

NO. 23-0067

In the Supreme Court of Texas

Christine Lenore Stary,
Petitioner,

vs.

Brady Neal Ethridge,
Respondent.

On Review from the First District Court of Appeals,
Houston, Texas, No. 01-21-00101-CV

AMICI CURIAE BRIEF OF TEXAS ASSOCIATION AGAINST SEXUAL
ASSAULT, TEXAS COUNCIL ON FAMILY VIOLENCE AND TEXAS
ADVOCACY PROJECT

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STATEMENT REGARDING ORAL ARGUMENT

Amici believe that, should the Court grant the petition, oral argument by the parties would aid this Court in its decision making but do not, themselves, separately request oral argument.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statement of Facts as stated in the Brief on the Merits filed by Amicus Counsel appointed by the Court for purposes of defending the court of appeals's judgment.

TEX. R. APP. P. RULE 11 REQUIREMENTS

This *amici curiae* brief complies with the briefing rules for parties. No fee was paid, or will be paid, for the preparing of this brief. A certificate of service certifying that copies were served on all parties appears at the end of the brief.

STATEMENT OF INTERESTS OF *AMICI CURIAE*

The Texas Association Against Sexual Assault (TAASA) is a nonprofit organization committed to ending sexual violence in Texas. It is a membership-based coalition consisting of rape crisis centers, advocates, criminal justice professionals, campuses, and medical professionals, focusing on education, prevention, and advocacy on behalf of victims of sexual violence. Since 1982, TAASA has worked to bring hope, healing, and justice to victims of sexual assault.

As part of that mission, TAASA promotes law and policy to ensure the fair, safe and respectful treatment of sexual assault victims in criminal and civil proceedings.

The Texas Council on Family Violence (TCFV) is a Texas coalition dedicated to creating safer communities and freedom from family violence. With statewide reach and direct local impact, TCFV shapes public policy, equips service providers with essential tools, and initiates strategic prevention efforts. Since 1978, TCFV has been a nationally recognized leader in efforts to end family violence.

Texas Advocacy Project (TAP) is a nonprofit organization mission-driven to end dating and domestic violence, sexual assault, and stalking in Texas. TAP empowers survivors through free legal services and access to the justice system, and advances prevention through public outreach and education. For 42 years, we have worked towards our vision that all Texans live free from abuse.

This case involves issues that are fundamental to the interests of all survivors of family violence and sexual assault in Texas, including their interests in safety from violence. *Amici* submit this brief to support the Amicus Counsel's Brief on the Merits defending the Court of Appeals' judgment.

ISSUE PRESENTED

Is the preponderance of the evidence a constitutional standard of proof for a protective order entered under Texas Family Code Section 85.025(a-1) that prohibits contact between a parent and their child for the duration of the parent's life when the parent has been charged with felony child abuse of their child?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici curiae respectfully present this brief in support of Amicus Counsel's Brief on the Merits. *Amici* join the arguments raised in the Amicus Counsel's Brief and request that the Court consider the additional reasoning set forth herein, in support of the First Court of Appeals' opinion.

SUMMARY OF THE ARGUMENT

The principal question in this case is whether it is constitutional for a trial court to render a protective order that is effective for the duration of the lives of the offender and the victim, pursuant to the terms in Texas Family Code Section 85.025(a-1), when the subject of the protective order is a parent and the protected person is their minor child. *Amici* aver that this Court answer that question in the affirmative.

Title 4 of the Texas Family Code was crafted to protect survivors of family violence from mortal danger, and section 85.025(a-1) was added in 2011 to address heightened safety concerns and risks of harm. While the standard term for a Protective Order is two years or less, the statute sets forth the option for trial courts to extend that term only in the most extreme cases based on findings of felony offenses, serious bodily injury, and serial violent offenses. This provision allows trial courts to appropriately respond to lethality risks that survivors of family violence face and alleviate safety concerns to the extent possible.

The standard of proof for Protective Orders of any duration is preponderance of the evidence. This standard does not violate a respondent's constitutional rights because (1) the order is impermanent by nature, and parents subject to the order do retain parental rights; and (2) the safety needs of the victim are balanced against the due process rights of the respondent, the State's substantial governmental objective in protecting victims, and the risk of error. This risk of error is managed by the protective order statute itself, through due process safeguards such as ample notice and hearing for all protective orders, and a heightened eligibility for lifetime protective orders, granted only in the most extreme cases.

Further, application of a clear and convincing standard of proof in Protective Order cases would lead to dangerous outcomes, placing thousands of survivors in Texas at risk. Establishing a higher standard of proof would impose an additional barrier to survivors seeking safety in a system which already has numerous barriers survivors must overcome. The Texas Legislature properly acknowledged the dangers facing survivors of family violence, sexual assault, stalking, and human trafficking, and crafted a statute designed to protect them while affording respondents their due process rights.

