IN THE MICHIGAN SUPREME COURT

IN THE MATTER OF ZOEY MAYS and	
LYRIC MAYS,	Supreme Court No 142566
Minors	Lower Ct No. 09-485821-NA
DEPARTMENT OF HUMAN SERVICES,	
Petitioner	Court of Appeals No 297447
v	
	Consolidated With
WALI PHILLIPS,	Court of Appeals No 297446
Respondent-Appellant	

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF RESPONDENT-APPELLANT WALI PHILLIPS

Kerry L. Morgan (P32645)
Pentiuk, Couvreur & Kobiljak, P.C.
Edelson Building, Suite 200
2915 Biddle Avenue
Wyandotte, Michigan 48192
(734) 281-7100
kmorganesq@aol.com

Michelle A. Scott
Center For Individual Rights
1233 20th Street, N.W. Suite 300
Washington, D.C. 20036
(202) 833-8400
scott@cir-usa.org

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STATEMENT OF INTEREST OF AMICI

Petitioner, the Center For Individual Rights ("CIR"), is a public interest law firm based in Washington, D.C. CIR has litigated many constitutional issues in the federal courts and has a particular interest in the rights of families. Last year, CIR took a family rights case in the United States District Court for Idaho to trial, *see Mueller v. Auker*, Case No. CV-04-399-S-BLW, and the case is currently on appeal to the Ninth Circuit. Recently, CIR filed an amicus brief in the Supreme Court on behalf of the Respondent in *Camreta v. Greene*, 131 S. Ct. 2020 (2011).

Here, this Court has specifically asked the parties to address the question whether the so-called one parent doctrine should be upheld. Because this doctrine substantially diminishes the fundamental liberty interest in family integrity and the rights of both parents, CIR submits this *amicus* brief.

QUESTION PRESENTED

Whether the so-called "one-parent" doctrine, first adopted in *In re C.R.*, 250 Mich. App. 185, 646 N.W.2d 506 (2001) should be upheld.

ARGUMENT

I. Introduction

"The 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 [the Supreme] Court." *Troxel v.Granville*, 530 U.S. 57, 65 (2000). The Supreme Court has further recognized "a presumption that fit parents act in the best interests of their children." *Troxel, 530 U.S. at 68*. Parents and their children have a fundamental liberty interest in the integrity of the family which is protected by the Due Process Clause of the Fourteenth Amendment. This interest protects families from government interference absent proof of unfitness. Michigan trial courts, in applying the so-called one parent doctrine of *In re C.R.* are violating the constitutional rights of fit parents by exercising jurisdiction over the family and in some cases terminating parental rights, based solely on the bad acts of the other parent. Here, although it never adjudicated Mr. Phillips unfit, the trial court assumed jurisdiction over his children and ordered him to complete a services plan based solely on the plea their mother entered. Later, the court terminated Phillips' parental rights, based simply on his minor non-compliance with the services plan and his economic status. Accordingly, this Court should reverse the decision terminating Phillips' parental rights, overturn the one parent doctrine, and firmly state that the courts have no jurisdiction over a child or his family where there is an able, fit parent willing to provide the needed care. On remand, if the state believes Phillips is unfit, it is free to commence a proceeding and present evidence to establish he is unfit. *See Santosky v. Kramer*, 455 U.S. 745, 764 (1982) ("Unlike criminal defendants, natural parents have no 'double jeopardy' defense against repeated state termination efforts. If the State initially fails to win

termination . . . it can always try once again to cut off the parents' rights after gathering more or better evidence.").

II. The so-called "one-parent" doctrine is not required by *In re C.R.*, and this Court should not adopt it.

In re C.R., 250 Mich. App. 185, 646 N.W.2d 506 (2002), does not stand for the proposition that the court can adjudicate a child dependent or neglected when a fit parent is available to care for the child. To conclude otherwise is overreaching given the facts and procedural posture of the case. To the extent that Michigan trial and appellate courts are applying *In re C.R.* in this manner, they are doing so in error.[1] Accordingly, this Court should not adopt the so-called "one-parent" doctrine of *In re C.R.*.

