

NO. 20-0378

IN THE TEXAS SUPREME COURT

IN THE INTEREST OF J.F.-G., A CHILD

Original Proceeding Arising Out of
the 74th Judicial District Court of McLennan County, Texas
(Cause No. 2017-1734-3)
and the Tenth Court of Appeals, Waco Texas
(Cause No. 10-19-00356-CV)

**BRIEF OF THE TEXAS PUBLIC POLICY FOUNDATION,
TEXAS CRIMINAL JUSTICE COALITION, LONE STAR
JUSTICE ALLIANCE, TEXAS ASSOCIATION OF FAMILY
DEFENSE ATTORNEYS, TEXAS APPLESEED, AND TEXAS
HOME SCHOOL COALITION AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER'S MOTION FOR REHEARING**

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INTEREST OF *AMICI CURIAE*¹

Texas Public Policy Foundation

The Texas Public Policy Foundation (the “Foundation”) is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of liberty, personal responsibility, limited government, and free enterprise through academically sound research and advocacy. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Specifically, the Foundation seeks to promote the welfare of children and the fundamental rights of Texas families through our work on child and family issues and advocacy in court on behalf of families.

Texas Criminal Justice Coalition

The Texas Criminal Justice Coalition (TCJC) is a non-profit, non-partisan research and advocacy organization dedicated to promoting community safety and wellbeing, racial equity, and lowered incarceration through research, organizing, educational outreach, and policy advocacy.

¹ *Amici Curiae* have paid all of the costs and fees incurred in the preparation of this brief.

Since its inception in 2000 and in accordance with its central mission, TCJC has authored research, presented legislative testimony, engaged in administrative advocacy with Texas agencies, and built coalitions with justice system-impacted Texans to safely reduce incarceration and help returning individuals live successfully in the community. In 2021, TCJC helped drive support for new legislation that provides a path for formerly incarcerated parents to regain rights to their children. TCJC seeks to address the intergenerational trauma to families and communities that stems from incarceration, and, through our outreach and advocacy, TCJC promotes family reunification as a significant contributor to the success of returning individuals.

Lone Star Justice Alliance

The Lone Star Justice Alliance is a nonprofit legal organization focused on improving the lives of youth and emerging adults in the justice system. Through research, alternatives-to-incarceration pilot programs, litigation, advocacy, and community engagement, LSJA seeks to replace the current, punitive approach of the justice system with one that is guided by public health principles. It is our overriding goal to realize a justice system that accounts for the distinctive attributes of individuals, especially children and youth, and their capacity for reform to both ensure public safety and just outcomes.

Texas Association of Family Defense Attorneys

The Texas Association of Family Defense Attorneys (“TAFDA”) is a statewide group of attorneys focused preserving and advocating for the right to family integrity as guaranteed by the Texas and U.S. Constitutions. TAFDA fulfills that mission by educating and training attorneys who represent parents and children in parental termination and child protection cases; by equipping those attorneys with the information, skills, and tools they need to succeed in the courtroom; and by participating in the legislative process to effect changes in the law that are beneficial to families. Through its focus on cooperation, education, and assistance, TAFDA seeks to strengthen families through zealous advocacy at all levels of government.

Texas Appleseed

Texas Appleseed is a public interest justice center that works to change unjust laws and policies that prevent Texans from realizing their full potential. Texas Appleseed conducts data-driven research that uncovers inequity in laws and policies and identifies solutions for lasting, concrete change. Texas Appleseed’s efforts include work on children’s issues such as juvenile justice, education justice, youth homelessness, and foster care.

On the issue of foster care, Texas Appleseed researched best practices for the courts and the legal system to assure that children in long-term foster care find permanent homes as quickly as possible and worked to influence court practices.

With the Children’s Commission, DFPS, and other partners, Texas Appleseed helped train hundreds of judges, lawyers, CASA advocates and others in how to improve the legal system so that children can find permanent homes sooner. Texas Appleseed also works on issues to help older foster youth make as smooth a transition as possible into adulthood. Most recently, Texas Appleseed worked with other groups to ensure that foster youth and youth experiencing homelessness can get drivers’ licenses, state identification documents, and drivers’ education easily and free of charge.

Texas Home School Coalition

The Texas Home School Coalition (hereinafter “THSC”) is a nonprofit organization committed to keeping Texas families free by protecting the constitutional right of parents to raise their children. Recognizing the attendant and equally important right and interest of children in maintaining relationships with their natural parents, THSC provides to its members, in addition to educational opportunities and resources, legislative advocacy and legal support. THSC was instrumental in affirming the rights of parents to homeschool in *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994).

