

No. 24-0881

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# **IN THE SUPREME COURT OF TEXAS**

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**In the Interest of K.N., K.L., K.L., and K.L., Children**

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**On Petition for Review from the  
Seventh Court of Appeals, Amarillo, Texas  
07-24-00146-CV**

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**Brief for the Texas Association of Family Defense Attorneys as *Amicus Curiae***

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Texas Association of Family Defense Attorneys (TAFDA) is a group of statewide attorneys focused on the defense of the family. TAFDA's mission is to preserve and advocate for the right to family integrity which is guaranteed by the Texas and United States Constitutions. TAFDA fulfills that mission by (1) educating and training attorneys who represent parents and children in cases involving parental termination or child protection; (2) equipping those attorneys with the information, skills, and tools necessary to be successful in the Courtroom; and (3) participating in the legislative process to effect changes in the law that are beneficial to families. Through this cooperation, education, and assistance, TAFDA strengthens families through zealous advocacy.

Amicus curiae submit this brief to assist the Court in interpreting and harmonizing the recently adopted parental-rights amendment to the Texas Constitution, Article I, §37, with the existing statutory framework governing termination of parental rights under Texas Family Code Chapter 161 and the interrelated child-protection provisions in Chapters 262, 263, and 264. The issues presented implicate fundamental constitutional liberties, the structural limits of governmental power, and the Legislature's deliberate preference for family preservation and reunification.

There were no costs or fees involved with the preparation of this brief.

## INTRODUCTION

In October 1835, a small group of settlers in Gonzales faced a Mexican government demand: surrender a cannon loaned for local defense. The settlers refused and raised a makeshift flag reading *Come and Take It*.<sup>1</sup> They did not negotiate, weigh outcomes, or ask whether government policy might be better—they simply insisted that the cannon, already in their possession, could not be taken without justification.

That structural understanding of rights — that they are possessed by the people and may not be taken without justification — is woven throughout the Texas Declaration of Rights. Article I, §37’s recognition of parental rights belongs to that tradition. When the State seeks to extinguish the parent–child relationship permanently, it must do more than satisfy statutory elements; it must justify the act within the constitutional order that protects fundamental liberties. Article I, §37 recognizes the fundamental rights of parents, not as privileges the State may adjust at will, but as liberties presumptively retained by the people; parental rights are not

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<sup>1</sup> The phrase “Come and Take It” originates from the 1835 Gonzales confrontation, where Texian settlers resisted governmental seizure of a privately held cannon. While often invoked colloquially, the phrase has enduring significance in Texas constitutional culture as an expression of resistance to unwarranted governmental intrusion into enumerated rights. Its relevance here is structural rather than rhetorical: it reflects the principle that constitutional liberties are presumptively retained by the people, and that the burden rests with the government to justify their deprivation. See generally Tex. Cont. art. I (Declaration of Rights).

subject to discretionary balancing any more than the cannon at Gonzales was subject to arbitrary seizure.

## **SUMMARY OF ARGUMENT**

In 2025, the people of Texas amended their Constitution to expressly protect parental rights. That amendment changed the constitutional structure governing family-law adjudication. Parental rights are no longer protected only by inference, presumption, or common-law doctrine; they are now protected by the Texas Constitution itself. TEX. CONST. ART. I, § 37.

The structural consequence is straightforward: statutes no longer define the outer limits of parental rights. Instead, statutes must operate within constitutional boundaries. Courts therefore may not treat compliance with a pre-existing statutory scheme as sufficient to justify the permanent extinguishment of a constitutional relationship. See *In re C.J.C.*, 603 S.W.3d 804, 817–18 (Tex. 2020) (parental rights are fundamental and constitutionally protected).

Article I, §37 recognizes parental rights as fundamental constitutional rights protected against unwarranted governmental intrusion. Although §37 does not expressly reference strict scrutiny, Texas courts have long applied heightened constitutional scrutiny to infringements of enumerated rights even when the constitutional text does not specify a particular standard. If the parental rights amendment means anything at all, it must mean that heightened scrutiny applies

when the state seeks not only to intervene in these fundamental constitutional rights, but extinguish them.

