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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

IN RE BATES MINORS

Supreme Court Case No. 165815
Court of Appeals Case No. 361566
Wayne County Circuit Court Family Division Case No. 18-004645-NA

AMENDED PROPOSED BRIEF OF AMICI CURIAE CIVIL RIGHTS CORPS, AMERICANS FOR PROSPERITY FOUNDATION, CENTER FOR CONSTITUTIONAL RIGHTS, CHILD JUSTICE, CHILDREN'S RIGHTS, FRONTIERS OF FREEDOM, NATIONAL COALITION FOR CHILD PROTECTION REFORM, RELIGIOUS FREEDOM INSTITUTE AND UNITED FAMILY ADVOCATES IN SUPPORT OF APPELLANT

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STATEMENT OF INTERESTS OF AMICI CURIAE*

Civil Rights Corps (CRC) is a national civil rights non-profit legal organization dedicated to challenging systemic injustice in the American legal system. It works with individuals directly impacted by the legal system, their families and communities, activists, organizers, judges, and government officials to create a legal system that promotes equality and freedom. CRC has worked extensively to ensure that courts apply the appropriate level of scrutiny—strict scrutiny—as a prerequisite to the deprivation of a fundamental liberty interest.

Americans for Prosperity Foundation (AFPF) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Those key ideas include constitutionally limited government and individual constitutional rights, including those fundamental rights recognized under and protected by the Fourteenth Amendment to the United States Constitution. As part of its mission, AFPF regularly appears as amicus curiae before state and federal courts.

The Center for Constitutional Rights (CCR), founded in 1966, is a national, nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Upholding the equal protection guarantees of the Fourteenth Amendment has been central to much of CCR's decades-long legal work, as has stopping the forced separation of families by the government. CCR has challenged violations of the Fourteenth Amendment by agencies at all levels of government in cases such as

* No counsel for a party authored this brief in whole or in part. No counsel, party, or individual other than amici curiae counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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Floyd, et al. v. City of New York, et al. as well as filed cases such as *Al Otro Lado, Inc., et al. v. Alejandro Mayorkas, et al.* to stop the separation of immigrant parents from their children. Additionally, it has used open records litigation to support nationally known family rights advocates such as Joyce McMillan.

Child Justice, Inc. is a national organization that advocates for the safety, dignity and self-hood of abused, neglected and at-risk children. The mission of Child Justice is to protect and serve the rights of children in cases where child sexual abuse, physical abuse or domestic violence are present. It works with local, state and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats facing abused, neglected and at-risk children.

Children's Rights is a national public interest organization based in New York that investigates, exposes, and combats violations of the rights of children. Through strategic advocacy and civil rights impact litigation, Children's Rights holds governments accountable for keeping children and youth safe, healthy, and free from discrimination. Since its founding in 1995, Children's Rights has achieved lasting, systemic change for hundreds of thousands of children throughout the country across over 20 jurisdictions. Its work challenges racist, discriminatory laws, policies, and

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practices that punish parents experiencing poverty by taking their children and unnecessarily placing them in dysfunctional foster systems. Its advocacy centers on building solutions that will advance the rights of children for generations.

Frontiers of Freedom (FF) is an educational foundation whose mission is to promote freedom and opportunity whenever and wherever it can. FF is dedicated to the principles of individual liberty, peace through strength, limited government, free enterprise, and the values embodied in the Declaration of Independence, Constitution, and Bill of Rights. FF believes freedom is worth preserving, defending and renewing. FF's goal is to build a robust culture of freedom, opportunity, and prosperity through effective education, analysis and advocacy. And it believes that basic standards of civic virtue are essential to maintaining America's economic strength, military might, and freedom. As a general rule, parents and families, not government, are best suited to prepare children to be good citizens and happy, productive adults.

National Coalition for Child Protection Reform (NCCPR) is an organization of professionals, drawn from the fields of law, academia, psychology and journalism, who are dedicated to improving child welfare systems through public education and advocacy. NCCPR is a tax-exempt non-profit organization founded at a 1991 meeting at Harvard Law School. NCCPR devotes much of its attention to public education concerning widespread public misconceptions about the child protective system and its impact on the children it is intended to serve. Lawyer members of NCCPR also

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individually have litigated numerous precedential cases involving child protection policies and proceedings.

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. RFI works to make religious freedom a priority for government, civil society, religious communities, businesses, and the general public. RFI envisions a world that respects religion as an indispensable societal good and which promises religious believers the freedom to live out their beliefs fully and openly. RFI thus seeks to ensure that governments do not inhibit the free exercise of religion and that religious believers are entitled to the full measure of protections afforded to religious practice—including by having full access to federal courts to protect religious freedoms from politicized state government investigations.

