting lower court erred in excluding his evidence that included accusations of mother’s drunkenness and profanity, and noting “neither of the parties has any rights that can be made to conflict with the welfare of the child, and that the order of the court should be made with a single reference to its best interests”); *Commonwealth v. Addicks*, 2 Serg. & Rawle 174, 177 (Pa. 1815) (awarding custody to father out of need to “guard the children against the consequences” of their mother’s “pernicious mistake” of adultery for fear the children will conclude “her conduct is approved”).

In many cases, courts also sometimes treated the child’s preference as dispositive of the child’s interests. In *In re Hansen*, 1 Edm. Sel. Cas. 9, 10–11

(N.Y. Recorder 1834), the court awarded custody to the mother based on the child's choice, noting she was old enough to "say where it would be best off, and be treated the best." See also *In re Waldron*, 13 Johns. 418, 420–21 (N.Y. Sup. Ct. 1816) (denying father's habeas petition on court's assessment that "it will be more for the benefit of the child to remain with her grandparents" and noting child's consent to do so).

By the time of the Fourteenth Amendment's ratification, courts definitively endorsed the view that parental rights yielded to concern for children's wellbeing, and often considered the child's own preferences in determining what would be in their best interest. In *Ellis v. Jesup*, 74 Ky. 403, 414 (1875), the Kentucky high court asked: "is the authority of the father paramount to every other consideration, and must the best interests of the child yield to that authority?" The answer was a resounding no. Courts would "exercise a sound discretion" and would "not as a matter of course interfere and take a child, though under fourteen years of age, from the possession of a third person and deliver it over to the father against the will of the child." *Id.*, at 414–15.

Authorities of the era were in accord that the best interests of the child are paramount, and that one important consideration was the child's own view. See, e.g., Cooley, *A Treatise on the Constitutional Limitations*, at 348 ("The courts . . . do not feel compelled to remand him to any custody where it appears not to be for the child's interest . . . if the child is of an age to render it proper to consult his feelings and wishes, this may be done in any case."); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and Practice Connected*

with It: With a View of the Law of Extradition of Fugitives 453–55, 461 (2d ed. 1876) (explaining “the welfare of the child and not the technical legal right [of the father] is the criterion by which to determine to whom the custody of the child shall be awarded” and that the court “will consult the inclination of an infant, if it be of sufficiently mature age to judge for itself”); James Schouler, *A Treatise on the Law of Domestic Relations, Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant* 446 (2d ed. 1874) (“The leading consideration for the court should be the interest and welfare of the child.”); see also Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 234–41 (1985).

Petitioners assume a historically expansive view of parental rights but cite scant authority in support.⁴ Pet. Br. 54–55. Likewise, their *Amici* cannot support the proposition that courts required “unfitness, danger, misconduct, or circumstances showing that the child could not safely remain with the parent otherwise entitled to custody.” Legal Scholars Br. 19–20; see *supra*, at 6–10. Nor do *Amici* give their primary sources balanced treatment. For example, they quote a passage from Kent’s *Commentaries* about the father’s recourse to habeas as a remedy, see Legal Scholars Br. 19; Florida Br. 8, but omit the next part of the same sentence deeming the rights of fathers significantly constrained by the court’s “sound discretion,” which did not consistently enforce the

⁴ Petitioners’ cited source—a student note—largely overlooks the rich history of significant limitations on parental rights. See Nathan J. Wertjes, *Parents and Medical Consent*, 100 Notre Dame L. Rev. 2259, 2269 (2025).

rights of “the father against the will of the child.” 2 Kent, *Commentaries*, at 163–64.

The issue is not whether our tradition recognized parents’ rights as important. The answer is clearly yes. Our tradition, however, does not support the near-absolute version of parental rights that Petitioners and their *Amici* detail.⁵ If anything, precisely at the time of the Fourteenth Amendment’s ratification, courts were even more clearly establishing limits on parents’ rights and simultaneously broadening the authority of the State in the interest of children’s wellbeing.

2. By the Fourteenth Amendment’s ratification, the expansion of the State’s *parens patriae* authority and police powers confirmed further limits on parental rights. The *parens patriae* doctrine derived from the English principle that the king had both sweeping power and commensurate duties to vulnerable subjects. This power devolved to England’s chancellors, who exercised it in custody cases. The doctrine was firmly established in American law by the nineteenth century, providing another basis for courts to restrict parental power.

