MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. KEN-14-192

In Re A.P.

ON APPEAL FROM THE MAINE DISTRICT COURT
(Seventh District)

BRIEF OF *AMICI CURIAE*: CHRISTIAN CIVIC LEAGUE OF MAINE, CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, CONCERNED WOMEN FOR AMERICA, AND ROMAN CATHOLIC DIOCESE OF PORTLAND

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INTRODUCTION

This case is about fundamental rights: the right to live, and the right to parent. The Maine Constitution places great value on human life, echoing the U.S. Declaration of Independence and providing that "[a]ll people are born equally free and independent, and have certain natural, inherent, and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Me. Const. art. 1, § 1. And a long tradition of U.S. Supreme Court and Maine State court precedent likewise affirms the intrinsic right to parent. Mainers, including *Amici*, cherish these fundamental, inherent rights, and desire to see them respected and preserved in State law.

Yet in this case, the District Court's decision threatens to deprive Maine parents and children of their fundamental rights to life, safety, and parenting. Rather than adhere to the plain constitutional and interpretive language finding inherent, universal rights to live and to parent, the District Court used the "clear and convincing evidence" standard to effectively terminate Baby A.P.'s mother's parental rights. The court took this path based on its dubious conclusion that it would be in A.P.'s "best interest" (A. at 18) to endure "a cascading series of events that would inevitably lead to her death," Appellant's Br. at 7, at the hands of her physicians – the trusted medical professionals who pledge to "do no harm." The District Court's apparent avoidance of the fundamental constitutional rights at stake and its failure to realize or admit to its ultimate effect have not only effectively terminated A.P.'s mother's parental rights but also seriously abridged her constitutional due process rights.

This Court, however, has the power to rectify the constitutional errors below. In order to uphold the fundamental values of the State of Maine, the history and tradition of this State and Nation, and modern notions of human dignity, this Court should reaffirm Mainers' interest in

life, safety, parental rights, and the integrity of the medical profession by reversing the lower court and restoring A.P.'s mother's full rights to make medical decisions on her daughter's behalf.

STATEMENT OF FACTS AND INTERESTS OF *AMICI*

Amici adopt the Procedural History and Statement of the Facts as contained in Appellant's brief.

Amicus Christian Civic League of Maine, founded in 1897, is a nonpartisan, nonprofit research and education organization focused on public policy and dedicated to the preservation of the family and family values. Its mission is to being a biblical perspective to public policy issues that impact the family and equip Maine citizens to be voices of persuasion on behalf of family values. The Christian Civic League of Maine has an interest in advocating for this mother's parental rights and A.P.'s right to life, on behalf of families and citizens statewide and its constituents' expressed interest in supporting families and parental rights.

Amicus Christian Medical & Dental Associations, founded in 1931, is a nonprofit organization that provides resources, education, and a public voice for their thirty-eight members in Maine and over 16,000 members nationwide; their members have a strong interest in advocating for the ethical practice of medicine that protects individuals with disabilities, as well as their own rights of conscience. The Christian Medical & Dental Associations wish to preserve medical integrity and public health and safety in Maine on behalf of their member physicians and Maine children.

Amicus Concerned Women for America ("CWA"), established in 1978 and incorporated in 1979, is the largest public policy women's organization in the United States, with 500,000 members nationwide. Through its grassroots organization, CWA advocates for traditional virtues

that are central to America's cultural health and welfare by actively promoting legislation, education, and policymaking consistent with its philosophy, and lending a voice to conservative women in the culture, the legislatures, and the courts. Among CWA's core concerns are protecting the sanctity of human life throughout every stage of development, and the defense of the family, which requires strong support of parental rights.

Amicus Roman Catholic Diocese of Portland, established by Pope Pius IX in 1853, includes the entire State of Maine. Its current listed membership is 193,392 registered Catholics, or one-seventh the total Maine population, and it serves Maine with medical care through Maine's three independent Catholic hospitals, dental care, disability services, end-of-life-care, and assistance to mothers and families; religious instruction and community through its fifty-five parishes; education and children's services through its three childcare centers, eleven elementary schools, three high schools, college, and scouting program; and social and family services through Catholic Charities Maine (the state's largest social service agency, which operates as a separate corporation), its seven subsidized housing units, four rehabilitation and residence facilities, and elder services. The Diocese, on behalf of its members and in support of its policies and programs promoting and upholding the dignity of human life, has an interest in advocating for A.P.'s right to life and preserving her mother's parental rights.

