No. 20-618

In the
Supreme Court of the United States

KELLY GEORGENE ROUTTEN,
***Petitioner*,**

v.

JOHN TYLER ROUTTEN,
***Respondent*.**

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF *AMICUS CURIAE* OF THE JUSTICE FOUNDATION

in Support of the Petition

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, The Justice Foundation respectfully submits this brief *Amicus Curiae* in support of Petitioner Kelly Georgene Routten.[1]

The Justice Foundation is a 501(c)(3) charitable foundation that provides free legal representation in cases to protect individual and parental rights and to promote appropriate limited government. The following summarizes its position in this regard:

> *We believe in protecting children from those who would destroy their innocence and exploit them for their own purposes. On the whole, parents are the best protectors of children and have the natural right and duty for the care, custody, and control for their children. Children, in the main, are naturally*

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[1] Pursuant to this Court's Rule 37.2, all Parties with Counsel listed on the docket have consented to the filing of this Brief. Counsel of Record for all listed Parties received notice at least 10 days prior to the due date of the *Amicus Curiae's* intention to file this Brief.

Pursuant to Rule 37.6, *Amicus Curiae* affirms that no Counsel for any Party authored this Brief in whole or in part, and no Counsel or Party made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

incapable of exercising self-government until reaching the age of majority.

The Justice Foundation was selected by the Texas State Board of Education to be one of the official evaluators of the State's open enrollment charter school program in which private operators are entitled to run public open enrollment charter schools as part of the public school system. The Justice Foundation's President, Allan E. Parker, Jr., in the past has represented public school districts for many years as an attorney and has taught Education Law at St. Mary's University School of Law in San Antonio, Texas.

This case is important to every parent who seeks to assert their right to determine the upbringing and education of their child as a state, federal, natural, and God-given right. The Justice Foundation submits that its experience and interest will provide a useful additional viewpoint to assist the Court in its consideration of Petitioner's petition.

SUMMARY OF THE ARGUMENT

This case centers upon the very cornerstone of our society: *the family*. Deeper still, this case involves the intersection of the family and the law: *parents' fundamental rights* in directing the care, custody, and control of their children as a family and the State's power to affect, limit, or even terminate those rights.

This Court has determined that parents have a fundamental right to direct the care, custody, and control of their children. This Court also has

determined that the government shall not interfere with this right unless and until a parent is proven unfit. In contradiction to this determination, the North Carolina Supreme Court in the case below declared protection of that fundamental right *irrelevant* in a custody dispute between two natural parents. *Routten v. Routten*, 843 S.E.2d 154, 159 (2020). Instead, the North Carolina Supreme Court upheld the trial judge's denial of custody and reasonable visitation to the Petitioner based on the judge's findings related to the best interest of the child, even though the trial judge did not find the mother unfit. *Id*. at 159. The holding below directly contradicts this Court's recognition of parents' primary and fundamental rights in the care, custody, and control of their children.

No doubt contributing to this contradiction, this Court has not clearly articulated the appropriate test for adjudicating the protection of parents' right when involving both natural parents. This Court also has not clearly articulated the level of scrutiny in judicial review of parents' fundamental right in such cases. To safeguard against such government infringement and avoid such contradictions in state courts, this Court should explicitly adopt a national standard articulating both the appropriate test and the appropriate level of scrutiny consistent with the Constitution and this Court's precedent.

This case presents the opportunity for the Court to unequivocally articulate the *fitness of the parent* as that test and *strict scrutiny* as that level of scrutiny for judicial review. Indeed, this case presents the appropriate vehicle to do so because it involves the rights of two natural parents. Therefore,

this Court should grant the Petition for Writ of Certiorari.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO CLARIFY THE APPROPRIATE TEST COURTS MUST USE IN ADJUDICATING PARENTS' FUNDAMENTAL RIGHTS OF CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN.

Nearly one hundred years ago, this Court acknowledged that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Thereafter, in *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court affirmed the fundamental rights of parents "in the companionship, care, custody, and management" of their children. *Id.* at 651. That same year, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court declared that "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id*. at 232.

More recently, this Court declared in *Washington v. Glucksberg*, 521 U.S. 702 (1997), that the Constitution, and specifically the Due Process Clause of the Fourteenth Amendment, protects the fundamental right of parents to direct the care, upbringing, and education of their children. *Id*. at 720. And in *Troxel v. Granville*, 530 U.S. 57 (2000),

this Court again unequivocally affirmed the fundamental right of parents to direct the care, custody, and control of their children.

In *Troxel*, this Court stated that "so long as a parent adequately cares for his or her children (***i.e., is fit***), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent's child." 530 U.S. at 68-69 (emphasis added). Therefore, a failure to consider the fitness of the parent represents "an unconstitutional infringement on [that parent's] fundamental right to make decisions concerning the care, custody, and control" of her children. 530 U.S. at 72. In fact, so inviolable and sacred is this right that this Court declared a *presumption* that "a fit parent will act in the best interest of his or her child." *Id*. at 69. Yet, in the case below, the North Carolina Supreme Court expressly rejected allowing this presumption in favor of the natural mother of the children. *Routten*, 843 S.E.2d at 159.

In 2005, quoting *Yoder* and *Troxel* in response to a public school district's subjection of children to inappropriate and sexually explicit content, the United States House of Representatives affirmed that "the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions." House Resolution 547 (November 16, 2005). Yet today, State courts of last resort throughout the United States are split, adjudicating children as "creatures of the State" by limiting or terminating parents' rights through using a subjective "best interest of the child"

test or by evaluating some level of "harm" to the child. In fact, in the case below, the North Carolina Supreme Court determined that, in a dispute between two natural parents, "the trial court must apply the 'best interest of the child' standard to determine custody and visitation questions." *Routten*, 843 S.E.2d at 159. Such a test blatantly violates the fundamental rights of natural parents, not only in custody and termination cases, but also in separation agreements where extra protection may be necessary due to inequality among spouses.