Nineteenth-century courts readily did so when adjudicating parental challenges to the practice of institutionalizing minors. Various called houses of refuge, reform schools, or reformatories, these

⁵ Historical scholarship overwhelmingly confirms this account. See Grossberg, *Governing the Hearth*, at 239 (detailing how “the judicial disposition to emphasize child welfare” transformed the common law); Hendrik Hartog, *Man and Wife in America: A History* 211 (2000) (describing how parental rights yielded to “the best interests of the child,” which “became the ‘polestar’ of American child custody law”).

institutions housed committed children who were impoverished, homeless, convicted of certain minor offenses, or perceived to be delinquent or immoral. When parents challenged their children's confinement, courts invoked the doctrine of *parens patriae* as a limitation on parental rights. In *Ex parte Crouse*, 4 Whart. 9, 11–12 (Pa. 1839) (per curiam), the Pennsylvania Supreme Court rejected one such challenge, reasoning, “The right of parental control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation.” *Ibid.* The court emphasized the State's interest in reforming youth, adding, “we know of no natural right to exemption from restraints which conduce to an infant's welfare.” *Ibid.* Other courts agreed, rejecting challenges to such statutes on *parens patriae* grounds. See *Roth v. House of Refuge*, 31 Md. 329, 335 (1869) (noting “[t]he right of parental control is a natural, but not an unalienable one” and “consequently remains subject to the ordinary legislative power”); *McLean Cnty. v. Humphreys*, 104 Ill. 378, 383–84 (1882) (stressing the State's “right to provide for the education, support and control of these unfortunate beings”); *Reynolds v. Howe*, 51 Conn. 472, 478 (1884) (rejecting a constitutional challenge and reaffirming the power of the State to attempt to “reform viciously inclined boys”); *Jarrard v. State*, 17 N.E. 912, 913 (Ind. 1888) (affirming state power to intervene when “parental restraint is not strong enough to prevent boys from becoming evil members of society”).

Moreover, by the Fourteenth Amendment's ratification, an expansive idea of *parens patriae* and police power underwrote the spread of state laws, see William J. Novak, *The People's Welfare: Law and*

Regulation in Nineteenth-Century America 11–21 (1996), including those regulating the health, labor, and education of children in ways that limited parental authority. “Direct regulation of children constituted one of the most active exercises of the states’ police powers between the end of the Civil War and the New Deal.” Julia Bowes, *Every Man’s Home a Castle: Parental Rights and the Makings of Modern Conservatism* 3 (2026). Between 1867 and 1900, for example, over thirty states passed compulsory school attendance laws. See *id.*, at 2. In the nineteenth century, more than fifteen states passed child labor laws. See *ibid.*; Naomi Cahn, Maxine Eichner & Mary Ziegler, *Children at Work, Parental Rights—and Rhetoric*, 77 Ark. L. Rev. 257, 260–61 (2024).

Constitutional challenges to these laws generally failed. For example, an 1876 Massachusetts case held that a statute limiting child labor in manufacturing workplaces to no more than ten hours per day was constitutional “either as a health or police regulation.” *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, 384 (1876). Similarly, *People v. Ewer*, 36 N.E. 4 (N.Y. 1894), considered a mother’s right to allow her seven-year-old child to work as a dancer at New York’s Broadway Theater. The challenged statute prohibited anyone from “exhibit[ing]” a girl younger than fourteen as “a dancer . . . or in a theatrical exhibition.” *Id.*, at 4. While recognizing the parent’s interest in shaping her child’s upbringing, the court found that the State’s police power allowed the legislature to assert a “right of supervision and control over the child which in every civilized state inheres in the government.” *Id.*, at 5. Similar logic led courts to uphold other child welfare laws. For example, the court in *Quigley v. State*, 3 Ohio C.D. 310, 1891 WL

289, at *11 (Ohio Cir. Ct. 1891), drew upon the State’s police powers to affirm the constitutionality of a statute requiring compulsory education and punishing parents who “refuse to cause said child to attend some recognized school.”

