

No. 24-0881

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# In the Supreme Court of Texas

IN THE INTEREST OF K.N., K.L., K.L., AND  
K.L., CHILDREN

On Petition for Review  
from the Seventh Court of Appeals, Amarillo

## RESPONDENT'S POST-SUBMISSION BRIEF

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## INTRODUCTION

This brief responds to the Court’s question regarding “the relationship between” newly adopted section 37 to the Texas Bill of Rights “and the existing statutory framework for termination of parental rights under Texas Family Code Chapter 161, including the clear-and-convincing standard referenced in Family Code Section 161.001(b).” Section 37 appeared on the ballot as Proposition 15 during the general election of November 4, 2025, asking voters to approve “The constitutional amendment affirming that parents are the primary decision makers for their children.” Tex. S.J. Res. 34, 89th Leg., R.S., § 2 (2025). Voters approved the amendment, which now appears in Texas’s Constitution:

To enshrine truths that are deeply rooted in this nation’s history and traditions, the people of Texas hereby affirm that a parent has the responsibility to nurture and protect the parent’s child and the corresponding fundamental right to exercise care, custody, and control of the parent’s child, including the right to make decisions concerning the child’s upbringing.

Tex. Const. art. I, § 37.

Though Petitioners may argue that their constitutional rights are implicated by these proceedings (a truism of any parental-rights termination case), they claim no constitutional infirmity regarding any statute governing the proceedings, which included a jury trial under the clear-and-convincing standard of proof. They did not object to the jury charge. And Petitioners raise no issue regarding a constitutional violation in their petitions. CN.Br.7; RL.Br.8. It follows, therefore, that any constitutional claims should be considered forfeited. *See In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) (“[I]t is the court’s

charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge.”). Section 37’s adoption does not change that result: As explained further below, the amendment did not alter Petitioners’ rights at adoption, and they had sufficient opportunity to raise constitutional claims in the lower courts. Thus, for all the reasons presented in the Department’s brief on the merits, the Court should affirm.

## ARGUMENT

### **I. Section 37 Codifies Existing Legal Frameworks, Both in Chapter 161 and Under Case Law.**

Section 37’s text, ballot language, and textual history each demonstrate that section 37 was intended to secure *existing* constitutional standards and rights. None of those sources contain anything suggesting repeal or curtailment of the existing statutory frameworks, including chapter 161, or Court precedent.

The Court generally construes constitutional provisions according to the “plain meaning of the text as it was understood by those who ratified it.” *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021) (orig. proceeding); *see also Koy v. Schneider*, 218 S.W. 479, 481 (Tex. 1920) (“It is a proper inquiry ..., in ascertaining whether a certain interpretation should be given to the language of the Constitution, to consider whether its framers and the voters ... intended the consequences which must follow such interpretation.”). Further, “[l]egislative construction and contemporaneous exposition of a constitutional provision is of substantial value in constitutional interpretation.” *Perez v. City of San Antonio*, 715 S.W.3d 709, 716 n.8 (Tex. 2025) (quoting *Am. Indem. Co. v. City of Austin*, 246 S.W. 1019, 1023 (Tex. 1922)).

A. Beginning with the amendment’s text, the opening usage of “enshrine” suggests that the amendment recognizes “truths” as they existed when the amendment was adopted. *See Abbott*, 628 S.W.3d at 292-93 (construing text of quorum provision of the Texas Constitution as of its adoption in 1845); *Sears v. Bayoud*, 786 S.W.2d 248, 251-52 (Tex. 1990) (construing text of judicial-eligibility amendment as of 1945, when it was passed upon by the voters).<sup>1</sup> “Enshrine” means “*preserve* (a right, tradition, or idea) in a form that ensures it will be protected and respected” or “to preserve or cherish as sacred.” *Enshrine*, New Oxford American Dictionary (3d ed. 2010) (emphasis added); *Enshrine*, Merriam Webster’s Collegiate Dictionary (11th ed. 2014). And to “affirm,” means to “state as fact; assert strongly and publicly,” or to “declare one’s support for; *uphold* or defend.” *Affirm*, New Oxford American Dictionary (3d ed. 2010) (emphasis added).

