ORIGINAL

In the
Supreme Court of Ohio

In the Matter of: **L.K.M.,** **A Minor**	Case No. 2010-0276 On Appeal from the First District Court of Appeals; Case Nos. C090285 and C090407

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENSE FUND IN SUPPORT OF APPELLEE KELLY MULLEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 2

ARGUMENT 2

I. The U.S. Supreme Court's Development of the Recognition of Fundamental Parental Rights 3

A. The Fundamental Rights of Fit Natural Parents to Direct the Upbringing of Their Children 3

B. *Troxel v. Granville*: Parental Rights and Third-Party Visitation 8

II. The Judicial Implementation of Parental Status Upon Legal Strangers Infringes Upon the Well Established Fundamental Rights of Fit Natural Parents 11

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

***OHIO CASES*:**

In re Adoption of Zschach (1996),
75 Ohio St.3d 648 6

In re Bonfield (2002),
97 Ohio St.3d 387 12

In re Hockstok (2002),
98 Ohio St.3d 238 ..... 3, 8, 12, 14

In re Messner (1969),
19 Ohio App.2d 33 6

In re Perales (1977),
52 Ohio St.2d 89 ..... 2, 3, 12, 14, 15

In re Schoeppner's Adoption (1976),
46 Ohio St.2d 21 6

In re Smith (1991),
77 Ohio App.3d 1 12

Masitto v. Masitto,
22 Ohio St.3d 63 ..... 3, 12, 14

Reynolds v. Goll (1992),
80 Ohio App. 3d 494 3

State v. Whisner (1976),
47 Ohio St.2d 181 ..... 4, 5

***OTHER STATE CASES*:**

E.N.O. v. L.M.M (Mass. 1999),
711 N.E.2d 886 11

McDermott v. Dougherty (Md. 2005),
869 A.2d 751 14

V.C. v. M.J.B. (N.J. 2000),
748 A.2d 539 12

***FEDERAL CASES*:**

Bartels v. State of Iowa (1923),
262 U.S. 404 4

Farrington v. Tokushige (1927),
273 U.S. 284 5

Hodgson v. Minnesota (1990),
497 U.S. 417 13

Lassiter v. Dep't of Soc. Servs. (1981),
452 U.S. 18 13

Lehr v. Robertson (1983),
463 U.S. 248 13

Meyer v. Nebraska (1923),
262 U.S. 390 ..... 3, 4

Moore v. City of East of Cleveland (1977),
431 U.S. 494 7

Parham v. J.R. (1979),
442 U.S. 584 ..... 7, 8

Perry Educ. Ass'n v. Perry Local Educators' Ass'n (1983),
460 U.S. 37 11

Pierce v. Society of Sisters (1925),
268 U.S. 510 ..... 3, 4

Prince v. Massachusetts (1944),
321 U.S. 158 ..... 3, 5

Quilloin v. Walcott (1978),
434 U.S. 246 5

Santosky v. Kramer (1982),
455 U.S. 745 ..... 8, 13, 15

Stanley v. Illinois (1972),
405 U.S. 645 6

Troxel v. Granville,
530 U.S. 57 (2000) 1, 2, 8, 9, 10, 11, 13, 15

Washington v. Glucksberg (1997),
521 U.S. 702 6

Wisconsin v. Yoder (1972),
406 U.S. 205 5

INTEREST OF *AMICUS CURIAE*

The Alliance Defense Fund ("ADF") is a legal alliance that is composed of approximately 1,800 attorneys and committed to the preservation of family values, religious freedom, and the sanctity of life. ADF is one of the leading advocates of family rights and values in America.

The family is the most basic unit of society. Without healthy, functioning families, a culture cannot survive. As a result, ADF advocates for parents' fundamental rights to legal relationships with their children and, similarly, for children's rights to legal relationships with both their fit natural mother and father. ADF has consistently supported parental rights through litigation and funding for nearly fifteen years.

ADF has vast experience in cases similar to this one both by providing direct funding and assistance to parties and by funding or authoring briefs *amicus curiae*. Of particular relevance here, ADF funded a brief *amicus curiae* in *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), where the U.S. Supreme Court declared that "the interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests." *Id.* at 65.