In short, legislatures and courts in the mid- to late nineteenth century adopted a robust conception of the State’s *parens patriae* and police powers, enacting and upholding a series of laws designed to protect children, even when such legislation limited parental authority. Cf. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 260, at 248 (1904) (noting nineteenth-century courts held that “there is no parental authority independent of the supreme power of the state”).

3. Moreover, contrary to the assertion that parents had the right to make all decisions for their children, the historical record confirms that early American courts allowed minors to act for their own benefit in certain arenas. See generally Naomi Cahn, Maxine Eichner & Mary Ziegler, “*For Their Benefit*”: *The Lost History of Parental Consent and Minors’ Rights*, 114 Calif. L. Rev. 647, 653–62 (2026).

As Blackstone noted, minors could make certain contracts for their own benefit, including in the case of “meat, drink, apparel, physic, and such other necessities; and likewise for his good teaching and instruction.” 1 Blackstone, *Commentaries*, at 454. In the early days of the Republic, minors could enter contracts when the underlying contract advanced the child’s wellbeing. These contracts related to issues well beyond necessities.

For example, in *United States v. Bainbridge*, 24 F. Cas. 946 (CC Mass. 1816), Justice Story examined

whether a minor could enlist in the Navy without his parent's consent. The case arose from a habeas petition filed by the father of Robert Treadwell, who had enlisted in the Navy and subsequently was convicted of desertion. His father argued that Treadwell's contract to join the Navy was void since there was no parental consent; Treadwell's desertion conviction therefore could not stand.

Disagreeing, Justice Story discussed the nature of parental rights with significant nuance. Although fathers had the "right to the custody" of their children during infancy and a father was "entitled to the benefit of his children's labor, while they live with him, and are maintained by him," Justice Story confirmed that parental authority is limited in significant ways by considerations of the interests of the child. *Id.*, at 949. Moreover, absent statutory exclusions, minors could enter into contracts "for their benefit, and for the public benefit," even without parental consent. *Id.*, at 951. Notably, at common law, if "the contract is for the benefit of the infant, as for instance, for necessaries, there it shall bind him; when it can pronounce it to be to his prejudice, it is void; and that where it is of an uncertain nature, as to benefit or prejudice, it is voidable only; and it is in the election of the infant to affirm it or not." *Id.*, at 950. Accord *Commonwealth v. Murray*, 4 Binn. 487, 494 (Pa. 1812) (Yeates, J.) ("Where the minor has a probable benefit at the time which may result from the contract, he shall not avoid it.").

Thus, the court in *Bainbridge* rejected the father's argument that Treadwell's enlistment contract without parental consent was void because minors benefitted from such contracts: "The laws manifestly

contemplate, that it is a personal contract made by the infants themselves for their own benefit.” *Bainbridge*, 24 F. Cas., at 951.

Common-law authorities affirmed Story’s view. Kent’s *Commentaries* noted that “when the court could pronounce the contract to the infant’s prejudice, it was void, and when to his benefit, as for necessities, it was good.” 2 Kent, *Commentaries*, at 193. Joel Prentiss Bishop’s canonical treatise on contracts reflected this principle: “the common rule” governing minors’ contracts was that “if it is clearly for the minor’s benefit, it is valid, binding him the same as though he were an adult; if clearly to his disadvantage, it is void.” Joel Prentiss Bishop, *Commentaries on the Law of Contracts upon a New and Condensed Method* § 917, at 355 (1887).

Likewise, in the nineteenth century—and contrary to the assertion of Petitioners’ *Amici*, see, e.g., Florida Br. 6—courts enforced the marriage agreements of minors when permitted by state law, even if their parents did not consent. Key treatises of the era confirmed that for minors to marry, the “consent of parents, or guardians, to the marriage of minors is not requisite” in several states. 2 Kent, *Commentaries*, at 73–74. For example, in states like Maine and Massachusetts, although statutes required magistrates and ministers to identify “consent of the parents or guardians” for minors under a certain age, the rule was that a marriage without such consent “would nevertheless be lawful and binding, provided there was the presence and assent of a magistrate or minister.” *Id.*, at 77 (noting similar Connecticut and New Jersey policies). Bishop’s treatise on family law noted, “The consent of parents to the marriages of

their minor children is not, at common law, essential to the validity of such marriages.” Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits* § 174, at 167 (3d ed. 1859).