SUMMARY OF THE ARGUMENT

The rights to live and to parent are fundamental to American and Maine law, tradition, and society, and are implicit to ordered liberty. When the State takes actions to impinge upon these rights, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution subjects that interference to strict scrutiny, which requires that the State's action be narrowly tailored to serve a compelling state interest. The District Court erred by failing to engage in a

meaningful federal constitutional analysis, instead trumping A.P.'s mother's parental rights and A.P.'s own right to life in the name of what is perceived to be A.P.'s "best interest."

Not only are children and individuals with disabilities in equal possession of the fundamental right to life, but in the past several decades those with disabilities have experienced dramatically improved lives due to groundbreaking new research, modern assistive devices, and the continuing eradication of societal misconceptions and reduction of disability discrimination. Physician coercion to institute a "Do Not Resuscitate" ("DNR") order, rather than simply withdrawing from that patient's medical treatment and allowing the mother to select a new treating physician, discriminates against the infirm and runs counter to all the progress that has been made on their behalf.

Maine likewise has an interest in affirming the medical profession as a healing profession with the duty to "do no harm." Allowing a physician to mandate that a mother agree to a DNR does not properly respect that duty. The integrity of the profession depends on its ability to utilize the best practices, with the best information, to promote patient well-being. In contrast, a physician-mandated DNR would be fraught with uncertainty and risk.

With recent improvements in palliative care, there is no reason for a physician to take a hands-off approach to saving a life simply because it is physically compromised and frail. By prohibiting coercive DNR mandates, more attention and focus can be directed toward palliative care and research.

ARGUMENT

I. THE STATE HAS A COMPELLING INTEREST IN PROTECTING THE FUNDAMENTAL RIGHT TO LIFE OF ALL ITS CITIZENS, INCLUDING CHILDREN.

The Declaration of Independence places great value on human life: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with

certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). The Maine Constitution does likewise: "All people are born equally free and independent, and have certain natural, inherent, and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Me. Const. art. 1, § 1; *see also Plourde v. Valley Sno-Riders, Inc.*, 2002 WL 747903, at *3 (Me. Super. Mar. 18, 2002).

The Maine Supreme Judicial Court has specifically found the right to life to be "sacred[]," *State v. Wilbur*, 278 A.2d 139, 145 (Me. 1971), explaining that

> The security and safety of the state rest upon the security and safety of the individual, and the security and safety of the individual depend upon the preservation of his sacred rights of life, liberty, and property under the law. When these are in jeopardy, the state itself is in jeopardy.

Opinions of the Justices, 118 Me. 503, 106 A. 865 (Me. 1919). The right to life is universal and integral to protection and security. *See generally State v. Montgomery*, 94 Me. 192, 47 A. 165, 168 (1900) (internal citations omitted). The Supreme Judicial Court has further declared:

> Among the rights declared natural and inherent in all human beings by our constitution, is the right to life, and that necessarily includes and carries with it a right to the means of *sustaining life*. It is not merely common humanity, but common justice, that demands that no one shall be suffered to languish for lack of food . . . and other necessaries of life. To provide the means of preventing it is strictly within the line of public duty.

Opinion of the Justices, 58 Me. 590, 611, 1871 WL 7826 (1871) (emphasis supplied).

Moreover, the Fourteenth Amendment to the U.S. Constitution guarantees: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Maine Constitution likewise guarantees that "[n]o person shall be deprived of life, liberty, or

property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof." Me. Const. art. 1, § 6-A. "Due process of law . . . shield[s] the citizen's rights to life, liberty, and property from the exercise of arbitrary governmental power . . . . " *Le Clair v. White*, 117 Me. 335, 104 A. 516, 518 (Me. 1918).

Minors, as well as adults, are protected by the Constitution and possess these rights. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) ("[s]tudents . . . are 'persons' under our Constitution [who] are possessed of fundamental rights which the State must respect"); *In re Gault*, 387 U.S. 1, 13 (1967) ("whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). While "the State has somewhat broader authority to regulate the activities of children than of adults," *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976), based on its unique and significant interests in regulating children, *see, e.g., Carey v. Population Services International*, 431 U.S. 678, 693 (1977) (plurality opinion), these interests include "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (*Bellotti II*). "'[O]nly upon such a premise [may] a State . . . deprive children of . . . rights [when a similar deprivation] would be constitutionally intolerable for adults.'" *Bellotti II*, 443 U.S. at 635 n.13 (quoting *Ginsberg v. New York*, 390 U.S. 629, 650 (1968) (Stewart, J., concurring in the result)).