United Family Advocates (UFA) is a bipartisan coalition of child and family advocates who seek policy solutions to create a more compassionate and just approach to child welfare that focuses on supporting rather than separating families. We bring together advocates from across the political spectrum who have divergent views on many issues, but are united by our commitment to a future in which children and families find safety and support from community investment rather than government intervention.

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PRELIMINARY STATEMENT

In a time of deep division in our country on many constitutional questions, there is strong consensus on one point: family integrity is a fundamental right that commands the strongest constitutional protection. Across the political spectrum and throughout our nation's history, all agree that parental rights are fundamental rights that predated the Constitution and were enshrined in it. The U.S. Supreme Court has repeated this point again and again in unequivocal language, emphasizing that rights to family relationships are "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "In light of this extensive precedent, *it cannot now be doubted* that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (plurality opinion) (emphasis added).

The rights of parents and children to a relationship with each other are at their apex when the state seeks to completely sever the bonds between them. A termination of parental rights does far more than interfere with the fundamental constitutional right of family integrity—it extinguishes it. The United States Supreme Court has had the opportunity three times to review state-court judgments that resulted in terminations. Each time, drawing on longstanding caselaw on parental rights, the Court held that the substantive rights at issue in termination cases are "fundamental" within the meaning of the Fourteenth

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Amendment. While the Court has focused on procedural protections required by the Constitution when the state seeks to end the parent-child relationship, its decisions have made clear that the right at issue is one that requires substantive protection as well. Indeed, the right to family integrity is one of the few substantive due process rights that remains uncontested and firmly enshrined in Supreme Court jurisprudence. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022); *Troxel*, 530 U.S. at 65–6, 87 (plurality opinion). Therefore, there should be no doubt that the Constitution requires courts to apply strict scrutiny when reviewing an order that permanently severs the parent-child relationship to ensure that the order is narrowly tailored to meet a compelling state interest.

Of course, there is also broad consensus that protecting children from harm is a state interest of the gravest importance. The critical question raised in this case is when the state interest in protecting children from harm justifies permanently severing family relationships. That question properly includes an as-applied analysis that considers the individual circumstances of the parent-child relationship in question. This case presents an important opportunity to articulate the constitutional principles that govern the analysis courts must undertake and to guide trial courts entrusted with the profound decision of when the state can end family ties. These principles are timeless yet require consideration of the contemporary spectrum of permanency options and up-to-date social science on the importance of relational permanence to child wellbeing.

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Amici are legal and policy organizations that disagree with each other on many topics, but we join together to urge the Court to make clear that as a fundamental right, family integrity is unquestionably subject to strict scrutiny, and to explain the required inquiry. Family relationships can be permanently extinguished only when (1) that action would prevent harm to a child, and (2) a less extreme measure is not available. Anything less violates the constitutional rights of both parents and children.

ARGUMENT

I. The Constitution requires that application of a termination of parental rights statute be subject to strict scrutiny.

The Fourteenth Amendment's Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). This "heightened protection," *id.*, comes in the form of strict scrutiny: government infringement of these "fundamental" liberty interests is forbidden unless the infringement is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). A long line of U.S. Supreme Court caselaw makes it abundantly clear that when a state seeks to terminate parental rights, as it did in this case, that is precisely the kind of government interference with a fundamental liberty interest that the Due Process Clause protects. Thus, in reviewing the trial court action in this case, this Court must apply strict scrutiny.

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a. U.S. Supreme Court jurisprudence leaves no doubt that the right to family integrity is "fundamental" within the meaning of the Fourteenth Amendment.

U.S. Supreme Court caselaw clearly identifies the rights to family relationships as "fundamental" within the meaning of the Fourteenth Amendment. "[P]erhaps the oldest of the fundamental liberty interests recognized by the Court," *Troxel*, 530 U.S. at 65 (plurality opinion), the right to parent one's children is rooted in "[t]he history and culture of Western civilizations" and has long been "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). For more than a century, the Court has repeatedly reaffirmed this fundamental familial right, deeming rights to parent-child relationships "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), and "essential to the orderly pursuit of happiness by free men," *Meyer*, 262 U.S. at 399, and recognizing "on numerous occasions" that "the relationship between parent and child is constitutionally protected," *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).[1]

As a plurality of the Court explained in *Troxel v. Granville*: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make

[1] *See also, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (holding the "liberty of parents and guardians" includes the right "to direct the upbringing" of "children under their control"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.").

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decisions concerning the care, custody, and control of their children." 530 U.S. at 66 (plurality opinion). Indeed, the view that family integrity is a fundamental right requiring stringent constitutional protection is so deeply entrenched that it is among the rare jurisprudential principles that enjoy consensus. *See, e.g.*, *id.* (plurality opinion); *id.* at 80 (Thomas, J., concurring in the judgment) (arguing that the Court's "recognition of a fundamental right of parents to direct the upbringing of their children resolves this case" and stating that he would accordingly "apply strict scrutiny"); *id.* at 87 (Stevens, J., dissenting) ("Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children.").