The First Court of Appeals thus correctly held that the trial court did not err by following established and constitutional standards of proof in entering a lifetime Protective Order. *Amici* urge this Court to affirm the court of appeals's judgment.

ARGUMENT

I. The preponderance of the evidence standard is a constitutional burden of proof for all protective order cases, even those in which the protective order extends for the duration of the respondent or protected persons' life.

Petitioner argues that a trial court must apply a clear and convincing standard of proof in protective order cases involving parents and their children when the order is made effective for the lifetime of the parties. Due Process does not require this. A preponderance of the evidence standard is appropriate for civil, impermanent orders that do not seek to terminate the parent-child relationship.

Further, when a court considers whether due process has been afforded, it must balance competing interests: (1) the private interests affected by the proceeding; (2) the risk of error created by the jurisdiction's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. *Mathews v. Eldridge*, 424 U.S. 319, at 335 (1976). A crime victim's interests in seeking protection via Texas Family Code section 85.025(a-1) is one of the private interests affected by the proceeding, and should be factored into the *Eldridge* balancing test, along with the government's strong interest in protecting victims. Combined with a low risk of error, given the strong due process safeguards contained within the protective order statute, and the presumption of constitutionality all statutes enjoy, the *Eldridge* test demonstrates preponderance of the evidence to be a proper standard of proof in all protective cases.

A. The preponderance of the evidence standard of proof has withstood constitutional challenge in neglect proceedings and in custody modifications, which are both comparable to lifetime protective orders issued under §85.025(a-1).

Parents in neglect cases in other states have made the same argument that the Petitioner has made in this case: that an order that cuts off a parent's physical access and contact with their child is comparable to a termination and thus deserves the same heightened standard of proof as termination. *In re A.G.*, 900 A.2d 677, 680 (D.C. 2006); *In re R.W.*, 10 P.3d 1271, 1276 (Colo. 2000) (en banc); *Dependency of F.S.*, 913 P.2d 844, 846-47 (Wash. Ct. App. 1996), pet. for rev. denied, 130 Wash.2d 1002, 925 P.2d 988. Importantly, the courts in each of these states concluded that the clear and convincing evidence standard is not necessary to comport with a parent's due process rights. Rather, they distinctly held that preponderance of the evidence is appropriate when the parents retain at least some parental rights to their child and when the order can be modified.

In Colorado, the state sought a dependency and neglect action based on the custodial parent's continued illegal substance abuse, and the trial court suspended many of the parent's parental rights—many more rights than the trial court suspended in the instant case—until the children reached the age of 18. *L. L. v. People (In re R. W.)*, 10 P.3d 1271 (Colo. 2000). The Supreme Court of Colorado held that because the order did not terminate all of the parent's rights and the order was modifiable, subject to the parent making significant changes in her life to

alleviate the danger to her child, the preponderance of the evidence standard of proof did not violate the parent's due process rights. *Id.*

In Washington, similar to the Colorado case, the court was presented with a guardianship proceeding that had been granted upon a showing of cause under the preponderance of the evidence standard. *Dependency of F.S.* at 265. Again, the parents in that case argued that application of the preponderance of the evidence standard violated their constitutional due process rights. The court ultimately concluded that the higher standard of proof was not required. “[T]he impact of guardianship on the parent/child relationship is not tantamount to termination. Guardianship is not permanent, nor is it irreversible, and it does not sever all rights of the parent in the child.” *Id.* at 269.

In D.C., a trial court issued permanent guardianship to a child's aunt and uncle based on the mother's continued neglect. *In re A.G.*, 900 A.2d at 678. The mother argued for the first time on appeal that such an order required a clear and convincing standard of proof. *Id.* at 679. The D.C. Court of Appeals noted that there was no waiver argument presented and reached the merits.¹ *Id.* The court followed the reasoning in both Colorado and Washington and held that:

¹ *Amici* note that Petitioner in this case also did not raise a due process claim at trial, but waited to present it for the first time in the Motion for New Trial. Per Tex. R. App. P. 33.1(a), a complaint must be made to the trial court by a timely request, objection, or motion. *Amici* contend that waiting for the Motion for New Trial to make an argument about the proper standard of proof, after the court has delivered its ruling, is not timely, and is not preserved for appellate review. *Jacquot v. Coker*, No. 14-20-00123-CV, 2022 Tex. App. LEXIS 2588 (Tex. App.—Houston [14th Dist.] Apr.