In *In re C.R.*, 250 Mich. App. 185, 646 N.W.2d 506 (2002), the state sought to terminate parental rights based upon allegations that the mother abused drugs and both parents had an extensive criminal history. Later the parties reached an agreement whereby the mother pled no contest, the state dismissed the charges against the father, and the court took jurisdiction of the children, placing them with their father, subject to conditions including his participation in services and drug testing. *Id.* at 188, 508. The father, however, failed to satisfy many of the conditions, leaving the children unattended, testing positive for drugs, and, at one point "going so far as to shave all the hair on his body," before a required hair follicle drug test. *In re C.R.*, 250

[1] *See* Appellant's br. at 20; Vivek Sankaran, *But I Didn't Do Anything Wrong: Revisiting the Rights of Non-Offending Parents in Child Protection Proceedings*, 82 Mich. Bar J. 22 (2006).

Mich. App. at 191, 646 N.W.2d at 510. Following a hearing, the court terminated the mother and father's parental rights, based upon the best interests of the children. *Id.* at 194, 511.

On appeal, the father argued that because the original charges against him were dismissed, his right to procedural due process was violated when the court terminated his parental rights. The appellate court disagreed, finding that once the trial court had jurisdiction over *the children* due to their mother's no-contest agreement, the court could compel their father to comply with drug testing and other conditions it considered necessary to ensure the best interests of the children, even though the father was no longer a respondent. *Id.* at 202-03, 515-16. The court explained

> the court rules simply do not place a burden on [the state] to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in the protective proceeding before the family court can act in its dispositional capacity. The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding.

Id. at 205, 517. To the extent that "court rules" permit the court to exercise jurisdiction over a child and order the non-offending parent to participate in a service plan based upon a finding of unfitness as to only one parent, and to then terminate that parent's parental rights without establishing he is unfit, those court rules are clearly unconstitutional. *See Santosky*, 455 U.S. at 755 ("The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.") quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (brackets as in *Santosky*).

Several lower court cases have relied on *In re C.R.* for the proposition that the court has the jurisdiction to interfere with the rights of a family even where there is a fit parent available to care for the child. *See* Appellant br. at 20. But this argument ignores the fact that the father in *In re C.R.* was clearly not fit, and even though he was no longer a respondent in the original abuse proceeding, he had submitted to the court's jurisdiction without objection for over a year prior to the trial. Critically, in his appeal, the father in *In re C.R.* did not challenge the trial court's imposition of the services and conditions. Had he done so, the outcome may have been different. Moreover, the appellate court found that there was clear and convincing evidence presented at trial that he failed to provide proper care and supervision to the children and he failed to acknowledge that he had an independent duty apart from the mother, to ensure that the children were living in a safe home with adequate supervision. *In re C.R.*, 250 Mich. App. at 207, 646 N.W.2d 506 at 518. All of which would have established the father's unfitness before the trial court had he raised the issue earlier. Accordingly, the court did not actually address whether it was appropriate to terminate the father's rights based solely on his failure to comply with the conditions. The court simply found that the father took part in many of the hearings and was adequately represented by counsel; thus, his procedural due process rights were not violated. *In re C.R.*, 250 Mich. App. at 208, 646 N.W.2d at 518. Nowhere does the *In re C.R.* decision address the *substantive* due process rights of a true non-offending parent to the care and custody of his child without state interference.

III. Parents and children have a fundamental liberty interest in the integrity of their family.

a. Family rights are protected by the Fourteenth Amendment Due Process Clause.