The U.S. Supreme Court's clear understanding of family integrity as a fundamental right protected by the Fourteenth Amendment is not in question. To be sure, in recent years, the Court has suggested that the fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment are limited to those "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Glucksberg*, 521 U.S. at 721). But the right to a parent-child relationship unquestionably falls within this category, as it was broadly embraced in the common law even before the Court began discussing substantive due process.[2]

More than fifty years ago, the Court declared that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture

[2] Notably, the Court explicitly distinguished parental rights cases from the case law overturned in *Dobbs*. 597 U.S. at 273 (describing *Meyer* and *Pierce* as "obviously very, very

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and upbringing of their children." *Yoder*, 406 U.S. at 233. Indeed, according to William Blackstone, the parent-child relationship was "the most universal relation in nature." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446. At common law, a father "'possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture[,]'" *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (Kennedy, J., concurring in part) (quoting J. Schouler, Law of Domestic Relations 337 (3d. ed. 1882)), and "the rights of parents and guardians to the custody of their minor children or wards" were well established, *Robertson v. Baldwin,* 165 U.S. 275, 282 (1897). *See also Meyer*, 262 U.S. at 399 (listing the right "to establish a home and bring up children" as being among "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"). There can be no doubt that the Court's view of family integrity as a fundamental right will endure.

Significantly, the long-established and enduring right to family relationships is equally as fundamental for children as for parents. *See* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 556 HARV. C.R.-CIV. LIB. L. REV. 267, 282 (2021). That is because "the child and his parent *share* a vital interest in preventing erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (emphasis added). *See also Quilloin*, 434 U.S. at 255 ("We have little doubt that the Due Process Clause

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far afield" from *Roe v. Wade*); *see also* KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10820, Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage and Sexual Activity 1 (2022) (citing *Dobbs*, 597 U.S. at 257).

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would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children.").[3] When a state succeeds in terminating a parent's rights, then, it extinguishes the fundamental rights of both parents and children—and both are entitled to heightened review before their relationship can be ended.

This case presents an important opportunity for this Court to bring the U.S. Supreme Court's precedents regarding the fundamental rights to family relationships to life. "It is an elementary proposition that state courts are bound by the United States Supreme Court decisions construing federal law, including the Constitution." *People v. Lewis*, 903 N.W.2d 816, 819–20 (Mich. 2017) (quotation marks omitted). In the present case, where the state seeks to wholly extinguish the shared fundamental right to a parent-child relationship, this means affording that right the strong constitutional protection it demands by applying strict scrutiny. *See, e.g.*, *Reno*, 507 U.S. at 301–02 (government infringements on fundamental rights must be narrowly tailored to serve a compelling state interest).

[3] The reciprocal fundamental right of children to maintain a relationship with their parents has also been recognized by lower federal courts. *See*, *e.g.*, *Ratte v. Corrigan*, 989 F. Supp. 2d 550, 561 (E.D. Mich. 2013); *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002), *as amended on denial of reh'g* (June 26, 2022) ("Parents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents."); *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc) ("[T]he constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents."); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("Th[e] right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.").

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b. Fundamental rights caselaw requiring strict scrutiny applies to termination of parental rights proceedings despite no explicit U.S. Supreme Court holding to that effect.

The U.S. Supreme Court has reviewed state-court judgments that resulted in the termination of parental rights on three occasions. Each time, the Court has reaffirmed that the rights to parent-child relationships are fundamental. First, in *Lassiter v. Department of Social Services of Durham County, N.C.*, which concerned appointment of counsel for indigent parents in termination proceedings, the Court declared it "plain beyond the need for multiple citation" that a parent's interest in the custody and upbringing of her children is "a commanding one." 452 U.S. 18, 27 (1981). *Lassiter* drew on *Stanley v. Illinois* 405 U.S. 645, 649, 651–52 (1972), which earlier held that the right to parent one's children is "substantial" and that a parent is therefore "entitled to a hearing on his fitness . . . before his children [are] taken from him." *Lassiter* 452 U.S. 18 at 27. The *Stanley* Court emphasized that to raise one's own children was more significant than "'liberties which derive merely from shifting economic arrangements.'" *Id.* at 651 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

Second, in *Santosky v. Kramer*, the Court held that a "clear and convincing" standard of proof is constitutionally required in termination of parental rights proceedings. 455 U.S. at 769–70. The Court explained that parents have a "fundamental liberty interest" in the "care, custody, and management of their child" that "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *Id.* at 753. To the contrary,

because a parent's right to raise her children is "far more precious than any property right" and termination is a "unique kind of deprivation," the right to maintain the parent-child relationship demands protection by a high evidentiary standard. *Id.* at 758–59, 769.