The preponderance standard complies with due process requirements of the Constitution because § 16-2388(f), like the statutes analyzed in the Washington state and Colorado cases, does not operate as a final and absolute termination of the natural parents' rights. Indeed, the statute explicitly retains many important rights for the natural parents[.]

Id. at 681.

The court further noted that any risk of error is ameliorated because the statute allowed the parent to move to terminate the guardianship and required the trial court to terminate the guardianship if doing so was in the best interest of the child.

Texas's protective order statute is similar to these neglect and dependency statutes for purposes of considering the proper standard of proof. Texas's protective order statute, like neglect and dependency statutes, protects a person who is at risk. These statutes also leave intact a large number of rights to the parent who is subject to the order. They are also impermanent and give leeway to the parent to seek modification of the order. As a result, the court of appeals opinion below is consistent with other states' approach to this same issue.

Alternatively, as Amicus Counsel's Brief on the Merits aptly demonstrated, protective orders sought on behalf of minor children are more akin to a custody order than to a parental termination order. This is because protective orders issued for the protection of a child typically set forth custody and child support provisions, much

21, 2022, pet. denied) (holding no preservation of error when due process claim brought for the first time in Motion for New Trial). However, it is also true that no waiver argument has been presented thus far.

like custody orders, and they are typically between two parents, rather than between the state and a parent. When considering appropriate standards of proof, there is a fundamental difference between a case between two parents and a case between a parent and the state. *Hagberg v. New Jersey*, 751 F. App'x 281, 286 (3d Cir. 2018).

In a custody case in which an appellant argued that a clear and convincing standard was constitutionally required, likening the deprivation of access to the child to a termination (much like the Petitioner argues in the case at bar), the Court distinguished *Santosky v. Kramer*, *infra*, by holding that

[T]he result of a custody dispute between two parents does not result in the complete and irrevocable loss of parental rights or involve a vast disparity in litigation resources between the parties. *Hand v. Hand*, 391 N.J. Super. 102, 917 A.2d 269, 271 (Ct. App. Div. 2007). Thus, an order establishing a custody arrangement between parents is inherently temporary, since it can always be modified on a showing of changed circumstances.

Hagberg at 286. By the same reasoning, protective orders can be, and often are, modifiable. They are inherently temporary, and when between two parents, involve the same burden of resources, much like in child custody suits.

Therefore, whether looking at neglect and dependency cases in other states, or at custody modification suits (which can have the same effect of drastically limiting a parent's access to their child, much like a protective order), courts have properly concluded that a preponderance of the evidence standard of proof passes constitutional muster.

B. Crime victims’ right to safety, and the government’s interest in protecting victims, must be balanced with the countervailing due process rights of a parent subject to a protective order proceeding.

Petitioner rightly points out the constitutional rights afforded to parents, citing the seminal case of *Santosky v. Kramer*, 455 U.S. 745 (1982). However, as with all constitutional rights, a parent’s constitutional rights are not absolute. *In the Interest of A.B.*, 437 S.W.3d 498, 503 (Tex. 2014); *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). “It is ‘essential’ that courts do not sacrifice the child’s emotional and physical interests merely to preserve the parent’s rights.” *In re C.H.* at 26.

Children who have been abused, and indeed all crime victims, are entitled to reasonable protection from an accused throughout the criminal justice process. Tex. Const. Art. 1, Sec. 30. While protective orders are civil in nature, they are a vital means by which victims are afforded reasonable protection from an abuser.² This constitutional right to protection infers a right to safety that must be weighed when addressing a parent’s constitutional due process rights. A parent who has been accused of causing significant physical harm to their child must not have their parental rights elevated over and above their child’s competing rights of safety. Rather, a court must weigh equally these competing concerns, and a preponderance of the evidence standard strikes that balance.

² See Ch. 56A Art. 56A.052(d) which requires victims to be notified of their right to apply for a protective order, and even in some circumstances, the duty of a prosecutor to file for a protective order on a victim’s behalf.

When a parent's interest conflicts with the other parent, or their child "in relative equipoise," the preponderance of the evidence standard of proof is appropriate, as a higher standard of proof would impermissibly indicate a preference for protection of one interest over the other. See *A.D. v. L.D.*, 220 Conn. App. 172, 188 (2023) (holding that preponderance of the evidence standard was appropriate for modification of custody); see also *Cookson v. Cookson*, 201 Conn. 229 (1986) (distinguishing terminations from modification cases and holding that preponderance of the evidence comports with due process for changes in custody); *In re Marriage of Wehr*, 165 Wash. App. 610, 614 (2011) (liberty interests of parent wishing to relocate conflicted with other parent's right to care, custody, and control); *In re Manolito L.*, 90 Cal. App. 4th 753, 764 (2001) (balancing the interests of children with that of the parents justifies using preponderance of evidence standard).