ADF and its many supporters have a heightened interest in assuring that the constitutional rights of parents and children are adequately protected. Allowing the rights of parents to be eroded will inevitably lead to the destruction of the family and an unbearable societal strain. Thus, the infringement of these fundamental rights in a particular case will surely have broader ramifications. Given ADF's familiarity with this issue and its particularized experience advocating for families, parents, and children, this Court should grant ADF leave to file its brief *amicus curiae*.

STATEMENT OF THE FACTS

This case involves a custody dispute among three parties: 1) the mother, Kelly Mullen; 2) the father, Scott Liming; and 3) Ms. Mullen's ex-partner, Michelle Hobbs. Ms. Hobbs and Ms. Mullen lived together in 2003. In July of 2005, Ms. Mullen gave birth to her daughter. According to Ms. Mullen, the parties agreed the child would have one father and one mother. Scott Liming agreed to be the necessary sperm donor and signed a Donor/Recipient Agreement relinquishing his custodial rights and giving the mother, Ms. Mullen, the sole right to parent any child that resulted from his donation.

Ms. Mullen and Ms. Hobbs separated when the child was two years old. . Ms. Hobbs petitioned the Juvenile Court for shared custody, and a magistrate judge granted the petition. Ms. Mullen's objection to shared custody was later sustained, and the Trial Court held that Ms. Mullen never relinquished her parental rights to Ms. Hobbs. Ms. Hobbs appealed the decision and Ms. Mullen cross-appealed the trial court's decision to allow for visitation. The Court of Appeals affirmed the Trial Court's decision on custody concluding that competent, credible evidence demonstrated that Ms. Mullen did not relinquish custody of her child.

ARGUMENT

The Court and the U.S. Supreme Court have long recognized a fit, natural parent's fundamental right to make decisions concerning his or her child's upbringing. In fact, the Court has unequivocally held that "parents who are suitable persons have a paramount right to the custody of their minor children unless they forfeit that right by contract, abandonment, or by becoming totally unable to care for and support those children." *In re Perales* (1977), 52 Ohio St.2d 89, 97 (citation omitted); *see also Troxel,* 530 U.S. at 65 (parental interests are "perhaps the oldest of the fundamental liberty interests"). The U.S. Supreme Court explained that "[t]he

child is not the mere creature of the State." *Pierce v. Society of Sisters* (1925), 268 U.S. 510, 535. Instead, "[i]t is cardinal 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." *Prince v. Massachusetts* (1944), 321 U.S. 158, 166 (citing *Pierce*, 268 U.S. at 535).

While this Court recognizes that a parent may relinquish custody rights, this Court has consistently held that the recognition of a legal stranger as a parent, by action as a *de facto* parent, contravenes the fundamental right of a fit natural parents to direct a child's upbringing. In *In re Hockstok* (2002), this Court established that, "[w]ithin the framework of the statutes, the overriding principle in custody cases between a parent and nonparent is that natural parents have a fundamental liberty interest in the care, custody, and management of their children." *In re Hockstok* (2002), 98 Ohio St.3d 238, 241; *see also Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 64-66; *see also In re Perales* (1977), 52 Ohio St.2d 89, 97; *see also Reynolds v. Goll* (1992), 80 Ohio App. 3d 494, 498 ("[c]ustody could be awarded to a non-parent only upon a finding of unsuitability.").

I. The U.S. Supreme Court's Development of the Recognition of Fundamental Parental Rights.

A. The Fundamental Rights of Fit Natural Parents to Direct the Upbringing of Their Children.

The U.S. Supreme Court first recognized parental rights as a guaranteed constitutional right nearly ninety years ago in *Meyer v. Nebraska* (1923), 262 U.S. 390. The State of Nebraska passed a law making it unlawful to teach a foreign language to a child before she "successfully passed the eighth grade." *Id.* at 397. A teacher prosecuted for teaching German in violation of the statute challenged the law as "unreasonably infring[ing] the liberty guaranteed . . . by the

Fourteenth Amendment." *Id.* at 399. In finding the law unconstitutional, the U.S. Supreme Court explained:

> [T]his Court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. (emphasis added). *See also Bartels v. State of Iowa* (1923), 262 U.S. 404 (following *Meyer* to strike down a near identical Iowa law as violating the Fourteenth Amendment).