Just as there is a "fundamental difference between refusing life-sustaining treatment and demanding a life-ending treatment," American Medical Association, Council on Ethical and Judicial Affairs, *Physician-Assisted Suicide*, 10 ISSUES IN LAW & MEDICINE 91, 93 (1994); *see*

also Vacco v. Quill, 521 U.S. 793, 801 n.6 (1997), there is a fundamental difference between respecting the right of a patient and her legal guardian to exercise the right not to undergo unwanted extraordinary measures and a physician pressuring a patient or the patient's parent to agree to a potentially life-ending DNR. In this case, no circumstances exist to justify the Department's determination to take affirmative steps that may permanently deprive A.P. of her right to life.

Moreover, diagnoses and prognoses are often inaccurate. More than 40% of patients with disorders of consciousness are misdiagnosed, *see, e.g.*, Martin M. Monti et al., *Willful Modulation of Brain Activity in Disorders of Consciousness*, 362 NEW ENGLAND J. OF MED. 579 (2010) (noting that the rate of misdiagnosis of disorders of consciousness is approximately 40%); K. Andrews et al., *Misdiagnosis of the Vegetative State: Retrospective Study in a Rehabilitation Unit*, 313 BRITISH MED. J. 13 (1996) (finding a 43% misdiagnosis rate, even among long-term patients).[1] Overall, it is estimated that up to 15% of diagnoses are incorrect in most areas of medicine. *See* Eta S. Berner & Mark L. Graber, *Overconfidence as a Cause of Diagnostic Error in Medicine*, 121 AM. J. MED. S2 (2008).

This uncertainty may create a false premise upon which a decision to mandate or institute a DNR is made. In this case, A.P.'s prognosis has already been radically disproven at least once, when she failed to die and instead breathed without support, opened her eyes, emerged from her coma, and became more alert. *See* Appellants' Br. at 4-5. Nonetheless, Appellee continues to assert that A.P. will "'die prematurely from her injuries, and she will never be able to function

[1] This rate has not changed despite medical advances over the last fifteen years. *See* Caroline Schnakers et al., *Diagnostic Accuracy of the Vegetative and Minimally Conscious State: Clinical Consensus Versus Standardized Neurobehavioral Assessment*, 9 BMC NEUROLOGY 35 (2009).

beyond an early infantile level,'" Appellee's Br. at 2-3 (citing Tr. I at 166, 169). *See* Appellee's Br. at 3.

The uncertainty surrounding diagnoses in critical care cases underscores the State's compelling and rational interest in declaring that the risk of misdiagnosis is not worth it. Increasing the quality of life through improvements in palliative care, counseling, and innovative solutions to end-of-life care should be the focus, rather than forcing unwilling parents into signing away their children's lives in the interest of relieving their pain.

II. PARENTS HAVE A FUNDAMENTAL RIGHT TO MAKE CRITICAL MEDICAL DECISIONS FOR THEIR CHILDREN.

Not only does Appellee HHS seek to deprive A.P. of her constitutionally guaranteed right to life, it seeks to deprive her parents of their fundamental rights. "[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests . . ." protected under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).[2] The *Troxel* Court cited a multitude of cases treating this subject, going back more than ninety years.

[2] *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), additionally found that its fundamental right to privacy has "some extension" to activities relating to marriage, family relationships, and child rearing and education, and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), in a parental rights termination proceeding, further classified these rights as associational: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights, sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.*, 519 U.S. at 116 (quotations omitted).

In *Meyer v. Nebraska*, 262 U.S. 390, 396-97, 399-401 (1923), the Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." It reiterated this right in *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), explaining that a "child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Further distinguishing State capabilities from those of parents, in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court confirmed that "It is cardinal . . . that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Indeed, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.").[3]

"No right is more sacred [than the constitutional right to associate with family members], and [it] can be abrogated only to protect other very important interests." *Lipscomb v. Simmons*,

[3] *See also generally Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (a "host of cases" "have consistently" acknowledged a "private realm of family life which the state cannot enter").