Further, under the very balancing test set forth by the Supreme Court in *Santosky* (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)), the child's interests should be considered as part of the private interests that are affected by the protective order proceeding. When considering whether due process has been afforded, the Supreme Court in *Santosky* stated that a three-pronged test must be followed to weigh: (1) the private interests affected by the proceeding; (2) the risk of error created by the jurisdiction's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged

procedure. A child's interest in seeking protection under Texas Family Code section 85.025(a-1) is one of the private interests affected by the proceeding and should be factored into the *Eldridge* balancing test.

When a child's safety interests are at stake, their interests should be considered when determining if the proceeding afforded the appropriate measure of procedural due process. *In the Interest of R.M.T.*, 352 S.W.3d 12, 20 (Tex. App.—Texarkana 2011, no pet.) (holding that in a termination case, a child's welfare interests should be weighed together with a parent's due process interests). When the interests of the child directly conflict with the interests of a parent "one person's interest must trump the other; here, the interest of the child is the trump card." *Id.* at 21.

The second *Eldridge* factor – the risk of error in using the preponderance standard – is managed by the statute itself. The Texas Family Code provides for a duration of a maximum of two years for the majority of protective orders. Tex. Fam. Code § 85.025(a). Only in the most extreme cases may a protective order extend beyond two years: (1) when the alleged actions precipitating the protective order proceeding constitute a felony, (2) when the alleged actions caused serious bodily injury to the victim, and (3) when there are findings of family violence by the accused against the applicant that resulted in at least two prior protective orders. *Id.*

at § 85.025(a-1).³ Thus, lifetime protective orders are only issued if there is a preponderance of the evidence to show (1) a felony has occurred (this can be substantiated with formal charges, or a conviction, but is not required to be)⁴, (2) serious permanent disfigurement or protracted loss or impairment of a bodily function has occurred, or (3) at least two prior court orders have determined that family violence occurred between the parties.

The statute provides further due process safeguards for respondents by providing ample notice and opportunities to be heard. Indeed, there is a requirement that the respondent be personally served (service by publication is not permitted) and notified of the application and of the impending hearing. The hearing gives the respondent an opportunity to be heard (testify, call witnesses, cross examine the applicant and any of the applicant's witnesses, and make arguments to the trial court). Once the trial court issues the protective order, the respondent has more opportunities to be heard (once at least one year after the order is issued, and another chance at least one year after that) to argue that there is no longer a need for the order. A protected person under a protective order, or the applicant who sought the protective order, may also seek to modify the order an unlimited number of times.

³ Section (a-1)(2) and (3) were added to the protective order statute in 2011, and section (a-1)(1) was added in 2017. *See* 2011, 82nd Leg., S.B. 789, § 2, and 2017, 85th Leg., S.B. 712, §1.

⁴ *In the Interest of L.J.H.*, No. 05-21-00183-CV, 2021 Tex. App. LEXIS 7719 (Tex. App.—Dallas Sep. 20, 2021).

Contrast these procedural safeguards with the Chapter 161 procedures for termination of parental rights. Parents subject to termination may be served by citation by publication, and even by posting in some situations. Tex. Fam. Code §§ 161.002, 161.107. Further, parents subject to termination are not permitted multiple attempts to modify their termination order. Chapter 85 provides stricter notice requirements and allows more opportunities to amend the order after it has been signed. Because of these statutory safeguards to a parent's due process rights to allow meaningful notice and hearing, the heightened clear and convincing standard is not required in a proceeding under section 85.025(a-1) of the Texas Family Code.

The final *Eldridge* factor to be weighed is the countervailing governmental interest in the protection of crime victims. Certainly, protection of children from violence in the home is a critical governmental objective. The Supreme Court has held that the government has a strong interest in “ensuring public safety and criminal justice...and in protecting all crime victims.” *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2501-02 (2022); *see also Maryland v. Craig*, 497 U.S. 836, 844, 110 S. Ct. 3156, 111 L. Ed. 2d 666 (1990) (finding a compelling governmental interest in protecting minor victims of crime). This strong governmental interest combined with the child's interest in safety and the low risk of error all lend considerable weight to the constitutionality of the preponderance of the evidence standard of proof for protective order cases.