Two years later, in *Pierce v. Society of Sisters, supra*, the U.S. Supreme Court again recognized the broad scope of parental liberties guaranteed by the Fourteenth Amendment when it overturned an Oregon statute that prohibited parents from enrolling their children in private school. *Id* at 530. Relying on *Meyer*, the U.S. Supreme Court held that the statute:

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. 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.

Id. at 534-35. *See also State v. Whisner* (1976), 47 Ohio St.2d 181, 214 ("it has long been recognized that the right of a parent to guide the education . . . of his or her children is indeed a fundamental right guaranteed by the due process clause of the Fourteenth Amendment") (citations omitted).

Two years later, the U.S. Supreme Court invalidated a Hawaii restriction on foreign language schools. *Farrington v. Tokushige* (1927), 273 U.S. 284, 299 (citing *Meyer*, 262 U.S. 390). Children enrolled in the school, according to the U.S. Supreme Court, "obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest." *Id.* at 298. The U.S. Supreme Court held that continued regulation of the foreign language schools:

> would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.

Id.; see also Whisner, 47 Ohio St.2d at 215 n.15.

The U.S. Supreme Court reaffirmed its commitment to the rights of fit natural parents in *Wisconsin v. Yoder* (1972), 406 U.S. 205, in which it overturned convictions of Amish parents for removing their children from school before age sixteen. *Id.* at 207. According to the U.S. Supreme Court, the state's interest in providing universal education, must "yield to . . . the interest of parents in directing the rearing of their off-spring." *Id.* at 213-14. The U.S. Supreme Court noted the limitation on parental rights established in *Prince v. Massachusetts* (1944), 321 U.S. 158, that a state can override a parental decision only where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.* at 234. The Court emphasized, however, that absent such a showing of harm "*Pierce* stands as a charter of the rights of parents to direct the . . . upbringing of their children." *Id.* at 233. "Th[e] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232; *see also Quilloin v. Walcott* (1978), 434 U.S. 246, 255 ("We have recognized on numerous occasions that the

relationship between parent and child is constitutionally protected."); *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648, 653; *Washington v. Glucksberg* (1997), 521 U.S. 702, 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children."); *In re Schoeppner's Adoption* (1976), 46 Ohio St.2d 21, 24 ("[a]ny exception to the requirement of parental consent must be strictly construed so as to protect the right of natural parents to raise and nurture their children.").

The U.S. Supreme Court again emphasized the paramount importance of the rights of fit natural parents in *Stanley v. Illinois* (1972), 405 U.S. 645. The Court held that any termination of parental rights must comport with the constitutional guarantees of procedural due process. In *Stanley*, the U.S. Supreme Court ruled that a natural father could not have a child removed from his custody "without a hearing on parental fitness and without proof of neglect." *Id.* at 658.

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Id. at 651 (quoting *Kovacs v. Cooper* (1949), 336 U.S. 77, 95 (Frankfurter, J., concurring)). "We . . . conclude[] that all . . . parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Stanley*, 405 U.S. at 658; *see also In re Messner* (1969), 19 Ohio App.2d 33, 39-40 ("A parent has a right to custody of his child against all other persons unless and until in any court having jurisdiction there is a judicial hearing and finding of incapacity or unfitness of such parent.").

In *Moore v. City of East of Cleveland* (1977), 431 U.S. 494, the U.S. Supreme Court struck down a housing ordinance that restricted categories of relatives who could live together. The ordinance specifically limited single family dwellings to members of a "nuclear family," and, for instance, prohibited a grandmother from living with and raising her grandson. *Id.* at 498-99. The Court held that the ordinance "intrude[d] on choices concerning family living arrangements" in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 499.

> Our decisions establish 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. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.
>
> * * * *
>
> Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Id. at 503-04, 505. Because the "rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause," the Court held that it could not "avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 501.

The U.S. Supreme Court, in *Parham v. J.R.* (1979), 442 U.S. 584, considered the ability of the state to second-guess certain decisions of fit natural parents concerning their children. In that case, the Court held that parents could commit a child to a mental institution without a prior hearing. *Id.* at 602, 607. The Court recognized that parents make such commitment decisions "on the basis of their observations and independent professional recommendations, that their

child needs institutional care" and emphasized that "[n]either state officials nor federal courts are equipped to review such parental decisions." *Id.* at 601-02, 604.

> [H]istorically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . . The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

Id. at 602-03 (emphasis in original).