While earlier cases regarding minors and consent for medical treatment were rare, see Cahn et al., *For Their Benefit*, at 658, cases in the early twentieth century sometimes rejected liability for medical providers when they provided medical care to minors without parental consent, particularly when they involved older minors. Contra Pet. Br. 54–55; Legal Scholars Br. 16. As with other claims of parental rights, these cases turned on the wellbeing of the child. For example, in *Bakker v. Welsh*, 108 N.W. 94 (Mich. 1906), a seventeen-year-old boy named Stephen, while visiting relatives, had surgery to remove a tumor. When he unexpectedly died on the operating table, his father brought a tort claim against the physicians. The Michigan Supreme Court rejected the claim, reasoning that it would be “too harsh a rule to say that . . . the defendants should be held liable because they did not obtain the consent of the father.” *Id.*, at 96. The court suggested that any reasonable parent *would* have consented to the treatment at issue: There is “nothing in the record,” the court reasoned, “to indicate . . . that the father did not approve of his son’s going with his aunt and adult sisters, and consulting a physician as to his ailment, and following his advice.” *Ibid.* In other words, the role of parental consent was one means to ensure that the decision regarding surgery was the appropriate one to support the minor’s health, as it was in this case. Relevant to its determination were the facts that Stephen was “almost grown into manhood,” that he

had prior experience with medical care, and that he had consulted with other family members. *Ibid.*; see also *Luka v. Lowrie*, 136 N.W. 1106, 1110–11 (Mich. 1912) (in case about fifteen-year-old’s surgery without parental consent, finding no liability because the physician needed not “wait until perhaps he may be able to secure the consent of the parents” because doing so may “result in the loss of many lives which might otherwise be saved”).

Importantly, cases in which courts found in favor of requiring parental consent in medical decision-making, see Legal Scholars Br. 16, ground the parental right in service of the best interests of the child, not in an intrinsic conception of parental rights that needs no justification beyond itself. For example, in *Moss v. Rishworth*, 222 S.W. 225 (Tex. Comm’n App. 1920), the court found for the parents who sued over the unconsented medical operation of an eleven-year-old that resulted in death. In doing so, the court linked the very concept of parental right to child wellbeing: “The law wisely reposes in the parent the care and custody of the minor child, and neither a physician nor those in temporary custody of the child will be permitted, in a case of this character, to determine those matters touching its welfare.” *Id.*, at 227. Further, the court noted, in the case at bar, there was no contention “that any real danger would have resulted to the child” from the requirement of parental consent. *Id.*, at 226; see also *Bonner v. Moran*, 126 F.2d 121, 122–23 (CADC 1941) (treating “where the child is close to maturity” and the “benefit of the child” as exceptions to general rule of parental consent for medical procedures).

C. The Common-Law Torts of Harboring and Enticement Fail to Support Petitioners' Position.

In painting a picture of near-absolute parental rights, Petitioners and their *Amici* rely on the common-law torts of enticement and harboring to advance their argument that Article III standing can be rooted in the potential for the challenged laws to “lure” children into running away. Pet. Br. 32, n. 15, 41, 55; see also Legal Scholars Br. 11, 25. This argument deeply misunderstands these causes of action.

There are two significant reasons that the history of enticement torts cannot fill the large hole in historical precedent that Petitioners claim that it can. First, the cited historical causes of action of enticement and harboring were filed against private persons rather than the government. There is an excellent reason for that. As the history we have recounted makes clear, see *supra*, at 11–14, the State, acting on both its police and *parens patriae* powers, has long held a privileged position when it comes to children. As demonstrated in *Ex parte Crouse*, 4 Whart., at 11–12, the State’s authority over children allowed it to create a House of Refuge that removed children from their parents’ care without parental consent—a far more direct interference with ordinary parental prerogatives than the alleged interference contested here. And as shown in *Bainbridge*, 24 F. Cas., at 949–51, the government was understood to have the power to authorize minors to enlist without parental consent, again removing them entirely from their parents’ custody. If this sweeping governmental intervention was understood not to violate parental

rights, far less direct and unintentional actions would not, either.⁶ This history shows that the government is positioned vastly differently from the private parties found liable for enticement and harboring torts, and that such torts thus cannot support the instant suit against the State.

