IN THE SUPREME COURT OF GEORGIA
CASE NO. S25G1349

In the Interest of J.K. et al.,
Children,

On Writ of Certiorari to the Georgia Court of Appeals Court of Appeals Case No. A25A0637

BRIEF AS *AMICI CURIAE* ON BEHALF OF THE FAMILY JUSTICE LAW CENTER, UNITED FAMILY ADVOCATES, THE PARENTAL RIGHTS FOUNDATION, THE RELIGIOUS FREEDOM INSTITUTE, AND THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF APPELLEE

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici are nonprofit legal and policy organizations from across the political spectrum that share a commitment to protecting the fundamental constitutional right to family integrity. *Amici* agree that, as a fundamental right, family integrity is subject to strict scrutiny.

The Family Justice Law Center (FJLC) is a nonprofit civil rights organization dedicated to challenging systemic injustice for families mistreated by the child welfare system. FJLC litigates to ensure that terminations of parental rights happen only when necessary. FJLC has authored amicus briefs before state and federal courts arguing for strict scrutiny.

United Family Advocates (UFA) is a bipartisan organization comprised of child welfare advocates, attorneys, researchers, and nonprofit leaders from across the country who seek policy solutions to create a more compassionate and just approach to child welfare focused on supporting families. UFA brings together advocates from across the political spectrum who have divergent views on many issues, but are united by a commitment to bipartisan solutions that strengthen investments in and support for families.

The Parental Rights Foundation (PRF) is a national nonpartisan 501(c)(3) organization with supporters in all fifty states. PRF is dedicated to research, education, and advocacy to defend and advance the right of parents to direct the upbringing, education, and care of their minor children without undue government interference.

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. 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.

The Center for American Liberty (CAL) is a 501(c)(3) nonprofit law firm dedicated to protecting individuals' right to free speech, assembly, association, and other civil liberties. As relevant, CAL has represented litigants in numerous cases seeking to vindicate parental rights against oppressive state action. CAL has an interest in ensuring

that this Court applies the correct legal standard in cases involving infringements of the parental right.

INTRODUCTION

The State's authority to protect a child from harm does not give it automatic authority to extinguish the child's legal relationship with a parent. Removing a child from parental custody and permanently severing the parent-child bond are distinct acts that require distinct justifications. The question here is whether grounds for removing a child from a parent's custody are enough, under the Constitution, to destroy that relationship forever.

The fundamental importance of the parent-child relationship commands agreement even across a deeply divided political spectrum. *Amici* reflect that agreement. They unite to defend a principle deeply rooted in our Nation's history and constitutional law: the State must satisfy the most demanding constitutional standard before permanently severing the parent-child relationship. The U.S. Supreme Court has described parental rights as "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). This Court has likewise

recognized parental rights as "deeply embedded in [Georgia] law." *Patten v. Ardis*, 304 Ga. 140, 141 (2018). That protection does not disappear when a parent loses custody. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A State seeking termination must therefore justify the permanent destruction of a relationship the Constitution still protects.

Strict scrutiny gives that protection practical force. The State must identify a compelling interest and demonstrate that termination is narrowly tailored to achieve it. Protecting children from harm is a compelling interest; termination is the means the State must justify. The Department's argument reverses that inquiry: it treats termination itself as the compelling interest and rejects guardianship because guardianship preserves parental rights. The conclusion is built into the premise. If the State may define its interest as the very deprivation it seeks to impose, every less restrictive alternative fails by definition. Strict scrutiny instead asks whether the particular child's safety and need for a permanent home require legal severance, or whether those interests can be served while preserving family ties.

That distinction answers this Court's second question. As applied, the disjunctive ground in O.C.G.A. § 15-11-310(a)(5) can lead to an

unconstitutional termination when harm from returning a child to parental custody is treated as sufficient constitutional justification for ending the legal relationship altogether. Here, the juvenile court stated that a continued relationship with the mother would not harm the children. The danger of reunification explains why the children cannot return to her custody; it does not, without more, explain why their legal relationships with her must be destroyed. The court must consider whether guardianship or another available permanent placement can protect the children without irrevocably severing those relationships.