Even as *Lassiter* and *Santosky* produced divided decisions, in both cases "the Court was unanimously of the view that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment," *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (internal quotation and citation omitted), and "[f]ew consequences of judicial action are so grave as the severance of natural family ties," *Santosky*, 455 U.S. at 787 (Rehnquist, J., dissenting). *See also Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting); *id.* at 59–60 (Stevens, J., dissenting).

Third, in *M.L.B. v. S.L.J.*—the most recent termination case to reach the U.S. Supreme Court—the Court held that Mississippi could not condition access to appeals of termination decisions on ability to pay. 519 U.S. 102, 128 (1996). Because the case "involve[d] the State's authority to sever permanently a parent-child bond," the Court readily understood that it "demand[ed] the close consideration the Court has long required when a family association so undeniably important is at stake." *Id.* at 116–17. The *M.L.B.* Court reaffirmed that "sever[ing] the parent-child bond" is "irretrievably destructive of the most fundamental family relationship." 519 U.S. at 120.

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The U.S. Supreme Court clearly understands the substantive right at issue in termination cases to be "fundamental" within the meaning of the Fourteenth Amendment. In fact, the Court's language suggests the nature of the underlying right was never even up for debate. *See*, *e.g.*, *Lassiter*, 452 U.S. at 27 ("This Court's decisions have by now made it plain beyond the need for multiple citation" that the right to parent one's child "undeniably warrants deference."). It directly follows that when a state infringes upon this fundamental familial right by initiating termination proceedings, that infringement must be "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302.

Because the U.S. Supreme Court has considered only *procedural* protections required by the Constitution in termination proceedings, it has never had the opportunity to address the substantive standards for terminating parental rights. Every time the U.S. Supreme Court has reviewed a state court termination of parental rights decision, it has focused on procedural due process protections rather than the substantive level of scrutiny. *See Lassiter*, 452 U.S. at 24 (appointment of counsel); *Santosky*, 455 U.S. at 747–48 (standard of proof); *M.L.B.*, 519 U.S. at 102 (access to appellate review). This pattern is unsurprising considering the Court's reluctance to weigh in on the substance of state-court judgments in family-law cases. In line with the deeply entrenched view that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States," *In re Burruss*, 136 U.S. 589, 593–94 (1890), the U.S. Supreme Court has a long-established tradition of "deferr[ing] to

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state-law policy decisions with respect to domestic relations," *U.S. v. Windsor*, 570 U.S. 744, 767 (2013). The infrequency with which questions regarding substantive standards in family-law proceedings reach the Supreme Court makes it more, not less, essential for state high courts to safeguard the substantive rights at stake.

c. The unique deprivation of termination of parental rights cases demands strict scrutiny.

"[U]nder circumstances where the parental right is most in jeopardy, due process concerns are the most heightened." *Hunter v. Hunter*, 771 N.W.2d 694, 708 (Mich. 2009). There is no circumstance where parental rights are more in jeopardy than when a state initiates a termination proceeding: "When a State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky*, 455 U.S. at 759. By wholly extinguishing the fundamental (and reciprocal) rights of parent and child to a relationship with each other, the termination of parental rights inflicts "a unique kind of deprivation," *Lassiter*, 452 U.S. at 27, that is "tantamount to a civil death penalty," *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc). With this drastic deprivation of familial rights, the U.S. Supreme Court's pronouncement that infringements on fundamental right trigger strict scrutiny, *see Reno*, 507 U.S. at 302, undoubtedly means that a state cannot terminate parental rights unless it does so in a way narrowly tailored to serving a compelling interest.

Importantly, given the unique deprivation wrought by a termination of parental rights proceeding, applying strict scrutiny in this case would not require this Court to do so any time it reviews state intervention in parental decisions. *See*,

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e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 115 (2021) (arguing for a "two-tiered model of parental rights" wherein strict scrutiny applies when the government threatens to separate children and parents but intermediate scrutiny governs other forms of state involvement in the family). What U.S. Supreme Court caselaw makes undeniable is that termination of parental rights proceedings implicate the complete destruction of a fundamental familial right and therefore demand strict scrutiny.

II. Strict scrutiny requires that a termination protect a child from harm and that no less extreme option is available.

Proper application of strict scrutiny to termination of parental rights proceedings requires careful and case-specific attention to each of the test's prongs: a court must find that the state has a compelling interest in securing the destruction of the family and that such action is narrowly tailored to protect the child from significant harm. This two-part constitutional test overlays, but is distinct from, the inquiry required under current Michigan statutory law, which directs courts to consider whether one of a variety of enumerated termination grounds exists and to inquire into the child's best interests. Mich. Comp. L. § 712A.19b(3)(a)-(m) & (5). Of course, the state must meet the statutory requirements before a parent's rights may be terminated. In addition, the state must provide grounds sufficient for the court to conclude that, as applied, the statute meets the requirements of strict scrutiny.