Second, the historical enticement and harboring cases on which Petitioners and their *Amici* rely involved suits in which children actually left the family home. Harboring and enticement at least partly originated out of the master-servant action for loss of services (*per quod servitium amisit*). See Melville M. Bigelow, *Leading Cases on the Law of Torts Determined by the Courts of America and England* 290 (1875) (“The action was fashioned after the claim of a master for injuries to his servant whereby a loss of service was sustained.”). For this reason, the plaintiff needed to prove the separation of the child from the family to demonstrate the loss of the minor’s company or services. See 3 William Blackstone, *Commentaries on the Laws of England* 140 (1768) (explaining that an action might exist for “abduction or taking away the children from the father”).⁷ As the Restatement (Second) of Torts later

⁶ At common law, intentionality was required for enticement liability, something lacking in this case. See Schouler, *A Treatise on the Law of Domestic Relations*, § 380 (noting that an enticement defendant must have the active “intention of aiding or encouraging, or . . . the knowledge that it aids and encourages the [child] to stay away from the father”).

⁷ In addition to being legally unavailable, the tort of “harboring” is also logically inconceivable before the child has left the home, rendering Petitioners’ theory of standing based on the “lure” of a government policy hollow.

put it, “an action may be maintained by the parent who is entitled to the custody of a minor child against one who by force abducts the child from its home, or one who induces the child to leave its home with knowledge that the parent has not consented.” Restatement (Second) of Torts § 700, Comment a (1977).

Petitioners’ own citations prove the point. For example, their invocation of *Kirkpatrick v. Lockhart*, 4 S.C.L. (2 Brev.) 276 (S.C. Const. Ct. App. 1809), for the proposition that the parental right extended to “enticement and harboring of a runaway child” involving “no proof of harm beyond invasion of the parental right,” misreads the case. Pet. Br. 55. In *Kirkpatrick*, the plaintiff father sued over the defendant “*forcibly taking away* the plaintiff’s daughter,” a minor. *Kirkpatrick*, 4 S.C.L., at 276 (emphasis added). In short, the injury being redressed was the forcible removal from the child’s father’s home.

The authorities cited in the Legal Scholars brief are not on point, either. Focusing on dicta in an 1850 Massachusetts Supreme Judicial Court decision, *Butterfield v. Ashley*, 6 Cush. 249 (Mass. 1850), the brief argues that there is “liability for knowingly enticing or harboring a minor, without physical seizure.” Legal Scholars Br. 25. But the fact that enticement does not require physical force is irrelevant here: the minor still needed to leave the home so that the parent experienced the loss of custody and companionship that was the gravamen of the tort. In *Butterfield*, unlike the present case, the minor left home, of his own accord, and then “applied to the defendants to employ him in a whaling vessel.”

6 Cush., at 250; see also *Butterfield v. Ashley*, 2 Gray 254, 256 (Mass. 1854) (holding no enticement liability for conduct after child has already left the home).

Likewise, the Legal Scholars brief's other citations all involve children who had left the home. See *Campbell v. Cooper*, 34 N.H. 49, 68 (1856) (no cause of action for plaintiffs who were nonparent indenture masters of minors who left to live with another relative); *Sargent v. Mathewson*, 38 N.H. 54, 57–58 (1859) (finding for father because he was “deprived of his services and custody,” but noting that no liability would lie if the defendant could show he was acting under “mere motives of kindness and charity, or in order that he might restore him to his father, or give his father an opportunity to recover him”); *Gulf, C. & S.F. Ry. Co. v. Redeker*, 2 S.W. 527, 527 (Tex. 1886) (noting liability turns on “loss of service and incidental expenses accruing from the injury”). None of these cases contemplates a cause of action based on the diminishment of the quality of an ongoing custodial relationship, which Petitioners seek to assert as the relevant injury in this case.