Finally, when a court reviews the constitutionality of a statute, the statute is presumed constitutional. *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 754 (Tex. 2020); *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015) (“The party attacking a statute’s constitutionality bears “a high burden to show that it is unconstitutional”); *Kloecker v. Lingard*, No. 01-19-00533-CV, 2021 Tex. App. LEXIS 4069 (Tex. App.—Houston [1st Dist.] May 25, 2021, pet. denied) (“In reviewing a legislative act, a court presumes it to be constitutional and will not declare it invalid except upon inescapable grounds.”). When reviewing a law that relates to health and welfare, the Supreme Court has noted that there is a “strong presumption of validity.” *Dobbs v. Jackson Women’s Health Org*, 142 S. Ct. 2228, 2239 (2022).

In conclusion, a review of the *Eldridge* factors demonstrates that (1) when the private interests between the parent and the child are in conflict, the child’s interest in safety prevails; (2) any risk of error is managed by the protective order statute itself; and (3) there is a strong governmental interest in protecting crime victims. When weighing the presumption of constitutionality with these factors, it is clear that the preponderance of the evidence standard of proof survives any due process challenge. *See also R.M.T.* at 23 (weighing three *Eldridge* factors with constitutional presumption).

II. Applying a heightened standard of proof to lifetime protective orders would lead to potentially dangerous outcomes for thousands of survivors of family violence, sexual assault, stalking, and human trafficking.

Writing into Chapter 85 a heightened standard of proof for protective order cases, particularly those that last in excess of the ordinary two-year duration, would have a devastating impact on vulnerable Texans who are most at risk of violence. As the Colorado Supreme Court noted in a neglect case, such a burden would make it more difficult for the state to protect children and lessen the ability of the court and the state to fashion workable solutions. *In re R.W.*, 10 P.3d at 1278.

Further, changing the standard of proof for lifetime orders would impact not only child victims of family violence, but would necessarily also apply to adult victims of family violence, many of whom face the very real threat of permanent bodily injury or death. Additionally, such an order would also apply to protective orders issued pursuant to Chapter 7B of the Code of Criminal Procedure, which would impact both child and adult victims of sexual assault, stalking and human trafficking. These crimes lead to a lifetime of both physical and psychological trauma and often necessitate a lifetime order for the victim to experience true safety.

Amici offer the following relevant data to aid the Court in appreciating the statewide impact that a new heightened standard of proof in Texas protective order proceedings would have on survivors of family violence, sexual assault, stalking and human trafficking who seek a protective order that exceeds two years in duration.

A. Family Violence Protective Orders protect victims of abuse in the home and in dating relationships.

At issue in this case is a protective order issued pursuant to Title 4 of the Texas Family Code, commonly known as a “family violence protective order” (hereinafter, FVPO). Tex. Fam. Code, Title 4. FVPOs aim to protect victims of any age from violence they are experiencing from a family or household member or from a dating relationship. Tex. Fam. Code §82.002. It is not hyperbolic to suggest that family violence protective orders can and do save thousands of lives every year.

Family violence impacts over one-third of all Texans.⁵ Most of these crimes go unreported to law enforcement and many end in fatalities.⁶ In 2022, 216 Texans were killed by their intimate partners, including 10 children.⁷ “Homicide perpetrators also killed 28 family members, friends, or bystanders and injured an additional 14 victims, including five law enforcement officers and nine family members, neighbors and friends.”⁸ These figures illustrate how vital a role FVPOs play in maintaining public safety, as they are not just critically important to the life of the victim, but they also serve to protect the lives of those close to the victim.

⁵ Centers for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey, 2010 Summary Report*.

⁶ U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, July 2000 (finding that only one-fourth of physical assaults are reported).

⁷ Texas Council on Family Violence; *Honoring Texas Victims: 2022 Family Violence Fatalities*, 2023.

⁸ *Id.*

Moreover, offenders most often pose the highest risk when victims seek support from the justice system to stop abusive behavior.⁹ In 2022, Texas Council on Family Violence looked at family violence homicide cases across the state and found that nearly 51% of victims had attempted to end their relationships prior to their murders.¹⁰ The report discovered that 63 of the victims died after seeking help, and 82 died after they had separated or ended their relationship.¹¹ When protective orders are sought, but not obtained, victims are at the highest risk of lethality.

The data is no less dire for child victims of family violence. The CDC reports that about 1 in 7 children experience abuse and neglect.¹² In Texas, in 2023 alone, more than 58,000 children were confirmed by the Department of Family and Protective Services (DFPS) to be victims of abuse or neglect¹³ and 164 children died due to abuse or neglect.¹⁴ Of particular significance to the case at bar, the mother was the sole perpetrator of violence in 27% of these reported fatalities, and blunt force trauma accounted for 21% of the deaths.¹⁵

⁹ Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C., Campbell, D., Curry, M. A., Laughon, K., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*. American Journal of Public Health, 93(7), 1089–1097, 2003.