To establish a compelling interest in a termination, the state must prove that maintaining *any* parent-child relationship poses a significant risk of harm to the

child that outweighs any harm threatened by the termination itself. The narrow tailoring prong requires courts to determine whether there is a less invasive alternative such as a juvenile guardianship or custody order that can satisfy whatever compelling interest may exist.

a. The two prongs of strict scrutiny are distinct from the two prongs of a termination.

The two prongs of the strict scrutiny test are not coterminous with the two statutory prongs of a termination proceeding. Establishing that parents are unfit to have legal and physical custody of their child by meeting one of the statutory grounds for termination is necessary, but insufficient, to prove that terminating the relationship comports with the Constitution. As the U.S. Supreme Court has noted, a determination of unfitness is distinct from the determination required to terminate a parent's entire relationship with the child. *Santosky*, 455 U.S. at 765–66 & n.16 (1982). For this reason, this Court has made clear that the parental rights at issue in a termination include not only a parent's "care, custody, and management of their children" but the "companionship" between parent and child. *In re J.K.*, 661 N.W.2d 216, 221 (Mich. 2003). Because a termination extinguishes *both* a parent's right to custody *and* any companionship or legal relationship between parent and child, the state must do more than prove a statutory factor to establish a compelling interest in termination.

At the same time, the best interest prong of a termination is not synonymous with narrow tailoring. The best interest prong includes considerations related to narrow tailoring—most prominently, the existence of any alternative, less severe

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steps to provide children with permanency and safety. But it also includes considerations relevant to the compelling interest analysis, such as evidence about the quality of the parent-child relationship and alternatives to termination. Courts must consider evidence of the potential harms or benefits of ending the parent-child relationship to determine whether a compelling need to terminate that relationship exists.

Accordingly, the Court must consider the compelling interest and narrow tailoring prongs independently of the statutory factor and best interest tests.

b. To establish a compelling interest in termination, the state must show that any relationship with the parent would impose a significant harm on the child.

For the state to have a compelling interest in terminating the legal relationship between a parent and child, the child must face an unacceptable risk of harm from *any* remaining relationship with the parent. The state must prove this risk because the right at issue is fundamental and the "gravity of the sanction" so severe that a termination of parental rights can lawfully occur only in the face of "a powerful countervailing interest." *M.L.B.*, 519 U.S. at 116-18. That countervailing interest must reflect the fact that "[t]he object of the proceeding is not simply to infringe upon the parent's interest . . . but to *end it*." *Id.* at 118 (quoting *Lassiter*, 452 U.S. at 27) (emphasis added; cleaned up). Thus, a harm analysis requires a court to determine the impact on the child of both maintaining an ongoing relationship with the parent and permanently severing the relationship.

The harm analysis is a fact-intensive inquiry into the details of a particular child's relationship with his or her parent and the need for achieving permanency

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via an adoption. It is precisely that analysis that the lower courts in this case failed to undertake. Instead, all they did was determine that the statutory grounds for termination were met. Heightened review requires more.

The harm analysis must focus on the quality and importance of maintaining the parent-child relationship, independent of the parent's ability to have custody of the child. In some cases, a parent's abuse may be so severe that any continuing relationship with the child presents ongoing and unacceptable harm; this harm is most likely to exist if the parent has severely physically or sexually abused the child. *See, e.g., In re S.D.*, 599 N.W.2d 772, 776 (Mich. Ct. App. 1999) (affirming termination of father who sexually abused two children and evidence showed "a continuing relationship with [father] would result in serious emotional harm to the children"). In other cases, when the parent and child maintain a bond and have positive interactions, terminations risk harming the child and a compelling interest in termination is lacking. Consistent with this position, Alabama courts—which have long applied strict scrutiny to terminations—have found that a positive parent-child relationship renders a termination unlawful. *See, e.g.*, *P.M. v. Lee County Dep't of Human Res.*, 335 So.3d 1163, 1167, 1172 (Ala. Civ. App. 2021) (reversing a termination because relatives could have obtained custody and the mother and child could have maintained their "beneficial relationship" and "significant relationship and bond"); *A.B. v. Montgomery County Dep't of Human Res.*, 370 So.3d 822, 829-30 (Ala. Civ. App. 2022) (rejecting termination because a continued parent-child relationship "is beneficial for the child"); *R.H. v. Madison*