Since that time, THSC has become increasingly involved in the defense of this precious fundamental right. As a part of that mission, THSC works significantly in the Child Protective Services (CPS) arena. THSC has drafted, and been

instrumental in passing, major legislative reforms in the Texas CPS system. In response to numerous experiences of THSC member families being contacted by CPS, THSC assists those families in obtaining legal representation through various sources, including financial assistance and access to volunteer attorneys. This has resulted in the resolution of fifty-nine (59) cases since 2014, with more currently in progress. THSC has also worked substantially to advance parental rights in other areas. THSC was appointed by Gov. Greg Abbott as a member of a CPS policy workgroup during the 2017-2018 legislative interim and was instrumental in aiding the development of the recommendations provided by that workgroup. In December 2018, THSC filed a detailed brief with the Texas Attorney General's office, detailing the century long history of constitutional case law protecting parental rights. The Attorney General's office subsequently issued opinion KP-0241, giving a comprehensive overview of the constitutional rights of parents.

It is with this background and experience that the *Amici Curiae* file this Brief in support of Petitioner's Motion for Rehearing.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Petitioner’s Motion for Rehearing and urges the Court to withdraw its Opinion and render judgment in favor of D.F.

In affirming the judgment of the Tenth Court of Appeals to uphold the termination of Petitioner’s parental rights, the Majority acted contrary to this Court’s own well-established precedent recognizing the parent-child relationship as a fundamental constitutional right that may not be interfered with absent “the most solid and substantial reasons.” *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (quoting *State v. Deaton*, 93 Tex. 243, 248 (1900)). Both the United States Supreme Court and this Court have long protected the interest of parents and children in maintaining their relationship with one another free from state interference, even in cases where a parent’s behavior has been less than ideal. *See, e.g., Troxel v. Granville*, 530 U.S. 567, 65 (2000) (noting that “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”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (emphasizing that the liberty interest of parents in maintaining their relationship with their children “does not evaporate simply because they have not been model parents”); *In re C.J.C., Relator*, 603 S.W.3d 804, 812 (Tex. 2020) (recognizing that the “legal presumption that it is in the child’s best interest to be raised by his or her parents [...] is ‘deeply embedded in Texas law’”).

In order to safeguard these rights, this Court's precedent requires that termination of parental rights proceedings be strictly scrutinized and that involuntary termination statutes be strictly construed in favor of the parent's natural rights. *Holick v. Smith*, 685 S.W.2d 18, 20-21(Tex. 1985). Contrary to this well-established precedent, the Majority failed to apply strict scrutiny to its review of the lower courts' decisions terminating Petitioner's rights, instead opting for the less strenuous legal-sufficiency standard. Further, in its application of Texas Family Code Section 161.001(b)(1)(E) to Petitioner's case, by giving undue weight to Petitioner's prior bad actions while downplaying his more recent record of rehabilitation and exemplary behavior the Majority fails to strictly construe the statute in manner most favorable to Petitioner's natural rights.

The Majority's opinion, if allowed to stand, will serve to undermine the fundamental constitutional rights of parents and erode the strong protections this Court has long recognized to safeguard those rights. Such erosion will result in widespread negative consequences for untold numbers of Texas families. Accordingly, this Court should grant Petitioner's motion for rehearing, withdraw its Opinion, and render judgment in favor of Petitioner's natural rights as a father.

ARGUMENT

I. THE RELATIONSHIP BETWEEN A PARENT AND CHILD IS ONE OF CONSTITUTIONAL DIMENSIONS AND MAY NOT BE TERMINATED BY THE STATE ABSENT “THE MOST SOLID AND SUBSTANTIAL REASONS.”

Both the United States and Texas Constitutions have long recognized that the parent-child relationship is a fundamental right that government may not interfere with except in the most limited circumstances. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). As the United States Supreme Court held in *Troxel v. Granville*, and this Court recently strongly affirmed in *In re C.J.C., Relator*, “the interest of parents in the care, custody, and control of their children is perhaps the oldest of fundamental liberty interests recognized by this court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re C.J.C., Relator*, 603 S.W.3d 804, 812 (Tex. 2020) (emphasizing that the fundamental right articulated in *Troxel* and the “legal presumption that that it is in a child’s best interest to be raised by his or her parents [...] is ‘deeply embedded in Texas law’”). Accordingly, this Court has repeatedly affirmed that “actions which break the ties between a parent and child ‘can never be justified without the most solid and substantial reasons,’” and requires that any action “which permanently sunders those ties [...] be strictly scrutinized.” *Wiley*, 543 S.W.2d at 352 (quoting *State v. Deaton*, 93 Tex. 243, 248 (Tex. 1900)).