Lacking historical evidence, Petitioners and their *Amici* turn to more recent cases, but to no avail. In stating that the “tort of enticement was available where a defendant ‘induce[d] a child to leave the parent’s home,’ knowing the parent did not consent,” Petitioners cite a single state court decision from 2008 about abduction. Pet. Br. 55 (citing *Khalifa v. Shannon*, 945 A.2d 1244, 1253 (Md. 2008)). But *Khalifa* had precisely the element that Petitioners lack—the actual departure of the child from the custodial home. There, the defendant third-party mother took her children, one of whom was not in her

primary custody, out of the country without notice and refused all contact with the children’s father—conduct the court labeled an “abduction and harboring of minor children.” *Id.*, at 1248 (citing *Kirkpatrick*, 4 S.C.L., at 276). While the court quoted authority stating that “[t]he true ground of action cannot be the loss of service,” it emphasized that “[t]he true ground of action is the outrage, and *deprivation*; the injury the father sustains in the *loss* of his child” *Id.*, at 1250–51 (emphasis added). Unlike in *Khalifa*, Petitioners have sustained no such injuries of either type.

* * *

In short, the historical development of parental rights in this Nation has a relatively consistent through line: parental rights were “deeply rooted in this Nation’s history and tradition,” *Glucksberg*, 521 U.S., at 721, but those rights were not absolute or near-absolute.

II. This Court’s Longstanding Constitutional Jurisprudence Likewise Recognized that Parental Rights Are Both Fundamental and Limited.

In a line of cases going back to the early twentieth century, this Court, although repeatedly stressing that parental rights are fundamental under the Constitution, also continually recognized that these rights were subject to important constraints. This line of cases recognized several propositions that Petitioners and their *Amici* overlook. See, e.g., Pet. Br. 32; Legal Scholars Br. 18; Florida Br. 7–8; U.S. Br. 14–16. First, the Court’s longstanding jurisprudence continued to validate the view developed in earlier law that the ultimate end of decision-making regarding

children is to protect children's wellbeing. Second, the Court recognized that parents most often have rights to make decisions about their children because they best serve children's interests. Third, the Court affirmed that the State itself has its own important authority and interests in legislating regarding children.

In the first landmark case recognizing that the substantive Due Process Clause of the Fourteenth Amendment encompassed "the power of parents to control the education of their own," this Court in *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), struck down a state law requiring English-only education. In recognizing the teacher's "right thus to teach and the right of parents to engage him so to instruct their children," the Court nonetheless described the parental right as one that must be balanced against the State's own authority. Reasoning that the teaching of children in modern foreign languages was "not injurious to the health, morals or understanding of the ordinary child," the Court clarified that parents' rights to control the education of their children were bounded by considerations of the child's "health, morals or understanding." *Id.*, at 403. Further, the state interest in "foster[ing] a homogeneous people with American ideals prepared readily to understand current discussions of civic matters" did not win the day because teaching children other languages was not "so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed." *Id.*, at 402–03. Thus, the challenged law lacked "reasonable relation to any end within the competency of the state." *Ibid.*

Similarly, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), the Court struck down a statute requiring public-school education because the “liberty of parents and guardians to direct the upbringing and education of children” included the right to choose private education. *Id.*, at 534. But the Court took pains to affirm the State’s *parens patriae* authority, noting the case did not impinge on the “power of the state reasonably to regulate all schools.” *Ibid.* As the progenitors of a subsequent line of cases applying parental rights to a variety of contexts, *Meyer* and *Pierce* solidified the notion that parental rights are both foundational and limited.

The same principles informed the Court’s decision in *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). The case considered the conviction of Sarah Prince, the aunt and legal guardian of nine-year-old Betty Simmons. Prince was prosecuted under Massachusetts’s child labor laws for allowing Betty to distribute Jehovah’s Witness literature on the street while Prince accompanied her. The Court recognized that “custody, care and nurture of the child reside first in the parents,” but emphasized that the “rights of parenthood” are not “beyond limitation.” *Id.*, at 166. Against parents’ “sacred private interests,” the Court counseled, “stand the interests of society to protect the welfare of children, and the state’s assertion of authority to that end.” *Id.*, at 165. It explained, “[a]cting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control.” *Id.*, at 166. Ultimately, the Court upheld the law on the ground that it fell within the State’s power to support minors “within a broad range of selection.” *Id.*, at 168.

Wisconsin v. Yoder, 406 U.S. 205 (1972), likewise affirmed important limits on the bounds of parental rights. In ruling for the Amish parents who challenged Wisconsin’s compulsory school attendance law on the grounds that it violated their religious beliefs, the Court recognized several principles.