¹⁰ *Id.*

¹¹ *Id.*

¹² Centers for Disease Control and Prevention, *Fast Facts: Preventing Child Sexual Abuse*, Apr. 6, 2022.

¹³ Texas Department of Family and Protective Services, *DFPS Data Card, Fiscal Year 2023*, at 3.

¹⁴ Texas Department of Family and Protective Services, *Fiscal Year 2023 Child Maltreatment Fatalities and Near Fatalities Annual Report*, March 2024, at 7.

¹⁵ *Id.* at 29-30.

These are just confirmed cases that are known. Underreporting and lack of action by Child Protective Services account for an alarming gap in services to child victims of abuse. Per DFPS's own Child Maltreatment Fatalities and Near Fatalities Annual Report for Fiscal Year 2023, the vast majority of child fatalities occurred in homes for which there was no open CPS case.¹⁶ Further, in 53% of confirmed child abuse fatalities, CPS had no prior history with the family.¹⁷

Children who are abused and neglected do not just suffer immediate physical injuries. These children also suffer emotional and psychological problems, such as anxiety or posttraumatic stress. "Over the long term, children who are abused or neglected are also at increased risk for experiencing future violence victimization and perpetration, substance abuse, sexually transmitted infections, delayed brain development, lower educational attainment, and limited employment opportunities."¹⁸ Further, chronic abuse without intervention may change a child's brain development and increase their risk for learning, attention, and memory difficulties.¹⁹ A primary tool for intervention is a FVPO, particularly when CPS lacks the capacity or the awareness of the abuse to intervene.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 28.

¹⁸ Centers for Disease Control and Prevention, *Fast Facts: Preventing Child Sexual Abuse*, Apr. 6, 2022.

¹⁹ *Id.*

Further, studies have shown that without permanent intervention to stop an abusive parent-child relationship, children experience more behavioral and emotional problems than children in foster care.²⁰ While child welfare policy and practice emphasizes reunification when possible in abuse and neglect cases, this does not necessarily produce better outcomes for children. Indeed, a few studies have “discovered that children who were not reunified had better IQ scores, higher well-being indicators and less criminal involvement than those foster children reunified with their families.”²¹ Thus, FVPOs that protective parents seek to help their children escape an abusive relationship can protect the child in ways that transcend their physical safety.

B. Chapter 7B Protective Orders protect victims of sexual assault, stalking and human trafficking.

Title 4 of the Texas Family Code prescribes the legal process, procedures and standards for protective orders filed under Chapter 7B of the Texas Code of Criminal Procedure.²² Chapter 7B protective orders are offered for victims experiencing sexual violence, stalking and human trafficking. Thus, this Court’s decision impacts not only family violence survivors but also survivors facing physical danger from each of these other crimes.

²⁰ Texas Institute for Child & Family Wellbeing at the University of Texas at Austin; *Texas Youth Permanency Study*; March 2018, at 5.

²¹ *Id.*

²² Tex. Code Crim. Pro. Art. 7B.008 (Title 4 applies to protective orders issued under this chapter), Art. 7B.051 (may request protective order in same manner as Title 4), Art. 7B.101 (same).

1. Sexual Assault Protective Orders (SAPO) protect adult victims of sexual assault and indecent assault and child victims of sexual abuse and sexual assault.

Sexual assault impacts the lives of 6.3 million adult Texans and 66% of these assaults are perpetrated by a known offender, increasing the threat of harm to the survivor.²³ Similar to the lack of CPS involvement with known child abuse cases, sexual assaults are infrequently addressed by law enforcement, whether because of underreporting or because of under-investigating. A statewide audit conducted in 2020 found that out of 71,274 reports of sexual violence, arrests were only made about one-third of the time.²⁴ The justice gap is even larger in institutions such as the military and in prisons.²⁵ Survivors of sexual assault frequently have to rely on civil courts to prioritize their physical safety, by way of a FVPO or SAPO.

More children are impacted by sexual abuse than childhood cancer, which impacts 1 in 285 children before their 20th birthday.²⁶ Contrary to popular misconceptions of “stranger danger,” approximately 90 percent of child sexual

²³ Institute on Domestic Violence and Sexual Assault, *Prevalence Study*, 2015, at 29.

²⁴ Texas State Auditor’s Office, *An Audit Report on Investigation and Prosecution Processes for Reported Sexual Assaults in Texas*, Oct. 2020, at 33-34.

²⁵ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-2012, 2013; Department of Defense, *Fiscal Year 2019 Annual Report on Sexual Assault in the Military*, 2020.