Maintaining the ties between a parent and child is so important to the functioning of a free society that the United States Supreme Court has held that this fundamental right is one that all parents, not just the most perfect, enjoy. Indeed, the Court has held that “the fundamental liberty interest of natural parents in the care, custody, and management of their children is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents.” *Santosky*, 455 U.S. at 753. This liberty interest is so strong, in fact, that “persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.” *Id.*

Petitioner is exactly the type of parent the holding in *Santosky* is intended to protect. It is undisputed that Petitioner committed crimes that resulted in a period of incarceration. However, the record in this case clearly shows that it was not Petitioner’s prior criminal history that endangered his child, but the actions of the child’s mother and her boyfriend. It is also clear from the record that Petitioner rehabilitated during his incarceration and pursued numerous opportunities to improve himself and prepare to take on the responsibilities of fatherhood upon his release. The tragedy of this case is that the relationship between a father and daughter is at risk of being forever destroyed because the courts of this state have thus far denied Petitioner the constitutionally-required protections to which he is entitled.

II. THE MAJORITY FAILED TO APPLY THE PROPER STANDARD OF REVIEW—STRICT SCRUTINY—TO ITS REVIEW OF THE TERMINATION OF PETITIONER’S PARENTAL RIGHTS UNDER TEXAS FAMILY CODE § 161.001(B)(1)(E).

Although the Majority correctly points out that the State “must establish by clear and convincing evidence a legal ground to terminate the parent’s right and that termination is in the child’s best interest” and that this high burden of proof requires a “heightened standard of review” on appeal, it fails to apply the proper standard for both reviewing the lower courts’ proceedings and construing the involuntary termination statute at issue.

This Court has repeatedly held that, due to the constitutional dimensions of the parent-child relationship, not only must “the evidence in support of termination be clear and convincing,” but also such “proceedings should be strictly scrutinized.” *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *see also Wiley*, 543 S.W.2d at 352. Moreover, this Court’s jurisprudence clearly holds that involuntary termination statutes like Texas Family Code Section 161.001(b)(1)(E) must be “strictly construed in favor of the parent.” *Holick*, 685 S.W.2d at 20-21 (citing *Cawley v. Allums*, 518 S.W.2d 790, 792 (Tex. 1975); *Heard v. Bauman*, 443 S.W.2d 715, 719 (Tex. 1969)).

In the current case, the Majority relies on a legal-sufficiency standard to uphold the termination of Petitioner’s parental rights. This standard, it argues, gives due deference to the trial court’s role as factfinder while honoring the “elevated

burden of proof” required in parental termination cases. *In the Interest of J.F.-G., A Child*, No. 20-0378, 10 (Tex., May 21, 2021). Under the standard employed, the Majority only considers “whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof.” *Id.* at 9. This analysis, however, falls short of this Court’s own well-established jurisprudence discussed above, which requires that a lower court’s decision to forever and irrevocably terminate parental rights be subject to strict scrutiny analysis.

The Majority also failed to strictly construe Texas Family Code Section 161.001(b)(1)(E) and its application to Petitioner as is required. As discussed above, this Court has held that in cases involving the involuntary termination of parental rights, “the rule of strict construction applies in favor of” the parent whose rights are in jeopardy. *Heard*, 443 S.W.2d at 719; *see also Holick*, 685 S.W.2d at 20; *Cawley*, 518 S.W.2d at 792. Elaborating on the application of the rule of strict construction in termination cases, this Court in *Heard* held that “where the statute is open to construction and interpretation, it should be construed in support of the parent’s natural rights [...]” *Heard*, 443 S.W.2d at 719 (quoting *Stinson v. Rasco*, 316 S.W.2d 900, 905 (Tex. Civ. App. 1958, no writ); *Gilley v. Anthony*, 404 S.W.2d 60, 63 (Tex. Civ. App. 1966, no writ). Since the application of subsection 161.001(b)(1)(E) to cases involving parental incarceration is at issue, the subsection

is clearly “open to construction and interpretation.” Thus, this Court is required to construe its terms in a manner most favorable to Petitioner.