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County Dep't of Human Res., __ So.3d __, 2023 WL 2620029, *3–*4 (Ala. Civ. App. 2023) (following evidence "that spending time with the mother and the father made the children happy" and "that such contact benefited the children," termination was unlawful). *Accord* American Law Institute, Restatement of the Law, Children and the Law, Tentative Draft No. 5, § 2.80 termination of parental rights, *comment l* (2023) ("[T]he court must consider the child's relationship with the parent and whether the child is likely to suffer emotional harm if the relationship were severed."), *available at* https://www.ali.org/projects/show/children-and-law/#_status.[4]

A harm analysis may also include evaluating whether a termination would protect the child from the harm of growing up in state custody or, alternatively, whether it would increase the risk of that harm. In some cases, a child will have lived with a foster parent for multiple years, that foster parent may be open to adopting the child, and no other permanency option—such as guardianship or third-party custody—may be available. In such a case, a compelling state interest in protecting the child from the harm of impermanency may exist. But many cases do not present this harm. This is particularly true when no potential adoptive parent has been identified or when permanency options other than adoption are viable. When no adoptive parent is identified, termination of parental rights turns children

[4] The American Law Institute (ALI) is near the completion of an almost decade-long project to develop the Restatement of the Law for Children and the Law. Final approval for the Restatement is expected in 2024. American Law Institute, Restatement of the Law, Children and the Law. https://www.ali.org/projects/show/children-and-law/. The cited provisions of the Restatement's section on terminations are in Tentative Draft No. 5, which the ALI Council approved in 2023. *Id.*

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into legal orphans: the state will have eliminated the only parental relationship the child had without obtaining a new one. In such cases, the state spites its interest in avoiding harm to the child. *See* Cynthia Godsoe*, Parsing Parenthood*, 17 Lewis & Clark L. Rev. 113, 115 (2013) (describing the United States' creation of "over a hundred thousand 'legal orphans'" as a "disturbing legacy").

The federal Children's Bureau has sounded the alarm that tens of thousands of children nationally have had their legal relationships with their parents terminated yet remain in state custody without permanency. U.S. Dep't of Health & Human Servs., Administration on Children, Youth and Families, ACYF-CB-IM-21-01, at 16 (Jan. 5, 2021), *available at* https://www.acf.hhs.gov/cb/policy-guidance/im-21-01. The federal data indicate that foster children and youth whose parents' rights are terminated are *more*, not less, likely to remain in foster care than children whose parents' rights are not terminated. *Id.* (expressing concern that "[i]n many instances [termination] results in children staying in foster care for long periods of time, often without the important connections to familial support that are necessary for their well-being"). Over twenty-five percent of children whose parents' rights are terminated remain in foster care until adulthood without a legal connection to any adult. *Id.* Forty-five percent of older children whose parents' rights are terminated are never adopted. *Id.* at 9.

Empirical evidence has long demonstrated that a large portion of Michigan children whose parents' rights were terminated grow up in state custody without the state ever finding permanent homes for them—leaving these children as legal

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orphans for the rest of their lives. A generation ago, scholars studying Michigan foster care cases over a seven-year timespan noted that as terminations increased, the number of adoptions that followed failed to keep pace, leading to a sharp increase in the creation of legal orphans. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two* States, 29 Fam. L.Q. 121, 127 (1995). The problem continues today. According to the most recently available federal report, each year, an average of over 1,200 more Michigan foster children are "waiting to be adopted" following a termination than are adopted. U.S. Dep't of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, *The AFCARS Report: Michigan: Preliminary FY'2022 Estimates as of May 9, 2023—No. 29*, 1 (2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-tar-mi-2022.pdf. The state had placed only five percent of such children in pre-adoptive homes. *Id.* at 5.

In the present case, it is difficult to see a compelling interest in a termination.[5] Ms. Bates has a loving and close relationship with her sons and has modeled for them her resilience in her sobriety journey. She has positive weekly visits that led a visitation specialist to testify that terminating the relationship would be "detrimental" to the children. There is no likelihood that the children would languish in foster care absent a termination, as they are living with their father (and thus are not even in foster care). A grant of full custody to their father

[5] *Amici* rely on the Appellant-Mother's Statement of Facts.

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can end the litigation. Mich. Comp. L. § 722.21 *et seq*. Absent evidence of harm from a continuing relationship with the parent—and, indeed, in the face of evidence that terminating that relationship would cause harm—there is no compelling interest in termination.

Different facts would lead to a different conclusion. When the state proves that a failure to sever the relationship between a parent and a child would psychologically harm the child or that a termination would quickly facilitate an adoption and no other permanency option would protect the child from the harm of growing up in foster care, a compelling interest would exist. The critical point is that to meet constitutional muster, the state must demonstrate that a termination will prevent more harm to the child than it would cause.

c. Narrow tailoring requires the state to prove that no less invasive option is available to achieve the compelling interest.