This rule does not make every termination under the disjunctive provision unconstitutional. Nor does harmless continued contact invariably foreclose termination; termination may still be necessary to secure a permanent home and avoid long-term foster care. But the State must demonstrate that necessity on the facts of the particular child's case. It cannot presume necessity from a finding that return to parental custody would be unsafe. Strict scrutiny requires the State to show why an available, less restrictive disposition would not adequately protect the child and provide permanence. That requirement preserves the State's power to protect children while reserving its most drastic

intervention for cases that require it. This Court should hold that satisfying a statutory ground for termination does not relieve the State of its independent constitutional obligation to justify permanently severing the parent-child relationship.

ARGUMENT

I. Termination of Parental Rights Is 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 protection comes in the form of strict scrutiny: "[s]ubstantive due process requires that state infringement on fundamental rights be narrowly tailored to serve a compelling state interest." *State v. Jackson*, 269 Ga. 308, 310–11 (1998) (citing *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)). A long line of precedent from the U.S. Supreme Court and this Court makes clear that when a State seeks to terminate parental rights, as here, that is precisely the kind of

government interference with a fundamental liberty interest that the Due Process Clause protects. Strict scrutiny applies.

A. The parent-child relationship is a fundamental liberty interest.

The U.S. Supreme Court identifies the right to parent one's children as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Henry v. Sheriff of Tuscaloosa Cnty., Ala.*, 180 F.4th 1294, 1302 (11th Cir. 2026) (en banc) ("The right to establish a home and bring up children is among the first fundamental rights the Supreme Court ever acknowledged." (quotation marks omitted)). 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 near-consensus. *See*, *e.g.*, *Troxel*, 530 U.S. at 65 (plurality opinion); *id.* at 80 (Thomas, J., concurring in the judgment) (noting the fundamental right and stating that he would accordingly "apply strict scrutiny"); *id.* at 87 (Stevens, J., dissenting) (noting the "fundamental" parental right).

Georgia's cases are just as clear. "There can scarcely be imagined a more fundamental and fiercely guarded right than the right of a

natural parent to [her] offspring." *Nix v. Dep't of Hum. Res.*, 236 Ga. 794, 795 (1976); *see also, e.g.*, *Patten*, 304 Ga. at 141.

The Fourteenth Amendment's protection of family integrity as a fundamental right is not in question. Even as the U.S. Supreme Court has pulled back on protecting certain unenumerated rights, it has emphasized that the Due Process Clause strongly protects those fundamental rights that are "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) (quotation marks omitted). And the Court has repeatedly said that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977); *Patten*, 304 Ga. at 141 ("[T]his Court recognized the [parent-child] right as early as 1858." (citation omitted)).[1]

[1] The Department thus gets it backwards when it suggests the age of the parental right makes modern strict scrutiny inapplicable. *See* Reply Br. 16. The right's deep roots affirm its fundamental status: the consequences of a right being historically grounded is heightened review of government encumbrances. *See Henry*, 180 F.4th at 1302 ("[T]he deeply rooted and historically important nature of fundamental rights entitles them to more protection from the government[.]").

Significantly, because "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship," *Santosky*, 455 U.S. at 760, the long-established and enduring right to family relationships is as fundamental for children as for parents, *see* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 282–83 (2021). Therefore, as the Court of Appeals has repeatedly recognized, "'terminating a parent's rights, and thus forever foreclosing the possibility of restoring the natural parent-child relationship, is governmental extinguishment of *the parent and child's* constitutional right to familial relations.'" *In Interest of E.M.D.*, 339 Ga. App. 189, 202 (2016) (Peterson, J.) (alteration adopted and emphasis added) (quoting *In the Interest of S.O.C.*, 332 Ga. App. 738, 743 (2015)). Both parent and child are entitled to heightened review before their relationship can be permanently ended.

B. Established fundamental rights doctrine requires strict scrutiny in termination of parental rights cases even though the U.S. Supreme Court has not yet had the opportunity to address the specific question.