In *Santosky v. Kramer* (1982), 455 U.S. 745, the U.S. Supreme Court held that due process required a heightened standard of proof before parental rights could be terminated. *Id.* at 768-70. The use of the "fair preponderance of the evidence" standard, according to the Court, "violate[d] the Due Process Clause of the Fourteenth Amendment." *Id.* at 768. Instead, the U.S. Supreme Court endorsed the use of the "clear and convincing evidence" standard, explaining "such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.* at 769; *see also In re Hockstok* (2002), 98 Ohio St.3d 238, 241-42.

After its decision in *Santosky,* the U.S. Supreme Court did not significantly address parental rights again for almost twenty years.

B. *Troxel v. Granville*: Parental Rights and Third-Party Visitation.

The U.S. Supreme Court most recently reaffirmed the unalienable rights of fit natural parents in *Troxel v. Granville* (2000), 530 U.S. 57 (plurality opinion). In *Troxel*, the Court addressed whether courts could award visitation to a third party over the objections of a fit natural parent. *Id.* at 60. Ms. Tommie Granville and Brad Troxel had two children together but were never married. *Id.* About two years after the couple ended their relationship, Mr. Troxel committed suicide. *Id.* Even after their son's death, Troxel's parents regularly visited with their

two grandchildren. *Id.* However, the mother eventually informed Mr. Troxel's parents, that "she wished to limit their visitation with her daughters to one short visit per month." *Id.* at 61. Troxel's parents were unhappy with the limited visitation offered by the mother and petitioned a Washington Superior Court for more extensive visitation rights under a statute allowing third-party, non-parents to seek visitation. *Id.* The grandparents decided that greater visitation with them was in the best interests of their grandchildren. The Superior Court of Washington agreed and ordered the mother to permit the visitation sought by the Troxels. *Id.* The Washington Supreme Court upheld the grandparents' intrusion into the mother's rights, but the U.S. Supreme Court reversed that decision. A plurality of the U.S. Supreme Court agreed with the mother's argument that the Washington State third-party visitation statute violated her rights as a fit natural parent under the Due Process Clause of the Fourteenth Amendment. *Id.* at 65. At the outset, the U.S. Supreme Court observed that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* (citing and discussing *Meyer*, 262 U.S. at 401, *Pierce*, 268 U.S. at 534-35, *Prince*, 321 U.S. at 158, *Stanley*, 405 U.S. at 651, *Parham*, 442 U.S. at 602, *Washington*, 521 U.S. at 720). "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." *Id.* at 66.

The U.S. Supreme Court ruled that the Washington State third-party visitation statute was unconstitutionally overbroad because it allowed "any person"—related or unrelated to a child—to petition a court at "any time" for visitation rights. *Id.* at 67. The statute, according to the Court, "permit[ted] any third party seeking visitation to subject any decision by a parent

concerning visitation of the parent's children to state-court review." *Id.* In the instant case, the magistrate has permitted a woman who is neither biologically nor legally related to Ms. Mullen's child to encroach upon Ms. Mullen's fundamental rights. With virtually no guiding principles in place, legally or otherwise, the magistrate employed a legal scheme tantamount to that of Washington State, permitting "any person" to petition for custodial rights of another's child.

In *Troxel*, the U.S. Supreme Court identified three reasons the Washington Superior Court misapplied the third-party visitation statute. First, the Superior Court failed to give deference to "Granville's determination of her daughters' best interests." *Id.* at 69. She had decided that more limited visitation with Troxel's parents was in her children's best interests, and the Superior Court "gave no [] weight at all" to Granville's decision. *Id.*

Second, because the Washington Superior Court made no determination about the mother's fitness it had no ground for second guessing Ms. Granville's parenting decisions. *Id.* at 68. The U.S. Supreme Court reasoned 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 that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69.

Finally, "[t]he [Washington] Superior Court gave no weight to [the mother's] having assented to visitation even before the filing of any visitation petition or subsequent court intervention." *Id.* at 71. The mother did not wish "to cut off visitation entirely." *Id.* Rather, she preferred to restrict Troxel's parents' visitation with her daughters "to one short visit per month and special holidays." *Id.* The Washington Superior Court, in effect, "rejected [the mother's] proposal" and substituted its own judgment about what was best for the children. *Id.* The Supreme Court held that the "combination" of these three factors "infringed on [the mother's]

fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id.* at 72.