Courts must ensure that any termination of the parent-child relationship is narrowly tailored to achieving whatever compelling state interest may exist. Like the compelling interest inquiry, this is a case-specific analysis. In cases where a parent has severely abused the child and any relationship is physically or psychologically harmful, the narrow tailoring prong may be relatively straight-forward. When, however, the compelling state interest is protecting children from the harm of impermanency, courts must closely analyze the proposed termination and, in particular, must determine that alternatives such as custody or guardianship are inadequate to provide the child a permanent family. By failing to do so, the lower courts violated the constitutional command that they find "the least

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restrictive means available" to achieve the state's compelling interest. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

i. Applying strict scrutiny must reflect contemporary permanency options and social science.

The existence of permanency options beyond reunification and adoption is a relatively new innovation that affects the narrow-tailoring analysis. These options reflect the importance of children's relational permanence. As recent federal guidance explains: "Children in foster care should not have to choose between families. We should offer them the opportunity to expand family relationships, not sever or replace them." U.S. Dep't of Health & Human Servs., Administration on Children, Youth and Families, ACYF-CB-IM-21-01, at 3 (Jan. 5, 2021), *available at* https://www.acf.hhs.gov/cb/policy-guidance/im-21-01.

Until relatively recently, the primary, and often only, permanency option for foster children who could not reunify with the parent from whom they were removed was the complete severance of their parent's rights to them and an adoption. The child welfare field viewed the choice for the foster children as binary: reunification or adoption. Consistent with this view, this Court has described termination cases as "involv[ing] an all-or-nothing proposition"—extinguish a parent-child relationship or not. *Hunter v. Hunter*, 771 N.W.2d 694, 708 (Mich. 2009). Indeed, throughout the late 20th century, states and the federal government focused on permanency as synonymous with adoption when reunification could not occur. *See*, *e.g.,* Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272 (1980); Adoption and Safe Families Act. Pub. L. 105-89 (1997).

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In contrast, today, when parents and children cannot reunify, courts have a spectrum of options to provide children with a new permanent family. In particular, authorities can protect children from harms which may come from an unfit parent's custody without imposing the harms that come from completely and permanently severing the parent-child relationship. This results from three related developments, each of which has opened up substantial opportunities to meet children's relational needs. First, the child welfare system has prioritized and become better at locating non-custodial fathers when children are removed from single mothers, and those parents can, of course, obtain custody. Second, the child welfare system has significantly increased placements with other kin. Third, courts now have the option of guardianship, which grants custody rights to a non-parent, while maintaining the legal relationship between parent and child and some residual rights, including visitation. The Michigan legislature added juvenile guardianship as a permanency option in 2008, 2008 Mich. Legis. Serv. P.A. 200 (S.B. 669), *codified at* Mich. Comp. L. § 712A.19a(9)-(10),[6] the same year Congress first enacted legislation providing federal funding for kinship guardianships. Fostering Connections to Success and Increasing Adoptions Act, Pub. L. 110-351, § 101 (2008), *codified at* 42 U.S.C. §§ 671(a)(28) & 673(d).

This development from an "all-or-nothing proposition," *Hunter*, 771 N.W.2d at 708, to a spectrum of options is crucial: for most of the history of foster care, there

[6] Consistent with recognizing guardianship as a permanency option, that same bill codified the rule that DHHS need not even file a termination petition when "[t]he child is being cared for by relatives." 2008 Mich. Legis. Serv. P.A. 200 (S.B. 669), *codified at* Mich. Comp. L. § 712A.19a(8)(a).

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was no need to consider alternatives to terminations and adoptions because alternatives did not feature prominently in the field. The "new permanency," as it has been dubbed, means it is now time for state high courts to clarify how those additional permanency options inform the application of strict scrutiny to terminations. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. OF JUV. L. & POL'Y 1 (2015). Following these developments, terminations are unnecessary when foster children are living with a parent or kinship caregivers. *Id.* at 3. This Court should clarify the import of these developments in constitutional terms: lower courts must consider whether any proposed termination is "the least restrictive means available" to achieve any compelling interest presented in a case. *Bernal*, 467 U.S. at 219. That analysis requires consideration of whether permanency options other than termination and adoption are available to satisfy any compelling interest.

ii. Guardianship: An alternative to termination and adoption.

The Michigan statutory scheme now makes plain that the state can provide children with permanency without terminating the parent-child relationship. Michigan courts may place a foster child in a legal guardianship or in the custody of a relative. Mich. Comp. L. § 712A.19a(4)(c)-(d), (9)(c), (10). Each of these arrangements is permanent and may last until the child reaches adulthood. *Id.* at § 712A.19a(9)(c). Similarly, federal law defines guardianship as a relationship "intended to be permanent and self-sustaining" and which transfers most parental rights to the guardian, including "care and control of the person, custody of the

person, and decisionmaking." 42 U.S.C. § 675(7). Kinship guardians are those who "have committed to care on a permanent basis" for the children placed in their homes. 42 U.S.C. § 671(a)(28). Moreover, federal law makes clear that DHHS need not even file a termination petition when, as in this case, a child is living with a relative. 42 U.S.C. § 675(5)(E)(i).