The absence of a U.S. Supreme Court case expressly announcing application of strict scrutiny to terminations does not mean strict

scrutiny does not apply. That Court has reviewed only three judgments that resulted in the termination of parental rights and, each time, it 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*, which earlier described the parent-child relationship rights as "ha[ving] been deemed essential, basic civil rights of man" and substantially more significant than "liberties which derive merely from shifting economic arrangements," *Stanley*, 405 U.S. 645, 651 (1972) (quotation marks omitted).

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 748, 768–70. The Court explained that parents have a "fundamental liberty interest" in their relationship with 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 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 (quotation marks omitted).

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'" and that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 103 (1996) (quoting *Santosky*, 455 U.S. at 774, 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. at 102, 128. 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 121 (alterations adopted) (quoting *Santosky*, 455 U.S. at 753).

These cases make undeniably clear that the substantive right at stake at termination is the right to the parent-child relationship. Importantly, and contrary to the Department's contention, *see* Appellant Br. 29–33, parents facing termination retain this constitutionally protected right even if they have lost physical custody or have otherwise been found unfit. While unfitness may supply a compelling reason to remove a child from a parent's custody, it does not, without more, extinguish the parent's fundamental interest in an ongoing relationship before termination. *See, e.g.*, *Santosky*, 455 U.S. at 753 (a parent's fundamental interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State"). That fundamental interest is

broader than entitlement to physical custody; it encompasses the enduring legal and relational bonds between parent and child, including association, communication, religious upbringing, inheritance, and the possibility of future family life. *See id.* at 748–49, 754–47, 759–61; *In re M.F.*, 298 Ga. 138, 142, 144–45 (2015); *Lassiter*, 452 U.S. at 39 (Blackmun, J., dissenting) ("Unlike other custody proceedings, [termination] leaves the parent with no right to visit or communicate with the child.").[2]

The Department's argument that the only relevant constitutional right is a right to a finding of unfitness (so that's all the Constitution requires before there can be a termination), Appellant Br. 26–37, badly misreads *Santosky*. *Santosky* is a procedural, not substantive, due process decision concerning the minimum standard of proof at fact-finding—a phase wholly distinct under the relevant New York scheme from the later dispositional hearing where termination was on the table. 455 U.S. at 747–78, 760–61, 765–66. The Court's application of

[2] Guardianship rests precisely on the distinction between the right to the parent-child relationship and the exercise of custody: it transfers custody while leaving parental rights intact. *M.F.*, 298 Ga. at 142, 145. Similarly, after divorce, physical and legal custody are often given to one parent, while the other parent retains their legal relationship, including the right to continued contact with the child. *See* O.C.G.A. § 19-9-6(11).

the *Mathews v. Eldridge* test—which applies to procedural, not substantive, due process challenges—makes clear that *Santosky* rested solely on procedural grounds. *See id.* at 761.

Santosky says that, at fact-finding, procedural due process requires proof of unfitness by clear and convincing evidence. *Id.* at 760, 768–70. But *Santosky* says nothing to suggest that a finding of unfitness alone satisfies the requirements of substantive due process. Quite the opposite. *See id.* at 753 (parent's fundamental interest "does not evaporate" simply because she is unfit); *see also Henry*, 180 F.4th at 1305 ("[p]recedent, history and tradition, and the nature of fundamental rights" all show why parents who have committed state-defined misconduct still maintain the fundamental parent-child right).[3] The *Santosky* Court did not address the substantive question because it reversed the termination on procedural grounds.

[3] Nor does *Clark v. Wade*, 273 Ga. 587 (2001), reduce the right to a procedural entitlement to an unfitness finding. *Clark* addressed custody, not termination. *Id.* at 588–89. The plurality required clear and convincing evidence of unfitness or other statutorily defined circumstances before a best-interests comparison. *Id.* at 593–99. Nothing in *Clark* suggests a custody determination irrevocably eliminates the parent's separate interest in preserving the legal relationship. Rather, *Clark* repeatedly described the constitutional right as fundamental and subject to infringement only under compelling circumstances. *Id.* at 596–97.