The termination scheme in Texas Family Code §161.001(b), while requiring clear and convincing evidence, must therefore be applied in a manner that is narrowly tailored and consistent with the Legislature’s least-restrictive statutory design reflected in Chapters 262, 263, and 264 of the Texas Family Code. Termination of parental rights is constitutionally permissible only as a last resort.

Amicus Curiae respectfully urges the Court to clarify that termination of parental rights is constitutionally permissible only if the Court finds by clear and convincing evidence that a compelling governmental interest exists and that no less-restrictive alternative authorized by the Family Code will protect the child.

## **ARGUMENT AND AUTHORITIES**

### **I. ARTICLE I, §37 AND FUNDAMENTAL RIGHTS ANALYSIS**

Article I, §37 of the Texas Constitution provides that parents have a fundamental right to make decisions concerning the care, custody, and control of their children. Like other provisions in the Texas Bill of Rights—free speech, free exercise of religion, and freedom of the press—§37 does not prescribe an explicit standard of review. Yet Texas courts routinely apply heightened scrutiny to laws burdening those rights. The absence of the words “strict scrutiny” in §37 does not diminish its constitutional force. TEX. CONST. ART. I, §37.

## **Strict Scrutiny**

Historically, Texas Courts have used strict scrutiny as the standard of review when analyzing the constitutionality of a statute that interferes with a fundamental right as expressed in the Texas Constitution.<sup>2</sup>

Parental rights have long been recognized as fundamental under both federal and Texas law. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re C.J.C.*, 603 S.W.3d 804, 812–13 (Tex. 2020). Article I, §37 enshrines an expansive view of that protection in the Texas Constitution’s text and requires courts to ensure that statutory mechanisms for terminating parental rights are constitutionally constrained.

Strict scrutiny requires that any state interference with a fundamental right serve a compelling state interest and be narrowly tailored to accomplish that interest. *Ex parte Ellis*, 609 S.W.3d 332, 337 (Tex. App.—Waco 2020, pet. ref’d); See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Several sister states have agreed

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<sup>2</sup> “A statute is evaluated under ‘strict scrutiny’ if it interferes with a ‘fundamental right’ or discriminates against a “suspect class.” *Walker v. State*, 222 S.W.3d 707, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. ref’d). See also *In the Interest of McLean*, 725 S.W.2d 696 (Tex. 1987)(use of strict scrutiny to interpret the Equal Rights Amendment, Art. 1, Sec. 3a of the Texas Constitution); *Perez v. City of San Antonio*, 24-0714 (Tex. Jun 13, 2025) (answering certified question to the 5<sup>TH</sup> Circuit)(“We have also applied strict scrutiny to the Texas Constitution’s Freedom of Worship Clause, which is original to the 1876 Texas Constitution. . .”); *Abbott v. Anti-Defamation League Austin*, 610 S.W.3d 911 (Tex. 2020)(a “severe” impediment to the right to vote must survive strict scrutiny, an exacting standard that places the burden of proof on the government to demonstrate that its restriction is narrowly tailored to achieve a compelling governmental interest.); *Mercer v. Board of Trust, North Forest Independent School District*, 538 S.W.2d 201 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.) (Under our model of strict judicial scrutiny, such discrimination is allowed only when the proponent of the discrimination can prove that there is no other manner to protect the state’s compelling interest.)

with this principle in cases involving the termination of parental rights, and their holdings are persuasive in this context.<sup>3</sup>

Importantly, strict scrutiny prohibits a court from interfering with a fit parent’s decision simply because a better decision could be made. *See Troxel v Granville*, 530 US 57, 72-73 (2000); *see also Parham v. J. R.*, 442 U.S. 584, 602–04 (explaining that a court may not interfere with a parent’s decision simply because that decision involved some risk).