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. The liberty interest guaranteed by the Fourteen Amendment includes the right to establish a home and raise children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Supreme Court has explained that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights the Court has ranked of 'basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-117 (1996). The Court has considered a person's right to conceive and raise children to be one of the "basic civil rights of man." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). *See also Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The Due Process Clause of the Fourteenth Amendment protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Parents have a constitutionally protected interest in raising their children without interference from the state. *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979) (holding that parents have the right to make medical decisions for their children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents have the right to make educational decisions for their children). And family members have constitutionally protected interests in their familial integrity—a right to remain together, and not to be forcibly separated by the state. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). The Court has found that these interests "undeniably warrant deference and, absent a powerful

countervailing interest, protection." *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 27 (1981) quoting *Stanley*, 405 U.S. at 651.

b. The State must have a compelling interest in order to interfere with a family.

As a matter of constitutional law, the government cannot restrict a fundamental right unless it demonstrates a compelling interest to do so. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993). In the parent child relationship, the state's compelling interest in protecting best interests of the child only exists where the parent is unfit to make decisions or care for his children. *Troxel*, 530 U.S. at 68-69. Accordingly, a showing of unfitness is necessary in for the government to interfere. As the Supreme Court has stated, "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force a breakup of a natural family, over the objections of parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in children's best interest.'" *Quilloin*, 434 U.S. at 255 (Stewart, J., concurring).

In *Troxel v. Granville*, the Supreme Court found a fit mother's due process rights were violated when the court awarded grandparent visitation based upon the best interests of the children. A plurality of the Supreme Court recognized "a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68. Relying on *Parham*, the Court recognized that "natural bonds of affection lead parents to act in the best interests of their children," so that as long as a parent 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." *Troxel*, 530 U.S. at 68-

69 (citations omitted). Accordingly, a plurality of the Court held that "the Due Process Clause does not permit a State to infringe on the fundamental right of the parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S at 72-73.

Accordingly, the burden falls on the state has to prove that a parent is unfit--unfitness cannot be presumed. The Supreme Court requires the state to provide an individual hearing to establish unfitness, and it not permitted to rely on a blanket presumption of unfitness about a broad category of people. *Stanley*¸ 405 U.S. at 656-58 (1972) (overturning an Illinois statutory presumption that unwed fathers were unfit). Thus, the fact that one parent is unfit does not relieve the state of its burden to prove the remaining parent is unable to care for the child before it may interfere in the relationship between that parent and the child. To hold otherwise would lead to a situation where one parent's acts could negate or waive the constitutional rights of the other.

c. No compelling interest exists to support the State's interference where there is a fit parent present.

In this case, the state's failure to even mention a purported compelling interest to justify its summary interference with a fit parent is telling. So is their reference to Phillips' due process arguments as "platitudes . . . about the importance of parents raising their children." *See* Appellee's br. 15. As the Court asked in *Stanley*, "What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case?" *Stanley*, 405 U.S. at 652. There is none.

And since each parent has the same rights under the Constitution, the existence of a single fit parent negates the state's constitutional authority to interfere. For, if a fit parent is available, he is presumed to act in the best interests of his child, negating any interest the state could articulate in doing so. Thus, Michigan's so-called single parent rule of taking jurisdiction over a child and in some cases terminating parental rights on the basis of the acts of one parent (where there is a fit parent willing and able to care for the child) violates the fit parent's fundamental rights. Where there is a fit parent, the state has no compelling interest to interfere at all.

Moreover, in this case, the state essentially argues that Phillips has waived his right to object to the court's initial imposition of the services plan because he failed to appeal from that initial order. What they fail to acknowledge is that at the time the court ordered Phillips to participate in services, he had no notice that his parental rights were at stake. Essentially, under this view, a fit parent waives his constitutional right to have the state prove unfitness prior to termination simply for failing to object to an order the court entered at the beginning of a long process, often months prior when the state has not yet even threatened termination of parental rights. This view overlooks the crucial issue that waiver of a fundamental constitutional right is only valid if it is knowing, intelligent, and voluntary, and the state has the burden to establish this. The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. And there is a presumption against the waiver of Constitutional rights. *See Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Glasser v. United States*, 315 U.S. 60, 70-71 (1942). For a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Terminating a parent's rights is the utmost destruction of the

family's integrity interest. "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosk*y, 455 U.S. at 759.