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. *Lassiter*, 452 U.S. at 31–32, *Santosky*, 455 U.S. at 747–48, and *M.L.B.*, 519 U.S. at 102–07, 128, resolved specific procedural questions—appointed counsel, burden of proof, and access to appellate review, respectively. None purported to decide or reject the substantive-due-process question presented here.

But while the Supreme Court has not considered a substantive-due-process claim in a termination case, it has made clear in these cases and others that—as explained above—the right to the parent-child relationship is "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. 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.[4]

Exacting review is consistent with Georgia's approach to parental rights cases, as well. This Court has held that the parent-child custodial relationship may be severed only under "compelling circumstances" established by clear and convincing evidence. *Clark*, 273 Ga. at 591. And the Court of Appeals has repeatedly instructed that the family-shattering decision to terminate parental rights must be "scrutinized deliberately and exercised most cautiously." *In the Interest of J.K.*, 375 Ga. App. 700, 703 (2025) (quoting *In the Interest of E.G.L.B.*, 342 Ga. App. 839, 840 (2017)). Strict scrutiny gives those commands their familiar doctrinal content: the State must identify a compelling end, and the particular infringement must be necessary and narrowly tailored to that end.[5]

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[4] *Goodell v. Moulton*, No. S25G1418, 2026 WL 2298888 (Ga. Aug. 11, 2026) does not displace federal strict scrutiny. *Contra* Reply Br. 15–16. *Goodell* considered the standard governing Georgia's judicially developed state constitutional right to privacy. 2026 WL 2298888 at *4–8. It declined to import modern federal tiers of scrutiny throughout that distinct state law tradition because Georgia's privacy cases historically used a contextual balancing approach. *Id.* at *7–8. *Goodell* did not decide the standard governing a federal substantive-due-process claim, parental rights, or termination.

[5] Other state courts have recognized that strict scrutiny applies to termination of parental rights cases. *See e.g. Ex parte Beasley*, 564 So. 2d 950, 952–54 (Ala. 1990); *Ex parte Bodie*, 377 So. 3d 1051, 1064–65, 1068 (Ala. 2022) (Parker, C.J., concurring) (because parental rights are fundamental, governmental interference must advance a compelling interest

C. The unique deprivation caused by termination of parental rights demands strict scrutiny.

The above principles apply with maximum force in termination proceedings. There is no circumstance where parental rights are more in jeopardy than at termination: when the State initiates termination, "it seeks not merely to infringe" the fundamental interest "but to end it." *Santosky*, 455 U.S. at 759. Termination is "irretrievably destructive of the most fundamental family relationship," *M.L.B.*, 519 U.S. at 121 (quotation marks omitted and alterations adopted), and severs the right "for the future as effectively in law as if it never had existed," *Nix*, 236 Ga. at 795. By wholly extinguishing the fundamental (and reciprocal) rights of parent and child to a relationship with each other, termination is "tantamount to a civil death penalty." *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (quotation marks omitted). With this drastic deprivation of familial rights, the U.S. Supreme Court's pronouncement that infringements on fundamental rights trigger strict scrutiny, *see Reno*, 507 U.S. at 302, undoubtedly

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through the least restrictive means); *Matter of B.A.R.*, 582 P.3d 922, 927 (Wyo. 2026); *Fla. Dep't of Child. and Fams. v. F.L.*, 880 So. 2d 602, 608 (Fla. 2004); *In re H.G.*, 757 N.E.2d 864, 871–72 (Ill. 2001). The Supreme Court of Texas has expressed the same core principle. *See, e.g., In re H.S.*, ---S.W.3d---, 2026 WL 1614496, at *8–9 (Tex. June 5, 2026) (terminations must be "strictly scrutinize[d]," are "always the last resort," and may be used only "in the absence of other legitimate options" (quotation marks omitted)).

means the State cannot terminate parental rights unless it does so in a way narrowly tailored to serve a compelling interest. *Cf. Henry*, 180 F.4th at 1319 (permanent restriction on co-residence between parent and child—*a lesser restriction than termination of all parental rights*—triggers strict scrutiny).