For the last forty years, Appellate opinions have cited to *Holick v. Smith* for support that terminations must be “strictly scrutinized,” and termination statutes “strictly construed” in favor of the parents. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Prior to this Court’s decision in *In re K.R.*, (2001),<sup>4</sup> several opinions

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<sup>3</sup> *See, e.g., In re Mason*, 486 Mich 142, 164 (2010); *T.D.K. v L.A.W.*, 78 So 3d 1006, 1011 (Ala Civ App, 2011) (In termination proceedings court must “consider whether all viable alternatives to terminating parental rights have been exhausted”), quoting *Ex parte J.E.*, 1 So 3d 1002, 1008 (Ala. 2008); *Fla Dep’t of Child & Fams v FL*, 880 So 2d 602, 608, 611 (Fla. 2004) (“the termination of parental rights to the current child must be the least restrictive means of protecting that child from harm”); *Int of B.T.B.*, 472 P3d 827, 841, 842 (Utah 2020) (“a court must specifically address whether termination is strictly necessary to promote the child’s welfare and best interest”); *People in Int of Am v TM*, 480 P3d 682, 687, 689 (Colo. 2021) (“a trial court must consider and reject less drastic alternatives to termination as part of its overall consideration”).

<sup>4</sup> “In fact, this Court recently rejected relying on Holick's strict scrutiny language as a basis for reversing a parental-termination judgment based on a parent's due process claim. *See In re KR.*, 63 S.W.3d 796, 800, n. 20 (Tex. 2001). In *K.R.*, the Court considered a parent's argument that procedural due process precludes a reviewing court from applying a harmless error analysis to his claim that his being handcuffed throughout the trial improperly prejudiced the jury. *Id.* at 798. The Court held that, while it agreed "that judgments terminating the parent-child relationship must be **carefully scrutinized** because of the importance of that relationship, [it could not] conclude that the Fourteenth Amendment requires reversal of the judgment in this case without regard to harm." *Id.* at 800. *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002) (Schneider, J., dissenting).”

recognized that, “the goal of establishing a stable, permanent home for a child is a compelling interest of the government,” and apparently Courts had been interpreting *Holick* as requiring the use of strict scrutiny in termination cases.<sup>5</sup>

Since *K.R.*, however, Courts rarely, if ever, have cited to a compelling interest of the government, and instead have analyzed termination of parental rights based strictly (no pun intended) on the termination statutes in the Texas Family Code, albeit “carefully scrutinizing” the evidence. *See e.g. In re Z.D.*, 05-25-00138-CV, 05-25-00139-CV (Tex. App. Aug 04, 2025).

The newly-enacted parental rights amendment demands a re-commitment to applying strict scrutiny to TPRs. The people’s decision to enshrine parental rights in the text of the Constitution makes clear the fundamental nature of these rights and therefore that infringements upon them may occur only when necessary to achieve a compelling state interest. Especially in the context of a termination of parental rights case, there can be no question that strict scrutiny applies. After all, a termination not merely seeks to intervene in or partially limit a parent’s right to the care, custody, and control of their child, but to permanently and irrevocably destroy that right.

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<sup>5</sup> *Hann v. Texas Dept. of Protective and Regulatory Services*, 969 S.W.2d 77 (Tex. App.—El Paso 1998); *Edwards v. Texas Department of Protective and Regulatory Services*, 946 S.W.2d 130 (Tex. App.—El Paso 1997); *Dupree v. Texas Dept. of Protective and Regulatory Services*, 907 S.W.2d 81 (Tex. App.—Dallas 1995).

## II. §161.001(b) AND CLEAR AND CONVINCING EVIDENCE

Section 161.001(b) authorizes termination of parental rights only upon proof, by clear and convincing evidence, of a statutory predicate ground and that termination is in the child's best interest. TEX. FAM. CODE § 161.001(b). The clear-and-convincing standard is constitutionally required as a matter of due process. *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982). But an evidentiary burden does not itself answer whether the State's chosen remedy is constitutionally excessive. Strict construction reflects the understanding that termination is the most severe civil remedy available and permanently extinguishes a fundamental constitutional relationship.

### **Reconstruction of the Endangerment Statutes**

Terminations may be allowed if they are necessary to serve a compelling governmental interest, and protecting children from significant danger qualifies as such an interest. But strict scrutiny demands that courts ensure that endangerment is not understood too broadly; the weaker the evidence that a parent's actions actually endanger a child, the less likely that a compelling interest justifying termination exists. Accordingly, the parental rights amendment should lead this Honorable Court to reconstruct the "endangerment" grounds (D and E), as argued by Petitioner and as this Amicus has argued to the Court before.