The objects of this affirmance are twofold: Parental responsibility comes first, then the corresponding rights to “exercise care, custody, and control” and to “make decisions concerning the child’s upbringing.” Tex. Const. art. I, § 37. The presumption that this “corresponding fundamental right,” *id.*, may not be interfered with thus only applies to *fit* parents, under longstanding Texas law. *E.g.*, *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1894) (“The law recognizes the parent as the natural guardian of, and entitled to the custody of, his minor child, *so long as he discharges the*

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<sup>1</sup> The import of the amendment’s purpose-based introductory text, “To enshrine truths that are deeply rooted in this nation’s history and traditions,” is addressed more fully in Part II.A, *infra*.

*obligation imposed upon him by social and civil law*, of protecting and maintaining his offspring.” (emphasis added)).

Section 37 begins with language affirming, not “rights,” but the “*responsibility* to nurture and protect.” Tex. Const. art. I, § 37 (emphasis added). Accordingly, those with an interest in the child—such as the other parent or the State when necessary to exercise its *parens patriae* duty—must have legal recourse to enforce this duty if parents fall short. *See Schall v. Martin*, 467 U.S. 253, 265 (1984) (“[Children] are assumed to be subject to the control of their parents, and if parental control falters, the State *must* play its part as *parens patriae*.” (emphasis added)). Chapter 161, the statutory framework under which parental rights may be terminated, is the Legislature’s answer to this constitutional prerogative. Texas’s interest in ensuring child welfare is deeply rooted in its history and traditions:

The State has such an interest in the welfare of its citizens as will authorize the enactment of suitable legislation by which the State may assume the custody of children and the parents may be deprived of the custody thereof where the parents abandon the children or neglect them in such manner as to cause them to become a public charge, or where the parents otherwise prove to be unsuitable.

*De Witt v. Brooks*, 182 S.W.2d 687, 690 (Tex. 1944) (citations omitted). As a constitutional, moral, and political matter, the Legislature’s codification of chapter 161 embodies the inherent power of the people to ensure the welfare of Texas children. *State v. Loe*, 692 S.W.3d 215, 240 & n.3 (Tex. 2024) (Blacklock, J., concurring) (citing Tex. Const. art. I, § 2). Indeed, if the Legislature were concerned that chapter 161 was

flawed, it would have been easier to simply amend chapter 161 rather than propose a constitutional amendment to override it.

**B.** The ballot language similarly uses the word “affirm,” in describing the amendment’s effects—it asks voters to “affirm[] that parents are the primary decision makers for their children” S.J.R. 34. This language does not suggest that, until now, the Legislature and courts have been violating this fundamental right. *See Koy*, 218 S.W. at 481; *see also Dacus v. Parker*, 466 S.W.3d 820, 825 (Tex. 2015) (holding that a ballot “must identify the measure *by* its chief features, showing its character and purpose”). And neither this ballot language nor the amendment’s text answers any questions about what happens when parents are divorced and disagree on their child’s upbringing. Instead, the likelier explanation is that chapter 161’s protections and this Court’s case law supply the governing standards. *See infra* Section II.A.2.

**C.** The amendment’s textual history also demonstrates that it codifies existing constitutional rights and preserves existing legal frameworks governing those rights. The position advocated by the amicus—that no “interfere[ence] with the rights of a parent described by” the amendment could occur unless “essential to further a compelling governmental interest” and “narrowly tailored to accomplish that compelling governmental interest”—was included in an earlier version of the Senate Joint Resolution for this amendment and was rejected by the Legislature. *Compare* Bill Analysis, Tex. S.J.R. 34, 89th Leg. R.S. (2025),<sup>2</sup> *with* Tex. Const. art. I, § 37. Consistent with the intent to preserve existing standards, Proposition 15’s author stated

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<sup>2</sup> Available at <https://lrl.texas.gov/scanned/srcBillAnalyses/89-0/SJR34INT.PDF>.

that “[t]his amendment would merely place into the Texas Constitution the rights of parents *already protected* by the U.S. Constitution, *as laid out in case law*.” Bill Analysis, Tex. S.J.R. 34 (emphasis added); see *Perez*, 715 S.W.3d at 716 n.8; *Am. Indem. Co.*, 246 S.W. at 1023 (“Legislative construction and contemporaneous exposition of a constitutional provision is of substantial value in constitutional interpretation.”).