²⁶ Townsend, C. & Rheingold, A.A., *Estimating a Child Sexual Abuse Prevalence Rate for Practitioners: A Review of Child Sexual Abuse Prevalence Studies*. Charleston, S.C., Darkness to Light, 2013.

abuse is perpetrated by someone known and trusted by the victim.²⁷ Approximately 30 percent of all children who are sexually abused are abused by a family member.²⁸ Research indicates similar prevalence in Texas.²⁹ Thus it is abundantly likely that a child victim of sexual assault would be seeking a SAPO against a family member, rather than against someone outside the family.

While physical safety risks exist for child victims of sexual abuse, unseen threats exist to the children's psychological safety. Child sexual abuse can have lifelong mental health effects well into adulthood, as well as actual physical health challenges. These effects include post-traumatic stress, anxiety, depression, suicide, diabetes, cancer, heart problems, stroke, and hypertension.³⁰

Court intervention by way of SAPOs are critically important for both children and adults who are experiencing sexual violence, and they deserve safety from their abusers, often for a period that lasts longer than two years. Sexual Assault advocates have long recognized that safety for sexual assault victims looks different from

²⁷ Finkelhor, D., *Characteristics of Crimes Against Juveniles*. Durham, NH: Crimes against Children Research Ctr., 2012.

²⁸ Snyder, H.N., *Sexual Assault of Young Children As Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*. Washington, D.C.: Nat'l Ctr. for Juv. Justice, U.S. Dept. of Justice, Office of Justice Programs, Bureau for Justice Statistics, 2000.

²⁹ *Id.* (Among those abusing a child younger than six, 50 percent were family members).

³⁰ Kilpatrick, D. G., Ruggiero, K. J., Acierno, R., Saunders, B. E., Resnick, H. S., & Best, C. L., *Violence and Risk of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results from the National Survey of Adolescents*. *Journal of Consulting and Clinical Psychology*, 71(4), 2003, at 692–700.

family violence victims. Because the sexual assault itself takes away a person's sense of bodily autonomy and control, safety for victims of sexual assault entails psychological and emotional wellbeing.³¹ This often includes a complete termination of contact from the abuser. It is for exactly this reason that the SAPO statute is structured differently from the FVPO statute with regard to lifetime orders.³² While the standard FVPO lasts for a maximum of two years, and only lasts in excess of two years under extreme circumstances, the SAPO (and stalking and human trafficking protective orders as well) may be issued for the duration of the lives of the offender and victim without such extreme circumstances. Further, the trial court *must* issue a lifetime order upon the offender's conviction or deferred adjudication of one of those three crimes.³³

A conclusion that a lifetime protective order must be based on a clear and convincing evidence when the accused is a parent and the victim is a child will impact not just those cases for which physical abuse is alleged. It will also implicate cases of sexual abuse and assault, for both children and adults, who may very well need a lifetime order to begin the psychological and emotional healing process and a complete termination of contact with their abuser.

³¹ Pappas, S., *How to Support Patients Who Have Experienced Sexual Assault*. American Psychological Association, Vol. 53, No. 6, Sept. 1, 2022.

³² *Contrast* Tex. Code Crim. Proc. Art. 7B.007 with Tex. Fam. Code §85.025.

³³ Tex. Code Crim. Proc. Art. 7B.007(a-1).

2. Stalking and Human Trafficking Protective Orders protect victims of two additional dangerous crimes for which the risk of mortality is high.

The threat of physical harm and death also exists in cases of stalking and human trafficking. Stalking is frequently a precursor to physical violence and homicide, as 76% of women murdered by an intimate partner were first stalked.³⁴ Most troubling is the lack of law enforcement attention to stalking cases. The Office for Victims of Crime found in 2018 that only 8% of perpetrators were arrested for stalking, and 20% of stalking victims reported that law enforcement took no action in response to the stalking at all.³⁵ This means that often a protective order is a survivor's only legal line of defense against a stalker.

Of all the crimes covered by Article 7B, the crime of human trafficking is the most underreported and unrecognized. The Texas Attorney General reports that there are 79,000 victims of minor sex trafficking in Texas at any given time.³⁶ However, in 2019, only 2,455 had been identified.³⁷ Victims of trafficking face lethal threat of harm, as well as ongoing physical and sexual abuse. The average life expectancy after a victim begins to be trafficked is 7 years, and the mortal danger

³⁴ National Coalition Against Domestic Violence, *Quick Guide to Stalking: 16 Important Statistics and What You Can Do About It*, Jan. 30, 2017.

³⁵ Office for Victims of Crime, *Stalking Fact Sheet*, 2018.

³⁶ Busch-Armendariz, N.B., Nale, N.L. Kammer-Kerwick, M., Kellison, B., M.I.M., Cook Heffon, L., Nehme, J., *Human Trafficking by the Numbers: The Initial Benchmark of Prevalence and Economic Impact for Texas*. Institute on Domestic Violence and Sexual Assault, the University of Texas at Austin, 2016.