Using the so-called one parent doctrine, the Michigan courts routinely exercise jurisdiction over children with ready and willing fit parents, as they did with Phillips. And as in *Stanley*, here, the state of Michigan "registers no gains toward its declared goals when it separates children from the custody of fit parents." *Stanley*, 405 U.S. at 652. Indeed, the record here reflects that Phillips presented evidence that he in fact participated in most of the service plan the state imposed and had also arranged for housing for the children. But applying a presumption of unfitness based upon the mother's guilty plea and Phillips' failure to perfectly comply with the service plan, the state spited its own presumed goal of serving the best interests of the children by separating them from their father.

IV. Under the Fourteenth Amendment to the United States Constitution, the State must assess each parent's fitness separately.

The broad dicta of *In re C.R.*, implying that the condition of the child confers jurisdiction on the court, only serves to confuse what should be a rather straightforward constitutional question: Has the state proven the child has no fit parent available to care for him? If the child has no fit parent, then the state has a compelling interest to act as *parens patriae*, and the court has jurisdiction to order one or both parents to undergo services or in some cases take custody of the child or transfer him to someone other than the parents. If the child has a fit parent, then the state has no compelling interest to interfere, and must return the child to the fit parent. *Wallis v.*

Spencer, 202 F.3d 1126, 1142 n.14 (9th Cir. 2000). *See also Brokaw v. Mercer County*, 253 F.3d 1000, 1019 (7th Cir. 2000) (in balancing the competing interests of the state and the family, "courts have recognized that a state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse"); *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123, 1126 (3d Cir. 1997) ("a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse"). Furthermore, the fitness of each parent must be assessed separately. *Wallis*, 202 F.3d at 1142 n.14. *See also Fredenburg v. Santa Clara*, 407 Fed. Appx. 114, 115 (9th Cir. 2010) (finding that "the right to familial association free from government intrusion, absent reasonable cause to believe *both* parents pose a threat to the children," is clearly established) (emphasis in original); *Burke v. County of Alameda*, 586 F.3d 725, 733 (9th Cir. 2009) (extending *Wallis* to non-custodial parents and holding that where the noncustodial parent was not accused of wrongdoing and the state failed to investigate the possibility of placing his daughter with him rather than the government, a reasonable jury could find his constitutional rights were violated) . As the Ninth Circuit recently explained, "The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct--real or imagined--of the other parent." *Wallis*, 202 F.3d at 1142 n.14.

By focusing its view on the *child* rather than the parent, in misplaced reliance on *In re C.R.*, the Michigan courts are disregarding the state's burden under the United States Constitution to establish the unfitness of each parent prior to interfering with the family. By applying what basically amounts to a presumption of unfitness against a parent whenever the

other parent is shown to be unfit, Michigan courts are engaging in precisely the type of procedural short-cut the Supreme Court struck down in *Stanley v. Illinois.* In *Stanley*, an unwed father challenged an Illinois statute that provided the children of unwed fathers automatically became wards of the state upon their mother's death, without any hearing to establish the father's unfitness. *Stanley*, 405 U.S. at 646-47. Acknowledging that the state has an interest in establishing prompt and efficacious procedures and that a presumption is "always cheaper and easier than individualized determination," the Court noted that the "Constitution recognizes higher values than speed and efficiency," and here the presumption "needlessly risks running roughshod over the important interests of both parent and child." *Id.* at 656-57. Here, as in *Stanley*, the state's interest in caring for Phillips' children is *de minimis* if Phillips is shown to be a fit father. Here, the state's use of the one parent rule in lieu of a separate fitness determination solely for expediency or convenience offends the Due Process Clause. As in *Stanley*, "that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Stanley*, 405 U.S. at 658.