While *Troxel* was a plurality decision by the Supreme Court, all the Justices, with the exception of Justice Scalia, recognized the existence of a fundamental right of fit natural parents "to make decisions concerning the care, custody, and control of" their children, including the determination of which third parties may visit with their children and to what extent. *See id.* at 65 (plurality opinion); *id.* at 77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 87 (Stevens, J., dissenting); *id.* at 95-96 (Kennedy, J., dissenting). Further, a majority of the Justices agreed that fit natural parents are entitled to a presumption that they act in the best interests of their children. *See id.* at 69 (plurality opinion); *id.* at 78 & n.2 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 97-98 (Kennedy, J., dissenting). To disregard this presumption or infringe upon the fundamental rights of fit natural parents subjects the action to strict scrutiny. *See id.* at 80 (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights."); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983), 460 U.S. 37, 54 (holding that strict scrutiny applies when "government action impinges upon a fundamental right protected by the Constitution").

II. The Judicial Implementation of Parental Status Upon Legal Strangers Infringes Upon the Well Established Fundamental Rights of Fit Natural Parents.

It is against this backdrop of longstanding U.S. Supreme Court precedent protecting the rights of fit natural parents that a third party, Ms. Hobbs, requests this Court to reinstate the magistrate's intrusion into Ms. Mullen's parental rights. Ms. Hobbs acknowledges that she is not related to the child, by either biology or adoption.[1] Thus, Ms. Hobbs is a legal stranger to the

[1] Indeed, a "*de facto* parent," by definition, is "one who has no biological relation to the child . . . ." *E.N.O. v. L.M.M* (Mass. 1999), 711 N.E.2d 886, 891.

child. Nonetheless, Ms. Hobbs insists that her previous "parent-like" relationship with the child now justifies her standing in seeking custody of the child. This Court has considered the issue of custody between a parent and nonparent many times, each time focusing on two key elements: (1) the fitness of the natural parent, and (2) the natural parent's consent to relinquish his or her parental rights. *See Perales*, 52 Ohio St.2d 89; *Masitto*, 22 Ohio St.3d 63; *Hockstok*, 98 Ohio St.3d 238; and *In re Bonfield* (2002), 97 Ohio St.3d 387.

In the present case, the question before this Court is whether a nonparent maybe a parent to a child without the consent of a fit, natural parent. The answer, taking into consideration the consistent decisions of this Court, is no, as finding otherwise would terminate all of a portion of the constitutionally protected rights of the fit, natural parent. And Ohio law does not take this issue lightly as "[a] termination of parental rights is the family law equivalent of the death penalty." *In re Smith* (1991), 77 Ohio App.3d 1, 16.

By giving Ms. Hobbs custodial status under Ohio law, the magistrate sought to treat her—a biological and legal stranger to the child—as equal to the child's fit natural mother. By apply the "best interests of the child" standard to decide visitation and custody, as if two natural parents were vying for visitation or custody in a typical divorce proceeding. *See V.C. v. M.J.B.* (N.J. 2000), 748 A.2d 539, 554 ("Once a third party has been determined to be a psychological parent to a child, . . . he or she stands in parity with the legal parent. Custody and visitation issues between them are to be determined on a best interests standard . . . ." (citation omitted)). In other words, even though Ms. Hobbs did not (a) bear the child, (b) contribute to the child's creation, or (c) adopt the child, she nevertheless demands that this Court to place her on equal footing with the fit natural mother of the child. But if this Court were to recognize Ms. Hobbs as

a parent of the child, doing so would necessarily infringe on a fit natural mother's most fundamental rights.

A fit natural mother maintains the right to direct the upbringing of her children and to determine who associates or visits with those children. *See Troxel*, 530 U.S. at 78 (Souter, J., concurring) ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character."). How a mother values her child's relationships is not the State's domain. The U.S. Supreme Court agrees that parental rights include a parent's "interest in controlling a child's associates," *Id.* at 78. The U.S. Supreme Court has repeatedly recognized that this right belongs specifically to fit natural parents. *See, e.g., Hodgson v. Minnesota* (1990), 497 U.S. 417, 447 ("A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference."); *Santosky*, 455 U.S. at 753 (discussing the "fundamental liberty interest of natural parents in the care, custody, and management of their child"); *see also Lehr v. Robertson* (1983), 463 U.S. 248, 270 (White, J., dissenting) ("[T]he interest that a natural parent has in his or her child . . . has long been recognized and accorded constitutional protection."); *Lassiter v. Dep't of Soc. Servs.* (1981), 452 U.S. 18, 38-39 (Blackmun, J., dissenting) ("[T]he Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing and in retaining the custody and companionship of the child." (citations omitted).