Contrary to this precedent, however, the Majority’s opinion construes subsection 161.001(b)(1)(E) in a manner that is most favorable to termination. For example, in finding that the evidence presented was legally-sufficient to support termination of Petitioner’s parental rights, the Majority relies primarily upon the endangering acts committed by Julie’s mother and her boyfriend while petitioner was incarcerated as well as what it characterizes as Petitioner’s “escalating criminal activity.” *In the Interest of J.F.-G., A Child*, No. 20-0378, 2 (Tex., May 21, 2021). In making the case that Petitioner had engaged in a pattern of increasingly severe criminal activity that endangered his daughter, however, the Majority is forced to bring up criminal activity that mostly occurred prior to the birth of his daughter, beginning with a minor conviction for possession of marijuana that occurred when Petitioner was seventeen years old. *Id.* at 2. In doing so, the Majority not only fails to strictly construe subsection 161.001(b)(1)(E) in favor of Petitioner as required, it also broadens the application of the subsection to allow for any bad action committed by a person at any point in their life to be later used as grounds to support termination of their parental rights.

At the same time, the Majority downplays the clear evidence of Petitioner’s rehabilitation, his efforts to maintain his presence in his daughter’s life while

incarcerated, the steps he took to prepare himself to take on the responsibilities of fatherhood upon his release, his cooperation with the Department of Family and Protective Services once he learned that his daughter had been removed into foster care, and his exemplary conduct since his release. Although the Majority characterizes Petitioner’s positive pattern of behavior as “short-term,” the evidence in the record shows that Petitioner was actively working to improve himself and prepare for his release since at least 2014—a period of time arguably longer than the period during which he committed the acts the Majority points to as evidence of a pattern of escalating criminal activity. This downplaying of Petitioner’s clear rehabilitation combined with a focus on prior bad actions shows that the Majority failed to meet its constitutionally-required obligation to construe subsection 161.001(b)(1)(E) in favor of Petitioner’s natural rights as a father.²

² The Majority’s opinion with respect to Petitioner’s positive pattern of behavior is also out of alignment with the clear policy pronouncements being made by the Legislature that seek to recognize and reward rehabilitation. During its most recent session, the Legislature unanimously passed House Bill 2926, which creates a legal process for reinstating parental rights that had been previously terminated. Tex. H.B. 2926, 87th Leg., R.S. (2021). According to statements of legislative intent, the bill, which takes effect on September 1, 2021, is designed to promote family preservation, provide second chances for parents who have successfully rehabilitated, and prevent children from suffering the trauma of aging out of foster care. In both child welfare and criminal justice, public policy is trending toward incentivizing rehabilitation. The present case presents this Court with the perfect opportunity to do the same.

III. THE PRESENT CASE IS DISTINGUISHABLE FROM *IN RE J.F.C.*, WHICH THE MAJORITY CITES IN SUPPORT OF ITS APPLICATION OF THE LEGAL-SUFFICIENCY STANDARD.

Although the Majority relies upon *In re J.F.C.* to support its application of the legal-sufficiency standard, *J.F.C.* does not absolve this Court of its obligation to apply strict scrutiny to the termination at issue in this case. In *J.F.C.*, this Court took issue with the lower court’s conclusion that strict scrutiny required it to consider an unpreserved jury-charge error committed by the trial court. *In re J.F.C.*, 96 S.W.3d 256, 302 (Tex. 2002). Although the Majority in *J.F.C.* rejected this conclusion, it did so by distinguishing *J.F.C.* from *Holick*, in which the Court wrestled with “how to construe a particular ground for termination in the Family Code” rather than an unpreserved error. *Id.* The instant case, which requires this Court to construe the application of subsection 161.001 (b)(1)(E) with respect to a formerly-incarcerated parent whose actions were not the direct cause of the danger that led to the removal of his child by the Department, is thus more analogous to *Holick* than to *J.F.C.* Accordingly, the Majority should have applied strict scrutiny when reviewing of the termination of Petitioner’s parental rights.

CONCLUSION

All parents, even those who have not been model parents, possess a fundamental liberty interest in their relationship with their children. To secure this interest, the United States Supreme Court, this Court, and the Legislature of this state

have provided extensive protections to safeguard this right against interference by the government absent the most compelling reasons. These protections are especially important for parents like Petitioner who are facing the forced dissolution of their relationship with their children. Foremost among these protections is the requirement that termination proceedings be strictly scrutinized by the Court and involuntary termination statutes be strictly construed in favor of the natural parent whose rights are in jeopardy. As demonstrated above, the Majority failed to provide Petitioner with both of these protections. Accordingly, the Majority must vacate its opinion, grant Petitioner's motion for rehearing, and render judgment in favor of Petitioner.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 2,296 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/Robert Henneke

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following persons via the Court's electronic filing system this

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