884 F.2d 1242, 1244 (9th Cir. 1989) (citing *Santosky*, 455 U.S. at 753; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974), as well as numerous international instruments affirming the centrality of family relationships in the framework of rights).

This fundamental liberty interest includes control over minors' medical procedures, about which minors cannot make "sound judgments." *See, e.g.*, *Parham*, 442 U.S. at 603 ("Most children, even in adolescence, simply are not able to make sound judgments concerning . . . their need for medical care or treatment. Parents can and must make those judgments."); *Arnold v. Bd. of Educ.*, 880 F.2d 305, 312 (11th Cir. 1989) (finding that "a parent's constitutional right to direct the upbringing of a minor is violated when the minor is coerced to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion[,] . . . which touches fundamental values and religious beliefs parents wish to instill in their children"); *Newmark v. Williams*, 588 A.2d 1108, 1115 (Del. 1991) (holding that a decision not to treat a minor with chemotherapy implicates the parent's fundamental and "sacred" due process right to parental autonomy); *In re Green*, 292 A.2d 387, 392 (Pa. 1972) (holding, "as between a parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is not immediately imperiled by his physical condition"). Indeed,

> [I]t is simply logical . . . that the community, acting through the State, has an exceedingly compelling interest in having parents parent their children. Thus, the State has . . . a compelling interest in requiring parental responsibility for providing medical care, guidance, and counseling, particularly when a parent's child is in crisis.

N. Fla. Women's Health, 866 So. 2d 612, 670 (2003) (Wells, J., dissenting) (internal citations omitted).

Even when a State agency believes the parent's decision to be incorrect, that does not permit it to interfere in the parent's right to make medical decisions for her child. "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause . . . protects the

fundamental right of parents to make decisions concerning the care, custody, and control of their children[, and] does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 66, 72-73; *see also id.* at 77 (Souter, J. concurring). And in *Reno v. Flores*, 507 U.S. 292 (1993), the Supreme Court said:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion – much less the sole constitutional criterion – for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others.
>
> "The best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

"The 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* at 753-54.

Maine courts agree. *See, e.g.*, *Eaton v. Paradis*, 2014 ME 61, ¶ 8, 91 A.3d 590, 593; *Davis v. Anderson*, 2008 ME 125, ¶ 18, 953 A.2d 1166; *Rideout v. Riendeau*, 2000 ME 198, ¶ 12, 761 A.2d 291 (plurality opinion). As the State Supreme Court observed in *Pitts v. Moore:*

> If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. There is "normally . . . no reason for the State to inject itself into the private realm of the family to . . . question the ability of [a] parent to make the best decisions concerning the rearing of that parent's children."

2014 ME 59, ¶ 11, 90 A.3d 1169 (citing *Rideout v. Riendeau*, 2000 ME 198, ¶¶ 12, 18, 761 A.2d 291). Yet it appears the trial court did just that in this case.

When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. *Santosky* at 753-54. "When the State does interfere with the fundamental right to parent, [courts] must evaluate that interference with strict scrutiny – the highest level of scrutiny – which 'requires that the State's action be narrowly tailored to serve a compelling state interest.'" *Pitts v. Moore*, 2014 ME 59, ¶ 12, 90 A.3d 1169 (citing *Rideout v. Riendeau*, 2000 ME 198, ¶ 19, 761 A.2d 291).

Under strict scrutiny, the State's "intrusions into the parent-child relationship" should be limited "to those instances in which there is some urgent reason or there are exceptional circumstances affecting the child that justify the intrusion." *Pitts v. Moore*, 2014 ME 59, ¶ 12, 90 A.3d 1169 (citing *Robichaud v. Pariseau*, 2003 ME 54, ¶ 7, 820 A.2d 1212; *Merchant v. Bussell*, 139 Me. 118, ¶¶ 121-22, 27 A.2d 816 (1942)). *Merchant* further specified, "The natural right of a parent to the care and control of a child should be limited only for the most urgent reasons." 139 Me. 118, ¶ 122; *see also Robichaud v. Pariseau*, 2003 ME 54, ¶ 10, 820 A.2d 1212; *Croxford v. Roberts*, 509 A.2d 662, 663 (Me. 1986); *Stanley v. Penley*, 142 Me. 78, 46 A.2d 710, 711 (1946).