D. Finally, although Petitioners have not preserved a constitutional challenge to any provision in chapter 161, any interpretive tension between it and section 37 would be resolved by applying the canon of constitutional avoidance. See *B.L.D.*, 113 S.W.3d at 349 (“As a rule, we only decide constitutional questions when we cannot resolve issues on nonconstitutional grounds.”); see also *Elliott v. City of College Station*, 717 S.W.3d 888, 898 (Tex. 2025) (“Under the doctrine of constitutional avoidance, our duty to ensure compliance with the Texas Constitution comes with a corresponding ‘duty to avoid unnecessary constitutional issues.’”) (quoting *In re Turner*, 627 S.W.3d 654, 656 (Tex. 2021) (per curiam)). Constitutional avoidance should apply with special force where no party asserts a specific conflict between anything in chapter 161’s text and their constitutional rights to begin with.

## **II. The Clear-and-Convincing Standard Ensures Parents’ Constitutional Rights Are Adequately Protected in Termination Proceedings.**

No party has asserted section 37 as a basis for challenging the verdict. Rather, the question of whether the State may interfere with parental rights has generally arisen, as a constitutional matter, under the due process clause of the Fourteenth Amendment to the U.S. Constitution and the due course of law provision of the Texas Constitution. *In re I.S.*, 699 S.W.3d 610, 615 n.3 (Tex. App.—Houston [14th

Dist.] 2024, no pet.) (citing *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)). But those questions were not briefed or asserted by any party or amicus. Petitioners have not claimed that the Department violated their rights to substantive due process, and because Petitioners have already had a trial with the required protections, procedural due process was honored. *E.g.*, *I.S.*, 699 S.W.3d at 615.

Amicus’s contention that the State may not interfere with a parent’s “fundamental liberty interests” unless a “statute ... is narrowly tailored to serve a compelling state interest,” Amicus.Br.18, is doubly improper. Petitioners have not (1) challenged any statute’s constitutional validity, nor have they (2) argued that the State has interfered with a “*careful[ly] descri[bed]*,” fundamental right or liberty that is “deeply rooted in this Nation’s history and tradition.” *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (emphasis added).

Critically, the jury charge, which was approved without objection, governs the sufficiency-of-the-evidence analysis. CR.505-15. The Court cannot properly apply new standards for the first time at the appellate level when the jury was not instructed on them. *See B.L.D.*, 113 S.W.3d at 349; *Osterberg*, 12 S.W.3d at 55.

### **A. Substantive due process was honored.**

1. The introductory text of section 37 parallels that used in the Supreme Court’s substantive-due-process jurisprudence, but Petitioners never asserted any such deeply rooted rights protected their conduct here. *Compare Glucksberg*, 521 U.S. at 720-21, *with* Tex. Const. art. I, § 37. The jury assessed credibility regarding all aspects of physical abuse Petitioners inflicted on KN. Resp.Br.37-53. Striking and bruising an infant with a wooden spoon, 7.RR.24, depriving her of food, 3.RR.236,

bruising and leaving marks on her neck and legs, 3.RR.151;4.RR.33-34, making her stand against a wall so long she develops a red mark on her forehead from holding it against the wall, 2.RR.116-17; 7.RR.11, and dragging her by the hair, 3.RR.25, cannot be considered deeply rooted forms of traditional “discipline” because bountiful evidence rendered those assertions incredible. *See Loe*, 692 S.W.3d at 258 (Young, J., concurring) (“Conduct that constitutes abuse and neglect, after all, is not the kind of conduct that our history, tradition, or law has ever characterized as within the zone of options for a parent, even though parents have extraordinarily broad discretion regarding how to care for children.”).

The jury was free to reject that these acts of physical violence had some permissible nexus to discipline. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) (“Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. They may choose to believe one witness and disbelieve another. Reviewing courts cannot impose their own opinions to the contrary.”); *cf. Temple v. State*, 390 S.W.3d 341, 363 (Tex. Crim. App. 2013) (“direct-appeal courts are not permitted to act as the ‘thirteenth juror’” in criminal cases, where the burden of proof is beyond a reasonable doubt). Texas courts have correctly labeled acts of physical violence like hair-pulling what they are: child abuse. *In re E.L.A.*, No. 01-18-00751-CV, 2019 WL 438605, at \*2 (Tex. App.—Houston [1st Dist.] Feb. 5, 2019, pet. denied) (mem. op.); *In re B.B.*, 971 S.W.2d 160, 164, 166 (Tex. App.—Beaumont 1998, pet. denied), *disapproved of on other grounds by In re C.H.*, 89 S.W.3d 17 (2002). Here, the jury correctly found as a factual matter that these acts of physical violence rose to the level of abuse, which is not constitutionally protected.