In 2024, this Honorable Court attempted to rein in the expansion of the word by holding that endangerment may be supported by a “pattern of parental behavior that presents a substantial risk of harm to the child,” however, as is apparent from this case and others, that holding still leaves room for interpretation. *In re R.R.A.* 687 S.W.3d 269, 278 (Tex. 2024); TEX. FAM. CODE §§ 161.001(b)(1)(D)(E).

For example, the Department still regularly argues in its briefs that a parent’s failure to complete services and/or visit the children, amongst other things, are acts which are endangering to the children. In fact, they did so in this case:

“Rather, it was Ronnie’s pattern of parental behavior that present[ed] a substantial risk of harm to the child[ren]. Ronnie’s brief is silent concerning these events. That ‘pattern of parental behavior,’ *id.*, did not stop at exposure to physical harm. Ronnie also made **little effort to visit the children** during his periods of 49 visitation, 3.RR.164-65; CR.254, 271, and made virtually **no effort to comply with his service plan**, which was necessary for reunification: He, like Clare, **failed to provide his new address to the Department or attend counseling**, 3.RR.160-71, 182-83.” (Brief of Respondent, page 49.)

Prior to this Court’s Holding in *Boyd*, the Austin Court of Appeals held that actual danger to a child was needed for a parent’s rights to be terminated due to endangerment of a child. In *Boyd*, the Austin court of appeals stated that the word “endanger” as used in the statute meant “danger” and defined “danger” as an “actual and concrete threat of injury to the child's emotional or physical well-being.” *Boyd v. Texas Dept. of Human Services*, 715 S.W.2d 711, 715 (Tex. App.-Austin 1986, rev’d by *Texas Dept. of Human Services v. Boyd*, 727 S.W.2d 531 (Tex. 1987.))

The Austin Court of Appeals further held that the “‘danger’ must be established as an independent proposition and is not inferable alone from parental misconduct.”

*Id.* The Austin Court cited a plethora of appellate cases that also held that endanger equated to danger.

To address the plethora of terminations based on the misuse of the endangerment statutes, every other year when the Legislature meets, new statutes must be written to protect parental rights and curb the abuse of the Department. For instance, parental rights cannot be terminated if: parents choose to homeschool; parents are impoverished; parents seek a different medical opinion; parents choose not to give a child psychotropic medicines; parents seek alternative healthcare; parents decline immunization. TEX. FAM. CODE § 161.001(c).

Additionally, the 88<sup>th</sup> Legislature enacted statutes that require that Courts find by clear and convincing evidence that the Department made reasonable efforts to return the child to the parent and that a continuing danger remains in the home before terminating parental rights. Further, the 89<sup>th</sup> Legislature repealed the prior “O” ground, which was termination for failure to complete services, although the Department continues to plead that failure as endangerment.

Now that strict scrutiny is required pursuant to Art. 1, § 37, this Honorable Court should take this opportunity to re-define endangerment as actual harm to a child in line with the original holding by the Austin Court of Appeals in *Boyd*.

### **III. THE BEST-INTEREST FINDING AND CONSTITUTIONAL LIMITS**

The best-interest requirement in §161.001(b)(2) does not operate in a constitutional vacuum. TEX. FAM. CODE §161.001(b)(2). While the best-interest inquiry is fact-intensive, it cannot serve as an open-ended justification for permanently severing parental rights – and that principle is even stronger after the adoption of the parental rights amendment. Termination cannot be based merely on a belief that a child might be better off elsewhere. See *In re J.A.J.*, 243 S.W.3d 611, 616–17 (Tex. 2008). Without constitutional constraint, best-interest determinations risk becoming subjective and outcome-driven. Article I, § 37 requires courts to ensure that the State’s interest in protecting children is pursued through means that are proportionate and justified.

### **Holley Factors**

Historically, Courts have utilized the *Holley* factors when determining what was in the best interest of the child. *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976). However, the *Holley* factors are no longer an appropriate framework for the best-interest analysis in a public conservatorship or termination case because they were developed before the constitutional recognition that parental rights are fundamental and therefore subject to the highest level of judicial protection. The *Holley* factors are open-ended, subjective, and permit conservatorship or termination based on broad value judgments that do not require the State to demonstrate that

conservatorship or termination is the *least restrictive means* of protecting the child. *See also* TEX. FAM. CODE §153.002. (requiring proof of significant impairment).