And *Pitts* specified that currently (as of 2014), there are "only two types of exceptional circumstances that are legally sufficient to justify the State's interference with the fundamental right to parent," *Pitts v. Moore*, 2014 ME 59, ¶ 14, 90 A.3d 1169: "when necessary to preserve a child's 'sufficient existing relationship' to a grandparent," *id.* at ¶ 15 (internal citations omitted), and "when harm to the child will result from the absence of . . . governmental interference," such as a "temporarily intolerable . . . living situation," "abuse, or neglect," *id.* at ¶ 14 (internal citations omitted), to none of which A.P. is currently subject. And even in these cases, termination of parental rights is viewed as a last resort, as the State only "has a compelling

interest in limiting, restricting, or *even* terminating a parent's rights" in those limited circumstances. *Id.* (emphasis supplied).

Absent such urgent reasons, State interest in intrusion into parental decision-making may well be suspect. See generally *Pitts v. Moore*, 2014 ME 59, n.3, 90 A.3d 1169. "[I]n great part," the limitation on a parent's "constitutional interest in family integrity" is "because the rights of another person – the child – must also be protected by the State." *Pitts v. Moore*, 2014 ME 59, ¶ 12, 90 A.3d 1169 (citing *Rideout v. Riendeau*, 2000 ME 198, ¶ 19, 761 A.2d 291) (internal quotation marks omitted).

It is further clear that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Santosky*, 455 U.S. at 747-48; *see also In re Christmas C.*, 1998 ME 258, ¶ 13, 721 A.2d 629; *In re C.P.*, 2013 ME 57, ¶ 9, 67 A.3d 558. And it is hard to imagine a more permanent functional equivalent to termination of parental rights than permitting an outside entity to set into motion a "cascading series of events that would inevitably lead to her death." Appellant's Br. at 7. Yet on April 24, 2014, the lower court held that it was required to make a finding of parental unfitness by clear and convincing evidence before authorizing a DNR where the Department has only temporary custody of a child, and did so, deciding that a DNR was in A.P.'s best interest, *see* Appellant's Br. at 9 (citing A. at 18), and issuing an order granting authority for the Department to consent to a DNR after consulting with A.P.'s mother. *See* Appellant's Br. at 8 (citing A. at 21).

Based on *Troxel* and *Pitts*, the Court's entire premise was incorrect; the State must not interfere simply because it disagrees with a parent's decision, or because a parent has temporarily lost custody of her child. Interference should stem mostly if not solely, *see generally*

Quilloin v. Walcott, 434 U.S. 247, 255 (1978), from the State's interest in protecting the child's fundamental rights – of which, as discussed *supra*, the most fundamental is the right simply to live. And it is accepted as a "basic principle[]" that "[o]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment . . . ." *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992) (internal citations omitted).

While the trial-level arguments and District Court opinion are not available to *Amici* other than through their limited inclusion in the appellate briefing due to their being unredacted and sealed, the level of procedural due process afforded A.P.'s mother appears to be suspect under the *Santosky* standard.

The District Court hit upon the correct standard of proof required to restrict or terminate parental rights – clear and convincing evidence – with strict scrutiny of the State's actions impinging on A.P.'s right to live and her mother's right to parent and make medical decisions. *See generally In re Matthew W.*, 2006 ME 67, ¶ 11-12, 903 A.2d 333 (*overruled on other grounds by In re B.C.*, 2012 ME 140, 58 A.3d 1118). However, as in *In re Matthew W.*, it applied this standard to the wrong proceeding. While the Court may have believed itself to be engaging in no more than a temporary abridgement of A.P.'s mother's right to make medical decisions regarding her daughter, in a very real sense, the judgment was a *de facto* and potentially permanent revocation of all her rights, including even the possibility of the future reunification the Department and the Court appear to be desirous of. *See* Appellee's Br. at 8, 16; Appellant's Br. at 9, 17 (citing A. at 20).

Clearly, if the lower court's ruling is allowed to stand, A.P.'s institutional physicians will medicate her as desired under the DNR, and she may in fact require resuscitation – but then she

will not be treated due to the DNR, and thus she will die – and her mother's parental rights would be *de facto* and irrevocably terminated in one of the cruelest ways imaginable. *See, e.g.*, *In re Matthew W.*, 2006 ME 67, ¶ 11-12, 903 A.2d 333 ([A]pproval of the DNR, without [parental] consent, could have the effect of terminating their parental rights. . . . Exercise of a DNR over the parents' objections not only infringes upon the fundamental rights of parenthood, but could have the effect of conclusively preventing parents from raising their child or ever again exercising their fundamental rights. . . . Thus, due process requires that parents be afforded the same procedural protections before approval of a DNR for their child as they are afforded prior to the termination of their parental rights.").