II. Application of Strict Scrutiny Is Distinct from the Inquiry Required by Georgia's Termination Statute.

Proper application of strict scrutiny to termination of parental rights proceedings requires careful and case-specific attention to each of the constitutional test's prongs: a court must find that destruction of the family serves a compelling state interest and that such action is narrowly tailored to achieve that interest. This two-part test overlays, but is distinct from, the required inquiry under Georgia's statute, which asks whether a ground for termination exists and whether termination is in the child's best interests.[6] O.C.G.A. § 15-11-310(a), (b). The State must satisfy those statutory requirements, but it must also establish

[6] For instance, the best-interests stage may include evidence relevant to strict scrutiny, such as that adoption is the only viable permanency option, but many best-interest considerations will not establish that termination is the least restrictive effective means of securing safety and permanence.

facts sufficient for the court to conclude that, as applied, termination satisfies strict scrutiny.

So long as courts apply O.C.G.A. § 15-11-310(a)(5) in harmony with these principles, the statute poses no constitutional problem. The statute's use of "or" may identify alternative factual routes by which the State can establish a statutory ground authorizing consideration of termination, but "or" does not eliminate the independent constitutional requirement that the final termination order itself be narrowly tailored to serve a compelling interest. Put simply, a legislature may define the facts that permit a court to act, while the Constitution still limits how far the court may go in response. A termination must meet both the state statutory requirements and the constitutional requirements.

In cases where the State satisfies the statutory component by showing that continuation of the parent-child relationship will result in significant harm to the child under subsection (B), the strict scrutiny inquiry may be relatively straightforward. In such cases, a termination of parental rights may well be narrowly tailored to meet the compelling state interest in protecting the child from harm. When, however, termination is available because the State has shown that return to

parental custody will result in harm under subsection (A), courts must closely—and independently—analyze whether a termination is needed, i.e., narrowly tailored, to serve a compelling state interest. As explained *infra*, this analysis must consider the quality and importance of maintaining the parent-child relationship, the potential harms of termination, and the availability of alternative safe permanency options—all independent of the parent's ability to have custody of the child. Showing that a parent cannot safely exercise custody establishes the need for intervention, but does not itself prove that ending all legal ties is necessary. *Santosky*, 455 U.S. at 753, 765–66; *M.F.*, 298 Ga. at 141–46. The State must justify the further deprivation; where preservation of the legal relationship would be beneficial to the child and a safe, permanent arrangement is available, the State cannot constitutionally justify the extreme step of permanently severing the family relationship.[7]

[7] Where the statutory ground is (A), justification for termination will require additional findings to pass constitutional scrutiny, which may be made during the best-interests inquiry. For example, in some cases, the parent and child may have a positive relationship, but termination might satisfy strict scrutiny because termination is required to allow adoption where no other permanency option would protect the child from the harm of long-term foster care.

III. Strict Scrutiny Requires Proof That, For Each Child, Termination Is Narrowly Tailored to a Compelling State Interest.

The State has a compelling interest in protecting children from harm and securing safe, enduring homes for them. The question is whether termination is necessary to serve that interest for each child.

A. For each child, termination must further the government's compelling interest in protecting children from harm and securing safe, enduring homes for them.

The gravity of termination demands "a powerful countervailing interest." *M.L.B.*, 519 U.S. at 117–18. The Department attempts to identify the compelling interest as termination itself. Reply Br. 17. But that formulation impermissibly collapses strict scrutiny's ends and means inquiries. The compelling interest must exist independently of the challenged infringement; the court then asks whether termination is necessary and narrowly tailored to further that interest. Otherwise, the analysis becomes tautological: termination is constitutional because the State has a compelling interest in terminating parental rights. As the U.S. Supreme Court warned in rejecting an analogous argument, "this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Simon &*

Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 120 (1991).