First, it noted that there was no indication in the record that the children dissented from their parents’ preferences, thereby leaving open the notion that children’s own views could constrain parental rights. *Id.*, at 231. Second, the Court noted that parents’ rights must be balanced against “the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.” *Id.*, at 213. Finally, the Court suggested that parental authority would be constrained insofar as it undermined children’s wellbeing. It explained, “the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Id.*, at 233–34.

Importantly, in applying these relevant considerations to reach its conclusion, the Court repeatedly emphasized the need to scrutinize the record evidence. The strength of the State’s interests in supporting minors’ wellbeing and development, the Court stated, would vary depending on the evidence presented in the case. *Id.*, at 234–35. On the facts of the case before it, though, the Court determined the evidence showed that forgoing one or two “additional years of compulsory education will not impair the physical or mental health of the child, or result in an

inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.” *Id.*, at 234.

Next, in *Parham v. J. R.*, 442 U.S. 584 (1979), the Court examined a challenge by a class of children against Georgia laws that allowed parents to admit their minor children to psychiatric institutions against the child’s consent. The Court began by reaffirming the “broad parental authority over minor children” based on the recognition “that natural bonds of affection lead parents to act in the best interests of their children.” *Id.*, at 602. But the Court also stressed that “a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.” *Id.*, at 603. Instead of approving parents’ absolute rights to commit their children, the Court engaged in a multifaceted inquiry about “what process protects adequately the child’s constitutional rights by reducing risks of error without unduly trenching on traditional parental authority and without undercutting efforts to further the legitimate interests of both the state and the patient.” *Id.*, at 606 (cleaned up).

The Court eventually concluded that the process must include a “neutral factfinder to determine whether the statutory requirements for admission are satisfied,” which must “probe the child’s background using all available sources” and “include an interview with the child.” *Id.*, at 607. The Court expressly recognized “the child’s rights,” which, when combined with “the nature of the commitment decision,” meant that “parents cannot always have absolute and

unreviewable discretion to decide whether to have a child institutionalized.” *Id.*, at 604.

Further, in *Santosky v. Kramer*, 455 U.S. 745, 768–69 (1982), which held that the evidentiary standard of clear and convincing evidence applies to proceedings that would terminate parental rights, this Court again recognized “two state interests” when parents assert rights over children: “a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.” *Id.*, at 766. While parents generally have a right to make decisions regarding their children, that principle did not reign supreme in all situations.

Troxel v. Granville, 530 U.S. 57 (2000), is the most recent case in which the Court addressed a substantive due process claim for parental rights on the merits. There, the Court emphasized the constitutional importance of that right while also affirming its historical limits. The Court considered a parental-rights challenge to a visitation order pursuant to a Washington law that permitted “[a]ny person” to “petition the court for visitation rights at any time” and gave the court power to grant such a petition when in its opinion “visitation may serve the best interest of the child.” *Id.*, at 67. Justice O’Connor, writing for a plurality of the Court, concluded that the particular order at issue granting visitation rights to the children’s grandparents represented “an unconstitutional infringement on Granville’s fundamental right to make decisions concerning the care, custody, and control of her two daughters” because the state court “failed to accord” Granville,

the mother and “a fit custodial parent,” “any material weight.” *Id.*, at 72.

The plurality based its determination on the ground that the lower court “directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child” and thus violated the mother’s “fundamental constitutional right to make decisions concerning the rearing of her own daughters.” *Id.*, at 69–70. However, the plurality opinion did not accord even a fit parent like the mother in the case anything close to absolute authority. According to the plurality, the lower court erroneously “gave no special weight at all to [the mother’s] determination of her daughters’ best interests.” *Id.*, at 69. Ultimately, the plurality determined that the lower court must give some weight to the mother’s decision regarding visitation, but did not require that her preferences receive overwhelming or decisive weight. Meanwhile, the plurality declined to decide “[w]hether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation,” noting only that “the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best ‘elaborated with care.’” *Id.*, at 73.