The parental rights amendment requires the opposite: that courts respect parents' rights to maintain a legal relationship with their children unless the extreme remedy of a permanent destruction of that relationship is necessary to achieve a compelling governmental interest.

#### **IV. THE LEGISLATIVE SCHEME IN CHAPTERS 262, 263, AND 264**

The Legislature has enacted a comprehensive, graduated child-protection system. Chapter 262 governs emergency intervention; Chapter 263 mandates permanency planning and reunification efforts; Chapter 264 emphasizes family-based services and preservation. Together, these chapters reflect a clear legislative preference for maintaining family integrity whenever safely possible. Termination under Chapter 161 is the endpoint of this scheme, not its starting point. Courts are required to construe related statutes harmoniously. *In re Office of the Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). Reading §161.001(b) in isolation ignores the Legislature's deliberate design.

##### **Least-restrictive alternatives**

Article I, §37 constrains the application of §161.001(b) by requiring courts to consider whether less-restrictive alternatives—such as conservatorship, monitored return, or continued services—can adequately protect the child. This does not add

elements to the statute; it ensures constitutional compliance by avoiding destruction to parental rights when less invasive measures are possible. When such measures can protect the child, termination is constitutionally excessive. TEX. FAM. CODE §§ 262.401; 263.403; 263.404; 264.203.

As an example, the Texas Legislature has recognized that an award of permanent managing conservatorship of the child, without termination of parental rights, to a relative, other suitable individual, or the Department, is an appropriate permanency goal. TEX. FAM. CODE §§ 263.3026(3); 263.404.

## **V. RESPONSE TO DFPS ARGUMENTS**

DFPS argues that §161.001(b) already provides sufficient protection through clear and convincing evidence and a best-interest finding. That argument conflates evidentiary sufficiency with constitutional justification.

DFPS also relies on the flexibility of the best-interest standard. Constitutional rights, however, are defined by limits on governmental power, not flexibility. Termination cannot rest on flexible subjective determinations that another placement is preferable. DFPS's flexibility argument illustrates the necessity of this Court imposing strict scrutiny on terminations.

DFPS also seems to argue that because the parental presumption applies to fit parents, it doesn't apply to those parents in the crossfire of DFPS; however, parents are fit parents until the Court finds otherwise by clear and convincing evidence that

they are not. Courts have long held that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (cited in *In the Interest of C.A.M. and Z.J.M.*, 633 S.W.3d 68 (Tex. App.—Amarillo, 2021)). The Department's perspective on this issue succinctly sums up the problem: they presume that parents are unfit if a Court finds probable cause at the adversary hearing that the children should be removed, and they require parents to prove that they are fit at trial.

Moreover, even when parents are unfit, that is not enough to justify a termination of their relationships with their children. The parental rights amendment demands more. Parents' rights to relationships with their children have fundamental, constitutionally-protected value, even when parents are unfit to exercise full custody. That is why strict scrutiny is essential to impose on termination proceedings – so terminations only occur when they are necessary and the least restrictive means to protect children from endangerment.

## **CONCLUSION AND PRAYER**

“Texas law rightly requires that, before infringing on a parent's right to care for and have custody of her child, the State, usually acting through the Texas Department of Family and Protective Services, must demonstrate to a court that

governmental intrusion is warranted. The bar is—appropriately—highest when the State seeks a judgment effecting the outright and permanent termination of the parent-child relationship.” *In re R.J.G.*, 681 S.W.3d 370, 373 (Tex. 2023).

In *R.J.G.*, this Court appears to have recognized the requirement of strict scrutiny in parental termination cases. Article I, §37 now requires Texas courts to apply §161.001(b) in a manner consistent with the fundamental nature of parental rights and the Legislature’s least-restrictive statutory scheme. Termination must remain a last resort.

Amicus respectfully urges the Court narrow the definition of endangerment to require actual harm to the child, and to clarify that termination of parental rights is constitutionally permissible only when the Court finds by clear and convincing evidence that there is a compelling governmental interest and that no less-restrictive alternative authorized by the Family Code will protect the child.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4,041 words, excluding the portions exempted by Tex. R. App. P. 9.4(i)(1) according to Microsoft Word.

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I certify that on January 7, 2026, a true and correct copy of this document was served electronically in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure on:

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