Like the natural mother in the *Troxel* case, Ms. Mullen, the sole fit natural parent, has made a clear decision to limit her child's association with a legal stranger. No court is permitted a *de novo* review of such a determination. The Juvenile Court possesses no statutory or constitutional authority for its intrusion into Ms. Mullen's fundamental rights. Were this Court

to uphold the imposition of Ms. Hobbs' custodial status, it would establish Ohio's juvenile courts as a new "super parent," with the power to impermissibly second guess and overrule a mother's decision. Such intrusions are inconsistent with our most basic freedoms. If this Court upholds the unconstitutional decision by the magistrate, there would be few limitations on Ohio's courts. As Maryland's highest court has recognized:

> Where the dispute is between a fit parent and a private third party, . . . both parties do not begin on equal footing in respect to rights to "care, custody, and control" of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child.

McDermott v. Dougherty (Md. 2005), 869 A.2d 751, 770.

It is precisely to avoid such interference with constitutionally protected parental rights that this Court has consistently rejected the notion that a nonparent should be treated as a parent against the will of the natural fit parent. *See Perales*, 52 Ohio St.2d 89; *Masitto*, 22 Ohio St.3d 63; and *Hockstok*, 98 Ohio St.3d 238.

In *Perales*, *supra*, this Court weighed the "best interest" of the child against "parental rights" and held that

> [u]nder the former, custody is awarded in accordance with best interests of the child regardless of the fitness of the parents. Under the latter, parents are entitled to the custody of their children unless it clearly appears that they are unfit or have abandoned their right to the custody or unless there are some extraordinary circumstances which require that they be deprived of custody. The importance of those doctrines and the names attached to them has probably been overestimated. Although jurisdictions professing to consider only the welfare of the child may not require a finding of unsuitability or state that there is a rebuttable presumption that it is in the best interest of the child to be placed in the custody of his parents, they do, in fact, tacitly assume that the welfare of the child is best served by his living with his parents. Moreover, both

> doctrines seek the same objective (albeit from two different approaches) and the result, under either doctrine is likely, in most cases, to be the same.

52 Ohio St.2d at 96, n. 9 (citations omitted). Thus, in "balancing the interests of both parent and child . . . parents may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable that is, that an award of custody would be detrimental to the child." *Id.* at 98.[2] None of the aforementioned relinquishments apply in the present case.

Perales recognizes what the United States Supreme Court has firmly established—that a fit natural mother has a "fundamental liberty interest . . . in the care, custody, and management of their children." *Santosky*, 455 U.S. at 753. To allow biological and/or legal strangers to use the courts to interfere with this care and management would unconstitutionally infringe on fundamental rights. *Troxel*, 530 U.S. at 72. Furthermore, no intervening change in the law justifies overturning this Court's prior precedent. This Court should not provide standing to a biological and legal stranger to seek custody or visitation at the expense of a mother's rights.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Alliance Defense Fund respectfully requests that the Court affirm the Appellate Division's December 31, 2009, decision concerning custody; and deny Ms. Hobbs any order permitting her to petition for custody and/or visitation; and grant such other and further relief as the Court may deem just and proper.

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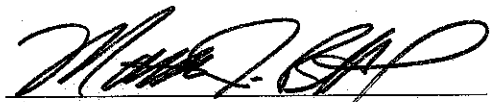
[2] *But see Santosky v. Kramer, supra,* where the U.S. Supreme Court held that the mere preponderance of the evidence standard "violate[d] the Due Process Clause of the Fourteenth Amendment." *Id.* at 768.

Respectfully submitted,



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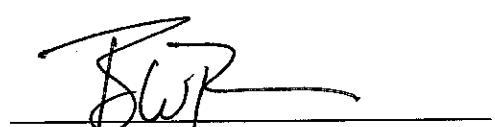

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