The compelling government interests are protecting children from harm and securing permanence—not achieving termination for its own sake.[8] This prong of strict scrutiny thus requires a fact-intensive inquiry into the details of the particular child's relationship with his or her parent, the particular harms that would result from termination, and the need for achieving permanency via adoption. Where, as here, custody is already vested in safe caregivers, the State must show why permanently severing family ties is necessary to serve a compelling interest. A generalized preference for adoption or a "clean slate" cannot by itself justify the irreversible destruction of a fundamental relationship.

Courts must assess the value 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

[8] The Department's circular reasoning ignores that terminations often end up serving no interest at all, let alone a compelling one. Thousands of children leave foster care each year as legal orphans because their parents' rights were terminated and the children were never adopted. U.S. Dep't of Health & Hum. Servs., Admin. on Child., Youth & Fams., ACYF-CB-IM-21-01, Achieving Permanency for the Well-being of Children and Youth 16 (2021), available at https://www.acf.hhs.gov/cb/policy-guidance/im-21-01.

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. In others, even though a parent is unable to have custody of the child, they maintain a bond and have positive interactions. Where the child can be in a safe, permanent home while maintaining a valuable relationship with the parent, or the foreseeable possibility of a valuable relationship in the future, termination does not advance a compelling interest.[9]

To establish a compelling interest in protecting the child from harm, the State must prove that the risk of additional harm to the child from maintaining any parent-child relationship outweighs any harm threatened by the termination itself. There is a growing recognition that, even where there is a successful adoption, termination comes at great cost to the child. *See* Vivek S. Sankaran & Christopher E. Church, *The Ties that Bind Us: An Empirical, Clinical, and*

[9] Consistent with this position, Alabama courts—which have long applied strict scrutiny to terminations—have found that a positive parent-child relationship can render a termination unlawful. *See, e.g.*, *P.M. v. Lee Cnty. Dep't of Hum. Res.*, 335 So.3d 1163, 1167, 1172 (Ala. Civ. App. 2021) (reversing termination because relatives could have obtained custody and mother and child could have maintained their "beneficial relationship" and "significant relationship and bond"); *R.H. v. Madison Cnty. Dep't of Hum. Res.*, 383 So.3d 667, 671–73 (Ala. Civ. App. 2023) (termination unlawful where "spending time with the mother and the father made the children happy" and "such contact benefited the children").

Constitutional Argument Against Terminating Parental Rights, 61 FAM. CT. REV. 246, 258 (2023) (children whose parents' rights have been terminated "still maintain significant psychological ties to their birth family and grieve their loss even as they bond with their adoptive parents" (quotation marks omitted)); *id.* (children adopted out of foster care are often "grieving the loss of their identities and their role within their psychological family," leading to "feelings of fear, anger, abandonment, shame, embarrassment, and low self-esteem" (quotation marks and footnotes omitted)).

Courts may also evaluate 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, such as where a couple is looking only for a baby to adopt, it may be possible to find an adoptive placement when it is not possible to find an available guardianship or third-party custody placement. There, a compelling state interest in protecting the child from the harm of impermanency may exist. But in the many cases where no potential adoptive parent has been identified or when permanency options other than adoption are viable, termination makes long-term state custody more, not less,

likely. When no adoptive parent is identified, termination of parental rights turns children 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 frustrates its interest in avoiding harm to the child. *See* Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 115 (2013) (describing the creation of "over a hundred thousand 'legal orphans'" as a "disturbing legacy").

The present case demonstrates the importance of precision in identifying the compelling interest. The juvenile court found potential harm if the children were returned to their mother, yet stated that it did not think the continued relationship would cause harm.[10] *See* Appellee Br. 15–16 (citing transcript). Once safe placement had addressed the first concern, the record needed a compelling justification for the additional step of legal severance. The court's own finding negated, rather than supplied, that justification.

[10] In fact, the Department testified that a continued relationship between the children and their mother would "[d]efinitely" be "beneficial for the children." Appellee Br. 12 (citing transcript).