Further, this Court has long held that proof of direct, physical harm to the child is not required to terminate parental rights on endangerment grounds. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009); *Tex. Dep’t of Hum. Servs. v. Boyd*, 727 S.W.2d 531, 532 (Tex. 1987). Parents who are in a position to prevent physical harm to their children yet fail to do so are just as culpable, as the Court of Appeals correctly held regarding Father. *In re K.N.*, 719 S.W.3d 388, 396 (Tex. App.—Amarillo 2024, pet. granted) (mem. op.). Specifically, Father was present throughout and knew of Mother’s abuse. 2.RR.129-30. Father expressed to caseworkers that he knew Mother’s conduct was dangerous enough for him to take his children and leave the home, but he chose not to. 2.RR.130. Thus, not only was any potential substantive-due-process claim not preserved, Petitioners lack any factual predicate for it.

2. As to some of the questions at argument regarding where to draw the line between reasonable discipline and abuse, the Legislature defines the relevant termination grounds in section 161.001, and those standards are what governed the jury’s deliberations. Tex. Fam. Code § 161.001(b)(1)(D)-(E); *see Loe*, 692 S.W.3d at 241 & n.3 (Blacklock, J., concurring). Even in 1856, assault was an aggravated offense “[w]hen committed by an adult male upon the person of a female, or child.” Act approved Aug. 28, 1856, 6th Leg., Adj. S., ch. 121, art. 488, 1856 Tex. Gen. Laws 156, 171, *reprinted in* 4 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 1043 (Austin, Gammel Book Co. 1898). A defense to assault applied “[i]n the exercise of the right of moderate restraint or correction given by law to the parent over the child,” and, at common law, the “right” to lawful correction was limited to those actions performed “in a reasonable manner.” *Davis v. State*, 6 Tex. Ct. App. 133, 141 (1879). In

1875, this Court observed the impracticality of “la[ying] down any fixed measure of moderation in the lawful correction of a child,” and that the question is “to be judged of by the jury, under the directions of the court as to the law of the case.” *Stanfield v. State*, 43 Tex. 167, 168 (1875); *see also Nabors v. State*, 508 S.W.2d 650, 651-52 (Tex. Crim. App. 1974) (rejecting constitutional vagueness challenge to similar language in jury charge). Throughout the last 150 years, Texas courts have rightly left the question of reasonable “correction” to the jury.

Petitioners never argued that chapter 161 proceedings are subject to (or violate) strict scrutiny. No court has held that parents have a substantive-due-process right to avoid such proceedings writ large. *Loe*, 692 S.W.3d at 229 (rejecting substantive due process challenge where “Plaintiffs here (and the dissent) likewise seek to define the asserted right as nothing more than an extension of ‘parental autonomy.’”). Critically, other than claiming a right to move to another state, Petitioners have never claimed a specific constitutional right to engage in any of the conduct under which the jury found grounds for termination, only the generic “right” to be free from any governmental interference at all.

Substantive due process offers no such blanket protection to unfit parents. Instead, “the rights of natural parents are not absolute; protection of the child is paramount. The rights of parenthood are accorded only to those fit to accept the accompanying responsibilities.” *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994). “If it were otherwise, the State would be helpless to protect the children who need it the most: the small minority of children whose parents are not fit and who, instead of defending

their children, either leave them defenseless or affirmatively subject them to harm.” *Loe*, 692 S.W.3d at 258 (Young, J., concurring).

3. When this Court has said that parental-rights-termination proceedings are to be “strictly scrutinized,” *Id.* at 230 (citing *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976)), it said that statutes under which a parent’s right to his or her child is involuntarily terminated “are strictly construed in favor of the parent.” *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). *Loe* demonstrates that when this Court referred to “strictly scrutiniz[ing]” termination proceedings, it was not referring to strict scrutiny in the context of substantive due process. 692 S.W.3d at 230-31. In that case, even though the Court acknowledged that termination proceedings must be “strictly scrutinized,” it did not apply narrow tailoring to the challenged statute, instead recognizing that “neither our society’s history and legal traditions nor this Court’s precedents support a view of the scope of parents’ constitutionally protected interest in directing their children’s care, custody, and control that would place *any* action a parent may undertake outside the government’s authority to regulate.” *Id.* at 230 (citing *J.W.T.*, 872 S.W.2d at 195; *De Witt*, 182 S.W.2d at 690). To suggest otherwise ignores precedent and the role of jury trials in adjudicating these weighty questions.