In that regard, scholars recognize that the "best interest of the child" standard provides "no standard at all because of its vagueness" and uncertainty. *See, e.g.,* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. Miami L. Rev. 79, 108 (1997). As Notre Dame Law School Professor Eugene Volokh recognized, courts applying "the best interest of the child" test in parent custody cases violate sacred, fundamental, constitutional rights of those parents. *See* Volokh, "*Parent-Child Speech and Child Custody Speech Restrictions,"* 81 N.Y.U. L. Rev. 631 (2006). Professor Volokh also recognized that "harm" analyses have significant limits, foremost being their highly subjective nature and risk of the fact-finder's personal hostilities entering into the determination. Volokh, *supra* at 700. Essentially, both tests violate the due process rights of parents guaranteed by the Fourteenth Amendment to the Constitution if the fitness of the parents is disregarded. Yet today, some State courts still apply these inappropriate tests without first making the required constitutional finding of a parent's unfitness. As a result, these courts continue

to violate the fundamental right of parents to direct the care, custody, and control of their children.

While the Court has alluded to the *fitness of the parent* test in the past, the Court has not articulated the exact standard in these cases. *See Troxel*, 530 U.S. at 73 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context"). Given the complexities of the modern family dynamic and the high-stakes interest of the parties involved in these cases, *Amicus Curiae* submits that the time has come for the Court to adopt the *fitness of the parent test* as the appropriate standard moving forward for cases involving both natural parents.

This case presents the ideal vehicle for this Court to clearly articulate the *fitness of the parents* test as the appropriate test for all State courts because this case involves a lower court's review of the rights of both natural parents. *Troxel*, while providing cogent precedent, involved the rights of a natural parent and the rights of grandparents after the children's father died. *Stanley*, likewise, is analytically different because it involved the natural but unwed father of the children who had been declared wards of the state after their mother died. As demonstrated in Petitioner's Petition, App. 2a, this case involves two natural biological parents, both of whom have fundamental rights protected from unwarranted government interference by the Fourteenth Amendment and both of whom seek care, custody, and control of their children. Only the fitness test protects the constitutional rights of both natural parents in a custody case such as that presented in this Petition.

II. THE COURT SHOULD GRANT THE PETITION TO CLARIFY THE LEVEL OF SCRUTINY COURTS MUST USE IN ADJUDICATING PARENTS' FUNDAMENTAL RIGHTS OF CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN.

In addition to articulating the appropriate test, this Court also has the opportunity to clearly articulate the appropriate level of scrutiny courts should use in adjudicating parents' constitutional rights of care, custody, and control of their children. As one State court judge explained regarding the failure of State courts and judges to follow what this Court has suggested as the appropriate standard:

> Despite the United States Supreme Court's determination to subject infringement upon such fundamental rights to strict scrutiny and of our own legislature's mandate to preserve and foster parent-child relationships . . . courts have developed a jurisprudence under which trial court decisions severely curtailing that relationship stand absent an abuse of discretion. Considering the importance of and the risk to the rights at issue and the legislature's clear mandates that courts take measures to protect this most sacred of relationships, I believe we need to carefully re-examine the standards by which decisions that limit a parent's access to or possession of a child are made and reviewed.

In Re: J.R.D. and R.C.D., 169 S.W.3d 740, 752 (Tex. App. 2005) (Puryear, J., concurring) (internal citations omitted).

Because these cases involve such deeply grounded fundamental rights guaranteed under the Constitution to the parents, courts must consistently apply the appropriate level of judicial scrutiny. In this regard, just as the *fitness of the parent* test alone satisfies the constitutional requirements, only strict scrutiny will suffice for judicial review in these situations.

In his concurring opinion in *Troxel*, Justice Thomas summarized an important aspect of this Court's precedential opinion in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), writing that "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them." *Troxel* at 80 (Thomas, J., concurring). This fundamental right is just as critical and sacred today as when Justice Thomas wrote those words twenty years ago and when this Court cemented that truth in 1925. Justice Thomas proceeded to the next step in the analysis by concluding: "I would apply strict scrutiny to infringements of fundamental rights." *Id*.

Amicus Curiae agrees that strict scrutiny is the appropriate level of review and submits that this issue alone, as presented in this case, supports this Court granting the Petition. Petitioner Kelly Routten now provides this Court with the ideal opportunity to declare the appropriate level of scrutiny for the courts of this nation to apply.

CONCLUSION

This Petition presents the ideal opportunity for this Court to resolve the conflict among the States and articulate one test – *the fitness of the parent test* – for adjudicating natural parents' rights in the care, custody, and control of their children. The North Carolina Supreme Court, in the opinion below, declared this test irrelevant.

This Petition also presents the ideal opportunity for this Court to resolve the conflict among the States and articulate one standard of review – *strict scrutiny* – when reviewing the fundamental rights of natural parents in the care, custody, and control of their children. The North Carolina Supreme Court, in the opinion below, required no such level of review.

In today's world, family dynamics are always changing, especially in an era of ever-increase divorce rates. Even in the face of such change, however, constitutional rights remain steadfast. Therefore, *Amicus Curiae* respectfully submits that this Court should grant the Petition for review.

Respectfully submitted
This 7th day of December, 2020,

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