B. For each child, termination must be narrowly tailored 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 straightforward. When, however, the compelling state interest is protecting children from foster care limbo, 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. Without such an inquiry, a termination order fails to satisfy the constitutional command to find "the least restrictive means available" to achieve the state's compelling interest. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

1. Narrow tailoring must reflect contemporary permanency options and social science.

The spectrum of permanent placements matters to narrow tailoring. Federal guidance recognizes the value of preserving family relationships while securing permanence. U.S. Dep't of Health & Hum.

Servs., Admin. on Child., Youth & Fams., ACYF-CB-IM-21-01, *supra*, at 3. Georgia has made permanent guardianship a statutory placement, O.C.G.A. §§ 15-11-2(54)(C); 15-11-240–244, so a court must consider whether that option serves the interest in permanency without the need to completely sever family ties.

The Department repeatedly invokes the prospect of extended foster care. Appellant Br. 3, 8–9. No one recommends it. A permanent guardianship places custody with a committed caregiver by court order while preserving the parent-child relationship. *See* O.C.G.A. §§ 15-11-242(a)(3), (b); *id.* § 29-2-22(a)(1); *M.F.*, 298 Ga. at 142. Narrow tailoring must compare termination with the real permanency option, not indefinite foster care.

Until relatively recently, the primary (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. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 6–7 (2015). The child welfare field viewed the choice for foster children as binary: reunification or adoption. 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).

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 that may come from an unfit parent's custody without imposing 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 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. Georgia's Juvenile Code authorizes permanent guardianship, O.C.G.A.

§§ 15-11-240–244, and Congress recognized federally supported kinship guardianship in 2008. 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).

The new spectrum of permanency options is crucial. For most of foster care's history, there was no need to consider alternatives to terminations and adoptions because alternatives were not available. *See* Gupta-Kagan, *supra*, at 6–7. But now, termination may be unnecessary when a safe and stable placement can be made permanent while maintaining family connections.

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.

2. Guardianship: an alternative to termination and adoption.

Georgia's statute expressly identifies placement with a permanent guardian as "permanent placement." O.C.G.A. § 15-11-2(54)(C). The juvenile court may appoint a permanent guardian for an adjudicated dependent child after finding, *inter alia*, that reunification would be detrimental or the parents consent to guardianship; termination and adoption are not in the child's best interests; and the guardian can offer a safe and permanent home. *Id.* § 15-11-240(a). The guardian exercises parental power. *Id.* §§ 15-11-242(b), 29-2-22(a)(1). The order runs until adulthood or emancipation, is not routinely reviewed, and provides for meaningful parent contact or justified restrictions. *Id.* § 15-11-242.

Guardianship is relevant to narrow tailoring. The Department insists that courts cannot even consider guardianship until after already rejecting termination, Reply Br. 17–18, but this argument overreads O.C.G.A. § 15-11-240(a)(2). That provision describes the findings necessary to enter a guardianship order; it does not prohibit a court from considering whether guardianship is available when deciding whether termination is in the child's best interest and is the least restrictive alternative. That would make no sense. A court cannot

decide whether termination is in the child's best interest—much less whether it is constitutionally necessary—without comparing available dispositions. And, in any event, a state statute cannot define a federal constitutional alternative out of existence by placing it later in the statutory sequence.

Nor is guardianship "by definition, continued dependency." Appellant Br. 18 n.5. Far from it. Although the statute conditions the court's guardianship jurisdiction on a prior dependency finding, O.C.G.A. § 15-11-240(a), it says nothing to suggest guardianship is an indefinite continuation of foster care. On the contrary, the statute expressly defines "permanent placement" to include placement with a permanent guardian, along with return to parental custody and adoption. *Id.* § 15-11-2(54). And the Department's own policy identifies guardianship as an approved permanency plan that, once achieved, leads to closure of the child's foster care case. Ga. Div. of Fam. & Child. Servs., Child Welfare Policy Manual § 10.26, Requirements 1, 3; Procedures 4(a).

As this Court has recognized, although it does not forever terminate parental rights, guardianship is "presumptively permanent."