For this reason, the authorities referred to the Court by the mother's counsel are well-reasoned. *See In re Guardianship of Stein*, 105 Ohio St. 3d 30, ¶ 37, 821 N.E.2d 1008, 1013 (2004) (in a case contemplating reunification, "the probate court's order authorizing the guardian to withdraw life-supporting treatments has the effect of terminating parental rights. We, therefore, hold that the probate court exceeded its statutory authority in granting the guardian the power to withdraw life-supportive treatments [b]efore the parents' rights were permanently terminated."); *In re Interest of Tabatha R.*, 252 Neb. 687, 696-97, 564 N.W.2d 598, 605 (1997) (concurring opinion) ("Such a request necessarily requires as a first prerequisite that all rights of the parents to the child be terminated."); *Commonwealth v. Cabinet for Health and Family Services*, 221 S.W.3d 382 (Ky. App. 2007). Thus, no matter how sound the Court's legal reasoning may have been, its misapplication moots its use in this case.

This case, at most, should be remanded to the District Court so it may analyze afresh the factors that must be considered and balanced in determining whether a certain standard of proof satisfies procedural due process, in light of the actual proceeding at hand. These factors are: "(1)

the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also generally Santosky*, 455 U.S. at 754.

Although *Eldridge* delineated these factors in the context of deprivation of property, they are equally applicable to the deprivation of liberty. *See, e.g.*, *Santosky*, 455 U.S. at 754 ("[T]he nature of the process due in parental rights termination proceedings turns on a balancing of the 'three distinct factors' specified in *Mathews v. Eldridge* . . . ."); *Akron Ctr. for Reprod. Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.9, 599-606 (6th ed. 2000) (enumerating the courts that have relied upon the *Eldridge* factors in a deprivation of liberty context).

Most obviously at issue here are factors (1) and (2): those implicating A.P.'s right to live and her mother's right to parent, and the ultimate risk of error accorded to A.P. and her mother by putting her squarely in harm's way, with no one but this Court left to save her. *See generally Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 42 (1981) (Blackmun, J., dissenting) ("The fundamental significance of the liberty interest at stake in a parental termination proceeding is undeniable, and I would find this first portion of the due process balance weighing heavily in favor of refined procedural protections. The second *Eldridge* factor, namely, the risk of error in the procedure provided by the State, must then be reviewed with some care."); *see also id.* at 30 (indicating the weakness of factor (3) in such proceedings as these).

Further, the lower Court was statutorily required to find that the circumstances that led it to grant the Department's motion were unlikely to change within a timeframe reasonably

calculated to meet the A.P.'s needs before terminating her mother's parental rights – but it did not. Thus again, whether intentionally or unintentionally, the District Court avoided the very issue it was called upon to address – the termination of A.P.'s mother's fundamental right to parent her child. "[P]arenthood is forever," *Pitts v. Moore*, 2014 ME 59, ¶ 34, 90 A.3d 1169, but the District Court's decision, threatens to terminate this fundamental relationship without proper acknowledgement or procedure.

CONCLUSION

The U.S. and Maine Constitutions and the cases interpreting them unquestionably guarantee fundamental rights to live, and to parent. Moreover, they afford the chance to make use of procedural due process – that is, the proper procedure in relation to the case at hand. And Maine itself has a rational and compelling interest in preserving the value of life, protecting the vulnerable, and upholding the integrity of the medical profession, for the good of all Mainers. This Court may prevent the tragic and unpredictable consequences to life, the vulnerable, and the medical profession that are likely to result from allowing a Department to overrule a parent's reasoned, loving medical decision for her child. Wherefore, *Amici* respectfully request that the lower Court's order granting the Department of Health and Human Services' Motion for Expedited Judicial Review be reversed and remanded for further consideration in line with constitutional and case precedent. A.P.'s mother should be allowed a full and fair chance to parent, and continue to exercise her right to make medical decisions for her daughter.

Respectfully submitted,

s/ Catherine Glenn Foster

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2014, I filed the foregoing with the Clerk of the Court by hand delivery and have caused the same to be served along with service of process on the parties' counsel by first class mail as follows:

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