Although this Court, in considering an emergency application last Term, discussed parental rights at a high level of generality, see *Mirabelli v. Bonta*, 607 U.S. 492, 497–98 (2026) (per curiam), that interim order on the Court’s emergency docket did not overrule precedent or change the way the Court

evaluates our history and tradition, see *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (noting that “our interim orders are not conclusive as to the merits” although they do “inform how a court should exercise its equitable discretion in like cases”). *Mirabelli* reasons that “parents—not the State—have primary authority with respect to ‘the upbringing and education of children,’” and that parents cannot “be shut out of participation in decisions regarding their children’s mental health.” 607 U.S., at 497 (citations omitted). But *Mirabelli* did not embrace the idea that parents’ rights in our tradition are absolute. Indeed, the Court pointed out that “[e]veryone agrees that children’s safety is the overriding equity.” *Ibid.* That is precisely what our history and tradition require.

As the above discussion shows, this Court’s precedent has long confirmed what our history and tradition establish: the Constitution protects rights for parents, even as those rights are limited by concern for children themselves.

CONCLUSION

In discussing parental rights in this case, Petitioners and their *Amici* make sweeping claims that ignore the historical complexity and boundaries of parental rights. This Court should avoid making the same errors in evaluating the narrow Article III question presented.

Respectfully submitted.

ANGELA CAI
Counsel of Record
 PLATKIN LLP
1 Gateway Center,
Suite 1150
Newark, NJ 07102
(973) 561-1952
acai@platkinllp.com

MARY ZIEGLER
Chancellor's Leadership
Professor and Martin
Luther King Jr.
Professor of Law
 UC DAVIS SCHOOL OF LAW

NAOMI R. CAHN
Justice Anthony M.
Kennedy Distinguished
Professor of Law
Co-Director, Family
Law Center

MAXINE EICHNER
Graham Kenan
Distinguished
Professor of Law
 UNIVERSITY OF NORTH
 CAROLINA SCHOOL OF LAW

UNIVERSITY OF VIRGINIA
 SCHOOL OF LAW

Counsel for Amici Curiae

OCTOBER 2026

APPENDIX

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APPENDIX — LIST OF *AMICI CURIAE*⁸

Susan Frelich Appleton

Lemma Barkeloo & Phoebe Couzins Professor of Law
Professor of Women, Gender, & Sexuality
Studies (courtesy)
WASHINGTON UNIVERSITY IN ST. LOUIS

Barbara A. Atwood

Mary Anne Richey Professor of Law Emerita
Co-Director, Family and Juvenile Law
Certificate Program
JAMES E. ROGERS COLLEGE OF LAW,
THE UNIVERSITY OF ARIZONA

Naomi R. Cahn

Justice Anthony M. Kennedy
Distinguished Professor of Law
Co-Director, Family Law Center
UNIVERSITY OF VIRGINIA SCHOOL OF LAW

June Carbone

Robina Chair of Law, Science and Technology
UNIVERSITY OF MINNESOTA LAW SCHOOL

Maxine Eichner

Graham Kenan Distinguished Professor of Law
UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Dov Fox

Warren Distinguished Professor of Law
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW

⁸ *Amici* file this brief solely as individuals; institutional affiliations are listed for identification purposes only.

Marie-Amélie George

Professor

WAKE FOREST UNIVERSITY SCHOOL OF LAW

Michael Grossberg

Professor Emeritus of History

Department of History

INDIANA UNIVERSITY, BLOOMINGTON

Joanna L. Grossman

Ellen K. Solender Endowed Chair

in Women and the Law

Altshuler Distinguished Teaching Professor

SMU DEDMAN SCHOOL OF LAW

Joan Heifetz Hollinger

Elizabeth Boalt Lecturer-in-Residence, Emerita

UC BERKELEY SCHOOL OF LAW

Solangel Maldonado

Eleanor Bontecou Professor of Law

SETON HALL UNIVERSITY SCHOOL OF LAW

Serena Mayeri

Arlin M. Adams Professor of Constitutional Law and

Professor of History (courtesy)

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Linda C. McClain

Robert Kent Professor of Law

BOSTON UNIVERSITY SCHOOL OF LAW

Laura Savarese

Assistant Professor of Law

MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

Gregg Strauss

Joseph W. Dorn Research Professor of Law

Co-Director, Family Law Center

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mary Ziegler

Chancellor's Leadership Professor and

Martin Luther King Jr. Professor of Law

UC DAVIS SCHOOL OF LAW