M.F., 298 Ga. at 141–45. Guardianship can be modified, vacated, or revoked only on clear and convincing proof of a material change in the circumstances of the child or guardian and that a change is in the child's best interests. O.C.G.A. § 15-11-244(c). This is "a heavy burden." *M.F.*, 298 Ga. at 142. Similarly, federal law defines guardianship as a relationship "intended to be permanent and self-sustaining" that 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).

Empirical research demonstrates the durability of guardianships. As one 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, *supra*, at 23–24 (collecting studies). Guardianship also benefits children by permitting maintenance of family relationships. Federal child welfare policy recognizes that more, not fewer, relationships benefit children: children's "positive, healthy, and

nurturing attachments and relationships with their parents, siblings, and others" are "the foundation for lifelong thriving." U.S. Dep't of Health & Hum. Servs., Admin. on Child., Youth & Fams., ACYF-CB-IM-21-01, *supra*, at 12. Indeed, guardianship with parental visitation may be the only way to ensure siblings remain in touch with each other and with extended family. *See generally id.*

Moreover, adoption does not guarantee stability. Adoptions can break down, forcing children to return to foster care. *See*, *e.g.*, Jesus Palacios, et al., *Adoption Breakdown: Concept, Research, and Implications*, 29 RES. ON SOC. WORK PRACTICE 130, 131–33 (2019) (collecting studies documenting adoption "breakdown" rates ranging from 6 to 27 percent). And, even more frequently, pre-adoptive placements fail, with children remaining in impermanent foster settings as legal orphans. Gupta-Kagan, *supra*, at 25 (noting most studies found 9 to 15 percent of pre-adoptive placements fell apart and at least one jurisdiction reported 25 percent of pre-adoptive placements fell apart).

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

Where guardianship or another permanent disposition adequately serves the compelling interest, narrow tailoring requires preserving existing family ties. *See Ex parte T.V.*, 971 So. 2d 1, 7–10 (Ala. 2007) (reversing termination absent proof that no viable alternative existed).

Notably, this constitutional requirement is wholly consistent with federal child welfare policy guidance, which states that "[a]gencies 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 & Hum. Servs., Admin. on Child., Youth & Fams., ACYF-CB-IM-21-01, *supra*, at 3.

The Department says guardianship cannot be an alternative because it does not terminate parental rights, Reply Br. 17, but that, again, impermissibly defines the government's purpose by the challenged means. The interests are protecting children from harm and securing safe, permanent care. A permanent guardian may serve both while preserving a child's legal relationship with a parent. If an

available guardianship would meet those interests adequately, legal severance is not narrowly tailored. If it would not, the State can demonstrate why on the facts of that child's case.

Nor does strict scrutiny require the State to impose guardianship, wait for it to fail, and only then seek termination. The required inquiry is prospective and evidence-based: would guardianship or another permanent kinship arrangement adequately protect this child and meet the identified permanency need? Unless clear and convincing evidence shows it would not, termination is not the least restrictive effective means.

* * *

The disjunctive statutory ground remains operative. The Constitution forbids treating a finding of danger from reunification as conclusive proof that destruction of legal parenthood is necessary. Where the juvenile court itself stated that the relationship would not cause harm and no determination ruled out feasible permanent alternatives, the order cannot stand. On remand, the State may offer evidence of concrete harms and the suitability of each available alternative.

CONCLUSION

The State seeks not merely to invade but to extinguish the fundamental relationship shared by parent and child. The answer to the Court's second question is, as applied, yes: although O.C.G.A. § 15-11-310(a)(5) sets out alternative factual routes to a statutory ground, a termination based on that disjunction may violate constitutional rights. Strict scrutiny requires that the final remedy be necessary to protect the particular child and narrowly tailored in light of available permanent placements, including guardianship. The State did not make that showing here.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

This submission does not exceed the word-count limit imposed by Rule 20. Excluding the parts of the document exempted under Rule 20(6), this amicus brief contains 6,930 words as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2026, I served a copy of the foregoing *Brief as Amici Curiae on Behalf of the Family Justice Law Center, et al. in Support of Appellee* upon all attorneys of record.

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