Empirical research demonstrates that guardianships are permanent family arrangements, and are just as lasting as adoptions. As a leading study found, "the homes of guardians are no more likely to disband than the homes of caregivers who can only become adoptive parents." Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 533 (2005). *See also* Gupta-Kagan, 19 U.C. DAVIS J. OF JUV. L. & POL'Y at 23–24 (collecting studies); Mark F. Testa, *Disrupting The Foster Care To TPR Pipeline: Making A Case For Kinship Guardianship As The Next Best Alternative For Children Who Can't Be Reunified With Their Parents*, FAM. INTEGRITY & JUST. Q. 74 (Winter 2022) (updating and re-affirming the stability and permanency of guardianship compared to adoption).

Moreover, pursuing adoption is no guarantee of stability. Adoptions disrupt, forcing children to return to foster care. *See* U.S. Dep't of Health and Human Services, Children's Bureau, *Discontinuity and Disruption in Adoptions and Guardianships* 3-4 (2021) (describing studies showing up to 10 percent of adoptions lead to foster care re-entries); Jesus Palacios, *et al.*, *Adoption Breakdown: Concept, Research, and Implications*, 29 RES. ON SOC. WORK PRACTICE 130, 131–33 (2019)

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(collecting studies documenting adoption "breakdown" rates ranging from 6 to 27 percent); Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437 (2012). And, even more frequently, pre-adoptive placements—the sort of foster care placements that agencies seek to identify after terminations—fall apart, with children remaining in impermanent foster settings as legal orphans. Gupta-Kagan, 19 U.C. DAVIS J. OF JUV. L. & POL'Y at 25 (noting most studies found 9-15 percent of pre-adoptive placements fell apart and at least one jurisdiction reported 25 percent of pre-adoptive placements fell apart); Trudy Festinger, *Adoption Disruption: Rates, Correlates, and Service Needs*, *in* CHILD WELFARE FOR THE 21ST CENTURY 452, 452–53 (Gerald P. Mallon & Peg McCartt Hess eds. 2005).

iii. Narrow tailoring requires finding that less extreme options than termination are not possible.

When alternative permanency options like guardianship or custody can satisfy a compelling state interest, narrow tailoring demands that children's existing family relationships be preserved. *See, e.g.*, *Ex parte T.V.*, 971 So.2d 1, 7–10 (Ala. 2007) (reversing termination because state did not meet its burden to prove no viable alternative to termination); American Law Institute, Restatement of the Law, Children and the Law, Tentative Draft No. 5, § 2.80 Termination of parental rights, *comment m* (2023) ("[T]he court considers whether there are alternatives that further the state's permanency goals but do not require termination of the parent's rights."), *available at* https://www.ali.org/projects/show/children-and-law/#_status.

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Notably, this constitutional requirement is wholly consistent with federal child welfare policy guidance, which states that "Agencies and courts must be certain that termination of parental rights is necessary to achieve what is best for the long-term well-being of children and youth," and "emphasize[s] the importance of safely guarding and protecting family relationships while pursuing permanency for children and youth." U.S. Dep't of Health & Human Servs., Administration on Children, Youth and Families, ACYF-CB-IM-21-01, at 3 (Jan. 5, 2021), *available at* https://www.acf.hhs.gov/cb/policy-guidance/im-21-01.

Before granting a termination, Michigan courts should be required to determine that a termination is in fact necessary to protect the child from the harm of impermanency (when that is the primary compelling interest at stake). Guardianship typically provides a viable alternative that courts must rule out before a termination is constitutionally acceptable.

In the present case, a termination is not narrowly tailored to any compelling interest. As argued in Part II.b, there is no compelling interest in a termination, as the children benefit from their positive relationship with their mother and will not languish in foster care without a termination. Even if there were a compelling interest in protecting them from the harm of extended foster care, a termination would not be narrowly tailored to that interest, because a custody order provides a viable and less invasive alternative.

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CONCLUSION

The state seeks not only to invade but to extinguish the parent and child's fundamental right to maintain their relationship. The Constitution requires the state to satisfy strict scrutiny before a court can grant a termination petition. Here, the state can show neither that terminating the parent-child relationship serves a compelling interest nor that it is a narrowly tailored means to fulfill any such interest. The decision below must therefore be reversed.

April 22, 2024

Respectfully, submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to MCR 7.212(B)(3), I hereby certify that this document contains 7,805 countable words, based upon the word count of the word processing system used to prepare the brief.

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