Regardless of whether Michigan statutes permit the state this interference, the United States Constitution grants each parent and child fundamental liberty interests in their family integrity, which must be respected by the states. The state in this case argues that all but two states follow the one parent doctrine. Appellant's br. 8-9 ("only Maryland and Pennsylvania mandate that children be placed with a non-offending respondent parent unless abuse or neglect can be proven against *both* parents").[2] But the fact that other states violate the constitutional

[2] Michigan courts should follow the lead of courts in New York, Maryland, and Pennsylvania, which have directly addressed this situation and held that where there is a fit parent, a child cannot be deemed neglected or dependent. New York requires a finding of unfitness before even reaching the best interests of the child inquiry. *See In re Cheryl K*, 484

rights of non-offending parents and their children does not make the one parent doctrine constitutional. The Supreme Court and federal courts throughout the country recognize parents'

N.Y.S.2d 476, 477 (1985) (recognizing that a parent has "a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood," and that in the absence of "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances," a parent cannot be denied custody and holding that since there was no indication that the mother was "anything other than a fit parent," the "inquiry ends and the natural parent may not be deprived of the custody of his or her child."). *See also People ex rel. Kropp v. Shepsky*, 113 N.E.2d 801 (N.Y. 1953); *Matter of Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976); *Matter of Male Infant L.*, 462 N.E.2d 1165, 1169 (N.Y. 1984) (in the absence of "gross misconduct" or "other behavior evincing utter indifference and irresponsibility" the natural parent "may not be supplanted" and "the question of best interests itself is not even reached); *In re Alfredo S.*, 568 N.Y.S.2d 123, 124 (App. Div. 1991) ("Nor may we attribute responsibility to the father for the mother's prenatal drug use, her admitted addiction to cocaine, and the finding of neglect entered against her, and thereby leap the logical gap in this reasoning to find the presence of extraordinary circumstances sufficient to mandate a best interests inquiry.").

In Maryland, a child in a parent's custody is considered a "child in need of assistance" only if *both* parents are unwilling or unable to give proper care. *In re Russell G.*, 672 A.2d 109, 114 (Md. Ct. Spec. App. 1996) ("a child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court."). *See also In re Sophie S.*, 891 A.2d 1125 (Md. Ct. Spec. App. 2006) (permitting the court to award custody to the remaining fit parent before dismissing the case where allegations of neglect are sustained as to only one parent and that parent has sole legal custody).

In Pennsylvania, a court cannot adjudge a child to be dependent where an innocent, caring and loving parent is ready, willing and able to provide the child with proper care and control." *In re Jeffrey S.*, 628 A.2d 439 (Pa. Sup. 1993). *See also In re M.L.*, 757 A.2d 849, 851 (Pa. 2000) (When a court adjudges a child dependent, that court then possesses the authority to place the child in the custody of a relative or a public or private agency. Where a non-custodial parent is available and willing to provide care to the child, such power in the hands of the court is an unwarranted intrusion into the family. Only where a child is truly lacking a parent, guardian or legal custodian who can provide adequate care should we allow our courts to exercise such authority.); *Hammack v. Wise*, 211 S.E.2d 118 (W.V. 1975) (reversing a court's award of custody to a grandmother where the child's father was fit and able to care for the child, explaining that while the best interest of the child is a "polestar" guiding the court, "it will not be invoked to deprive an unoffending parent of his natural right to custody of his child" unless there is clear and convincing proof that the parent is unfit).

and children's fundamental constitutional rights. To the extent the Michigan court rules or dicta in *In re C.R.* permit otherwise, they are unconstitutional. *See* U.S. Const. art. VI ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

V. Conclusion

For the foregoing reasons this Court should reverse the decision terminating Phillips' parental rights, overturn the one parent doctrine, and firmly state that the courts have no jurisdiction over a child or his family where there is an able, fit parent willing to provide the needed care.

July 27, 2011

Respectfully submitted,

Kerry L. Morgan (P32645)
Pentiuk, Couvreur & Kobiljak, P.C.
Edelson Building, Suite 200
2915 Biddle Avenue
Wyandotte, Michigan 48192
(734) 281-7100
kmorganesq@aol.com

Michelle A. Scott
Center For Individual Rights
1233 20th Street, N.W. Suite 300
Washington, D.C. 20036
(202) 833-8400
scott@cir-usa.org