³⁷ Polaris Project, *Texas Spotlight 2019 National Human Trafficking Hotline Statistics*, 2020.

that exists for these victims when they seek legal protection cannot be underestimated.³⁸

In a 2012 study, 95% of victims admitted to being the victims of violence and abuse including forced rapes, being kicked, punched or strangled.³⁹ Victims also frequently lack “adequate nutrition, medical care, education, and stable living conditions, while being subjected to brutal physical, emotional, and sexual abuse.”⁴⁰ In *Health Consequences of Sex Trafficking*, 92% of victims were found to have neurological health problems, 89% suffered from depression with crippling shame, guilt and post-traumatic stress disorder, 42% attempted suicide, and 84% of victims admitted to substance abuse of some form.⁴¹

The most insidious reality of human trafficking is the overwhelming difficulty for victims to escape. Perpetrators of human trafficking manipulate their victims by offering tokens of love and protection from harm, alternating their behavior between affection and violence, creating what is commonly referred to as a “trauma bond.”⁴² These trauma bonds convince victims that they are willing participants of the abuse,

³⁸ Federal Bureau of Investigation (FBI), *Innocence Lost National Initiative*.

³⁹ Lederer, L. J. and Wetzel, C. A., *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*. *Annals of Health Law*. Vol. 23, 2014.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Texas CASA, *CASA Advocacy for Affected Youth: A Guide for CASA Volunteers and Staff in Texas*, 2023, at 27; see also Texas Association Against Sexual Assault, *Human Trafficking Resource Manual for Advocates*, March, 2022, at 24.

and often do not identify as a victim.⁴³ “For many youth who have been trafficked, their needs were met by their traffickers. Because of this, and the dependence on their exploiter, it is common that survivors will relapse by running away multiple times before finally leaving.”⁴⁴ This makes it critically important that a human trafficking protective order be lengthy, lasting up to the lifetime of the offender and the victim, to provide the ultimate protection throughout the difficult process of escaping a life of trafficking.

C. Protective Orders save lives and should be accessible for those who need them the most.

Protective orders are one of the most effective deterrents to repeated incidents of violence in the vast majority of cases. In short, these orders are one of the most valuable tools we have to prevent sexual and family violence lethality in Texas.⁴⁵ In one study on the effectiveness of protection orders, researchers found that 72.4 percent of survivors with protective orders experienced no further violence from the abuser after obtaining their order, and 80% felt safer.⁴⁶ Of the high-risk cases seen by Domestic Violence High Risk Teams, only 5 percent included violations of protective orders, indicating strong effectiveness of preventing fatalities.⁴⁷

⁴³ *Id.* at 27.

⁴⁴ *Id.* at 33.

⁴⁵ Keilitz, S., Hannaford, P., Efken, H., *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence*, 1994, at 6.

⁴⁶ *Id.* at page 6.

⁴⁷ Texas Council on Family Violence, *Domestic Violence High Risk Team 2020 case report*, 2020, at 3.

This is precisely why Protective Orders exist, and why they must remain accessible to survivors. In the absence of court intervention, there is a very real threat to survivors' lives.

Indeed, there are already numerous barriers to obtaining a protective order. Forty percent of participants in a National Institute of Justice study indicated judicial bias as being a primary barrier, particularly in rural areas.⁴⁸ Difficulty navigating the judicial system, confusion about the process, and fear of retribution also ranked as overwhelming barriers to applicants.⁴⁹ Add to that a higher burden of proof, and a critical pathway to safety is removed for victims of violence.

According to the Office of Court Administration, a total of 82,132 protective order cases have been issued since 2015, through February 2024. This represents an average of 9,000 orders per year, comprising both FVPOs and Ch. 7B POs. Thus, the Court's decision in this case affects thousands of survivors every year.

Imposing a higher standard of proof for lifetime Protective Orders would lead to dangerous outcomes for nearly 10,000 survivors per year. This Court should deny the petition for review. Alternatively, if the Court grants the petition, the Court should affirm the court of appeals's judgment as correctly concluding that a preponderance of the evidence standard is constitutional in protective order cases.

⁴⁸ Hawkins, N., *Perspectives on Civil Protective Orders in Domestic Violence Cases: The Rural and Urban Divide*, NIJ Journal, Issue No. 266, page 6.

⁴⁹ *Id.*

PRAYER FOR RELIEF

Wherefore, *amici curiae* respectfully request that the Court deny the petition for review, or alternatively, issue an opinion affirming the court of appeals's judgment.

Respectfully submitted,

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