Moreover, contrary to amicus’s argument (at 15), the presumption of parental fitness and noninterference, as articulated in *Troxel v. Granville*, is not at issue here. 530 U.S. 57, 65-66 (2000) (plurality op.); *see J.W.T.*, 872 S.W.2d at 195. Petitioners demanded a trial before a jury of their peers, who were instructed on the clear-and-convincing standard and subject to the persuasion of Petitioners’ capable counsel

under that evidentiary standard. The jury found grounds to terminate under four separate statutory provisions. CR.508-11. Petitioners have been duly adjudicated unfit under the heightened process they were due, and *Troxel*'s protections do not apply.

**B. Parents asserted no procedural-due-process violation.**

Section 37 also enshrines and affirms decades of precedent applying the clear-and-convincing standard as protecting parents' procedural-due-process rights. The constitutional interest in guiding child upbringing has been ingrained in Texas's jurisprudence for decades. *D.V. v. Tex. Dep't of Family & Protective Servs.*, 2025 WL 3038976, at \*3 (Tex. Oct. 31, 2025); *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980). Consistent with that right, to protect the parents' interests in their relationship with their children, courts must instruct juries on the clear-and-convincing standard before they issue their verdicts in parental-rights termination cases. *Santosky v. Kramer*, 455 U.S. 745, 766-68 (1982); *G.M.*, 596 S.W.2d at 847. That standard was adopted by this Court in 1980 even before the U.S. Supreme Court made it constitutional law; the standard is codified into chapter 161. Tex. Fam. Code § 161.001(b); *G.M.*, 596 S.W.2d at 847. Accordingly, the clear-and-convincing standard as applied to parental-rights terminations is deeply rooted in Texas's history and traditions.

Thus, the jury was instructed that “[c]lear and convincing evidence’ means the measure or degree of proof that produces a firm belief or conviction as to the truth of the allegations sought to be established.” CR.505. The appellate standard of review accounts for this trial standard. *See C.H.*, 89 S.W.3d at 25 (“We hold that the appellate standard for reviewing termination findings is whether the evidence is such

that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.”). When it comes to proceedings in this Court, where only legal sufficiency of the evidence may be challenged, the Court has articulated the standard of review in this way:

The distinction between legal and factual sufficiency when the burden of proof is clear and convincing evidence may be a fine one in some cases.... In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so.

*In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).

This standard is more than a preponderance of evidence but less than the standard in criminal cases, which is beyond a reasonable doubt. *C.H.*, 89 S.W.3d at 26. In other words, “[a]n appellate court’s review must not be so rigorous that the only fact findings that could withstand review are those established beyond a reasonable doubt.” *Id.* The suggestion at argument that the verdict must be thrown out if an appeals court holds that any one of twelve reasonable jurors could find that the evidence goes either way flips the standard of review by allowing the appellate court to serve as the thirteenth juror, and it would render doubtful almost any jury verdict in termination proceedings. *See id.*; *Temple*, 390 S.W.3d at 363. Such a standard of review would be higher than that used in criminal cases, in which the appellate court upholds the conviction if “*any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt.” *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The Department was not required to prove its case to a jury as a matter of law—that is, with conclusive evidence. *C.H.*, 89 S.W.3d at 26. To the contrary, so long as the factfinder could form a firm belief or conviction regarding the truth of what the evidence shows, the jury’s verdict must be upheld. *G.M.*, 596 S.W.2d at 847. These jury instructions are a mainstay of family law trials and were not objected to based on any constitutional infirmity; the Court should accordingly not superimpose one in its review here. *See Osterberg*, 12 S.W.3d at 55.

Any time a fundamental liberty interest like a parent’s right to child custody is implicated, procedural due process requires procedures adequate to protect those rights, like a heightened evidentiary standard at trial considering the private interests at stake, the risk of erroneous deprivation, and the State’s *parens patriae* and administrative and fiscal interests. *Santosky*, 455 U.S. at 753-56 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Moreover, Texas parents are entitled to government-appointed counsel in termination proceedings, which this Court recognizes as “practically unheard of in civil litigation.” *D.V.*, 2025 WL 3038976, at \*3 (citing Tex. Fam. Code § 107.013(a)). Neither Petitioners nor amicus argue that the Constitution demanded more process before this jury could render a verdict. “While parental rights are of constitutional magnitude, they are not absolute. Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed

merely to preserve that right.” *C.H.*, 89 S.W.3d at 26. This case is especially appropriate for applying that principle.

**PRAYER**

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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**CERTIFICATE OF COMPLIANCE**

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